



THE CITY OF SAN DIEGO

DATE: September 27, 2021

TO: Mara Elliott, City Attorney

FROM: Andy Hanau, City Auditor, Office of the City Auditor

SUBJECT: City Auditor's Response to the City Attorney's Allegations Related to the Hotline Report on Improper Free Trash Collection at Short-Term Residential Occupancy Units

On September 10, 2021, the City Attorney issued a memorandum (attached) regarding the above-referenced Fraud Hotline report.¹ The memorandum correctly states that the Fraud Hotline report was written by Senior Fraud Investigator Andy Horita, and reviewed, approved, and issued by Interim City Auditor Kyle Elser. However, the assertions and opinions in the City Attorney's memorandum are incorrect.

The City Attorney Was Aware of the Limitations of the City Consultant's STRO Data 20 Months Ago

The City Attorney claims to have been "recently informed of deposition testimony" from City Auditor personnel that led her to conclude that the Fraud Hotline report was "based on unverified and inaccurate information." Specifically, the City Attorney is referring to the statement in our report that up to 16,000 Short-Term Residential Occupancy (STRO) units receive free trash collection service from the City. As a result, the City Attorney claims that a lawsuit was filed against the City for providing free trash collection to STRO properties illegally, and that if the plaintiff had been informed that the figure of 16,000 STRO units was a preliminary and unverified estimate, the City Attorney's Office could have avoided the cost of defending the lawsuit.

However, the City Attorney was present for, and actively participated in, a lengthy public discussion regarding the Fraud Hotline report, including the issue of the number of STRO units, at a City Council meeting twenty months ago on January 28, 2020.

¹ Hotline Report of Improper Free Trash Collection at Short-Term Residential Occupancy Units: https://www.sandiego.gov/sites/default/files/20-001_hotline_report_of_improper_free_trash_collection_at_short-term_residential_occupancy_units.pdf

As the [video record of the January 28, 2020 City Council meeting](#)² shows, five City Councilmembers specifically discussed the number of STRO units that the Fraud Hotline report accurately cited and attributed to a City-retained consultant. In response to those questions, Mr. Horita repeatedly stated that the consultant's data "had not been validated," adding at one point, "we don't know the exact number of addresses." Also, the City's Chief Financial Officer (CFO) described the consultant's data as merely "leads on potential properties." Thus, it was made clear to the public, the City Council, and the City Attorney that the consultant's data had not been validated by anyone at the City around the time when our Fraud Hotline report was issued. Our report does not claim to have validated the actual number of STRO units.

Government Auditing Standards Do Not Apply to Fraud Hotline Investigations and Reports

In addition, the City Attorney incorrectly claims that the City Auditor is not in compliance with Generally Accepted Government Auditing Standards (GAGAS) because he has not withdrawn the Fraud Hotline report and communicated to key stakeholders that the report was, in her view, "based on insufficient evidence"—namely, the number of estimated STROs in the City. Specifically, the City Attorney cites GAGAS Section 9.68, which requires auditors to amend *audit reports* if they find after issuance that their findings and conclusions were not based on sufficient and appropriate evidence.

However, GAGAS that are applicable to performance audits do not apply to Fraud Hotline investigations and reports. The distinction between audits and Fraud Hotline activities should be clear to the City Attorney's Office since they have reviewed each version of our Fraud Hotline Procedures Manuals since 2009.³

The Fraud Hotline Report Was Accurate

Although Fraud Hotline reports are not subject to GAGAS, OCA's policy is still to amend Hotline reports if we discover any critical errors after issuance. However, in this case, the Fraud Hotline report accurately reported that a City-retained consultant estimated that there were approximately 16,000 STROs operating throughout the City as of March

² The Office of the City Auditor's presentation begins at 3:07:00, and Councilmember discussion begins at 3:15:00.

³ The City Charter requires the City Auditor to follow GAGAS. GAGAS allows auditors to perform 'non-audit services,' such as operating the Fraud Hotline and issuing Fraud Hotline reports, that are not subject to other GAGAS standards for audits.

2018. The exact number, 16,363 was listed on page 3 of the Host Compliance contract with the City. The consultant's estimate was used as the basis for determining their fee for the data and other advisory services they provided to the City. Ultimately, the consultant was paid over \$200,000 for this information. The technical distinction between a listing⁴ at a point in time and a qualifying rental unit based on various specific criteria is ultimately not important in the larger context of the Hotline report. If even one STRO is receiving free trash service, it is a "very likely" violation of the People's Ordinance as the City Attorney's memoranda from June 9, 2017 concluded.⁵ We presented the consultant's estimate of up to 16,000 simply to provide a point of reference as to what the scale of the problem may be.

The City Attorney Misrepresented the Facts in Evidence

Lastly, the City Attorney also claimed—contrary to the official transcript and facts on the record—that "Mr. Horita testified under oath that the Hotline Report lacked sufficient, appropriate evidence to support its findings or conclusions." In fact, as detailed below, the transcript clearly shows that Mr. Horita testified under oath that he stands by the conclusions in the Fraud Hotline report. For the record, that remains true to this day.

The City Attorney misrepresented the sworn statement by Senior Fraud Investigator Andy Horita. His words can easily be verified based on the official transcript provided. Based on the evidence, the City Attorney's statement "Mr. Horita testified under oath that the Hotline Report lacked sufficient, appropriate evidence to support its findings or conclusions..." is demonstrably false. To the contrary, when Mr. Briggs asked if he still stands by the conclusions in the Fraud Hotline report, Mr. Horita stated,

Yes, I think the ideas in that conclusion are based on the evidence. That is what I reviewed. So, I think it's still a valid conclusion based on our review. Not making a legal conclusion, but it seems like that lays out what the facts and results of our investigation were.

We would be happy to discuss these issues further at your convenience.

⁴ The approximate number of listings was later confirmed as reasonable by the Independent Budget Analyst's (IBA) February 19, 2021 report, which estimated that there were approximately 19,000 STRO rental listings on average over the course of the following 2019 calendar year.

⁵ <https://docs.sandiego.gov/memooflaw/MS-2018-14.pdf>

Respectfully submitted,



Andy Hanau
City Auditor

cc: Honorable Members of the Audit Committee
Jay Goldstone, Chief Operating Officer
Paola Avila, Chief of Staff, Mayor's Office

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: September 10, 2021

TO: Andy Hanau, City Auditor, Office of the City Auditor

FROM: Mara W. Elliott, City Attorney

SUBJECT: Hotline Report on Improper Free Trash Collection at Short-Term Residential Occupancy Units

On July 10, 2019, the City Auditor issued the above-referenced Hotline Report performed by Senior Fraud Investigator Andy Horita after receiving a complaint that the City improperly provides free “nonresidential” trash collection services at properties that are occupied for less than a month at a time. In the Staff Report dated September 24, 2019 accompanying the Hotline Report, the Auditor wrote: “The Office of the City Auditor investigated a Fraud Hotline report regarding the City’s Environmental Services Department (ESD) improperly providing free “nonresidential” trash collection services at short-term residential occupancy (STRO) properties that are occupied for less than a month at a time. Public and confidential reports were issued to City management on July 10, 2019. According to the San Diego Municipal Code (SDMC), the City Attorney’s Office, and ESD’s Regulation, STRO rental properties do not qualify for free trash collection service. Our investigation determined that up to 16,000 STRO units receive free trash collection service from the City.”

On October 15, 2019, attorney Cory Briggs sent a letter to then-Mayor Kevin Faulconer, with a copy to the City Council and then-Interim Auditor Kyle Elser, demanding that the City “immediately cease and desist from collecting trash for free from properties being used as short-term vacation rentals.” In support of his demand, Mr. Briggs wrote that the City Auditor’s Hotline Report “points out that up to 16,000 such units are receiving free trash-collection service even though they do not qualify for it.”

On January 13, 2020, Mr. Briggs filed a lawsuit against the City of San Diego (Complaint). In support of his Complaint, he states “[o]n or about July 10, 2019, CITY’s auditor issued a written report concerning the findings of one of its investigations in an allegation about “the City’s Environmental Services Department (ESD) improperly providing free ‘nonresidential’ trash collection services at short-term residential occupancy (STRO) properties that are occupied for less than a month at a time.” According to the report: “Our investigation determined that up to 16,000 STRO unites receive free trash collection service from the City.” Complaint, page 3, ¶ 6.

I was recently informed of deposition testimony elicited under oath by Mr. Briggs from Kyle Elser and Andy Horita last April, which calls into question the validity of the Hotline Report. Although both transcripts are attached, I will highlight the areas of concern.

Mr. Horita's deposition occurred on April 27, 2021. Mr. Briggs directed Mr. Horita to his Hotline Report and asked him a series of questions as follows:

Briggs: "And on the first page, at the end of the first paragraph, it states, (as read): Our investigation determined that up to 16,000 STRO units received free trash collection service from the City."

Mr. Briggs then asked Mr. Horita to explain how he determined there were 16,000 STROs receiving free trash collection. Specifically, Briggs asks: "Okay. So your report states on the first page that there -- that you determined that there were up to 16,000 STRO units receiving free trash collection service from the City, correct?"

Horita responds: "That's what I wrote. I wished I had stated that differently or more clearly, perhaps, given what I now know about that number and the source of that estimate, being 16,000 listings without address information and possibly duplicates. And many of that would not qualify, because they were, for instance, like, apartment buildings that would not be eligible for free trash collection because they don't qualify as residential refuse. So that number is the number that the consultant provided in their contract document as a number of listings. So I wish I had been more clear about distinguishing between a number of listings as opposed to units."

Briggs: "You said, did I understand you correctly, that Host Compliance gave you that 16,000 number?"

Horita: "It is in their contract."

Briggs: "Did I hear you correctly, Mr. Horita, you don't know where that figure [16,000] comes from?"

Horita: "That's correct. I've since learned that it was an estimate based on listings as opposed to actual, hard verified numbers of residential occupancy units that were operating according to the criteria that the City was concerned with."

Briggs: "Well, here in the contract, it says, quote (as read): Based on the estimated 16,363 short-term rental listings in the City as of March 2018. Do you see that?"

Horita: "I do."

Briggs: "So is it true that the entire basis for your assertion in Exhibit 3, receiving free trash collection service from the City, is based on that language I just read from the contract with Host Compliance?"

Horita: "Yes, that was the source of the 16,000 number."

Briggs: "Did you do any investigation whatsoever into the number of STRO units that were receiving free trash collection when you were doing your investigation?"

Horita: "Other than reviewing the estimate provided by the consultant, no, because that wasn't the focus of our investigation."

Briggs: "Do you have an estimate today of how many STRO units are receiving free trash collection from the City?"

Horita: "I don't know, because the -- I believe that there was new legislation that was passed earlier this month regarding the definitions of short-term rentals and how and where they operate, so I'm not even clear what the definition is currently."

Accordingly, Mr. Horita confirms that the Hotline Report is based on information that the Auditor did not validate and cannot explain. The City Auditor should have had access to all the information and reports used by City Management and their consultant. A review of that information would have shown that the number of STROs cited in the Hotline Report was inaccurate.

Mr. Elser's deposition was also taken on April 27, 2021. The dialogue of importance is as follows:

Briggs: "Can you tell me the extent of your involvement in preparing that report [the Hotline Report]?"

Elser: "My fraud examiner -- fraud investigator prepared this report and I reviewed it. And then I issued it."

Briggs: "Was your investigator Andy Horita?"

Elser: "Yes."

Briggs: "Did you do any of the investigation on the report?"

Elser: "No, I just reviewed his report."

Briggs: "Did you make any contributions to the report in its final form, other than putting your name on it?"

Elser: "I don't recall. I may have, but I don't recall making any -- yeah. I don't recall what edits I may have made to it."

Briggs: "Is it a fair statement -- and I don't mean this to disparage your role as Interim City Auditor at the time, but is it a fair statement that this report is really the work product of Mr. Horita and not of you?"

Elser: "Well, I'm responsible for the report, and I -- but, yes, he prepared -- he gathered the evidence. He prepared the report. I reviewed it, made sure I was good with it, and I issued it."

Section 9.68 of the Government Auditing Standards (GAS) issued by the United States Government Accountability Office, which the City Auditor is required by the San Diego Charter to follow, addresses the course of action that should be taken after an auditor discovers that a report it has released is based on insufficient evidence. It states:

If, after the report is issued, the auditors discover that they did not have sufficient, appropriate evidence to support the reported findings or conclusions, they should communicate in the same manner as that used to originally distribute the report to those charged with governance, the appropriate officials of the audited entity, the appropriate officials of the entities requiring or arranging for the audits, and other known users, so that they do not continue to rely on the findings or conclusions that were not supported. If the report was previously posted to the auditors' publicly accessible website, the auditors should remove the report and post a public notification that the report was removed. The auditors should then determine whether to perform the additional audit work necessary to either reissue the report, including any revised findings or conclusions, or repost the original report if the additional audit work does not result in a change in findings or conclusions.

In the nearly five months since these depositions, the Auditor has not complied with GAS by communicating to the Audit Committee, City Council, Chief Operating Officer, or the public that the Hotline Report was based on unverified and inaccurate information, and by removing the report from the Auditor's website and posting a public notification that it was removed. Adherence to these practices is required by Charter and when followed reduce the risk of litigation based on flawed Auditor findings. The lawsuit in this case was subsequently dismissed, but not until one of the top litigators in my Office had spent upward of 100 hours on it.

We recommend that you promptly inform the Audit Committee of this situation, since it is responsible for directing and reviewing the work of the City Auditor under San Diego Municipal Code section 26.1701, and your plan to address it, which may include additional training of Auditor staff and improved policies concerning quality control.

Andy Hanau, City Auditor

September 10, 2021

Page 5

In addition, as Mr. Horita testified under oath that the Hotline Report lacked sufficient, appropriate evidence to support its findings or conclusions, the Auditor should consider communicating that fact to those who received the Hotline Report and other known users, which includes the public, so that they do not continue to rely on the findings or conclusions that were not supported. As the Hotline Report is still posted on your website and is publicly accessible, it should be removed with notice to the public of such action.

Please let us know if you need assistance.

MARA W. ELLIOTT, CITY ATTORNEY

By  _____

MWE:sne

Doc. No.: 2757865

Attachment: Deposition of Kyle Elser

Deposition of Andy Horita

cc: Jay Goldstone, Chief Operating Officer

Paola Avila, Chief of Staff, Office of the Mayor

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO - HALL OF JUSTICE

SAN DIEGANS FOR OPEN GOVERNMENT,)
)
Plaintiff,) CASE No.
) 37-2019-00062913-CU-MC-CTL
VS.)
)
CITY OF SAN DIEGO; and DOES 1)
through 1,000,)
)
Defendants.)
)
)
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DEPOSITION OF KYLE ELSER

VOLUME I

Chula Vista, California

Tuesday, April 27, 2021

Reported by: Sonia Blake, CSR
CSR No. 9854

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO - HALL OF JUSTICE

SAN DIEGANS FOR OPEN GOVERNMENT,)
)
Plaintiff,) CASE No.
) 37-2019-00062913-CU-MC-CTL
VS.)
)
CITY OF SAN DIEGO; and DOES 1)
through 1,000,)
)
Defendants.)
_____)

DEPOSITION OF KYLE ELSER, VOLUME I, taken on behalf
of the Plaintiff, Remote via Zoom, CHULA VISTA,
California, beginning at 1:30 p.m., and ending at
1:35 p.m., on Tuesday, April 27, 2021, before Sonia
Blake, Certified Shorthand Reporter, No. 9854.

1 APPEARANCES:

2

3 For The Plaintiff:

4 BRIGGS LAW CORPORATION
5 By CORY JAY BRIGGS, ESQ.
6 99 C Street, Suite 111
7 Upland, California 91786
(909) 949-7115
Remote via Zoom videoconference

7

8 For The Defendant:

8

9 SAN DIEGO CITY ATTORNEY'S OFFICE
10 By JENNY KRISTINE GOODMAN, ESQ
11 1200 3rd Avenue, Suite 1100
12 San Diego, California 92101
(619) 533-5919
jgoodman@sandiego.gov
Remote via Zoom videoconference

12

13 Also Present: Nora Pasin, ESQ., Briggs Law Corporation
14 Grace Lowenberg, Deputy City Attorney

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1		INDEX	
2	WITNESS		
3	KYLE ELSER		
4			PAGE
5	Examination by CORY JAY BRIGGS		7
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			

1		EXHIBITS	
2	MARKED	DESCRIPTION	PAGE
3	1	26 pages, Complaint for Declaratory Injunctive 4 Relief to Remedy Taxpayer Waste	8
5	2	Five pages, First 6 Amended Notice of Deposition of Kyle Elser	8
7	3	17 pages, Memo dated 8 July 10, 2019 to Kris Michell from Kyle Elser	8
9	4	Report No. 126298451, 10 titled City of San Diego Fraud, Waste & Abuse 11 Hotline	8
12	5	Voluntary Collection 13 Agreement	8
14			
15			
16			
17			
18			
19			
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21			
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CHULA VISTA, CALIFORNIA;

Tuesday, April 27, 2021, 1:30 p.m.

(Remote read-on.)

THE REPORTER: The attorneys participating in this deposition acknowledge that I am not physically present in the deposition room and that I will be reporting this deposition remotely. They further acknowledge that, in lieu of an oath administered in person, the witness will verbally declare his testimony in this matter is under penalty of perjury. The parties and their counsel consent to this arrangement and waive any objections to this manner of reporting.

Please indicate your agreement by stating your name and your agreement on the record, beginning with the noticing attorney.

MR. BRIGGS: Cory Briggs so stipulates.

MS. GOODMAN: Deputy City Attorney Jenny Goodman on behalf of the City of San Diego, so stipulated.

KYLE ELSER,

having been first duly sworn by the reporter,
was examined and testified as follows:

1 EXAMINATION

2 BY MR. BRIGGS:

3 Q Mr. Elser, would you please state and spell your
4 name for the record?

5 A My name is Kyle Elser, K-Y-L-E, E-L-S-E-R.

6 Q Are you employed?

7 A Yes.

8 Q Where?

9 A The City of San Diego, Office of the City Auditor.

10 Q How long have you been in the Office of the City
11 Auditor?

12 A About 12 years.

13 Q Okay. Have you had your deposition taken before?

14 A Years ago, yes.

15 Q I'm going to give some guidelines. I'm afraid
16 they are going to take longer than the rest of the depo.
17 I'll tell you what, I'm going to forego that, and if
18 necessary, I'll do it.

19 Do you have Exhibit 3 for today's deposition in
20 front of you? That's a copy of the July 10, 2019 --

21 A I can grab it real quick.

22 Q Yeah.

23 MS. GOODMAN: I'm going email something to you,
24 Kyle. Where is it?

25 MR. BRIGGS: Okay. I see that you got the paper

1 copy of the report there in front of you.

2 This is Exhibit 3 to today's deposition.

3 (Plaintiff's Exhibit 3 was marked for
4 identification.)

5 BY MR. BRIGGS:

6 Q We're using the same five exhibits that we used
7 this morning. The only difference is that Exhibit 2,
8 which was the Notice for the deposition, has been swapped
9 out and is now the Deposition Notice for you, Mr. Elser.
10 But Exhibit 3 is the same, and that's a July 10, 2019,
11 report that purports to be from you to Kris Michell.

12 Are you familiar with that report?

13 A Yes, I am.

14 (Plaintiff's Exhibit 1 was marked for
15 identification.)

16 (Plaintiff's Exhibit 2 was marked for
17 identification.)

18 (Plaintiff's Exhibit 4 was marked for
19 identification.)

20 (Plaintiff's Exhibit 5 was marked for
21 identification.)

22 BY MR. BRIGGS:

23 Q Can you tell me the extent of your involvement in
24 preparing that report?

25 A My fraud examiner -- fraud investigator prepared

1 this report and I reviewed it. And then I issued it.

2 Q Was your investigator Andy Horita?

3 A Yes.

4 Q Did you do any of the investigation on the report?

5 A No, I just reviewed his report.

6 Q Did you make any contributions to the report in
7 its final form, other than putting your name on it?

8 A I don't recall. I may have, but I don't recall
9 making any -- yeah. I don't recall what edits I may have
10 made to it.

11 Q Is it a fair statement -- and I don't mean this to
12 disparage your role as Interim City Auditor at the time,
13 but is it a fair statement that this report is really the
14 work product of Mr. Horita and not of you?

15 A Well, I'm responsible for the report, and I --
16 but, yes, he prepared -- he gathered the evidence. He
17 prepared the report. I reviewed it, made sure I was good
18 with it, and I issued it.

19 Q Have you done any work on the recommendations in
20 the report since it was issued?

21 A I have not done any work on the recommendations,
22 no, not myself.

23 Q You're aware that Mr. Horita has, correct?

24 A Yes.

25 Q Okay. Do you know whether anyone else in your

1 office has worked on the recommendations since the report
2 was issued?

3 A I believe it was just Andy Horita, because he was
4 assigned the follow-up on those recommendations.

5 Q Okay. So my understanding is that, really, the
6 only person in your office who did any substantive
7 investigation, analysis, number crunching, recommendation,
8 crafting, that sort of thing, was Mr. Horita.

9 Is that a fair statement?

10 A Yes.

11 Q Is it a fair statement that whatever you know
12 about the issue covered by this report is parasitic on
13 whatever Mr. Horita had figured out?

14 A Yes.

15 MR. BRIGGS: Okay. I don't have any further
16 questions, then.

17 Jenny, I just -- we're just -- the real person who
18 knows is Mr. Horita, that's how it seems to me. Is that
19 fair?

20 MS. GOODMAN: Yep.

21 MR. BRIGGS: Yeah. Okay. Then let's -- let's let
22 Mr. Elser get back to doing more important things.

23 And we'll conclude this depo same resolution as
24 last one? We'll just incorporate it into this one?

25 MS. GOODMAN: Yes, that would be fine.

1 (Whereupon at 1:35 p.m. the deposition was concluded.)

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* * *

I hereby declare under penalty of perjury that the foregoing is my deposition under oath; that I have read my deposition and have made the necessary corrections, additions or changes to my answers that I deem necessary.

In witness thereof, I hereby subscribe my name this _____ day of _____, 2021.

KYLE ELSER

1 STATE OF CALIFORNIA)
 : Ss.
2 COUNTY OF SAN DIEGO)

3 I, Sonia Blake, Certified Shorthand Reporter in and
4 for the State of California, Certificate No. 9854, do
5 hereby certify:

6 That the witness in the foregoing deposition was by me
7 first duly sworn to testify the truth, the whole truth,
8 and nothing but the truth in the foregoing cause; that the
9 deposition was taken before me at the time and place
10 herein named; that said deposition was reported by me in
11 shorthand and transcribed, through computer-aided
12 transcription, under my direction; and that the foregoing
13 transcript is a true record of the testimony elicited at
14 proceedings had at said deposition.

15 I do further certify that I am a disinterested person
16 and am in no way interested in the outcome of this action
17 or connected with or related to any of the parties in this
18 action or to their respective counsel.

19 In witness whereof, I have hereunto set my hand this
20 28th day of May, 2021.

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Sonia Blake, CSR No. 9854

<p><u>WORD INDEX</u></p> <p>< 1 > 1 1:7 2:7 5:3 8:14 1,000 1:7 2:7 1:30 2:16 6:2 1:35 2:16 11:1 10 5:8 7:20 8:10 1100 3:9 111 3:5 12 7:12 1200 3:9 126298451 5:8 17 5:6</p> <p>< 2 > 2 5:4 8:7, 16 2019 5:8 7:20 8:10 2021 1:14 2:16 6:2 12:7 13:20 26 5:3 27 1:14 2:16 6:2 28th 13:20</p> <p>< 3 > 3 5:6 7:19 8:2, 3, 10 37-2019-00062913 -CU-MC-CTL 1:5 2:5 3rd 3:9</p> <p>< 4 > 4 5:8 8:18</p> <p>< 5 > 5 5:12 8:20 533-5919 3:10</p> <p>< 6 > 619 3:10</p> <p>< 7 > 7 4:5</p> <p>< 8 > 8 5:3, 4, 6, 8, 12</p> <p>< 9 > 909 3:6</p>	<p>91786 3:5 92101 3:10 949-7115 3:6 9854 1:20 2:17 13:4, 23 99 3:5</p> <p>< A > About 7:12 10:12 Abuse 5:10 acknowledge 6:6, 8 action 13:16, 18 additions 12:5 administered 6:9 afraid 7:15 ago 7:14 Agreement 5:12 6:14, 15 Also 3:11 Amended 5:6 analysis 10:7 Andy 9:2 10:3 answers 12:5 APPEARANCES 3:1 April 1:14 2:16 6:2 arrangement 6:12 assigned 10:4 Attorney 3:13 6:16, 19 attorneys 6:5 ATTORNEY'S 3:6 Auditor 7:9, 11 9:12 Avenue 3:9 aware 9:23</p> <p>< B > back 10:22 beginning 2:16 6:15 behalf 2:15 6:20 believe 10:3 Blake 1:20 2:17 13:3, 23 BRIGGS 3:4, 4, 11 4:5 6:18, 18 7:2, 25 8:5, 22 10:15, 21</p>	<p>< C > CALIFORNIA 1:1, 13 2:1, 16 3:5, 10 6:1 13:1, 4 CASE 1:5 2:5 cause 13:8 Certificate 13:4 Certified 2:17 13:3 certify 13:5, 15 changes 12:5 Chula 1:13 2:15 6:1 CITY 1:7 2:7 3:6, 13 5:10 6:19, 20 7:9, 9, 10 9:12 Collection 5:12 Complaint 5:3 computer-aided 13:11 conclude 10:23 concluded 11:1 connected 13:17 consent 6:11 contributions 9:6 copy 7:20 8:1 CORPORATION 3:4, 11 correct 9:23 corrections 12:4 CORY 3:4 4:5 6:18 counsel 6:11 13:18 COUNTY 1:2 2:2 13:2 COURT 1:1 2:1 covered 10:12 crafting 10:8 crunching 10:7 CSR 1:20, 20 13:23</p> <p>< D > dated 5:6 day 12:7 13:20 Declaratory 5:3 declare 6:10 12:2 deem 12:5 Defendant 3:6</p>	<p>Defendants 1:8 2:8 depo 7:16 10:23 DEPOSITION 1:11 2:15 5:6 6:6, 7, 8 7:13, 19 8:2, 8, 9 11:1 12:3, 4 13:6, 9, 10, 14 Deputy 3:13 6:19 DESCRIPTION 5:2 DIEGANS 1:4 2:4 DIEGO 1:2, 7 2:2, 7 3:6, 10 5:10 6:20 7:9 13:2 difference 8:7 direction 13:12 disinterested 13:15 disparage 9:12 doing 10:22 duly 6:23 13:7</p> <p>< E > edits 9:9 elicited 13:13 ELSER 1:11 2:15 4:3 5:6, 8 6:22 7:3, 5 8:9 10:22 12:9 E-L-S-E-R 7:5 email 7:23 employed 7:6 ESQ 3:4, 9, 11 evidence 9:16 Examination 4:5 7:1 examined 6:24 examiner 8:25 Exhibit 7:19 8:2, 3, 7, 10, 14, 16, 18, 20 EXHIBITS 5:1 8:6 extent 8:23</p> <p>< F > fair 9:11, 13 10:9, 11, 19 familiar 8:12</p>	<p>figured 10:13 final 9:7 fine 10:25 First 5:4 6:23 13:7 Five 5:4 8:6 follows 6:24 follow-up 10:4 forego 7:17 foregoing 12:3 13:6, 8, 12 form 9:7 Fraud 5:10 8:25, 25 front 7:20 8:1 further 6:8 10:15 13:15</p> <p>< G > gathered 9:16 give 7:15 going 7:15, 16, 17, 23 good 9:17 GOODMAN 3:9 6:19, 19 7:23 10:20, 25 GOVERNMENT 1:4 2:4 grab 7:21 Grace 3:13 guidelines 7:15</p> <p>< H > HALL 1:2 2:2 hand 13:19 hereunto 13:19 Horita 9:2, 14, 23 10:3, 8, 13, 18 Hotline 5:11</p> <p>< I > identification 8:4, 15, 17, 19, 21 important 10:22 incorporate 10:24 INDEX 4:1 indicate 6:14 Injunctive 5:3 interested 13:16 Interim 9:12 investigation 9:4 10:7</p>
--	--	---	--	--

<p>investigator 8:25 9:2 involvement 8:23 issue 10:12 issued 9:1, 18, 20 10:2 its 9:7</p> <p>< J > JAY 3:4 4:5 JENNY 3:9 6:19 10:17 jgoodman@sandi ego.gov 3:11 July 5:8 7:20 8:10 JUSTICE 1:2 2:2</p> <p>< K > know 9:25 10:11 knows 10:18 Kris 5:8 8:11 KRISTINE 3:9 KYLE 1:11 2:15 4:3 5:6, 8 6:22 7:5, 24 12:9 K-Y-L-E 7:5</p> <p>< L > LAW 3:4, 11 lieu 6:9 long 7:10 longer 7:16 Lowenberg 3:13</p> <p>< M > making 9:9 manner 6:13 MARKED 5:2 8:3, 14, 16, 18, 20 matter 6:10 mean 9:11 Memo 5:6 Michell 5:8 8:11 morning 8:7</p> <p>< N > name 6:15 7:4, 5 9:7 12:6 named 13:10 necessary 7:18 12:4, 5</p>	<p>Nora 3:11 Notice 5:6 8:8, 9 noticing 6:16 number 10:7</p> <p>< O > oath 6:9 12:3 objections 6:12 OFFICE 3:6 7:9, 10 10:1, 6 Okay 7:13, 25 9:25 10:5, 15, 21 OPEN 1:4 2:4 outcome 13:16</p> <p>< P > p.m 2:16, 16 6:2 11:1 PAGE 4:4 5:2 pages 5:3, 4, 6 paper 7:25 parasitic 10:12 participating 6:5 parties 6:11 13:17 Pasin 3:11 penalty 6:11 12:2 perjury 6:11 12:2 person 6:9 10:6, 17 13:15 physically 6:6 place 13:9 Plaintiff 1:5 2:5, 15 3:3 Plaintiff's 8:3, 14, 16, 18, 20 Please 6:14 7:3 prepared 8:25 9:16, 17 preparing 8:24 Present 3:11 6:6 proceedings 13:14 product 9:14 purports 8:11 putting 9:7</p> <p>< Q > questions 10:16 quick 7:21</p> <p>< R ></p>	<p>read 12:3 read-on 6:4 real 7:21 10:17 really 9:13 10:5 recall 9:8, 8, 9 recommendation 10:7 recommendations 9:19, 21 10:1, 4 record 6:15 7:4 13:13 related 13:17 Relief 5:4 Remedy 5:4 Remote 2:15 3:6, 11 6:4 remotely 6:8 Report 5:8 8:1, 11, 12, 24 9:1, 4, 5, 6, 13, 15, 17, 20 10:1, 12 Reported 1:20 13:10 Reporter 2:17 6:5, 23 13:3 reporting 6:7, 13 resolution 10:23 respective 13:18 responsible 9:15 rest 7:16 reviewed 9:1, 5, 17 role 9:12 room 6:7</p> <p>< S > SAN 1:2, 4, 7 2:2, 4, 7 3:6, 10 5:10 6:20 7:9 13:2 see 7:25 set 13:19 Shorthand 2:17 13:3, 11 Sonia 1:20 2:16 13:3, 23 sort 10:8 spell 7:3 Ss 13:1 STATE 1:1 2:1 7:3 13:1, 4 statement 9:11, 13 10:9, 11 stating 6:14</p>	<p>stipulated 6:20 stipulates 6:18 Street 3:5 subscribe 12:6 substantive 10:6 Suite 3:5, 9 SUPERIOR 1:1 2:1 sure 9:17 swapped 8:8 sworn 6:23 13:7</p> <p>< T > take 7:16 taken 2:15 7:13 13:9 Taxpayer 5:4 tell 7:17 8:23 testified 6:24 testify 13:7 testimony 6:10 13:13 thereof 12:6 thing 10:8 things 10:22 time 9:12 13:9 titled 5:10 today's 7:19 8:2 transcribed 13:11 transcript 13:13 transcription 13:12 true 13:13 truth 13:7, 7, 8 Tuesday 1:14 2:16 6:2</p> <p>< U > understanding 10:5 Upland 3:5</p> <p>< V > verbally 6:10 videoconference 3:6, 11 Vista 1:13 2:15 6:1 VOLUME 1:12 2:15 Voluntary 5:12 VS 1:6 2:6</p>	<p>< W > waive 6:12 Waste 5:4, 10 way 13:16 Well 9:15 We're 8:6 10:17 whereof 13:19 WITNESS 4:2 6:9 12:6 13:6, 19 work 9:14, 19, 21 worked 10:1</p> <p>< Y > Yeah 7:22 9:9 10:21 years 7:12, 14 Yep 10:20</p> <p>< Z > Zoom 2:15 3:6, 11</p>
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO - HALL OF JUSTICE

SAN DIEGANS FOR OPEN GOVERNMENT,)
)
 Plaintiff,) CASE No.
) 37-2019-00062913-CU-MC-CTL
VS.)
)
 CITY OF SAN DIEGO; and DOES 1)
 through 1,000,)
)
 Defendants.)
)
 _____)

DEPOSITION OF ANDY HORITA
VOLUME I
Chula Vista, California
Tuesday, April 27, 2021

Reported by: Sonia Blake, CSR
CSR No. 9854

Andy Horita, 4/27/2021

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO - HALL OF JUSTICE

SAN DIEGANS FOR OPEN GOVERNMENT,)
)
Plaintiff,) CASE No.
) 37-2019-00062913-CU-MC-CTL
VS.)
)
CITY OF SAN DIEGO; and DOES 1)
through 1,000,)
)
Defendants.)
)
)
)

DEPOSITION OF ANDY HORITA, VOLUME I, taken on
behalf of the Plaintiff, Remote via Zoom, CHULA
VISTA, California, beginning at 9:11 a.m., and
ending at 10:40 a.m., on Tuesday, April 27, 2021,
before Sonia Blake, Certified Shorthand Reporter,
No. 9854.

1 **APPEARANCES :**

2

3 For The Plaintiff:

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Remote via Zoom videoconference

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For The Defendant:

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SAN DIEGO CITY ATTORNEY'S OFFICE

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San Diego, California 92101

(619) 533-5919

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jgoodman@sandiego.gov

Remote via Zoom videoconference

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Also Present: Nora Pasin, ESQ., Briggs Law Corporation

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Andy Horita, 4/27/2021

1		INDEX	
2	WITNESS		
3	ANDY HORITA		
4			PAGE
5	Examination by CORY JAY BRIGGS		8
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			

Andy Horita, 4/27/2021

		EXHIBITS	
	MARKED	DESCRIPTION	PAGE
1			
2			
3	1	26 pages, Complaint for	14
4		Declaratory Injunctive	
5		Relief to Remedy	
6		Taxpayer Waste	
7			
8	2	Five pages, First	14
9		Amended Notice of	
10		Deposition of Kyle Elser	
11			
12	3	17 pages, Memo dated	17
13		July 10, 2019 to Kris	
14		Michell from Kyle Elser	
15			
16	4	Report No. 126298451,	18
17		titled City of San Diego	
18		Fraud, Waste & Abuse	
19		Hotline	
20	5	Voluntary Collection	31
21		Agreement	
22			
23	6	Cooperative Procurement	32
24		Contract	
25	7	Email from Danielle	51
		Knighten to Kyle Elser	
		to Andy Horita	

Andy Horita, 4/27/2021

1
2
3
4
5
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INSTRUCTED NOT TO ANSWER

Page Line

47 4

Andy Horita, 4/27/2021

1
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CHULA VISTA, CALIFORNIA;
Tuesday, April 27, 2021, 9:11 a.m.

(Remote read-on.)

THE REPORTER: The attorneys participating in this deposition acknowledge that I am not physically present in the deposition room and that I will be reporting this deposition remotely. They further acknowledge that, in lieu of an oath administered in person, the witness will verbally declare his testimony in this matter is under penalty of perjury. The parties and their counsel consent to this arrangement and waive any objections to this manner of reporting.

Please indicate your agreement by stating your name and your agreement on the record, beginning with the noticing attorney.

MR. BRIGGS: Cory Briggs so stipulates.

MS. GOODMAN: Deputy City Attorney Jenny Goodman on behalf of the City of San Diego, so stipulated.

THE REPORTER: Okay. Did you guys hear her cutting out or was that just me?

MR. BRIGGS: We heard her cutting out.

THE REPORTER: Okay. So this might be tough if there is a lot of talking coming from you, Ms. Goodman,

1 because then I'll have to unmute -- okay.

2 MS. GOODMAN: Okay.

3 MR. BRIGGS: Jenny won't object to anything asked
4 today.

5 MS. GOODMAN: I'm sure Cory will ask perfectly
6 reasonable questions.

7

8

ANDY HORITA,

9

having been first duly sworn by the reporter,

10

was examined and testified as follows:

11

12

EXAMINATION

13

BY MR. BRIGGS:

14

Q Okay. Good morning, Mr. Horita.

15

Would you state and spell your name for the

16

record.

17

A Sure. Andy Horita, A-N-D-Y, last name,

18

H-O-R-I-T-A.

19

Q Sir, have you ever had your deposition taken

20

before?

21

A No.

22

Q Okay. You've probably had a chance to talk to

23

Ms. Goodman about today's depo, but let me give you a few

24

guidelines to make today go as smoothly and quickly as

25

possible.

1 You've taken an oath to tell the truth just as if
2 you were in front of a judge or a jury in court.

3 Do you understand that?

4 A Yes.

5 Q Your -- your answers and my questions will be
6 typed up in a booklet by the court reporter when we're
7 done. You will have an opportunity to review the
8 transcript that she prepares. You'll also be allowed to
9 make any corrections to it, and then you'll sign it under
10 penalty of perjury. If you make any changes to the
11 transcript, however, I or any other attorney in the case
12 could comment on that to a judge or a jury, and that could
13 affect your credibility. And for that reason, it's
14 important that you give a correct, truthful answer now
15 during the deposition as opposed to changing your answers
16 later on.

17 Do you understand that?

18 A Yes.

19 Q Okay. You're doing a great job so far, but one of
20 the things that some witnesses do is rather than giving
21 verbal responses like a "yes" or a "no," they will nod
22 their heads, shrug their shoulders, roll their eyes,
23 things like that -- grunts and groans. The court reporter
24 is not allowed to interpret body language. And if we fall
25 into that rut, I may say, Did you mean "yes," did you mean

1 "no." I'm not picking on you. I'm just trying to make
2 sure that we have a clean transcript for you to review
3 later on.

4 Do you understand that?

5 A Yes.

6 Q Another thing you're doing really well is allowing
7 me to finish my statements before you answer. I'm going
8 to do my best to extend the same courtesy to you, but if
9 either of us finds the other talking over one another,
10 it's perfectly fine to say, Hey, let me finish. We don't
11 mean that in any meanspirited way. Sometimes people get
12 into a rhythm and, you know, finish each other's sentence.
13 And that's fine if we were having a beer, but for purposes
14 of a deposition, it's important that we let each other
15 finish so the court reporter can do her job and we have a
16 clean transcript.

17 Do you understand that?

18 A I do.

19 Q Today I may ask you questions that require an
20 answer about date, time, quantity, and I'm entitled to
21 your best recollection. If you don't know precisely the
22 answer, I'm entitled to your best estimate, but I don't
23 want you ever to guess. So if you don't know something
24 and you'd have to guess, just say, "I don't know." But if
25 you have a rough idea, I'm entitled to the rough idea.

1 And if you have better than a rough idea, I'm entitled to
2 that answer.

3 The example I give to witnesses between an
4 estimate and a guess, if I were to ask you to estimate,
5 you know, how many little notes are in my wife's
6 spontaneity jar, you'd say, I have no idea, because I've
7 never seen it. Couldn't tell you. But if I asked you how
8 many ounces are in the tumbler that you just drank from,
9 well, you could probably estimate it because you have some
10 life experience. You can see it, you know what 12 ounces
11 or 24 ounces or a liter looks like.

12 Do you understand the difference?

13 A Yes.

14 Q Okay. Today's not meant to be any sort of trick
15 session. It's not meant to be an Olympic marathon. If at
16 some point you need to take a break to use the restroom,
17 get some fresh air, let your eyes rest from looking at
18 these screens, talk to Ms. Goodman, all of that's fine.
19 My only request of you is that you answer the question
20 that's on the table so that we have a clean transcript for
21 everyone to review.

22 Do you understand that?

23 A Yes.

24 Q Okay. And last question, I don't want to you tell
25 me anything personal -- I don't care about your medical

1 history or anything in your personal life -- but I do want
2 to know whether there is any reason, whether it's
3 emotional, physical, chemical, anything of the sort, that
4 would prevent from you giving your best testimony today.

5 A No, there's no reason why I wouldn't be able to
6 testify today.

7 Q Okay. Now, just before the deposition started,
8 I sent some exhibits to your counsel, who I understand
9 forwarded them to you.

10 Did you receive that email? There were five
11 exhibits.

12 A Yes, I did.

13 Q Okay. Can you -- can you tell me your title at
14 the City of San Diego?

15 A I'm the Senior Fraud Investigator in the Office of
16 the City Auditor.

17 Q And how long have you worked for the City?

18 A Since October of 2011.

19 Q Okay. And what does a Senior Fraud Investigator
20 do?

21 A I review the Fraud Hotline reports as they come in
22 through the system. And I help coordinate the
23 investigations that are conducted by departments, and help
24 decide the disposition of the cases, like, where they
25 should go and who should investigate them in collaboration

1 with the management in our office and the other fraud
2 investigator.

3 **Q How long have you been a senior fraud**
4 **investigator?**

5 A It's a new title. Roughly six months. But I've
6 been the fraud investigator -- I was by myself, since
7 April of 2014 --

8 **Q Okay.**

9 A -- in the office.

10 **Q Now, you have some assistance.**

11 **Is that why you have a new title?**

12 A Right. In September of 2019, we hired the second
13 fraud investigator, so that's, I think, why I became the
14 "senior".

15 **Q Okay. I understand.**

16 **Are you aware that my client has filed a lawsuit**
17 **against the City over its collection of trash from**
18 **short-term vacation rentals for free, generally speaking?**
19 **Were you aware of that?**

20 A Yes.

21 **MR. BRIGGS: Okay. I'd like you to take a look at**
22 **Exhibit 1.**

23 **(Plaintiff's Exhibit 1 was marked for**
24 **identification.)**

25

1 BY MR. BRIGGS:

2 Q For the record, Exhibit 1 is 26 pages, and it's
3 the Complaint for Declaratory and Injunctive Relief filed
4 in this lawsuit, November 25 of 2019.

5 Mr. Horita, do you recognize Exhibit 1?

6 A No, I don't think I've ever seen that before.

7 MR. BRIGGS: Okay. All right.

8 Let me now have you take a look at Exhibit 2.

9 (Plaintiff's Exhibit 2 was marked for
10 identification.)

11 BY MR. BRIGGS:

12 Q For the record, Exhibit 2 is five pages, and it's
13 the First Amended Notice of Deposition of the City's
14 Person Most Qualified to testify.

15 Mr. Horita, have you seen Exhibit 2 before today?

16 A Yes, that looks familiar.

17 Q How long ago did you first receive it?

18 A I don't recall the exact date.

19 Q Was it more than a week ago?

20 A Um -- sorry. I know that's not a "yes" or "no,"
21 but roughly a week ago. I don't remember.

22 Q That's -- sometime in the last 15 days?

23 A That sounds about right.

24 Q Okay. Did you read it when you received it?

25 A Yes, I'm sure I read it when I received it.

1 Q Okay. On the second page, it asks that you
2 provide some writings, and before today's deposition, the
3 City provided some documents to my office. Do you know --
4 did you -- withdrawn.

5 Did you know that the City had provided some
6 documents to me before today's depo in connection with
7 your depo?

8 A Yes. It was my understanding that that's
9 something that happened, yes.

10 Q Okay. Did you review those documents, any of
11 them?

12 A Yes. The documents that I helped provide,
13 I reviewed before I provided them.

14 Q Okay. So the documents that the lawyer sent to my
15 office were documents that you provided to them under the
16 Subpoena -- or under the Depo Notice; is that correct?

17 A Well, I'm not sure exactly which documents were
18 provided to you by the attorneys.

19 Q Okay. Let me --

20 MS. GOODMAN: Cory, I can let you know that the
21 documents that I provided to your office were the
22 documents that Mr. Horita gathered and provided to me.

23 MR. BRIGGS: Okay. Perfect. Thanks. That will
24 short-circuit some of my questions.

25

1 BY MR. BRIGGS:

2 Q Okay. So going back to Exhibit 2, sir. If you
3 look on the third page, there's an Attachment 1, and it
4 has a description of the topics that we'll be covering
5 today.

6 Are you the City's most qualified person to answer
7 questions that fall under those topics?

8 A Yes. Regarding this report, I would say so, yes.

9 Q Okay. Do you have a supervisor?

10 A I do.

11 Q Who is that?

12 A Kyle Elser, who's the Assistant City Auditor.

13 Q Okay. And does Mr. Elser know that you're
14 testifying today?

15 A Yes.

16 Q Did you discuss today's deposition with him?

17 A No, just the fact and timing of our depositions.

18 Q Okay. What did you do to prepare for today's
19 deposition?

20 A In addition to discussions with the Deputy City
21 Attorney's Office, I reviewed the documents that I
22 generated in the course of the investigation, and provided
23 those documents that I thought were responsive to the
24 Exhibit 2 Request for Documents, and reread the report
25 that I generated.

1 **Q** Other than talking to Deputy City Attorneys, did
2 you talk to anybody else about today's deposition?

3 A No, I mean, other than to mention in passing that
4 it was going to happen. You know, I mentioned to my wife
5 that I have a deposition this morning, that sort of thing.
6 Nothing about the content.

7 **Q** Yeah. You haven't had any substantive
8 conversations with anybody about today's deposition,
9 correct?

10 A Correct.

11 **MR. BRIGGS:** Let me have you take a look at
12 Exhibit 3, please.

13 (Plaintiff's Exhibit 3 was marked for
14 identification.)

15 **BY MR. BRIGGS:**

16 **Q** And for the record, Exhibit 3 is a 17-page
17 exhibit. It's on City of San Diego letterhead, and it's a
18 July 10, 2019 memo to Kris, K-R-I-S, Michell,
19 M-I-C-H-E-L-L, from Kyle, K-Y-L-E, Elser, E-L-S-E-R.

20 Sir, do you recognize Exhibit 3?

21 A I do. That's the report that I generated.

22 **Q** Okay. Now, I see that the report on the first
23 page says that it's from Kyle Elser, but you just
24 mentioned that you generated it.

25 Can you tell me, what's your connection to this

1 **report?**

2 A If you look at the top of page seven, it actually
3 mentions that I wrote the report. But our process has
4 been to put the City Auditor's name on the cover page and
5 have the City Auditor's signature appear at the bottom.
6 That's just been tradition and protocol, but I wrote the
7 report.

8 Q Okay. When was the last time you reviewed this
9 report?

10 A Just this morning.

11 Q Okay. And the report refers to a "Hotline
12 Report".

13 Are you familiar with the Hotline Report?

14 A Yes.

15 MR. BRIGGS: Let me have you take a look at
16 Exhibit 4, please.

17 (Plaintiff's Exhibit 4 was marked for
18 identification.)

19 BY MR. BRIGGS:

20 Q For the record, Exhibit 4 is a two-page document.
21 It says Report No. 126298451 in the upper, left-hand
22 corner.

23 Do you recognize Exhibit 2 [sic], sir?

24 A I do.

25 Q Is Exhibit 2 the Hotline Report that you just

1 mentioned?

2 A Right, and it may be a bit confusing.

3 (Reporter interjects.)

4 MR. BRIGGS: You did not mishear me, I misspoke.

5 Thanks for that.

6 BY MR. BRIGGS:

7 Q Sir, does Exhibit 4 appear to be the Hotline

8 Report that you were just discussing when you were

9 referring to Exhibit 3?

10 A Yes. Exhibit 4 is the Hotline Report that was
11 received from our third-party Fraud Hotline provider.

12 That's the information that we got from the system.

13 Q Is it fair to say that Exhibit 4 is what prompted
14 the investigation described in Exhibit 3?

15 A It is.

16 Q Okay. So let me have you go back to Exhibit 3,
17 please. And on the first page, at the end of the first
18 paragraph, it states, (as read): Our investigation
19 determined that up to 16,000 STRO units received free
20 trash collection service from the City.

21 Do you see that?

22 A I do.

23 Q And the acronym STRO stands for Short-Term
24 Residential Occupancy; is that correct?

25 A Yes.

1 **Q** Okay. Can you tell me what you did in order to
2 investigate the Hotline Report? In general terms, what's
3 the -- how does the investigation unfold? Who do you talk
4 to? What documents do you look for? How much time did it
5 take? Things like that.

6 A In general, I looked at the documents that were
7 produced by the City and the laws and regulations and
8 other rules regarding trash collection and the
9 interpretation of those rules. And I talked to
10 Environmental Services Department staff about how they go
11 about the trash collection process, and then generated the
12 report based on that information.

13 **Q** And when you talked to Environmental Services, who
14 was present in those conversations other than you and
15 staff in the Environmental Services Department?

16 A They were by phone, so it was just me and the
17 staff directly.

18 **Q** Was anyone from the City Attorney's Office
19 involved?

20 A No.

21 **Q** Okay. How long did it take to you do the
22 investigation and write up the report from start to
23 finish?

24 A Roughly, I would say the time between when the
25 report was received and when our draft was published, so

1 I believe it was 2017 when the report came in. I'd have
2 to look at the exhibit to get you the exact date.

3 Q So Exhibit 4, it says the report date is
4 October 13, 2017. And Exhibit 3 has a date of July 10,
5 2019.

6 So a little shy of two years; is that right?

7 A That's right.

8 Q Were you working on the investigation for that
9 entire period?

10 A Not just that investigation, which is the hard
11 part. During that period, I was the only fraud
12 investigator, so I was managing the whole caseload of all
13 the cases that come in. Spinning plates, you might say.

14 Q San Diego being San Diego, you had more than one
15 fraud report to investigate.

16 Is that a fair statement?

17 A It is.

18 MS. GOODMAN: Objection. Argumentative.

19 BY MR. BRIGGS:

20 Q Okay. So other than talking to people in the
21 Environmental Services Department, what documents did you
22 look at?

23 A The regulation from the Environmental Services
24 Department, the Municipal Code Sections, and the written
25 public documents from the City Attorney's Office. And the

1 contract that the City entered into with a vendor to help
2 identify the number of short-term rentals in the City.

3 Q Who was that vendor?

4 A A company called Host Compliance.

5 MR. BRIGGS: Was that -- this is a question for
6 your counsel.

7 Jenny, was that agreement a cooperative
8 procurement contract between the City of San Diego and
9 Host Compliance that you sent over last week?

10 MS. GOODMAN: Yes.

11 MR. BRIGGS: Okay.

12 BY MR. BRIGGS:

13 Q So it's fair to say that nobody else assisted you
14 in the City Auditor's Office with the investigation; is
15 that correct?

16 A Correct. Other than drafting and input and
17 reviewing the draft, which we send to the department to
18 get any response for clarification or accuracy. And we
19 send it to the City Attorney's Office for legal review.

20 Q In terms of gathering evidence and data and facts,
21 that's done just by you, correct?

22 A Correct.

23 Q And then you start to articulate your ideas in
24 writing colleagues, supervisors, and affected parties,
25 look at drafts, and have some input before you generate

1 the final product.

2 Is that a fair statement?

3 A Yes.

4 Q How long is the review process? In other words,
5 once you've written your draft and shared it with the
6 other department in the City Attorney's Office, how long
7 did it take before you had a final product to release?

8 A It really can vary depending on the report and the
9 complexity of the report, and I don't remember the
10 specific timeframe on this one.

11 Q Do you recall whether anybody provided written
12 comments on your draft report?

13 A I believe so, yes.

14 Q Do you recall who provided written comments?

15 A I think the comments in this report only came from
16 the City Attorney's Office -- substantive comments on the
17 draft.

18 MR. BRIGGS: And were those written comments
19 produced to my office, Jenny?

20 MS. GOODMAN: No, those were not produced, because
21 those are attorney-client privileged communications.
22 I did serve you with objections that stated that
23 objection.

24 MR. BRIGGS: Okay.

25

1 BY MR. BRIGGS:

2 Q So other than the City Attorneys' written
3 comments, you didn't receive any written feedback on your
4 draft report; is that correct?

5 A That's correct, as far as what I was able to find
6 and recall.

7 Q Let me have you go back to Exhibit 3.

8 And on page 4, can you just read your conclusion
9 to refresh your recollection? Let me know when you're
10 done.

11 A You want me to read it just to myself?

12 Q Just to yourself, yeah. I don't know why some
13 lawyers ask witnesses to read things out loud, especially
14 when we're all looking at the same piece of paper. No,
15 just read it to yourself and let me know when your memory
16 is fresh.

17 A Yes, I have read it.

18 Q Do you still stand behind that conclusion today?

19 MS. GOODMAN: Objection. Outside the scope of his
20 designated deposition. Calls for potential legal
21 conclusion.

22 MR. BRIGGS: You can answer.

23 THE WITNESS: I'd have to think for a second, if
24 you don't mind.

25 MR. BRIGGS: Yeah, sure.

1 THE WITNESS: Yes, I think the ideas in that
2 conclusion are based on the evidence. That is what I
3 reviewed. So I think it's still a valid conclusion based
4 on our review. Not making a legal conclusion, but it
5 seems like that lays out what the facts and results of our
6 investigation were.

7 BY MR. BRIGGS:

8 Q Okay. Let me have you look at page 5 of
9 Exhibit 4 -- sorry -- of Exhibit 3. Under "Recommendation
10 one," please read that and let me know when your memory is
11 fresh.

12 A Okay. Yes, I read it.

13 Q Okay. Do you know whether the City still provides
14 free trash service to households generating
15 non-residential refuse?

16 MS. GOODMAN: Calls for a legal conclusion.
17 Beyond the scope of --

18 MR. BRIGGS: You can answer.

19 MS. GOODMAN: Beyond the scope of his deposition
20 designation.

21 THE WITNESS: I don't know specifically what the
22 operations of the Environmental Services Department are,
23 or -- so I can't really comment on their operations.

24 BY MR. BRIGGS:

25 Q When you issue reports in the City Auditor's

1 **Office and make recommendations, does your office do**
2 **anything to see whether the recommendations are**
3 **implemented?**

4 A We do. We have a recommendation follow-up
5 process.

6 **Q Did you or your office do anything to follow up on**
7 **the recommendations in Exhibit 3?**

8 A We did recently receive information from the
9 Environmental Services Department, but deemed that the
10 recommendation was still in process based on the evidence
11 that they provided.

12 **Q What did the Environmental Services Department**
13 **provide you? What was the evidence?**

14 A Generally information about the collection of
15 trash services. I read it quickly and determined that it
16 didn't address whether or not they were going to stop or
17 whether they had stopped collection. It was more of a
18 look at how many short-term rentals were out there
19 according to the Treasurer's Office, and a series of
20 numbers and estimates about the impacts. But nothing
21 definitive about whether that service was going to be
22 changed at any point. So we didn't deem it responded to
23 any of the three parts of our recommendation.

24 **Q When did you read that material last?**

25 A Within the last month.

1 Q Do you still have that written evidence?

2 A I do.

3 Q Okay. And do you recall who provided that written
4 evidence?

5 A I do. It was, I believe, Hasan Yousef from the
6 Environmental Services Department.

7 Q Was it in paper format or an email?

8 A It was in email.

9 Q Do you recall whether anyone from the City
10 Attorney's Office was copied on that email?

11 A I do not recall.

12 Q Do you still have that email?

13 A I do.

14 Q Do you recall how many short-term vacation rentals
15 were estimated in that email?

16 A I do not.

17 Q Was it more than one?

18 A Yes.

19 Q Was it more than a thousand?

20 A I believe so. I believe the number was in the
21 several thousands, but I don't know the exact number.

22 Q Is it fair to say that what you read within the
23 last month leads you to believe that the City continues to
24 collect trash for free from at least one short-term
25 vacation rental?

1 MS. GOODMAN: Calls for a legal conclusion.
2 Beyond the scope of his deposition designation.

3 MR. BRIGGS: You can answer.

4 THE WITNESS: I don't know, because I think that
5 really is a legal question about when and if the
6 collection is illegal at any given point in time.

7 BY MR. BRIGGS:

8 Q Well, let me ask you this: Did what you read
9 within the last month from the Environmental Services
10 Department lead you to believe that the City continues to
11 pick up trash from short-term vacation rentals?

12 MS. GOODMAN: Calls for a legal conclusion.
13 Beyond the scope of his deposition designation.

14 THE WITNESS: My understanding was that they were
15 estimating the costs associated with servicing short-term
16 rentals and other services, but I don't know whether any
17 of that was per se illegal.

18 BY MR. BRIGGS:

19 Q My second question actually didn't refer to free
20 trash collection or anything illegal. I just asked
21 whether what you read left you with the impression that
22 the City continues to pick up trash from short-term
23 vacation rentals. I'm asking you a factual question based
24 on your impression of what you read.

25 MS. GOODMAN: Calls for a legal conclusion as to

1 what a short-term vacation rental is.

2 MR. BRIGGS: You can answer.

3 THE WITNESS: So if I understand your question,
4 you're asking if the information provided by Environmental
5 Services led me to believe that, as a factual basis,
6 Environmental Services was collecting trash from
7 short-term residential occupancy units.

8 It seemed like that was the case.

9 BY MR. BRIGGS:

10 Q Okay. So let me try to put it this way.

11 Your report asserts that there are such things as
12 short-term residential occupancy units, correct?

13 A Yes.

14 Q And your report asserts that those units have
15 their trash picked up by the City for free, correct?

16 MS. GOODMAN: Calls for a legal conclusion.

17 BY MR. BRIGGS:

18 Q Isn't that what your report asserts, sir?

19 A That -- to the extent that there are short-term
20 residential occupancy units that are receiving free trash
21 service, that appears in the words of the City Attorney's
22 Office to be very likely prohibited. So that process
23 seemed to be continuing, so that's what our report was, is
24 to look at that.

25 Q Okay. I'm going to -- let me try the question

1 again, because I didn't use the word "illegal". I'm
2 asking a factual question.

3 Your report asserts that there are thousands of
4 STRO units that are having their trash picked up by the
5 City for free.

6 Is that a true statement?

7 A I would say that that may be putting too fine a
8 point on it, that our report was based on an estimate
9 that -- as you may say, that there's a potential of one or
10 more short-term rentals that are operating that don't
11 qualify for free trash service that are receiving free
12 trash service. As of --

13 Q There's at least one STRO unit in the City that's
14 receiving free trash service.

15 That is the gist of your report, correct?

16 A I think that's the impression, right, yes.

17 Q And that was the impression you intended to give
18 with your report, correct?

19 A Right.

20 Q Okay. So your report states on the first page
21 that there -- that you determined that there were up
22 to 16,000 STRO units receiving free trash collection
23 service from the City, correct?

24 A That's what I wrote. I wished I had stated that
25 differently or more clearly, perhaps, given what I now

1 know about that number and the source of that estimate,
2 being 16,000 listings without address information and
3 possibly duplicates. And many of that would not qualify,
4 because they were, for instance, like, apartment buildings
5 that would not be eligible for free trash collection
6 because they don't qualify as residential refuse. So that
7 number is the number that the consultant provided in their
8 contract document as a number of listings. So I wish
9 I had been more clear about distinguishing between a
10 number of listings as opposed to units.

11 **Q You said, did I understand you correctly, that**
12 **Host Compliance gave you that 16,000 number?**

13 A It is in their contract.

14 **Q Do you recall where it is in their contract?**

15 A If you have it, I can point to the page.

16 **Q Do you need me to email you the contract?**

17 A Sorry. I thought it was one of your exhibits.

18 **MR. BRIGGS: Let's look and see whether we're**
19 **talking about the same contract. Let me have you take a**
20 **look at Exhibit 5.**

21 (Plaintiff's Exhibit 5 was marked for
22 identification.)

23 **BY MR. BRIGGS:**

24 **Q For the record, Exhibit 5 is a 4-page Voluntary**
25 **Collection Agreement. And though it is undated on the**

1 first page, it is dated and signed on the last page.

2 Is that the contract that you were talking about?

3 A No. I'm not familiar with that document.

4 MR. BRIGGS: Okay. Let me ask your counsel,
5 because I don't want to waste time.

6 Jenny, is the contract -- do you know whether the
7 contract the witness is talking about is the 40-page Host
8 Compliance Agreement that you emailed over?

9 MS. GOODMAN: Yes.

10 MR. BRIGGS: Okay.

11 MS. GOODMAN: That is exactly what he's talking
12 about.

13 MR. BRIGGS: Do you have that handy that you can
14 email it to him or do you need me to send it to you?
15 I have it handy if you need it.

16 MS. GOODMAN: Yeah, if you have it handy, that
17 would be great.

18 Andy, do you have that on your computer?

19 THE WITNESS: Yeah, I can pull it up. Does it
20 need to be an exhibit?

21 MR. BRIGGS: We're going make it Exhibit 6 right
22 now.

23 (Plaintiff's Exhibit 6 was marked for
24 identification.)

25 MR. BRIGGS: Okay. I just emailed that to

1 production at Peterson and to you, Jenny.

2 MS. GOODMAN: Okay.

3 MR. BRIGGS: Excellent.

4 BY MR. BRIGGS:

5 Q Okay. Mr. Horita, do you have that document up in
6 front of you?

7 A Are you referring to the Exhibit 6 that you sent?
8 Because I haven't received that.

9 Q Yeah. It's the 40-page Cooperative Procurement
10 Contract.

11 A I do have a copy of that, yes.

12 Q What page of that tells you that there is 16,000
13 units?

14 A One moment please.

15 Q Sure.

16 A Okay. I see it on page 3 of the document under
17 Section 4, 1st paragraph, about the third sentence. It
18 refers to the estimated 16,363 short-term rental listings
19 in the City as of March 2018.

20 Q Okay. Do you know where that 16,363 figure came
21 from? And just being inserted in this --

22 (Technical interruption. Reporter interjects.)

23 (Record read.)

24 BY MR. BRIGGS:

25 Q That is mentioned in the contract. And the

1 witness, I think, said, no he doesn't.

2 Did I hear you correctly, Mr. Horita, you don't
3 know where that figure comes from?

4 A That's correct. I've since learned that it was an
5 estimate based on listings as opposed to actual, hard
6 verified numbers of residential occupancy units that were
7 operating according to the criteria that the City was
8 concerned with.

9 Q Well, here in the contract, it says, quote
10 (as read): Based on the estimated 16,363 short-term
11 rental listings in the City as of March 2018.

12 Do you see that?

13 A I do.

14 Q So is it true that the entire basis for your
15 assertion in Exhibit 3, receiving free trash collection
16 service from the City, is based on that language I just
17 read from the contract with Host Compliance?

18 A Yes, that was the source of the 16,000 number.

19 Q Did you do any investigation whatsoever into the
20 number of STRO units that were receiving free trash
21 collection when you were doing your investigation?

22 A Other than reviewing the estimate provided by the
23 consultant, no, because that wasn't the focus of our
24 investigation.

25 Q Okay. And when you say the estimate provided by

1 the consultant, you mean the statement that I just read
2 you from page 3 of the Host Compliance contract,
3 correct -- what is Exhibit 6, correct?

4 A Correct.

5 Q Do you have an estimate today of how many STRO
6 units are receiving free trash collection from the City?

7 MS. GOODMAN: Calls for a legal conclusion.
8 Beyond the scope of his deposition designation.

9 THE WITNESS: I do not have a firm number of
10 exactly how many units might be operating.

11 BY MR. BRIGGS:

12 Q How about an approximation?

13 MS. GOODMAN: Same objections.

14 THE WITNESS: I have no idea.

15 BY MR. BRIGGS:

16 Q Do you have reason to believe that it's in the
17 thousands?

18 MS. GOODMAN: Same objections.

19 THE WITNESS: I don't know, because the --
20 I believe that there was new legislation that was passed
21 earlier this month regarding the definitions of short-term
22 rentals and how and where they operate, so I'm not even
23 clear what the definition is currently.

24 BY MR. BRIGGS:

25 Q I want you to use the same definition of STRO that

1 you used when you wrote your report.

2 With that definition in mind, do you have any
3 reason to believe, as you sit here right now, that the
4 City continues to provide free trash collection service to
5 any STRO units?

6 MS. GOODMAN: Calls for a legal conclusion.
7 Beyond the scope of his PMQ designation. Calls for
8 speculation.

9 THE WITNESS: I don't know specifically how the --
10 I don't know the answer to that. It --

11 BY MR. BRIGGS:

12 Q How about approximately?

13 A No, I don't know approximately.

14 Q Did I hear you correctly, about 10, 15 minutes
15 ago, tell me about evidence you had recently read from the
16 Environmental Services Department that led you to believe
17 that the City continues to provide free trash collection
18 service to STRO units?

19 MS. GOODMAN: Misstates --

20 BY MR. BRIGGS:

21 Q Did I hear you correctly at that time?

22 MS. GOODMAN: Sorry. Misstates prior testimony.

23 THE WITNESS: I don't know what definition the
24 Environmental Services Department used when they referred
25 to short-term rentals and what criteria they used, but

1 it -- I had the impression that there was at least the
2 possibility that the City was collecting trash from one or
3 more units that could qualify as a short-term rental unit.

4 BY MR. BRIGGS:

5 Q Do you have the email that you received from the
6 Environmental Services Department accessible?

7 A I can check.

8 MS. GOODMAN: And, Cory, that -- I'm pretty sure
9 that email has been previously provided to you in response
10 to the City's discovery that was provided a couple months
11 ago.

12 MR. BRIGGS: Okay. Let me look and see if I have
13 it.

14 MS. GOODMAN: It's the one that has the
15 attachments that have the Excel spreadsheets that include
16 the number of residences that have applied for short-term
17 vacation rental certificates. And then it also has the
18 Excel spreadsheet that has a listing of all of the
19 residences that ESD services.

20 MR. BRIGGS: Let's go off the record for a second.
21 Okay?

22 MS. GOODMAN: Sure.

23 (Discussion was held off the record.)

24 MR. BRIGGS: Let's go back on.

25

1 BY MR. BRIGGS:

2 Q Mr. Horita, did you find the email that we were
3 just talking about?

4 A I found the email that I received from the
5 Environmental Services Department regarding the
6 recommendation follow-up process. I'm not sure if that's
7 exactly what you were just talking about.

8 Q What's the date of that email?

9 A I received it -- I apologize. I have -- okay. So
10 the email actually didn't go to me initially. It went to
11 someone else in my office, December 29th, 2020.

12 Q Okay. And when did you get it?

13 A April 19th, 2021.

14 Q Did you review it to prepare for today's
15 deposition?

16 A I did not.

17 Q Okay. How long is that email?

18 A There is a Word document that's attached that is
19 two pages, and there are four attachments.

20 MR. BRIGGS: Jenny, do you know whether there were
21 Bates numbers on that item when it was produced by the
22 City?

23 MS. GOODMAN: Well, I'm sure there were Bates
24 numbers on it. I couldn't tell you as I'm sitting here
25 right now, because I don't have access to that. My

1 computer --

2 BY MR. BRIGGS:

3 Q Okay. Mr. Horita, is there anybody from the City
4 Attorney's office named as a recipient of that email?

5 A No.

6 Q Is it possible for you to forward that to
7 Ms. Goodman so she could forward it to me?

8 A I'm doing that now.

9 Q Thanks.

10 MS. GOODMAN: Andy, you're sending that to my work
11 email, right?

12 THE WITNESS: Correct. Should I send it to your
13 personal email too?

14 MS. GOODMAN: No, I would prefer it just at work.
15 It's just taking a while to get here. I should have
16 gotten it by now.

17 THE WITNESS: I sent it high priority, so
18 hopefully that makes it go a little faster.

19 MS. GOODMAN: I can't imagine why I don't have it
20 yet. Why don't you go ahead and send it to my personal
21 email. Do you need me to give that to you again?

22 THE WITNESS: No, I can pull it up from --

23 MR. BRIGGS: Should we let the record reflect the
24 City's computer system dislikes the Auditors Office just
25 as much as it dislikes Briggs Law Corporation's office?

1 MS. GOODMAN: So stipulated.

2 MR. BRIGGS: The party's laughing. Counsel's
3 laughing. Everybody gets the joke.

4 While we're waiting for that to come in, let me
5 move on, sir, I don't want to waste folks' time.

6 MS. GOODMAN: As soon as it comes in, I'll let you
7 know.

8 BY MR. BRIGGS:

9 Q Okay. So if we go back to Exhibit 3, Mr. Horita.

10 A Okay.

11 Q And we look at pages 5 and 6, there's a reference
12 to management's response.

13 Do you see that?

14 A I do.

15 Q Do you know who the -- who are the people who
16 constituted management providing the response?

17 A I do. It was Johnny Perkins who provided the
18 response.

19 Q Okay. Anybody else?

20 A Not to my knowledge.

21 Q Okay. Let me now have you take a look at
22 Attachment A to Exhibit 3, the City Attorney Memorandum.

23 Do you recognize that?

24 A Yes.

25 Q And to be clear, Attachment A to Exhibit 3 has an

1 Attachment A, which is itself a two-page memo to counsel
2 member Lorie, L-O-R-I-E, Zapf, Z-A-P-F.

3 Do you see that?

4 A I do.

5 Q When you were conducting your investigation, did
6 you read Attachment A, and the other Attachment A to
7 Attachment A?

8 A I did.

9 Q Did you ever hear anybody disagree with the
10 analysis in the City Attorney's memo that is Attachment A
11 to your report?

12 MS. GOODMAN: Excluding any discussions you've had
13 with the City Attorney's Office, Andy.

14 THE WITNESS: I don't remember any discussion
15 outside of the City Attorney's Office related to that
16 Attachment A.

17 MS. GOODMAN: And, Cory, I did just forward you
18 the email.

19 MR. BRIGGS: Okay. Thanks. I'll look for it here
20 in a sec.

21 BY MR. BRIGGS:

22 Q Mr. Horita, when you issued your report, did you
23 have any reason to believe that the City Attorney's Office
24 did not stand behind the analysis and its memorandum dated
25 June 9, 2017, that is attached to your report?

1 MS. GOODMAN: Objection. Calls for
2 attorney-client privileged communication.

3 And I would instruct you not to answer.

4 MR. BRIGGS: I didn't ask what the City Attorney's
5 Office told you. I just asked whether the witness had any
6 reason to believe that the City Attorney's Office didn't
7 stand behind the memorandum that's Attachment A to his
8 investigation.

9 MS. GOODMAN: I understand. But to the extent
10 that he has that impression from discussions with the City
11 Attorney's Office, and in particular this counsel, then
12 I would instruct him not to answer.

13 MR. BRIGGS: That's --

14 MS. GOODMAN: On attorney-client privileged
15 communications.

16 MR. BRIGGS: Well, if he has that impression from
17 anybody else, that's discoverable.

18 MS. GOODMAN: If he has it from anybody else,
19 that's a proper avenue for inquiry.

20 BY MR. BRIGGS:

21 Q So, Mr. Horita, do you need me to repeat the
22 question or do you have it in mind?

23 A If you would like to repeat your question, that
24 would be helpful.

25 Q When you issued your report, did you have any

1 reason to believe the City Attorney's Office was not
2 standing behind its analysis reflected in the June 9,
3 2017, memorandum that is Attachment A to your report?

4 A I don't recall any discussion of that nature.

5 Q If that discussion had occurred, would you still
6 have issued your report with Attachment A included?

7 MS. GOODMAN: Vague and ambiguous. Calls for
8 speculation.

9 THE WITNESS: If -- the memo was public and
10 published by the City Attorney's Office. If it was
11 retracted or later corrected, then we would have issued
12 the corrected version, but that was the version that we
13 had available to use.

14 BY MR. BRIGGS:

15 Q Well, I'm asking a slightly different question.

16 Given that you had this public written memorandum
17 from the City Attorney's Office at the time you issued the
18 report, would you have issued the report as you did if you
19 knew that the City Attorney's Office no longer stood
20 behind its analysis reflected in the report?

21 MS. GOODMAN: Calls for speculation.

22 (Reporter interjects.)

23 MS. GOODMAN: Let's go off the record.

24 (Recess was taken.)

25 MR. BRIGGS: Shall we go back on the record? And

1 when we do, can you please read back the last question I
2 asked?

3 (Record read.)

4 THE WITNESS: Potentially, yes. If the -- the
5 analysis in the City Attorney's report seemed to be valid
6 depending on the reasons that the City Attorney's Office
7 provided, we would look at that. And if it's something
8 that was still published publicly on their website that
9 wasn't corrected or redacted or retracted, then I think
10 it's -- it would be fair to use.

11 BY MR. BRIGGS:

12 Q And if you had credible information indicating
13 that the City Attorney's Office no longer stood behind
14 that analysis, even though it was still available
15 publicly, would you have at least noted that credible
16 information in your report or would you have kept that to
17 yourself?

18 MS. GOODMAN: Objection. Potentially calls for
19 attorney-client privileged communications.

20 To the extent that you can answer without
21 factoring in any attorney-client privileged
22 communications, you can answer.

23 THE WITNESS: Regarding whether we would have
24 noted any concerns or issues that the City Attorney's
25 Office had with their own work-product in our public

1 report, that would have been subject to the City
2 Attorney's Office review and approval.

3 BY MR. BRIGGS:

4 Q So if the City Attorney's Office doubted its own
5 analysis, it had an opportunity to say so when it
6 commented on the draft of your report, correct?

7 MS. GOODMAN: Calls for attorney-client privileged
8 communications.

9 Instruct you not to answer.

10 MR. BRIGGS: I just asked whether that opportunity
11 was provided. I didn't ask about the communications.

12 MS. GOODMAN: Let me think about that for a
13 minute. I think even the opportunity is -- is a
14 potentially attorney-client privileged communication. And
15 therefore, I still assert the objection and instruct you
16 not to answer.

17 BY MR. BRIGGS:

18 Q Mr. Horita, are you going to take your attorney's
19 advice?

20 A Yes.

21 Q So how long -- how much time lapsed between when
22 you provided a draft of your report to the City Attorney's
23 Office and the City Attorney providing written comments on
24 your draft?

25 MS. GOODMAN: Assumes facts not in evidence.

1 MR. BRIGGS: You can answer.

2 THE WITNESS: I don't remember what -- how much
3 time it took.

4 BY MR. BRIGGS:

5 Q But you did provide the City Attorney's Office
6 with a draft your report, correct?

7 A Yes.

8 Q And the City Attorney's Office did provide a
9 written response to your report, correct?

10 MS. GOODMAN: Objection. Calls for
11 attorney-client privilege communications.

12 Instruct you not to answer.

13 MR. BRIGGS: I'm sorry. The fact that your office
14 did or did not respond is not privileged. The response
15 might be privileged, but the fact that it responded or not
16 is not privileged.

17 MS. GOODMAN: I disagree.

18 BY MR. BRIGGS:

19 Q Mr. Horita, I'm going to ask you again.

20 When you received feedback on your draft
21 investigation, can you tell me who provided written
22 feedback?

23 MS. GOODMAN: Hold on. Objection. May call for
24 attorney-client privileged communications.

25 Instruct you not to answer.

1 BY MR. BRIGGS:

2 Q Are you going take her advice, Mr. Horita?

3 A Yes.

4 Q Did you tell me earlier in today's deposition that
5 the only department that provided a written response to
6 your draft investigation was the City Attorney's Office?

7 A I believe so, yes.

8 Q Okay. Do you want to change that testimony right
9 now or does that continue to be what you believe the
10 truthful answer is?

11 MS. GOODMAN: And my objection would be asked and
12 answered.

13 MR. BRIGGS: You can answer.

14 BY MR. BRIGGS:

15 Q Sir, do you want to change your prior testimony or
16 do you stand behind it right now?

17 A I am not changing my prior testimony. I'm just
18 responding to Counsel's advice.

19 Q Is it true that you testified earlier today that
20 the only written response you received to your draft
21 report was from the City Attorney's Office?

22 MS. GOODMAN: I'll allow him to answer that.

23 THE WITNESS: Yes.

24 BY MR. BRIGGS:

25 Q Does that answer remain true right now at

1 10:20 a.m.?

2 A Yes.

3 Q Thank you. Let me have you go back to Exhibit 3
4 and take a look at Attachment B.

5 MS. GOODMAN: Attachment what?

6 MR. BRIGGS: B to Exhibit 3. It starts on
7 page 15.

8 BY MR. BRIGGS:

9 Q Let me know when you've refreshed your
10 recollection of that page, sir.

11 A Yes, I'm familiar with that page.

12 Q Okay. This page basically describes the priority
13 levels that are given to the recommendations you make in
14 your audit, correct?

15 A Correct.

16 Q I said, "in your audit".

17 I meant, in your investigation, but you understood
18 that -- understood me to be talking about the same thing,
19 yes?

20 A They're the same classifications. We just use the
21 word "Fraud Hotline Report" as opposed to "audit".

22 Q Okay. And -- so which level of recommendation did
23 your recommendations in the report receive?

24 MS. GOODMAN: Vague and ambiguous.
25

1 BY MR. BRIGGS:

2 Q Do you understand the question, sir?

3 A I believe you're referring to page 5 of Exhibit 3,
4 which is the Priority 1 for Recommendation 1, which was
5 the only recommendation.

6 Q Okay. So the recommendation in your report
7 received Priority Class 1, correct?

8 A Yes, that's what I marked it as.

9 Q Is Priority Class 1 the highest level of
10 recommendation?

11 A It is.

12 Q Does that mean that the problem that prompted the
13 recommendation is the most serious type that the City
14 Auditor's Office finds?

15 MS. GOODMAN: Vague and ambiguous.

16 THE WITNESS: I would say generally, yes.

17 BY MR. BRIGGS:

18 Q And what I'm trying to figure out is whether the
19 one, two, three sequence has some sort of significance in
20 terms of seriousness. One is the most serious. Two is
21 less serious, but still serious. And three is least
22 serious.

23 Is that a fair statement?

24 A Yes.

25 MR. BRIGGS: Okay. Let me have you take a look at

1 Exhibit 5 to today's deposition, please.

2 (Exhibit previously marked as referenced.)

3 BY MR. BRIGGS:

4 Q For the record, Exhibit 5 -- I think I did this
5 already, but just to be safe -- is a 4-page Voluntary
6 Collection Agreement, undated on the first page, but dated
7 and signed on the last page.

8 Sir, do you recognize Exhibit 5?

9 MS. GOODMAN: Asked and answered.

10 THE WITNESS: I do not.

11 BY MR. BRIGGS:

12 Q Is today the first time you've seen Exhibit 5?

13 A As far as I know, yes.

14 Q Okay. Do you know whether the City has ever
15 conducted an audit of HomeAway?

16 A I do not.

17 (Simultaneously speaking.)

18 THE WITNESS: Oh, sorry.

19 MS. GOODMAN: Objection. Calls for information
20 beyond the scope of his deposition designation.

21 MR. BRIGGS: Let's go off the record for a moment,
22 please.

23 MS. GOODMAN: Okay.

24 (Recess was taken.)

25 MR. BRIGGS: Mr. Horita, I've provided you what

1 we've marked as Exhibit 7.

2 (Plaintiff's Exhibit 7 was marked for
3 identification.)

4 BY MR. BRIGGS:

5 Q For the record, Exhibit 7 is an email. It has my
6 name at the top, because it was just forwarded by your
7 Counsel this morning. But it really starts in the middle
8 of the first page as from Danielle, D-A-N-I-E-L-L-E,
9 Knighten, K-N-I-G-H-T-E-N, to Kyle Elser and to you.

10 Do you see that?

11 A I do.

12 Q Okay. And that email, when you received it,
13 included a Word document titled, (as read): STRO Audit
14 Update 12-29-20.docX, plus four attachments.

15 So a total of five attachments to the email,
16 correct?

17 A Yes.

18 Q And so the Word document that was attached, it
19 begins on page 4 of Exhibit 7, correct?

20 A Yes.

21 Q And it goes for a couple pages.

22 And then Attachment 1 to the email begins on
23 page 6 of the attachment, correct?

24 A Yes.

25 Q And then if you jump to pages 233 and 234, we'll

1 see the format of the spreadsheet changes, and
2 Attachment 2 to the email that Ms. Knighten sent to you
3 begins on page 234 of Exhibit 7, correct?

4 A I believe so, yes. I -- I'm not very familiar
5 with those attachments.

6 Q Let me have you now jump to pages 358 and 359.
7 And I believe that you'll see on page 359 you get the
8 beginning of Attachment 3.

9 A That sounds right.

10 Q And then if you jump to page 516 and compare it
11 to 517, you'll see that the spreadsheet changes again, and
12 on 517, you get the beginning of what was Attachment 4 to
13 that email, correct?

14 A That seems correct, yes.

15 Q Okay. Let me now have you go back to the fourth
16 page of Exhibit 7, which is the 2-page Word document.
17 Take a look at pages 4 and 5 and let me know when you're
18 done looking at them.

19 A Okay.

20 Q Are those two pages, pages 4 and 5 of Exhibit 7,
21 are they the recommendations update from the Environmental
22 Services Department that you mentioned earlier in today's
23 deposition?

24 A Yes.

25 MR. BRIGGS: Okay. So I think I'm done with my

1 questions. I'd like to just go off the record for two
2 more minutes to look at my notes, and if we're done, we'll
3 wrap it up.

4 MS. GOODMAN: Okay.

5 MR. BRIGGS: Okay. Off the record. Thanks.

6 (Recess was taken.)

7 MR. BRIGGS: Mr. Horita, I don't have any more
8 questions for you right now. On a couple questions, your
9 counsel asked you not to answer and you agreed. So there
10 may be some follow-up discussion that I have with
11 Ms. Goodman, and we may need to sit down and ask you some
12 of those questions again if the judge says so. But for
13 now, you've answered the questions I wanted to ask you.
14 I appreciate your time. We're doing this per Code now.
15 We're not stipulating anymore down here, so let's wrap it
16 up.

17 I'll need a copy of the transcript, Madam
18 Reporter.

19 MS. GOODMAN: As will I. Send it to me and I'll
20 arrange to have him review and sign it.

21 (Whereupon at 10:40 a.m. the deposition was concluded.)

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Andy Horita, 4/27/2021

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* * *

I hereby declare under penalty of perjury that the foregoing is my deposition under oath; that I have read my deposition and have made the necessary corrections, additions or changes to my answers that I deem necessary.

In witness thereof, I hereby subscribe my name this _____ day of _____, 2021.

ANDY HORITA

1 STATE OF CALIFORNIA)
 : Ss.
2 COUNTY OF SAN DIEGO)

3 I, Sonia Blake, Certified Shorthand Reporter in and
4 for the State of California, Certificate No. 9854, do
5 hereby certify:

6 That the witness in the foregoing deposition was by me
7 first duly sworn to testify the truth, the whole truth,
8 and nothing but the truth in the foregoing cause; that the
9 deposition was taken before me at the time and place
10 herein named; that said deposition was reported by me in
11 shorthand and transcribed, through computer-aided
12 transcription, under my direction; and that the foregoing
13 transcript is a true record of the testimony elicited at
14 proceedings had at said deposition.

15 I do further certify that I am a disinterested person
16 and am in no way interested in the outcome of this action
17 or connected with or related to any of the parties in this
18 action or to their respective counsel.

19 In witness whereof, I have hereunto set my hand this
20 day of 20

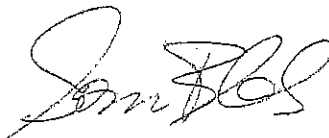
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Sonia Blake

CSR No. 9854

<p style="text-align: center;">A</p> <p>A-N-D-Y 8:17 a.m 2:16,16 7:2 48:1 53:21 able 12:5 24:5 Abuse 5:10 access 38:25 accessible 37:6 accuracy 22:18 acknowledge 7:6,8 acronym 19:23 action 55:16,18 actual 34:5 addition 16:20 additions 54:5 address 26:16 31:2 administered 7:9 advice 45:19 47:2 47:18 affect 9:13 ago 14:17,19,21 36:15 37:11 agreed 53:9 agreement 5:12 7:14,15 22:7 31:25 32:8 50:6 ahead 39:20 air 11:17 allow 47:22 allowed 9:8,24 allowing 10:6 ambiguous 43:7 48:24 49:15 Amended 5:6 14:13 analysis 41:10,24 43:2,20 44:5,14 45:5 Andy 1:11 2:15 4:3 5:16 8:8,17 32:18 39:10 41:13 54:9 answer 6:1 9:14 10:7,20,22 11:2 11:19 16:6 24:22 25:18 28:3 29:2 36:10 42:3,12 44:20,22 45:9,16 46:1,12,25 47:10 47:13,22,25 53:9 answered 47:12 50:9 53:13 answers 9:5,15 54:5 anybody 17:2,8 23:11 39:3 40:19 41:9 42:17,18 anymore 53:15 apartment 31:4</p>	<p>apologize 38:9 appear 18:5 19:7 APPEARANCES 3:1 appears 29:21 applied 37:16 appreciate 53:14 approval 45:2 approximately 36:12,13 approximation 35:12 April 1:14 2:16 7:2 13:7 38:13 Argumentative 21:18 arrange 53:20 arrangement 7:12 articulate 22:23 asked 8:3 11:7 28:20 42:5 44:2 45:10 47:11 50:9 53:9 asking 28:23 29:4 30:2 43:15 asks 15:1 assert 45:15 assertion 34:15 asserts 29:11,14,18 30:3 assistance 13:10 Assistant 16:12 assisted 22:13 associated 28:15 Assumes 45:25 attached 38:18 41:25 51:18 attachment 16:3 40:22,25 41:1,6,6 41:7,10,16 42:7 43:3,6 48:4,5 51:22,23 52:2,8 52:12 attachments 37:15 38:19 51:14,15 52:5 attorney 7:16,19 9:11 40:22 45:23 attorney's 3:8 16:21 20:18 21:25 22:19 23:6,16 27:10 29:21 39:4 41:10 41:13,15,23 42:4 42:6,11 43:1,10 43:17,19 44:5,6 44:13,24 45:2,4</p>	<p>45:18,22 46:5,8 47:6,21 attorney-client 23:21 42:2,14 44:19,21 45:7,14 46:11,24 attorneys 7:5 15:18 17:1 Attorneys' 24:2 audit 48:14,16,21 50:15 51:13 Auditor 12:16 16:12 Auditor's 18:4,5 22:14 25:25 49:14 Auditors 39:24 available 43:13 44:14 avenue 3:9 42:19 aware 13:16,19</p> <hr/> <p style="text-align: center;">B</p> <p>B 48:4,6 back 16:2 19:16 24:7 37:24 40:9 43:25 44:1 48:3 52:15 based 20:12 25:2,3 26:10 28:23 30:8 34:5,10,16 basically 48:12 basis 29:5 34:14 Bates 38:21,23 beer 10:13 beginning 2:16 7:15 52:8,12 begins 51:19,22 52:3 behalf 2:15 7:20 believe 21:1 23:13 27:5,20,20,23 28:10 29:5 35:16 35:20 36:3,16 41:23 42:6 43:1 47:7,9 49:3 52:4,7 best 10:8,21,22 12:4 better 11:1 beyond 25:17,19 28:2,13 35:8 36:7 50:20 bit 19:2 Blake 1:20 2:17 55:3,23 body 9:24 booklet 9:6 bottom 18:5</p>	<p>break 11:16 Briggs 3:4,4,12 4:5 7:18,18,23 8:3,13 13:21 14:1,7,11 15:23 16:1 17:11 17:15 18:15,19 19:4,6 21:19 22:5 22:11,12 23:18,24 24:1,22,25 25:7 25:18,24 28:3,7 28:18 29:2,9,17 31:18,23 32:4,10 32:13,21,25 33:3 33:4,24 35:11,15 35:24 36:11,20 37:4,12,20,24 38:1,20 39:2,23 39:25 40:2,8 41:19,21 42:4,13 42:16,20 43:14,25 44:11 45:3,10,17 46:1,4,13,18 47:1 47:13,14,24 48:6 48:8 49:1,17,25 50:3,11,21,25 51:4 52:25 53:5,7 buildings 31:4</p> <hr/> <p style="text-align: center;">C</p> <p>C 3:5 California 1:1,13 2:1,16 3:5,10 7:1 55:1,4 call 46:23 called 22:4 calls 24:20 25:16 28:1,12,25 29:16 35:7 36:6,7 42:1 43:7,21 44:18 45:7 46:10 50:19 care 11:25 case 1:5 2:5 9:11 29:8 caseload 21:12 cases 12:24 21:13 cause 55:8 Certificate 55:4 certificates 37:17 Certified 2:17 55:3 certify 55:5,15 chance 8:22 change 47:8,15 changed 26:22 changes 9:10 52:1 52:11 54:5 changing 9:15</p>	<p>47:17 check 37:7 chemical 12:3 Chula 1:13 2:15 7:1 City 1:7 2:7 3:8 5:10 7:19,20 12:14,16,17 13:17 15:3,5 16:12,20 17:1,17 18:4,5 19:20 20:7,18 21:25 22:1,2,8,14 22:19 23:6,16 24:2 25:13,25 27:9,23 28:10,22 29:15,21 30:5,13 30:23 33:19 34:7 34:11,16 35:6 36:4,17 37:2 38:22 39:3 40:22 41:10,13,15,23 42:4,6,10 43:1,10 43:17,19 44:5,6 44:13,24 45:1,4 45:22,23 46:5,8 47:6,21 49:13 50:14 City's 14:13 16:6 37:10 39:24 clarification 22:18 Class 49:7,9 classifications 48:20 clean 10:2,16 11:20 clear 31:9 35:23 40:25 clearly 30:25 client 13:16 Code 21:24 53:14 collaboration 12:25 colleagues 22:24 collect 27:24 collecting 29:6 37:2 collection 5:12 13:17 19:20 20:8 20:11 26:14,17 28:6,20 30:22 31:5,25 34:15,21 35:6 36:4,17 50:6 come 12:21 21:13 40:4 comes 34:3 40:6 coming 7:25 comment 9:12 25:23 commented 45:6 comments 23:12,14</p>
---	---	---	---	--

<p>23:15,16,18 24:3 45:23 communication 42:2 45:14 communications 23:21 42:15 44:19 44:22 45:8,11 46:11,24 company 22:4 compare 52:10 Complaint 5:3 14:3 complexity 23:9 Compliance 22:4,9 31:12 32:8 34:17 35:2 computer 32:18 39:1,24 computer-aided 55:11 concerned 34:8 concerns 44:24 concluded 53:21 conclusion 24:8,18 24:21 25:2,3,4,16 28:1,12,25 29:16 35:7 36:6 conducted 12:23 50:15 conducting 41:5 confusing 19:2 connected 55:17 connection 15:6 17:25 consent 7:11 constituted 40:16 consultant 31:7 34:23 35:1 content 17:6 continue 47:9 continues 27:23 28:10,22 36:4,17 continuing 29:23 contract 5:14 22:1 22:8 31:8,13,14 31:16,19 32:2,6,7 33:10,25 34:9,17 35:2 conversations 17:8 20:14 cooperative 5:13 22:7 33:9 coordinate 12:22 copied 27:10 copy 33:11 53:17 corner 18:22 Corporation 3:4,12</p>	<p>Corporation's 39:25 correct 9:14 15:16 17:9,10 19:24 22:15,16,21,22 24:4,5 29:12,15 30:15,18,23 34:4 35:3,3,4 39:12 45:6 46:6,9 48:14 48:15 49:7 51:16 51:19,23 52:3,13 52:14 corrected 43:11,12 44:9 corrections 9:9 54:4 correctly 31:11 34:2 36:14,21 Cory 3:4 4:5 7:18 8:5 15:20 37:8 41:17 costs 28:15 counsel 7:11 12:8 22:6 32:4 41:1 42:11 51:7 53:9 55:18 Counsel's 40:2 47:18 COUNTY 1:2 2:2 55:2 couple 37:10 51:21 53:8 course 16:22 court 1:1 2:1 9:2,6 9:23 10:15 courtesy 10:8 court 18:4 covering 16:4 credibility 9:13 credible 44:12,15 criteria 34:7 36:25 CSR 1:20,20 55:23 currently 35:23 cutting 7:22,23</p> <hr/> <p style="text-align: center;">D</p> <p>D-A-N-I-E-L-L-E 51:8 Danielle 5:15 51:8 data 22:20 date 10:20 14:18 21:2,3,4 38:8 dated 5:7 32:1 41:24 50:6 day 54:7 55:20 days 14:22 December 38:11</p>	<p>decide 12:24 Declaratory 5:3 14:3 declare 7:10 54:2 deem 26:22 54:5 deemed 26:9 Defendant 3:7 Defendants 1:8 2:8 definition 35:23,25 36:2,23 definitions 35:21 definitive 26:21 department 20:10 20:15 21:21,24 22:17 23:6 25:22 26:9,12 27:6 28:10 36:16,24 37:6 38:5 47:5 52:22 departments 12:23 depending 23:8 44:6 depo 8:23 15:6,7,16 deposition 1:11 2:15 5:6 7:6,7,8 8:19 9:15 10:14 12:7 14:13 15:2 16:16,19 17:2,5,8 24:20 25:19 28:2 28:13 35:8 38:15 47:4 50:1,20 52:23 53:21 54:3 54:4 55:6,9,10,14 depositions 16:17 Deputy 7:19 16:20 17:1 described 19:14 describes 48:12 description 5:2 16:4 designated 24:20 designation 25:20 28:2,13 35:8 36:7 50:20 determined 19:19 26:15 30:21 DIEGANS 1:4 2:4 Diego 1:2,7 2:2,7 3:8,10 5:10 7:20 12:14 17:17 21:14 21:14 22:8 55:2 difference 11:12 different 43:15 differently 30:25 direction 55:12 directly 20:17 disagree 41:9 46:17</p>	<p>discoverable 42:17 discovery 37:10 discuss 16:16 discussing 19:8 discussion 37:23 41:14 43:4,5 53:10 discussions 16:20 41:12 42:10 disinterested 55:15 dislikes 39:24,25 disposition 12:24 distinguishing 31:9 document 18:20 31:8 32:3 33:5,16 38:18 51:13,18 52:16 documents 15:3,6 15:10,12,14,15,17 15:21,22 16:21,23 16:24 20:4,6 21:21,25 doing 9:19 10:6 34:21 39:8 53:14 doubted 45:4 draft 20:25 22:17 23:5,12,17 24:4 45:6,22,24 46:6 46:20 47:6,20 drafting 22:16 drafts 22:25 drank 11:8 duly 8:9 55:7 duplicates 31:3</p> <hr/> <p style="text-align: center;">E</p> <p>E-L-S-E-R 17:19 earlier 35:21 47:4 47:19 52:22 either 10:9 elicited 55:13 eligible 31:5 Elser 5:6,8,15 16:12 16:13 17:19,23 51:9 email 5:15 12:10 27:7,8,10,12,15 31:16 32:14 37:5 37:9 38:2,4,8,10 38:17 39:4,11,13 39:21 41:18 51:5 51:12,15,22 52:2 52:13 emailed 32:8,25 emotional 12:3 entered 22:1</p>	<p>entire 21:9 34:14 entitled 10:20,22,25 11:1 Environmental 20:10,13,15 21:21 21:23 25:22 26:9 26:12 27:6 28:9 29:4,6 36:16,24 37:6 38:5 52:21 ESD 37:19 especially 24:13 ESQ 3:4,9,12 estimate 10:22 11:4 11:4,9 30:8 31:1 34:5,22,25 35:5 estimated 27:15 33:18 34:10 estimates 26:20 estimating 28:15 Everybody 40:3 evidence 22:20 25:2 26:10,13 27:1,4 36:15 45:25 exact 14:18 21:2 27:21 exactly 15:17 32:11 35:10 38:7 Examination 4:5 8:12 examined 8:10 example 11:3 Excel 37:15,18 Excellent 33:3 Excluding 41:12 exhibit 13:22,23 14:2,5,8,9,12,15 16:2,24 17:12,13 17:16,17,20 18:16 18:17,20,23,25 19:7,9,10,13,14 19:16 21:2,3,4 24:7 25:9,9 26:7 31:20,21,24 32:20 32:21,23 33:7 34:15 35:3 40:9 40:22,25 48:3,6 49:3 50:1,2,4,8,12 51:1,2,5,19 52:3 52:16,20 exhibits 5:1 12:8,11 31:17 experience 11:10 extend 10:8 extent 29:19 42:9 44:20 eyes 9:22 11:17</p>
---	--	---	---	---

<p style="text-align: center;">F</p> <p>fact 16:17 46:13,15 factoring 44:21 facts 22:20 25:5 45:25 factual 28:23 29:5 30:2 fair 19:13 21:16 22:13 23:2 27:22 44:10 49:23 fall 9:24 16:7 familiar 14:16 18:13 32:3 48:11 52:4 far 9:19 24:5 50:13 faster 39:18 feedback 24:3 46:20,22 figure 33:20 34:3 49:18 filed 13:16 14:3 final 23:1,7 find 24:5 38:2 finds 10:9 49:14 fine 10:10,13 11:18 30:7 finish 10:7,10,12,15 20:23 firm 35:9 first 5:5 8:9 14:13 14:17 17:22 19:17 19:17 30:20 32:1 50:6,12 51:8 55:7 five 5:5 12:10 14:12 51:15 focus 34:23 folks' 40:5 follow 26:6 follow-up 26:4 38:6 53:10 follows 8:10 foregoing 54:3 55:6 55:8,12 format 27:7 52:1 forward 39:6,7 41:17 forwarded 12:9 51:6 found 38:4 four 38:19 51:14 fourth 52:15 fraud 5:10 12:15,19 12:21 13:1,3,6,13 19:11 21:11,15 48:21 free 13:18 19:19</p>	<p>25:14 27:24 28:19 29:15,20 30:5,11 30:11,14,22 31:5 34:15,20 35:6 36:4,17 fresh 11:17 24:16 25:11 front 9:2 33:6 further 7:8 55:15</p> <p style="text-align: center;">G</p> <p>gathered 15:22 gathering 22:20 general 20:2,6 generally 13:18 26:14 49:16 generate 22:25 generated 16:22,25 17:21,24 20:11 generating 25:14 gist 30:15 give 8:23 9:14 11:3 30:17 39:21 given 28:6 30:25 43:16 48:13 giving 9:20 12:4 go 8:24 12:25 19:16 20:10 24:7 37:20 37:24 38:10 39:18 39:20 40:9 43:23 43:25 48:3 50:21 52:15 53:1 goes 51:21 going 10:7 16:2 17:4 26:16,21 29:25 32:21 45:18 46:19 47:2 Good 8:14 Goodman 3:9 7:19 7:19,25 8:2,5,23 11:18 15:20 21:18 22:10 23:20 24:19 25:16,19 28:1,12 28:25 29:16 32:9 32:11,16 33:2 35:7,13,18 36:6 36:19,22 37:8,14 37:22 38:23 39:7 39:10,14,19 40:1 40:6 41:12,17 42:1,9,14,18 43:7 43:21,23 44:18 45:7,12,25 46:10 46:17,23 47:11,22 48:5,24 49:15 50:9,19,23 53:4</p>	<p>53:11,19 gotten 39:16 GOVERNMENT 1:4 2:4 great 9:19 32:17 groans 9:23 grunts 9:23 guess 10:23,24 11:4 guidelines 8:24 guys 7:21</p> <p style="text-align: center;">H</p> <p>H-O-R-I-T-A 8:18 HALL 1:2 2:2 hand 55:19 handy 32:13,15,16 happen 17:4 happened 15:9 hard 21:10 34:5 Hasan 27:5 heads 9:22 hear 7:21 34:2 36:14,21 41:9 heard 7:23 held 37:23 help 12:22,23 22:1 helped 15:12 helpful 42:24 hereunto 55:19 Hey 10:10 high 39:17 highest 49:9 hired 13:12 history 12:1 Hold 46:23 HomeAway 50:15 hopefully 39:18 Horita 1:11 2:15 4:3 5:16 8:8,14,17 14:5,15 15:22 33:5 34:2 38:2 39:3 40:9 41:22 42:21 45:18 46:19 47:2 50:25 53:7 54:9 Host 22:4,9 31:12 32:7 34:17 35:2 Hotline 5:11 12:21 18:11,13,25 19:7 19:10,11 20:2 48:21 households 25:14</p>	<p>ideas 22:23 25:1 identification 13:24 14:10 17:14 18:18 31:22 32:24 51:3 identify 22:2 illegal 28:6,17,20 30:1 imagine 39:19 impacts 26:20 implemented 26:3 important 9:14 10:14 impression 28:21 28:24 30:16,17 37:1 42:10,16 include 37:15 included 43:6 51:13 INDEX 4:1 indicate 7:14 indicating 44:12 information 19:12 20:12 26:8,14 29:4 31:2 44:12 44:16 50:19 initially 38:10 Injunctive 5:3 14:3 input 22:16,25 inquiry 42:19 inserted 33:21 instance 31:4 instruct 42:3,12 45:9,15 46:12,25 INSTRUCTED 6:1 intended 30:17 interested 55:16 interjects 19:3 33:22 43:22 interpret 9:24 interpretation 20:9 interruption 33:22 investigate 12:25 20:2 21:15 investigation 16:22 19:14,18 20:3,22 21:8,10 22:14 25:6 34:19,21,24 41:5 42:8 46:21 47:6 48:17 investigations 12:23 investigator 12:15 12:19 13:2,4,6,13 21:12 involved 20:19 issue 25:25 issued 41:22 42:25 43:6,11,17,18</p>	<p>issues 44:24 item 38:21</p> <p style="text-align: center;">J</p> <p>jar 11:6 JAY 3:4 4:5 Jenny 3:9 7:19 8:3 22:7 23:19 32:6 33:1 38:20 jgoodman@sandi... 3:11 job 9:19 10:15 Johnny 40:17 joke 40:3 judge 9:2,12 53:12 July 5:8 17:18 21:4 jump 51:25 52:6,10 June 41:25 43:2 jury 9:2,12 JUSTICE 1:2 2:2</p> <p style="text-align: center;">K</p> <p>K-N-I-G-H-T-E-N 51:9 K-R-I-S 17:18 K-Y-L-E 17:19 kept 44:16 knew 43:19 Knighten 5:15 51:9 52:2 know 10:12,21,23 10:24 11:5,10 12:2 14:20 15:3,5 15:20 16:13 17:4 24:9,12,15 25:10 25:13,21 27:21 28:4,16 31:1 32:6 33:20 34:3 35:19 36:9,10,13,23 38:20 40:7,15 48:9 50:13,14 52:17 knowledge 40:20 Kris 5:8 17:18 KRISTINE 3:9 Kyle 5:6,8,15 16:12 17:19,23 51:9</p> <p style="text-align: center;">L</p> <p>L-O-R-I-E 41:2 language 9:24 34:16 lapsed 45:21 laughing 40:2,3 Law 3:4,12 39:25 laws 20:7</p>
---	---	--	--	--

lawsuit 13:16 14:4	40:16	need 11:16 31:16	18:8,11 19:16	passed 35:20
lawyer 15:14	management's	32:14,15,20 39:21	20:1,21 21:20	passing 17:3
lawyers 24:13	40:12	42:21 53:11,17	22:11 23:24 25:8	penalty 7:11 9:10
lays 25:5	managing 21:12	never 11:7	25:12,13 27:3	54:2
lead 28:10	manner 7:13	new 13:5,11 35:20	29:10,25 30:20	people 10:11 21:20
leads 27:23	marathon 11:15	nod 9:21	32:4,10,25 33:2,5	40:15
learned 34:4	March 33:19 34:11	non-residential	33:16,20 34:25	Perfect 15:23
led 29:5 36:16	marked 5:2 13:23	25:15	37:12,21 38:9,12	perfectly 8:5 10:10
left 28:21	14:9 17:13 18:17	Nora 3:12	38:17 39:3 40:9	period 21:9,11
left-hand 18:21	31:21 32:23 49:8	noted 44:15,24	40:10,19,21 41:19	perjury 7:11 9:10
legal 22:19 24:20	50:2 51:1,2	notes 11:5 53:2	47:8 48:12,22	54:2
25:4,16 28:1,5,12	material 26:24	Notice 5:6 14:13	49:6,25 50:14,23	Perkins 40:17
28:25 29:16 35:7	matter 7:10	15:16	51:12 52:15,19,25	person 7:9 14:14
36:6	mean 9:25,25 10:11	noticing 7:16	53:4,5	16:6 55:15
legislation 35:20	17:3 35:1 49:12	November 14:4	Olympic 11:15	personal 11:25 12:1
let's 31:18 37:20,24	meanspirited 10:11	number 22:2 27:20	once 23:5	39:13,20
43:23 50:21 53:15	meant 11:14,15	27:21 31:1,7,7,8	OPEN 1:4 2:4	Peterson 33:1
letterhead 17:17	48:17	31:10,12 34:18,20	operate 35:22	phone 20:16
level 48:22 49:9	medical 11:25	35:9 37:16	operating 30:10	physical 12:3
levels 48:13	member 41:2	numbers 26:20 34:6	34:7 35:10	physically 7:6
lieu 7:9	memo 5:7 17:18	38:21,24	operations 25:22,23	pick 28:11,22
life 11:10 12:1	41:1,10 43:9		opportunity 9:7	picked 29:15 30:4
Line 6:2	memorandum		45:5,10,13	picking 10:1
listing 37:18	40:22 41:24 42:7	O	opposed 9:15 31:10	piece 24:14
listings 31:2,8,10	43:3,16	oath 7:9 9:1 54:3	34:5 48:21	place 55:9
33:18 34:5,11	memory 24:15	object 8:3	order 20:1	Plaintiff 1:5 2:5,15
liter 11:11	25:10	objection 21:18	other's 10:12	3:3
little 11:5 21:6	mention 17:3	23:23 24:19 42:1	ounces 11:8,10,11	Plaintiff's 13:23
39:18	mentioned 17:4,24	44:18 45:15 46:10	outcome 55:16	14:9 17:13 18:17
long 12:17 13:3	19:1 33:25 52:22	46:23 47:11 50:19	outside 24:19 41:15	31:21 32:23 51:2
14:17 20:21 23:4	mentions 18:3	objections 7:12		plates 21:13
23:6 38:17 45:21	Michell 5:8 17:18	23:22 35:13,18	P	please 7:14 17:12
longer 43:19 44:13	middle 51:7	occupancy 19:24	page 4:4 5:2 6:2	18:16 19:17 25:10
look 13:21 14:8	mind 24:24 36:2	29:7,12,20 34:6	15:1 16:3 17:23	33:14 44:1 50:1
16:3 17:11 18:2	42:22	occurred 43:5	18:2,4 19:17 24:8	50:22
18:15 20:4 21:2	minute 45:13	October 12:18 21:4	25:8 30:20 31:15	plus 51:14
21:22 22:25 25:8	minutes 36:14 53:2	office 3:8 12:15	32:1,1 33:12,16	PMQ 36:7
26:18 29:24 31:18	mishear 19:4	13:1,9 15:3,15,21	35:2 48:7,10,11	point 11:16 26:22
31:20 37:12 40:11	misspoke 19:4	16:21 20:18 21:25	48:12 49:3 50:6,7	28:6 30:8 31:15
40:21 41:19 44:7	Misstates 36:19,22	22:14,19 23:6,16	51:8,19,23 52:3,7	possibility 37:2
48:4 49:25 52:17	moment 33:14	23:19 26:1,1,6,19	52:10,16	possible 8:25 39:6
53:2	50:21	27:10 29:22 38:11	pages 5:3,5,7 14:2	possibly 31:3
looked 20:6	month 26:25 27:23	39:4,24,25 41:13	14:12 38:19 40:11	potential 24:20 30:9
looking 11:17 24:14	28:9 35:21	41:15,23 42:5,6	51:21,25 52:6,17	potentially 44:4,18
52:18	months 13:5 37:10	42:11 43:1,10,17	52:20,20	45:14
looks 11:11 14:16	morning 8:14 17:5	43:19 44:6,13,25	paper 24:14 27:7	precisely 10:21
Lorie 41:2	18:10 51:7	45:2,4,23 46:5,8	paragraph 19:18	prefer 39:14
lot 7:25	move 40:5	46:13 47:6,21	33:17	prepare 16:18
loud 24:13	Municipal 21:24	49:14	part 21:11	38:14
		Oh 50:18	participating 7:5	prepares 9:8
M	N	okay 7:21,24 8:1,2	particular 42:11	present 3:12 7:6
M-I-C-H-E-L-L	name 7:15 8:15,17	8:14,22 9:19	parties 7:11 22:24	20:14
17:19	18:4 51:6 54:6	11:14,24 12:7,13	55:17	pretty 37:8
Madam 53:17	named 39:4 55:10	12:19 13:8,15,21	parts 26:23	prevent 12:4
making 25:4	nature 43:4	14:7,24 15:1,10	party's 40:2	previously 37:9
management 13:1	necessary 54:4,5	15:14,19,23 16:2	Pasin 3:12	50:2
		16:9,13,18 17:22		

prior 36:22 47:15 47:17	question 11:19,24 22:5 28:5,19,23 29:3,25 30:2 42:22,23 43:15 44:1 49:2	record 7:15 8:16 14:2,12 17:16 18:20 31:24 33:23 37:20,23 39:23 43:23,25 44:3 50:4,21 51:5 53:1 53:5 55:13	49:6	San 1:2,4,7 2:2,4,7 3:8,10 5:10 7:20 12:14 17:17 21:14 21:14 22:8 55:2
priority 39:17 48:12 49:4,7,9	questions 8:6 9:5 10:19 15:24 16:7 53:1,8,8,12,13	redacted 44:9	reported 1:20 55:10	says 17:23 18:21 21:3 34:9 53:12
privilege 46:11	quickly 8:24 26:15	refer 28:19	reporter 2:17 7:5 7:21,24 8:9 9:6,23 10:15 19:3 33:22 43:22 53:18 55:3	scope 24:19 25:17 25:19 28:2,13 35:8 36:7 50:20
privileged 23:21 42:2,14 44:19,21 45:7,14 46:14,15 46:16,24	quote 34:9	reference 40:11	reporting 7:7,13	screens 11:18
probably 8:22 11:9		referenced 50:2	reports 12:21 25:25	se 28:17
problem 49:12	R	referred 36:24	request 11:19 16:24	sec 41:20
proceedings 55:14	read 14:24,25 19:18 24:8,11,13,15,17 25:10,12 26:15,24 27:22 28:8,21,24 33:23 34:10,17 35:1 36:15 41:6 44:1,3 51:13 54:3	referring 19:9 33:7 49:3	require 10:19	second 13:12 15:1 24:23 28:19 37:20
process 18:3 20:11 23:4 26:5,10 29:22 38:6	read-on 7:4	refers 18:11 33:18	residences 37:16,19	Section 33:17
procurement 5:13 22:8 33:9	really 10:6 23:8 25:23 28:5 51:7	reflect 39:23	residential 19:24 29:7,12,20 31:6 34:6	Sections 21:24
produced 20:7 23:19,20 38:21	reason 9:13 12:2,5 35:16 36:3 41:23 42:6 43:1	reflected 43:2,20	respect 55:18	see 11:10 17:22 19:21 26:2 31:18 33:16 34:12 37:12 40:13 41:3 51:10 52:1,7,11
product 23:1,7	reasonable 8:6	refresh 24:9	respond 46:14	send 22:17,19 32:14 39:12,20 53:19
production 33:1	reasons 44:6	refreshed 48:9	responded 26:22 46:15	sending 39:10
prohibited 29:22	recall 14:18 23:11 23:14 24:6 27:3,9 27:11,14 31:14 43:4	refuse 25:15 31:6	responding 47:18	senior 12:15,19 13:3,14
prompted 19:13 49:12	receive 12:10 14:17 24:3 26:8 48:23	regarding 16:8 20:8 35:21 38:5 44:23	response 22:18 37:9 40:12,16,18 46:9 46:14 47:5,20	sent 12:8 15:14 22:9 33:7 39:17 52:2
proper 42:19	received 14:24,25 19:11,19 20:25 33:8 37:5 38:4,9 46:20 47:20 49:7 51:12	regulation 21:23	responses 9:21	sentence 10:12 33:17
protocol 18:6	receiving 29:20 30:11,14,22 34:15 34:20 35:6	regulations 20:7	responsive 16:23	September 13:12
provide 15:2,12 26:13 36:4,17 46:5,8	Recess 43:24 50:24 53:6	related 41:15 55:17	rest 11:17	sequence 49:19
provided 15:3,5,13 15:15,18,21,22 16:22 23:11,14 26:11 27:3 29:4 31:7 34:22,25 37:9,10 40:17 44:7 45:11,22 46:21 47:5 50:25	recipient 39:4	release 23:7	restroom 11:16	series 26:19
provider 19:11	recognize 14:5 17:20 18:23 40:23 50:8	Relief 5:4 14:3	results 25:5	serious 49:13,20,21 49:21,22
provides 25:13	recognition 10:21 24:9 48:10	Remedy 5:4	retracted 43:11 44:9	seriousness 49:20
providing 40:16 45:23	recommendation 25:9 26:4,10,23 38:6 48:22 49:4,5 49:6,10,13	remember 14:21 23:9 41:14 46:2	review 9:7 10:2 11:21 12:21 15:10 22:19 23:4 25:4 38:14 45:2 53:20	serve 23:22
public 21:25 43:9 43:16 44:25	recommendations 26:1,2,7 48:13,23 52:21	Remote 2:15 3:6,11 7:4	reviewed 15:13 16:21 18:8 25:3	service 19:20 25:14 26:21 29:21 30:11 30:12,14,23 34:16 36:4,18
publicly 44:8,15		remotely 7:8	reviewing 22:17 34:22	services 20:10,13,15 21:21,23 25:22 26:9,12,15 27:6 28:9,16 29:5,6 36:16,24 37:6,19 38:5 52:22
published 20:25 43:10 44:8		rental 27:25 29:1 33:18 34:11 37:3 37:17	rights 13:12 14:7,23 19:2 21:6,7 30:16 30:19 32:21 36:3 38:25 39:11 47:8 47:16,25 52:9 53:8	servicing 28:15
pull 32:19 39:22		rentals 13:18 22:2 26:18 27:14 28:11 28:16,23 30:10 35:22 36:25	roll 9:22	session 11:15
purposes 10:13		repeat 42:21,23	room 7:7	set 55:19
put 18:4 29:10		report 5:9 16:8,24 17:21,22 18:1,3,7 18:9,11,12,13,21 18:25 19:8,10 20:2,12,22,25 21:1,3,15 23:8,9 23:12,15 24:4 29:11,14,18,23 30:3,8,15,18,20 36:1 41:11,22,25 42:25 43:3,6,18 43:18,20 44:5,16 45:1,6,22 46:6,9 47:21 48:21,23	rough 10:25,25 11:1	seven 18:2
putting 30:7		remotely 7:8	roughly 13:5 14:21 20:24	shared 23:5
Q		remotely 7:8	rules 20:8,9	short-circuit 15:24
qualified 14:14 16:6		remotely 7:8	rut 9:25	short-term 13:18
qualify 30:11 31:3,6 37:3		remotely 7:8		
quantity 10:20		remotely 7:8	S	
		remotely 7:8	safe 50:5	

19:23 22:2 26:18 27:14,24 28:11,15 28:22 29:1,7,12 29:19 30:10 33:18 34:10 35:21 36:25 37:3,16 shorthand 2:17 55:3,11 shoulders 9:22 shrug 9:22 shy 21:6 sic 18:23 sign 9:9 53:20 signature 18:5 signed 32:1 50:7 significance 49:19 Simultaneously 50:17 sir 8:19 16:2 17:20 18:23 19:7 29:18 40:5 47:15 48:10 49:2 50:8 sit 36:3 53:11 sitting 38:24 six 13:5 slightly 43:15 smoothly 8:24 Sonia 1:20 2:17 55:3,23 soon 40:6 sorry 14:20 25:9 31:17 36:22 46:13 50:18 sort 11:14 12:3 17:5 49:19 sounds 14:23 52:9 source 31:1 34:18 speaking 13:18 50:17 specific 23:10 specifically 25:21 36:9 speculation 36:8 43:8,21 spell 8:15 Spinning 21:13 spontaneity 11:6 spreadsheet 37:18 52:1,11 spreadsheets 37:15 Ss 55:1 staff 20:10,15,17 stand 24:18 41:24 42:7 47:16 standing 43:2 stands 19:23	start 20:22 22:23 started 12:7 starts 48:6 51:7 state 1:1 2:1 8:15 55:1,4 stated 23:22 30:24 statement 21:16 23:2 30:6 35:1 49:23 statements 10:7 states 19:18 30:20 stating 7:14 stipulated 7:20 40:1 stipulates 7:18 stipulating 53:15 stood 43:19 44:13 stop 26:16 stopped 26:17 Street 3:5 STRO 19:19,23 30:4,13,22 34:20 35:5,25 36:5,18 51:13 subject 45:1 Subpoena 15:16 subscribe 54:6 substantive 17:7 23:16 Suite 3:5,9 SUPERIOR 1:1 2:1 supervisor 16:9 supervisors 22:24 sure 8:5,17 10:2 14:25 15:17 24:25 33:15 37:8,22 38:6,23 sworn 8:9 55:7 system 12:22 19:12 39:24	32:7,11 38:3,7 48:18 Taxpayer 5:4 Technical 33:22 tell 9:1 11:7,24 12:13 17:25 20:1 36:15 38:24 46:21 47:4 tells 33:12 terms 20:2 22:20 49:20 testified 8:10 47:19 testify 12:6 14:14 55:7 testifying 16:14 testimony 7:10 12:4 36:22 47:8,15,17 55:13 Thank 48:3 Thanks 15:23 19:5 39:9 41:19 53:5 thereof 54:6 thing 10:6 17:5 48:18 things 9:20,23 20:5 24:13 29:11 think 13:13 14:6 23:15 24:23 25:1 25:3 28:4 30:16 34:1 44:9 45:12 45:13 50:4 52:25 third 16:3 33:17 third-party 19:11 thought 16:23 31:17 thousand 27:19 thousands 27:21 30:3 35:17 three 26:23 49:19 49:21 time 10:20 18:8 20:4,24 28:6 32:5 36:21 40:5 43:17 45:21 46:3 50:12 53:14 55:9 timeframe 23:10 timing 16:17 title 12:13 13:5,11 titled 5:10 51:13 today 8:4,24 10:19 12:4,6 14:15 16:5 16:14 24:18 35:5 47:19 50:12 today's 8:23 11:14 15:2,6 16:16,18 17:2,8 38:14 47:4	50:1 52:22 told 42:5 top 18:2 51:6 topics 16:4,7 total 51:15 tough 7:24 tradition 18:6 transcribed 55:11 transcript 9:8,11 10:2,16 11:20 53:17 55:13 transcription 55:12 trash 13:17 19:20 20:8,11 25:14 26:15 27:24 28:11 28:20,22 29:6,15 29:20 30:4,11,12 30:14,22 31:5 34:15,20 35:6 36:4,17 37:2 Treasurer's 26:19 trick 11:14 true 30:6 34:14 47:19,25 55:13 truth 9:1 55:7,7,8 truthful 9:14 47:10 try 29:10,25 trying 10:1 49:18 Tuesday 1:14 2:16 7:2 tumbler 11:8 two 21:6 38:19 49:19,20 52:20 53:1 two-page 18:20 41:1 type 49:13 typed 9:6	36:5,18 37:3 unmute 8:1 update 51:14 52:21 Upland 3:5 upper 18:21 use 11:16 30:1 35:25 43:13 44:10 48:20
				V
				vacation 13:18 27:14,25 28:11,23 29:1 37:17 Vague 43:7 48:24 49:15 valid 25:3 44:5 vary 23:8 vendor 22:1,3 verbal 9:21 verbally 7:10 verified 34:6 version 43:12,12 videoconference 3:6,11 Vista 1:13 2:16 7:1 VOLUME 1:12 2:15 Voluntary 5:12 31:24 50:5 VS 1:6 2:6
				W
				waiting 40:4 waive 7:12 want 10:23 11:24 12:1 24:11 32:5 35:25 40:5 47:8 47:15 wanted 53:13 wasn't 34:23 44:9 waste 5:4,10 32:5 40:5 way 10:11 29:10 55:16 we'll 16:4 51:25 53:2 we're 9:6 24:14 31:18 32:21 40:4 53:2,14,15 we've 51:1 website 44:8 week 14:19,21 22:9 went 38:10 whatsoever 34:19 whereof 55:19 wife 17:4

<p>wife's 11:5 wish 31:8 wished 30:24 withdrawn 15:4 witness 4:2 7:9 24:23 25:1,21 28:4,14 29:3 32:7 32:19 34:1 35:9 35:14,19 36:9,23 39:12,17,22 41:14 42:5 43:9 44:4,23 46:2 47:23 49:16 50:10,18 54:6 55:6,19 witnesses 9:20 11:3 24:13 word 30:1 38:18 48:21 51:13,18 52:16 words 23:4 29:21 work 39:10,14 work-product 44:25 worked 12:17 working 21:8 wouldn't 12:5 wrap 53:3,15 write 20:22 writing 22:24 writings 15:2 written 21:24 23:5 23:11,14,18 24:2 24:3 27:1,3 43:16 45:23 46:9,21 47:5,20 wrote 18:3,6 30:24 36:1</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>yeah 17:7 24:12,25 32:16,19 33:9 years 21:6 Yousef 27:5</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>Z-A-P-F 41:2 Zapf 41:2 Zoom 2:15 3:6,11</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 1:7 2:7 5:3 13:22 13:23 14:2,5 16:3</p>	<p>49:4,4,7,9 51:22 1,000 1:7 2:7 10 5:8 17:18 21:4 36:14 10:20 48:1 10:40 2:16 53:21 1100 3:9 111 3:5 12 11:10 12-29-20.docX 51:14 1200 3:9 126298451 5:9 18:21 13 21:4 14 5:3,5 15 14:22 36:14 48:7 16,000 19:19 30:22 31:2,12 33:12 34:18 16,363 33:18,20 34:10 17 5:7,7 17-page 17:16 18 5:9 19th 38:13 1st 33:17</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 5:5 14:8,9,12,15 16:2,24 18:23,25 52:2 2-page 52:16 2011 12:18 2014 13:7 2017 21:1,4 41:25 43:3 2018 33:19 34:11 2019 5:8 13:12 14:4 17:18 21:5 2020 38:11 2021 1:14 2:16 7:2 38:13 54:7 55:20 233 51:25 234 51:25 52:3 24 11:11 25 14:4 26 5:3 14:2 27 1:14 2:16 7:2 28th 55:20 29th 38:11</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 5:7 17:12,13,16,20 19:9,14,16 21:4 24:7 25:9 26:7</p>	<p>33:16 34:15 35:2 40:9,22,25 48:3,6 49:3 52:8 31 5:12 32 5:13 358 52:6 359 52:6,7 37-2019-0006291... 1:5 2:5 3rd 3:9</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>4 5:9 6:3 18:16,17 18:20 19:7,10,13 21:3 24:8 25:9 33:17 51:19 52:12 52:17,20 4-page 31:24 50:5 40-page 32:7 33:9 47 6:3</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 5:12 25:8 31:20,21 31:24 40:11 49:3 50:1,4,8,12 52:17 52:20 51 5:15 516 52:10 517 52:11,12 533-5919 3:10</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>6 5:13 32:21,23 33:7 35:3 40:11 51:23 619 3:10</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>7 5:15 51:1,2,5,19 52:3,16,20</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p>8 4:5</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>9 41:25 43:2 9:11 2:16 7:2 909 3:6 91786 3:5 92101 3:10 949-7115 3:6 9854 1:20 2:17 55:4 55:23 99 3:5</p>
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