BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS
STATE OF WYOMING

An inquiry concerning	) COMMISSION ON JUDICIAL
	) CONDUCT AND ETHICS
The Honorable Ruth Neely	)
	) No. 2014-27
Municipal Court Judge and	)
Circuit Court Magistrate	)
Ninth Judicial District	)
Pinedale, Sublette County	)
	)

COMMISSION ON JUDICIAL CONDUCT AND ETHICS
Official Record
FILED
Date: 9/17/15
Wendy J. Soto

THE HONORABLE RUTH NEELY'S MOTION TO DISMISS THE NEW CLAIMS IN THE COMMISSION'S AMENDED NOTICE OF COMMENCEMENT OF FORMAL PROCEEDINGS

The Honorable Ruth Neely respectfully requests that the Commission dismiss the new claims in the Amended Notice of Commencement of Formal Proceedings ("Amended Notice")—that is, the claims that Judge Neely violated Rules 2.4 and 3.6 of the Wyoming Code of Judicial Conduct by her choice of counsel in this matter.[1]

By adding these claims to the Amended Notice, the Commission on Judicial Conduct and Ethics (the "Commission") threatens fundamental constitutional rights, including the rights of citizens to hire counsel of their choosing, to associate with groups of their choosing, and to live consistent with their sincerely held religious convictions. After the Commission initiated these

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[1] Concurrent with this Motion to Dismiss, Respondent files her Verified Answer to the Amended Notice. Because the governing rules do not clearly explain the relationship between a Motion to Dismiss and a Verified Answer, Respondent is exercising caution and filing her Verified Answer now, even though the Commission has yet to rule on this Motion to Dismiss. It is Respondent's intent that if there is a conflict between her filing of the Motion to Dismiss and the Verified Answer, the Motion to Dismiss should take precedence, and that she will file an updated Verified Answer once the Commission resolves her Motion to Dismiss.

proceedings alleging that Judge Ruth Neely violated the Code of Judicial Conduct by expressing her religious beliefs about marriage and her inability to perform same-sex marriages, Judge Neely retained Herb Doby and Alliance Defending Freedom ("ADF") as counsel to defend her. ADF is a nationwide, nonprofit, nonpartisan legal organization that specializes in constitutional law, provides free legal defense in civil-rights cases, and has won four cases before the United States Supreme Court over the last five years alone.[2]

After Judge Neely made her selection of counsel, the Commission amended its Notice of Commencement of Formal Proceedings to allege that Judge Neely violated the Code of Judicial Conduct merely by retaining ADF as her legal representative. While all the claims in the Amended Notice lack merit and violate Judge Neely's constitutional rights, the new claims attack Judge Neely's chosen means of defending herself in this matter and therefore jeopardize the fairness of these proceedings moving forward. As a result, these new claims necessitate this motion and require swift action from this tribunal.

Standard

A complaint must be dismissed when, accepting "the facts stated in the complaint as true and view[ing] them in the light most favorable to the plaintiff," the relief may not be granted. *Accelerated Receivable Solutions v. Hauf*, 2015 WY 71, ¶ 10, 350 P.3d 731, 734 (Wyo. 2015).[3] Furthermore, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief'

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[2] *See e.g. Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015) (unanimously upholding ADF's client's free-speech rights); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (striking down federal burden's on ADF's client's free-exercise rights); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (upholding a legislative prayer policy promulgated by a town represented by ADF); *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (upholding a state's tuition tax credit program defended by a faith-based tuition organization represented by ADF).

[3] In applying this standard, Judge Neely does not admit any facts or conclusions pled by the Commission, but deems those facts to be true for purposes of this motion only.

requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).[4]

Argument

I. The Rule 2.4 and 3.6 Claims Should be Dismissed Because They Violate Judge Neely's Constitutional Rights to Counsel, to Associate, and to Exercise her Religion.

a. The Rule 2.4 and 3.6 Claims Violate Judge Neely's Right to Counsel.

For over 100 years, courts have recognized that the Constitution protects the right to counsel of one's choosing in both criminal and civil litigation—indeed, this right is protected by many constitutional provisions, including the First Amendment.[5] As the Tenth Circuit has summarized, "[t]he right to retain and consult with an attorney . . . implicates . . . clearly established First Amendment rights of association and free speech." *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990).

This right to counsel extends beyond retaining an attorney. It protects the right to retain the attorney a party wants. "The right to counsel, safeguarded by the constitutional guarantee of due process of law, includes the right to choose the lawyer who will provide that representation." *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1257 (5th Cir. 1983). And the government cannot override that choice unless it establishes "compelling reasons" to do so. *Id.* at 1263.

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[4] "Because the Wyoming Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, federal court interpretations of their rules are highly persuasive in [Wyoming courts'] interpretation of the corresponding Wyoming rules." *Lamar Outdoor Advert. v. Farmers Co-Op Oil Co. of Sheridan*, 2009 WY 112, ¶ 12, 215 P.3d 296, 301 (Wyo. 2009); *see also Graus v. OK Investments, Inc.*, 2014 WY 166, ¶ 14, 342 P.3d 365, 369 (Wyo. 2014) (similar).

[5] *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (identifying cases that ground the right to access courts and the right to counsel in Article IV Privileges and Immunities Clause, First Amendment Petition Clause, Fifth Amendment Due Process Clause, and Fourteenth Amendment Equal Protection and Due Process Clauses); *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 221-22 (1967) (grounding the right to counsel in "the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments"); *Johnson v. City of Cincinnati*, 310 F.3d 484, 501 (6th Cir. 2002) (grounding the right to counsel in the right to intimate association in the Fourteenth Amendment Due Process Clause).

Moreover, in this case, the right to counsel has particular force because constitutional defenses are at issue. In a long line of decisions, the United States Supreme Court has established the First Amendment right of groups to provide free legal defense vindicating civil rights and the corresponding constitutional right of individuals to employ these groups' legal service.[6] "Underlying [these cases] was the Court's concern that [members of the public] receive information regarding their legal rights and the means of effectuating them." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376 n.32 (1977). "This concern applies with at least as much force to aggrieved individuals as it does to groups." *Id.*

As the Supreme Court said when invalidating a constraint on employing an ACLU attorney, restrictions on groups that engage "in the defense of unpopular causes and unpopular defendants" and that represent "individuals in litigation" defining "the scope of constitutional protection" must overcome "exacting scrutiny." *Primus*, 436 U.S. at 427-28, 432 (concluding that a reprimand of an ACLU attorney by the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina violated the First Amendment).

Under these principles, the Commission's Rule 2.4 and 3.6 claims must also overcome exacting scrutiny because they fault Judge Neely for her "engagement of . . . the Alliance Defending Freedom Organization." (Amended Notice, ¶ B.2). In other words, the Commission alleges that Judge Neely violated ethical rules by retaining ADF as counsel, and through these claims, the Commission tries to sever Judge Neely's attorney-client relationship with ADF. But

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[6] *See, e.g.*, *In re Primus*, 436 U.S. 412, 414 (1978) (protecting the ACLU's right to give legal advice and solicit for lawsuits); *United Mine Workers*, 389 U.S. at 221-22 (1967) (protecting union members' right to hire an attorney to collectively assist them in asserting their legal claims); *NAACP v. Button*, 371 U.S. 415, 429–30 (1963) (protecting the NAACP's right to advise litigants to seek and pay for assistance of certain attorneys). *See also Owens v. Rush*, 654 F.2d 1370, 1379 (10th Cir. 1981) (protecting the right to assist in "litigation vindicating civil rights," to "attend[] meetings on necessary legal steps," and to "associat[e] for the purpose of assisting persons seeking legal redress").

just like the ACLU and NAACP, ADF is a nonprofit legal advocacy group that seeks to protect constitutional rights through free legal representation. By demanding that Judge Neely stop receiving this representation, the Commission's Rule 2.4 and 3.6 claims not only impair Judge Neely's First Amendment right to select her counsel, they also impair her First Amendment right to participate in collective legal action that seeks to vindicate constitutional freedoms.

Even worse, the Commission's Rule 2.4 and 3.6 claims smack of bad faith, for the Commission dragged Judge Neely into this legal proceeding and now tries to eliminate her legal defense. Without ADF, Judge Neely may be unable to obtain free civil-rights legal defense from another organization, much less one with significant constitutional expertise. Indeed, not many (if any) constitutional-law specialists offer the free legal defense that ADF provides, particularly in Wyoming's relatively small legal community. So if the Rule 2.4 and 3.6 claims succeeded, they would weaken, if not extinguish, Judge Neely's legal defense.

The harm inflicted by the Commission's Rule 2.4 and 3.6 claims are not confined to Judge Neely. Under the Commission's logic, no judge could hire a legal organization that advocates against the state's chosen ideology. The state could thus target any legal group it dislikes in an effort to hinder its mission and prevent its clients from vindicating their constitutional rights. Red states could target liberal groups like the ACLU, and blue states could target conservative groups like the NRA. But in the end, litigants' rights and our adversarial system of justice would lose. Thankfully, though, the Constitution does not permit this result, for it protects the right to offer and access civil-rights defense regardless of the "political or religious affiliation of the members of the group which invokes its shield, or . . . the truth, popularity, or social utility of the ideas and beliefs which are offered." *Button*, 371 U.S. at 444-45.

The chilling effect of the Commission's position is not limited to clients who retain nonprofit legal advocacy groups as their attorneys; it would also threaten the constitutional liberties of individuals who hire solo practitioners and private firms. In the Amended Notice, the Commission specifically references three of Judge Neely's counsel by name. (Amended Notice, ¶¶ A.9, B.2). Supposedly, Judge Neely cannot retain these attorneys because of the legal positions that they have advocated about same-sex marriage. (*Id.* at ¶ A.10). But crediting that claim would mean that neither could a judge retain Chief Justice John G. Roberts, or any of the three other United States Supreme Court Justices who, like him, dissented from the Supreme Court's recent same-sex marriage ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), should one of them step down from the bench and enter private practice. Yet the mere fact that an attorney has taken a legal position that the state dislikes does not deprive a judge of her right to retain that attorney as counsel. If the law were otherwise, a judge's right to choose not only nonprofit legal groups, but also countless attorneys in private practice would be infringed. Therefore, the Commission's claims seeking to remove Judge Neely's counsel are inherently suspect and deserve the strictest constitutional scrutiny.

b. The Rule 2.4 and 3.6 Claims Violate Judge Neely's Right to Freely Associate.

Besides attacking Judge Neely's right to counsel, the Rule 2.4 and 3.6 claims allege that she violated the Code of Judicial Conduct by her "affiliation with the Alliance Defending Freedom Organization." (Amended Notice, ¶ B.2). The Amended Notice does not specify how Judge Neely affiliated with ADF, but this motion will accept the Commission's vague allegation as true. Even so, this allegation still fails because the Commission cannot penalize Judge Neely for affiliating with ADF. That violates her First Amendment right to free association.

The First Amendment protects the right of citizens "to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Thus, the government may not "impose penalties or withhold benefits from individuals because of their membership in a disfavored group" unless the government satisfies the most stringent form of constitutional review. *Id.* at 622-23.

In the legal context, this means that the state cannot deny an attorney "admission to the Bar solely because of his membership in an organization." *Application of Stolar*, 401 U.S. 23, 28 (1971). Nor can the state bar judges from associating with political parties. *Republican Party of Minnesota v. White*, 416 F.3d 738, 754 (8th Cir. 2005) (invaliding Minnesota judicial cannon barring partisan activities). Because it is well established that the state cannot bar judicial association with a political party—the most partisan entity imaginable—it necessarily follows that the Commission cannot forbid Judge Neely from associating with a nonpartisan public-interest group like ADF.

To be sure, First Amendment protections do not allow judges to do anything they please. The state can mandate that judges recuse themselves in particular cases where they lack impartiality. *Id.* at 755. Yet the Commission does not seek case-by-case recusal, but a blanket removal of Judge Neely for associating with a nonpartisan legal organization.

Once again, the Commission's claims reach too far and impinge too much on personal liberty. If those claims are allowed to proceed, the government could seek to remove judges for associating with any group (like the Catholic Church, the Mormon Church, various Muslim sects, local Boy Scout troops, and even the Republican Party) that believes in, or advocates for, the time-honored understanding of marriage as a relationship that unites a man and a woman for life and thereby connects children to both their mother and father. Even worse, the Commission's

logic empowers the Commission to penalize judges for associating with *any* group whose views or advocacy it dislikes. Such unchecked power is subject to abuse even against those who currently wield it.

The Commission would do better to respect a diversity of associations and beliefs than to punish judges for affiliating with particular groups. "The freedom to associate applies" not only "to the beliefs we share," but also "to those we consider reprehensible." *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974). Accordingly, protecting that right "tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change." *Id.* Because the Commission's Rule 2.4 and 3.6 claims imperil this freedom, they are subject to strict scrutiny.

c. The Rule 2.4 and 3.6 Claims Create an Impermissible Religious Test and Violate Judge Neely's Right to Exercise Her Religious Beliefs.

The United States and Wyoming Constitutions forbid the Commission's newfound prohibition on judges' engaging legal counsel that hold certain religious beliefs about marriage. In no uncertain terms, the Wyoming Constitution states that "no person shall be rendered incompetent to hold any office of trust . . . because of his opinion on any matter of religious belief whatever." Wyo. Const. art. I, § 18; *see also* U.S. Const. art. VI, cl. 3("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").[7] Here, the Commission maintains that a judge must be removed if she affiliates with an organization that holds and advocates for particular religious views about marriage. Yet the Constitution permits no such religious test for judges.

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[7] The Commission cannot successfully argue that the absence of a right to government employment means that there is no burden on Judge Neely's constitutional rights. In a case such as this, "[t]he fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961).

In *Feminist Women's Health Center v. Codispoti*, 69 F.3d 399 (9th Cir. 1995), a party sought recusal of a federal circuit judge based on his affiliation with the Catholic Church and its religious belief about abortion. The motion to recuse was denied because it would impose a religious test on judges. As the published opinion explained: "The plaintiffs seek to qualify the office of federal judge with a proviso: no judge with religious beliefs condemning abortion may function in abortion cases. The sphere of action of these judges is limited and reduced. The proviso effectively imposes a religious test on the federal judiciary." *Id.* at 401. Notably, the plaintiffs in that case sought only recusal from a particular case, and not "disqualification . . . from all judicial office." *Id.* at 400. The constitutional concerns are thus far greater here, for while the plaintiffs there sought a religious test that would have *curtailed* a judge's role, the Commission here seeks a religious test that would *eliminate* a judge's position.

Similarly, in *Paulson v. Abdelnour*, 145 Cal. App. 4th 400, 433, 51 Cal. Rptr. 3d 575, 600 (2006), the plaintiffs claimed that the City of San Diego violated the Establishment Clause by retaining an attorney affiliated with a faith-based public-interest legal organization. The California Court of Appeals rejected the claim, explaining that "we are troubled by the proposition that a government entity or any individual appearing as an attorney before a court, on any issue, may first be screened for their sectarian or nonsectarian background or motives before being allowed to appear as an advocate." The very inquiry into such a claim "lead[s] the judicial system into claims of hostility to religion and potential violations of the proviso that no religious test may ever be required of any individual to an office or public trust. (U.S. Const., art. VI, clause 3.)" *Id.*

Not only do the constitutional prohibitions on religious tests forbid the Commission's Rule 2.4 and 3.6 claims, the Free Exercise and Establishment Clause provisions of the United

States and Wyoming Constitutions do so as well. Those constitutional protections unequivocally prohibit the Commission from targeting religious beliefs. For decades, the United States Supreme Court has consistently affirmed that the Establishment Clause forbids state action that "disapprove[s]," "inhibit[s]," or evinces "hostility" toward religion. *See Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (forbidding "disapprov[al]" of religion); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("affirmatively mandat[ing] accommodation, not merely tolerance, of all religions, and forbid[ing] hostility toward any"); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) (forbidding laws that "inhibi[t]" religion). State action must be careful not to "foster[] a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 846 (1995). In addition, free-exercise principles similarly forbid the government from targeting religious beliefs. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993) (striking down a law that targeted a particular religious practice); *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) (explaining that the government cannot impose "special disabilities on the basis of religious views").

The Commission's Rule 2.4 and 3.6 claims contravene these constitutional principles. The Commission has alleged that a judge violates the Code of Judicial Conduct merely by retaining a faith-based legal group that exists "to keep the doors open for the Gospel by advocating for religious liberty, the sanctity of life, and marriage and family." (Amended Notice, ¶ A.10). Such unabashed hostility toward, and targeting of, religion runs directly counter to the religious protections guaranteed in the federal and state constitution.

II. The Commission's Rule 2.4 and 3.6 Claims Fail Strict Scrutiny.

Government action that burden foundational constitutional rights "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546 (noting that "the compelling interest standard that we apply . . . is not watered down but really means what it says") (quotation marks and alterations omitted). The compelling-interest test "look[s] beyond broadly formulated interests justifying the general applicability of government mandates" and determines whether strict scrutiny "is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006); *see also Burwell*, 134 S. Ct. at 2779. Thus, the relevant government interest here is not a generic interest in the integrity of the judiciary; it is the Commission's specific interest in prohibiting Judge Neely from retaining ADF as her counsel. But the Commission has no compelling interest in intruding itself into Judge Neely's choice of counsel in this way.

Neither can the Commission satisfy the narrow-tailoring requirement of strict-scrutiny analysis. The Commission has a number of other means to pursue its asserted interests in maintaining judicial integrity without violating Judge Neely's constitutional rights. For example, the Commission could require judges to recuse themselves from matters that involve legal organizations with whom the judges are affiliated. Notably, Code of Judicial Conduct Rule 2.11 already empowers the Commission to require recusal under these circumstances. And a lack of

narrow tailoring exists where the government can adequately protect its interests through already-existing means.[8] Accordingly, the Commission cannot satisfy strict scrutiny here.

III. The Commission Fails to State a Claim under Rule 2.4 or 3.6.

In addition to the constitutional violations discussed above, the Commission has also failed to state a claim under Rule 2.4 or 3.6. Rule 2.4 prohibits a judge from being "swayed by public clamor or fear of criticism" or permitting "family, social, political, financial, or other interests or relationships to influence [her] judicial conduct or judgment." But in its Amended Notice, the Commission has not pled any specific facts that allege a violation of this rule. *See Twombly*, 550 U.S. at 555. Moreover, the Amended Notice also fails to plead sufficient facts that, if proven, would establish a violation of Rule 3.6. A mere allegation of discriminatory association is not enough. "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* The Commission's allegations do not rise above the mere recitation of the elements of a claim under Rule 3.6.

Furthermore, there is no indication that Rule 3.6 was intended to implicate a judge's choice of counsel. The comments to Rule 3.6 make it clear that the Rule is primarily concerned with a judge's *membership* (ADF does not have members) in an invidiously discriminatory organization that could impair public confidence in the integrity and impartiality of the

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[8] *See, e.g.*, *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 524 (D.C. Cir. 2010) (finding that an "all-encompassing" speech restriction was not narrowly tailored where "the [government] could simply prohibit and punish conduct that . . . creates security or accessibility hazards"); *Berger v. City of Seattle*, 569 F.3d 1029, 1043 (9th Cir. 2009) (en banc) (finding that a speech restriction was not narrowly tailored where the government could have simply "enforce[d] its existing rules against those who actually exhibit unwanted behavior"); *Bery v. City of New York*, 97 F.3d 689, 698 (2d Cir. 1996) (finding that a speech restriction was not narrowly tailored where "[t]here exist[ed] specific sections of the Administrative Code which . . . already achieve the[] [government's] ends without such a drastic effect").

judiciary.[9] There is no indication that Rule 3.6 was crafted to prohibit a judge from retaining the ACLU, NAACP, ADF, or any other nonprofit public-interest legal group based on the nature of its legal advocacy on hotly contested issues.

Finally, it is untenable to suggest, as the Commission does, that ADF engages in "invidious discrimination" by championing the idea that marriage is the unique, presumptively procreative relationship that unites one man and one woman for life. (Amended Notice, ¶¶ A.10, B.1). In fact, the Supreme Court's recent decision mandating same-sex marriage nationwide forecloses that baseless argument by recognizing that "[t]his view [of marriage] long has been held—and continues to be held—*in good faith by reasonable and sincere people* here and throughout the world." *Obergefell*, 135 S. Ct. at 2594; *see also id.* at 2602 ("Many who deem same-sex marriage to be wrong reach that conclusion based on *decent and honorable religious or philosophical premises*, and neither they nor their beliefs are disparaged here."). Thus, the Commission's attempt to transform this good-faith and reasonable view of marriage into irrational discrimination must be summarily rejected.

The Commission has thus failed to state a claim that Judge Neely violated Rule 2.4 or 3.6.

Conclusion

For the foregoing reasons, the Presiding Officer of the Adjudicatory Panel should dismiss the Commission's claims under Rule 2.4 and 3.6.

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[9] Even if ADF were a religious membership organization, Comment 4 to Rule 3.6 provides that "[a] judge's membership in a religious organization . . . is not a violation of th[e] Rule."

Dated: September 16, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September, 2015, I served the foregoing Motion by electronic mail on the following:

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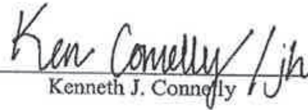

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