

IN THE CIRCUIT COURT OF THE 6TH  
JUDICIAL CIRCUIT, IN AND FOR  
PINELLAS COUNTY, FLORIDA

ALFRED L. WILLIAMS, II, on behalf of  
himself and all others similarly situated,

Plaintiffs,

CASE NO.: 05-7822-CI-11

vs.

HERITAGE OPERATING, L.P., d/b/a  
HERITAGE PROPANE, a Delaware  
Limited Partnership, as successor in  
interest to PEOPLES GAS; and  
AMERIGAS PROPANE, L.P., a  
Delaware Limited Partnership,

Defendants.

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**FINAL JUDGMENT**

THIS CAUSE, a bifurcated trial on the issue of damages in a class action, came before the Court as to liability on December 10-11, 2012, and as to damages on February 20-21, 24, 27, 2014 (Phase I) and November 19-21, 2014 (Phase II). The Court, having heard the witnesses' testimony, argument of counsel, and considering the memoranda filed by the parties, and otherwise being fully advised in the premises, hereby finds and orders as follows:

**I. THE PROCEEDINGS**

**A. The complaint, class certification, and discovery on the class**

Heritage Operating, L.P. ("Heritage"), is the successor in interest to Peoples Gas, which was a propane gas company Heritage acquired on August 1, 2000. Amerigas Propane, L.P., was added as a defendant due to its acquisition of Heritage.

In 2005, Alfred L. Williams II ("Williams" or "the plaintiff") brought this class action against Heritage, asserting two counts. In Count I, the plaintiff asserted a claim for breach of

contract, alleging that Heritage had breached the General Services Agreement (“GSA”) he and Peoples Gas had entered into for the provision of propane gas by charging a tank rental fee that was not authorized by the GSA, as it was silent on the issue. In Count II, the plaintiff sought declaratory relief determining the tank rental fee violated Florida law and injunctive relief prohibiting Heritage from charging class members the tank rental fee.

After extensive proceedings, this Court certified the following class under Florida Rule of Civil Procedure 1.220(b)(3):

All customers who entered into contracts with PEOPLES GAS for LP Gas Service in Florida, which contracts were silent as to any “Tank Rental” who have been, and are being charged, such “Tank Rental” by the Defendant, HERITAGE OPERATING, L.P. d/b/a HERITAGE PROPANE.

The Second District affirmed the class certification order without opinion. See Heritage Operating, L.P. v. Williams (Heritage II), 75 So. 3d 278 (Fla. 2d DCA 2011).

Subsequently, the plaintiff endeavored to create a class notice list, and sought discovery from Heritage for that purpose. However, Heritage was not forthcoming with the necessary information. A hearing was held on the matter on March 29, 2012. In May 2012, the Court entered an Order Regarding Class Notice that instructed Heritage “to produce to the Plaintiff, in computer readable format (Excel/Access), the names, addresses, customer numbers, and telephone numbers of Heritage customers whose information is maintained in Heritage’s Propane 2000 database . . . limited to those customers who first began paying ‘tank rent’ after August 1, 2000, but whose Propane 2000 records reflect the following values began prior to August 1, 2000: Deposit Date; PC Start Date; PB Start Date; Tank Install/Start Date.”<sup>1</sup>

Following the Court’s order, the Class Notice List was compiled by taking the Propane 2000 entries for Heritage customers who were first charged tank rent after August 1, 2000—the

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<sup>1</sup> Subsequently, Heritage disclosed the existence of another database called “RIS,” which is discussed in more detail later in this judgment.

date of the Peoples Gas/Heritage merger—but whose Propane 2000 records reflected either a “default” value (01/01/08) or date prior to August 1, 2000, for those particular fields mentioned above. Class notices were sent to over 91,000 Heritage customers.

#### **B. Heritage’s databases and records**

Heritage has utilized an electronic database of customers called “Propane 2000.” Peoples Gas’s database was called “Inersys.” After Heritage purchased Peoples Gas, it transferred the Peoples Gas customers’ entries from Inersys to Propane 2000. This database merger began sometime during the summer of 2003. It is not entirely clear when the database merger was completed statewide, but, as noted below, the Inersys data existed and was available until at least 2006.

However, there were differences in the data stored by the databases. Propane 2000 contains certain fields for each customer, including: name, account number, address, telephone number, the customer’s start date with Heritage, transaction history, the serial number of the provided tank, when the customer was first charged tank rent, when the customer was last charged tank rent, and customer notes.

Inersys did not have some of these fields. When merging the two databases, a default date (01-01-80) would be entered in the field in Propane 2000 if it was one of those fields Inersys lacked. Heritage destroyed the Inersys database sometime after the conversion in 2003, but it was available locally in each Heritage district office—each district maintained its own Inersys server—at least as of 2006, i.e., after the filing of this lawsuit. Thus, the parties could not simply compare the Propane 2000 data with Inersys to develop the class list.

Until late 2014, Heritage consistently asserted there was no way to further reduce the

Class Notice List electronically, i.e., by using the information in the Propane 2000 fields.<sup>2</sup> Based on Heritage's representations, and the testimony of Heritage employees, the Court was led to believe that Heritage properly maintained a paper customer file for each Peoples Gas customer, and that each file contained a copy of that customer's GSA which would contain information about the tank rent obligation.<sup>3</sup> Thus, Heritage contended the notice list could be reduced later in the litigation by reviewing each of its paper customer files to determine whether the customer was actually a member of the class. Indeed, Heritage asserted—at the March 20, 2012, hearing and repeatedly in other subsequent hearings and filings with the Court—that it was necessary to review each file to determine class membership and damages, and that such a review was feasible.

### C. The Court's Order on Liability

Following a trial on liability, the Court entered an Order Finding Liability of Heritage Operating, LP on Breach of Contract Claim of the Plaintiff Class ("Order on Liability") on January 8, 2013.

With respect to Count II of the plaintiff's complaint, the Court ruled Heritage had breached its GSA with its customers by unilaterally charging the customers for tank rent even

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<sup>2</sup> See Heritage's Motion for Case Management and Scheduling Order Regarding Identification of Class Members at 3 (May 7, 2013) ("it would be helpful if there were a structure in place to determine the members of the Certified Class and any objections to any members as part of the Certified Class," i.e., the file-by-file review"); Heritage's Response in Opposition to Plaintiff's Motion for Valcin Presumption and Further Relief Due to Spoliation of Evidence at 9-10 (June 4, 2013) ("[F]ull-bodied production is now underway that has been quite successful at finding and producing files."); Heritage's Supplement to Defendant's Motion for Case Management and Scheduling Order Regarding Identification of Class Members at 3 (June 4, 2013) ("8. In order to determine Plaintiffs' damages, if any, Heritage has proposed that the Plaintiffs conduct a file-by-file review of each customer of Peoples Gas from November 22, 2000[,] through November 1, 2008[,] in order to determine whether each customer is or could be a member of the Certified Class. 9. This process will permit and ascertain the proper members of the Certified Class and damages, if any."); Transcript of Hearing on Nov. 26, 2013 at 81 ("So having that database would have narrowed by 20,000 the scope, but it would not have any way eliminated the necessity of going on an individual file-by-file review basis.").

<sup>3</sup> The GSAs were contracts of adhesion, and the class action was premised in part on the uniform provisions contained on the GSA contract form. Heritage contended, however, that some, handwritten deviations from that form language would be shown on many customers' GSAs.

though their GSAs were silent on tank rent. With respect to Count I, the Court ruled the class could recover the tank rent charges up to November 1, 2008, for the breach of contract, because the modification language contained in the statement backer of that date was a fair and equitable interpretation or modification of the GSA, even without additional or new consideration.

Based on the evidence presented during the liability trial, the Court also identified certain groups of customers on the Class Notice List which could be included or excluded from membership in the class as guidance to the parties in determining which customers were entitled to recover damages. Although there has been some confusion on the terminology, the Court did not, by identifying these groups, create subclasses as that term is used in Florida Rule of Civil Procedure 1.220(d)(4)(B).

#### **D. Proceedings after the Liability Trial but before the Damages Trial**

The state of Heritage's records was the subject of the May 22, 2013, Plaintiff's Motion to Order that Damages Will be Determined Using a Damages Study Based on Defendant's Computer Records ("Motion for Damages Study"). In the motion, the plaintiff argued that Heritage's paper records could not be used to reliably identify each class member because, among other things, some files were missing in toto, some files were missing GSAs, and some GSAs were altered. The plaintiff asserted the best method for determining damages would be to use Heritage's customer database, Propane 2000, and electronically exclude customers based on data in designated fields. The plaintiff's suggested damages study would have obviated the need to review each customer file.

However, based on Heritage's aforementioned representations as to what its paper customer files contained and, that damages could only be determined by going through each file, the Court denied the Motion for Damages Study without prejudice. Instead, the Court ordered

the plaintiff to review all of the paper files that Heritage would provide the plaintiff in order to determine who is a member of the class entitled to damages.

On November 22, 2013, the Court entered an order granting the Plaintiff's Motion for Valcin Presumption and Further Relief Due to Spoliation of Evidence ("Valcin Order"). In that order, the Court created certain rebuttable presumptions regarding Heritage's records for the purposes of the Damages Trial. Indeed, during the summer of 2013, the Court reviewed approximately 7,000 customer files and has found them to be incomplete and untrustworthy. As the Court noted in the Order Denying Defendant's Motion to Decertify of January 24, 2014, the Valcin Order also did not create any subclasses.

#### **E. The Damages Trial**

The case proceeded to a Damages Trial. The Damages Trial was conducted in phases, with each phase resolving damages as to a group of customers of Heritage's Florida districts.

##### **1. Phase I—Background**

Phase I of the Damages Trial, covering the Heritage districts of (1) West Palm Beach/Jupiter (District 201), (2) St. Augustine (District 511), (3) Naples (District 902), (4) Hudson (District 908), (5) Clearwater (District 912-913), and (6) Avon Park (District 917), was scheduled to begin on February 20-21. Just prior to Phase I, however, on January 30, 2014, Heritage filed a Motion for Partial Summary Judgment Regarding Class Members ("PSJ Motion"). In the PSJ Motion, Heritage revealed a previously undisclosed way, using its own electronic databases, to determine that some of Heritage's customers were not members of the class, thereby eliminating a significant percentage of those who received class notice from class membership. This was, of course, directly contrary to the consistent and ongoing representations Heritage had made that there was no way to reduce the notice list electronically using the

information contained in its databases.

After the Court denied Heritage's PSJ Motion at the start of Phase I, the plaintiff suggested a recess so the plaintiff and Heritage could verify the electronic exclusion methods suggested by that motion and the affidavits from its information technology employees attached to that motion. As a result, the plaintiff and Heritage agreed that approximately 30% of the potential class members for the six Phase I districts could be reliably excluded using electronic data.

In his case in chief in Phase I, the plaintiff demonstrated through the testimony of Heritage's information technology employees: (1) how Heritage's databases operated, (2) what fields of information they contained, and (3) that the databases contained exact information regarding the dates and amounts that each customer had been charged tank rent.

For example, Linda Yip testified about a database, RIS, which Heritage used in a specific geographic area. RIS was the database of a company Heritage acquired after the Heritage/Peoples Gas merger. In 2006—i.e., after Inersys was merged with Propane 2000—Heritage then transferred the data for its own customers in the acquired company's geographic area from Propane 2000 into RIS, so it would then have one database for all of its customers in that area. RIS was one of the databases from which the notice list was compiled. There were digits in the customer code field in RIS which indicated whether a customer had been migrated from the Propane 2000 database, whether a customer's data had been migrated from Propane 2000 to RIS, or whether a customer's data originally was in RIS. If the customer's data was originally in RIS, the customer originated with the company Heritage subsequently acquired—and could not have been a Peoples Gas customer.<sup>4</sup>

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<sup>4</sup> Since Yip was the person who effected this database merger and created the customer codes for the transferred customers, she knew when the notice list was being compiled in 2012 that it was possible to exclude

Once all of the above-noted electronic capabilities were fully and finally disclosed by Heritage, the plaintiff's expert incorporated these electronic capabilities into his Damages Study. Ultimately, the Damages Study was used to determine which customers from the Class Notice List were entitled to damages and the amount of those damages.

The plaintiff's expert analyzed and verified the following fields of data, which were all derived from Heritage's database, to electronically exclude customers that were sent Class Notice: (1) Deposit Date; (2) Price Cap Date; (3) Pre Buy Date; (4) Tank Install Date; (5) Tank Rent Date; (6) Product Code; (7) Description; (8) Amount; (9) Customer Start Date; (10) Start Date; (11) Prior Tank Rent; and (12) Hillsboro Gas-Customer Data. The plaintiff's expert was also able to electronically exclude customers based on Yip's testimony that she used unique numerical digits when originally merging Propane 2000's customer information into RIS to identify which customers could not be Peoples Gas customers.

When Heritage was given an opportunity to present its case, Heritage chose not to present any evidence. Heritage chose not to offer any of its customer files. Therefore, the subgroups the Court identified in the Order on Liability were never implicated, nor did Heritage attempt to rebut the presumptions imposed by the Valcin Order.

## **2. Phase I-Findings of fact**

After Heritage rested without presenting any evidence, the plaintiff's expert witness established precisely which, and how many Peoples Gas customers were entitled to damages: there were 9,083 members of the class for the six districts tried in Phase I. The Court specifically credits this testimony and finds that as to the Heritage districts of (1) West Palm Beach/Jupiter (District 201), (2) St. Augustine (District 511), (3) Naples (District 902), (4)

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these customers. But, Yip testified, she was told by either Heritage or Heritage's counsel to run a query on the entire database, including on those customers who Heritage knew never could have been Peoples Gas customers, who were then included on the Class Notice List.

Hudson (District 908), (5) Clearwater (District 912-913), and (6) Avon Park (District 917) there were 9,083 class members.

The plaintiff's expert calculated—for each respective class member—the total tank rental and taxes charged from the individual tank rent transactions produced by Heritage from the database; the expert added to that amount the prejudgment interest due in order to arrive at each class member's total damages. He testified that the class members in Phase I were entitled to damages in the amount of \$2,547,780.68. The Court specifically credits this testimony and finds that the 9,083 class members in the six districts were entitled to total damages in the amount of \$2,547,780.68.

### **3. Proceedings after Phase I but before Phase II**

Following Phase I of the Damages Trial, the Court entered an Order Granting Class Plaintiff's Motion for Sanctions Against Defendant ("Sanctions Order"), on August 22, 2014. In the Sanctions Order, the Court reconsidered its earlier order denying the plaintiff's Motion for Damages Study and granted the motion as to future phases of the Damages Trial.

The Court had concluded during Phase I, and continues to find, that damages are properly determined by the methodology discussed in the Motion for Damages Study and as was presented by the plaintiff's expert in Phase I. A damage study, which is an aggregate proof of damages, is a proper way to determine damages in a class action even absent sanctions. See Newberg on Class Actions § 10:2 ("Courts have approved various methods of discovery and determining damages in class actions on the basis of class wide, rather than individualized proof of damages, and the use of statistics and representative samples are one such method." (citing Long v. Trans World Airlines, 761 F. Supp. 1320, 1323-26 (N.D. Ill. 1991))).

Aggregate proof based on an inspection of a defendant's records of, for example, sales

and transactions is the “paradigmatic example” of such proof, since the defendant’s records are obviously the best evidence of the class’s losses. Id. It is especially easy when, as here, the proof can be obtained and organized using a computer. Cf. Klay v. Humana, Inc., 382 F.3d 1241, 1259-60 (11th Cir. 2004) (“Particularly where damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical methods, the fact that damages must be calculated on an individual basis is no impediment to class certification.” (footnotes omitted)); Roper v. Conserve, Inc., 578 F.2d 1106, 1112 (5th Cir. 1978) (“While it may be necessary to make individual fact determinations with respect to charges, if that question is reached, these will depend on objective criteria that can be organized by a computer, perhaps with some clerical assistance. It will not be necessary to hear evidence on each claim.”), aff’d on other grounds sub. nom. Deposit Guar. Nat’l Bank, Jackson, Miss. v. Roper, 445 U.S. 326 (1980).

Courts also have ordered damages to be calculated using damages studies in circumstances similar to those present in this case—the defendant’s records and recordkeeping practices are to blame for any inadequacies. In re Checking Account Overdraft Litig., 281 F.R.D. 667 (S.D. Fla. 2012); Gutierrez v. Wells Fargo, No. C 07-05923 WHA, 2010 WL 1233810 (N.D. Cal. Mar. 26, 2010); see also Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265 (1946) (“The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.” (citation omitted)); SUFI Network Servs. v. United States, 755 F.3d 1305, 1315 (Fed. Cir. 2014) (citing Bigelow); In re Elec. Books Antitrust Litig., No. 11 MD 2293(DLC), 2014 WL 1282293, at \*17 (S.D.N.Y. Mar. 28, 2014) (same); Moore v. Health Care Auth., 332 P.3d 461, 468 (Wash. 2014) (same).

Here, the plaintiff's methodology is not an approximation of damages, unlike the aggregate proof contemplated by the above authorities. Rather than approximating the class's overall damages based on statistics or a representative sample of customer files, with individual damages determined later in a claims-administration process, the plaintiff's methodology in this case has determined with specificity both class membership and exact damages as to each class member. Thus, unlike cases where the courts use aggregate proof, this case involves identified, individual class members and each class member's actual damages, which is the sum of that member's total charged tank rental and taxes and prejudgment interest.

In the Sanctions Order, the Court then imposed guidelines on Heritage if it intended to offer any of its paper customer files as evidence at any future trial on damages: (1) 45 days before the damages trial, Heritage was required to identify the specific customers, customer account numbers, and particular district for the respective files it intended to rely on and specify which category the file or GSA fell within. (2) 30 days before the damages trial, Heritage was required to lay the factual predicate for the admissibility of the documents it intended to offer. (3) 30 days before the damages trial, Heritage was required to lay the factual predicate for the trustworthiness of the documents it intended to offer. And (4) within that 30-day period, the plaintiff was allowed to conduct appropriate discovery on those documents.

#### **4. Phase II—Background**

Phase II of the Damages Trial occurred on November 19-21, 2014, and it covered all of Heritage's remaining districts. It proceeded in the same manner as Phase I, with the exception that Heritage presented a single witness, a former Heritage employee (and proffered the testimony of another witness).

Heritage did not comply with the guidelines the Court imposed in the Sanctions Order.

Additionally, Heritage never identified a valid records custodian for the purpose of attempting to establish the admissibility of the GSAs or trustworthiness of any other documents in the customer files. And, notably, Heritage's only witness, for the first time, revealed yet another database, PIBS, which had been used by Peoples Gas.

## **5. Phase II—Findings of fact**

In Phase II, using the same methodology discussed above for Phase I, the plaintiff's expert testified that there are 56,041 class members in the remaining districts.<sup>5</sup> Utilizing Heritage's electronic records of each transaction involving these customers, the plaintiff's expert further testified those class members were entitled to \$15,650,350.69 in damages. The Court specifically credits this testimony and finds there were 56,041 class members in the remaining districts and these class members are entitled to damages of \$15,650,350.69.

In all, the plaintiff's expert was able, using the Damages Study methodology, to exclude 27,393 customers named in the Class Notice List, and he found there were 65,124 total class members.<sup>6</sup> Again, the Court credits the expert's testimony and, therefore, finds there are 65,124 total class members. Adding together the damages figures from Phase I and Phase II, the sum of the class's damages is \$18,198,131.37, and the Court finds the class is entitled to that amount of damages.

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<sup>5</sup> (1) Lakeland (District 5207), (2) Jacksonville South (District 601), (3) Jacksonville Beach (District 602), (4) Green Cove (District 603), (5) Starke (District 604), (6) Lake City (District 606), (7) Crawfordville (District 608), (8) Mt. Dora (District 609), (9) Leesburg (District 610), (10) Jacksonville West (District 615), (11) Yulee (District 622), (12) MacClenny (District 625), (13) Gainesville (District 626), (14) Ocala (District 627), (15) Orlando (District 628), (16) Palm Coast (District 631), (17) Hernando (District 633), (18) Spring Hill (District 634), (19) Ft. Myers (District 901), (20) Immokalee (District 903), (21) North Port (District 904), (22) Tampa (District 911), (23) Ft. Lauderdale (District 915), and (24) Dover (District 918).

<sup>6</sup> It is significant that this final number of class members—*i.e.*, Peoples Gas customers—does not exceed the “more than 70,000” number of customers which Peoples Gas reported in its Form 10-K filing with the United States Securities and Exchange Commission for the fiscal year ending August 31, 2000 (around when Peoples Gas merged with Heritage).

## **II. CONCLUSIONS**

### **A. Count I**

Pursuant to the above, the Court finds, with respect to Count I (breach of contract), that Heritage breached its GSAs with the class members and that the class shall recover damages for the tank rent charges incurred until November 1, 2008.

IT IS ADJUDGED that Plaintiff, ALFRED L. WILLIAMS, II, on behalf of himself and all others similarly situated, 2295 W. Bay Isle Drive SE, St. Petersburg, FL 33705, shall recover from Defendants, HERITAGE OPERATING, L.P., d/b/a HERITAGE PROPANE, a Delaware Limited Partnership, as successor in interest to PEOPLES GAS, 460 N. Gulph Road, King of Prussia, PA 19406, and AMERIGAS PROPANE, L.P., a Delaware Limited Partnership, 460 N. Gulph Road, King of Prussia, PA 19406, the sum of \$18,198,131.37, together with post-judgment interest, which shall bear interest at the rate of 4.75% a year, pursuant to section 55.03, Florida Statutes, for which let execution issue.

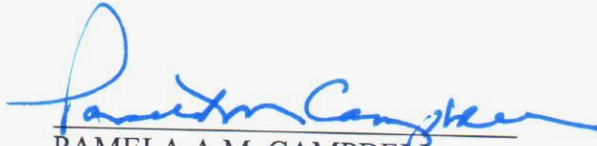
### **B. Count II**

Pursuant to the above, the Court DECREES AND DECLARES, with respect to Count II (declaratory and injunctive relief), that Heritage's imposition of the tank rental fee on the class members was in violation of Florida law until November 1, 2008. Injunctive relief is denied based on the Court's ruling, in the Order on Liability, that the statement backer effectively modified the GSAs and rendered valid the assessment of tank rent on or after November 1, 2008.

### **C. Reservation of jurisdiction**

The Court reserves jurisdiction to comply with Florida Rule of Civil Procedure 1.220(d)(3) and to determine taxable costs and attorney's fees.

**DONE AND ORDERED** in Chambers, in St. Petersburg, Pinellas County, Florida, this  
5 <sup>January, 2015.</sup> day of ~~December~~, 2014.

  
PAMELA A.M. CAMPBELL  
CIRCUIT COURT JUDGE

Copies to:

Hala Sandridge, Esquire [hala.sandridge@bipc.com](mailto:hala.sandridge@bipc.com)  
Carl Nelson, Esquire [carl.nelson@bipc.com](mailto:carl.nelson@bipc.com)  
Edward Waller, Esquire [Edward.waller@bipc.com](mailto:Edward.waller@bipc.com)  
Thomas Seider, Esquire [Thomas.seider@bipc.com](mailto:Thomas.seider@bipc.com) [joanne.volpe@bipc.com](mailto:joanne.volpe@bipc.com) [valeria.terry@bipc.com](mailto:valeria.terry@bipc.com)  
R. Charles Wilkin Esquire [cwilkin@wilkinmcmurray.com](mailto:cwilkin@wilkinmcmurray.com)  
Eddie G. Godwin, Esquire [egodwin@laulane.com](mailto:egodwin@laulane.com) [mdallago@laulane.com](mailto:mdallago@laulane.com)  
Kent G. Whittemore, Esquire [kwhittemore@wherejusticematters.com](mailto:kwhittemore@wherejusticematters.com) [eservice@wherejusticematters.com](mailto:eservice@wherejusticematters.com)  
Jeffrey M. Liggio, Esquire [emailservice@liggiolaw.com](mailto:emailservice@liggiolaw.com)  
Geoff S. Stahl, Esquire [emailservice@liggiolaw.com](mailto:emailservice@liggiolaw.com)  
Scott T. Johni, Esquire [service@johnilaw.com](mailto:service@johnilaw.com) [scott@johnilaw.com](mailto:scott@johnilaw.com)