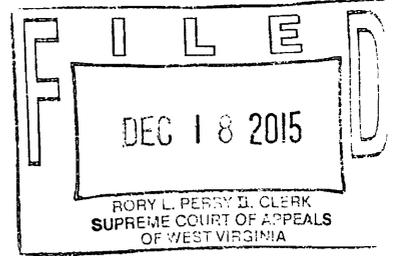


In the Supreme Court of Appeals of West Virginia

DOCKET NO: 15-0888



In Re: Tax Assessment of Cabela's Retail, Inc.

PETITIONER'S BRIEF

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Assignments of Error

1. The Circuit Court erred in holding that the Ohio County Assessor's failure to consider the income and comparable sales approach is not required by West Virginia law.
2. The Circuit Court erred in affirming the decision of the Board of Equalization and Review to uphold the Ohio County Assessor's 2009 and 2010 tax assessments of Cabela's retail store, despite the Assessor's failure to properly apply the cost appraisal approach.
3. The Circuit Court erred in affirming the valuation of the Cabela's retail store set by the Board of Equalization and Review, despite overwhelming evidence offered that the value set by the Assessor was excessive.

Statement of the Case

The present case concerns excessive and unjust 2009 and 2010 tax assessments of Petitioner Cabela's Retail, Inc.'s ("Cabela's") retail store located in the Highlands shopping complex near Wheeling, West Virginia (hereinafter "Cabela's retail store"). Cabela's retail store specializes in hunting, fishing, and outdoor pursuits. The massive store expands over 175,000 square feet and is finished with high-end tongue-and-groove ceilings, a large atrium, and other amenities which are distinctive to Cabela's brand. In addition to merchandise, it showcases museum-quality animal displays and habitats, oversized aquariums, a waterfall, and an indoor trout stream.

In the underlying matter, the Ohio County Assessor's Office assessed the value of Cabela's retail store to be \$52,332,200.00 for the 2009 tax year and \$50,085,900.00 for the 2010 tax year.¹ (See Appendix pp. AR14 and AR358-359). Thereafter, Cabela's filed Applications for Review of Property Valuation with the Ohio County Commission regarding the tax assessments on the basis that the assessments were greatly inflated and did not reflect the fair market value of Cabela's retail store.² (See Appendix pp. AR15 and AR361). In both cases, the County Commission of Ohio County, West Virginia, sitting as the Board of Equalization and Review (hereinafter the "County Commission") held hearings regarding Cabela's Applications for Review of Property Valuation. (See Appendix pp. AR136-AR157 and AR413-AR448).

In those hearings, Cabela's presented testimony from Douglas A. Herold, a licensed real estate appraiser, who holds the highest West Virginia accreditation as a Certified General Real Estate Appraiser. (See Appendix pp. AR141-152, AR428-432, AR434-436, AR439, and AR441-

¹ The Ohio County Assessor's Office is responsible for listing and valuing all property in Ohio County, West Virginia in order to assess *ad valorem* real property taxes.

² The annual assessments of real property must reflect the property's fair market value, which is defined as what the property would sell for on the open market. See W.Va. Code § 11-3-1; W.Va. C.S.R. §110-IP-2 (1991).

443).³ Mr. Herold offered detailed testimony that the subject tax assessments did not accurately reflect the fair market value of Cabela's retail store as required by W. Va. Code §11-3-1. (*Id.*) Mr. Herold explained that Cabela's retail store would not sell on the open market for the high cost of construction due to unique features of the property which make it "super adequate" for any purpose other than Cabela's business. (*Id.*) In other words, a buyer would not pay extra for features such as expensive tongue-and-groove ceilings, additional plumbing and electricity for the aquariums and exhibits, and opulent finishes, as such features are not necessary or suitable for any likely purchaser. (*Id.*) A likely purchaser would ostensibly be a big box retailer, such as Lowe's or Sam's Club. (*Id.*) Consequently, Mr. Herold testified that the method utilized by the county appraiser, the cost of construction approach, was an unreliable method to value Cabela's retail store. (*Id.*)

Mr. Herold further testified that the most accurate method to determine the fair market value of Cabela's retail store is the sales comparison approach, also termed the market data approach, which considers the sale prices of similar properties. (*Id.*) Applying property-specific and market-related factors, Mr. Herold presented an appraisal prepared in conformity with the requirements of the code of Professional Ethics and Standards of Professional Appraisal, finding the value of Cabela's retail store to be \$22,600,000 for the 2009 and 2010 tax years. (*See* Appendix pp. AR16-AR53 and AR363-AR400).

Jeff Prettyman, the employee of the Ohio County Assessor's office who prepared the 2009 and 2010 assessments, offered testimony on behalf of the Assessor. Mr. Prettyman testified that he had to perform a cost based appraisal because it was the only option "left." (*See*

³ Mr. Herold is incorrectly identified as "Mr. Herald" in the 2009 hearing transcript. (*See* Appendix pp. AR141-152)

Appendix pp. AR152 and AR 437).⁴ Mr. Prettyman further stated that the income or sales approach of valuation would not apply due to the uniqueness of Cabela's retail store and because he did not have any data to consider the income approach. (*Id.*) Mr. Prettyman did not provide any testimony regarding any factors he considered in appraising the subject property other than the cost to build the current structure and he did not state whether he utilized any depreciation in his calculations. (*See* Appendix pp. AR152-154 and AR 437-438).

Following the hearings, the County Commission immediately entered Orders upholding the Assessor's appraised values of Cabela's retail store. (*See* Appendix pp. AR54 and AR402). Cabela's then filed Petitions for Appeal in the Circuit Court of Ohio County, West Virginia, pursuant to W. Va. Code § 58-3-1, *et seq.*, seeking relief from the excessive assessments. (*See* Appendix pp. AR1-58 and AR345-405). By stipulation of the parties, the two actions concerning the 2009 and 2010 tax years were consolidated for judgment by the Court. (*See* Appendix pp. AR457-459). Cabela's presented evidence to the Circuit Court that, *inter alia*, the most accurate valuation method for Cabela's retail store was the sales comparison approach, that the 2009 and 2010 assessments set by the Assessor were excessive, and that the appraised value of the property should be \$22,600,000 using the sales comparison approach. (*See* Appendix p. AR01-58, AR72-157, AR180-316, and AR338-448).

On July 20, 2011, Ohio County Circuit Court Judge Ronald E. Wilson entered an Order, (*See* Appendix pp. AR189-197), finding that "the Assessor failed to place evidence on the record to show whether he considered the required appraisal factors set forth in W.Va. C.S.R. §§110-1P-2.1.1 to 2.1.4 (1991)." (*See* Appendix pp. AR197). Judge Wilson stated that *it was unclear what, if any, of the required W.Va. C.S.R. §§110-1P-2.1.1 to 2.1.4 (1991) factors that the*

⁴ Mr. Prettyman is incorrectly identified in the 2009 hearing transcript as "Mr. Freeman." (*See* Appendix pp. AR152-154)

Assessor utilized in appraising Cabela's property. (See Appendix pp. AR196). As stated in the Order, the West Virginia Supreme Court set forth a clear directive in W.Va. C.S.R. § 110-1P-2.1.4 that each of these factors must be considered in the appraisal of a specific parcel of commercial real property. (*Id.*) Therefore, the Circuit Court remanded the matter to the County Commission with the specific instruction to make a “further determination of the factors and method utilized by the Assessor in the cost based approach for valuation of the Cabela's property.” (See Appendix pp. AR197).

Despite acknowledging the complete lack of evidence presented by the Assessor, Judge Wilson effectively disregarded the issue presented by Cabela's that the Assessor did not consider the sales and income approaches as required by West Virginia law. (See Appendix pp. AR196). He stated in the above-described Order:

Based upon the limited record, it is unclear who to blame for the fact that there was insufficient data for [Mr.] Prettyman to conduct sales and income approaches to valuation. Without that data the Assessors [sic] determination that the cost approach was the most appropriate method for valuing the subject property was correct and was neither arbitrary, capricious, nor unreasonable.

(*Id.*) Therefore, remand of the case concerned only the Assessor's application of the cost based appraisal method.

On February 28, 2013, following extensive delay, the County Commission held a Remand Hearing on Cabela's appeal of its 2009 and 2010 tax assessments. (See Appendix pp. AR223-310). However, contrary to the Court's Remand Order, the hearing revealed nothing more about the factors and methodology utilized by the Assessor in valuing Cabela's property than the original 2009 and 2010 hearings before the Board. (*Id.*) The Assessor presented no additional witnesses or documentation during the Remand Hearing. (*Id.*) The testimony of Mr. Prettyman on behalf of the Assessor's office did not differ in any substantive regard from his

initial testimony which was found deficient by the Circuit Court. (*See* Appendix pp. AR230-250 and 256-269). Rather than providing any evidence of his thorough consideration of the required appraisal factors as ordered by the Circuit Court, Mr. Prettyman simply responded “yes” when questioned if he considered the factors as they were read to him by counsel. (*See* Appendix pp. AR236-242). Furthermore, Mr. Prettyman inexplicably failed to discuss some of the enumerated factors in their entirety. (*Id.*)

Importantly, Mr. Prettyman acknowledged that his prior testimony that he could not perform the income approach because Cabela’s did not provide him with sales data was incorrect. (*See* Appendix pp. AR259-260). He also confirmed that the limited resources of the tax department were the reason that he could not access data on comparable properties to perform the income or sales comparison valuation methods. (*See* Appendix pp. AR260-261).

During the Remand Hearing, Cabela’s offered testimony from Jay Goldman, an additional certified West Virginia appraiser, who also holds the highest possible designation available to appraisers, the MAI designation from the Appraisal Institute, as well as other certifications. (*See* Appendix pp. AR271-309). Mr. Goldman testified that he reviewed Mr. Herold’s appraisal of Cabela’s retail store for the 2009 and 2010 tax years and affirmed his findings and conclusions. (*Id.*) Mr. Goldman provided extensive testimony in support of Mr. Herold’s appraisal. (*Id.*)

Immediately following the hearing, the County Commission issued a decision stating that the tax assessments should not be changed from the Assessor’s appraised values. (*See* Appendix pp. AR312). Following additional briefing by the parties, (*See* Appendix pp. AR198-344), the Circuit Court entered an Order on August 17, 2015 finding that Cabela’s failed to show by clear and convincing evidence that the Assessor’s 2009 and 2010 valuations were arbitrary or unjust

and the Circuit Court affirmed the assessments. (*See* Appendix pp. AR459-467). Therefore, Cabela's filed the instant appeal of the Circuit Court's final judgment.

Summary of Argument

The Circuit Court erred in upholding the 2009 and 2010 tax assessments of Cabela's retail store, which were not prepared in conformity with West Virginia law and greatly exceed the fair market value of the property. First, the Circuit Court erred in finding that the Ohio County appraiser, Jeff Prettyman, was not required under West Virginia law to consider the sales comparison/market data and income capitalization valuation methods in performing the 2009 and 2010 appraisals. *See* 110 W. Va. C.S.R. §1P-2.2.1 (1991) (states that the appraisal must consider and use where applicable three generally accepted approaches to value: cost, income, and market data).

Mr. Prettyman testified that he could not perform either the sales comparison or income capitalization approaches due to the fact that he was not furnished any sales data by Cabela's and because he did not find any comparable properties provided that Cabela's is so unique. (*See* Appendix p. AR152 and AR437). However, Mr. Prettyman later acknowledged that his ability to perform the income approach was in no way reliant on receiving sales data from Cabela's and that he could not access information on comparable properties, not due to any fault of Cabela's, but solely because of the lack of resources provided by the State Tax Department. (*See* Appendix pp. AR259-261).

As stated by Cabela's expert appraisers Douglas Herold and Jay Goldman, information on comparable properties was available on various subscription-based national commercial listing websites. (*See* Appendix pp. AR145-148, AR283, AR289, and AR294). For instance, Gander Mountain, a very similar store to Cabela's retail store in a very similar location, adapted

a Lowe's store for its reuse and Sam's Club stores have closed and become furniture stores. (*See* Appendix p. AR284). Clearly, national data on comparable properties was available, but the State Tax Department simply did not provide Mr. Prettyman with the available resources to perform his job.

Mr. Prettyman unequivocally testified that he did not disregard the sales and income approaches because they were less reliable or accurate, but because he could not access such data. (*See* Appendix p. AR260-261). He confirmed that he applied the cost approach because it was the only one "left." (*See* Appendix p. AR152). Under these facts, Mr. Prettyman's supposed "consideration" of all three valuation methods amounted to no legitimate consideration at all. West Virginia law dictates that all three approaches must be considered and the most accurate appraisal method must be used when possible. *See In re Tax Assessment Against Bituminous Power Partners, L.P., 208 W. Va. 250, 539 S.E. 757 (2000)*. Here, two appraisal methods (which, as shown below, are more accurate methods in this circumstance) were summarily disregarded based on an alleged lack of resources. Cabela's should not be penalized by tax assessments which are inflated by more than \$20,000,000 due to the Assessor's failure or inability to access such information. In upholding the assessments, the Circuit Court adjudged that Mr. Prettyman was not required under West Virginia law to consider the sales and income approaches. This is clear error by the Circuit Court.

Further, the Circuit Court erred in affirming the assessments despite the fact that Mr. Prettyman failed to apply the replacement cost methodology correctly, even though it was the only method which he utilized to assess the value of Cabela's retail store. West Virginia law requires that depreciation and the factors listed in W.Va. C.S.R. §§110-1P-2.1.1 to 2.1.4 (1991) must be considered in performing the replacement cost approach. *See In Re Tax Assessment*

Against American Bituminous Power Partners, LP, 208 W. Va. 250, 539 S.E.2d 757 (2000); *see also* W.Va. C.S.R. § 110-IP-2 (1991). In this case, it is unclear from the record how depreciation factored into the 2009 and 2010 appraisals. Mr. Prettyman provided no explanation of his findings regarding the W.Va. C.S.R. §§110-1P-2.1.1 to 2.1.4 (1991) factors or how the factors impacted the assessments. There is no evidence of which factors the Assessor actually utilized, which were disregarded, and why the decision to do either was made because Mr. Prettyman's statements that he "considered" various factors could mean that he utilized or rejected them and provide no insight into his rationale. (*See* Appendix p. AR259).

The Assessor's findings regarding all of the above factors are of critical importance in this case. Cabela's contends that factors such as the store's massive size, improvements, and high-end finishes and construction make it super adequate for any purpose other than Cabela's. Even the Circuit Court unequivocally stated in its July 20, 2011 Order that the amenities of Cabela's retail store are super adequate for a purpose other than Cabela's. (*See* Appendix p. AR219). As such, it is inexplicable, not to mention insufficient under the law, that the appraisals did not even consider issues such as super adequacy.

Likewise, Mr. Prettyman provided no information regarding his consideration of the functional obsolescence or design features of Cabela's store that would not be accepted by the market. (*See* Appendix p. AR267). There is no explanation in the record regarding how functional obsolescence was utilized in the assessments, although it was clearly not a major consideration. Based on the lack of evidence offered by the Assessor in the underlying action, it is clear the cost-based assessments were not prepared in accordance with West Virginia law. The record does not establish how the required appraisal factors, the amenities which Cabela's and the Circuit Court consider to be super adequate, or functional obsolescence, impacted the

assessments. As such, the Circuit Court's decision to uphold the 2009 and 2010 tax assessments despite the Assessor's failure to properly apply the cost approach was likewise clear error.

Finally, the Circuit Court erred in upholding the assessments despite overwhelming evidence offered that the value set by the Assessor was excessive. By law, assessments must reflect the "fair market value" of Cabela's retail store, which is defined as what the property would sell for if it were sold on the open market. *See Syl. Pt. 3, in part, Killen v. Logan County Comm'n*, 170 W.Va. 602, 295 S.E. 2d 689 (1982), *overruled on other grounds by In Re Tax Assessment of Foster Found.'s Woodlands Ret. Cmty.*, 223 W.Va. 14, 672 S.E. 2d 150; *see also Kline v. McCloud*, 174 W.Va. at 372, 326 S.E. 2d at 718.

The record overwhelming proves that Cabela's retail store is super adequate; it would not sell on the open market for the high cost of construction because the substantial improvements are not suitable for any potential buyer's purposes. For this reason, the appraisal and testimony offered by Cabela's experts based on sale prices of comparable properties clearly shows that the fair market value of Cabela's retail store is markedly lower than the assessments based on mechanical replacement cost alone.

Further, the assessments are demonstrably excessive considering the value per square foot of comparable properties. The Assessor valued Cabela's retail store at \$208 per square foot for the 2009 tax year and \$203 per square foot for the 2010 tax year.⁵ Yet, the only comparable property which sold in Wheeling, WV within the respective time frame was a Lowe's store which sold for only \$87.07 per square foot. (*See Appendix p. AR26*). In fact, the assessed value per square foot of Cabela's retail store in this matter exceeded the appraised value per square

⁵ The values per square foot were calculated based on the assessed building value of \$37,595,400 for 2009, (*see Appendix p. AR14*), and \$36,622,300 for 2010, (*see Appendix p. AR358*), which were divided by the 180,650 square feet of gross leasable area of Cabela's retail store, (*see Appendix pp. AR18 and AR20*).

foot of any other Cabela's store in the county by nearly \$100 per square foot. (*See* Appendix p. AR292-293). The only Cabela's store with a valuation within \$100 per square foot of the assessed value of the Cabela's retail store at issue in this matter was a Cabela's store located in East Hartford, Connecticut. (*Id.*) It is unconscionable to accept that a Cabela's store located in Wheeling, West Virginia exceeds that fair market value of any other Cabela's store by almost \$100 per square foot.

The substantial evidence offered by Cabela's stands in direct contrast to the vastly insufficient evidence presented by the Assessor in support of the 2009 and 2010 tax assessments. The Ohio County appraiser, Mr. Prettyman, performed a mechanical cost of construction approach. The only depreciation utilized by Mr. Prettyman was a set mathematical formula ("county modifier"), which in no way accounted for the functional obsolescence based on the significant super adequacy of Cabela's retail store. The record is simply devoid of sufficient evidence to support the Assessor's tax assessments or to rebut the appraisal prepared by Mr. Herold, the only certified general real estate appraiser who offered an appraisal of Cabela's retail store in this matter. As such, the Circuit Court's affirmance of the 2009 and 2010 tax assessments despite overwhelming evidence that the value set by the Assessor was excessive constitutes clear error. Therefore, this Court must reverse the Circuit Court's final judgment.

Statement Regarding Oral Argument and Decision

Cabela's states that oral argument is necessary pursuant to the criteria in Rule 18(a). Further, Cabela's contends that this case is appropriate for Rule 19 argument because it concerns the Circuit Court's application of settled law and a judgment based on insufficient evidence or a result against the weight of the evidence. Finally, Cabela's states that this case is not appropriate for a memorandum decision.

Argument

1. **The Circuit Court erred in holding that the Ohio County Assessor's failure to consider the income and comparable sales approach is not required by West Virginia law.**

W.Va. Code § 11-3-1 requires that “[a]ll property shall be assessed annually . . . at its true and actual value.” True and actual value means fair market value, which is what the property would sell for if it were sold on the open market. *See* W.Va. C.S.R. § 110-IP-2 (1991) (The appraised value (market value) of commercial and industrial real property is the price for which the property would sell if it was sold to a willing buyer by a willing seller in an arms-length transaction without either the buyer or the seller being under any compulsion to buy or sell); *Syl. Pt. 3, in part, Killen v. Logan County Comm’n*, 170 W.Va. 602, 295 S.E. 2d 689 (1982), *overruled on other grounds by In Re Tax Assessment of Foster Foundation’s Woodlands Ret. Cmty.*, 223 W.Va. 14, 672 S.E. 2d 150 (2008); *Kline v. McCloud*, 174 W.Va. 369, 372, 326 S.E. 2d 715, 718 (1985).

“In determining an estimate of fair market value, the Tax Commissioner [and county assessors] **will consider** and use where applicable, three (3) generally accepted approaches to value: (A) cost, (B) income, and (C) market data.”⁶ W. Va. C.S.R. § 110-1P-2.2.1 (1991) (emphasis added). Also, “[o]nce generated, the various estimates of value **will be considered** in arriving at a final value estimate.” 110 W. Va. C.S.R. § 1P-2.5.3.2 (1991) (emphasis added).

⁶ To determine fair market value under the cost approach, replacement cost of the improvements is reduced by the amount of accrued depreciation and added to an estimated land value. Three types of depreciation are considered: (1) physical deterioration, (2) functional obsolescence, and (3) economic obsolescence. *W. Va. C.S.R. § 110-1P-2* (1991); *see also In Re Tax Assessment Against American Bituminous Power Partners, LP*, 208 W. Va. 250, 539 S.E.2d 757 (2000). In determining fair market value under the income approach, a property’s present worth is directly related to its ability to produce income over the life of the property. *Id.* The selection of an overall capitalization rate will be derived from current available market data by dividing annual net income by the current selling price of comparable properties. *Id.* The present fair market value of the property shall then be determined by dividing the annual economic rent by the capitalization rate. *Id.* Finally, the market data, or sales comparison approach, is applied by considering the selling prices of comparable properties. *Id.*

In 2000, this Court interpreted the meaning of the words “consider” and “use” within the foregoing rule. *See In re Tax Assessment Against Am. Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (2000). The Court held that the Tax Commissioner and county assessors are “required to ‘consider’ the various approaches to valuation by *contemplating the feasibility of utilizing each of the ascribed methods*” and the methods are then to be “‘used’ or actually employed only where ‘applicable.’” *In re Tax Assessment Against Am. Bituminous Power Partners, L.P.*, 208 W. Va. at 257, 539 S.E.2d at 764 (emphasis added).

In the above case, this Court clearly stated that it is within the discretion of the Tax Commissioner and county assessors to choose the most reliable technique for appraising a particular property and that in certain instances the data is insufficient to employ one or more of the designated valuation methods. *Id.* However, as discussed in additional detail below, in the case of Cabela’s retail store, the Assessor did not disregard the income and sales approaches because they were less reliable or because there was insufficient data to utilize such approaches, as contemplated by *In re Tax Assessment Against Am. Bituminous Power Partners, L.P.*, 208 W. Va. at 257, 539 S.E.2d at 764. Rather, Mr. Prettyman, the county appraiser failed to utilize those approaches because he did not understand the income approach and did not access information on comparable properties in order to perform either the sales or income approach. To be clear: the Assessor did not lack access to information on comparable properties because the information was not available, but, according to Mr. Prettyman, because the State Tax Department failed to provide the resources to access the information. (*See Appendix pp. AR259-261*).

Mr. Prettyman’s consequent disregard of the income and sales approaches, based upon misunderstanding and his inability or failure to seek out all information, was insufficient under

West Virginia law. *See Kline v. McCloud*, 174 W.Va. at 372, 326 S.E. 2d at 718. Even under the most deferential basis, these facts cannot be viewed as legitimate “consideration” of the three appraisal methods as required by West Virginia law.

With regard to the 2009 appraisal, Mr. Prettyman testified before the Ohio County Commission that he “considered,” but did not utilize the income or sales comparison valuation methods. (*See* Appendix pp. AR152). He stated that due to Cabela’s “uniqueness,” he felt that the income approach could not apply because he was not furnished any sales information from Cabela’s and that the sales comparison approach could not apply because nothing like Cabela’s retail store has sold anywhere. (*Id.*) Therefore, he stated “that left [him] the cost approach.” (*Id.*) Similarly, regarding the 2010 appraisal, Mr. Prettyman testified that he did not perform the income or sales valuation methods because due to the uniqueness of the structure, no comparables were found. (*See* Appendix pp. AR437).

Following remand, Mr. Prettyman capitulated and conceded that his prior testimony regarding the income approach was incorrect. (*See* Appendix pp. AR259-260). He acknowledged that he previously testified that he did not have the data to do an income appraisal because he was not provided sales data from Cabela’s; however, the income appraisal method is based on rental of a similar property, not sales data provided by Cabela’s. (*Id.*) Mr. Prettyman further recognized that his ability to perform the income and sales methodology was limited based on the lack of resources from the State Tax Department. (*See* Appendix pp. AR260-261).

Cabela’s certified appraisers Doug Herold and Jay Goldman, on the other hand, testified that comparable properties were available to perform the income and sales approaches. (*See* Appendix pp. AR145-148, AR283, AR289, and AR294). In performing both approaches, Mr. Herold accessed a commercial listing database, the Integra network, to evaluate other big box

retailers on a national level, such as Lowe's, Wal-Mart, Target, BJ Wholesale Club, and Sam's Club. (*See* Appendix pp. AR26-28, AR141, and AR145-148). Mr. Herold explained that all information to perform both approaches was available from the Internet and other sources and that the only information that he needed from Cabela's was the size of the building, which he obtained by inspecting the property (information which was also known to Mr. Prettyman from his inspection of the property). (*See* Appendix pp. AR430-431). Further, Mr. Herold clarified that the sales comparison approach was not dependent on whether there is another store like Cabela's retail store, but rather, it concerns the price at which Cabela's retail store could sell to a willing purchaser. (*See* Appendix pp. AR442-443).

Cabela's expert, Mr. Goldman, likewise testified that comparable properties were available on commercial real estate listing services such as LoopNet and CoStar. (*See* Appendix pp. AR283, AR289, and AR294). Mr. Goldman discussed that in searching for comparable properties, he reviewed nationwide data for stores of a similar size that have similar uses as Cabela's. For instance, Gander Mountain, a store very similar to Cabela's retail store in a very similar location; adapted a Lowe's store for its reuse and Sam's Club stores have closed and become furniture stores. (*See* Appendix p. AR284).

Upon review of the testimony and arguments offered by Cabela's challenging the 2009 and 2010 tax assessments, the Circuit Court in this matter simply stated the following:

Based upon the limited record, it is unclear who to blame for the fact that there was insufficient data for [Mr.] Prettyman to conduct sales and income approaches to valuation. Without that data the Assessor[']s determination that the cost approach was the most appropriate method for valuing the subject property was correct and was neither arbitrary, capricious, nor unreasonable.

(See Appendix pp. AR196). Therefore, the Circuit Court merely glossed over the fact that the Assessor failed to consider the income and sales approach and held that his decision to utilize only the cost approach was sound.

The Assessor's decision to not utilize the income and comparable sales data approach is insufficient under *In re Tax Assessment Against Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E. 757, 764 (W. Va. 2000) and related authorities. As stated by this Court, the Assessor has considerable discretion to choose the most reliable technique for appraising property, ***but when possible, the most accurate form of appraisal should be used.*** *Id.* (emphasis added). In this case, the Assessor's rationale for disregarding the sales and income approach is not that the approaches were less reliable, but that comparable sales and rental information was not available. However, the information was in fact available and not used by the Assessor. The Assessor's office failed to seek out all information which would enable it to fulfill its legal obligation to assess the true and actual value of Cabela's retail store.

It is clear from the record that the Internet and other sources provided information regarding comparable properties which were sold and adapted for different uses within the relevant time frame of the 2009 and 2010 tax assessments. (See Appendix pp. AR16-53, AR145-148, AR283-284, AR289, AR294, and AR430-431). The point being: comparable sales and rental information was available, but the Assessor could not or did not access it. Even if a lack of resources precluded the Assessor from considering such information, it is insufficient justification to disregard such data in this matter. Cabela's should not be penalized with vastly inflated tax assessments due to the State Tax Department's lack of resources or failure to conduct a thorough evaluation. As stated by the Circuit Court, "[a] considerable amount of money is involved in this appraisal issue and it needs to comply in every aspect with well established West

Virginia law.” (See Appendix p. AR197). The Circuit Court’s decision to uphold the assessments despite the Assessor’s failure to consider the income and sales approaches, although such data was available, belies logic and warrants reversal of the Circuit Court’s August 17, 2015 decision.

2. The Circuit Court erred in affirming the decision of the Board of Equalization and Review to uphold the Ohio County Assessor’s 2009 and 2010 tax assessments of Cabela’s retail store despite the Assessor’s failure to properly apply the cost appraisal approach.

The “cost approach” to appraising property is defined as the appraisal process in which replacement cost of improvements, *less all types of depreciation*, is added to land value in determining an estimate of the fair market value for improved real property. See *In Re Tax Assessment Against American Bituminous Power Partners, LP*, 208 W. Va. 250, 539 S.E.2d 757 (2000) (emphasis added); see also W.Va. C.S.R. § 1 10-IP-2.2.1.1 (Cost approach: to determine fair market value under this approach, replacement cost of the improvements is *reduced by the amount of accrued depreciation* and added to an estimated land value. In applying the cost approach, the tax commissioner will consider three (3) types of depreciation: physical deterioration, *functional obsolescence* and *economic obsolescence*) (emphasis added). *Id.*

As previously discussed, the county appraiser, Mr. Prettyman, utilized only the cost approach in assessing the value of Cabela’s retail store for the 2009 and 2010 tax years. (See Appendix pp. AR258-260). However, the Assessor’s office failed to provide evidence that the cost approach was executed correctly. As discussed below, despite repeated opportunities, the Assessor’s office failed to adduce sufficient evidence of the methodology of Mr. Prettyman’s cost-based appraisal. Mr. Prettyman’s appraisal thus resulted in a valuation that was neither consistent with the property’s true and actual value, nor complied with the clear mandates of West Virginia law.

The Circuit Court in this matter found that it was unclear what, if any, of the factors in W.Va. C.S.R. §§110-1P-2 (1991) Mr. Prettyman considered in his appraisal of Cabela's retail store, including whether he provided any allowance functional obsolescence based on super adequacy. (See Appendix p. AR196). "Functional obsolescence is defined as "[t]he loss of value due to factors such as excess capacity, changes in technology, flow of material, seasonal use, part-time use or other like factors [...]. See W.Va. C.S.R. §§110-1P-2.3.8. The Circuit Court conceded that "[t]here is no question that the amenities [of Cabela's retail store] are super adequate for any purpose other than Cabela's." (See Appendix p. AR195).

Ultimately, as stated by the Circuit Court, "the Assessor failed to place any evidence on the record to show whether he considered the required appraisal factors set forth in W.Va. C.S.R. §§110-1P-2.1.1 to 2.1.4 (1991)." (See Appendix pp. AR189-197). Therefore, the Circuit Court remanded the case to the Board of Equalization and Review "for further determination of the factors and method utilized by the Assessor in his cost based approach for valuation of the Cabela's property." (See Appendix p. AR197).

A remand hearing was held on February 28, 2013. (See Appendix pp. AR223-310). Although the Assessor's office was provided an additional opportunity to explain the methodology and findings of the 2009 and 2010 tax assessments, it failed to place evidence on the record to show that the cost-based appraisal was prepared in conformity with West Virginia law. (*Id.*) Mr. Prettyman testified that he used a "straight-line" long-term depreciation computer program to assess the value of Cabela's store, which is apparently the exact same methodology as he would have used to assess the value of a typical "big box" store such as Lowe's or Home Depot. (See Appendix p. AR246 and AR258). It is unclear, because Mr. Prettyman did not explain his methodology, to discern whether the program that he utilized accounted for the

different rates of depreciation of items or whether the program applied a set rate of depreciation to the store as a whole. *Id.* It is also apparent that Mr. Prettyman did not apply any deductions for the short-term depreciation of items such as the HVAC, roof, and paint. *Id.* Yet, without the Assessor's testimony regarding why he chose not to account for such deductions, it is impossible to distinguish whether his decision was proper. *Id.*

Mr. Prettyman's testimony during the Remand Hearing provided no additional insight into his actual *findings* and how he *applied* such findings in his appraisal. For instance, he provided only a general description of his methodology:

- Q. Now, would you please tell the body, if you will, when you decided to use the replacement cost methodology to value this building, what does that mean?
- A. That means that we do a thorough inspection of the building, measure everything. Take into consideration wall height, fit and finish. External. External portions of the building, attached improvements, yard improvements; everything.

(*See* Appendix p. AR234).

Although Mr. Prettyman provided the above general description, he provided no subsequent testimony regarding his findings concerning factors such as wall height, fit, and finish or the external portions of the subject building, nor did he explain whether any findings regarding such factors were used to increase or decrease the value of this building, why the factors increased or decreased the value, and how much they altered the value. Simply put, there exists no evidence in the record, of a thorough consideration of the required factors by the Assessor in attempting to utilize the cost approach.

The entire Remand Hearing conformed to the above-stated pattern. Mr. Prettyman stated that he "considered" square footage, condition and type of the building, and construction materials, but failed to discuss context, application, or methodology. (*See* Appendix p. AR236).

Mr. Prettyman likewise failed to testify as to how his findings influenced the valuation of Cabela's property. His terse responses of "yes" are insufficient to establish that he complied with West Virginia law. It is impossible to evaluate the Assessor's determination of the above factors without knowing what was found and how it applied to the tax assessments. Furthermore, as stated by Mr. Prettyman, his use of the word "considered" is not synonymous with "utilized;" for instance, it often meant that he chose to disregard the factor.⁷ (*See* Appendix p. AR259). Mr. Prettyman's testimony is vastly insufficient to establish that he considered the factors and in no way indicates how the factors weighed into his assessments. Mr. Prettyman's response that he "considered" the factors could mean that he utilized or rejected them. (*See* Appendix pp. AR241-242); *see also* (*See* Appendix p. AR259) ("considered" does not mean "utilized"). The record remains unclear as to which factors the Assessor actually utilized, which were disregarded, and why the decision to do either was made.

Mr. Prettyman continued to offer vague testimony throughout his direct examination. For example, regarding the considerations listed in W.Va. C.S.R. §110-1P-2.1.3, such as size, topography, accessibility, present use, highest and best use, easements, zoning, utilities, and supply and demand, he provided the same affirmative responses without any explanation or documentation. (*See* Appendix pp. AR241-242). Despite his counsel's specific request that he explain the impact that each factor had on his consideration, Mr. Prettyman did not provide any information other than stating that "yes" he considered a given factor. *Id.* The Assessor's findings regarding all of the above factors are of critical importance in this case. This action concerns the impact of such amenities on the assessed value of Cabela's retail store. Specifically,

⁷ It is apparent that Mr. Prettyman defines "consideration" to include his repeated decision not to utilize numerous factors mandated by West Virginia law. (*See, e.g.,* Appendix pp. AR259). Stated differently, Mr. Prettyman's "thorough consideration" of required factors was routinely limited to his decision to summarily disregard each factor without true consideration or justifiable rationale.

Cabela's argues that the Assessor failed to account for the super-adequacy of Cabela's building.

Cabela's contends that factors such as the store's massive size, improvements, and high-end finishes and construction make it super adequate for any purpose other than Cabela's. The super adequacy of Cabela's building was emphasized by the Circuit Court in its July 20, 2011 Order:

Cabela's poses a unique valuation problem. It is unquestioned that there is nothing like a Cabela's in Ohio County. It is more than a retail store; it is a unique tourist destination. **There is no question that the amenities are super-adequate for a purpose other than Cabela's [...]**

(See Appendix p. AR195) (emphasis added).

Cabela's retail building contains full-scale exhibits, aquariums, ponds, and as the Court mentioned, "tongue and groove finished ceilings," "atriums," and "massive square footage." (See Appendix pp. AR195-196). Cabela's retail store is not a simple "warehouse" such as Lowe's or Home Depot. As such, it is inexplicable that the Assessor glossed over any information regarding the amenities of the building and simply stated that he did not consider issues of super-adequacy in appraising its value:

Q. And did you consider the issues of super-adequacy in appraising the building in this matter?

A. **No, sir.**

Q. Why not?

A. It didn't apply. They -- it's a -- at this time was a five-year-old building. I don't think that they would have built it way too large. And it would be considered way too large five years after you built it.

(See Appendix p. AR240) (emphasis added).

Thus, Mr. Prettyman ignored the extremely unique nature of Cabela's retail store. In other words, Cabela's could never recoup the high cost of construction. Mr. Prettyman failed to

even consider the fact that no potential buyer would value a waterfall, trout stream, or the other unique features and fixtures installed for the sole purpose of creating a retail environment that defines Cabela's brand.

Likewise, Mr. Prettyman provided no information on his consideration of the functional obsolescence or design features of Cabela's store that would not be accepted by the market. He stated that functional obsolescence "was considered, but not utilized to much extent." (*See* Appendix p. AR267). There is no explanation in the record regarding how functional obsolescence was utilized in the assessments, although it was clearly not a major consideration.

Regarding super adequacy, Mr. Prettyman also testified as follows:

Q. Okay. Is it possible to account within that software for super-adequacies?

A. Automatically? No.

Q. You would have to go in and override it?

A. Yes, sir.

Q. Did you do it in this case?

A. **No, sir.**

(*See* Appendix p. AR258) (emphasis added).

Cabela's appraisal expert, Mr. Goldman, testified during the Remand Hearing that the current trend with respect to "big box" retailers such as Wal-Mart is toward building smaller sized stores to reduce the huge operating costs of high ceilings and expansive square footage that exists in the Cabela's store. (*See* Appendix p. AR279). There is no indication whether Mr. Prettyman considered this or any other aspect of functional obsolescence in appraising Cabela's retail store. His testimony does not reveal what factors of functional obsolescence that he

considered and how it affected his assessments. In fact, Mr. Prettyman's testimony is so indistinct that it is subject to different interpretations from his own office. For instance, the County Assessor stated in a brief submitted to the Circuit Court that Mr. Prettyman rejected functional obsolescence. (*See* Appendix p. AR320). However, Mr. Prettyman testified that he utilized it. (*See* Appendix p. AR267).

Based on the lack of evidence offered by the Assessor in this matter, no one can ascertain how the required appraisal factors, the amenities which Cabela's and the Circuit Court consider to be super adequate, or functional obsolescence, impacted the assessments. Mr. Prettyman's testimony fails to demonstrate that he thoroughly considered the factors enumerated in W.Va. C.S.R. §§110-1P-2.1.1 to 2.1.4 (1991) at all. Simple responses of "yes" when questioned whether he considered the factors do not evidence thorough consideration as required by West Virginia law. The lack of explanation or discussion is particularly critical given the technical nature of valuing a unique property like Cabela's, the fact that the Assessor was specifically ordered to provide this information because it was lacking in the record, and the large amount of money at stake based on the wide discrepancy between the appraisals offered by Cabela's and the Assessor's Office. The Assessor's testimony provided no explanation of the appraisal methodology and is insufficient to support the inflated tax assessments.

Inexplicably, after determining the record was deficient and receiving no substantive additional information regarding the Assessor's consideration of the required factors and methodology, as discussed above, (*see* Appendix pp. AR223-310), the Circuit Court affirmed the 2009 and 2010 valuations. (*See* Appendix pp. AR459-467). The Circuit Court acknowledge that Mr. Prettyman failed to elaborate how he considered the factors in W.Va. C.S.R. §§110-1P-2 (1991) and "that his only consideration on functional obsolescence was that the store was not

‘too big’ for what it was originally built but, functional obsolescence clearly entails far more than just size.” (See Appendix p. AR466).

Yet, despite the clear lack of evidence that the Assessor complied with the law by considering the required appraisal factors, the Circuit Court affirmed the assessments. (See Appendix p. AR459-467). The Assessor’s failure to properly apply the cost approach and the Court’s affirmation of his assessments despite that fact is insufficient under the law. There is simply no evidence in the record to show that the Assessor considered the W.Va. C.S.R. §§110-1P-2.1 (1991) factors. Therefore, the Assessor did not properly apply the cost approach and the Circuit Court’s order affirming the assessments must be reversed.

3. The Circuit Court erred in affirming the valuation of the Cabela’s retail store set by the Board of Equalization and Review despite overwhelming evidence offered that the value set by the Assessor was excessive.

As discussed in preceding sections, the Ohio County Assessor was charged with determining the fair market value of Cabela’s retail store for the 2009 and 2010 tax years for the purpose of assessing *ad valorem* property taxes. See W.Va. Code § 11-3-1. As stated, “fair market value” is defined as what the property would sell for if it were sold on the open market. See *Syl. Pt. 3, in part, Killen v. Logan County Comm’n*, 170 W.Va. 602, 295 S.E. 2d 689 (1982), overruled on other grounds by *In Re Tax Assessment of Foster Found.’s Woodlands Ret. Cmty.*, 223 W.Va. 14, 672 S.E. 2d 150; see also *Kline v. McCloud*, 174 W.Va. 369, 372, 326 S.E. 2d 715, 718 (1985).

In this case, Cabela’s presented overwhelming evidence to the Circuit Court that the Assessor’s mechanical cost of construction valuation approach did not accurately reflect the fair market value of Cabela’s retail store. Simply put, due to the substantial super adequacy of Cabela’s retail store for any purpose other than Cabela’s, the property would not sell on the open

market for the high cost of construction because many of the unique features of the building, including the massive scale, opulent finishes, and additional plumbing and electrical capacity, are not needed for any potential buyer's purposes. A potential buyer, which would most likely be a "big box" retailer, would not pay extra for features which are of no use to the buyer.

Cabela's offered the testimony and appraisal of Douglas A. Herold, a licensed appraiser, who holds the highest West Virginia accreditation as a Certified General Real Estate Appraiser and holds West Virginia Certificate No. CG376. Mr. Herold conducted a detailed inspection and evaluated comparable properties and other factors and determined that the fair market value of the Cabela's retail store was \$22,600,000.00 for the 2009 and 2010 tax years. (*See* Appendix pp. AR16-53). Cabela's submitted to the Circuit Court Mr. Herold's appraisal report, (*Id.*), as well as offered his thorough testimony in support of his findings, (*See* Appendix p. AR141-152 and AR439-443). Cabela's also submitted to the Circuit Court post-remand testimony from Jay Goldman, a second licensed West Virginia appraiser, who holds the MAI Designation from the Appraisal Institute; Mr. Goldman reviewed and affirmed Mr. Herold's findings. (*See* Appendix p. AR271-309).

In assessing the value of Cabela's retail store, Mr. Herold considered the three appraisal methods as required by W. Va. C.S.R. § 110-1P-2.2.1: the cost, income, and market data valuation methods. (*See* Appendix p. AR141). He determined that the sale comparison approach was the most reliable valuation method for the subject property because there was an active market for similar properties, sufficient sales data was available for analysis, the approach directly considers the prices of alternative properties having similar utility, and the approach was typically the most relevant for owner-user properties. (*See* Appendix pp. AR141-142, AR23).

Mr. Herold also found that the income capitalization approach was an applicable valuation method for the property, as there was an active rental market for similar properties that allowed him to estimate the property's income generating potential, which was then converted to a market value indication through capitalization. (*See* Appendix p. AR23). Importantly, Mr. Herold determined that the cost approach was not an applicable valuation method of Cabela's retail store because the property included substantial super adequacy that would limit the reliability of the accrued depreciation estimate; also, Mr. Herold identified that the cost approach is not typically used by market participants on buildings that are designed for a specific user. (*Id.*)

Mr. Herold further elaborated on his findings in his testimony before the County Commission. (*See* Appendix pp. AR141-152 and AR439-443). As Mr. Herold explained, in order to assess the fair market value of any national retail chain store, the appraiser should not focus on local data; the properties are typically bought and sold by market participants which are national in scope. (*See* Appendix p. AR141). Further, because Cabela's was built for a very specific use, it cost more to build than any other big box retailer. (*Id.*) For instance, Cabela's retail store includes high-end finishes, tongue and groove ceilings, massive square footage, and extra plumbing and electrical capacity to accommodate the exhibits, waterfall, and aquariums. (*See* Appendix p. AR141-142). These features are defined as "super-adequacy," meaning that there is no one outside of Cabela's that would pay extra for these features that they would not need or use. (*See* Appendix p. AR142).

To assess the fair market value of Cabela's retail store, Mr. Herold used the highest-end of the range of the selling price for a comparable big box retailer, which would be the most likely

purchaser.⁸ (See Appendix p. AR148). Mr. Herold was also able to perform an income capitalization approach based on comparable rents; however, he placed little weight on it because Cabela's is an occupied property. (See Appendix p. AR151 and AR27-28).

As noted by Mr. Herold, the value per square foot based on sale prices of comparable properties ranged from \$66.72 per square foot on the lower end, \$94.35 in the mid-range, and \$123.30 in the highest range. (See Appendix p. AR26 and AR190). Mr. Herold generously indicated the value of Cabela's retail store to be \$125 per square foot, which was above the value per square foot based on even the highest sale price of a comparable property. (*Id.*) On the other hand, the Assessor's valuations of Cabela's retail store amounted to an excessive \$208 per square foot for the 2009 tax year and \$203 per square foot for the 2010 tax year. (See Appendix pp. AR14, AR358, AR18, and AR20).

The assessed values of Cabela's retail store of \$208 and \$203 per square foot are undeniably disproportionate to the values of comparable properties, including other Cabela's stores. The record reflects that the only comparable property which sold in Wheeling, WV within the respective time frame was a Lowe's store which sold for only \$87.07 per square foot in June 2007. (See Appendix p. AR26). There is not a scintilla of evidence in the record of any comparable property which was assessed or sold for over \$200 per square foot as is the case of the outrageous assessments of Cabela's retail store. In fact, the assessed value per square foot of Cabela's retail store in this matter exceeded the appraised value per square foot of any other Cabela's store in the county by nearly \$100 per square foot. (See Appendix p. AR292-293). The only Cabela's store with a valuation within \$100 per square foot of the assessed value of the

⁸ Mr. Herold testified that, realistically, his assessment was generous because the property would probably sell at the lower-end of the range because there would be a more limited audience for the Cabela's store than other big box retailers such as Lowe's or Home Depot. Mr. Herold stated that the property would be very difficult to sell. (See Appendix p. AR148).

Cabela's retail store at issue in this matter was a Cabela's store located in East Hartford, Connecticut. (*Id.*) It is unconscionable to accept that a Cabela's store located in Wheeling, West Virginia exceeds that value of any other Cabela's store by almost \$100 per square foot. The assessments undoubtedly fail to reflect the fair market value of Cabela's retail store.

In sum, the voluminous, reliable, and precise evidence presented by Cabela's stands in direct contrast to the vague and wholly insufficient evidence presented by the Assessor in support of the 2009 and 2010 tax assessments. As discussed in preceding sections, the Assessor performed a mechanical cost of construction approach. The only depreciation utilized by Mr. Prettyman was a set mathematical formula ("county modifier"), which in no way accounted for the functional obsolescence based on the significant super adequacy of Cabela's retail store. The record is simply devoid of sufficient evidence to support the Assessor's tax assessments or to rebut the appraisal prepared by Mr. Herold, the only certified general real estate appraiser who offered an appraisal of Cabela's retail store in this matter. As such, the 2009 and 2010 tax assessments of Cabela's retail store should be reduced in accordance with the appraisal performed by Mr. Herold.

Conclusion

In conclusion, the basis of this appellate action is the fundamental unfairness of tax assessments that fail to comply with West Virginia law. Cabela's is an extremely unique outdoor retailer that expended inarguable cost to create not only a store, but a tourist destination, in Wheeling, West Virginia. West Virginia law sets forth rules that require tax assessors to consider the unique nature of the properties in their assessments. In this case, the Assessor not only ignored the super adequacy of Cabela's, but the Assessor disregarded two valuation methods as

required by West Virginia law. Further, the Assessor egregiously misapplied the cost approach, the only valuation method used to appraise Cabela's retail store.

The net result of the Assessor and the County's multiple failures in appraising Cabela's property resulted in assessments which are inflated by tens of millions of dollars and which exceed the value of any other Cabela's store in the county by almost \$100 per square foot. It is unquestionably true that Cabela's made a significant investment to create the atmosphere present at its retail store. However, it is irrational to expect that other retailers that might purchase the property would value and pay for features such as an indoor waterfall, trout stream, and high-end finishes in accordance with the cost that was expended to install them. This line of thought, coupled with the misapplication of West Virginia law, leaves Cabela's with 2009 and 2010 tax assessments that are wildly out of sync with reality. As such, for the reasons stated herein, Cabela's respectfully requests that this Court reverse the Circuit Court's final judgment and set the assessed value of Cabela's retail store in conformity with the appraisal prepared by Mr. Herold and submitted by Cabela's in this matter.

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In the Supreme Court of Appeals of West Virginia

DOCKET NO: 15-0888

In Re: Tax Assessment of Cabela's Retail, Inc.

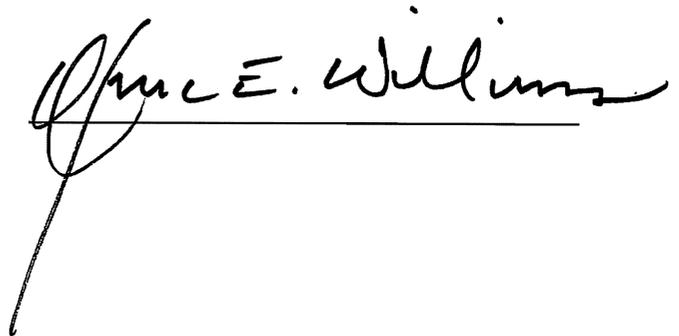
**(Appeal of Civil Action Nos. 09-CAP-6 and 10-CAP-8 in the Circuit Court of Ohio County,
West Virginia)**

CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that on the 18th day December, 2015, a true copy of the foregoing "*Petitioner's Brief*" and "*Appendix*" was served upon the following counsel by depositing the same, postage prepaid, in the United States Mail:

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A handwritten signature in black ink that reads "Bruce E. Williams". The signature is written in a cursive style and is positioned above a solid horizontal line.