

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for transfer of water and) DOCKET NO. 20220064-WS
wastewater facilities of Tymber Creek)
Utilities, Inc., water Certificate No. 303-W,) FILED: March 20, 2023
and wastewater Certificate No. 252-S to)
CSWR-Florida Utility Operating)
Company, LLC, in Volusia County.)
_____)

CSWR-FLORIDA UTILITY OPERATING COMPANY, LLC'S
MOTION TO DISMISS OBJECTIONS

Pursuant to rule 28-106.204, Florida Administrative Code, Applicant CSWR-Florida Utility Operating Company, LLC (“CSWR-Florida UOC”) moves to dismiss the objections/requests for hearing filed by Anna Hannon and Scott Buckwald and to deem the same as correspondence in the nature of customer comments, allowing this docket to proceed to consideration by the Commission without a hearing. In support, CSWR-Florida UOC states:

1. On March 15, 2022, CSWR-Florida UOC filed its Application For Transfer Of Facilities And Certificate From A Regulated Utility To Another Regulated Utility. As more fully described in the Application, CSWR-Florida UOC has a contract to purchase the assets of Tymber Creek Utilities, Inc. and has requested that the Commission transfer Tymber Creek Utilities, Inc.’s water and wastewater certificates to CSWR-Florida UOC. CSWR-Florida UOC’s contract to purchase the assets of Tymber Creek Utilities, Inc. is contingent on Commission approval and other preconditions described in the contract (Exhibit B to the Application).

2. On May 19, 2022, Tymber Creek Homeowners Association (“Tymber Creek HOA”) requested to be added to this docket as an interested person.

3. On July 19, 2022, Commission staff approved the form of the notice to customers advising them of this docket and the opportunity to object.

4. On July 26, 2022, the notice was published in The Daytona Beach News-Journal.

5. On August 1, 2022, the notice was mailed to customers and to the applicable entities on the list provided by staff.

6. On August 10, 2022, CSWR-Florida UOC filed affidavits that the notice process was complete.

7. Section 367.045(4), Florida Statutes, provides that “If, within 30 days after the last day that notice was mailed or published by the applicant, whichever is later, the commission receives from the Public Counsel, a governmental authority, or a utility or consumer who would be substantially affected by the requested certification or amendment a written objection requesting a proceeding pursuant to ss. 120.569 and 120.57, the commission shall order such proceeding conducted in or near the area for which application is made, if feasible.”¹

8. Accordingly, consumers and other substantially affected persons by statute had until August 31, 2022, to file “a written objection requesting a proceeding pursuant to ss. 120.569 and 120.57.”

9. Between August 18, 2022 and August 30, 2022, approximately twenty-five (25) residents of the Tymber Creek subdivision, plus the Tymber Creek HOA, sent letters to the Commission, subsequently placed in the docket file as correspondence, objecting to the Application. None of these letters “request[ed] a proceeding pursuant to ss. 120.569 and 120.57.”

10. The letters are all virtually identical and raise the same concern -- that there was a leak in the Tymber Creek Utilities’ wastewater system under a roadway and that after the leak was

¹ Section 367.045, Florida Statutes, on its face applies to applications for an initial certificate of authorization from the Commission, not certificate transfers. However, section 367.071(4), Florida Statutes, provides that transfer applications “shall be disposed of as provided in s. 367.045. . . .”

repaired, the road above it was not properly repaired, leading to erosion in the road bed and other related problems with the road.²

11. On or about November 29, 2022, approximately three (3) months after the section 367.045 notice period expired on August 31, 2022, Commission staff sent letters to the Tymber Creek residents and Tymber Creek HOA who had filed objection letters. These letters from staff, which were posted to the docket file on December 15, 2022, inquired “whether you wish to merely state for the record your objection to the transfer, or whether you are requesting that an administrative hearing be held with regard to your objection.” It then ostensibly gave each recipient until December 21, 2022, about four months after the statutory notice period expired, to respond to staff “regarding your intention with respect to your letter of objection.” Two (2) residents affirmatively responded.

12. The Tymber Creek HOA did not respond to staff.

13. On December 14, 2022, resident Scott Buckwald responded to staff, which response was added to the docket file on December 15, 2022 (document number 12058-2022).

14. Mr. Buckwald’s response states that he is “requesting an administrative hearing in order to resolve and complete two items that must be accomplished prior to the sale.” The first item discussed in the response is the road, as set forth above -- that Tymber Creek Utilities, Inc. did not properly repair the road after repairing a leak in its wastewater system.

² Tymber Creek Utilities, Inc. has since had the road repaired. See photos attached as Exhibit A. Moreover, CSWR-Florida UOC has offered the Tymber Creek HOA assurances that it will resolve any remaining issues relating to the road arising from a system leak when it acquires the Tymber Creek system.

15. The second item Mr. Buckwald raised in his December 14, 2022, correspondence to staff, is a now-expired stipulated settlement agreement executed in 2011 between Tymber Creek HOA and Tymber Creek Utilities, Inc.

16. The settlement agreement between Tymber Creek Utilities, Inc. and Tymber Creek HOA raised in Mr. Buckwald's letter (document number 12058-2022), resolved Tymber Creek HOA's objection to the Florida Department of Environmental Protection's issuance of Domestic Wastewater Facility Permit FLA011193-003 (August 16, 2010), to Tymber Creek Utilities, Inc. According to Mr. Buckwald's correspondence, the settlement agreement "was a ten year plan to repair and upgrade the system that was to start in 2012. Tymber Creek Utilities was to provide to the HOA a signed and sealed certification of what repairs had been done each year. . . . The HOA board and myself would like to see that TCU completed all items spelled out in this agreement for inspections and repair prior to the sale and transfer." In sum, Mr. Buckwald's objections expressed in his letter were: 1) Tymber Creek Utilities, Inc. did not properly repair the road(s) above the leak; and 2) he "would like to see" that Tymber Creek Utilities, Inc. complied with the 2011 stipulated settlement agreement with the Tymber Creek HOA in the FDEP permit proceeding.

17. On December 15, 2022, resident Anna Hannon responded to staff via email stating that "I am requesting a hearing be held regarding my objection" with no additional information. Ms. Hannon's response was placed in the docket file on January 3, 2023 (document number 00048-2023).

18. On December 21, 2022, Tymber Creek HOA filed a lawsuit against Tymber Creek Utilities, Inc. and CSWR-Florida UOC in circuit court in Volusia County (case number 2022-31795-CICI). The factual allegations of the Complaint relate to the 2011 stipulated settlement agreement between the Tymber Creek HOA and Tymber Creek Utilities, Inc. to resolve a 2010

FDEP wastewater permit proceeding, the same matter raised by Mr. Buckwald in his December 14, 2022, correspondence to staff.

19. The Complaint filed in the suit asks the Court to permanently enjoin the sale of Tymber Creek's assets to CSWR-Florida UOC³, declare that CSWR-Florida UOC is required to assume Tymber Creek Utilities' obligations under the stipulated settlement, order Tymber Creek Utilities' specific performance under the stipulated settlement, and alleges that Tymber Creek Utilities, Inc. has been negligent in its operation of the water and wastewater system. A copy of the circuit court Complaint is attached as Exhibit B. Tymber Creek Utilities, Inc. and CSWR-Florida UOC have each filed motions to dismiss the Complaint in the circuit court case.

20. In the three (3) months since Mr. Buckwald and Ms. Hannon sent the referenced correspondence to staff in mid-December, 2022, there has been no substantive activity in the docket file.

21. For the reasons set forth below, CSWR-Florida UOC requests that the prehearing officer dismiss Mr. Buckwald and Ms. Hannon's objections/hearing requests, as well as any other similar correspondence in the docket file currently interpreted by staff as an objection/request for hearing, deem the same as correspondence in the nature of customer comments, and allow this docket to proceed without a hearing to consideration by the Commission.

³ As shown in the attached Exhibit B, the circuit court Complaint does not seek to enjoin the Commission from approving the transfer of the water and wastewater certificates to CSWR-Florida UOC or otherwise proceeding with this administrative docket.

MEMORANDUM OF LAW

As the Commission has noted, “[u]nder Florida law, the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action” and that “[i]n order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted.” *In Re Application for Transfer of Certificate No. 492-S*, Docket No. 991812-SU, Order No. PSC-00-0757-PCO-SU, 2000 WL 639914, at *1 (Fla. P.S.C. Apr. 17, 2000) (internal citations omitted). Despite being given multiple opportunities and many months beyond the statutory deadline to do so, Mr. Buckwald and Ms. Hannon have failed to raise any questions of law or allege any facts that, if true, would be a basis to deny CSWR-Florida UOC’s Application for transfer of the certificates.

I. THE OBJECTIONS RAISE NO ISSUE RELEVANT TO A TRANSFER PROCEEDING

Nothing raised to date by Mr. Buckwald or Ms. Hannon, or the Tymber Creek HOA or any other Tymber Creek resident in their correspondence to staff has anything to do with any issue relevant to this transfer docket.⁴ Rule 25-30.037(2), F.A.C., sets out the information that must be filed by an applicant for transfer of a regulated utility to another regulated utility. The key elements are the financial and technical ability of the applicant to operate the system. Rule 25-30.037(1)-(m), F.A.C. Mr. Buckwald in his correspondence to staff claims there is (or was) an unrepaired road and that Tymber Creek Utilities, Inc. is not in compliance with a 2011 stipulated settlement

⁴ Even if they were relevant to any issue in this docket, allegations that the current owner has failed to properly repair a road or comply with a stipulated settlement in an FDEP permit proceeding would weigh in favor of transfer of the water and wastewater certificates to CSWR-Florida UOC, not as a basis to keep the certificates with the current owner with the alleged failings and compliance issues.

agreement with Tymber Creek HOA that resolved a 2010 FDEP wastewater facility permit proceeding. Those matters have nothing to do with CSWR-Florida UOC's financial and technical ability to own and operate the system, or any other issue relevant to this transfer docket. *See, e.g., In Re Application for Transfer of Facilities of Lake Utilities*, Docket No. 940091-WS, Order No. PSC-95-0062-FOF-WS, 1995 WL 30870, at *4 (Fla. P.S.C. Jan. 11, 1995) (noting that “[i]n transfer proceedings, we always analyze a utility’s financial and technical ability and then make a determination as to whether the proposed transfer will be in the public interest” and that “we find it significant that the [objector] has not disputed [the applicant’s] technical and financial ability to provide service”).

Under the Water and Wastewater Regulatory Law (chapter 367, Florida Statutes), the Commission has exclusive jurisdiction over each water and wastewater utility “with respect to its authority, service, and rates.” § 367.011, Fla. Stat. The Commission has no jurisdiction over any contract dispute between the Tymber Creek HOA and Tymber Creek Utilities, Inc. and by virtue of its role as asset purchaser, CSWR-Florida UOC. *See, e.g., In Re Lake Yale Util. Co.*, Docket No. 930133-WS, Order No. PSC-94-0171-FOF-WS, 1994 WL 52798, at *2 (Fla. P.S.C. Feb. 10, 1994) (concluding that “[w]ith respect to agreements between utilities and customers or other parties, contract disputes are matters which must be settled by the circuit court” and dismissing the objection of homeowners, which objection was based on an agreement with the utility/developer). Similarly, the alleged contract issue raised by Mr. Buckwald⁵ in his objection is a matter for the

⁵ Mr. Buckwald is not a party to the stipulated settlement agreement. The agreement is between Tymber Creek Utilities, Inc. and the Tymber Creek HOA. See Exhibit B. On May 19, 2022, the Tymber Creek HOA was made an interested person in this docket. Despite staff’s invitation, the Tymber Creek HOA made no attempt to subsequently request a hearing. Accordingly, not only is the Commission not the proper forum to address any contract dispute between the utility and HOA, Mr. Buckwald has no rights under that contract to litigate anywhere.

circuit court where it is currently pending, not for the Commission. Any contract issues arising from the 2011 stipulated settlement agreement between the utility and association have no bearing on any issue in this transfer docket and accordingly, the objections must be dismissed on that basis. The objections simply raise no issue relevant to this docket that would provide a basis for the Commission to deny the Application.

II. THE OBJECTIONS ARE TIME-BARRED BY STATUTE

Section 367.045(4), Florida Statutes requires a customer who wishes to object to a certificate transfer to file “a written objection requesting a proceeding pursuant to ss. 120.569 and 120.57.” It is not enough to simply object. The objection must request an administrative hearing (i.e., a “proceeding pursuant to ss. 120.569 and 120.57”) and allege facts and law that would provide a basis for relief. This must be done “within 30 days after the last day that notice was mailed or published by the applicant, whichever is later” Mr. Buckwald and Ms. Hannon have never properly requested a proceeding, let alone within the required 30 days. That 30-day statutory period ran on August 31, 2022, approximately seven (7) months ago.

Rule 28-106.201(1), F.A.C. provides in pertinent part that “initiation of proceedings shall be made by written petition to the agency responsible for rendering final agency action.” A written petition must include the following:

- (a) The name and address of each agency affected and each agency's file or identification number, if known;
- (b) The name, address, any e-mail address, any facsimile number, and telephone number of the petitioner, if the petitioner is not represented by an attorney or a qualified representative; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests will be affected by the agency determination;
- (c) A statement of when and how the petitioner received notice of the agency decision;

(d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

(e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action;

(f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and

(g) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action.

Rule 28-106.301(2), F.A.C.; *see also* rule 25-30.031(2), F.A.C. (stating that “[a] written objection must state the grounds for the objection with particularity”).

To have been in compliance with section 367.045(4), Florida Statutes, a “proceeding pursuant to ss. 120.569 and 120.57” had to have been requested by August 31, 2022, many months ago. To initiate such a proceeding, a petition had to have been filed containing the elements required by rule 28-106.201(1), F.A.C. That was never done. Nor was there filed an objection stating grounds with particularity that could, if true, serve as a basis for denial of the application. The “requests for hearing” filed by Mr. Buckwald and Ms. Hannon in mid-December, 2022, were time-barred by statute by at least four (4) months when they were filed and were nonetheless deficient for the reasons expressed above.

WHEREFORE, CSWR-Florida UOC requests that the objections filed by Mr. Buckwald and Ms. Hannon, as well as any other similar correspondence being treated by staff as an objection/request for hearing, be dismissed, deemed as correspondence in the nature of customer comments, and that no related hearing be held, allowing the transfer Application to proceed to consideration by the Commission without further delay.

Respectfully submitted this 20th day of March, 2023.

/s/ Thomas A. Crabb
Susan F. Clark, FBN 179580
Thomas A. Crabb, FBN 25846
Jordann Wilhelm, FBN 1003182
Radey Law Firm
301 South Bronough Street, Suite 200
Tallahassee, FL 32301
(850) 425-6654
tcrabb@radeylaw.com
sclark@radeylaw.com
jwilhelm@radeylaw.com
Attorneys for CSWR-Florida UOC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via electronic mail to the following this 20th day of March, 2023.

Jennifer Crawford, Esq.
Major Thompson, Esq.
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
jcrawfor@psc.state.fl.us
mthomps@psc.state.fl.us

Richard Gentry
Patricia A. Christensen
Office of Public Counsel
c/o Florida Legislature
Tallahassee FL 32399-1400
gentry.richard@leg.state.fl.us
christensen.patty@leg.state.fl.us

Tymber Creek Utilities, Inc.
1951 West Granada Blvd.
Ormond Beach FL 32174-6740
tymbercreekutil@aol.com

Linda Hughes, President
Tymber Creek HOA, Inc.
476 Tymber Run
Ormond Beach, Florida 32174
Ljhughes8014@yahoo.com

Scott Buckwald
324 Groover Creek Crossing
Ormond Beach, FL 32174
s324b@bellsouth.net

Anna Hannon
260 Amberwood Court
Ormond Beach, FL 32174
anna_hannon@yahoo.com

/s/ Thomas A. Crabb
Thomas A. Crabb

EXHIBIT A









EXHIBIT B

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA**

TYMBER CREEK HOMEOWNERS
ASSOCIATION, INC., *a Florida Not-for-
Profit Corporation,*

Case No:

Division:

Plaintiff,

v.

TYMBER CREEK UTILITIES, INC., *a
Florida Corporation,* and CSWR-
FLORIDA UTILITY OPERATING
COMPANY, LLC, *a Florida Limited
Liability Company,*

Defendants.

_____ /

COMPLAINT

Plaintiff, Tymber Creek Homeowners Association, Inc., (“HOA”) by and through undersigned counsel sues Defendants, Tymber Creek Utilities, Inc. (“TCU”) and CSWR-Florida Utility Operating Company, LLC (“CSWR”) and in support thereof alleges as follows:

JURISDICTION AND VENUE

1. Plaintiff, HOA, is a corporation duly organized and existing under the laws of the State of Florida, whose principal place of business is 376 Tymber Run, Ormond Beach, Florida 32174.
2. HOA is the ownership entity for the common areas (“Common Areas”) of the subdivision known as “Tymber Creek” in Ormond Beach, Florida.
3. The Common Areas consist of the private roads, pools, and other property.

4. Defendant, TCU, is a corporation duly organized and existing under the laws of the State of Florida, whose principal place of business is 1951 W. Granada Blvd., Ormond Beach, Florida 32174.

5. Defendant, CSWR-Florida Utility Operating Company, LLC, is a limited liability company duly organized and existing under the laws of the State of Florida, whose principal place of business is 1630 Des Peres Road, Suite 140, St. Louis, Missouri 63131.

6. Venue is proper in Volusia County, Florida because the causes of action herein accrued in Volusia County, Florida and TCU is located in Volusia County, Florida.

GENERAL ALLEGATIONS

7. TCU is a utility provider for HOA and its members who are homeowners in Tymber Creek including providing water and sewer service.

8. On or about August of 2010, the parties were subject to a dispute wherein HOA filed a Petition for Formal Hearing pursuant to §120.569, Florida Statutes regarding a permit to TCU authorizing the continued operation of a domestic waste water treatment plan.

9. The parties resolved the dispute by a Stipulated Settlement Agreement which specifically set forth the obligations and duties of the parties, subject to the dismissal of the formal action. A true and accurate copy of the Agreement is attached hereto as “**Exhibit A**”.

10. On or about June of 2022, a waste water or water line leak in the pipes which were in the strict custody, care, and control of Defendant TCU, began to cause damages to the general area including, but not limited to, the roads owned and maintained by HOA.

11. HOA has made numerous complaints to Defendant TCU, but the remedial efforts have failed to repair the damage.

12. In late 2022, HOA was made aware of a pending sale of TCU to CSWR which is currently pending approval by the Florida Public Utility Commission.

COUNT I- PERMANENT INJUNCTION

13. This is a cause of action for injunctive relief brought by Plaintiff, Tymber Creek Homeowners Association, Inc., against Defendants, Tymber Creek Utilities, Inc. and CSWR-Florida Utility Operating Company, LLC.

14. Plaintiff alleges and incorporates Paragraphs 1 through 12.

15. Plaintiff has performed all conditions precedent to the filing of this suit or the conditions precedent have been waived.

16. Under information and belief, the Defendants, TCU and CSWR, are parties to a sale wherein TCU, its accounts, and its water and sewer elements are being purchased *in toto* by CSWR.

17. The pending sale threatens to block the rights and abilities of the Plaintiff to enforce the Agreement it entered into with TCU in 2010.

18. The loss of these rights poses an irreparable harm to the Plaintiff, where it would be left without recourse as to the failing elements in the strict custody, care, and control of the Defendant TCU.

19. HOA has a clear legal right to be able to enforce the covenants and restrictions set forth in the Agreement.

20. HOA has no adequate remedy at law.

21. It is in the public interest to bar the pending purchase and sale pending the resolution of the matters herein.

WHEREFORE, Plaintiff, Tymber Creek Homeowners Association, Inc., requests this Court enjoin the Defendants, Tymber Creek Utilities, Inc. and CSWR-Florida Utility Operating

Company, LLC, from consummating their pending sale and purchase until all the obligations of the Agreement are completed by Tymber Creek Utilities, Inc., and such other relief as this Court deems appropriate.

COUNT II- DECLARATORY JUDGMENT

22. This is a cause of action for declaratory judgment pursuant to Chapter 86, Florida Statutes, brought by Plaintiff, Tymber Creek Homeowners Association, Inc., against Defendants, Tymber Creek Utilities, Inc. and CSWR-Florida Utility Operating Company, LLC.

23. Plaintiff alleges and incorporates Paragraphs 1 through 12.

24. Plaintiff has performed all conditions precedent to the filing of this suit or the conditions precedent have been waived.

25. Under information and belief, the Defendants, TCU and CSWR, are parties to a pending sale wherein TCU, its accounts, and its water and sewer elements are being purchased *in toto* by CSWR.

26. TCU is a party to the Agreement with HOA, which sets forth the rights, obligations, and duties of the parties as to those sewer elements in the strict care, custody, and control of TCU.

27. TCU's pending purchaser, CSWR, is not a party to the Agreement between the Plaintiff and TCU and no privity exists between the Plaintiff and CSWR.

28. Section 8 of the Agreement states that it shall be "*binding upon and inure to the benefit of the parties hereto and their respective successors, heirs, parent corporations, subsidiaries affiliates, representatives, and assigns.*"

29. However, there exists a question as to the rights, obligations, and duties of the parties should the pending sale proceed and the sewer elements remain unrepaired, causing

further damage to the Plaintiff's property and safety to the members of HOA, the residents of Tymber Creek.

30. Pertinently, the Plaintiff is in doubt as to whether CSWR is required to assume TCU's place as party to the Agreement, with or without such provision in Defendant's pending sale.

WHEREFORE, Plaintiff, Tymber Creek Homeowners Association, Inc., requests this Court enter a judgment declaring the legal rights and duties of the parties under the Stipulated Settlement Agreement, and such other relief as this Court deems appropriate.

COUNT III- SPECIFIC PERFORMANCE

31. This is a cause of action for specific performance brought by Plaintiff, Tymber Creek Homeowners Association, Inc., against Defendant, Tymber Creek Utilities, Inc., which compliance with would cost in excess of \$30,000.00, exclusive of interest, costs, and attorneys' fees.

32. Plaintiff alleges and incorporates Paragraphs 1 through 12.

33. Plaintiff has performed all conditions precedent to the filing of this suit or the conditions precedent have been waived.

34. HOA and TCU are parties to the Stipulated Settlement Agreement executed in 2010, whereby TCU specifically agreed to execute a schedule of capital improvement programs beginning in 2012 to and concluding by December 31, 2021 ("Schedule").

35. The Agreement was clear, definite, certain, and complete as to all essential terms.

36. In exchange for executing the Agreement and Schedule, HOA agreed to dismiss its administrative claims against TCU, and further, file no further administrative or judicial lawsuits concerning the permit subject of the Agreement.

37. HOA also agreed to not to provide financial assistance to any person, firm or corporation for purposes of litigating with TCU or further interfering with its permit.

38. HOA has fully performed all of its obligations and honored the Agreement and otherwise complied with the terms thereof.

39. TCU has failed to execute the Schedule in its entirety pursuant to the Agreement.

40. The Agreement provides HOA the right to seek specific performance of the Agreement.

41. Where the sewer elements failing are in the strict care, custody, and control of TCU, HOA has no remedy at law, adequate or otherwise.

42. Should the system completely fail, HOA and its members would be left without sewer service for the Common Areas and the homes in Tymber Creek.

43. In order to enforce its rights pursuant to the Agreement, the Plaintiff has had to retain counsel and is otherwise indebted for the reasonable fees and costs of the undersigned.

44. The Plaintiff is entitled to its reasonable attorneys' fees and costs pursuant to Section 7 of the Agreement, and hereby makes formal demand for the same.

WHEREFORE, Plaintiff, Tymber Creek Homeowners Association, Inc., requests this Court enter a judgment commanding Tymber Creek Utilities, Inc. to complete its required repairs and improvements pursuant to the Agreement, perform fully and completely under the Agreement, repair those items and properties that have been damaged due to its failure to timely act pursuant to the Agreement, award Tymber Creek Homeowners Association, Inc its reasonable attorneys' fees and costs, and such other relief as this Court deems appropriate.

COUNT IV- NEGLIGENCE

45. This is a cause of action founded in negligence brought by Plaintiff, Tymber Creek Homeowners Association, Inc., against Defendant, Tymber Creek Utilities, Inc., for damages in excess of \$8,000.00 but less than \$30,000.00, exclusive of interest, costs, and attorney's fees.

46. Plaintiff alleges and incorporates Paragraphs 1 through 12.

47. Plaintiff has performed all conditions precedent to the filing of this suit or the conditions precedent have been waived.

48. Defendant TCU owed a duty to HOA to discharge their duties to maintain the sewage and water pipes and elements in their strict care, custody, and control so as to not cause damage to the property of HOA.

49. TCU at all times material failed to properly monitor and maintain its sewer and water pipes under the roads (that are the property of HOA) and failed to act decisively to correct the issue with said elements.

50. TCU breached its duty by failing to act as they were required to and failed to conform to the standard of conduct for the protection of private property as a utility in Volusia County, including HOA.

51. Defendant TCU was negligent in its:

- a. Failure to maintain the sewage and water elements located and situated on and near HOA's property;
- b. Failure to act promptly to correct the issues with the sewage and water elements; and
- c. Other acts of negligence to be determined through discovery.

52. As a direct result of TCU's negligence, HOA has suffered damages including damage to its property, roads, and loss of use of the same.

WHEREFORE, Plaintiff, Tymber Creek Homeowners Association, Inc., requests this Court enter a judgment against Tymber Creek Utilities, Inc. for damages plus costs, pre-judgment interest, and such other relief as this Court deems appropriate.

DEMAND FOR JURY TRIAL

The Plaintiff hereby demands a trial by jury of all issues so triable.

Dated this December 21, 2022.

Alexander B. Cvercko, Esq.
Alexander B. Cvercko, Esq.
Florida Bar No. 186200
Cvercko & Associate, P.A.
13500 Sutton Park Drive S., Suite 304
Jacksonville, FL 32224
Phone: (904) 821-8700
Fax: (888) 477-3412
Primary: alex@cverckolaw.com
Primary: associate@cverckolaw.com
Secondary: assistant@cverckolaw.com
*Attorneys for Tymber Creek Homeowners
Association, Inc.*

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

TYMBER CREEK HOMEOWNERS
ASSOCIATION, INC.

Petitioner,

v.

DOAH CASE NO. 10-8863
OGC CASE NO. 10-2468

TYMBER CREEK UTILITIES, INC., &
STATE OF FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION

Respondents.

STIPULATED SETTLEMENT AGREEMENT

This Stipulated Settlement Agreement ("Settlement" or "Agreement") is made and entered into this 10th day of October, 2011, by and between TYMBER CREEK HOMEOWNERS ASSOCIATION, INC., a Florida corporation (hereafter "TCHOA"), and TYMBER CREEK UTILITIES, INC., a Florida corporation regulated by the Florida Public Service Commission (hereafter "TCU"). TCHOA and TCU shall be hereafter collectively referred to as the "PARTIES."

RECITALS

1. TCHOA filed a Petition for Formal Hearing pursuant to Section 120.569, Florida Statutes, challenging the Florida Department of Environmental Protection's (hereafter "FDEP") issuance of Domestic Wastewater Facility Permit no. FLA [REDACTED] dated August 16, 2010 (the "Permit"), to TCU authorizing TCU to continue to operate a domestic wastewater treatment plant.

2. The PARTIES met and have discussed and negotiated in good faith to resolve their differences over the issuance of the Permit.

3. All PARTIES now wish to resolve all pending appeals and challenges in the above-styled cause.

ACCORDINGLY, in consideration of the above-stated Recitals, the receipt and sufficiency of which are acknowledged by the PARTIES hereto, the PARTIES agree as follows:

SECTION 1. RECITALS. The above Recitals are true and correct and form a material part of this Stipulated Settlement Agreement.

SECTION 2. TCU OBLIGATIONS. TCU agrees to do the following:

(1) TCU has prepared a "Capital Improvement Programs and Cost Documentation," which is attached to and incorporated in this Stipulated Settlement Agreement as Exhibit "A;" provided however that those items listed in Year 3 designated as MH 22 to CO 23 and MH 22 to MH 21 shall be performed in Year 1. TCU agrees that within thirty (30) days after the dismissal of this matter and the entry of a final order closing the Division of Administrative Hearings ("DOAH") case file, whichever last occurs, it shall implement the schedule contained in Exhibit "A" hereof. Year 1 shall be 2012, and each sequentially numbered year shall correspond to the following calendar year, with Year 2 being 2013, and ending with Year 10 being 2021; provided, however, that those two items in Year 3 listed above shall be accomplished in Year 1.

(2) TCU has previously performed a test using a standpipe assembly constructed by TCU that demonstrated that no leak is occurring in the force main

from the lift station into the headworks of the domestic wastewater treatment plant. TCHOA agrees that no further action is required regarding the issue of the force main leak, and further agrees that it will not object or otherwise challenge the appropriate modification, extension, or deletion of dates contained in condition VI.1 so long as such modifications, extensions, or deletions are consistent with and not in conflict with the terms of this Stipulated Settlement Agreement.

(3) TCU shall provide an engineering certification to TCHOA by its engineer of record that the proposed repairs contained in items (1) and (2) above are adequate to repair the system and in accordance with good industry practice.

(4) Should there be any documented sewage backup or release from any facilities owned and operated by TCU, TCU shall immediately investigate such backup and release utilizing appropriate professionals. Any documented deficiencies in TCU's system shall be addressed within a reasonable time so that the backup or release does not recur. TCU shall report any such leaks to the FDEP in writing in accordance with state regulation.

(5) Within thirty (30) days following completion of an item contained in Exhibit "A" or at the end of each calendar year under the schedule provided in Exhibit "A," (whichever last occurs), TCU shall provide to TCHOA through its engineer a signed and sealed certification that the facility repairs for that year have been inspected and have been completed in a good and workmanlike manner, and that there are no recurring leaks into or out of the repaired facilities.

(6) TCU agrees to operate, maintain, and repair the facilities covered by the Permit in compliance with the applicable Florida Department of Environmental Protection permit conditions and requirements.

(7) Within twelve (12) months from the date this matter is dismissed with prejudice, TCU further agrees to clean and video inspect the remainder of the vitrified clay pipelines contained within Phase One of the Tymber Creek development that have not been previously video inspected. TCU agrees to make a copy of the video report available to TCHOA. If TCU finds anything requiring repair during the video inspection, then that repair would be added to year 10 of the schedule, unless TCU's engineer determines that an emergency repair is needed. If so, then the emergency repair will be accomplished as directed by TCU's engineer.

SECTION 3. TCHOA OBLIGATIONS; NOTICE OF VOLUNTARY DISMISSAL OF PETITIONS WITH PREJUDICE. TCHOA agrees as follows:

(1) TCHOA agrees to immediately file a Notice of Voluntary Dismissal with Prejudice and request to relinquish jurisdiction to the Department with the Division of Administrative Hearings and the Administrative Law Judge in TYMBER CREEK HOMEOWNERS ASSOCIATION, INC. v. TYMBER CREEK UTILITIES, INC. AND STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DOAH Case No. 10-8863,

(2) TCHOA agrees it shall file no further administrative or judicial lawsuits or otherwise participate in any judicial or administrative proceeding related to the facilities owned by TCU and permitted pursuant to the Permit so

long as the TCU complies with the terms of this Stipulated Settlement Agreement.

(3) TCHOA agrees that it shall not provide financial assistance to any person, firm or corporation for purposes of litigating with TCU or participating in any administrative or judicial forum related to challenging or in any way interfering with the Permit,

(4) Should TCHOA initiate or participate in any such form or proceedings as described above, the dismissals provided for in this Stipulated Settlement Agreement shall be deemed to create the rebuttable presumption of improper purposes.

SECTION 4. COOPERATION. Neither Party nor entity referenced above shall take any action or refrain from taking any action in a manner which is inconsistent with the intent and spirit of this Stipulated Settlement Agreement.

SECTION 5. EFFECTIVE DATE. This Stipulated Settlement Agreement shall become effective upon execution by counsel for all parties.

SECTION 6. RELEASE OF CURRENT CLAIMS FOR SANCTIONS, ATTORNEYS' FEES, COSTS, OR OTHER LOSSES. In consideration for execution of this Stipulated Settlement Agreement and Dismissal with Prejudice of all pending actions, all parties agree not to seek sanctions, attorneys' fees, costs, or other losses incurred in all proceedings to date of execution of this Stipulated Settlement Agreement.

SECTION 7. ENFORCEMENT. Any party to this Stipulated Settlement Agreement and Notice of Voluntary Dismissal with Prejudice shall be able to

seek specific performance of its terms by suit in the Circuit Court of the Seventh Judicial Circuit of Florida. In any action for specific performance of this Stipulated Settlement Agreement and Notice of Voluntary Dismissal with Prejudice, the prevailing party shall be awarded its attorneys' fees and costs.

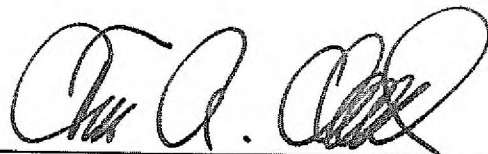
SECTION 8. BINDING UPON SUCCESSORS. This Stipulated Settlement Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, heirs, parent corporations, subsidiaries affiliates, representatives, and assigns.

SECTION 9. REPRESENTATION OF AUTHORITY TO BIND THE PARTIES. The signature by any person to this Stipulated Settlement Agreement and Notice of Voluntary Dismissal shall be deemed a personal warranty by that person that he or she has full power and authority to bind an incorporation, partnership, or other business or public entity for which he/she purports to act.

IN WITNESS WHEREOF, the PARTIES hereto have executed this Stipulated Settlement Agreement on the date first above written.



ALEXANDER B. CVERCKO, ESQ.
Florida Bar No. 186200
Cvercko & Valantasis, PLLC
4745 Sutton Park Court, Suite 502
Jacksonville, FL 32224
Phone: (904) 821-8700
Facsimile: (888) 477-3412
alex@cverckolaw.com
Attorneys for Petitioner
TCHOA



THOMAS A. CLOUD, ESQUIRE
Florida Bar No: 293326
GRAYROBINSON, P.A.
301 East Pine Street, Suite 1400
Orlando, Florida 32801
Phone: 407-843-8880
Facsimile: 407-244-5690
thomas.cloud@gray-robinson.com
Attorneys for Respondent
TYMBER CREEK UTILITIES, INC.

EXHIBIT "A"

For Item 16, we prioritized all necessary repairs based on the video inspection and recommendations by previous engineering studies. We suggest that TCU should accomplish these repairs in a 10-year period.

Year 1

The Engineer Evaluation Report found that integrity of the pipe between manhole (MH) 16, behind 5 Creeksbridge Court and the Main Lift Station (LS) should be evaluated, as this is a critical link to the collection system. During the video inspection, multiple cracks and separated joints along the pipe were found including one which runs around circumference of pipe a few feet in front of joint. Therefore, the repair of the 8-inch vitrified clay pipe (VCP) between MH 16 to main LS is recommended in Year 1. The proposed repairs include:

- Grout the complete distance of 400 LF
- 4-ft short liner at 122.5 ft from MH 16
- 5-ft short liner at 237.2ft from MH 16
- 4-ft short liner at 244 ft from MH 16
- 4-ft short liner at 380.1 ft from MH 16
- 2-ft short liner at 391.9 ft from MH 16

Year 2

Based on the video inspection, the 8-inch VCP between MH 16 and MH 24 is in very poor condition. There are multiple cracks along the pipe and root balls in the pipe. Therefore cured in place pipe (CIPP) lining is recommended in Year 2.

1. MH 16 to MH 24 – 8-inch VCP
 - Complete distance (288 LF) liner
 - Three (3) lateral reinstatements
 - 10-ft of dry bag for inversion

Year 3

Previous engineering studies and the video inspection found that root intrusion and pipe deterioration exist in (1) sewer lines behind Hollow Branch Crossing (MH 2 to MH 1 and MH 1 to LS) and (2) along Snaresbrook Ct. (MH 22 to cleanout (CO) 23) . Therefore, these repairs are recommended for the third year.

1. MH 2 to MH 1 - 8-inch VCP (behind Hollow Branch Crossing)
 - Grout joints at 15.8ft, 46.2ft, and 354.9 ft from MH 2
2. MH 1 to LS - 8-inch VCP (behind Hollow Branch Crossing)
 - Grout joints at 38.3ft, 159.2ft, 266ft, and 277.2 ft from MH 1
3. MH 22 to CO 23 ~ 6-inch VCP (along Snaresbrook Ct.)
 - Grout and root cut the complete distance of 175 LF

- 3-ft short liner at 160.8 ft from MH 22
 - One lateral reinstatement
4. MH 22 to MH 21 - 8-inch VCP (along Shallow Creek Ford)
 - Grout the complete distance of 220 LF
 - 3-ft short liner at 27.6 ft from MH 22

Year 4

Root intrusions and multiple cracks were observed in pipes between MH 28 to MH 29 and MH 29 to CO 30 along Becontree Ct. It was also a concerned area in the hydraulic analysis conducted in 2009 engineering report. Therefore, these pipes are recommended to be repaired in Year 3 as follows:

1. MH 29 to CO 30 - 6-inch VCP (along Becontree Ct.)
 - Grout and root cut the complete distance of 125 LF
 - 3-ft short liner at 47.4 ft from MH 29
2. MH 29 to MH 28 - 8-inch VCP (along Sandy Spring Rd.)
 - Grout and root cut the complete distance of 185 LF
 - 3-ft short liner at 62.8 ft from MH 29
 - 3-ft short liner at 96.2 ft from MH 29

Year 5

1. General Cleaning

Visual inspection and cleaning of the collection system should be performed on a routine basis, not just in response to complaints or blockages. In an effort to ensure that all of the lines are routinely cleaned within a reasonable period of time, we suggest TCU should clean the entire system every five years.

Year 6

Along Shallow Creek Ford, 430 LF of 8-inch VCP between MH 21 to MH 19 is recommended to have grout repair in Year 6.

1. MH 21 to MH 20 - 8-inch VCP (along Shallow Creek Ford)
 - Grout the complete distance of 270 LF
 - 3-ft short liner at 152.9 ft from MH 21
2. MH 20 to MH 19 - 8-inch VCP (along Shallow Creek Ford)
 - Grout the complete distance of 160 LF

Year 7

In Year 7, the 6-inch VCP between MH 22 to CO 35 along Wicksfield Ct. will be lined at five spots where cracks were observed.

1. MH 22 to CO 35 – 6-inch VCP (along Wicksfield Ct.)
 - 3-ft short liner at 9.4 ft from MH 22
 - 3-ft short liner at 21.6 ft from MH 22
 - 2-ft short liner at 44 ft from MH 22
 - 4-ft short liner at 149.1 ft from MH 22
 - 3-ft short liner at 153.6 ft from MH 22

Year 8

In Year 8, 239 LF of 8-inch VCP along Shallow Creek Ford between MH 19 and MH 18 and 140 LF of 8-inch VCP between MH 18 and drop MH 17 along Sandy Spring Rd. will be grout repaired.

1. MH 19 to MH 18 - 8-inch VCP (along Shallow Creek Ford)
 - Grout the complete distance of 239 LF
2. MH 18 to MH 17 - 8-inch VCP (along Sandy Spring Rd.)
 - Grout the complete distance of 140 LF

Year 9

In Year 9, 212 LF 8-inch VCP between MH 17 and MH 36 and a short distance of 65 LF 8-inch VCP between MH 36 and MH 16 along Creeksbridge Ct. will be grouted.

1. MH 17 to MH 36 - 8-inch VCP (along Creeksbridge Ct.)
 - Grout and root cut the complete distance of 212 LF
2. MH 36 to MH 16 - 8-inch VCP (along Creeksbridge Ct.)
 - Grout and root cut the complete distance of 65 LF

Year 10

1. General Cleaning

As stated above, every 5 years, general cleaning of the collection system is recommended.

Table 2-2 summarizes the costs for annual maintenance and repairs. **Figure 2-1** depicts locations of these repairs by years. During 10 years, routine operation and maintenance (O&M) of the collections system are also recommended. A successful O&M program for a wastewater collection system provides many benefits including:

- Elimination of backups/overflows and associated public health hazards
- Utilization of the full hydraulic capacity of the system
- Extended service life and protection of capital investment in the collection system
- Reduced operating and capital costs
- Minimized damage to public/private property associated claims and liability.

Table 2-2 10-year Wastewater Collection System Additional Operational Costs @ November 2010 (without Overheads)

Year 1					
Item	Descriptions	Quantity	Unit	Unit Price	Total Cost ⁽¹⁾⁽²⁾
1	Install Manhole Insert	1	EA	\$ 250.00	\$ 250.00
2	Point Repair	1	LS	\$ 18,275.00	\$ 18,275.00
Total (Rounded)					\$ 18,530.00
Year 2					
Item	Descriptions	Quantity	Unit	Unit Price	Total Cost ⁽¹⁾⁽²⁾
1	Install CIPP	1	LS	\$ 18,290.00	\$ 18,290.00
Total (Rounded)					\$ 18,290.00
Year 3					
Item	Descriptions	Quantity	Unit	Unit Price	Total Cost ⁽¹⁾⁽²⁾
1	Point Repair	1	LS	\$ 12,865.00	\$ 12,865.00
Total (Rounded)					\$ 12,870.00
Year 4					
Item	Descriptions	Quantity	Unit	Unit Price	Total Cost ⁽¹⁾⁽²⁾
1	Point Repair	1	LS	\$ 12,835.00	\$ 12,835.00
Total (Rounded)					\$ 12,840.00
Year 5					
Item	Descriptions	Quantity	Unit	Unit Price	Total Cost ⁽²⁾
1	Cleaning and TV Inspection	1	LS	\$ 12,536.43	\$ 12,536.43
Total (Rounded)					\$ 12,540.00
Year 6					
Item	Descriptions	Quantity	Unit	Unit Price	Total Cost ⁽¹⁾⁽²⁾
1	Point Repair	1	LS	\$ 10,150.00	\$ 10,150.00
Total (Rounded)					\$ 10,150.00
Year 7					
Item	Descriptions	Quantity	Unit	Unit Price	Total Cost ⁽¹⁾⁽²⁾
1	Point Repair	1	LS	\$ 10,875.00	\$ 10,875.00
Total (Rounded)					\$ 10,875.00
Year 8					
Item	Descriptions	Quantity	Unit	Unit Price	Total Cost ⁽¹⁾⁽²⁾
1	Point Repair	1	LS	\$ 7,563.10	\$ 7,563.10
Total (Rounded)					\$ 7,560.00

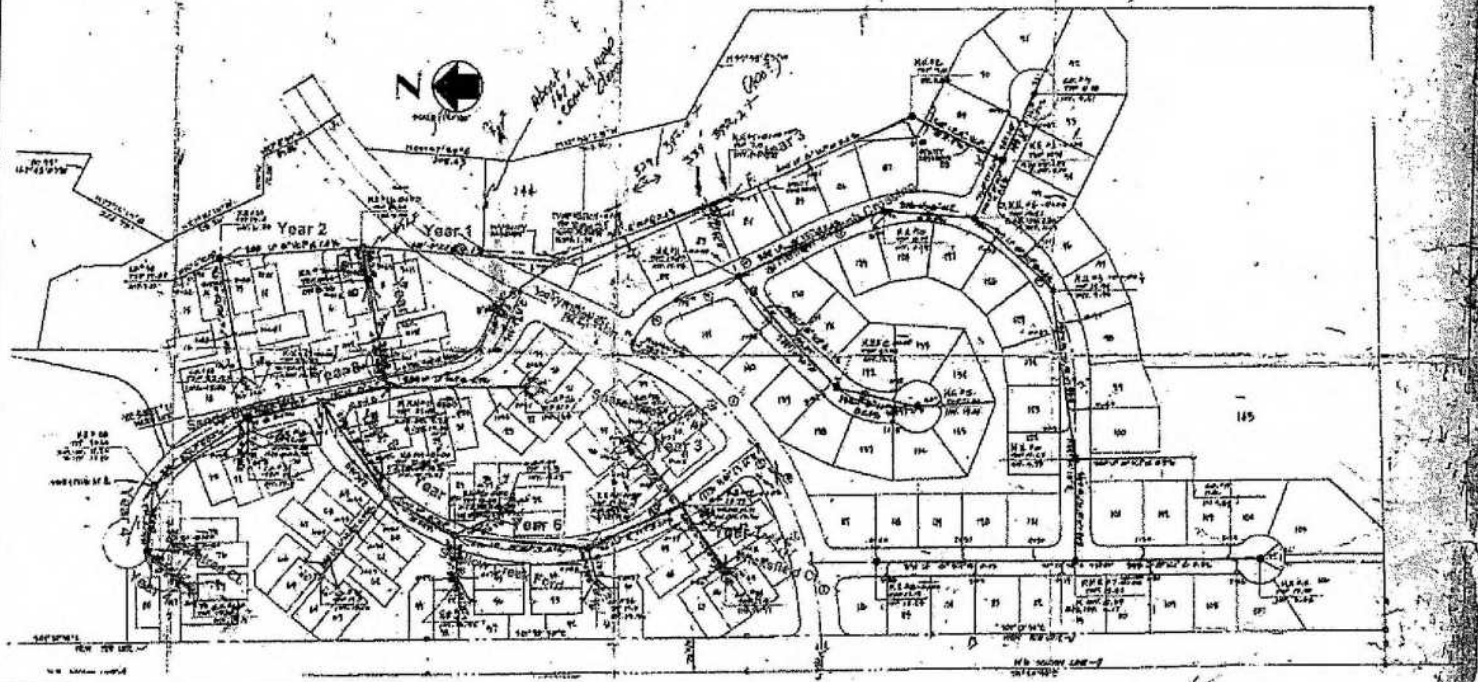
**Table 2-2 10-year Wastewater Collection System Additional Operational Costs @
November 2010 (without Overheads)**

Year 9					
Item	Descriptions	Quantity	Unit	Unit Price	Total Cost ⁽¹⁾⁽²⁾
1	Point Repair	1	LS	\$ 6,309.00	\$ 6,309.00
Total (Rounded)					\$ 6,310.00
Year 10					
Item	Descriptions	Quantity	Unit	Unit Price	Total Cost ⁽²⁾
1	Cleaning and TV Inspection	1	LS	\$ 12,536.43	\$ 12,536.43
Total (Rounded)					\$ 12,540.00

(1): Assuming one way mobilization will be absorbed in the 10 hour day rate, therefore, one high pressure sewer cleaner is \$1,600.00 per day.

(2): TCU does not own the service laterals on the private property of each resident/customer. The point of connection is the property line. The property owner has the responsibility to maintain their service laterals--use of RootX foam or Roto-Rooter or other activities may be required.

- Year 1: MH16 to LS.
- Year 2: MH16 to MH24
- Year 3: MH22 to CO23, MH22 to MH21, MH2 to MH1, and MH1 to LS
- Year 4: MH29 to CO30 and MH29 to MH28
- Year 5: General Cleaning
- Year 6: MH21 to MH20 and MH20 to MH19
- Year 7: MH22 to CO35
- Year 8: MH19 to MH18 and MH18 to MH17
- Year 9: MH17 to MH36 and MH36 to MH16
- Year 10: General Cleaning



Date: 01/20/2010 10:58:00 AM



LOCATIONS OF ANNUAL REPAIRS IN 10-YEAR PERIOD
TYMBER CREEK UTILITIES, INC.

FIGURE

2-1



LAURA E. ROTH
CLERK OF THE CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT - VOLUSIA COUNTY
P.O. BOX 6043 DELAND, FLORIDA 32721-6043 - WWW.CLERK.ORG

Filing #: [REDACTED]

Filer: Alexander Cvercko

Payment: \$420.00

1 Filing Fee: \$400.00

2 Summons Issuance: \$20.00

3 Complaints/Petitions Complaint: \$0.00

4 Complaints/Petitions Request that Summons be Issued: \$0.00

5 Complaints/Petitions Request that Summons be Issued: \$0.00

6 Complaints/Petitions Civil Cover Sheet: \$0.00

This document is a Clerk generated receipt. This page was not included in the original court document submitted by the filer.