

STATE OF MICHIGAN JUDICIAL DISTRICT 18TH JUDICIAL CIRCUIT COUNTY PROBATE	SUMMONS AND COMPLAINT	CASE NO. 15-3583-AW KS
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Court address: 1230 Washington Ave., Bay City, Michigan 48708
 Court telephone no.: (989) 895-4115

Plaintiff's name(s), address(es), and telephone no(s).
 CYNTHIA A. LUCZAK
 Bay City Clerk, in her official capacity as an elected official
 Bay County Building
 515 Center Avenue, Ste. 101
 Bay City, Michigan 48708-5941 (989) 895-4280

v

Defendant's name(s), address(es), and telephone no(s).
 KIM MEAD
 Bay County Circuit Court Administrator
 1230 Washington Ave., Suite 725
 Bay City, Michigan 48708

Plaintiff's attorney, bar no., address, and telephone no.
 Matthew T. Smith (P46754)
 Joseph W. Colaianne (P47404) - CLARK HILL PLC
 212 East Grand River Avenue
 Lansing, Michigan 48906
 (517) 318-3100

SUMMONS NOTICE TO THE DEFENDANT: In the name of the people of the State of Michigan you are notified:

- You are being sued.
- YOU HAVE 21 DAYS** after receiving this summons to **file a written answer with the court** and serve a copy on the other party **or take other lawful action with the court** (28 days if you were served by mail or you were served outside this state). (MCR 2.111(C))
- If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.

Issued SEP 25 2015	This summons expires DEC 25 2015	Court clerk <i>Cynthia A. Luczak</i>
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*This summons is invalid unless served on or before its expiration date. This document must be sealed by the seal of the court.

COMPLAINT *Instruction: The following is information that is required to be in the caption of every complaint and is to be completed by the plaintiff. Actual allegations and the claim for relief must be stated on additional complaint pages and attached to this form.*

This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035.

Family Division Cases

There is no other pending or resolved action within the jurisdiction of the family division of circuit court involving the family or family members of the parties.

An action within the jurisdiction of the family division of the circuit court involving the family or family members of the parties has been previously filed in _____ Court.

The action remains is no longer pending. The docket number and the judge assigned to the action are:

Docket no.	Judge	Bar no.
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General Civil Cases

There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.

A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in _____ Court.

The action remains is no longer pending. The docket number and the judge assigned to the action are:

Docket no.	Judge	Bar no.
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VENUE

Plaintiff(s) residence (include city, township, or village) Bay City, Michigan	Defendant(s) residence (include city, township, or village) Bay City, Michigan
Place where action arose or business conducted Bay City, County of Bay, Michigan	

09/24/2015
 Date

Joseph W. Colaianne
 Signature of attorney/plaintiff Joseph W. Colaianne (P47404)

If you require special accommodations to use the court because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR BAY COUNTY

CYNTHIA A. LUCZAK, BAY COUNTY
CLERK in HER capacity as an elected official,

File No. 3583 -AW *KS*

Hon.

Plaintiff/)

KENNETH W. SCHMIDT
P# 25211

v

THOMAS L. HICKNER, BAY COUNTY
EXECUTIVE, in his capacity as an elected
official, BAY COUNTY BOARD OF
COMMISSIONERS, the governing body for
the County of Bay, and KIM MEAD, Bay
County Circuit Court Administrator,

Defendant/

Matthew T. Smith (P46754)
Joseph W. Colaianne (P47404)
CLARK HILL PLC
Attorneys for Plaintiff
212 E. Grand River Ave.
Lansing, MI 48906
(517) 318-3100

STATE OF MICHIGAN
COUNTY OF BAY

ATTESTED
A TRUE COPY
CYNTHIA A. LUCZAK
CLERK OF CIRCUIT COURT

By *D. A. Dwyer* Deputy

A CIVIL ACTION BETWEEN THESE PARTIES OR OTHER
PARTIES ARISING OUT OF THE TRANSACTION OR
OCCURRENCE ALLEGED IN THE COMPLAINT HAS NOT
BEEN PREVIOUSLY FILED IN THE 18TH CIRCUIT COURT
OF BAY COUNTY.

**PETITION FOR APPOINTMENT OF LEGAL COUNSEL
AND COMPLAINT FOR DECLARATORY JUDGMENT,
WRIT OF MANDAMUS AND INJUNCTIVE RELIEF**

NOW COMES, Plaintiff, Cynthia A. Luczak, Bay County Clerk (“Luczak”), in her
capacity as an elected official, by and through her attorneys, Clark Hill PLC, who for her
Complaint against the Defendants states as follows:

INTRODUCTORY STATEMENT

This lawsuit involves the Luczak's request for the assistance of independent legal counsel to represent before this Court in declaring the rights and responsibilities of the office of the Bay County Clerk and further to ensure and protect the constitutional and statutory duties and functions of her office.

Beginning 2004, Luczak was first appointed then subsequently elected to serve the taxpayers of Bay County as their County Clerk. Since that time, there has been a systematic, methodical and deliberate effort through both direct action and inactions by the County Executive and his staff, and/or County Board of Commissioners to interfere and/or prevent through budgeting and county administrative processes, to deny, marginalize, Luczak and her office in carrying out her constitutionally and statutory duties. No other county-wide elected constitutional officer has had to endure such unlawful and extreme interference by the County Executive of their respective offices.

As the elected Bay County Clerk, Luczak is responsible for maintaining all vital records of county residents (i.e. birth, death and marriage records); is required to serve as the Clerk for the 18th Judicial Circuit, responsible for maintaining all court files; is the chief election officer responsible for maintaining and administering all election related information, including the qualified voter file, election equipment and election records; is responsible for securing military discharge records, and verification of public notary applications; and is the statutory member of the county's plat board, gun board, board of canvassers, apportionment committee, election commission, and clerk for the County Board of Commissioners. All of these functions requires specific training and understanding of almost 600 different Michigan statutes to ensure proper compliance with the law, as well as time to attend and prepare. It is without question that in order

to carry out the functions and duties on behalf of a county the size of Bay County, experienced and trained staff, along with sufficient time to carry out these functions is vital and necessary. At this time, however, the 107,000 county residents are served by the Bay County Clerk by herself and a staff consisting of her chief deputy and a file clerk to meet the functions of her non-circuit court mandated constitutional and statutory duties. Despite the fact that the Luczak is also responsible for the circuit court clerks, she has been denied the ability to utilize this staff to assist when necessary, in carrying out her other mandated and statutory functions by Defendant, Kim Mead, the Court Administrator.

Luczak has made repeated attempts, over several county budgeting cycles, to impress upon and educate the County Executive and Board of Commissioners regarding the significant and important functions of her office and the necessity for hiring of sufficient number of adequately experienced and trained personnel, to hire experienced consultants to assist, and the ability to make technological upgrades of the office. The County Executive and Board of Commissioners have denied Luczak's requests for additional staff assistance, while at the same time, on information and belief, approving the hiring and promoting Executive Department personnel for non-mandated functions. Moreover, on information and belief, the County Executive and County Board of Commissioners have permitted the restoration, re-classification and/or the hiring of personnel by other county-wide elected officials (i.e. Sheriff, County Register of Deeds and Treasurer) and permitted budget amendments to accommodate their employment demands without the necessity of studying their constitutional and statutory functions, or mandated and non-mandated duties. However, the County Executive feels compelled to require "a study of her office and functions" before taking any action to improve the situation in the County Clerk's office, which study is unilateral, arbitrary and without the

assistance of the Luczak. Luczak maintains that the County Executive, Board of Commissioners and Court Administrator have made it virtually impossible for the her to adequately perform her constitutional and statutory responsibilities at a serviceable level.

Luczak is seeking legal representation and guidance from this Court to prevent the degradation of her constitutional office by the unlawful interference and/or deliberate indifference by the County Executive, County Board of Commissioners and Court Administrator.

GENERAL ALLEGATIONS

1. This cause of action arises in Bay County, Michigan and Luczak and the Defendants have their offices in Bay County.

2. Luczak, is the duly elected County Clerk for the County of Bay, and has been the Bay County Clerk since 2004.

3. In 1979 the Bay County electorate adopted an optional unified form of county government with an elected county board of commissioners and county executive pursuant to the optional unified form of county government act, Michigan Public Act 139 of the Public Acts of 1973, as amended, MCL 45.551 et seq. (“Act 139”).

4. Pursuant to Act 139, Defendant, Board of Commissioners (“Board”) is the duly elected board of commissioners and governing body for the County of Bay. MCL 45.555.

5. Pursuant to Act 139, Defendant, Thomas L. Hickner, is the duly elected county executive for the County of Bay (“County Executive”).

6. Defendant, Kim Mead is appointed Court Administrator for the Circuit Court of Bay County (“Court Administrator”).

7. The position of County Clerk is created by Article VII, Section 4 of the Michigan Constitution of 1963.

8. The County Clerk is one of the most diversified in county government, governed by almost 600 Michigan statutes. (Attached hereto and made a part hereof as Exhibit A, Luczak Affidavit, para 4).

9. The County Clerk serves four major areas: Clerk of the Circuit Court; Clerk to the County Board of Commissioners; Registrar of Vital Statistics; and Chief Election Official for Bay County. (Luczak Affidavit, para 5).

10. As Clerk for the Circuit Court, the County Clerk performs ministerial duties to ensure the safekeeping of all circuit court records and making those records available to Circuit Court, and the public where appropriate; to collect Court ordered fees such as fines, costs and restitution, and further to transmit revenue collected to the State, the County and Victims; to attend every session of the Circuit Court; and to serve as the Clerk of the Jury Board. (Luczak Affidavit, para 6)

11. As Clerk to the County Board of Commissioners, Luczak attends every meeting of the County Board of Commissioners in which a quorum is present; and records and maintains the official minutes of each Board of Commissioners' regular, special or closed sessions (pursuant to the Michigan Open Meetings' Act). (Luczak Affidavit, para 7)

12. As Registrar of Vital Statistics, Luczak is responsible for recording and maintaining all vital statistics occurring in Bay County which includes, birth certificates, death certificates, marriage certificates, notary public licenses, veterans' discharge licenses and assumed names certificates for businesses. (Luczak Affidavit, para 8)

13. In addition, as Registrar of Vital Statistics, Luczak is the access point for Bay County residents to obtain a Concealed Pistol License (CPL), accepting all CPL applications, and attending and serving as Clerk for the Concealed Weapons Licensing Board. (Luczak Affidavit, para 9).

14. As Clerk for the Concealed Weapons Licensing Board Luczak is required to attend every meeting of the Concealed Weapons Licensing Board, prepare and maintain all official minutes, and ultimately issuing CPLs to applicants that are approved. (Luczak Affidavit, para 10).

15. As the Chief Election Official for the County, Luczak is required to preside over every election held within Bay County, which may include three election dates per year: May, August and November. (Luczak Affidavit, para 11).

16. In addition, as the Chief Election Official for the County, Luczak is responsible for accepting candidate filings, programming voting equipment, testing and coding on the ballots and machines, preparing and ordering the printing of all ballots, distributing ballots to all local jurisdictions, maintaining all campaign finance reports, training of all election inspectors, and the tabulation of election results. (Luczak Affidavit, para 12).

17. As County Clerk, Luczak is the Clerk for the Board of Canvassers, where she is required to attend all meetings of this Board, review, audit and certify all local election results; maintain all minutes and permanent record of all official election results; and oversee and manage all recounts conducted by the County. (Luczak Affidavit, para 13).

18. As County Clerk, Luczak serves on the County Election Commission, whose duties include proof of all ballots prior to printing, manage all precinct consolidation and polling

location changes, and all other election related responsibilities; and required to attend clarity hearings when a recall petition has been filed. (Luczak Affidavit, para 14).

19. As the Chief Election Official for the County, Luczak is required to maintain the Voter Registration and Street Index File (also known as Qualified Voter File or QVF) to ensure that all voters get proper ballots. (Luczak Affidavit, para 15).

20. The current staffing level for carrying out the functions and duties related to Luczak's role as Clerk of the Circuit Court includes four (4) full-time employees, while the staffing level for all other functions includes three (3) full-time employees that includes herself, her chief deputy and one full time employee designated as clerical. (Luczak Affidavit, para 16).

21. In accordance with the budget approved in December 2010, in 2011 Luczak's staff was reduced by two full-time employees, a reduction of approximately 50% to compensate for reductions in appropriations. (Luczak Affidavit, para 17).

22. On information and belief in 2011 other county-wide departments, including the County Executive administrative staff, Sheriff, Treasurer and/or the Register of Deeds, also observed staff reductions. (Luczak Affidavit, para 18).

23. However, on information and belief, since 2011, the County Executive ("County Executive") and County Board of Commissioners ("Board") have permitted restoration, re-classification, and/or increases in staffing levels, and/or created "new positions," for the County Executive administrative staff, Sheriff, Treasurer and Register of Deeds to address both mandated and un-mandated constitutional and statutory duties. (Luczak Affidavit, para 19).

24. On information and belief, before authorizing the restoration and/or increasing staffing levels, and creation of new positions, the Defendants did not require extensive study of

the operations of the County Executive administrative staff, Sheriff, Treasurer and Register of Deeds. (Luczak Affidavit, para 24).

25. Since at least 2011, Luczak has made repeated requests to increase her staffing levels and sought appropriations, including presenting extensive information of the services provided by her office and internal remedy to fund said positions, from the County Executive and the Board, only to be summarily denied such requests for increases in staffing levels or being required to subject her office to unreasonable demands made by the County Executive and his staff, such as submitting to “study of the Clerk’s operations,” which on information and belief, no other county-wide elected official has had to endure before restoration, re-classification and/or increases in staffing levels. (Luczak Affidavit, para 21).

26. In order to meet the demands of the public and fulfill her statutory and constitutional duties, Luczak and her staff have had to work afterhours or have incurred significant delays in processing service requests from taxpayers. (Luczak Affidavit, para 22).

27. Because of the volume of service requests, Luczak has personally worked the counter of the County Clerk’s office assisting with service requests from taxpayers, and working afterhours, sometimes 10-12 hour days in order fulfill her constitutional and statutory duties. (Luczak Affidavit, para 23); it is not uncommon for Luczak to leave work between 10:00 to 11:00 at night.

28. From time-to-time Luczak have been without sufficient trained staff when her Chief Deputy and/or clerical staff are not available to work due to injuries, sickness, vacation or other leave afforded by union contract. (Luczak Affidavit, para 24).

29. From time-to-time, due to insufficient staff in the County Clerks' office, either Luczak, or staff have been left alone solely to conduct daily operations presenting what she believes is a serious security concern in the workplace. (Luczak Affidavit, para 25).

30. In an attempt to accommodate for the lack of sufficient trained staff, Luczak has closed the County Clerk's Office from noon to 1:00 PM each day only to receive criticism from the County Executive, and members of the Board and the public. (Luczak Affidavit, para 26).

31. Due to insufficient staff, Luczak's statutory responsibilities, such as preparing and filing of minutes of the Concealed Weapons Licensing Board, filings with the State of Michigan, and other responsibilities associated with vital statistics (i.e. birth certificates, death certificates, and marriage certificates) have been delayed or remain incomplete. (Luczak Affidavit, para 27).

32. On information and belief, in July 2013, in retaliation against Luczak the Board eliminated all funding of the County Board of Canvassers because a temporary employee hired by the Board of Canvassers and working in the County Clerk's office (and performing services for the Board of Canvassers), assisted another county-wide elected official with a request that was not part of the temporary employees' responsibilities. (Luczak Affidavit, para 28).

33. On further information and belief, the Board ultimately restored funding following a letter from the members of the Board of Canvassers to the Michigan Secretary of State, Director of the Michigan Bureau of Elections, and the Michigan Attorney General indicating a potential election law violation and inability to conduct canvass of the election because of the Board's elimination of the Board of Canvassers' budget. (Luczak Affidavit, para 28).

34. In or about November 2014, Luczak presented a request to the Board of Commissioners for the approval of the purchase and implementation of a campaign finance

indexing and reporting computer software system in order to comply with Michigan Campaign Finance Act (that requires the filing and maintenance of campaign committee statements), and a separate request dealing with a record retention system. (Luczak Affidavit, para 29).

35. On December 2, 2014 the Board of Commissioners approved every item on their agenda, except for her request to purchase and implementation of a campaign finance indexing and reporting computer software system and her request for dealing with a record retention system; and instead, directed that my requests be reviewed by the County Executive, where it has remained without further action by the Defendants. (Luczak Affidavit, para 29).

36. On information and belief, Luczak's purchase requests for goods and services to the County Executive and Board of Commissioners are unusually delayed and/or funding withheld as compared to other county-wide elected officials and county departments even though she has provided sufficient information to the County Executive and Board. (Luczak Affidavit, para 30).

37. For example, in February, 2015 she submitted purchase requests for the programming services and ballot printing for the May 2015 election which takes weeks to prepare and involves the coordination between a number of people, including her office and the State of Michigan. (Luczak Affidavit, para 30).

38. Despite the fact that the State of Michigan would be reimbursing the County for the full cost of the May 2015 election, the County Executive staff refused to process my purchasing requests insisting that she submit a sole source letter or new bid request even though since 2005, Bay County had utilized the same vendor and the only vendor, who could service the election equipment, and had, just a year before approved the vendor used for the printing of ballots. (Luczak Affidavit, para 30).

39. Of every election performed, Luczak has experienced delays in the processing of purchasing requests necessary for the election by the County Executive staff. (Luczak Affidavit, para 30).

40. In 2015, Luczak was informed by the county corporation counsel that her staffing concerns would require a new study of the County Clerk's operations by the County Executive, and the Board, allocated up to \$6,000 of taxpayer dollars for said study on July 14, 2015. (See Luczak Affidavit, para 31).

41. On information and belief no other county-wide official has been subjected to or required to undertake a study of their respective operations before being authorized to hire additional staff by the County Executive and/or Board. (Luczak Affidavit, para 32).

42. Luczak maintains that the suggested operational study, which would be under the complete control of the County Executive, is unlikely to be objective and meaningful; and simply designed to unlawfully control her constitutional office and therefore is suspect. (Luczak Affidavit, para 33).

43. With regard to staffing levels associated with her duties as Clerk of the Circuit Court, Luczak has been denied the ability to utilize and share employees as necessary in order to meet serviceable levels of her non-circuit court functions based on the direction of Defendant, Kim Mead, Court Administrator. (Luczak Affidavit, para 37).

44. As the Clerk of the Circuit Court, the Court Administrator has not included her in the proceedings involving the transformation of the Circuit Court's e-filing system despite her repeated requests to be included, and following the training she received from the State Court Administrator's Office. (Luczak Affidavit, para 38).

45. Many of my ministerial duties associated with the safekeeping of all Circuit Court records and making those records available to Circuit Court, the collecting of Court Ordered fees such as fines, costs and restitution, and transmission of the revenue collected, and serving as the Clerk of the Jury Board, have been assumed by the Court Administrator with no agreement with Luczak in place. (Luczak Affidavit, para 39).

46. Pursuant to Section 4(4) of Act 139, “[T]he power vested in the office of county prosecuting attorney, county sheriff, county register of deeds, *county clerk*, county treasurer, county drain commissioner, or the board of county road commissioners, shall not be minimized or divested by this act.” [emphasis added].

47. Pursuant to Section 12 of Act 139 “[U]pon the date an optional unified form of county government becomes effective, the following officials *shall exercise the powers and functions as provided by law, unless other powers or functions are delegated to an official by the board of county commissioners* (b) The ... clerk.” MCL 45.562. [Emphasis added].

48. A serviceable level of funding is the minimum appropriation at which statutorily mandated functions can be fulfilled, even if in a barely adequate manner; that level is not met when the failure to fund eliminates the function or creates an emergency immediately threatening the existence of the function.

49. Based on the preceding definition of serviceable funding, Luczak believes that the duties of her office are being impaired and/or infringed upon by the County Executive and Board.

50. Luczak maintains that her constitutionally and statutorily established duties of her office and her obligations to protect the functions of her office are being threatened, impaired, or hampered by the actions and inactions, either actual or implied, and/or by deliberate indifference by the County Executive and the Board because her repeated requests for staffing levels and

technology upgrades have been routinely and repeatedly denied by these Defendants since at least 2011. (Luczak Affidavit, para 40).

51. Luczak further maintains that it is unlikely that the County Executive and/or Board will grant any requests for additional staffing and/or technology needs in order to comply with the Michigan Campaign Finance Act, without guidance from this Court, and therefore there is an actual controversy.

COUNT I
COMPLAINT FOR APPOINTMENT OF LEGAL COUNSEL

52. Luczak incorporates by reference the allegations contained in paragraphs 1 through 51 as though fully set forth herein.

53. On June 8, 2015 Luczak notified the Bay County corporation counsel requesting permission to hire independent legal counsel at the expense of the county to investigate and define the legal issues in order to ensure that the County Clerk's office had sufficient staff to carry out its constitutional and statutorily mandated functions; to ensure that current, past and future employees of the Clerk's office were lawfully compensated for hour worked on behalf of the taxpayers; and to investigate any discriminatory behavior perpetrated against the Clerk's official position and Clerk's office by the County Executive and Board. (Luczak Affidavit, para 40).

54. On June 8, 2015 Luczak also indicated to Bay County's corporation counsel that independent legal assistance was necessary in order to define the legal issues and if necessary, bringing suit to declare the rights of the office of the County Clerk and protect the constitutional duties and functions of the office of the County Clerk. (Luczak Affidavit, para 41).

55. On June 8, 2015 Luczak advised Bay County's corporation counsel that due to the allegations and concerns against the Board, there was an inherent conflict of interest requiring the hiring of independent legal counsel, and further requested the retention of legal services from Clark Hill, PLC. (Luczak Affidavit, para 42).

56. On June 18, 2015 Luczak received a correspondence from Bay County's corporation counsel denying Luczak's request for independent legal counsel as requested in the June 8, 2015 letter, claiming that there was no conflict of interest, and then indicated that Corporation Counsel would be retaining outside legal counsel to determine whether the Luczak's legal claims had any merit to justify the retention of legal counsel by the Clerk. (Luczak Affidavit, para 43).

57. In the letter from June 18, 2015, Bay County corporation counsel further noted that county's outside legal counsel would be contacting the Luczak to "confer with you and your staff regarding your current workload and statutorily or constitutionally required duties..", but then added: "Please remember during these consultations that there exists no attorney-client privilege between you and" outside counsel retained by the County corporation counsel. (Luczak Affidavit, para 44).

58. On July 1, 2015 Luczak responded to Bay County corporation counsel requesting the counsel for Bay County file suit seeking declaratory and injunctive relief against the County Board of Commissioners and the County Executive on the her behalf. (Luczak Affidavit, para 45).

59. On July 7, 2015 the Bay County corporation counsel asserted that she had "NOT in fact 'denied your request' for the retention of outside legal counsel" but was trying to resolve the issues without litigation, and continued to profess there was no conflict of interest, encourage

Luczak to consult with corporation counsel's hand-picked legal counsel (without any privileges associated therewith), and the retention of a consultant to study the operations of the County Clerk. (Luczak Affidavit, para 46).

60. On July 13, 2015 through legal counsel, the Bay County corporation counsel was notified via letter by counsel retention of the Clark Hill law firm, and further instructed counsel to preserve all documents and materials, regardless of medium or storage location, that may be relevant to the claims asserted by the County Clerk, i.e. Litigation Hold letter. (Exhibit B, Litigation Hold Letter).

61. In a letter dated July 20, 2015 the Bay County corporation counsel acknowledged the Luczak's retention of the legal services of Clark Hill, PLC and asserting that the County has not and will not authorize the retention of and payment of fees incurred by Luczak. (Exhibit C).

62. Corporation counsel refusal to acknowledge that a conflict exists has resulted in Luczak being denied legal assistance such that her constitutional and statutory obligations to provide clerk services to the County's citizens has been severely limited.

63. Luczak is in need of and has utilized the assistance of legal counsel to assist her in defining the legal problems involved, negotiating resolution of the legal problems involved, or bringing suit to declare the rights of her office and to protect the functions of her office. (Luczak Affidavit, para 47).

64. A legal conflict exists between Luczak's office and Bay County corporation counsel such that the appointment and payment of independent counsel is necessary to define Luczak's rights. (Luczak Affidavit, para 48).

65. Luczak further alleges that the County Executive and/or the Board are acting in bad faith by failing to permit Luczak in adequately staffing her office with properly trained

employees that impact the serviceable levels to the public as required by law. (Luczak Affidavit, para 49).

66. This is particularly true when Luczak's inability to fulfill her constitutional and statutory duties is due solely to the seemingly arbitrary or politically motivated control of her office and budget by Defendants, County Executive and/or Board. (Luczak Affidavit, para 50).

67. Luczak further alleges that if she is required to pay for legal services out of her own pocket, the problem giving rise to the need for legal services will be exacerbated. (Luczak Affidavit, para 51).

68. Luczak further alleges that resolution of the staffing and budgetary issues between her office and the Defendant, County Executive and/or the Board is of public interest and benefit to the residents of the County such that appointment and payment of outside counsel is appropriate. (Luczak Affidavit, para 52).

69. The Luczak has retained Attorney Matthew Smith, Clark Hill PLC, to assist her in these matters. (Luczak Affidavit, para 53).

70. Luczak further alleges that Matthew Smith or his associates have provided Luczak with legal services to assist in the resolution of the issues. (Luczak Affidavit, para 54).

71. The services provided thus far include, in part, legal research and advice on the constitutional and statutory responsibilities of Luczak's office, meetings to help identify the issues and develop a plan for remediation, identifying the legal issues involved, provided response to legal counsel, communications with the County representatives, receiving and reviewing records, minutes, board resolutions, budgets, and related research of employment and staffing issues.

72. Luczak further has followed to the letter the County's alleged procedures by first requesting legal advice and counsel from Bay County corporation counsel but was effectively denied by her failure to acknowledge that a conflict of interest exists.

73. The County's denial of legal assistance combined with the increasing and severe time limitation, and staff resources to service requests, repeated attempts to resolve through budgetary process spanning several years, compelled Luczak to seek the retention of private counsel.

74. Luczak is acting in her official capacity as County Clerk in performing her statutory responsibilities and carrying out constitutionally mandated services on behalf of the residents of the County and the situation of necessity exists which required assistance of legal counsel, the retention and payment for legal service is required. *Wayne Co Sheriff v Wayne Co Bd of Comm'rs*, 196 Mich App 498 (1992).

75. The County Executive and the Board have legal counsel regarding their respective position.

76. As constitutional officer, Luczak maintains that she has a constitutional right to counsel of her choosing.

77. Luczak should be able to cause her attorney to be paid a reasonable fee, and that her counsel should be able to submit the invoices for legal services in the normal course of business and have them paid according to the normal procedure for the payment of bills by the County.

78. Attached as Exhibit A is an Affidavit by Luczak supporting the facts as alleged.

WHEREFORE, the Luczak respectively request from this Honorable Court grant authority for the Luczak, Bay County Clerk to retain counsel, and to have all outstanding fees

and fees to be accrued according to the normal procedures for payment of bills by the County of Bay.

COUNT II
DECLARATORY RULING ON CLERK'S DUTY
TO BE COUNTY AND CLERK OF THE CIRCUIT COURT

79. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 78 as though fully set forth herein.

80. That as the duly elected County Clerk, Luczak is constitutionally obligated to serve as clerk of the circuit court pursuant to Article VII, section 4 of the Michigan Constitution of 1963, which in pertinent part, provides:

There shall be elected for four-year terms in each organized county a sheriff, a county clerk, a county treasurer, a register of deeds and a prosecuting attorney, whose duties and powers shall be provided by law.

81. That section 591 of the Revised Judicature Act, 1961 PA 236, as amended, MCL 600.591 provides that:

The county clerk of each county shall:

(a) Be the clerk of the circuit court for the county.

(b) Attend the circuit court sessions.

(c) Appoint in counties with more than 1 circuit judge or having more than 100,000 population but less than 1,000,000 a deputy for each judge and approved by the judge to attend the court sessions. Each deputy shall receive a salary of at least \$6,500.00.

(d) On the first day of each court term render an accounting to the court of all funds, stocks or securities deposited with the court clerk pursuant to court order.

(e) Within 10 days after the beginning of each court term pay over to the county treasurer all fees belonging to the county received during the preceding court term together with an accounting thereof.

(f) Have the care and custody of all the records, seals, books and papers pertaining to the office of the clerk of such court, and filed or deposited

therein, and shall provide such books for entering the proceedings in said court, as the judge thereof shall direct.

(g) Perform such duties as may be prescribed by court rule. Whenever in any statute of this state, the designation “register in chancery” occurs, it shall be deemed to apply to the clerk of the circuit court.

82. The Michigan Supreme Court, in interpreting the provisions of Article VII, section 4 of the Michigan Constitution of 1963, has declared that “the clerk has a constitutional obligation to have the care and custody of the circuit court’s records.” *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 158 (2003).

83. The Michigan Supreme Court’s opinion plainly provides that Luczak has the constitutional obligation to be clerk of the court and that duty is one that she may not abrogate.

84. Constitutional obligations are not meant to be convenient, even in times of fiscal difficulty and as such, neither Luczak nor the County Executive or Board may take steps to eliminate, reduce or hamper any of Luczak’ constitutional obligations.

85. Luczak stands to suffer irreparable harm if her rights and responsibilities to serve as County Clerk and Clerk of the Circuit Court are not declared and protected by this Court.

86. Luczak maintains that as a constitutional officer that she should have the right to utilize and move employees to meet the demands of the Clerk’s office but has been denied the ability by the Defendant, Court Administrator.

87. The inability to utilize and move employees to assist with providing the serviceable levels in the County Clerk’s office created by the insufficient staffing levels created by the Defendants, County Executive and Board, creates an actual controversy.

88. Luczak respectfully requests that this Court declare the rights of the parties, and that it issue a judgment ruling that the Luczak is statutorily required to serve as County Clerk and

Clerk of the Court with the ability and discretion to utilize and move employees when necessary in order to meet serviceable levels within the office of the Clerk.

WHEREFORE, Luczak requests that this Court enter a judgment in its favor against Defendants ordering the following relief:

- A. A declaratory ruling determining whether or not the Defendants, County Executive, Board, and Court Administrator have the right or authority to excuse the Luczak from performing the statutory and constitutional duties as Clerk;
- B. A declaratory ruling as to the extent the County Clerk must comply with personnel and other policies administered by the County Executive and Board in relation to the performance of her statutory and constitutional duties as Clerk;
- C. A declaratory ruling determining that the County Executive, Board have not adequately staffed or funded Luczak offices sufficiently appropriate for Luczak to carry out her constitutionally and statutorily mandated duties; and,
- D. A declaratory ruling whether the Luczak has the right utilize and move employees assigned to the circuit court to assist with providing serviceable levels in the County Clerk's office created by the insufficient staffing levels created by the Defendants, County Executive and Board.
- E. Any other relief the Court deems and just and equitable.

COUNT III
WRIT OF MANDAMUS ORDERING COUNTY EXECUTIVE AND BOARD OF
COMMISSIONER TO PROVIDE STAFFING LEVELS
TO MEET SERVICEABLE LEVEL

89. Luczak incorporates by reference the allegations contained in paragraphs 1 through 88 as though fully set forth herein.

90. That as the duly elected County Clerk, Luczak has constitutional and statutory obligations which she cannot abrogate.

91. Based on the definition of serviceable funding, Luczak believes the duties of her office are being impaired or infringed upon by the arbitrary and capricious actions of the Defendants, County Executive and/or Board in their failure to permit her to adequately fund and/or staff her office with trained personnel, and approving provide technology upgrades to meet the serviceable level as required by law.

92. Defendant County Executive has a clear duty pursuant to Act 139 not to minimized or divest the authority an powers of the County Clerk.

93. Defendant Board has a clear duty pursuant to Act 139 not to minimized or divest the authority an powers of the County Clerk.

94. Mandamus is appropriate to compel the County Executive and Board to provide funding and staffing levels as determined by the Clerk in order to meet constitutional and statutory obligations at a serviceable level.

95. There is no adequate remedy at law.

96. Without a writ of mandamus County Executive and the Board of Commissioners will continue to act in an arbitrary and capricious manner impairing Luczak's constitutional and statutory obligations as Clerk, her staff and the public they serve will continue to be harmed.

WHEREFORE, the Luczak respectively request from this Honorable Court for an order compelling County Executive and Board to provide staffing levels and approve technology upgrades as determined by Luczak.

COUNT IV
INJUNCTIVE RELIEF PREVENTING THE COUNTY EXECUTIVE AND
BOARD OF COMMISSIONERS FROM
INTERFERING OR IMPAIRING THE OFFICE OF THE COUNTY CLERK

97. Luczak incorporates by reference the allegations contained in paragraphs 1 through 96 as though fully set forth herein.

98. That as the duly elected County Clerk, Luczak has constitutional and statutory obligations which she cannot abrogate.

99. Luczak believes that the duties of her office are being impaired or infringed upon by the arbitrary and capricious actions of the Defendants, County Executive and/or Board through the implication of policies and/or procedures that, on information and belief, have not been applied to other county-wide elected officials.

100. On information and belief, no other office of a county-wide elected official has been required to undergo an evaluation by and through the County Executive in order have their budgets increased, or the restoration, re-classification and/or the hiring of personnel.

101. Defendant County Executive has a clear duty pursuant to Act 139 not to minimized or divest the authority an powers of the County Clerk.

102. Defendant Board has a clear duty pursuant to Act 139 not to minimized or divest the authority an powers of the County Clerk.

103. Without injunctive relief, the County Executive and the Board of Commissioners will continue to act in an arbitrary and capricious manner impairing Luczak's constitutional and statutory obligations as Clerk, her staff and the public they serve will continue to be harmed.

WHEREFORE, the Luczak respectively request this Honorable Court for an order preventing County Executive and Board from implementing policies and/or procedures that interfere,

impair or otherwise infringed upon the rights and responsibilities of the office of County Clerk official office.

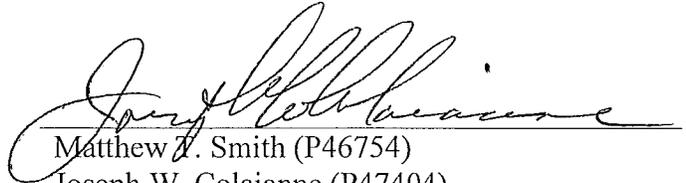
I declare the above statements are true to the best of my information, knowledge and belief.

Respectfully submitted,

CLARK HILL PLC

Dated: September 24, 2015

By:



Matthew Z. Smith (P46754)

Joseph W. Colaianne (P47404)

CLARK HILL PLC

Attorneys for Petitioner, Cynthia Luczk

212 E. Grand River Ave.

Lansing, MI 48906

(517) 318-3100

EXHIBIT A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR BAY COUNTY

CYNTHIA A. LUCZAK, BAY COUNTY
CLERK in HER capacity as an elected official,

File No. _____

Hon.

Plaintiff/Petitioner,

v

THOMAS L. HICKNER, BAY COUNTY
EXECUTIVE, in his capacity as an elected
official, BAY COUNTY BOARD OF
COMMISSIONERS, the governing body for
the County of Bay, and KIM MEAD, Bay
County Circuit Court Administrator,

Defendant/Claimant.

Matthew T. Smith (P46754)
Joseph W. Colaianne (P47404)
CLARK HILL PLC
Attorneys for Plaintiff
212 E. Grand River Ave.
Lansing, MI 48906
(517) 318-3100

AFFIDAVIT OF CYNTHIA A. LUCZAK

STATE OF MICHIGAN)
)ss
COUNTY OF BAY)

Cynthia A. Luczak, being first duly sworn, deposes and says:

1. I am the duly elected County Clerk for the County of Bay, having first appointed as the County Clerk by Circuit Court Judge upon the retirement of County Clerk Tober in 2004.

2. Prior to my election, I served the in the Bay County Clerks' office beginning in 1987, and ultimately served as secretary to the County Clerk, 1987-1999 and Chief Deputy Clerk from March, 1999 through July, 2004.

3. I am certified by the State of Michigan as an Election Coordinator.

4. The County Clerk is one of the most diversified in county government, governed by almost 600 Michigan statutes.

5. The County Clerk serves four major areas: Clerk of the Circuit Court; Clerk to the County Board of Commissioners; Registrar of Vital Statistics; and Chief Election Official for Bay County.

6. As Clerk for the Circuit Court, the County Clerk performs ministerial duties to ensure the safekeeping of all Circuit Court records and making those records available to Circuit Court, and the public where appropriate; to collect Court Ordered fees such as fines, costs and restitution, and further to transmit revenue collected to the State, the County and Victims; to attend every session of the Circuit Court; and to serve as the Clerk of the Jury Board.

7. As Clerk to the County Board of Commissioners, I am to attend every meeting of the County Board of Commissioners in which a quorum is present; record and maintain the official minutes of each Board of Commissioners' regular, special or closed sessions (pursuant to the Michigan Open Meetings' Act).

8. As Registrar of Vital Statistics, the County Clerk is responsible for recording and maintaining all vital statistics occurring in Bay County which includes, birth certificates, death certificates, marriage certificates, notary public licenses, veterans' discharge licenses and assumed names certificates for businesses.

9. In addition, as Registrar of Vital Statistics, the County Clerk is the access point for Bay County residents to obtain a Concealed Pistol License (CPL), accepting all CPL applications, and attending and serving as Clerk for the Concealed Weapons Licensing Board.

10. As Clerk for the Concealed Weapons Licensing Board I am required to attend every meeting of the Concealed Weapons Licensing Board, prepare and maintain all official minutes, and ultimately issuing CPLs to applicants that are approved.

11. As the Chief Election Official for the County, I am required to preside over every election held within Bay County, which may include up to three election dates per year: May, August and November.

12. In addition, as the Chief Election Official for the County, I am responsible for accepting candidate filings, programming voting equipment, testing and coding on the ballots and machines, preparing and ordering the printing of all ballots, distributing ballots to all local jurisdictions, maintaining all campaign finance reports, training of all election inspectors, and the tabulation of election results.

13. As County Clerk, I am also the Clerk for the Board of Canvassers, where I am required to attend all meetings of this Board, review, audit and certify all local election results; maintain all minutes and permanent record of all official election results; and oversee and manage all recounts conducted by the County.

14. As County Clerk, I also serve as a member of the County Election Commission, whose duties include proof of all ballots prior to printing, manage all precinct consolidation and polling location changes, and all other election related responsibilities; and, required to attend clarity hearings when recall petition has been filed and carry out all requirements of the recall process prescribed by law.

15. As the Chief Election Official for the County, I am required to maintain the Voter Registration and Street Index File (also known as Qualified Voter File or QVF) to ensure that all voters get proper ballots.

16. The current staffing level for carryout the functions and duties related to my role as Clerk of the Circuit Court includes four (4) full-time employees, while the staffing level for all other functions include three (3) full time employees, that includes myself, my chief deputy and one full time union employee designated as clerical.

17. In accordance with the budget approved in December 2010, in 2011 my staff was reduced by two full-time employees, a reduction of approximately 50% to compensate for reductions in appropriations.

18. On information and belief in 2011 other county-wide departments, including the County Executive administrative staff, Sheriff, Treasurer and the Register of Deeds, also observed staff reductions.

19. However, on information and belief, since 2011, the County Executive ("County Executive") and County Board of Commissioners ("Board") have permitted restoration, re-classification, and/or increases in staffing levels, and/or created "new positions," for the County Executive administrative staff, Sheriff, Treasurer and Register of Deeds to address both mandated and un-mandated constitutional and statutory duties.

20. On information and belief, before authorizing the restoration and/or increasing staffing levels, and creation of new positions, the Defendants did not require extensive study of the operations of the County Executive administrative staff, Sheriff, Treasurer and Register of Deeds.

21. Since at least 2011, I have made repeated requests to increase my staffing levels and sought appropriations, including presenting extensive information of the services provided by my office and internal remedy to fund said positions, from the County Executive and Board only to be summarily denied such requests for increases in staffing levels or being required to subject my office to unreasonable demands made by the County Executive and his staff, such as submitting to "study of the Clerk's operations," which on information and belief, no other county-wide elected official has had to endure before restoration, re-classification and/or increases in staffing levels.

22. In order to meet the demands of the public and fulfill my statutory and constitutional duties, myself and my staff have had to work afterhours or have incurred significant delays in processing service requests from taxpayers and various other entities, including law enforcement from other jurisdictions.

23. Because of the volume of service requests from taxpayers, I have personally worked the counter of the clerk's office assisting with service requests from taxpayers, and working afterhours, sometimes 10-12 hour days in order fulfill my constitutional and statutory duties.

24. From time-to-time I have been without sufficient trained staff when my Chief Deputy and/or clerical staff are not available to work due to injuries, sickness, vacation or other leave afforded by union contract.

25. From time-to-time, due to insufficient staff in the County Clerks' office, either myself, or staff have been left solely to conduct daily operations presenting what I believe is serious security concern in the workplace.

26. In an attempt to accommodate lack of sufficient trained staff, I closed the County Clerk's Office from noon to 1:00 PM each day only to receive criticism from the County Executive, the Board and the public.

27. Due to insufficient staff, I have statutory responsibilities, such as preparing and filing of minutes of the Concealed Weapons Licensing Board, filings with the State of Michigan, and other responsibilities associated with vital statistics (i.e. birth certificates, death certificates, and marriage certificates) that are delayed or remain incomplete.

28. On information and belief, in July 2013, in retaliation against me the Board eliminated all funding of the County Board of Canvassers because a temporary employee hired by the Board of Canvassers and working in the County Clerk's office (and performing services for the Board of Canvassers), assisted another county-wide elected official with a request that was not part of the temporary employees' responsibilities. On further information and belief, the Board ultimately restored funding following a letter from the members of the Board of Canvassers was sent to the Michigan Secretary of State, Director of the Michigan Bureau of Elections, and the Michigan Attorney General indicating a potential election law violation and inability to conduct canvass of the election because of the Board's elimination of the Board of Canvassers' budget.

29. In or about November 2014, I presented a request to the Board of Commissioners for the approval of the purchase and implementation of a campaign finance indexing and reporting computer software system in order to comply with Michigan Campaign Finance Act (that requires the filing and maintenance of campaign committee statements), and a separate request dealing with a record retention system. On December 2, 2014 the Board of Commissioners approved every item on their agenda, except my two requests; and instead,

directed that my requests be reviewed by the County Executive, where it has remained without further action by the Defendants.

30. On information and belief, my purchase requests for goods and services to the Defendants are unusually delayed and/or funding withheld as compared to other county-wide elected officials and county departments even though I have provided sufficient information to the County Executive and Board. For example, in February, 2015 I submitted purchase requests for the programming services and ballot printing for the May 2015 election. Elections take weeks to prepare and involve the coordination between a number of people, including my office and the State of Michigan. Moreover, since 2005, Bay County had utilized the same vendor and the only vendor, who services election equipment, and had, just a year before approved the vendor used for the printing of ballots. However, despite the fact that the State of Michigan would be reimbursing the County for the full cost of the election, the County Executive staff refused to process my purchasing requests insisting that I submit a sole source letter or new bid request. I have experienced this situation in preparation of every election performed.

31. In 2015, I was informed by the county corporation counsel that my staffing concerns would require a new study of the County Clerk's operations by the County Executive, and the Board allocated up to \$6,000 of taxpayer dollars for said study on July 14, 2015. See Attached Exhibit 1.

32. On information and belief no other county-wide elected official has been subjected to or required to undertake a study of their respective operations before being authorized to hire additional staff by the County Executive and Board.

33. I believe that the suggested operational study, which would be under the complete control of the County Executive, is unlikely to be objective and meaningful; and further believe that it is simply designed to unlawfully control my constitutional office.

34. Based on the definition of serviceable funding, I believe that my duties and office are being impaired or infringed upon by the County Executive and Board.

35. I believe that my constitutionally and statutorily established duties and obligations to protect the functions of her office are being threatened, impaired, or hampered by the actions and inactions, either actual or implied, and/or by deliberate indifference by the Defendants because my repeated requests for staffing levels and technology upgrades have been routinely and repeatedly delayed and/or denied by the County Executive and Board.

36. It is unlikely that the Defendants will grant any of my requests for additional staffing and/or technology needs in order to comply with the Michigan Campaign Finance Act, without guidance from this court.

37. With regard to staffing level associated with my duties as Clerk of the Circuit Court, I have been denied the ability to utilize and share employees as necessary in order to meet serviceable levels of my non-circuit court functions based on the direction of Court Administrator, Kim Mead.

38. As the Clerk of the Circuit Court, Kim Mead has not included me in the proceedings involving the transformation of the Circuit Court's e-filing system despite my repeated requests to be included, and following the training I received from the State Court Administrator's Office.

39. Many of my ministerial duties associated with the safekeeping of all Circuit Court records and making those records available to Circuit Court, the collecting of Court Ordered fees

such as fines, costs and restitution, and transmission of the revenue collected, and to serving as the Clerk of the Jury Board, have been assumed by Kim Mead, Court Administrator with no agreement with me in place.

40. As result of my past experience in seeking additional staffing and/or technology needs, on June 8, 2015 I notified in writing the Bay County corporation counsel requesting permission to hire independent legal counsel at the expense of the county to investigate and define the legal issues in order to ensure that the County Clerk's office had sufficient staff to carry out its constitutional and statutorily mandated functions; to ensure that current, past and future employees of the Clerk's office were lawfully compensated for the hours worked on behalf of the taxpayers; and to investigate any discriminatory behavior perpetrated against the Clerk's official position and Clerk's office by the Defendants. See Attached Exhibit 2.

41. On June 8, 2015 I also indicated in writing to the Bay County's corporation counsel that independent legal assistance was necessary in order to define the legal issues and if necessary, bringing suit to declare the rights of the office of the County Clerk and protect the constitutional duties and functions of the office of the County Clerk.

42. On June 8, 2015 I also advised Bay County's corporation counsel that due to the allegations and concerns against the County Board of Commissioners, there was an inherent conflict of interest requiring the hiring of independent legal counsel, and further requested the retention of legal services of Clark Hill, PLC.

43. On June 18, 2015 I received a correspondence from Bay County's corporation counsel denying my request for independent legal counsel as requested in the June 8, 2015 letter, asserting there was no conflict of interest. See Attached Exhibit 3.

44. In June 18 correspondence, I was also informed that by Corporation Counsel that the county would be retaining outside legal counsel to determine whether my legal claims had any merit to justify the retention of my own independent legal counsel, and that I contacted to “confer with you and your staff regarding your current workload and statutorily or constitutionally required duties.”, but was informed that exists no attorney-client privilege between you and the outside counsel retained by the County. See Attached Exhibit 3

45. On July 1, 2015 I then notified Bay County corporation counsel in writing requesting she file suit seeking declaratory and injunctive relief against the County Board of Commissioners and the County Executive on the my behalf. See Attached Exhibit 4.

46. On July 7, 2015 the Bay County corporation notified me that she had “NOT in fact denied my request for the retention of outside legal counsel but was trying to resolve the issues without litigation, and continued to profess there was no conflict of interest, encouraging me to consult with outside legal counsel selected by the corporation counsel and the retention of a consultant to study the operations of the County Clerk. See Attached Exhibit 5.

47. I am in need of and have utilized the assistance of legal counsel to assist me in defining the legal problems involved in this matter, negotiating resolution of the legal problems involved, or bringing suit to declare the rights of her office and to protect the functions of my office.

48. I believe that a legal conflict exists between my office and the Defendants such that the appointment and payment of independent counsel is necessary to define my rights as the duly elected County Clerk.

49. I believe that the Defendants are acting in bad faith by failing to adequately staff my office with properly trained employees that impact the serviceable levels to the public as required by law.

50. I believe that my inability to fulfill my constitutional and statutory duties is due solely to the seemingly arbitrary or politically motivated control of my office and budget by the Defendants.

51. I believe that if I am required to pay for legal services out my own pocket, the problem giving rise to the need for legal services will be exacerbated.

52. I believe that resolution of the staffing and budgetary issues between my office and the Defendants is of public interest and benefit to the residents of the County such that appointment and payment of outside counsel is appropriate.

53. I am requesting the retention of Attorney Matthew Smith, Clark Hill PLC, to assist her in these matters.

54. Matthew Smith or designee have provided me with legal services to assist in the resolution of the issues.

If sworn as a witness I can and will testify competently to these facts.

Cynthia A. Luczak
Cynthia A. Luczak

Subscribed and sworn before me

Katrena K Rappuhn

Katrena K Rappuhn

this 23rd day of September 2015.

Notary Public, Saginaw County, MI
Acting in Bay County
My commission expires 6-8-2018

KATRENA K RAPPUHN
Notary Public, State of Michigan
County of Saginaw
My Commission Expires 6-8-2018
Acting in the County of Bay

ATTACHMENT 7

BAY COUNTY BOARD OF COMMISSIONERS

7/14/2015

RESOLUTION

*TO: M. SMITH
FR: C. LUCIAK*

- BY: WAYS AND MEANS COMMITTEE (7/7/15)
- WHEREAS, The Bay County Board of Commissioners adopted Resolution 2014-113 on June 17, 2014 approving the County's current Civil Counsel Guidelines; and
- WHEREAS, Those guidelines provide that only Corporation Counsel may enter into contracts for outside legal services, and sets forth a procedure for elected officials to request retention of such outside counsel; and
- WHEREAS, The Bay County Clerk has, in conformance with those Guidelines, submitted a written request to retain outside counsel for potential litigation on behalf of the Clerk which may assert that the Bay County Board of Commissioners has failed to provide a serviceable level of funding to allow the Clerk's office to fulfill statutorily mandated functions; and
- WHEREAS Corporation Counsel has an obligation to review the request and make a determination if such a request is necessary and appropriate and, in cases where a conflict of interest between County entities has arisen, may obtain the legal opinion of an independent attorney to determine if any potential cause of action is frivolous or has merit; and
- WHEREAS, An independent analysis/evaluation by Resilient-C was commissioned by the Board of Commissioners in 2009 to analyze the operations in the Clerk's Office which determined that there was sufficient staffing in the office to provide the statutorily mandated services; and
- WHEREAS, There have been significant changes in the Clerk's Office since that time, including loss of a full time employee, changes in statutorily mandated responsibilities, and utilization of on-line services and availability of credit card payments through that on-line service; and
- WHEREAS, An up-to-date independent analysis of the work flow in the Clerk's Office would greatly assist Corporation Counsel in evaluating the Clerk's request to obtain outside counsel; and
- WHEREAS, The financial impact on the County would be the cost of the study itself. The prior resolution passed in 2009 approved a budget adjustment of up to \$4,000 for the work processes study. An increase in the amount not to exceed \$6,000 would seem appropriate for services at this date; and
- WHEREAS, The results of the survey may either cost the County additional funds for the retention of additional staffing in the Clerk's office, or may save costs for the retention of outside counsel if it is determined that the Clerk's office is sufficiently staffed. It is impossible to predict that economic impact at this time; Therefore, Be It

RESOLVED That the Bay County Board of Commissioners approves the following requests: (1) to retain an independent firm to study the work processes and work flow of the Clerk's office (at the cost of no more than \$6,000); and (2) for such firm to provide to the Board of Commissioners a recommendation regarding staffing and technology necessary for the Clerk's office to fulfill the statutorily mandated responsibilities at a serviceable level; Be It Further

RESOLVED That the Chairman of the Board is authorized to execute a contract with the independent firm on behalf of Bay County following legal review/approval; Be It Finally

RESOLVED That budget adjustments related to this work processes/work flow study are approved.

KIM COONAN, CHAIR
AND COMMITTEE

Favorably recommended by Personnel/Human Services Committee 6/16/15.

Corporation Counsel - Work Study for County Clerk's Office

MOVED BY COMM. COONAN

SUPPORTED BY COMM. TILLEY

COMMISSIONER	Y	N	E	COMMISSIONER	Y	N	E	COMMISSIONER	Y	N	E
MICHAEL J. DURANCZYK	✓			KIM J. COONAN	✓			MICHAEL E. LUTZ	✓		
ERNIE KRYGIER	✓			THOMAS M. HEREK	✓						
VAUGHN J. BEGICK		✓		DONALD J. TILLEY	✓						

VOTE TOTALS:

ROLL CALL: YEAS 6 NAYS 1 EXCUSED 0

VOICE: YEAS 6 NAYS 1 EXCUSED 0

DISPOSITION: ADOPTED ✓ DEFERRED (Begick) WITHDRAWN _____
AMENDED _____ CORRECTED _____ REFERRED _____

ATTACHMENT a

June 8 _____, 2015

Ms. Amber Davis-Johnson
Bay County Corporation Counsel
515 Center Avenue, Suite 402
Bay City, MI 48708

Re: Retention of Outside Legal Counsel

Dear Ms. Davis-Johnson:

In accordance with the Civil Counsel Guidelines adopted by the Bay County Board of Commissioners (Resolution #2014-113, June 17, 2014), I am requesting permission to retain outside legal counsel to represent me for the following reasons: (1) to ensure that the Bay County Clerk's office is afforded sufficient full-time staff to carry out its constitutional and statutorily mandated duties; (2) to ensure that current and future employees of the Clerk's office are lawfully compensated for hours worked on behalf of the taxpayers of Bay County; and (3) to investigate discriminatory behavior perpetrated against my official position and the Bay County Clerk's office by the Bay County Board of Commissioners.

As you are aware, in 2004 I was elected to serve the taxpayers of Bay County as their Clerk. In addition to maintaining all vital records of county residents, my office is mandated to serve as the clerk for the 18th Judicial Circuit Court, responsible for maintaining all court files. As Clerk, I also serve as the county's chief election officer maintaining all election related information, including the qualified voter file, election equipment and election records. Additionally, my office secures military discharge records and verifies public notary applications. Finally as Clerk, I am a statutory member of the county's plat board, gun board, board of canvassers, apportionment committee, election commission, and I serve as the clerk for the Bay County Board of Commissioners.

For over 10 years, with minimal staff and working very long hours (well in excess of 8 hours per day/40 hours per week without overtime pay), I and my staff have done our utmost to fulfill the foregoing constitutional and statutory duties. I have made repeated written requests and inquiries to the County Board of Commissioners for an increase in my budget and the ability to hire additional full-time personnel in order to adequately uphold these duties and functions. My repeated requests have been denied even though other County departments, which often provide non-mandated services, have seen their budgets and staff increased. Indeed, staffing levels in my office are far lower than those in the clerks offices in other Michigan counties of

similar size and economics (Allegheny, Eaton). The situation in Bay County is simply unacceptable.

I am requesting the assistance of Clark Hill PLC in order to assist me in defining the legal issues involved, negotiating a resolution of these legal issues, or if necessary, bringing suit to declare the rights of my office and to protect the constitutional and statutory duties and functions of my office. As this presents potential litigation between separate County Entities, as defined in the Civil Counsel Guidelines, there is an inherent conflict of interest in your Department representing the County and my office which mandates the retention of outside counsel.

I currently have no funding within my budget or account to pay for Clark Hill's legal services. However, please know that I intend to seek a budget request to fully provide such funding.

Please also know that, despite the County's Civil Counsel Guidelines, it is my belief that I have the absolute right to retain Clark Hill to assist me in protecting the constitutional and statutory duties and functions of my office and that the cost of such representation should be a County expense. Accordingly, I will make every effort to preserve this right if necessary.

I appreciate your prompt attention to this matter so that I may further determine my next course of action. Please contact me with questions or to discuss this matter in greater detail.

Sincerely,



Cynthia A. Luszczak
Bay County Clerk

cc: Tim Quinn

ATTACHMENT 3

**BAY COUNTY
DEPARTMENT OF CORPORATION COUNSEL**



AMBER L. DAVIS-JOHNSON
Corporation Counsel

THOMAS L. HICKNER
County Executive

June 18, 2015

Cynthia Luczak
Bay County Clerk
515 Center Avenue
Bay City, Michigan 48708

Re: June 8, 2015 (received June 11, 2015) Request for Retention of Outside
Legal Counsel

Dear Ms. Luczak:

Thank you for your recent letter regarding your request to retain outside legal counsel. You have indicated in your letter that you wish to retain outside legal counsel for three (3) reasons:

- (1) "To ensure that the Bay County Clerk's office is afforded sufficient full-time staff to carry out its constitutional and statutorily mandated duties;
- (2) [T]o ensure that current and future employees of the Clerk's office are lawfully compensated for hours worked on behalf of the taxpayers of Bay County; and
- (3) [T]o investigate discriminatory behavior perpetrated against [your] official position and the Bay County Clerk's office by the Bay County Board of Commissioners."

You further indicate that you believe that these areas cannot be effectively addressed by Corporation Counsel because the issue may present "potential litigation" in the future and would therefore create a conflict of interest for the Corporation Counsel Department.

As you are aware, Bay County's Civil Counsel Guidelines provide a specific process for the retention of outside legal counsel. Specifically, any request to retain outside counsel must comply with Section 3.B, which reads as follows:

3. Retention of Outside Counsel:

- B. Any request to Corporation Counsel for retention of outside counsel must:
- (i) Be submitted in writing;
 - (ii) Be reasonable and necessary;

515 Center Avenue, Suite 401, Bay City, MI 48708-5125 (989) 895-4131
FAX (989) 895-7658 TDD (hearing impaired) (989) 895-4049

Bay County Department of Corporation Counsel

June 18, 2015

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- (iii) Explain the need to retain outside counsel;
- (iv) Set forth the reasons why the Department cannot or may not handle the matter;
- (v) Indicate that the County Entity has verified that there are sufficient funds available in the portion of the Department's budget allocated to retention of outside legal counsel and, if sufficient funds are not available in the Department's budget, that the County Entity requesting the retention has the funds or will have the funds to pay for the outside legal services and shall identify the account from which the outside legal services will be paid.

The Guidelines further mandate that Corporation Counsel make a determination that the requesting County Entity's need to retain outside counsel is reasonable, necessary and appropriate. (See Sections 3.A.(i) and 3.B.(ii)).

Section 4 of the Civil Counsel Guidelines also addresses the procedure to retain outside counsel in the event that County Entities are adverse parties due to litigation between two separate County Entities. Section 4.B. of the Guidelines further reads as follows:

The Department reserves the right, WITH THE EXCEPTION OF any legal action filed by the district, probate or circuit courts asserting the court's inherent power doctrine, to obtain an independent legal opinion from outside counsel as to whether there exists a non-frivolous, legal basis to proceed with legal action against the defendant County Entity. In the event the independent outside counsel opines that there is no non-frivolous, legal basis to proceed with legal action, Corporation Counsel, in his or her discretion, may decline to retain outside counsel for the plaintiff County Entity or may retain such counsel only upon a reservation of rights pending a legal determination of the County's responsibility to retain outside counsel.

I have reviewed your request and the stated reasons you believe that outside counsel is necessary. After serious consideration, I do not find that the stated reasons or concerns arise to a level that constitutes a conflict of interest such that the Department of Corporation Counsel cannot address your concerns. There is currently no pending litigation between County Entities, and you have in fact identified a need to determine whether your office is receiving sufficient funding in order to ensure that the Clerk's office can carry out its constitutionally and statutorily mandated duties. It is in fact the responsibility of this office to investigate such inquiries and to further advise the Board of Commissioners if they are failing to fulfill their legal responsibilities

Bay County Department of Corporation Counsel

June 18, 2015

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in adequately staffing the County Offices. This is an appropriate function of the Department of Corporation Counsel.

In order to make a fully informed decision as to whether the Board of Commissioners has provided a serviceable level of funding to allow your office to fulfill constitutionally or statutorily mandated services, more information is required. To that end, I have requested that the Board approve the retention of an independent firm to study the work processes and the work flow of the Clerk's office to provide an opinion as to whether the office is sufficiently staffed to provide the level of services required. Although such a study was conducted in 2010, significant changes have occurred since that time, including loss of a full time staff member in your office, the availability of computerized purchase of vital records, and changing responsibilities regarding gun boards and concealed pistol permits. The Personnel and Human Services Committee approved my request at its most recent meeting on June 16, 2015 and referred the matter to the Way and Means Committee for approval of the necessary budget adjustment. I have included with this correspondence a copy of my memorandum to the Committee requesting the retention of such an independent firm.

In addition, although I do not agree that a conflict exists in this matter (at least at this juncture), in an effort to avoid any appearance of impropriety, this Department will be retaining the law offices of Gilbert, Smith & Borrello, P.C. to provide an independent opinion as to whether the noted *potential* legal claim/issue has merit sufficient to justify the retention of outside counsel. Attorneys Amy L. Lusk and Andre Borrello from that office will be working on this matter. They will be providing me with a list of additional information that they believe is necessary for them to effectively evaluate the merit of your potential issue in addition to the work/office study that has been requested at the Personnel and Human Services Committee meeting earlier this week.

Ms. Lusk or Mr. Borrello may be contacting you in the near future to confer with you and your staff regarding your current workload and statutorily or constitutionally required duties and where and why you believe current staffing is insufficient. Please remember during these consultations that there exists no attorney client privilege between you and the attorneys at the offices of Gilbert, Smith and Borrello, who have been retained by the Department of Corporation Counsel.

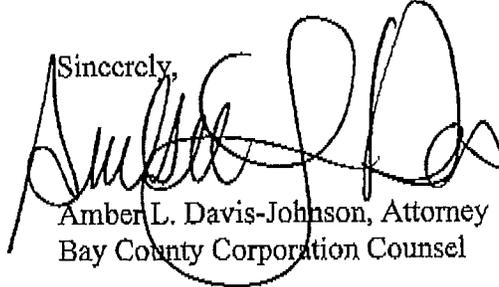
Bay County Department of Corporation Counsel

June 18, 2015

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Thank you for bringing this matter to my attention. I hope that we are able to resolve this issue to everyone's satisfaction such that the residents of Bay County are receiving the best possible services for their tax dollars. Please feel free to contact me with any additional questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Amber L. Davis-Johnson', written over the typed name and title.

Amber L. Davis-Johnson, Attorney
Bay County Corporation Counsel

Enclosure

cc: Tom Hickner, County Executive
Ernie Krygier, Chairman, Bay County Board of Commissioners
Amy Lusk/Andre Borrello
515 Center Avenue, Suite 401, Bay City, MI 48708-5125 (989) 895-4131
FAX (989) 895-7658 TDD (hearing impaired) (989) 895-4049

MEMORANDUM

TO: Michael Lutz, Chairman,
Bay County Personnel and Human Services Committee

From: Amber L. Davis-Johnson,
Bay County Corporation Counsel

Re: Request by County Clerk to Retain Outside Legal Counsel

Date: June 16, 2015

Background:

This Board passed Resolution 2014-113 on June 17, 2014 which adopted the County's current Civil Counsel Guidelines. Those guidelines provide that only Corporation Counsel may enter into contracts for outside legal services, and sets forth a procedure for elected officials to request retention of such outside counsel. The County Clerk has, in conformance with those Guidelines, submitted a written request to retain outside counsel for potential litigation on behalf of the Clerk which may assert that the Bay County Board of Commissioners has failed to provide a serviceable level of funding to allow the Clerk's office to fulfill statutorily mandated functions. Corporation Counsel has an obligation to review the request and make a determination if such a request is necessary and appropriate and, in cases where a conflict of interest between County entities has arisen, may obtain the legal opinion of an independent attorney to determine if any potential cause of action is frivolous or has merit.

An independent analysis/evaluation by Resilient-C was commissioned by the Board of Commissioners in 2009 to analyze the operations in the Clerk's Office which determined that there was sufficient staffing in the office to provide the statutorily mandated services. There have been significant changes in the Clerk's Office since that time, including loss of a full time employee, changes in statutorily mandated responsibilities, and utilization of on-line services and availability of credit card payments through that on-line service. An up-to-date independent analysis of the work flow in the Clerk's Office would greatly assist Corporation Counsel in evaluating the Clerk's request to obtain outside counsel.

Financial Impact on the County:

The financial impact on the County would be the cost of the study itself. The prior resolution passed in 2009 approved a budget adjustment of up to \$4,000 for the work processes study. An increase in the amount not to exceed \$6,000 would seem appropriate for services at this date. The results of the survey may either cost the County additional funds for the retention of additional staffing in the Clerk's office, or may save costs for the retention of outside counsel if it is determined that the Clerk's office is sufficiently staffed. It is impossible to predict that economic impact at this time.

Recommendation:

That the Board Approve the request: (1) to retain an independent firm to study the work processes and work flow of the Clerk's office (at the cost of no more than \$6,000); and (2) for such firm to provide to the Board of Commissioners a recommendation regarding staffing and technology necessary for the Clerk's office to fulfill the statutorily mandated responsibilities at a serviceable level. This, along with consultation with the Clerk's office and other County entities with pertinent information, will allow Corporation Counsel (or an independent attorney) to better determine if the Clerk's request to retain outside counsel is necessary and appropriate and/or if the potential cause of action is frivolous or has merit, necessitating the retention of outside counsel.

ATTACHMENT 4

July 1, 2015

Ms. Amber Davis-Johnson, Esq.
Bay County Corporation Counsel
515 Center Avenue, Suite 402
Bay City, MI 48708-5941

Re: Legal Representation – Bay County Clerk
Retention – Outside Legal Counsel

Dear Ms. Davis-Johnson:

Thank you for responding to my letter from June 8, 2015 requesting the retention of legal representation. However, I am dismayed and puzzled by your decision denying my request, especially when my claims pose a clear conflict of interest for your office and require the retention of outside counsel.

As indicated in my June 8 letter, I believe that the functions of the County Clerk are being threatened or hampered by the actions on the part of the Bay County Board of Commissioners (and I would add, the County Executive, as well). I have made repeated written requests and inquiries to the County Board of Commissioners for an increase in my budget and the ability to hire full-time personnel in order to adequately uphold my constitutional and statutory duties and functions. As noted, my repeated requests have been denied even though other county departments that often provide non-mandated services, have seen their budgets and staff increased. These actions have made it exceedingly difficult for me to carry out my constitutional and statutory duties, and serve the 107,000 taxpayers of Bay County.

My staff consists of me, my deputy and one other employee (who is currently unable to work due to injury). It is completely unnecessary to spend taxpayer dollars to conduct a new study of my operations when I am prepared to demonstrate that my staff is working long hours without overtime to meet the needs of the public. This will take time and that is something we do not have. When you compare the level of services and number of staff with the staff of the county clerks from comparable-size counties (e.g. Allegan and Eaton Counties), you would understand that we are woefully understaffed; the immediacy is unquestionable.

In addition, as you are aware, my office charges various fees that are either established by state law or by resolution of the County Board of Commissioners to offset the costs of the services provided. The fees charged are intended to be used to offset the cost of providing the services, and it follows that the fees should remain with the County Clerk. I believe the County Board of Commissioners has inappropriately diverted the fees to the county general fund rather than use the fees collected by my office to fund my office. That is, the County Board Commissioners is utilizing the fees as a revenue generator for the County general fund. This is not appropriate, if not illegal under *Headlee* (1963 Const., Art IX, §§25 and 31; *See Bolt v City of Lansing*, 459 Mich 152, 166 (1998); *see also, Graham v Kochville Twp*, 236 Mich App 141, 151 (1999) (Holding that fee do not benefit the general public; which would be the case if the Board of Commissioners continue to divert fees to the general fund).

Although there are those who would consider the actions or inactions of the Board of Commissioners and County Executive as it relates to my office as being "political", I cannot help but wonder and be concerned that these actions or inactions are discriminatory and retaliatory due to my gender (as the only female elected official in the Bay County Government) and for the reapportionment that resulted in the elimination of two county commissioner districts.

As a result of this continued disparate and discriminatory action perpetrated against me, my official position and the Bay County Clerk's office I demand that you file suit seeking declaratory and injunctive relief against the County Board of Commissioners and the County Executive. Your complaint should request the following relief:

- A declaratory ruling determining that the County Board of Commissioners and County Executive have not adequately funded the Bay County Clerk office in an amount minimally appropriate for the County Clerk to carry out her constitutionally and statutorily mandated duties.
- A declaratory ruling and injunctive relief clarifying that fees charged by the Bay County Clerk for services provided are intended to offset the costs of those services and preventing Defendant County Board of Commissioners from unlawfully using such fees as general fund revenue generators in violation of the Headlee Amendment.

I would appreciate your attention to this matter. While I am certainly open to reaching an amicable resolution, the situation at this time is untenable. I believe that litigation is now required in order to ensure that the Bay County Clerk's office afforded sufficient full-time staff to carry out its constitutional and statutorily mandated duties and to ensure that current and future employees are lawfully compensated for the hours worked.

I would request a response from you within 5 days with a decision from you to either file suit or authorize my retention of Clark Hill PLC.

Sincerely,

S/ Cynthia A. Luczak
with permission

Cynthia A. Luczak
Bay County Clerk

ATTACHMENT 5

BAY COUNTY
DEPARTMENT OF CORPORATION COUNSEL



AMBER L. DAVIS-JOHNSON
Corporation Counsel

THOMAS L. HICKNER
County Executive

July 7, 2015

Cynthia Luczak
Bay County Clerk
515 Center Avenue
Bay City, Michigan 48708

Re: July 1, 2015 letter faxed by Clark Hill -- Lansing Office regarding Request
for Retention of Outside Legal Counsel

Dear Ms. Luczak:

I am in receipt of your letter dated July 1, 2015 faxed to my office by the Clark Hill law firm. For purposes of clarification, please note that I have NOT in fact "den[ie]d [your] request" for the retention of outside counsel as is stated in your most recent correspondence. Rather, I noted that at this juncture I did not believe that your stated issue constituted a conflict of interest that would prohibit the Office of Corporation Counsel from attempting to resolve the matter short of litigation. It is obviously in the best interest of your office, the Board of Commissioners, and, most importantly, the taxpayers of Bay County to attempt to resolve your stated dispute short of litigation. To that end, every attempt to resolve this matter in an amicable fashion should be exhausted.

As stated in my June 18, 2015 correspondence, although I do not believe that a conflict exists at this juncture, in order to avoid even the appearance of impropriety and pursuant to Section 4.B. of the Civil Counsel Guidelines, I retained the law offices of Gilbert, Smith & Borrello to provide me with an independent legal opinion as to whether there exists a non-frivolous, legal basis for you to proceed with legal action against the County Board of Commissioners. This opinion provided by Gilbert, Smith & Borrello is essential to any determination to allow or deny your request to retain outside counsel at the County's expense should the need arise.

It is my understanding that Amy Lusk of Gilbert, Smith & Borrello contacted you shortly after my June 18th letter and you indicated to her that you were too busy to speak with her and would not be available to discuss this matter until after the Holiday weekend. I would strongly encourage you to speak with Ms. Lusk to provide her with the necessary information needed to evaluate your claim. This is especially true in light of the additional assertions you have made in your July 1 2015 letter indicating that you believe both the Board of Commissioners as well as

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Bay County Department of Corporation Counsel

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the County Executive have discriminated against you based on your gender or retaliated against you based upon any role you may have had in reapportionment.

I also have requested that the Board of Commissioners approve the retention of an expert consultant to conduct an independent analysis of the work flow in your office and make a recommendation as to necessary staffing needs. That request was approved by the Personnel and Human Services Committee on June 16, 2015, and is before the Ways and Means Committee to approve the necessary budget adjustment on today's date. Your cooperation with and input provided to that consultant is also vitally important so that the consultant's recommendation is based on all available information, including hours worked by your staff, volume of work, constitutional and statutorily mandated duties, etc.

Finally, I have also reviewed and considered your new assertion that the County Board of Commissioners has inappropriately diverted fees collected by the County Clerk's Office to the County's general fund in violation of Headlee. A review of the County's financial records reveals that the revenue generated by the County Clerk's office falls short of the cost to staff that office at its current level. This does not take into consideration additional costs for supplies, equipment, etc. which are provided to your office by the County through its general fund.

Other than the newly established Concealed Pistol Licensing Fund created by MCL 28.425x, there is no requirement under Michigan Law that the County segregate the revenues of the Clerk's office into a distinct fund separate from the general fund. The cited cases of *Bolt v City of Lansing* and *Graham v Kochville Twp* do not support any assertion that such a segregated account for County Clerk revenues is required nor even appropriate. It is further my understanding that your separate request to the Board of Commissioners to hire a part time employee to perform functions mandated by the new concealed pistol licensing laws is currently under review and has not been denied at this time.

I would encourage you to engage in an open and honest discussion with both Gilbert, Smith & Borrello and the work flow consultant in order to allow this office to fully evaluate your situation and make a determination of whether a non-frivolous claim exists, if litigation is necessary and therefore the retention of outside counsel at the County's expense. Until this evaluation is complete, you are not authorized to retain the requested outside counsel utilizing county funds.

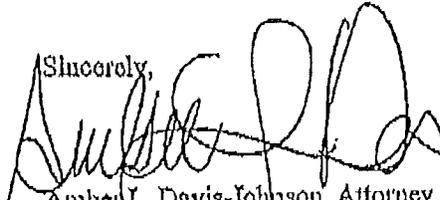
Bay County Department of Corporation Counsel

July 7, 2015

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Once again, I hope that we are able to resolve this issue to everyone's satisfaction such that the residents of Bay County are receiving the best possible services for their tax dollars. Please feel free to contact me with any additional questions.

Sincerely,


Amber L. Davis-Johnson, Attorney
Bay County Corporation Counsel

Enclosure

cc: Tom Hickner, County Executive
Ernie Krygier, Chairman, Bay County Board of Commissioners
Amy Lusk/Andre Borrello

515 Center Avenue, Suite 401, Bay City, MI 48708-5125 (989) 895-4131
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EXHIBIT B

CLARK HILL

Matthew T. Smith
T 517.318.3037
F 517.318.3080
Email: msmith@clarkhill.com

Clark Hill PLC
212 East Grand River Avenue
Lansing, MI 48906
T 517.318.3100
F 517.318.3099

clarkhill.com

July 13, 2015

Ms. Amber Davis-Johnson, Esq.
Bay County Corporation Counsel
515 Center Avenue, Suite 402
Bay City, MI 48708-5941

Re: Legal Representation – Bay County Clerk
Litigation - Hold

Dear Ms. Davis-Johnson:

Please be advised that Cynthia Luczak, Bay County Clerk has retained Clark Hill, PLC to assist her in defining the legal issues involved, negotiating a resolution of these legal issues, or if necessary bringing suit to declare the rights of her office and to protect the constitutional and statutory duties of her office. Ms. Luczak forwarded your most recent letter to my attention concerning the above referenced matter.

Your decision to delay Ms. Luczak's request for the retention of legal counsel pending the receipt of an "independent legal opinion" on whether there is a non-frivolous, legal basis for her to proceed with legal action is not appropriate given the reasons articulated in her previous correspondence to you. As you know the attorney-client relationship demands fidelity between attorney and client, including upholding the privilege of attorney-client communications. You have asked Ms. Luczak to consult with a law firm of your choosing, while informing her that her communications would not be subject to this important privilege. This is not acceptable. We maintain that Ms. Luczak, as a constitutional officer, has an absolute right to retain counsel of her choosing.

Secondly, engaging an expert consultant to conduct an independent analysis of her office work flow, exemplifies the unreasonable hurdles and disparate treatment by the County Executive and the County Board of Commissioners ("Board") continue to impose on her official position and the Bay County Clerk's office. One need only review of the minutes and resolutions of the Board, and county budgets dating back over the last 10 years, and you will find no other department or agency, including the offices of the Sheriff, Register of Deeds, Treasurer or County Executive that have had to go through more barriers in order to receive the approval for the hiring additional personnel or budget amendments. Indeed, nearly every request Ms. Luczak has made to the Board for additional assistance or other requests have either been denied, delayed or diminished.

Ms. Luczak has indicated that she would prefer to find an amicable resolution to this matter without the necessity of litigation. To this end, we are willing to work with you, independent counsel, and/or the expert consultant in negotiating her staffing and other needs that are necessary and appropriate for her office.

Please contact me to discuss. If I do not hear from you within the next five (5) days, I will assume that we are at an impasse and will take appropriate legal action.

Litigation Hold

In connection with matter, the parties involved are required to preserve documents and materials, regardless of medium or storage location, that may be relevant to the claims asserted by the County Clerk. This litigation hold notice ("Litigation Hold") outlines the steps that you must take immediately. Until further notice, it is critical that all documents relevant to this matter be preserved. If you have any questions or concerns about the requirements set forth in this Litigation Hold, please direct them to me at the number and email address listed above.

Subject Matter of Documents to Preserve

The subject matter of the County Clerk's claim(s) involve the acts and omissions of each County Commissioner, the County Executive, County Departments, and Circuit Court administration relating to the hiring of county staff including but not limited to, the hiring of staff of the Sheriff, Register of Deeds, Treasurer, and County Executive; approving or modifying county budgets of the County Clerk, Sheriff, Register of Deeds, Treasurer, and County Executive and county departments; and information and documentation relevant to Ms. Luczak claim of disparate treatment by members of the County Board of Commissioners and the County Executive.

Types of Documents to Preserve

The obligation to preserve documents and materials applies to tangible information of any kind, whether in hard copy or electronically stored.

Hard-copy documents and materials include, but are not limited to, letters, memoranda, notes, plans, surveys, models, drawings, designs, calendars, diaries, reports, studies, statistical or informational accumulations, analyses, tabulations, records of meetings, records of conversations (including tape recordings), manuals, charts, and graphs.

Electronically stored information includes, but is not limited to, digital communications such as e-mail and attachments, voice mail and instant messaging, word-processing documents, spreadsheets, databases, calendar entries (such as Outlook), computer drawings, computer plans and surveys, network access, internet usage files, presentations (such as PowerPoint), or any other documents or files created or stored on the company's computer or other information systems, including backup and archival files.

Please keep in mind that you can have both a hard copy and an electronic copy of the same document or information. You are obligated to preserve both. Further, this obligation to preserve applies to any copy or draft of a document or tangible thing that is not an identical duplicate of the original document or tangible thing.

Suspension of all Ordinary-Course Deletion of Electronic Documents

Effective immediately, it is critical that you and all relevant individuals do NOT delete, over-write, or otherwise alter or destroy any documents, files or information (paper copy or electronic, including backup) which may be relevant to this case and subject to this Litigation Hold and that you take those steps necessary to guard against such deletion.

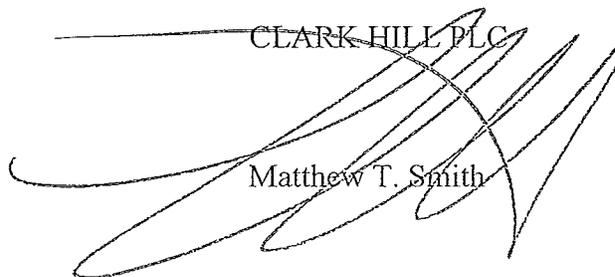
Documents to be Retained

All documents (including hard-copy documents, electronic documents, and e-mail messages) that refer or relate to the Cynthia Luczak, County Clerk and the County Clerk Office, county appropriations, hiring of county staff (including but not limited to, the hiring of staff of the Sheriff, Register of Deeds, Treasurer, and County Executive), and/or the disparate treatment by members of the County Board of Commissioners and the County Executive must be retained no matter how old the documents may be. If you are uncertain as to whether to retain a document, please err on the side of retention. As indicated above, please direct any questions regarding retention to me. The topics of information subject to this Litigation Hold may change and we will keep you informed of any such changes.

Summary

In summary, you should take all steps necessary, including instructing other employees under your supervision, to retain paper documents and materials and electronically stored documents and information that relate in any manner to the subjects relevant to this Litigation Hold. Please immediately review where you might have any such relevant documents, materials and information, including any personal electronic devices, so that you can ensure that any such documents, materials, and information are not accidentally deleted or altered. Please circulate this Litigation Hold to all necessary past and present agents, representatives, counsel and employees of the County to ensure that all potentially relevant evidence and information is adequately preserved.

Sincerely,

CLARK HILL PLC

Matthew T. Smith

cc: Cynthia Luczak

EXHIBIT C

**BAY COUNTY
DEPARTMENT OF CORPORATION COUNSEL**



AMBER L. DAVIS-JOHNSON
Corporation Counsel

THOMAS L. HICKNER
County Executive

July 20, 2015

Matthew T. Smith
Clark Hill, PLC
212 East Grand River Avenue
Lansing, Michigan 48906

Via U.S. Mail, facsimile to (517) 318-3080
and Email to msmith@clarkhill.com

Re: Legal Representation – Bay County Clerk
Litigation Hold

Dear Mr. Smith:

Thank you for your letter dated July 13, 2015, which was received by my office on the afternoon of July 15th. Please be advised that I have informed all Bay County employees of the Litigation Hold notice forwarded by your office. In addition, I acknowledge your statement that Ms. Luczak has retained your firm to “assist her in defining the legal issues involved, negotiating resolution of these legal issues, or if necessary bringing suit to declare the rights of her office and to protect the constitutional and statutory duties of her office.” I do have serious concerns as it relates to that representation and how it will affect the County’s ability, as well as my Department’s ability, to address the Clerk’s stated concerns. I would also like to correct a stated and repeated misperception of my role as well as my actions in this matter as stated in your latest correspondence.

I would first note that never have I indicated that Ms. Luczak cannot individually retain counsel at her own expense in this matter, nor have I “delayed” any such request. As I am sure you are aware, MCL 49.73 requires the County provide an attorney to represent an elected County official when that official is named as a *defendant* in a matter related to the performance of that individual’s official duties. There is no requirement under Michigan law, however, for the County to employ an attorney for that official when he or she is *contemplating* proceeding as a plaintiff, as is the case here.¹ Bay County’s Civil Counsel Guidelines potentially provide Bay County’s elected officials – as plaintiffs - with the opportunity to retain legal counsel *at the County’s expense* to file suit against another County entity so long as the requesting official satisfies certain pre-requisites and follows the required procedures. This is substantially more

¹ The exception to this rule being plaintiff courts suing a county entity pursuant to the Inherent Power Doctrine.

Bay County Department of Corporation Counsel

July 20, 2015

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than the County is required by Michigan law to provide. A copy of the Bay County Civil Counsel Guidelines is attached for your reference.

In addition, neither Michigan case law nor the Michigan Rules of Professional Conduct requires that Corporation Counsel recuse itself (even once litigation has been initiated) from representing at least one of two adverse County entities. However, once again, Bay County's Civil Guidelines, in an effort to preserve the relationship between Corporation Counsel and the County's elected officials over the long term, include a provision that, *once litigation is initiated*, Corporation Counsel will recuse itself from the matter and retain attorneys for the defendant and, under certain circumstances, the plaintiff County entity – assuming the stated prerequisites are met and procedures followed as set forth in the Civil Counsel Guidelines.

Historical requests for additional staff, standing alone, do not equate to an assertion that an elected official's office is unable to perform statutorily or constitutionally mandated duties at the required level. In this particular case, the Clerk had not asserted to my Department (or to the Board of Commissioners that I am aware) that her level of funding was so deficient that it prevented her office from functioning "serviceably" until I received her June 8, 2015, letter requesting the retention of outside counsel *at the County's expense* to address this concern (a letter I assume was likely drafted by your office). As you know, this "serviceable" standard has been adopted by Michigan's courts to determine whether a County official has been unlawfully underfunded such that he or she is unable to fulfill statutory or constitutional obligations.

It is my responsibility as Corporation Counsel to legally advise the County Board as a whole as well as ALL of the County's individually elected officials. If in fact the Clerk had approached me with a concern that the funding provided to her office was so deficient that she was unable to operate it at a "serviceable" level, I would have immediately investigated the matter and, if her allegations were supported, informed the Board that it has a legal obligation to provide the additional necessary funding (as it is required to do in order for all of its departments to function serviceably). This is **exactly** the type of issue for which my Department should be consulted in order to avoid the potential of litigation and the necessity to retain an outside law firm for either County entity, at great taxpayer expense.

Although no litigation had been initiated and no conflict existed sufficient to require my recusal, the Clerk indicated in her June 8th letter that she felt there was a conflict. In order to address that concern, I immediately requested that the Board hire an independent consultant to evaluate the staffing levels of the Clerk's office as well as its workflow to assist in determining whether the Clerk's office is adequately staffed or underfunded so as to prevent the office from functioning at a "serviceable" level. The Board approved that request to hire an outside

Bay County Department of Corporation Counsel

July 20, 2015

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consultant (a request made within two days of the Clerk's June 8th letter) *at the County's expense*. I further retained independent outside counsel, using funds from my Department's budget (NOT the Clerk's), to discuss this matter with the Clerk and to discern exactly what statutorily or constitutionally mandated duty she alleges she is unable to perform at a serviceable level. This would further allow me to determine whether the Clerk had a meritorious claim that, if not resolved internally through normal channels, could justify the retention of an independent outside firm if litigation were to become necessary. The attorney hired by my office to investigate this matter contacted the Clerk on two occasions, and on both occasions was told by the Clerk that she either would not or could not discuss the matter with her. As a result, neither I nor the Board have ANY idea what duties the Clerk is asserting she cannot perform at a serviceable level – because she is unwilling to provide that information. To approve a request for retention of outside counsel at the County's expense in order for the Clerk to “investigate” claims or to file suit against the County without being provided one shred of information to support her claim that she cannot perform her duties at a serviceable level would be reckless and irresponsible on my part.

I would very much like to discuss this matter directly with the Clerk, or would like some assurance that she will speak with the independent law firm and consulting firm I retained to review the matter. This seems to be an impossibility now that you have indicated the Clerk has formally retained your firm. Although I do not represent the Board of Commissioners in any litigation matter with the Clerk, I err on the side of caution in any instance where the Michigan Rules of Professional Conduct may be implicated. Michigan Rule of Professional conduct 4.2 arguably prohibits me from speaking directly with the Clerk regarding this matter and as such I will refrain from speaking with her regarding the issue until I receive permission from your firm to do so. If such permission is not granted, I request that your firm provide to my office ALL information that would identify and support the Clerk's claim that she is unable to perform any constitutionally or statutorily mandated duty at a “serviceable” level. Absent information or data to support the Clerk's claim, we cannot effectively address her concerns.

The County's first order of business is to fairly represent its constituents and ensure that the public's elected County officials are provided sufficient funding in order to fulfill statutorily and constitutionally mandated duties at a “serviceable” level. My obligation as Bay County's Corporation Counsel is to ensure that all offices and departments of the County operate within the confines of the law, and to do so in the most cost effective manner possible. The retention of outside counsel to “investigate” claims that have never even been brought to this Department's attention in the past, but which are currently being “investigated” in house is neither reasonable nor necessary and would constitute a mismanagement of Bay County taxpayer's funds. Bay County does not and has not authorized the retention of Clark Hill on behalf of the Bay County

Bay County Department of Corporation Counsel

July 20, 2015

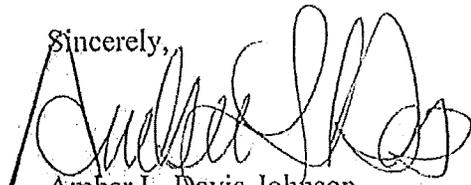
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Clerk. Any fees incurred to date or into the future are not the responsibility of the County, and the County does not intend to reimburse you for any legal services. Any fees previously incurred or incurred in the future remain the responsibility of the Clerk individually, and NO County funds (whether they are part of the Clerk's budget or the County's General Fund) are to be used to make payment on any invoice from your Firm.

I look forward to hearing from your firm or the Clerk directly to attempt to resolve this matter. Once my office has the needed information to determine what functions the Clerk is unable to perform at a "serviceable" level, we can make an informed determination as to what budget adjustments, if any, are to be recommended to the Bay County Board of Commissioners. If the matter cannot be resolved, we can revisit the issue of retaining outside counsel for the Clerk at the County's expense as set forth in the Civil Counsel Guidelines.

I look forward to receiving the requested information as soon as possible.

Sincerely,



Amber L. Davis-Johnson,
Bay County Corporation Counsel

Enclosure

cc: Tom Hickner, County Executive
Ernie Krygier, Chairman, Bay County Board of Commissioners
Amy Lusk/Andre Borrello

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