

Vanderburgh Circuit Court

STATE OF INDIANA )
) SS:
COUNTY OF VANDERBURGH )

IN THE VANDERBURGH CIRCUIT COURT

EVANSVILLE WATER AND SEWER UTILITY, )
Plaintiff, ) 82C01-1807-PL-004109
v. ) CAUSE NO. 82C01-1807-PL-\_\_\_\_\_
)
MCCURDY RENAISSANCE, LLC; )
MCCURDY 100 DEVELOPMENT, LLC; )
MCCURDY 100 TENANT, LLC; )
BVFL I FI LLC; )
BMO HARRIS BANK N.A.; and )
ENHANCED CAPITAL HTC FUND I, LLC, )
Defendants. )

COMPLAINT FOR DAMAGES AND FORECLOSURE OF SEWER LIENS

Comes now Plaintiff, Evansville Water and Sewer Utility ("EWSU"), by counsel, and files its Complaint against Defendants and complains as follows:

Factual Allegations

Introduction

1. The EWSU brings this suit as a result of McCurdy Renaissance, LLC, McCurdy 100 Development, LLC, and McCurdy 100 Tenant, LLC's (collectively "McCurdy Defendants") unlawful connection to the City of Evansville's ("City") sewer system at the McCurdy Building (defined below), which unlawfully discharged millions of gallons of wastewater into the sewer system, in violation of the Evansville Municipal Code and state law.

Parties

2. The EWSU is an Indiana public utility duly organized under the laws of the State of Indiana, responsible for, among other things, operating the City's Sanitary Sewer District and sewer system, including the discharge lines, ("City Sewer") within Vanderburgh County, Indiana.

3. The EWSU operates the City Sewer.
4. The EWSU is permitted to bring this action.
5. Defendant McCurdy Renaissance, LLC (“Renaissance”) is an Indiana limited liability company with its principal place of business located at 510 Main Street, Evansville, Indiana 47708.
6. Defendant McCurdy 100 Development, LLC (“McCurdy 100”) is an Indiana limited liability company with its principal place of business located at 501 Main Street, Evansville, Indiana 47708.
7. Defendant McCurdy 100 Tenant, LLC (“McCurdy Tenant”) is an Indiana limited liability company with its principal place of business located at 501 Main Street, Evansville, Indiana 47708.
8. Defendant BVFL I FI LLC (“BVFL”) is a Delaware Indiana limited liability company with its principal place of business located in Delaware.
9. Defendant BMO Harris Bank N.A (“Harris Bank”) is a national banking institution with its headquarters located at 111 West Monroe, Chicago, Illinois 60603.
10. Defendant Enhanced Capital HTC Fund I, LLC (“Enhanced Capital”) is a Delaware limited liability company with its principal place of business located in Delaware.

#### Jurisdiction and Venue

11. This Court has jurisdiction over the parties herein and venue is proper and preferred in Vanderburgh County, Indiana, as the actions giving rise to this Complaint took place in Vanderburgh County, Indiana.

General Allegations

12. McCurdy 100 owns the building commonly referred to as the McCurdy Building located at 100 SE Riverside Drive, Evansville, Indiana (the “McCurdy Building”).

13. Upon information and belief, on or about April, 2017, the McCurdy Defendants installed an open loop geothermal system, which included three geothermal pumps, at and/or near the McCurdy Building (“McCurdy Geothermal System”).

14. Prior to connecting the McCurdy Geothermal System to the City Sewer, the McCurdy Defendants had actual knowledge of their obligation to:

- a. Provide notice to the EWSU of the desired connection of the McCurdy Geothermal System to the City Sewer;
- b. Provide notice to the City’s Building Commission of the desired connection of the McCurdy Geothermal System to the City Sewer;
- c. Obtain approval by the EWSU for the desired connection of the McCurdy Geothermal System to the City Sewer;
- d. Acquire all necessary permits from the EWSU, the City, and/or related departments for the desired connection of the McCurdy Geothermal System to the City Sewer;
- e. Pay fees for the desired connection of the McCurdy Geothermal System to the City Sewer, including a tap fee; and
- f. Allow the installation of devices by the EWSU for the metering of the resulting usage of the City Sewer by the McCurdy Geothermal System.

15. The McCurdy Defendants connected the McCurdy Geothermal System to the City Sewer.

16. The McCurdy Defendants connected the McCurdy Geothermal System to the City Sewer without:

- a. Providing notice to the EWSU of the desired connection of the McCurdy Geothermal System to the City Sewer;
  - b. Providing notice to the City's Building Commission of the desired connection of the McCurdy Geothermal System to the City Sewer;
  - c. Obtaining approval by the EWSU for the desired connection of the McCurdy Geothermal System to the City Sewer;
  - d. Acquire all necessary permits from the EWSU, City, and/or related departments for the desired connection of the McCurdy Geothermal System to the City Sewer;
  - e. Paying fees for the desired connection of the McCurdy Geothermal System to the City Sewer, including a tap fee of, at least, \$60,000.00; and
  - f. Allowing the installation of devices by the EWSU for the metering of the resulting usage of the City Sewer by the McCurdy Geothermal System.
17. The McCurdy Defendants also had actual knowledge that they were required to:
- a. Pay fees associated with the usage of City Sewer by the McCurdy Geothermal System for the discharge;
  - b. Provide the EWSU with notice of the discharge from the McCurdy Geothermal System into the City Sewer; and
  - c. Obtain approval from the EWSU for the discharge from the McCurdy Geothermal System into the City Sewer.

18. The discharge from the McCurdy Geothermal System into the City Sewer must be treated at the City's wastewater treatment plant.

19. The McCurdy Defendants failed to:

- a. Pay fees associated with the usage of City Sewer by the McCurdy Geothermal System for the discharge;
- b. Provide the EWSU with notice of the discharge from the McCurdy Geothermal System into the City Sewer; and
- c. Obtain approval from the EWSU for the discharge from the McCurdy Geothermal System into the City Sewer.

20. The McCurdy Defendants have asserted that the McCurdy Geothermal System was disconnected from the City Sewer and ceased discharging to the City Sewer in late December 2017.

21. However, the McCurdy Defendants did not provide notice to EWSU of any such disconnection until mid-April 2018.

22. Based upon communications with the McCurdy Defendants, it is believed that the McCurdy Geothermal System remained connected to the City Sewer until, at least, April 2018.

23. Due to the McCurdy Defendants' actions, the EWSU was prevented from inspecting and monitoring the discharge from the McCurdy Geothermal System into the City Sewer, did not know the exact quantity of discharge by the McCurdy Geothermal into the City Sewer, and, accordingly, had to estimate the quantity of discharge.

24. On March 13, 2018, May 4, 2018 and June 7, 2018, based on the estimated the quantity of discharge due to the McCurdy Defendants' failure to allow the City and/or the EWSU with access to the McCurdy Building, sewer liens were duly recorded on the McCurdy

Building for the McCurdy Defendants' estimated unpaid sewer and refuse amounts and charges together with a delinquency penalty in the amount of ten percent (10%) (collectively, the "Original Sewer Liens").

25. Following the recording of the Original Sewer Liens, the McCurdy Defendants provided the City and/or the EWSU with access to the McCurdy Building to properly measure the amount of discharge from the McCurdy Geothermal System into the City Sewer.

26. On July 10, 2018, based on the updated measurements of the amount of discharge from the McCurdy Geothermal System into the City Sewer, an Amendment to Notice of Lien on the McCurdy Building for the McCurdy Defendants' unpaid sewer and refuse amounts and charges together with a delinquency penalty in the amount of ten percent (10%) totaling \$709,542.26 was duly recorded on the McCurdy Building (hereinafter referred to as "First Amended Sewer Lien").

27. A true and accurate copy of the First Amended Sewer Lien is attached hereto and incorporated herein by reference as Exhibit "A."

28. On July 10, 2018, based on the updated measurements of the amount of discharge from the McCurdy Geothermal System into the City Sewer, an Amendment to Notice of Lien on the McCurdy Building for the McCurdy Defendants' unpaid sewer and refuse amounts and charges together with a delinquency penalty in the amount of ten percent (10%) totaling \$64,607.14 was duly recorded on the McCurdy Building (hereinafter referred to as "Second Amended Sewer Lien").

29. A true and accurate copy of the Second Amended Sewer Lien is attached hereto and incorporated herein by reference as Exhibit "B."

30. On July 10, 2018, based on the updated measurements of the amount of discharge from the McCurdy Geothermal System into the City Sewer, an Amendment to Notice of Lien on the McCurdy Building for the McCurdy Defendants' unpaid sewer and refuse amounts and charges together with a delinquency penalty in the amount of ten percent (10%) totaling \$87,788.76 was duly recorded on the McCurdy Building (hereinafter referred to as "Third Amended Sewer Lien").

31. A true and accurate copy of the Third Amended Sewer Lien is attached hereto and incorporated herein by reference as Exhibit "C."

### **Legal Claims**

#### **Count I - Foreclosure of Sewer Lien Against the Defendants**

32. EWSU hereby realleges and incorporates the preceding paragraphs of this Complaint as if fully set forth herein.

33. EWSU is responsible for the collection of charges and fees for the connection to and usage of the City Sewer.

34. EWSU is entitled to a decree of foreclosure for the First Amended Sewer Lien, Second Amended Sewer Lien, and Third Amended Sewer Lien (collectively, "Amended Sewer Liens") under Indiana law, including pursuant to Indiana Code § 36-9-23, *et seq.*

35. EWSU has employed the law firm of Ziemer, Stayman, Weitzel, & Shoulders, LLP to prosecute this action on its behalf and has incurred and will continue to incur attorneys' fees and costs in connection therewith.

36. EWSU is entitled to its attorneys' fees and costs incurred in connection with the foreclosure of the Amended Sewer Liens under Indiana law, including pursuant to Indiana Code § 36-9-23, *et seq.*

37. Defendants Enhanced Capital, Harris Bank, and BVFL (collectively, “Potential Lienholders”) are included as a party defendant to declare what interest, if any, each has in the McCurdy Building.

**WHEREFORE**, as to Count I, EWSU prays that the Court:

- a. Enters judgment in favor of EWSU and against the McCurdy Defendants;
- b. Declares EWSU the holder of the Amended Sewer Liens, which are valid sewer liens on the McCurdy Building, and entitled to priority and superior to any and all other liens or rights;
- c. Enters a decree foreclosing the Amended Sewer Liens as a valid lien, foreclosing the equity of redemption of Defendants and all persons claiming under and through them;
- d. Orders, pursuant to Ind. Code § 32-28-3-1 *et seq.*, that the McCurdy Building shall be sold and that in the case of the sale of the McCurdy Building, a proper deed or deeds or bills of sale be issued according to law to the purchaser or purchasers of the McCurdy Building at such sale or sales;
- e. Orders that the proceeds of the sale of the McCurdy Building upon foreclosure of the Amended Sewer Liens be paid to the Clerk of the Court to be distributed upon further order by the Court;
- f. Enters a decree stating that, upon execution of a deed of conveyance of the McCurdy Building, it shall be sold pursuant to a decree of foreclosure, and said McCurdy Building not having been previously redeemed by any person entitled thereto, any person who may be in possession of the McCurdy Building or any party thereof upon demand and exhibition of said Sheriff’s deed shall forthwith



surrender the McCurdy Building to the holder of such deed, and in the event such persons so in possession of the McCurdy Building shall refuse to fully and peacefully surrender possession, the Sheriff shall vacate the McCurdy Building and give full and peaceful possession to the purchaser;

- g. Orders that in the event a deficiency remains after the sale of the McCurdy Building that said deficiency shall remain as a personal money judgment against the McCurdy Defendants;
- h. Awards EWSU its damages, including costs and attorneys' fees for this action and the collection of any deficiency; and
- i. For all other just and proper relief in the premises.

**COUNT II**  
**Violation of Evansville Municipal Code Chapter 13.05**  
**Against the McCurdy Defendants**

38. EWSU hereby realleges and incorporates the preceding paragraphs of this Complaint as if fully set forth herein.

39. As a result of the foregoing, the McCurdy Defendants have violated Evansville Municipal Code Title 13, including, but not limited to, failing to obtain the proper approval and permits for connecting to and usage of the City Sewer and by failing to pay the requisite charges and fees.

40. As a result of that violation, EWSU is entitled to all unpaid charges and fees and its costs, attorneys' fee, and expenses.

**WHEREFORE**, as to Count II, EWSU prays that the Court:

- a. Enters judgment in favor of EWSU and against the McCurdy Defendants;

- b. Awards damages in favor of EWSU and against the McCurdy Defendants, including all applicable charges and fees and EWSU's costs, attorneys' fees, and expenses;
- c. Awards EWSU pre-judgment and post-judgment interest upon such amounts at the maximum rates allowable by law; and
- d. Orders all other relief just and proper in the premises.

**COUNT III**  
**Unjust Enrichment**  
**Against the McCurdy Defendants**

41. EWSU hereby realleges and incorporates the preceding paragraphs of this Complaint as if fully set forth herein.

42. It would be unjust to permit the McCurdy Defendants to have connected to the City Sewer and to have discharged and/or continue to discharge to the City Sewer illegally and surreptitiously without paying the required charges and fees.

43. Therefore, to prevent that unjust enrichment, EWSU is entitled to payment for the unpaid fees and charges associated with the connection and discharge to the City Sewer.

**WHEREFORE**, as to Count III, EWSU prays that the Court:

- a. Enters judgment in favor of EWSU and against the McCurdy Defendants;
- b. Awards damages in favor of EWSU and against the McCurdy Defendants;
- c. Awards pre-judgment and post-judgment interest upon such amounts at the maximum rates allowable by law; and
- d. Orders all other relief just and proper in the premises.

Respectfully submitted,

ZIEMER, STAYMAN, WEITZEL & SHOULDERS, LLP

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**CERTIFICATE OF COMPLIANCE WITH ADMINISTRATIVE RULE 9(G)**

The undersigned hereby certifies that the foregoing or attached court record or document complies with the requirements of Trial Rule 5(G) with regard to information excluded from the public record under Administrative Rule 9(G).

/s/ Jean Blanton  
Jean Blanton