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IN THE RENTAL HOUSING COMMITTEE
OF MOUNTAIN VIEW, CALIFORNIA

Lindsay Properties, LLC, Appellant-Landlord, vs. Del Medio Manor Tenants Association, Respondent-Tenants.	Petition No.: 17180002 **Respondent Del Medio Manor Tenants Association's Response to Second Tentative Appeal Decision** Rental Housing Committee Date: February 11, 2019 Time: 7:00 p.m. Place: 500 Castro Street Mountain View, CA 94041

I. INTRODUCTION

Respondent Del Medio Manor Tenants Association submits this response to the Second Tentative Appeal Decision issued by the Rental Housing Committee (the "RHC") on February 1, 2019. This appeal involves an extremely lengthy evidentiary record, which includes comprehensive briefing, over 1,000 pages of documents, and hours of witness testimony. In reviewing this extensive record, the Hearing Officer was required to assess the validity of each document, the credibility of each witness, and the strength of each argument. Based on this familiarity with the record, the Hearing Officer provided each piece of evidence its due weight and rendered numerous factual findings to reach the Decision After Remand.

When considering the parties' requests for appeal, the RHC should treat these findings of fact with significant deference and affirm the portions of the Hearing Officer's decision that are supported by substantial evidence in the record, even if individual committee members would have reached contrary conclusions. (*See Bowers v. Bernards* (1984) 150 Cal. App. 3d 870, 874.) In assessing whether findings are supported by substantial evidence, the RHC can consider only the hearing record and must disregard any new evidence, including any additional testimony offered by the parties, in its decision on appeal. (Art. XVII, Sec. 1711(j).)

The Second Tentative Appeal Decision adheres to these principles with respect to the majority of the issues analyzed in the Decision After Remand. However, the Second Tentative Appeal Decision's inclusion of $24,836.67 worth of management expenses improperly categorized as Ordinary Repair, Replacement, and Maintenance Costs in the Petition Year clearly goes against the substantial evidence in the record and the findings in the Hearing Officer's decision. In its final decision, the RHC should properly categorize these costs as management expenses. In addition, the Second Tentative Appeal Decision's recommendation that the RHC ignore the Hearing Officer's thorough analysis of the record and grant the landlord a *Vega* adjustment to Base Year rents should not be adopted. The reasoning in the Second Tentative Appeal Decision is contradicted by the substantial evidence in the record, and the RHC must grant deference to the Hearing Officer's findings and affirm the decision denying a *Vega* adjustment.

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II. ARGUMENT

A. The Recommendation in Element B.1 of the Second Tentative Appeal Decision to Categorize $24,836.67 in Management Expenses as Ordinary Repair Costs in the Petition Year Conflicts with the Findings of the Hearing Officer and the Substantial Evidence in the Record.

Despite recommending that the RHC affirm the Hearing Officer's decision to exclude all costs labeled as "Salaries" from Base Year Ordinary Repair, Replacement and Maintenance Costs, the Second Tentative Appeal Decision proposes allowing $24,836.67 of such costs in the Petition Year. This recommendation should not be adopted because it directly contradicts the Hearing Officer's findings and the substantial evidence in the record.

The reasoning in the Second Tentative Appeal Decision in support of the recommendation to allow the landlord to claim $24,836.67 worth of "salary" expenses as Petition Year Ordinary Repair costs mischaracterizes both the reasoning in the Decision After Remand and the evidence in the record. The Second Tentative Appeal Decision states that the Decision After Remand concluded "that aggregated payments totaling $190,669.25 are excluded while specific checks are included" with respect to the Hearing Officer's analysis of the "salary" costs claimed as Petition Year Ordinary Repair expenses. (Second Tentative Appeal Decision at 15.) This statement misrepresents the Decision After Remand. The Hearing Officer made no findings indicating that any of the claimed salary expenses in the Petition Year were appropriately categorized as Ordinary Repair Expenses. In fact, the Decision After Remand states that Petitioner failed to meet its burden of proof with respect to "salaries" claimed as Ordinary Repair Expenses in both the Base and Petition Years. (Decision After Remand at 15 (finding that the landlord "failed to introduce any evidence that salaries attributed to ordinary repair, replacement and maintenance costs were different from those

classified as management expenses.").) The Hearing Officer then implemented the finding that the claimed "salary" expenses had been improperly classified as Ordinary Repair Costs by subtracting *all* of these claimed expenses from her calculation in the Base Year, including both aggregated and specific payments.[1] The Hearing Officer did not explicitly address the individual costs in the Petition Year; however, review of the reasoning in the Decision After Remand and the evidence in the record clearly demonstrates that her failure to similarly exclude *all* claimed "salary" expenses in the Petition Year was a mathematical oversight rather than an intentional result.

The Second Tentative Appeal Decision also mischaracterizes the evidence in the record relating to the "salary" costs by stating that the $24,836.67 included as Petition Year Ordinary Repair Costs "is supported by substantial evidence in the record, as copies of each check are included in evidence and purportedly pay for health and life insurance cost, as well as salaries to specified parties." (Second Tentative Appeal Decision at 15). This is not an accurate summary of the evidence submitted in support of these costs.

First, the only substantiating documentation provided in support of $23,589.00 of these costs are two checks *payable to the landlord's management company*. (*See* Attachment 1: Hearing Officer's Exhibit B-C, Documents Submitted in Support of Petition Year Ordinary Repair "Salary" Expenses). No other explanation or documentation related to this $23,589.00 expense exists in the record and there is absolutely no basis by which the Hearing Officer could have concluded that *payments to the landlord's management company* were properly classified

[1] Including a claimed payment to a life insurance company, which Petitioner substantiated with a cancelled check. (*See* Attachment 2: Hearing Officer's Exhibit B-C, Documents Submitted in Support of Base Year Ordinary Repair "Salary" Expenses).

as anything other than management expenses, and there is no indication anywhere in the record or in the Decision After Remand that the Hearing Officer reached such a conclusion. The inclusion of these expenses in the calculation of the landlord's Petition Year Ordinary Repair Costs was clearly in error and contrary to the findings of the Hearing Officer and the substantial evidence in the record.

Second, neither the Hearing Officer's findings nor the evidence in the record support the inclusion of the remaining $1,247.67 claimed as "salaries" in Petition Year Ordinary Repair Costs. The claim in the Second Tentative Appeal Decision that there was substantial evidence provided specifying for whom the purported health and life insurance costs were paid or relating these expenses to Ordinary Repair Costs rather than management expenses is not supported by either the Hearing Officer's findings or the evidence in the record. (*See* Second Tentative Appeal Decision at 15.) The only evidence provided in support of these expenses were cancelled checks and invoices, which provided no details as to the individuals for whom the expenses were incurred or any other basis that would allow the Hearing Officer to determine that these expenses were related to Ordinary Repair Costs rather than management expenses.[2] (*See* Attachment 1: Hearing Officer's Exhibit B-C, Documents Submitted in Support of Petition Year Ordinary Repair "Salary" Expenses).

In addition, the Hearing Officer *expressly stated* that similar evidence was insufficient to meet the landlord's burden that such expenses should be classified as Ordinary Repair Costs

[2] Respondent acknowledges that the CoPower invoice may possibly contain reference to specific individuals. However, this information was completely redacted in the copies provided, denying Respondent the opportunity to fully respond to the claim in the Second Tentative Appeal Decision regarding this expense. Even if these payments are related to specific employees, there is no credible basis for classifying a health insurance payment as an expense related to the repair of the property.

in the Base Year, finding that "Petitioner failed to meet its burden of proving these differing costs by a preponderance of relevant and credible evidence." (Decision After Remand at 15; *see also* Attachment 2: Hearing Officer's Exhibit B-C, Documents Submitted in Support of Base Year Ordinary Repair "Salary" Expenses). It is unreasonable for the Second Tentative Appeal Decision to assume that the Hearing Officer purposely included these expenses in the Petition Year when she expressly rejected, based on substantially the same evidence, the inclusion of these expenses in the Base Year. Therefore, the inclusion of these expenses in the calculation of Petition Year Ordinary Repair Costs was clearly in error and contrary to the findings of the Hearing Officer and the substantial evidence in the record.

As the recommendation in the Second Tentative Appeal Decision is unsupported by the findings of the Hearing Officer and the substantial evidence in the record, the $24,836.67 claimed "salary" expenses must be excluded from the calculation of Petition Year Ordinary Repair, Replacement, and Maintenance Costs. The total Petition Year Operating Expenses should be adjusted to $542,673.12.[3]

B. The Recommendation in Element A.1 of the Second Tentative Appeal Decision to Grant a *Vega* Adjustment Conflicts with the Findings of the Hearing Officer and the Substantial Evidence in the Record.

The RHC should decline to follow the Second Tentative Appeal Decision's award of a *Vega* adjustment in the Base Year because this recommendation directly contradicts the

[3] If the RHC declines to follow the recommendation of the Second Tentative Appeal Decision and determines that *all* claimed "salary" expenses are properly categorized as Ordinary Repair, Replacement and Maintenance Costs, then those $38,378.30 claimed "salary" expenses incurred *after* the close of the Petition Year must be excluded from the final calculation of these costs. (*See* Attachment 1: Hearing Officer's Exhibit B-C, Documents Submitted in Support of Petition Year Ordinary Repair "Salary" Expenses (showing several payroll statements from 2018).). Additionally, the $23,589.00 in *payments to the landlord's management company* must be excluded from this category regardless of the RHC's findings on the proper categorization of general "salary" costs.

thorough analysis and factual findings of the Hearing Officer, which are entitled to deference on appeal. Additionally, the reasoning provided in support of the *Vega* adjustment in the Second Tentative Appeal Decision is inconsistent with the evidence in the record.

In reviewing the Hearing Officer's findings, the RHC's role is not to second guess conclusions or inferences reasonably deduced from the facts in evidence, even if individual committee members would have independently reached a contrary decision. (*See Bowers v. Bernards* (1984) 150 Cal. App. 3d 870, 874 (affirming the longstanding "substantial evidence rule" of appellate review in California civil cases).) If the findings of the Hearing Officer are supported by substantial evidence in the record, then those findings must be affirmed. (*Id.*) The Decision After Remand provided four pages of thorough analysis of the evidence in the record and concluded, for several reasons, that a *Vega* adjustment is not warranted in this case. (Decision After Remand at 8-12). In particular, the Hearing Officer relied on testimony and evidence, presented by both parties, that the units for which a *Vega* adjustment is sought had generally not been "remodeled, re-carpeted, or modernized." (Decision After Remand at 9). The Hearing Officer also noted that the landlord admitted that upgrades are performed *when units are turned over* in order to command higher rents. (Decision After Remand at 12.) Analyzing the significant evidence presented by the parties on this issue, the Hearing Officer found that the actual rents charged in the Base Year for units subject to the *Vega* request accurately reflected the applicable market conditions, where units with less recent upgrades would logically command lower rents, and that the substantial evidence in the record did not support awarding a *Vega* adjustment in this case.

Despite the thorough analysis of the Hearing Officer, the Second Tentative Appeal Decision recommends reversing the numerous findings in the Decision After Remand and ignoring the substantial evidence in support of the Hearing Officer's conclusion in order to award a *Vega* adjustment. This recommendation appears to be based solely on the reasoning that "only 22—less than half—of the Subject Units presumptively warrant a Vega Adjustment even though all Subject Units had not been recently renovated or improved." (Second Tentative Appeal Decision at 8.) This statement does not accurately reflect the evidence in the record, which shows that the tenants living in subject units for which *Vega* adjustments are sought have, on average, been living in the property substantially longer than the tenants in subject units for which no *Vega* adjustments are sought, and that these units have generally received less recent upgrades. (*See* Hearing Officer's Exhibit B-C, Amended Petition, Worksheet 1A.) The evidence in the record shows that tenants living in units for which *Vega* adjustments are sought have been living on the property for an average of 14.6 years, compared to an average tenancy of only 8 years for subject tenants for whom no *Vega* adjustment is requested.[4] (*See id.*) In addition, the evidence also shows that many of the units for which no *Vega* adjustment is sought had been recently upgraded in 2015 whereas the units subject to the *Vega* request generally had fewer or less recent upgrades. (*See* Hearing Officer's Exhibits D-E.)

Based on the substantial evidence in the record, the Hearing Officer reasonably concluded that the actual rents charged reasonably reflected the older condition of these units combined with the physical condition and location of the building and therefore, no *Vega*

[4] The median length of tenancy of units for which a *Vega* adjustment is sought is 14 years as compared to only 6 years for those units for which no *Vega* adjustment is requested. (*See* Hearing Officer's Exhibit B-C, Amended Petition, Worksheet 1A).

adjustment was warranted in the Base Year. The Hearing Officer supported this decision with extensive factual findings that are consistent with substantial evidence in the record and entitled to significant deference on appeal. Further, review of the evidence in the record does not support the reasoning provided in the Second Tentative Appeal Decision to justify the award of a *Vega* adjustment. Therefore, the RHC should decline to follow the recommendation in Element A.2 of the Second Tentative Appeal Decision granting a *Vega* adjustment and should instead affirm the findings of the Hearing Officer that a *Vega* adjustment is unwarranted in this case.

C. Issues Not Remanded to the Hearing Officer Are Not Appropriately Subject to Review by the RHC.

The CSFRA provides that "[t]he decision of the Committee on appeal shall be final unless an aggrieved party has timely sought judicial review pursuant to law." (Art. XVII, Sec. 1711(k).) At the hearing on August 27, 2018, the RHC reviewed the parties' initial requests for appeal, affirmed some elements of the Hearing Officer's July 5, 2018, and remanded others to the Hearing Officer for further review and explanation. Under the CSFRA, those elements of the decision that were affirmed by the RHC became final and must be appealed to a court for any further review. (*Id.*)

1. <u>The RHC should adopt the recommendation in Element A.1 of the Second Tentative Appeal Decision to deny the Landlord's request for reconsideration of the RHC's final decision regarding the valuation of junior one-bedroom units.</u>

The RHC's September 6, 2018 Direction to Hearing Officer on Remand ("Direction to Hearing Officer") states that "[t]he Decision of the Hearing Officer that junior one-bedroom units shall be valued as 'efficiencies' for purposes of Regulation Chapter 6, Section G(3) (Vega

Adjustment) is **affirmed**." (emphasis in original.) As the Second Tentative Appeal Decision correctly notes "the issue of the treatment of the junior one-bedrooms is final and is not properly subject to a second appeal." (Second Tentative Appeal Decision at 7.) Under the CSFRA, parties seeking to challenge a final decision of the RHC must file an appeal in court. (Art. XVII, Sec. 1711(k).) Therefore, the recommendation in Element A.1 of the Second Tentative Appeal Decision denying the landlord's request that the RHC review this issue should be adopted.

2. The RHC should adopt the recommendation in Element A.4 of the Second Tentative Appeal Decision to affirm the calculation of management expenses.

The Direction to Hearing Officer following the August 27, 2018 appeal hearing affirmed the application of Regulation Chapter 6, Section E(1)(j) calculating management expenses as six percent of adjusted gross income in the Base and Petition Years. (Direction to Hearing Officer at 1-2.) The RHC directed the Hearing Officer to modify the calculation of these numbers only if any changes were made to Base or Petition Year income. (*Id.*) As the application of the six percent presumption to calculate management expenses was previously affirmed by the RHC, this issue no longer the appropriate subject of review by the RHC and Element A.4 of the Second Tentative Appeal Decision affirming the calculation of management expenses in the Base and Petition Years should be adopted.

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D. The Remaining Analysis in the Second Tentative Appeal Decision Should Be Adopted by the RHC.

1. <u>The RHC should adopt Elements A.7 and A.8 of the Second Tentative Appeal Decision and affirm the exclusion of pavers and parking lot resurfacing in the calculation of capital improvements.</u>

As noted in the Second Tentative Appeal Decision, "the CSFRA strictly regulates capital improvements," and only those capital improvements that are necessary to bring the property into compliance or maintain compliance with applicable health and safety codes may be considered in a petition for upward adjustment in rent. (Second Tentative Appeal Decision at 12; Art. XVII, Sec. 1710(a)(2)(c).) Further, Regulation Chapter 5 Section G states that the landlord must prove any claims raised in a petition for upward adjustment in rent by a preponderance of the evidence. Based on these standards and the evidence in the record, the Hearing Officer concluded that the landlord failed to meet its burden of proof with respect to paver and parking lot resurfacing costs claimed as capital improvements in the Petition. (Decision After Remand at 16-19.) As the Hearing Officer's conclusion was supported by the substantial evidence in the record, Respondent requests that the RHC adopt Element A.7 of the Second Tentative Appeal Decision affirming the exclusion of paver expenses and Element A.8 of the Second Tentative Appeal Decision affirming the exclusion of the parking lot resurfacing cost.

After thoroughly reviewing the record with respect to the claimed paver expense, the Hearing Officer found that "although this cost is listed on the worksheets, no evidence of an estimate, invoice, or payment was provided in the thousands of pages of Petitioner's documents." (Decision After Remand at 16). In addition, the Hearing Officer found no evidence that the installation of pavers was necessary for compliance with local health and

safety codes. (*Id.* at 16-17.) In fact, the Hearing Officer found that the evidence presented by the landlord conflicted with her claims made on appeal regarding the necessity of this expense. (Decision After Remand at 16 (stating that "The installation of the pavers (the over-improvement) necessitated the moving of electrical lines, not *vice versa* as Petitioner would have the Committee believe.") (emphasis in original).) As the Hearing Officer's finding that the landlord failed to prove this expense by a preponderance of credible evidence is supported by the record below, Respondent requests that the RHC adopt Element A.7 of the Second Tentative Appeal Decision and affirm the finding of the Hearing Officer.

Similarly, the Hearing Officer found that "Petitioner provided no evidence that the parking lot resurfacing was a necessary cost rather than an unnecessary over-improvement." (Decision After Remand at 17.) Because the landlord did not meet its burden of proving this expense through its failure to offer any evidence that this cost was necessary to maintain compliance with local health and safety codes, Respondent requests that the RHC adopt Element A.8 of the Tentative Appeal Decision affirming the exclusion of parking lot resurfacing costs from its calculation of capital improvements.

2. RHC should adopt Element A.10 of the Second Tentative Appeal Decision and affirm the equal allocation of the upward adjustment among all units on the property.

The Regulations applicable to this case state that any upward adjustment awarded "shall be allocated equally among all Rent Units in the property," but provide discretion to distribute increases in another matter if doing so is "necessary to ensure fairness and further the purposes of the Act." (Former Regulation 6(J).) In its Amended Petition, the landlord requested the upward adjustment to be allocated among only 56 of the 104 units on the property in amounts

ranging from $115 to $490. (Hearing Officer's Exhibits B-C, Amended Petition, Worksheet 1.A.)

In reviewing the record, the Hearing Officer found that "Petitioner admitted that it does not charge expenses to any specific unit, but charges expenses across all of them, thus the same should apply to any rent increases under the Act." (Decision After Remand at 20 (*citing* Hearing Officer's Exhibit's B-C, Amended Petition, Worksheet 6.).) The substantial evidence in the record demonstrates that the upward adjustment was calculated based on the *total* income and expenses for the property, and not only the income and expenses of the 56 units for which the landlord has sought rent increases. Therefore, the Hearing Officer reasonably concluded that placing the entire burden of the upward adjustment, which has been calculated based on the entire property's income and expenses, on only a fraction of the tenants would fail to ensure fairness or further the purposes of the CSFRA. (Decision After Remand at 20.) The Second Tentative Appeal Decision correctly affirms this finding. (Second Tentative Appeal Decision at 14)

The Hearing Officer further found that "to apportion the upward adjustment in inconsistent, excessive amounts to only certain tenants--rather than applying a modest increase to all units in the Property, clearly conflicts with the Act's purpose of promoting affordable rents 'to the greatest extent allowable under California law.'" (Decision After Remand at 20, (*citing* Art. XVII, Sec. 1700).) The conclusion that the landlord's requested distribution would undermine the CSFRA's purpose of promoting housing affordability was supported by substantial evidence in the record, including declarations from affected tenants. (*See, e.g.* Hearing Officer's Exhibit D: Delcaration of Danuta Przygurski (stating that proposed increase

would be a hardship due to limited income from Social Security benefits); Declaration of Marion Pauck (stating that proposed increase would be a hardship for retiree living on a fixed income); Declaration of Beth Eisenman (stating that proposed increase would be a hardship due to limited salary from job as a social worker).) As the Hearing Officer's conclusion that allocating the upward adjustment equally across all units on the property is consistent with the law and supported by substantial evidence in the record, Respondent requests that the RHC adopt Element A.10 of the Second Tentative Appeal Decision and affirm the findings of the Hearing Officer.

3. The RHC should adopt Element A.3 of the Second Tentative Appeal Decision and affirm the decision of the Hearing Officer excluding payments to lobbying organizations.

Regulation Chapter 6, Section 6(E)(2)(j) explicitly prohibits consideration of "[c]ontributions to lobbying efforts or organizations which advocate on behalf of apartment owners on local, State, or Federal legislative issues" in a petition for upward adjustment of rent. In analyzing the $860.25 payment to the California Apartment Association (CAA) claimed in the Petition as a Business License Fee, the Hearing Officer found that "Petitioner failed to meet the Act's definition of Operating expense, and failed to demonstrate why this expense should not be excluded by the Act at Regulation 6(E)(2)(j)." (Decision After Remand at 14.) The Hearing Officer relied on substantial evidence in the record demonstrating that the CAA engages in lobbying activity on behalf of the rental property industry. (Decision After Remand at 14; *see also* Hearing Officer's Exhibit D: Declaration of Khyrstyn R. McGarry In Support of Del Medio Manor Tenants Association Response in Opposition to the Petition Requesting Upward Adjustment of Rent at Ex. 7.) The Hearing Officer further found that

"Petitioner provided no evidence to controvert this fact other than vague testimony that it 'used some forms' and that the CAA provides legal assistance (but did not specify for what.)" (Decision After Remand at 14, *citing* Testimony at Hearing.) The Hearing Officer then found that the landlord "did not apportion this fee to claim only its non-lobbying expenses," leaving the Hearing Officer with no basis to include any portion of this expense in her calculation. (*Id.*) As the Hearing Officer's findings are supported by substantial evidence in the record,[5] Respondent requests that the RHC adopt Element A.3 of the Second Tentative Appeal Decision and exclude this expense.

4. <u>The RHC should adopt Element B.3 of the Second Tentative Appeal Decision and exclude expenses for which the landlord received, or was eligible to receive, reimbursement.</u>

Regulation Chapter 6, Section E(2)(d) prohibits consideration of expenses "for which the Landlord has been or is eligible for reimbursement by another party, whether or not reimbursement was actually received." As noted in the Second Tentative Appeal Decision, uncontested evidence in the record shows that the landlord claimed cleaning fees and credit check costs in the amounts of $2,130 and $262.80 in the Base Year and $2,320 and $109.50 in the Petition Year. (Second Tentative Appeal Decision at 16, citing Hearing Officer's Exhibits D & E.) Under California Civil Code Sections 1950.5 and 1950.6, the landlord was eligible to receive reimbursement for these expenses. Further, the evidence in the record indicates that the landlord actually did receive some reimbursements that were not accounted for anywhere in the

[5] At the August 27, 2018 appeal hearing in this matter, multiple Committee Members referenced their personal experiences with the CAA in deliberation regarding this expense. (Recording of August 27, 2018 RHC Meeting, Comments by Chair Grunewald at 2:05:00 and Committee Member Oldenkamp Honey at 2:09:21.) Under CSFRA Section 1711(j), the RHC must base its decision only on the evidence presented by the parties and cannot rely on facts outside of the record, such as personal experience in the rental property industry, in reaching its conclusions.

Petition. (*See, e.g.* Hearing Officer's Exhibit E; Recording of May 22, 2018 Hearing, Testimony of Stephanie Valle at 52:32.) As substantial evidence in the record supports the conclusion that these expenses must be excluded pursuant to Regulation Chapter 6, Section E(2)(d), Respondent requests that the RHC adopt Element B.3 of the Second Tentative Appeal Decision and accordingly reduce total operating expenses by $2,392.80 in the Base Year and $2,429.50 in the Petition Year.

III. CONCLUSION

For the aforementioned reasons, Respondent Del Medio Manor Tenants Association respectfully requests that the Committee adopt the tentative ruling with the following modifications:

(1) The Committee should deny in their entirety the $215,505.92 "salary" expenses claims as Petition Year Ordinary Repair, Replacement, and Maintenance Costs and properly classify all of these expenses as Management Expenses.

(2) The Committee should affirm the Hearing Officer's decision denying a *Vega* adjustment to Base Year income.

Respectfully submitted, this 6th day of February 2019.

By: _____

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