

MEMORANDUM

Agenda Item No. 8(A)(3)

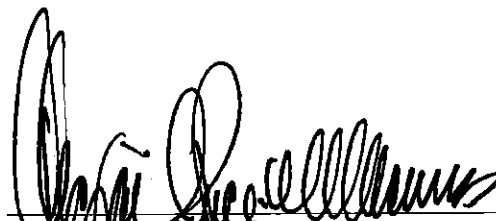
TO: Honorable Chairwoman Audrey M. Edmonson
and Members, Board of County Commissioners

DATE: June 4, 2019

FROM: Abigail Price-Williams
County Attorney

SUBJECT: Resolution approving Settlement Agreement between Miami-Dade County and the Insurance Company of the State of Pennsylvania and National Union Fire Insurance Company of Pittsburgh, Pennsylvania, related to the provision of insurance for the north terminal development project, in the amount of \$3,300,000.00, for the dismissal of the lawsuit, mutual release of all claims, and waiver of accrued interest; and authorizing the County Mayor to execute the Settlement Agreement and exercise all rights contained therein

The accompanying resolution was prepared by the Aviation Department and placed on the agenda at the request of Prime Sponsor Vice Chairwoman Rebeca Sosa.



Abigail Price-Williams
County Attorney

APW/uw

Memorandum



Date: June 4, 2019

To: Honorable Chairwoman Audrey M. Edmonson,
and Members, Board of County Commissioners

From: Carlos A. Gimenez
Mayor

A handwritten signature in black ink, appearing to read "Carlos A. Gimenez".

Abigail Price-Williams
County Attorney

A handwritten signature in black ink, appearing to read "Abigail Price-Williams".

Subject: Settlement and Mutual Release Agreement between Miami-Dade County and The Insurance Company of the State of Pennsylvania and National Union Fire Insurance Company of Pittsburgh, Pennsylvania

Recommendation

It is recommended that the Board of County Commissioners (the "Board") approve the attached Resolution authorizing the County Mayor or County Mayor's designee to execute the Settlement and Mutual Release Agreement (the "Settlement Agreement") (Attachment A) by and between Miami-Dade County (the "County") and The Insurance Company of the State of Pennsylvania and National Union Fire Insurance Company of Pittsburgh, Pennsylvania (collectively, the "Insurers").

Scope

MIA is located primarily within District 6, which is represented by Commissioner Rebeca Sosa; however, the impact of this item is countywide as MIA is a regional asset.

Fiscal Impact/Funding Source

Under this Settlement Agreement, the County will pay the Insurers \$3.3 million of the \$6.2 million in dispute. The funding source is Aviation Revenue Bonds.

Track Record/Monitor

Sergio San Miguel, Miami-Dade Aviation Department ("MDAD") Chief Financial Officer, will oversee the implementation of this Settlement Agreement.

Background

In 1989, American Airlines ("AA") decided to schedule traffic from its large domestic United States route system through Miami International Airport ("MIA") and into the Caribbean and Central/South America, resulting in the creation of an international passenger hub at MIA. The North Terminal Development ("NTD") project evolved as a result of this design growth. The detailed program that resulted from AA's design and planning efforts called for the reconfiguration of over one-half of the terminal area at MIA, requiring complex phasing and scheduling, at a cost in excess of \$1,000,000,000 (one billion dollars). Although AA had the responsibility of designing and constructing the NTD, the County later stepped in and took control of all aspects of the project, including insurance coverage.

MDAD, through its Owners Controlled Insurance Program (“OCIP”) purchased commercial general liability, workers’ compensation and employers’ liability, and deductible buy back insurance policies (the “Policies”) from Insurers to cover the contractors and subcontractors working on NTD. The Policies covered the initial period of December 31, 2007 to December 31, 2011 (the “Initial Period”). The County prepaid estimated premiums to the Insurers for the Initial Period of \$22,093,554 which was based on the agreed calculation of 13.5 percent of an estimated payroll of \$163 million during the Initial Period. The parties contractually agreed that the final insurance premium to be paid by the County would be calculated based upon full and complete annual audits of the payrolls of the contractors and subcontractors that provided labor for NTD, and the total time to complete NTD projects during the Initial Period. These audits were to be conducted at the end of each year, however Insurers failed to conduct such required audits. In 2014, Insurers demanded additional premium payments for the Initial Period in the total amount of \$9,235,449. MDAD analyzed the information, and recognized that it would potentially owe additional premiums as a result of unforeseen conditions and increased scope of work during the Initial Period. However, MDAD disputed the demand for additional premiums, arguing that Insurers failed to properly audit the contractors and subcontractors. On July 29, 2016, MDAD and Insurers agreed that (i) Insurers would provide certain audit and payroll materials for verification of additional premium payments demanded, and (ii) MDAD would make a good faith payment of \$4,000,000, which would be refunded in the event MDAD overpaid.

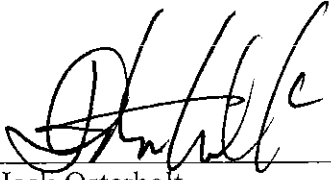
Notwithstanding the additional documentation provided, the dispute continued, and Insurers sought a balance of \$5,235,449 in premiums, plus accrued interest of approximately \$1,000,000. Insurers ultimately filed a lawsuit in the Southern District of New York (the “Lawsuit”), which sought to compel MDAD to arbitrate their disputes and in the alternative alleged affirmative claims against MDAD to pay the \$5,235,449 plus accrued interest. The County asserted affirmative defenses and a counterclaim against Insurers for breach of contract on grounds that Insurers failed to properly audit all records related to the Policies to determine the final premium payment either owed to Insurers or due to the County as a refund. The court ordered that all claims and counterclaims were subject to arbitration.

MDAD actively prepared for arbitration by, among other things, retaining an expert to review certain documents, including Insurers’ audits, and NTD contractors’ and subcontractors’ payroll data. The expert also prepared written reports, spreadsheets and other documents analyzing the audits and payroll data. In the meantime, the parties continued settlement discussions.

In consideration of the expert’s analysis of the Insurers’ audits, the ultimate uncertainty and cost of arbitration, and the potential exposure to the County of approximately \$6.2 million, MDAD recommends the approval of the Settlement Agreement, the terms of which require: (1) the County to pay to the Insurers \$3.3 million in additional premiums rather than the disputed \$5,235,449 plus accrued interest of roughly \$1,000,000; (2) Insurers to waive their accrued interest claim for approximately \$1,000,000; (3) the County and Insurers to dismiss the Lawsuit with prejudice; and (4) the County and Insurers to mutually release all claims related to the Lawsuit under the Policies, either current or in the future, known or unknown. The

Honorable Chairwoman Audrey M. Edmonson,
and Members, Board of County Commissioners
Page 3

Settlement Agreement also recognizes that neither side admits fault or liability with respect to the claims raised in the Lawsuit.

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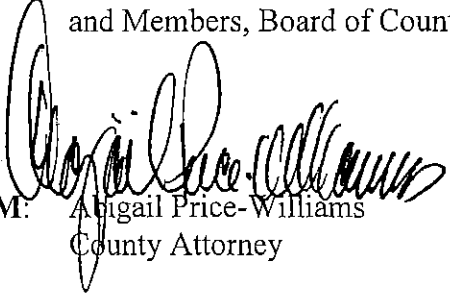
Jack Osterholt
Deputy Mayor



MEMORANDUM
(Revised)

TO: Honorable Chairwoman Audrey M. Edmonson
and Members, Board of County Commissioners

DATE: June 4, 2019

FROM: 
Abigail Price-Williams
County Attorney

SUBJECT: Agenda Item No. 8(A)(3)

Please note any items checked.

- "3-Day Rule" for committees applicable if raised
- 6 weeks required between first reading and public hearing
- 4 weeks notification to municipal officials required prior to public hearing
- Decreases revenues or increases expenditures without balancing budget
- Budget required
- Statement of fiscal impact required
- Statement of social equity required
- Ordinance creating a new board requires detailed County Mayor's report for public hearing
- No committee review
- Applicable legislation requires more than a majority vote (i.e., 2/3's present ____, 2/3 membership ____, 3/5's ____, unanimous ____, CDMP 7 vote requirement per 2-116.1(3)(h) or (4)(c) ____, CDMP 2/3 vote requirement per 2-116.1(3)(h) or (4)(c) ____, or CDMP 9 vote requirement per 2-116.1(4)(c)(2) ____) to approve
- Current information regarding funding source, index code and available balance, and available capacity (if debt is contemplated) required

Approved _____ Mayor

Agenda Item No. 8(A)(3)

Veto _____

6-4-19

Override _____

RESOLUTION NO. _____

RESOLUTION APPROVING SETTLEMENT AGREEMENT BETWEEN MIAMI-DADE COUNTY AND THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, RELATED TO THE PROVISION OF INSURANCE FOR THE NORTH TERMINAL DEVELOPMENT PROJECT, IN THE AMOUNT OF \$3,300,000.00, FOR THE DISMISSAL OF THE LAWSUIT, MUTUAL RELEASE OF ALL CLAIMS, AND WAIVER OF ACCRUED INTEREST; AND AUTHORIZING THE COUNTY MAYOR OR COUNTY MAYOR'S DESIGNEE TO EXECUTE THE SETTLEMENT AGREEMENT AND EXERCISE ALL RIGHTS CONTAINED THEREIN

WHEREAS, this Board desires to accomplish the purposes outlined in the accompanying memorandum, a copy of which is incorporated herein by reference,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA, that this Board:

Section 1. Approves the terms and conditions of the Settlement Agreement between Miami-Dade County and The Insurance Company of the State of Pennsylvania and National Union Fire Insurance Company of Pittsburgh, Pennsylvania, in substantially the form attached hereto and made a part hereof, the amount of \$3,300,000.00 to be paid by the County to the Insurers in exchange for the dismissal of the lawsuit, mutual release of all claims, and waiver of accrued interest related to the Policies, either current or in the future, known or unknown.

Section 2. Authorizes the County Mayor or the County Mayor's designee to execute the Settlement Agreement for and on behalf of Miami-Dade County and to exercise all rights contained in the Agreement.

The foregoing resolution was offered by Commissioner
who moved its adoption. The motion was seconded by Commissioner
and upon being put to a vote, the vote was as follows:

Audrey M. Edmonson, Chairwoman	
Rebeca Sosa, Vice Chairwoman	
Esteban L. Bovo, Jr.	Daniella Levine Cava
Jose "Pepe" Diaz	Sally A. Heyman
Eileen Higgins	Barbara J. Jordan
Joe A. Martinez	Jean Monestime
Dennis C. Moss	Sen. Javier D. Souto
Xavier L. Suarez	

The Chairperson thereupon declared this resolution duly passed and adopted this 4th day of June, 2019. This resolution shall become effective upon the earlier of (1) 10 days after the date of its adoption unless vetoed by the County Mayor, and if vetoed, shall become effective only upon an override by this Board, or (2) approval by the County Mayor of this resolution and the filing of this approval with the Clerk of the Board.

MIAMI-DADE COUNTY, FLORIDA
BY ITS BOARD OF
COUNTY COMMISSIONERS

HARVEY RUVIN, CLERK

By: _____
Deputy Clerk

Approved by County Attorney as
to form and legal sufficiency.

dsh

Altanese Phenelus
David Stephen Hope

SETTLEMENT AND MUTUAL RELEASE AGREEMENT

This Settlement and Mutual Release Agreement (the "Agreement") is entered into this _____ day of _____, 2019 by and between Miami-Dade County (the "County"), a political subdivision of the State of Florida, and The Insurance Company of the State of Pennsylvania and National Union Fire Insurance Company of Pittsburgh, Pennsylvania, (collectively, the "Insurers").

RECITALS

WHEREAS, the County, through its Miami-Dade Aviation Department's ("MDAD") Owners Controlled Insurance Program ("OCIP"), sought to purchase from Insurers certain commercial general liability, workers' compensation and employers liability, and deductible buy back insurance policies, to cover MDAD, the contractors and subcontractors working on the North Terminal Development Project ("NTD") at Miami International Airport ("MIA");

WHEREAS, the workers' compensation and employers liability, and deductible buy back general liability insurance policies (the "Policies")¹ covered the initial period of December 31, 2007 to December 31, 2011 (the "Initial Period"), but were extended through December 31, 2014 because NTD extended for a period longer than estimated;

WHEREAS, the County paid estimated premiums to the Insurers for the Initial Period amounting in Twenty-Two Million Ninety-Three Thousand Five Hundred Fifty-Four Dollars (\$22,093,554);

WHEREAS, Insurers subsequently demanded additional premium payments for the Initial Period in the total amount of Nine Million Two Hundred Thirty-Five Thousand Four Hundred Forty-Nine Dollars (\$9,235,449);

WHEREAS, on July 29, 2016, the parties entered into an interim agreement requiring (i) Insurers to provide certain audit and payroll materials for the verification of additional premium payments requested, and (ii) the County to make a good faith payment of Four Million Dollars (\$4,000,000) ("Good Faith Payment"), which would be repaid in the event the County overpaid;

¹ The term "Policies" includes the following policies only:

- WC 003-67-9225 (effective 12/31/07 – 12/31/08)
- WC 007-24-5430 (effective 12/31/08 – 12/31/09)
- WC 067-71-2036 (effective 12/31/09 – 12/31/10)
- WC 014-77-0995 (effective 12/31/10 – 12/31/11)
- WC 014-77-1160 (effective 12/31/11 – 12/31/12)
- DBP-001-59-3709 (effective 12/31/07 – 12/31/11)
- GL 001-61-7415 (effective 12/31/07-12/31/11)
- GL 006-98-8414 (effective 12/31/11 – 12/31/12)
- GL 004-52-2502 (effective 12/31/12 – 12/31/13)
- GL 005-14-2769 (effective 12/31/13 – 12/31/14)

WHEREAS, this left a total of Five Million Two Hundred Thirty-Five Thousand Four Hundred Forty-Nine Dollars (\$5,235,449) plus potential interest in the amount of approximately \$1 million still in dispute;

WHEREAS, the dispute persisted and Insurers ultimately filed the lawsuit styled *The Insurance Company of the State of Pennsylvania and National Union Fire Insurance Company of Pittsburgh, P.A. v. Miami-Dade County* (Case No. 1:17-cv-09327) (S.D.N.Y) (the "Lawsuit"), which sought to compel MDAD to arbitrate their disputes and in the alternative alleged affirmative claims against MDAD;

WHEREAS, in the Lawsuit MDAD asserted affirmative defenses and counterclaims against Insurers;

WHEREAS, the Court ordered that all claims and counterclaims were subject to arbitration; and

WHEREAS, Insurers and the County want to avoid the associated expense and uncertainty of arbitration, and therefore desire to amicably resolve their dispute and settle all claims and counterclaims whether current or in the future concerning the Policies, including but not limited to mutual agreements to dismiss with prejudice all claims against each other, as well as an agreement that Insurers waive interest charges, and the County pay Insurers Three Million Three Hundred Thousand Dollars (\$3,300,000) (the "Settlement Payment"),

NOW, THEREFORE, in consideration of the foregoing recitals and following promises, terms, and conditions, and for other good and valuable consideration, the receipt and sufficiency of which the parties acknowledge, the County and Insurers agree as follows:

TERMS AND CONDITIONS

1. Incorporation of Recitals. The parties agree that the above recitals are true and correct and that those recitals are incorporated by reference and form a part of this Agreement.

2. Effective Date. The Effective Date of this Agreement shall be the sooner of (1) the date of the expiration of the County Mayor's veto period subsequent to the approval of this Agreement by the Board of County Commissioners of Miami-Dade County (the "BCC") without the County Mayor vetoing the BCC's resolution approving same or (2) the date on which the County Mayor approves the BCC-approved resolution authorizing the execution of this Agreement. Notwithstanding the foregoing, Insurers covenant not to withdraw their approval of this Agreement, as set forth in Section 3 of this Agreement.

3. County Approval Process. Insurers acknowledge that before the County may settle any claims or enter into any binding contractual obligations pursuant to this Agreement, the County must obtain the approval of the BCC and the subsequent assent of the County Mayor or, if the County Mayor vetoes any legislation approving this Agreement, an override of the County Mayor's veto by the BCC (the "BCC Approval").

a. BCC Approval. Insurers acknowledge that County Resolution No. 130-06 requires that all non-County parties must execute this Agreement before the Agreement may be

placed on the BCC's agenda. Accordingly, Insurers agree to execute this Agreement before the County (the "Insurers' Execution") and as a precondition of the presentation of this Agreement to the County Mayor or County Mayor's designee or to the BCC. After such execution, Insurers (in exchange for sufficient consideration, the receipt of which is acknowledged, and which consideration includes the County Mayor or County Mayor's designee's recommendation of this Agreement to the BCC) agree that neither may withdraw from or modify the terms of its settlement with the County, as presented in this Agreement.

b. The Parties' Obligations Before BCC Approval. Neither party shall be required to file any document compromising any claims it may have against the other party and shall not have released the other party until the Effective Date of this Agreement.

c. Consequence Upon Failure to Obtain BCC Approval. To the extent the BCC does not approve this Agreement, and after all opportunities for BCC reconsideration have passed, the parties shall return to the status quo existing before the parties' preparation of this Agreement, and the fact that the County and Insurers sought to negotiate a resolution to their dispute concerning the Policies, including any supporting documents necessary to present this Agreement to the BCC, shall be inadmissible for all reasons and shall not prejudice any of their pre-existing rights and remedies with respect to each other or any other person or entity.

4. Agreement to Settle; No Admission of Liability. Subject to the terms and conditions of this Agreement, including the County's payment of the Settlement Payment, Insurers and the County hereby agree that the terms of this Agreement, the payment of any monies, or any other action or forbearance taken pursuant to this Agreement shall in no way constitute, nor be construed as, an admission of liability or acknowledgement of the validity of any allegation, finding, or conclusion by Insurers, the County, or their respective agents, but rather are made as a contractual settlement by way of compromise to avoid the expense and uncertainty of further litigation or arbitration.

5. Filing of Joint Stipulations of Dismissal. Within fifteen (15) days of the date the County makes the Settlement Payment as set forth in Section 6, the parties shall file a Joint Stipulation of Dismissal with Prejudice, dismissing all claims and counterclaims in the Lawsuit with prejudice. The Joint Stipulation of Dismissal shall provide that the Court retains jurisdiction to enforce the terms of the Agreement and that each party shall bear its own attorneys' fees and costs.

6. Payment Terms. The County agrees that Insurers shall retain the Good Faith Payment and to pay the Settlement Payment to the Insurers. The Settlement Payment shall be due and payable within thirty (30) days of the Effective Date of this Agreement. For purposes of this Agreement, the County's obligation to make the Settlement Payment shall be considered satisfied upon delivery and permanent clearance of funds of the Settlement Payment in accordance with the foregoing terms. Such payment may be made by wire transfer or mail:

If by mail: The check shall name National Union Fire Insurance Co. of Pittsburgh, PA as the payee, with reference to County of Miami Dade K448075-79 & K632375-78, and sent by express carrier to: 4 Chase Metrotech Center, 7th Floor East Lockbox 10472, Brooklyn, NY 11245. Payment shall be deemed delivered on the date mailed.

If by wire:

Chase Manhattan Bank, 55 Water Street, NY, NY 10005

ABA # 021-000-021

National Union Fire Insurance Co. of Pittsburgh, PA

Reference: County of Miami Dade K448075-79 & K632375-78

Bank A/C # 323-160-387 Phone # 1-877-204-1124

7. **Insurers' Release of the County.** For the consideration and promises made herein, Insurers, together with their parent, affiliates, successors, assignees, subsidiaries and related entities, shareholders, directors, officers, and agents, release and forever discharge the County (including its agents, successors, predecessors, employees, affiliates, subdivisions and assigns) from any and all claims, causes of action, demands, disputes and rights of whatever nature and kind, choate or inchoate, known or unknown, past or future, related to or in any way arising out of the Policies or the claims that were or could have been asserted in the Lawsuit. Notwithstanding the foregoing, Insurers do not release the County for any compulsory counterclaims that could be made in the event the County makes a claim for construction defect under the Policies.

8. **County's Release of Insurers.** For the consideration and promises made herein, the County releases and forever discharges Insurers (including their agents, member companies, successors, predecessors, employees, affiliates and assigns) from any and all claims, causes of action, demands, disputes and rights of whatever nature and kind, choate or inchoate, known or unknown, past or future, related to or in any way arising out of the Policies or the claims that were or could have been asserted in the Lawsuit. Notwithstanding the foregoing, the County does not release Insurers for any claims that could be made under the Policies in the event of a construction defect.

9. **Parties to Bear Their Own Costs and Fees.** Each party shall bear its own attorneys' fees and costs in any action, including through all stages of appellate review, relating to or arising out of the Lawsuit or the enforcement of the terms of this Agreement.

10. **Florida Law Applies; Exclusive Venue.** This Agreement shall be construed under the laws of the State of Florida without regard to its choice of law provisions. Venue for any dispute arising out of this Agreement shall lie exclusively in the United States District Court for the Southern District of New York.

11. **Entire Agreement; Modification.** This Agreement together with all documents required to be executed hereunder constitutes the entire agreement and understanding between the parties to this Agreement with respect to the subject matter of this Agreement. No supplement, modification, or amendment to this Agreement shall be binding unless it is executed in writing by all parties. For the avoidance of doubt, nothing in this Agreement modifies, supplants and amends in any way any other policy or contract between the parties relating to matters other than the Policies.

12. **Rule of Construction; Opportunity to Review.** The parties represent and agree that they have participated equally in the negotiation of the terms and provisions set forth in this Agreement and that no presumptions or inference shall apply against any party hereto to its construction. The parties declare that (a) they have completely read the terms of this Agreement, (b) they have discussed the terms of the Agreement with legal counsel of their choice, and (c) they fully understand and voluntarily accept the terms for the purpose of making a full and final compromise, adjustment and settlement of claims.

13. **Successors and Assigns.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, representatives, agents, attorneys, officers, directors, predecessors, affiliates, parent, subsidiaries, successors or assigns in connection with any legal action arising out of the Agreement.

14. **Authority to Execute and Bind.** By executing this Agreement the undersigned warrant and represent that they are authorized to enter into this Agreement and empowered to bind their respective parties to these terms and, where applicable, their parent, affiliates, subsidiaries, successors, and assignees and related entities. Further, the parties represent that they have not assigned any of their respective rights or claims subject of or to this Agreement to any third party.

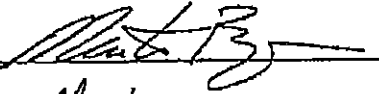
15. **Captions.** The captions or headings in this Agreement are for convenience only and in no way define, limit, or describe the scope or intent of any provisions of this Agreement.

16. **Severability.** The Parties have attempted to create an Agreement that is lawful and enforceable in all respects. The validity of this Agreement shall not be affected by any subsequent changes in federal, state, or county law, whether through legislation or judicial interpretation, which create, eliminate or change the rights and obligations of the parties. Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law. However, if any provision of this Agreement is held to be invalid, void or unenforceable, the balance of the provisions shall, nevertheless, remain in full force and effect and shall in no way be affected, impaired or invalidated.

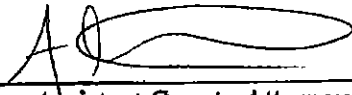
17. **Counterparts; Electronic Signatures.** The parties agree that this Agreement, and any and all other documents in connection with this Agreement, may be executed in one or more counterparts, each of which shall be deemed an original but all of which shall together constitute one and the same Agreement. This Agreement may be executed as facsimile, email, or electronic originals and each copy of this Agreement bearing the facsimile, email, or electronic transmitted signature of any party's authorized representative shall be deemed to be an original.

IN ACCEPTANCE WHEREOF, Miami-Dade County and The Insurance Company of the State of Pennsylvania and National Union Fire Insurance Company of Pittsburgh, Pennsylvania have set their respective hands as of the date and year appearing by their respective signatures.

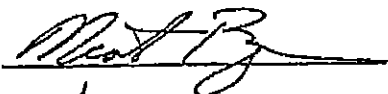
The Insurance Company of the State of Pennsylvania

By: 
Print: Martin Bogue
Title: Asst Secretary
Dated: 3/7/19

Miami-Dade County, Florida

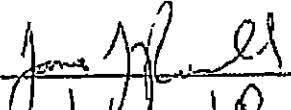
By: _____
Print: _____
Title: _____
Dated: _____
By: 
Assistant County Attorney
As to Form and Legal Sufficiency

National Union Fire Company of Pittsburgh, Pennsylvania

By: 
Print: Martin Bogue
Title: Asst Secretary
Dated: 3/7/19

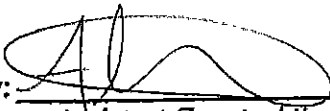
IN ACCEPTANCE WHEREOF, Miami-Dade County and The Insurance Company of the State of Pennsylvania and National Union Fire Insurance Company of Pittsburgh, Pennsylvania have set their respective hands as of the date and year appearing by their respective signatures.

The Insurance Company of the State of Pennsylvania

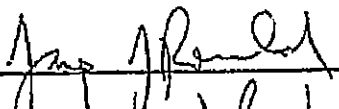
By: 
Print: James J. Rowland
Title: V.P. Collections
Dated: 3/6/19

Miami-Dade County, Florida

By: _____
Print: _____
Title: _____
Dated: _____

By: 
Assistant County Attorney
As to Form and Legal Sufficiency

National Union Fire Company of Pittsburgh, Pennsylvania

By: 
Print: James J. Rowland
Title: V.P. Collections
Dated: 3/6/19