

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

Derald Morgan, Rick and Cindy Graver, )  
William and Gloria Phipps and David Lott, )  
Complainants, )  
v. ) **File No. WC-2017-0037**  
Carl Richard Mills, Carriage Oaks Estates Homes )  
Association, Distinctive Designs and Caring )  
Americans Trust Foundation, Inc. (f/k/a Caring )  
Americans Foundation, Inc.), )  
Respondents )

**STAFF BRIEF**

**COMES NOW** the Staff of the Missouri Public Service Commission, by and through counsel, in response to the Commission’s February 15, 2018 *Order Directing Staff to File a Brief*. That *Order* directed Staff to “include a factual and legal analysis of the complaint as well as a recommendation for a resolution that is just and reasonable.” The *Order* further directed that Staff’s brief “shall be based on the record evidence admitted in the case.”

The most salient question before the Commission is whether any of the Respondent entities should have been subject to Commission jurisdiction prior to the formation of and transfer of the utility systems to the Chapter 393 entities. Staff will focus on this question, as the Commission’s “Conclusion” section in its January 23, 2018 *Order Denying Respondents’ Motion to Dismiss and Order Denying Complainants’ Motion for Partial Summary Determination (Order Denying Motions)* suggests that answer as being dispositive of the case.

## Relevant Facts

### The Entities Involved and their Ownership

This case concerns jurisdiction of the Commission regarding the provision of water and sewer utility service. Customers in a residential subdivision known as Carriage Oaks Estates (“Subdivision”) receive water and sewer service.<sup>1</sup> Mr. Carl Mills developed the Subdivision, through his development company, Mills Properties Group, Ltd., doing business as Distinctive Designs.<sup>2</sup> Mr. Mills is the sole owner of Distinctive Designs.<sup>3</sup> The Subdivision was developed in 2001, and currently seven of the expected 53 lots have been developed.<sup>4</sup> A newly built home on one of the undeveloped lots would be able to immediately connect to and use the water and sewer systems.<sup>5</sup>

From sometime in 2000 to 2016, Carriage Oaks, LLC, was the sole owner of the water and sewer systems located within the Subdivision.<sup>6</sup> Mr. Mills is the sole owner of Carriage Oaks, LLC.<sup>7</sup> Throughout the ownership, Mr. Mills was responsible for hiring contractors and arranging their payment.<sup>8</sup> In 2014, Carriage Oaks, LLC, contracted with Distinctive Designs to conduct operations and maintenance of the water and sewer

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<sup>1</sup> Ex. 24, *Carl Mills Rebuttal Testimony*, 3:24-4:1; 5:18.

<sup>2</sup> Ex. 24, 3:20-22; Tr. II, 123:9-19.

<sup>3</sup> Tr. II, 123:5-8.

<sup>4</sup> Ex. 24, 5:17-20.

<sup>5</sup> Tr. II, 82:9-18.

<sup>6</sup> Tr. II, 76:18-24.

<sup>7</sup> Tr. II, 139:17-140:7.

<sup>8</sup> Tr. II, 121:1-23.

system.<sup>9</sup> In 2016, the ownership of the water and sewer system transferred from Carriage Oaks, LLC, to the Caring Americans Trust Foundation, Inc.<sup>10</sup>

Caring Americans Trust Foundation, Inc. (“CATF”) is a Missouri Nonprofit Corporation.<sup>11</sup> Mr. Mills founded CATF on September 11, 2012, with the goal of supporting other charitable organizations.<sup>12</sup> According to Mr. Mills, CATF was not formed for the purposes of owning the water and sewer system.<sup>13</sup> Mr. Mills thought CATF “would just simply own” the water and sewer systems and CATF “would then hire somebody as needed” to operate the systems.<sup>14</sup>

#### The Carriage Oaks Estates Homeowners Association

The Subdivision is managed by Carriage Oaks Estates Homeowners Association (“Association”), a Missouri nonprofit corporation.<sup>15</sup> Since 1999, the Association is controlled by the Carriage Oaks Estates Bylaws (“Association Bylaws”)<sup>16</sup> and, since 2001, also controlled by the Carriage Oaks Estates Restrictive Covenants and Easements (“Covenants”).<sup>17</sup> The Covenants provide that:

Each and every owner of any lot within the Subdivision shall be, by virtue of ownership of one or more lots, a member of the Association. Membership shall be appurtenant to and may not be separated from ownership of any lot.<sup>18</sup>

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<sup>9</sup> Tr. II, 93:22-25; 120:4-14; 125-127; 132:1-6.

<sup>10</sup> Tr. II, 77:1-12.

<sup>11</sup> Ex. 24, 6:10-11.

<sup>12</sup> Ex. 24, 6:10-11.

<sup>13</sup> Tr. II, 78:8-11.

<sup>14</sup> Tr. II, 145:4-19.

<sup>15</sup> Ex. 24, *Carl Mills Rebuttal Testimony*, 7:4-5.

<sup>16</sup> Ex. 13, *Bylaws of Carriage Oaks Estates Homeowners Association*, p. 8.

<sup>17</sup> Ex. 14, *Declaration of Restrictive Covenants and Easements Carriage Oaks Estates*.

<sup>18</sup> Ex. 14, *Covenants*, Article IX, Section 1, p. 11.

The Covenants also provide for two classes of membership: Class A members who are entitled to “a single vote at any business meeting of the Association for each lot owner” regardless of the number of actual persons owning the lot;<sup>19</sup> and, Class B members identified as the Developer/Owner, who is “entitled to 10 votes for each lot” owned by the Developer/Owner for each successive Phase that may be developed in the future.<sup>20</sup> Developer/Owner is defined as Distinctive Designs, or any managing member of Carriage Oaks, LLC.<sup>21</sup> Being the sole owner of Distinctive Designs and Carriage Oaks, LLC, Mr. Mills is the sole Developer/Owner and the sole Class B member.

The Association Covenants also provide the Association shall have control over the maintenance, improvement, or replacement of the sewer system or water systems, and “the costs and expenses of having any of the foregoing performed shall be borne by the membership of the Association through special or regular assessment.”<sup>22</sup> Assessments are determined by the organization’s Board of Directors.<sup>23</sup>

#### Assessments and Payments

Between 2000 and 2014, the Homeowners’ Association assessed an annual fee, for amenities including common areas such as sewer, water, and roads.<sup>24</sup> The annual assessment for the lot owners, from 2012 to 2016 has been \$1,250 per year.<sup>25</sup> According to Mr. Mills, assessment money collected by the Association goes into the

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<sup>19</sup> Ex. 14, *Covenants*, Article IX, Section 2, p. 11.

<sup>20</sup> *Id.*, p. 12.

<sup>21</sup> Ex. 14, *Covenants*, Article I, Section 1.h, p. 4.

<sup>22</sup> Ex. 14, *Covenants*, Article IX, Section 4, p. 13.

<sup>23</sup> Ex. 13, *Bylaws*, Article VI, Section 2(c), p. 5.

<sup>24</sup> Tr. II, 114:12-17.

<sup>25</sup> Tr. II, 55-56.

Association checking account.<sup>26</sup> Money that Carriage Oaks, LLC, received from the Association for its connection with operating and maintaining the water and sewer systems would be reimbursement for “the real costs” related to operating and maintaining the system.<sup>27</sup>

When the contract with Distinctive Designs began in 2014, the Association paid Distinctive Designs fees for the operation and maintenance of the water and sewer systems.<sup>28</sup> The Association received bills from Distinctive Design for \$6,450 for management and maintenance of the water and sewer systems.<sup>29</sup> The Association paid part of the \$6,450 fee using the assessments.<sup>30</sup>

According to Mr. Mills, when ownership of the water and sewer utilities transferred to CATF, and while ownership remained with CATF, none of the customers of the Homeowners’ Association members had control over the operations of the water or sewer system.<sup>31</sup>

#### The 393 Company

On January 27, 2017, ownership of the water and sewer systems was transferred from CATF to Carriage Oaks Not-For-Profit Water and Sewer Corporation (“Carriage

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<sup>26</sup> Tr. II, 93:19-21.

<sup>27</sup> Tr. II128:19-129:2.

<sup>28</sup> Tr. II, 93:22-25.

<sup>29</sup> Tr. II, 117:21-118:6.

<sup>30</sup> Tr. II, 118:7-15.

<sup>31</sup> Tr. II, 78:22-79:18.

Oaks NFP”).<sup>32</sup> Carriage Oaks NFP is organized “under Section 393.825 to 393.175 and 393.900 to 393.954<sup>33</sup> of the Missouri Revised Statutes.”<sup>34</sup>

The 393 non-profit statutes provide for various requirements and responsibilities of the companies, as well as the duties and rights of any membership of a 393 non-profit company. Sections 393.839.7 and 393.921.7 RSMo provide that “[e]ach member shall be entitled to one vote on each matter submitted to a vote at a meeting.”

According to Mr. Mills, pursuant to the Carriage Oaks Not-For-Profit Water and Sewer Corporation Bylaws (Carriage Oaks NFP Bylaws), each lot owned by Mr. Mills has one vote.<sup>35</sup> The Carriage Oaks NFP Bylaws indicate that a member of the non-profit entity shall be each person or entity owning property that is or will receive water and sewer services located within the Subdivision.<sup>36</sup> Members have a “membership interest” and one vote; and “a member may have more than one Membership Interest.”<sup>37</sup>

Upon review of the record, and based on the time periods of ownership between Carriage Oaks, LLC, and CATF, and Carriage Oaks NFP, at no time has the Association owned the utility assets.

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<sup>32</sup> Ex. 24, *Carl Mills Rebuttal Testimony*, p. 8. Ln 1-2.

<sup>33</sup> Sections 393.825 to 393.175, and 393.900 to 393.954 RSMo are commonly referred to as the 393 non-profit statutes, or 393 non-profit companies.

<sup>34</sup> Ex. 15, *Articles of Incorporation of Carriage Oaks Not-for-Profit Water and Sewer Corporation*, p. 16.

<sup>35</sup> Tr. II, 101:7-25.

<sup>36</sup> Ex. 15, Carriage Oaks NFP Bylaws, Article II, Section 1.

<sup>37</sup> *Id.*, Section 2.

## Analysis

### **The Statutory and Legal Basis of Commission Jurisdiction**

Commission jurisdiction is statutory. Section 386.250 RSMo states in part:

The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:

\* \* \*

To all water corporations . . .<sup>38</sup>

\* \* \*

To all sewer systems and their operations within this state and to persons or corporations owning, leasing, operating or controlling the same[.]<sup>39</sup>

Section 386.020 RSMo defines sewer corporation and water corporation:

"Sewer corporation" includes every corporation, company, association, joint stock company or association, partnership or person, their lessees, trustees or receivers appointed by any court, owning, operating, controlling or managing any sewer system, plant or property, for the collection, carriage, treatment, or disposal of sewage anywhere within the state for gain, except that the term shall not include sewer systems with fewer than twenty-five outlets[.]<sup>40</sup>

\* \* \*

"Water corporation" includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, owning, operating, controlling or managing any plant or property, dam or water supply, canal, or power station, distributing or selling for distribution, or selling or supplying for gain any water[.]<sup>41</sup>

Moreover, in the longstanding and oft-quoted case ***State ex rel. M.O. Danciger & Co. v. Pub. Serv. Comm'n***, in its holding on the jurisdiction of the Commission,

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<sup>38</sup> § 386.250(3) RSMo.

<sup>39</sup> § 386.250(4) RSMo.

<sup>40</sup> § 386.020(49) RSMo.

<sup>41</sup> § 386.020(59) RSMo.

the Missouri Supreme Court read into the definitions the requirement that public utilities be “devoted to a public use before [they are] subject to public regulation.”<sup>42</sup>

In contested water cases, whether or not private property has been devoted to public use has been determined with the following analysis: whether there is any evidence in the record suggesting that the purported utility “refused to provide water service to any of the residents.”<sup>43</sup>

In the matter at hand, there is no testimony from Respondents’ representative, Mr. Mills, that there has been any refusal to provide service to the residents of the Subdivision. Instead, Mr. Mills stated that a newly-built home on one of the undeveloped lots would be able to immediately connect to and use the water and sewer systems.<sup>44</sup>

The remaining element to determine jurisdiction, then, is whether the water or sewer corporation is operating “for gain.”

### **For Gain and Compensation**

In addition to serving the general public, Commission jurisdiction requires a finding that the utility is operating a water or sewer system “for gain.”<sup>45</sup> In ***Hurricane Deck Holding Co. v. Pub. Serv. Comm'n***, the Western Court of Appeals held that a company need not actually ever collect any money for it to be considered “for gain”:

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<sup>42</sup> ***State ex rel. M.O. Danciger & Co. v. Pub. Serv. Comm'n***, 275 Mo. 483, 205 S.W. 36, 38 (1918); See ***Hurricane Deck Holding Co. v. PSC***, 289 S.W.3d 260, 264 (Mo. App., W.D. 2009); See ***Osage Water Co. v. Miller County Water Auth., Inc.***, 950 S.W.2d 569, 574 (Mo. App., S.D. 1997); ***Khulusi v. SW Bell Yellow Pages, Inc.***, 916 S.W.2d 227, 232 (Mo. App. W.D., 1995).

<sup>43</sup> ***Hurricane Deck Holding Co. v. PSC***, 289 S.W.3d 260, 265 (Mo. App., W.D. 2009) quoting ***Osage Water Co. v. Miller County Water Auth., Inc.***, 950 S.W.2d 569, 575 (Mo. App., S.D. 1997).

<sup>44</sup> Tr. II, 82:9-18.

<sup>45</sup> Section 386.020(49), RSMo.; Section 386.020(59), RSMo.



“For gain” is not specifically defined in the Public Service Commission Act. However, we do not write on a blank slate: in *Osage Water* the Southern District held that a not-for-profit corporation could fall within the definition of “water corporation” where it was “in the business of operating, managing and providing water service to the public *for compensation.*” 950 S.W.2d at 574 (emphasis added).<sup>46</sup>

The *Hurricane Deck* Court quoted the Commission’s challenged conclusion that:

[T]he definition [of “for gain”] depends upon an intent to supply water or sewer service for gain or compensation. Sending a bill to customers for the provision of water and sewer service meets the definition of operating a system for gain, regardless of whether any customer actually pays the bill.<sup>47</sup>

Agreeing with both the *Osage* Court and the Commission’s analysis, the *Hurricane Deck* Court relied upon *Webster’s* definition of “gain” as “to get or attain to possession, control, use or benefit.”<sup>48</sup> The Court then relied on the existence of Chapter 393 non-profit statutes as further supporting “for gain” as “for compensation” stating:

The legislature’s creation of these exemptions suggests that, such entities *would* be subject to Commission regulation but for the exemptions; it also suggests that entities not falling within these exemptions may otherwise be subject to PSC jurisdiction.<sup>49</sup>

Finally, the *Hurricane Deck* Court ended its analysis discussing the fact pattern before it, and noted that when the purported utility sent a letter to the homeowners making an assessment for “a portion of the actual costs for [the] systems for that period” that it had

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<sup>46</sup> *Hurricane Deck Holding Co. v. PSC*, 289 S.W.3d 260, 267.

<sup>47</sup> *Hurricane Deck Holding Co. v. PSC*, 289 S.W.3d 260, 267 (Mo. App., W.D. 2009).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

divided between the customers, the purported utility had “held itself out to serve the public for compensation.”<sup>50</sup>

### **Whether the Carriage Oaks, LLC should have been regulated**

Upon review of the facts in light of the statutes and case law, Carriage Oaks, LLC, should have been regulated by the Commission. Carriage Oaks, LLC, actually owned the utility assets from approximately 2000 to 2016. During that time period, the Association issued an annual assessment, seeking compensation of \$1,250 from the Association members for water, sewer and other common areas.<sup>51</sup> While Carriage Oaks, LLC was the owner of the utility assets, Mr. Mills testified that if Carriage Oaks LLC’s received money from the assessments to recover some of “the real costs” for the operation and maintenance of the water and sewer systems.<sup>52</sup>

### **Alternatively, the Association should have been regulated**

Due to the holdings in *Hurricane Deck Holding Co. v. PSC*, and *Osage Water Co. v. Miller County Water Auth., Inc.*, the Commission has jurisdiction over non-profit utilities.<sup>53</sup> The Commission may decline to exert jurisdiction over a non-profit subdivision or property owners’ association when the entity meets the following criteria laid out in *In the Matter of Rocky Ridge Ranch Property Owners’ Association*, Case No. WD-93-307:<sup>54</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> Tr. II, 114:12-17.

<sup>52</sup> Tr. II, 128:19-129:2.

<sup>53</sup> *Osage Water Co. v. Miller County Water Auth., Inc.*, 950 S.W.2d 569, 575 (Mo. App., S.D. 1997)(holding the Commission had jurisdiction over a not-for-profit corporation that sold water service to customers.)

<sup>54</sup> *In the Matter of Rocky Ridge Ranch Property Owners’ Association*, Case No. WD-93-307 (*Order Cancelling Certificate of Convenience and Necessity*, issued July 7, 1993).

1. The association's membership is comprised of all of its utility customers and the utility serves only the membership.
2. Each customer has only one vote.
3. The association has complete control over the system.<sup>55</sup>

However, the Association does not meet the **Rocky Ridge Ranch** criteria. First, the Association Covenants provide that Mr. Mills, Carriage Oaks, LLC, and or Distinctive Designs, have ten votes for every lot owned by the Developer/Owner. Finally, at no point did the Association have complete control over the water and sewer system. The only entities that owned the systems were Carriage Oaks, LLC; CATF, Inc.; and now Carriage Oaks NFP. The Association may have had control on paper via its Covenants, or alternatively some operational control of the systems via Mr. Mills' control as the Developer/Owner, but the Association itself has never had complete control or ownership. Because the Association fails to meet two of the three criteria, and because it operated for gain by issuing assessments to its members for use of the water and sewer systems, the Commission cannot decline jurisdiction.

### **Commission jurisdiction and Chapter 393 Non-profit entities**

The Missouri State Legislature excluded from the Commission's jurisdiction certain water and sewer corporations formed under Chapter 393. Specifically, § 393.933.3 RSMo states that "...The public service commission shall not have jurisdiction over the construction, maintenance or operation of the water facilities, service, rates, financing, accounting or management of any nonprofit water

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<sup>55</sup> Note how these criteria dovetail with key provisions in the 393 non-profit statutes: (1) the association's membership is comprised of all of its utility customers and the utility serves only the membership (§ 393.921.1 RSMo); (2) each customer has only one vote on utility matters (§ 393.921.7 RSMo); and, (3) the association has complete control over the system (§ 393.906 RSMo, detailing the powers of a 393 non-profit to manage the utility property).

company...”<sup>56</sup> The Legislature further detailed the conduct of nonprofit sewer companies in §§ 393.825-.861 and nonprofit water companies in §§ 393.900-.954 RSMo, including certain statutory requirements. One such condition provides that “[e]ach member shall be entitled to one vote on each matter submitted to a vote at a meeting.”<sup>57</sup> According to Mr. Mills and the Carriage Oaks NFP Bylaws, members of the Carriage Oaks NFP may be entitled to multiple votes.<sup>58</sup>

Failure to comply with Chapter 393 would subject the Respondents to Commission jurisdiction. In *Hurricane Deck*, the Court observed “...The legislature’s creation of these exemptions suggests that such entities *would* be subject to Commission regulation but for the exemptions.”<sup>59</sup> Additionally, “...it also suggests that entities not falling within these exemptions may otherwise be subject to PSC jurisdiction.”<sup>60</sup> Noncompliance with Chapter 393 would subject the Respondents to the PSC jurisdiction.<sup>61</sup>

### **Remedies and Conclusion**

In its February 15, 2018 *Order* directing Staff to file a brief, the Commission directed that Staff recommend a resolution that is just and reasonable. What is just and

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<sup>56</sup> § 393.933.3 RSMo.

<sup>57</sup> §§ 393.839.7 and 393.921.7 RSMo.

<sup>58</sup> Tr. II, 101:7-25; Ex. 15, Carriage Oaks NFP Bylaws, Article II, Section 1, Section 2.

<sup>59</sup> *Hurricane Deck Holding Co. v. PSC*, 289 S.W.3d 260, at 268.

<sup>60</sup> *Id.*

<sup>61</sup> Another potential consideration involves the makeup of Carriage Oaks NFP Board of Directors. Carl Mills, Dr. Marian Stewart, Joseph R. Mills, Robert Sykes, and Donald B. Mills serve on the Board of Directors of Carriage Oaks Not-for-Profit. Ex. 24, *Carl Mills Rebuttal Testimony*, 8:1-2. All of the Board of Directors members “own property within” the subdivision. Ex. 24, 8:19-22. The record is devoid of any indication that the Board Members *actually reside* within the Subdivision. Moreover, according to Mr. Mills, some of the members of the Board of Directors of Carriage Oaks NFP are also members of CATF. Tr. II, 146:13-19. Due to the similarities between all of the Carl Mills entities, there is an undeniable specter of a lack of local member control.

reasonable in this instance is limited to the request for relief sought by the complainants.<sup>62</sup> What follows are some possible suggestions within the scope of the amended complaint.

### **The Transfers are Void**

Section 393.190.1, RSMo. states:

No... water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage, or otherwise dispose of ... the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public... ***without having first secured from the commission an order authorizing it to do so. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void.*** (emphasis added)

If the Commission agrees that (1) the levying of the annual Association assessment, and the transfer of those funds to other entities for the operation of the systems is supplying water and sewer service “for compensation;” and, (2) that Carriage Oaks, LLC and/or the Association ought to have been regulated by the Commission from the beginning of the regulated activity, then the result is that Carriage Oaks, LLC was a “water corporation” by Commission statute, and therefore the transfers from Carriage Oaks, LLC, to CAFT, Inc. and again to Carriage Oaks NFP are void pursuant to § 393.190.1 RSMo. The Commission should therefore issue an order making the above factual findings, and concluding that because the transfers occurred without Commission approval, the transfers are void.

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<sup>62</sup> ***City of Kansas City v. New York-Kansas Bldg. Associates, L.P.***, 96 S.W.3d 846, 853 (Mo.App. W.D. 2002)(“[T]he trial court is limited when awarding relief to a party to the relief requested in the pleadings or tried by the express or implied consent of the parties.”)

**Carriage Oaks NFP is subject to Commission Jurisdiction**

Similarly, if the Commission agrees that the possibility for multiple votes is contrary to §§ 393.839.7 and 393.921.7 RSMo, there is sufficient argument provided by ***Hurricane Deck*** that Carriage Oaks NFP could be subject to Commission jurisdiction. However, this defect could be cured by the revision of the Carriage Oaks NFP Bylaws. Such cure would not resolve the issue of a potential void transfer from the prior entities, however.

**WHEREFORE**, Staff respectfully submits its Brief in the above-captioned matter.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile, or electronically mailed to all parties and or counsel of record on this 28 day of February, 2018.

**/s/ Ron Irving**