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UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
OCALA DIVISION

CASE NO. 5:20-cv-227-JSM-PRL

DAVID POSCHMANN,

Plaintiff,

v.

UNIFIED ENTERPRISES, LLC

Defendant.

\_\_\_\_\_ /

**PLAINTIFF'S MOTION FOR CONTEMPT AND FOR  
ATTORNEYS' FEES AND SANCTIONS**

Plaintiff, David Poschmann, by and through his undersigned counsel, pursuant to Rule 37 of the Federal Rules of Civil Procedure, files his Motion for Contempt and for Attorneys' Fees and Sanctions ("Motion") and in support thereof states as follows:

**I. INTRODUCTION/BACKGROUND**

This is an action for injunctive relief pursuant to Title III of the Americans With Disabilities Act, 42 U.S.C. § 12181 et seq. ("ADA"). Plaintiff seeks an injunction compelling Defendant, the owner and operator of the "Mount Dora Historic Inn and Cottages" ("Hotel"), to modify its policies, practices or procedures so that the online reservations service ("Reservations Service") for the Hotel, found at both [www.mountdoracottages.com](http://www.mountdoracottages.com) and [www.mountdoraahistoricinn.com](http://www.mountdoraahistoricinn.com), is compliant with the requirements of the ADA, specifically the requirements set forth in 28 C.F.R. § 36.302(e)(1) "Modifications in Policies, Practices, or Procedures".

As stated in the January 20, 2021 Order (DE 23 at p. 4) denying the parties' motions for summary judgment, "Defendant admits that it does not have any ADA accessible rooms or features and claims that it is exempt from the ADA's requirements because its Hotel is historic". The Court rejected Defendant's exemption argument, confirming that historic properties are required to comply with the ADA to the extent feasible pursuant to 28 C.F.R § 36.405(a), and, to the extent not feasible, alternative means of access shall be provided pursuant to section (b) (DE 23 at p. 3-4).

Based upon the foregoing, the Court ruled that Plaintiff's Motion for Summary Judgment was not appropriate at that time since the record did not contain evidence of the required alterations and, if such alterations are not feasible, the required alternative methods of access (DE 23 at p. 5). Once the extent of said required compliance is determined, the specific information and disclosures required by 28 C.F.R. § 36.302(e)(1) to be included on the Reservations Service can be determined and, in turn, incorporated into an injunction.

In light of the foregoing, on January 21, 2021 (the day after the above-described order was entered), Plaintiff served Defendant with "Plaintiff's Request to Defendant Pursuant to Rule 34", attached hereto as Exhibit "A", and "Plaintiff's First Request for Production to Defendant", attached hereto as Exhibit "B". After Defendant failed to respond to the discovery, and Defendant's counsel, James L. Homich, Esq., refused to respond to the undersigned's repeated telephone calls and emails about the discovery, Plaintiff filed his Motion to Compel (DE 26) on March 4, 2021. After the Motion to Compel was filed, Defendant filed its responses to Plaintiff's Request to Defendant Pursuant to Rule 34 (DE 31) and Plaintiff's First Request for Production (DE 32), both of which are attached hereto as Exhibit "C".

Number 17 of the request for production requested: “Records and statements from banks or other financial institutions wherein Defendant had/has an account for the past three years, including but not limited to Defendant’s checking account.”, Defendant’s response stated: “Statements to be provided upon receipt from storage”.

Plaintiff’s Motion to Compel was granted on March 30, 2021 (DE 33). The Court’s Order granting Plaintiff’s Motion to Compel ordered Defendant to produce all requested discovery documents on or before **April 5, 2021** and required the parties to confer to schedule the inspection of the defendant’s property.

**II. THE DISCOVERY AT ISSUE AND COMMUNICATIONS WITH MR. HOMICH AFTER THE MOTION TO COMPEL WAS GRANTED**

On March 31, 2021, the undersigned sent an email to Mr. Homich stating:

“As you know, the Court has ordered all requested discovery documents produced on or before April 5, 2021. We assume that by that time you will produce all of the requested bank statements, etc. Having said this, it is somewhat unusual for an ongoing business to possess no records or statements at all from any bank or financial institution, including its active recent checking account records/statements, which are, in the usual course, received, and reviewed, monthly (and usually available online) and that even the recent statements have been placed in storage. Hopefully this will not be an issue.

We are in the process of coordinating the rescheduling, with an expert, of the previously noticed Rule 34 inspection. I will call you soon to confer to schedule the inspection, as ordered by the Court.’

Although there was no substantive response to the above email, there was an automated response stating that “Mr. James L. Homich, Lawyer, will be unavailable until April 5<sup>th</sup>”. In light of the foregoing, the undersigned waited until April 5, 2021 for a response or to further correspond with Mr. Homich. Having received no response, on April 5, 2021 the undersigned sent an email to Mr. Homich stating:

“We have made arrangements for the previously noticed Rule 34 inspection of the facilities at issue to occur on Thursday, April 8, 2021 at 3:30 p.m.

Please confirm that the foregoing is acceptable. If not, please call me today to confer on the scheduling.

Thank you.”

Mr. Homich, again, did not respond to the undersigned’s email therefore, on April 6, 2021, the undersigned called Mr. Homich, leaving a voicemail, and sent an email to Mr. Homich stating:

“This follows up on my March 31, 2021 email, yesterday's email, and the voicemail that I just left for you requesting that you call me to confer on the outstanding discovery issues so that we may obtain the discovery that our client is entitled to without further discovery motion practice.

I again request that you call me to confer.

Thank you.”

Once again, since Mr. Homich did not respond the undersigned’s email, or voicemail, on April 7, 2021, the undersigned called Mr. Homich, leaving a voicemail, and sent another email to Mr. Homich, stating:

“This follows up on my March 31, 2021 email, Monday's email, the email and voicemail that I left for you yesterday, and the voicemail that I left for you this morning, all relating to the outstanding discovery. You have still never answered *any* of our calls or returned any voicemails that we have left for you since the start of this litigation. We don't know why, but this is extremely unusual to say the least.

We have not received the requested documents. We have not received any bank/financial institution statements at all, not even recent statements dealing directly with ongoing business operations, all of which must be produced and should not be in storage or otherwise unavailable.

As to the requested Rule 34 inspection, we are all still keeping Thursday, tomorrow, open as previously requested, and would like to proceed at that time. Please confirm that this is acceptable.

I again request that you call me to confer on the above matters so that we may obtain the discovery that our client is entitled to without further delay and/or discovery motion practice.

Thank you.”

Mr. Homich did not respond to the above voicemail or email and, consistent with the ten attempts, by email and telephone, to confer on the Motion to Compel, Mr. Homich continues to refuse to confer on the subject discovery issues,

**III. DEENDANT AND ITS COUNSEL, JAMES HOMICH, SHOULD BE HELD IN CONTEMPT, DEFENDANT SHOULD PERMIT THE RULE 34 INSPECTION OF THE PREMISES, ANY POTENTIAL DEFENSE RELATED TO FINANCIAL ISSUES SHOULD BE DISALLOWED, AND ATTORNEYS' FEES AND SANCTIONS SHOULD BE AWARDED**

Rule 37, Federal Rule of Civil Procedure, provides, in relevant part:

**“(b) Failure to Comply with a Court Order.**

**(2) Sanctions in the District Where the Action Is Pending.**

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent-or a witness designated under *Rule 30(b)(6)* or *31(a)(4)*-fails to obey an order to provide or permit discovery, including an order under *Rule 26(f)*, *35*, or *37(a)*, the court where the action is pending may issue further just orders. They may include the following:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.”

A district court has broad authority under Rule 37 to control discovery. *Chudasama v.*

*Mazda Motor Corp.*, 123 F.3d 1353, 1366 (11th Cir. 1997). "Rule 37 sanctions are imposed not only to prevent unfair prejudice to the litigants but also to [ensure] the integrity of the discovery process." *Aztec Steel Co. v. Fla. Steel Corp.*, 691 F.2d 480, 482 (11th Cir. 1982).

“Instead of or in addition to [such sanctions], the court *must* order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.” Fed. R. Civ. P. 37(b)(2)(C) (emphasis added).

Although default judgment is a sanction of "last resort," such a heavy sanction is appropriate when the disobedient party's noncompliance with a discovery order is willful, flagrant, or in bad faith. *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1542 (11th Cir. 1993); *Adolph Coors Co. v. Movement Against Racism and the Klan*, 777 F.2d 1538, 1543 (11th Cir. 1985) (citations omitted). The disobedient party's noncompliance with the discovery order cannot be caused by simple negligence, a misunderstanding, or the inability to comply with the discovery order. *Malautea*, 987 F.3d at 1542. Also, the district court must determine that available less drastic sanctions would not be effective in ensuring compliance with the court's orders. *Id.* But when the noncompliant party demonstrates "a flagrant disregard for the court and the discovery process," the "severe" sanctions of default and dismissal are not an abuse of discretion. *Aztec Steel Co.*, 691 F.2d at 481.

In light of Defendant and its counsel, Mr. Homich, violating this Court's Order (DE 33) in failing to produce the crucial financial documents sought in request 17 of Plaintiff's Request for Production of Documents on or before April 5, 2021, and their refusal to confer, despite repeated attempts, Defendant should be barred from asserting any defenses to Plaintiff's claim that involve Defendant's finances.<sup>1</sup>

---

<sup>1</sup> Defendant has had since January 21, 2021, the date of the request, to produce the financial documents at issue, none of which have been produced. As evidence of bad faith, at a minimum, Defendant would have received, and could have easily produced, the bank statements for January, February, March, and April, all of which would have been received by Defendant subsequent to the request, negating any claim that any of the documents were in storage or any other inability to comply with this Court's Order (DE 33).

As to the inspection of Defendant's premises, Plaintiff has now twice arranged the inspection, resulting in Defendant, both times, disregarding the arrangements, initially by ignoring the formal Rule 34 inspection request and then, despite a Court order requiring conferral on the inspection, by ignoring the proposed inspection for today, as well as the invitation to confer to schedule the inspection if today's inspection was not possible.

Defendant and its counsel have disregarded the discovery process, exhibiting a willful disregard for the Federal Rules of Civil Procedure, the Local Rules of this Court, and have flagrantly violated this Court's Order (DE 33), all while ignoring each and every attempt, by email and telephone, at conferral, forcing motion practice.<sup>2</sup> In light of the foregoing, significant sanctions are appropriate, as lesser sanctions have proven to be ineffective.

#### **IV. CONCLUSION**

Defendant and its counsel have had ample opportunity to comply with their discovery obligations under the Federal Rules of Civil Procedure and this Court's orders. Defendant and its counsel have ignored their obligations under the rules and have proceeded in bad faith. There is no justification for such conduct and Defendant should be compelled to permit the inspection of its premises and be prohibited from introducing any defense based upon its finances. For these same reasons, an award of attorney's fees against Defendant and its counsel is appropriate.

WHEREFORE, Plaintiff respectfully requests that this motion be granted as specified above, along with such other and further relief as this court deems just and proper.

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<sup>2</sup> As additional indicia of bad faith, and/or the cavalier approach to the issues before the Court, in response to the Court's Show Cause Order (DE 28), Defendant responded to the Order, in part, by claiming documents were unavailable "due to the voluminous request" and "the need to redact personal information". The total number of documents produced, virtually all comprised of three tax returns, is 70 pages, none of which have been redacted. The response also claimed that non-compliance was due to the unavailability of Plaintiff's representative, which, upon being alerted to the misstatement by the undersigned and the intent to bring it to the Court's attention, was amended to state that it was the Defendant's representative who was unavailable (although no explanation was provided).

**LOCAL RULE 3.01(g) CERTIFICATION**

I hereby certify that counsel for the movant has attempted, four times by email, and two times by telephone, to confer with counsel for the Defendant in a good faith effort to resolve the issues without court action but Defendant's counsel has been unavailable and has not responded.

s/Drew M. Levitt  
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drewmlevitt@gmail.com  
LEE D. SARKIN  
Florida Bar No. 962848  
LSarkin@aol.com  
4700 N.W. Boca Raton Boulevard, Ste. 302  
Boca Raton, Florida 33431  
Telephone (561) 994-6922  
Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on April 8, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the forgoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically, Notices of Electronic Filing.

s/Drew M. Levitt

**SERVICE LIST**

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jhomich@earthlink.net  
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Mount Dora, Florida 32757  
Telephone (352) 383-3031  
Attorney for Defendant  
Via CM/ECF

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA

CASE NO. 5:20-cv-227-Oc-30PRL

DAVID POSCHMANN,

Plaintiff,

v.

UNIFIED ENTERPRISES, LLC

Defendant.

PLAINTIFF'S REQUEST TO DEFENDANT PURSUANT TO RULE 34

Plaintiff, pursuant to Rule 34 of the Federal Rules of Civil Procedure, requests that Defendant respond within thirty days to the following request:

To permit the Plaintiff's expert and counsel to enter onto the following land and business to inspect, photograph and measure the property:

**LOCATION:** All spaces open to the public at the facility at issue, known as the Mount Dora Historic Inn and Cottages, including the adjoining grounds servicing the facility, located at 221 East 4<sup>th</sup> Avenue, Mount Dora, Florida, as described in paragraph 4 of Plaintiff's Complaint.

**DATE:** Wednesday, March 3, 2021

**TIME:** 11:00 a.m.

s/Drew M. Levitt  
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drewmlevitt@gmail.com  
Florida Bar No. 782246  
LEE D. SARKIN  
Lsarkin@aol.com  
Florida Bar No. 962848  
4700 N.W. Boca Raton Blvd., Suite 302  
Boca Raton, Florida 33431  
Telephone (561) 994-6922  
Attorneys for Plaintiff

**EXHIBIT A**

**CERTIFICATE OF SERVICE**

I hereby certify that on January 21, 2021 the forgoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically, Notices of Electronic Filing.

s/Drew M. Levitt

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Telephone (352) 383-3031  
Attorney for Defendant  
Via Email and U.S. Mail

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA

CASE NO. 5:20-cv-227-Oc-30PRL

DAVID POSCHMANN,

Plaintiff,

v.

UNIFIED ENTERPRISES, LLC

Defendant.

PLAINTIFF'S FIRST REQUEST FOR PRODUCTION TO DEFENDANT

Plaintiff, by and through his undersigned counsel, and pursuant to Federal Rule of Civil Procedure 34, hereby propounds his First Request for Production to Defendant and requests that it produce the following documents within the time prescribed by law:

INSTRUCTIONS

(a) All documents produced pursuant hereto are to be produced as they are kept in the usual course of business or shall be organized and labeled (without permanently marking the item produced) so as to correspond with the categories of each numbered request hereof.

(b) Each draft, final document original, reproduction, and each signed and unsigned document and every additional copy of such document where such copy contains any commentary, note, notation or other change whatsoever that does not appear on the original or on the copy of the one document produced shall be deemed and considered to constitute a separate document.

(c) When appropriate, the singular form of a word should be interpreted in the plural as may be necessary to bring within the scope hereof any documents which might otherwise be construed to be outside the scope hereof.

DEFINITIONS

A. All references to any "Person" includes his/her/its employees, agents, servants, subsidiaries, parent company, affiliated companies and any other person or entity or representative acting or purporting to act on behalf or under his/her/its control.

B. "You" or "Your" refers to the person or entity to whom this request is addressed, including his/her/its employees, agents, servants, subsidiaries, parent company, affiliated

**EXHIBIT B**

companies, and other persons acting or purporting to act on their or its behalf, including their or its representatives.

C. “Document(s)” shall be deemed to include every record of every type, and is used in the broadest sense and includes any medium upon which intelligence or information can be recorded and further includes, but is not limited to, all originals, non-identical copies and drafts of the requested items, whether printed, handwritten, typed, recorded, or stored on any electronic device or medium or form of data, or reproduced by hand.

D. “Communication” means any oral or written statement, dialogue, colloquy, discussion or conversation, and also means any transfer of thoughts or ideas between persons by means of documents and includes any transfer of data from one location to another by electronic or similar means.

E. “Related to” or “Relating to” shall mean directly or indirectly, refer to reflect, described, pertain to, arise out of or in connection with, or in any way legally, logically, or factually be connected with the matter discussed.

F. Defendant shall mean the above-named Defendant to whom this request is being made.

G. “Property” shall mean the real property and improvements described in paragraph 4 of Plaintiff’s Complaint in this matter.

**THE REQUESTED DOCUMENTS TO BE PRODUCED ARE AS FOLLOWS:**

1. Documents identifying any alterations, renovations or improvements to the Property by any person or entity since January 26, 1992.
2. Blueprints, site plans and architectural renderings for the Property showing the number of and location of any stores, rooms, entrances, routes and bathrooms at the Property.
3. Checks or other evidence of payment for any action taken to improve or alter the Property to achieve compliance with the ADA or otherwise provide increased accessibility at the Property for disabled persons.
4. Estimates for the cost and scope of the work that Defendant has determined needs to be done for the Property to comply with the ADA or the applicable ADA Standards.
5. Certificates of Occupancy for the Property.

6. Applications for a building permit for all or any part of the Property or any improvement thereto since January 26, 1992.

7. Documents exchanged with any contractor or subcontractor or other provider of materials or services used to perform any improvements or alterations to any part of the Property since January 26, 1992, including, but not limited to, invoices, plans, blueprints and correspondence.

8. Architectural plans used in conjunction with any improvements or alterations to any part of the Property since January 26, 1992.

9. Reports, analyses or communications from any person or entity that inspected the Property to identify the existence of (or lack of) of ADA violations at the Property or the failure to comply with any applicable ADA Standards.

10. The Federal income tax returns, including all schedules thereto, filed by Defendant for each of the past three years.

11. Financial statements of Defendant prepared within the past three years, including but not limited to profit and loss statements and balance sheets.

12. Applications made by Defendant to any lender, or potential lender, within the past three years.

13. Documents evidencing the number of employees or independent contractors utilized by Defendant during the past three years, including documents showing each person's name and address and time of employment.

14. Documents showing distributions or other monies paid to owners of Defendant or to their family or affiliates in the past three years.

15. The cash receipts and cash disbursements journal for Defendant for the past three years.

16. The general ledger for the Defendant for the past three years.
17. Records and statements from banks or other financial institutions wherein Defendant had/has an account for the past three years, including but not limited to Defendant's checking account.
18. QuickBooks or any other accounting or bookkeeping software records for Defendant for the past three years.
19. Documents identifying any accountant or bookkeeper used by Defendant in the past three years.
20. Documents showing the ownership of Defendant.
21. Communications regarding Defendant with the Internal Revenue Service within the past three years.
22. Communications with any entity or person, including any public or private board, agency or entity dealing with, advising on, or governing historic properties, regarding any alterations or improvements to the Property, or proposed alterations or improvements to the Property, including alterations or improvements to improve accessibility at the Property, threatening or destroying the historic significance of the Property, or any part thereof.
23. Documents discussing or explaining the historic significance of the Property.
24. Communications with any public or private board, agency or entity dealing with, advising on, or governing historic properties, regarding the historic significance of the Property, including any communications regarding the obtaining of any historic designation for the Property.
25. Documents containing reports, analyses, and/or communications regarding alternative methods of access in lieu of barrier removal.

26. Documents discussing that one or more ADA violations at the Property, or one or more ADA Standards not being met, cannot be remedied due to remediation not being readily achievable.

27. Estimates or other communications discussing or stating the cost and/or scope of the work that must be done, or that is recommended to be done, for the Property to comply with the ADA Standards.

28. Documents showing the number of employees or independent contractors utilized by Defendant during the past three years including, but not limited to, unemployment tax returns, employee/independent contractor ledgers or payroll/accounts payable records.

29. Mortgages, and the promissory notes secured thereby, encumbering the Property.

s/Drew M. Levitt  
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Telephone (561) 994-6922  
Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on January 21, 2021 the forgoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically, Notices of Electronic Filing.

s/Drew M. Levitt

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Telephone (352) 383-3031  
Attorney for Defendant  
Via Email and U.S. mail

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA

DAVID POSCHMANN,  
Plaintiff,

v.

Case No. 5:20-cv-227

UNIFIED ENTERPRISES, INC.,  
Defendant.

RESPONSE TO PLAINTIFF'S REQUEST TO DEFENDANT PURSUANT  
TO RULE 43

The Defendant, Unified Enterprises, Inc., responds to the Plaintiff's Request to Defendant pursuant to Rule 34 as follows:

The Defendant is ready, willing and able to permit inspection of the Defendant's properties at a convenient time for the Plaintiff upon the Plaintiff identifying the individuals who will be present for the inspection and certification that the named individuals have been vaccinated so as to minimize the risks to any guests or employees at the properties. Counsel for the Defendant has been fully vaccinated and will attend the inspection along with the Defendant's representative, James Tuttle, who has recently received his first dose of the vaccine.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 27, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record

**EXHIBIT C**

via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ James L. Homich  
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UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA

DAVID POSCHMANN,  
Plaintiff,

v.

Case No. 5:20-cv-227

UNIFIED ENTERPRISES, INC.,  
Defendant.

RESPONSE TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION

The Defendant, Unified Enterprises, Inc., responds to Plaintiff's First Request for Production as follows:

1. City Roof Permit completed 9/13/2018 provided.
2. Plans from City Records provided.
- 3 - 5. No such records exist.
6. Application for Roof Permit provided.
7. Invoice for Roof provided.
- 8 - 9. None.
10. 2017 - 2019 Tax Returns provided.
- 11 - 12. None.
13. Department of Revenue Records provided.
14. 2017 - 2019 Tax Returns provided.
- 15 -16. None.

17. Statements to be provided upon receipt from storage.

18. None.

19 - 20. 2017 - 2019 Tax Returns provided.

21 - 27. None

28. Department of Revenue Records provided.

29. Promissory Notes Provided

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 27, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

*/s/ James L. Homich*  
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