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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

JEFF BECK, individually; AMY ) Case No.  
WEINBERG, individually; ZAC ) CV-22-44-M-KLD  
WEINBERG, individually; ALTA ) August 22, 2023  
VIEWS, LLC; and on behalf of a )  
class of similarly situated )  
persons or entities, )  
 )  
Plaintiffs, )  
 )  
-vs- )  
 )  
CITY OF WHITEFISH, a Montana )  
municipality, and DOES 1-50, )  
 )  
Defendants. )  
 )  
CITY OF WHITEFISH, a Montana )  
municipality, )  
 )  
Third-Party Plaintiff, )  
 )  
-vs- )  
 )  
FINANCIAL CONSULTING SOLUTIONS, )  
INC., )  
 )  
Third-Party Defendant. )  
 )  
 )

BEFORE MAGISTRATE KATHLEEN L. DeSOTO  
FOR THE DISTRICT OF MONTANA

Taken at Russell Smith Federal Building  
Missoula, Montana  
Tuesday, August 22, 2023  
1:33 p.m. to 4:00 p.m.

Proceedings recorded by machine shorthand  
Transcript produced by computer-assisted transcription

## A P P E A R A N C E S

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## 1 A P P E A R A N C E S (contd.)

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1 TUESDAY, AUGUST 22, 2023

2 THE COURT: All right. This is the time and place  
3 set for oral argument on Plaintiffs' motion to certify class  
4 in Beck versus City of Whitefish, Whitefish -- Whitefish  
5 versus FCS Group, Inc., at CV-22-44-M-KLD.

6 Why don't we begin with the Plaintiffs. Please  
7 introduce counsel and -- well, tell me who's going to be  
8 arguing.

9 MR. KOVACICH: Good afternoon, Your Honor.

10 Mark Kovacich on behalf of the Plaintiffs, and I will be  
11 arguing today.

12 THE COURT: Okay.

13 MR. BRADY: Caelan Brady on behalf of Plaintiffs.

14 MR. WAVRA: Good afternoon, Your Honor. Riley Wavra  
15 on behalf of the Plaintiffs.

16 THE COURT: Thank you.

17 And for the City of Whitefish.

18 MS. QUINN: Marcel Quinn on behalf of the City, and  
19 I'm doing argument today.

20 THE COURT: Okay.

21 MS. JONES: Natasha Jones on behalf of the City.

22 MR. LEONARD: Tom Leonard on behalf of the City.

23 THE COURT: FCS.

24 MS. QUINLAN: Jori Quinlan with Hall Boone Smith on  
25 behalf of FCS.

1 MR. DRENNON: Your Honor, Baxter Drennon for FCS,  
2 and I'll be doing the arguing.

3 THE COURT: All right. I believe at least one party  
4 has exhibits; is that accurate? Or potentially has  
5 exhibits?

6 MS. JONES: (Nods head.)

7 THE COURT: Okay. Do you have enough for the clerk  
8 to have a copy and me as well?

9 MS. JONES: (Nods head.)

10 THE COURT: So, Sarah, please proceed that way.

11 All right. Mr. Kovacich.

12 MR. KOVACICH: Thank you, Your Honor. The purpose  
13 of Rule 23 and certifying a class action case is, of course,  
14 to allow parties access to justice where they might  
15 otherwise not be able to bring their disputes in Court, and  
16 there are cases that fit that mold because the individual  
17 amounts in dispute don't justify the effort of the  
18 litigation, but collectively bringing the claims together on  
19 behalf of a class makes the Court hearing the dispute  
20 practical and realistic.

21 In this case, the City of Whitefish overcharged more  
22 than 300 residents, probably closer to 400 residents, for  
23 water and sewer impact fees, and those charges not only  
24 violated the federal constitutional rights of those  
25 citizens, but also their rights under Montana state law.

1        The individual amounts on a per-property basis would be  
2 only a few thousand dollars, but the collective amount that  
3 the City overcharged its citizens is in the multiple  
4 millions of dollar range.

5        For those reasons, this is the exact type of case  
6 contemplated by Rule 23 where the individual claims could  
7 not realistically be brought, but that a dispute can be  
8 heard in a collective fashion as a class action.

9        The Defendants make several arguments to oppose class  
10 certification here disputing virtually every element of the  
11 test that the Court has to go through, going so far as to  
12 dispute numerosity, where we undisputedly have 3- to 400  
13 members of this class and very clear law in the Ninth  
14 Circuit and in this district that would define numerosity  
15 under those circumstances.

16       Rather than going through the elements -- and I'm happy  
17 to discuss this however the Court would like -- but all of  
18 the Defendants' arguments can really be summarized as an  
19 effort to emphasize differences among class members, but the  
20 reality is those differences are either insignificant or  
21 completely nonexistent.

22       The real disputes in this case are all issues that are  
23 common to the entire class. Every manner in which the  
24 Plaintiffs allege that the City overcharged resulted in an  
25 overcharge that applied to all class members who actually

1 paid these fees.

2 The -- Of course the individual amounts that people were  
3 overcharged does vary, they're not the same, but they can be  
4 easily calculated, and the manner in which they would be  
5 calculated is not the subject of dispute here.

6 Now, the Defendants may raise disputes as to how  
7 calculations might be performed, but that is not really  
8 what's at issue in this case.

9 Once determinations are made about how the engineering  
10 evaluations were done and applied and the project costs that  
11 were included, those are all figures and calculations that  
12 would be applied across the board to the class members.

13 And, in fact, those individual calculations have already  
14 been performed by experts retained by the Plaintiffs. And  
15 performed in the same manner that the City performed them  
16 when they originally came up with the amounts to charge,  
17 adjusting only for the issues that are in dispute, which is  
18 costs to be included and the engineering evaluation of how  
19 to apply the formula that was used.

20 THE COURT: So, Mr. Kovacich, can I ask you a  
21 question? I think that leads me to maybe the most  
22 significant jumping-off point that struck me while I was  
23 preparing for this today, and that is that it seems that  
24 there are a few different ways the Plaintiffs are  
25 approaching their case, both in terms of the liability side,

1 I guess I would say, and the damage side.

2 And my first impression when I was getting ready --  
3 well, before I started reading the briefing, just reading  
4 the Complaint and having worked, of course, on the motion  
5 for judgment on the pleadings, is that it seemed to be much  
6 more -- the argument seemed to be much more based on the  
7 projects. I think they were referred to as, let's see,  
8 phantom, ineligible and improperly calculated future  
9 projects.

10 And then as I started getting ready for the argument, it  
11 seems that the Plaintiffs have maybe -- I don't want to say  
12 changed, maybe distilled or honed their argument a little  
13 bit differently and now it seems to be that the resolutions  
14 from the moment they were enacted were not in compliance  
15 with Montana law, therefore, giving rise to a taking at that  
16 time.

17 And the reason I bring that up is that that issue of  
18 when a person or an entity would be entitled to make a  
19 takings claim sort of permeates all of the issues raised by  
20 the Defendants in terms of individual issues predominating  
21 as opposed to class issues. So could you address that,  
22 please.

23 MR. KOVACICH: Yes, Your Honor, I can, and the  
24 Complaint -- original Complaint filed in this case  
25 references both the projects that the Court made mention of

1 as well as the calculations and the application of the  
2 collection chart that involved the engineering work done by  
3 FCS and a prior entity referred to as HDR, I think.

4 So those issues have been in the case from the get-go,  
5 both, and they remain. Both -- The Plaintiffs' allegations  
6 are that the overcharges resulted both from the improper  
7 calculations in the maximum daily use for -- of water for  
8 property is -- is a very big issue.

9 The City used the chart that it had come up and  
10 previously used for impact fees wrong, and then in addition  
11 to that, they included in their calculations projects that  
12 were not appropriate to be considered.

13 And so all of those issues have been there from the  
14 start, and it's the Plaintiffs' claim -- and this is also in  
15 the Complaint, and I can give the Court the citations to the  
16 paragraphs for this at 2932 -- the allegation as to those  
17 projects was that they were not properly included in the  
18 costs that would be used to calculate impact fees right from  
19 the start.

20 Under federal constitutional authority and the Montana  
21 state law at issue, a municipality can't just throw phantom  
22 costs for made-up or unrealistic projects and then charge  
23 fees for them.

24 THE COURT: But I -- Well, let me -- let me stop you  
25 there because that's sort of where I have an issue and where

1 I think the Defendants have an issue in terms of how you --  
2 how and when a claim might arise, because a municipality,  
3 when deciding how and when to create impact fee resolutions,  
4 or what have you, certainly the projects aren't done  
5 already; they're anticipating doing them. So they're almost  
6 always going to go future projects. It's possible they  
7 could be in the works or, you know, under construction, but  
8 they're going to be future.

9 And when I read these paragraphs, you know, To date  
10 little or no money -- this is paragraph 28.1 -- To date  
11 little or no money has been spent on the South Water  
12 Reservoir Project.

13 And then I think the paragraph above describes how it's  
14 evolved and changed over time, including retitling, and then  
15 with the solar arrays -- and that's for 19- -- Resolution  
16 1915, and I'm looking at paragraph 31 -- that they -- the  
17 City has spent little to no money on the solar array project  
18 and upon information and belief, it has scrapped the solar  
19 array project entirely.

20 So -- so -- And then the following paragraph talks about  
21 the Planning Department conducting a feasibility project --  
22 feasibility study on the project in late 2019 that did not  
23 produce promising results.

24 So when I read that altogether, the understanding that I  
25 have is that the City plans on these projects, and there can

1 be a variety of reasons why they haven't been done to date  
2 and we can talk about that, but that moves the needle in  
3 terms of timeline, in my understanding, and that would also  
4 then change to a more individualized analysis of whether it  
5 was appropriate or not to include these projects, because  
6 unless there's a determination that from the moment these  
7 resolutions were passed, they were facially not compliant  
8 with the law, there's some period of time, at least,  
9 afterwards where it's possible that these projects may go  
10 forward. So, therefore, at least as to the argument  
11 regarding phantom, ineligible and so forth, that wouldn't  
12 apply.

13 And then if somebody has a -- has an impact fee imposed  
14 upon them later, after there's more evidence, arguably, to  
15 whether these are feasible projects or not, that would be a  
16 different analysis.

17 And that's where I'm getting hung up on the -- the  
18 individuality of each claim and whether that would  
19 predominate over class claims.

20 MR. KOVACICH: Well, a couple of things, Your Honor.  
21 So under the law, to include those projects initially for  
22 the impact fees it would pay, they had to be reasonable  
23 estimates of costs to be incurred because of the  
24 development.

25 THE COURT: Uh-huh.

1 MR. KOVACICH: And it's the Plaintiffs' allegation  
2 that they were not, and -- and so they should not have been  
3 included right from the onset.

4 Now, there are allegations about what happened later,  
5 and that speaks to the fact that these were not projects  
6 that were necessary because of that development, but we're  
7 five years later, nothing's happened on them, and they've  
8 continued with development.

9 Development from five years ago very clearly didn't  
10 cause the need for the cost of the solar array, and that  
11 reality is informed by the fact that they never did it and  
12 they're not going to do it.

13 Now --

14 THE COURT: But that's a -- that's a retrospective  
15 view, not a prospective view or even a current one, right?

16 So we can look today and say, well, five years ago they  
17 said they would do this, it's 2023, they haven't done it,  
18 you can make inference, arguably, that it's not going to  
19 happen.

20 But in 2018, which is when the impact fee resolution is  
21 passed and then it goes into effect in January of '19, isn't  
22 that the time period that we have to look at for whether  
23 it's reasonable?

24 MR. KOVACICH: Well, I think we could look at it at  
25 both times, and it could be found improper at either/or both

1 times.

2 Another important issue here, though, is that fee was  
3 paid once by our clients and the putative class, and those  
4 costs were included in that fee.

5 Now, I'll agree that the issue as to the language of  
6 that state statute that we're going to talk about becomes  
7 more problematic with the -- under the theory that a cost  
8 was properly included to begin with and later became  
9 improper, and that's not the allegation here. Our argument  
10 is it was improper all along.

11 Nonetheless, when it's found later to be improper, the  
12 person who paid for it is our clients and the putative  
13 class, and they have rights under the Constitution that  
14 can't be abrogated by a poorly worded state court statute.  
15 They're the ones who paid that cost.

16 And the whole concept of the taking claim under the  
17 Nollan/Dolan standard that the Court addressed on the motion  
18 for judgment on the pleadings is that a municipality cannot  
19 extortionately charge fees to a party seeking to develop his  
20 or her property. That is what is considered to be a taking.

21 So the developers, the people who originally paid fees  
22 to develop the property, are the ones who suffered that  
23 taking, even if it was because there was a charge included  
24 at that time that five years later they abandoned and it  
25 clearly becomes something that should not have been

1 included.

2 It would not -- they would not be compensated for that  
3 taking of their property that occurred by the City paying  
4 some subsequent property owner who just happened to buy the  
5 property for market value just like they could've bought any  
6 other property that wasn't subject to impact fees in 2019 or  
7 later.

8 THE COURT: But for the sake of argument,  
9 Mr. Kovacich, if -- and I'm not trying to say that you agree  
10 with this because I know that you don't -- but for the sake  
11 of argument, if the impact fee was appropriate from January  
12 of 2019 to December of 2019, when -- when it sounds like, at  
13 least as to the solar array, for example, there was a  
14 feasibility study done that indicated that it was not very  
15 viable, and the change in that viability, at that time, the  
16 entitlement to a refund would arise, and if a property owner  
17 had sold the property in the interim time period, wouldn't  
18 it both be due and refundable after the property owner had  
19 sold it, even though the property -- the original property  
20 owner had paid for the impact fee?

21 MR. KOVACICH: On that example, Your Honor, I agree  
22 that the refund would be due later. And I think that  
23 creates a more complicated issue than the Court needs to  
24 resolve here because the allegation is that those charges  
25 shouldn't have been included from the outset and just like

1 the other improper charges, they've been due since they were  
2 improperly collected, and under the Court's example where  
3 something clearly becomes refundable later, there's a  
4 problem with the language of that state court statute, but  
5 that doesn't mean that the person who paid that fee and  
6 suffered that loss is not the one entitled to a remedy under  
7 the federal Constitution or other state law theories.  
8 They're the party that was damaged by it.

9 THE COURT: So from your perspective, it doesn't  
10 make a difference at all who owns it; it's the party solely  
11 that paid it regardless of whether the appropriateness or  
12 inappropriateness of the impact fee is -- is certain at the  
13 time they paid it; is that correct?

14 MR. KOVACICH: Our claim in this case is that the  
15 fees were improper when collected for all of the reasons  
16 alleged in the Complaint, and for that reason, the parties  
17 who are entitled to damages for those fees are the parties  
18 who paid them.

19 If we change the scenario and say that we're addressing  
20 something that becomes refundable later when someone else  
21 owns the property, there is a difficult problem with the  
22 language of that state court statute saying when the refund  
23 is due. And --

24 THE COURT: How do you address that, because that's  
25 something we have certainly struggled with and just -- in my

1 mind, the statute is not ambiguous; I think it says what it  
2 says, I think it's pretty clear, so I think the real issue  
3 comes down to when it is due to be refunded.

4 And so if we find ourselves in a situation where it is  
5 due to be refunded after ownership has changed, how do we  
6 reconcile what seems to be a tension between takings law and  
7 the state statute?

8 MR. KOVACICH: Well, let me back up and just say I  
9 think part of the problem is the language of the statute is  
10 not clear for the Court just illustrated, it begs the  
11 question of when the refunds are due.

12 And the defense emphasizes that it could have said the  
13 refund goes to the party who paid it. It could just as  
14 easily say the refund goes to the owner of the property at  
15 the time the Defendant determines that it owes it or that a  
16 Court determines that it owes it. It doesn't say that  
17 either. So the question is when is it due.

18 Even with what the Defendant has agreed to do in this  
19 case it's problematic. They've sent letters out to property  
20 owners talking about a process whereby they might be  
21 entitled to a refund.

22 Well, that process alone has drug out for a year now.  
23 Ownership has changed again on some of these properties,  
24 including some properties that were owned by class  
25 representatives.

1        So the -- on the Defendants' theory, I guess, a refund  
2 is due when they decide that a refund is due, or is it not  
3 due until there's a Court determination that a refund is due  
4 or after an appeal?

5        I think a better and more workable interpretation of  
6 that statute that is more consistent with the federal  
7 constitutional law that the entire statutory scheme was  
8 intended to address is that it's due when it's improperly  
9 charged, and the -- it's very clear under the federal cases  
10 that are cited in our briefing, the Knick case, the --

11            THE COURT: But Knick doesn't address the issue of  
12 damages; Knick addresses when you have the ability to bring  
13 a takings claim, so that's a slightly different analysis,  
14 isn't it?

15            MR. KOVACICH: Well, under Knick, Pakdel, Koontz and  
16 other cases, it's very clear that the taking occurs at the  
17 time -- that the right to a remedy arises at the time of the  
18 taking.

19            And in an exaction case the taking occurs when the  
20 municipality improperly charges a property owner and  
21 conditions the use of the property on paying that charge.

22            And in this case, our class, the defined class of people  
23 who actually paid these improper fees, are the parties that  
24 suffered the taking and the parties that should be  
25 reimbursed upon a determination that the charges were

1 improper.

2 THE COURT: So if there's ultimately a decision or a  
3 determination either on summary judgment or by a jury that  
4 the resolutions themselves are not appropriate -- were not  
5 inappropriate, I'm sorry, but that things happened later in  
6 time that made the impact fees then appropriate, so, in  
7 other words, everything is fine in 2019 when these are in  
8 effect and for some time -- and I'm kind of focusing on the  
9 phantom -- what is it --

10 MR. KOVACICH: Right, if it --

11 THE COURT: -- phantom, ineligible, improperly  
12 calculated. So if everything is fine until those projects  
13 get scraped, or -- or, arguably, you can say they are  
14 scraped because it's been five years, isn't that -- I know  
15 that payment has already been made, but that's the  
16 determination of when it was wrong.

17 Prior to that, there was no determination that it was a  
18 wrongful exaction. So when there's a wrongful exaction,  
19 that's when the entitlement to refund arises; is that  
20 correct?

21 MR. KOVACICH: It is correct, but the party who was  
22 damaged by that exaction is still the party who paid it.  
23 It's not some subsequent property owner that just bought a  
24 property for fair market value in Whitefish.

25 THE COURT: Unless they passed it through.

1 MR. KOVACICH: Well, yeah, there's no evidence -- no  
2 credible evidence of those charges being passed through.  
3 Even under the defense theory, there's -- there's literature  
4 that suggests that taxes and things like that can become  
5 part of built into the value of property. It's not all of  
6 it.

7 And in this case, we're talking about a small subset of  
8 properties for which impact fees were paid over a  
9 couple-year period.

10 If I go to buy a property in Whitefish and I have two  
11 equal choices in all respects except one was built in 2018  
12 and one in 2019, I'm not going to pay an extra five grand  
13 because the developer incurred an impact fee.

14 THE COURT: So, but like let's look at Alta Views  
15 and -- I'm trying to remember the other name of the very  
16 large developer that had multiple condominiums --

17 MR. KOVACICH: So that's -- that's Alta Views.

18 THE COURT: Okay. And there was another one in  
19 there too, but, I mean, those are properties that were  
20 developed by a developer individually, or a company or what  
21 have you, and then marketed and, assumably, the costs in  
22 bringing those properties to market were built into the  
23 market price. I mean, I think that's a reasonable  
24 assumption to make.

25 And, you're right, at this stage I have no evidence of

1 it, but that's my point, is that if there is a argument  
2 about whether those costs were passed through to the  
3 ultimate owner and consumer, isn't that an individual look  
4 that we have to take that's going to distract from any  
5 class -- any efficiencies that we might have from a class  
6 action?

7 MR. KOVACICH: Well, I don't think it is, Your  
8 Honor, because the -- again, the claim is that the charges  
9 were all improper when paid. If there's some scenario where  
10 it's determined that the fees became improper at a later  
11 date, under our theories and our claims, the party that was  
12 damaged by that, entitled to compensation for it is -- would  
13 still be the class members who paid it.

14 Now, what that means in terms of a current property  
15 owner and the language of that state court statute is a  
16 problem that would -- the Court would have to resolve in  
17 this case.

18 The question is whether the property owners who paid  
19 those fees are entitled to damages under the theories that  
20 they've pled, and our position, even under the scenario  
21 which I don't agree with, that the charges were proper to  
22 begin with and found improper later, our claim would still  
23 be that the party who suffered the harm by paying the  
24 improper charge is who is entitled to the compensation.

25 THE COURT: So what would happen -- and I agree,

1 it's not something that we need to decide here today and  
2 probably not something for the Court to decide at all,  
3 necessarily -- but what would happen if there was a finding  
4 or a determination ultimately that it's an improper --  
5 improper impact fee; it should be refunded; it should be  
6 refunded to the owner at the time -- or whoever bore the  
7 cost, whether it was the contractor, initial owner or what  
8 have you, and then the current owners say to the City, I'm  
9 reading this statute. It says I get the money, you didn't  
10 pay me the money, I'm going to sue you for that?

11 I mean, that's not an outlandish outcome if -- if what  
12 you say is correct. And then how -- how would that be  
13 addressed?

14 MR. KOVACICH: That scenario is problematic, and the  
15 City would just have to defend and address those claims if  
16 they were brought in a separate proceeding.

17 It's no more problematic than to say that, as they're  
18 saying now, they're just going to pay refunds to people who  
19 didn't incur those costs and are not the party that suffered  
20 a constitutionally recognized loss by paying extortionate  
21 impact fees. That's also a problem.

22 If the class isn't certified and they pay some property  
23 owner \$5,000 that was actually paid by Alta Views,  
24 there's -- that creates a claim by Alta Views as well.

25 So I think the statute using the language "when due"

1 could be problematic. I don't think it's problematic in  
2 this case because all of the allegations of improper charges  
3 were problems right from the start.

4 And the biggest problem, like in terms of quantifying  
5 the loss, the most substantial overcharge comes from the way  
6 the formula was used in the calculation of maximum daily  
7 demand for a household on a particular size meter in  
8 Whitefish, and there can't be any argument that that's  
9 something that arose later. That was a problem, without any  
10 question, right from the start.

11 And these other examples that we've now spent some time  
12 on, the handful of projects, there's also an argument and an  
13 allegation in the Complaint that they did not meet the  
14 criteria that has to be met for inclusion in impact fees  
15 right from the start.

16 THE COURT: So would it be possible, Mr. Kovacich,  
17 to -- because when I read the proposed class and then the  
18 definition of the class claims -- and, obviously, we can  
19 talk about that later -- but is it possible that a remedy to  
20 this whole issue is having a liability class solely based on  
21 whether the impact fees were wrongful from the outset so the  
22 moment that the ink is dry on those resolutions, if it's  
23 wrongful, then it's wrongful for everybody and then of  
24 course, like you say, it would just be a formula. I mean,  
25 did you pay impact fees? Yes, I did. You get them back.

1 And then we still have the issue of who gets them, but --  
2 And, of course, that's live by the sword, die by the sword,  
3 right, because if it's not wrongful, then you have other  
4 problems.

5 MR. KOVACICH: The answer to the Court's question I  
6 think is, yes, I think we could revise the class definition  
7 in a way that would deal with that problem -- potential  
8 problem better.

9 I think there are some other issues that have been  
10 raised here as well that the best way to handle would be  
11 slight revisions to the way the class was defined.

12 For example, it's been pointed out that some of the  
13 people who paid fees after January 1 of 2019 actually paid  
14 them under the prior resolution. There are things like that  
15 that could be fixed in the class definition.

16 And, yes, I think this theoretical problem of when a  
17 refund is due based upon what I would characterize as a  
18 poorly worded statute could be remedied with some language  
19 in the class definition.

20 If we're ready to move on from that, I want to comment  
21 on something else, which is the filing of a declaration by  
22 the City of Whitefish yesterday. We would suggest that the  
23 Court not take that into consideration. The same counsel  
24 that filed it requested leave to file additional briefing on  
25 this motion, and that request was denied.

1 Now, the day before the hearing, they file a --  
2 basically a factual argument and call it something other  
3 than a brief. We have no opportunity to respond to it given  
4 the timing, so I don't think it's proper to be considered as  
5 part of the record for this motion.

6 Nonetheless, I do want to address the topic that it  
7 focuses on because it's a topic that was raised in the  
8 briefing, and it's a classic straw man that the City set up  
9 solely for the purposes of this motion that we're here to  
10 argue today, and that is the idea that the refunds can't be  
11 determined without these onerous individual inspections of  
12 every single property.

13 Well, the City, before it charged any of these people  
14 impact fees, had the burden to demonstrate that its impact  
15 fee approach met the nexus and proportionality requirements  
16 to show that the impact fees were properly related to the  
17 charges, expenses, that they were based on, and they had no  
18 problem doing that using the building plans.

19 In fact, their whole scheme contemplated doing these  
20 fees based on the plans that people provided, and they  
21 charged millions of dollars to people developing property in  
22 Whitefish using that approach.

23 They didn't have to go inspect every property to follow  
24 the approach that they used and that they contended met  
25 their requirements under the law to show the nexus and the

1 proportionality.

2 Now, because they're faced with a class action and  
3 they're fighting a class action certification, they want to  
4 say that there's no way to determine what an impact fee  
5 should be without going out and inspecting every single  
6 property and counting the actual toilets.

7 They didn't have to do that to charge the fees. Why  
8 would they not be able to use the exact same plans that they  
9 used to charge the fees to figure out what adjustments  
10 should be made based on problems with -- other problems with  
11 how the charges were implemented?

12 And it wasn't -- it's not a secret to the City of  
13 Whitefish that there are some differences in construction  
14 between the building plans and the finished project. They  
15 have building inspections like every other municipality.  
16 They do plumbing inspections and then before anybody can get  
17 a Certificate of Occupancy, they go out and do a final  
18 inspection, and they can look at anything they want to make  
19 sure that all of the building codes are complied with.

20 They didn't -- At that time they didn't say, oh, we're  
21 going to have to count all these fixtures and make sure that  
22 you didn't put an extra sink in here and then adjust your  
23 impact fee. That wasn't necessary. Nobody claims that  
24 that's necessary now except the City for the sole purpose of  
25 disputing class certification in this case to make it look

1 like there has to be this super-involved individual inquiry  
2 into the details of every property.

3 THE COURT: Well, in the interest of accuracy, shouldn't  
4 they do that?

5 I mean, if there's going to be a refund, shouldn't the  
6 City get the best information it can, which is are you  
7 really entitled to a refund based on what actually was put  
8 into your home?

9 And so -- And you know, there's a lot about this case  
10 that is technical to someone like me in terms of plumbing  
11 and how the UPC operates and so forth, but at its most basic  
12 level, if you're charged by showerhead or fixtures, the  
13 allegation is that you improperly calculated based on number  
14 of fixtures and it turns out that, well, actually maybe we  
15 didn't because you have ten more than you said you were  
16 going to, shouldn't the City be able to at least get some  
17 credit for that? Or is your position that they messed it up  
18 from the beginning and so, therefore, they have unclean  
19 hands and shouldn't be able to -- to be as accurate as  
20 possible?

21 MR. KOVACICH: They just don't need to do that, and  
22 the discrepancies are likely to work both ways.

23 They weren't going out inspecting people's properties to  
24 make refunds before this case got filed, even though,  
25 through their own inspections, they could have easily

1 determined that, in fact, there are often discrepancies  
2 between building plans and what actually ends up getting  
3 constructed. There are probably cases where they got notice  
4 of changes because somebody needed to amend the plan and  
5 there's no evidence that they changed the impact fees for  
6 any of those reasons.

7 So, yeah, they could go out and inspect them all, just  
8 like they could have adopted an impact fee approach where  
9 they're going to inspect them all at the time they charge  
10 them.

11 So if that's the level of detail that's needed, then it  
12 should work both ways. They should have done that to begin  
13 with. They didn't. They instead found that it was  
14 reasonable enough to use the building plans to calculate  
15 people's charges and now refunds could be determined in the  
16 exact same manner.

17 And it wouldn't create this specter of individual issues  
18 for purposes of a class certification argument.

19 Another major theme in the Defendants' opposition briefs  
20 is the statute of limitations. There's a few things to talk  
21 about on this. So they take the position that all of the  
22 Plaintiffs' claims are subject to a six-month statute of  
23 limitations in Title 27, Chapter 2, I forget which  
24 subpart --

25 THE COURT: It's 209, I think.

1                   MR. KOVACICH: That -- A few problems with that, but  
2 before I get to that, I also want to say that it's not a --  
3 it's not nearly the significant issue that they try to pin  
4 it as because that six-month statute of limitations would  
5 also be subject to the discovery doctrine in 27-2-102, I  
6 think, and under any reasonable view of the evidence in this  
7 case, property owners in Whitefish had no reason to believe  
8 or no reasonable way to conclude that they had been  
9 overcharged until Mr. Gilman started digging into it, and  
10 the first indication of any public discussion of that was in  
11 September of 2021. The class action Complaint was filed in  
12 February of 2022, so even if the six-month statute did  
13 apply, all of the Plaintiffs' claims would have been filed  
14 within that statute.

15                 Additionally, based upon the Burnett case in the United  
16 States Supreme Court, I think that case can't be reconciled  
17 with applying a six-month statute of limitations under  
18 Montana law to bar these federal civil rights claims that  
19 should be allowed a longer period for the same reasons the  
20 Court found that the claims in Burnett should have been  
21 allowed a longer period.

22                 It's also a pretty broad interpretation of the language  
23 of that section of Title 27 to say that it was intended to  
24 cover these kinds of claims. What it says is it applies to  
25 the claims relating to a decision on land use, development,

1 et cetera. There was no land use decision as that language  
2 contemplates at issue here. This was an impact fee  
3 calculation that was determined by the City and put out to  
4 charge anyone who requested a building permit that would  
5 contemplate water or sewer services.

6 And so what statute would apply there, you know, I guess  
7 for purposes of today's argument, it's really not that  
8 important. There could be an argument that it's a two-year  
9 statute for property damage or it's a general tort statute  
10 of three years. Either way, and, for that matter, the  
11 six-months statute does not create any significant  
12 difference among the class representatives or putative class  
13 members because they would all have been filed within that  
14 time frame.

15 THE COURT: It strikes me as sort of interesting -- and  
16 I just thought about this while I was sitting here listening  
17 to you -- that if you're correct, we'll have sort of some  
18 inconsistent rulings based on when the claims arose because  
19 for the takings claims under the Knick case, the -- the  
20 entitlement to the refund arose the second that the wrongful  
21 impact fee was -- was assessed, yet at the same time, the  
22 statute of limitations for any state law claims doesn't  
23 begin until it's discovered, which is arguably when  
24 Mr. Gilman first started looking into it and then made his,  
25 you know, statements at a public meeting and so forth. So

1 it's sort of -- I don't know what to do about that. It just  
2 seems like it's sort of inconsistent where, one, we go back  
3 in time for and say the rules at that time, at that time it  
4 was right, and yet at the same time they get the benefit of  
5 the discovery doctrine, which tolls the statute from  
6 running, until they actually discover it.

7 So, again, I just -- It's just a comment that I --

8 MR. KOVACICH:: Yeah.

9 THE COURT: -- I just -- came to my mind when I was  
10 listening to you, Mr. Kovacich.

11 MR. KOVACICH: It's interesting, but it's also  
12 not --

13 THE COURT: Germane? (Laughter.)

14 MR. KOVACICH: -- unusual or uncommon. Anytime the  
15 discovery doctrine is applied, it has the purpose of tolling  
16 the statute of limitations. That doesn't mean there wasn't  
17 an injury. In most of those cases, there very clearly is an  
18 injury; the Plaintiff just doesn't know about it yet. And  
19 so the statute is tolled. Their right to bring a case to  
20 seek a remedy for it is delayed based on the policy of the  
21 discovery doctrine. But that doesn't mean that the injury  
22 didn't occur. The injury at issue here, the claims that we  
23 filed on behalf of our clients in the putative class,  
24 occurred when they paid money that they shouldn't have paid.  
25 And most of them -- all of them didn't realize that they had

1 been overcharged or why they'd been overcharged until  
2 sometime later when -- started by Mr. Gilman and then  
3 even -- most of them probably had no idea until they maybe  
4 read about this case and some people may not even know now.

5       But any -- any case involving the discovery doctrine and  
6 a tolling of the statute of limitations would have similar  
7 characteristics to that.

8       Aside from those major areas, so we talked about the  
9 property ownership timing issue, the statute of limitation  
10 arguments and the idea that it's impossible to calculate  
11 fees now without doing on-site inspections, all of the other  
12 differences that are highlighted by the Defendants are  
13 completely insignificant, things that really -- wouldn't be  
14 subject to dispute.

15       You know, they talk about the fees being paid at  
16 different times, different types of properties. Some people  
17 pay water, some people pay sewer. Almost everybody paid  
18 both, by the way. None of that is -- are issues that would  
19 become the focal point of the case because they're  
20 insignificant things that are easily dealt with.

21       And if those kind of differences could defeat class  
22 certification, we could never have a class action and there  
23 would be no reason to even have Rule 23 because, A, a good  
24 defense lawyer can come up with arguments to say people are  
25 different for this reason or that, but that's not the kind

1 of difference that defeats class certification.

2 It has to be a real dispute that would become the focal  
3 point of the litigation and distract from the ability of the  
4 Court to resolve common issues like we could here. The  
5 common issues of using the formulas wrong, charging for  
6 projects that they shouldn't have, those are all things that  
7 would be determined without reference to particular class  
8 members, but those things resulted in harm to every one of  
9 the class members.

10 Even the things that are a little more involved that we  
11 talked about, those are issues that can be resolved by a  
12 ruling of the Court on, you know, who is entitled to the  
13 refund based on interpretation of federal law, what does  
14 "when due" mean in the context of the allegations that were  
15 made here.

16 And the other point I want to make on that is it does  
17 create a difference. It creates a difference between the  
18 people who paid their fee and still own the property and  
19 those who paid the fee but do not, but that's a large group  
20 of people. It's probably half or more of the class, and so  
21 we're talking about a determination --

22 THE COURT: Which is? Which group is half of the  
23 class?

24 MR. KOVACICH: Well, if it's half, they're both  
25 half.

1 THE COURT: Okay. Good point. Good point.

2 (Laughter.)

3 MR. KOVACICH: I think what I said is it's half or  
4 more than half talking about those that no longer own the  
5 property.

6 THE COURT: No longer own it? Okay.

7 MR. KOVACICH: That would be my guess. I haven't  
8 done that calculation. I think the City's brief includes  
9 some numbers, but it's not precise.

10 In any event, any determinations that are -- that need  
11 to be made relative to that group can be made rather  
12 expeditiously and would apply to that entire group and that  
13 a statute of limitations argument, for example, if for some  
14 reason there -- it mattered whether it was six months or two  
15 years, that's a determination the Court can make and then  
16 it's going to apply to a large group of the class.

17 It's not like one person is subject to a unique statute  
18 of limitations argument or even one person is subject to  
19 these arguments about the state statute and when the refund  
20 was due or who's entitled to the refund.

21 Those are things that the Court can address that would  
22 apply not necessarily to the entire class, but to a large  
23 enough portion of the class that individual arguments is  
24 still not the focal point.

25 THE COURT: Can you address, Mr. Kovacich, how class

1 certification would impact your state law claims?

2 MR. KOVACICH: So we seek class certification for  
3 the federal and state law claims, and I'm not sure if I  
4 understand the focus of the Court's question, but it would  
5 be --

6 THE COURT: Well --

7 MR. KOVACICH: -- we would have a class -- our class  
8 representatives would represent the entire class as defined  
9 with respect to both their federal and state law claims.

10 THE COURT: And so my reading of the briefs -- and I  
11 guess my understanding of how it would work -- is that your  
12 claims of negligence and negligent misrepresentation  
13 wouldn't be individual conversations had between folks, but  
14 it literally is the resolution and asking them to pay and  
15 taking the payment, and that's the basis for both the  
16 negligence and the negligent misrepresentation claims?

17 MR. KOVACICH: Yes, Your Honor. These claims are  
18 not based on individual conversations that anyone had, and I  
19 know this is likely to be the subject of another motion and  
20 argument, particularly on the negligent misrepresentation,  
21 but our theories with respect to both are based on common  
22 facts.

23 The City represented to people that these were proper  
24 charges and that they met the legal requirements that we  
25 talked about earlier by sending them a bill and saying you

1 have to pay this in order to get your property developed in  
2 the manner that you're seeking to develop it, and  
3 negligence, negligence per se and negligent  
4 misrepresentation are all based on those actions which the  
5 City took with respect to all of these people.

6 THE COURT: Okay. Thank you.

7 MR. KOVACICH: Thank you, Your Honor. That's all I  
8 have right now.

9 THE COURT: All right. Ms. Quinn.

10 MS. QUINN: Thank you, Your Honor. First and  
11 foremost, Plaintiffs had a burden before coming here today  
12 and asking the Court to certify a class action, and that  
13 burden has been defined by United States Supreme Court case  
14 law for quite some time, and the burden in the Halliburton  
15 case, Supreme Court case 573 U.S. 253, kind of concisely  
16 states what that burden is, and it's not just relying on  
17 allegations in a Complaint and it's not relying on arguments  
18 of counsel.

19 The Halliburton case that says that Plaintiffs wishing  
20 to proceed through a class action must actually prove -- and  
21 not simply plead -- that their proposed class satisfies each  
22 requirement of Rule 23, including, if applicable, the  
23 predominance requirement of Rule 23(b)(3) and must carry  
24 their burden of proof before class certification.

25 The only things the Plaintiffs have provided the Court

1 in briefing to date through oral argument as evidence in  
2 support of the claim's suitability for class certification  
3 are the two resolutions and the list of potential class  
4 members prepared by Plaintiffs' counsel.

5        We would respectfully submit that that does not satisfy  
6 Plaintiffs' burden in proving for the Court's rigorous  
7 analysis, which is the standard, that the, actually, claims  
8 that they're pursuing from a liability basis as set forth in  
9 the Complaint are susceptible to common issues that  
10 predominate over individual ones. All we've heard are  
11 allegations and argument.

12       The Comcast case, which we cited in our briefing and has  
13 been repeatedly discussed in Ninth Circuit case law,  
14 specifies also that before class certification, the named  
15 Plaintiff has to put forth a damage model to show the Court  
16 that the damages are actually capable of measurement on a  
17 class-wide basis for the individual theories of liability  
18 and causes of action that they've alleged.

19       THE COURT: Well, Ms. Quinn, if Mr. Kovacich is  
20 correct and the resolutions were void from the beginning,  
21 isn't the damage model pretty easy to figure out? Did you  
22 pay it in? Yes, I paid it. Here's the money.

23       MS. QUINN: No, I would respectfully disagree with  
24 that given the causes of action and the allegations raised,  
25 which is the analysis for the class certification.

1        If they're proving that the ordinance themselves weren't  
2 properly supported by -- by the background the charges were  
3 too high, from a state law damage standpoint, it is still  
4 incumbent on the jury to determine cause and damages arising  
5 from that conduct, which necessarily includes issues such as  
6 how many fixtures were in the individual's home and what  
7 their true and accurate damages are.

8        And from a taking standpoint, the analysis about whether  
9 the ordinance was supported or not or meet Nollan and Dolan,  
10 still requires an assessment of the burden and the benefit  
11 to the City and the named Plaintiff for their property and  
12 assessing whether there's rough proportionality between the  
13 burden imposed, the fee imposed, and the benefit and the  
14 burden on the public in providing the services. And that  
15 requires analysis about what the actual services the  
16 Plaintiffs used for their property.

17       So, for example, the Weinbergs are a wonderful example  
18 about the individual issues that are going to be pervasive  
19 for each and every one of the causes of action. The  
20 Weinbergs applied for a building permit and submitting --  
21 submitted construction plans and afterwards they installed  
22 additional fixtures in their home.

23       Their original fee for wastewater was \$1,611. Because  
24 of the unreported fixtures in the Weinbergs' home, they are  
25 not owed any refund related to the shower error because it's

1 offset by virtue of the fixtures that they put in without  
2 proper notice to the City, and beyond that, the Weinbergs  
3 owe an additional \$1,123.41 to the City for unauthorized  
4 fixtures.

5 And knowing what the actual fixtures in the Weinbergs'  
6 house is relevant to a jury assessing what their true and  
7 accurate damages are or any state law claim --

8 THE COURT: Well, but, I mean, let's not get the  
9 cart before the horse here. I mean, obviously if this case  
10 is not resolved on motions, there will be a jury trial. I  
11 understand that. But at the class certification level,  
12 that's not the burden the Plaintiff has to the meet. The  
13 Plaintiff does not have to establish what a jury verdict  
14 will be. It has to establish -- they have to establish a  
15 reasonable method for going forward in which individual  
16 issues do not predominate.

17 And so -- so I don't know that we need to -- I don't --  
18 I'm not saying one way or the other necessarily, but I don't  
19 think it's as cut and dry as you -- as you portray it.

20 MS. QUINN: Well, the Plaintiffs have asked for a  
21 class certification. The motion presented to the Court is  
22 on all claims --

23 THE COURT: Right.

24 MS. QUINN: -- all state law claims and all federal  
25 claims and all bases of liability, which is numerous in

1 their Complaint and their discovery responses, and all  
2 damages.

3 That is the motion that the Plaintiffs have asked the  
4 Court to certify from a class bases and it's replete with  
5 issues of individual questions that outweigh any common ones  
6 that exist.

7 THE COURT: Well, the question that I posed to  
8 Mr. Kovacich, and I'll pose the same one to you, is isn't  
9 there something beautiful in the simplicity of just saying,  
10 all right, well, we're not going to certify a class as to  
11 all claims, all issues, but we will certify a class as to  
12 whether the resolutions or ordinances, whichever they're  
13 called, were void from the beginning?

14 In other words, if they inappropriate- -- if they  
15 violated Montana law from the outset -- and that's obviously  
16 something that would have to be briefed by the parties and  
17 then determined -- but if that's the case, then that would  
18 be one type of a certification that I can imagine that  
19 doesn't necessarily involve all the other issues and then  
20 other things can be handled at a later time.

21 It's not uncommon in class actions for there to be  
22 initial certifications, holding off on, for example, damage  
23 classes and so forth and then addressing those if need be,  
24 so -- And ultimately that's for the Court to do and to  
25 determine.

1 MS. QUINN: From a cause of action standpoint, what  
2 causes -- cause of action, what bases for liability would  
3 the Court be making that sort of certification decision  
4 under, and that's an issue because that one question isn't  
5 the standard for takings, for negligent misrep, and it's not  
6 going to answer the questions about liability, causation for  
7 damages for the actual claims that the Plaintiffs pursued.

8 The Plaintiffs could have asked the Court to certify a  
9 class -- a declaratory class, which is exactly what the  
10 Court is talking about here, to determine the issue of were  
11 those resolutions unconstitutional, and they haven't done  
12 so. That's not the bases of their motion for certification  
13 presented to the Court and it's not the bases for the motion  
14 for certification requested in the Complaint, which is under  
15 (b)(3).

16 And when we look at (b)(3), the purpose of a (b)(3)  
17 action is for monetary damages, and that's what this case is  
18 really about. They're pursuing monetary damages on behalf  
19 of developers at the expense of the landowners for these  
20 claims.

21 The question you pose is a discrete issue that might be  
22 relevant to some of the issues to reach a cause of action,  
23 but it isn't dispositive.

24 And so for the takings claim, again, for the Weinbergs  
25 as an example, we have to consider the burden and the

1 benefit. We have to ask the question what is the Weinbergs' 2 property on Flathead Lake? What is the size of the house? 3 What are the number of fixtures? What is the size of the 4 meter they should have put in if they would have accurately 5 reported their fixtures? How many fixtures did they add? 6 Do they have a lawn? Do they irrigate? What is the size of 7 the fee that was charged to assess rough proportionality 8 based on each individual Plaintiff? And those are all 9 individual questions --

10 THE COURT: Let me ask you a different question: 11 Does the appropriateness of mixing together the FCS report 12 and the HDR -- I think it's HDR -- prior, the 2007 report -- 13 is that universal for all people? Either that was 14 appropriately done or not appropriately done, or is that 15 also individualized?

16 MS. QUINN: The resolutions that the City issued 17 were premised on both the HDR report as well as the FCS 18 report and that's stated in the -- in the preamble of those 19 resolutions.

20 THE COURT: Right, so if that was inappropriate, 21 it's inappropriate to all, correct?

22 MS. QUINN: No. Well, it depends. Unfortunately, 23 the named class that the Plaintiffs have proposed include 24 people who didn't even pay fees underneath the January 1, 25 2019 -- those ordinances --

1 THE COURT: Right.

2 MS. QUINN: -- so determining even class  
3 membership --

4 THE COURT: But that's a pretty easy carve-out. I  
5 mean, there's 300-some people involved. I mean, the  
6 submissions from both the Plaintiffs and from the City list  
7 all of the people by name and, you know, which -- which  
8 ordinance they were proceeding under, what they paid and so  
9 forth. If there are folks who paid under the -- they paid  
10 in 2019 but paid under the 2018 schematic, that seems to me  
11 to be a pretty easy thing to handle. I imagine that's how  
12 we probably got rid of Riverview. I think that was the  
13 Plaintiff that was recently dismissed. So I don't see that  
14 as an insurmountable issue to certification.

15 MS. QUINN: But even determining which class to  
16 certify is problematic. The main claim that they're  
17 pursuing here is the takings claim. It's the basis upon  
18 which this Court has jurisdiction, and for the takings  
19 claim, in their reply brief they redefine the class that  
20 they're asking you to certify to be property owners that  
21 owned property that bore the burden of actually paying the  
22 impact fees underneath of those resolutions, and those  
23 elements that they add of ownership and bearing the burden  
24 of the cost are critical elements for a takings claim  
25 because it has to be tied to an interest in property and

1 then actually bearing the fee is relevant to each and every  
2 one of their -- their causes of action.

3 So even before we get to trying to define a parameter of  
4 a class for any of these, we are facing individual questions  
5 that are impossible to answer on a class-wide bases.  
6 Ownership is public -- public records. That can be  
7 answered --

8 THE COURT: Uh-huh.

9 MS. QUINN: -- in fairness. But the issue of who  
10 bore the fee is a hundred percent individualized. And we  
11 provided a spreadsheet attached to our opposition brief that  
12 took their Plaintiff list and then went into the building  
13 permit applications and the building permits themselves to  
14 see who actually applied for and paid the fee.

15 And when you look at those, many of them were applied  
16 for and paid by architects, by general contractors, by --  
17 There were some that were even paid by people leasing  
18 property.

19 And so trying to determine who ultimately bore the fee  
20 that would even have standing to have a takings claim to be  
21 part of a class certified for that -- that claim, whether  
22 broadly or a narrow issue, again goes to very  
23 individualistic questions that defeat the common question.

24 There's no reason the Plaintiff can't prove whether or  
25 not the ordinances were valid for their named Plaintiffs.

1 They say that the other individuals have small claims, but  
2 Riverview's claim is to the tune of hundreds -- or Alta  
3 Views' is hundreds of thousands of dollars in this case.

4 So their argument that people don't have an incentive to  
5 pursue this, it depends upon how much they paid. One of  
6 their named Plaintiffs would have an incentive.

7 And they had other options available to them --

8 THE COURT: But circling back, I'm just sort of hung  
9 up on this idea that if the calculations using the HDR  
10 report and the FCS together -- if that is wrong from the  
11 outset, can't we make a determination of that issue for a  
12 class-wide basis and then proceed to a damages phase  
13 separately where we have subclasses for folks?

14 Because, I mean, you're right, there are going to be  
15 some people who both owned it at the time, paid the fee at  
16 the time, still own it now. Very simple analysis.

17 There are going to be developers who owned it then, paid  
18 for it, sold it, don't own it now.

19 There are going to be -- I mean, you know, it's pretty  
20 standard when you're building a home that you have money,  
21 you have an account, the builder has it. The builder uses  
22 his check down at the City to pull permits and things like  
23 that, but it comes out of money paid for by the homeowner.  
24 All of that's going to be pretty easy, I would think, at  
25 that stage to -- to determine.

1        But I agree that, to some extent, that's individualized,  
2 but the ultimate determination of whether the underlying  
3 calculations were inappropriate, they're either  
4 inappropriate for everyone or they're not, right?

5        MS. QUINN: But that's one common issue --

6        THE COURT: Well --

7        MS. QUINN: -- that could be certified to have  
8 addressed, which is not what they've asked for, that  
9 declaratory, but to get to the monetary part, to see what  
10 other -- under (b)(3), whether predominance, whether this  
11 process is a superior way, we can't just consider that  
12 isolated issue. We have to consider the difficulties of  
13 figuring out who's in that class.

14       And for general contractors, some contractors have fixed  
15 fee agreements that may not have passed along the impact fee  
16 and until we ask that question, time and material versus a  
17 fixed fee, you know, we can't assume that people would be --  
18 bore the actual fee.

19       And then even if we answer that question, we still have  
20 to consider from a predominance standpoint, looking at the  
21 causes of action, you know, whether all of the individual  
22 issues for the rest of the case still predominate over the  
23 benefit of that singular question.

24       And when we start looking at balancing the burden and  
25 the benefit for a takings claim, which is a hundred percent

1 individualistic, or looking at whether someone actually  
2 suffered a harm and if it caused them damages and the amount  
3 of the damages and if they passed those damages along to a  
4 subsequent purchaser, which we've heard argument on but we  
5 have no proof of, in reality, the expert disclosures to date  
6 differ on that subject; that their expert says, no, it's  
7 borne by the person who pays it; our expert says it gets  
8 passed along; and even that question is individualistic.

9 THE COURT: Those aren't before me, so --

10 MS. QUINN: This question about can we certify a  
11 class for that issue, the class that you would certify would  
12 potentially include a lot of people that don't even have  
13 standing, that didn't suffer damages, that went on to -- to  
14 future owners.

15 And so there's so many individual questions about  
16 whether they fit in the class at all, from ownership, to  
17 bearing the fee, to harm, to liability under the causes of  
18 action, that this simply isn't suited -- well-suited for a  
19 class certification, and the Plaintiffs can pursue the claim  
20 on an individual bases for their clients, which one has a  
21 substantial claim, and they have a right to attorney fees if  
22 they succeed on a takings claim. There's no reason to  
23 convert this to a class.

24 And one thing I really wanted to focus on is that their  
25 case isn't just about the ordinances and the resolutions,

1 that they've carved out the individual bases that they claim  
2 the City acted inappropriately, and they've chosen to  
3 include in their lawsuit the single-head shower issue,  
4 which, as this Court knows from involvement in prior  
5 briefing, that issue, once it came to the attention of the  
6 City, the City acknowledged the issue and started the refund  
7 process.

8 And what the City did, the problem -- I know that  
9 Plaintiffs counsel want to paint that inspections of the  
10 building was just to try to -- a farce to keep information  
11 for this case, it couldn't be further from the truth. The  
12 Rose Declaration establishes that when the City learned of  
13 this issue, they pulled out their fixture unit table, and,  
14 unfortunately, that table had a single line for bath/shower.

15 And so the way fixtures were counted in the past was  
16 just you have a tub or a shower and it's counted as one and  
17 assigned a 4. So single tubs, tub/shower combos,  
18 stand-alone showers with one head or two heads all are  
19 lumped into that single line, so the City had no way of  
20 knowing which individual people were actually impacted by  
21 this error. I mean, for all they knew, it could be a  
22 tub/shower combo which wouldn't be impacted.

23 And so that issue, which is one of their claims they're  
24 asking for class cert on and it's part of our audit process,  
25 that should be denied class cert.

1        The City is currently going through a process to address  
2 it, and there's absolutely no way that that issue could be  
3 addressed on a class-wide bases because it involves having  
4 to find out from individual Plaintiffs whether they have a  
5 single-head stand-alone shower.

6        And that's why letters were sent saying you may be  
7 subject to this error because the City didn't know. And  
8 until the City finds out from the individual Plaintiffs, we  
9 don't know who suffered an injury from that allegation of  
10 this class harm or not.

11       There is no common issue at all for that claim. There's  
12 no bases for them to ask the Court to include that in a  
13 class action because it can't -- the harm itself can't be  
14 determined universally.

15       THE COURT: And is the City, in fact -- if it goes,  
16 for example, to the Weinbergs' house and it sees that they  
17 are -- and I don't know -- Another thing that strikes me as  
18 difficult to establish since the City's record keeping was  
19 not very great on this issue is when it was put in. You  
20 know, I mean, additional fixtures may be put in during the  
21 building process and it just doesn't get inspected correctly  
22 or if there are any -- which is the City's problem, or they  
23 could be added in separately and the folks didn't get a  
24 permit, which is their problem, but is, in fact, the City  
25 now using this refund process to go to people and say,

1 actually, you owe us more money?

2 MS. QUINN: They're not actually asking for  
3 additional money, but we are considering those issues  
4 because they are --

5 THE COURT: What do you mean when you say  
6 "considering those issues"?

7 MS. QUINN: From a class action basis, not -- The  
8 City isn't considering charging Plaintiffs for that.

9 THE COURT: Okay.

10 MS. QUINN: Because if the Plaintiff put in more  
11 fixtures when they were building and didn't report it to the  
12 City, absolutely the City should be charging for it.

13 But, unfortunately, that issue is so individualized,  
14 like you said, did the City miss a fixture on a building  
15 plan? Did they change the building plan and not tell the  
16 City, which was the Weinbergs. Did they add fixtures after  
17 the original construction and not get a plumbing permit?  
18 All individual issues. And so we aren't asking for more  
19 money.

20 Properties are changing meter size in order to  
21 accommodate their existing units, if they needed to go up.  
22 And the City's also crediting properties for where the  
23 fixture count issue made them put in too high of a meter,  
24 and that also shows that meter size and fixture count when  
25 we're actually saying what is the true harm imposed by

1 individual Plaintiffs is individualistic and can't rely on  
2 the face of the building permit, particularly when the  
3 Plaintiffs have chosen themselves to include the shower  
4 issue as part of all of their claims.

5 And they haven't put it as cause one only. It is  
6 inherent in every single one of their causes of action.

7 For takings they're asking for that issue and trying to  
8 correct it, and so these issues about the inability to  
9 answer what the meters are, what the fixtures are, whether  
10 they're subject to an error, it -- it pervades all the  
11 causes of action.

12 THE COURT: What would the effect be if the  
13 showerhead issue was dropped?

14 Would that impact your analysis of whether a class  
15 action is appropriate?

16 MS. QUINN: If the -- No, unfortunately, because the  
17 issue is, from the takings standpoint, what's the burden and  
18 the benefit? The burden and the benefit of the actual  
19 project as constructed by the Plaintiff. If they put in  
20 extra fixtures unbeknownst to the City and used the City's  
21 services and put a burden on the City's water and  
22 wastewater, then the jury would have the right to know that  
23 individual defense and analysis to assessing liability for  
24 takings, whether the burden and the benefit -- Here, the  
25 Weinbergs should have paid 40 percent more.

1                   THE COURT: So I'm -- I'm not following you exactly.  
2 My question is if the issue with the showerheads was dropped  
3 by the Plaintiffs, and I think what your response is, no,  
4 because we're going to bring it in --

5                   MS. QUINN: Right, because 65 percent of what we've  
6 seen so far and the Rose Declaration wasn't a surprise to  
7 Plaintiffs' counsel. Our expert reports had included a  
8 smaller sample, but we got through some more recalculations,  
9 and the percentage is actually really close.

10                  About 65 percent of homes have a change in fixtures from  
11 that which they paid impact fees. And Plaintiffs' counsel  
12 is incorrect when he says it's a wash both ways. That's  
13 absolutely false. There are a select few that have less  
14 fixtures, but pretty -- the vast majority put in multiple  
15 additional fixtures, from single sinks going to double  
16 sinks, putting in toilets and all -- all of the like.

17                  And when we look at the takings claim, we believe the  
18 takings claim considers the actual impacts of the project,  
19 which is the actual burden the house put -- the Weinberg  
20 house put on the City's system to assess is the payment of  
21 the \$1300 -- was it reasonable?

22                  Well, it was more than reasonable, particularly given  
23 they snuck in additional fixtures that they should have paid  
24 approximately twice, and so --

25                  THE COURT: So what I think what I'm hearing is we

1 might have made a mistake, but because they put in extra  
2 fixtures, ignore the mistake because they actually should be  
3 paying more.

4 So if our calculations are wrong and inappropriate, it  
5 doesn't make a difference because they put in extra sinks  
6 and toilets.

7 MS. QUINN: It goes to, in part, liability for  
8 takings because it's the burden and benefit. It also goes  
9 to causation and damages for every one of their causes of  
10 action, because they have an expert that's tried to come up  
11 with a formula for addressing this issue and he has to input  
12 what the fixtures and meters are for the purpose of  
13 determining the actual damages, which requires knowing  
14 what's actually there.

15 Their damages should be premised on the actual numbers  
16 of meters and fixtures in their house.

17 THE COURT: That's damages, not liability.

18 MS. QUINN: Liability on takings, liability on the  
19 shower audit issue, because the fixtures they added offset  
20 the two-fixture unit error that occurred.

21 THE COURT: So I guess -- and correct me if I'm  
22 wrong, but I think what I'm hearing is a government can --  
23 can have a taking situation, so, in other words, the  
24 government can have an exaction or something that results in  
25 a taking, but if the Plaintiff does something to damage the

1 government back, then the taking is just -- they cancel each  
2 other out. Is that what you're saying?

3 MS. QUINN: Well, our position is no taking  
4 occurred. The taking analysis is not whether we agree with  
5 the mathematical decision the City -- FCS recommended or the  
6 City used.

7 THE COURT: Right.

8 MS. QUINN: That's the impact fee statute claim.  
9 They chose to bring a separate cause of action for a taking,  
10 and the taking standard is benefited balancing the benefit  
11 and burden, which doesn't force us to look at it from a  
12 microscopic view but look at it from a broader perspective.

13 And Dolan itself says damages are not calculated to a  
14 mathematical precision. Math shouldn't be required, which  
15 means it's acceptable for the jury and for the Court and for  
16 the parties to consider each individual house and whether  
17 the fee charged for them to connect and use the City's  
18 system is roughly proportional to the burdens and the  
19 benefits involved.

20 THE COURT: But isn't the Plaintiffs' argument that  
21 it can't be proportional and it's overly burdensome because  
22 it was illegal? Isn't that their basic argument?

23 MS. QUINN: In part, but the damages --

24 THE COURT: Well, no, I understand, but just in  
25 terms of whether there was something inappropriate done by

1 the City, it's -- it's, I think, pretty basic, which is,  
2 look, because these fees were inappropriately calculated and  
3 we were required to pay them as a condition precedent to  
4 getting a permit to build our home, or our condos or  
5 whatever, it is a taking under Nollan/Dolan.

6 MS. QUINN: Taking is not that precise. If they  
7 prove that our fees violated the impact fee statute, which  
8 is the hypertechnical argument, in part, that they're  
9 making, that doesn't necessarily mean it's also a taking.  
10 Taking is a different standard. And we're allowed to put on  
11 evidence of the burden and benefit based on the actual  
12 project that used our system considering what their fixtures  
13 were, including what they added.

14 THE COURT: So that's a merits argument, correct?

15 MS. QUINN: It is. It goes to liability. The --

16 THE COURT: And at the class certification level, I  
17 am not supposed to determine merit. So, in other words, I  
18 can't deny certification because of something that might  
19 ultimately come up at the merits level. That is something  
20 that is done afterwards.

21 MS. QUINN: But you do have to determine are these  
22 individual issues and are they common issues and which  
23 predominate, and what we're saying is this is an individual  
24 issue that impacts likely about 65 percent of the proposed  
25 class that's going to result in many trials about what

1 fixtures and what meters and what use and what the value of  
2 their property, how much water they use and -- and whether  
3 they irrigate, if they have a separate irrigation meter.  
4 Those issues are going to outweigh the limited common issue  
5 that's been proposed, which is merely that we paid under the  
6 same resolution. The benefit and burden is individualistic.

7 And even under takings, I found a case out of Oregon  
8 called Hammer versus City of Eugene, and they say -- It was  
9 a case where an exaction occurred, and the Plaintiff sued  
10 the City saying you don't have rough proportionality at the  
11 time that you imposed this fee and then the Plaintiff said,  
12 well, you can't come back and argue later rough  
13 proportionality existed because you didn't determine it at  
14 the time, and the Court started thinking about what the  
15 takings clause is really about. And as we all know, it's  
16 about just compensation.

17 And the Court said that Plaintiffs' rule of trying to  
18 limit the town to what information was known precisely at  
19 the time that the exaction was -- occurred, the proposed  
20 rule tells us nothing about whether justice requires  
21 compensation.

22 In fact, in cases in which there's rough  
23 proportionately, the rule would saddle taxpayers with the  
24 burden of paying compensation that justice doesn't require.

25 So, ultimately, the question in a takings claim is what

1 does justice require, which requires individual  
2 consideration of the actual fixtures that were put in by the  
3 Plaintiffs, the fact that the Weinbergs should have paid  
4 \$1100 more than the 1200 they paid to determine if just  
5 compensation requires the City and the taxpayers to bear  
6 that additional cost.

7 THE COURT: So there can never be a class  
8 certification of an exaction case, correct?

9 MS. QUINN: No.

10 THE COURT: Okay.

11 MS. QUINN: It depends --

12 THE COURT: Well, you just said it's an individual  
13 determination of the nexus and proportionality, and you've  
14 said that every single person has to be examined  
15 individually, and if that's the case, there can never be a  
16 class certification involving an exaction --

17 MS. QUINN: I think it would --

18 THE COURT: -- going under the Nollan/Dolan  
19 standard.

20 MS. QUINN: -- it would depend on the nature of the  
21 exaction. So if exaction is water and wastewater services,  
22 I believe that is accurate because it is very  
23 individualistic looking at meters and fixtures, particularly  
24 where we know people have added fixtures.

25 THE COURT: Can you give me an example of an

1 exaction that would, in your opinion, be suitable for class  
2 certification?

3 MS. QUINN: An exaction that would apply equally and  
4 isn't based on individual specifics, I can't think of one  
5 offhand, but I think the issue with an exaction here is the  
6 exaction is based on so many individual issues -- the  
7 meters, the fixtures -- that if the exaction is based on  
8 individual issues, then it makes it where those individual  
9 issues are going to predominate when we have to look at it  
10 from a takings standpoint and what just compensation  
11 requires.

12 And we just have to look at the case that we have in  
13 front of us, which is would just compensation be due to  
14 individuals like the Weinbergs or the 65 percent of other  
15 people that changed their fixtures, and we don't believe it  
16 would, and that goes to the heart of liability.

17 THE COURT: All right.

18 MS. QUINN: Beyond that, the Court puts finger on a  
19 substantial issue in the Plaintiffs' Complaint, which is  
20 that Plaintiffs aren't merely complaining that the charge at  
21 the time it was assessed is improper. A reading -- a fair  
22 reading of the Complaint, which Plaintiffs' brief  
23 acknowledges, the Complaint itself is what's considered for  
24 class certification. That Complaint talks about spending,  
25 improper spending, it talks about the failure of the City to

1 issue refunds. Like the Court said, it talks about  
2 abandonment of projects or decisions not to pursue projects,  
3 which all of those issues change the time frame of when the  
4 purported class that they're seeking to represent would --  
5 would exist. Because at the time -- And it would have been  
6 past December of 2019 is when they claim solar array was  
7 determined not to go forward. Well, then everybody before  
8 then may have properly paid a fee and they could argue a  
9 refund, but then the issue about the statute and to whom  
10 it's owed comes up, and that's a different class than the  
11 class that they're seeking to represent.

12 And so the fact that they're continuing to seize on  
13 these claims involving -- involving spending and refunds and  
14 they're expressly in their Complaint adds layers upon layers  
15 of individual issues that predominate over any common issue,  
16 which is the singular one that you've identified.

17 And I don't believe finding a singular issue that's  
18 common is sufficient to certify a class under (b)(3), which  
19 assesses the claims as a whole and the theories of liability  
20 and the damages.

21 And when we start going into that based on the claims  
22 asserted, it's so many individual questions, it's not  
23 suitable for class cert.

24 They've also raised the negligent misrepresentation  
25 claim arguing that's suitable for class cert. We've pointed

1 out -- Well, we asked them to dismiss the claim because the  
2 Plaintiffs testified no representation was made, and that's  
3 going to be the subject of a motion for summary judgment  
4 when the named class rep on this claim says I never got a  
5 written or verbal representation, and I quoted precisely the  
6 language in their Complaint, but it illustrates why it's not  
7 suitable for class cert.

8 Whether a representation was made, whether the Plaintiff  
9 heard it and relied on it and was damaged by it, those are  
10 all individual questions that have to be answered for a  
11 negligent misrep claim. It's just not suitable for a class  
12 cert.

13 The only thing that they pulled out in their reply  
14 brief, they pulled out an internal document of the City  
15 which is a calculation table that the City uses to input  
16 fixtures to say what it will be, and then the attorney  
17 argues it's an invoice -- and, again, this is why putting on  
18 some evidence to the Court about the suitability of class  
19 cert, that these things could actually be addressed on a  
20 class basis is important, because it's not an invoice. It's  
21 an internal document that has a City Bates stamp that the  
22 named Plaintiffs themselves said they didn't get a  
23 representation.

24 They haven't satisfied their burden of putting on  
25 information to the Court to determine the negligent misrep

1 or the other claims are suitable from -- for certification  
2 from liability, causation and damages standpoint.

3 The issue of their negligence per se claim includes even  
4 further problems because their negligence per se claim is  
5 based on a statute that specifies to whom the refunds are  
6 due and that that statute says that impact fees charged  
7 or -- or not spent in accordance with the statute then  
8 trigger the refund provision.

9 And their claims are based on the charging and the  
10 spending, but the statute specifies to whom those refunds  
11 are paid, which is not the class that they're seeking to be  
12 certified in this case.

13 In that class, a class action under that statute would  
14 be a moving target because it depends on when is a refund  
15 due, and you can't determine when a refund is due without  
16 their being disputed evidence from both sides and arguments  
17 about whether or when a refund is due to pinpoint a time to  
18 say these are the class members for that issue.

19 Because at any given time, people are being charged  
20 impact fees, they're selling their property, and so the  
21 class just inherently is in constant fluctuating change --

22 THE COURT: Unless the resolutions or ordinances  
23 were -- were void at the beginning and then everybody who  
24 paid would be a member of the class.

25 MS. QUINN: They haven't pursued -- That is not a

1 cause of action in their Complaint. Even their declaratory  
2 ruling is just -- Their damages that they're asking is not  
3 we want all refunds back. They haven't said that it's all  
4 unconstitutional. They're asking for the portion of what  
5 they claim was improperly charged based on their expert's  
6 recalculation of what those impact fees should be, so the  
7 delta.

8 So they're not even seeking and haven't presented to  
9 this Court claims in the Complaint. It hasn't been part of  
10 discovery, it hasn't been part of their interrogatory  
11 answers, the issue that you're presenting.

12 When we look at the case through its entirety and  
13 analyze each cause of action and the actual questions  
14 relevant to the causes of action as raised by the  
15 Plaintiffs, they're all individualistic and not suitable for  
16 class cert.

17 That's all that I have. Thank you.

18 THE COURT: All right. Thank you.

19 Mr. Drennon, I don't know if you have anything to add to  
20 that.

21 MR. DRENNON: I can be very brief, but if you  
22 wouldn't mind a very quick restroom break before we do that?

23 THE COURT: Certainly. Yeah, why don't we take ten  
24 minutes.

25 (Whereupon, the proceedings were in recess at

1 2:59 p.m. and subsequently reconvened at 3:11 p.m., and the  
2 following proceedings were entered of record: )

3 THE COURT: All right. Mr. Drennon.

4 MR. DRENNON: Your Honor, Baxter Drennon, FCS, and  
5 you asked a question earlier of Ms. Quinn about when a legal  
6 exaction could be a class, for an example, and one that I  
7 have personal experience with, unfortunately, is sales abuse  
8 tax that's improperly charged would be an example of when  
9 that's occurred.

10 Kind of moving forward, I'll try to be very brief. At  
11 the risk of using a metaphor from home that might not be as  
12 received here, I'll try not to replow any ground that  
13 Ms. Quinn has covered.

14 Your Honor, we're here on class certification in a  
15 matter that's been fully briefed by the Plaintiff with a  
16 proposed class and common questions that have been proposed,  
17 and there are fundamental questions that haven't been  
18 answered, can't be answered, and I'm not sure how you  
19 certify a class without the answer to those questions.

20 The first one the Court pointed out almost immediately  
21 this afternoon, and that is who can recover if they are  
22 successful in this matter.

23 Counsel's response to that, I think, effectively was  
24 that the state's statute on a refund was unconstitutionally  
25 void because it is vague and doesn't have language that at

1 least he agrees with.

2 It's my understanding under Montana law if you're going  
3 to make a challenge to the constitutionality of the state  
4 statute that there's a procedure that has to be followed,  
5 and that procedure hasn't been followed in this case, and I,  
6 frankly, think the statute's pretty clear and says that the  
7 refund is due to the owner of the property at the time that  
8 the refund is due.

9 Without --

10 THE COURT: So, Mr. Drennon, how do you square that  
11 then -- I don't think I've really gotten a great answer out  
12 of anybody, but I don't know that I have one myself either,  
13 which is how do you square that, then, with takings  
14 jurisprudence that would seem to stand for the proposition  
15 that when the takings occurs, that is when you are entitled  
16 to recoup whatever the government has inappropriately taken  
17 from you.

18 MR. DRENNON: Sure. I think some of that is based  
19 on standing because they have ownership of the property  
20 still, and I'm not sure how -- if it changes.

21 But here I think the reason the rule is there because if  
22 a individual no longer owns the property, how do they have  
23 standing to make a takings claim?

24 And here, once the statute recognized that and once they  
25 sell the property, the then owner of the property would have

1 the standing to make the claim and to recover the fee.

2 I have no way of knowing what the legislature thought  
3 when they set out the statute, but presumably they believed  
4 that the value of the fee was baked into the sale price when  
5 they went forward.

6 Part of the question for a takings is the benefit to the  
7 property -- or this type of taking is the benefit of the  
8 property -- to the property, and so if the property was  
9 benefited or harmed, that would be effectively baked in.

10 But I'm not sure it's one that I can answer or one that  
11 I have to. The Plaintiff has the burden of establishing  
12 that this case is appropriate for class certification, and  
13 at the very least, they have to show standing and that they  
14 have to show that the class that they've proposed is  
15 appropriate.

16 And without answering that question, I'm not sure how  
17 they do that, and they haven't done even a procedural  
18 process to answer the question.

19 If their -- if their solution is that the statute is  
20 unconstitutional under the federal Constitution, again, it's  
21 my understanding there is a state process for challenging  
22 that, and they haven't done it.

23 And so I'm not sure -- I'm not sure how we get past  
24 that, but that's where they are.

25 Moving past that, again, I don't want to go into the

1 individual issues that Ms. Quinn touched on, but one that I  
2 do think is worth noting, we talked about the statute of  
3 limitations briefly and the six-month issue.

4 Counsel kind of blew past the discovery rule and just  
5 assumed that that applies to every one of the proposed class  
6 members.

7 How could the discovery rule, without something more on  
8 an individualized basis, apply? They have to show that they  
9 could not, either reasonably or through reasonable due  
10 diligence, determine that that they had a cause of action.

11 The two --

12 THE COURT: So does that -- That argument really  
13 only applies if we're looking at the 209 statute of  
14 limitations, because if we are proceeding on the general  
15 three-year tort statute of limitations, there's no issue.

16 MR. DRENNON: Sure, but the 209 statute of  
17 limitations applies against claims -- applies to claims  
18 against municipalities related to the regulation of land  
19 use.

20 And although I don't -- I don't know if counsel would  
21 admit it, but he seemed to say that this wasn't a regulation  
22 of land use, which then gives us -- has a problem with a  
23 takings claim if we're not talking about regulating land  
24 use.

25 But that -- the language on 209 seems pretty clear on

1 that. As I was about to say, you have -- you have two  
2 resolutions that were presented publicly, there were public  
3 hearings on these fees. There was actually a public -- a  
4 committee on developmental impact fees, including members of  
5 the public.

6 I think they're going to have to make a showing -- I  
7 propose they have to make a showing, if they're going to  
8 rely on the discovery rule, why that they did not understand  
9 that they had a claim.

10 Plaintiffs' counsel characterized the fee as excessive  
11 and extortionary. I think people who are extorted know on  
12 the front end when they're extorted.

13 THE COURT: Unless it's hidden by the person that's  
14 extorting them.

15 MR. DRENNON: And then that -- Sure, but that gets  
16 into an individualized question, was it hidden from them,  
17 and how was it hidden and why didn't they know.

18 If we're going to -- if we're going to rely on the  
19 discovery rule as the basis to toll the statute of  
20 limitations, it requires an individual analysis of each  
21 person who's going to assert that.

22 And then last, Your Honor, just trying to short-circuit  
23 this, Montana Code gives the City the authority to enact  
24 these fees.

25 Today, at various times, the question has seemed are

1 Plaintiffs claiming that we have no authority whatsoever to  
2 have a fee at all or are they asking for a refund for the  
3 amount that's been overcharged, and I think their own  
4 briefing really answers those questions.

5 On pages 26 and moving forward of their reply brief  
6 related to class certification, they talk about the damages  
7 calculation in this case. And they don't talk about it as a  
8 zero-sum gain. They talk about an overcharge.

9 The recovery that they seek, the claims that they make  
10 relate to an overcharge. That's the class that they seek to  
11 certify, that's the case that they've pursued, that's the  
12 expert report that they have, and that's the language that  
13 they argue here.

14 We're not talking about a zero-sum gain. We're talking  
15 about what they allege is a fee that resulted in an  
16 overcharge, and the degree of that overcharge is the  
17 individual analysis that Ms. Quinn spoke about.

18 The issue with the fixture count and these other things,  
19 where that comes in is the degree of overcharge --

20 THE COURT: So, Mr. -- Mr. Drennon, I'm not trying  
21 to be obtuse about this, but if the calculations based on  
22 the mixture or the overlapping or whatever, sort of the  
23 Frankensteining of the HDR report and the FCS report is what  
24 results in this inappropriate calculation, isn't that the  
25 same for everybody?

1 Now, there may be variations based on the size of your  
2 house or what have you, but if the formula used to get to  
3 whatever the number is is uniformly wrong, can't that  
4 determination be made on a class-wide basis?

5 MR. DRENNON: I don't think so, Your Honor. If the  
6 claim is based on the Fifth Amendment of the constitution,  
7 the takings claim, which they say the Montana takings claim  
8 follows, effectively, the same analysis, you still have to  
9 ask the question.

10 So even if calculated errantly, which we don't concede,  
11 you have to show rough proportionality and essential nexus.  
12 They still have to establish those things.

13 And if we undercharged somewhere else, we get the  
14 benefit of that when you're doing that analysis. It's on --

15 THE COURT: So I guess -- and this is where I'm  
16 really having a disconnect -- what I'm hearing you say, and  
17 what I think I heard Ms. Quinn say, is that we can commit a  
18 constitutional violation, but as long as there's some other  
19 damage problem over here, the constitutional violation just  
20 gets swept under the rug, and that cannot possibly be.

21 MR. DRENNON: No, Your Honor. And I apologize, I  
22 actually have a note to address that. I don't agree with  
23 that assessment at all, but there is a question -- The  
24 constitutional violation has to have a -- there has to be a  
25 causal nexus between that and the damages.

1        And so it's -- because it's a takings clause and what it  
2 requires to establish a takings -- a takings claim and what  
3 it requires to establish, it still requires an analysis  
4 of -- of what the benefit is versus the burden.

5        And once you've done that analysis and say, okay, the  
6 benefit does not outweigh the burden, there was a taking,  
7 then you get to what the damages are.

8        But if -- if the burden -- if the property receives a  
9 benefit that outweighs the burden to it, it's not a taking.

10       You can -- you can have a -- under state law, federal  
11 law, you can have -- If we think about this in eminent  
12 domain standards, which is effectively the same thing, just  
13 kind of -- if the -- if you take the property through  
14 eminent domain and you improve the property, it still serves  
15 as a taking, but there are no damages for that.

16       THE COURT: Well, except for the owner doesn't have  
17 the property anymore and you've been completely deprived of  
18 its use.

19       MR. DRENNON: If the benefit -- Sure, if the bene-  
20 -- but if the benefit of doing that to the remainder of  
21 their property increases the value of that property --

22       THE COURT: Oh, I see what you're saying.

23       MR. DRENNON: -- in an amount that exceeds the loss,  
24 there are no damages, and that's our -- that's where our  
25 point is except it works -- it's on both sides.

1        To establish a takings claim, you have to establish that  
2 the benefit does not exceed the burden, and so that's where  
3 the individual analysis comes in.

4            THE COURT: And I suppose that leads into the issue  
5 with the solar array and the South -- South Reservoir, which  
6 ultimately were not done, and that's going to be part of the  
7 City's -- or, I'm sorry, the Plaintiffs' argument that,  
8 well, how could there be a benefit because those projects  
9 were never done so there is no benefit at all.

10           MR. DRENNON: And I don't want to get too far into  
11 the merits, but the cost --

12           THE COURT: Well, we're already there.

13           MR. DRENNON: I know. -- the cost associated -- I  
14 think the Court will ultimately hear that the costs  
15 associated -- state solar array, the costs associated --  
16 that was related to a water treatment plant -- the costs  
17 associated with the water treatment plant far exceeded what  
18 was expected or estimated at the time the fee was  
19 calculated.

20           THE COURT: Uh-huh.

21           MR. DRENNON: So those funds were actually used to  
22 be able to pursue the treatment plant, and so that -- that  
23 gets us away from individual -- the Plaintiffs' side on the  
24 individual analysis --

25           THE COURT: Right, because impact fees may not

1 include expenses for operations or maintenance of a  
2 facility.

3 MR. DRENNON: It's not -- that's not an O&M. That  
4 was to -- to build it out is what I'm saying.

5 THE COURT: Oh, okay.

6 MR. DRENNON: Not -- not an O&M issue.

7 THE COURT: All right. I see.

8 MR. DRENNON: Thank you, Your Honor. I don't have  
9 anything else at this time.

10 THE COURT: All right. Mr. Kovacich, so I have a  
11 few questions for you based on the arguments made by counsel  
12 for the City and for FCS, and the first is what do we do  
13 with this whole fixture issue, because the City's position,  
14 obviously, is that the fixture issue permeates every claim  
15 that you are seeking on behalf of your clients, so --

16 MR. KOVACICH: Two -- two things: The fixture issue  
17 is -- is part of the claims. It's a small part of the  
18 claims. This difference compared to the other things is  
19 really not the big issue in the case.

20 However, I want to go back to the fact that, apparently,  
21 it was fine and constitutionally permitted, according to the  
22 City, to base impact fees on building plans and that's what  
23 they did.

24 And so now if we go back and look at the -- at just  
25 things that should have -- that were improperly done using

1 those building plans, why can we not just calculate refunds  
2 based on the same building plans?

3       Why does there have to be a double standard where it's  
4 okay for them to use building plans to charge people, but  
5 God forbid, if somebody's entitled to a refund, we're going  
6 to go count their toilets and make sure that we offset any  
7 penny that we missed when we made the charge to begin with?

8       They could do this the same way that their program  
9 provided for and use the building plans. Simple to do.

10       Second thing, if we really do have to go out and count  
11 fixtures, then I guess, fine, let's count them. We're not  
12 talking about -- It's actually far less complicated than the  
13 technical issues on -- that we're going to have disputes on  
14 over the engineering calculations that admittedly apply to  
15 everybody.

16       I don't think we'll have much of a dispute if we have to  
17 go out and count bathtubs. I don't think that needs to be  
18 done, and neither did they when they charged people impact  
19 fees to begin with.

20       This --

21       THE COURT: Well, what --

22       MR. KOVACICH: -- this affidavit that counsel talked  
23 about, maybe I misheard her say that two-thirds of the  
24 people snuck toilets in and owed the City money.

25       Exhibit B is the list of the properties with

1 discrepancies, and I'm just looking at this thing here, it  
2 says "refund owed" for almost everybody. "No refund" on a  
3 few and then "owes City" on fewer than that.

4 Now, this is just the shower versus tub problem. You  
5 know, who owes -- who they really owe refunds to is more  
6 appropriately based on these bigger issues, which is  
7 doubling the maximum daily demand in your calculations and  
8 then using a maximum for each water meter as a -- as a  
9 bottom base and then adding on to that for toilets and  
10 bathtubs.

11 You know, these issues -- if our claims that are heard  
12 and we are successful in proving them are going to result in  
13 far greater refunds than what the City is offering, and most  
14 of these people they say are still entitled to a refund,  
15 from what I see here.

16 But it's not the kind of individual issue that would --  
17 should defeat class certification here because it would  
18 become a focal point of the litigation.

19 Number one, we could just use the plans that they used  
20 to charge them to begin with. There's nothing wrong with  
21 that. And our experts have already done that.

22 And Counsel was talking about a spreadsheet where they  
23 can't tell if it's a shower or a tub. The building plans  
24 show if it's a shower or a tub.

25 Now, it might not be the same in every case as what

1 actually got built. That doesn't mean somebody snuck a  
2 bathtub into their property. Changes happen, and the City's  
3 aware of it, and they certainly had the opportunity to be  
4 aware of it. Nobody can live in those properties until they  
5 go out and inspect the whole thing.

6 If they were so worried about matching up fixtures to  
7 what they charged for impact fees, they could have done that  
8 in their final inspections.

9 They didn't think that they needed to. I don't think  
10 they needed to and they don't need to now. We can figure  
11 out refunds the same way they figured out the charges.

12 Counsel for FCS made reference to an analysis of  
13 property improvements having to be taken into account on  
14 every property for the takings analysis.

15 There is no property improvement involved here; this is  
16 a fee that these people paid. And there's lots of law  
17 that's clear that in order to charge a fee for a building  
18 permit for a property use, you have to meet these standards,  
19 and -- the nexus and the proportionality, and if you don't  
20 meet that, it's an unconstitutional fee, and the person who  
21 paid it is entitled to damages reflecting what that was.

22 It's not individualized here because these class members  
23 all paid the fee, and the problems that resulted in the  
24 overcharge are things that were common to all of them.

25 Now, once you have a resolution of what was and wasn't

1 proper, the next step does require a formula that's going to  
2 result in different amounts.

3 And, in fact, if the Court recalls, when the City argued  
4 its motion for judgment on the pleadings, it was very -- one  
5 of its primary focuses of the argument was that this was a  
6 legislative enactment, and in order to support that  
7 position, the City represented to the Court that this was a  
8 broadly applicable fee assessment and it was uniformly  
9 calculated based on a preset framework.

10 And other than the issues that we've talked about and  
11 the issues that are referenced in the Complaint, we agree  
12 with that, and once those issues are resolved and fixed, we  
13 can easily uniformly calculate what each person's fee should  
14 have been based on that same preset framework.

15 THE COURT: So let me ask you, Mr. Kovacich, because  
16 some of the things that everyone here has talked about today  
17 aren't actually before me, so I don't have expert reports.  
18 I mean, I know we have the issue with Mr. Campbell and so  
19 forth, but in terms of an expert that calculates the damages  
20 that you believe are owed to each of the potential class  
21 members, is it a delta between what should have been paid  
22 and what was actually paid? And how is what should have  
23 been paid calculated?

24 MR. KOVACICH: Yes, Your Honor. Thank you. It is a  
25 delta, that is the claim, but it's important to note that

1 that delta, as I said earlier, is based on the -- our claim  
2 that all of these problems with the charges were problems  
3 from the outset when the Plaintiffs -- who are defined in  
4 our class. We don't have different classes here or a class  
5 that's going to change. Our proposed class is the property  
6 owners who paid the fees.

7 And we had a digression in the City's argument about  
8 changing that to the person who bore the cost or whatever,  
9 but the point was just that, yeah, sometimes an architect  
10 wrote the check and then sent a bill to the property owner.

11 But the -- So the point is this class -- proposed class  
12 is the property owners who paid those fees, and the claim is  
13 that the fees in all respects that are alleged were improper  
14 at that time, and based on that, their damages are the  
15 difference between what would have been an allowable fee --  
16 We're not saying they can't charge for an impact fee, but  
17 the ways that they charged improperly are -- can be  
18 recalculated in a way that squares with the nexus and the  
19 proportionality that they need, and so you can calculate  
20 that difference. And you can calculate it for every single  
21 class member.

22 THE COURT: Does that determination rely on -- and  
23 again, I'm kind of focusing on those projects because that  
24 seems to be a variable, a potential variable -- does that --  
25 And let me back up, I guess, because I'm trying to

1 distinguish between what I think the argument is in relation  
2 to how the base calculations -- the formula for the base  
3 calculations was put together, and that's the combination of  
4 the FCS and the HDR report, that's going to be the same  
5 regardless, is my understanding. It's just -- it's a  
6 mathematical formula.

7 MR. KOVACICH: There could be no argument that it  
8 changed later.

9 THE COURT: Okay.

10 MR. KOVACICH: You know, this is this argument that  
11 they have to go count fixtures, you know, if they had  
12 counted them on the front end, it might have been different.  
13 And it's --

14 THE COURT: Well, but -- but, I mean, regardless of  
15 the fixtures, if the -- and I'm just going to call it a  
16 multiplier, but that's not maybe the right way to talk about  
17 it, but if the -- if the base calculation was wrong, it's  
18 going to be wrong for fixtures one, two, three, four, 20.  
19 Doesn't make a difference. If the base calculation is  
20 wrong, it's wrong for everybody.

21 The other issue, though, is to the extent your argument  
22 is that the fact that they baked in these projects, which  
23 ultimately were not completed -- or I think I heard  
24 Mr. Drennon say that actually the wastewater one was -- is  
25 diverted to a different one I guess, but same wastewater --

1 The money was used for the wastewater plant.

2 MR. KOVACICH: Well, what he said is they want to  
3 justify the money they didn't spend on the solar array by  
4 saying we spent more on the wastewater plant. That's what  
5 he's saying.

6 THE COURT: Right, yeah. So I guess that's what I'm  
7 questioning is, is that something that would change because  
8 until they found out, for example, that the solar array  
9 wasn't viable, that's what it's earmarked for, that's what  
10 it was going to go for, and leaving aside the issue that the  
11 base multiplier was wrong, there's nothing wrong in saying  
12 we're going to have an impact fee that allows us to install  
13 a solar array in our wastewater plant.

14 MR. KOVACICH: Well, there could be an appropriate  
15 way to include a future cost like that, but, again, it's our  
16 claim here that they didn't because it was not a reasonably  
17 estimated cost that was related to the needs of the  
18 development.

19 And if that's the case, it was improper from the outset,  
20 and so now I think we can go back to some discussion of  
21 whether you could have a project that does meet that test  
22 initially and then something changes and they refunded that,  
23 that's a different scenario, and it does become more  
24 problematic.

25 But our claim would still be that the person damaged by

1 their failure to spend that money is the person who paid it.

2 And that's the proposed class here.

3 THE COURT: What do you make of the argu- -- Well,  
4 let me rephrase that. Could you please address the argument  
5 that you were required to notify the AG that you were  
6 challenging the constitutionality of the refund statute.

7 MR. KOVACICH: I can, Your Honor, and at this point  
8 in the litigation, we haven't challenged the  
9 constitutionality of that.

10 I made a reference to trying to square hypotheticals  
11 with the fact that these property owners who paid those fees  
12 and suffered a taking had constitutional harm that's  
13 compensable, and interpretation of that statute that would  
14 lead a municipality to pay someone else for that would be --  
15 have constitutional problems, and it's a -- it's a  
16 fundamental aspect of statutory interpretation that the  
17 Court should, when possible, give a statute meaning that  
18 would not violate constitutional rights, and so that's our  
19 position here.

20 Now --

21 THE COURT: So it's not a facially -- it's not a  
22 facial problem; it potentially could be an as-applied  
23 problem, potentially.

24 MR. KOVACICH: Depending on how it's interpreted, I  
25 think there could be constitutional problems with that

1 statute.

2 And we're here on a class certification motion that's  
3 been briefed for a long time, and as I'm sure the Court is  
4 expecting at this point, there's going to be more motions in  
5 this case, and depending on what that looks like, maybe  
6 there will be a letter to Austin Knudsen about whether he  
7 wants to talk about the constitutionality of that statute.

8 At this point, we haven't done that. I don't think that  
9 our argument requires that, and I think that the Court can  
10 make a decision on class certification that does not create  
11 constitutional problems with that language.

12 THE COURT: All right.

13 MR. KOVACICH: There was lots of discussion about  
14 factual issues and merits. As the Court has pointed out, a  
15 lot of this stuff isn't even in the record here.

16 I think I just have to comment on a couple of things.  
17 The characterization of the Weinberg situation, we don't  
18 agree with that. They do have some differences between the  
19 fixture counts that they paid fees on and what's actually in  
20 the property. It actually goes both ways. They had more  
21 fixtures in one place and less in another.

22 And, you know, again, I think the best way to deal with  
23 this would just be to follow the plan that they actually  
24 utilized to charge people these fees, which is going off the  
25 building plans, and Weinbergs, that can be done just like

1 everyone else.

2 Counsel also commented on the fact that we could  
3 continue this case with respect to the named class  
4 representatives, and that really just is absolutely not  
5 realistic.

6 Alta Views did develop a pretty large condominium  
7 complex. I think it was actually townhomes, is what they  
8 called it. Their damage calculation is -- I believe it's  
9 less than \$200,000.

10 As the Court can imagine from what's happened so far and  
11 what we can expect in the rest of this case, even that claim  
12 is not one that can be realistically prosecuted individually  
13 in a court like this.

14 And that's not the analysis and not the important  
15 question. The important right that Rule 23 provides to  
16 citizens is to bring inappropriate cases -- their claims  
17 together. It's not just about Alta Views.

18 The overwhelming majority of people who paid these fees  
19 that were improper, and they suffered what to any one of  
20 them or most of them is a significant loss is in the single  
21 digit thousands of dollars. They can't file individual  
22 cases.

23 Even Alta Views, if it's \$200,000, that's not a  
24 realistic damage claim for this type of case.

25 One final comment, and I may have touched on this

1 already, but I heard counsel say a number of times that  
2 people were sneaking fixtures into their properties.

3 The fact that the City when it charged for impact fees  
4 didn't use information that matched up with what was  
5 actually built is based on the way it set that fee program  
6 up, and I think that aspect of it is not really what's  
7 problematic here.

8 Again, we could use that. If you're going to use it to  
9 charge the fees, then there shouldn't be anything wrong with  
10 using it to recalculate those fees.

11 But this is -- You know, when people make changes to  
12 their construction, the City has access to that and every  
13 right to know that information.

14 And we don't need to go there, but even if we did, it  
15 would be fairly easy and would not create the kind of  
16 individual predominate issue that should defeat the policy  
17 in favor of allowing people who've suffered constitutional  
18 harm through takings to have their case heard in court.

19 And this case will not be heard in court in the absence  
20 of a class action certification. Thank you, Your Honor.

21 THE COURT: All right. Thank you. Well, we'll take  
22 this under advisement, and while you're all here, let's talk  
23 about the schedule.

24 As I pulled up the scheduling order today -- And,  
25 obviously, the schedule that we have in place is not

1 feasible given where we are because the -- unless I missed  
2 something, there's been at least one amendment to it, but  
3 every time I amend it I say something like all -- all other  
4 dates remain in full force and effect.

5 And so as far as I can tell and as far as I understand,  
6 the motions deadline, motions in limine and all of the final  
7 pretrial dates are still in place, which obviously is not  
8 realistic. I think those are going to be met.

9 So let's talk about what you all think is realistic in  
10 terms of getting this case to a trial. I think we'll have  
11 an order out on the class certification issue within a  
12 couple weeks. Hopefully on the shorter end of that.

13 Of course if there is a class certified, then that opens  
14 the door to a lot more process that has to occur and that  
15 generally, my experience, tends to slow down the regular  
16 trial schedule as well.

17 So I don't know if anyone wants to weigh in on that off  
18 the top of your head.

19 Mr. Kovacich?

20 MR. KOVACICH: Your Honor, I don't have,  
21 necessarily, a time frame in mind. We had hoped to keep the  
22 schedule, but I understand the Court's concern in that  
23 regard. I'm not really --

24 THE COURT: Well, let me just tell you--

25 MR. KOVACICH: -- against a change, but --

1                   THE COURT: -- I mean, the reason that I think it  
2 has to change is, for example, I can't imagine that --  
3 especially based on the things that people said here today  
4 that there aren't going to be motions filed, and that time  
5 is already blown, so -- Because it's fully briefed.

6                   MR. KOVACICH: Oh. The Court did change the motion  
7 deadline.

8                   THE COURT: Did I?

9                   MR. KOVACICH: It hasn't quite hit us yet.

10                  THE COURT: Okay. Because I didn't see that in the  
11 docket.

12                  MR. KOVACICH: It is coming right up.

13                  THE COURT: Okay.

14                  MR. KOVACICH: I think summary judgment motions --

15                  THE COURT: I showed it as September 8th.

16                  MR. KOVACICH: Yeah, there was an order following  
17 the status conference that we had on the phone that you --

18                  THE COURT: It changed the experts.

19                  MR. KOVACICH: I thought it moved the motion  
20 deadline to be fully briefed to like the 22nd.

21                  THE COURT: Did it?

22                  MR. KOVACICH: I believe so.

23                  THE COURT: Is that -- is that correct?

24                  MS. QUINN: That's my understanding as well, so I  
25 think they're due --

1 THE COURT: Okay.

2 MS. QUINN: -- next Friday, but given the status  
3 that you're going to be working on class cert decisions and  
4 the number of motions for summary judgment that we're  
5 anticipating filing, I still believe that the Court's  
6 concern that the scheduling order dates may not be a viable  
7 or workable schedule, and what I would propose is that the  
8 scheduling order deadlines be stayed until we get your class  
9 cert decision and then we reconvene about appropriate dates  
10 to address motions and pretrial work after that class cert  
11 decision comes out.

12 THE COURT: Yeah, I don't want to do that. It makes  
13 me nervous to not have a schedule in place because I think  
14 things tend to fall through the cracks at that time, but --  
15 but I think that what we can do, if you -- if you can give  
16 me a ballpark of what you think is realistic based not so  
17 much on a class certification issue, but based on motions  
18 for summary judgment, because if -- if there is a class  
19 certified, right, there would have to be the tinkering with  
20 the definition of the class, the class claim, notice would  
21 have to be -- we'd have to get a notice process set up for  
22 that, that can all, of course, be going on coexistent with  
23 other things at the same time.

24 So I don't think we need to stop everything until the  
25 class certification is handled, but given some realistic

1 dates, I think we should anticipate moving what we have now,  
2 which is a trial January 22nd of 2024.

3 And then, of course, backing out all of the deadlines  
4 from there, it just -- I just don't think it's workable or  
5 feasible because the trial deadline did not move. That I  
6 know for sure.

7 MR. KOVACICH: So, Your Honor, just throwing  
8 something out, if we looked at a trial something like three  
9 to four months later, I don't think we need three more  
10 months now to file motions, so with the concern about that  
11 whole process taking time and impacting what the trial looks  
12 like, that deadline should stay relatively close in time.  
13 You know, maybe -- maybe one month.

14 I know we've already talked about what we contemplated  
15 filing, and I can't imagine that the Defendants haven't done  
16 that.

17 You know, a class certification order, depending on what  
18 it looks like, could have an effect on that, but...

19 THE COURT: Yeah.

20 MR. KOVACICH: Or maybe 60 days until motion  
21 deadlines and then push -- We're going to have to look for a  
22 date that actually works for the trial.

23 THE COURT: Right.

24 MS. QUINN: If the case is not certified, I think  
25 the scheduling order remains workable. If the case is

1 certified, we're going to run into all of the issues that  
2 were raised in oral argument about how do we figure out who  
3 paid fees. And so if a case is certified, I would imagine  
4 we would be reopening discovery to try to figure out are  
5 fees passed along, who are potential members of the class.  
6 I can't imagine pushing a trial date out a month or even  
7 three months would be workable given the standing issues and  
8 the who's-in-the-class issues that we don't have answers  
9 for, and the Plaintiff hasn't given a proposed way to  
10 introduce who's in or out on those bases.

11 So I would prepare nine months out for trial.

12 THE COURT: That is not happening.

13 MS. QUINN: But, I mean, it's just the extent of  
14 information that has to be discovered is substantial, so the  
15 more months you're willing to give us, whether it's four  
16 months, five months, six months to try to dig into --

17 THE COURT: Well, it strikes me that the motion for  
18 summary judgment are what they are, right?

19 I already have -- it's called a motion to strike, it's a  
20 Daubert motion, really, on some level for Campbell. I  
21 imagine there's going to be some other motions like that. I  
22 think those exist irrespective of what the determination of  
23 class certification is, so I don't think that I have quite  
24 the doom-and-gloom approach to that as you might have,  
25 Ms. Quinn, but I do appreciate that there's going to have to

1 be some time baked in, probably more than 60 days. I think  
2 three months is probably appropriate.

3 Mr. Kovacich.

4 MR. KOVACICH: That is acceptable to the Plaintiffs,  
5 Your Honor. I do want to just comment also, however,  
6 discovery is closed. Expert disclosures have been made.  
7 They were made in contemplation of a class action, and they  
8 address issues that would apply class-wide including the  
9 exact things that Ms. Quinn is talking about.

10 I do not agree that we need to reopen scorched-earth  
11 discovery about things that have already been addressed in  
12 discovery and by the experts.

13 MS. QUINN: But we don't even know how to determine  
14 who's in the class. The Plaintiff hasn't discovered the  
15 information to answer all of the individual questions we  
16 have about who bore the fees and who's a property owner. We  
17 need to delve into individual stuff to make sure the class  
18 that's certified, actually the people have standing.

19 THE COURT: Well, do we know -- Can we tell who  
20 paid -- who wrote the check?

21 MR. KOVACICH: The information about who wrote the  
22 checks is in the --

23 THE COURT: City's records.

24 MS. QUINN: That's inaccurate.

25 THE COURT: The City doesn't keep records of that?

1 MS. QUINN: What we have is we have a printout  
2 receipt that on some instances puts the property record  
3 owner, but it doesn't necessarily mean that owner actually  
4 paid the fee. And then we have the building architect and  
5 the engineers and the tenants, which constitute about a  
6 hundred fifty of the properties that are at issue.

7 And so trying to figure out for all of these the  
8 other -- the one where the receipt doesn't say the actual  
9 owner's name, it either says nothing or it says a third  
10 party, I think those are about a hundred fifty. It's  
11 Exhibit B in our opposition. Those are the ones that we  
12 don't have a way to treat it like a class to figure out  
13 who's in or who's out on those.

14 So I think that if the Court was --

15 THE COURT: So are you anticipating deposing 350  
16 people?

17 MS. QUINN: Potentially. It goes -- We don't have a  
18 way of defining the class to figure out who those people  
19 are. And it was Plaintiffs' burden, and that's why --

20 THE COURT: All right. Yeah, I don't want to hear  
21 any more argument.

22 MS. QUINN: No. Right.

23 THE COURT: I'm just trying to figure out deadlines  
24 and what we need to do.

25 Mr. Kovacich, is there a way to determine of your

1 clients -- potential clients -- I don't know what the City  
2 paperwork all says. I mean, I know there was an Exhibit B  
3 prepared for me -- or prepared for this. It's obviously a  
4 summary. It's not the underlying documents. I don't have  
5 those. I haven't looked at those.

6 MR. KOVACICH: I believe we can determine who paid  
7 the fees. In the limited cases where it wasn't clearly paid  
8 by the actual record owner of the property, some inquiry  
9 could be done to verify whether that cost was truly passed  
10 along.

11 Or if it was a contractor who charged a flat fee and ate  
12 the cost himself, that would be more like the situation  
13 where somebody sells the property for market value and  
14 didn't actually incur that damage.

15 But, yes, I think that could be figured out.

16 THE COURT: And is there a discovery request from  
17 the City as to those issues, or from FCS?

18 MR. KOVACICH: I -- I don't know exactly what the  
19 discovery requests say. I think there are requests that --

20 THE COURT: There arguably would be supplementation.  
21 I guess that's what I'm getting at.

22 MR. KOVACICH: Could be. I don't know off the top  
23 of my head if there's a request that would -- would require  
24 us to try and answer that.

25 I can tell the Court that we -- I believe we can get

1 that answered and provide that information without having  
2 300 depositions.

3 THE COURT: Mr. Brady, did you want to say something  
4 either to Mr. Kovacich first or -- It's up to you.

5 MR. BRADY: There's a request to our Plaintiffs for  
6 proof of payment --

7 THE COURT: Okay.

8 MR. BRADY: -- if that expanded to the class...

9 THE COURT: Okay.

10 MR. BRADY: But they -- they also have their own  
11 records on who paid what, so...

12 THE COURT: Okay, Okay. I guess what I'm getting at  
13 is that if -- if the City's representation is that they  
14 cannot tell from their records who paid, that if there's  
15 arguably an existing discovery request that asks for proof  
16 of payment, that is something you could run to ground and  
17 provide a supplement to.

18 MR. BRADY: Yeah, for our Plaintiffs right now we  
19 know that they paid and that was what the request was for.

20 THE COURT: Okay.

21 MR. KOVACICH: And, yes, we can certainly work on  
22 that in the broader respect and I believe figure out for  
23 these people who actually paid and if there are some cases  
24 where the property owner did not.

25 THE COURT: Okay. So --

1 MR. KOVACICH: And that would be, I guess, something  
2 that would need to be done for class notice purposes.

3 THE COURT: It would.

4 All right. I'm looking at trial in May of 2024. And I  
5 don't know, obviously, the experts that you have, and I know  
6 there's going to be a fair amount of motion practice in  
7 relation to some of those experts and their testimony and so  
8 forth, but, Mr. Kovacich, if you had to give your best guess  
9 on how long you think it takes to try this case soup to  
10 nuts, what would you say?

11 MR. KOVACICH: Well, the case was set originally for  
12 seven days, I believe.

13 THE COURT: Okay.

14 MR. KOVACICH: Depending on what the Court  
15 entertains in terms of some of this individual stuff that  
16 was talked about today, if it were tried more in the manner  
17 that we envision, I think seven days is absolutely doable.

18 THE COURT: Okay. Ms. Quinn, I don't know who wants  
19 to weigh in on what your schedules are.

20 Ms. Jones, do you --

21 MS. QUINN: It depends on if the trial would be on  
22 liability, on liability and damages would impact the length,  
23 and so if it's soup to nuts, the longer, the better. Six  
24 weeks.

25 THE COURT: Also not happening. I think we got

1 W.R. Grace done in about six weeks, so I don't see this  
2 being a six-week trial. Very few things are six-week  
3 trials.

4 MS. QUINN: I haven't had a six-week trial so I  
5 wouldn't know, but knowing the number of issues that -- that  
6 we would want to be able to present to the jury, like I  
7 said, the longer -- the longest the Court is willing to --  
8 to entertain, we would ask for.

9 THE COURT: All right. Mr. Drennon.

10 MR. DRENNON: I may be briefer than other folks, I  
11 don't know. Two or three weeks is kind of where I see this.

12 THE COURT: All right. I'm going to set it for two  
13 weeks. I think we can get it done in that time period.

14 MS. JONES: And, Your Honor, I have a two-week trial  
15 that starts May 6th in the Monsanto class where the  
16 Plaintiff is a --

17 THE COURT: Is what?

18 MS. JONES: The case is Mehmke versus Monsanto, so I  
19 have another trial that's in May. And then we have another  
20 trial that's in June, I believe. I think the Proof case was  
21 reset.

22 THE COURT: Okay.

23 MS. JONES: So for me personally, a trial in May is  
24 very burdensome and jams me between two significant case  
25 settings, one with this Court.

1 MR. DRENNON: And if we're set for two weeks, Judge,  
2 I start a products case -- I think it's the third Monday of  
3 May.

4 THE COURT: All right. July 8th.

5 MR. DRENNON: Other than that being my wife's  
6 birthday, that sounds great.

7 THE COURT: Well, I bet she would love Missoula in  
8 the summer.

9 MR. DRENNON: She would, she would.

10 THE COURT: That's the best time to be here.

11 MR. KOVACICH: July 8 is open for me, Your Honor. I  
12 would have preferred to make sure Cory doesn't have a  
13 problem.

14 Do you --

15 MR. WAVRA: I would indicate we have a 15-day jury  
16 trial scheduled in Wyoming during that time for a pretty  
17 significant products case. But it's up to you,  
18 Mr. Kovacich, if you want us to get in the way of that.

19 MR. KOVACICH: Let's go ahead and set it.

20 You're going to settle that one.

21 MR. WAVRA: Okay.

22 (Laughter.)

23 THE COURT: I think you got your marching orders  
24 there, Mr. Wavra.

25 MR. KOVACICH: Tasha is going to settle hers too.

1                   THE COURT: All right. So does the 8th of July  
2 work.

3                   MS. QUINN: Yes, Your Honor.

4                   THE COURT: So we'll set it for two weeks starting  
5 the 8th. I'll back all the dates out other than that, but I  
6 will want a shorter leash on the motions, partially just  
7 because -- Unless -- unless you guys are engaging in mere  
8 puffery, I think there's going to be a lot of motions for us  
9 to decide, and so that's going to take a fair amount of  
10 Court resources so I want to make sure we have enough time  
11 to devote to them to get resolved in plenty of time for  
12 trial prep for everyone, so...

13                 All right. With that, is there anything else we need to  
14 handle here today?

15                 Mr. Kovacich, anything from the Plaintiffs?

16                 MR. KOVACICH: No. Thank you, Your Honor.

17                 THE COURT: You're welcome.

18                 Ms. Quinn, anything from the City?

19                 MS. QUINN: No, Your Honor.

20                 THE COURT: Mr. Drennon, anything from FCS?

21                 MR. DRENNON: No, Your Honor.

22                 THE COURT: All right. We'll be in recess. Thank  
23 you.

24                 MR. DRENNON: May I approach?

25                 THE COURT: Sure.

1                   MR. DRENNON: We haven't met. I just want to shake  
2 your hand.

3                   (Discussion held off the record.)

4                   (End of proceedings.)

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## REPORTER'S CERTIFICATE

2 I, Melody Jeffries Peters, a Registered Diplomate  
3 Reporter, Certified Realtime Reporter and Certified Realtime  
4 Captioner, certify that the foregoing transcript is a true  
5 and correct record of the proceedings given at the time and  
6 place hereinbefore mentioned; that the proceedings were  
7 reported by me in machine shorthand and thereafter reduced  
8 to typewriting using computer-assisted transcription; that  
9 after being reduced to typewriting, a certified copy of this  
10 transcript will be filed electronically with the Court.

11 I further certify that I am not attorney for, nor  
12 employed by, nor related to any of the parties or attorneys  
13 to this action, nor financially interested in this action.

14 IN WITNESS WHEREOF, I have set my hand at  
15 Missoula, Montana this 5th day of October, 2023.

16



17

18 /s/ Melody Jeffries Peters

19 \_\_\_\_\_  
20 Melody Jeffries Peters  
21 Freelance Court Reporter  
22  
23  
24  
25

A	55:13, 57:24 adding 74:9 addition 10:10 additional 24:24 38:22, 39:3, 49:20 50:3, 52:15, 52:23 57:6 Additionally 29:15 address 9:21, 16:24 18:8, 18:11, 22:15 25:6, 34:21, 34:25 49:1, 69:22, 80:4 86:10, 89:8 addressed 14:17 22:13, 46:8, 49:3 60:19, 89:11 addresses 18:12 addressing 16:19 40:23, 53:11 adds 59:14 adjust 26:22 adjusting 8:17 adjustments 26:9 admit 66:21 admittedly 73:14 adopted 28:8 advise 83:22 affidavit 73:22 action 6:13, 7:8 21:6, 26:2, 26:3 29:11, 32:22, 36:12 36:20, 37:18, 37:24 38:19, 41:1, 41:2 41:17, 41:22, 44:2 46:21, 47:18, 49:13 50:7, 51:6, 51:11 51:15, 53:10, 54:9 61:13, 62:1, 62:13 62:14, 66:10, 83:20 89:7, 98:13, 98:13 actions 36:4, 40:21 actual 26:6, 38:15 39:5, 41:7, 46:18 51:18, 52:18, 52:19 53:13, 53:15, 55:11 57:2, 62:13, 90:8 91:8 add 42:5, 43:23 50:16, 62:19 added 49:23, 53:19	allowable 77:15 allowed 29:19 29:21, 55:10 allowing 83:17 allows 79:12 Alta 1:12, 20:14 20:17, 22:23, 22:24 45:2, 82:6, 82:17 82:23 altogether 11:24 ambiguous 17:1 amend 28:4, 84:3 amendment 69:6 84:2 amount 7:2, 47:2 68:3, 70:23, 93:6 96:9 amounts 6:17, 7:1 8:2, 8:16, 76:2 AMY 1:11 analysis 12:4, 12:16 18:13, 37:7, 37:25 38:8, 38:15, 45:16 51:14, 51:23, 54:4 67:20, 68:17, 69:8 69:14, 70:3, 70:5 71:3, 71:24, 75:12 75:14, 82:14 afternoon 5:9, 5:14 63:21 AG 80:5 ago 13:9, 13:16 agree 14:5, 15:9 15:21, 21:21, 21:25 46:1, 54:4, 69:22 76:11, 81:18, 89:10 agreed 17:18 agreements 46:15 agrees 64:1 ahead 95:19 allegation 10:16 13:1, 14:9, 15:24 23:13, 27:13, 49:9 allegations 10:5 13:4, 23:2, 33:14 36:17, 37:11, 37:24 allege 7:24, 68:15 alleged 16:16 37:18, 77:13 allow 6:14	3:20, 4:6 applicable 36:22 76:8 application 10:1 applications 44:13 applied 7:25, 8:10 8:12, 31:15, 38:20 44:14, 44:15 applies 29:24, 66:5 66:13, 66:17, 66:17 apply 8:19, 12:12 29:13, 30:6, 34:12 34:16, 34:22, 58:3 66:8, 73:14, 89:8 applying 29:17 appreciate 88:25 approach 25:15 25:22, 25:24, 28:8 88:24, 96:24 approaching 8:25 appropriate 10:12 12:5, 15:11, 19:4 19:6, 51:15, 65:12 65:15, 79:14, 86:9 89:2 appropriately 42:14 42:14, 74:6 appropriateness 16:11, 42:11 approximately 52:24 architect 77:9, 90:4 architects 44:16 areas 32:8 argu 80:3 arguably 12:14 13:18, 19:13, 30:23 91:20, 92:15 argue 25:10, 56:12 59:8, 68:13 argued 76:3 argues 60:17 arguing 5:8, 5:11 6:2, 59:25 argument 5:3, 5:19 9:6, 9:10, 9:12 12:10, 14:9, 15:8 15:11, 21:1, 23:8 23:12, 25:2, 28:18 30:7, 30:8, 34:13	34:18, 35:20, 37:1 37:11, 45:4, 47:4 54:20, 54:22, 55:8 55:14, 66:12, 71:7 76:5, 77:7, 78:1 78:7, 78:10, 78:21 80:4, 81:9, 88:2 90:21 arguments 7:9, 7:18 32:10, 32:24, 34:19 34:23, 36:17, 61:16 72:11 arises 18:17, 19:19 arising 38:4 arose 23:9, 30:18 30:20 array 11:17, 11:19 13:10, 15:13, 59:6 71:5, 71:15, 79:3 79:8, 79:13 arrays 11:15 as-applied 80:22 aside 32:8, 79:10 asked 39:20, 40:3 41:8, 46:8, 60:1 63:5 asking 35:14, 36:12 43:20, 48:24, 50:2 50:18, 51:7, 62:2 62:4, 68:2 asks 92:15 aspect 80:16, 83:6 assert 67:21 asserted 59:22 assess 42:7, 52:20 assessed 30:21 58:21 assesses 59:19 assessing 38:12 39:6, 51:23 assessment 38:10 69:23, 76:8 assigned 48:17 associated 3:5, 3:9 3:14, 3:19, 4:5 71:13, 71:15, 71:15 71:17 assumably 20:21 assume 46:17 assumed 66:5
---	---	--	---	--

assumption 20:24 ate 91:11 attached 44:11 attention 48:5 attorney 47:21 60:16, 98:11 attorneys 98:12 audit 48:24, 53:19 August 1:12, 2:5 5:1 Austin 81:6 authority 10:20 67:23, 68:1 available 45:7 Avenue 1:3, 3:8 aware 75:3, 75:4	86:17 bases 39:25, 40:4 41:2, 41:12, 41:13 44:5, 47:20, 48:1 49:3, 49:12, 88:10 basic 27:11, 54:22 55:1 basically 25:2 basis 7:1, 35:15 37:8, 37:17, 43:17 45:12, 50:7, 60:20 66:8, 67:19, 69:4 Bates 60:21 bath/shower 48:14 bathtub 75:2 bathtubs 73:17 74:10 Baxter 4:2, 6:1 63:4 bdrennon@hallboo...	70:6, 70:9, 70:19 70:20, 71:2, 71:8 71:9 benefited 54:10 65:9 benefits 54:19 best 24:10, 27:6 81:22, 93:8, 95:10 bet 95:7 better 18:5, 24:8 93:23 beyond 39:2, 58:18 big 10:8, 72:19 bigger 74:6 biggest 23:4 bill 35:25, 77:10 birthday 95:6 bit 9:13 blew 66:4 blown 85:5 board 8:12 Boone 3:17, 5:24 Booth 4:3 bore 22:6, 43:21 44:10, 44:19, 46:18 77:8, 89:16 Beck 1:11, 5:4 beginning 27:18 37:20, 40:13, 61:23 begs 17:10 behalf 1:12, 3:10 3:20, 4:6, 5:10 5:13, 5:15, 5:18 5:21, 5:22, 5:25 bought 15:5, 19:23 Box 3:3, 3:13 Brady 3:2, 5:13 5:13, 92:3, 92:5 92:8, 92:10, 92:18 bottom 74:9 bore 47:7 bottom 74:9 bought 15:5, 19:23 Box 3:3, 3:13 Brady 3:2, 5:13 5:13, 92:3, 92:5 92:8, 92:10, 92:18 break 62:22 brief 25:3, 34:8 43:19, 44:11, 58:22 60:14, 62:21, 63:10 68:5 briefed 40:16 63:15, 81:3, 85:5 85:20 briefer 94:10 believed 65:3 bene 70:19 benefit 31:4, 38:10 38:13, 42:1, 46:23 46:25, 51:18, 51:18 51:24, 53:8, 54:10 55:11, 56:6, 65:6 65:7, 69:14, 70:4	bringing 6:18 20:22 broad 29:22 broader 54:12 92:22 broadly 44:22, 76:8 brought 7:7, 22:16 build 55:4, 72:4 builder 45:21 45:21 building 2:4, 3:18 25:18, 26:14, 26:15 26:19, 28:2, 28:14 30:4, 38:20, 44:12 44:13, 45:20, 48:10 49:21, 50:11, 50:14 50:15, 51:2, 72:22 73:1, 73:2, 73:4 73:9, 74:23, 75:17 81:25, 90:4 built 20:5, 20:11 20:22, 75:1, 83:5 burden 25:14, 36:11 36:13, 36:14, 36:16 36:24, 37:6, 38:10 38:13, 38:14, 39:12 41:25, 43:21, 43:23 46:24, 51:17, 51:18 51:21, 51:24, 52:19 53:8, 54:11, 55:11 56:6, 56:24, 60:24 65:11, 70:4, 70:6 70:8, 70:9, 71:2 90:19 brief 25:3, 34:8 43:19, 44:11, 58:22 60:14, 62:21, 63:10 68:5 briefed 40:16 63:15, 81:3, 85:5 85:20 briefer 94:10 believed 65:3 bene 70:19 benefit 31:4, 38:10 38:13, 42:1, 46:23 46:25, 51:18, 51:18 51:24, 53:8, 54:10 55:11, 56:6, 65:6 65:7, 69:14, 70:4	71:19, 76:9, 76:23 calculates 76:19 calculation 23:6 30:3, 34:8, 60:15 68:7, 68:24, 78:17 78:19, 82:8 calculations 8:7 8:11, 8:13, 10:1 10:7, 10:11, 45:9 46:3, 53:4, 68:21 73:14, 74:7, 78:2 78:3 call 25:2, 78:15 called 40:13, 56:8 82:8, 88:19 Campbell 76:18 88:20 cancel 54:1 capable 37:16 Captioner 1:2, 98:4 carry 36:23 cart 39:9 carve-out 43:4 carved 48:1 case 1:11, 6:13 6:21, 7:5, 7:22, 8:8 8:25, 9:24, 10:4 16:14, 17:19, 18:10 18:19, 18:22, 20:7 21:17, 23:2, 26:25 27:9, 27:24, 29:7 29:15, 29:16, 30:19 31:19, 32:4, 32:5 32:19, 36:13, 36:15 36:15, 36:19, 37:12 37:13, 39:9, 40:17 41:17, 45:3, 46:22 47:25, 48:11, 56:7 56:9, 57:8, 57:15 58:12, 61:12, 62:12 64:5, 65:12, 68:7 68:11, 72:19, 74:25 79:19, 81:5, 82:3 82:11, 82:24, 83:18 83:19, 84:10, 87:24 87:25, 88:3, 93:9 93:11, 94:18, 94:20 94:24, 95:2, 95:17 cases 6:16, 18:9 18:16, 28:3, 31:17
B			C	
b)(3 41:15, 41:16 41:16, 46:10, 59:18 back 17:8, 23:25 31:2, 45:8, 54:1 56:12, 62:3, 72:20 72:24, 77:25, 79:20 96:5 background 38:2 backing 87:3 baked 65:4, 65:9 78:22, 89:1 balancing 46:24 54:10 ballpark 86:16 bar 29:18 base 72:22, 74:9 78:2, 78:2, 78:17 78:19, 79:11 based 9:6, 23:20 24:17, 25:17, 25:20 26:10, 27:7, 27:13 29:15, 30:18, 31:20 33:13, 35:18, 35:21 36:4, 42:8, 55:11 58:4, 58:6, 58:7 59:21, 61:5, 61:9 62:5, 64:18, 68:21 69:1, 69:6, 72:11 73:2, 74:6, 76:9 76:14, 77:1, 77:14 83:5, 85:3, 86:16				

56:22, 82:16, 82:22	63:19, 68:11, 98:4	89:20	44:21, 45:2, 46:25	37:14, 37:25, 39:11
91:7, 92:23	98:11	checks 89:22	47:19, 47:21, 47:22	39:21, 40:4, 40:10
causal 69:25	certifying 6:13	choices 20:11	48:1, 49:11, 52:17	40:11, 40:21, 41:9
causation 41:6, 53:9	cetera 30:1	chose 54:9	52:18, 54:8, 56:25	41:9, 42:23, 43:2
61:2	challenge 64:3	chosen 48:2, 51:3	59:6, 59:25, 60:1	43:15, 43:19, 44:4
cause 13:10, 38:4	challenged 80:8	circling 45:8	60:4, 60:11, 61:3	44:21, 46:13, 47:11
41:1, 41:2, 41:22	challenging 65:21	Circuit 7:14, 37:13	61:4, 62:5, 64:23	47:11, 47:16, 47:19
51:5, 54:9, 62:1	80:6	circumstances 7:15	65:1, 66:23, 67:9	47:23, 48:24, 48:25
62:13, 66:10	change 12:4, 15:15	citations 10:15	69:6, 69:7, 69:7	49:10, 49:13, 50:7
caused 47:2	16:19, 50:15, 52:10	cited 18:10, 37:12	70:2, 71:1, 72:14	51:14, 55:16, 55:25
causes 37:18, 37:24	59:3, 61:21, 77:5	citizens 6:25, 7:3	76:25, 77:1, 77:12	57:7, 57:16, 58:1
38:19, 41:2, 44:2	79:7, 84:25, 85:2	82:16	79:16, 79:25, 82:11	58:24, 59:4, 59:10
46:21, 47:17, 51:6	85:6	City 1:16, 1:19	82:24, 86:20	59:11, 59:18, 59:23
51:11, 53:9, 62:14	changed 9:12	3:20, 5:4, 5:17	claim's 37:2	59:25, 60:4, 60:7
Central 3:18	11:14, 17:5, 17:23	5:18, 5:21, 5:22	claiming 68:1	60:11, 60:18, 60:20
cert 48:24, 48:25	28:5, 58:15, 78:8	6:21, 7:3, 7:24	claims 6:18, 7:6	61:11, 61:13, 61:13
59:23, 59:25, 60:7	85:18	8:15, 10:9, 11:17	12:19, 21:11, 22:15	61:18, 61:21, 61:24
60:12, 60:19, 62:16	changes 28:4, 64:20	11:25, 15:3, 22:8	23:18, 26:23, 28:22	62:16, 63:6, 63:14
86:3, 86:9, 86:10	75:2, 79:22, 83:11	22:15, 24:22, 25:8	29:13, 29:18, 29:20	63:16, 63:19, 65:12
certain 16:12	changing 50:20	25:13, 26:12, 26:24	29:24, 29:25, 30:18	65:14, 66:5, 68:6
certainly 11:4	77:8	27:6, 27:16, 30:3	30:19, 30:22, 31:22	68:10, 74:17, 75:22
16:25, 62:23, 75:3	Chapter 28:23	35:23, 36:5, 38:11	35:1, 35:3, 35:9	76:20, 77:4, 77:4
92:21	characteristics 32:7	39:2, 39:3, 42:16	35:12, 35:16, 35:17	77:5, 77:11, 77:11
Certificate 26:17	characterization	43:6, 45:22, 48:2	37:7, 39:22, 39:24	77:21, 80:2, 81:2
98:1	81:17	48:6, 48:6, 48:8	39:25, 40:11, 41:7	81:10, 82:3, 83:20
certification 7:10	characterize 24:17	48:12, 48:19, 49:1	41:20, 45:1, 48:23	84:11, 84:13, 86:3
26:3, 26:25, 28:18	characterized 67:10	49:7, 49:8, 49:15	51:4, 59:13, 59:19	86:8, 86:10, 86:17
32:22, 33:1, 35:1	charge 8:16, 10:22	49:24, 50:8, 50:12	59:21, 61:1, 61:9	86:18, 86:20, 86:20
35:2, 36:24, 37:2	14:19, 14:23, 18:21	50:12, 50:14, 50:16	62:9, 66:17, 66:17	86:25, 87:17, 88:5
37:14, 37:25, 39:11	21:24, 26:7, 26:9	51:20, 54:5, 54:6	68:9, 72:17, 72:18	88:23, 89:7, 89:14
39:21, 40:18, 41:3	28:9, 30:4, 58:20	55:1, 56:8, 56:10	74:11, 82:16	89:17, 90:12, 90:18
41:12, 41:14, 43:14	73:4, 73:7, 74:20	57:5, 58:25, 60:14	class 1:13, 5:3, 6:13	92:8, 93:2, 94:15
47:19, 55:16, 55:18	75:17, 77:16, 81:24	60:15, 60:21, 67:23	6:19, 7:8, 7:9, 7:13	class-wide 37:17
57:8, 57:16, 58:2	83:9	72:12, 72:22, 73:24	7:19, 7:23, 7:25	44:5, 45:12, 49:3
58:24, 61:1, 63:14	charged 18:9, 25:13	74:3, 74:13, 76:3	8:12, 9:21, 12:19	69:4, 89:8
65:12, 68:6, 74:17	25:21, 27:12, 42:7	76:7, 83:3, 83:12	14:3, 14:13, 17:24	classes 40:23, 77:4
81:2, 81:10, 83:20	54:17, 61:6, 61:19	89:25, 91:1, 91:17	18:22, 18:22, 21:5	classic 25:8
84:11, 86:17, 86:25	62:5, 63:8, 73:18	96:18	21:5, 21:13, 22:22	clause 56:15, 70:1
87:17, 88:23	75:7, 77:17, 83:3	City's 34:8, 49:18	23:17, 23:18, 23:20	clear 7:13, 17:2
certifications 40:22	91:11	49:22, 50:22, 51:20	24:6, 24:11, 24:15	17:10, 18:9, 18:16
certified 1:2, 1:2	charges 6:23, 15:24	51:21, 52:20, 54:17	24:19, 26:2, 26:3	64:6, 66:25, 75:17
22:22, 44:21, 46:7	16:1, 18:20, 18:25	71:7, 72:13, 75:2	26:25, 28:18, 29:11	clearly 13:9, 14:25
61:12, 84:13, 86:19	20:2, 21:8, 21:21	77:7, 89:23, 92:13	30:12, 30:12, 31:23	16:3, 31:17, 91:7
87:24, 88:1, 88:3	23:2, 25:17, 26:11	civil 29:18	32:21, 32:22, 33:1	clerk 6:7
89:18, 98:3, 98:3	28:15, 35:24, 38:2	claim 9:19, 10:14	33:7, 33:9, 33:20	clients 14:3, 14:12
98:9	75:11, 77:2	11:2, 12:18, 14:16	33:23, 34:16, 34:22	31:23, 47:20, 72:15
certify 5:3, 36:12	charging 33:5, 50:8	16:14, 18:13, 21:8	34:23, 34:25, 35:2	91:1, 91:1
40:4, 40:10, 40:11	50:12, 61:9	21:22, 22:24, 39:7	35:7, 35:7, 35:8	close 52:9, 87:12
41:8, 43:16, 43:20	chart 10:2, 10:9	41:24, 43:16, 43:17	36:12, 36:20, 36:21	closed 89:6
47:10, 47:11, 59:18	check 45:22, 77:10	43:19, 43:24, 44:20	36:24, 37:2, 37:3	closer 6:22

Code 67:23	complex 82:7	51:19	Counsel's 63:23	57:10, 57:12, 57:18
codes 26:19	compliance 9:14	construction 11:7	count 26:21, 50:23	57:25, 58:17, 58:18
coexistent 86:22	compliant 12:7	26:13, 38:21, 50:17	50:24, 68:18, 73:6	59:1, 60:18, 60:25
collected 16:2	complicated 15:23	83:12	73:10, 73:11, 73:17	61:22, 62:9, 62:18
16:15	73:12	Consulting 1:22	78:11	62:23, 63:3, 63:20
collection 10:2	complied 26:19	4:6	counted 48:15	64:10, 66:12, 67:13
collective 7:2, 7:8	computer-assisted	consumer 21:3	48:16, 78:12	68:20, 69:15, 70:16
collectively 6:18	2:25, 98:8	contd 4:1	counting 26:6	70:22, 71:4, 71:12
combination 78:3	concede 69:10	contemplate 30:5	counts 81:19	71:14, 71:20, 71:25
combo 48:22	concept 14:16	contemplated 7:6	couple 12:20, 81:16	72:5, 72:7, 72:10
combos 48:17	concern 84:22, 86:6	25:19, 87:14	84:12	73:21, 76:3, 76:7
Comcast 37:12	87:10	contemplates 30:2	couple-year 20:9	76:15, 77:22, 78:9
come 10:9, 32:24	concisely 36:15	contemplation 89:7	course 6:13, 8:2	78:14, 79:6, 80:3
53:10, 55:19, 56:12	conclude 29:8	contended 25:24	9:4, 23:24, 24:2	80:17, 80:21, 81:3
comes 17:3, 23:5	condition 55:3	context 33:14	84:13, 86:22, 87:3	81:9, 81:12, 81:14
45:23, 59:10, 68:19	conditions 18:21	continue 82:3	court 1:3, 1:9, 5:2	82:10, 82:13, 83:18
71:3, 86:11	condominium 82:6	continued 13:8	5:12, 5:16, 5:20	83:19, 83:21, 84:24
coming 36:11	condominiums	continuing 59:12	5:23, 6:3, 6:7, 6:10	85:1, 85:6, 85:8
85:12	20:16	contractor 22:7	6:15, 6:19, 7:11	85:10, 85:13, 85:15
comment 24:20	condos 55:4	91:11	7:17, 8:20, 9:25	85:18, 85:21, 85:23
31:7, 81:16, 82:25	conduct 38:5	contractors 44:16	10:15, 10:24, 12:25	86:1, 86:12, 87:19
89:5	conducting 11:21	46:14, 46:14	13:14, 14:14, 14:17	87:23, 88:12, 88:17
commented 82:2	conference 85:17	conversations 35:13	15:8, 15:23, 16:4	89:19, 89:23, 89:25
commit 69:17	connect 54:17	35:18	16:9, 16:22, 16:24	90:14, 90:15, 90:20
committee 67:4	consider 41:25	convert 47:23	17:10, 17:16, 18:3	90:23, 91:16, 91:20
common 7:23, 33:4	46:11, 46:12, 46:20	copy 6:8, 98:9	18:11, 19:2, 19:11	91:25, 92:3, 92:7
33:5, 35:21, 37:9	54:16	correct 16:13, 19:20	19:25, 20:14, 20:18	92:9, 92:12, 92:20
40:5, 44:23, 46:5	consideration 24:23	19:21, 22:12, 30:17	21:15, 21:16, 21:25	92:25, 93:3, 93:13
49:11, 55:22, 56:4	57:2	37:20, 42:21, 51:8	22:2, 23:16, 24:23	93:14, 93:18, 93:25
59:15, 59:18, 63:16	considered 10:12	53:21, 55:14, 57:8	27:3, 28:25, 29:16	94:7, 94:9, 94:12
75:24	14:20, 25:4, 58:23	85:23, 98:5	29:20, 30:15, 31:9	94:17, 94:22, 94:25
company 20:20	considering 50:3	correctly 49:21	31:13, 33:4, 33:12	95:4, 95:7, 95:10
compared 72:18	50:6, 50:8, 55:12	Cory 95:12	33:22, 34:1, 34:6	95:23, 96:1, 96:4
compensable 80:13	considers 52:18	cost 13:10, 14:7	34:15, 34:21, 34:25	96:10, 96:17, 96:20
compensated 15:2	consistent 18:6	14:15, 22:7, 43:24	35:6, 35:10, 36:6	96:22, 96:25, 98:10
compensation 21:12	constant 61:21	57:6, 71:11, 71:13	36:9, 36:12, 36:13	98:19
21:24, 56:16, 56:21	constitute 90:5	77:8, 79:15, 79:17	36:15, 36:25, 37:15	Court's 16:2, 24:5
56:24, 57:5, 58:10	constitution 14:13	91:9, 91:12	37:19, 39:8, 39:21	35:4, 37:6, 84:22
58:13	16:7, 65:20, 69:6	costs 8:10, 8:18	39:23, 40:4, 40:7	86:5
complaining 58:20	constitutional 6:24	10:18, 10:22, 12:23	40:24, 41:3, 41:8	cover 29:24
Complaint 9:4, 9:24	10:20, 18:7, 69:18	14:4, 20:21, 21:2	41:10, 41:13, 42:10	covered 63:13
9:24, 10:15, 16:16	69:19, 69:24, 80:12	22:19, 71:14, 71:15	42:20, 43:1, 43:4	Cowley 3:7
23:13, 29:11, 36:17	80:15, 80:18, 80:25	71:16	43:18, 44:8, 45:8	cracks 86:14
37:9, 40:1, 41:14	81:11, 83:17	could've 15:5	46:6, 47:9, 48:4	create 11:3, 28:17
58:19, 58:22, 58:23	constitutionality	counsel 5:7, 24:23	49:12, 49:15, 50:5	30:11, 33:17, 81:10
58:24, 59:14, 60:6	64:3, 80:6, 80:9	36:18, 37:4, 48:9	50:9, 51:12, 52:1	83:15
62:1, 62:9, 76:11	81:7	52:7, 52:11, 66:4	52:25, 53:17, 53:21	creates 15:23, 22:24
completed 78:23	constitutionally	66:20, 67:10, 72:11	54:7, 54:15, 54:20	33:17
completely 7:21	22:20, 72:21	73:22, 74:22, 75:12	54:24, 55:14, 55:16	credible 20:2
32:13, 70:17	constructed 28:3	82:2, 83:1	56:14, 56:17, 57:7	credit 27:17

crediting 50:22 criteria 23:14 critical 43:24 current 13:15 21:14, 22:8 currently 49:1 cut 39:19 CV-22-44-M-KLD 1:11, 5:5	dealt 32:20 December 15:12 59:6 decide 18:2, 22:1 22:2, 96:9 deciding 11:3 decision 19:2 29:25, 30:1, 41:3 54:5, 81:10, 86:9 86:11 decisions 59:2, 86:3 declaration 24:21 48:12, 52:6 declaratory 41:9 46:9, 62:1 defeat 32:21, 44:23 74:17, 83:16 defeats 33:1 defend 22:15 Defendant 1:24 3:20, 4:6, 17:15 17:18 Defendants 1:18 7:9, 7:18, 8:6, 9:20 11:1, 18:1, 28:19 32:12, 87:15 defense 17:12, 20:3 32:24, 51:23 define 7:14, 44:3 59:20, 61:2, 62:2 68:6, 69:25, 70:7 70:15, 70:24, 75:21 76:19, 77:14, 93:22 date 11:9, 11:10 12:1, 21:11, 37:1 47:5, 87:22, 88:6 dates 84:4, 84:7 86:6, 86:9, 87:1 96:5 Daubert 88:20 dawnell@justicemt... 3:6 day 25:1, 98:15 days 87:20, 89:1 93:12, 93:17 deadline 84:6, 85:7 85:20, 87:5, 87:12 deadlines 86:8, 87:3 87:21, 90:23 deal 24:7, 81:22	57:11, 61:14, 93:21 deposing 90:15 depositions 92:2 deprived 70:17 describes 11:13 DeSOTO 2:2 detail 28:11 details 27:2 determination 12:6 18:3, 18:25, 19:3 19:16, 19:17, 22:4 33:21, 34:15, 45:11 46:2, 57:13, 69:4 77:22, 88:22 determinations 8:9 34:10 determine 26:4 38:4, 40:25, 41:10 44:19, 45:25, 55:17 55:21, 56:13, 57:4 60:25, 61:15, 66:10 89:13, 90:25, 91:6 determined 21:10 25:11, 28:1, 28:15 30:3, 33:7, 40:17 49:14, 59:7 determines 17:15 17:16 determining 43:2 43:15, 53:13 develop 14:19 14:22, 36:2, 82:6 developed 20:20 36:1 developer 20:13 20:16, 20:20 developers 14:21 41:19, 45:17 developing 25:21 development 12:24 13:6, 13:8, 13:9 29:25, 79:18 developmental 67:4 devote 96:11 die 24:2 differ 47:6 difference 16:10 30:12, 33:1, 33:17 33:17, 53:5, 72:18 77:15, 77:20, 78:19	differences 7:19 7:20, 26:13, 32:12 32:21, 81:18 different 8:24 12:16, 18:13, 32:16 32:16, 32:25, 42:10 55:10, 59:10, 76:2 77:4, 78:12, 78:25 79:23 differently 9:13 difficult 16:21 49:18 difficulties 46:12 dig 88:16 digging 29:9 digit 82:21 digression 77:7 diligence 66:10 Diplomate 1:1, 98:2 disagree 37:23 disclosures 47:5 89:6 disconnect 69:16 discover 31:6 discovered 30:23 88:14, 89:14 discovery 29:5 31:5, 31:15, 31:21 32:5, 40:1, 62:10 66:4, 66:7, 67:8 67:19, 88:4, 89:6 89:11, 89:12, 91:16 91:19, 92:15 discrepancies 27:22 28:1, 74:1 discrete 41:21 discuss 7:17 discussed 37:13 discussion 29:10 79:20, 81:13, 97:3 dismiss 60:1 dismissed 43:13 dispositive 41:23 dispute 6:17, 6:19 7:7, 7:12, 8:5, 8:17 32:14, 33:2, 73:16 disputed 61:16 disputes 6:15, 7:22 8:6, 73:13 disputing 7:10	26:25 distilled 9:12 distinguish 78:1 distract 21:4, 33:3 district 1:9, 1:9, 2:3 7:14 diverted 78:25 DIVISION 1:10 doable 93:17 docket 85:11 doctrine 29:5, 31:5 31:15, 31:21, 32:5 document 60:14 60:21 documents 91:4 doing 5:19, 6:2 11:5, 25:18, 25:19 32:11, 69:14, 70:20 Dolan 38:9, 54:13 dollar 7:4 dollars 7:2, 25:21 45:3, 82:21 domain 70:12 70:14 doom-and-gloom 88:24 door 84:14 double 52:15, 73:3 doubling 74:7 Drennon 4:2, 6:1 6:1, 62:19, 62:21 63:3, 63:4, 63:4 64:10, 64:18, 66:16 67:15, 68:20, 69:5 69:21, 70:19, 70:23 71:10, 71:13, 71:21 72:3, 72:6, 72:8 78:24, 94:9, 94:10 95:1, 95:5, 95:9 96:20, 96:21, 96:24 97:1 Drive 3:12 dropped 51:13, 52:2 drug 17:22 dry 23:22, 39:19 due 15:18, 15:22 16:1, 16:23, 17:3 17:5, 17:11, 17:17 18:2, 18:2, 18:3 18:3, 18:8, 22:25
---	---	--	---	--

24:17, 33:14, 34:20	entities 1:13	58:5, 58:6, 58:7	extortionately 14:19	65:20, 70:10
58:13, 61:6, 61:15	entitled 9:18, 16:6	63:6	extra 20:12, 26:22	fee 11:3, 12:13
61:15, 61:17, 64:7	16:17, 17:21, 21:12	exactly 41:9, 52:1	51:20, 53:1, 53:5	13:20, 14:2, 14:4
64:8, 66:9, 85:25	21:19, 21:24, 27:7	91:18		15:11, 15:20, 16:5
<b>E</b>				
earlier 35:25, 63:5	33:12, 34:20, 64:15	examined 57:14	<b>F</b>	
77:1	73:5, 74:14, 75:21	example 15:13	<b>F</b>	
earmarked 79:9	entitlement 15:16	15:21, 16:2, 24:12	face 51:2	28:8, 30:2, 30:21
easily 8:4, 17:14	19:19, 30:20	34:13, 38:17, 38:17	faced 26:2	33:18, 33:19, 38:13
27:25, 32:20, 76:13	entity 9:18, 10:3	40:22, 41:25, 49:16	facial 80:22	38:23, 42:7, 44:1
East 4:4	envision 93:17	57:25, 63:6, 63:8	facially 12:7, 80:21	44:10, 44:14, 44:19
easy 37:21, 43:4	equal 20:11	79:8, 85:2	facility 72:2	45:15, 46:15, 46:15
43:11, 45:24, 83:15	equally 58:3	examples 23:11	facing 44:4	46:17, 46:18, 47:17
effect 13:21, 19:8	errantly 69:10	exceed 71:2	fact 8:13, 13:5	54:8, 54:17, 55:7
51:12, 84:4, 87:18	error 38:25, 48:21	exceeded 71:17	13:11, 25:19, 28:1	56:11, 59:8, 65:1
effectively 63:23	49:7, 51:10, 53:20	exceeds 70:23	49:15, 49:24, 56:22	65:4, 67:10, 68:2
65:9, 69:8, 70:12	especially 85:3	excessive 67:10	57:3, 59:12, 72:20	68:15, 71:18, 75:16
efficiencies 21:5	Esq 3:2, 3:2, 3:7	Exhibit 73:25	76:3, 78:22, 80:11	75:17, 75:20, 75:23
effort 6:17, 7:19	3:11, 3:16, 3:16	90:11, 91:2	82:2, 83:3	76:8, 76:13, 77:15
either 7:20, 17:17	4:2, 4:3	exhibits 6:4, 6:5	facts 35:22	77:16, 79:12, 83:5
19:3, 30:10, 42:13	essential 69:11	exist 40:6, 59:5	factual 25:2, 81:14	90:4, 91:11
46:3, 64:12, 66:9	establish 39:13	88:22	failure 58:25, 80:1	fees 6:23, 8:1
90:9, 92:4	39:14, 39:14, 49:18	existed 56:13	fair 19:24, 58:21	10:10, 10:18, 10:23
either/or 13:25	69:12, 70:2, 70:3	existing 50:21	93:6, 96:9	12:22, 14:19, 14:21
electronically 98:10	71:1, 71:1	92:15	fairly 83:15	15:6, 16:15, 16:17
element 7:10	establishes 48:12	expanded 92:8	fairness 44:9	18:23, 19:6, 20:8
elements 7:16	establishing 65:11	expect 82:11	fall 86:14	21:10, 21:19, 22:21
43:23, 43:24	estimated 71:18	expected 71:18	Falls 3:4	23:14, 23:21, 23:25
eminent 70:11	79:17	expecting 81:4	false 52:13	24:13, 25:14, 25:16
70:14	estimates 12:23	expeditiously 34:12	far 7:11, 52:6	25:20, 26:7, 26:9
emphasize 7:19	et 30:1	expense 41:19	71:10, 71:17, 73:12	28:5, 32:11, 32:15
emphasizes 17:12	Eugene 56:8	expenses 25:17	74:13, 82:10, 84:5	42:24, 43:22, 47:21
employed 98:12	evaluation 8:18	72:1	84:5	52:11, 55:2, 55:7
enact 67:23	evaluations 8:10	experience 63:7	farce 48:10	61:6, 61:20, 62:6
enacted 9:14	event 34:10	84:15	fashion 7:8	67:3, 67:4, 67:24
enactment 76:6	everybody 23:23	expert 47:5, 47:6	favor 83:17	71:25, 72:22, 73:19
ends 28:2	32:17, 59:7, 61:23	47:7, 52:7, 53:10	FCS 5:5, 5:23, 5:25	75:7, 77:6, 77:12
engaging 96:7	68:25, 73:15, 74:2	68:12, 76:17, 76:19	6:1, 10:3, 42:11	77:13, 80:11, 81:19
engineering 8:9	78:20	89:6	42:17, 45:10, 54:5	81:24, 82:18, 83:3
8:18, 10:2, 73:14	evidence 12:14	expert's 62:5	63:4, 68:23, 72:12	83:9, 83:10, 88:3
engineers 90:5	20:1, 20:2, 20:25	experts 8:14, 74:21	75:12, 78:4, 91:17	88:5, 89:16, 91:7
entered 63:2	28:5, 29:6, 37:1	85:18, 89:12, 93:5	96:20	fewer 74:3
entertain 94:8	55:11, 60:18, 61:16	93:7	feasibility 11:21	Fifth 69:6
entertains 93:15	evolved 11:14	expressly 59:14	11:22, 15:14	fifty 90:6, 90:10
entire 7:23, 18:7	exact 7:5, 26:8	extent 46:1, 78:21	feasible 12:15, 84:1	fighting 26:3
34:12, 34:22, 35:8	28:16, 89:9	88:13	87:5	figure 26:9, 37:21
entirely 11:19	exaction 18:19	extorted 67:11	February 29:12	75:10, 88:2, 88:4
entirety 62:12	19:18, 19:18, 19:22	67:12	federal 2:4, 6:24	90:7, 90:12, 90:18
	53:24, 56:9, 56:19	extorting 67:14	10:20, 16:7, 18:6	90:23, 92:22
	57:8, 57:16, 57:21	extortionary 67:11	18:9, 29:18, 33:13	figured 75:11
	57:21, 58:1, 58:3	extortionate 22:20	35:3, 35:9, 39:24	91:15

figures 8:11	flat 91:11	85:20	28:9, 34:16, 38:18	hand 97:2, 98:14
figuring 46:13	Flathead 42:2	fundamental 63:17	39:15, 40:10, 41:6	handful 23:12
file 24:24, 25:1	fluctuating 61:21	80:16	45:14, 45:17, 45:19	handle 24:10, 43:11
82:21, 87:10	focal 32:19, 33:2	funds 71:21	45:24, 49:1, 52:4	96:14
filed 9:24, 24:24	34:24, 74:18	further 48:11, 61:4	52:15, 55:25, 56:4	handled 40:20
27:24, 29:11, 29:13	focus 35:4, 47:24	98:11	57:18, 58:9, 59:21	86:25
30:13, 31:23, 85:4	focuses 25:7, 76:5	future 9:8, 11:6	60:3, 64:2, 67:6	hands 27:19
98:10	focusing 19:8	11:8, 47:14, 79:15	67:7, 67:18, 67:18	happen 13:19
filings 24:21, 86:5	77:23		67:21, 71:6, 73:5	21:25, 22:3, 75:2
87:15	folks 35:13, 43:9		73:13, 74:12, 76:1	happened 13:4
final 26:17, 75:8	45:13, 49:23, 94:10		77:5, 78:4, 78:15	13:7, 15:4, 19:5
82:25, 84:6	follow 25:23, 81:23		78:18, 79:10, 79:12	82:10
Financial 1:22, 3:12	followed 64:4, 64:5		81:4, 81:24, 83:8	happening 88:12
4:6	following 11:20		84:8, 85:4, 86:3	93:25
financially 98:13	52:1, 63:2, 85:16		86:22, 87:21, 88:1	happy 7:16
find 17:4, 49:4	follows 69:8		88:21, 88:25, 93:6	harm 21:23, 33:8
finding 22:3, 59:17	forbid 73:5		94:12, 95:20, 95:25	47:2, 47:17, 49:10
finds 49:8	force 54:11, 84:4		96:8, 96:9	49:13, 50:25, 80:12
fine 19:7, 19:12	foregoing 98:4		good 5:9, 5:14	83:18
72:21, 73:11	foremost 36:11		32:23, 34:1, 34:1	harmed 65:9
finger 58:18	forget 28:23		gotten 64:11	HDR 10:3, 42:12
finished 26:14	formula 8:19, 23:6		government 53:22	42:12, 42:17, 45:9
first 9:2, 29:10	23:24, 53:11, 69:2		53:24, 54:1, 64:16	68:23, 78:4
30:24, 36:10, 63:20	76:1, 78:2, 78:6		Grace 94:1	head 6:6, 6:9, 48:18
72:12, 92:4	formulas 33:5		grand 20:12	84:18, 91:23
fit 6:16, 47:16	forth 12:11, 27:11		great 3:4, 49:19	heads 48:18
five 13:7, 13:9	30:25, 37:8, 37:15		64:11, 95:6	hear 71:14, 90:20
13:16, 14:24, 19:14	40:23, 43:9, 76:19		greater 74:13	heard 7:8, 37:10
20:12, 88:16	93:8		ground 63:12	47:4, 60:9, 69:17
fixed 24:15, 46:14	forward 12:10		92:16	74:11, 78:23, 83:1
46:17, 76:12	39:15, 59:7, 63:10		group 5:5, 33:19	83:18, 83:19
fixture 48:13, 50:14	65:5, 68:5		33:22, 34:11, 34:12	hearing 6:19, 25:1
50:23, 50:24, 68:18	found 13:25, 14:11		34:16	52:25, 53:22, 69:16
72:13, 72:14, 72:16	21:22, 28:13, 29:20		guess 9:1, 18:1	hearings 67:3
81:19	56:7, 79:8		30:6, 34:7, 35:11	heart 58:16
fixtures 26:21	four 78:18, 87:9		53:21, 69:15, 73:11	held 97:3
27:12, 27:14, 38:6	88:15		77:25, 78:25, 79:6	hereinbefore 98:6
38:22, 38:24, 39:1	frame 30:14, 59:3		91:21, 92:12, 93:1	hidden 67:13, 67:16
39:4, 39:5, 42:3	84:21		93:8	67:17
42:5, 42:5, 48:15	framework 76:9		guys 96:7	high 38:3, 50:23
49:20, 50:11, 50:16	76:14			highlighted 32:12
51:9, 51:20, 52:10	Frankenstein 68:23			hit 85:9
52:14, 52:15, 52:23	frankly 64:6			holding 40:22
53:2, 53:12, 53:16	Freelance 98:19			home 27:8, 38:6
53:19, 55:12, 56:1	Friday 86:2			38:22, 38:24, 45:20
57:2, 57:23, 57:24	front 4:4, 58:13			55:4, 63:11
58:7, 58:15, 60:16	67:12, 78:12			homeowner 45:23
73:11, 75:6, 78:11	full 84:4			homes 52:10
78:15, 78:18, 81:21	fully 63:15, 85:5			honed 9:12
83:2				Honor 5:9, 5:14

6:1, 6:12, 9:23 12:20, 15:21, 21:8 35:17, 36:7, 36:10 63:4, 63:14, 67:22 69:5, 69:21, 72:8 76:24, 80:7, 83:20 84:20, 87:7, 89:5 94:14, 95:11, 96:3 96:16, 96:19, 96:21 hoped 84:21 Hopefully 84:12 horse 39:9 house 39:6, 42:2 49:16, 52:19, 52:20 53:16, 54:16, 69:2 household 23:7 hundred 44:10 46:25, 90:6, 90:10 hundreds 45:2, 45:3 hung 12:17, 45:8 hypertechnical 55:8 hypotheticals 80:10	67:4, 71:25, 72:22 73:18, 75:7, 77:16 79:12, 83:3, 93:22 impacted 48:20 48:22 impacting 87:11 impacts 52:18 55:24 implemented 26:11 important 14:2 30:8, 60:20, 76:25 82:14, 82:15 imposed 12:13 38:13, 38:13, 50:25 56:11 impossible 32:10 44:5 impression 9:2 improper 10:6 13:25, 14:9, 14:10 14:11, 16:1, 16:15 18:23, 19:1, 21:9 21:10, 21:22, 21:24 22:4, 22:5, 23:2 58:21, 58:25, 77:13 79:19, 82:19 improperly 9:8 16:2, 18:8, 18:20 19:11, 27:13, 62:5 63:8, 72:25, 77:17 improved 70:14 illustrates 60:6 imagine 40:18 43:11, 82:10, 85:2 87:15, 88:3, 88:6 88:21 immediately 63:20 impact 6:23, 10:10 10:18, 11:3, 12:13 12:22, 13:20, 15:6 15:11, 15:20, 16:12 19:6, 20:8, 20:13 22:5, 22:21, 23:14 23:21, 23:25, 25:14 25:14, 25:16, 26:4 26:23, 28:5, 28:8 30:2, 30:21, 35:1 43:22, 46:15, 51:14 52:11, 54:8, 55:7 61:6, 61:20, 62:6	10:11, 10:17, 13:3 14:4, 14:8, 14:23 15:1, 15:25, 52:7 includes 34:8, 38:5 61:3 including 11:14 17:24, 36:22, 55:13 67:4, 89:8 inclusion 23:14 inconsistent 30:18 31:2 incorrect 52:12 increases 70:21 incumbent 38:4 incur 22:19, 91:14 incurred 12:23 20:13 indicate 95:15 indicated 15:14 indication 29:10 individual 6:16, 7:1 7:6, 8:2, 8:13, 9:20 21:3, 25:11, 27:1 28:17, 34:23, 35:13 35:18, 37:10, 37:17 38:18, 39:15, 40:5 42:8, 42:9, 44:4 46:21, 47:15, 47:20 48:1, 48:20, 49:4 49:8, 50:18, 51:1 51:23, 54:16, 55:22 55:23, 57:1, 57:12 58:4, 58:6, 58:8 58:8, 59:15, 59:22 60:10, 64:22, 66:1 67:20, 68:17, 71:3 71:23, 71:24, 74:16 82:21, 83:16, 89:15 89:17, 93:15 individual's 38:6 individualistic 44:23, 47:1, 47:8 51:1, 56:6, 57:23 62:15 incentive 45:4, 45:6 include 12:5, 12:21 42:23, 47:12, 48:3 49:12, 51:3, 72:1 79:15 included 8:11, 8:18	1:11, 1:12, 20:20 57:15, 82:12 individuals 45:1 58:14 ineligible 9:8 12:11, 19:11 inference 13:18 information 11:18 27:6, 48:10, 56:18 60:25, 83:4, 83:13 88:14, 89:15, 89:21 92:1 informed 13:11 inherent 51:6 inherently 61:21 initial 22:7, 40:22 initially 12:21 79:22 injury 31:17, 31:18 31:21, 31:22, 49:9 ink 23:22 input 53:11, 60:15 inquiry 27:1, 91:8 insignificant 7:20 32:13, 32:20 inspect 25:23, 28:7 28:9, 75:5 inspected 49:21 inspecting 26:5 27:23 inspection 26:18 inspections 25:11 51:7, 51:13, 51:17 52:2, 53:11, 53:19 55:24, 56:4, 58:5 58:19, 59:1, 59:9 59:15, 59:17, 61:3 61:18, 62:11, 66:3 66:15, 68:18, 71:4 72:6, 72:13, 72:14 72:16, 72:19, 74:16 76:18, 78:21, 79:10 83:16, 84:11, 86:17 90:6 issued 42:16 issues 7:22, 8:17 9:19, 9:20, 9:21 10:4, 10:13, 24:9 28:17, 32:18, 33:4 33:5, 33:11, 37:9 38:5, 38:18, 39:16	80:16 interpreted 80:24 interrogatory 62:10 introduce 5:7, 88:10 invoice 60:17 60:20 involve 40:19 involved 10:2 33:10, 43:5, 54:19 75:15 involvement 48:4 involves 49:3 involving 32:5 57:16, 59:13, 59:13 irrespective 88:22 irrigate 42:6, 56:3 irrigation 56:3 isolated 46:12 issue 8:8, 9:17 10:8, 10:21, 10:25 11:1, 14:2, 14:5 15:23, 17:2, 18:11 23:20, 24:1, 29:3 30:2, 31:22, 32:9 41:4, 41:10, 41:21 43:14, 44:9, 44:22 45:11, 46:5, 46:12 47:11, 48:3, 48:5 48:6, 48:13, 48:23 49:2, 49:11, 49:19 50:13, 50:23, 51:4 51:7, 51:13, 51:17 52:2, 53:11, 53:19 55:24, 56:4, 58:5 58:19, 59:1, 59:9 59:15, 59:17, 61:3 61:18, 62:11, 66:3 66:15, 68:18, 71:4 72:6, 72:13, 72:14 72:16, 72:19, 74:16 76:18, 78:21, 79:10 83:16, 84:11, 86:17 90:6 issued 42:16 issues 7:22, 8:17 9:19, 9:20, 9:21 10:4, 10:13, 24:9 28:17, 32:18, 33:4 33:5, 33:11, 37:9 38:5, 38:18, 39:16
I				
idea 25:10, 32:3 32:10, 45:9 identified 59:16 ignore 53:2 illegal 54:22 illustrated 17:10 imagine 40:18 43:11, 82:10, 85:2 87:15, 88:3, 88:6 88:21 immediately 63:20 impact 6:23, 10:10 10:18, 11:3, 12:13 12:22, 13:20, 15:6 15:11, 15:20, 16:12 19:6, 20:8, 20:13 22:5, 22:21, 23:14 23:21, 23:25, 25:14 25:14, 25:16, 26:4 26:23, 28:5, 28:8 30:2, 30:21, 35:1 43:22, 46:15, 51:14 52:11, 54:8, 55:7 61:6, 61:20, 62:6				

40:5, 40:11, 40:19 41:22, 46:22, 50:3 50:6, 50:18, 51:8 55:22, 55:22, 56:4 58:6, 58:8, 58:9 59:3, 59:15, 66:1 73:13, 74:6, 74:11 76:10, 76:11, 76:12 81:14, 88:1, 88:7 88:8, 89:8, 91:17 94:5	<b>K</b>  Kalispell 3:13 Karlberg 3:17 KATHLEEN 2:2 keep 48:10, 84:21 89:25 keeping 49:18 kgrimes@lairdcow... 3:10 kind 19:8, 32:21 32:25, 36:15, 63:10 66:4, 70:13, 74:16 77:23, 83:15, 94:11 kinds 29:24 knew 48:21 Knick 18:10, 18:11 18:12, 18:15, 30:19 know 11:7, 11:9 15:10, 19:14, 27:9 30:6, 30:25, 31:1 31:18, 32:4, 32:15 33:12, 35:19, 39:17 43:7, 45:19, 46:17 46:21, 48:8, 49:7 49:9, 49:17, 49:20 51:22, 56:15, 57:24 62:19, 64:12, 66:20 67:11, 67:17, 71:13 74:5, 74:11, 76:18 78:10, 78:11, 81:22 83:11, 83:13, 84:17 87:6, 87:13, 87:14 87:17, 89:13, 89:19 91:1, 91:2, 91:18 91:22, 92:19, 93:5 93:5, 93:18, 94:5 94:11 knowing 39:5 48:20, 53:13, 65:2 94:5 known 56:18 knows 48:4 Knudsen 81:6 Koontz 18:15 Kovacich 3:2, 3:3 5:9, 5:10, 6:11 6:12, 8:20, 9:23 12:20, 13:1, 13:24 15:9, 15:21, 16:14	17:8, 18:15, 19:10 19:21, 20:1, 20:17 21:7, 22:14, 23:16 24:5, 27:21, 29:1 31:8, 31:10, 31:11 31:14, 33:24, 34:3 34:7, 34:25, 35:2 35:7, 35:17, 36:7 37:19, 40:8, 72:10 72:16, 73:22, 76:15 76:24, 78:7, 78:10 79:2, 79:14, 80:7 80:24, 81:13, 84:19 84:20, 84:25, 85:6 85:9, 85:12, 85:14 85:16, 85:19, 85:22 87:7, 87:20, 89:3 89:4, 89:21, 90:25 91:6, 91:18, 91:22 92:4, 92:21, 93:1 93:8, 93:11, 93:14 95:11, 95:18, 95:19 95:25, 96:15, 96:16 kwakefield@hallb... 4:5	40:15, 64:2, 70:10 70:11, 75:16 lawn 42:6 lawsuit 48:3 lawyer 32:24 layers 59:14, 59:14 lead 80:14 leads 8:21, 71:4 learned 48:12 leash 96:6 leasing 44:17 leave 24:24 leaving 79:10 legal 35:24, 63:5 legislative 76:6 legislature 65:2 length 93:22 Leonard 3:16, 5:22 5:22 letter 81:6 letters 17:19, 49:6 level 27:12, 28:11 39:11, 55:16, 55:19 88:20 liability 8:25, 23:20 37:8, 37:17, 39:25 41:2, 41:6, 47:17 51:23, 53:7, 53:17 53:18, 53:18, 55:15 58:16, 59:19, 61:2 93:22, 93:22 limine 84:6 limit 56:18 limitation 32:9 limitations 28:20 28:23, 29:4, 29:17 30:22, 31:16, 32:6 34:13, 34:18, 66:3 large 20:16, 33:19 34:16, 34:22, 82:6 late 11:22 Laughter 31:13 34:2, 95:22 law 6:25, 7:13, 9:15 10:21, 12:8, 12:21 16:7, 17:6, 18:7 25:25, 29:18, 30:22 33:13, 35:1, 35:3 35:9, 36:14, 37:13 38:3, 39:7, 39:24	little 9:12, 11:10 11:11, 11:17, 33:10 live 24:2, 75:4 LLC 1:12 long 69:18, 81:3 93:9 longer 29:19, 29:21 34:4, 34:6, 64:22 93:23, 94:7 longest 94:7 look 13:16, 13:22 13:24, 20:14, 21:3 26:18, 26:25, 41:16 44:15, 52:17, 54:11 54:12, 55:2, 58:9 58:12, 62:12, 72:24 87:21 looked 87:8, 91:5 looking 11:16 30:24, 46:20, 46:24 47:1, 57:23, 66:13 74:1, 93:4 looks 81:5, 87:11 87:18 loss 16:6, 22:20 23:5, 70:23, 82:20 lot 27:9, 47:12 81:15, 84:14, 96:8 lots 75:16, 81:13 love 95:7 lumped 48:19
jams 94:24 January 13:21 15:11, 24:13, 42:24 87:2 JEFF 1:11 Jeffries 1:1, 1:3 98:2, 98:18, 98:19 Johnson 3:3 Jones 3:16, 5:21 5:21, 6:6, 6:9 93:20, 94:14, 94:18 94:23 Jori 4:3, 5:24 jquinlan@hallboot... 4:5 Judge 95:1 judgment 9:5 14:18, 19:3, 60:3 76:4, 85:14, 86:4 86:18, 88:18 July 95:4, 95:11 96:1 jumping-off 8:22 June 94:20 jurisdiction 43:18 jurisprudence 64:14 jury 19:3, 38:4 39:6, 39:10, 39:13 51:22, 54:15, 94:6 95:15 justice 6:14, 56:20 56:24, 57:1 justify 6:17, 79:3	<b>L</b>  Laird 3:7 Lake 42:2 land 29:25, 30:1 66:18, 66:22, 66:23 landowners 41:19 language 14:5, 16:4 16:22, 17:9, 21:15 22:25, 24:18, 29:22 30:1, 60:6, 63:25 66:25, 68:12, 81:11 large 20:16, 33:19 34:16, 34:22, 82:6 late 11:22 Laughter 31:13 34:2, 95:22 law 6:25, 7:13, 9:15 10:21, 12:8, 12:21 16:7, 17:6, 18:7 25:25, 29:18, 30:22 33:13, 35:1, 35:3 35:9, 36:14, 37:13 38:3, 39:7, 39:24	Laird 3:7 Lake 42:2 land 29:25, 30:1 66:18, 66:22, 66:23 landowners 41:19 language 14:5, 16:4 16:22, 17:9, 21:15 22:25, 24:18, 29:22 30:1, 60:6, 63:25 66:25, 68:12, 81:11 large 20:16, 33:19 34:16, 34:22, 82:6 late 11:22 Laughter 31:13 34:2, 95:22 law 6:25, 7:13, 9:15 10:21, 12:8, 12:21 16:7, 17:6, 18:7 25:25, 29:18, 30:22 33:13, 35:1, 35:3 35:9, 36:14, 37:13 38:3, 39:7, 39:24	<b>M</b>  machine 2:24, 98:7 made-up 10:22 MAGISTRATE 2:2 main 3:17, 43:16 maintenance 72:1 major 28:19, 32:8 majority 52:14 82:18 making 41:3, 55:9 man 25:8 manner 7:23, 8:4 8:15, 28:16, 36:2 93:16 Marcel 3:11, 5:18 marcelquinn@attor... 3:14	

marching 95:23	merely 56:5, 58:20	94:18	60:4, 60:22, 82:3	noting 66:2
Mark 3:2, 5:10	merit 55:17	Montana 1:4, 1:9	narrow 44:22	npjones@boonekar...
mark@justicemt.c...	merits 55:14, 55:19	1:16, 1:19, 2:3, 2:5	Natasha 3:16, 5:21	3:19
3:5	71:11, 81:14	3:4, 3:8, 3:13, 3:18	nature 57:20	nschreckendgust@...
market 15:5, 19:24	messed 27:17	4:4, 6:25, 9:15	nearly 29:3	3:19
20:22, 20:23, 91:13	met 23:14, 25:15	10:20, 29:18, 40:15	necessarily 22:3	number 27:13, 42:3
marketed 20:21	25:24, 35:24, 84:8	64:2, 67:23, 69:7	34:22, 38:5, 39:18	69:3, 74:19, 83:1
matched 83:4	97:1	98:15	40:19, 55:9, 84:21	86:4, 94:5
matching 75:6	metaphor 63:11	month 87:13, 88:6	90:3	numbers 34:9
material 46:16	meter 23:7, 42:4	months 34:14, 87:9	necessary 13:6	53:15
Math 54:14	50:20, 50:23, 50:24	87:10, 88:7, 88:11	26:23, 26:24	numerosity 7:12
mathematical 54:5	56:3, 74:8	88:15, 88:16, 88:16	need 13:10, 22:1	7:14
54:14, 78:6	meters 51:9, 53:12	88:16, 89:2	27:21, 34:10, 39:17	numerous 39:25
matter 30:10, 63:15	53:16, 56:1, 57:23	motion 5:3, 9:4	40:23, 75:10, 77:19	nuts 93:10, 93:23
63:22	58:7	14:17, 24:25, 25:5	83:14, 86:24, 87:9	
mattered 34:14	method 39:15	25:9, 35:19, 39:21	89:10, 89:17, 90:24	O
maximum 10:7	microscopic 54:12	40:3, 41:12, 41:13	93:2, 96:13	O&M 72:3, 72:6
23:6, 74:7, 74:8	millions 7:4, 25:21	60:3, 76:4, 81:2	needed 28:4, 28:11	obtuse 68:21
McDonald 3:8	mind 17:1, 31:9	85:6, 85:19, 87:20	50:21, 75:9, 75:10	obviously 23:18
mean 16:5, 20:19	62:22, 84:21	88:17, 88:19, 88:20	needle 12:2	39:9, 40:15, 72:14
20:23, 22:11, 23:24	minutes 62:24	93:6	needs 15:23, 73:17	83:25, 84:7, 91:3
27:5, 31:16, 31:21	misheard 73:23	motions 39:10, 81:4	79:17	93:5
33:14, 39:8, 39:9	misrep 41:5, 60:11	84:6, 84:6, 85:4	negligence 35:12	Occupancy 26:17
43:5, 43:5, 45:14	60:25	85:14, 86:4, 86:10	35:16, 36:3, 36:3	occur 31:22, 84:14
45:19, 48:21, 49:20	misrepresentation	86:17, 87:10, 88:21	61:3, 61:4	occurred 15:3
50:5, 55:9, 75:1	35:12, 35:16, 35:20	96:6, 96:8	negligent 35:12	31:24, 53:20, 54:4
76:18, 78:14, 85:1	36:4, 59:24	Mount 1:3	35:16, 35:20, 36:3	56:9, 56:19, 63:9
88:13, 90:3, 91:2	missed 73:7, 84:1	move 24:20, 87:5	41:5, 59:24, 60:11	occurs 18:16, 18:19
meaning 80:17	Missoula 1:4, 1:10	moved 85:19	60:25	64:15
means 21:14, 54:15	2:5, 3:8, 3:18, 4:4	moves 12:2	neither 73:18	October 98:15
measurement 37:16	95:7, 98:15	moving 61:14	nervous 86:13	offering 74:13
meet 23:13, 38:9	mistake 53:1, 53:2	63:10, 65:25, 68:5	never 13:11, 32:22	offhand 58:5
39:12, 75:18, 75:20	mixing 42:11	87:1	57:7, 57:15, 60:4	office 1:4
79:21	mixture 68:22	multiple 7:3, 20:16	71:9	offset 39:1, 53:19
meeting 30:25	mjeffries@montan...	52:14	nexus 25:15, 25:25	73:6
Mehmke 94:18	1:5	multiplier 78:16	57:13, 69:11, 69:25	oh 26:20, 70:22
Melody 1:1, 98:2	model 37:15, 37:21	79:11	75:19, 77:18	72:5, 85:6
98:18, 98:19	mold 6:16	municipalities	nine 88:11	okay 5:12, 5:20, 6:7
member 61:24	moment 9:14, 12:6	66:18	Ninth 7:13, 37:13	20:18, 34:1, 34:6
77:21	23:22	municipality 1:17	Nods 6:6, 6:9	36:6, 50:9, 57:10
members 7:13, 7:19	Monday 95:2	1:19, 10:21, 11:2	Nollan 38:9	70:5, 72:5, 73:4
7:25, 8:12, 21:13	monetary 41:17	14:18, 18:20, 26:15	Nollan/Dolan 14:17	78:9, 85:10, 85:13
30:13, 33:8, 33:9	41:18, 46:9	80:14	55:5, 57:18	86:1, 92:7, 92:9
37:4, 61:18, 66:6	money 11:10, 11:11		nonexistent 7:21	92:12, 92:12, 92:20
67:4, 75:22, 76:21	11:17, 22:9, 22:10		North 3:4	92:25, 93:13, 93:18
88:5	31:24, 37:22, 45:20		note 69:22, 76:25	94:22, 95:21
membership 43:3	45:23, 50:1, 50:3		nothing's 13:7	on-site 32:11
mention 9:25	50:19, 73:24, 79:1		notice 28:3, 39:2	once 8:9, 14:3, 48:5
mentioned 98:6	79:3, 80:1		86:20, 86:21, 93:2	64:24, 64:24, 70:5
mere 96:7	Monsanto 94:15		notify 80:5	

75:25, 76:12 onerous 25:11 ones 14:15, 14:22 37:10, 40:5, 90:11 onset 13:3 open 95:11 opens 84:13 operates 27:11 operations 72:1 opinion 58:1 opportunity 25:3 75:3 oppose 7:9 opposed 9:21 opposition 28:19 44:11, 90:11 options 45:7 oral 5:3, 37:1, 88:2 order 36:1, 50:20 75:17, 76:6, 83:24 84:11, 85:16, 86:6 86:8, 87:17, 87:25 orders 95:23 ordinance 38:1 38:9, 43:8 ordinances 40:12 42:25, 44:25, 47:25 61:22 Oregon 56:7 original 9:24, 15:19 38:23, 50:17 originally 8:16 14:21, 93:11 outcome 22:11 outlandish 22:11 outset 15:25, 23:21 40:15, 45:11, 77:3 79:19 outweigh 40:5, 56:4 70:6 outweighs 70:9 overcharge 7:25 23:5, 68:8, 68:10 68:16, 68:16, 68:19 75:24 overcharged 6:21 7:3, 7:24, 8:3, 29:9 32:1, 32:1, 68:3 overcharges 10:6 overlapping 68:22	overly 54:21 overwhelming 82:18 owe 39:3, 50:1 74:5 owed 38:25, 59:10 73:24, 74:2, 76:20 owes 17:15, 17:16 74:3, 74:5 owned 17:24, 43:21 45:15, 45:17 owner 15:4, 15:16 15:18, 15:20, 17:14 18:20, 19:23, 21:3 21:15, 22:6, 22:7 22:23, 64:7, 64:25 70:16, 77:10, 89:16 90:3, 90:3, 91:8 92:24 owner's 90:9 owners 17:20 21:18, 22:8, 29:7 43:20, 47:14, 77:6 77:12, 80:11 ownership 17:5 17:23, 32:9, 43:23 44:6, 47:16, 64:19 owns 16:10, 16:21 64:22	51:25, 52:11, 52:23 56:5, 57:3, 57:4 59:8, 61:11, 61:24 75:16, 75:21, 75:23 76:21, 76:22, 76:23 77:6, 77:12, 80:1 80:11, 81:19, 82:18 88:3, 89:20, 90:4 91:6, 91:7, 92:11 92:14, 92:19, 92:23 paint 48:9 Pakdel 18:15 paperwork 91:2 paragraph 11:10 11:13, 11:16, 11:20 paragraphs 10:16 11:9 parameter 44:3 part 17:9, 20:5 25:5, 44:21, 46:9 48:24, 51:4, 53:7 54:23, 55:8, 62:9 62:10, 65:6, 71:6 72:17, 72:17 partially 96:6 particular 23:7 33:7 particularly 35:20 51:2, 52:22, 57:23 parties 6:14, 16:16 16:17, 18:23, 18:24 40:16, 54:16, 98:12 party 6:3, 14:19 16:8, 16:10, 17:13 19:21, 19:22, 21:11 21:23, 22:19, 90:10 pages 68:5 paid 8:1, 14:3 14:12, 14:15, 14:21 15:20, 16:5, 16:11 16:13, 16:18, 17:13 18:23, 19:22, 20:8 21:9, 21:13, 21:18 22:23, 24:13, 24:13 31:24, 31:24, 32:15 32:17, 33:18, 33:19 37:22, 43:8, 43:9 43:9, 43:10, 44:14 44:16, 44:17, 45:5 45:15, 45:17, 45:23	92:16 pays 47:7 penny 73:7 people 8:2, 14:21 18:22, 22:18, 24:13 25:13, 25:20, 25:21 32:4, 32:16, 32:17 32:24, 33:18, 33:20 35:23, 36:5, 42:13 42:24, 43:5, 43:7 44:17, 45:4, 45:15 46:17, 47:12, 48:20 49:25, 57:24, 58:15 61:19, 67:11, 73:4 73:18, 73:24, 74:14 75:16, 81:24, 82:18 83:2, 83:11, 83:17 85:3, 89:18, 90:16 90:18, 92:23 people's 27:23 28:15 per-property 7:1 percent 44:10 46:25, 51:25, 52:5 52:10, 55:24, 58:14 percentage 52:9 performed 8:7, 8:14 8:15, 8:15 period 12:8, 13:22 15:17, 20:9, 29:19 29:21, 94:13 permeates 9:19 72:14 permit 30:4, 38:20 44:13, 49:24, 50:17 51:2, 55:4, 75:18 permits 44:13 45:22 permitted 72:21 person 9:18, 14:12 16:5, 34:17, 34:18 47:7, 57:14, 67:13 67:21, 75:20, 77:8 79:25, 80:1 person's 76:13 personal 63:7 personally 94:23 persons 1:13 perspective 16:9 54:12	pervades 51:10 pervasive 38:18 Peters 1:1, 98:2 98:18, 98:19 phantom 9:8, 10:21 12:11, 19:9, 19:11 phase 45:12 phone 85:17 pin 29:3 pinpoint 61:17 place 5:2, 81:21 83:25, 84:7, 86:13 98:6 Plaintiff 1:20 31:18, 37:15, 38:11 39:12, 39:13, 42:8 43:13, 44:12, 44:24 50:10, 51:19, 53:25 56:9, 56:11, 60:8 63:15, 65:11, 88:9 89:14, 94:16 Plaintiffs 1:14, 3:10 5:3, 5:6, 5:10, 5:13 5:15, 7:24, 8:14 8:24, 9:11, 10:5 10:14, 13:1, 28:22 29:13, 36:11, 36:19 36:25, 37:4, 37:6 38:16, 39:20, 40:3 41:7, 41:8, 42:23 43:6, 44:25, 45:6 47:19, 48:9, 49:4 49:8, 50:8, 51:1 51:3, 52:3, 52:7 52:11, 54:20, 56:17 57:3, 58:19, 58:20 58:22, 60:2, 60:22 62:15, 67:10, 68:1 71:7, 71:23, 77:3 89:4, 90:19, 92:5 92:18, 96:15 plan 28:4, 50:15 50:15, 81:23 Planning 11:21 plans 11:25, 25:18 25:20, 26:8, 26:14 28:2, 28:14, 38:21 72:22, 73:1, 73:2 73:4, 73:9, 74:19 74:23, 81:25	
		P			
		P.C 3:3, 3:17, 4:3 p.m 2:6, 2:6, 63:1 P.O 3:3, 3:13 pages 68:5 paid 8:1, 14:3 14:12, 14:15, 14:21 15:20, 16:5, 16:11 16:13, 16:18, 17:13 18:23, 19:22, 20:8 21:9, 21:13, 21:18 22:23, 24:13, 24:13 31:24, 31:24, 32:15 32:17, 33:18, 33:19 37:22, 43:8, 43:9 43:9, 43:10, 44:14 44:16, 44:17, 45:5 45:15, 45:17, 45:23	party 6:3, 14:19 16:8, 16:10, 17:13 19:21, 19:22, 21:11 21:23, 22:19, 90:10 passed 12:7, 13:21 19:25, 20:2, 21:2 46:15, 47:3, 47:8 88:5, 91:9 pay 12:22, 20:12 22:10, 22:18, 22:22 23:25, 32:17, 32:17 35:14, 36:1, 37:22 42:24, 55:3, 80:14 paying 15:3, 18:21 21:23, 22:20, 43:21 53:3, 56:24 payment 19:15 35:15, 52:20, 92:6	72:14 permit 30:4, 38:20 44:13, 49:24, 50:17 51:2, 55:4, 75:18 permits 44:13 45:22 permitted 72:21 person 9:18, 14:12 16:5, 34:17, 34:18 47:7, 57:14, 67:13 67:21, 75:20, 77:8 79:25, 80:1 person's 76:13 personal 63:7 personally 94:23 persons 1:13 perspective 16:9 54:12	49:8, 50:8, 51:1 51:3, 52:3, 52:7 52:11, 54:20, 56:17 57:3, 58:19, 58:20 58:22, 60:2, 60:22 62:15, 67:10, 68:1 71:7, 71:23, 77:3 89:4, 90:19, 92:5 92:18, 96:15 plan 28:4, 50:15 50:15, 81:23 Planning 11:21 plans 11:25, 25:18 25:20, 26:8, 26:14 28:2, 28:14, 38:21 72:22, 73:1, 73:2 73:4, 73:9, 74:19 74:23, 81:25

plant 71:16, 71:17 71:22, 79:1, 79:4 79:13 plead 36:21 pleadings 9:5 14:18, 76:4 please 5:6, 6:10 9:22, 80:4 pled 21:20 plenty 96:11 PLLC 3:7, 3:12 plumbing 26:16 27:10, 50:17 point 8:22, 21:1 32:19, 33:3, 33:16 34:1, 34:1, 34:24 70:25, 74:18, 77:9 77:11, 80:7, 81:4 81:8 pointed 24:12 59:25, 63:20, 81:14 policy 31:20, 83:16 poorly 14:14, 24:18 portion 34:23, 62:4 portray 39:19 pose 40:8, 41:21 posed 40:7 position 21:20 27:17, 28:21, 54:3 72:13, 76:7, 80:19 possible 11:6, 12:9 23:16, 23:19, 27:20 80:17 possibly 69:20 potential 24:7, 37:3 76:20, 77:24, 88:5 91:1 potentially 6:4 47:12, 80:22, 80:23 90:17 practical 6:20 practice 93:6 preamble 42:18 precedent 55:3 precise 34:9, 55:6 precisely 56:18 60:5 precision 54:14 predominance 36:23, 46:10, 46:20	predominate 12:19 37:10, 39:16, 46:22 55:23, 58:9, 59:15 83:16 predominating 9:20 preferred 95:12 premised 42:17 53:15 prep 96:12 prepare 88:11 prepared 37:4, 91:3 91:3 preparing 8:23 present 94:6 presented 39:21 41:13, 62:8, 67:2 presenting 62:11 preset 76:9, 76:14 presumably 65:3 pretrial 84:7, 86:10 pretty 17:2, 29:22 37:21, 43:4, 43:11 45:19, 45:24, 52:14 55:1, 64:6, 66:25 82:6, 95:16 previously 10:10 price 20:23, 65:4 primary 76:5 printout 90:1 Prinzing 3:16 prior 10:3, 19:17 24:14, 42:12, 48:4 probably 6:22, 22:2 28:3, 32:3, 33:20 43:12, 89:1, 89:2 problem 16:4 16:21, 17:9, 21:16 22:21, 23:4, 23:9 24:7, 24:8, 24:16 25:18, 48:8, 49:22 49:24, 66:22, 69:19 74:4, 80:22, 80:23 95:13 problematic 14:7 17:19, 22:14, 22:17 23:1, 23:1, 43:16 79:24, 83:7 problems 23:3, 24:4 26:10, 26:10, 29:1 61:4, 75:23, 77:2	77:2, 80:15, 80:25 81:11 procedural 65:17 procedure 64:4 64:5 proceed 6:10, 36:20 45:12 proceeding 22:16 43:8, 66:14 proceedings 2:24 62:25, 63:2, 97:4 98:5, 98:6 process 17:20 17:22, 46:11, 48:7 48:24, 49:1, 49:21 49:25, 65:18, 65:21 84:14, 86:21, 87:11 produce 11:23 produced 2:25 products 95:2 95:17 program 73:8, 83:5 project 8:10, 11:12 11:17, 11:19, 11:21 11:22, 26:14, 51:19 52:18, 55:12, 79:21 projects 9:7, 9:9 9:25, 10:11, 10:17 10:22, 11:4, 11:6 11:25, 12:5, 12:9 12:15, 12:21, 13:5 19:12, 23:12, 33:6 59:2, 59:2, 71:8 77:23, 78:22 promising 11:23 proof 36:24, 47:5 92:6, 92:15, 94:20 proper 21:21, 25:4 35:23, 39:2, 76:1 properly 10:17 14:8, 25:16, 38:2 59:8 properties 17:23 17:24, 20:8, 20:19 20:22, 27:23, 32:16 50:20, 50:22, 73:25 75:4, 83:2, 90:6 property 10:8 14:20, 14:22, 15:3 15:4, 15:5, 15:6	15:16, 15:17, 15:18 15:19, 15:19, 16:21 17:14, 17:19, 18:20 18:21, 19:23, 19:24 20:5, 20:10, 21:14 21:18, 22:22, 25:12 25:21, 25:23, 26:6 27:2, 29:7, 30:9 32:9, 33:18, 34:5 36:1, 38:11, 38:16 42:2, 43:20, 43:21 43:25, 44:18, 56:2 61:20, 64:7, 64:19 64:22, 64:25, 64:25 65:7, 65:8, 65:8 65:8, 70:8, 70:13 70:14, 70:17, 70:21 70:21, 75:2, 75:13 75:14, 75:15, 75:18 77:5, 77:10, 77:12 80:11, 81:20, 89:16 90:2, 91:8, 91:13 92:24 proportional 54:18 54:21 proportionality 25:15, 26:1, 38:12 42:7, 56:10, 56:13 57:13, 69:11, 75:19 77:19 proportionately 56:23 propose 67:7, 86:7 proposed 23:17 36:21, 42:23, 55:24 56:5, 56:19, 63:16 63:16, 65:14, 66:5 77:5, 77:11, 80:2 88:9 proposition 64:14 prosecuted 82:12 prospective 13:15 prove 36:20, 44:24 55:7 provide 92:1, 92:17 provided 25:20 36:25, 44:11, 73:9 property 10:8 14:20, 14:22, 15:3 15:4, 15:5, 15:6	74:12 provision 61:8 public 29:10, 30:25 38:14, 44:6, 44:6 67:2, 67:3, 67:5 publicly 67:2 puffery 96:8 pull 45:22 pulled 48:13, 60:13 60:14, 83:24 purchaser 47:4 purported 59:4 purpose 6:12, 26:24 31:15, 41:16, 53:12 purposes 25:9 28:18, 30:7, 93:2 pursue 45:5, 47:19 59:2, 71:22 pursued 41:7, 61:25 68:11 pursuing 37:8 41:18, 43:17 push 87:21 pushing 88:6 put 26:22, 27:7 30:3, 37:15, 39:1 42:4, 49:19, 49:20 50:10, 50:23, 51:5 51:19, 51:21, 52:14 52:19, 52:20, 53:1 53:5, 55:10, 57:2 78:3 putative 14:3, 14:12 30:12, 31:23 puts 58:18, 90:2 putting 52:16 60:17, 60:24
			Q	
			quantifying 23:4 question 8:21 17:11, 17:17, 21:18 23:10, 24:5, 35:4 40:7, 41:4, 41:21 42:1, 42:10, 44:23 46:16, 46:19, 46:23 47:8, 47:10, 52:2 56:25, 63:5, 65:6 65:16, 65:18, 67:16	

67:25, 69:9, 69:23 82:15 questioning 79:7 questions 40:5 41:6, 42:9, 44:4 44:23, 47:15, 59:22 60:10, 62:13, 63:16 63:17, 63:19, 68:4 72:11, 89:15 quick 62:22 Quinlan 4:3, 5:24 5:24 Quinn 3:11, 3:12 5:18, 5:18, 36:9 36:10, 37:19, 37:23 39:20, 39:24, 41:1 42:16, 42:22, 43:2 43:15, 44:9, 46:5 46:7, 47:10, 50:2 50:7, 50:10, 51:16 52:5, 53:7, 53:18 54:3, 54:8, 54:23 55:6, 55:15, 55:21 57:9, 57:11, 57:17 57:20, 58:3, 58:18 61:25, 63:5, 63:13 66:1, 68:17, 69:17 85:24, 86:2, 87:24 88:13, 88:25, 89:9 89:13, 89:24, 90:1 90:17, 90:22, 93:18 93:21, 94:4, 96:3 96:18, 96:19 quite 36:14, 85:9 88:23 quoted 60:5	22:9, 35:10, 58:21 58:22 ready 9:2, 9:10 24:20 real 7:22, 17:2, 33:2 realistic 6:20, 82:5 82:24, 84:8, 84:9 86:16, 86:25 realistically 7:7 82:12 reality 7:20, 13:11 47:5 realize 31:25 really 7:18, 8:7 27:7, 30:7, 32:13 41:18, 47:24, 52:9 56:15, 64:11, 66:12 68:4, 69:16, 72:19 73:10, 74:5, 82:4 83:6, 84:23, 88:20 Realtime 1:2, 1:2 98:3, 98:3 reason 9:17, 16:16 29:7, 32:23, 32:25 34:14, 44:24, 47:22 64:21, 85:1 reasonable 12:22 13:23, 20:23, 28:14 29:6, 29:8, 39:15 52:21, 52:22, 66:9 reasonably 66:9 79:16 reasons 7:5, 12:1 16:15, 28:6, 29:19 recalculate 83:10 recalculated 77:18 recalculation 62:6 recalculations 52:8 recalls 76:3 receipt 90:2, 90:8 received 63:12 receives 70:8 recess 62:25, 96:22 recognized 22:20 64:24 recommended 54:5 reconcile 17:6 reconciled 29:16 reconvene 86:9 reconvened 63:1	record 25:5, 49:18 63:2, 81:15, 90:2 91:8, 97:3, 98:5 recorded 2:24 records 44:6, 89:23 89:25, 92:11, 92:14 recoup 64:16 recover 63:21, 65:1 recovery 68:9 redefine 43:19 reduced 98:7, 98:9 reference 33:7 75:12, 80:10 referenced 76:11 references 9:25 referred 9:7, 10:3 reflecting 75:21 refund 15:16, 15:22 16:22, 17:13, 17:14 17:21, 18:1, 18:2 18:3, 19:19, 24:17 27:5, 27:7, 30:20 33:13, 34:19, 34:20 38:25, 48:6, 49:25 59:9, 61:8, 61:14 61:15, 61:17, 63:24 64:7, 64:8, 68:2 73:5, 74:2, 74:2 74:14, 80:6 refundable 15:18 16:3, 16:20 refunded 17:3, 17:5 22:5, 22:6, 79:22 refunds 17:11 22:18, 25:10, 27:24 28:15, 59:1, 59:13 61:5, 61:10, 62:3 73:1, 74:5, 74:13 75:11 regard 84:23 regarding 12:11 regardless 16:11 78:5, 78:14 Registered 1:1, 98:2 regular 84:15 regulating 66:23 regulation 66:18 66:21 reimbursed 18:25 relate 68:10	related 25:16, 38:25 66:18, 68:6, 71:16 79:17, 98:12 relating 29:25 relation 78:1, 93:7 relative 34:11 relatively 87:12 relevant 39:6, 41:22 44:1, 62:14 relied 60:9 rely 51:1, 67:8 67:18, 77:22 relying 36:16 36:17 remain 10:5, 84:4 remainder 70:20 remains 87:25 remedied 24:18 remedy 16:6, 18:17 23:19, 31:20 remember 20:15 reopen 89:10 reopening 88:4 rep 60:4 repeatedly 37:13 rephrase 80:4 replete 40:4 replow 63:12 reply 43:19, 60:13 68:5 report 42:11, 42:12 42:17, 42:18, 45:10 50:11, 68:12, 68:23 68:23, 78:4 reported 42:5, 98:7 Reporter 1:1, 1:2 98:3, 98:3, 98:19 REPORTER'S 98:1 Reporting 1:3 reports 52:7, 76:17 represent 35:8, 59:4 59:11 representation 60:2 60:5, 60:8, 60:23 92:13 representatives 17:25, 30:12, 35:8 82:4 represented 35:23 76:7	request 24:25 91:16, 91:23, 92:5 92:15, 92:19 requested 24:24 30:4, 41:14 requests 91:19 91:19 require 56:24, 57:1 76:1, 91:23 required 54:14 55:3, 80:5 requirement 36:22 36:23 requirements 25:15 25:25, 35:24 requires 38:10 38:15, 53:13, 56:20 57:1, 57:5, 58:11 67:20, 70:2, 70:3 70:3, 81:9 Reservoir 11:12 71:5 reset 94:21 residents 6:22, 6:22 resolution 11:15 13:20, 24:14, 35:14 56:6, 75:25 resolutions 9:13 11:3, 12:7, 19:4 23:22, 37:3, 37:20 40:12, 41:11, 42:16 42:19, 43:22, 47:25 61:22, 67:2 resolve 15:24 21:16, 33:4 resolved 33:11 39:10, 76:12, 96:11 resources 96:10 respect 35:9, 35:21 36:5, 82:3, 92:22 respectfully 37:5 37:23 respects 20:11 77:13 respond 25:3 response 52:3 63:23 responses 40:1 rest 46:22, 82:11 restroom 62:22
R	raise 8:6 raised 9:19, 24:10 25:7, 37:24, 59:24 62:14, 88:2 randijohnson@atto... 3:15 range 7:4 reach 41:22 read 11:9, 11:24 23:17, 32:4 reading 9:3, 9:3	regard 84:23 regarding 12:11 regardless 16:11 78:5, 78:14 Registered 1:1, 98:2 regular 84:15 regulating 66:23 regulation 66:18 66:21 reimbursed 18:25 relate 68:10	reports 52:7, 76:17 represent 35:8, 59:4 59:11 representation 60:2 60:5, 60:8, 60:23 92:13 representatives 17:25, 30:12, 35:8 82:4 represented 35:23 76:7	

result 55:25, 74:12 76:2 resulted 7:24, 10:6 33:8, 68:15, 75:23 results 11:23, 53:24 68:24 retained 8:14 retitling 11:14 retrospective 13:14 revise 24:6 revisions 24:11 rid 43:12 right 5:2, 6:3, 6:11 10:18, 13:3, 13:15 18:17, 19:10, 20:25 23:3, 23:10, 23:15 24:3, 31:4, 31:19 36:8, 36:9, 39:23 40:10, 42:20, 43:1 45:14, 46:4, 47:21 51:22, 52:5, 54:7 58:17, 62:18, 63:3 71:25, 72:7, 72:10 78:16, 79:6, 81:12 82:15, 83:13, 83:21 85:12, 86:19, 87:23 88:18, 90:20, 90:22 92:18, 93:4, 94:9 94:12, 95:4, 96:1 96:13, 96:22 rights 6:24, 6:25 14:13, 29:18, 80:18 rigorous 37:6 Riley 3:7, 5:14 rise 9:15 risk 63:11 Riverview 43:12 Riverview's 45:2 Rose 48:12, 52:6 rough 38:12, 42:7 56:10, 56:12, 56:22 69:11 roughly 54:18 rug 69:20 rule 6:13, 7:6 32:23, 36:22, 36:23 56:17, 56:20, 56:23 64:21, 66:4, 66:7 67:8, 67:19, 82:15 rules 31:3	ruling 33:12, 62:2 rulings 30:18 run 88:1, 92:16 running 31:6 Russell 2:4 rwavra@lairdcowl... 3:9	secret 26:12 section 29:23 see 9:7, 43:13 44:14, 46:9, 70:22 72:7, 74:15, 85:10 94:1, 94:11 seek 31:20, 35:2 68:9, 68:10 seeking 14:19, 36:2 59:4, 59:11, 61:11 62:8, 72:15 seen 52:6 sees 49:16 seize 59:12 select 52:13 sell 64:25 selling 61:20 sells 91:13 sending 35:25 sent 17:19, 49:6 77:10 separate 22:16, 54:9 56:3 separately 45:13 49:23 says 17:1, 17:2 22:9, 29:24, 36:19 47:6, 47:7, 52:12 54:13, 60:4, 61:6 64:6, 74:2, 90:9 90:9, 91:2 scenario 16:19 21:9, 21:20, 22:14 79:23 schedule 83:23 83:25, 84:16, 84:22 86:7, 86:13 scheduled 95:16 schedules 93:19 scheduling 83:24 86:6, 86:8, 87:25 schematic 43:10 scheme 18:7, 25:19 scorched-earth 89:10 scraped 19:13 19:14 scrapped 11:18 se 36:3, 61:3, 61:4 second 30:20, 73:10	48:16, 49:5, 51:3 53:19, 74:4, 74:23 74:24 showerhead 27:12 51:13 showerheads 52:2 showers 48:18 showing 67:6, 67:7 shows 50:24 side 8:25, 9:1 71:23 sides 61:16, 70:25 significant 8:22 29:3, 30:11, 82:20 94:24, 95:17 similar 32:6 similarly 1:13 sells 91:13 sending 35:25 sent 17:19, 49:6 77:10 separate 22:16, 54:9 56:3 separately 45:13 49:23 September 29:11 85:15 serves 70:14 services 30:5, 38:14 38:15, 51:21, 57:21 set 5:3, 25:8, 37:8 65:3, 83:5, 86:21 93:11, 94:12, 95:1 95:19, 96:4, 98:14 settings 94:25 settle 95:20, 95:25 seven 93:12, 93:17 sewer 6:23, 30:5 32:17 shake 97:1 Shaw 3:12 short-circuit 67:22 shorter 84:12, 96:6 shorthand 2:24 98:7 show 25:16, 25:25 37:15, 65:13, 65:14 66:8, 69:11, 74:24 showed 85:15 shower 38:25, 48:3	72:17 smaller 52:8 Smith 2:4, 4:3, 5:24 sneaking 83:2 Snipes 3:3 snuck 52:23, 73:24 75:1 solar 11:15, 11:17 11:18, 13:10, 15:13 59:6, 71:5, 71:15 79:3, 79:8, 79:13 sold 15:17, 15:19 45:18 sole 26:24 solely 16:10, 23:20 25:9 solution 65:19 Solutions 1:22, 4:6 somebody 12:13 28:4, 75:1, 91:13 somebody's 73:5 sorry 19:5, 71:7 sort 9:19, 10:25 30:15, 30:17, 31:1 31:2, 41:3, 45:8 68:22 sounds 15:12, 95:6 soup 93:9, 93:23 South 11:11, 71:5 71:5 speaks 13:5 specifics 58:4 specifies 37:14 61:5, 61:10 specter 28:17 spend 79:3, 80:1 spending 58:24 58:25, 59:13, 61:10 spent 11:11, 11:17 23:11, 61:7, 79:4 spoke 68:17 spreadsheet 44:11 74:22 square 3:18, 64:10 64:13, 80:10 squares 77:18 Staff 3:5, 3:9, 3:14 3:19, 4:5 stage 20:25, 45:25 stamp 60:21
--	---	---	--	---

stand 64:14	61:6, 61:7, 61:10	82:19, 83:17	taken 2:4, 64:16	23:4, 27:10, 54:25
stand-alone 48:18	61:13, 63:24, 64:4	sufficient 59:18	75:13	76:19, 84:10, 93:15
49:5	64:24, 65:3, 65:19	suggest 24:22	takes 93:9	test 7:11, 79:21
standard 14:17	66:2, 66:13, 66:15	suggests 20:4	takings 9:19, 17:6	testified 60:2
37:7, 41:5, 45:20	66:16, 67:19, 80:6	suitability 37:2	18:13, 30:19, 41:5	testimony 93:7
54:10, 55:10, 57:19	80:13, 80:17, 81:1	60:18	41:24, 43:17, 43:18	Thank 5:16, 6:12
73:3	81:7	suitable 58:1, 59:23	43:24, 44:20, 46:25	36:6, 36:7, 36:10
standards 70:12	statute's 64:6	59:25, 60:7, 60:11	47:22, 51:7, 51:17	62:17, 62:18, 72:8
75:18	statutory 18:7	61:1, 62:15	51:24, 52:17, 52:18	76:24, 83:20, 83:21
standing 44:20	80:16	Suite 1:3, 3:4, 3:8	53:8, 53:18, 56:7	96:16, 96:22
47:13, 64:19, 64:23	stay 87:12	3:12, 3:17	56:15, 56:25, 58:10	theme 28:19
65:1, 65:13, 88:7	stayed 86:8	suited 47:18	64:13, 64:15, 64:23	theoretical 24:16
89:18	step 76:1	summarized 7:18	65:6, 66:23, 69:7	theories 16:7, 21:11
standpoint 38:3	stop 10:24, 86:24	summary 19:3, 60:3	69:7, 70:1, 70:2	21:19, 35:21, 37:17
38:8, 41:1, 46:20	straw 25:8	85:14, 86:4, 86:18	70:2, 71:1, 75:14	59:19
51:17, 58:10, 61:2	Street 3:4, 4:4	88:18, 91:4	83:18	theory 14:7, 18:1
start 10:14, 10:19	strike 88:19	summer 95:8	talk 12:2, 14:6	20:3
23:3, 23:10, 23:15	strikes 30:15, 49:17	super-involved 27:1	23:19, 28:20, 32:15	thing 43:11, 47:24
46:24, 59:21, 95:2	88:17	superior 46:11	68:6, 68:7, 68:8	49:17, 60:13, 70:12
started 9:3, 9:10	struck 8:22	supplement 92:17	78:16, 81:7, 83:22	73:10, 74:1, 75:5
29:9, 30:24, 32:2	struggled 16:25	supplementation	84:9	things 12:20, 19:5
48:6, 56:14	study 11:22, 15:14	91:20	talked 32:8, 33:11	20:4, 24:14, 28:20
starting 96:4	stuff 81:15, 89:17	support 37:2, 76:6	35:25, 66:2, 73:22	32:13, 32:20, 33:6
starts 94:15	93:15	supported 38:2	76:10, 76:16, 87:14	33:8, 33:10, 34:21
state 6:25, 10:21	subclasses 45:13	38:9	93:16	36:25, 40:20, 45:22
14:6, 14:14, 16:4	subject 8:5, 15:6	suppose 71:4	talked 17:20, 20:7	60:19, 68:18, 69:12
16:7, 16:22, 17:7	28:22, 29:5, 32:14	supposed 55:17	33:21, 34:4, 41:10	72:16, 72:18, 72:25
21:15, 30:22, 34:19	34:17, 34:18, 35:19	Supreme 29:16	66:23, 68:14, 68:14	75:24, 76:16, 81:16
35:1, 35:3, 35:9	47:6, 49:7, 51:10	36:13, 36:15	73:12, 74:22, 89:9	85:3, 86:14, 86:23
38:3, 39:7, 39:24	60:3	sure 26:19, 26:21	talks 11:20, 58:24	89:9, 89:11, 94:2
64:3, 65:21, 70:10	submissions 43:6	35:3, 63:18, 64:18	58:25, 59:1	think 8:21, 9:7
71:15	submit 37:5	64:20, 65:10, 65:16	target 61:14	10:3, 11:1, 11:13
state's 63:24	submitted 38:21	65:23, 65:23, 66:16	Tasha 95:25	13:24, 15:22, 17:1
stated 42:18	submitting 38:20	67:15, 70:19, 73:6	tax 63:8	17:2, 17:2, 17:9
statements 30:25	subpart 28:24	81:3, 87:6, 89:17	taxes 20:4	18:5, 20:23, 21:7
states 1:9, 29:16	subsequent 15:4	95:12, 96:10, 96:25	taxpayers 56:23	22:25, 23:1, 24:6
36:13, 36:16	19:23, 47:4	surprise 52:6	57:5	24:6, 24:9, 24:16
status 85:17, 86:2	subsequently 63:1	susceptible 37:9	technical 27:10	25:4, 28:25, 29:6
statute 14:6, 14:14	subset 20:7	swept 69:20	73:13	29:16, 34:3, 34:8
16:4, 16:22, 17:1	substantial 23:5	sword 24:2, 24:2	tell 5:7, 50:15	39:19, 42:12, 43:12
17:7, 17:9, 18:6	47:21, 58:19, 88:14	system 52:20	74:23, 84:5, 84:24	45:24, 52:3, 52:25
21:15, 22:9, 22:25	succeed 47:22	54:18, 55:12	89:19, 91:25, 92:14	53:22, 55:1, 57:17
24:18, 28:20, 28:22	successful 63:22		tells 56:20	58:4, 58:5, 63:23
29:4, 29:12, 29:14	74:12		ten 27:15, 62:23	64:6, 64:11, 64:18
29:17, 30:6, 30:9	sue 22:10		tenants 90:5	64:21, 66:2, 67:6
30:9, 30:11, 30:22	sued 56:9	table 48:13, 48:14	tend 86:14	67:11, 68:3, 69:5
31:5, 31:16, 31:19	suffer 47:13	60:15	tends 84:15	69:17, 70:11, 71:14
32:6, 32:9, 34:13	suffered 14:22, 16:6	take 21:4, 24:23	tension 17:6	73:16, 73:17, 75:9
34:17, 34:19, 54:8	18:24, 21:23, 22:19	28:21, 62:23, 70:13	terms 8:25, 9:20	75:9, 78:1, 78:23
55:7, 59:9, 61:5	47:2, 49:9, 80:12	83:21, 96:9	11:1, 12:3, 21:14	79:20, 80:25, 81:8

## **BECK, et al. v. CITY OF WHITEFISH, et al.**

8/22/2023

## **TRANSCRIPT OF PROCEEDINGS**

81:9, 81:16, 81:22	32:16, 67:25, 83:1	trying 15:9, 20:15 44:3, 44:19, 51:7 56:17, 67:22, 68:20 77:25, 80:10, 90:7 90:23	91:4 underneath 42:24 43:22 understand 35:4 39:11, 54:24, 67:8 84:5, 84:22 understanding 11:24, 12:3, 35:11 64:2, 65:21, 78:5 85:24	vast 52:14 verbal 60:5 verdict 39:13 verify 91:9 versus 5:4, 5:5 46:16, 56:8, 70:4 74:4, 94:18 viability 15:15 viable 15:15, 79:9 86:6
82:7, 83:6, 84:8	timing 25:4, 32:9	tub 48:16, 74:4 74:23, 74:24	view 13:15, 13:15 29:6, 54:12	
84:9, 84:10, 85:1	tinkering 86:19	tub/shower 48:17 48:22	Views 1:12, 20:14 20:17, 22:23, 22:24 45:3, 82:6, 82:17 82:23	
85:14, 85:25, 86:13	Title 28:23, 29:23	tubs 48:17	violate 80:18	
86:15, 86:16, 86:24	tleonard@booneka...	Tuesday 2:5, 5:1	violated 6:24, 40:15 55:7	
87:1, 87:4, 87:9	3:19	tune 45:2	violation 69:18 69:19, 69:24	
87:24, 88:22, 88:23	today 5:11, 5:19	turns 27:14	virtually 7:10	
89:1, 90:10, 90:14	8:23, 13:16, 22:1	twice 52:24	virtue 39:1	
91:15, 91:19, 93:9	25:10, 36:11, 67:25	two 20:10, 34:14 37:3, 48:18, 66:11 67:1, 72:16, 72:16	void 37:20, 40:13 61:23, 63:25	
93:17, 93:25, 94:13	76:16, 83:24, 85:3	78:18, 94:11, 94:12 94:24, 95:1, 96:4	vs 1:15, 1:21	
94:20, 95:2, 95:23	93:16, 96:14	two-fixture 53:20		
96:8	today's 30:7	two-thirds 73:23		
thinking 56:14	toilets 26:6, 52:16	two-week 94:14		
third 3:4, 90:9, 95:2	53:6, 73:6, 73:24	two-year 30:8		
Third-Party 1:20	74:9	type 7:5, 40:18 65:7, 82:24		
1:24, 4:6	toll 67:19	types 32:16		
Thomas 3:16	tolled 31:19	typewriting 98:8 98:9		
thought 30:16, 65:2	tolling 31:15, 32:6			
85:19	tolls 31:5			
thousand 7:2	Tom 5:22			
thousands 45:3	top 84:18, 91:22			
82:21	topic 25:6, 25:7			
three 30:10, 78:18	tort 30:9, 66:15			
87:8, 87:9, 88:7	touched 66:1, 82:25			
89:2, 94:11	town 56:18			
three-year 66:15	townhomes 82:7			
throw 10:21	transcript 2:25, 98:4			
throwing 87:7	98:10			
tied 43:25	transcription 2:25			
time 5:2, 9:16	98:8			
11:14, 12:8, 13:22	treat 90:12			
14:24, 15:15, 15:17	treatment 71:16			
16:13, 17:15, 18:17	71:17, 71:22	Uh-huh 12:25, 44:8 71:20		
18:17, 19:6, 19:8	trial 39:10, 84:10	ultimate 21:3, 46:2		
22:6, 23:11, 26:20	84:16, 87:2, 87:5	ultimately 19:2 22:4, 40:24, 44:19 55:19, 56:25, 71:6 71:14, 78:23		
28:9, 30:14, 30:21	87:8, 87:11, 87:22	unauthorized 39:3		
31:3, 31:3, 31:3	88:6, 88:11, 93:4	unbeknownst 51:20		
31:4, 36:14, 40:20	93:21, 94:2, 94:4	unclean 27:18		
45:15, 45:16, 46:16	94:14, 94:19, 94:20	uncommon 31:14 40:21		
56:11, 56:14, 56:19	94:23, 95:16, 96:12	unconstitutional 41:11, 62:4, 65:20 75:20		
58:21, 59:3, 59:5	trials 55:25, 94:3	unconstitutionally 63:24		
61:17, 61:19, 64:7	tried 53:10, 93:16	undercharged 69:13		
71:18, 72:9, 77:14	trigger 61:8	underlying 46:2		
81:3, 84:3, 84:21	true 38:7, 39:6			
85:4, 86:14, 86:23	50:25, 98:4			
87:11, 87:12, 89:1	truly 91:9			
94:13, 95:10, 95:16	truth 48:11			
96:10, 96:11, 98:5	try 29:3, 48:10			
timeline 12:3	63:10, 63:12, 88:4			
times 13:25, 14:1	88:16, 91:24, 93:9			

Wavra 3:7, 5:14 5:14, 95:15, 95:21 95:24 way 6:10, 23:5 24:7, 24:10, 24:11 26:4, 29:8, 30:10 32:18, 39:18, 46:11 48:15, 48:19, 49:2 65:2, 73:8, 75:11 77:18, 78:16, 79:15 81:22, 83:5, 88:9 90:12, 90:18, 90:25 95:18 ways 8:24, 27:22 28:12, 52:12, 77:17 81:20 we've 23:11, 37:10 47:4, 52:5, 59:25 76:10, 87:14 weeks 84:12, 93:24 94:1, 94:11, 94:13 95:1, 96:4 weigh 84:17, 93:19 Weinberg 1:11 1:12, 52:19, 81:17 Weinbergs 38:17 38:20, 38:24, 39:2 39:5, 41:24, 42:1 49:16, 50:16, 51:25 57:3, 58:14, 81:25 welcome 96:17 well-suited 47:18 went 44:12, 47:13 65:5 West 3:17 whatever 68:1 WHEREOF 98:14 whichever 40:12 Whitefish 1:16 1:19, 3:20, 5:4, 5:4 5:4, 5:17, 6:21 19:24, 20:10, 23:8 24:22, 25:22, 26:13 29:7 who's-in-the-class 88:8 who've 83:17 wife's 95:5 willing 88:15, 94:7 wishing 36:19	WITNESS 98:14 wonderful 38:17 worded 14:14 24:18 words 19:7, 40:14 53:23, 55:17 work 10:2, 27:22 28:12, 35:11, 86:10 92:21, 96:2 workable 18:5, 86:7 87:4, 87:25, 88:7 worked 9:4 working 86:3 works 11:7, 70:25 87:22 worried 75:6 worth 66:2 written 60:5 wrong 10:10, 19:16 33:5, 45:10, 53:4 53:22, 69:3, 74:20 78:17, 78:18, 78:20 78:20, 79:11, 79:11 83:9 wrongful 19:18 19:18, 23:21, 23:23 23:23, 24:3, 30:20 wrote 77:10, 89:20 89:21 Wyoming 95:16	1 1 24:13, 42:24 1,123.41 39:3 1,611 38:23 1:33 2:6 100 3:12, 3:12 101 4:4 1015 1:3 1100 57:4 1200 57:4 1300 52:21 1-50 1:17 15-day 95:15 19 11:15, 13:21 1915 11:16	27-2-102 29:5 28:1 11:10 2932 10:16  /s/ 98:18
		3	
		4	
		5	
		6	
		7	
		8	