

PLEASE NOTE THAT ALL MEETINGS ARE RECORDED

AGENDA
Value Adjustment Board
Organizational Meeting - September 9, 2014 - 9:00 a.m.
Ernie Lee Magaha Government Building - First Floor

1. Call to Order.

(PLEASE TURN YOUR CELL PHONE TO THE VIBRATE, SILENCE, OR OFF SETTING)

2. Publication.

Recommendation: That the Board accept, for filing with the Board's Minutes, the certified affidavit establishing proof of publication for the Meeting, as published in the Pensacola News Journal on August 29, 2014.

The Public Notice was also posted on the websites of the Escambia County Clerk of the Circuit Court and the Escambia County Board of County Commissioners.

3. Introduction of, and Contact Information for, Value Adjustment Board Membersm, Counsel, and Clerk.

Steven L. Barry, Chairman	VAB Member	district5@myescambia.com	(850) 595-4950
Gerald W. Adcox, Vice Chairman	VAB Member (School Board Appointee)	adcoximports@aol.com	(850) 439-9209
Gerald Boone	VAB Member	gboone@escambia.k12.fl.us	(850) 469-6153
Gene M. Valentino	VAB Member	district3@myescambia.com	(850) 595-4930
Rodger Doyle	VAB Member (BCC Appointee)	rdoyle06@gmail.com	(850) 572-6166
Suzanne Whibbs	VAB Attorney	suzanne@whibbsandstone.com	(850) 434-5395
Pam Childers	Clerk and Comptroller	pchilders@escambiaclerk.com	(850) 595-4310
Lizabeth Carew	Clerk to the Board's Office	lfcarew@escambiaclerk.com	(850) 595-3917

4. Selection of Private Counsel.

Recommendation:

That the Board select one of the following Applicants for Private Counsel for 2014 and authorize the Chairman to execute a Contract for Services of Private Counsel, in accordance with Chapter 194.035 (1), Florida Statutes:

- Gregory P. Farrar
- Larry A. Matthews
- Suzanne N. Whibbs

5. Selection of Appraiser Special Magistrate.

Recommendation:

That the Board select one of the following Applicants for Appraiser Special Magistrate for 2013, and authorize the Chairman to execute a Contract for Services of Special Magistrate, in accordance with Chapter 194.035 (1), Florida Statutes:

- Steven L. Marshall
- John A. Robinson
- Robert S. Sutte

6. Selection of Attorney Special Magistrate.

Recommendation:

That the Board select one of the following Applicants for Attorney Special Magistrate for 2014 and authorize the Chairman to execute a Contract for Services of Special Magistrate, in accordance with Chapter 194.035 (1), Florida Statutes:

- Larry A. Matthews
- Phillip A. Pugh

7. Florida Administrative Code Rules 12D-9, 12D-10, 12D-51.001, 12D-51.002, and 12D-51.003 and Florida Statute, Chapters 192 through 195.

The following Florida Administrative Code Rules can be accessed on the Florida Department of Revenue's website via the following links:

- The Uniform Policies and Procedures Manual, containing Florida Administrative Code Rule Chapters 12D-9 and 12D-10, <http://dor.myflorida.com/dor/property/vab/>
- Classified Use Real Property Guidelines, Standard Assessment Procedures and Standard Measures of Value, Agricultural Guidelines, 1982, 12D-51.001, <http://dor.myflorida.com/dor/property/rp/pdf/FLag.pdf>
- Tangible Personal Property Appraisal Guidelines, 1997, 12D-51.002, <http://dor.myflorida.com/dor/pdf/paguide.pdf>
- Florida Real Property Appraisal Guidelines (FRPAG), 2002, 12D-51.003, <http://dor.myflorida.com/dor/property/rp/pdf/FLrpg.pdf>

Florida Statutes Chapters 192 through 195 can be accessed at <http://www.leg.state.fl.us/Statutes/>

8. Overview of Sunshine Law (Section 286.011, Florida Statutes), Public Records Law (Chapter 119, Florida Statutes), and Voting Conflicts (Chapter 112, Florida Statutes).

The 2014 Government-In-The-Sunshine Manual available at <http://www.myflsunshine.com/sun.nsf/sunmanual>

9. Filing Fee Resolution.

Recommendation:

That the Board acknowledge, for the record, that Resolution R2012-1, which was adopted by the Value Adjustment Board (VAB) on March 20, 2012, remains in effect until repealed by the VAB, and provides that a petition filed pursuant to Section 194.013, Florida Statutes, and Rule Chapter 12D-9.013(k), F.A.C., shall be accompanied by a filing fee, to be paid to the Clerk of the Circuit Court, in the amount of \$15 for each separate parcel of property, real or personal, covered by the petition.

10. Approval of Minutes.

Recommendation:

That the Board approve the Minutes of the Regular Board Meeting held December 16, 2013, as prepared by the Clerk to the Board's Office.

11. Adjournment.



Pam Childers

Clerk of the Circuit Court and Comptroller, Escambia County

Clerk of Courts • County Comptroller • Clerk of the Board of County Commissioners • Recorder • Auditor

Value Adjustment Board Organizational Meeting

4.

Meeting Date: 09/09/2014

Issue: Selection of Private Counsel for 2014

From: Pam Childers, Clerk of the Circuit Court & Comptroller

Organization: Clerk & Comptroller's Office

Information

Recommendation:

That the Board select one of the following Applicants for Private Counsel for 2014 and authorize the Chairman to execute a Contract for Services of Private Counsel, in accordance with Chapter 194.035 (1), Florida Statutes:

- Gregory P. Farrar
- Larry A. Matthews
- Suzanne N. Whibbs

Background:

Attachments

Gregory P. Farrar

Larry Matthews

Suzanne N. Whibbs

**APPLICATION
COUNSEL TO THE ESCAMBIA COUNTY VALUE ADJUSTMENT BOARD**

**PLEASE TYPE OR PRINT
IF MORE SPACE IS NEEDED, ATTACH ADDITIONAL SHEETS**

1. PLEASE PROVIDE THE FOLLOWING GENERAL INFORMATION:

NAME: Gregory P. Farrar
SOCIAL SECURITY OR TAXPAYER IDENTIFICATION NUMBER: [REDACTED]
HOME ADDRESS: 3421 Oakmont Drive, Pensacola, FL
BUSINESS NAME: Farrar Law Firm
BUSINESS ADDRESS: 109 N. Palafox Street, Pensacola, FL
PHONE: 850-434-8904 CELL: 8
EMAIL: greg@farrarlawfirm.com

2. ARE YOU AN ELECTED OR APPOINTED OFFICIAL OR EMPLOYEE OF ESCAMBIA COUNTY? YES ✓ NO

3. HOURLY RATE \$ 200.00 MINIMUM HOURS: 2

4. PLEASE PROVIDE THE FOLLOWING INFORMATION:

A. FLORIDA BAR NUMBER: 708860 ADMISSION DATE: 1987

B. LIST ALL SOURCES OF YOUR KNOWLEDGE, INCLUDING EDUCATION AND EXPERIENCE:

See Attached

C. LIST ANY DISBARMENT, SUSPENSION, OR ANY OTHER DISCIPLINARY ACTION WHICH YOU HAVE RECEIVED FROM ANY ORGANIZED BAR ASSOCIATION:

None

5. LIST EACH INSTANCE IN WHICH YOU HAVE BEEN DISMISSED, TERMINATED, OR DENIED APPOINTMENT AS COUNSEL FOR POOR OR IMPROPER PERFORMANCE:

NONE

6. LIST ANY PERSONAL OR BUSINESS RELATIONSHIP YOU HAVE EVER HAD WITH ANY OFFICER OR EMPLOYEE OF THE OFFICE OF THE PROPERTY APPRAISER, OFFICE OF THE CLERK OF THE CIRCUIT COURT, OFFICE OF THE COUNTY ATTORNEY, OR THE VALUE ADJUSTMENT BOARD:

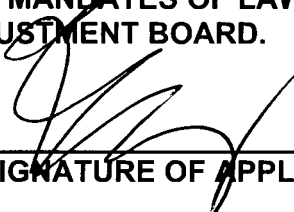
7. LIST ANY ADDITIONAL INFORMATION WHICH QUALIFIES YOU TO SERVE AS COUNSEL TO THE VALUE ADJUSTMENT BOARD:

See Attached Resume.

Value Adjustment Board of Santa Rosa County 2 yrs
Formerly owner of Barrister Title Co.

8. PLEASE PROVIDE A WRITING SAMPLE, WHICH MAY CONSIST OF ANY OPINION, LETTER, OR OTHER DOCUMENTATION THAT CONTAINS ONE (1) OR MORE WRITTEN PAGE(S) OF ORIGINAL MATERIAL.

THE UNDERSIGNED CERTIFIES, UNDER PENALTY OF DISQUALIFICATION FROM CONSIDERATION, THAT EACH ITEM CONTAINED IN THIS APPLICATION, OR OTHER DOCUMENT FURNISHED BY OR ON BEHALF OF THE APPLICANT IS TRUE AND COMPLETE AS OF THE DATE IT BEARS. THE UNDERSIGNED AUTHORIZES THE VALUE ADJUSTMENT BOARD TO OBTAIN INFORMATION FROM OTHER SOURCES TO VERIFY EACH ITEM CONTAINED HEREIN. THE UNDERSIGNED ACKNOWLEDGES THAT IF SELECTED HE/SHE WILL FOLLOW ALL REQUIREMENTS AND MANDATES OF LAW IN FULFILLING THE DUTIES OF COUNSEL TO THE VALUE ADJUSTMENT BOARD.


SIGNATURE OF APPLICANT

6-23-14
DATE



**GREGORY P. FARRAR
109 N. PALAFOX STREET
PENSACOLA, FL 32502**

**QUALIFICATIONS TO SERVE AS COUNSEL FOR THE ESCAMBIA COUNTY
VALUE ADJUSTMENT BOARD**

- Graduated from Mississippi College School of Law in 1986
- Practicing law since 1986
- Licensed in Florida, Mississippi and Washington, D.C.
- Barrister Title Company began in 2007
- Certified Family Law Mediator
- Admitted to practice in the following:
 - ✓ Florida State Courts
 - ✓ All Federal Courts for the Northern District of Florida
 - ✓ 11th Circuit Court of Appeals
 - ✓ 5th Circuit Court of Appeals
 - ✓ U.S. Supreme Court
 - ✓ U.S. Court of Claims
 - ✓ Mississippi State Courts
 - ✓ Federal Courts
- Twenty years of experience in the following practices of law:
 - ✓ Family Law
 - ✓ Real Estate
 - ✓ Personal Injury
 - ✓ Estate Planning
 - ✓ Criminal Defense

Bar Admissions:

- Florida, 1987
- Mississippi, 1986

Special Honors

- Pro Bono Attorney of the Year
- Virginia College Employer of the Year

- Service to Mankind Award for Jury Duty Spay & Neuter
- 1990 to 1991 Appreciation Award for Legal Services to the Poor
- Pro Bono Award 2013

Community Participation

- Florida Bar Association
- Escambia/Santa Rosa Bar Association, Vice President
- Board of Northwest Florida Legal Services, President
- Jury Duty Spay and Neuter Program
- Hearing Officer for the School Board from 1999 to the Present
- President of the Real Estate Council, 2010 to 2011, 2011-2012
- Member of Attorney's Title Fund Services, LLC
- Santa Rosa County Value Adjustment Board Attorney, 2010 and 2011

Larry A. Matthews*+
Raymond F. Higgins, III
M. Kevin Hausfeld*

Thomas R. Jenkins, of Counsel*+

* Also Admitted in Alabama
- Certified Circuit Court Mediator
- Board Certified Civil Trial Lawyer

HMH MATTHEWS
HIGGINS
& HAUSFELD
CIVIL TRIAL ATTORNEYS
www.matthewshigginslaw.com

Post Office Box 13145
Pensacola, FL 32591

114 East Gregory Street
Pensacola, FL 32502

(850) 434-2200 Phone
(850) 434-2600 Fax

June 16, 2014

Hon. Pam Childers
Clerk of the Circuit Court & Comptroller
Attn: Lizabeth Carew, Clerk to the Board's Office
Value Adjustment Board
221 Palafox Place, Suite 130
Pensacola, FL 32502-5843

Re: Counsel to the Value Adjustment Board

Dear Ms. Childers:

I have enclosed my application, resume and writing sample. My references include the following:

J. Andrew Talbert, Esq.
Quintairos, Prieto, Wood & Boyer, P.A.
114 E. Gregory Street, 2nd Floor
Pensacola, FL 32502
850-434-6490

Douglas F. Miller, Esq.
Guy E. Burnette, Jr., P.A.
109 E. Garden Street, Ste. B
Pensacola, FL 32502
850-912-6420

Michael J. Stebbins, Esq.
504 N. Baylen Street
Pensacola, FL 32501
850-434-9922

With best regards, I am

Sincerely,

MATTHEWS, HIGGINS,
HAUSFELD & FENIMORE



Larry A. Matthews
lmattews@matthewshigginslaw.com

Enclosures

Mailing Address:
Post Office Box 13145
Pensacola, FL 32591
Fax (850) 434-2600

Main Office:
114 E. Gregory Street
Pensacola, FL 32502
Tel. (850) 434-2200

Panama City, FL Office:
475 Harrison Avenue
Panama City, FL 32401
Tel. (850) 769-7200

Mobile, AL Office:
910 Government Street
Mobile, AL 36604
Tel. (251) 434-6711

**APPLICATION
COUNSEL TO THE ESCAMBIA COUNTY VALUE ADJUSTMENT BOARD**

**PLEASE TYPE OR PRINT
IF MORE SPACE IS NEEDED, ATTACH ADDITIONAL SHEETS**

1. PLEASE PROVIDE THE FOLLOWING GENERAL INFORMATION:

NAME: Larry A. Matthews
SOCIAL SECURITY OR TAXPAYER IDENTIFICATION NUMBER: [REDACTED]
HOME ADDRESS: 2387 Bay Street, Gulf Breeze, FL 32563
BUSINESS NAME: Matthews, Higgins, Hausfeld & Fenimore
BUSINESS ADDRESS: 114 E. Gregory St., Pensacola, FL 32502
PHONE: 434-2200 CELL: 384-3476
EMAIL: lmatthews@matthewshigginslaw.com

2. ARE YOU AN ELECTED OR APPOINTED OFFICIAL OR EMPLOYEE OF ESCAMBIA COUNTY? YES X NO

3. **HOURLY RATE \$** 150 **MINIMUM HOURS:** no minimum

4. PLEASE PROVIDE THE FOLLOWING INFORMATION:

A. FLORIDA BAR NUMBER: 339601 ADMISSION DATE: 5/11/82

B. LIST ALL SOURCES OF YOUR KNOWLEDGE, INCLUDING EDUCATION AND EXPERIENCE:

See attached resume

C. LIST ANY DISBARMENT, SUSPENSION, OR ANY OTHER DISCIPLINARY ACTION WHICH YOU HAVE RECEIVED FROM ANY ORGANIZED BAR ASSOCIATION:

None

5. LIST EACH INSTANCE IN WHICH YOU HAVE BEEN DISMISSED, TERMINATED, OR DENIED APPOINTMENT AS COUNSEL FOR POOR OR IMPROPER PERFORMANCE:

None

6. LIST ANY PERSONAL OR BUSINESS RELATIONSHIP YOU HAVE EVER HAD WITH ANY OFFICER OR EMPLOYEE OF THE OFFICE OF THE PROPERTY APPRAISER, OFFICE OF THE CLERK OF THE CIRCUIT COURT, OFFICE OF THE COUNTY ATTORNEY, OR THE VALUE ADJUSTMENT BOARD:

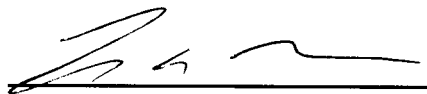
Special Magistrate, 2013/14

7. LIST ANY ADDITIONAL INFORMATION WHICH QUALIFIES YOU TO SERVE AS COUNSEL TO THE VALUE ADJUSTMENT BOARD:

Counsel for several governmental entities over my career; accounting/CPA (inactive)
background; experienced in real estate closings; certified mediator

8. PLEASE PROVIDE A WRITING SAMPLE, WHICH MAY CONSIST OF ANY OPINION, LETTER, OR OTHER DOCUMENTATION THAT CONTAINS ONE (1) OR MORE WRITTEN PAGE(S) OF ORIGINAL MATERIAL.

THE UNDERSIGNED CERTIFIES, UNDER PENALTY OF DISQUALIFICATION FROM CONSIDERATION, THAT EACH ITEM CONTAINED IN THIS APPLICATION, OR OTHER DOCUMENT FURNISHED BY OR ON BEHALF OF THE APPLICANT IS TRUE AND COMPLETE AS OF THE DATE IT BEARS. THE UNDERSIGNED AUTHORIZES THE VALUE ADJUSTMENT BOARD TO OBTAIN INFORMATION FROM OTHER SOURCES TO VERIFY EACH ITEM CONTAINED HEREIN. THE UNDERSIGNED ACKNOWLEDGES THAT IF SELECTED HE/SHE WILL FOLLOW ALL REQUIREMENTS AND MANDATES OF LAW IN FULFILLING THE DUTIES OF COUNSEL TO THE VALUE ADJUSTMENT BOARD.



SIGNATURE OF APPLICANT

6-16-14

DATE

LARRY A. MATTHEWS
Matthews, Higgins, Hausfeld & Fenimore
114 East Gregory Street
Pensacola, FL 32502
850-434-2200
850-434-2600 facsimile
lmatthews@matthewshigginslaw.com

EDUCATION

Florida State University Tallahassee, Florida	Juris Doctor Honors	1981
University of Florida Gainesville, Florida	Bachelor of Science, Accounting Honors	1976

EXPERIENCE

Matthews, Higgins, Hausfeld & Fenimore Pensacola & Panama City, Florida	Partner	2012- present
Bozeman, Jenkins & Matthews, P.A. Pensacola & Ft. Walton Beach, Florida	Shareholder	1993 - 2011
Jenkins & Matthews Pensacola, Florida	Partner	1992 - 1993
Beggs & Lane Pensacola, Florida	Partner	1987 - 1992
Emmanuel, Sheppard & Condon Pensacola, Florida	Associate	1985 - 1987
Holland & Knight Tampa, Florida	Associate	1982 - 1985
Fowler, White et al. Tampa, Florida	Associate	1981 - 1982

NATURE OF PRACTICE

Mr. Matthews specializes in general civil litigation practice with an emphasis in the defense of personal injury matters including automobile negligence, professional negligence, premises liability, products liability, employment law and civil rights litigation. In addition, Mr. Matthews has experience in commercial litigation including insurance coverage matters, real property, and fire and casualty matters, with a recent concentration in toxic tort litigation and complex case/class action litigation.

SPECIAL QUALIFICATIONS

Board Certified Civil Trial Lawyer (Florida)	Certified Public Accountant (inactive)
Certified Circuit Court Mediator (Florida)	

PROFESSIONAL ORGANIZATIONS

The Florida Bar (1982)	American Trial Lawyers Association
Alabama State Bar (1994)	American Board of Trial Advocates
U.S. Supreme Court	Florida Defense Lawyers Association
U.S. Court of Appeals for the Eleventh Circuit	The Federal Bar Association
U.S. District Court, Northern, Middle and Southern Districts of Florida	Tax Court
U.S. District Court, Southern District of Alabama	American Inns of Court

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

Appeal Case No.: 09-13954-B

**BRIAN MOORE, as Personal
Representative on behalf of the
Estate of Bernard P. Rice, deceased,**

L.T. Case No.: 5:08cv343/RS/MD

Appellant,

v.

**NORTH AMERICA SPORTS, INC., a
foreign corporation d/b/a World
Triathlon Corporation, also d/b/a
Ironman Triathlon, and also d/b/a Ford
Ironman Florida, and f/k/a Ironman
North America, and USA TRIATHLON,
a foreign corporation,**

Appellees.

BRIEF OF APPELLEES

**On Appeal from the United States District Court
Northern District of Florida**

**Larry A. Matthews
Shane M. Dean
Jason B. Onacki
BOZEMAN, JENKINS & MATTHEWS, P.A.
114 East Gregory Street (32502)
Post Office Box 13105
Pensacola, FL 32591-3105
(850) 434-6223 Telephone
(850) 434-5242 Facsimile
Attorneys for Appellees**

**CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF
INTERESTED PERSONS**

Non-governmental corporate parties to this proceeding:

1. North America Sports, Inc. has no parent corporation nor does any publicly held corporation own any North America Sports, Inc. stock.
2. USA Triathlon has no parent corporation nor does any publicly held corporation own any USA Triathlon stock.

Persons and entities known to Appellees to have an interest in the outcome of this action:

1. Boggs, John N., Esq., Counsel for Appellant
2. Bozeman, Jenkins & Matthews, P.A., Counsel for Appellees
3. The Honorable Miles Davis, U.S. Magistrate Judge
4. Dean, Shane M., Esq., Counsel for Appellees
5. Estate of Bernard P. Rice, Appellant
6. Matthews, Larry A., Esq., Counsel for Appellees
7. Moore, Brian (as Personal Representative of the Estate of Bernard P. Rice),
Appellant
8. North America Sports, Inc., Appellee
9. Onacki, Jason B., Esq., Counsel for Appellees

Appeal Case No.: 09-13954-B Brian Moore V. North America Sports, Inc.
L.T. CaseNo.: 5:08cv343/RS/MD

10. Perwin, Joel S., Esq., Counsel for Appellant
11. Joel S. Perwin, P.A., Counsel for Appellant
12. Santa Maria, Diana, Esq., Counsel for Appellant
13. Diana Santa Maria, P.A., Counsel for Appellant
14. Sims, Dorothy C., Esq., Counsel for Appellant
15. Sims & Stakenborg, P.A., Counsel for Appellant
16. The Honorable Richard Smoak, U.S. District Judge
17. USA Triathlon, Appellee
18. World Triathlon Corporation

I HEREBY CERTIFY the above constitutes a complete list of interest persons
and entities to this appeal as described in 11th Cir. R. 28-1(b) and 11th Cir. R. 26.1-1.

/s/ Larry A. Matthews
Larry A. Matthews
Florida Bar No.: 0339601
Shane M. Dean
Florida Bar No.: 499889
Jason B. Onacki
Florida Bar No.: 0698016

TABLE OF CONTENTS

	<u>Page(s)</u>
CERTIFICATE OF INTERESTED PARTIES	C1-C2
STATEMENT REGARDING ORAL ARGUMENT	i
TABLE OF CONTENTS	ii-iii
TABLE OF CITATIONS	iv-v
STATEMENT OF JURISDICTION	vi
STATEMENT OF ISSUES	1
(A) Whether Plaintiff's Motion to Remand was properly denied because removal was timely, and, if not, was such error procedural and therefore not warrant a new trial where the district court had jurisdiction at the time judgment was rendered.	
(B) Whether evidence rebutting Plaintiff's claim for net accumulations was properly admitted under the circumstances created by Plaintiff, and if not, did the error substantially prejudice the outcome of trial.	
(C) Whether media coverage prevented Plaintiff from receiving a fair trial.	
(D) Whether Plaintiff's Motion for Summary Judgment was properly denied where there was evidence that decedent entered several releases and waivers.	
STATEMENT OF THE CASE	2
(i) Course of Proceedings	2

(ii) Statement of Facts	3
(iii) Standard of Review	18
SUMMARY OF ARGUMENT	19
ARGUMENT	20
(A) Plaintiff's Motion to Remand was properly denied because removal was timely, and if not, such error was procedural and therefore does not warrant a new trial	20
(B) The trial court did not abuse its discretion by allowing the questioning of Plaintiff's witnesses as to evidence rebutting Plaintiff's claim for net accumulations, and any such claimed error did not substantially prejudice the outcome of trial	26
(C) Media coverage had no influence on Plaintiff receiving a fair trial	31
(D) Plaintiff's Motion for Summary Judgment was properly denied because there was evidence that Plaintiff executed enforceable releases and waivers	35
CONCLUSION	40
CERTIFICATE OF COMPLIANCE	41
CERTIFICATE OF SERVICE	42

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page(s)</u>
<i>Baker v. Firestone & Rubber Co.</i> , 537 F.Supp. 244, 245-47 (S.D.Fla. 1982)	24
<i>Banfield v. Louis</i> , 589 So.2d 441, 444-45 (Fla. 4th DCA 1991)	36, 37
<i>Bennett v. United States Cycling Federation</i> , 193 Cal.App.3d 1485, 239, Cal.Rptr. 55 (Cal.Ct.App.1987)	37
<i>Bosky v. Kroger Texas, LP</i> , 288 F.3d 208, 211 (5th Cir.2002)	23
<i>Boyle v. County of Kern</i> , 2008 WL 220413 (E.D.Cal. 2008)	30
<i>Caterpillar Inc. v. Lewis</i> , 519 U.S. 61, 76, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996).	25
<i>CSX Transp., Inc. v. Hensley</i> , --- U.S. ----, 129 S.Ct. 2139, 2141, 173 L.Ed.2d 1184 (2009)	29
<i>Estes v. U.S.</i> , 335 F.2d 609, 615 (5 Cir. 1964)	31
<i>Estevez-Gonzalez v. Kraft, Inc.</i> , 606 F.Supp. 127, 129 (S.D.Fla. 1985)	24
<i>Fioretti v. Massachusetts General Life Ins. Co.</i> , 53 F.3d 1228, 1235 (11 th Cir. 1995)	36
<i>Foster v. Resources for Human Development, Inc.</i> , 2007 WL 2225811 (M.D.Fla. July 31, 2007)	22, 24
<i>Gordon v. U.S.</i> , 438 F.2d 858, 873 (5th Cir.), cert. denied, 404 U.S. 828, 92 S.Ct. 139, 30 L.Ed.2d 56, cert. denied, 404 U.S. 828, 92 S.Ct. 140, 30 L.Ed.2d 56 (1971)	32

<i>Greer v. Miller</i> ,	29, 32
483 U.S. 756, 767 n. 8, 107 S.Ct. 3102, 3109 n. 8, 97 L.Ed.2d 618 (1987)	
<i>Huffman v. Saul Holdings, LP</i> ,	23
194 F.3d 1072, 1078 (10th Cir.1999)	
<i>King v. Gulf Oil Co.</i> ,	28
581 F.2d 1184, 1186 (5th Cir. 1978)	
<i>Lee v. Altamil Corp.</i> ,	24
457 F.Supp. 979, 981 (M.D.Fla. 1978)	
<i>Lowery v. Alabama Power Co.</i> ,	4-5, 20-25*
483 F.3d 1184, 1219 (11th Cir. 2007)	
<i>Okura v. United States Cycling Federation</i> ,	37
186 Cal.App.3d 1462, 1468, 231 Cal.Rptr. 429, 432 (Cal.Ct.App.1986);	
<i>Proctor v. Fluor Enterprises, Inc.</i> ,	28
494 F.3d 1337, 1352 (11th Cir. 2007)	
<i>Wagner v. Oerlikon, USA, Inc.</i> ,	22
2008 WL 2262041 (M.D.Fla. May 30, 2008)	

OTHER AUTHORITIES

28 U.S.C. § 1291	vi
28 U.S.C. § 1446(b)	3, 23, 25
Fed.R.Evid. 103	28
Fed.R.Civ.P. 61	28
Mont. Code Ann. § 28-3-102	36

STATEMENT OF THE ISSUES

- A. WHETHER PLAINTIFF'S MOTION TO REMAND WAS PROPERLY DENIED BECAUSE REMOVAL WAS TIMELY, AND, IF NOT, WAS SUCH ERROR PROCEDURAL AND THEREFORE NOT WARRANT A NEW TRIAL WHERE THE DISTRICT COURT HAD JURISDICTION AT THE TIME JUDGMENT WAS RENDERED.**
- B. WHETHER EVIDENCE REBUTTING PLAINTIFF'S CLAIM FOR NET ACCUMULATIONS WAS PROPERLY ADMITTED UNDER THE CIRCUMSTANCES CREATED BY PLAINTIFF, AND IF NOT, DID THE ERROR SUBSTANTIALLY PREJUDICE THE OUTCOME OF TRIAL.**
- C. WHETHER MEDIA COVERAGE PREVENTED PLAINTIFF FROM RECEIVING A FAIR TRIAL.**
- D. WHETHER PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED WHERE THERE WAS EVIDENCE THAT DECEDENT ENTERED SEVERAL RELEASES AND WAIVERS.**

STATEMENT OF THE CASE

(i) Course of Proceedings

This is an appeal of a final judgment for the Defendants in a wrongful death action. (R-245). The judgment is based on a jury verdict in favor of Defendants rendered at the conclusion of a five-day jury trial on July 10, 2009. (R-213 (civil minutes from trial); R-216 (jury verdict); R-218 (judgment)).

Plaintiff, as Personal Representative of the Estate of Bernard P. Rice, filed a four-count negligence action against World Triathlon Corporation, North America Sports, Inc., USA Triathlon, and Any Other Entity Whose Acts or Omissions Caused or Contributed to the death of Bernard P. Rice. (R-1-3, Exhibit "B" to Defendants' Notice of Removal). The lawsuit was filed in the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida. (R-1-2, Exhibit "A" to Defendants' Notice of Removal; R-1-3, Exhibit "B" to Defendants' Notice of Removal).

On October 2, 2008, Defendant USA Triathlon served its First Request for Admissions to Plaintiff, requesting Plaintiff admit the amount in controversy claimed by Plaintiff exceeded \$75,000 exclusive of interest and costs. (R-1-7, Exhibit "F" to Defendants' Notice of Removal). Plaintiff answered on November 3, 2008, admitting for the first time that the amount in controversy exceeded \$75,000 exclusive of interest and costs. (R-1-8, Exhibit "G" to Defendants' Notice of Removal). Eleven

days later on November 14, 2008, Defendants North America Sports and USA Triathlon timely filed their Notice of Removal to federal court pursuant to 28 U.S.C. § 1446(b). (R-1). Plaintiff's subsequent Motion to Remand and Motion for Attorneys' Fees and Costs, (R-3), was denied. (R-12).

Judgment was entered in favor of Defendants on July 13, 2009. (R-218). This appeal followed. (R-245).

(ii) Statement of Facts

The facts relevant to Plaintiff's four challenges on appeal are as follows:

A. Removal. Plaintiff filed a negligence action in the Circuit Court for Bay County, Florida. (R-1-3, Exhibit "B" to Defendants' Notice of Removal). Four Defendants were identified, including World Triathlon Corporation, which was alleged to be a Florida Corporation. (*Id.*). As to the amount in controversy, the Complaint alleged "damages were in excess of \$15,000.00 (fifteen thousand dollars) exclusive of interest where applicable and costs," (R-1-3, Exhibit "B" to Defendants' Notice of Removal)¹, the state court's minimum jurisdictional amount. (R-12, p 4).

On July 14, 2008, Defendants North America Sports and USA Triathlon filed a Motion to Dismiss, or in the alternative, Motion for More Definite Statement. (R-1-

¹Plaintiff incorrectly states that the Complaint alleged damages in excess of \$75,000. *See* Plaintiff's Brief at 30. The Complaint alleges that damages were in excess of \$15,000, not \$75,000, hence the need for the Requests for Admission.

4, Exhibit “C” to Defendants’ Notice of Removal; R-1-5, Exhibit “D” to Defendants’ Notice of Removal). Thereafter, on September 2, 2008, Plaintiff served a Notice of Dropping World Triathlon Corporation as a party-Defendant, which created diversity of citizenship. (R-1-6, Exhibit “E” to Defendants’ Notice of Removal). Only once diversity was established on September 2, 2008, did the issue of the amount in controversy become important. On October 2, 2008, Defendant USA Triathlon served its First Request for Admissions to Plaintiff, requesting Plaintiff admit the amount in controversy exceeded the \$75,000 removal threshold. (R-1-7, Exhibit “F” to Defendants’ Notice of Removal). Plaintiff belatedly served his response to the requests for admissions on November 3, 2008, admitting the amount in controversy met the jurisdictional threshold set by 28 U.S.C. § 1332(a) (R-1-8, Exhibit “G” to Defendants’ Notice of Removal). Importantly, under the mandate of *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1219 (11th Cir. 2007), this was the first document from Plaintiff constituting an unambiguous statement that the claimed damages satisfied the amount in controversy necessary for removal. Eleven days later, on November 14, 2008, Defendants North America Sports and USA Triathlon timely filed their Notice of Removal. (R-1). The trial court denied Plaintiff’s Motion to Remand and Motion for Attorneys’ Fees and Costs, (R-12), reasoning that under *Lowery* removal before the request for admission would require the District Court to

engage in “impermissible speculation” as to the amount in controversy. (R-12, p 4 citing *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1219 (11th Cir. 2007)).

B. Evidentiary Ruling. Contrary to the record, Plaintiff misstates throughout his brief that he dropped his claim for net accumulations before he presented any evidence on that claim.² (R-213 at p 5³; R-256⁴). He also misstates that he dropped his claim for net accumulations before Defendants’ attempt to cross-examine Plaintiff’s witness as to evidence highly relevant to the net accumulations claim.⁵ Plaintiff is absolutely incorrect. Plaintiff made the claim for lost net accumulations a focus of his voir dire, opening statement, and case-in-chief. (R-256). It was not until the fourth day of trial, and after the two questions on cross-

²Plaintiff offers no citation to the record to support his assertion that he “dropped” the net accumulations claim without introducing any evidence on this element of damages. (Appellant’s Brief at p 10). Nor does he cite to the date (Thursday) when he dropped his net accumulations claim. (*Id.*) See also footnote 6.

³Jury Trial Minutes showing Plaintiff presented evidence from economics expert Frederick Raffa, Ph.D.

⁴Plaintiff presented trial testimony regarding claim for net accumulations by reading the Deposition of Frederick Raffa, Ph.D.

⁵Plaintiff presented testimony from his economics expert regarding the basis for his net accumulations claim after Plaintiff presented witness Patricia Rice, whom Defendants cross-examined regarding the wrongful conversion claim by Plaintiff’s father against his son. (R-213 at p 5; R-238 at pp 5-6; R-256).

examination of Plaintiff's mother for which Plaintiff complains, when Plaintiff elected to drop his claim for loss of net accumulations.⁶

Plaintiff claimed loss of net accumulations when he filed suit. (R-1-3, Exhibit "B" to Defendants' Notice of Removal). His discovery was directed towards supporting that claim. (R-256, Deposition of Frederick Raffa, Ph.D read into evidence at trial). Plaintiff's economics expert, who was presented at trial by deposition testimony, opined that Plaintiff lost massive amounts of net accumulations based on Plaintiff's projected earnings as general manager of his father's car dealership. (R-213 at p 6; R-256 at pp 5-11). What Plaintiff did not disclose to Defendants was that shortly after Plaintiff's death, his father, in his capacity as Plaintiff's employer, brought a legal action claiming his son and daughter-in-law wrongfully converted hundreds of thousands of dollars from the family car dealership. (R-173; R-173-1 at pp 20, 24, 34, 39, 41, 62). Despite Defendants'

⁶Defendants are not aware of any record as to the withdrawal of Plaintiff's net accumulations claim until Friday. (R-213 at pp 8-9). However, defense counsel recalls plaintiff making the announcement on Thursday, and will supplement the record with the transcript of proceedings from that date. Nonetheless, Defendants point to the fact that Plaintiff offered evidence supporting his claim for net accumulations by testimony of his economics expert at the close of the third day of trial (July 8) and before he closed his case, (R-213 at p 5; R-256). Plaintiff would not have presented evidence to support his net accumulations claim, nor would Defendants have allowed such evidence, if Plaintiff had dropped his net accumulations claim prior to the testimony of Plaintiff's economics expert.

multiple discovery requests, it was not until the eve of trial that Defendants discovered there was a claim for wrongful conversion against Plaintiff.^{7 8} (R-255-2 at p 8 (¶18); R-173; R-173-1 at pp 20, 24, 34, 39, 41, 62). Among the items in the

⁷A brief timetable illustrates Plaintiff's failure to timely disclose the highly relevant evidence:

February 10, 2009. *First Interrogatories to Plaintiff.* Defendant North America Sports, Inc.'s First Interrogatories: Plaintiff's response served on March 23, 2009, failed to disclose any other claims or litigation involving the Estate and Decedent. (R-255-1 at p 8 (¶18)). Both the Estate and Decedent's widow were named parties in the other litigation alleging wrongful conversion and embezzlement of funds and property, and it is hard to imagine Plaintiff did not have knowledge of this other litigation that began in 2007 prior to the filing of the wrongful death action. (R-173).

April 30, 2009. *Deposition of widow:* For the first time, the Decedent's wife reluctantly hinted there may be other litigation involving the Estate. (R-255-2 at p 64, ln 17 - p 66, ln 19). Unfortunately, Plaintiff's counsel directed the widow to not provide any information about the nature of the litigation, the identity of the parties, etc., based on invocation of questionable privileges, and even though the subject matter was public record and otherwise not privileged. (*Id.*).

May 8, 2009. *Discovery deadline:* Plaintiff and his counsel obviously knew of the claim involving the Estate in order to invoke a privilege. Despite having knowledge of the other litigation, Plaintiff still failed to supplement his answers to interrogatories to disclose it as required under Fed.R.Civ.P. 26(e)(1)(A).

⁸This is not the only time Plaintiff failed to timely disclose crucial evidence. For example, Plaintiff failed to timely disclose a videotape of Plaintiff from the race until after the discovery deadline and despite Defendants' earlier discovery requests seeking such crucial evidence. (R-74).

probate documents characterizing the son's actions are terms such as "embezzlement," "altered statements," "illegal receipt," and similar terms. (*Id.*). Evidence that Plaintiff's father was so upset as to sue his son's estate and daughter-in-law for wrongful conversion completely undermined Plaintiff's basis for net accumulations. The District Court recognized the relevance of this evidence:

"[E]mbezzlement, that [Decedent's] former employer has accused him of embezzlement, not only his former employer, but arguably sheltered employment with his father, such that they are claiming embezzlement, then I think that raises a - - that is - - has some probative value on the question of projecting out his future earnings on net accumulations.

(R-237 at p 29).

"The jury can conclude if [Decedent] has ripped off his employer for \$400,000, that calls into question whether he would continue to be employed there, and earning that type of salary."

(R-237 at p 40).

However, the District Court denied as untimely the Defendants' motion requesting to use documents concerning the wrongful conversion claim as trial exhibits. (R-237, p 8). The District Court was frustrated with Defendants' request for leave to add this newly discovered evidence the week before trial. (R-237 at pp 6, 10). Nevertheless, Judge Smoak allowed this evidence to come in through testimony, reasoning that cross-examination was:

the less of two evils of totally misleading the jury that all is fine in paradise, if we don't let it in, where at least [if we let it in on cross-examination] at least [Defendants] can try to make of it what [they] will.

(R-237 at p 11).

The District Judge instructed "if these non-party witnesses for some reason get into the issue of [Decedent's] employment, his continued employment, the future accumulation, then I think that opens the door. (R-237 at p 35). The District Judge permitted use of the term "wrongful conversion" to describe the claim made against Plaintiff's Decedent's Estate. (R-237 at p 40).

Following the District Court's instructions, Defendants cross-examined Plaintiff's mother, Patricia Rice, as follows:

MR. DEAN: You mentioned that he had worked and had a job since he was 16, is that right?

PATRICIA RICE: Right.

* * * * *

MR. DEAN: Who was he working for at the time of his death?

PATRICIA RICE: He was working for his father.

MR. DEAN: And what is his father's name?

PATRICIA RICE: His dad's name is Pete Rice.

* * * * *

MR. DEAN: Are you aware that Mr. Rice, Pete Rice, has filed a claim against your son's estate for wrongfully converting money and property in the amount of \$427,000, as well as some other property?

MS. SANTA MARIA [Plaintiff's counsel]: Objection, Your Honor.

THE COURT: Overruled.

MR. DEAN: Were you aware of that, ma'am?

PATRICIA RICE: I know there's been some allegations, and I know that something is going on. I've never read. I've never been around in Kallispell or talked to any attorneys, or have any information like that.

MR. DEAN: Are you aware that the allegations that you said you were generally aware of, that they included allegations that your son was stealing money and property from your ex-husband and his dad?

MS. SANTA MARIA: Objection, Your Honor.

THE COURT: Sustained. Counsel, remember our sidebar conference.

(R-238 at pp 5-6).

When Patricia Rice responded to Defendants' counsel's question regarding the "wrongful conversion" claim, and after indicating some possible confusion as to the legal terms used, Defendants' counsel clarified his question by using the layman's term "stealing." Even the District Court admitted to not knowing the difference between "wrongful conversion" and "stealing," and presumably neither did the jury. (R-238 at p 11). Nevertheless, no further inquiry was pursued by Defendants' counsel, and the jury was only left with the testimony that Plaintiff's mother was

aware of some claim involving wrongful conversion brought by Plaintiff's father against his son's estate. (R-238 at p 6, ln 7-8). Cross-examination was finished shortly thereafter pursuant to the Court's instruction. (R-238).

Plaintiff moved for mistrial on the basis that Defendants overstepped the District Court's instructions allowing cross-examination. (R-238 at p 9). The District Court denied Plaintiff's Motion for Mistrial at the conclusion of trial. (R-238 at p 14).

C. *Jury Poll.* Media coverage of Plaintiff's lawsuit leading up to and including trial was certainly expected. The fact that a participant would sue an organization putting on a triathlon (2.4 mile swim, 112 mile bike, and 26.2 mile run) for a heart condition or drowning is noteworthy regardless of the venue.

Plaintiff's first motion to transfer venue was filed a month before trial on June 1, 2009 (R-96), followed by a supplemental motion on June 8, 2009 (R-104), and both were based on an article in the Panama City News Herald, which quoted portions of Defendants' Motion to Dismiss filed on July 14, 2008, prior to the removal of the case to federal court. (R-1, Exh. C). The District Judge denied Plaintiff's Motion to Transfer, reasoning that if there was an issue, then it could be addressed at voir dire. (R-148).

Another article appeared in the News Herald on the first day of trial. (R-240). During voir dire, the District Judge addressed the issue of media coverage by asking the prospective jurors if any of them had “heard anything about this case, or seen anything?” (R-277 at p 2). The transcript of voir dire indicates that at least one juror raised his/her hand indicating that they had heard or seen something about the case. (*Id.*). The District Judge then instructed “that article is not evidence(*Id.*). Evidence you’re going to hear is going to come here in this courtroom, and that’s what this jury has to decide its - - make its decision on.” (*Id.*). Judge Smoak then confirmed:

Can all of you set aside what you may have seen or heard about this case and decide this case solely on the evidence that comes in during trial, and follow and apply the law that I will instruct the jury that they must follow?

(R-277 at p 2).

The jurors confirmed they would set aside anything they may have seen or heard about the case, and they would limit their consideration to the evidence presented at trial and the District Court’s instructions regarding what law to apply to the evidence. (*Id.*).

The District Court even took further precaution by asking:

For those of you who saw or heard anything about this case, was what you saw or what you heard so strong that you will not be able to set that aside and decide the case solely on the evidence and follow the law?

(R-277 at p 2).

Again, the jurors confirmed that they would limit their deliberation to the evidence presented at trial and follow the law provided by the Judge. (*Id.*).

Additional media coverage occurred for the next four days of trial. (R-236; R-240; R-241; R-242; R-244). However, there is no evidence that any juror ever observed the additional media coverage or in any way violated the District Court's instructions. Further, the District Court evaluated the media coverage each day and found it to be "about as neutral as you can get." (R-228, at p 3, ln 1-6; R-235 at p 7, ln 20-24). The District Court relied on its instructions given to the jury during voir dire and ruled "I'm not going to ask the jurors every day - - every time they come in whether they've followed my instructions. I don't think those articles are much to get much stirred about, quite frankly, but we gave them the instruction." (R-228 at p 3, ln 7-8). The District Court refused Plaintiff's request to interrogate the jurors by ruling that the media coverage did not create an "extreme" case. (R-235 at p 7, ln 7-25; R-235 at p 13, ln 1-7). Nevertheless, Judge Smoak reminded the jury of his instructions at the close of Plaintiff's case-in-chief, at the end of the third day of trial:

Now, remember on Monday, part of my instructions were to you that you are to avoid seeing or listening to anything about this case that might appear in the media. There have been some mention, of no particular consequence, but remember my instructions to you on that point and remember the oath you took. Your decision in this case will be based solely on the evidence and by following the law that I instruct you on.

These [parties] need to feel confident and assured that they're going to get a fair trial, both sides, and they don't need to worry about the television or the newspaper.

So if you would - - and I have no doubt that you will - - keep those in mind. The only reason I bring it up because usually these [media sources], they don't have a clue what we're doing down here, but for some reason they get some mention in the newspaper, and I think one of the television stations. Of no particular consequence. And so with that, you all can go on now and we'll see you at 8:30 in the morning.

(R-256 at pp 12-13; R-213 at p 6).

D. Summary Judgment as to Releases and Waivers. Plaintiff was required to execute at least two separate waivers and releases (sometimes referred to as "waiver" or "waivers")⁹ to participate in the 2006 Ironman Florida ("Florida event"). (R-79-2; R-79-3; R-79-4; R-79-5). Plaintiff entered a waiver when registering online using the internet, (R-79-2; R-79-3), and then entered another waiver as required for his race site registration in Panama City. (R-81 at p 7(¶19), p 13(¶17), p 18(¶¶14-17); R-79-4).

⁹There was another release required by USA Triathlon for participants to execute if they were not an annual member of USA Triathlon. (R-79-5; R-81 at p 8 (¶¶15-17, 23), p 14 (¶23), p 18 (¶¶15-17)). The majority of the 2200 participants in the Florida event were annual members of USA Triathlon, and therefore USAT only sent 1000 waiver forms for use in race site registration in anticipation of the small number of participants needing to enter that waiver. (R-81 at p 30, ln 7-23, excerpt of Deposition of Kathy Matejka). This was not an issue at trial, although Plaintiff's brief confuses the USAT waiver with the other race site waiver required of all participants in the Florida event.

The online registration was administered by The Active Network, Inc., a company specializing in providing internet registration support for sporting events such as triathlons. (R-81 at p 6(¶14), p 12(¶14)). Plaintiff had to agree with all of the terms of the online registration, including the waiver, to submit the registration for entry into the Florida event. (R-81 at p 6(¶12), p 12(¶12)). Failure to check the box signifying acceptance of the waiver would not allow Plaintiff to continue the online registration process necessary to participate in the Florida event. (R-81 at p 6(¶13), p 12(¶13)).

All participants in the Florida event were also required to complete a race site waiver as a prerequisite to obtaining materials necessary to participate. (R-81 at p 7 (¶¶17, 18, 19), p 8 (¶24), p 13 (¶¶17, 18, 19), p 14 (¶24)). The opposite side of that waiver form required participants to provide emergency medical information. (R-285 at p 5, ln 4 - p 6, ln 10; p 14, ln 11-25). The form was stored in the medical tent, and it was to be provided to medical personnel if a participant required emergency medical treatment. (R-285 at p 15, ln 1 - p 16, ln 10). There were no copies made of these waivers, so if it was given to emergency personnel, there would be no duplicate. (*Id.*).

There was also a third waiver from an earlier triathlon, which was part of Defendants' defense. (R-79-6; R-81 at p 34 (¶¶16, 17); R-81 at p 51 (¶¶16, 17)).

Plaintiff had also participated in a triathlon in California earlier in 2006. (R-81 at p 34 (¶16); R-81 at p 51 (¶16)). As part of his participation in the California event, Decedent signed race site waivers similar to those he completed to participate in the Florida event later that same year. (R-79-6; R-79-7; R-81 at p 34 (¶¶16, 17); R-81 at p 51 (¶¶16, 17)). This waiver expressly applied to all of Defendants' events for the 2006 season, which included the subsequent Florida event. (R-79-6, R-79-7). The Court denied Defendant's motion for directed verdict on the earlier California waiver. (R-213 at p 6).

Defendants raised affirmative defenses relying on the waivers entered by Plaintiff as a bar to his claims. (R-29 (¶¶53, 54); R-30 (¶¶53, 54)). Both Plaintiff and Defendants moved for summary judgment on those affirmative defenses. (R-46, R-79, R-89).

Plaintiff argued: (i) the online waiver was invalid and unenforceable by operation of Montana law; (ii) even if the online waiver were an enforceable bar against Plaintiff's claims, he did not agree to it; and, (iii) the race site waiver was never signed by Plaintiff because it could not be located. (R-46).

Defendants responded to Plaintiff's arguments as part of their own Motion for Summary Judgment. (R-79). Defendants argued: (i) although Plaintiff entered the online waiver while located in Montana, both Florida law and Montana law

commanded that the online waiver be interpreted under Florida substantive law, and under Florida law, the online waiver barred Plaintiff's claims; (ii) Plaintiff's agreement to the terms of the online waiver was evidenced by his submission of it, which could not have occurred without Plaintiff agreeing to all of its terms; and (iii) Plaintiff had to sign the race site waiver in order to receive materials necessary to participate, and if the waiver could not be located, it was because the executed waiver was given to emergency personnel. (R-79).

The District Court refused to grant summary judgment to Defendants on the enforceability of the online waiver on the basis that there was an inadequate showing the Plaintiff had agreed to it. (R-147). The District Court pointed to the hard copy of Plaintiff's online registration as not showing "check mark boxes" nor "check marks" referenced by the registration. (R-147 at pp 7-8). The District Court reasoned that the lack of check mark boxes and check marks meant there was a question of fact as to whether Plaintiff agreed with the online waiver. (R-147 at 8). Judge Smoak ruled that "[w]hether the online waiver was properly executed is clearly in dispute," and therefore the issue must proceed to trial. (R-147 at 8).

The District Court also found there was an issue of fact as to whether Plaintiff entered the race site waivers. (R-147 at 9).

The District Court structured the verdict form so the jury first assessed whether Defendants were liable for negligence, and only if there was a finding of negligence would the jury then determine whether Plaintiff had entered the online and race site waivers. (R-216). The jury's finding that Defendants were not liable for negligence ended the case, and no findings were made as to whether Plaintiff entered the online and race site waivers. (*Id.*).

(iii) Standard of Review

Defendants agree with Plaintiff's statements regarding the standards of review applicable to each alleged error.

SUMMARY OF ARGUMENT

The District Court properly denied Plaintiff's Motion to Remand because removal was timely. But even if there was a procedural defect in removal, such a defect does not command a new trial where the federal court had jurisdiction at the time judgment was entered.

Second, the District Court acted within its discretion by ruling that evidence of a wrongful conversion claim by Plaintiff's father against Plaintiff was relevant to challenge the basis for Plaintiff's claim for loss of net accumulations, which relied on the assertion that Plaintiff would work for his father for the rest of his life. The District Court also properly denied Plaintiff's Motion for Mistrial for defense counsel's follow-up question clarifying the claim by Plaintiff's father against Plaintiff.

Third, the District Court gave proper instructions to address media coverage of the case, and the jury confirmed that they would only consider evidence presented at trial in reaching their verdict. Judge Smoak properly considered: (i) the character of the media coverage; (ii) its timing; (iii) its credibility; and (iv) whether it would

influence the jury, as well as his observation of the jury, local knowledge¹⁰, and other considerations incumbent upon the presiding judge.

Finally, the District Judge properly denied Plaintiff's Motion for Summary Judgment on the grounds that there was evidence that Decedent entered several releases and waivers.

ARGUMENT

A. PLAINTIFF'S MOTION TO REMAND WAS PROPERLY DENIED BECAUSE REMOVAL WAS TIMELY, AND IF NOT, SUCH ERROR WAS PROCEDURAL AND THEREFORE DOES NOT WARRANT A NEW TRIAL.

i. Defendants timely sought removal under the mandate of *Lowery*

Plaintiff incorrectly argues that the timing for removal starts when the diversity of the parties is established. Plaintiff ignores the requirement that in addition to establishing diversity there must also be an unambiguous statement establishing the amount in controversy. Only when both elements are established does the thirty-day time period for removal begin.

¹⁰District Judge Smoak has been on the bench since 2005. *See Biographical Directory of U.S. Judges*. Before that he had an active civil trial practice in the Panama City-area for over thirty years. *Id.* With this background he has an excellent understanding of his community and those factors which may influence a jury.

The following time line supports the District Court's ruling that removal was timely:

June 20, 2008: Complaint served naming World Triathlon Corporation (the only alleged Florida citizen)

July 14, 2008: Defendants file Motion to Dismiss

September 2, 2008: Plaintiff voluntarily dismisses World Triathlon Corporation

* * *(Diversity established)* * *

October 2, 2008: *With diversity now established*, Defendants serve request for admissions to ascertain whether or not Plaintiff is seeking damages in excess of \$75,000

November 3, 2008: Plaintiff admits he is seeking damages in excess of \$75,000 exclusive of fees and costs

* * *(Amount in controversy established)* * *

November 14, 2008: Defendants timely file Petition for Removal

This Court is aware of the many cases addressing the issue of amount in controversy as a basis for federal jurisdiction. This Court, with its decision in *Lowery v. Alabama*, 483 F.3d 1184 (11th Cir. 2007), established a bright line standard for removal requiring an unambiguous statement by Plaintiff of the amount in

controversy.¹¹ No longer are the District Courts or the parties required to speculate as to the amount in controversy, and any speculation is now strictly prohibited.

Lowery provides a strict, but easy, framework for establishing the amount in controversy, which if followed no longer places the removing party at risk of remand or sanctions. *Lowery*, 483 F.3d at 1214-15. Under *Lowery*, the District Court and parties need only look at record evidence to determine the amount in controversy, no more and no less:

¹¹ With the exception of the two cases discussed below, Plaintiff cites to cases which pre-date *Lowery* or are from outside the Eleventh Circuit. A brief discussion of the inapplicability of these cases follows:

Foster v. Resources for Human Development, Inc., 2007 WL 2225811, *5 (M.D.Fla. July 31, 2007) cited at page 32 of Appellant's Brief. *Foster* is readily distinguishable from the instant case. In *Foster*, there were statements demonstrating that the claimant's alleged wage losses exceeded \$60,000 and a statute showing her entitlement to attorneys fees would exceed \$15,000. *Id.* at *4-*5.

Wagner v. Oerlikon, USA, Inc., 2008 WL 2262041, *1 (M.D.Fla. May 30, 2008) cited at page 32 of Appellant's Brief. *Wagner* is readily distinguishable from the instant case. In *Wagner*, the complaint explicitly alleged a breach of an agreement to pay "Severance Benefits," and the employment agreement defined "Severance Benefits" as a two-year continuation of "any pension, life insurance, health insurance, disability insurance and other employee benefit plans, if any, which the Company may from time to time make available to its executive officers generally." The District Judge held that because the defendants undoubtedly maintained a record of their contributions on behalf of the plaintiff, each category of benefit was peculiarly within the defendants' knowledge at the commencement of the action, and it was obvious to defendants that the amount in controversy exceeded \$75,000.

Under the first paragraph of § 1446(b), a case may be removed on the face of the complaint if the plaintiff has alleged facts sufficient to establish the jurisdictional requirements. Under the second paragraph, a case becomes removable when three conditions are present: there must be (1) “an amended pleading, motion, order or other paper,” which (2) the defendant must have received from the plaintiff (or from the court, if the document is an order), and from which (3) the defendant can “first ascertain” that federal jurisdiction exists. § 1446(b). Under either paragraph, the documents received by the defendant must contain an unambiguous statement that clearly establishes federal jurisdiction. See Bosky v. Kroger Texas, LP, 288 F.3d 208, 211 (5th Cir.2002) (holding that grounds must be “unequivocally clear and certain”); Huffman v. Saul Holdings, LP, 194 F.3d 1072, 1078 (10th Cir.1999) (same). As we have noted, a removing defendant's counsel is bound by Rule 11 to file a notice of removal only when counsel can do so in good faith.

Lowery, 483 F.3d at 1215, n. 63.

Although a successful wrongful death case typically involves damages exceeding \$75,000, in the instant case the Defendants and the District Court were bound to follow the mandate of *Lowery*. The only unambiguous statement regarding the amount in controversy prior to Defendants’ Request for Admissions was Plaintiff’s allegation that he was seeking damages in excess of \$15,000. (R-1-3, Exhibit “B” to Defendants’ Notice of Removal). The District Court agreed that more was required to establish the amount in controversy:

The complaint seeks damages for Plaintiff’s wife, three minor children, and estate for past suffering, future suffering, loss of support and services of the decedent, mental pain and suffering, medical expenses, and funeral expenses. The complaint alleges only damages in excess of \$15,000, the state court’s minimum jurisdictional amount. Based on Plaintiff’s online application to participate in Defendant’s

event, Defendants were also aware that Plaintiff died at the age of thirty-five, held a bachelor's degree, and he was president of a boat dealership. Plaintiff cites numerous authorities to support its argument that Defendants should have known that the amount in controversy based on the allegation of the complaint and the information then available to Defendants without requiring speculation. *See Foster v. Resources for Human Development, Inc.*, 2007 WL 2225811, *5 (M.D.Fla. 2007); *Estevez-Gonzalez v. Kraft, Inc.*, 606 F.Supp. 127, 129 (S.D.Fla. 1985); *Baker v. Firestone & Rubber Co.*, 537 F.Supp. 244, 245-47 (S.D.Fla. 1982); *Lee v. Altamil Corp.*, 457 F.Supp. 979, 981 (M.D.Fla. 1978).

However, the complaint and online application do not provide Defendants with an unambiguous statement sufficient to establish that Plaintiffs' claims potentially exceed \$75,000. *See Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1219 (11th Cir. 2007). The nature of the claim is sufficient to conclusively establish the amount in controversy; instead, it requires impermissible speculation. *Id.* at 1220. Defendants did not receive a document clearly indicating that the value of Plaintiff's claim exceed \$75,000 until Plaintiff responded to the Defendants' First Request for Admission on November 3, 2008. *Id.* at 1221. Therefore, the Defendants were able to establish federal jurisdiction by a preponderance of the evidence starting on November 3, 2008 and has thirty days to file a notice of removal. On November 14, 2008, Defendants removed the case to this court in a timely fashion.

(R-12 at pp 4-5).

There was an insufficient basis to establish the amount in controversy for removal until Plaintiff responded to Defendants' Requests for Admission. When that occurred, Defendants timely sought removal.

ii. If the District Court erred in applying *Lowery*, such error was procedural and does not entitle Plaintiff to a new trial

Plaintiff had a five-day jury trial and yet asserts that failure to comply with the thirty-day procedural requirement of 28 U.S.C. § 1446(b) entitles him to a new trial in state court. To allow a party a new trial on a procedural error in invoking jurisdiction, when it is undisputed the court had jurisdiction at the time judgment was entered, is not what the law provides. Once a diversity case has been tried in federal court “considerations of finality, efficiency, and economy” overshadow any defects in removal procedure and do not provide a sufficient basis for new trial in state court. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 76, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996).

Plaintiff concedes, and in fact argues, there is no question the federal court had jurisdiction at the time judgment was entered. His argument focuses on whether removal was timely. Such error is not a sufficient basis to require a new trial:

To wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.

(*Id.* at 77).

Plaintiff had his day in court before a court of competent jurisdiction. The alleged procedural defect in invoking removal jurisdiction does not entitle Plaintiff to a new trial.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE QUESTIONING OF PLAINTIFF'S WITNESSES AS TO EVIDENCE REBUTTING PLAINTIFF'S CLAIM FOR NET ACCUMULATIONS, AND ANY SUCH CLAIMED ERROR DID NOT SUBSTANTIALLY PREJUDICE THE OUTCOME OF TRIAL.

Plaintiff's mother's admission of having knowledge of a wrongful conversion claim by Plaintiff's father against his son's estate was properly admitted. Three points support the District Court's ruling: (i) evidence of a wrongful conversion claim was relevant; (ii) Defendants complied with the District Court's instructions; and (iii) if there was error, it did not substantially prejudice the outcome of trial.

(i) A wrongful conversion claim is highly relevant to the basis for Plaintiff's claim for lost net accumulations

Plaintiff's claim for lost net accumulations relied substantially on his continually working for his father's car dealership for the rest of his life. (R-256 at p 11, ln 6-15). Evidence suggesting that Plaintiff would have been fired by his father from his sheltered employment seriously challenges Plaintiff's claim for lost net accumulations. (R-237 at pp 29, 40).

A claim for loss of net accumulations to the estate of a 35-year old healthy male can certainly be significant. (R-237 at p 2, ln 22-23). Plaintiff's expert, Dr. Raffa, testified by deposition that Plaintiff was earning \$99,403.00 a year as manager of his father's used car dealership. (R-256 at p 5, ln 8-11). Dr. Raffa extrapolated this significant salary for the remainder of Plaintiff's anticipated working life of 31

years, making the net accumulations claim approximately \$800,000. (R-256 at p 5, ln 8-11; p 6, ln 10-12; p 11, ln 9-15). As the District Court aptly described this “sheltered income,” it was contingent upon Plaintiff remaining in his father’s good graces. (R-237 at p 29, ln 19-25).

The District Court reasoned:

MR. MATTHEWS: [Plaintiff has] based a large portion of his testimony on net accumulation on the fact that Mr. Rice was going to make hundreds of thousands of dollars a year for - - I think he had a 34-year life expectancy, working for his daddy. The fact that his daddy is suing him - - his estate, for embezzlement, which we think there’s pretty strong indication - -

THE COURT: I think that’s fair game for cross-examination.

(R-237 at p 6, ln 14-22).

With the District Court’s ruling that evidence of a wrongful conversion claim by Decedent’s father against his son was relevant if such testimony could be elicited on cross-examination, Defendants proceeded. (R-237 at p 6, ln 14-22; p 7, ln 14-16; p 30, ln 3 - p 32, ln 16).

(ii) Defendants complied with the District Court’s instructions

The District Court permitted defense counsel to question Plaintiff’s mother about her knowledge concerning a wrongful conversion claim between her ex-husband and her son. (R-238 at p 5, ln 12-23). Defendants’ counsel then attempted to clarify his term “wrongful conversion” with the more readily understood term

“stealing” or similar wording which Mrs. Rice was likely to have used or understood. (R-238 at p 5, ln 24 - p 6, ln 5). At this point, the District Court terminated any further inquiry on this issue. (R-238 at p 6, ln 7-8). The fact that Mrs. Rice presumably learned of the claim against her son’s estate (and his wife) from her daughter-in-law, with whom she maintains a close relationship, was not explored further by Defendants’ counsel pursuant to the District Court’s instruction. Defendants finished their cross-examination shortly thereafter. (R-238 at p 6).

(iii) Any error in admitting evidence concerning the claim for wrongful conversion did not substantially prejudice the outcome of trial

Assuming *arguendo* that it was error to allow cross-examination on the existence of the wrongful conversion claim, that error is not grounds for reversal because there was no resulting substantial prejudice. *King v. Gulf Oil Co.*, 581 F.2d 1184, 1186 (5th Cir. 1978) (citing Fed.R.Evid. 103 and Fed.R.Civ.P. 61); *Proctor v. Fluor Enterprises, Inc.*, 494 F.3d 1337, 1352 (11th Cir. 2007).

At most, the jury heard Plaintiff’s witness admit that “there’s been some allegations [of wrongful conversion], and I know that something is going on.” (R-238 at p 5, ln 19-23). The District Court properly allowed inquiry regarding allegations of “wrongful conversion”, but would not allow any further inquiry. (R-238 at p 5, ln 12 - p 6, ln 8). This was a five-day trial with the focus on liability. A

brief attempt to clarify the term “wrongful conversion” with the more common term “stealing” certainly did not substantially prejudice the outcome of this lengthy trial.

Moreover, Plaintiff dropped his claim for net accumulations the day after Plaintiff’s mother conceded the existence of the wrongful conversion claim. Once Plaintiff dropped his claim, the jury was no longer asked to consider this evidence or its relevance. *CSX Transp., Inc. v. Hensley*, --- U.S. ----, 129 S.Ct. 2139, 2141, 173 L.Ed.2d 1184 (2009) (Juries are presumed to follow the court’s instructions.); *Greer v. Miller*, 483 U.S. 756, 767 n. 8, 107 S.Ct. 3102, 3109 n. 8, 97 L.Ed.2d 618 (1987) (Presume that a jury will follow an instruction to disregard inadmissible evidence.).

Finally, any error on the issue of net accumulation complained of by Plaintiff is not a consideration given the jury’s finding of no negligence, with no need to consider damages.

(iv) Documents concerning the wrongful conversion claim should have been allowed at trial

Understandably, the District Judge was frustrated that Defendants sought leave to add newly discovered documents evidencing the wrongful conversion claim the week before trial. (R-173; R-173-1 at pp 20, 24, 34, 39, 41, 62; R-237 at p 9, ln 11 - p 10, ln 18). After hearing arguments the morning of jury selection, the District Court ruled that Defendants could not place those documents in evidence as being untimely. (R-237 at p 11-14). The District Judge did, however, permit Defendants’

counsel to elicit testimony from witnesses on this issue. (R-237 at p 6, ln 14-22; p 7, ln 14-16; p 30, ln 3 - p 32, ln 16). Just a few examples illustrate why the documents proving the wrongful conversion claim should have been admitted in evidence:

There was absolutely no possibility of prejudice to Plaintiff by admission of evidence concerning the wrongful conversion claim: Plaintiff knew about the wrongful conversion claim since its inception in 2007, and certainly cannot complain they were surprised by late notice. Any prejudice concerning late notice of this claim could only damage Defendants' defenses.

Plaintiff relied on an affidavit from the Montana attorney handling the wrongful conversion litigation: Plaintiff introduced and relief on an affidavit from the Montana attorney handling the wrongful conversion litigation for Plaintiff. (Doc. 176). That affidavit made the existence of the wrongful conversion litigation the law of the negligence action. The use of the affidavit was an admission under oath by the Plaintiff that the wrongful conversion litigation existed.

Judicial notice of other court documents: The District Court should have taken judicial notice of the court documents filed in the Montana court from the wrongful conversion litigation. (R-173-1 at pp 20, 24, 34, 39, 41, 62). *Boyle v. County of Kern*, 2008 WL 220413 (E.D.Cal. 2008) (a court may take judicial notice of court records in another case, including probate cases).

The District Court's ruling forced Defendants to rely on cross-examination of Plaintiff's witnesses without any means of impeaching them in the event their testimony contradicted these court documents. This was a particular risk given the lack of candor by Plaintiff's wife (who was also a named defendant in the wrongful conversion litigation) and the Personal Representative in their discovery

responses. Fortunately, Plaintiff's mother was more candid and conceded the existence of the wrongful conversion claim against Plaintiff. (R-238 at p 5, ln 12-23).

Contrary to Plaintiff's argument, the issue is not necessarily the validity of the amount claimed (albeit, it is relevant), the real issue is the likelihood that Plaintiff would have enjoyed his sheltered income for the remainder of his life. The fact that Plaintiff's father sued his son and daughter-in-law for wrongfully converting hundreds of thousands of dollars provides insight on this issue. It is the existence and nature of the father's claim that is crucial for the jury to consider. The jury should have been allowed to consider both documents and testimony regarding this crucial issue and assign whatever weight to it they deemed appropriate.

C. MEDIA COVERAGE HAD NO INFLUENCE ON PLAINTIFF RECEIVING A FAIR TRIAL.

Plaintiff argues Defendant had more media coverage than Plaintiff, and therefore he has been denied a fair trial. Not only does Plaintiff's argument have no basis in law or fact, but it lacks common sense. Even assuming the news media focused more on Defendants' arguments, opening statement, or presentation of evidence, that does not change the fact that the jury heard both parties' cases. Moreover, the District Court properly instructed the jury on media coverage, which instructions the jury is presumed to have been followed. *Estes v. U.S.*, 335 F.2d 609, 615 (5 Cir. 1964) (presumed that jurors did not violate instructions not to read

newspaper articles or listen to broadcasts relative to case in absence of some showing that they did); *Greer v. Miller*, 483 U.S. 756, 767 n. 8, 107 S.Ct. 3102, 3109 n. 8, 97 L.Ed.2d 618 (1987) (Presume that a jury will follow an instruction to disregard inadmissible evidence.). By agreeing to follow the District Court's instructions, and with no evidence to the contrary, the jury's verdict should stand. Moreover, if Judge Smoak continuously drew the jury's attention to media coverage as Plaintiff suggests he should have done, or if he repeatedly warned the jurors to avoid such coverage, there is a risk it would peek the jurors' curiosity and cause them to actually seek out media coverage instead of avoid it.

Review of the record shows the District Judge took measures to ensure a fair trial by considering: (i) the character of the media coverage; (ii) the timing of the media coverage in relation to the trial; (iii) the credibility of the source to which the coverage was attributed; and (iv) the pervasiveness of the publicity and whether it reached the jury. *Gordon v. U.S.*, 438 F.2d 858, 873 (5th Cir.), cert. denied, 404 U.S. 828, 92 S.Ct. 139, 30 L.Ed.2d 56, and cert. denied, 404 U.S. 828, 92 S.Ct. 140, 30 L.Ed.2d 56 (1971)).

i. Media coverage was neutral and not likely to influence the jury

The District Judge found media coverage regarding the case to be "about as neutral as you can get." (R-228, at p 3, ln 1-6; R-235 at p 7, ln 20-24). Plaintiff asks

this Court to disagree with the District Judge, but a review of the articles at issue shows them to be nothing more than a factual account of trial. (R-236; R-240; R-241; R-242; R-244).

Even assuming Plaintiff's characterization of the media articles as "decidedly pro-defendant" is correct, then Plaintiff would have this Court believe the jury disregarded what they observed firsthand in trial in lieu of secondhand media accounts. There is no basis in law or the record to support such an assertion.

ii. Plaintiff claims internet blogs, which lack any credibility, somehow adversely affected his right to a fair trial

Plaintiff devotes several pages of his brief to citing and arguing that selected internet blogs that appeared in the Panama City News Herald website almost a year before trial is evidence Plaintiff could not receive a fair trial in Panama City. (Appellant's Brief at pp 14-17, 38). Judge Smoak inquired of the jury during voir dire about their exposure to media coverage and its possible effect on either party. (R-277). He was satisfied that whatever media coverage or blogs the jury may have seen or heard would not influence their ability to sit as fair and impartial jurors. Internet blogs posted by a few people on a newspaper website is no basis to show prospective jurors are somehow biased. (R-277; R-256 at pp 12-13).

The District Judge also considered the sources of media coverage in considering its possible influence on the venire. The District Judge relied on his

experience residing in the Panama City-area for over thirty years by finding that jurors “don’t believe anything the News Herald says,” and area residents refer to it as “mullet wrapper.” (R-235 at p 4, ln 10-11). Lacking even less credibility are the blogs Plaintiff quotes throughout his brief. (Appellant’s Brief at pp 14, 15). Incredibly, Plaintiff wants this Court to not only assume that the jurors read the blogs, but that they also assigned some weight to them in their deliberations. Even if the jurors had read the blogs, which is a huge assumption with no basis in fact, the jury expressly agreed to disregard them in reaching their verdict. The blogs could have no possible effect on the jury.

iii. Plaintiff argues that a television poll somehow influenced the jurors

Plaintiff argues that a poll taken by a television station somehow influenced the jury. According to the poll, approximately 92% of viewers who called in to participate in the poll agreed with the ultimate jury verdict that Defendants were not liable. (R-236 at p 8). The fact that the television viewers agree with the eventual verdict is not evidence of media influencing the jury, but more likely a reflection of Plaintiff’s case.

D. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED BECAUSE THERE WAS EVIDENCE THAT PLAINTIFF EXECUTED ENFORCEABLE RELEASES AND WAIVERS.

As expected with most sporting events, Plaintiff was required to execute a waiver in order to participate in the Florida event. In fact, Plaintiff had to execute two waivers. (R-79-2; R-79-3; R-79-4; R-79-5). If Plaintiff had failed to execute any of those waivers the Defendants would not have been allowed him to compete in the Florida event. (R-81 at p 7(¶¶17, 18, 19), p 13(¶¶17, 18, 19), p 18(¶14). The District Court's denial of Plaintiff's Motion for Summary Judgment was proper for several reasons, including the following: (i) Florida law is the proper law to use in interpreting the online and race site waivers, and Florida law provides that those waivers are enforceable; (ii) evidence shows Plaintiff had to agree with the waiver included in his online registration in order to submit the registration; and (iii) evidence shows Plaintiff had to execute race site waivers to participate in the Florida event.

i. Florida law is the proper law to use in interpreting the online and race site waivers

Plaintiff argues the District Court should have used Montana or California law to interpret the enforceability of the online waiver entered by Plaintiff, (R-46), but the District Court properly found Florida law applied. (R-147 at p 7).

Plaintiff entered the online waiver while living in Montana. Regardless of what choice of law analysis is used,^{12 13} the result is Florida law must be used to interpret the online waiver. If Montana law applies, when interpreting contract provisions such as the online waiver entered by Plaintiff, Montana law requires application of the law of the place where the contract is to be performed, which is Florida. (R-147 at p 7 citing Mont. Code Ann. § 28-3-102). Judge Smoak held:

In Florida, waivers or exculpatory clauses, although not looked upon with favor, are valid and enforceable if the intent to relieve a party of its own negligence is clear and unequivocal.

(R-147 at p 8).

Plaintiff's alternative argument that California law applies when interpreting the online waiver is also misplaced.¹⁴ Even if California law applied, like Florida it

¹²The District Court applied the doctrine of *lex loci contractus*. (R-147 at p 6).

¹³Florida courts have considered releases and waivers, like the ones entered by Decedent, and treat them as providing services. *Banfield v. Louis*, 589 So.2d 441, 444-45 (Fla. 4th DCA 1991). Service contracts are not subject to the rule of *lex loci contractus*, but instead require application of the most significant relationship test. *Fioretti v. Massachusetts General Life Ins. Co.*, 53 F.3d 1228, 1235 (11th Cir. 1995). Application of the most significant relationship test requires that the online waiver be interpreted applying Florida law.

¹⁴Plaintiff incorrectly seeks to rely on a choice of law provision inapplicable to Plaintiff's online waiver. Plaintiff agreed to several terms with Active Network to use Active's online registration process for the Florida event. (R-81 at pp 6-7 (¶¶15, 16), pp 12-13 (¶¶15, 16); R-147 at p 8). One term Plaintiff agreed to was Active's requirement that any dispute between Plaintiff and Active be decided

would uphold the exculpatory clause in the online waiver. *See Banfield v. Louis*, 589 So.2d 441, 444-45 (Fla. 4th DCA 1991) (citing *Okura v. United States Cycling Federation*, 186 Cal.App.3d 1462, 1468, 231 Cal.Rptr. 429, 432 (Cal.Ct.App.1986); *Bennett v. United States Cycling Federation*, 193 Cal.App.3d 1485, 239, Cal.Rptr. 55 (Cal.Ct.App.1987)).

ii. Evidence shows Plaintiff had to agree with the waiver included in his online registration in order to submit the registration

Plaintiff had to agree with all of the terms of the online registration, including its waiver, in order to register for the Florida event. (R-81, p 6 (¶12), p 12 (¶12)). This evidence was never refuted. Race Director Shelley Bramblett's trial testimony explaining to the jury how the online registration process works further confirmed her earlier affidavit submitted against Plaintiff's Motion for Summary Judgment.

Plaintiff's Motion for Summary Judgment was properly denied with respect to the online waiver, but Defendants' Motion for Summary Judgment should have been granted based on the undisputed evidence they submitted supporting the existence and enforceability of that waiver. At a bare minimum Defendants should have been

Footnote 14 continued.

under California law. The District Court recognized that Active's choice of law provision has no application to the terms Plaintiff agreed to with Defendants as part of his online registration for the Florida event, including the online waiver. (R-147 at p 8).

allowed to present their evidence regarding the online waiver to the jury, which is what the District Court allowed.

iii. Evidence shows Plaintiff signed race site waivers to participate in the Florida event

Plaintiff also signed a waiver during race site registration in order to participate in the Florida event. (R-81 at p 7 (¶¶17-19), p 8 (¶24), p 13 (¶¶17-19), p 14 (¶24)). Plaintiff argues that the race site waiver never existed because Defendants could not produce it. Plaintiff fails to understand that the mere fact that the race site waiver could not be located does not mean it never existed. Fortunately, the District Court understood this distinction in ruling that “[t]he fact that Defendants cannot provide a signed waiver does not exclude testimony on this matter; it merely goes to the weight of the evidence for the jury to consider.” (R-147 at p 9). At trial, Defendants offered testimony from Race Director Shelley Bramblett, Medical Director Joyce Wilson, and Virginia Jensen, who was the person that oversaw the registration process for the 2006 Florida event, to explain the registration process and that participants simply could not participate in the event without executing the race site waiver because without that step they would not be provided materials necessary to participate in the race.¹⁵ (R-213 at 7; R-285 at p 5, ln 4 - p 6, ln 10). Ms. Bramblett

¹⁵ Unfortunately, the transcripts of testimony by Race Director Shelley Bramblett and Virginia Jensen are not available at the time this brief is filed.

CONCLUSION

There is no question this is a tragic case. The sympathies for the wife, the children, and the parents, no doubt were present in the jurors' deliberation, and by its very nature made the jury's decision difficult. But after a lengthy trial, the jury reached its decision. That decision should not be disturbed.

It is respectfully submitted that the Judgment of the District Court should be upheld.

Respectfully submitted,

/s/ Larry A. Matthews

Larry A. Matthews

Florida Bar No.: 0339601

Shane M. Dean

Florida Bar No.: 499889

Jason B. Onacki

Florida Bar No.: 0698016

BOZEMAN, JENKINS

& MATTHEWS, P.A.

114 East Gregory Street (32502)

Post Office Box 13105

Pensacola, FL 32591-3105

(850) 434-6223 Telephone

(850) 434-5242 Facsimile

Email: Lmatthews@bjm-law.com

Sdean@bjm-law.com

Jonacki@bjm-law.com

Attorneys for Appellees

North America Sports, Inc.

and USA Triathlon

CERTIFICATE OF COMPLIANCE

We hereby certify that this Brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). This Brief contains 9,358 words. The Brief, in PDF format, was uploaded to the Eleventh Circuit Court website on the 7th day of December, 2009 at 5:00 p.m.

/s/ Larry A. Matthews

Larry A. Matthews

Florida Bar No.: 0339601

Shane M. Dean

Florida Bar No.: 499889

Jason B. Onacki

Florida Bar No.: 0698016

BOZEMAN, JENKINS

& MATTHEWS, P.A.

114 East Gregory Street (32502)

Post Office Box 13105

Pensacola, FL 32591-3105

(850) 434-6223 Telephone

(850) 434-5242 Facsimile

Email: Lmatthews@bjm-law.com

Sdean@bjm-law.com

Jonacki@bjm-law.com

Attorneys for Appellees

North America Sports, Inc.

and USA Triathlon

CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was furnished to Diana Santa Maria, Esq., Law Offices of Diana Santa Maria, P.A. 5220 South University Drive University Place, Suite 205C, Ft. Lauderdale, FL 33328 and Joel S. Perwin, Esq., Joel S. Perwin, P.A., Alfred I. DuPont Building, 169 East Flagler St., Suite 1422, Miami, FL 33131, via U.S. Mail, this 7th day of December, 2009. The original and six copies of this brief were also furnished to the Clerk, U.S. Court of Appeals for the 11th Circuit, 56 Forsyth St. N.W., Atlanta, Georgia 30303, via U.S. Mail, on the 7th Day of December, 2009.

/s/ Larry A. Matthews

Larry A. Matthews

Florida Bar No.: 0339601

Shane M. Dean

Florida Bar No.: 499889

Jason B. Onacki

Florida Bar No.: 0698016

BOZEMAN, JENKINS

& MATTHEWS, P.A.

114 East Gregory Street (32502)

Post Office Box 13105

Pensacola, FL 32591-3105

(850) 434-6223 Telephone

(850) 434-5242 Facsimile

Email: Lmatthews@bjm-law.com

Sdean@bjm-law.com

Jonacki@bjm-law.com

Attorneys for Appellees

North America Sports, Inc.

and USA Triathlon

**APPLICATION
COUNSEL TO THE ESCAMBIA COUNTY VALUE ADJUSTMENT BOARD**

**PLEASE TYPE OR PRINT
IF MORE SPACE IS NEEDED, ATTACH ADDITIONAL SHEETS**

1. PLEASE PROVIDE THE FOLLOWING GENERAL INFORMATION:

NAME: Suzanne N. Whibbs

SOCIAL SECURITY OR TAXPAYER IDENTIFICATION NUMBER: [REDACTED]

HOME ADDRESS: 2535 Angel Ct, Gulf Breeze, FL 32563

BUSINESS NAME: Whibbs & Store, P.A.

BUSINESS ADDRESS: 801 W. Romana St., Unit C, Pensacola, FL 32502

PHONE: 850-434-5395 CELL: 850-324-3059

EMAIL: Suzanne@whibbsandstore.com

2. ARE YOU AN ELECTED OR APPOINTED OFFICIAL OR EMPLOYEE OF ESCAMBIA COUNTY? YES ✓ NO

3. HOURLY RATE \$ 200.00 MINIMUM HOURS:

4. PLEASE PROVIDE THE FOLLOWING INFORMATION:

A. FLORIDA BAR NUMBER: 122777 ADMISSION DATE: September 1997

B. LIST ALL SOURCES OF YOUR KNOWLEDGE, INCLUDING EDUCATION AND EXPERIENCE:

current and prior VAB attorney

C. LIST ANY DISBARMENT, SUSPENSION, OR ANY OTHER DISCIPLINARY ACTION WHICH YOU HAVE RECEIVED FROM ANY ORGANIZED BAR ASSOCIATION:

5. LIST EACH INSTANCE IN WHICH YOU HAVE BEEN DISMISSED, TERMINATED, OR DENIED APPOINTMENT AS COUNSEL FOR POOR OR IMPROPER PERFORMANCE:

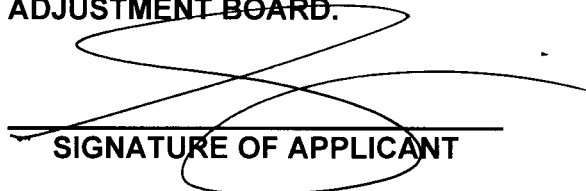
6. LIST ANY PERSONAL OR BUSINESS RELATIONSHIP YOU HAVE EVER HAD WITH ANY OFFICER OR EMPLOYEE OF THE OFFICE OF THE PROPERTY APPRAISER, OFFICE OF THE CLERK OF THE CIRCUIT COURT, OFFICE OF THE COUNTY ATTORNEY, OR THE VALUE ADJUSTMENT BOARD:

prior VAB attorney

7. LIST ANY ADDITIONAL INFORMATION WHICH QUALIFIES YOU TO SERVE AS COUNSEL TO THE VALUE ADJUSTMENT BOARD:

8. PLEASE PROVIDE A WRITING SAMPLE, WHICH MAY CONSIST OF ANY OPINION, LETTER, OR OTHER DOCUMENTATION THAT CONTAINS ONE (1) OR MORE WRITTEN PAGE(S) OF ORIGINAL MATERIAL.

THE UNDERSIGNED CERTIFIES, UNDER PENALTY OF DISQUALIFICATION FROM CONSIDERATION, THAT EACH ITEM CONTAINED IN THIS APPLICATION, OR OTHER DOCUMENT FURNISHED BY OR ON BEHALF OF THE APPLICANT IS TRUE AND COMPLETE AS OF THE DATE IT BEARS. THE UNDERSIGNED AUTHORIZES THE VALUE ADJUSTMENT BOARD TO OBTAIN INFORMATION FROM OTHER SOURCES TO VERIFY EACH ITEM CONTAINED HEREIN. THE UNDERSIGNED ACKNOWLEDGES THAT IF SELECTED HE/SHE WILL FOLLOW ALL REQUIREMENTS AND MANDATES OF LAW IN FULFILLING THE DUTIES OF COUNSEL TO THE VALUE ADJUSTMENT BOARD.


SIGNATURE OF APPLICANT

6/17/14
DATE

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ENTERING A FINAL JUDGMENT IN APPELLEE'S FAVOR AND THE TRIAL COURT DID NOT TAKE JANE DOE'S PROPERTY IN VIOLATION OF JANE DOE'S CONSTITUTIONAL RIGHTS.

a) The trial court did not err in failing to protect Appellant's homestead rights pursuant to Fla. Const., Art. X, Sec. 4 as alleged by Appellant JANE DOE. Assuming the subject property was the Appellant JANE DOE's homestead property, the lower court is not under a duty or obligation to protect that right when the pleadings, affidavits and documents submitted to the court show that Appellant JANE DOE's property in 1994 was seized and levied by the IRS due to the fact that Appellant JANE DOE did not pay his taxes. However, the subject property is not the homestead property of the defendant at the time of the present lawsuit. There is no evidence before the trial court that the subject property was Appellant JANE DOE's homestead property. As stated in Appellant JANE DOE's initial brief, he in fact moved from the subject property in 1994 and has never returned to the State of Florida. If the subject property was his homestead property at the time IRS seized and levied the property back in 1994, then it was at that point in time Appellant JANE DOE should have taken action against the IRS for any alleged violation of his constitutional rights in federal court.

b) Appellant JANE DOE was not denied his due process rights when he was allegedly denied a jury trial on the possession issue as he claims. The issue of possession of the property is not an allegation or claim of the Appellant JANE DOE's complaint to Remove Cloud from Title. The Appellant JANE DOE is misrepresenting to the Court the proper issue before this honorable Court. Appellant JANE DOE is referring to Case 94-1120, JOHN DOE v. JANE DOE, in which Appellant JANE DOE mistakenly claims he was awarded "possession" of the subject property. In that order the court specifically stated "the Defendant vacated the subject premises and relocated...the Plaintiff, therefore, filed a Motion for Voluntary Dismissal of the original Complaint in that ejectment was in effect a moot issue." (V-I, R-55). The court further stated:

"A review of the Defendant's pleadings consistently show that Defendant has challenged the authority of the Internal Revenue Service to execute on Defendant's property to satisfy a levy for unpaid Federal Income taxes...this Court is of the opinion that under the circumstances of this case, the Defendant cannot allege a cause of action in this Court. The Defendant's underlying claim of the right to the property and therefore the "wrongful eviction" stems from his argument that the Internal Revenue Service lacks the authority to levy against real property and have said property sold at public auction to satisfy delinquent federal income taxes. This Court is of the opinion that once the deed of real estate was issued by the District Director of the Internal Revenue Service, the Defendant's remedy was to challenge the same through the Federal Courts...Therefore, without having set aside the deed of real estate in a Federal Court,

this Court is of the opinion that the Defendant cannot state a cause of action in State court." (V-I, R-56-59).

However, the final order in that case is not before this Court and the appeal time for that order has passed. Therefore, Appellee JOHN DOE argues that there have been no due process rights violated by the trial court.

c) Appellant JANE DOE states the trial court erred by allegedly upholding the sale of Appellant JANE DOE's property when the properties were sold for an amount far below market value in entering a Final Judgment in favor of Appellee. The argument Appellant JANE DOE makes is irrelevant to the entry of the Final Judgment which is the subject of this appeal. Appellee JOHN DOE argues that Appellant JANE DOE is referring back to the IRS seizure and levy against the subject property in 1994. Appellant JANE DOE claims that the IRS sold his property for less than fair market value. However, this is not an issue properly before this Court. These allegations by Appellant JANE DOE should have been pursued against the IRS in Federal Court within the prescribed statutory time requirements.

d) The Appellee JOHN DOE further argues that Appellant JANE DOE was not denied his rights pursuant to the 14th Amendment of the U.S. Constitution as presented in his points 2, 3, and 4, which will be addressed as to each point later in this brief.

II. THE TRIAL COURT DID NOT ERR WHEN IT ALLEGEDLY DENIED APPELLANT'S JURY TRIAL ON CERTAIN FACT ISSUES.

Appellant was not denied a jury trial. The issue before the lower court were resolved by the parties' motions for summary judgment. Even if the case survived summary judgment, Chancery Courts have authority to quiet title or remove cloud from title to real property. See Trawick's Florida Practice and Procedure, pg. 546. Jury trials are not available for quiet title actions.

See Florida Real Property Litigation, §1.7. If the defendant to a quiet title action is in possession, then the defendant may demand a jury trial because ejectment becomes a cause of action to remove the defendant. See Florida Real Property Litigation, §1.19. However, in the present case, Appellant JANE DOE was not in possession of the property and therefore, the quiet title action was one in equity and he was not entitled to a jury trial.

III. THE TRIAL COURT DID NOT ERR BY ALLEGEDLY REFUSING TO RULE ON APPELLANT'S FEBRUARY 8, 2000 MOTION, ALLEGEDLY RESULTING IN APPELLANT BEING DENIED OPPORTUNITY TO COMPLETE DISCOVERY.

Appellant JANE DOE argues that the trial court failed to rule on his February 8, 2000 motion for an order declaring admissions directed to Appellee JOHN DOE as being admitted. Appellant JANE DOE never sent a proposed order to the trial court. Nor did the Appellant JANE DOE schedule and notice the motion for hearing. Further, the Appellant JANE DOE failed to argue this point as part of his Motion in Defense to Appellee

JOHN DOE''s Motion for Summary Judgment. As stated in his November 9, 2000 motion for Rehearing, Appellant JANE DOE stated he informed the court at the motion for summary judgment hearing that there were outstanding motions. The fact that the trial court ruled on the summary judgment motions and entered a final judgment disposed of the outstanding motions. In light of the foregoing, the trial court in fact ruled on the motions Appellant JANE DOE's claims were outstanding at the time the final judgment was entered. Further, on November 9, 2000 Appellant JANE DOE filed JANE DOE's Motion for Rehearing and it states as follows:

"JANE DOE is bringing this Motion for the following reasons: [1] During the Hearing of Oct. 20, 2000, JANE DOE specifically informed Judge Allen that there were 6 other Motions before the Court that needed to be heard. To repeat, the Motion are as follows: (a) JANE DOE's Motion to Exclude dated July 12, 1999; (b) JANE DOE's Motion to Establish Escrow Account, dated Sep. 27, 1999; (c) JANE DOE's Motion for Order Declaring Admissions Directed to JOHN DOE as Being Admitted, dated Feb. 8, 2000..."

On November 16, 2000, in Judge Allen's Order Denying Defendant's Motion for Rehearing and Motion for Clarification the court stated:

"This matter having come before the Court upon the Defendant's Motion for Rehearing filed November 6, 2000...it is hereby ORDERED AND ADJUDGED that the Defendant's Motion for Rehearing is hereby DENIED...and Defendant's Motion for Clarification is hereby DENIED."
(V-II, R-282).

**IV. THE TRIAL COURT DID NOT ERR IN GRANTING APPELLEE JOHN
DOE' MOTION FOR SUMMARY JUDGMENT**

A. Standard of Review and Summary Judgment

The standard of appellate review applicable to the grant of summary judgment is de novo. _____ 760 So.2d 126 (_____, 130).

Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law. Wills v. Sears, Roebuck & Co., 351 So.2d 29, 30 (Fla. 1977). The issue of the case must be one of material fact. _____ 758 So.2d 1214 (_____, 1217). Issues of material facts are irrelevant to the summary judgment determination and a material fact, for summary judgment purposes, is a fact that is essential to the resolution of the legal questions raised in the case. _____ 758 So.2d at 1217.

B. Summary Judgment in the Present Case was proper.

Appellant JANE DOE filed a Complaint to Remove Cloud from Title. Appellee JOHN DOE filed a Motion to Dismiss Complaint which was denied because the trial court found that Appellant JANE DOE had stated a cause of action. Appellant JANE DOE then files a Motion for Summary Judgment (However, according to Appellant JANE DOE's initial brief, he is not appealing the issue of whether the trial court erred in denying his motion for summary judgment). In his motion for summary judgment, Appellant JANE DOE fails to put forth undisputed material facts entitling

him to a summary judgment. Appellant JANE DOE failed to put forth any evidence of his entitlement to remove cloud from title.

Appellant JANE DOE did not submit any documentation or affidavits to support his complaint or motion. The trial court was proper in denying Appellant JANE DOE's motion for summary judgment.

Appellee JOHN DOE files a Counter-Claim/Cross-Claim to Quiet Tax Title setting forth the required elements to quiet title. Attached to Appellee JOHN DOE' complaint is a copy of the Deed of Real Estate issued by the Internal Revenue Service in favor of Appellee JOHN DOE duly recorded in Santa Rosa County, Florida. Appellee JOHN DOE then files his Motion for Summary Final Judgment and Notice to Take Judicial Notice. In Appellee JOHN DOE' motion, he sets forth the undisputed material facts which include the chain of title regarding the subject property, the action taken by the IRS in seizing and levying the subject property for tax assessments, describing the Deed granting him the subject property which was duly recorded, stating that all claims rights, title, and interest of Appellant JANE DOE were extinguished by the Tax Deed, and that he is entitled to a judgment as a matter of law.

In support of Appellee JOHN DOE' Motion for Summary Judgment, he requested the trial court, pursuant to Florida Rule of Evidence §90.202, et seq., to take Judicial Notice of a certified copy of Record of Seizure and Sale of Real Estate from

the United State Department of Treasury Internal Revenue Service, also known as IRS Form Record 21. When a matter is judicially noticed, it is taken as true without the necessity of offering evidence by party who should ordinarily have done so. Maradie v. Maradie, 680 So.2d 538 (Fla. 1st DCA 1996). Therefore, Appellee JOHN DOE was not required to prove each of the facts listed on the IRS Form Record 21. Each fact on the Record is taken to be true and correct.

In opposition to Appellee JOHN DOE' Motion for Summary Judgment, Appellant JANE DOE filed his Defense Against JOHN DOE' Motion for Summary Judgment on October 17, 2000. In Appellant JANE DOE's Defense, he simply asks to the trial court to rely on seven motions previously filed with the court. Six out of the seven motions relate to another defendant known as Weisensee, who won her summary judgment and final judgment entered on February 3, 2000. Appellant JANE DOE failed to put forth any evidence either through supporting documentation or supporting affidavit to raise any disputed issues of material fact.

Therefore, there were no disputed facts, as shown by the pleadings, supporting affidavits, and evidence in the court record as to Appellee JOHN DOE right to quiet title to the subject property.

Based upon the foregoing, the trial court properly granted Appellee JOHN DOE' motion for summary judgment and denied Appellant JANE DOE's motion for summary judgment. See, Benner

v. Royce, 354 So.2d 142 (Fla. 1st DCA 1978).

C. The Appellant JANE DOE argues that there are genuine issues of material facts.

The first point or fact that Appellant JANE DOE raises in his initial brief is (a) "possession." Again, the Appellee JOHN DOE argues that the issue of possession relates to an earlier case known as JOHN DOE v. JANE DOE lower court case number 94-1120. This is not a case or issue on appeal before this Court. The 94-1120 case has been adjudicated and was not a proper issue or claim before the trial court.

The other issues mentioned by Appellant include (b) IRS District Director personal approval, (c) manner of service of notices by the IRS, and (d) if the IRS actually seized the properties. These are not issues or facts that were before the lower court and are therefore, not properly before this Court on appeal. The Appellant JANE DOE failed to raise or put forth any evidence as to the invalidity of the Deed of Real Estate issued by the IRS. Appellant JANE DOE first raises these issues on appeal in his initial brief. Appellant JANE DOE failed to put forth any disputed facts regarding the IRS Form R21 submitted by Appellee JOHN DOE in support of his motion for summary judgment.

These allegations by the Appellant JANE DOE are issues that should have been resolved against the IRS in federal court at the time of the seizure and levy back in 1994.

Next Appellant JANE DOE states that (e) whether Appellee JOHN

DOE' Quit Claim Deeds were written in accordance with the laws of Florida as an issue. Appellee JOHN DOE is unclear as to which Quit Claim Deeds Appellant JANE DOE is referring to in his brief. However, in order to address the issue, Appellee JOHN DOE in his Motion for Summary Judgment stated the method in which he received title to the property and that such deeds were properly recorded in the public records of Santa Rosa County, Florida. Appellant JANE DOE failed to provide any evidence to contradict such evidence to the lower court in response to the Motion for Summary Judgment. The Appellee JOHN DOE did not submit any affidavits or documents establishing that the deeds did not conform to Florida law. Therefore, the trial court was proper in granting Appellee's motion for summary judgment.

In point (f) Appellant JANE DOE questions if Appellee has "fee simple" ownership. Appellee JOHN DOE set forth in his complaint to Quiet Tax Title and his Motion for Summary Judgment the required elements of law in obtaining fee simple title to the subject real property. Appellant JANE DOE failed to put forth any evidence or facts showing Appellee JOHN DOE did not have fee simple ownership to the subject property to contradict the facts asserted by Appellee JOHN DOE.

Appellant JANE DOE states there is an issue of (g) whether the IRS can levy trust properties. However, this is not an issue properly before this honorable Court on appeal. Again, Appellant JANE DOE's argument is against the Internal Revenue

Service.

The issue of (i) due process raise by Appellant JANE DOE is not an issue properly before this honorable Court on appeal. The trial court properly disposed of the outstanding motions. Appellant JANE DOE failed to set and notice for hearing his outstanding motions. However, as stated by Appellant JANE DOE, he raised the outstanding motions at the hearing on the parties' motions for summary judgment. Further, by order of the trial court, it denied Appellant JANE DOE's Motion for Rehearing and Clarification which again encompassed the alleged outstanding motions.

CONCLUSION

The proper issue before this Court is whether the trial court erred in granting Appellee JOHN DOE' Motion for Summary Judgment and Notice to Take Judicial Notice. The Appellee JOHN DOE argues the trial properly granted Appellee's Motion for Summary and Notice to Take Judicial Notice and properly denied Appellant's Motion for Summary Judgment. The Appellee JOHN DOE demonstrated there were no genuine issues of material fact and that he was entitled to a judgment to quiet tax title as a matter of law. Appellant JANE DOE failed to controvert Appellee JOHN DOE' undisputed facts.

The Appellant JANE DOE has a history of filing non-meritorious lawsuits in state court against Appellee JOHN DOE in which he wishes to challenge the authority of the Internal

Revenue Service to execute on property to satisfy a levy for unpaid federal income taxes. The Appellee JOHN DOE has been forced to defend numerous lawsuits and has incurred substantial legal fees as a result. Again, in Appellant JANE DOE's initial brief he raise numerous allegations which are not properly before this Court on appeal. The Appellee JOHN DOE requests that this Court strike those portions of the brief which do not directly relate to the issue on appeal. Furthermore, the Appellee JOHN DOE respectfully requests that this honorable Court affirm the trial court's Final Judgment to quiet tax title in favor of the Appellee JOHN DOE.



Pam Childers

Clerk of the Circuit Court and Comptroller, Escambia County

Clerk of Courts • County Comptroller • Clerk of the Board of County Commissioners • Recorder • Auditor

Value Adjustment Board Organizational Meeting

5.

Meeting Date: 09/09/2014

Issue: Selection of Appraiser Special Magistrate

From: Pam Childers, Clerk of the Circuit Court & Comptroller

Organization: Clerk & Comptroller's Office

Information

Recommendation:

That the Board select one of the following Applicants for Appraiser Special Magistrate for 2013, and authorize the Chairman to execute a Contract for Services of Special Magistrate, in accordance with Chapter 194.035 (1), Florida Statutes:

- Steven L. Marshall
- John A. Robinson
- Robert S. Sutte

Background:

Attachments

Steven L. Marshall

John Robinson

Robert S. Sutte



Clayton, Roper & Marshall, Inc., a Florida Corporation

CRAIG H. CLAYTON, MAI

State-Certified General Appraiser RZ 118

PAUL M. ROPER, MAI, SRA

State-Certified General Appraiser RZ 141

STEVEN L. MARSHALL, MAI, SRA

State-Certified General Appraiser RZ 155



June 17, 2014

Pam Childers, Clerk of the Circuit Court & Comptroller
First Judicial Circuit, Escambia County
Attn: Doris Harris, Deputy Clerk to the Board
221 Palafox Place, Suite 130
Pensacola, Florida 32502-5843

Re: Escambia County VAB Special Magistrate Application for 2014 Tax Cycle

Dear Ms. Harris:

Please accept my attached application for consideration as a Special Magistrate for the Escambia County Value Adjustment Board. I have worked as a Special Magistrate in Central Florida for approximately 26 years. In the past years, I have served as Special Magistrate for Orange, Osceola, Brevard, Santa Rosa, and Escambia Counties. As you may recall, I have served the Escambia County VAB eight times dating back to 1999.

Along with my completed Special Magistrate Application, I have enclosed a copy of my qualifications, state-certification, and other pertinent documentation, as requested. My professional fee for this service is \$149 per hour, plus airfare, rental car, parking, and meals, as applicable.

I have served as a Special Magistrate for over 25 years – completing hundreds of hours and thousands of cases. Within the profession, I am recognized as an expert Special Magistrate, with ample experience, market knowledge and understanding of the Florida Statutes as they relate to valuation and the VAB process. I had the honor of serving as an Escambia County VAB Special Magistrate in 2013. I heard many petitions involving properties located at Pensacola Beach. I believe I demonstrated exceptional knowledge of applicable case law, valuation techniques and market knowledge. Several participants and observers complimented me for providing high level services to the VAB. I handled each petitioner with dignity and respect. I have worked as a Special Magistrate in five Florida counties since 1989. In 2006, I was Chairperson for the Florida Statute, Chapter 475, Part II, re-write committee. This is the Florida Statute that regulates the appraisal industry in Florida. The updated law, that I helped write, incorporates AQB criteria promulgated by the Appraisal Foundation. I received a Letter of Appreciation from the Chairman of the DBPR for my efforts. I have made seminar presentations, on three separate occasions, to elected property appraiser officials (state-wide

Real Estate Appraisers • Consultants • Since 1982

Orlando Headquarters: 246 North Westmonte Drive, Altamonte Springs, Florida 32714

Telephone: (407) 772-2200 / Facsimile: (407) 772-1340

June 17, 2014

Page 2

Pam Childers, Clerk of the Circuit Court & Comptroller
Attn: Doris Harris, Deputy Clerk to the Board

meetings) regarding the Valuation Adjustment Board process and the role of the Special Magistrate. Also, I have recently served on a speaker panel regarding the VAB process in a Continuing Education seminar with The Appraisal Institute.

If you have any questions, please do not hesitate to contact me. Thank you for the opportunity to submit this proposal.

Sincerely,

CLAYTON, ROPER & MARSHALL

A handwritten signature in black ink, reading "Steven L. Marshall". The signature is fluid and cursive, with the first name "Steven" and last name "Marshall" clearly legible.

Steven L. Marshall, MAI, SRA
State-Certified General Real Estate Appraiser
License No. RZ 155

SLM/avr
Enclosures

**Special Magistrate Application
Value Adjustment Board
Escambia County, Florida**

**PLEASE TYPE OR PRINT
IF MORE SPACE IS NEEDED, ATTACH ADDITIONAL SHEETS**

1. PLEASE PROVIDE THE FOLLOWING GENERAL INFORMATION:

NAME: Steven L. Marshall, MAI, SRA
SOCIAL SECURITY NUMBER: CRM Tax ID 59-2856881
HOME ADDRESS: 825 Palmer Avenue, Winter Park, Florida 32789
BUSINESS NAME: Clayton, Roper & Marshall, Inc.
BUSINESS ADDRESS: 246 N. Westmonte Drive, Altamonte Springs, Florida 32714
PHONE NUMBER(S):
BUSINESS: (407) 772-2200, x 314 HOME: (407) 628-9577
FAX: (407) 772-1340 CELL: (407) 256-1518

2. ARE YOU AN ELECTED OR APPOINTED OFFICIAL OR EMPLOYEE OF ESCAMBIA COUNTY? YES X NO
3. APPLICATION FOR: ATTORNEY SPECIAL MAGISTRATE
 X APPRAISER SPECIAL MAGISTRATE

HOURLY RATE / MINIMUM HOURS: \$149 / 8

4. IF YOU ARE A MEMBER OF THE FLORIDA BAR, PLEASE PROVIDE THE FOLLOWING INFORMATION:

A. BAR NUMBER: N/A ADMISSION DATE:

- B. LIST ALL SOURCES OF YOUR KNOWLEDGE, INCLUDING EDUCATION AND EXPERIENCE:

See attached Qualifications

E. LIST ANY DISBARMENT, SUSPENSION OR ANY OTHER DISCIPLINARY ACTION WHICH YOU HAVE RECEIVED FROM ANY ORGANIZED BAR ASSOCIATION:

N/A

6. DESCRIBE EXPERIENCE YOU HAVE APPRAISING TANGIBLE PROPERTY:

See attached Qualifications

7. LIST ANY EXPERIENCE AND/OR SPECIALTY FOR THE FOLLOWING PROPERTY:

<u>PROPERTY TYPE</u>	<u>EXPERIENCE/SPECIALTY</u>
RESIDENTIAL REAL PROPERTY	<u>See attached Qualifications</u>
COMMERCIAL REAL PROPERTY	
TANGIBLE PROPERTY	
OTHER (PLEASE SPECIFY)	

8. IF YOU HAVE PREVIOUSLY SERVED AS A SPECIAL MAGISTRATE, PLEASE PROVIDE THE FOLLOWING INFORMATION:

<u>A. COUNTY</u>	<u>DATES SERVED</u>	<u>CONTACT/TELEPHONE</u>
<u>Osceola</u>	<u>1990-2005</u>	<u>Katrina Scarborough 407-742-5000</u>
<u>Orange</u>	<u>1989-1993, 1999-2001</u>	<u>Rick Singh 407-836-5044</u>
<u>Santa Rosa</u>	<u>1999-2000, 2002-2005</u>	<u>Greg Brown 850-983-1880</u>
<u>Escambia</u>	<u>1999-2000, 2002-2004, 2009, 2010, 2011, 2013</u>	<u>Chris Jones 850-434-2735</u>
<u>Brevard</u>	<u>1992-1997</u> <u>(best of my recollection)</u>	<u>Dana Blickley 321-264-6700</u>

B. IF APPLICABLE, EXPLAIN WHY YOU NO LONGER SERVE AS A SPECIAL MAGISTRATE IN THE ABOVE COUNTIES:

N/A

C. LIST EACH INSTANCE IN WHICH YOU HAVE BEEN DISMISSED, TERMINATED OR DENIED APPOINTMENT AS A SPECIAL MAGISTRATE:

None

9. LIST ANY PERSONAL OR BUSINESS RELATIONSHIP YOU HAVE EVER HAD WITH ANY OFFICER OR EMPLOYEE OF THE OFFICE OF THE PROPERTY APPRAISER, OFFICE OF THE CLERK OF THE CIRCUIT COURT, OFFICE OF THE COUNTY ATTORNEY, OR THE VALUE ADJUSTMENT BOARD:

None

10. LIST ANY ADDITIONAL INFORMATION WHICH QUALIFIES YOU TO SERVE AS A SPECIAL MAGISTRATE:

I have served as a Special Magistrate for over 25 years – completing hundreds of hours and thousands of cases. Within the profession, I am recognized as an expert Special Magistrate, with ample experience, market knowledge and understanding of the Florida Statutes as they relate to valuation and the VAB process. I had the honor of serving as an Escambia County VAB Special Magistrate in 2013. I heard many petitions involving properties located at Pensacola Beach. I believe I demonstrated exceptional knowledge of applicable case law, valuation techniques and market knowledge. Several participants and observers complimented me for providing high level services to the VAB. I handled each petitioner with dignity and respect. I have worked as a Special Magistrate in five Florida counties since 1989. In 2006, I was Chairperson for the Florida Statute, Chapter 475, Part II, re-write committee. This is the Florida Statute that regulates the appraisal industry in Florida. The updated law, that I helped write, incorporates AQB criteria promulgated by the Appraisal Foundation. I received a Letter of Appreciation from the Chairman of the DBPR for my efforts. I have made seminar presentations, on three separate occasions, to elected property appraiser officials (state-wide meetings) regarding the Valuation Adjustment Board process and the role of the Special Magistrate. Also, I have recently served on a speaker panel regarding the VAB process in a Continuing Education seminar with The Appraisal Institute.

11. PLEASE PROVIDE A WRITING SAMPLE. THIS SAMPLE MAY CONSIST OF ANY OPINION, LETTER, APPRAISAL, OR OTHER DOCUMENTATION THAT CONTAINS ONE (1) OR MORE WRITTEN PAGE(S) OF ORIGINAL MATERIAL.

THE UNDERSIGNED CERTIFIES, UNDER PENALTY OF DISQUALIFICATION FROM CONSIDERATION, THAT EACH ITEM CONTAINED IN THIS APPLICATION, OR OTHER DOCUMENT FURNISHED BY OR ON BEHALF OF THE APPLICANT IS TRUE AND COMPLETE AS OF THE DATE IT BEARS. THE UNDERSIGNED AUTHORIZES THE VALUE ADJUSTMENT BOARD TO OBTAIN INFORMATION FROM OTHER SOURCES TO VERIFY EACH ITEM CONTAINED HEREIN. THE UNDERSIGNED ACKNOWLEDGES THAT IF SELECTED HE/SHE WILL FOLLOW ALL REQUIREMENTS AND MANDATES OF LAW IN FULFILLING THE DUTIES OF SPECIAL MAGISTRATE TO THE VALUE ADJUSTMENT BOARD.


SIGNATURE OF APPLICANT

June 17, 2014
DATE

STEVEN L. MARSHALL, MAI, SRA

STATE OF FLORIDA CERTIFICATION

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AC# 670746		STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION		SEQ# L12111401105
FLORIDA REAL ESTATE APPRAISAL BD		
DATE	BATCH NUMBER	LICENSE NBR
11/14/2012	128146095	RZ155
The CERTIFIED GENERAL APPRAISER Named below IS CERTIFIED Under the provisions of Chapter 475 FS. Expiration date: NOV 30, 2014		
		
MARSHALL, STEVEN L 246 N WESTMONTE DRIVE ALTAMONTE SPRINGS FL 32714		
RICK SCOTT GOVERNOR		KEN LAWSON SECRETARY
DISPLAY AS REQUIRED BY LAW		

CLAYTON, ROPER & MARSHALL

QUALIFICATIONS OF STEVEN L. MARSHALL, MAI, SRA

BUSINESS ADDRESS

Clayton, Roper & Marshall
246 North Westmonte Drive
Altamonte Springs, Florida 32714

Ph: (407) 772-2200, x 314
Fax: (407) 772-1340
smarshall@crmre.com

PROFESSIONAL DESIGNATIONS AND ASSOCIATIONS

MAI, SRA	Appraisal Institute
Member	Orlando Board of Realtors
Member	Florida and National Association Realtors
Registered Real Estate Broker	State of Florida
State-Certified General Real Estate Appraiser	State of Florida - Expires November 30, 2014
License Number:	RZ 155
FNMA Number:	1195447

EDUCATION

B.A. Degree, Communication Arts, University of West Florida - 1975

REAL ESTATE COURSES UNDER THE DIRECTION OF THE APPRAISAL INSTITUTE

(formerly American Institute of Real Estate Appraisers):

Course I-A	Basic Appraisal Principles
Course I-B	Capitalization Theory and Techniques
Course II	Valuation Analysis and Report Writing Methods & Techniques
Course II-1	Case Studies in Real Estate Valuation
Course VI	Introduction to Real Estate Investment Analysis
Course VIII	Single-Family Residential Appraisal
SPP	Standards of Professional Practice
R-2	Narrative Report Writing
Review Theory - General	

The Appraisal Institute conducts a voluntary program of continuing education for its designated members. MAI's who meet the minimum standards of this program are awarded periodic educational certification. I am currently certified under this program through December 31, 2016.

CREDIT FOR COURSES UNDER THE DIRECTION OF THE APPRAISAL INSTITUTE

(formerly the Society of Real Estate Appraisers):

Course 101	Introduction to Appraising Real Property
Course 201	Principles of Income Property Appraising
R-2	Narrative Report Writing

COMPLETED EXAMINATIONS FOR REAL ESTATE SECURITIES AND SYNDICATION EDUCATION UNDER THE DIRECTION OF THE NATIONAL ASSOCIATION OF SECURITIES DEALERS

Series 22	Direct Participation Program Representative
Series 39	Direct Participation Program Principal

**CREDIT FOR THE FOLLOWING SEMINARS SPONSORED BY THE APPRAISAL INSTITUTE*
AND OTHER ENTITIES**

*(*formerly the American Institute of Real Estate Appraisers and the Society of Real Estate Appraisers):*

IRS Valuation - Webinar
Appraisal Regulations of the Federal Banking Agencies (Title XI FIRREA)
Federal Home Loan Bank Board - Memorandum R-41b
Federal Home Loan Bank Board - Memorandum R-41c
Valuation and Evaluation of Proposed Projects
Creative Financing/Cash Equivalency
Investment Feasibility
Market & Marketability Analysis
Cash Flow & Risk Analysis
Narrative Report Writing Seminar
Standards of Professional Practice
Environmental Concerns - Hazardous Waste
Appraiser State Certification Program
Investment Criteria of Purchasers of Major Commercial Properties
Hotel Valuation
Appraising in a Changing Economy
Using Lotus 1-2-3 in the Appraisal Office
Electronic Spreadsheet in the Appraisal Office
Real Estate Appraisal Course Instructor's Clinic
Appraising Interim Use Properties
Easement Valuation
Understanding Limited Appraisals and Reporting Options - General
Single-Family Construction
HP-12C Calculator
From the Appraiser to the Underwriter
Professional Standards USPAP Update Core Law for Appraisers
Analyzing Operating Expenses
Land Management Dept. 1995, 1996 and 1997 Annual Seminar (S. Fla. Water Mgmt. District)
Argus Financial Software Use Seminar
The Internet and the Appraiser
Understanding and Using DCF Software
Appraising Rural Properties in southeast Florida
Professional Standards USPAP Update Core Law for Appraisers
Valuation and the Evolution of the Real Estate Capital Market
Condemnation Appraising: Basic Principles and Applications
Condemnation Appraising: Advanced Principles and Applications
SFWMD Current Appraisal Issues in Florida
The IRS and FLPs: Where Are We Now
Determination of Value - What is Fair? A Public Interest Value Program
Recent Developments in Federal Tax Valuation
The Real Estate Capital Markets: Case Studies in Valuation
Section 8/HUD: Rent Comparability Studies
Government & Public Relations Chapter Forum

Appraisal Review Seminar – General
Florida Core Law Update
Subdivision Analysis
Uniform Standards for Federal Land Acquisitions “The Yellow Book, Tallahassee, Florida
7-Hour National USPAP Update Course
Rail Corridor Acquisition Seminar
Appraising from Blueprints and Specifications
The Road Less Traveled: Special Purpose Properties
Business Practices and Ethics
2006 Scope of Work and the New USPAP Requirements
Evaluation Commercial Construction
A Professional’s Guide to Conservation Easements
Case Studies in Commercial Highest and Best Use
Sovereignty Submerged Land Easements
Appraisal Curriculum Overview (2 Day General)
Uniform Standards of Professional Appraisal Practice (2010)
Fundamentals of Separating Real Property, Personal Property and Intangible Business Assets
Appraising the Appraisal: Appraisal Review-General
HUD Multi-Family Accelerated Processing (MAP) - 3rd Party Technical Training Seminar

EXPERT WITNESS EXPERIENCE

U.S. Federal Bankruptcy Court
Circuit Courts of Brevard, Orange, Osceola, Pasco, Santa Rosa, Seminole and Volusia Counties.

PROFESSIONAL ACTIVITIES

2006 – 2007 National Board of Directors, Appraisal Institute
2007 Chairman, Region X (Florida/Puerto Rico) Appraisal Institute
2006 Vice Chairman, Region X (Florida / Puerto Rico) Appraisal Institute
2005 – 2006 State Chairman, Florida AQB Criteria Implementation Task Force
2003 State Chairman – Florida Statute 475 Part II Rewrite Committee
2000 to 2006: Chairman, State Governmental Affairs, Region X, Appraisal Institute
2005 Director Region X, Appraisal Institute
2003 Outstanding Service Award, Appraisal Institute
1995: Public Relations Committee Chairman, Region X, Appraisal Institute
1995: Member, National General Appraiser Board Examination Subcommittee
1990 - 1992: Member, National Public Relations Committee, Appraisal Institute
1991, 1992, 1999 to 2004: Region 10 Representative for East Florida Chapter, Appraisal Institute
1989 National Chairman - Young Advisory Council - Society of Real Estate Appraisers
Member - 1990 National Conference Committee, Society of Real Estate Appraisers
President, 1990 - Florida Chapter 100, Appraisal Institute
Member, Board of Directors, 1999-2001, East Florida Chapter, Appraisal Institute
Member - Board of Directors - 1986-1992 - Central Florida Chapter, Appraisal Institute
Member - East Florida Chapter, Appraisal Institute (Served on Government Affairs & Admissions Committees)
Alumni - Leadership Orlando Program - Orlando Chamber of Commerce
Special Magistrate - Property Appraisal Adjustment Board - Orange, Brevard, Osceola, Santa Rosa, and Escambia Counties, Florida

PARTIAL LIST OF PAST CLIENTS

Attorneys' Title Insurance Fund, Inc.	Lincoln Property Company
Banco Popular	Lockheed Martin
BankFirst	Metropolitan Life
Bank of America	M&I Marshall & Ilsley Bank
BB&T	Mercantile Bank
Chicago Title	Mobile Home Communities, Inc.
Citicorp Real Estate	Nara Bank
Citizens Bank of Florida	National City Bank
City of Orlando, Florida	New York Life
City of Pensacola, Florida	Orlando Neighborhood Improvement Corporation
CNL Bank	Orange County
Escambia County	Osceola County
Exxon Company, USA	PNC Bank
Federal Department of Energy	Pensacola Housing Authority
Federal Deposit Insurance Corporation	Prudential Insurance
Federal National Mortgage Association	Regions Bank
First Horizon	St. Joe Company
First Southern Bank	Seminole County
Florida Bank of Commerce	South Florida Water Management District
Florida Community Partners	SunTrust
Florida Department of Environmental Protection	SunTrust Mortgage, Inc.
GMAC	TD Bank
Greater Orlando Chamber of Commerce	Trammell Crow Company
General Services Administration	Trust Company Bank
General Electric Mortgage Insurance Companies	United Southern Bank
Hancock Bank	U.S. Bank
Howard Johnson Company	Wells Fargo
John Hancock Insurance	Westinghouse Electric Company
KeyBank	Zions First National Bank
Key West Redevelopment Agency	ZOM Communities Inc.

APPRAISAL EXPERIENCE

I have completed a variety of appraisal and valuation assignments for commercial banks, insurance companies, other financial institutions and asset managers. I have extensive experience in subdivision development, industrial warehouses, apartments, shopping centers, office buildings, condominiums, hotels, mobile home parks, golf courses, retirement centers and undeveloped land. In addition to real estate valuation, past assignments include discounted cash flow analysis, leased fee and leasehold interest, highest and best use studies, market/feasibility studies, investment analysis and other forms of analysis involving investment grade properties.

I have served as a Special Magistrate or hearing officer reviewing property owner disputes regarding county valuations and exemptions in Orange, Brevard, Osceola, Santa Rosa, and Escambia Counties. I am familiar with Florida Statutes, case law, and Florida Department of Revenue rules and procedures regarding real property assessment and tax issues. I have made presentations regarding Value Adjustment Board Hearings to the Property Appraiser's Association of Florida (elected public appraiser) and the International Association of Assessing Officers (IAAO) and The Appraisal Institute.

Special consultation assignments include preparation of appraisal guidelines, procedures, and policy manuals for use by mortgage lenders. I have presented a "Use of Real Estate Appraisals" seminar held for several Florida based financial institutions. I have made presentations to the Florida Department of Revenue, the real estate section of the Orange County Bar Association, the Florida Academy of Trial Lawyers, Building Owners & Managers Association (BOMA), and the Jacksonville Chapter of the Florida Institute of Certified Public Accountants. I participated in a seminar and mock trial regarding valuation of contaminated properties with the American Bar Association - Section of Litigation at their national convention. Recently (2003 – 2005), I chaired a panel of appraisers representing a coalition of prominent national appraisal organizations and prepared a rewrite/update of Florida Statute 475, Part II. This statute is the Florida law pertaining to the real estate appraisal profession.

STATE OF FLORIDA CERTIFICATION

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MARSHALL, STEVEN L 246 N WESTMONTE DRIVE ALTAMONTE SPRINGS FL 32714		
RICK SCOTT GOVERNOR		KEN LAWSON SECRETARY
DISPLAY AS REQUIRED BY LAW		

STEVEN L. MARSHALL: REFERENCES

Hancock Bank

Gulfport, Mississippi

Contact: Leslie North, MAI

Phone: (228) 563-7942

E-mail: leslie_north@hancockbank.com

Old Florida National Bank

315 E. Robinson Street, Suite 100

Orlando, Florida 32801

Contact: H.E. (ED) Davis

Executive Vice President

Phone: (407) 650-9816

E-mail: hedavis@oldfnb.com

Keybank Real Estate Technical Services (KRETS)

4200 West Cypress Street, Suite 490

Tampa, Florida 33607

Contact: Janet Gutin,

Senior Vice President

Phone: (813) 313-5523

E-mail: janet_gutin@keybank.com

Escambia County, FL (Pensacola)

Escambia County Clerk's Office

Escambia County Governmental Complex

221 Palafax Place, Suite 130

Pensacola, Florida 32502-5843

Contact: Doris Harris

Clerk

Phone: (850) 595-3918

E-mail: dharris@clerk.co.escambia.fl.us

BMO Harris Bank, N.A.

Commercial RE Appraisal Services Unit (CREASU)

501 E. Kennedy Boulevard, Suite 900

Tampa, Florida 33602

Contact: Julie R. Webster

AVP/Florida Regional Review Appraiser

Phone: (813) 204-1937

E-mail: Julie.Webster@MICorp.com

Iberia Bank

2150 Goodlette Road North

Naples, Florida 34102

Contact: Ray Melton

Phone: (239) 403-6621

E-mail: Ray.Melton@IberiaBank.com

Wells Fargo

2859 Paces Ferry Road, Suite 1200

Atlanta, Georgia 30339

Contact: Robert J. Franc, MAI

Phone: (727) 578-8581

E-mail: robert.j.franc@wellsfargo.com

SunTrust Bank, Central Florida

200 South Orange Avenue, Tower 5

Mail Code 0-1053

Orlando, Florida 32801

Contact: Andrew J. Grossmann

Phone: (407) 237-4718

E-mail: andrew.grossmann@suntrust.com

Florida Community Bank

1261 Homestead Road

Lehigh Acres, Florida 33936oor

Contact: Karen Bailey

Assistant Vice President

Phone: (239) 368-4021

E-mail: Kbailey@fcb1923.com

Wal-Mart Stores, Inc.

2001 SE 10th Street, NE 5

Bentonville, Arkansas 72716-0550

Contact: Kenneth G. Foltz, MAI, SRA

Realty Appraisal Manager

Phone: (479) 277-9962

E-mail: kenneth.foltz@wal-mart.com

Citizens Bank of Florida

P. O. Box 729

Oviedo, Florida 32765

Contact: Terry Vargo

Senior Vice President

Phone: (407) 365-5631

E-mail: tvargo@mycbfl.com

TD Bank

1501 Main Street; Loc Code SC 963-61, 3rd Floor

Columbia, SC 29201

Contact: William C. Crosby

Chief Appraiser

Phone: (803) 540-2737

E-mail: william.crosby@bankmercantile.com

Orange County Public Schools

6501 Magic Way

Orlando, Florida 32809

Contact: Timothy Radabaugh, MAI
Senior Real Estate Manager

Phone: (407) 317-3700 ext. 5405

E-mail: timothy.radabaugh@ocps.net**Lowndes, Drosdick, Doster, Kantor & Reed**

215 North Eola Drive

Orlando, Florida 32801

Contact: Matthew R. O'Kane, Esq.
Partner

Phone: (407) 418-6255

E-Mail: matt.okane@lowndes-law.com**Shutts & Bowen LLP**

300 South Orange Avenue, Suite 1000

Orlando, Florida 32801

Contact: Michael J. Grindstaff, Esq.
Partner

Phone: (407) 835-6927

E-Mail: mgrindstaff@shutts.com**Regions Financial Corporation**

1710 Barton St.

Longwood, FL 32750-6803

Contact: Susan E. Baker, MAI
Vice President

Phone: (407) 758-4486

E-mail: appraisersusan@yahoo.com**United Southern Bank**

2701 South Bay Street

Eustis, Florida 32726

Contact: Greg Lewis
Executive Vice President

Phone: (352) 483-3056

E-Mail: greg.lewis@unitedsouthernbank.com**Surety Bank**

1990 Woodland Boulevard

Deland, Florida 327203

Contact: Suzette Hill
Vice President

Phone: (386) 734-1647

E-mail: shill@mysuretybank.com**BB&T**

Real Estate Support

4600 New Bern Avenue, Suite 101

Raleigh, North Carolina 27610-1463

Contact: Charles R. Wolfe, MAI
Vice President-Senior Review Officer

Phone: (919) 212-3736

Insurance Office of America

1855 West State Road 434

Longwood, Florida 32750

Contact: John Ritenour

Phone: (407) 998-4101

E-mail: john.ritenour@ioausa.com**First Southern Bank**

945 South Orange Avenue

Orlando, Florida 32806

Contact: Patrick Dunigan

Phone: (407) 563-0231

E-mail: patrick.dunigan@firstsouthernbank.com**Florida Hospital**

1919 N. Orange Avenue, Suite E

Orlando, Florida 32804

Contact: Jody Barry
Director of Real Estate

Phone: (407) 303-1125

E-mail: jbarry@ahss.org**Lee Vista Center**

P. O. Box 620365

Orlando, Florida 32862

Contact: Richard T. Lee
Chief Executive Officer

Phone: (407) 857-2835

E-mail: 24xxldog@bellsouth.net**McCarron Accounting & Consulting, CPAs**

628 Ellen Drive

Winter Park, Florida 32789

Contact: David M. McCarron, CPA
President

Phone: 407-897-7050

E-mail: David@McCarronCPA.com



**ERNIE LEE MAGAHA
CLERK OF THE CIRCUIT COURT
ESCAMBIA COUNTY, FLORIDA**

**VAB - Special Master Hearing Worksheet
Market Or Classified Use Value**

Petition # 2011-88 Account: 170255628 User: kmacarthur Residential

Relief Granted ☒ Relief Denied ☒ Remanded to PA ☒ No Show Relief Denied ☒

Special Master	Steven L. Marshall	Petitioner Representation	Not Present Attorney Agent Other
New Market Value	0.00	New Assessed Value	0.00
New Exemption Value	0.00	New Taxable Value	0.00

Petitioner's Estimate of Fair Market Value:

SECTION I. OBJECTIONS OF PETITIONER (Please check all applicable statements)

The Petitioner objects to the assessment for the following reasons:

- | | |
|--|---|
| ☒ 1. Increase From prior year(s) assessment | ☒ 13. Allegation of inequity in assessments |
| ☒ 2. Financial performance of the property | ☒ 14. Amount of the assessment |
| ☒ 3. Property Condition | ☒ 15. Method of assessment |
| ☒ 4. External conditions | ☒ 16. Amount of taxes |
| ☒ 5. Alleged error in factual information | ☒ 17. Non-conforming use |
| ☒ 6. Appraisal by an independent third party appraiser | ☒ 18. Present use |
| ☒ 7. Sales analysis by an independent agent | ☒ 19. Financial hardship of the petitioner |
| ☒ 8. Recent sale price _____, or asking price _____ of the property | |
| Sale Price 0.00 Asking Price 0.00 | |
| ☒ 9. Sales comparisons _____, Listings _____, Income _____, Expenses _____ | |
| Cost Data _____, Other _____ | |

☒ 10. Claim that the Property Appraiser failed to consider other criteria in Section 193, Florida Statutes

☒ 11. No stated Reason

☒ 12. Other _____

SECTION II. FINDINGS OF FACT (Please check all applicable statements)

- ☒ 1. Prior year(s) or future assessments are irrelevant to the assessment under discussion.
- ☒ 2. Prevailing market rates prevail when the actual financial performance is less than market standards.
- ☒ 3. The Property Appraiser must appraise the entire fee simple estate, except classified use properties, which are appraised on the basis of value in use. The Petitioner's information did not address the entire fee simple estate.

Subject is a sfr containing 1784 sf. The petitioner purchased the property for \$720,000 March 2005. The petitioner does not want the land to be taxed because it is leased. The petitioner argued the Income approach should be the primary valuation technique. Petitioner argues cost of insurance premiums, BP oil spill, issue not properly accounted for by the P.A. The P.A. relied upon comparable sales data after date of the oil spill. The petitioner did not make a reasonable argument regarding oil issue (oil impact is reflected in the transaction price of the PA's sale comps), Insurance issue or use of the Income Approach valuation technique. P.A. used the Market Approach -- typical methodology of buyers, sellers & lenders to value the subject. Sales indicated a tight range of \$280,000-\$417,456 for value. The assessment is \$237,324 or \$133.03 per square foot and is well supported. the assessment is 67+/- below the actual 2005 purchase price of the subject property.

☒ 4. The Property Appraiser lawfully considered the eight criteria enumerated in Section 193.011, Florida Statutes.

☒ 5. The Property Appraiser failed to lawfully consider specific criteria of Section 193.011, Florida Statutes, as follows:

☐ 6. Properties have different assessments because of different characteristics that comprise the entire property.

☐ 7. The assessment of any property other than the subject is immaterial.

☒ 8. The assessment was (a)____, was not (b)____, shown to be higher than the general level of assessment of "all or substantially all" other property in the County.

☒ 9. No evidence overcoming the presumption of correctness was presented.

☒ 10. Facts were presented that do (a)____, do not (b)____, support a change in the assessment.

do (a) ☐ do not (b) ☒

The land is taxable & should be appraised --- as confirmed by VAB attorney.

☒ 11. Information was presented that does (a)____, does not (b)____, indicated a factual error.

☒ 12. The market value of the property is within the discretion of the Property Appraiser and within a reasonable range of values for the property.

☒ 13. The assessment was (a)____, was not (b)____, developed by generally accepted appraisal methods.

was (a) ☒ was not (b) ☐

☒ 14. The Value Adjustment Board is not empowered to consider the ultimate amount of taxes to be paid in the process of evaluating a petition.

☒ 15. The assessment was (a)____, was not (b)____, proven to be incorrect.

was (a) ☐ was not (b) ☒

☒ 16. Data was present that does (a)____, does not (b)____, support a change in assessment.

does (a) ☐ does not (b) ☒

Income & expense data & petitioners suggestion that the Income Approach is the best appraisal technique to value a sff is rejected by the Special Magistrate. Buyers, sellers, lenders & most all market participants rely on the direct Sales Comparison (Market Approach) to value.

☒ 17. The sale price of the property should be considered when it is indicative of market value and is within a reasonable range of values for the property.

☒ 18. Sale(s) Market Data occurring after January 1st of the assessment year may be presented when insufficient data exists in the prior year and the data presented by the Petitioner is indicative of market value for the legal assessment date.

☒ 19. Sale(s) of the subject property is not an arms-length transaction as determined by guidelines in the Florida Administrative Code, Chapter 12D-8.011(1)(m).

☒ 20. Comparable sale(s) evidence presented is not an arms-length transaction as determined by guidelines in the Florida Administrative Code, Chapter 12D-8.011(1)(m).

- ☐ 21. The purchase price of property is no a valid objection when it is not indicative of the market value.
- ☐ 22. The market evidence is deficient. One sale does not make a market.
- ☐ 23. Only evidence of the Petitioner's financial hardship was presented. The Value Adjustment Board is not empowered to consider the financial hardship of a Petitioner in evaluating a petition.
- ☐ 24. Market value is generally perceived from the standpoint of the buyer who is typically indifferent cost and expenses of the seller.
- ☐ 25. The Property Appraiser supports the assessment on the market approach to value. An assessment based on the market approach to value completely satisfies all eight criteria enumerated in Section 193.011, Florida Statutes.
- ☐ 26. The present use is not the highest and best use for the property. Accordingly, such use is not a valid basis for objection, unless there is no immediate demand for an alternative highest and best use, as of the legal assessment date.
- ☐ 27. The applicable land use plan controls over local zoning.
- ☐ 28. The petition was complete (a)_____, incomplete (b) _____.

☐ 29. Other:

Section III. CONCLUSIONS OF LAW

☐ A. The Petitioner failed to overcome the presumption of correctness accorded the Property Appraiser by law. It was not proven by a preponderance of evidence that the Property Appraiser's market value is in excess of just value. It is recommended that the petition be denied and the market value be upheld.

The land is taxable and must be valued as part of the overall property (Turner vs. Bell Chevrolet.. The SM has no legal authority to rule otherwise. Petitioner made weak arguments regarding BP oil spill impact, rising insurance premiums and use of the Income Approach. The Income Approach valuation technique is not the primary valuation technique relied upon by buyers, sellers, lenders or other market participants. P.A. has met the criteria in Fl. St. 193.011 and DOR rules regarding valuation of real property. The petitioner did not present competent legal evidence sufficient to make a reasonable argument. The petitioner failed to over the presumption of correctness of the P.A. The P.A. has quality comparables and a highly defensible value estimate of \$237,324. The petitioners request to reduce the value to \$100,000 to \$175,000 (letter to P.A.) dated September 13,2011). My ruling is to deny the petitioners request for a value reduction.

☐ B. The Petitioner established by a preponderance of evidence that the Property Appraiser failed to properly consider one or more of the eight criteria enumerated in Section 193.011, Florida Statutes. However, the Petitioner did not prove by a preponderance of evidence that the Property Appraiser's market value is in excess of just value. It is recommended that the petition be denied and the market value be upheld.

☐ C. The Petitioner established by a preponderance of evidence that the Property Appraiser's market value was arbitrarily based upon appraisal practices different from appraisal practices generally applied by the Property Appraiser to comparable property within the same class. The Petitioner did not prove by a preponderance of evidence that the Property Appraiser's market value is in excess of just value. It is recommended that the petition be denied and the market value be upheld.

☐ D. The Petitioner established by a preponderance of evidence that the Property Appraiser failed to properly consider one or more of the eight criteria enumerated in Section 193.011, Florida Statutes. The Petitioner did prove by a preponderance of the evidence that the Property Appraiser's market value is in excess of just value. It is recommended that the market value be reduced.

☐ E. The Petitioner established by a preponderance of evidence that the Property Appraiser's market value was arbitrarily based upon appraisal practices different from appraisal practices generally applied by the Property Appraiser to comparable property within the same class. The Petitioner did prove by a preponderance of evidence that the Property Appraiser's market value is in excess of just value. It is recommended that the market value be reduced.

☐ F. The Petitioner failed to introduce sufficient evidence to overcome the presumption of correctness accorded the Property Appraiser by law. Petitioner did prove by a preponderance of evidence that the Property Appraiser's market value is in excess of just value. It is recommended that the new market value be approved.

☐ G. During the course of the hearing, the Property Appraiser reduced the market value of the subject property. No basis for a further reduction was determined. The market value by the Property Appraiser is entitled to a presumption of correctness. It is recommended that the new market value be approved.

☐ H. The Property Appraiser's market value is found to be erroneous. The record lacks competent, substantial evidence meeting the just value criteria of Section 193.011, Florida Statutes. The matter is remanded to the Property Appraiser with the following direction:

☐ I. Prior to the hearing, the Property Appraiser reduced the market value of the subject property. No basis for a further reduction was determined. The assessment by the Property Appraiser is entitled to a presumption of correctness. It is recommended that the new assessment be approved.

ESCAMBIA COUNTY - VALUATION ADJUSTMENT BOARD

Special Master: Steven L. Marshall, MAI, SRA

Petitioner: Cordova Community Facility Corporation

Parcel ID: 09-2S-30-0600-000-001
00-0S-00-9010-001-163

Hearing Date: November 28, 2000

Petition Number: 2000-337
2000-338

STATEMENT OF CASE

The Petitioner, Mr. Paul W. Groom, negotiated an agreement with Property Appraiser, Chris Jones, via Attorney Elliott Messer, regarding the willingness to stipulate to the testimony of the witnesses that were called last year in order to eliminate lengthy hearings.

Therefore, a complete transcript of last year's hearing is hereby attached as an integral part of this document by this specific reference. Also, my six (6) page ruling on the 1999 petition regarding this same case is hereby attached and incorporated by this specific reference as a specific integral accompanying document to this Special Master Ruling.

BASIC FACTS

The Petitioner seeks to overturn the denial of a non-profit status and resulting exemption from taxation. Mr. Groom believes the properties are exempt under either the governmental or the charitable exemption categories established in the Florida Statutes.

The Property Appraiser's office was represented by Thomas Findley and Elliott Messer, just as last year's petition.

Mr. Groom, when questioned by the Special Master as to why last year's decision was flawed or incorrect, responded -- the properties are owned by a governmental entity (either legally or beneficially) and is used for government purposes.

The reader/user of this Special Master's ruling on this petition is directed to read thoroughly the "Reply of the Property Appraiser" (prepared by Elliott Messer and Thomas Findley). Also attached is an Escambia County Circuit Court Final Judgment regarding the "Service Metro Case" adjudged by Judge Tarbuck on June 2, 2000. Finally, a letter to Mr. Dan Church, c/o Escambia County Property Appraiser, Chris Jones' office, from Stephen Keller, Chief Assistant General Counsel, Department of Revenue, is attached. These three documents provide clear evidence of the proper decision to be made by the Special Master.

ULTIMATE FACTS

The Petitioner owned the property, leased the property, and then encumbered the property with tax exempt bonds. Escambia County is not presently (or specifically) the owner on January 1. Escambia County does not insure, maintain or manage the property.

The Petitioner/Owner has tried and failed to obtain a Consumer's Certificate of Exemption from the Department of Revenue.

The Property Owner/Developer and the bond holders accrue financial benefits. Rent is paid to bond holders who enjoy profit and benefit associated with such payments.

As discussed in brief testimony by Mr. Groom and Mr. Steve Del Gallo, the sum total of the bond debt greatly exceeds Property Appraiser Jones' estimate of market value (testified as being prepared in compliance with Florida Statutes 193.011 criteria).

As Special Master, I question the argument of "beneficial ownership" when the bond debt exceeds market value by millions of dollars.

CONCLUSION OF LAW

Just because a non-profit corporation owns real property that is leased to a government entity does not provide the Owner/Petitioner to a governmental exemption.

Clearly, the initial bond proceeds, rental income, and ownership provides substantial profit to the Petitioner/Owner.

As of January 1, the bond debt exceeds the market value of the property. Escambia County will not, if ever, receive a deed to the subject property for 24± years and certainly not this past January 1st.

The bond documents express that the Petitioner is not an agency or instrumentality of the County. The leases between the petitioner and Florida Department of Manager and Services are standardized leases. The leases require the lessor (Petitioners/Owner) covenants to pay taxes on the premises. The lease terms are far short of the bond amortization periods. This circumstance could jeopardize timely payment of the bond debt.

The Florida Constitution does not provide for an exemption for all governmental entities and agencies. Florida Statutes provide the general rule that all real property is subject to tax unless "expressly" exempted. The Petitioner testified in 1999 that they are not a governmental agency.

As of January 1, Escambia County did not own or have financial benefits derived from the Petitioner's real property. Escambia County has not agreed to purchase the property. Escambia County has not agreed to pay any amount to pay off the bonds and obtain the property. Escambia County has an option to do so, but until such option is exercised (highly speculative as to if and when), then title is not conveyed and remains titled in the name of the Petitioner/Owner.

Specifically, Cordova Community Facilities Corporation has existing bond debt (\$8,964,157.05 versus a market value of \$5,285,000). The County would be poorly advised to accept title couple with debit highly in excess of value.

Clearly, Escambia County's only measurable interest is a purchase option which is future oriented, contingent and speculative.

Finally, regarding the Petitioner's claim of a charitable exemption, the fact that the lease stream goes entirely to pay off private bond holders, including the private developers who sold the property to the current title holder, disqualifies the Petitioner's property for a charitable exemption. Another reason to rule against the notion of a charitable exemption is the lack of ability of the owner to obtain a Consumer Certificate of Exemption from the Department of Revenue.

Eligibility for exemption status has not been convincingly demonstrated by the Petitioner. The Petitioner has failed to provide sufficient competent evidence to prevail. The burden of proof is on the Petitioner. Based upon my analysis of the foregoing evidence, testimony, and arguments made on this case, the Petitioner is the legal and beneficial title hold to the real property and is obligated to pay property taxes in keeping with Florida law. The Petitioner and the property do not qualify for an exemption as specified in the Florida Statutes. Therefore, the Petitioner's request for an exemption is denied.

Steven L. Marshall, MAI, SRA
Special Master
Escambia County Value Adjustment Board
December 12, 2000



John A. Robinson, MAI, CCIM
State-Certified General Real Estate Appraiser #RZ417
Ana M. Arroyo, MAI
State-Certified General Real Estate Appraiser #RZ3450
Lori R. Linqanti
State-Registered Trainee Real Estate Appraiser #R115251
Blair Beasley
State-Registered Trainee Real Estate Appraiser #R123675
www.PropertyValue.com

June 23, 2014

Doris Harris, Deputy Clerk to the Board
PAM CHILDERS, Clerk of the Circuit Court & Comptroller
First Judicial Circuit, Escambia County
221 Palafox Place
Pensacola, FL 32502

Ref: VAB Special Magistrate Application

Dear Ms. Harris:

Enclosed with this letter is a sealed application for VAB Special Magistrate for John Robinson, MAI, CCIM. Thank you for the opportunity to apply.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Dawn Carlson'.

Dawn Carlson
Administrative Assistant
Property Valuation & Consulting, Inc.
204 S. Dillard Street
Winter Garden, FL 34787

5. IF YOU ARE CURRENTLY A LICENSED FLORIDA REAL ESTATE BROKER OR A CERTIFIED OR LICENSED REAL ESTATE APPRAISER PURSUANT TO CHAPTER 475, FLORIDA STATUTES, PLEASE PROVIDE THE FOLLOWING INFORMATION:

A. DESIGNATION: MAI, CCIM
LICENSE OR CERTIFICATION NUMBER: RZ417
DATE LICENSED OR CERTIFIED: 1990 through 11/30/2014

- B. LIST EACH INSTANCE IN WHICH YOU HAVE BEEN FINED, REPRIMANDED, PLACED ON PROBATION, DISCIPLINED OR OTHERWISE PREVENTED FROM CONDUCTING BROKER OR APPRAISAL SERVICES BY THE FLORIDA REAL ESTATE COMMISSION OR THE FLORIDA REAL ESTATE APPRAISAL BOARD:

None

- C. LIST EACH ORGANIZATION RECOGNIZED BY THE REAL ESTATE APPRAISAL INDUSTRY, OR PROFESSIONALS IN THE APPRAISAL FIELD, IN WHICH YOU ARE CURRENTLY OR HAVE PREVIOUSLY BEEN A DESIGNATED MEMBER:

<u>ORGANIZATION</u>	<u>DESIGNATION</u>	<u>DATE OF DESIGNATION</u>	<u>MEMBERSHIP NUMBER</u>
<u>Appraisal Institute</u>	<u>MAI</u>	<u>5/1989</u>	<u>8135</u>
<u>CCIM Institute</u>	<u>CCIM</u>	<u>11/1999</u>	<u>9080</u>
<u>FL Real Estate Appraisal Board</u>	<u>Certified General Appraiser</u>		<u>RZ417</u>

NOTE: PLEASE PROVIDE SUPPORTING DOCUMENTATION TO VERIFY EACH DESIGNATION. APPLICATIONS WILL NOT BE CONSIDERED UNTIL VERIFICATION IS RECEIVED BY THE OFFICE OF THE CLERK OF THE CIRCUIT COURT.

- D. LIST THE REQUIREMENTS, INCLUDING EXPERIENCE AND EDUCATION, NECESSARY TO OBTAIN EACH DESIGNATION LISTED ABOVE:

MAI: 5 years of appraisal experience and successful completion of 7 required courses, demonstration appraisal report and comprehensive examination.
CCIM: proof of MAI designation, successful completion of 3 required courses and comprehensive examination.

E. LIST ANY DISBARMENT, SUSPENSION OR ANY OTHER DISCIPLINARY ACTION WHICH YOU HAVE RECEIVED FROM ANY ORGANIZED BAR ASSOCIATION:

None

6. DESCRIBE EXPERIENCE YOU HAVE APPRAISING TANGIBLE PROPERTY:

Have heard tangible VAB courses sporadically over past 17 years (most recently in 2010).

7. LIST ANY EXPERIENCE AND/OR SPECIALTY FOR THE FOLLOWING PROPERTY:

<u>PROPERTY TYPE</u>	<u>EXPERIENCE/SPECIALTY</u>
RESIDENTIAL REAL PROPERTY	<u>19 years including appraisal experience</u>
COMMERCIAL REAL PROPERTY	<u>19 years including appraisal experience</u>
TANGIBLE PROPERTY	<u>5-10 years</u>
OTHER (PLEASE SPECIFY)	<u>vacant land, income producing, and</u> <u>special purpose real estate</u>

8. IF YOU HAVE PREVIOUSLY SERVED AS A SPECIAL MAGISTRATE, PLEASE PROVIDE THE FOLLOWING INFORMATION:

<u>A. COUNTY</u>	<u>DATE(S) SERVED</u>	<u>CONTACT/TELEPHONE</u>
Pinellas	2008, 2009, 2010, 2011, 2012, 2013	Norman Loy/ 727-464-3463
Hillsborough	2008, 2009, 2010, 2011, 2012, 2013	Kimberly Richards /813-307-7087
Orange	1994-1996, 1998-1999, 2001-2007, 2009-2011, 2012, 2013	Katie Smith/ 407-836-7301
Brevard	1999-2012	Christine Mulligan/ 321-687-6523
Citrus	2005-2006, 2008-2009, 2013	Tifani White/ 352-341-6455
Seminole	1997-2000, 2002-2003, 2006, 2010, 2011	Jane Spencer/ 407-665-7662
Okaloosa	2010, 2011	Teresa Ward/ 850-689-5000 x3412
Escambia	2012	Doris Harris/ 850-595-3918
Polk	2012, 2013	Alison Prevatt/ 863-534-6502
Hernando	2012	Amy Stephens/ 352-540-6399
Pasco	2013	Donalee Schmidt/ 352-521-4347 x4347

B. IF APPLICABLE, EXPLAIN WHY YOU NO LONGER SERVE AS A SPECIAL MAGISTRATE IN THE ABOVE COUNTIES:

N/A

C. LIST EACH INSTANCE IN WHICH YOU HAVE BEEN DISMISSED, TERMINATED, OR DENIED APPOINTMENT AS A SPECIAL MAGISTRATE:

N/A

9. LIST ANY PERSONAL OR BUSINESS RELATIONSHIP YOU HAVE EVER HAD WITH ANY OFFICER OR EMPLOYEE OF THE OFFICE OF THE PROPERTY APPRAISER, OFFICE OF THE CLERK OF THE CIRCUIT COURT, OFFICE OF THE COUNTY ATTORNEY, OR THE VALUE ADJUSTMENT BOARD:

N/A

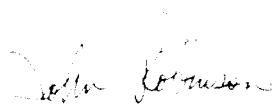
10. LIST ANY ADDITIONAL INFORMATION WHICH QUALIFIES YOU TO SERVE AS A SPECIAL MAGISTRATE:

Full-time real estate appraiser for past 30 years, specializing in commercial real estate.

Part-time real estate broker for past 26 years.

11. **PLEASE PROVIDE A WRITING SAMPLE.** THIS SAMPLE MAY CONSIST OF ANY OPINION, LETTER, APPRAISAL, OR OTHER DOCUMENTATION THAT CONTAINS ONE (1) OR MORE WRITTEN PAGE(S) OF ORIGINAL MATERIAL.

THE UNDERSIGNED CERTIFIES, UNDER PENALTY OF DISQUALIFICATION FROM CONSIDERATION, THAT EACH ITEM CONTAINED IN THIS APPLICATION, OR OTHER DOCUMENT FURNISHED BY OR ON BEHALF OF THE APPLICANT IS TRUE AND COMPLETE AS OF THE DATE IT BEARS. THE UNDERSIGNED AUTHORIZES THE VALUE ADJUSTMENT BOARD TO OBTAIN INFORMATION FROM OTHER SOURCES TO VERIFY EACH ITEM CONTAINED HEREIN. THE UNDERSIGNED ACKNOWLEDGES THAT IF SELECTED HE/SHE WILL FOLLOW ALL REQUIREMENTS AND MANDATES OF LAW IN FULFILLING THE DUTIES OF SPECIAL MAGISTRATE TO THE VALUE ADJUSTMENT BOARD.



SIGNATURE OF APPLICANT

6-10-2014

DATE

QUALIFICATIONS OF JOHN A. ROBINSON, MAI, CCIM
State-Certified General Real Estate Appraiser #RZ417

Business Address:

Property Valuation & Consulting, Inc.
204 S. Dillard Street
Winter Garden, FL 34787
(407) 877-0200 Fax: (407) 877-8222

Residence Address:

800 Windergrove Court
Ocoee, Florida 34761

Education

Auburn University - Auburn, Alabama
BS in Business Administration, Major: Finance, December 1982
Melbourne High School - Melbourne, Florida

Appraisal courses sponsored by The Appraisal Institute:

Course 1A, Part 1 - Real Estate Appraisal Principles, Univ. of North Carolina, July 1984
Course 1A, Part 2 - Basic Valuation Procedures, University of San Diego, June 1985
Course 1B, Part A - Capitalization Theory and Techniques, Orlando, Florida, May 1986
Course 1B, Part B - Capitalization Theory and Techniques, Daytona Beach, Florida, September 1986
Course 2-3 - Standards of Professional Practice, Orlando, Florida, March 1987
Course 2-1 - Case Studies in Real Estate Valuation, Orlando, Florida, May 1987
Course 2-2 - Valuation Analysis & Report Writing, Arizona State Univ., February 1988
Comprehensive Examination, Atlanta, Georgia, August 1988
Course 6 - Computer Assisted Investment Analysis, College Park, Maryland, June 1990
Course II520 - Highest & Best Use and Market Analysis, Orlando, Florida, March 1994
Course 430 - Standards of Professional Practice, Part C, Orlando, Florida, Sept. 1997
Course 430 - Standards of Professional Practice, Part C, Altamonte Springs, FL, Nov. 2002
Condemnation Appraising: Principles & Applications, Destin, FL, April 2009

Courses sponsored by the CCIM (Certified Commercial Investment Member) Institute:

Course CI 101 - Financial Analysis for Commercial Real Estate, October 1997
Course CI 201 - Market Analysis for Commercial Investment Real Estate, May 1998
Course CI 104 - Investment Analysis for Commercial Investment Real Estate, May 1999
Comprehensive Examination – Orlando, Florida, November 1999

Courses sponsored by the American Society of Farm Managers and Rural Appraisers

Valuation of 'Conservation Easements' & Other Partial Interests in Real Property, September 2009

Appraisal seminars sponsored by The Appraisal Institute (and South Florida Water Management District):

Rate Extraction/Application, July 1989
Impact of Environmental Considerations on Real Estate Appraisals, July 1989
Standards of Professional Practice Update, July 1990
Appraisal Regulations of the Federal Banking Agencies, November 1990
Environmental Concerns, September 1991
Subdivision Analysis, November 1991
Standards of Professional Practice, October 1992
Americans with Disabilities Act, February 1993
Rates, Ratios & Reasonableness, February 1993
Appraisal Review Overview, August 1993
ARGUS Beginning Training, October 1993

QUALIFICATIONS OF JOHN A. ROBINSON, MAI, CCIM
State-Certified General Real Estate Appraiser #RZ417
(Continued)

Appraising Troubled Properties, November 1993
Limited Appraisal Round Table, June 1994
Uniform Standards of Professional Appraisal Practice Update*, June 1994
(Instructed for Lincoln Graduate Center)
HUD/FHA Training Session, November 1994
Principles of Appraisal Review*, January 1995 (Instructed for Lincoln Graduate Center)
Analyzing Operating Expenses, March 1995
Fair Lending and the Appraiser, June 1995
Farm and Land Appraisal*, June 1995 (Instructed for Lincoln Graduate Center)
The Internet and Appraising, February 1997
Understanding and Using DCF Software: A Comparison of ARGUS, PRO-JECT and
DYNLEASE, December 1997
USPAP Update Core Law For Appraisers, February 1998
Econometrics, June 1999
Public Market for Real Estate, June 1999
General Appraiser USPAP Update, June 1999
Client Satisfaction/Retention/Development, June 1999
Technology Forum, June 1999
Appraising from Blueprints & Specifications, February 2000
Current Appraisal Issues in Florida (South Florida Water Management District), May 2000
Professional Standards USPAP Update/Florida Law for Real Estate Appraisers, August 2000
Florida State Law and USPAP Review for Real Estate Appraisers, April 2002
Appraisers and the Gramm-Leach-Bliley Act, April 2002
Mark-to-Market-The Next FIRREA, April 2002
Current Appraisal Issues in Florida (South Florida Water Management District), May 2002
Internet Appraisal Research and the Florida Appraiser, May 2003
2003 South Florida Water Management District Appraisal Seminar, May 2003
Appraising A Proposed Property, February 2004
Florida Appraiser's State Law Update, March 2004
Course 400 – National USPAP Update Course, March 2004
Uniform Standards for Federal Land Acquisitions, March 2004
2004 South Florida Water Management District Appraisal Seminar, May 2004
Real Estate Finance, Value and Investment Performance, February 2005
2005 South Florida Water Management District Appraisal Seminar, May 2005
Subdivision Valuation: A Comprehensive Guide to Valuing Improved Subdivisions, February 2006
2006 South Florida Water Management District Appraisal Seminar, April 2006
2006 Scope of Work and the New USPAP Requirements Seminar, June 2006
2006 New Technology for the Real Estate Appraiser: Cool Tools Seminar, June 2006
Florida Core Law and National USPAP Update, September 2006
Business Practices and Ethics, May 2007
2007 South Florida Water Management District Appraisal Seminar, May 2007
USPAP Update Course including Florida Law and Supervisor/Trainee Roles & Relationships, April 2008
2008 South Florida Water Management District Appraisal Seminar, May 2008
Course-I400 – National USPAP Update Course, July 2010
Florida Law and Supervisor/Trainee Roles & Rules, July 2010
Uniform Standards for Federal Land Acquisitions: Yellow Book, February 2011
Appraising the Appraisal, January 2012
Business Practices and Ethics, March 2012

QUALIFICATIONS OF JOHN A. ROBINSON, MAI, CCIM
State-Certified General Real Estate Appraiser #RZ417
(Continued)

Fundamentals of Separating Real Property, Personal Property and Intangible Business Assets, March 2012
Trial Components: Recipe For Success of Disaster?, August 2012
USPAP Update Course, November 2012
Marketability Studies: The Six-Step Process and Basic Applications, March 2013
Marketability Studies: Advanced Considerations and Applications, March 2013
Front of the House/Back of the House, April 2013
Central Florida Real Estate Forum-The Road to Recovery, September 2013
Critical Thinking in Appraisals, January 2014
Introduction to Land Valuation, April 2014

Real Estate Experience

2000- - President, Property Investment Specialists, Inc., Winter Garden, FL
1994- - President, Property Valuation & Consulting, Inc., Orlando, FL
1991-1994 - Vice President/Senior Review Appraiser, First Union Corporation, Orlando, FL
1990-1991 - Appraisal Review Officer, Southeast Bank, N.A., Orlando, FL
1986-1990 - Senior Appraiser, SEMCO Services, Inc., Orlando, FL
1985-1986 - Appraiser, Pardue, Heid, Church, Smith & Waller, Inc., Orlando, FL
1983-1985 - Appraisal/Property Manager, Sherrill Realty Company, Pensacola, FL

Appraisal experience includes narrative and form report writing and review of single-family and multi-family residential, agricultural, commercial (office, retail, hotels/motels), industrial, special purpose and vacant land properties. Experience includes providing expert witness testimony.

Publications

"Scope of the Appraisal - A Practical Analysis", *The Appraisal Journal*, January 1992, *The Canadian Appraiser*, Winter 1993

Professional Affiliations and Memberships

Member Appraisal Institute (MAI Number 8135)
Certified Commercial Investment Member (CCIM Number 9080)
State-Certified General Appraiser, License No. RZ417
Licensed Florida Real Estate Broker/Salesman - Active Status
1991 and 1993 Young Advisory Council - Appraisal Institute
Florida General Appraiser Instructor, License No. GA1000019
Approved Instructor for Lincoln Graduate Center, San Antonio, Texas
Approved Instructor for Valencia Comm. College Adult Ed. (R.E. Appraisal), Orlando, Florida
Selected as Special Master for Orange County (1994-1996, 1998, 1999 and 2001-2007, 2009-2013), Seminole County (1997-2000, 2002-2003, 2006 and 2010-2011), Volusia County (1999-2009), Brevard County (1999-2012), Indian River County (2004-2007), Citrus County (2005, 2006, 2008-2009 and 2013), Hillsborough County (2008-2013), Pinellas County (2008-2013), Escambia County (2012), Polk County (2013), Pasco County (2013), Hernando County (2012) and Okaloosa County (2010-2011)

References

Available upon request

AC# 670750

STATE OF FLORIDA

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
FLORIDA REAL ESTATE APPRAISAL BD

SEQ# L12111401109

DATE	BATCH NUMBER	LICENSE NBR
11/14/2012	128147602	RZ417

The CERTIFIED GENERAL APPRAISER

Named below IS CERTIFIED

Under the provisions of Chapter 475 FS.

Expiration date: NOV 30, 2014

ROBINSON, JOHN ALAN
204 S DILLARD ST
WINTER GARDEN

FL 34787

RICK SCOTT
GOVERNOR

KEN LAWSON
SECRETARY

DISPLAY AS REQUIRED BY LAW





MEMBERSHIP CERTIFICATE

This Certifies That

John Alan Robinson

*was admitted to membership in the American Institute
of Real Estate Appraisers as an MAI Member (8135)
on the 2nd day of May, 1989 and by virtue
of the unification of the American Institute of Real Estate Appraisers
and the Society of Real Estate Appraisers has become an
MAI Member*

*in the Appraisal Institute and is entitled to all the rights and
privileges of membership subject only to the limiting
conditions set forth from time to time in the Bylaws and
Regulations of the Appraisal Institute.*

*In Witness Whereof, the Board of Directors of the Appraisal Institute has
authorized this certificate to be signed in its behalf by the President.*

Richard H. Anderson

PRESIDENT





430 N. Michigan Avenue
Chicago Illinois 60611 409.
Telephone 312 321 4460
Facsimile 312.321.4530

November 10, 1999

John A. Robinson, CCIM
Property Valuation and Consultant, Inc
331 Northtland Avenue
Suite B-4
Maitland, FL 32751

*Affiliated with the
NATIONAL ASSOCIATION
OF REALTORS®*

Dear John:

Congratulations on earning your CCIM Designation!

I sincerely hope that one of your membership goals includes active involvement in our organization. We find that the greatest overall satisfaction is derived from active members who utilize all the services we offer. We cannot effectively serve you as an organization, a networking medium or to have education and career development resource without your active participation. Get involved and feel free to contact me personally with any suggestions, comments or questions you may have about the Institute. Consider getting involved in your local CCIM chapter as well.

The CCIM designation number assigned to you is 9080. You will need this to access the CCIM Web site. Remember, all United States designees are required to be members of National Association of Realtors® (NAR) through a local board or association as either a REALTOR® or Institute Affiliate Member. If you choose Institute Affiliate Membership, simply present a copy of this letter to your local board to certify your CCIM status.

Again, congratulations on this milestone accomplishment in your career, and welcome to the ever-growing roster of CCIM's pledged maintain professional knowledge, expertise, and ethical practice in commercial real estate.

If you have any questions, feel free to contact Cathy Wright, CIREI Designation Supervisor 800/621-7027 ext. 4495.

Sincerely,

A handwritten signature in black ink, appearing to read "W. Duncan Patterson".

W. Duncan Patterson, CCIM
2000 CIREI President

FOF

Rusty Altizer and Maryanne LoSasso represented the petitioner as ownership. Gino Rodriguez, Byron Johnson and Randy Monroe represented the Property Appraiser (PA). The property is the First Presbyterian Church of Maitland located at 301 E. George Avenue/341 N. Orlando Ave., which consists of five improvements including a cell tower that is within and sits above one of the structures. The appeal is exclusively based on the value attributable to the cell tower as there is no taxable value on any of the remaining improvements.

Evidence was exchanged between the PA and the petitioner. Evidence presented by the PA includes a summary list of evidence, petition, subject property record card/information sheet, aerial map, property record/information cards for three comparable improved cell tower sales with aerial maps (ranging from 3,119 to 10,002 square feet of land area, zoned C-3, AC-2/RP/AN/S and PD, that transpired between November 2012 and April 2013 that sold for between \$250,000 and \$500,000 (averaging \$368,333); article by Varnum (Attorneys at Law) entitled "What's a Cell Tower Lease Worth?", cell tower Q&A from AppraisersForum, document entitled *The Eighth Criterion and the 15%*, and a document entitled *How FS 193.011 and the 8 Criteria are Considered in CAMA*. The PA stated cell towers have been being valued since 2003 and were valued based on the income stream from the ground lease at that time; however, more recently sales have taken place from investors. The impacted site area of the cell tower is estimated to be 100' by 100', or 10,000 SF and the assessment is based on the ground area and not how many or who the carrier is. The cap rate used by the PA is 10% and the net operating income is based on \$10,000 per year.

The petitioner's evidence includes a request for the PA's evidence, a summary of evidence, a discussion of the PA's value of these cell towers (the subject bell tower has a 75 foot height and is located within an existing structure, encompassing 440 square feet of underlying land area), pointing out that the PA did not follow professionally accepted appraisal practices and failed to comply with FS 193.011 by ignoring seven of the eight factors. The petitioner understood the property was valued by the income approach on the basis of an assumed net operating income (NOI) of \$10,000 and applied an arbitrary cap rate of 10% to the income for a value of \$100,000. The petitioner references four cell towers in Orange County (two of which were comparable sales used by the PA) and states that all were assessed the same despite physical differences in current rent, operating expenses, remaining lease term, available and potential available tower space in the area, population density, tower height, and number of carriers on the cell tower. The petitioner proceeds to state how the PA did not consider Florida Statute 193.011 by only considering #7 (income) of the eight criteria required. The petitioner reveals the current lease with Sprint that expires in February 2017 and references the presence of alternate potential sites in Maitland, including Uptown Maitland, located across the street from the subject. The petitioner then estimates the net income for the four comparable properties identified, assuming an average monthly rent of \$1,500 per month (although no market support is provided for this estimate). This exercise goes on to show the additional value to these comparable properties based on the average rent per carrier (and these comparables are reported to accommodate between 4 and 6 carriers) and application of a

conservative 18% cap rate (based on the PA's evidence citing discussion among professional appraisers as to the appropriateness of a cap rate, given a contractual end date as opposed to capitalization into perpetuity). The petitioner goes on to say that the recommended valuation method is the discounted cash flow analysis. The petitioner then applies a DCF to the subject, with a 3% increase to the gross income and operating expenses, at a discount rate of 22.8%. From that amount, a 15% cost of sale is applied, resulting in a value estimate of \$31,385. Additional evidence includes a photograph of the tower (which sits above a structure on the church's property), a photograph of Uptown Maitland (a residential, senior housing high-rise apartment across the street from the subject), additional lease rate and property information on Uptown Maitland, details on the four comparables selected for analysis including property record card (real estate and tangible personal property), FCC registration (including heights and applications made). While no sale information is presented from the petitioner's comparables, two of the properties were used by the PA as comparable sales.

Other pertinent information relevant to this case is that the petitioner stated the actual area utilized by the cell tower and equipment is only 440 SF (the PA uses an area of 10,000 SF as typical for these property types). Additionally, Sprint currently pays \$1,552/month for the subject ground lease. The petitioner is seeking a value of \$31,385 based on actual income received, with support from the sales comparison approach (on the basis that sold properties have more potential for higher NOI than the subject).

The Department of Revenue (DOR) has developed specific evidence rules for presenting relevant and credible evidence. See Rule 12D-9.025 (1), Florida Administrative Code (F.A.C.). Generally, "relevant evidence" is evidence that is reasonably related, directly or indirectly, to the statutory criteria that apply to the issue under review. This description means the evidence meets or exceeds a minimum level of relevance necessary to be admitted for consideration, although it does not necessarily mean that the evidence has sufficient relevance to legally justify a particular conclusion. See Rule 12D-9.025(2)(b), F.A.C.

The Special Magistrate (SM) reviewed all evidence presented by the parties. In accordance with DOR guidelines, the Special Magistrate determined the evidence and testimony was relevant and credible to the valuation issue at hand. Thus, the evidence as presented (by the PA and petitioner) was admitted for consideration in relation to the appropriateness of the subject's valuation.

The PA demonstrated that they properly considered the eight criteria specified in Florida Statute 193.011, as follows:

- (1) Present cash value – the PA's market value reportedly assumes sale prices were adjusted downward to reflect costs of sale prior to incorporation of the sales data into property-specific valuation models; however, no specific evidence regarding this factor was provided within the PA's evidence but the concluded unit value is significantly lower than the indication from comparable sales;

- (2) Highest and best use –land use and building codes representing highest and best use of the property were applied (as identified on the subject’s Property Record Card), which were consistent with the current use; however, this is not applicable for the subject since the cell tower in question is an ancillary use;
- (3) Location – the subject was assigned a “neighborhood code” related to its specific location or market area. Frontage features influencing value are also considered through the land description coding and unit price applied in assessing the subject’s land component. The PA used sales of properties with similar locational features in determining value. When differences existed between the subject and the comparable locations, the PA indicated consideration was given as to the sales data representing an upper or lower unit of comparison relative to the subject; however, once again, this factor has limited to no applicability regarding the subject cell tower unless being compared with other properties that are not exclusively used for cell towers;
- (4) Quantity or size – the subject’s size was considered based primarily on land and building areas as identified on the subject’s PRC; however, the petitioner does make a valid case that the actual impacted area of the ground being used for the cell tower is significantly less than what is being used as an average area by the PA although the relevance of this factor is questionable;
- (5) Cost and present replacement value – the PA indicates replacement costs are incorporated into the Cost/Market hybrid approach utilized in the CAMA system. The subject’s estimated replacement cost new was provided within the PRC for the property as a church; however, given the cell tower improvement is valued as a ground lease, the improvements are not relevant on a replacement cost basis;
- (6) Condition – the PA considers the condition of the property through periodic site inspections. Accrued depreciation was deducted from the replacement cost new estimate based on the estimated effective age of the property. The depreciated cost new was established based on the “% good” coding noted on the PRC for the parent church property; however, the condition is not relevant for the subject ground lease housing the cell tower;
- (7) Income – the PA applied an income analysis based on available rental and statistical data from local data sources in the subject’s market area for the subject’s specific property type; and
- (8) Net proceeds of sale – the PA indicates costs of sale have been considered through their application of a 15% downward adjustment to sale prices incorporated into formulation of property-specific valuation models. However, there was no specific evidence presented to support that this adjustment was applied in the market value calculation. However, as stated in (1) above, the PA’s value indicates that an adjustment was applied given the data supported a much higher unit value via the sales comparison approach.

The SM determined the appraisal methodology used in making the assessment was appropriate and in compliance with criteria of F.S. 193.011, as well as consistent with professionally accepted appraisal practices. The PA’s analysis is supported from the sales comparison approach with limited support from the income approach based on the best available data. While the petitioner presented excellent data and analysis in support of a lower value, several comments are warranted.

The petitioner does not provide market evidence of any sales of cell tower properties selling or being assessed at less than \$100,000 to support the cause that the value attributable to the ground housing the cell tower is in excess of market value. The PA's sales, although different physically, do support the assessment. Additionally, PA is valuing the ground lease site in fee simple; therefore, actual contract rent and remaining lease term would be used in valuing the leased fee estate, which is not relevant in this case. The petitioner's analysis from an income analysis is tied to the business aspects of the cell tower with respect to potential sublease of additional carriers being added to the cell tower. The PA is tasked to assign real estate value only (based on supply and demand) with no business considerations. Therefore, the substantial weight of the evidence rests with the PA.

COL

Based on the evidence and testimony presented at the hearing, the Property Appraiser lawfully considered the eight criteria enumerated in Section 193.011, Florida Statutes and, therefore did present sufficient evidence to establish a presumption of correctness. Petitioner did not prove by a preponderance of the evidence that the Property Appraiser's just value does not represent just value nor did the Petitioner prove that the property appraiser's just valuation is arbitrarily based on appraisal practices that are different from the appraisal practices generally applied by the property appraiser to comparable property within the same county. The petitioner did not present competent, substantial evidence to overcome the presumption of correctness established by the Property Appraiser. Therefore, the petition is DENIED.



2433 Lee Road • Winter Park, Florida 32789-1755
(407) 628-0505 • FAX (407) 628-0523
E-mail: rpa@rpaflorida.com • www.rpaflorida.com

Doris Harris, Deputy Clerk to the Board
Value Adjustment Board
221 Palafox Place, Suite 130
Pensacola, Florida 32502-5843

June 23, 2014

Re: Application for Special Magistrate Services 2014
Both Real and Tangible Properties

Dear Ms. Harris:

I'm sorry to learn that you will no longer be administrating the proceedings. I very much enjoyed working with you back in 2002, 2006 and 2007. Please enjoy your well earned retirement. If I'm lucky enough to be selected again this year a very much look forward to working with Liz Carew.

I have been selected to serve as a Special Magistrate for both Okaloosa and Walton Counties this coming October and November (if needed for good cause hearings). If also selected by Escambia County, I would try to coordinate my travel plans to hopefully split some travel expenses. They are paying me \$125 per hour and I'm only requesting \$100 per hour from your Board. I very much enjoy visiting Pensacola and walking Palafox Street.

I look forward with positive anticipation to hopefully be selected to work with your VAB again. Included with this cover letter is my Special Magistrate application. If you require any additional information, please contact me.

Respectfully submitted,

A handwritten signature in black ink, reading "Robert Sutte".

Robert S. Sutte, CRE, MAI, SRA
State-Certified General Real Estate Appraiser RZ241

enclosures

PLEASE TYPE OR PRINT
IF MORE SPACE IS NEEDED, ATTACH ADDITIONAL SHEETS

- None

5. IF YOU ARE CURRENTLY A LICENSED FLORIDA REAL ESTATE BROKER OR A CERTIFIED OR LICENSED REAL ESTATE APPRAISER PURSUANT TO CHAPTER 475, FLORIDA STATUTES, PLEASE PROVIDE THE FOLLOWING INFORMATION:

A. DESIGNATION: state- certified general appraiser

LICENSE OR CERTIFICATION NUMBER: RZ241

DATE LICENSED OR CERTIFIED: 1987

- B. LIST EACH INSTANCE IN WHICH YOU HAVE BEEN FINED, REPRIMANDED, PLACED ON PROBATION, DISCIPLINED OR OTHERWISE PREVENTED FROM CONDUCTING BROKER OR APPRAISAL SERVICES BY THE FLORIDA REAL ESTATE COMMISSION OR THE FLORIDA REAL ESTATE APPRAISAL BOARD:

None

- C. LIST EACH ORGANIZATION RECOGNIZED BY THE REAL ESTATE APPRAISAL INDUSTRY, OR PROFESSIONALS IN THE APPRAISAL FIELD, IN WHICH YOU ARE CURRENTLY OR HAVE PREVIOUSLY BEEN A DESIGNATED MEMBER:

<u>ORGANIZATION</u>	<u>DESIGNATION</u>	<u>DATE OF DESIGNATION</u>	<u>MEMBERSHIP NUMBER</u>
Appraisal Institute	MAI, SRA	1970	4421
Counselors of Real Estate	CRE	1975	659

NOTE: PLEASE PROVIDE SUPPORTING DOCUMENTATION TO VERIFY EACH DESIGNATION. APPLICATIONS WILL NOT BE CONSIDERED UNTIL VERIFICATION IS RECEIVED BY THE OFFICE OF THE CLERK OF THE CIRCUIT COURT.

Please see attachments A and B

- D. LIST THE REQUIREMENTS, INCLUDING EXPERIENCE AND EDUCATION, NECESSARY TO OBTAIN EACH DESIGNATION LISTED ABOVE:

Lengthy, involving many years of hands-on experience, many courses and examinations and writing three demonstration reports.

- E. LIST ANY DISBARMENT, SUSPENSION OR ANY OTHER DISCIPLINARY ACTION WHICH YOU HAVE RECEIVED FROM ANY ORGANIZED BAR ASSOCIATION:

None

6.DESCRIBE EXPERIENCE YOU HAVE APPRAISING TANGIBLE PROPERTY:

Please note that I am primarily a residential and commercial real property valuation expert, but over the last 12 years in Florida I have had considerable experience hearing tangible personal property petitions in various Florida counties, including, Escambia, Santa Rosa, Okaloosa, and Walton. I would be pleased to serve in both capacities again for Escambia County.

7. LIST ANY EXPERIENCE AND/OR SPECIALTY FOR THE FOLLOWING PROPERTY:

<u>PROPERTY TYPE</u>	<u>EXPERIENCE/SPECIALTY</u>
RESIDENTIAL REAL PROPERTY	<u>various excluding time shares.</u>
COMMERCIAL REAL PROPERTY	<u>most commercial properties.</u>
TANGIBLE PROPERTY	<u>several types no specialty</u>
OTHER (PLEASE SPECIFY)	<u>land subdivision analyses.</u>

8. IF YOU HAVE PREVIOUSLY SERVED AS A SPECIAL MAGISTRATE, PLEASE PROVIDE THE FOLLOWING INFORMATION:

A. COUNTY DATE(S) SERVED CONTACT/TELEPHONE

<u>Brevard</u>	<u>2002 – 2014</u>	<u>Tammy Etheridge 321-637-6523</u>
<u>Walton</u>	<u>2007 – 2014</u>	<u>Dori Cordle – 850-892-8115</u>
<u>Okaloosa</u>	<u>2011 – 2014</u>	<u>Teresa Ward – 850-689-5000</u>
<u>Seminole</u>	<u>2013 – 2014</u>	<u>Terri Porter – 407-665-7662</u>
<u>Citrus</u>	<u>2013</u>	<u>Tifani White – 352-341-6455</u>

B. IF APPLICABLE, EXPLAIN WHY YOU NO LONGER SERVE AS A SPECIAL MAGISTRATE IN THE ABOVE COUNTIES:

Not Applicable

C. LIST EACH INSTANCE IN WHICH YOU HAVE BEEN DISMISSED, TERMINATED, OR DENIED APPOINTMENT AS A SPECIAL MAGISTRATE:

I no longer currently serve as a special magistrate in the following counties:

Orange – personalities, Santa Rosa – hourly rate requested, Escambia – to the best of my knowledge, politics.

9. LIST ANY PERSONAL OR BUSINESS RELATIONSHIP YOU HAVE EVER HAD WITH ANY OFFICER OR EMPLOYEE OF THE OFFICE OF THE PROPERTY APPRAISER, OFFICE OF THE CLERK OF THE CIRCUIT COURT, OFFICE OF THE COUNTY ATTORNEY, OR THE VALUE ADJUSTMENT BOARD:

None

10. LIST ANY ADDITIONAL INFORMATION WHICH QUALIFIES YOU TO SERVE AS A SPECIAL MAGISTRATE:

Honesty, integrity, punctuality, attention to detail, hard worker and good listener. I give the taxpayer or their representative as much time as they require to explain their situation, and provide their opinions.

11. PLEASE PROVIDE A WRITING SAMPLE. THIS SAMPLE MAY CONSIST OF ANY OPINION, LETTER, APPRAISAL, OR OTHER DOCUMENTATION THAT CONTAINS ONE (1) OR MORE WRITTEN PAGE(S) OF ORIGINAL MATERIAL.

Please see attachment C

THE UNDERSIGNED CERTIFIES, UNDER PENALTY OF DISQUALIFICATION FROM CONSIDERATION, THAT EACH ITEM CONTAINED IN THIS APPLICATION, OR OTHER DOCUMENT FURNISHED BY OR ON BEHALF OF THE APPLICANT IS TRUE AND COMPLETE AS OF THE DATE IT BEARS. THE UNDERSIGNED AUTHORIZES THE VALUE ADJUSTMENT BOARD TO OBTAIN INFORMATION FROM OTHER SOURCES TO VERIFY EACH ITEM CONTAINED HEREIN. THE UNDERSIGNED ACKNOWLEDGES THAT IF SELECTED HE/SHE WILL FOLLOW ALL REQUIREMENTS AND MANDATES OF LAW IN FULFILLING THE DUTIES OF SPECIAL MAGISTRATE TO THE VALUE ADJUSTMENT BOARD.

Robert Suttle
SIGNATURE OF APPLICANT

June 23, 2014
DATE



Real Property Analysts, Inc.

Page 1 of 3

2433 Lee Road • Winter Park, Florida 32789-1755
 (407) 628-0505 • FAX (407) 628-0523
 E-mail: rpa@rpaflorida.com • www.rpaflorida.com

**QUALIFICATIONS
 OF
ROBERT S. SUTTE, CRE, MAI, SRA**

Since 1962, Mr. Sutte has served as a real estate appraiser and consultant to a wide variety of private and public clients in eighteen states and the District of Columbia. His background includes both real property valuation and real estate counseling on the most efficient and profitable solutions to various real estate problems. Mr. Sutte has had training and experience in the field of finance and experience in designing environmentally acceptable mixed use land development plans.

RESIDENT OF: Winter Park, Florida

EDUCATION: Bachelor of Science Degree
 Business Administration (Concentration in Finance),
 Drake University, Des Moines, Iowa

MEMBER OF: Counselors of Real Estate (CRE)
 Appraisal Institute (MAI, SRA)

EMPLOYMENT: Real Property Analysts, Inc.
 2433 Lee Road
 Winter Park, Florida 32789
 (407) 628-0505
 (407) 628-0523 FAX
 rpa@rpaflorida.com
 www.rpaflorida.com

**APPRAISAL
 EXPERIENCE:** Mr. Sutte's appraisal experience includes preparation of market value estimates for use in conjunction with sales, acquisitions, leasing, mortgage lending, condemnation, real estate assessment equalization, charitable donations for conservation purposes and estate settlement. All types of commercial, industrial and residential land and almost all types of improved property have been involved. In many instances, the valuation of encumbered ownerships and the appraisal of leasehold or leased fee interests have been part of the appraisal problem.

ROBERT S. SUTTE, CRE, MAI, SRA (Continued)

A partial list of property types which have been appraised includes:

Diminution in Value Studies	Outdoor Advertising Signs
Conservation easement encumbrances	Hotels-Motels
Most types of land	Banking facilities
Salt and freshwater islands	RV/Mobile Home Parks
Ocean and Gulf front property	Preparatory schools and colleges
Silviculture and agriculture land	Radio Transmission Facilities
Various types of residential property	Railroad property
Commercial and institutional buildings	Gas stations-convenience stores
Shopping centers and retail stores	Warehouses
Restaurants	Truck terminals
Churches	Manufacturing plants
Nursing homes	Special purpose property

**CONSULTING
EXPERIENCE:**

Mr. Sutte's consulting experience has encompassed many real estate disciplines. Counseling services rendered have involved guidance on individual property leasing, ownership and development problems. A partial list of types of assignments completed includes:

Estimates of marketability and economic feasibility

Highest and best and most profitable use analysis

Condominium conversion studies

Land planning and development strategies

Analysis of potential zoning and land use changes

Commercial, retail, motel, apartment and industrial space rental surveys

Direct mail and field interview studies to gauge marketability for various types of real estate



ROBERT S. SUTTE, CRE, MAI, SRA (Continued)

LICENSES: Licensed Real Estate Broker - State of Florida (BK232449)
State-Certified General Real Estate Appraiser - State of Florida (RZ241)
State-Certified General Real Property Appraiser - State of Georgia (004009)
State-Certified General Appraiser Instructor - State of Florida (GA5069)
State-Certified Real Estate Instructor - State of Florida (ZH1001982)
AQB Certified USPAP Instructor - The Appraisal Foundation (10485)

CLIENTS SERVED: Mr. Sutte has appraised and consulted for a variety of clients, including property owners, investors, attorneys, financial institutions, insurance companies, and federal, state and local government agencies. A partial list of clients served and references are available upon request.

COURT TESTIMONY: Qualified as an expert witness in federal and state courts including the United States Bankruptcy Court Middle District Florida and before boards of appeal. Testimony was provided in connection with market value, condemnation, deficiency judgements, tax abatements, rate setting, and appraiser ethical conduct. In addition, has served as a Special Magistrate for the Value Adjustment Boards of Brevard, Citrus, Escambia, Orange, Santa Rosa, and Walton Counties.

TEACHING EXPERIENCE: Membership in the national faculty of the Appraisal Institute since 1972, as an instructor for various real estate courses and seminars, including Business Practices and Ethics and certified instructor of the Uniform Appraisal Standards for Federal Land Acquisitions, Washington, D.C., 2000 (the Yellow Book). Appraisal Foundation Appraisal Qualifications Board Certified, Uniform Standards of Professional Appraisal Practice Instructor.

Florida Realtors[®] faculty member since 1982, as instructor for the Graduate Realtors Institute (GRI) and the Continuing Education Express seminar series. Also served for 9 years as an adjunct faculty member of the College of Extended Studies at the University of Central Florida.



IMPORTANT EDUCATION INFORMATION**rpa****Real Property Analysts, inc.**

2433 Lee Road, Winter Park (Orlando) Florida 32789-1755
 (407) 628-0505; (407) 628-0523 FAX
 Email: rpa@rpaflorida.com;www.rpaflorida.com

**ROBERT S. SUTTE, CRE, MAI, SRA****REAL ESTATE EDUCATION INSTRUCTION****COURSES**

7 Hour National USPAP Update	General Appraiser Market Analysis & Highest and Best Use
3 Hour Florida Law Update	Advanced Sales Comparison & Cost Approaches
15 Hour National USPAP Course	Advanced Market Analysis and Highest and Best Use
Business Practices and Ethics	Advanced Concepts & Case Studies
Basic Appraisal Principles	Residential Sales Comparison and Income Approaches
Basic Appraisal Procedures	Residential Market Analysis and Highest & Best Use
General Applications	Residential Site Valuation and Cost Approach
Advanced Applications	General Appraiser Site Valuation & Cost Approach
	General Appraiser Sales Comparison Approach
	Yellow Book: Uniform Standards Federal Land Acquisitions

SEMINARS

Appraising the Appraisal: Appraisal Review-General (7 hours)
 Appraising the Appraisal: Appraisal Review-Residential (7 hours)
 Appraisal of Local Retail Properties (General) (7 hours)
 Litigation Skills for the Appraiser (General) (7 hours)
 Marketability Studies: 6 Step Process & Basic Applications (7 hours)
 A Lenders Perspective: The Role of the Appraisal in the Lending Process (2 hours)
 Spotlight on USPAP: Hypothetical Conditions & Extraordinary Assumptions (2 or 3 hours)
 Agreement for Services – Instructions for Use (2 hours)
 Appraisal Review (2 hours)
 Common Errors and Issues (2 hours)
 Confidentiality (2 hours)
 Reappraising, Readdressing, Reassigning: What to Do and Why? (2 hours)
 Workfiles - Who, What, Where, When, How, and Why? (1 hour)

Findings of Fact:

This petition was rescheduled to be heard at 9:30 AM on the morning of November 7, 2013. Mr. Murray Briggs petitioner provided detailed, well thought out extensive evidence with the primary issue being that the assessed value of the land included with the improved single family dwelling at 10 Moreno Point Road, Holiday Isle, Destin, Florida. According to the petitioner, the assessed value for the Briggs dwelling was not an issue. Mr. Pat Castille, CFE, also presented detailed, well thought out extensive evidence on behalf of the property appraiser's office, with the primary issue being the assessed value for the total subject property. Mr. Pete Smith, Property Appraiser, also provided testimony.

Mr. Briggs started his testimony by emphasizing that his subject lot 10 was extremely unique to do its riparian lines which extend in a triangular shape and terminate out into the Old Pass Lagoon. He argued that due to these riparian lines his 60 feet of frontage along the water effectively was reduced to 40 feet. Also due to these unique riparian lines, the maximum docking area that could be created for his lot 10 was 12' x 30', thereby only allowing slippage for one boat with a maximum length of 35 feet. Mr. Briggs pointed out that the adjoining lot to the South, lot 9, only had 30 feet of water frontage, but its water rights would allow slippage for a boat up to 80 feet in length. He also said that the lot 9 slippage could accommodate 2 vessels and his slippage would allow only one vessel.

Of primary importance, Mr. Briggs expressed the opinion that due to these riparian lines there were no waterfront lots in the Holiday Isle's subdivision that were physically, comparable to his. Here he was implying that the property appraiser selected comparable sales were not comparable and should not be relied upon.

It was also pointed out by Mr. Briggs, that the lot 9 improved property sold in October 2012 for \$980,000. Mr. Briggs noted that the assessed value for lot 9 land was \$206,862, compared to the assessed value for his land of \$224,384. Mr. Briggs argued that his land should be assessed at \$206,638 in accordance with his calculations on his evidence page A (an application of the 65%-35% property appraiser rule). This would be a reduction in the land assessed value of \$17,746 which Mr. Briggs rounded and called 17,500. It was his request that his land value be reduced by \$17,500.

Mr. Briggs also provided opinion concerning the differences between God made water frontage and man-made water frontage, i.e. the Holiday Isle canal system. He noted that canal front lots are basically not regulated, and the upland can be dredged to create boat slips without undue expense and government supervision. He also said that vacant waterfront lots are more valuable because there is no building demolition expense involved. He pointed out that his lot 10 location is less desirable because of the considerable distance to be traveled to reach the mouth of the harbor.

The only comparable sale that Mr. Briggs discussed was that of the adjoining lot 9 property. He did, however, present many comments which were critical of the property appraiser's evidence. Mr. Briggs also expressed his displeasure for having to provide his evidence to the property appraiser 15 days prior to the hearing with the property appraiser only being required to provide their evidence to him within 7 days. This was discussed by both sides, and it was recognized that these requirements are by Florida law. Mr. Briggs objected to receiving his evidence from the property appraiser only 10 days before the October 28, 2013 scheduled hearing. He said because of the short amount of time he had to review the evidence he requested his hearing be rescheduled, which was November 7, 2013.

Mr. Pat Castille, CFE, supervisor residential department, property appraiser's office, reported that the 2013 original Briggs just value (trim notice) was \$331,024. Discussion took place between Mr. Castille and Mr. Briggs and this just value was reduced, primarily because of the shallow water front amenity, to \$306,865. This was the total subject property assessment for both the land and the dwelling.

Mr. Castille presented four year 2012 sales of improved waterfront properties which indicated a mean comparable sale price of \$440,000 or \$171 per square foot and a median comparable sale price of \$422,500 or a price of \$182 per square foot and compared this to the current subject valuation of \$306,865 or \$146 per square foot. He noted that comparing the mean comparable sale price of \$440,000 to the subject assessed value of \$306,865 indicates that the comparable sale prices are about \$130,000 higher value than the subject value. Mr. Castille went on to present, three vacant lot sales, which also took place in year 2012. Sales 1 and 3 were canal front and sale 2 was an interior lot with an across Gulf shore Drive Gulf of Mexico view. The mean sale price was \$355,666, with the median sale price being \$345,000 as compared to the Briggs total assessed value of \$306,865. It was Mr. Castillo's opinion that these 3 sales of vacant Holiday Isle lots also indicate that the total improved subject assessed value of \$306,865 is significantly less than market value.

Mr. Castille also noted that it was not practical and possible for him to identify riparian lines associated with comparable waterfront sales. He recognized that the riparian lines do effect the quality of the water frontage, but felt that his estimate of value which approximated about \$130,000 less than market value was compensated for a the riparian lines issue .

Mr. Pete Smith provided some discussion and opinion regarding the timeliness of evidence submission, the assessed value of the Briggs property versus its market value, and the possible inequitableness of the lot 9 land assessed value versus the subject. Mr. Smith expressed the opinion that this is a value adjustment board, not a board of equalization. He also provided the opinion that the special magistrate is obligated to provide opinion regarding the appropriateness of the total property valuation not land only. Also Mr. Smith asked Mr. Briggs if he would sell his improved property for \$306,865. Mr. Briggs said no and that it was his opinion that his property was most likely worth \$750,000, but he would not sell it for that amount. He stated that his father had built this home and it had sentimental value in excess of this amount.

Petition Number 21 (Page 3 of 3)

Based upon careful consideration of the above information, and all evidence provided by both the petitioner and the property appraisers, the following special magistrate opinions and observations were developed.

* Insufficient information was provided by the petitioner to support a change in the assessments.

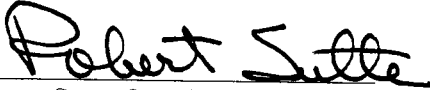
* No legal information was provided to indicate justification for consideration of the value estimated for the subject land only.

* The issue of limited waterfront utility due to riparian lines was recognized, understood, and considered. The limitation for storage of a vessel with a maximum length of 35 feet was also considered. This limitation of value was considered compensated for by the property appraiser's estimate of a property value about \$130,000 less than average prices paid for similar nearby Holiday Isle waterfront homes.

Conclusions of Law :

The petitioner did not prove by clear and convincing evidence that the property appraiser's value is in excess of just value. It is recommended that the petition be denied and the value be upheld.

This conclusion of law, that relief is denied, and this decision is being issued in order that any right the petitioner may have, to bring action in circuit court is not impaired.


Robert Sutte Special Magistrate

11-29-13
Date



Pam Childers

Clerk of the Circuit Court and Comptroller, Escambia County

Clerk of Courts • County Comptroller • Clerk of the Board of County Commissioners • Recorder • Auditor

Value Adjustment Board Organizational Meeting

6.

Meeting Date: 09/09/2014

Issue: Selection of Attorney Special Magistrate

From: Pam Childers, Clerk of the Circuit Court & Comptroller

Organization: Clerk & Comptroller's Office

Information

Recommendation:

That the Board select one of the following Applicants for Attorney Special Magistrate for 2014 and authorize the Chairman to execute a Contract for Services of Special Magistrate, in accordance with Chapter 194.035 (1), Florida Statutes:

- Larry A. Matthews
- Phillip A. Pugh

Background:

Attachments

Phillip A. Pugh

Larry A. Matthews



LITVAK BEASLEY WILSON & BALL
LLP
ATTORNEYS AT LAW

KRAMER A. LITVAK *
ROBERT O. BEASLEY
PAUL A. WILSON†
BRADEN K. BALL, JR.

†ALSO ADMITTED IN ALABAMA
‡LL.M. IN TAXATION
*BOARD CERTIFIED TAX ATTORNEY
§BOARD CERTIFIED REAL ESTATE
ATTORNEY

226 East Government Street
Pensacola, Florida 32502-3503
www.lawpensacola.com
TELEPHONE: (850) 432-9818
FACSIMILE: (850) 432-9830

PENNY HENDRIX
PHILLIP A. PUGH ‡§

June 30, 2014

VIA HAND DELIVERY

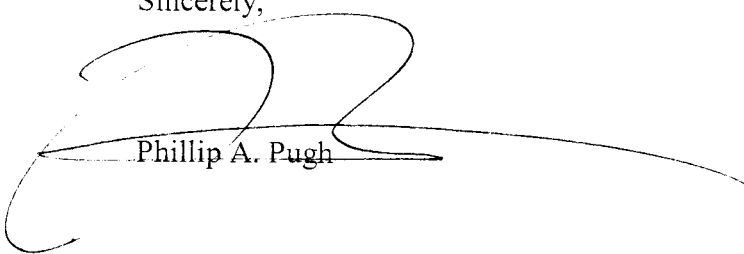
Honorable Pam Childers:
Clerk of the Circuit Court and Comptroller
Attn: Lizabeth Carew, Clerk to the Board's Office
Value Adjustment Board
221 Palafox Place, Suite 130
Pensacola, FL 32502-5843

RE: 2014 Special Magistrate to the Value Adjustment Board

Dear Mrs. Carew:

I would like to be considered for the position of Special Magistrate to the Escambia County Value Adjustment Board for the 2014 tax year. I served as the Special Magistrate to the Santa Rosa County Value Adjustment Board for 2012 and 2013. I have enclosed my resume. I appreciate your consideration. Please let me know if you need any additional information. I look forward to hearing from you.

Sincerely,



Phillip A. Pugh

Enclosure

PHILLIP A. PUGH

3 5 2 6 R I V E R V I E W D R I V E P A C E , F L 3 2 5 7 1

8 5 0 . 5 3 0 . 1 8 4 6

OBJECTIVE

To serve my clients to the best of my ability and to be a productive reliable member of my firm and my community.

EXPERIENCE

- | | | |
|---------------|---|-----------------------|
| 2012 and 2013 | Special Magistrate to the
Value Adjustment Board | Santa Rosa County, FL |
| 2010-Present | Litvak Beasley & Wilson, LLP
<i>Associate Attorney</i> | Pensacola, FL |
| | <ul style="list-style-type: none">■ Real Estate Transactions■ Estate Planning, Trust & Probate■ Corporate Law■ Commercial and Real Estate Litigation | |
| 2001-2010 | Emmanuel, Sheppard & Condon
<i>Associate Attorney</i> | Pensacola, FL |
| | <ul style="list-style-type: none">■ Real Estate Transactions■ Estate Planning, Trust & Probate■ Corporate Law■ Commercial and Real Estate Litigation | |

EDUCATION

- | | | |
|------|--|-----------------|
| 2001 | Cumberland School of Law | Birmingham, AL |
| | <ul style="list-style-type: none">■ Juris Doctorate■ Member - Cumberland Law Review | |
| 1998 | Florida State University | Tallahassee, FL |
| | <ul style="list-style-type: none">■ B.S. – Finance, Magna Cum Laude | |
| 1996 | University West Florida | Pensacola, FL |
| | <ul style="list-style-type: none">■ Associate of Arts | |

CERTIFICATIONS

- Board Certified in Real Estate Law, Florida Bar since 2007

COURT ADMITTANCES

- Admitted to all Florida State Courts
- Admitted to all Alabama State Courts
- Admitted to the Northern District of Florida Federal Courts

COMMUNITY & CIVIC INVOLVEMENT

- Member of Woodbine Baptist Church
- Former Director of Angel Food Ministries Program, East Brent Baptist Church
- Home Builders Association of West Florida, Associate Member

PROPOSED COMPENSATION

- \$125 per hour
- Travel time within Escambia County will not be billed
- No minimum hours

REFERENCES

- T.A. Borowski, Jr., Esq. of Borowski & Traylor, P.A., 25 W. Cedar St., Suite 525, Pensacola, FL 32502. 850-429-2027
- Steven E. Quinnell, Esq. of Elder Law Firm, 101 E. Government St., Pensacola, FL 32502 850-432-4386
- John Trawick, Esq. of Coastal Association Law Group, 139 E. Government St., Pensacola, FL 32502

Larry A. Matthews*+
Raymond F. Higgins, III
M. Kevin Hausfeld*

Thomas R. Jenkins, of Counsel*+

* Also Admitted in Alabama
- Certified Circuit Court Mediator
- Board Certified Civil Trial Lawyer



Post Office Box 13145
Pensacola, FL 32591

114 East Gregory Street
Pensacola, FL 32502

(850) 434-2200 Phone
(850) 434-2600 Fax

June 16, 2014

Hon. Pam Childers
Clerk of the Circuit Court & Comptroller
Attn: Lizabeth Carew, Clerk to the Board's Office
Value Adjustment Board
221 Palafox Place, Suite 130
Pensacola, FL 32502-5843

Re: Value Adjustment Board Special Magistrate

Dear Ms. Childers:

I have enclosed my application, resume and writing sample. My references include the following:

J. Andrew Talbert, Esq.
Quintairos, Prieto, Wood & Boyer, P.A.
114 E. Gregory Street, 2nd Floor
Pensacola, FL 32502
850-434-6490

Douglas F. Miller, Esq.
Guy E. Burnette, Jr., P.A.
109 E. Garden Street, Ste. B
Pensacola, FL 32502
850-912-6420

Michael J. Stebbins, Esq.
504 N. Baylen Street
Pensacola, FL 32501
850-434-9922

With best regards, I am

Sincerely,

MATTHEWS, HIGGINS,
HAUSFELD & FENIMORE

Larry A. Matthews
Lmatthews@matthewshigginslaw.com

Enclosures

Mailing Address:
Post Office Box 13145
Pensacola, FL 32591
Fax (850) 434-2600

Main Office:
114 E. Gregory Street
Pensacola, FL 32502
Tel. (850) 434-2200

Panama City, FL Office:
475 Harrison Avenue
Panama City, FL 32401
Tel. (850) 769-7200

Mobile, AL Office:
910 Government Street
Mobile, AL 36604
Tel. (251) 434-6711

**Special Magistrate Application
Escambia County Value Adjustment Board**

**PLEASE TYPE OR PRINT
IF MORE SPACE IS NEEDED, ATTACH ADDITIONAL SHEETS**

1. PLEASE PROVIDE THE FOLLOWING GENERAL INFORMATION:

NAME: Larry A. Matthews
SOCIAL SECURITY OR TAXPAYER IDENTIFICATION NUMBER: [REDACTED]
HOME ADDRESS: 2837 Bay Street, Gulf Breeze, FL 32563
BUSINESS NAME: Matthews, Higgins, Hausfeld & Fenimore
BUSINESS ADDRESS: 114 E. Gregory St., Pensacola, FL 32502
PHONE: 434-2200 CELL: 384-3486
EMAIL: lmatthews@matthewshigginslaw.com

2. ARE YOU AN ELECTED OR APPOINTED OFFICIAL OR EMPLOYEE OF ESCAMBIA COUNTY? YES X NO

3. APPLICATION FOR: X ATTORNEY SPECIAL MAGISTRATE
 APPRAISER SPECIAL MAGISTRATE

HOURLY RATE \$ 150 MINIMUM HOURS no minimum

4. IF YOU ARE A MEMBER OF THE FLORIDA BAR, PLEASE PROVIDE THE FOLLOWING INFORMATION:

A. BAR NUMBER: 339601 ADMISSION DATE: 5/11/82

- B. LIST ALL SOURCES OF YOUR KNOWLEDGE, INCLUDING EDUCATION AND EXPERIENCE:

See attached resume

- C. LIST ANY DISBARMENT, SUSPENSION OR ANY OTHER DISCIPLINARY ACTION WHICH YOU HAVE RECEIVED FROM ANY ORGANIZED BAR ASSOCIATION:

None

5. IF YOU ARE CURRENTLY A LICENSED FLORIDA REAL ESTATE BROKER OR A CERTIFIED OR LICENSED REAL ESTATE APPRAISER PURSUANT TO CHAPTER 475, FLORIDA STATUTES, PLEASE PROVIDE THE FOLLOWING INFORMATION:

A. DESIGNATION: _____

LICENSE OR CERTIFICATION NUMBER: _____

DATE LICENSED OR CERTIFIED: _____

- B. LIST EACH INSTANCE IN WHICH YOU HAVE BEEN FINED, REPRIMANDED, PLACED ON PROBATION, DISCIPLINED OR OTHERWISE PREVENTED FROM CONDUCTING BROKER OR APPRAISAL SERVICES BY THE FLORIDA REAL ESTATE COMMISSION OR THE FLORIDA REAL ESTATE APPRAISAL BOARD:

- C. LIST EACH ORGANIZATION RECOGNIZED BY THE REAL ESTATE APPRAISAL INDUSTRY, OR PROFESSIONALS IN THE APPRAISAL FIELD, IN WHICH YOU ARE CURRENTLY OR HAVE PREVIOUSLY BEEN A DESIGNATED MEMBER:

<u>ORGANIZATION</u>	<u>DESIGNATION</u>	<u>DATE OF DESIGNATION</u>	<u>MEMBERSHIP NUMBER</u>
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

NOTE: PLEASE PROVIDE SUPPORTING DOCUMENTATION TO VERIFY EACH DESIGNATION. APPLICATIONS WILL NOT BE CONSIDERED UNTIL VERIFICATION IS RECEIVED BY THE OFFICE OF THE CLERK OF THE CIRCUIT COURT.

- D. LIST THE REQUIREMENTS, INCLUDING EXPERIENCE AND EDUCATION, NECESSARY TO OBTAIN EACH DESIGNATION LISTED ABOVE:

- E. LIST ANY DISBARMENT, SUSPENSION OR ANY OTHER DISCIPLINARY ACTION WHICH YOU HAVE RECEIVED FROM ANY ORGANIZED BAR ASSOCIATION:

6. DESCRIBE EXPERIENCE YOU HAVE APPRAISING TANGIBLE PROPERTY:

Involvement in commercial litigation, mediations, disputes with insurers/insureds on valuation issues which often included working with experts on valuation.

7. LIST ANY EXPERIENCE AND/OR SPECIALTY FOR THE FOLLOWING PROPERTY:

<u>PROPERTY TYPE</u>	<u>EXPERIENCE/SPECIALTY</u>
RESIDENTIAL REAL PROPERTY	<u>Occasional real estate closings, represent</u> <u>buyer/seller</u>
COMMERCIAL REAL PROPERTY	<u>Occasional real estate closings, represent</u> <u>buyer/seller</u>
TANGIBLE PROPERTY	_____
OTHER (PLEASE SPECIFY)	_____

8. IF YOU HAVE PREVIOUSLY SERVED AS A SPECIAL MAGISTRATE, PLEASE PROVIDE THE FOLLOWING INFORMATION:

<u>A. COUNTY</u>	<u>DATE(S) SERVED</u>	<u>CONTACT/TELEPHONE</u>
<u>Escambia</u>	<u>2013/14</u>	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

B. IF APPLICABLE, EXPLAIN WHY YOU NO LONGER SERVE AS A SPECIAL MAGISTRATE IN THE ABOVE COUNTIES:

C. LIST EACH INSTANCE IN WHICH YOU HAVE BEEN DISMISSED, TERMINATED, OR DENIED APPOINTMENT AS A SPECIAL MAGISTRATE:

9. LIST ANY PERSONAL OR BUSINESS RELATIONSHIP YOU HAVE EVER HAD WITH ANY OFFICER OR EMPLOYEE OF THE OFFICE OF THE PROPERTY APPRAISER, OFFICE OF THE CLERK OF THE CIRCUIT COURT, OFFICE OF THE COUNTY ATTORNEY, OR THE VALUE ADJUSTMENT BOARD:

10. LIST ANY ADDITIONAL INFORMATION WHICH QUALIFIES YOU TO SERVE AS A SPECIAL MAGISTRATE:

11. PLEASE PROVIDE A WRITING SAMPLE. THIS SAMPLE MAY CONSIST OF ANY OPINION, LETTER, APPRAISAL, OR OTHER DOCUMENTATION THAT CONTAINS ONE (1) OR MORE WRITTEN PAGE(S) OF ORIGINAL MATERIAL.

THE UNDERSIGNED CERTIFIES, UNDER PENALTY OF DISQUALIFICATION FROM CONSIDERATION, THAT EACH ITEM CONTAINED IN THIS APPLICATION, OR OTHER DOCUMENT FURNISHED BY OR ON BEHALF OF THE APPLICANT IS TRUE AND COMPLETE AS OF THE DATE IT BEARS. THE UNDERSIGNED AUTHORIZES THE VALUE ADJUSTMENT BOARD TO OBTAIN INFORMATION FROM OTHER SOURCES TO VERIFY EACH ITEM CONTAINED HEREIN. THE UNDERSIGNED ACKNOWLEDGES THAT IF SELECTED HE/SHE WILL FOLLOW ALL REQUIREMENTS AND MANDATES OF LAW IN FULFILLING THE DUTIES OF SPECIAL MAGISTRATE TO THE VALUE ADJUSTMENT BOARD.


SIGNATURE OF APPLICANT

6-16-14
DATE

LARRY A. MATTHEWS
Matthews, Higgins, Hausfeld & Fenimore
114 East Gregory Street
Pensacola, FL 32502
850-434-2200
850-434-2600 facsimile
lmatthews@matthewshigginslaw.com

EDUCATION

Florida State University Tallahassee, Florida	Juris Doctor Honors	1981
University of Florida Gainesville, Florida	Bachelor of Science, Accounting Honors	1976

EXPERIENCE

Matthews, Higgins, Hausfeld & Fenimore Pensacola & Panama City, Florida	Partner	2012- present
Bozeman, Jenkins & Matthews, P.A. Pensacola & Ft. Walton Beach, Florida	Shareholder	1993 - 2011
Jenkins & Matthews Pensacola, Florida	Partner	1992 - 1993
Beggs & Lane Pensacola, Florida	Partner	1987 - 1992
Emmanuel, Sheppard & Condon Pensacola, Florida	Associate	1985 - 1987
Holland & Knight Tampa, Florida	Associate	1982 - 1985
Fowler, White et al. Tampa, Florida	Associate	1981 - 1982

NATURE OF PRACTICE

Mr. Matthews specializes in general civil litigation practice with an emphasis in the defense of personal injury matters including automobile negligence, professional negligence, premises liability, products liability, employment law and civil rights litigation. In addition, Mr. Matthews has experience in commercial litigation including insurance coverage matters, real property, and fire and casualty matters, with a recent concentration in toxic tort litigation and complex case/class action litigation.

SPECIAL QUALIFICATIONS

Board Certified Civil Trial Lawyer (Florida)	Certified Public Accountant (inactive)
Certified Circuit Court Mediator (Florida)	

PROFESSIONAL ORGANIZATIONS

The Florida Bar (1982)	American Trial Lawyers Association
Alabama State Bar (1994)	American Board of Trial Advocates
U.S. Supreme Court	Florida Defense Lawyers Association
U.S. Court of Appeals for the Eleventh Circuit	The Federal Bar Association
U.S. District Court, Northern, Middle and Southern Districts of Florida	Tax Court
U.S. District Court, Southern District of Alabama	American Inns of Court

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

Appeal Case No.: 09-13954-B

**BRIAN MOORE, as Personal
Representative on behalf of the
Estate of Bernard P. Rice, deceased,**

L.T. Case No.: 5:08cv343/RS/MD

Appellant,

v.

**NORTH AMERICA SPORTS, INC., a
foreign corporation d/b/a World
Triathlon Corporation, also d/b/a
Ironman Triathlon, and also d/b/a Ford
Ironman Florida, and f/k/a Ironman
North America, and USA TRIATHLON,
a foreign corporation,**

Appellees.

BRIEF OF APPELLEES

**On Appeal from the United States District Court
Northern District of Florida**

**Larry A. Matthews
Shane M. Dean
Jason B. Onacki
BOZEMAN, JENKINS & MATTHEWS, P.A.
114 East Gregory Street (32502)
Post Office Box 13105
Pensacola, FL 32591-3105
(850) 434-6223 Telephone
(850) 434-5242 Facsimile
Attorneys for Appellees**

**CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF
INTERESTED PERSONS**

Non-governmental corporate parties to this proceeding:

1. North America Sports, Inc. has no parent corporation nor does any publicly held corporation own any North America Sports, Inc. stock.
2. USA Triathlon has no parent corporation nor does any publicly held corporation own any USA Triathlon stock.

Persons and entities known to Appellees to have an interest in the outcome of this action:

1. Boggs, John N., Esq., Counsel for Appellant
2. Bozeman, Jenkins & Matthews, P.A., Counsel for Appellees
3. The Honorable Miles Davis, U.S. Magistrate Judge
4. Dean, Shane M., Esq., Counsel for Appellees
5. Estate of Bernard P. Rice, Appellant
6. Matthews, Larry A., Esq., Counsel for Appellees
7. Moore, Brian (as Personal Representative of the Estate of Bernard P. Rice).
Appellant
8. North America Sports, Inc., Appellee
9. Onacki, Jason B., Esq., Counsel for Appellees

Appeal Case No.: 09-13954-B Brian Moore V. North America Sports, Inc.
L.T. CaseNo.: 5:08cv343/RS/MD

10. Perwin, Joel S., Esq., Counsel for Appellant
11. Joel S. Perwin, P.A., Counsel for Appellant
12. Santa Maria, Diana, Esq., Counsel for Appellant
13. Diana Santa Maria, P.A., Counsel for Appellant
14. Sims, Dorothy C., Esq., Counsel for Appellant
15. Sims & Stakenborg, P.A., Counsel for Appellant
16. The Honorable Richard Smoak, U.S. District Judge
17. USA Triathlon, Appellee
18. World Triathlon Corporation

I HEREBY CERTIFY the above constitutes a complete list of interest persons
and entities to this appeal as described in 11th Cir. R. 28-1(b) and 11th Cir. R. 26.1-1.

/s/ Larry A. Matthews
Larry A. Matthews
Florida Bar No.: 0339601
Shane M. Dean
Florida Bar No.: 499889
Jason B. Onacki
Florida Bar No.: 0698016

TABLE OF CONTENTS

	<u>Page(s)</u>
CERTIFICATE OF INTERESTED PARTIES	C1-C2
STATEMENT REGARDING ORAL ARGUMENT	i
TABLE OF CONTENTS	ii-iii
TABLE OF CITATIONS	iv-v
STATEMENT OF JURISDICTION	vi
STATEMENT OF ISSUES	1
(A) Whether Plaintiff's Motion to Remand was properly denied because removal was timely, and, if not, was such error procedural and therefore not warrant a new trial where the district court had jurisdiction at the time judgment was rendered.	
(B) Whether evidence rebutting Plaintiff's claim for net accumulations was properly admitted under the circumstances created by Plaintiff, and if not, did the error substantially prejudice the outcome of trial.	
(C) Whether media coverage prevented Plaintiff from receiving a fair trial.	
(D) Whether Plaintiff's Motion for Summary Judgment was properly denied where there was evidence that decedent entered several releases and waivers.	
STATEMENT OF THE CASE	2
(i) Course of Proceedings	2

(ii) Statement of Facts	3
(iii) Standard of Review	18
SUMMARY OF ARGUMENT	19
ARGUMENT	20
(A) Plaintiff's Motion to Remand was properly denied because removal was timely, and if not, such error was procedural and therefore does not warrant a new trial	20
(B) The trial court did not abuse its discretion by allowing the questioning of Plaintiff's witnesses as to evidence rebutting Plaintiff's claim for net accumulations, and any such claimed error did not substantially prejudice the outcome of trial	26
(C) Media coverage had no influence on Plaintiff receiving a fair trial	31
(D) Plaintiff's Motion for Summary Judgment was properly denied because there was evidence that Plaintiff executed enforceable releases and waivers	35
CONCLUSION	40
CERTIFICATE OF COMPLIANCE	41
CERTIFICATE OF SERVICE	42

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page(s)</u>
<i>Baker v. Firestone & Rubber Co.</i> , 537 F.Supp. 244, 245-47 (S.D.Fla. 1982)	24
<i>Banfield v. Louis</i> , 589 So.2d 441, 444-45 (Fla. 4th DCA 1991)	36, 37
<i>Bennett v. United States Cycling Federation</i> , 193 Cal.App.3d 1485, 239, Cal.Rptr. 55 (Cal.Ct.App.1987)	37
<i>Bosky v. Kroger Texas, LP</i> , 288 F.3d 208, 211 (5th Cir.2002)	23
<i>Boyle v. County of Kern</i> , 2008 WL 220413 (E.D.Cal. 2008)	30
<i>Caterpillar Inc. v. Lewis</i> , 519 U.S. 61, 76, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996).	25
<i>CSX Transp., Inc. v. Hensley</i> , --- U.S. ----, 129 S.Ct. 2139, 2141, 173 L.Ed.2d 1184 (2009)	29
<i>Estes v. U.S.</i> , 335 F.2d 609, 615 (5 Cir. 1964)	31
<i>Estevez-Gonzalez v. Kraft, Inc.</i> , 606 F.Supp. 127, 129 (S.D.Fla. 1985)	24
<i>Fioretti v. Massachusetts General Life Ins. Co.</i> , 53 F.3d 1228, 1235 (11 th Cir. 1995)	36
<i>Foster v. Resources for Human Development, Inc.</i> , 2007 WL 2225811 (M.D.Fla. July 31, 2007)	22, 24
<i>Gordon v. U.S.</i> , 438 F.2d 858, 873 (5th Cir.), cert. denied, 404 U.S. 828, 92 S.Ct. 139, 30 L.Ed.2d 56, cert. denied, 404 U.S. 828, 92 S.Ct. 140, 30 L.Ed.2d 56 (1971)	32

<i>Greer v. Miller</i> ,	29, 32
483 U.S. 756, 767 n. 8, 107 S.Ct. 3102, 3109 n. 8, 97 L.Ed.2d 618 (1987)	
<i>Huffman v. Saul Holdings, LP</i> ,	23
194 F.3d 1072, 1078 (10th Cir.1999)	
<i>King v. Gulf Oil Co.</i> ,	28
581 F.2d 1184, 1186 (5th Cir. 1978)	
<i>Lee v. Altamil Corp.</i> ,	24
457 F.Supp. 979, 981 (M.D.Fla. 1978)	
<i>Lowery v. Alabama Power Co.</i> ,	4-5, 20-25*
483 F.3d 1184, 1219 (11th Cir. 2007)	
<i>Okura v. United States Cycling Federation</i> ,	37
186 Cal.App.3d 1462, 1468, 231 Cal.Rptr. 429, 432 (Cal.Ct.App.1986);	
<i>Proctor v. Fluor Enterprises, Inc.</i> ,	28
494 F.3d 1337, 1352 (11th Cir. 2007)	
<i>Wagner v. Oerlikon, USA, Inc.</i> ,	22
2008 WL 2262041 (M.D.Fla. May 30, 2008)	

OTHER AUTHORITIES

28 U.S.C. § 1291	vi
28 U.S.C. § 1446(b)	3, 23, 25
Fed.R.Evid. 103	28
Fed.R.Civ.P. 61	28
Mont. Code Ann. § 28-3-102	36

STATEMENT OF THE ISSUES

- A. WHETHER PLAINTIFF'S MOTION TO REMAND WAS PROPERLY DENIED BECAUSE REMOVAL WAS TIMELY, AND, IF NOT, WAS SUCH ERROR PROCEDURAL AND THEREFORE NOT WARRANT A NEW TRIAL WHERE THE DISTRICT COURT HAD JURISDICTION AT THE TIME JUDGMENT WAS RENDERED.**
- B. WHETHER EVIDENCE REBUTTING PLAINTIFF'S CLAIM FOR NET ACCUMULATIONS WAS PROPERLY ADMITTED UNDER THE CIRCUMSTANCES CREATED BY PLAINTIFF, AND IF NOT, DID THE ERROR SUBSTANTIALLY PREJUDICE THE OUTCOME OF TRIAL.**
- C. WHETHER MEDIA COVERAGE PREVENTED PLAINTIFF FROM RECEIVING A FAIR TRIAL.**
- D. WHETHER PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED WHERE THERE WAS EVIDENCE THAT DECEDENT ENTERED SEVERAL RELEASES AND WAIVERS.**

STATEMENT OF THE CASE

(i) Course of Proceedings

This is an appeal of a final judgment for the Defendants in a wrongful death action. (R-245). The judgment is based on a jury verdict in favor of Defendants rendered at the conclusion of a five-day jury trial on July 10, 2009. (R-213 (civil minutes from trial); R-216 (jury verdict); R-218 (judgment)).

Plaintiff, as Personal Representative of the Estate of Bernard P. Rice, filed a four-count negligence action against World Triathlon Corporation, North America Sports, Inc., USA Triathlon, and Any Other Entity Whose Acts or Omissions Caused or Contributed to the death of Bernard P. Rice. (R-1-3, Exhibit "B" to Defendants' Notice of Removal). The lawsuit was filed in the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida. (R-1-2, Exhibit "A" to Defendants' Notice of Removal; R-1-3, Exhibit "B" to Defendants' Notice of Removal).

On October 2, 2008, Defendant USA Triathlon served its First Request for Admissions to Plaintiff, requesting Plaintiff admit the amount in controversy claimed by Plaintiff exceeded \$75,000 exclusive of interest and costs. (R-1-7, Exhibit "F" to Defendants' Notice of Removal). Plaintiff answered on November 3, 2008, admitting for the first time that the amount in controversy exceeded \$75,000 exclusive of interest and costs. (R-1-8, Exhibit "G" to Defendants' Notice of Removal). Eleven

days later on November 14, 2008, Defendants North America Sports and USA Triathlon timely filed their Notice of Removal to federal court pursuant to 28 U.S.C. § 1446(b). (R-1). Plaintiff's subsequent Motion to Remand and Motion for Attorneys' Fees and Costs, (R-3), was denied. (R-12).

Judgment was entered in favor of Defendants on July 13, 2009. (R-218). This appeal followed. (R-245).

(ii) Statement of Facts

The facts relevant to Plaintiff's four challenges on appeal are as follows:

A. Removal. Plaintiff filed a negligence action in the Circuit Court for Bay County, Florida. (R-1-3, Exhibit "B" to Defendants' Notice of Removal). Four Defendants were identified, including World Triathlon Corporation, which was alleged to be a Florida Corporation. (*Id.*). As to the amount in controversy, the Complaint alleged "damages were in excess of \$15,000.00 (fifteen thousand dollars) exclusive of interest where applicable and costs," (R-1-3, Exhibit "B" to Defendants' Notice of Removal)¹, the state court's minimum jurisdictional amount. (R-12, p 4).

On July 14, 2008, Defendants North America Sports and USA Triathlon filed a Motion to Dismiss, or in the alternative, Motion for More Definite Statement. (R-1-

¹Plaintiff incorrectly states that the Complaint alleged damages in excess of \$75,000. *See* Plaintiff's Brief at 30. The Complaint alleges that damages were in excess of \$15,000, not \$75,000, hence the need for the Requests for Admission.

4, Exhibit “C” to Defendants’ Notice of Removal; R-1-5, Exhibit “D” to Defendants’ Notice of Removal). Thereafter, on September 2, 2008, Plaintiff served a Notice of Dropping World Triathlon Corporation as a party-Defendant, which created diversity of citizenship. (R-1-6, Exhibit “E” to Defendants’ Notice of Removal). Only once diversity was established on September 2, 2008, did the issue of the amount in controversy become important. On October 2, 2008, Defendant USA Triathlon served its First Request for Admissions to Plaintiff, requesting Plaintiff admit the amount in controversy exceeded the \$75,000 removal threshold. (R-1-7, Exhibit “F” to Defendants’ Notice of Removal). Plaintiff belatedly served his response to the requests for admissions on November 3, 2008, admitting the amount in controversy met the jurisdictional threshold set by 28 U.S.C. § 1332(a) (R-1-8, Exhibit “G” to Defendants’ Notice of Removal). Importantly, under the mandate of *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1219 (11th Cir. 2007), this was the first document from Plaintiff constituting an unambiguous statement that the claimed damages satisfied the amount in controversy necessary for removal. Eleven days later, on November 14, 2008, Defendants North America Sports and USA Triathlon timely filed their Notice of Removal. (R-1). The trial court denied Plaintiff’s Motion to Remand and Motion for Attorneys’ Fees and Costs, (R-12), reasoning that under *Lowery* removal before the request for admission would require the District Court to

engage in “impermissible speculation” as to the amount in controversy. (R-12, p 4 citing *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1219 (11th Cir. 2007)).

B. Evidentiary Ruling. Contrary to the record, Plaintiff misstates throughout his brief that he dropped his claim for net accumulations before he presented any evidence on that claim.² (R-213 at p 5³; R-256⁴). He also misstates that he dropped his claim for net accumulations before Defendants’ attempt to cross-examine Plaintiff’s witness as to evidence highly relevant to the net accumulations claim.⁵ Plaintiff is absolutely incorrect. Plaintiff made the claim for lost net accumulations a focus of his voir dire, opening statement, and case-in-chief. (R-256). It was not until the fourth day of trial, and after the two questions on cross-

²Plaintiff offers no citation to the record to support his assertion that he “dropped” the net accumulations claim without introducing any evidence on this element of damages. (Appellant’s Brief at p 10). Nor does he cite to the date (Thursday) when he dropped his net accumulations claim. (*Id.*) See also footnote 6.

³Jury Trial Minutes showing Plaintiff presented evidence from economics expert Frederick Raffa, Ph.D.

⁴Plaintiff presented trial testimony regarding claim for net accumulations by reading the Deposition of Frederick Raffa, Ph.D.

⁵Plaintiff presented testimony from his economics expert regarding the basis for his net accumulations claim after Plaintiff presented witness Patricia Rice, whom Defendants cross-examined regarding the wrongful conversion claim by Plaintiff’s father against his son. (R-213 at p 5; R-238 at pp 5-6; R-256).

examination of Plaintiff's mother for which Plaintiff complains, when Plaintiff elected to drop his claim for loss of net accumulations.⁶

Plaintiff claimed loss of net accumulations when he filed suit. (R-1-3, Exhibit "B" to Defendants' Notice of Removal). His discovery was directed towards supporting that claim. (R-256, Deposition of Frederick Raffa, Ph.D read into evidence at trial). Plaintiff's economics expert, who was presented at trial by deposition testimony, opined that Plaintiff lost massive amounts of net accumulations based on Plaintiff's projected earnings as general manager of his father's car dealership. (R-213 at p 6; R-256 at pp 5-11). What Plaintiff did not disclose to Defendants was that shortly after Plaintiff's death, his father, in his capacity as Plaintiff's employer, brought a legal action claiming his son and daughter-in-law wrongfully converted hundreds of thousands of dollars from the family car dealership. (R-173; R-173-1 at pp 20, 24, 34, 39, 41, 62). Despite Defendants'

⁶Defendants are not aware of any record as to the withdrawal of Plaintiff's net accumulations claim until Friday. (R-213 at pp 8-9). However, defense counsel recalls plaintiff making the announcement on Thursday, and will supplement the record with the transcript of proceedings from that date. Nonetheless, Defendants point to the fact that Plaintiff offered evidence supporting his claim for net accumulations by testimony of his economics expert at the close of the third day of trial (July 8) and before he closed his case, (R-213 at p 5; R-256). Plaintiff would not have presented evidence to support his net accumulations claim, nor would Defendants have allowed such evidence, if Plaintiff had dropped his net accumulations claim prior to the testimony of Plaintiff's economics expert.

multiple discovery requests, it was not until the eve of trial that Defendants discovered there was a claim for wrongful conversion against Plaintiff.^{7 8} (R-255-2 at p 8 (¶18); R-173; R-173-1 at pp 20, 24, 34, 39, 41, 62). Among the items in the

⁷A brief timetable illustrates Plaintiff's failure to timely disclose the highly relevant evidence:

February 10, 2009. *First Interrogatories to Plaintiff.* Defendant North America Sports, Inc.'s First Interrogatories: Plaintiff's response served on March 23, 2009, failed to disclose any other claims or litigation involving the Estate and Decedent. (R-255-1 at p 8 (¶18)). Both the Estate and Decedent's widow were named parties in the other litigation alleging wrongful conversion and embezzlement of funds and property, and it is hard to imagine Plaintiff did not have knowledge of this other litigation that began in 2007 prior to the filing of the wrongful death action. (R-173).

April 30, 2009. *Deposition of widow:* For the first time, the Decedent's wife reluctantly hinted there may be other litigation involving the Estate. (R-255-2 at p 64, ln 17 - p 66, ln 19). Unfortunately, Plaintiff's counsel directed the widow to not provide any information about the nature of the litigation, the identity of the parties, etc., based on invocation of questionable privileges, and even though the subject matter was public record and otherwise not privileged. (*Id.*).

May 8, 2009. *Discovery deadline:* Plaintiff and his counsel obviously knew of the claim involving the Estate in order to invoke a privilege. Despite having knowledge of the other litigation, Plaintiff still failed to supplement his answers to interrogatories to disclose it as required under Fed.R.Civ.P. 26(e)(1)(A).

⁸This is not the only time Plaintiff failed to timely disclose crucial evidence. For example, Plaintiff failed to timely disclose a videotape of Plaintiff from the race until after the discovery deadline and despite Defendants' earlier discovery requests seeking such crucial evidence. (R-74).

probate documents characterizing the son's actions are terms such as "embezzlement," "altered statements," "illegal receipt," and similar terms. (*Id.*). Evidence that Plaintiff's father was so upset as to sue his son's estate and daughter-in-law for wrongful conversion completely undermined Plaintiff's basis for net accumulations. The District Court recognized the relevance of this evidence:

"[E]mbezzlement, that [Decedent's] former employer has accused him of embezzlement, not only his former employer, but arguably sheltered employment with his father, such that they are claiming embezzlement, then I think that raises a - - that is - - has some probative value on the question of projecting out his future earnings on net accumulations.

(R-237 at p 29).

"The jury can conclude if [Decedent] has ripped off his employer for \$400,000, that calls into question whether he would continue to be employed there, and earning that type of salary."

(R-237 at p 40).

However, the District Court denied as untimely the Defendants' motion requesting to use documents concerning the wrongful conversion claim as trial exhibits. (R-237, p 8). The District Court was frustrated with Defendants' request for leave to add this newly discovered evidence the week before trial. (R-237 at pp 6, 10). Nevertheless, Judge Smoak allowed this evidence to come in through testimony, reasoning that cross-examination was:

the less of two evils of totally misleading the jury that all is fine in paradise, if we don't let it in, where at least [if we let it in on cross-examination] at least [Defendants] can try to make of it what [they] will.

(R-237 at p 11).

The District Judge instructed "if these non-party witnesses for some reason get into the issue of [Decedent's] employment, his continued employment, the future accumulation, then I think that opens the door. (R-237 at p 35). The District Judge permitted use of the term "wrongful conversion" to describe the claim made against Plaintiff's Decedent's Estate. (R-237 at p 40).

Following the District Court's instructions, Defendants cross-examined Plaintiff's mother, Patricia Rice, as follows:

MR. DEAN: You mentioned that he had worked and had a job since he was 16, is that right?

PATRICIA RICE: Right.

* * * * *

MR. DEAN: Who was he working for at the time of his death?

PATRICIA RICE: He was working for his father.

MR. DEAN: And what is his father's name?

PATRICIA RICE: His dad's name is Pete Rice.

* * * * *

MR. DEAN: Are you aware that Mr. Rice, Pete Rice, has filed a claim against your son's estate for wrongfully converting money and property in the amount of \$427,000, as well as some other property?

MS. SANTA MARIA [Plaintiff's counsel]: Objection, Your Honor.

THE COURT: Overruled.

MR. DEAN: Were you aware of that, ma'am?

PATRICIA RICE: I know there's been some allegations, and I know that something is going on. I've never read. I've never been around in Kallispell or talked to any attorneys, or have any information like that.

MR. DEAN: Are you aware that the allegations that you said you were generally aware of, that they included allegations that your son was stealing money and property from your ex-husband and his dad?

MS. SANTA MARIA: Objection, Your Honor.

THE COURT: Sustained. Counsel, remember our sidebar conference.

(R-238 at pp 5-6).

When Patricia Rice responded to Defendants' counsel's question regarding the "wrongful conversion" claim, and after indicating some possible confusion as to the legal terms used, Defendants' counsel clarified his question by using the layman's term "stealing." Even the District Court admitted to not knowing the difference between "wrongful conversion" and "stealing," and presumably neither did the jury. (R-238 at p 11). Nevertheless, no further inquiry was pursued by Defendants' counsel, and the jury was only left with the testimony that Plaintiff's mother was

aware of some claim involving wrongful conversion brought by Plaintiff's father against his son's estate. (R-238 at p 6, ln 7-8). Cross-examination was finished shortly thereafter pursuant to the Court's instruction. (R-238).

Plaintiff moved for mistrial on the basis that Defendants overstepped the District Court's instructions allowing cross-examination. (R-238 at p 9). The District Court denied Plaintiff's Motion for Mistrial at the conclusion of trial. (R-238 at p 14).

C. *Jury Poll.* Media coverage of Plaintiff's lawsuit leading up to and including trial was certainly expected. The fact that a participant would sue an organization putting on a triathlon (2.4 mile swim, 112 mile bike, and 26.2 mile run) for a heart condition or drowning is noteworthy regardless of the venue.

Plaintiff's first motion to transfer venue was filed a month before trial on June 1, 2009 (R-96), followed by a supplemental motion on June 8, 2009 (R-104), and both were based on an article in the Panama City News Herald, which quoted portions of Defendants' Motion to Dismiss filed on July 14, 2008, prior to the removal of the case to federal court. (R-1, Exh. C). The District Judge denied Plaintiff's Motion to Transfer, reasoning that if there was an issue, then it could be addressed at voir dire. (R-148).

Another article appeared in the News Herald on the first day of trial. (R-240). During voir dire, the District Judge addressed the issue of media coverage by asking the prospective jurors if any of them had “heard anything about this case, or seen anything?” (R-277 at p 2). The transcript of voir dire indicates that at least one juror raised his/her hand indicating that they had heard or seen something about the case. (*Id.*). The District Judge then instructed “that article is not evidence(*Id.*). Evidence you’re going to hear is going to come here in this courtroom, and that’s what this jury has to decide its - - make its decision on.” (*Id.*). Judge Smoak then confirmed:

Can all of you set aside what you may have seen or heard about this case and decide this case solely on the evidence that comes in during trial, and follow and apply the law that I will instruct the jury that they must follow?

(R-277 at p 2).

The jurors confirmed they would set aside anything they may have seen or heard about the case, and they would limit their consideration to the evidence presented at trial and the District Court’s instructions regarding what law to apply to the evidence. (*Id.*).

The District Court even took further precaution by asking:

For those of you who saw or heard anything about this case, was what you saw or what you heard so strong that you will not be able to set that aside and decide the case solely on the evidence and follow the law?

(R-277 at p 2).

Again, the jurors confirmed that they would limit their deliberation to the evidence presented at trial and follow the law provided by the Judge. (*Id.*).

Additional media coverage occurred for the next four days of trial. (R-236; R-240; R-241; R-242; R-244). However, there is no evidence that any juror ever observed the additional media coverage or in any way violated the District Court's instructions. Further, the District Court evaluated the media coverage each day and found it to be "about as neutral as you can get." (R-228, at p 3, ln 1-6; R-235 at p 7, ln 20-24). The District Court relied on its instructions given to the jury during voir dire and ruled "I'm not going to ask the jurors every day - - every time they come in whether they've followed my instructions. I don't think those articles are much to get much stirred about, quite frankly, but we gave them the instruction." (R-228 at p 3, ln 7-8). The District Court refused Plaintiff's request to interrogate the jurors by ruling that the media coverage did not create an "extreme" case. (R-235 at p 7, ln 7-25; R-235 at p 13, ln 1-7). Nevertheless, Judge Smoak reminded the jury of his instructions at the close of Plaintiff's case-in-chief, at the end of the third day of trial:

Now, remember on Monday, part of my instructions were to you that you are to avoid seeing or listening to anything about this case that might appear in the media. There have been some mention, of no particular consequence, but remember my instructions to you on that point and remember the oath you took. Your decision in this case will be based solely on the evidence and by following the law that I instruct you on.

These [parties] need to feel confident and assured that they're going to get a fair trial, both sides, and they don't need to worry about the television or the newspaper.

So if you would - - and I have no doubt that you will - - keep those in mind. The only reason I bring it up because usually these [media sources], they don't have a clue what we're doing down here, but for some reason they get some mention in the newspaper, and I think one of the television stations. Of no particular consequence. And so with that, you all can go on now and we'll see you at 8:30 in the morning.

(R-256 at pp 12-13; R-213 at p 6).

D. Summary Judgment as to Releases and Waivers. Plaintiff was required to execute at least two separate waivers and releases (sometimes referred to as "waiver" or "waivers")⁹ to participate in the 2006 Ironman Florida ("Florida event"). (R-79-2; R-79-3; R-79-4; R-79-5). Plaintiff entered a waiver when registering online using the internet, (R-79-2; R-79-3), and then entered another waiver as required for his race site registration in Panama City. (R-81 at p 7(¶19), p 13(¶17), p 18(¶¶14-17); R-79-4).

⁹There was another release required by USA Triathlon for participants to execute if they were not an annual member of USA Triathlon. (R-79-5; R-81 at p 8 (¶¶15-17, 23), p 14 (¶23), p 18 (¶¶15-17)). The majority of the 2200 participants in the Florida event were annual members of USA Triathlon, and therefore USAT only sent 1000 waiver forms for use in race site registration in anticipation of the small number of participants needing to enter that waiver. (R-81 at p 30, ln 7-23, excerpt of Deposition of Kathy Matejka). This was not an issue at trial, although Plaintiff's brief confuses the USAT waiver with the other race site waiver required of all participants in the Florida event.

The online registration was administered by The Active Network, Inc., a company specializing in providing internet registration support for sporting events such as triathlons. (R-81 at p 6(¶14), p 12(¶14)). Plaintiff had to agree with all of the terms of the online registration, including the waiver, to submit the registration for entry into the Florida event. (R-81 at p 6(¶12), p 12(¶12)). Failure to check the box signifying acceptance of the waiver would not allow Plaintiff to continue the online registration process necessary to participate in the Florida event. (R-81 at p 6(¶13), p 12(¶13)).

All participants in the Florida event were also required to complete a race site waiver as a prerequisite to obtaining materials necessary to participate. (R-81 at p 7 (¶¶17, 18, 19), p 8 (¶24), p 13 (¶¶17, 18, 19), p 14 (¶24)). The opposite side of that waiver form required participants to provide emergency medical information. (R-285 at p 5, ln 4 - p 6, ln 10; p 14, ln 11-25). The form was stored in the medical tent, and it was to be provided to medical personnel if a participant required emergency medical treatment. (R-285 at p 15, ln 1 - p 16, ln 10). There were no copies made of these waivers, so if it was given to emergency personnel, there would be no duplicate. (*Id.*).

There was also a third waiver from an earlier triathlon, which was part of Defendants' defense. (R-79-6; R-81 at p 34 (¶¶16, 17); R-81 at p 51 (¶¶16, 17)).

Plaintiff had also participated in a triathlon in California earlier in 2006. (R-81 at p 34 (¶16); R-81 at p 51 (¶16)). As part of his participation in the California event, Decedent signed race site waivers similar to those he completed to participate in the Florida event later that same year. (R-79-6; R-79-7; R-81 at p 34 (¶¶16, 17); R-81 at p 51 (¶¶16, 17)). This waiver expressly applied to all of Defendants' events for the 2006 season, which included the subsequent Florida event. (R-79-6, R-79-7). The Court denied Defendant's motion for directed verdict on the earlier California waiver. (R-213 at p 6).

Defendants raised affirmative defenses relying on the waivers entered by Plaintiff as a bar to his claims. (R-29 (¶¶53, 54); R-30 (¶¶53, 54)). Both Plaintiff and Defendants moved for summary judgment on those affirmative defenses. (R-46, R-79, R-89).

Plaintiff argued: (i) the online waiver was invalid and unenforceable by operation of Montana law; (ii) even if the online waiver were an enforceable bar against Plaintiff's claims, he did not agree to it; and, (iii) the race site waiver was never signed by Plaintiff because it could not be located. (R-46).

Defendants responded to Plaintiff's arguments as part of their own Motion for Summary Judgment. (R-79). Defendants argued: (i) although Plaintiff entered the online waiver while located in Montana, both Florida law and Montana law

commanded that the online waiver be interpreted under Florida substantive law, and under Florida law, the online waiver barred Plaintiff's claims; (ii) Plaintiff's agreement to the terms of the online waiver was evidenced by his submission of it, which could not have occurred without Plaintiff agreeing to all of its terms; and (iii) Plaintiff had to sign the race site waiver in order to receive materials necessary to participate, and if the waiver could not be located, it was because the executed waiver was given to emergency personnel. (R-79).

The District Court refused to grant summary judgment to Defendants on the enforceability of the online waiver on the basis that there was an inadequate showing the Plaintiff had agreed to it. (R-147). The District Court pointed to the hard copy of Plaintiff's online registration as not showing "check mark boxes" nor "check marks" referenced by the registration. (R-147 at pp 7-8). The District Court reasoned that the lack of check mark boxes and check marks meant there was a question of fact as to whether Plaintiff agreed with the online waiver. (R-147 at 8). Judge Smoak ruled that "[w]hether the online waiver was properly executed is clearly in dispute," and therefore the issue must proceed to trial. (R-147 at 8).

The District Court also found there was an issue of fact as to whether Plaintiff entered the race site waivers. (R-147 at 9).

The District Court structured the verdict form so the jury first assessed whether Defendants were liable for negligence, and only if there was a finding of negligence would the jury then determine whether Plaintiff had entered the online and race site waivers. (R-216). The jury's finding that Defendants were not liable for negligence ended the case, and no findings were made as to whether Plaintiff entered the online and race site waivers. (*Id.*).

(iii) Standard of Review

Defendants agree with Plaintiff's statements regarding the standards of review applicable to each alleged error.

SUMMARY OF ARGUMENT

The District Court properly denied Plaintiff's Motion to Remand because removal was timely. But even if there was a procedural defect in removal, such a defect does not command a new trial where the federal court had jurisdiction at the time judgment was entered.

Second, the District Court acted within its discretion by ruling that evidence of a wrongful conversion claim by Plaintiff's father against Plaintiff was relevant to challenge the basis for Plaintiff's claim for loss of net accumulations, which relied on the assertion that Plaintiff would work for his father for the rest of his life. The District Court also properly denied Plaintiff's Motion for Mistrial for defense counsel's follow-up question clarifying the claim by Plaintiff's father against Plaintiff.

Third, the District Court gave proper instructions to address media coverage of the case, and the jury confirmed that they would only consider evidence presented at trial in reaching their verdict. Judge Smoak properly considered: (i) the character of the media coverage; (ii) its timing; (iii) its credibility; and (iv) whether it would

influence the jury, as well as his observation of the jury, local knowledge¹⁰, and other considerations incumbent upon the presiding judge.

Finally, the District Judge properly denied Plaintiff's Motion for Summary Judgment on the grounds that there was evidence that Decedent entered several releases and waivers.

ARGUMENT

A. PLAINTIFF'S MOTION TO REMAND WAS PROPERLY DENIED BECAUSE REMOVAL WAS TIMELY, AND IF NOT, SUCH ERROR WAS PROCEDURAL AND THEREFORE DOES NOT WARRANT A NEW TRIAL.

i. Defendants timely sought removal under the mandate of *Lowery*

Plaintiff incorrectly argues that the timing for removal starts when the diversity of the parties is established. Plaintiff ignores the requirement that in addition to establishing diversity there must also be an unambiguous statement establishing the amount in controversy. Only when both elements are established does the thirty-day time period for removal begin.

¹⁰District Judge Smoak has been on the bench since 2005. *See Biographical Directory of U.S. Judges*. Before that he had an active civil trial practice in the Panama City-area for over thirty years. *Id.* With this background he has an excellent understanding of his community and those factors which may influence a jury.

The following time line supports the District Court's ruling that removal was timely:

June 20, 2008: Complaint served naming World Triathlon Corporation (the only alleged Florida citizen)

July 14, 2008: Defendants file Motion to Dismiss

September 2, 2008: Plaintiff voluntarily dismisses World Triathlon Corporation

* * *(Diversity established)* * *

October 2, 2008: *With diversity now established*, Defendants serve request for admissions to ascertain whether or not Plaintiff is seeking damages in excess of \$75,000

November 3, 2008: Plaintiff admits he is seeking damages in excess of \$75,000 exclusive of fees and costs

* * *(Amount in controversy established)* * *

November 14, 2008: Defendants timely file Petition for Removal

This Court is aware of the many cases addressing the issue of amount in controversy as a basis for federal jurisdiction. This Court, with its decision in *Lowery v. Alabama*, 483 F.3d 1184 (11th Cir. 2007), established a bright line standard for removal requiring an unambiguous statement by Plaintiff of the amount in

controversy.¹¹ No longer are the District Courts or the parties required to speculate as to the amount in controversy, and any speculation is now strictly prohibited.

Lowery provides a strict, but easy, framework for establishing the amount in controversy, which if followed no longer places the removing party at risk of remand or sanctions. *Lowery*, 483 F.3d at 1214-15. Under *Lowery*, the District Court and parties need only look at record evidence to determine the amount in controversy, no more and no less:

¹¹ With the exception of the two cases discussed below, Plaintiff cites to cases which pre-date *Lowery* or are from outside the Eleventh Circuit. A brief discussion of the inapplicability of these cases follows:

Foster v. Resources for Human Development, Inc., 2007 WL 2225811, *5 (M.D.Fla. July 31, 2007) cited at page 32 of Appellant's Brief. *Foster* is readily distinguishable from the instant case. In *Foster*, there were statements demonstrating that the claimant's alleged wage losses exceeded \$60,000 and a statute showing her entitlement to attorneys fees would exceed \$15,000. *Id.* at *4-*5.

Wagner v. Oerlikon, USA, Inc., 2008 WL 2262041, *1 (M.D.Fla. May 30, 2008) cited at page 32 of Appellant's Brief. *Wagner* is readily distinguishable from the instant case. In *Wagner*, the complaint explicitly alleged a breach of an agreement to pay "Severance Benefits," and the employment agreement defined "Severance Benefits" as a two-year continuation of "any pension, life insurance, health insurance, disability insurance and other employee benefit plans, if any, which the Company may from time to time make available to its executive officers generally." The District Judge held that because the defendants undoubtedly maintained a record of their contributions on behalf of the plaintiff, each category of benefit was peculiarly within the defendants' knowledge at the commencement of the action, and it was obvious to defendants that the amount in controversy exceeded \$75,000.

Under the first paragraph of § 1446(b), a case may be removed on the face of the complaint if the plaintiff has alleged facts sufficient to establish the jurisdictional requirements. Under the second paragraph, a case becomes removable when three conditions are present: there must be (1) “an amended pleading, motion, order or other paper,” which (2) the defendant must have received from the plaintiff (or from the court, if the document is an order), and from which (3) the defendant can “first ascertain” that federal jurisdiction exists. § 1446(b). Under either paragraph, the documents received by the defendant must contain an unambiguous statement that clearly establishes federal jurisdiction. See Bosky v. Kroger Texas, LP, 288 F.3d 208, 211 (5th Cir.2002) (holding that grounds must be “unequivocally clear and certain”); Huffman v. Saul Holdings, LP, 194 F.3d 1072, 1078 (10th Cir.1999) (same). As we have noted, a removing defendant's counsel is bound by Rule 11 to file a notice of removal only when counsel can do so in good faith.

Lowery, 483 F.3d at 1215, n. 63.

Although a successful wrongful death case typically involves damages exceeding \$75,000, in the instant case the Defendants and the District Court were bound to follow the mandate of *Lowery*. The only unambiguous statement regarding the amount in controversy prior to Defendants’ Request for Admissions was Plaintiff’s allegation that he was seeking damages in excess of \$15,000. (R-1-3, Exhibit “B” to Defendants’ Notice of Removal). The District Court agreed that more was required to establish the amount in controversy:

The complaint seeks damages for Plaintiff’s wife, three minor children, and estate for past suffering, future suffering, loss of support and services of the decedent, mental pain and suffering, medical expenses, and funeral expenses. The complaint alleges only damages in excess of \$15,000, the state court’s minimum jurisdictional amount. Based on Plaintiff’s online application to participate in Defendant’s

event, Defendants were also aware that Plaintiff died at the age of thirty-five, held a bachelor's degree, and he was president of a boat dealership. Plaintiff cites numerous authorities to support its argument that Defendants should have known that the amount in controversy based on the allegation of the complaint and the information then available to Defendants without requiring speculation. *See Foster v. Resources for Human Development, Inc.*, 2007 WL 2225811, *5 (M.D.Fla. 2007); *Estevez-Gonzalez v. Kraft, Inc.*, 606 F.Supp. 127, 129 (S.D.Fla. 1985); *Baker v. Firestone & Rubber Co.*, 537 F.Supp. 244, 245-47 (S.D.Fla. 1982); *Lee v. Altamil Corp.*, 457 F.Supp. 979, 981 (M.D.Fla. 1978).

However, the complaint and online application do not provide Defendants with an unambiguous statement sufficient to establish that Plaintiffs' claims potentially exceed \$75,000. *See Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1219 (11th Cir. 2007). The nature of the claim is sufficient to conclusively establish the amount in controversy; instead, it requires impermissible speculation. *Id.* at 1220. Defendants did not receive a document clearly indicating that the value of Plaintiff's claim exceed \$75,000 until Plaintiff responded to the Defendants' First Request for Admission on November 3, 2008. *Id.* at 1221. Therefore, the Defendants were able to establish federal jurisdiction by a preponderance of the evidence starting on November 3, 2008 and has thirty days to file a notice of removal. On November 14, 2008, Defendants removed the case to this court in a timely fashion.

(R-12 at pp 4-5).

There was an insufficient basis to establish the amount in controversy for removal until Plaintiff responded to Defendants' Requests for Admission. When that occurred, Defendants timely sought removal.

ii. If the District Court erred in applying *Lowery*, such error was procedural and does not entitle Plaintiff to a new trial

Plaintiff had a five-day jury trial and yet asserts that failure to comply with the thirty-day procedural requirement of 28 U.S.C. § 1446(b) entitles him to a new trial in state court. To allow a party a new trial on a procedural error in invoking jurisdiction, when it is undisputed the court had jurisdiction at the time judgment was entered, is not what the law provides. Once a diversity case has been tried in federal court “considerations of finality, efficiency, and economy” overshadow any defects in removal procedure and do not provide a sufficient basis for new trial in state court. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 76, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996).

Plaintiff concedes, and in fact argues, there is no question the federal court had jurisdiction at the time judgment was entered. His argument focuses on whether removal was timely. Such error is not a sufficient basis to require a new trial:

To wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.

(*Id.* at 77).

Plaintiff had his day in court before a court of competent jurisdiction. The alleged procedural defect in invoking removal jurisdiction does not entitle Plaintiff to a new trial.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE QUESTIONING OF PLAINTIFF'S WITNESSES AS TO EVIDENCE REBUTTING PLAINTIFF'S CLAIM FOR NET ACCUMULATIONS, AND ANY SUCH CLAIMED ERROR DID NOT SUBSTANTIALLY PREJUDICE THE OUTCOME OF TRIAL.

Plaintiff's mother's admission of having knowledge of a wrongful conversion claim by Plaintiff's father against his son's estate was properly admitted. Three points support the District Court's ruling: (i) evidence of a wrongful conversion claim was relevant; (ii) Defendants complied with the District Court's instructions; and (iii) if there was error, it did not substantially prejudice the outcome of trial.

(i) A wrongful conversion claim is highly relevant to the basis for Plaintiff's claim for lost net accumulations

Plaintiff's claim for lost net accumulations relied substantially on his continually working for his father's car dealership for the rest of his life. (R-256 at p 11, ln 6-15). Evidence suggesting that Plaintiff would have been fired by his father from his sheltered employment seriously challenges Plaintiff's claim for lost net accumulations. (R-237 at pp 29, 40).

A claim for loss of net accumulations to the estate of a 35-year old healthy male can certainly be significant. (R-237 at p 2, ln 22-23). Plaintiff's expert, Dr. Raffa, testified by deposition that Plaintiff was earning \$99,403.00 a year as manager of his father's used car dealership. (R-256 at p 5, ln 8-11). Dr. Raffa extrapolated this significant salary for the remainder of Plaintiff's anticipated working life of 31

years, making the net accumulations claim approximately \$800,000. (R-256 at p 5, ln 8-11; p 6, ln 10-12; p 11, ln 9-15). As the District Court aptly described this “sheltered income,” it was contingent upon Plaintiff remaining in his father’s good graces. (R-237 at p 29, ln 19-25).

The District Court reasoned:

MR. MATTHEWS: [Plaintiff has] based a large portion of his testimony on net accumulation on the fact that Mr. Rice was going to make hundreds of thousands of dollars a year for - - I think he had a 34-year life expectancy, working for his daddy. The fact that his daddy is suing him - - his estate, for embezzlement, which we think there’s pretty strong indication - -

THE COURT: I think that’s fair game for cross-examination.

(R-237 at p 6, ln 14-22).

With the District Court’s ruling that evidence of a wrongful conversion claim by Decedent’s father against his son was relevant if such testimony could be elicited on cross-examination, Defendants proceeded. (R-237 at p 6, ln 14-22; p 7, ln 14-16; p 30, ln 3 - p 32, ln 16).

(ii) Defendants complied with the District Court’s instructions

The District Court permitted defense counsel to question Plaintiff’s mother about her knowledge concerning a wrongful conversion claim between her ex-husband and her son. (R-238 at p 5, ln 12-23). Defendants’ counsel then attempted to clarify his term “wrongful conversion” with the more readily understood term

“stealing” or similar wording which Mrs. Rice was likely to have used or understood. (R-238 at p 5, ln 24 - p 6, ln 5). At this point, the District Court terminated any further inquiry on this issue. (R-238 at p 6, ln 7-8). The fact that Mrs. Rice presumably learned of the claim against her son’s estate (and his wife) from her daughter-in-law, with whom she maintains a close relationship, was not explored further by Defendants’ counsel pursuant to the District Court’s instruction. Defendants finished their cross-examination shortly thereafter. (R-238 at p 6).

(iii) Any error in admitting evidence concerning the claim for wrongful conversion did not substantially prejudice the outcome of trial

Assuming *arguendo* that it was error to allow cross-examination on the existence of the wrongful conversion claim, that error is not grounds for reversal because there was no resulting substantial prejudice. *King v. Gulf Oil Co.*, 581 F.2d 1184, 1186 (5th Cir. 1978) (citing Fed.R.Evid. 103 and Fed.R.Civ.P. 61); *Proctor v. Fluor Enterprises, Inc.*, 494 F.3d 1337, 1352 (11th Cir. 2007).

At most, the jury heard Plaintiff’s witness admit that “there’s been some allegations [of wrongful conversion], and I know that something is going on.” (R-238 at p 5, ln 19-23). The District Court properly allowed inquiry regarding allegations of “wrongful conversion”, but would not allow any further inquiry. (R-238 at p 5, ln 12 - p 6, ln 8). This was a five-day trial with the focus on liability. A

brief attempt to clarify the term “wrongful conversion” with the more common term “stealing” certainly did not substantially prejudice the outcome of this lengthy trial.

Moreover, Plaintiff dropped his claim for net accumulations the day after Plaintiff’s mother conceded the existence of the wrongful conversion claim. Once Plaintiff dropped his claim, the jury was no longer asked to consider this evidence or its relevance. *CSX Transp., Inc. v. Hensley*, --- U.S. ----, 129 S.Ct. 2139, 2141, 173 L.Ed.2d 1184 (2009) (Juries are presumed to follow the court’s instructions.); *Greer v. Miller*, 483 U.S. 756, 767 n. 8, 107 S.Ct. 3102, 3109 n. 8, 97 L.Ed.2d 618 (1987) (Presume that a jury will follow an instruction to disregard inadmissible evidence.).

Finally, any error on the issue of net accumulation complained of by Plaintiff is not a consideration given the jury’s finding of no negligence, with no need to consider damages.

(iv) Documents concerning the wrongful conversion claim should have been allowed at trial

Understandably, the District Judge was frustrated that Defendants sought leave to add newly discovered documents evidencing the wrongful conversion claim the week before trial. (R-173; R-173-1 at pp 20, 24, 34, 39, 41, 62; R-237 at p 9, ln 11 - p 10, ln 18). After hearing arguments the morning of jury selection, the District Court ruled that Defendants could not place those documents in evidence as being untimely. (R-237 at p 11-14). The District Judge did, however, permit Defendants’

counsel to elicit testimony from witnesses on this issue. (R-237 at p 6, ln 14-22; p 7, ln 14-16; p 30, ln 3 - p 32, ln 16). Just a few examples illustrate why the documents proving the wrongful conversion claim should have been admitted in evidence:

There was absolutely no possibility of prejudice to Plaintiff by admission of evidence concerning the wrongful conversion claim: Plaintiff knew about the wrongful conversion claim since its inception in 2007, and certainly cannot complain they were surprised by late notice. Any prejudice concerning late notice of this claim could only damage Defendants' defenses.

Plaintiff relied on an affidavit from the Montana attorney handling the wrongful conversion litigation: Plaintiff introduced and relied on an affidavit from the Montana attorney handling the wrongful conversion litigation for Plaintiff. (Doc. 176). That affidavit made the existence of the wrongful conversion litigation the law of the negligence action. The use of the affidavit was an admission under oath by the Plaintiff that the wrongful conversion litigation existed.

Judicial notice of other court documents: The District Court should have taken judicial notice of the court documents filed in the Montana court from the wrongful conversion litigation. (R-173-1 at pp 20, 24, 34, 39, 41, 62). *Boyle v. County of Kern*, 2008 WL 220413 (E.D.Cal. 2008) (a court may take judicial notice of court records in another case, including probate cases).

The District Court's ruling forced Defendants to rely on cross-examination of Plaintiff's witnesses without any means of impeaching them in the event their testimony contradicted these court documents. This was a particular risk given the lack of candor by Plaintiff's wife (who was also a named defendant in the wrongful conversion litigation) and the Personal Representative in their discovery

responses. Fortunately, Plaintiff's mother was more candid and conceded the existence of the wrongful conversion claim against Plaintiff. (R-238 at p 5, ln 12-23).

Contrary to Plaintiff's argument, the issue is not necessarily the validity of the amount claimed (albeit, it is relevant), the real issue is the likelihood that Plaintiff would have enjoyed his sheltered income for the remainder of his life. The fact that Plaintiff's father sued his son and daughter-in-law for wrongfully converting hundreds of thousands of dollars provides insight on this issue. It is the existence and nature of the father's claim that is crucial for the jury to consider. The jury should have been allowed to consider both documents and testimony regarding this crucial issue and assign whatever weight to it they deemed appropriate.

C. MEDIA COVERAGE HAD NO INFLUENCE ON PLAINTIFF RECEIVING A FAIR TRIAL.

Plaintiff argues Defendant had more media coverage than Plaintiff, and therefore he has been denied a fair trial. Not only does Plaintiff's argument have no basis in law or fact, but it lacks common sense. Even assuming the news media focused more on Defendants' arguments, opening statement, or presentation of evidence, that does not change the fact that the jury heard both parties' cases. Moreover, the District Court properly instructed the jury on media coverage, which instructions the jury is presumed to have been followed. *Estes v. U.S.*, 335 F.2d 609, 615 (5 Cir. 1964) (presumed that jurors did not violate instructions not to read

newspaper articles or listen to broadcasts relative to case in absence of some showing that they did); *Greer v. Miller*, 483 U.S. 756, 767 n. 8, 107 S.Ct. 3102, 3109 n. 8, 97 L.Ed.2d 618 (1987) (Presume that a jury will follow an instruction to disregard inadmissible evidence.). By agreeing to follow the District Court's instructions, and with no evidence to the contrary, the jury's verdict should stand. Moreover, if Judge Smoak continuously drew the jury's attention to media coverage as Plaintiff suggests he should have done, or if he repeatedly warned the jurors to avoid such coverage, there is a risk it would peek the jurors' curiosity and cause them to actually seek out media coverage instead of avoid it.

Review of the record shows the District Judge took measures to ensure a fair trial by considering: (i) the character of the media coverage; (ii) the timing of the media coverage in relation to the trial; (iii) the credibility of the source to which the coverage was attributed; and (iv) the pervasiveness of the publicity and whether it reached the jury. *Gordon v. U.S.*, 438 F.2d 858, 873 (5th Cir.), cert. denied, 404 U.S. 828, 92 S.Ct. 139, 30 L.Ed.2d 56, and cert. denied, 404 U.S. 828, 92 S.Ct. 140, 30 L.Ed.2d 56 (1971)).

i. Media coverage was neutral and not likely to influence the jury

The District Judge found media coverage regarding the case to be "about as neutral as you can get." (R-228, at p 3, ln 1-6; R-235 at p 7, ln 20-24). Plaintiff asks

this Court to disagree with the District Judge, but a review of the articles at issue shows them to be nothing more than a factual account of trial. (R-236; R-240; R-241; R-242; R-244).

Even assuming Plaintiff's characterization of the media articles as "decidedly pro-defendant" is correct, then Plaintiff would have this Court believe the jury disregarded what they observed firsthand in trial in lieu of secondhand media accounts. There is no basis in law or the record to support such an assertion.

ii. Plaintiff claims internet blogs, which lack any credibility, somehow adversely affected his right to a fair trial

Plaintiff devotes several pages of his brief to citing and arguing that selected internet blogs that appeared in the Panama City News Herald website almost a year before trial is evidence Plaintiff could not receive a fair trial in Panama City. (Appellant's Brief at pp 14-17, 38). Judge Smoak inquired of the jury during voir dire about their exposure to media coverage and its possible effect on either party. (R-277). He was satisfied that whatever media coverage or blogs the jury may have seen or heard would not influence their ability to sit as fair and impartial jurors. Internet blogs posted by a few people on a newspaper website is no basis to show prospective jurors are somehow biased. (R-277; R-256 at pp 12-13).

The District Judge also considered the sources of media coverage in considering its possible influence on the venire. The District Judge relied on his

experience residing in the Panama City-area for over thirty years by finding that jurors “don’t believe anything the News Herald says,” and area residents refer to it as “mullet wrapper.” (R-235 at p 4, ln 10-11). Lacking even less credibility are the blogs Plaintiff quotes throughout his brief. (Appellant’s Brief at pp 14, 15). Incredibly, Plaintiff wants this Court to not only assume that the jurors read the blogs, but that they also assigned some weight to them in their deliberations. Even if the jurors had read the blogs, which is a huge assumption with no basis in fact, the jury expressly agreed to disregard them in reaching their verdict. The blogs could have no possible effect on the jury.

iii. Plaintiff argues that a television poll somehow influenced the jurors

Plaintiff argues that a poll taken by a television station somehow influenced the jury. According to the poll, approximately 92% of viewers who called in to participate in the poll agreed with the ultimate jury verdict that Defendants were not liable. (R-236 at p 8). The fact that the television viewers agree with the eventual verdict is not evidence of media influencing the jury, but more likely a reflection of Plaintiff’s case.

D. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED BECAUSE THERE WAS EVIDENCE THAT PLAINTIFF EXECUTED ENFORCEABLE RELEASES AND WAIVERS.

As expected with most sporting events, Plaintiff was required to execute a waiver in order to participate in the Florida event. In fact, Plaintiff had to execute two waivers. (R-79-2; R-79-3; R-79-4; R-79-5). If Plaintiff had failed to execute any of those waivers the Defendants would not have been allowed him to compete in the Florida event. (R-81 at p 7(¶¶17, 18, 19), p 13(¶¶17, 18, 19), p 18(¶14). The District Court's denial of Plaintiff's Motion for Summary Judgment was proper for several reasons, including the following: (i) Florida law is the proper law to use in interpreting the online and race site waivers, and Florida law provides that those waivers are enforceable; (ii) evidence shows Plaintiff had to agree with the waiver included in his online registration in order to submit the registration; and (iii) evidence shows Plaintiff had to execute race site waivers to participate in the Florida event.

i. Florida law is the proper law to use in interpreting the online and race site waivers

Plaintiff argues the District Court should have used Montana or California law to interpret the enforceability of the online waiver entered by Plaintiff, (R-46), but the District Court properly found Florida law applied. (R-147 at p 7).

Plaintiff entered the online waiver while living in Montana. Regardless of what choice of law analysis is used,^{12 13} the result is Florida law must be used to interpret the online waiver. If Montana law applies, when interpreting contract provisions such as the online waiver entered by Plaintiff, Montana law requires application of the law of the place where the contract is to be performed, which is Florida. (R-147 at p 7 citing Mont. Code Ann. § 28-3-102). Judge Smoak held:

In Florida, waivers or exculpatory clauses, although not looked upon with favor, are valid and enforceable if the intent to relieve a party of its own negligence is clear and unequivocal.

(R-147 at p 8).

Plaintiff's alternative argument that California law applies when interpreting the online waiver is also misplaced.¹⁴ Even if California law applied, like Florida it

¹²The District Court applied the doctrine of *lex loci contractus*. (R-147 at p 6).

¹³Florida courts have considered releases and waivers, like the ones entered by Decedent, and treat them as providing services. *Banfield v. Louis*, 589 So.2d 441, 444-45 (Fla. 4th DCA 1991). Service contracts are not subject to the rule of *lex loci contractus*, but instead require application of the most significant relationship test. *Fioretti v. Massachusetts General Life Ins. Co.*, 53 F.3d 1228, 1235 (11th Cir. 1995). Application of the most significant relationship test requires that the online waiver be interpreted applying Florida law.

¹⁴Plaintiff incorrectly seeks to rely on a choice of law provision inapplicable to Plaintiff's online waiver. Plaintiff agreed to several terms with Active Network to use Active's online registration process for the Florida event. (R-81 at pp 6-7 (¶¶15, 16), pp 12-13 (¶¶15, 16); R-147 at p 8). One term Plaintiff agreed to was Active's requirement that any dispute between Plaintiff and Active be decided

would uphold the exculpatory clause in the online waiver. *See Banfield v. Louis*, 589 So.2d 441, 444-45 (Fla. 4th DCA 1991) (citing *Okura v. United States Cycling Federation*, 186 Cal.App.3d 1462, 1468, 231 Cal.Rptr. 429, 432 (Cal.Ct.App.1986); *Bennett v. United States Cycling Federation*, 193 Cal.App.3d 1485, 239, Cal.Rptr. 55 (Cal.Ct.App.1987)).

ii. Evidence shows Plaintiff had to agree with the waiver included in his online registration in order to submit the registration

Plaintiff had to agree with all of the terms of the online registration, including its waiver, in order to register for the Florida event. (R-81, p 6 (¶12), p 12 (¶12)). This evidence was never refuted. Race Director Shelley Bramblett's trial testimony explaining to the jury how the online registration process works further confirmed her earlier affidavit submitted against Plaintiff's Motion for Summary Judgment.

Plaintiff's Motion for Summary Judgment was properly denied with respect to the online waiver, but Defendants' Motion for Summary Judgment should have been granted based on the undisputed evidence they submitted supporting the existence and enforceability of that waiver. At a bare minimum Defendants should have been

Footnote 14 continued.

under California law. The District Court recognized that Active's choice of law provision has no application to the terms Plaintiff agreed to with Defendants as part of his online registration for the Florida event, including the online waiver. (R-147 at p 8).

allowed to present their evidence regarding the online waiver to the jury, which is what the District Court allowed.

iii. Evidence shows Plaintiff signed race site waivers to participate in the Florida event

Plaintiff also signed a waiver during race site registration in order to participate in the Florida event. (R-81 at p 7 (¶¶17-19), p 8 (¶24), p 13 (¶¶17-19), p 14 (¶24)). Plaintiff argues that the race site waiver never existed because Defendants could not produce it. Plaintiff fails to understand that the mere fact that the race site waiver could not be located does not mean it never existed. Fortunately, the District Court understood this distinction in ruling that “[t]he fact that Defendants cannot provide a signed waiver does not exclude testimony on this matter; it merely goes to the weight of the evidence for the jury to consider.” (R-147 at p 9). At trial, Defendants offered testimony from Race Director Shelley Bramblett, Medical Director Joyce Wilson, and Virginia Jensen, who was the person that oversaw the registration process for the 2006 Florida event, to explain the registration process and that participants simply could not participate in the event without executing the race site waiver because without that step they would not be provided materials necessary to participate in the race.¹⁵ (R-213 at 7; R-285 at p 5, ln 4 - p 6, ln 10). Ms. Bramblett

¹⁵ Unfortunately, the transcripts of testimony by Race Director Shelley Bramblett and Virginia Jensen are not available at the time this brief is filed.

CONCLUSION

There is no question this is a tragic case. The sympathies for the wife, the children, and the parents, no doubt were present in the jurors' deliberation, and by its very nature made the jury's decision difficult. But after a lengthy trial, the jury reached its decision. That decision should not be disturbed.

It is respectfully submitted that the Judgment of the District Court should be upheld.

Respectfully submitted,

/s/ Larry A. Matthews

Larry A. Matthews

Florida Bar No.: 0339601

Shane M. Dean

Florida Bar No.: 499889

Jason B. Onacki

Florida Bar No.: 0698016

BOZEMAN, JENKINS

& MATTHEWS, P.A.

114 East Gregory Street (32502)

Post Office Box 13105

Pensacola, FL 32591-3105

(850) 434-6223 Telephone

(850) 434-5242 Facsimile

Email: Lmatthews@bjm-law.com

Sdean@bjm-law.com

Jonacki@bjm-law.com

Attorneys for Appellees

North America Sports, Inc.

and USA Triathlon

CERTIFICATE OF COMPLIANCE

We hereby certify that this Brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). This Brief contains 9,358 words. The Brief, in PDF format, was uploaded to the Eleventh Circuit Court website on the 7th day of December, 2009 at 5:00 p.m.

/s/ Larry A. Matthews

Larry A. Matthews

Florida Bar No.: 0339601

Shane M. Dean

Florida Bar No.: 499889

Jason B. Onacki

Florida Bar No.: 0698016

BOZEMAN, JENKINS

& MATTHEWS, P.A.

114 East Gregory Street (32502)

Post Office Box 13105

Pensacola, FL 32591-3105

(850) 434-6223 Telephone

(850) 434-5242 Facsimile

Email: Lmatthews@bjm-law.com

Sdean@bjm-law.com

Jonacki@bjm-law.com

Attorneys for Appellees

North America Sports, Inc.

and USA Triathlon

CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was furnished to Diana Santa Maria, Esq., Law Offices of Diana Santa Maria, P.A. 5220 South University Drive University Place, Suite 205C, Ft. Lauderdale, FL 33328 and Joel S. Perwin, Esq., Joel S. Perwin, P.A., Alfred I. DuPont Building, 169 East Flagler St., Suite 1422, Miami, FL 33131, via U.S. Mail, this 7th day of December, 2009. The original and six copies of this brief were also furnished to the Clerk, U.S. Court of Appeals for the 11th Circuit, 56 Forsyth St. N.W., Atlanta, Georgia 30303, via U.S. Mail, on the 7th Day of December, 2009.

/s/ Larry A. Matthews

Larry A. Matthews

Florida Bar No.: 0339601

Shane M. Dean

Florida Bar No.: 499889

Jason B. Onacki

Florida Bar No.: 0698016

BOZEMAN, JENKINS

& MATTHEWS, P.A.

114 East Gregory Street (32502)

Post Office Box 13105

Pensacola, FL 32591-3105

(850) 434-6223 Telephone

(850) 434-5242 Facsimile

Email: Lmatthews@bjm-law.com

Sdean@bjm-law.com

Jonacki@bjm-law.com

Attorneys for Appellees

North America Sports, Inc.

and USA Triathlon



Pam Childers

Clerk of the Circuit Court and Comptroller, Escambia County

Clerk of Courts • County Comptroller • Clerk of the Board of County Commissioners • Recorder • Auditor

Value Adjustment Board Organizational Meeting

9.

Meeting Date: 09/09/2014

Issue: Filing Fee Resolution

From: Pam Childers, Clerk of the Circuit Court & Comptroller

Organization: Clerk & Comptroller's Office

Information

Recommendation:

That the Board acknowledge, for the record, that Resolution R2012-1, which was adopted by the Value Adjustment Board (VAB) on March 20, 2012, remains in effect until repealed by the VAB, and provides that a petition filed pursuant to Section 194.013, Florida Statutes, and Rule Chapter 12D-9.013(k), F.A.C., shall be accompanied by a filing fee, to be paid to the Clerk of the Circuit Court, in the amount of \$15 for each separate parcel of property, real or personal, covered by the petition.

Background:

Attachments

Resolution R2012-1

VALUE ADJUSTMENT BOARD OF ESCAMBIA COUNTY
RESOLUTION R2012-1

A RESOLUTION OF THE VALUE ADJUSTMENT BOARD OF ESCAMBIA COUNTY, FLORIDA; REPEALING AND REPLACING RESOLUTION R2011-1; RE-ESTABLISHING FILING FEES FOR APPEALS TO THE VALUE ADJUSTMENT BOARD; PROVIDING THAT NO FILING FEE SHALL BE REQUIRED FOR PETITIONS APPEALING THE DISAPPROVAL OF HOMESTEAD EXEMPTIONS OR DENIAL OF TAX DEFERRALS; ENACTING PROVISIONS FOR WAIVER OF THE FEE; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Value Adjustment Board of Escambia County, Florida (VAB), considers petitions from taxpayers relating to property tax assessments and exemptions; and

WHEREAS, Section 194.013, Florida Statutes, and Rule Chapter 12D-9.013(k), Florida Administrative Code (F.A.C.), authorize Value Adjustment Boards to establish, by resolution, a non-refundable filing fee for submitting a petition; and

WHEREAS the VAB desires to establish such a fee to defray the costs incurred in connection with the administration and operation of the VAB;

NOW, THEREFORE, BE IT RESOLVED BY THE VALUE ADJUSTMENT BOARD OF ESCAMBIA COUNTY, FLORIDA, AS FOLLOWS:

Section 1. The above recitals are true and incorporated herein.

Section 2. Value Adjustment Board Resolution R2011-1 is hereby repealed.

Section 3. In accordance with Section 194.013, Florida Statutes, and Rule Chapter 12D-9.013(k), F.A.C., petitions filed pursuant to Section 194.011, Florida Statutes, shall be accompanied by a filing fee to be paid to the Clerk of the Circuit Court in an amount of \$15.00 for each separate parcel of property, real or personal, covered by the petition and subject to appeal. However, no such filing fee shall be required with respect to an appeal from the disapproval of homestead exemption under Section 196.151, Florida Statutes, or from the denial of tax deferral under Section 197.253, Florida Statutes. Only a single filing fee shall be charged as to any particular parcel of property despite the existence of multiple issues and hearings pertaining to such parcel. For joint petitions filed pursuant to Section 194.011(3)(e) or Section 194.011(3)(f), Florida Statutes, a single filing fee shall be charged. The filing fee for such joint petitions shall be calculated at \$5.00 per parcel and shall be proportionately paid by the affected parcel owners.

Section 4. The filing fee shall be waived with respect to a petition filed by a taxpayer who demonstrates at the time of filing, by an appropriate certificate or other documentation issued by the Department of Children and Family Services and submitted with the petition, that the petitioner is then an eligible recipient of temporary assistance under Chapter 414, Florida Statutes.

Section 5. All filing fees shall be non-refundable and shall be paid to the Clerk of the Circuit Court at the time of filing. If such fees are not paid at that time, the petition shall be deemed invalid and shall be rejected.

Section 6. All filing fees collected by the Clerk shall be allocated and utilized to defray, to the extent possible, the costs incurred in connection with the administration and operation of the VAB.

Section 7. This Resolution shall become effective upon its adoption, and shall remain in effect until repealed, and copies of this Resolution shall be provided to each member of the VAB upon his or her appointment to the VAB.

ADOPTED this 20th day of March 2012.

VALUE ADJUSTMENT BOARD
ESCAMBIA COUNTY, FLORIDA

ATTEST:

By: Gene M. Valentino
Gene M Valentino, Chairman

Ernie Lee Magaha
Clerk of the Circuit Court and Comptroller



This document approved as to form and legal sufficiency.

By [Signature]
Title VAB Legal Counsel
Date 3/20/12



Pam Childers

Clerk of the Circuit Court and Comptroller, Escambia County

Clerk of Courts • County Comptroller • Clerk of the Board of County Commissioners • Recorder • Auditor

Value Adjustment Board Organizational Meeting

10.

Meeting Date: 09/09/2014

Issue: Approval of Minutes

From: Pam Childers, Clerk of the Circuit Court & Comptroller

Organization: Clerk & Comptroller's Office

Information

Recommendation:

That the Board approve the Minutes of the Regular Board Meeting held December 16, 2013, as prepared by the Clerk to the Board's Office.

Background:

Attachments

20131216 Minutes

MINUTES OF THE REGULAR MEETING OF THE VALUE ADJUSTMENT BOARD
HELD DECEMBER 16, 2013
BOARD CHAMBERS, FIRST FLOOR, ESCAMBIA COUNTY GOVERNMENTAL COMPLEX
221 PALAFOX PLACE, PENSACOLA, FLORIDA
(9:04 a.m. – 9:12 a.m.)

Present: Honorable Steven L. Barry, Chairman, Board of County Commissioners
Gerald W. Adcox, Vice Chairman, District School Board Appointee
Honorable Gerald Boone, District School Board
Honorable Lumon J. May, Board of County Commissioners
Suzanne Whibbs, Private Counsel
Doris Harris, Deputy Clerk to the Board

Absent: Rodger Doyle, Board of County Commissioners' Appointee

AGENDA NUMBER

1. Call to Order

Chairman Barry called the Meeting of the Value Adjustment Board (VAB) to order at 9:04 a.m.

2. Was the Meeting Properly Advertised?

Motion made by Commissioner May, seconded by Mr. Adcox, and carried 4-0, with Mr. Doyle absent, waiving the reading of the legal advertisement, which was published in the Pensacola News Journal on December 14, 2013, *in the Board of County Commissioners – Escambia County, Florida Meeting Schedule December 16-December 20, 2013, Legal No. 1615115 (notice was also posted to the Clerk's website).*

3. Special Magistrates' Recommended Decisions

Motion made by Commissioner May, seconded by School Board Member Boone, and carried 4-0, with Mr. Doyle absent, upholding the recommended decisions of the Special Magistrates based on the October 7, 2013, October 11, 2013, and November 12, 2013, Hearings for 2013 Petitions.

Speaker(s):

Honorable Chris Jones

MINUTES OF THE REGULAR MEETING OF THE VAB – Continued

AGENDA NUMBER – Continued

4. Approval of Minutes

Motion made by Commissioner May, seconded by Mr. Adcox, and carried 4-0, with Mr. Doyle absent, approving the Minutes of the Meeting of the Value Adjustment Board held July 23, 2013, as prepared by Doris Harris, Deputy Clerk to the Board.

5. Certification of Value Adjustment Board for Real Property

Motion made by Mr. Adcox, seconded by Commissioner May, and carried 4-0, with Mr. Doyle absent, approving the Property Appraiser's *Certification of the Value Adjustment Board* to the Florida Department of Revenue for the 2013 Tax Roll for Real Property, in the amount of \$11,813,863,400.

6. Certification of Value Adjustment Board for Tangible Personal Property

Motion made by School Board Member Boone, seconded by Commissioner May, and carried 4-0, with Mr. Doyle absent, approving the Property Appraiser's *Certification of the Value Adjustment Board* to the Florida Department of Revenue for the 2013 Tax Roll for Tangible Personal Property, in the amount of \$1,802,882,241.

7. Election of Chairman and Vice Chairman

Motion made by Commissioner May, seconded by School Board Member Boone, and carried 4-0, with Mr. Doyle absent, taking the following action concerning election of the Chairman and Vice Chairman:

- A. Electing Commissioner Barry to serve as Chairman for January 2014 through December 2014, pursuant to Section 194.015, Florida Statutes; and
- B. Electing Mr. Adcox to serve as Vice Chairman for January 2014 through December 2014.

8. Adjournment

There being no further discussion to come before the Value Adjustment Board, Chairman Barry declared the Meeting adjourned at 9:12 a.m.