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IN THE FOURTH JUDICIAL DISTRICT CORT

WASATCH COUNTY, STATE OF UTAH

DAVID E. SALZMAN, an individual, DAVID E. SALZMAN UTAH RESIDENCE TRUST, ROBERT J. MCCORMICK, an individual; KENT W. TAYLOR, an individual; GARY M. HOLLOWAY, an individual; PATRICIA B. HOLLOWAY, an individual and ADA LLC, a Utah Limited Liability Company, Plaintiffs, v. WASATCH COUNTY FIRE PROTECTION SPECIAL SERVICE DISTRICT, a county improvement district, Defendants.	**PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, MEMORANDUM IN OPPOSITION TO CROSS-MOTION FOR SUMMARY JUDGMENT, MEMORANDUM IN OPPOSITION TO RULE 56(F) MOTION AND, IN THE ALTERNATIVE MEMORANDUM IN SUPPORT OF RULE 56(F) MOTION** **ORAL ARGUMENT REQUESTED** Case No.: 130500033 Honorable Derek P. Pullan

INTRODUCTION

Plaintiffs are entitled to summary judgment on their claims against the Wasatch County Fire District ("Fire District"). Specifically, Plaintiffs are entitled to a declaration that their protests were timely filed and received by the Fire District and that their protests should be counted against the creation of an Assessment Area ("Assessment Area") that imposes a new tax on Plaintiffs' properties. In addition, Plaintiffs are entitled to a declaration that their due process rights were violated, because Plaintiffs timely submitted valid protests and the Fire District refused to count their protests. Accordingly, Plaintiffs were deprived of their constitutional right to be heard. Lastly, Plaintiffs are entitled to a declaration that the Assessment Area failed. It is not disputed, according to the Fire District's own calculations, that the Assessment Area passed by just $5 Million dollars in market value. It is also not disputed that Plaintiffs' protests equate to a combined market value of over $15 Million. As such, when Plaintiffs' protests are added to the protest total, the Assessment Area failed.

The Fire District, in its Opposition memorandum and its Cross-Motion for Summary Judgment, asserts that certain protests should now be removed from the protest total. The Fire District's decision to attempt to remove and disqualify protests from the protest total was made only after this Court held that Plaintiffs' protests were valid and after it became apparent that the Assessment Area failed. The Fire District's attempt to remove valid protests from the total should be rejected for a number of reasons. First, neither the Fire District nor its consultant, Lewis Young Robertson and Burningham, Inc. ("LYRB"), have a statutory, legal or other basis upon which to conduct an investigation

into protests or to remove protests after they were submitted. Second, the Fire District does not have authority to remove otherwise valid protests simply because property owners did not respond to letters of inquiry from LYRB. Third, the sole evidentiary basis for the Opposition to Plaintiffs' Motion for Summary Judgment and for the Cross-Motion for Summary Judgment are declarations submitted by Kelly Pfost and Janet Carson. However, these declarations must be stricken because they lack foundation and are based on inadmissible hearsay. Accordingly, the Fire District is able to demonstrate no fact to dispute Plaintiffs' Motion for Summary Judgment or to support its Cross-Motion for Summary Judgment. The Cross-Motion for Summary Judgment fails and the Assessment Area must be declared invalid because adequate protests were submitted to defeat its creation.

REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS

1. On or about October 3, 2012, the Wasatch County Council adopted a Notice of Intention to Designate Assessment Area ("Notice of Intent"). See Answer at, ¶ 43. A copy of the Notice of Intent is attached as Exhibit 1.

RESPONSE: The District objects to Plaintiffs' citation to the Answer at 43 as nonsensical, as neither the Complaint nor Answer discuss the Notice of intent in paragraph 43. Therefore, this fact is not supported by the "pleadings, depositions, answers to interrogatories, and admissions on file ... [or] affidavits" and does not comply with Rule 56(c). Utah R. Civ. P. 56(c).

The District does not dispute that the Notice of Intent, attached as Exhibit 1 speaks for itself. The District affirmatively asserts that the Notice of Intent further provides:

> State law requires that protests must be in writing and submitted in person or by mail, with receipt by the County within the time specified in this public notice. Furthermore, such protest shall describe or otherwise identify the property owned by the person filing the protest. Accordingly, the County will not accept or consider emails of protests. Emails are not permitted by state law and it would be extraordinarily challenging to verify the authenticity of emails. ***Protests need to be filed in writing by the owner of the property which is within the proposed assessment area, and then delivered in person or via mail service (not by proxy) to the County Auditor/Clerk of Wasatch County, Utah*** with receipt by the County at the place and within the time frame described in this public notice.

(Notice of intent, Exhibit 2 hereto (emphasis added.))

REPLY: The reference to paragraph 43 of the Answer was a clerical error. The statement in Paragraph 1 of Plaintiffs' Statement of Facts ("SOF") is a restatement of Paragraph 13 of the Complaint, which was admitted in Paragraph 13 of Defendant's Answer. The parties agree that the Notice of Intent speaks for itself.

2. The creation of the Assessment Area was purportedly to finance the operation and maintenance costs associated with paying for full-time staffing of the fire station located near Jordanelle Reservoir (the "Station"). *See* Answer at 45.

RESPONSE: The District objects to Plaintiffs' citation to the Answer at 45 as nonsensical, as neither the Complaint nor Answer discuss the creation of the Assessment Area and purpose of the same in paragraph 45. Therefore, this fact is not supported by the "pleadings, depositions, answers to interrogatories, and admissions on file ... [or] affidavits" and does not comply with Rule 56(c). Utah R. Civ. P. 56(c). The District affirmatively asserts that the purpose

of the Assessment Area is as stated in the Notice of intent, which document speaks for itself. (Notice of intent, Exhibit 2 hereto.)

REPLY: The reference to paragraph 45 of the Answer was a clerical error. The statement in Paragraph 2 of Plaintiffs' SOF is a restatement of Paragraph 15 of the Complaint. The parties agree that the Notice of Intent speaks for itself.

3. According to the Notice of Intent, the intended purpose of the Assessment Area is to levy assessments on property owners within the Assessment Area to pay approximately $671,602 in annual costs associated with staffing the Station. See Answer at 46.

RESPONSE: The District objects to Plaintiffs' citation to the Answer at 46 as nonsensical, as neither the Complaint nor Answer discuss the purpose of the Assessment Area in paragraph 46. Therefore, this fact is not supported by the "pleadings, depositions, answers to interrogatories, and admissions on file ... [or] affidavits" and does not comply with Rule 56(c). Utah R. Civ. P. 56(c).

The District affirmatively asserts that the purpose of the Assessment Area and annual costs associated with the same was as stated in the Notice of intent, which document speaks for itself. (Notice of Intent, Exhibit 2 hereto.)

REPLY: The reference to paragraph 46 of the Answer was a clerical error. The statement in Paragraph 3 of Plaintiffs' SOF is a restatement of Paragraph 16 of the Complaint. The parties agree that the Notice of Intent speaks for itself.

4. The Notice of Intent states:

> Any person who is the owner of record of property to be included within the Assessment Area shall have the right to file in writing a protest against the designation of the Assessment Area or to make any other objection thereto. Protests shall describe or otherwise identify the property owned of record by the person or

> persons making the protest. Protests shall be filed in writing with the County Auditor/Clerk of Wasatch County, Utah, either in person during regular business hours Monday through Friday, or by mail on or before the date of the hearing at 5:00 p.m. on November 8,
> 2012 ....(emphasis added).

See Answer at 49.

RESPONSE: The District objects to Plaintiffs' citation to the Answer at ¶ 49 as nonsensical, as neither the Complaint nor Answer discuss the Notice of intent in paragraph 49. Therefore, this fact is not supported by the "pleadings, depositions, answers to interrogatories, and admissions on file ... [or] affidavits" and does not comply with Rule 56(c). Utah R. Civ. P. 56(c). The District affirmatively asserts the Notice of Intent speaks for itself. (Notice of Intent, Exhibit 2 hereto.) The District further affirmatively asserts that the Notice of Intent expressly put property owners on notice that protests submitted by proxy are not permitted:

> Protests need to be filed in writing by the owner of the property which is within the proposed assessment area, and then delivered in person or vial mail service ***(not by proxy)*** to the County Auditor/Clerk of Wasatch County, Utah with receipt by County at the place and within the time frame described in this public notice.

(Notice of intent, Exhibit 2 hereto (emphasis added).) Additionally, Utah Code Ann. § 11-42- 203 provides that only an owner of property may file a protest.

REPLY: The reference to paragraph 49 of the Answer was a clerical error. The statement in Paragraph 4 of Plaintiffs' SOF is a restatement of Paragraph 19 of the Complaint. The parties agree that the Notice of Intent speaks for itself. Plaintiffs affirmatively state that Utah Code Ann. § 11-42- 203 speaks for itself.

5. The Notice of intent states:

> Thereafter, at 7:00 p.m. in /November 8, 2012, the County Council will meet in public meeting at the County Council Chambers in Heber City, Utah to consider all protests so filed and hear all objections relating to the proposed Assessment Area and the proposed [operating and maintenance] Assessments. After such consideration and determination, the Council shall adopt a resolution either abandoning the Assessment Area or designating the Assessment Area either as described in this Notice of Intention to Designate Assessment Area or with deletions and changes made as authorized by the Act; but the County Council shall abandon the designation of the Assessment Area if the necessary number of protests as provided herein have been filed on or before the time specified in this Notice of Intention to Designate Assessment Area for the filing of protests after eliminating from such filed protests: (a) protests relating to property that has been deleted from the Assessment Area, and (b) protests that have been withdrawn in writing prior to the conclusion of the hearing (emphasis added).

See Answer at 50.

RESPONSE: The District objects to Plaintiffs' citation to the Answer at 50 as nonsensical, as neither the Complaint nor Answer discuss the Notice of Intent in paragraph 50. Therefore, this fact is not supported by the "pleadings, depositions, answers to interrogatories, and admissions on file ... [or] affidavits" and does not comply with Rule 56(c). Utah R. Civ. P. 56(c). See also response to Fact No.4.

REPLY: The reference to paragraph 50 of the Answer was a clerical error. The statement in Paragraph 5 of Plaintiffs' SOF is a restatement of Paragraph 20 of the Complaint. The parties agree that the Notice of Intent speaks for itself.

6. The Notice of Intent states that:

> The necessary number of protests shall mean the following: Protests representing at least one-half of the total market

> value of all properties to be assessed where an assessment is proposed to be made according to assessed market value (emphasis added).

See Answer at 51.

RESPONSE: The District objects to Plaintiffs' citation to the Answer at 51 as nonsensical, as neither the Complaint nor Answer discuss the Notice of Intent in paragraph 51. Therefore, this fact is not supported by the "pleadings, depositions, answers to interrogatories, and admissions on file ... [or] affidavits" and does not comply with Rule 56(c). Utah R. Civ. P. 56(c). See also response to Fact No.4.

REPLY: The reference to paragraph 51 of the Answer was a clerical error. The statement in Paragraph 6 of Plaintiffs' SOF is a restatement of Paragraph 19 of the Complaint. The parties agree that the Notice of Intent speaks for itself.

7. In the Notice of Intent, the County did not disclose the total market value of the property included in the Assessment Area. *See* Notice of Intent.

RESPONSE: The District admits that the Notice of Intent speaks for itself and denies any insinuation that the District was required to disclose the total market value of the property included in the Assessment Area in the Notice of intent. (Notice of intent, Exhibit 2 hereto.)

REPLY: The Fire District does not deny the substance of Paragraph 7. Accordingly, Paragraph 7 should be deemed admitted.

8. The Fire District has, at various times, stated that the total market value of properties in the Assessment Area is approximately $1.2 Billion. See Answer at § 23.

RESPONSE: The District admits that the Notice of Intent speaks for itself and denies any insinuation that the District was required to disclose the total market value of the property included in the Assessment Area in the Notice of Intent. (Notice of Intent, Exhibit 2 hereto.) The

District admits that the total market value of properties within the Assessment Area is $1,200,190,932. (Declaration of Kelly Pfost ("Pfost Decl."), 2/13/14 at 6, attached hereto as Exhibit 3.)

9. On November 8, 2012, the Fire District held a public hearing regarding the Notice of Intent and regarding protests to the creation of the Assessment Area. See Answer at§ 24.

RESPONSE: The District admits that it held a properly scheduled public meeting on November 8, 2012 whereby any person was given an opportunity to be heard regarding the Notice of Intention and the District's adoption of Resolution 12-15. (Minutes of November 8, 2012 meeting, attached hereto as Exhibit 4.) None of the Plaintiffs appeared and/or attended the November 8, 2012 public meeting. (Id.)

REPLY: The Fire District does not deny the substance of Paragraph 9. Accordingly, Paragraph 9 should be deemed admitted. Plaintiffs object to the Fire District's attempt to add words to its admission to spin the statement in SOF 9 and dispute that the meeting was properly scheduled. This Court has already held that Plaintiffs each submitted timely protests to the adoption of Resolution 12-15. See, SOF 35.

10. On December 5, 2012, Ms. Lewis issued her report regarding whether a sufficient number of protests had been submitted to defeat the creation of the Assessment Area (the "Lewis Report"). A copy of the Lewis Report has been attached as Exhibit 2. *See* Answer at§ 30.

RESPONSE: The District admits that the Lewis Report was issued on December 5, 2012, which was prepared by Lewis Young Robertson & Burningham ("LYRB") and was presented by Kelly Pfost to the governing body of the District, which Report speaks for itself.

(Pfost Decl.¶ 5.)

REPLY: The Fire District does not deny the substance of Paragraph 10. Accordingly, Paragraph 10 should be deemed admitted. The "LYRB" report is signed by Ms. Lewis.

11. The Lewis Report states that the Fire District asked her to tally the protests received by the County and provide a report of the results. See Answer at§ 31.

RESPONSE: The District admits that the Lewis Report speaks for itself. (See Lewis Report, attached as Exhibit A to the Pfost Decl.)

REPLY: The Fire District does not deny the substance of Paragraph 11. Accordingly, Paragraph 11 should be deemed admitted.

12. The Lewis Report states that each protest was given a value equal to the amount of assessment proposed against the property being protested. See Answer at § 32.

RESPONSE: The District admits that the Lewis Report speaks for itself. (See Lewis Report, attached as Exhibit A to the Pfost Decl.) The District further asserts that the means and methods of determining whether Resolution No. 12-15 could proceed or had to be abandoned was set forth in the Notice of Intent, which provided that it was based on whether "at least one-half of the total market value of all properties to be assessed where an assessment is proposed to be made according to assessed market value." (Notice of Intent at 4, attached hereto as Exhibit 2.)

REPLY: The Fire District does not deny the substance of Paragraph 12. Accordingly, Paragraph 12 should be deemed admitted. Again, the Notice of Intent speaks for itself.

13. The Lewis Report states that "...protests ....received after the deadline (close of the public hearing on November 8, 2012) were tallied, but were not included in the official count." See Answer at§ 33.

RESPONSE: The District admits that the Lewis Report speaks for itself. (See Lewis Report, attached as Exhibit A to the Pfost Decl.) Per an updated report prepared by Lewis Young Robertson & Burningham on February 5, 2014 ("Updated Lewis Report"), protests postmarked on or before November 8, 2012 that were previously excluded were included in the updated tally. (Pfost Decl. 22; Updated Lewis Report, 2/5/ 14, attached to the Pfost Decl. as Exhibit B.)

REPLY: The Fire District does not deny the substance of Paragraph 13. Accordingly, Paragraph 13 should be deemed admitted. The decision to count Plaintiffs' protests was made only after the Plaintiffs had to file a lawsuit, participate in litigation and oppose the Fire District's Motion to Dismiss. In fact, the "Updated Lewis Report" was created only after this Court issued its Order denying the Fire District's Motion to Dismiss, in which the Court held that Plaintiffs' protests were filed and valid.

14. The Lewis Report did not disclose the "tally" of the market value of protests purportedly received after the deadline. See Answer at § 34.

RESPONSE: The District admits that the Lewis Report speaks for itself. (See Lewis Report, attached as Exhibit A to the Pfost Decl.) The District disputes any inference that it was required to disclose the market value of protests purportedly received before or after November 8, 2012. In any event, the Updated Lewis Report indicates that protests which were postmarked on or before November 8, 2012 were counted in an updated tally. (Pfost Decl.¶ 22.)

REPLY: The Fire District does not deny the substance of Paragraph 14. Accordingly, Paragraph 14 should be deemed admitted. The decision to count Plaintiffs' protests was made only after

the Plaintiffs had to file a lawsuit, participate in litigation and oppose the Fire District's Motion to Dismiss. In fact, the "Updated Lewis Report" was created only after this Court issued its Order denying the Fire District's Motion to Dismiss, in which the Court held that Plaintiffs' protests were timely and valid.

15. The Lewis Report states that the percentage of protests received was 50.78% of the properties in the Assessment Area. See Answer at § 35.

RESPONSE: Denied. The Lewis Report, which speaks for itself, does not state that it received protests representing 50.78% of the properties in the Assessment Area and Plaintiffs misrepresent the content of the Lewis Report. (See Lewis Report, attached as Exhibit A to the Pfost Decl.) In fact, the number of protests received from property owners in the Assessment Area represents less than 35% of the total number of property owners within the Assessment Area. (Pfost Decl. ¶, 27.). Moreover, the Notice of Intent provides that the protests necessary to defeat designation of the assessment area means "[p]rotests representing at least one-half of the **total market value** of all properties to be assessed where an assessment is proposed to be made according to assessed market value." (Notice of intent, at 4, attached hereto as Exhibit 2 (emphasis added).) In other words, since the total market value of all properties within the Assessment Area totaled $1,200,190,932, the total market value of protests necessary to defeat the designation of the assessment area had to be greater than $600,095,456.

The Lewis Report states that it made "every effort ... to count the protest[s] in good faith," and excluded only those protests it believed in good faith should be excluded. (Pfost Decl.¶ 4.) With the exception of the eight (8) protests that were identified as fraudulent before

the December 5, 2012 public meeting, all other potentially fraudulent protests were included in the tally. (Id. at 7) Further, any protests that were filed by "proxy" were included in the tally. (Id.) However, in doing so, the Lewis Report recommended that District reserve the right to "re-examine the protests counted and conduct further due diligence to insure the legitimacy of the protests." (Id. at 9.) The Lewis Report further noted that "in the interest of time and costs, we did not perform any due diligence on irregularities in protests received" and that many protests "are under review by the Summit County Sheriff's Office." (Id. at 8.) In any event, the Updated Lewis Report indicates that the total protests counted are fewer than 50% of market value of properties within the Assessment Area. (Id. at 25.)

REPLY: The Fire District does not deny the substance of Paragraph 15. Accordingly, Paragraph 15 should be deemed admitted. The Fire District is playing semantic games. The Lewis Report plainly states that the Fire District received protests representing 50.78% of the total market value of properties in the Assessment Area. The percentage of property owners that submitted protests is a red herring and is irrelevant. In addition, the Lewis Report's "reservation of rights" to exclude additional protests has no legal meaning or effect because Ms. Lewis and her firm have no statutory or other authority to conduct investigations or to exclude protests after they have been filed.

16. However, the Lewis Report states that .38% of the protests were not counted because they were purportedly withdrawn before the November 8, 2012 deadline. See Answer at§ 36.

RESPONSE: The District admits that the Lewis Report speaks for itself. (See Lewis. Report, attached as Exhibit A to the Pfost Decl.; see also Response to Paragraph 15 above which is incorporated by this reference.) The Updated Lewis Report indicates that the total protests

counted represent fewer than 50% of market value of properties within the Assessment Area. (Pfost Decl.¶ 25.)

REPLY: The Fire District does not deny the substance of Paragraph 16. Accordingly, Paragraph 16 should be deemed admitted. In addition, the conclusions set forth in the Updated Lewis Report are invalid and have no legal meaning or effect because Ms. Lewis and her firm have no statutory or other authority to conduct investigations or to exclude protests after they have been filed.

17. The Lewis Report also states that .82% of the protests were not counted because the owners allegedly told the Fire District that they did not submit a protest. See Answer at§ 37.

RESPONSE: The District admits that the Lewis Report speaks for itself. (See Lewis Report, attached as Exhibit A to the Pfost Decl.; see also Response to Paragraph 15 above which is incorporated by this reference.) The Updated Lewis Report indicates that the total protests counted represent fewer than 50% of market value of properties within the Assessment Area. (Pfost Decl. ¶ 25 .)

REPLY: The Fire District does not deny the substance of Paragraph 17. Accordingly, Paragraph 17 should be deemed admitted. In addition, the conclusions set forth in the Updated Lewis Report are invalid and have no legal meaning or effect because Ms. Lewis and her firm have no statutory or other authority to conduct investigations or to exclude protests after they have been filed.

18. Thus, according to the Lewis Report, the Assessment Area passed by a mere .42% or a money value e of approximately $5 million. See Answer at§ 39.

RESPONSE: Denied. First, the Lewis Report is not the definitive document that determined whether a resolution would be adopted to either abandon or designate an assessment

area. Whether a resolution was passed to abandon or designate an assessment area was conditioned upon whether "at least one-half of the total market value of all properties to be assessed" filed valid protests . (Notice of Intent at 4, attached hereto as Exhibit 2.) Based on the information it had at the time, the Lewis Report determined that less than one-half of the total market value of all properties to be assessed had filed valid protests. (Lewis Report, Exhibit A to Pfost. Decl.) It then "recommended that the Fire District reserve the right to complete a final count with appropriate due diligence on each protest as needs may warrant." (Id.) The District, by and through its governing board, then adopted Resolution 12-15 designating the Assessment Area on the grounds that less than one-half of the total market value of all properties to be assessed had filed valid protests. (See Resolution 12-15, attached hereto as Exhibit 5.)

Since the adoption of Resolution No. 12-15, however, a dispute has arisen regarding the governing body's determination that less than one-half of the total market value of all properties to be assessed filed valid protests. (See Compl.). The District moved to dismiss this action, in part, on the grounds that Plaintiffs' written protests, which were postmarked on or before November 8, 2012, but not received until after November 8, 2012, were untimely. (See Memorandum in Support of Motion to Dismiss, 4/24/13, at 13-17.) On August 23, 2013, the Court issued a Ruling and Order, which denied in part and granted in part, the District's motion. The Ruling and Order determined that the Plaintiffs' protests were timely filed. (See Ruling and Order, attached as Exhibit 9 to Plaintiffs' Motion.)

Shortly thereafter, the District directed Lewis Young Robertson & Burningham, Inc. ("LYRB") to conduct a more in depth investigation into the legitimacy of all the protests filed in opposition to the adoption of the assessment area to determine if the number of valid protests remained less than one-half of the total market value of all properties to be assessed. (Pfost

Decl. ¶ 10.) On February 5, 2014, LYRB presented its findings to the District during a properly scheduled public meeting, which included the Updated Lewis Report. (ld. ¶21.) The findings confirmed that less than one half of the total market value of all properties to be assessed filed valid protests. (Id. ¶ 25.)

REPLY: The Fire District does not deny the substance of Paragraph 18, namely that the Assessment Area passed by a mere .42% or a money value of approximately $5 million. Accordingly, that portion of Paragraph 18 should be deemed admitted. The Updated Lewis Report was created only after this Court issued its Order, holding that the Plaintiffs' protests were timely and must be counted. In addition, the conclusions set forth in the Lewis Report are invalid and have no legal meaning or effect because Ms. Lewis and her firm have no statutory or other authority to conduct investigations or to exclude protests after they have been filed.

19. The Lewis Report states that after counting the protests received by the Fire District, (excluding protests deemed "late") it confirmed that the total amount of protests in the official count was less than 50% and that the Fire District could move forward with the creation of the Assessment Area. See Answer at§ 40.

RESPONSE: The District admits that the Lewis Report speaks for itself. (See Lewis Report, attached as Exhibit A to the Pfost Decl.) The District incorporates its response to Fact Number 18 above as though set forth herein.

REPLY: The Fire District does not deny the substance of Paragraph 19. Accordingly, Paragraph 19 should be deemed admitted.

20. As noted above, the Notice of Intent provides:

> Protests shall be filed in writing with the County Auditor/Clerk of Wasatch County, Utah, either in person

> during regular business hours Monday through Friday, or by mail on or before the date of the hearing at 5:00p.m. on November 8. 2012 ....

RESPONSE: The District admits the Notice of Intent speaks for itself.

REPLY: The Fire District does not deny the substance of Paragraph 20. Accordingly, Paragraph 20 should be deemed admitted.

21. In addition, Utah Code Annotated§ 68-3-8.5 (2)(a) provides:

> [A] report ... that is transmitted through the United States mail is considered to be filed or made and received by the state of political subdivision on the date shown by the post office cancellation mark stamped upon the envelope or other appropriate wrapping containing it[.]

RESPONSE: The District asserts that Utah Code Ann. §68-3-8.5(2)(a) speaks for itself.

REPLY: The Fire District does not deny the substance of Paragraph 21. Accordingly, Paragraph 21 should be deemed admitted.

22. Utah Code Ann. § 68-2-8.5 (l)(b) [sic] defines "report" as "a report, claim, tax return, statement, or other document required or authorized to be filed with the state or a political subdivision of the state." *See* Answer at § 48.

RESPONSE: The District admits that the Utah Code speaks for itself.

REPLY: The Fire District does not deny the substance of Paragraph 22. Accordingly, Paragraph 22 should be deemed admitted.

23. On January 28, 2013, Gary Oliverson, an owner of property in the proposed Assessment Area, sent a GRAMA request to Wasatch County and the Fire District, asking for a copy of all protests deemed to be late by the Fire District together with a copy of their accompanying postmarked envelopes. See Answer at § 51. A copy of the GRAMA request is

attached as Exhibit 3.

RESPONSE: The District admits that the document attached as Exhibit 3 to the Motion speaks for itself. The District asserts that this fact is neither material nor relevant to the instant Motion because the Updated Lewis Report indicates that protests previously considered late which were postmarked on or before November 8, 2012 have now been counted in an updated tally. (Pfost Decl. 22; see also Response to Statement of Fact Nos. 15 and 18.)

REPLY: The Fire District does not deny the substance of Paragraph 23. Accordingly, Paragraph 23 should be deemed admitted. The decision to count Plaintiffs' protests was made only after the Plaintiffs had to file a lawsuit, participate in litigation and oppose the Fire District's Motion to Dismiss. In fact, the "Updated Lewis Report" was created only after this Court issued its Order denying the Fire District's Motion to Dismiss, in which the Court held that Plaintiffs' protests were timely and valid.

24. The GRAMA request revealed that the envelope which contained David Salzman's ("Salzman") and ADA LLC's ("ADA") letters (collectively "Salzman-ADA Letters") was postmarked November 5, 2012. Id. See Salzman-ADA Letters. A copy of the Salzman-ADA Letters has been attached as Exhibit 4.

RESPONSE: The District incorporates its response to Fact No. 23 as though fully set forth herein.

REPLY: See, Reply relating to SOF 23.

25. The GRAMA request revealed that the envelope which contained Robert J. McCormick's ("McCormick") letter ("McCormick Letter") was postmarked November 5, 2012. See McCormick Letter. A copy of the McCormick Letter has been attached as Exhibit 5.

RESPONSE: The District incorporates its response to Fact No. 23 as though fully set

forth herein.

REPLY: See, Reply relating to SOF 23.

26. The GRAMA request revealed that the envelope which contained Kent W. Taylor's ("Taylor") letter ("Taylor Letter") was postmarked November 7, 2012. See Taylor Letter. A copy of the Taylor Letter has been attached as Exhibit 6.

RESPONSE: The District incorporates its response to Fact No. 23 as though fully set forth herein.

REPLY: See, Reply relating to SOF 23.

27. The GRAMA request revealed that the envelope which contained Gary M. and Patricia B. Holloway's ("Holloway") letter ("Holloway Letter") was postmarked October 23, 2012. See Holloway Letter. A copy of the Holloway Letter has been attached as Exhibit 7.

RESPONSE: The District incorporates its response to Fact No. 23 as though fully set forth herein.

REPLY: See, Reply relating to SOF 23.

28. The total market value of Plaintiffs' properties is $15,788,122. See Declaration of Nicholas Frost, January 22, 2014 at§§ 1-9. A copy of the Declaration of Nicholas Frost is attached as Exhibit 8.

RESPONSE: The District incorporates its response to Fact No. 23 as though fully set forth herein.

REPLY: See, Reply relating to SOF 23.

29. As noted above, the Lewis Report concludes that the protests to the creation of the Assessment Area total 49.58% of the total market value of the proposed Assessed Area. See Answer at§ 38. See Lewis Report.

RESPONSE: Disputed. The District incorporates by this reference its response to Fact Nos. 15 and 18 above.

REPLY: See, Reply relating to SOFs 15 and 18.

30. The Assessment Area passed by a mere .42% or a monetary value of approximately $5 Million. See Answer at § 38. See Lewis Report.

RESPONSE: Disputed. The District incorporates by this reference its response to Fact Nos. 15 and 18 above.

REPLY: See, Reply relating to SOFs 15 and 18.

31. Plaintiffs' protests equate to a total market value of$ 15,788,122 . See Declaration of Nicholas Frost.

RESPONSE: The District admits that the total market value of Plaintiffs' property is $15,788,122. However, this fact is neither material nor relevant to the instant Motion because even though the District has included the Plaintiffs' Protests, the total market value of the protests filed by property owners within the assessment area remains less than fifty percent of the total market value of property within the designated assessment area. (Pfost Decl. 25.)

REPLY: The Fire District does not deny the substance of Paragraph 31. Accordingly, Paragraph 31 should be deemed admitted. In addition, the conclusions set forth in the Updated Lewis Report are invalid and have no legal meaning or effect because Ms. Lewis and her firm have no statutory or other authority to conduct investigations or to exclude protests after they have been filed.

32. Plaintiffs' combined assessed property value was sufficient to have surpassed the 50% requirement to defeat the proposed Assessment Area pursuant to UTAH CODE ANN. § 11-42- 206 (2012). See Lewis Report.

RESPONSE: Disputed. The District incorporates its responses to Fact Nos. 15, 18 and 31 above by this reference.

REPLY: See, Reply relating to SOFs 15, 18 and 31.

33. On April 20, 2013, the Fire District filed a motion to dismiss, among other things, Plaintiffs' claims that their protests were timely filed and that their due process rights were violated. See Record.

RESPONSE: The District admits that it filed a Motion to Dismiss, which speaks for itself, although it was filed on April 24, 2013, not April 20, 2013. The District denies Plaintiffs' characterization of the arguments contained therein.

REPLY: The Fire District does not deny the substance of Paragraph 33. Accordingly, Paragraph 33 should be deemed admitted.

34. On May 10, 2013, Plaintiffs filed their opposition to the Fire District's Motion to Dismiss. See Record.

RESPONSE: Admitted.

35. On August 20, 2013, the District Court issued a written ruling. The Court concluded that Plaintiffs' written protests, which were postmarked before the November 8, 2012 deadline, were timely filed. Specifically, the Court stated:

> [T]he Court concludes that the filing of written protests by mail was complete upon mailing on or before November 8, 2012 .... So long as a written protest was mailed to the County Auditor/Clerk on or before November 8, 2012, the protest was timely filed and deemed received by the County at the place and within the time frame described in the public notice ....Therefore, [the protests] are 'considered to be filed or made and received by [the District] on the date shown by the post office cancellation mark stamped upon the envelope or other appropriate wrapper containing it.' Utah Code § 68-3-8.5(2)(a).

See August 20, 2013 Ruling and Order at 6-8 attached as Exhibit 9.

RESPONSE: The District admits that the Ruling and Order speaks for itself. The District also incorporates by this reference its responses to Fact Nos. 15, 18 and 31 above.

REPLY: The Fire District does not deny the substance of Paragraph 35. Accordingly, Paragraph 35 should be deemed admitted. See also, Reply relating to SOFs 15, 18 and 31.

36. In addition, in the August 20, 2013 Ruling and Order, this Court stated that the Fire District's failure to "consider the Plaintiffs' timely filed protests deprived Plaintiffs of their right to be heard in a meaningful way." See August 20, 2013 Ruling and Order at 8-9.

RESPONSE: The District admits that the Ruling and Order speaks for itself, and affirmatively asserts that Plaintiffs have taken the above quotation out of context. The Court made the statement in the context of a motion to dismiss, in which the Court accepted the facts in the complaint as true. See Order at 8-9, Exhibit 9 to Plaintiffs' Motion ("Accepting the facts in the complaint as true, Plaintiffs have stated a claim against the District for a violation of Plaintiffs' due process rights.") The Court does not accept the facts in the Complaint as true for a motion for summary judgment. Utah R. Civ. P. 56. See also Responses to Fact Nos. 18, 31 and 35 above.

REPLY: The Ruling and Order speaks for itself. The language quoted in the Ruling and Order is accurate. The fact remains that Plaintiffs' valid protests were excluded by the Fire District. That exclusion deprived the Plaintiffs of their right to be heard in a meaningful way.

STATEMENT OF ADDITIONAL UNDISPUTED FACTS

1. In accordance with Utah Code Ann. § 11-42-201(2) and 11-42-202(1), on or about October 3, 2012, the District adopted a resolution declaring its intention to designate the Assessment Area (the "Notice of Intent"). (Complaint, 4/3/13, ("Compl.") 13, and Ex. 1 thereto.)

The Notice of Intent, a copy of which is attached here as Exhibit 2, states:

a. Disclosed that the District intended to "designate one or more areas within [its boundaries] as an assessment area." (Utah Code Ann. §11-42-202(1); Compl., Ex. 1, Ex. 2 hereto.)

b. Disclosed that the District proposed to levy an assessment "to Pay operation and maintenance costs" for fire protection services. (Id.)

c. Disclosed that the District proposed to finance the cost of the operation and maintenance by an assessment "to be levied against the properties that are directly or indirectly benefited," by the fire protection services. *(ld.)*

d. Described the proposed assessment area in a manner that property owners could determine if their property was within the proposed assessment area. *(ld.)*

e. Described "how the estimated assessment will be determined," and "how and when the governing body will adjust the assessment to reflect the costs of ... current operation and maintenance costs." *(ld.)*

f. Described the method of assessment and the number of years the assessment was to be levied. *(Id.)*

g. Stated the estimated assessment for the first year. *(ld.)*

h. Informed property owners that any protests to the designation of the proposed assessment area must be filed in writing "before the date of the hearing at 5:00 on November 8, 2012." (ld.)

i. Notified property owners that "at 7:00 p.m. on November 8, 2012, the County Council, as the governing body of the District, will meet in public meeting at the

County Council Chambers in Heber City, Utah, to consider all protests so filed and hear all objections relating to the proposed Assessment Area and the proposed O&M Assessments." (Id.)

j. Declared that the District would abandon the designation of the proposed assessment area if it received protests from at least 50% of the total market value of the properties to be assessed. (Id.)

k. Declared that only a "person who is an owner of record of property" could file a protest and that "[p]rotests need to be filed in writing by the owner of the property which is within the proposed assessment area, and then delivered in person or via mail service (not by proxy) to the County Auditor/Clerk of Wasatch County, Utah with receipt by the County at the place and within the time described in this public notice." (Id.)

RESPONSE: Admitted, to the extent that Paragraphs 1a. – 1k. are merely a recitation of the language set forth in the Notice of Intent. Denied, to the extent that paragraphs (1a-1k) do not accurately quote from the Notice of Intent.

2. On November 8, 2012, the County held a public hearing in accordance with Utah Code Ann. § 11-42-204, and all protests to the Assessment Area that had been filed and received by the County by the 5:00p.m. November 8, 2012, deadline were considered. (Compl., 26.)

RESPONSE: Admit that a public hearing was held on November 8, 2012. Deny to the extent that Paragraph 2 misquotes Paragraph 26 of the Complaint, which appears to be the sole support for this statement. Paragraph 26 does not state that the hearing was held in accordance with Utah law, which Plaintiffs deny. Paragraph 26 does not state that "all protests" were considered, which Plaintiffs deny. Obviously, Plaintiffs' protests, which have been held to be

timely and valid, were not considered. Moreover, there are additional protests – likely exceeding $26 Million in value – that still have not been considered by the Fire District. See, Plaintiffs' Statement of Additional Undisputed Facts, at 1-16.

3. In accordance with Utah Code Ann.§ 11-42-201, and after receiving and reviewing the filed protests and hearing objections at the public hearing, the District, on December 5, 2012, during a regularly scheduled public hearing, adopted Resolution No. 12-15, approving the creation of the Assessment Area (the "Creation Resolution" or Resolution No. 12-15"), a copy of which is attached hereto as Exhibit 5.) (Compl. 41.)

RESPONSE: Deny. The primary support for this statement appears to be Paragraph 41 of the Complaint, which merely states "On December 5, 2012, the Fire District appears to have verbally decided to proceed with adoption of a resolution to create the Assessment Area." In fact, almost none of the statements in Paragraph 3 appear in Paragraph 41 of the Complaint. Plaintiffs deny all portions of Paragraph 3 that are inconsistent with this statement. Specifically, Plaintiffs deny that the Fire District acted in accordance with Utah law, and that it properly adopted or documented adoption of Resolution 12-15. Plaintiffs also deny that the Fire District received and reviewed all protests. See Plaintiffs' Statement of Additional Undisputed Facts, at 1-16.

4. In adopting Resolution 12-15, the District determined that less than one-half of the total market value of all properties to be assessed had filed valid protests. (See Resolution 12-15, attached hereto as Exhibit 5.)

RESPONSE: Plaintiffs admit that the Fire District determined that less than one-half of the total market value of all properties to be assessed had filed valid protests. Plaintiffs deny that this conclusion was correct. The Fire District failed to count Plaintiffs' valid protests, which have a combined market value exceeding $15 Million. See, SOF 31. In addition, the Fire District

failed to count additional protests with a market value likely exceeding $26 Million. See, Plaintiffs Statement of Additional Undisputed Facts at 1-16.

5. Prior to the adoption of Resolution 12-15 on December 5, 2012, the District was informed that at least eight property owners (not the Plaintiffs) notified the District in writing that a fraudulent protest was submitted on their behalf. (Pfost Decl. ¶7 and Exhibit A thereto.) Indeed, these eight property owners notified the District that they had not filed a protest to the designation of the Assessment Area even though the District had received a protest in their name. (Declaration of Janet Carson ("Carson Decl."), February 13, 2014, attached hereto as Exhibit 6.) The property owners were understandably upset that protests were submitted in their names without their knowledge or consent. (Id.)

RESPONSE: Deny. Paragraph 5 is based upon purported statements of third parties. These statements are inadmissible hearsay and cannot be considered in the context of a Motion for Summary Judgment. See, Motion to Strike Portions of Declaration of Kelly Pfost and Janet Carson.

6. Home Owners Associations were also contacting property owners offering to prepare and submit protests on behalf of property owners, and stating they would call property owners within the HOAs if they did not respond to their inquiry within one week. (See Exhibit 7 hereto.)

RESPONSE: Exhibit 7 speaks for itself.

7. Although the District suspected that a substantial number of additional protests may have been fraudulently signed and/or submitted, the District, with assistance from LYRB, made every effort to include all protests in the tally. (Pfost Decl. 4, 7.) For example: (a) protests listing the wrong lot, parcel or unit number were included; (b) protests in which the name

did not match the owner of record were included; (c) signed and unsigned protests were included; (d) protests were included in which the signature of the owner was misspelled or otherwise an unusual designation was given that did not match the county records (i.e. "Mt. Fed" as the signature for Mountain America Federal Credit); (e) protests that were submitted by proxy were included; and (f) protests that were later discovered to be fraudulent were included. (Pfost Decl. 24.)

RESPONSE: Deny, to the extent that the Fire District is stating that there was a suspicion of fraud. Such statement is either hearsay, or based on hearsay. The Fire District and LYRB have had exclusive possession of information relating to the protests were that counted and excluded, since the protests were received in 2012. Plaintiffs simply have no way of verifying whether the information in Paragraph 7 is accurate or inaccurate. To the extent that the Court does not grant Plaintiffs' Motion for Summary Judgment, Plaintiffs must be allowed to conduct discovery regarding which protests were counted, which protests were excluded and the rationale behind these decisions.

8. In an effort to give every benefit to the protesting property owners, all of the suspected fraudulent protests were counted, unless there was a written statement indicating the person listed on the protest confirmed the protest was not from them, in which case the protest was excluded from the count. (Id.)

RESPONSE: Plaintiffs incorporate their responses to Paragraphs 5 and 7 as if set forth here.

9. Following the adoption of Resolution 12-15, Plaintiffs filed this action claiming the Assessment Area failed because their protests were not, and should have been, counted rendering the total protests over 50% of market value within the Assessment Area and, as a result,

their due process rights were violated. (Compl.)

RESPONSE: Admit that Plaintiffs filed a Complaint, but deny the characterization of the Complaint, as set forth in Paragraph 9. The Complaint, and the allegations therein, speaks for itself.

10. The District moved to dismiss the action and the Court granted in part and denied in part the District's motion on August 5, 2013. (Ruling and Order, Exhibit 9 to Plaintiffs' Motion.)

RESPONSE: Admit.

11. Based on the Ruling and Order, the District directed LYRB to conduct a more in-depth investigation into the legitimacy of the protests filed in opposition to the adoption of the assessment area to determine if the number of valid protests remained less than one-half of the total market value of all properties to be assessed. (Pfost Decl. 10.)

RESPONSE: Deny. Plaintiffs affirmatively aver that following the Court's Order and Ruling that Plaintiffs' protests were timely filed and must be counted, the Fire District realized that the Assessment Area was void because more than one half of the market value of the properties to be assessed had, in fact, submitted protests. Plaintiffs also aver that the Fire District then used its captive consulting firm, LYRB, to attempt to put protests "back on the board" to attempt to ensure that the Assessment Area was not declared void. LYRB then held itself out as having investigative authority and demanded that property owners in the Assessment Area validate their protests. In many cases, the same property owners received multiple letters and demands from LYRB. This coercive and manipulative process was undertaken without any statutory or other authority.

12. Based on its investigation, LYRB discovered the following:

a. First, LYRB learned that Gary Oliverson, who is a vocal opponent of the Assessment Area, delivered a large stack of protests to the County Clerk's office. Most of the protests were written on the same form with a red border around the "narrative" portion of the protest. (Carson Decl., Exhibit 6 hereto.)

RESPONSE: The statements in paragraph 12(a) are based upon improper hearsay and must be stricken.

b. Second, LYRB learned that on November 20, 2012, Robert Brooke, the Secretary of the Home Owners' Association for Fox Bay (a condominium complex located within the Assessment Area) told Janet Carson, (an assistant for the District) that the HOA had contacted every property owner telling them to protest and informing them that if they did not respond to them, the HOA would protest on their behalf. *(*Id.*)* Ms. Carson informed Mr. Brooke that as per the assessment notice, proxy votes would not be accepted and that the protests received by the proxy had suspicious signatures on them and that several owners had contacted the District and were very upset that protests had been submitted on their behalf without their knowledge or consent. (Id.)

RESPONSE: The statement in paragraph 12(b) is based upon improper hearsay and must be stricken.

c. Third, beginning on September 13, 2013, LYRB sent letters to 238 property owners within the assessment area with suspected fraudulently submitted protests representing a market value of $97,216,214. (Pfost Decl. 12.)

RESPONSE: There is no proper evidentiary basis for the suspicion that there were fraudulent protests and this statement should be stricken. Plaintiffs are not in a position to confirm or deny the statements made in 12(c) without a full accounting and an opportunity to conduct discovery.

d. Fourth, on October 18, 2013, a second letter was sent to the property owners who had not responded to the September 13, 2013 letter and for which no returned mail had been received. 143 properties were included in this mailing. (Id. 13.)

RESPONSE: Plaintiffs are not in a position to confirm or deny the statements made in 12(d) without a full accounting and discovery.

e. Fifth, on November 22, 2013, a third certified letter was sent to fifteen (15) owners of property within the assessment area who had not responded to the previous two letters. (Id.14.)

RESPONSE: Plaintiffs are not in a position to confirm or deny the statements made in 12(e) without a full accounting and discovery.

f. Sixth, on January 17, 2014, nine (9) certified letters were sent to property owners who had not responded to the September, October or November letters referenced above, wherein each owner was informed that their protest may be assumed invalid unless a positive response was received validating a protest had been filed. The same day, a first class letter was sent to 92 property owners who had not responded to the September or October letters with the same notice that their protest may be assumed invalid unless a positive response was received validating a protest had been filed. (Id. 15 and Exhibit C thereto, which includes the nine letters sent by certified mail and return receipts showing each letter was delivered to the property owner, which have been marked attorneys' eyes

only to protect the identities of the property owners.)

RESPONSE: Plaintiffs are not in a position to confirm or deny the statements made in 12(f) without a full accounting and discovery.

g. Seventh, on January 17, 2014, another sixty-four (64) letters were sent to property owners who had not been previously contacted asking them to confirm they had submitted a protest. (Id.16.)

RESPONSE: Plaintiffs are not in a position to confirm or deny the statements made in 12(g) without a full accounting and discovery.

h. Eighth, of the 302 property owners who were notified and requested to respond, LYRB received a total of 138 responses, of which 67 (or 48.6%) disclosed that the written protest included in the letter was not their signature. However, the Updated Lewis Report proposed excluding only 58 of these protests because it confirmed that the remaining nine property owners had submitted a second protest that was identified as having been timely filed by the actual property owner. (See Pfost Decl. 17 and Exhibit D thereto which includes the 58 fraudulently protests, which have been marked attorneys' eyes only to protect the identities of the property owners.)

RESPONSE: The statements in paragraph 12(h) are based upon improper hearsay and must be stricken. The purportedly fraudulent protests and the "Investigation Protest Form" created by LYRB, are not notarized by the property owner. No property owner has submitted a sworn declaration or affidavit stating that a fraudulent protest was filed on their behalf. None of the documents identified or relied upon by Ms. Pfost has proper foundation. Plaintiffs are not in a position to confirm or deny the remaining statements made in 12(h) without a full accounting and discovery.

i. In the responses received by LYRB, property owners commented as follows:

1) "This signature is a forgery and I would like this matter to be Investigated and the forgor [sic] to be indicted."

2) "Who ever [sic] did this should spend time in jail. In this county it is a felony. Go for it. This dishonesty needs to stop. They need to keep this fire district here."

3) "Please provide updates to your investigation. This is very concerning and I would like the person(s) to be punished."

4) "I received your letter regarding the 'Protest of assessment area for the proposed Jordanelle fire district' and I can unequivocally state that this is fraudulent! I have neither protested this nor is it my signature by a long shot!"

(Id.)

RESPONSE: The statements in paragraph 12(i) are based upon improper hearsay and must be stricken. The purportedly fraudulent protests and the "Investigation Protest Form" created by LYRB, are not notarized by the property owner. No property owner has submitted a sworn declaration or affidavit stating that a fraudulent protest was filed on their behalf. None of the documents identified or relied upon by Ms. Pfost has proper foundation. Plaintiffs are not in a position to confirm or deny the remaining statements made in 12(i) without a full accounting and discovery.

13. On February 5, 2014, LYRB submitted the results of its additional due diligence into the legitimacy of certain protests received by the District and presented its findings to the District. (Pfost Decl. 21; see also Updated Lewis Report Exhibit B thereto.)

RESPONSE: Plaintiffs are not in a position to confirm or deny the remaining statements made in 13 without an opportunity to conduct discovery. Plaintiffs deny that LYRB had any statutory or other authority to conduct an investigation into the legitimacy of protests or to make

conclusions regarding whether to include or withdraw protests submitted to the Fire District.

14. Plaintiffs' protests that were postmarked on or before November 8, 2012, which had previously been excluded from the tally, are now included in the updated tally. (Id. 22.)

RESPONSE: Plaintiffs are not in a position to confirm or deny the statements made in 14 without an opportunity to conduct an accounting and discovery.

15. Every effort was made to only remove those protests that were confirmed to have been fraudulently submitted or submitted by proxy. (Id. 23; see also Exhibit E thereto, which includes those protests removed because the property owner confirmed the protest was submitted by proxy. These have been marked attorneys' eyes only to protect the identities of the property owners.)

RESPONSE: Deny. LYRB and the Fire District have, in fact, made every effort to "remove" the maximum number of protests from the original total that was announced in the original Lewis Report. See, Response to Paragraph 22.

16. For example, the following protests were included in the tally, despite their irregularities:

a. Protests which included the incorrect lot or unit number (i.e. unit 1202 when the actual unit owned by the individual listed on the protest is J202) were counted in good faith.

b. If the name on the protest did not match the owner of record, the protest was still counted.

c. Signed and unsigned protests were counted.

d. Withdrawals received after November 8, 2012 were not removed from the tally.

e. Protests were counted even when signatures or owner names were misspelled or otherwise deemed unusual unless there was a written statement indicating the person listed on the protest confirmed the protest was not from them.

(Pfost Decl. 24.)

RESPONSE: See, Response to Paragraph 15.

17. LYRB determined the number of valid protests remained less than one-half of the total market value of all properties to be assessed. (Pfost Decl. 25.)

RESPONSE: Plaintiffs are not in a position to confirm or deny the statements made in 17 without an opportunity to complete a full accounting and to conduct discovery. Plaintiffs deny that LYRB had any statutory or other authority to conduct an investigation into the legitimacy of protests or to make conclusions regarding whether to include or withdraw protests submitted to the Fire District.

18. This tally was determined as follows:

Total Market Value of Properties within Assessment Area:	**$1,200,190,983**
Signed & Unsigned Protests	$627,563.672
Total Protests Rec'd (52.29%)	**$627, 563, 67**
Excluded (Invalid) Protests:	
Protests Withdrawn before 11/8/12 (0.38%)	($4,503,450)
Confirmed Fraudulent Protests (2.04%)	($24,497,039)
Proxy Protests: (0.25%)	($3,054,144)
Total Excluded:	($32,054,633)
Valid Protests: (49.62%)	**$595,509,03**

(Id. 26.)

RESPONSE: Plaintiffs are not in a position to confirm or deny the statements made in 17 without an opportunity to complete a full accounting and to conduct discovery. Plaintiffs deny that LYRB had any statutory or other authority to conduct an investigation into the legitimacy of protests or to make conclusions regarding whether to include or withdraw protests submitted to the Fire District. Plaintiffs deny that the numbers set forth in Paragraph 18 are true and accurate. For example, available evidence establishes that the actual "Total Protests Rec'd" greatly exceeds a dollar value of $627,563,672 and the stated percentage of 52.29%. See, Plaintiffs' Statement of Additional Facts, at 1-16. There is also no reliable and admissible evidence of the total: 1) Protests withdrawn before 11/8/12; 2) Confirmed fraudulent protests; and 3) Proxy protests. Each of these conclusory calculations is based entirely upon inadmissible hearsay and they cannot be considered in this motion.

19. Kelly Pfost from LYRB presented the Updated Lewis Report and findings to the Wasatch County Council, acting as the governing body of the District, at the Council's February 5, 2014 public meeting. (Id. 28.)

RESPONSE: Plaintiffs are not in a position to confirm or deny the statements made in 19 without an opportunity to conduct discovery. But, this statement is irrelevant to and has no bearing on this motion.

20. Ms. Pfost noted that of the 2,884 parcels in the assessment area, only 983 are currently on record as desiring to protest (signed, unsigned, and late; less those withdrawn or fraudulent). This is only 34.08% of all the parcels in the assessment area. (Id. 27.)

RESPONSE: Plaintiffs are not in a position to confirm or deny the statements made in 20

without an opportunity to conduct discovery. But, this statement is irrelevant to and has no bearing on this motion. The percentage of owners that submitted protests is an irrelevant red herring. The validity of the Assessment Area turns on the total market value of properties that protest creation.

21. The meeting was open to the public, and the public was invited to make comments, and did make comments, following Ms. Pfost's presentation. (Id. 29.)

RESPONSE: Plaintiffs are not in a position to confirm or deny the statements made in paragraph 21 without an opportunity to conduct discovery. But, this statement is irrelevant to and has no bearing on this motion.

22. After hearing Ms. Pfost's report and hearing comments from the public, the Council, as the governing body of the District, voted to not only exclude the protests set forth above, but to also exclude (a) the nine property owners protests who had failed to respond to the certified letters sent to them by LYRB requesting them to confirm they filed a protest; and (b) the 81 property owners' protests who had failed to respond to the letters sent to them by LYRB requesting them to confirm they filed a protest. Accordingly, the governing body of the District confirmed that that less than one-half of the owners of property within the designated assessment area with a total market value of all properties to be assessed filed valid protests. (Id. 30.)

RESPONSE: Deny, to the extent that Paragraph 22 suggests or implies that: 1) LYRB had any statutory or other authority to conduct an investigation; 2) the Fire District had any right to remove or exclude any protests after the original Lewis Report was issued; or 3) property owners had any obligation to respond to the letters from LYRB or to confirm their prior protests. Plaintiffs also deny that the Wasatch County Council or the Fire District had any authority to "exclude" valid protests merely because property owners did not respond to letters delivered by

LYRB. Property owners, in fact, had no legal or other obligation to respond in any way to the LYRB's fishing expedition.

STATEMENT OF ADDITIONAL UNDISPUTED FACTS

In accordance with Rule 7 and 56 of the Utah Rules of Civil Procedure, Plaintiffs set forth additional undisputed facts in opposition to the Fire District's Motion and in support of the Plaintiffs' Motion for Summary Judgment.

1. Stitching Mayflower Recreational Fonds and Stitching Mayflower Mountain Fonds ("Stitching Mayflower") owns over 50 separate parcels of property located in Wasatch County. *See* Declaration of Arie Bogerd, January 2, 2013 ("Bogard Declaration"), a copy of which is attached as Exhibit A, at ¶ 3.

2. On or about November 8, 2012, Mr. Bogerd submitted a protest to the Assessment Area for each property owned by Stitching Mayflower. *See id*. at ¶ 5, Exhibit 1.

3. Wasatch County failed to count the protests submitted for at least five properties owned by Stitching Mayflower, including properties designated by the County as 00-0007-1576, 00-0007-3465, 00-0007-3598, 00-0007-3606 and 00-0007-3622 (the "Mayflower Excluded Properties"). *See id.* at ¶ 6.

4. The Mayflower Excluded Properties are located in Wasatch County and are within the boundaries of the Assessment Area. *See id.* at ¶ 7.

5. The total market value for the Mayflower Excluded Properties exceeds $2,580,000. *See id*. at ¶ 8, Exhibit 2.

6. Stitching Mayflower, through Mr. Bogerd, intended to protest the Assessment Area for each of its properties and all protests should have been counted. *See id*. at ¶ 9.

7. The Cummings family and entities controlled by that family own many separate

parcels of real property located in Wasatch County, Utah. *See* Declaration of David Cummings, January 9, 2013 ("Cummings Declaration"), a copy of which is attached as Exhibit B, at ¶ 2.

8. On or about November 8, 2012, the Cummings family submitted protests for each property owned by them and/or related entities. *See id*. at ¶ 2, Exhibit 1.

9. Based upon a spreadsheet posted on the County's Website, the County failed to count the protests submitted for at least three properties owned by the Cummings family and/or related entities (the "Cummings Excluded Properties"). *See id.* at ¶ 5.

10. The Cummings Excluded Properties are located in Wasatch County and are within the boundaries of the Assessment Area. *See id*. at ¶ 6.

11. The total market value for the Cummings Excluded Properties is $323,498. *See id.* at ¶ 7, Exhibit 2.

12. The Cummings family intended to protest the Assessment Area for each of the excluded properties and they should have been counted. *See id.* at ¶ 8.

13. The County appears to have excluded many protests submitted by property owners that submitted protests for more than one property. The Mayflower Excluded Properties and the Cummings Excluded Properties are examples of this practice.

14. A review of the spreadsheet created by Ms. Lewis demonstrates that the market value of properties that fall into this category – multiple properties owned by one party, but only some properties counted – exceeds $26 million. *See* March 21, 2014 Second Declaration of Nicholas Frost, at 1 - 5. The Second Frost Declaration is attached as Exhibit C.

15. The spreadsheet created by Ms. Lewis identified one "late" protest that was excluded for parcel number 00-0020-3698, which is owned by Phillip Carlucci. This property has a market value of $1,018,445. *Id.* at 6.

16. There is no reference to the protest for the Carlucci property on the County's website, no indication of when this protest was received and no rationale given for the determination that it was submitted after the deadline. *Id*. at 7.

The Boundaries of the Assessment Area Do Not Comply with the Act

17. The Act defines "Assessment Area" as an area within a local entity's jurisdictional boundaries that is designated for the purpose of financing the costs of improvements, operation and maintenance, or economic promotion activities that benefit property within the area. *See* Utah Code Ann. § 11-42-102(2).

18. The Act defines "Benefitted Property" as property within an assessment area that directly or indirectly benefits from improvements, operation and maintenance, or economic promotion activities. *See* Utah Code Ann. § 11-42-102(9).

19. The Act provides that "a governing body of a local entity intending to levy an assessment on property to pay some or all of the cost of providing improvements benefitting the property, performing operation and maintenance benefitting the property, or conducting economic promotion activities benefitting the property shall adopt a resolution or ordinance designating an assessment area." *See* Utah Code Ann. § 11-42-201(1)(a).

20. The Act provides that, "[e]ach local entity that levies an assessment under this chapter shall levy the assessment on each block, lot, tract, or parcel that borders, is adjacent to, or benefits from an improvement: (i) to the extent that the improvement directly or indirectly benefits the property; and (ii) to whatever depth on the parcel of property that the governing body determines, including the full depth. *See* Utah Code Ann. § 11-42-409(1)(a).

21. The Act provides that "[a]ssessments shall be fair and equitable according to the benefit to the benefitted property from the improvement." *See* Utah Code Ann. §11-42-409(5)(a).

22. On December 17, 1998, an agreement titled "Deer Crest Interlocal Agreement" ("Deer Crest Agreement"), a copy of which is attached as Exhibit D, was executed by Wasatch County and Park City Municipal Corporation.

23. Paragraph 12 of the Deer Crest Agreement required Wasatch County to construct a "Public Safety Building at or near the Mayflower Intersection . . . ." *Id.* at ¶12.

24. The Deer Crest Agreement also requires Wasatch County to "equip and man the Public Safety Building in a manner that provides emergency response times to [Deercrest] that are comparable to current Park City Fire Department response time." *Id.* at ¶12.

25. All property owners in Wasatch County, including all property owners in the Jordanelle Basin, are assessed property taxes by the County. Those property taxes include a line item for "County Fire." *See* Declaration of Gary Oliverson, January 8, 2013 at 33. A copy of the Oliverson Declaration is attached as Exhibit E.

26 Plaintiffs have been required to pay property taxes assessed to them. By doing so, they have paid for the fire protection services they have received since the Station was built. *See id*. at 34.

27. Call logs for the time period between October 2010 and October 2011 show that most of the calls to which the Station responds do not benefit property owners surrounding Jordanelle Reservoir, including the Plaintiffs. Copies of these call logs are attached as Exhibit F.

28. Many of the calls relate to property outside the Jordanelle area in the Heber Valley. *See id.*

29. In addition, many calls are for medical emergencies or vehicle accidents on the roads in the Heber Valley. *See id.*

30. Thus, the majority of costs of operating Station do not benefit the Plaintiffs, but

rather residents of the Heber Valley. *See id.*

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR FIRST CAUSE OF ACTION BECAUSE THE ASSESSMENT AREA FAILED, IS INVALID AND MUST BE ABANDONED.

A. Plaintiffs are Entitled to Judgment, as a Matter of Law, that their Protests to the Creation of the Assessment Area Were Timely and Must be Counted by the Fire District.

Plaintiffs argued in their Motion for Summary Judgment that they are entitled to a declaratory judgment that their protests were timely submitted, that their protests are valid and that the Fire District improperly excluded their protests from the count against the creation of the Assessment Area. The Fire District concedes this point. Accordingly, the Court should enter declaratory judgment in Plaintiffs' favor, holding that Plaintiffs' protests were timely and valid, that the Fire District improperly excluded Plaintiffs' protests and that the Fire District is required to count Plaintiffs' protests.

B. Plaintiffs are Entitled to a Declaration that their Due Process Rights were Violated.

The Fire District concedes that the elements of a due process claim are: 1) notice and 2) the opportunity to be heard. See, Fire District Motion at 35. Plaintiffs' claim for violation of due process is very simple – Plaintiffs timely submitted valid protests and the Fire District refused to count their protests. Accordingly, Plaintiffs were deprived of their constitutional right to be heard. Indeed, the refusal to accept and count a valid protest – a vote against taxation by a governmental entity– is the archetype of the denial of the right to be heard. This conclusion is supported by the case law provided with Plaintiffs' opening Memorandum. In each of the cases cited by Plaintiffs, the Courts concluded that due process requires that citizens be given a

meaningful right to participate and be heard. See, *Tolman v. Salt Lake County Attorney*, 818 P.2d 23, 28 (Utah App. 1991) (right to participate meaningfully in hearing); *St. Louis Land Co. v. Kansas City*, 241 U.S. 419, 430 (1916) (property owner's right to be heard in assessment proceedings); *Salt Lake County v. Murray City Redevelopment*, 598 P.2d at 1345-1346, citing, among other cases, *In re Phillips Estate*, 44 P.2d 699, 703 (Utah 1935); *W & G Co. v. Redevelopment Agency*, 801 P.2d at 761, citing *Town of Tremonton v. Johnston*, 167 P. 190, 191 (Utah 1917.) Here, the Fire District improperly deemed Plaintiffs' protests to be late, and effectively discarded their protests by refusing to count them. Plaintiffs' protests were not counted and their voices were not heard.

This Court recognized the validity of Plaintiffs' due process claims in its August 13, 2013 Order, stating that "[t]he failure of the District to consider the Plaintiffs' timely-filed protests deprived Plaintiffs of their right to be heard in a meaningful way." Contrary to the Fire District's assertion, the Court's conclusion that Plaintiffs had been deprived of their right to be heard was based upon two facts that were and remain undisputed: 1) Plaintiffs' protests were timely submitted; and 2) the Fire District failed to count Plaintiffs' timely and valid protests. The undisputed facts demonstrate that Plaintiffs are entitled to declaratory judgment that their due process rights were violated.

The Fire District submits a litany of curious and contradictory arguments in opposition to Plaintiffs' claim for violation of due process. For example, the Fire District argues that it has now counted Plaintiffs' protests, so there is no violation of due process. This argument ignores that Plaintiffs' valid protests were not counted and that they were denied the right to be heard in the first instance. This position also ignores the fact that Plaintiffs had to file this lawsuit and to oppose the Fire District's Motion to Dismiss in order to force the Fire District to recognize their

legitimate right to be heard. The Fire District's recognition of the Court's Order and remedial action after the fact, does not cure the initial violation of due process nor does it absolve the Fire District from the implications of its denial of due process, which forms the basis of this suit. Plaintiffs are entitled to a declaratory judgment that their due process rights were violated.

Next, the Fire District argues "not counting Plaintiffs' Protests is not a violation of due process" and "plaintiffs were given notice, and filed protests…thus, Plaintiffs' due process rights were satisfied." In other words, the Fire District is arguing that it was not required to count Plaintiffs' protests, so long as Plaintiffs submitted protests. This argument is fatally flawed and contrary to common sense. Obviously, Plaintiffs would not have been given an opportunity to be heard if their protest was not counted. If a voter goes to the poll and fills out a ballot, but that ballot is thrown in a trash can before it is counted, clearly that voter did not have an opportunity to be heard. Rather, it is as if that vote never happened and the vote was never cast in the first place. Similarly, here, the failure to actually count Plaintiffs' timely protests deprived Plaintiffs of their fundamental right to be heard.

The Fire District also goes to great lengths to characterize and contort Plaintiffs' claims into something that they are not. The Fire District asserts that this case is really about whether the Assessment Area fails or not. Certainly, the First Cause of Action in the Complaint asserts that the Assessment Area is invalid and void. However, the Second Cause of Action clearly identifies the failure to count Plaintiffs' protests as a violation of Plaintiffs' due process rights.[1] For example, the Complaint contains the following allegations:

> Paragraph 91. Accordingly, by failing to count valid protests, Defendants have deprived Plaintiffs of their right to protest the creation of the Assessment Area.

[1] Plaintiffs also claim that the failure to count their protests led to the creation of the Assessment Area and a improper tax. This is a separate and distinct due process claim.

> Paragraph 95. Plaintiffs' valid protests were effectively discarded by the Fire District, an entity of the state. As such, Plaintiffs' legitimate right to protest the creation of the Assessment Area was improperly denied by the Fire District.
>
> Paragraph 96. Because their valid protests were discarded by the Fire District, Plaintiffs have been disenfranchised and were denied a meaningful opportunity to be heard with respect to the creation of the Assessment Area, which deprived Plaintiffs of their constitutionally protected property interests under the Fourteenth Amendment and the Utah Constitution.
>
> Paragraph 97. Due process requires treatment of citizens by a state actor which in its totality is fundamentally fair, and through the failure of the Fire District to count valid and timely protests, the Fire District has also deprived Plaintiffs of Plaintiffs' fundamental right to vote and protest, violating Plaintiffs' liberty interests protected by the Fourteenth Amendment.
>
> Paragraph 98. Accordingly, Plaintiffs are entitled to a declaratory judgment from this Court that the Fire District should be required to count Plaintiffs' valid protests.

It is evident that Plaintiffs' due process claims are predicated upon the failure to count their valid protests and the denial of their fundamental right to be heard.

The Fire District also attempts to argue that Plaintiffs' due process claims are really a challenge of an "error or irregularity" with the assessment process. This is false. In fact, Plaintiffs assert that the failure to count their valid protests was a violation of their constitutional rights to due process, not a violation of the statute. Plaintiffs' claims are not a claim of error or irregularity with the assessment process under Utah Code Ann. 11-42-106, they are predicated upon the due process requirements of Utah Constitution and the Constitution of the United States. These claims supersede any statutory basis or limitation on claims.

In attempting to distinguish the cases provided by Plaintiffs, the Fire District asserts that there was no violation of Plaintiffs' due process rights, including their right to be heard, because they could have attended the November 8, 2012 meeting in person. However, this argument has

already be considered and rejected by the Court. See, Briefing related to the Fire District's Motion to Dismiss. In fact, in the Court's Order, it expressly held, "That the Plaintiffs could have attended the hearing and been heard there is immaterial. The notice of intent allowed owners to protest either in person or by mail. The availability of one means to be heard did not foreclose the other." The Plaintiffs submitted valued and timely written protests they had no reason or obligation to also protest in person. It is evident that Plaintiffs were deprived of their fundamental right to be heard and that Plaintiffs are entitled to declaratory judgment on their due process claim.

C. Plaintiffs are Entitled to a Declaration that the Assessment Area Failed.

1. Based upon the Official Count of Protests on December 5, 2012, the Assessment Area Failed Once Plaintiffs' Valid Protests are Counted.

The Fire District does not dispute the Lewis Report concluded, on December 5, 2012, that protests were submitted representing 50.78% of the market value in the Assessment Area.[2] However, the Lewis Report then removed protests with a market value of 1.2% from this total. Accordingly, the Lewis Report actually only counted protests totaling 49.58%. As such, the Lewis Report concluded that the Assessment Area passed by a mere .42% or a money value of approximately $5 Million. It is also not disputed that the Lewis Report did not count the Plaintiffs' protests because Ms. Lewis and/or the Fire District concluded that they were not filed in a timely manner, despite the fact that they were post marked before the Fire District's deadline. The Fire District concedes, as it must, that Plaintiffs' properties have a market value of

[2] Plaintiffs have assumed, for purposes of their Motion, that this number is correct. However, Plaintiffs believe that the actual number of protests submitted (but not counted) is much greater that the total set forth in the Lewis Report. See, Plaintiffs' Additional Statement of Undisputed Facts, 1-16.

$15,788.122.00, which equates to approximately 1.27% of the total market value of the properties in the Assessment Area. After this lawsuit was filed, this Court ruled, as a matter of law, that Plaintiffs' protests were timely filed and are valid. It is evident, based upon calculations and conclusions set forth in the Lewis Report, that once Plaintiffs' valid protests are included in the protest total, the Assessment Area failed, is invalid and must be abandoned.

The Fire District should be bound by the final tally set forth in the Lewis Report and the Court should declare that the Assessment Area failed. Once protests were filed and counted, they cannot be withdrawn. Utah Code Ann. § 1-42-203 (1) and (3). However, the Fire District argues, in contravention of the statute, that the Lewis Report and the final tally somehow remained open and, that Ms. Lewis is allowed to conduct a never-ending "investigation" regarding whether protests should be removed and disqualified. As an initial matter, there is no statutory or other basis that allowed the Fire District to engage a captive consultant to do its bidding. Moreover, there is no statutory basis that allows the Fire District, let alone its paid consulting firm, to conduct any investigation regarding protests submitted by property owners. There is also not a statutory basis or support for the position taken by the Fire District, that it can unilaterally exclude protests from the protest tally, once they have been filed and counted. The Lewis Report was created after the Fire District and Ms. Lewis had exclusive possession of all protests for nearly one month. That was sufficient time to complete a full and fair analysis of all protests that had been submitted. The December 5, 2012 tally of protests should be final. The Fire District should not be allowed to make the protest total a perpetually moving target – removing additional protests in order to suit its needs and desire to ensure that the Assessment Area is not declared invalid. Based upon the calculations and conclusions in the original Lewis Report, and once Plaintiffs' valid protests are counted, the Assessment Area failed and must be

declared invalid and void.

2. The Fire District's Opposition to Plaintiffs' Motion for Summary Judgment is Based on Inadmissible Hearsay and Plaintiffs' Facts Must be Deemed Undisputed.

The Fire District's Opposition to Plaintiffs' Motion for Summary Judgment is based solely on the assertion that purportedly "fraudulent" protests and protests submitted by "proxy" should be disqualified and not counted toward the total protests to the creation of the Assessment Area. After unilaterally subtracting these protests from the protest total, the Fire District claims that the percentage of protests is below fifty percent. However, as explained in more detail below, it is apparent that the only evidentiary bases for these assertions are the Declarations of Kelly Pfost and Janet Carson. In turn, those Declarations lack foundation and rely solely on inadmissible hearsay that may not be considered in the context of a Motion for Summary Judgment. See, Motion to Strike Portions of Declarations of Kelly Pfost and Janet Carson. No property owner has submitted a declaration or affidavit or any other evidence substantiating or supporting the notion that fraudulent protests were submitted. The documents relied upon by Ms. Pfost are not notarized or authenticated in any way. Accordingly, the Fire District has no valid evidentiary or other legitimate basis to support its Opposition to Plaintiffs' Motion for Summary Judgment.

D. Plaintiffs are Entitled to an Award of their Attorney Fees.

In order to establish a claim to attorney fees under § 42 U.S.C.S. § 1983 (2012), a plaintiff must establish both: (1) a deprivation of a federal right; and (2) that the person who deprived the plaintiff of that right acted under color of state law. As noted above, Plaintiffs are entitled to declaratory judgment, as a matter of law, that their protests were submitted in a timely way, are valid and must be counted. Plaintiffs are also entitled to declaratory judgment, as a

matter of law that their due process rights were violated. Accordingly, Plaintiffs are entitled to an award of their attorney fees incurred in vindicating their rights.

II. THE FIRE DISTRICT'S CROSS-MOTION FOR SUMMARY JUDGMENT MUST BE REJECTED.

A. The Fire District's Attempt to Remove Protests from the Total After the Fact are Invalid.

The sole basis for the Fire District's Cross-Motion for Summary Judgment is its assertion that fraudulent protests and proxy protests exist and must be removed from the protest total. The Fire District contends that once these protests are removed from the total, the addition of Plaintiffs' protests does not result in the defeat of the Assessment Area. For the reasons set forth below, this argument fails. Once the Fire District received this Court's ruling, it should have immediately counted Plaintiffs' protests and it should have declared that the Assessment Area failed pursuant to Utah Code Ann. § 11-42-206 (2012). However, unwilling to accept the will of the property owners in the Assessment Area and in a desperate attempt to cling to the Assessment Area, the Fire District instructed Ms. Lewis and her team to find additional protests to remove from the protest total. Ms. Lewis and her team complied with this directive and launched a campaign to attempt to locate "fraudulent protests" to remove from the protest total. Ms. Lewis and her team then sent wave after wave of letters to property owners – to date six separate letters – in an effort to pad the total of purportedly "fraudulent" protests. However, the Fire District's attmept to remove protests from the total should be rejected.

1. <u>The Fire District Lacks Statutory Authority to Conduct its "Investigation" and to Attempt to Withdraw Protests After the Fact</u>.

As detailed above, Defendant has undertaken a private investigation by repeatedly mailing letters to multiple property owners within the Assessment Area. Specifically, on at least

six different occasions, the Fire District mailed letters to hundreds of property owners within the Assessment Area and then unilaterally removed protests from the officially tally. However, the Fire District has stated no basis or authority in law to conduct or perform this self-serving investigation.[3] In fact, the Fire District's actions are directly contrary to Utah law, which disallows votes to be added or withdrawn after the November 8, 2012 deadline. *See* Utah Code Ann. §§ 11-42-202(g)(i) and 11-42-203(1) and (3). Moreover, the attempt to remove protests after the November 8, 2012 deadline violates the Fire District's own Notice of Intent, which also disallows protests to be added or withdrawn after the November 8, 2012 deadline. The Fire District's decision to attempt to circumvent Utah law and its own Notice of Intent should be declared unauthorized and therefore invalid. Further, the Fire District should be prohibited from performing future unauthorized investigation.

2. The Fire District's "Evidence" of Fraud is Inadmissible Hearsayand Cannot be Considered in Deciding the Cross-Motion for Summary Judgment.

The sole evidentiary support offered by the Fire District for its position that there are purportedly fraudulent protests is the Declaration of Kelly Pfost. As noted above, Ms. Pfost's Declaration is based, almost entirely, on inadmissible hearsay. See, Motion to Strike Portions of Declaration of Kelly Pfost and Janet Carson. The forms and other documents relied upon by Ms. Pfost are not notarized, verified or authenticated in any way by the property owner. And, no property owner submitted sworn testimony supporting the notion that any fraudulent protest was submitted. In short, Kelly Pfost's Declaration, and the Fire District's argument relating to

[3] The Fire District claims that LYRB's recommendation that the Fire District "reserve the right to re-examine the protests" at the end of the Lewis Report grants the Fire District unlimited and unbridled authority to conduct investigations. Obviously, LYRB's recommendation has no force of law and does not lend any legitimacy to an investigation with no end.

allegedly fraudulent protests, is based entirely on inadmissible hearsay. As such, the Court may consider neither the Declaration of Ms. Pfost, nor the assertion that there are fraudulent protests. For that reason, the Fire District's Cross-Motion for Summary Judgment must be denied.

3. Fire District's Attempt to Remove Alleged Proxy Protests, after they have already Been Counted must be Rejected.

In the original Lewis Report, Ms. Lewis counted in the total protests that were considered to be submitted by proxy. See, Pfost Declaration, at 7. ("Further, any protests that were filed by "proxy" were included in the [original Lewis Report] tally.") Presumably, these protests were originally counted to avoid challenge from the owner submitting the protest. However, now that the Court has held that Plaintiffs' protests must be counted, Ms. Lewis and her team have elected to attempt to exclude those same protests. The asserted dollar value of these proxy votes is $3,054,144 or .25% of the market value of the Assessment Area. As noted above, Utah Code prohibits the Fire District from withdrawing protests that have been submitted and counted. This Court should order the Fire District to count these protests, which were included in Ms. Lewis' original total of valid protests. Furthermore, the Fire District should be estopped, in fairness, from including protests in the total, presumably for strategic reasons, but then attempting to exclude those same protests when it decides to reverse its prior position in order to secure its desired outcome.

In addition, Ms. Pfost's Declaration regarding the purported confirmation that some protests were submitted by "proxy" is based upon inadmissible hearsay. As such, for the reasons set forth above, Ms. Pfost's Declaration and the Fire District's argument regarding removal of alleged proxy protests may not be considered in the context of the motion for summary judgment.

4. Fire District's Attempt to Remove Protests Where There Is No Evidence or Suggestion of Fraud Must be Rejected.

According to the Declaration of Ms. Pfost, on February 5, 2014, at a Wasatch County Council public meeting, the Council voted to exclude otherwise valid protests of at least 90 property owners, merely because they did not respond to letters from LYRB. *See* Declaration of Kelly Pfost *at* ¶ 30. The Fire District, offers the following explanation for this extreme and improper action:

> Nine property owners received and accepted certified letters. They did not respond verifying their protests were valid. Eighty-one property owners who purportedly submitted protests received three letters (sent first class mail) which they failed to respond to or confirm their protests were valid. The District determined, in good faith, to exclude these 90 protests because if the property owner wished to have their protest counted, they would have verified their protest. Excluding these additional protests further reduced the market value of valid protests below fifty-percent.

(Emphasis added). See, Fire District Motion at 34.

To clarify, the Fire District has zero proof of fraud related to these 90 protests. Yet, shockingly, it has made the unilateral decision to remove and disqualify these legitimate protests. Utah law requires the Fire District to count all timely filed protests. *See* Utah Code Ann. § 11-42-201(2)(b). On or before November 8, 2012, property owners submitted timely filed protests against the creation of the Assessment Area in accordance with Utah law. *See* Utah Code Ann. § 11-42-203(1)(a). Accordingly, the 90 property owners submitted their timely filed protests in accordance with Utah law. The Fire District has no valid basis to exclude the legitimate and valid protests of 90 property owners. The Court should order the Fire District to include these protests in the total.

The sole basis for removing and disqualifying the 90 protests from the protest total is that

the property owners did not respond to a letter or letters from LYRB. The District makes the unsupported leap of logic that "if the property owner wished to have their protest counted, they would have verified their protest." Obviously, the property owners did the only thing required to have their protest counted, they submitted a protest. It is very important to emphasize, again, Ms. Lewis and her team have no statutory or other authority to conduct an ongoing investigation or to remove or disqualify protests. More importantly, property owners had and have no obligation to respond to the tide of letters from the Fire District's inside consulting firm. There is no statute, court order, or other basis to require any response from home owners. Accordingly, the fact that a property owner did not respond to a letter from LYRB – for whatever reason – provides no basis whatsoever to withdraw a valid protest submitted by a property owner.

The Council's vote to exclude protests was unauthorized and invalid and represents an appalling additional violation of due process. The Fire District has deprived the 90 Property Owners of their right to be heard in a meaningful way by unilaterally and unlawfully removing at least 90 validly filed protests without permission or authority.

B. Additional Material Facts Preclude the Entry of Summary Judgment.

The nature of Plaintiffs' claims are quite limited, they are focused solely on the Fire District's refusal to count their valid protests. However, there is a companion case that challenges the creation of the Assessment Area on several additional grounds, each of which preclude summary judgment on the issue of whether the Assessment Area is legitimate and valid.

1. <u>The Assessment Area is Invalid and Void Due to the Failure to Count Additional Protests.</u>

The spreadsheet created by Ms. Lewis identified one "late" protest that was excluded for parcel number 00-0020-3698, which is owned by Phillip Carlucci. This property has a market

value of $1,018,445. *See*, Exhibit O. There is no reference to the protest for the Carlucci property on the County's website, no indication of when this protest was received and no rationale given for the determination that it was submitted after the deadline.

Ms. Lewis, failed to count valid protests submitted for properties located in the Assessment Area valued at over $2.9 Million. For example, Stitching Mayflower Recreational Fonds and Stitching Mayflower Mountain Fonds ("Stitching Mayflower") owns over 50 separate parcels of property located in Wasatch County. *See* Declaration of Arie Bogerd, January 2, 2013 ("Bogard Declaration"), a copy of which is attached as Exhibit K, at ¶ 3. Arie Bogerd, the Manager of Stitching Mayflower, is aware that the County expressed an intent to levy an assessment for the creation of the Assessment Area. *See id*. at ¶ 4.

On or about November 8, 2012, Mr. Bogerd submitted a protest to the Assessment Area for each property owned by Stitching Mayflower. *See id*. at ¶ 5, Exhibit 1 Wasatch County failed to count the protests submitted for at least five properties owned by Stitching Mayflower, including properties designated by the County as 00-0007-1576, 00-0007-3465, 00-0007-3598, 00-0007-3606 and 00-0007-3622 (the "Mayflower Excluded Properties"). *See id.* at ¶ 6. The Mayflower Excluded Properties are located in Wasatch County and are within the boundaries of the Assessment Area. *See id.* at ¶ 7. The total market value for the Mayflower Excluded Properties exceeds $2,580,000. *See id*. at ¶ 8, Exhibit 2. Stitching Mayflower, through Mr. Bogerd, intended to protest the Assessment Area for each of its properties and all protests should have been counted. *See id*. at ¶ 9. The Cummings family and entities controlled by that family own many separate parcels of real property located in Wasatch County, Utah. *See* Declaration of David Cummings, January 9, 2013 ("Cummings Declaration"), a copy of which is attached as Exhibit L, at ¶ 2. On or about November 8, 2012, the Cummings family submitted protests for

each property owned by them and/or related entities. *See id*. at ¶ 2, Exhibit 1. Based upon a spreadsheet posted on the County's Website, the County failed to count the protests submitted for at least three properties owned by the Cummings family and/or related entities (the "Cummings Excluded Properties"). *See id.* at ¶ 5. The Cummings Excluded Properties are located in Wasatch County and are within the boundaries of the Assessment Area. *See id*. at ¶ 6. The total market value for the Cummings Excluded Properties is $323,498. *See id.* at ¶ 7, Exhibit 2.

The Cummings family intended to protest the Assessment Area for each of the excluded properties and they should have been counted. *See id.* at ¶ 8. Given the market values of the Mayflower Excluded Properties and the Cummings Excluded Properties, and given the very slim margin of victory for the Assessment Area, if the protests regarding the Mayflower Excluded Properties and the Cummings Excluded Properties had been counted, the creation of the Assessment Area would have failed. The County appears to have excluded many protests submitted by property owners that submitted protests for more than one property. The Mayflower Excluded Properties and the Cummings Excluded Properties are examples of this practice.

A review of the spreadsheet created by Ms. Lewis demonstrates that the market value of properties that fall into this category – multiple properties owned by one party, but only some properties counted – exceeds $26 million.

2. <u>The Assessment Area is Invalid And Void Due to the Manner in Which it was Created.</u>

Property owners in the Assessment Area, including Plaintiffs, already pay for fire protection through property taxes. The County wants Plaintiffs to pay a second tax for fire

protection that it now labels as an "assessment." The Act defines "Assessment Area" as an area that is designated for the purpose of financing the costs of improvements, operation and maintenance, or economic promotion activities that benefit property within the area. *See* Utah Code Ann. § 11-42-102(2). The Act also defines "Benefitted Property" as property within an assessment area that directly or indirectly benefits from improvements, operation and maintenance, or economic promotion activities. *See* Utah Code Ann. § 11-42-102(9). Additionally, the Act states that "[a]ssessments shall be fair and equitable according to the benefit to the benefitted property from the improvement." *See* Utah Code Ann. §11-42-409(5)(a). In light of these provisions, it is clear that the boundaries of the Assessment Area do not comply with the Act.

The Notice of Intent indicates that the Assessment Area is being created to pay for operation and maintenance of the Station. However, the Station was not built to service the needs or demands of owners of property in the Jordanelle area. Rather, the Station was constructed because the County was contractually obligated to do build it under the Deer Crest Agreement. Similarly, the Station was created to be a "full time" station so that the County could satisfy its obligations under the Deer Crest Agreement.

Additionally, the evidence demonstrates that most of the calls responded to by the Station do not benefit owners of property in the Jordanelle area, but rather residents of the Heber Valley. This evidence proves that the residents of the Heber Valley receive substantial benefit from the Station. Thus, the Assessment Area cannot comply with the Act unless it includes property located in the Heber Valley. It is undisputed that this is not the case. Consequently, it is substantially likely that the Court will deem the boundaries of the Assessment Area violate the Act and are arbitrary and capricious. On that basis alone, there is a substantial likelihood that

Plaintiffs will prevail on the merits of their underlying claims.

III. THE FIRE DISTRICT'S REQUEST FOR DISCOVERY SHOULD BE REJECTED.

Following the Order holding that Plaintiffs' protests were timely, the Fire District saw the writing on the wall. But, rather than accepting that the Assessment Area had failed, the Fire District instructed Ms. Lewis and her team to work to attempt to take protests off the board. And, it is evident that the Fire District is not content to stop at protests that are allegedly fraudulent, the Fire District is attempting to pad its numbers by disqualifying 90 valid protests merely because the property owners did not respond to LYRB's fishing expedition. The Fire District is now seeking to extend and expand this fishing expedition into this litigation and apparently is seeking to conduct a never-ending investigation to avoid a ruling that the Assessment Area is invalid and void.

The Court can grant Plaintiffs' Motion for Summary Judgment, based upon the undisputed facts. The only evidence offered by the Fire District in Opposition to Plaintiffs' Motion is inadmissible hearsay. And, the Fire District's argument – that it is allowed to conduct an investigation and disqualify protests that have been submitted and already counted – lacks any statutory or other support. The Fire District's attempt to avoid the implication of the simple addition of Plaintiffs' valid protests to the protest total set forth in the original Lewis report should be rejected.

IV. ALTERNATIVELY, THE COURT SHOULD GRANT PLAINTIFFS' ADDITIONAL TIME TO CONDUCT DISCOVERY.

If, however, the Court is not inclined to grant Plaintiffs' Motion for Summary Judgment, Plaintiffs request that the Court grant their Rule 56(f) Motion so that they can conduct additional discovery. Rule 56(f) empowers the Court to deny or continue the Fire District's Motion to allow

Plaintiffs a fair opportunity to conduct the discovery they need to oppose the Motion. *See* UTAH R. CIV. P. 56(f).[4] As noted above, the only evidence that has been submitted in support of the assertion that "fraudulent protests" exist is in the form of inadmissible hearsay. If the Court is going to give any credence to the notion that there were fraudulent protests, Plaintiffs are entitled to conduct discovery into the alleged fraud and to determine whether property owners meant to say there was fraud, or were coerced and intimidated by the Fire District into withdrawing otherwise valid protests. This discovery includes taking the depositions of property owners that purportedly withdrew their protests before the November 8, 2012 deadline, property owners that have been identified as submitting protests by proxy and protest owners that purportedly confirmed that their protests were fraudulent.

In addition, to date, Plaintiffs have not been privy to LYRB's accounting, and Plaintiffs should be granted leave to conduct written discovery and depositions in this and the companion case regarding: 1) the number and identity of valid protests that were not and have not been counted by the Fire District; 2) the basis for the representation that property owners withdrew protests before the November 8, 2012 deadline; 3) the basis for attempting to remove and disregard protests that are alleged to be "proxies"; 4) the basis for attempting to remove and disregard protests alleged to be "fraudulent"; 4) procedural irregularities in formation of the Assessment Area; and 5) flaws in the creation of Assessment Area, including its geographic boundaries. In accordance with Rule 56(f), Plaintiffs submit the Declaration of Counsel to present specific facts showing why they cannot, at this time, present matters essential to their Opposition. See,

[4] Rule 56(f) of the Utah Rules of Civil Procedure states: "Should it appear from the affidavits of a party opposing a motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Plaintiffs' Rule 56(f) Declaration of Counsel, March 21, 2014, attached as Exhibit G.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment and deny the Fire Districts' Cross-Motion for Judgment.

REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request oral argument on its Motion for Summary Judgment.

DATED March 21, 2014

WRONA GORDON & DUBOIS, P.C.

/s/ Scott A. DuBois
Scott A. DuBois
Jarom B. Bangerter
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of March, 2014, I caused the foregoing document to be served via the Court's ECF system upon the following:

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/s/ Kim Cassett