The Honorable Judge Douglass North
Date of Hearing: April 3, 2019
Time of Hearing: 8:30 a.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

S 212th ST LLC, a Washington limited liability company,

Plaintiff,

v.

FORTERRA NW, a Washington public benefit nonprofit corporation, and FORTERRA ENTERPRISES, INC., a Washington corporation,

Defendants.

No. 18-2-55191-9-SEA

FORTERRA DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND CONTEMPT

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I. INTRODUCTION

Plaintiff's Motion for Preliminary Injunction and Contempt distorts the indisputable facts.[1] Despite what the opening of the Motion implies, Plaintiff *knew* this Property presented development challenges. It had been vacant for years and had the same obvious issues—such as overgrown foliage and homeless tents—that commonly affect vacant local property. Further, as Forterra disclosed from the outset, wetlands made all but a small part of the Property unsuitable for building. That's why Forterra listed the Property for sale at a price "well below its 2008 appraised value—and even below its assessed value for property tax purposes." Connor Decl. ¶3. Knowing all this, Plaintiff expressed intense interest in the Property, even threatening to sue when Forterra initially accepted another offer. *Id*. Ex. 1. Far from being "naive" about the Property, Plaintiff was represented as having "vast experience and knowledge ... in land assets," with particular focus on "complex lands such as this one." *Id*. Ex. 2.

Since agreeing to buy the Property on May 2, 2018, however, Plaintiff apparently has done little to determine development feasibility. Rather than conduct studies, hire architects and engineers, talk with land use officials, or undertake typical pre-development activities, it has focused on finding ways to coerce Forterra through litigation into giving it the Property without payment. *See* Grausz Decl. ¶10 & Exs. 6, 7 (offers to buy Property for no monetary consideration).[2] In furtherance of that effort, Plaintiff comes before the Court again, seeking even more time, more documents (which Forterra does not have), and an advisory opinion from the Court as to payment of an indisputable latecomer charge on the Property that has not come due. The Court should deny the Motion:

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[1] Even though Plaintiff certified to the Court that its Motion contained "fewer than 4,200 words," it *actually* contained over 5,800 words—or 40% more than the word limit of LCR 7(b)(5)(B)(vi). Despite being advised of the issue, Plaintiff's counsel declined to do anything about it. This brief, on the other hand, complies with the rule.

[2] "Washington law admit[s] evidence of compromise and offers of compromise when offered for some purpose other than [establishing] liability." *Sharbono v. Universal Underwriters Ins.*, 139 Wn. App. 383, 418, 161 P.3d 406 (2007) (citations omitted). Here, Plaintiff's proposals to buy the Property for nothing reveal its motive in bringing this Motion, i.e., *not* to evaluate the existing deal for $275,000 but to intimidate Forterra into slashing its price.

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First, the request that Forterra produce *more* documents verges on the absurd. Forterra has thoroughly reviewed its paper and electronic files, and has produced all Property Documents, as the Court has defined that term—and more. Plaintiffs' arguments revolve around nine documents that its principal, Mr. Jha, claims were in Forterra's possession but not produced. He is mistaken. In each instance, Forterra either does not have the document (for good reason) or it produced the document to Plaintiff.

Second, the record contains no evidence on which the Court could base a finding of contempt—which requires proving intentional disobedience of an order—much less award sanctions. Forterra's Senior Director of Strategic Projects spent days collecting, reviewing, and producing documents in response to the Order, a process he completed on January 10, 2019. Until this Motion, Plaintiff never complained about the production of documents, saving that claim until the brink of expiration of the feasibility period.

Third, Plaintiff does not come close to satisfying its burden for injunctive relief to extend the feasibility period so it can tie up the Property while it litigates the handwritten provision on the front page of the Purchase and Sale Agreement (Purchase Agreement) obliging Plaintiff to satisfy "any and all latecomer fees/charges due after closing." Jha Decl. Ex. AH. Even if Mr. Jha did not understand that when there are only two fees/charges in question, the term "any and all" means both of them, his agent was advised of Plaintiff's responsibility for the charges within days of signing the Purchase Agreement. But Plaintiff failed to enlist the Court's assistance on the point until days before expiration of the feasibility period. That brinksmanship, standing alone, requires denial of equitable relief. Further, Plaintiff cannot show a likelihood of success. The only evidence—from an impartial third party—shows that Plaintiff is responsible for the charges it disputes. Even if Plaintiff had a credible argument, the dispute is about money—which means, under settled law, that it's not properly the subject of injunctive relief.

Plaintiff's 45-business day feasibility period has now extended to 11 months. Plaintiff must decide whether it wishes to buy the Property or not.

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II. STATEMENT OF FACTS

A. The Transaction

Plaintiff begins its brief with a discussion of alleged misrepresentations by Forterra that have nothing to do with the matters at issue on this Motion. Rather than risk allowing the Court to be influenced by Plaintiff's mischaracterizations, Forterra will briefly respond.

Plaintiff came to this transaction *knowing* the Property presented challenges for a developer. The Vacant Land Agent Detail Report—a document available to all real estate agents—made clear that "[p]roperty is mostly sloped & wet," with only a "small portion ... buildable." Emery Decl. Ex. B. The Detail Report presented the Property not as suitable for large-scale development, but as having a small buildable area for a single family "dream house." *Id.* The same document referred to "Soos Creek & latecomer fees of $218k." *Id.* For these reasons, Forterra listed the Property "at a price well below its 2008 appraised value—and even below its assessed value," hoping "someone with more development experience could do what Forterra had been unable to do." Connor Decl. ¶3. In the Purchase Agreement, Plaintiff acknowledged "the several legal and environmental challenges involving the Property," Jha Decl. Ex. AH, Addendum/Amendment ¶3, "Feasibility Contingency," and that it was purchasing the property "IN ITS EXISTING CONDITION, 'AS-IS, WHERE IS, WITH ALL FAULTS,'" *id.*, Addendum B ¶1.

Plaintiff was not a "naive buyer." Mot. 1:22. Plaintiff presented itself as "the real estate arm of a Seattle based family office." Connor Decl. Ex. 1. And its broker emphasized Plaintiff's extensive experience with challenging property:

> *They are a true experience [sic] company that have done many transaction like this with before.*
>
> Most importantly, they would like you to stress the *vast experience and knowledge they have in land assets*. Their main holding is *complex lands such as this one*. They are successful in not only understanding the complex nature of environmental, legal and development challenges lands face, but are *experienced in navigating the local, state, and federal regulations for lands with environmental and legal challenges*. Above all, undeveloped land is their focus and they bring a wealth of

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> knowledge to the table, and this ensures that they are the right partner to ensure closing on this transaction. *I have sold similar and or more extensive properties in wetland with them in the past.*

Connor Decl. Ex. 2 (emphasis added).

Most issues on which Plaintiff argues it was misled involved matters visible to the naked eye, ranging from homeless tents—a tragic fact of life across King County—to the unremarkable presence of invasive plant species such as blackberry bushes, Scotch broom, holly, and ivy. *Compare* Mot. 4:11-6:2 *with* Watson Decl. ¶¶6-7. An "experienced" buyer such as Plaintiff would have walked the Property before seeking to buy it and many times after that during its feasibility review. Plaintiff complains Forterra checked "DON'T KNOW" on listing Form 17C, which inquired into various property conditions. Mot. 4:11-6:2. But Plaintiff presents *no evidence* of (a) boundary or encroachment disputes; (b) prior use for illegal dumping; (c) environmental contamination, "such as asbestos, formaldehyde, radon gas, lead based paint, fuel of chemical storage tanks, or contaminated soil or water"; (d) threatened or endangered species; or (e) use of the site for illegal drug manufacturing (beyond a wetland ecologist's stray reference years ago to seeing "bottles [of] chemicals and canisters of propane," Jha Decl. Ex. P, which did not necessarily have anything to do with drugs), as those phrases were intended to be understand for purposes of the Form 17C. Connor Decl. ¶¶7-9. Instead, its evidence reveals a lot that remained vacant for several years, with easily visible problems that vacancy would predictably bring.

None of this has to do with the matters in dispute on this Motion. But the Court should not allow this Plaintiff, with its "vast experience and knowledge" in dealing with "complex lands such as this one," to pretend it was "naïve" and duped.

B. Forterra's Robust Compliance with the Court's Order.

Plaintiff signed the Purchase Agreement for the Property on May 2, 2018. The parties negotiated a 45-business day feasibility period to allow Plaintiff to review documents, visit the Property (which, to Forterra's knowledge, it has never done), consult with professionals and the City of Kent Planning Services Department (which, to Forterra's

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knowledge, it has never done), and decide whether to purchase the Property. Forterra gave Plaintiff *five* extensions of the feasibility period, the last of which was to expire on December 14, 2018. Shortly before Thanksgiving, Plaintiff sued Forterra to obtain more documents to review in due diligence.

On December 20, 2018, the Court entered an Order requiring Forterra to provide more documents—but far less than everything Plaintiff requested. Under the Order, Forterra was not obliged to produce "correspondence (whether privileged, internal or external), Forterra board meeting minutes, Forterra board resolutions, internal draft documents wholly created by Forterra, and purchase and sale agreements with other buyers." Order ¶ 14. Nor was Forterra required to produce documents related to taxes or assessments, consultant agreements, permits or applications, drawings, photos, or maintenance records. *Id*. But the Court directed Forterra to produce other categories of documents and extended the feasibility period to March 19, 2019. *Id.* Part III.

Forterra immediately responded. Dan Grausz, Forterra's Senior Director of Strategic Projects, took responsibility for providing documents. That review included all of the sources identified in Plaintiff's preliminary injunction motion—and more. For example, even though Forterra was not obliged to produce correspondence, Mr. Grausz reviewed correspondence to determine if it included any documents that might be responsive. Grausz Decl. ¶4. After completing this process, Forterra provided hundreds of documents to Plaintiff starting on December 21, 2018 and continuing until January 10, 2019. Grausz Decl. ¶4 & Ex. 1. In an effort to minimize further disputes, Forterra went beyond what the Order required. *Id.* ¶4. Mr. Grausz then worked with Plaintiff's principal, Sidd Jha, to assist him in understanding the documents. *Id.* ¶6. The documents Forterra provided covered a wide variety of topics—including information on homeless tents and invasive species on the Property. *Id.* ¶5.

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C. Plaintiff's Shifting Grounds for an Injunction.

As the feasibility period ticked away, Mr. Jha did not complain to Forterra about any alleged shortcomings in its compliance with the Order. On March 6, 2019, just two weeks before expiration of the period, Plaintiff's counsel abruptly emailed the Court to seek a preliminary injunction hearing before expiration of the feasibility period, "to require [Forterra] to state its position" as to satisfaction of liens on the Property and to "extend feasibility until this significant issue can be briefed and resolved." Grausz Decl. Ex. 8. The email made no mention of any alleged non-compliance with the Court's Order.

On March 11, 2019, with only eight days remaining in the extended feasibility period, Plaintiff *for the first time* indicated in an email to the Court that it would bring on a motion for contempt, implying (but still not stating directly) that Plaintiff believed Forterra's extensive production of documents did not satisfy its obligation under the Order. *Id.* Ex. 8. Until Plaintiff filed this Motion, Plaintiff *never* identified a single document that it believed Forterra should have provided in response to the Order but failed to do so, never made *any* request that Forterra take a second look for any material, and never raised issues about the homeless or plants. Grausz Decl. ¶¶6, 11.

D. Latecomer Fees

Plaintiff asks the Court to enter an injunction requiring Forterra to extend the feasibility period *again* so Plaintiff can litigate an issue relating to latecomer fees—which will matter *only* if (a) Plaintiff decides to acquire the Property and then (b) hooks up to a water main installed in connection with another development. Speer Decl. ¶6. Although Plaintiff muddies the waters, the facts are clear. A handwritten change to the front page of the Purchase Agreement makes "Buyer [Plaintiff] responsible for any and all latecomer fees/charges due after closing." Jha Decl. Ex. AH. This handwritten change applied to two items on the title commitment, both relating to the same water line and both triggered by the same future event, i.e., hooking into the line. *See* Emery Decl.; Speer Decl.

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The magnitude of these contingent fees had been brought to Plaintiffs' agent's attention, both through the Vacant Land Agent Detail Report and through an email sent by Forterra's agent to Plaintiff's agent on May 14, 2018. Emery Decl. Exs. A & B. But whether the fees come due and, if so, in what amount, remains to be seen: liability will depend on whether "there is a connection made to the 10" water main" whose installation gives rise to the charge, in which case the "latecomer" to the water main will have to pay its fair share of installation. Speer Decl. ¶6. "There may be a level or type of development that does not trigger the payment requirement." *Id.* ¶6. That is why fees of this nature are considered "latecomer" fees, as the industry uses the term. *Id.* ¶7.

Plaintiff advocates a distinction between a $37,000 charge under a Memorandum of Developer Extension Reimbursement Agreement—which it admits it will owe if it closes on the Property and hooks up to the main—and a $125,000 charge for a Lien for Special Connection Charges applicable to the same hook up. Mot. 13:15-14:2. Plaintiff offers no *evidence* that the charges have different legal significance. (Its Motion suggests the title company initially thought Forterra would satisfy the lien, Mot. 11:17-20, but no evidence suggests that.) The Soos Creek Water and Sewer District's General Manager could not be more clear: "Given the nature of these Water Line Liens and the fact that they only apply under the circumstances described above, *they are both considered 'latecomer fees/charges'* when one applies that term in the manner it is customarily understood by the District and similar utilities." Speer Decl. ¶7 (emphasis added).

III. STATEMENT OF ISSUES

1. Should the Court grant Plaintiff's motion for an injunction requiring Forterra to turn over still more documents, even though the only *evidence* establishes that Forterra conducted a comprehensive search for Property Documents and has no more Property Documents to provide?

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2. Should the Court grant Plaintiff's motion for a finding of contempt for failure to comply with the Court's Order, even though the only *evidence* establishes that Forterra intended to and did comply with the Order?

3. Should the Court grant Plaintiff's motion for an injunction to extend the feasibility period to allow Plaintiff to litigate its responsibility for latecomer charges, even though Plaintiff (a) has no chance of success on the merits and (b) has an adequate remedy in monetary damages if it is correct?

IV. EVIDENCE RELIED UPON

This opposition relies upon the concurrently filed Declarations of Michelle Connor, Dan Grausz, Ron Speer, Stuart Watson, and Lisamari Emery, together with attached exhibits, as well as the pleadings and papers on file.

V. ARGUMENT

A. The Court Should Deny Plaintiff's Request for Another Injunction Because Forterra Has No More Documents to Give.

To prevail on this its Motion, Plaintiff must show a clear legal right to the relief it seeks, that Forterra is threatening that right, and that Plaintiff is likely to prevail on the merits at trial. *Fed. Way Family Physicians, Inc. v. Tacoma Stands Up for Life*, 106 Wn.2d 261, 264-65, 721 P.2d 946 (1986). Plaintiff must also show that the balance of the equities favors its position, since an injunction may not be used as "an equitable club … as a weapon of oppression rather than in defense of a right." *Arnold v. Melani*, 75 Wn.2d 143, 153, 449 P.2d 800 (1968).

The only "clear legal right" Plaintiff could invoke arises under its contract, which required Forterra to "provide Buyer with copies of all contracts, documents, reports and studies relating to the Property and its development, for Buyer's information and review ('Property Documents')." Jha Dec. Ex. AH (addendum). The Order elaborated on that obligation, specifying what falls within the definition of Property Documents. Order ¶14.

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Since then, Forterra did a comprehensive search for Property Documents and produced hundreds of documents; nothing remains to be collected or produced. Grausz Decl. ¶¶4-6.

For roughly two months after completion of Forterra's production, Plaintiff made *no complaint* as to the materials made available to it. *Id.* ¶6. Now, Plaintiff for the first time alleges shortcomings in what Forterra provided pursuant to the Order: The Jha Declaration lists nine documents that he claims "Forterra did not provide to the Company in violation of the Court's Order." Jha Decl. ¶¶22-30 (referring to Exhibits U though AC). From these, Plaintiff asks the Court to infer that Forterra (a) fell short in compliance with the Order, and (b) has more documents to produce. But Plaintiff is wrong. "In each instance, Forterra either produced the document or a substantially identical document to Mr. Jha (applicable rows are highlighted) or the document cannot be found in Forterra's records." Grausz Decl. ¶7. The Grausz Declaration (¶7) includes a chart explaining what Forterra knows as to each of the nine documents. In summary, that chart shows the following:

- ***Exhibit U***. This document—which relates to a 1997 subdivision proposal that pre-dates Forterra's ownership—*was not in Forterra's files*, probably because it was sent to *former* employee Paul Leavitt's personal email.

- ***Exhibit V***. This letter and draft Right of Entry Agreement *were not in Forterra's files*. Forterra has no reason to believe it was executed, as the subject was addressed in the September 27, 2016 Agreement Granting Temporary Access for Project Construction ("Access Agreement"), which Forterra provided.

- ***Exhibit W***. This Report *was not in Forterra's files*, and nothing in Exhibit W suggests Forterra received a copy.

- ***Exhibit X***. This email and attachment *were not in Forterra's files*. A similar document to the attachment was provided to Plaintiff. *See* Grausz Decl. Ex. 3.

- ***Exhibit Y***. The email and draft Possession and Use Agreement *were not in Forterra's files*. Forterra has no reason to believe it was executed; the subject was addressed in the Access Agreement.

- ***Exhibit Z***. The email and draft Slope Easement *were not in Forterra's files*. Forterra has no reason to believe the Agreement was executed; the subject was addressed in the Access Agreement.

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- ***Exhibit AA***. This legal description was *provided to Plaintiff long ago*, as it appears as an exhibit to the Access Agreement.

- ***Exhibit AB***. This includes an email, which was not required to be provided, and a *legal description that was provided to Plaintiff.*

- ***Exhibit AC***. This diagram *was not in Forterra's possession* when it provided documents pursuant to the Order. Forterra received it for the first time on March 5, 2019; Mr. Jha received it the following day.

Thus, four Exhibits (V, Y, Z, AA) relate to draft agreements superseded by the Access Agreement; three (X, AA, AB) include materials Plaintiff already has; and one (AC) came into Forterra's possession the day before Plaintiff received it. Plaintiff has not identified a *single* Property Document that Forterra has in its files but failed to provide. Mr. Jha's assertions to the contrary amount to self-interested speculation, not testimony on personal knowledge. Plaintiff has no basis for another injunction requiring more documents.

B. Plaintiff Offers No Basis for a Finding of Contempt.

Plaintiff asks the Court to hold Forterra in contempt. "The contempt statutes provide three requirements for imposing remedial contempt sanctions. First, the contemnor must have 'failed or refused to perform an act,' RCW 7.21.030(2), which under RCW 7.21.010(1)(b) includes the disobedience of a lawful order. Second, the failure to perform an act must have been intentional. RCW 7.21.010(1). Third, the act must have been within the contemnor's power to perform. RCW 7.21.030(2)." *Kitsap County v. Kitsap Rifle & Revolver Club*, 2 Wn. App. 2d 1021, 2018 WL 623681, at *4 (2018) (unpublished; cited under GR 14.1). When deciding whether a party has intentionally disobeyed an order, "strict construction [of the order] is required." *Johnston v. Beneficial Mgmt. Corp*., 96 Wn.2d 708, 713, 638 P.2d 1201 (1982). "The party seeking to impose civil contempt bears the burden of proving contempt by a preponderance of the evidence." *JZK, Inc. v. Coverdale*, 192 Wn. App. 1022, 2016 WL 236481, at *13 (2016) (unpublished; cited under GR 14.1).

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Plaintiff has given the Court no evidence from which it could conclude that Forterra violated its Order, much less that it did so intentionally. Forterra started delivering documents immediately after entry of the Order, and it continued doing so until January 10, 2019. It turned over hundreds of documents, including many that were not required. Grausz Decl. ¶¶4-5. The Court should deny the motion for contempt.

C. Plaintiff Has Not Shown Any Basis for an Injunction to Extend Feasibility to Permit Litigation over Latecomer Fees.

Plaintiff asks the Court to extend the feasibility period yet again so it can "amend its complaint to assert Declaratory Relief, and ask the Court to interpret the Agreement [as to latecomer fees] in a fully briefed Motion for Summary Judgment." Mot. 14:6-8. Contrary to what is required by *Federal Way Family Physicians*, 106 Wn.2d at 264-65, the record evidence shows that Plaintiff does *not* have a clear legal or equitable right to relief, is *not* likely to prevail at trial, and any invasion of its rights can be redressed by an award of damages. Further, Plaintiff has waited too long to invoke the Court's equity jurisdiction.

Plaintiff in the Purchase Agreement promised to be "responsible for any and all latecomer fees/charges due after closing." Jha Decl. Ex. AH. Plaintiff asserts (without evidence) that a "Latecomer Fee" is limited to a $37,000 contingent fee for reimbursing, pursuant to a Developer Extension Agreement, a prior developer for its expenses in installing a water main near the Property, but does *not* include the water district's Lien for Special Connection Charges. Mot. 13:25-14:3. Nothing in the record or the law supports that artificial distinction.

Both fees arise under Chapter 57.22 RCW, "Contracts for System Extensions." Under RCW 57.22.020(1), a developer who constructs a water system extension has a right to reimbursement "from other property owners who subsequently connect to or use the facilities ... and who did not contribute to the original cost." But a water district "may join in the financing of improvement projects," in which case it "*may be reimbursed in the same manner as the owners of real estate who participate in the projects*." RCW 57.22.050

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(emphasis added). Here, the General Manager of the Soos Creek Water and Sewer District explains that *both* the charges at issue "resulted from the installation of the same 10" water main on S. 208th Street." Speer Decl. ¶3. Further, both charges will come due only if the Property owner connects to that main, in which case the owner, as a latecomer, will have to pay its fair share—to both the developer and the district because "[t]he cost of this work was shared" between them. *Id.* "Given the nature of these Water Line Liens and the fact that they only apply under the circumstances described above, *they are both considered 'latecomer fees/charges'* when one applies that term in the manner it is customarily understood by the District and similar utilities." *Id*. ¶7 (emphasis added).

The Purchase Agreement is clear. Plaintiff's purported distinction between the charges is made-up and cannot be squared with the Legislature's direction in RCW 57.22.050 that reimbursement to the district occurs "in the same manner" as reimbursement to the developer. Further, Forterra's agent specifically brought the obligation to Plaintiff's attention on May 14, 2018. Emery Decl. Ex. A. Plaintiff has not met its burden of showing a likelihood of success sufficient to force Forterra to extend the feasibility period.

But even if the meaning of "any and all latecomer fees/charges" were debatable (and it is not), the debate is about money—and "injunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law," including where there is an "adequate remedy at law in the form of monetary damages." *Kucera v. State, Dep't of Transp*., 140 Wn.2d 200, 209-10, 995 P.2d 63 (2000). *If* Plaintiff closes on the Property, *if* Plaintiff connects to the 208th Street water main, and *if* the district requires it to pay a fee, *see* Speer Decl. ¶6, Plaintiff can seek a damages remedy. No case holds that Forterra must put the Property on ice while Plaintiff seeks an advisory ruling on this contingent (but clear-cut) monetary issue.

VI. CONCLUSION

Defendants request that the Court deny Plaintiff's motion in its entirety.

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DATED this 1st day of April, 2019.

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I certify that this memorandum contains fewer than 4,200 words, in compliance with the Local Civil Rules.