**CASE NO. 10-5072**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Appellee/Plaintiff,

vs.

PAMELA WHITNEY, AMBER CALLAWAY, THE ESTATE OF SUZANNE WHITNEY AND THE ESTATE OF MARY WHITNEY,

Appellants/Defendants.

On Appeal from the United States District Court
for Northern District of Oklahoma
The Honorable Judge Gregory K. Frizzell Presiding
Case No. 09-CV-78-GKF-FHM

# RESPONSE TO APPELLANTS'/DEFENDANTS' OPENING BRIEF

**ORAL ARGUMENT NOT REQUESTED**

Respectfully submitted,

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## CORPORATE DISCLOSURE STATEMENT

Merrill Lynch, Pierce, Fenner & Smith Incorporated is a wholly-owned subsidiary of Merrill Lynch & Co., Inc. Merrill Lynch & Company, Inc. is a direct subsidiary of Bank of America Corporation, which owns all of the common stock of Merrill Lynch & Company, Inc. Bank of America Corporation is a publicly held company whose shares are traded on the New York Stock Exchange. It has no parent company and no publicly held company owns more than 10% of Bank of America Corporation's shares.

## STATEMENT OF THE FACTS

As the United States District Court for the Northern District of Oklahoma correctly stated, "[t]he dispute giving rise to this lawsuit has a tortuous history." [Aplt. App., Vol. 2 at 238]. This case revolves around the distribution of funds owned or inherited by Suzanne Whitney from her mother, Mary Whitney. (Defendants/Appellants Pamela Whitney, the Estate of Suzanne Whitney and the Estate of Mary Whitney may be referred to collectively as the "Whitney Parties"). At the time of her death in May 2007, Mary Whitney maintained two Individual Retirement Accounts ("IRAs") with Plaintiff/Appellee Merrill Lynch, Pierce, Fenner & Smith Incorporated. ("Merrill Lynch"). She had designated her daughters, Suzanne Whitney and Pamela Whitney, as beneficiaries, with each to receive fifty percent (50%) of the assets upon her death. Both daughters opened beneficiary controlled accounts and executed a Beneficiary Controlled Letter of Transfer Authorization Form, directing the transfer of assets from the Mary Whitney IRAs to their respective beneficiary controlled accounts. Suzanne Whitney designated Amber Callaway as beneficiary to the Suzanne Whitney Beneficiary Controlled Accounts, numbered 659-71152 and 659-71155.

Suzanne Whitney died on October 25, 2007. On February 13, 2008, Pamela Whitney was advised that she was not the designated beneficiary on the Suzanne Whitney Beneficairy Controlled Accounts. Thereafter, on February 29, 2008, Pamela Whitney filed suit against Merrill Lynch and Amber Callaway in District Court in Tulsa County, Oklahoma, Case No. CJ-2008-1654. [Aplt. App., Vol. 2 at 273]. Pamela Whitney claimed a right to the assets in the Suzanne Whitney Beneficiary Controlled Accounts and the Suzanne Whitney IRA Account, numbered 659-84028, alleging that Suzanne Whitney lacked the requisite mental capacity to designate a beneficiary. At a hearing on May 27, 2008, upon agreement of the parties, the court dismissed Merrill Lynch from the state court action with the instructions to freeze the Suzanne Whitney Beneficiary Controlled Accounts until the state court action was resolved.

On July 8, 2008, Pamela Whitney filed an arbitration claim with the Financial Regulatory Authority ("FINRA") claim alleging (1) Merrill Lynch did not have the authorization necessary to distribute the assets in the Mary Whitney IRAs; and (2) the contract between Merrill Lynch and Suzanne Whitney, by which Suzanne Whitney designated a beneficiary for the Suzanne Whitney Beneficiary Controlled Accounts, was unlawful. [Aplt. App., Vol. 1 at 21]. Claimant's basis for both of these claims was the same

basis she pursued in the state court action, i.e. Suzanne Whitney was not competent and of sound mind when she designated Amber Callaway as her beneficiary.

On December 4, 2008, the jury in the state court action returned a verdict in favor of Defendant Amber Callaway, finding (1) that Suzanne Whitney was competent and of sound mind when she designated Amber Callaway as her beneficiary, and (2) that Amber Callaway was not unjustly enriched by Suzanne Whitney's designation of her as beneficiary to Suzanne Whitney's IRA Account, Account # 659-84028. [Aplt. App., at 282]. Pamela Whitney appealed the jury's verdict and the judgment to the Oklahoma Supreme Court, which judgment was affirmed by the Court of Civil Appeals on February 26, 2010. [Aplt. App., Vol. 2 at 331].

On December 31, 2008, Merrill Lynch set up a new account, the Amber Callaway Account, numbered 659-12951, to facilitate a Required Minimum Distribution from the Suzanne Whitney Beneficiary Controlled account as mandated by the Internal Revenue Service rules. On January 22, 2009, Callaway made written demand on Merrill Lynch for payment of the funds in the Suzanne Whitney Beneficiary Controlled Accounts and the Amber Callaway Account. As a result of Callaway's written demand, and because the FINRA arbitration claim filed by Whitney was pending, Merrill

Lynch filed a Petition for Interpleader in the District Court of Tulsa County, seeking to interplead the three accounts in dispute. [Aple. App. at 1]. Whitney removed the action to the United States District Court for the Northern District of Oklahoma. [Aple. App. at 9]. By Order dated July 10, 2009, the District Court granted Merrill Lynch's interpleader and directed the parties to identify an alternative custodian for the three accounts at issue and thereafter transfer the accounts away from Merrill Lynch on or before July 31, 2009. [Aple. App. at 14].

Unfortunately, the Whitney Parties' continuous pursuit of funds to which they are not entitled, the never-ending litigation endured by Merrill Lynch, and the potential for future litigation attached to the funds, resulted in the Whitney Parties and Callaway being unable to locate an alternative custodian willing to accept the funds at issue. Thus the funds remain with Merrill Lynch as a disinterested stakeholder.

The FINRA arbitration proceeding was held in August 2009, during which the arbitration panel was fully informed and apprised of all of the legal and factual issues in this case. At the conclusion of the arbitration proceeding, the Whitney Parties, through their counsel, stated that they had a full and fair opportunity to present their case. On October 21, 2009, after consideration of the pleadings, testimony and evidence presented at the

hearing, the Arbitration Panel entered an award (1) denying all of the Whitney Parties' claims and (2) awarding Merrill Lynch attorney fees of $93,205.00. [Aplt. App., Vol. 2 at 218].

Merrill Lynch moved to confirm the arbitration award, and the Whitney Parties moved to vacate the award. [Aplt. App. Vol. 1 at 16; Aplt. App. Vol. 1 at 67]. The Whitney Parties' opposition once again led to extensive briefing of the issues by both sides. In addition, although Merrill Lynch filed its motion to confirm the award in the U.S. District Court for the Northern District of Oklahoma, the Whitney Parties filed motions to vacate the award in both the U.S. District Court for the Northern District of Oklahoma and the District Court for Tulsa County, where the initial state court action was filed, [Aple App. at 22], thus requiring Merrill Lynch to address not only the issues before the courts regarding confirmation of the award, but also unnecessarily addressing various jurisdictional issues.

On January 26, 2010, the federal district court entered its Opinion and Order confirming the arbitration award and denying the motion to vacate. [Aplt. App., Vol. 2 at 238]. Despite this Order, the Whitney Parties refused to dismiss or withdraw their motion to vacate pending in Tulsa County. Therefore, on January 27, 2010, Judge Sellers entertained the parties' oral arguments on the Whitney Parties' motion to vacate. Just as

the federal court did, the state court rejected each of the Whitney Parties' arguments, denied their motion to vacate, and confirmed the arbitration award. [Aple. App. at 71].

In what appears to be an absolute refusal to accept the courts' rulings at each stage of this litigation, the Whitney Parties continued with their "never-say-die" attitude, filing a a motion for new trial pursuant to Fed. R. Civ. P. 59, and a motion for relief from judgment pursuant to Fed. R. Civ. P. 60. [Aplt. App., Vol. 2 at 249; Aplt. App., Vol. 2 at 283]. The motions were virtually identical, absent reliance on different procedural rules, and failed to present any new or novel arguments to justify the requested relief. By Opinion and Order dated May 20, 2010, the district court denied both motions. [Aplt. App., Vol. 2 at 358]. This appeal followed.

## SUMMARY OF THE ARGUMENT

The crux of Merrill Lynch's argument in this appeal is that the Whitney Parties have wholly disregarded the extremely limited standard of review applicable to arbitration decisions, and instead seek review as if the determination had been made in the first instance by a court. The Whitney Parties essentially argue that the Arbitration Panel committed error in determining that Amber Calloway was the named beneficiary as to both of Suzanne Whitney's Beneficiary Controlled Accounts or inherited IRAs, that Suzanne Whitney lacked the legal capacity in the first instance to name a beneficiary for her inherited IRAs, and that Merrill Lynch had to present itemized time records in order to be entitled to an award of attorney fees.

As will be fully discussed, even if the Arbitration Panel's decision is found to be clearly erroneous, which it is not, it is not subject to vacatur on appeal. The case law is well established that a court may vacate an arbitration award only in certain instances of fraud or corruption, in the case of arbitrator misconduct or if the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award was not made. 9 U.S.C. § 10. While the Whitney Parties attempt to couch their arguments in these terms, it is beyond dispute that they cannot meet this standard. The Whitney Parties' appeal should thus be summarily

dismissed and Merrill Lynch should be awarded attorney fees and costs for being forced to defend this frivolous appeal.

## ARGUMENT AND AUTHORITIES

## I.

## Standard Of Review

The standard of review to be applied in this case has particular significance to this appeal. This Court has described the standard of review of arbitration proceedings as follows:

> Judicial review of arbitration panel decisions is extremely limited; indeed, it has been described as among the narrowest known to law. Under §10 of the Federal Arbitration Act, a court may vacate an arbitration award in certain instances of fraud or corruption, arbitrator misconduct, or where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, definite award upon the subject matter submitted was not made. In addition, we have acknowledged a judicially created basis for vacating an award when the arbitrators acted in manifest disregard of the law. This standard requires a finding that the panel's decision exhibits willful inattentiveness to the governing law. Merely erroneous interpretations or applications of law are not reversible. Put another way, we require more than error or misunderstanding of the law. A finding of manifest disregard means the record will show the arbitrators knew the law and explicitly disregarded it.

*Dominion Video Satellite, Inc. v. Echostar Satellite, L.L.C.,* 430 F.3d 1269, 1273 (10th Cir. 2005)[1] (internal citations omitted).

[1] The manifest disregard standard has arguably been abrogated by the United States Supreme Court case of *Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008). However, for purposes of the instant appeal, "it makes no difference what, if any, judicially-created grounds for vacatur survive in the wake of *Hall Street Associates*," as the Whitney Parties cannot establish the right to

This highly deferential standard of review preserves the strong federal policy favoring arbitration. "In consenting to arbitration, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration." *Bowen v. Amoco Pipeline Co.,* 254 F.3d 925, 930 (10th Cir. 2001). Accordingly, this Court must not independently judge the arbitration award entered by the panel in this case. *Id.* at 931. When this standard of review is applied to the facts of this case, it is clear that the decision of the arbitration panel should be summarily affirmed.

## II.

## The Arbitration Panel Properly Determined Ownership Of The Suzanne Whitney Accounts

The Whitney Parties' first argument in this appeal is that the Arbitrators exceeded their powers by determining that the beneficiary designation made by Suzanne Whitney as to one of her inherited IRA accounts also controlled as to her second account. They claim this result is specifically precluded by the Client Relationship Agreement ("CRA") between Suzanne Whitney and Merrill Lynch and in contradiction of the

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vacatur for any reason. *Legacy Trading Co. v. Hoffman,* 363 Fed. Appx. 633, 636, n. 2 (10th Cir. 2010). *See also, DMA International, Inc. v. Qwest Communications International, Inc.,* 585 F.3d 1341. 1343, n. 2 (10th Cir. 2009).

CRA's express terms.[2] As such, the Whitney Parties claim the Arbitrators' decision exceeded the scope of their authority.

However, the Whitney Parties argument misstates the established law in this area. An arbitrator's decision as to contractual interpretation must be enforced by the reviewing court "so long as it draws its essence from the contract." *United Paperworkers Int'l Union v. Misco, Inc.,* 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed. 2d 286 (1987).

> An arbitrator's decision draws its essence from the contract if it is based on the arbitrator's interpretation of the agreement, correct or incorrect though that interpretation may be…Indeed, it is only when the arbitrator *must* have based his award on some body of thought, or feeling, or policy, or law that is outside the contract…that the award can be said not to draw its essence from the parties' agreement.

*United Food and Commercial Workers, Local 1546 v. Illinois-American Water Company,* 569 F.3d 750, 754 (7th Cir. 2009)(internal citations omitted)(emphasis in original).

The law of this Circuit is in accord.

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[2] While not necessary to this Court's determination, a witness for Merrill Lynch explained in the arbitration that the Whitney Parties misinterpret the CRA designation form in any event. [Aple. App. at 74-77; Aplt. App., Vol. 1, p. 137]. Because Suzanne Whitney was the only named client on the listed accounts, there was no "Client 2" as argued by the Whitney Parties. As a result, there was no need to make a designation with regard to "Client 2" and the beneficiary designation given for "Client 1", Suzanne Whitney, was applicable to both accounts owned by Suzanne Whitney.

> This is a typical contractual dispute in which the parties disagree about the terms of their agreement. There are arguments to be made on both sides of the contractual interpretation issue, and they were made to the arbitrator before being made to the district court and then to us. Even if we were convinced that we would have decided this contractual dispute differently, that would not be *nearly enough* to set aside the award.

*DMA International, Inc. v. Qwest Communications International, Inc.,* 585 F.3d 1341, 1345 (10th Cir. 2009)(*quoting B.L. Harbert International LLC v Herculers Steel Co.,* 441 F.3d 905, 911 (11th Cir. 2006))(emphasis added). This Court went on to state that "DMA's argument that the award contradicts the express terms of the contract is simply another way of saying that the arbitrator clearly erred, and even a showing of clear error on the part of the arbitrator is not enough." *Id.* (internal citations omitted).

Accordingly, the district court was completely correct in refusing to vacate the award of the Arbitration Panel, and the Whitney Parties' argument to the contrary should be denied.

## III.

## The Arbitration Panel Determined That Suzanne Whitney Had The Authority To Name A Beneficiary

The Whitney Parties next assert that the Arbitrators incorrectly decided that Suzanne Whitney possessed the legal authority to name a beneficiary for the IRAs she inherited from her mother, for the reason that

the beneficiary is not the owner of the account. However, as the Whitney Parties concede, they requested declaratory relief before the Arbitration Panel on this very issue. [Defendants'/Appellants' Opening Brief at 21; Aplt. App., Vol. 2 at 269]. When the district court was asked to review the decision of the Arbitration Panel, the court found as follows:

> Whitney contends the award was ambiguous and incomplete because it failed to address her claims for declaratory relief in Claims 1, 2, 6, 7 and 9. This claim is without merit. As the court noted above, the award stated, in pertinent part: "Claimant's claims, each and all, are hereby denied and dismissed with prejudice."
>
> Similarly, Whitney asserts the Panel's award failed to determine whether a beneficiary may legally name a beneficiary to an inherited IRA. In finding against Whitney on all of her claims, the Panel implicitly answered this question in the affirmative.

[Aplt. App., Vol. 2 at 246-247]. [3]

Accordingly, the Whitney Parties are again necessarily contending, as they did with regard to the ownership of the accounts, that the Arbitration Panel incorrectly determined this issue in the first instance. As stated above, error on the part of the Arbitrators, even clear error, is not enough to justify vacatur of the award. This is the case as to both factual

[3] The attached transcription of the arbitration hearing makes it abundantly clear that this issue was thoroughly presented to the Arbitration Panel. Merrill Lynch's expert testified directly to the contrary over argument from opposing counsel, which testimony was accepted by the Arbitration Panel. [Aple. App. at 78-89]

and legal determinations. *Bowen,* 254 F.3d at 932, n. 5 (holding that "[c]ourts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts).

Moreover, the Whitney Parties' argument on this issue is absurd on its face. Even the IRS publication cited by the Whitney Parties' refutes their position. As the Whitney Parties' acknowledge, the publication states that "[l]ike the original owner, you generally will not owe tax on the assets in the IRA until you receive distributions from it." [Defendants'/Appellants' Opening Brief at 23]. By the inclusion of the word "original", the IRS clearly indicates that the beneficiary is the subsequent or successor owner. In addition, in the prior paragraph of the IRS publication, the IRS defines what is meant by the clause emphasized by the Whitney Parties that "you cannot treat the inherited IRA as your own." *Id.* The IRS goes on to explain that "[t]his means that you cannot make any contributions to the IRA. It also means you cannot roll over any amounts into or out of the inherited IRA." In other words, while you cannot directly use the inherited account as your own IRA account or deferred tax investment vehicle, you are nonetheless considered the owner of the account.

This same frivolous argument was made and rejected by the Arbitration Panel and then by the district court on two separate occasions.

Merrill Lynch should not be required to defend against a patently invalid argument yet again. The Whitney Parties are simply trying to obtain additional bites at the apple in violation of established case law and the clearly stated purpose of arbitration, which attempt should be summarily rejected by this Court.

## IV.

## The Arbitration Panel Had The Authority To Award Attorney Fees In Favor Of Merrill Lynch

The Whitney Parties' final proposition in support of this appeal is that the Arbitration Panel exceeded their authority in awarding attorney fees to Merrill Lynch based on Merrill Lynch's affidavit in support of its request for such fees. The Whitney Parties contend that an award of attorney fees cannot be made under Oklahoma law without the support of detailed time records, and thus that the Arbitration panel's determination to do so mandates reversal.

In support of their argument on this issue, the Whitney Parties themselves quote the portion of the district court's Opinion and Order affirming the award of fees as follows:

> Whitney's argument that Merrill Lynch submitted insufficient evidence to support the fee awards is also unavailing. Whitney contends that under *Burk v. City of Oklahoma City,* 598 P.2d 659, 663 (Okla. 1979), Merrill Lynch can only recover attorney fees if it submitted detailed time records showing the work

> performed and offered evidence as to reasonable value for the services performed. However, In *Conti v. Republic Underwriters Insurance Company,* 782 P.2d1357, 1362 (Okla. 1989), the Oklahoma Supreme Court held the trial court did not abuse its discretion in awarding attorney fees where the prevailing party did *not* follow the *Burk* guidelines. In so ruling, the court stated, "The appellant's argument is based on the perception that the guidelines set out in…*Burk*…are mandatory, and that failure of counsel to follow those documentation guidelines prohibits an award of attorney fees." *Id.* The court made it clear that the guidelines were not mandatory. *Id.* Here, the award of fees had a basis in law and fact and the court finds no reason to vacate the Panel's decision.

[Aplt. App., Vol. 2 at 363-364](emphasis in original).

While Merrill Lynch submits that the district court was not required to make this explicit finding in order to affirm the decision of the Arbitration Panel, the court was clearly correct in its affirmance for the same reasons previously discussed. It is well established that an arbitrator is not required to comply with all of the procedural niceties of a court proceeding. *Michael Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 481 F.3d 813, 816 (D.C. Cir. 2007).

Just as in connection with their other propositions, the Whitney Parties are asserting that the Arbitration Panel was simply wrong in their award. This argument is foreclosed. The Whitney Parties' blatant and repeated disregard of the settled standard for judicial review of arbitration decisions should not be condoned by this Court.

## V.

## Merrill Lynch Is Entitled To Appellate Attorney Fees And Costs

Section 1927 imposes personal liability upon an attorney for excessive litigation costs.

> Any attorney or other person admitted to conduct cases in any Court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. §1927. Such an award is similarly authorized by Fed. R. App. P. 38.[4]

"Because arbitration presents such a narrow standard of review, Section 1927 sanctions are warranted if the arguments presented are completely meritless." *Lewis v. Circuit City Stores, Inc.,* 500 F.3d 1140, 1151 (10th Cir. 2007). This Court emphasized that "[a]t the appellate level, the bringing of the appeal itself may be a sanctionable multiplication of proceedings." *Id.* at 1150. In so holding, the Court stated as follows:

> When a party who loses an arbitration award assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable belief it will prevail, the promise of arbitration is broken. Arbitration's allure is dependent upon the arbitrator being the last decision maker in all but the most unusual cases. The more cases there are, like

[4] Fed. R. App. P. 38 provides that if a court determines an appeal is frivolous, it may award damages and single or double costs to the appellee.

> this one, in which the arbitrator is only the first stop along the way, the less arbitration there will be. If arbitration is to be a meaningful alternative to litigation, the parties must be able to trust that the arbitrators decision will be honored sooner rather than later.
>
> Courts cannot prevent parties from trying to convert arbitration losses into court victories, but it may be that we can and should insist that if a party on the short end of an arbitration award attacks that award in court without any real legal basis for doing so, that party should pay sanctions.

*Id.* at 151 (quoting *B.L. Harbert, Int'l, LLC v. Hercules Steel Co.,* 441 F.3d 905, 913 (11th Cir. 2006)). This Court has also explicitly found that application of this standard does not require a finding of bad faith. *Braley v. Campbell,* 832 F.2d 1504, 1512 (10th Cir. 1987).

It is difficult to conceive of a case that satisfies the above standard more completely than this one. As previously set forth, the arbitration proceeding in this case is not even the first stop along the way, as the case initially began in Oklahoma state court.[5] The Whitney Parties have refused to accept the determinations of the Tulsa County District Court Judge and jury, the Oklahoma Court of Civil Appeals, the Arbitration Panel and the United States District Court for the Northern District of Oklahoma, all the while recycling and reiterating the same arguments they have espoused

[5] And according to the Whitney Parties, they intend to continue litigating in the Northern District of Oklahoma after the instant appeal has concluded.

since the inception of this litigation. The Whitney Parties thus epitomize the never-say-die attitude that has been soundly condemned by this Court. Given the history of this litigation, no objectively reasonable interpretation of this Court's case law could justify the Whitney Parties' belief that they might prevail before this Court. *DMA International, Inc.,* 585 F.3d 1341, 1345 (10th Cir. 2009). Sanctions in the form of attorney fees and single or double costs are thus warranted to compensate Merrill Lynch for being forced to defend the arbitration award in this appeal.

## CONCLUSION

Merrill Lynch respectfully requests that this Court affirm the decision of the Arbitration Panel and the United States District Court for the Northern District of Oklahoma and finally terminate Merrill Lynch's involvement in these unnecessarily protracted proceedings. In addition, Merrill Lynch requests an award of its appellate attorney fees and single or double costs.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2010, I electronically transmitted the foregoing Entry of Appearance and Certificate of Interested Parties to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Steven M. Harris
Christopher Matthew Bickell
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Tulsa, OK 74119

I also certify that on October 4, 2010, I served the foregoing document by pre-paid first-class mail to the following whose registration as participants in the ECF System is currently unknown:

Curtis Allan Parks
1736 S. Carson
Tulsa, OK 74119

s/ *Tara A. LaClair*
Tara A. LaClair

## CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that all required privacy redactions have been made, and, with the exception of those redactions, every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the Clerk.

I also certify that this digital submission has been scanned for viruses with the most recent version of a commercial virus-scanning program, Sunbelt Vipre Agent Version 4.0.3275. I further certify that, according to the commercial virus-scanning program, this digital submission is free of viruses.

s/ *Tara A. LaClair*
Tara A. LaClair