

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
M. RABE,) OTA NO. 230813982
)
)
) APPELLANT.
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TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Wednesday, June 19, 2024

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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IN THE MATTER OF THE APPEAL OF,)
M. RABE,) OTA NO. 230813982
APPELLANT.)
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Transcript of Electronic Proceedings,
taken in the State of California, commencing
at 2:33 p.m. and concluding at 3:03 p.m. on
Wednesday, June 19, 2024, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Administrative Law Judge: SUZANNE BROWN

For the Appellant: M. RABE

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD

ANDREA WATKINS
CYNTHIA KENT

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-2 were received into evidence at page 11.)

(Department's Exhibits A-I were received into evidence at page 12.)

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California; Wednesday, June 19, 2024

2:33 p.m.

JUDGE BROWN: We are on the record in the Appeal of M. Rabe, OTA Case Number 230813982. Today is Wednesday, June 19th, 2024, and it is approximately 2:33 p.m.

My name is Suzanne Brown. I'm the Administrative Law Judge or ALJ who will be conducting the hearing for this case. This case is being heard by a single Administrative Law Judge under OTA's Small Case Program.

First, I will ask each party -- each participant to identify themselves for the record. I will start by asking each of the Franchise Tax Board's representatives to please identify themselves.

MS. WATKINS: This is Andrea Watkins with the Franchise Tax Board.

MS. KENT: And I'm Cynthia Kent with the Franchise Tax Board.

JUDGE BROWN: Thank you both very much. And if I can ask Appellant and his witness to identify themselves as well.

MR. RABE: Yes. My name is Michael Rabe.

MRS. RABE: Hi. I'm Christine Rabe, his -- his wife.

1 JUDGE BROWN: All right. Thank you both very
2 much. Thank you all very much.

3 I will note that this hearing is being conducted
4 today before the Office of Tax Appeals which we also refer
5 to as OTA. OTA is not a court but is an independent
6 appeals body. OTA is staffed by tax experts and is
7 independent from the state's tax agencies, including being
8 independent from the Franchise Tax Board. Because the
9 Office of Tax Appeals is a separate agency from FTB,
10 arguments and evidence heard previously before FTB are not
11 necessarily part of the record here at OTA.

12 OTA's written opinion for this appeal will be
13 based upon the briefs the parties submitted, the exhibits
14 that will be admitted into evidence, and the hearing
15 record that we will hear today. I have read everything
16 that the parties have submitted thus far, including the
17 exhibits. And I will remind everyone as the ALJ in this
18 case, I do not engage in ex parte communications with
19 either party.

20 Now, a few weeks ago on May 22nd, we had a
21 prehearing conference in this matter, and I issued a
22 prehearing minutes and orders where we -- that confirmed
23 everything we talked about and confirmed what the issues
24 are. And I'm just going to confirm them here again today.
25 There are two issues. The first is whether Appellant has

1 established reasonable cause to abate the late-filing
2 penalty imposed under Revenue & Taxation Code
3 section 19131 for the 2020 tax year; and the second issue
4 is whether Appellant has established reasonable cause to
5 abate the demand penalty imposed Revenue & Taxation Code
6 section 19133, also for the 2020 tax year.

7 Let me first confirm with Appellant.

8 Is that your understanding of the issues?

9 MR. RABE: Yes, Your Honor.

10 JUDGE BROWN: Thank you.

11 And let me ask Franchise Tax Board, likewise, is
12 that your understanding of the issues?

13 MS. WATKINS: Yes, that's correct.

14 JUDGE BROWN: Okay. Thank you.

15 I want to briefly discuss the exhibits, and then
16 I will admit the exhibits into evidence. Both parties
17 have submitted proposed exhibits that are proposed for
18 admission into the record. And as I explained during the
19 prehearing conference, our regulations require that the
20 proposed exhibits must be submitted at least 15 days in
21 advance of the hearing.

22 First I'm going to address Appellant's exhibits,
23 and then afterwards I will address FTB's exhibits.

24 Appellant has submitted exhibits that I have marked as
25 Exhibits 1 and 2. Exhibit 1 is a Department of Veterans

1 Affairs report of a medical examination, and Exhibit 2 is
2 FTB's claim for refund denial.

3 And I believe previously FTB indicated that it
4 did not have any objections to those exhibits being
5 admitted.

6 But I wanted to ask, Mr. Rabe, previously you
7 stated that you were going to be submitting additional
8 exhibits, but I see we did not receive any. Did you send
9 us anything?

10 MR. RABE: Yes. Yes, ma'am. Yes, ma'am. I
11 requested my medical records, and they went to an old
12 address. So I wasn't able to secure them in time to get
13 them over to you.

14 JUDGE BROWN: Okay. So you did not send them to
15 us?

16 MR. RABE: I did not send them.

17 JUDGE BROWN: Okay.

18 MR. RABE: I have them here. I have all the
19 exhibits that I was going to send. But, yeah, I was not
20 able to send them.

21 JUDGE BROWN: Okay. Can I ask how many pages are
22 we talking about?

23 MR. RABE: Really, it's just -- it's really just
24 one page. It's an additional assessment from my primary
25 care physician just, you know, really just indicating what

1 I've already indicated that I'm, you know, a housebound
2 disabled veteran. So it's just another form, ma'am.
3 It's -- it's -- it would be in addition to that.

4 JUDGE BROWN: Okay. Let me ask. First, are
5 you -- do you want to submit this document into evidence
6 if I gave you an extra 30 days to send it to --

7 MR. RABE: Yes, ma'am.

8 JUDGE BROWN: -- to my office?

9 MR. RABE: Yes. Yes, ma'am. I would like that.

10 JUDGE BROWN: And let me ask FTB.

11 Does FTB have any objection if we hold the record
12 open to allow Appellant to submit this medical record into
13 evidence?

14 MS. WATKINS: No objection.

15 JUDGE BROWN: Okay. So what I'm going to say is,
16 Appellant, if you can send this document to OTA and to FTB
17 as soon as you can, I will hold the record open for
18 30 days so that we can consider it. Can you send it by
19 email, or you want to send it by U.S. mail?

20 MR. RABE: I could send it. I could send it
21 both, yeah.

22 JUDGE BROWN: Okay.

23 MR. RABE: I can certainly send it email. I'll
24 send it email today.

25 JUDGE BROWN: Okay. Thank you.

1 Appellant had also indicated that you were going
2 to be submitting additional tax documents to show that you
3 had filed for the 2020 tax year at issue, but I have
4 not --

5 MR. RABE: Yes. I --

6 JUDGE BROWN: We have not received anything.

7 MR. RABE: I -- I have -- I have that as well
8 here. I have my 2020 tax return. And I can send that via
9 email as well, if I'm able.

10 JUDGE BROWN: Okay. FTB, do you have objection
11 to Appellant submitting these documents?

12 MS. WATKINS: I don't have an objection.
13 However, as I noted in the prehearing conference, if we
14 did have a copy of that 2020 return, the penalties may be
15 adjusted if the return is accepted. So it could change
16 the outcome.

17 JUDGE BROWN: Right. I understand. But we won't
18 know until we see the document.

19 So I don't see any reason to hold off on having
20 the hearing today. I will hold the record open for
21 Appellant submit both the medical record he identified and
22 the 2020 tax documents, but we will proceed with the
23 hearing. And then once we receive the documents from
24 Appellant, I will give FTB 30 days to respond.

25 Is that acceptable to FTB?

1 MS. WATKINS: Yes, that would be fine.

2 JUDGE BROWN: Okay. Thank you.

3 All right. Mr. Rabe, is all of that clear that
4 you're going to submit both your medical record and your
5 2020 tax documents to OTA and to FTB?

6 MR. RABE: Yes, Your Honor. That's very clear.

7 JUDGE BROWN: Okay. Thank you.

8 Oh, and will mention as well, Appellant, you can
9 feel free to redact, meaning blackout your social security
10 number when you send these documents. I think that I will
11 leave that up to you.

12 MR. RABE: I -- I will -- I will redact that,
13 ma'am. Yes.

14 JUDGE BROWN: Okay. All right. So at the
15 moment, for Appellant's exhibits, the only documents I can
16 admit are Exhibits 1 and 2.

17 And I'll confirm FTB has no objection to
18 admitting those documents into evidence; correct.

19 MS. WATKINS: That's correct.

20 JUDGE BROWN: Thank you. Then I will admit
21 Appellant's Exhibits 1 through 2 into evidence.

22 (Appellant's Exhibits 1-2 were received
23 in evidence by the Administrative Law Judge.)

24 JUDGE BROWN: Now, as I said, I'm holding the
25 record -- we'll hold the record open for Appellant to

1 submit the additional documents that we identified.

2 Next, I'm going to move on to addressing and
3 admitting FTB's exhibits. Previously, we received --
4 first, we received FTB's Exhibits A through H. And then
5 about June 3rd we received FTB's Exhibit I, which is
6 Appellant's filing history.

7 Can I ask, Mr. Rabe, do you have -- let me ask
8 first. Did you receive Exhibit I, the most recent
9 document that FTB submitted?

10 MR. RABE: Yes. I believe I did, ma'am.

11 JUDGE BROWN: Okay. Do you have any objection to
12 me admitting FTB's Exhibits A through I into evidence?

13 MR. RABE: No, ma'am.

14 JUDGE BROWN: Okay. Then I will admit FTB's
15 Exhibits A through I into evidence.

16 (Department's Exhibits A-I were received in
17 evidence by the Administrative Law Judge.)

18 JUDGE BROWN: All right. Now that all of the
19 exhibits that we have are admitted, I will move on to
20 talking about the witness testimony today. FTB is not
21 calling any witnesses, and Appellant plans to testify and
22 is also calling his wife Christine Rabe as a witness. I
23 will just remind both of the witnesses that we will need
24 you to speak one at a time so that the stenographer can
25 hear exactly what you're saying. Because when two people

1 talk at the time, it is not clear what's being said.

2 After the witnesses testify, both FTB and I will
3 have an opportunity to ask them questions. Because FTB is
4 not calling any witnesses to testify, they won't have any
5 witnesses for examination. But after FTB's presentation,
6 I may have questions for FTB. And the order of events is
7 that we'll hear Appellant's presentation first, including
8 testimony. Then we will hear FTB's presentation, and then
9 I will allow five minutes or so for Appellant to make a
10 rebuttal.

11 Does anyone have any questions about anything
12 before we begin with the parties' presentations? Okay.
13 If not, we can proceed with Appellant's presentation.

14 Before we begin, I will swear in both
15 Mr. and Mrs. Rabe as witnesses.

16
17 M. RABE,
18 produced as a witness, and having been first duly sworn by
19 the Administrative Law Judge, was examined, and testified
20 as follows:

21
22 C. RABE,
23 produced as a witness, and having been first duly sworn by
24 the Administrative Law Judge, was examined, and testified
25 as follows:

1 JUDGE BROWN: Okay. Then, Mr. Rabe, you can
2 begin your presentation. And you may testify, and you may
3 have Mrs. Rabe testify whenever you are ready.

4 MR. RABE: Great. Thank you.

5

6 PRESENTATION

7 MR. RABE: You know, I was just hoping to convey
8 that we had a very difficult time. I think our history,
9 in terms of filing, is -- is quite -- quite good. You
10 know, I believe I was late in 2016 in a year where I had
11 both a heart attack and a pulmonary embolism and was
12 clearing more than 20 clots. My -- my -- as you see with
13 the medical information that I've sent in, I have a
14 genetic disorder which I was diagnosed in 2015. My memory
15 is pretty bad, so I've made -- may not be entirely
16 accurate on that. But it's -- it's impacted my entire
17 life, including my filing of my taxes, as you see.

18 I certainly was late in filing, but I believe I
19 have good cause for having been late. That year we
20 suffered both a -- a huge fire and was displaced from our
21 home for several weeks because of these wild fires that we
22 have up here in Northern California. And, you know, I
23 think aside -- putting that aside, I believe that we would
24 have been certainly on time.

25 Our -- our tax person is in Chico, California,

1 and we live about an hour and 40 minutes away from Chico.
2 And when we were displaced, we were displaced to Roseville
3 area, outside of Sacramento, and -- and were unable to get
4 to her in a timely fashion to file. And -- and I believe
5 for me that's -- that's my entire testimony.

6 Thank you for the opportunity.

7 JUDGE BROWN: All right. And, Ms. Rabe, do you
8 want to testify as well? Or I don't know if you're going
9 to be testifying in a narrative format or if Mr. Rabe will
10 be asking you questions.

11 MRS. RABE: I just want to say that -- that year
12 was a very hard year. Michael was in and out of the
13 hospital in the emergency room suffering a heart attack
14 and receiving stents and had a pulmonary embolism. So we
15 were very distracted, along with the fire. So I just
16 wanted to -- to agree with everything he said, and I was
17 with him at that time.

18 JUDGE BROWN: All right. Thank you both. I
19 have some -- well, first I will say, does that complete
20 Appellant's presentation?

21 MR. RABE: Yes, ma'am.

22 JUDGE BROWN: Okay. First, I will ask if FTB
23 wishes to ask any questions of the witnesses?

24 MS. WATKINS: No questions. Thank you.

25 JUDGE BROWN: Thank you.

1 I may have questions, and I will -- I will just
2 broach the questions to both witnesses, and will let you
3 each you decide, I suppose, who wants to answer. But
4 I'll -- because I don't know who knows the information
5 better. When you each talk about that year was a very
6 difficult year, are you talking about -- we're talking
7 about the 2020 tax year. So are you talking about 2020,
8 or are you talking about 2021 when you would have filed
9 your taxes?

10 MR. RABE: It -- it would have been when we're
11 filing. The period in which we were filing, not the year
12 itself. So it would be the -- it would be -- you know,
13 we're really talking about 2021 in essence.

14 JUDGE BROWN: Okay. And when were you displaced
15 from your home?

16 MR. RABE: We were displaced that -- it was -- we
17 were out the summer prior for about seven weeks. And then
18 we were out from January -- I want to say probably the
19 first week of January through the end of February, early
20 March.

21 JUDGE BROWN: Of 2021?

22 MR. RABE: We haven't -- yes.

23 JUDGE BROWN: And let me ask Mrs. Rabe, because
24 she may have a better recollection.

25 Can you identify the time periods of your

1 husband's hospitalization that you were describing?

2 MRS. RABE: It was approximately April 1st.

3 MR. RABE: No. Five days. Four days.

4 JUDGE BROWN: April 1st.

5 MR. RABE: Four days.

6 MRS. RABE: April 4th.

7 MR. RABE: I was in the hospital for four days
8 and then recovered for -- for about a week or so after
9 that, you know, with in-house therapy.

10 JUDGE BROWN: So around April 1st through
11 April 5th of 2021?

12 MR. RABE: Correct.

13 JUDGE BROWN: And, Mr. Rabe, you had indicated
14 that you thought you did file returns for the 2020 tax
15 year. Do you know why --

16 MR. RABE: Yes, ma'am. I have that return. I
17 have that return in the email format on my phone. I'll be
18 sending that over.

19 JUDGE BROWN: Do you know why FTB doesn't have --
20 do you have -- I mean, I don't want you to guess, but do
21 you have any idea why FTB wouldn't have a record of that?
22 Is there some glitch that you might be aware of?

23 MR. RABE: None at all, Your Honor. None at all.
24 Quite remarkable that they wouldn't, to be honest. But,
25 yeah, I don't know.

1 JUDGE BROWN: I also wanted to ask, in FTB's
2 briefing, they wrote that it appears that you were able to
3 work because you received W-2 wages during the 2020 tax
4 year. So I wanted to ask if that is accurate. Did you
5 work and receive wages for your work, or were those -- or
6 are they -- is that not correct?

7 MR. RABE: You know, I -- I can't answer that
8 right now without looking at the return. You know, I
9 don't have the recollection, but -- but it's possible that
10 I worked. You know, I'm a clinician by trade. I do
11 psycho therapy, and so it -- it would have been over the
12 computer or something like that. And -- and I endeavor to
13 do that, you know, as much as I can just to be a good
14 person, I guess.

15 JUDGE BROWN: And I'll ask Mrs. Rabe as well. Do
16 you have any recollection about whether Mr. Rabe earned
17 wages during the 2020 tax year?

18 MRS. RABE: I'm sorry. I cannot answer this. I
19 don't -- I don't remember.

20 JUDGE BROWN: That's fine. All right. I think
21 those are all the questions I have for Appellant right
22 now, but I may have questions at the end after we hear
23 FTB's presentation. So I will say that if -- one second.
24 I will say I've completed my questions, and so now we can
25 move on to hear FTB's presentation, whenever FTB is ready.

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MS. WATKINS: Thank you.

PRESENTATION

MS. WATKINS: Good afternoon. Again, my name is Andrea Watkins, and I, along with my Co-Counsel Cynthia Kent represent Respondent Franchise Tax Board.

The issue on appeal is whether Appellant has established reasonable cause to abate the late-filing or demand penalties imposed for the 2020 tax year. FTB received information that Appellant received sufficient income in 2020 to require him to file a tax return. When FTB had no record of a filed return, it issued a Demand for Tax Return. When Appellant failed to respond or file a return in reply, FTB issued a Notice of Proposed Assessment proposing tax, a late-filing penalty, a demand penalty, a filing enforcement fee, and interest. The Appellant did not file a protest and the assessment went final pursuant to law.

Following full satisfaction of the deficiency, Appellant requested abatement of the penalties based on reasonable cause. With respect to a late-filing penalty, if a tax return is not filed by its due date, California law prescribes that a penalty shall be imposed. As the Appellant's 2020 return was not filed by the due date and still yet to be filed, FTB properly imposed a late-filing

1 penalty.

2 With respect to the demand penalty, the law
3 prescribes that a penalty shall be imposed if the taxpayer
4 fails to timely respond to a current demand for tax turn,
5 and the taxpayer failed to respond to a prior request for
6 demand within the preceding four tax years. Both
7 conditions are met in this case, so FTB properly imposed a
8 demand penalty. The Appellant contends that he has
9 established reasonable cause to abate these penalties
10 based on his poor health. While FTB is sympathetic to
11 Appellant's circumstances, the legal standard to show
12 reasonable cause requires that the taxpayer act with
13 ordinary business care and prudence.

14 Appellant provided two reports from the
15 Department of Veterans Affairs outlining his medical
16 difficulties. However, both of the reports find that
17 Appellant has the mental capacity to manage his benefit
18 payments, or that he's able to direct someone to do so.
19 The documentation also indicates that Appellant had the
20 assistance and oversight of his wife. In addition,
21 Appellant was able to work and earn some wage income
22 during 2020. A reasonably prudent taxpayer exercising
23 ordinary care would have sought assistance to timely file
24 his tax return, but Appellant did not do this. As is
25 shown in FTB's Exhibit I, Appellant was able to file

1 multiple tax returns for other years on April 1st, 2021,
2 which is just two weeks prior to the 2020 filing deadline.

3 In the precedential opinion in the Appeal of Head
4 and Feliciano, which has facts very similar to this
5 appeal, the OTA found that if a taxpayer's difficulty
6 simply caused them to sacrifice the timeliness of one
7 aspect of their affairs to pursue others, this does not
8 constitute reasonable cause. It is FTB's position that it
9 properly imposed late-filing and demand penalties for the
10 2020 tax year. And Appellant has not met his burden to
11 establish reasonable cause to abate these penalties. FTB
12 respectfully request that its refund claim denial be
13 sustained.

14 I'm happy to answer any questions.

15 JUDGE BROWN: Thank you.

16 I did want to ask one question to FTB. FTB, in
17 your presentation and in your briefing you pointed out
18 that the documentation indicates that Appellant's memory
19 is intact, but do you also recognize that the medical
20 report says that he has pain that causes cognitive
21 impairment? And does that effect any of the analysis and
22 consideration that we need to do for the issues here?

23 MS. WATKINS: Yes, I did review the third medical
24 reports, and it's clear that the Appellant does have
25 medical hardship. However, the reports also -- both of

1 the two reports provided do indicate that he was able to
2 manage his own benefit payments or direct someone to do
3 so. So FTB's position just remains that he has not
4 established reasonable cause to abate the penalties.

5 JUDGE BROWN: Thank you.

6 I think that's all of the questions that I have
7 for FTB right now. So what I will say is we can move on
8 to hear Appellant's rebuttal.

9 Mr. Rabe, whenever you are ready, if you want to
10 make any rebuttal to the arguments thus far, you may
11 proceed.

12 MR. RABE: Great. Great. Thank you.

13

14 CLOSING STATEMENT

15 MR. RABE: Yeah. I'd just like to say this is
16 that when I first filed the appeal, I received a letter
17 indicating that if I were to prove that I had MS and if
18 the MS impacted my ability to file, that I would -- I
19 would, you know, the -- the fees would be waived. And,
20 you know, I did so. And I -- and I don't know how this --
21 we -- we got this far. So I'm a little confused about
22 that. So I'd just like remind, Your Honor and Franchise
23 Tax Board, that that's where we were some time ago. And,
24 you know, we get -- somehow we ended up here.

25 But in terms of -- of other pursuits, you know, I

1 don't have any pursuits. Not only am I home-bound, you
2 know, I'm essentially bound to, you know, a space in my
3 home. So I was not pursuing anything, I don't believe, in
4 2020 nor 2021. And -- and in terms of the work, like I
5 say, I'm a psycho therapist. I do it on the computer. My
6 wife logs in for me, and I treat the -- the people that I
7 have known for a long, long time. And that way I don't
8 have to confuse and get the -- and in my memory.

9 The reason I don't work any longer is because of
10 cognitive deficits. I can no longer do a male status
11 examine and a bio psycho - social examiner and -- and --
12 and have it and -- and work it into a diagnostic framework
13 any longer. So, you know, that's just where I am in that
14 regard. My memory is quite impaired. You know, I -- I
15 did remember to file all of this stuff for today. That's
16 where we're. I mean, I had it. It's all here. It's on
17 my phone. I just didn't push the buttons.

18 So, you know, that -- that being said, I just
19 feel like that, you know, that period of time between, you
20 know, probably December of that year when it started to
21 snow and through -- through March and then having my
22 impairment -- my -- my episode in April, you know, this
23 is -- this is where we were in terms of not being able to
24 file that particular year. And, you know, my history is
25 quite good in terms of filing, you know. I -- I -- it's

1 important to file. It's important to me to file, to make
2 sure to do this properly.

3 So, you know, I do appreciate this opportunity
4 and the time to speak with you today. Thank you.

5 JUDGE BROWN: Okay. Thank you very much.

6 I think I will say that I don't have any further
7 questions at this time. But I will remind everyone that
8 we were holding the record open for 30 days for Appellant
9 to submit the documents that we identified at the
10 beginning of the hearing, and those were both the medical
11 records and the tax records. And then once we receive
12 those from Appellant, I will allow 30 days for FTB to
13 respond. Then once I have received both the records and
14 FTB's response, then the record will closed, and the case
15 will be submitted, and OTA will mail both parties the
16 written decision no later than 100 days from the date of
17 the closing of the record.

18 Does anyone have any questions about anything
19 before we conclude this hearing?

20 MR. RABE: No, Your Honor. Thank you.

21 JUDGE BROWN: All right very good. Thank you all
22 very much. Thank you all for participating today.

23 The hearing is now adjourned, and this concludes
24 OTA's hearings for today. Hearings will resume tomorrow
25 morning.

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Thank you.

(Proceedings adjourned at 3:03 p.m.)

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HEARING REPORTER'S CERTIFICATE

I, Ernalyne M. Alonzo, Hearing Reporter in and for the State of California, do hereby certify:

That the foregoing transcript of proceedings was taken before me at the time and place set forth, that the testimony and proceedings were reported stenographically by me and later transcribed by computer-aided transcription under my direction and supervision, that the foregoing is a true record of the testimony and proceedings taken at that time.

I further certify that I am in no way interested in the outcome of said action.

I have hereunto subscribed my name this 15th day of July, 2024.

ERNALYN M. ALONZO
HEARING REPORTER