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DISTRICT COURT WELD COUNTY, COLORADO 901 9th Ave. Greeley, CO 80631	▲COURT USE ONLY▲
Plaintiff: MARGARET R. COLUCCI v. **Defendants:** NATIONAL BOARD OF CHIROPRACTIC EXAMINERS; SALVATORE D. LARUSSO; STEVEN R. CONWAY; JOHN C. NAB; PAUL N. MORIN; DANIEL M. COTE; LEROY F. OTTO; JOHN R. MCGINNIS; FARREL GROSSMAN; and KIRK SHILTS	Case Number: 2018CV30203 Div.: 5
Attorneys for Plaintiff: S. Kato Crews, #31927 Hoffman Crews Nies Waggener & Foster LLP 5350 S. Roslyn St., Ste. 100 Greenwood Village, Colorado 80111 (303) 860-7140 kcrews@hcnwf-law.com	

PLAINTIFF'S RESPONSE OPPOSING MOTION TO DISMISS

Plaintiff, Margaret R. Colucci ("Dr. Colucci"), submits the following for her response opposing Defendants' Motion to Dismiss ("Motion"):

ARGUMENT

A. PERSONAL JURISDICTION - RULE 12(B)(2)

1. Each Individual Defendant purposefully availed himself of the privilege of conducting business in Colorado; this litigation arises out of their forum-related contacts, giving the Court specific personal jurisdiction.

Specific jurisdiction exists when the injuries triggering litigation arise out of, and are related to, a defendant's activities that were purposefully directed at residents of the forum state.

Archangel Diamond Corp. v. Lukoil, 123 P.3d 1187, 1194 (Colo. 2005). The minimum contacts analysis for specific jurisdiction includes two parts: (1) whether the defendant purposefully availed himself of the privilege of conducting business in the forum state; and, (2) whether the litigation arises out of the defendant's forum-related contacts. *Id.* A defendant's deliberate creation of continuing obligations with the forum is a factor establishing purposeful availment. *Id.*

In their role as board members of Defendant National Board of Chiropractic Examiners (NBCE), each Individual Defendant deliberately created continuing obligations with Colorado, and availed himself of the privilege of conducting business in this state. Not only is the NBCE headquartered in Colorado, but the Individual Defendants decided, in their Board Policy Manual (Ex. J to the Motion), to follow Colorado law in managing the NBCE's affairs, agreeing that "NBCE business will be conducted in accordance with the laws of Texas and Colorado...." (Ex. J to the Motion, §2.1 (emphasis added); Complaint, ¶¶16-17.)

The Board Policy Manual also advises board members of their individual accountability under Colorado law, stating: "Each member of the NBCE board, individually and collectively, is legally and morally responsible for all activities of NBCE;" and, "The NBCE Board and the law require every board member to follow the rule of the reasonably prudent person and the principle of good faith." (Ex. J to the Motion, §§ 2.1, 2.9.) It further provides: "If NBCE Board members violate their trust or fiduciary duty, they may be subject to legal consequences. The duties and responsibilities of board membership attach automatically when board members accept the office. There is a certain amount of liability involved with being a board member..." (*Id.* at § 2.11.) (Emphasis added.) Thus, by accepting their position as board members, each Individual

Defendant voluntarily assumed and availed himself of the benefits of Colorado law in choosing to oversee and manage the NBCE's affairs. (*Id.*)

The Motion itself contains the best evidence of the Individual Defendants' purposeful availment of Colorado law to their personal benefit. There, they avail themselves of C.R.S. § 13-21-115.7(2) to argue that they are immune from suit as volunteers of a Colorado non-profit organization. (Motion, p.10.)

Additionally, NBCE compensates the Individual Defendants in their role as board members. The 2016 I.R.S. Form 990 filed by NBCE, and made available by NBCE for public inspection, shows certain Defendants received the following compensation from NBCE in 2016: (1) Conway: $35,600; (2) Cote: $32,290; (3) Grossman: $24,700; (4) LaRusso: $32,500; (5) Morin: $39,600; (6) Nab: $18,250; and, (7) Otto: $35,013. **Ex. 1 at p. 7 (Part VII, Box D)**. The NBCE website provides a link to a document that identifies the 2017 compensation paid to each Individual Defendant, as follows: (1) Conway: $37,450; (2) Cote: $38,531; (3) Grossman: $29,800; (4) LaRusso: $42,000; (5) McGinnis: $23,950; (6) Morin: $51,000; (7) Nab: $35,800; (8) Otto: $35,000; and, (9) Shilts: $13,550. **Ex. 2**.[1] The Individual Defendants, therefore, derive an economic benefit from governing the NBCE's affairs, and thus, they are deemed to have consented to jurisdiction for claims related to those contacts. *See Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1078 (10th Cir. 2008) ("Specific jurisdiction…is premised on something of a *quid pro quo*: in exchange for 'benefitting' from some purposive conduct directed at the forum state, a party is deemed to consent to the exercise of jurisdiction for claims related to those contacts.").

[1] Taken from https://www.nbce.org/annual-meeting/delegate-manual/ (last accessed 05/11/2018).

Each Individual Defendant conceded (in his affidavit attached to the Motion) that he makes telephone calls to, and exchanges emails with, employees at the NBCE's Colorado headquarters. (Exs. A – D, F – G, I to the Motion at ¶16, respectively; Exs. E, H to the motion at ¶17, respectively). The NBCE's website publishes a summary of the number of days each NBCE board member spent at meetings in Colorado in 2017. **Ex. 3**.[2] According to the NBCE, in 2017 alone, LaRusso spent nine days in Colorado between three meetings on behalf of NBCE; Conway spent 12 days between three meetings in Colorado; Nab spent 13 days between four meetings in Colorado; Morin spent 20 days between five meetings in Colorado; Cote spent six days between two meetings in Colorado; Otto spent 11 days between three meetings in Colorado; McGinnis spent three days for one meeting in Colorado; and, Shilts spent three days for one meeting in Colorado. **Ex. 3**. (*See also* Complaint, ¶¶16-30.) The NBCE's published meeting attendance summary appears to be in addition to the few meetings the Individual Defendants were willing to acknowledge in their affidavits attached to the Motion.

Having decided to conduct NBCE's business under Colorado law, take compensation from NBCE for their board service, and avail themselves of Colorado's civil immunity statute, the Individual Defendants have necessarily confessed application of Colorado's Nonprofit Corporations Act (the "Act") to them. C.R.S. § 7-128-101 *et seq.* The Act specifies the fiduciary obligations board members owe to the nonprofit organizations under their care. *Id.* § -401. These include duties to act in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the board member reasonably believes to be in the best interests of the entity. *Id.* § -401(1). These are specific duties each

[2] *Id.*

Individual Defendant owed to NBCE, a Colorado resident, in managing and governing NBCE's affairs. *Id.* §§ -101(1), (2), and -401.

The Complaint alleges the Individual Defendants' breached their fiduciary duties owed to NBCE (a Colorado resident), causing injury to Dr. Colucci. (Complaint, ¶¶102-06, 108-14.) As a result, this litigation arises out of the Individual Defendants' forum-related contacts, since their acts and omissions in fulfilling their fiduciary duties were necessarily directed at, and conferred upon, the Colorado resident (NBCE) under their care.

When a defendant creates continuing obligations between himself and a resident of the forum state, "he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Burger King Corp.*, 471 U.S. 462, 476 (1985). This applies even when a defendant never physically entered the forum state, because a significant amount of business is conducted electronically and remotely, "thus obviating the need for physical presence within a State in which business is conducted." *Id.* "So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Id.; see also Foundation for Knowledge in Dev. v. Interactive Design Consultants LLC*, 234 P.3d 673, 680 (Colo. 2010) ("DiNobile pursued a business relationship with a corporation that was, at all relevant times, headquartered in Colorado.").

Moreover, the commission of a tort itself creates a sufficient connection between a defendant and the forum state to establish jurisdiction. *Foundation for Knowledge in Dev.*, 234

P.3d at 681; *Goettman v. North Fork Valley Rest.*, 176 P.3d 60, 69 (Colo. 2008). "In such cases, there is no need for further minimum contacts analysis because the defendant is so connected with the forum state that traditional notions of fair play and substantial justice are not offended by the forum state's exercise of personal jurisdiction over the defendant." *Goettman*, 176 P.3d at 69. Dr. Colucci's claims in this case allege the commission of torts that arise from the Individual Defendants' breach of fiduciary obligations owed to a resident of Colorado—the NBCE. Jurisdiction over them is proper based on the nature of Dr. Colucci's claims alone. *Id.* To be sure, when a tort has been committed in the forum, and no other forum is likely to exercise personal jurisdiction over the defendant, the forum state has an even more legitimate interest in adjudicating the matter. *See id.* at 71; *see also infra* Section A(3).

Finally, the Complaint alleges that each Individual Defendant was a primary participant in the breaches of fiduciary duty that give rise to specific jurisdiction in this case. (*See, for example,* Complaint, ¶¶82-84, 97-100, 103-06). Employees or agents of a corporation may be subject to the personal jurisdiction of the court if they were the primary participants in the activities giving rise to jurisdiction over the corporation. *See SEC v. Knowles*, 87 F.3d 413, 418-19 (10th Cir. 1996); *Wise v. Lindamood*, 89 F. Supp.2d 1187, 1194-95 (D. Colo. 1999).

For all of these reasons, the Court has specific jurisdiction over each Individual Defendant. Each one purposefully availed himself of the privilege of governing the affairs of a Colorado nonprofit in accord with Colorado law, and NBCE compensates each of them for their efforts. **Exs. 1, 2**. Each agreed that Colorado law would govern their activities, and in doing so, availed himself of Colorado's civil immunity statute to avoid liability in this case. *Wise*, 89 F. Supp.2d at 1193. This is in addition to their respective physical attendance at meetings in

Colorado, their admitted routine communications with personnel of the NBCE in Greeley, and the additional record evidence of their Greeley meeting attendance in 2017.

2. There is also general jurisdiction over the Individual Defendants based on their continuous and systematic general business contacts.

When a court's exercise of jurisdiction does not directly arise from a defendant's forum-related activities, the court may nonetheless maintain general personal jurisdiction over the defendant based on the defendant's general business contacts with the forum state. *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1091 (10th Cir. 1998). A court has general personal jurisdiction over a defendant if the defendant conducted continuous and systematic activities that are of a general business nature in the forum state. *Foundation for Knowledge in Dev.*, 234 P.3d at 677.

The Individual Defendants' contacts which support specific jurisdiction (discussed above) demonstrate the continuous and substantial nature of the Individual Defendants' contacts with Colorado to also establish general personal jurisdiction over them. To be sure, however, the Complaint alleges numerous additional continuous and systematic contacts of each Individual Defendant which supports general personal jurisdiction, and which are not contradicted by the Individual Defendants' affidavits submitted in support of the Motion. (Complaint, ¶¶16-30.)

The Colorado long-arm statute is intended to allow Colorado courts to assert jurisdiction to the maximum extent permissible under due process. *Rogers v. Clipper Cruise Lines, Inc.*, 650 F. Supp. 143, 146 (D. Colo. 1986) (*citing Le Manufacture Francaise des Pneumatiques Michelin v. District Court*, 620 P.2d 1040, 1044 (Colo. 1980)). In the least, the Individual Defendants' contacts with Colorado establish a *prima facie* showing that they each maintain continuous and substantial business contacts in and with Colorado to support this Court's exercise of general personal jurisdiction over them.

3. Personal jurisdiction over the Individual Defendants is reasonable.

When a plaintiff establishes the requisite minimum contacts, the court next considers whether the exercise of jurisdiction is reasonable under the circumstances. *Archangel Diamond Corp.*, 123 P.3d at 1195. This reasonableness determination includes numerous factors, including: (1) the burden on defendant; (2) the forum state's interest in resolving the controversy; and, (3) the plaintiff's interest in attaining effective and convenient relief. *Foundation for Knowledge in Dev.*, 234 P.3d at 682.

Courts have determined that technology and electronically-stored information minimizes the burden on an out-of-state litigant. *Id.*; *Burger King Corp.*, 471 U.S. at 474. Notably, the burdens on Dr. Colucci, a resident of Nevada, equal the burdens on the Individual Defendants since Dr. Colucci also does not reside here. (Complaint, ¶1.) Further, the Individual Defendants have retained local counsel, which further lightens any burden on them to litigate here.

"Colorado has a strong interest in resolving any controversy involving a nonprofit corporation headquartered...within the state." *Foundation for Knowledge in Dev.*, 234 P.3d at 682. This typifies the reasonableness of the exercise of personal jurisdiction in this case when considering NBCE's Colorado residency; the Individual Defendants' decision that Colorado law controls their conduct as board members; and this action arising out of their breaches of fiduciary duties owed to NBCE.

By attempting to disavow the personal jurisdiction of this Court, the Individual Defendants imply that only the courts of their respective states would have personal jurisdiction over them and their malfeasance as board members of NBCE. If true, then Dr. Colucci's only recourse would be to piecemeal this litigation and bring at least nine separate actions in nine different states since none of the Individual Defendants are residents of Colorado, and only two of them reside in the same state (South Carolina). (*See generally* Exs. A – I to the Motion.) This absurd result would stifle Dr. Colucci's interest in obtaining effective and convenient relief. When a tort, however, has been committed in the forum, and no other forum is likely to exercise personal jurisdiction over the defendant, the forum state has an even more legitimate interest in adjudicating the matter. *See, e.g., Goettman*, 176 P.3d at 71.

Colorado undeniably has jurisdiction over the NBCE. It is likely that much of the same evidence will be presented for and against each of the Defendants. Litigating this matter in nine other jurisdictions would lead to the presentation of overly-duplicative evidence and the need to litigate substantially similar matters at least nine times given Defendants' differing states of residency. This multiplicity of litigation would be burdensome to witnesses involved. Litigating this matter in Colorado where NBCE is headquartered, however, promotes judicial economy by avoiding multiplicity and piecemeal litigation.

For at least these reasons, this Court's exercise of personal jurisdiction over the Individual Defendants is reasonable.

B. FAILURE TO STATE A CLAIM – RULE 12(B)(5)

Motions to dismiss are disfavored. *Qwest Corp. v. Colo. Div. of Prop. Taxation*, 304 P.3d 217, 221 (Colo. 2013). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Warne v. Hall*, 2016 CO 50, ¶¶2, 24.

1. Colorado law recognizes standing to sue for breach of a fiduciary duty owed to a third party.

While the second element of the *prima facie* case for a breach of fiduciary duty claim requires that a defendant breach a fiduciary duty owed to the plaintiff, the Colorado Court of Appeals in *Taylor v. Taylor*, 2016 COA 100, held that a plaintiff may maintain a breach of fiduciary duty claim where the fiduciary duty is owed to a third party. *Id.* at ¶¶14-25. The *Taylor* Court noted that prior authorities were "not confronted, as we are here, with the question of whether a plaintiff may sue on the basis of a fiduciary duty owed to someone else." *Id.* The court went on to hold that a settlor's children had standing to bring an action against a trustee for breach of fiduciary duty even though the trustee's fiduciary duty was owed to the settlor and not to the children. *Id.* Referring to the issue as one of standing, the question for the court was whether the injury suffered by the settlor's children, as trust beneficiaries, was an injury to a legally protected interest. *Id.* at ¶¶16-18. Analyzing the "implications" in Colorado's probate code, the court determined that the claimed injury was to a legally-protected interest despite the fact that the probate code did not expressly afford a cause of action to a trust beneficiary for breach of a trustee's fiduciary duties. *Id.* at ¶¶19-21. The court found this legally-protected interest emanated from various code provisions, and particularly a provision which allows courts to surcharge a trust fiduciary for damages to an estate, beneficiaries, or interested persons. *Id.* at ¶21. While the case involved trust beneficiaries, the court did not express that its holding was limited to the estate or probate context. *See generally id.*

Similar to the *Taylor* Court's analysis of the probate code, the Act establishes Dr. Colucci's standing—*i.e.*, her legally protected interest in her NBCE board position. The Act requires each non-profit corporation to have a board of directors. C.R.S. § 7-128-101(1). It includes various provisions regarding how different types of directors may be removed. *Id.* §§ -108, -109. And yet, the Act limits a board of directors' ability remove another director with impunity by requiring each director to discharge his or her duties consistent with statutorily mandated fiduciary duties. *Id.* § -401. Similar to the probate code in *Taylor*, the Act makes directors personally liable for breaches of fiduciary duty, to include liability for breaches of the duty of loyalty, acts or omissions not in good faith or that involve intentional misconduct, knowing violations of law, or any transaction from which the director directly or indirectly derived an improper personal benefit. *Id.* § -402(1). This liability is consistent with the Colorado legislature's approach with the civil immunity statute, which maintains director liability for injuries caused by a director's willful and wanton acts or omissions. *Id.* § 13-21-115.7(2).

Based on these statutory provisions, and consistent with the court's analysis in *Taylor*, the Act's statutory framework supports a director's legally-protected interest in her board position to afford standing to sue directors, who remove another director, in breach of their fiduciary duties. Otherwise, directors of a nonprofit organization could remove each other with impunity, at any time, for any baseless reason, and in derogation of the best interests of the organizations they serve. Such actions would be contrary to the Act's mandates. *See, e.g., id.* §§ 7-128-401, -402; *see also id.* at § 13-21-115.7(2). Moreover, standing here is further consistent with "common law principles recognizing third party standing to sue for breaches of fiduciary duties." *Taylor*, 2016 COA at ¶22. It is also consistent with other principles of common law which recognize that business partners and LLC members owe fiduciary duties to each other, and that corporate officers and directors always remain liable for their own individual torts. *LaFond v. Sweeney*, 2012 COA 27, ¶38 (noting LLC members and business partners owe each other fiduciary duties);

Hoang v. Arbess, 80 P.3d 863, 867-68 (Colo. App. 2003) (holding a corporate officer can be personally liable for his own individual torts even though committed on behalf of the corporation); *Sanford v. Kobey Bros. Constr. Corp.*, 689 P.2d 724, 725 (Colo. App. 1984) (holding an officer, director, or agent of a corporation may be held personally liable for his tortious acts).

For these reasons, Dr. Colucci has standing to sue the Individual Defendants for their breaches of fiduciary duties because their acts and omissions harmed her legally-protected interest in her board position. *Taylor*, ¶19. This standing allows her to assert her claims without being required to bring a derivative action, as the Motion argues. *See, e.g., Taylor*, 2016 COA 100; C.R.S. § 7-128-402(1).

2. The civil immunity statute does not apply because the Individual Defendants received compensation, and because the Complaint alleges facts plausibly establishing their willful and wanton acts and omissions.

The civil immunity statute for directors of nonprofits has three express exceptions. C.R.S. § 13-21-115.7(2). First, it does not apply to directors who are compensated for their service on a salary "or prorated equivalent basis." *Id.* The NBCE's 2016 I.R.S. Form 990, which it is required by law to file and make available for public inspection, shows that seven of the Individual Defendants who served as directors in 2016 received "reportable compensation from the organization." **Ex. 1 at p. 7 (Part VII, Box D).**[3] The NBCE's Form 990s for 2015 and 2014

[3] The Court may take judicial notice of the NBCE's 2016 Form 990, and without converting the Motion to a motion for summary judgment. *See* C.R.E. 201(b)(2); *City of Aurora v. 1405 Hotel LLC*, 2016 COA 52, ¶13. The contents of the Form 990 are not subject to reasonable dispute. The contents show that it is signed and dated by NBCE's Executive Director "under penalties of perjury" with a declaration that the form is true, correct, and complete; it was prepared by NBCE's certified public accountant; and, NBCE makes the Form 990 open to public inspection. **Ex. 1 at p.1 (Part II, and upper-right-hand corner).** *See Shook v. Pitkin Cnty. Comm'rs*, 2015

(2017 has not yet been made available by NBCE) demonstrate, generally, that NBCE in fact compensates its board members. **Ex. 4.**[4] Because NBCE's own tax and business records demonstrate that it compensates the Individual Defendants for their service, the civil immunity statute does not apply to them.

Second, the civil immunity statute does not apply when an injury was caused by a director's willful and wanton acts. C.R.S. § 13-21-115.7(2). On this point, the Motion seems to take issue with the Complaint not using the words, "willful and wanton." But the Complaint sufficiently alleges facts of plausible willful and wanton acts warranting denial of the Motion. *See Peterson v. Arapahoe County Sheriff*, 72 P.3d 440, 444 (Colo. App. 2003) (holding allegations in plaintiff's complaint were sufficient to plead a claim based on willful and wanton conduct).

"Willful and wanton" is not defined in the civil immunity statute. The courts have defined the phrase to involve "an element of conscious disregard for the safety of others." *Id.* (*citing Jarvis v. Deyoe*, 892 P.2d 398, 401 (Colo. App. 1994).) Numerous allegations in the Complaint include or suggest the Individual Defendants' conscious disregard for their fiduciary duties in their actions to remove Dr. Colucci from the board. For example, the Complaint alleges: the Individual Defendants' differential treatment of Dr. Colucci in relation to themselves; their proffered reason for her removal was a pretext;[5] and, their removal of Dr. Colucci was an *ultra vires* act made in bad faith.[6] (Complaint, ¶¶ 52-53, 90-96, 98-99; *see also* Complaint, ¶¶58, 60,

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COA 84, fn.4; *see also* C.R.E. 803(6).

[4] *Id.*

[5] Pretext is defined as a "false or weak reason or motive advanced to hide the actual or strong reason or motive. BLACK'S LAW DICTIONARY 1225 (8th ed. 2004) (emphasis added).

[6] *Ultra vires* is defined as "unauthorized; beyond the scope of power allowed or granted by a

72, 84-85.) Unless the Individual Defendants seek to claim they lacked knowledge of their fiduciary duties, the Complaint plausibly alleges their conscious disregard (and thus, willful and wantonness) of their legal and other obligations which caused harm to Dr. Colucci. *See, e.g., Peterson*, 72 P.3d at 444.

Third, the civil immunity statute does not apply when an injury is caused by a director's omission. C.R.S. § 13-21-115.7(2). Omission is defined as a "failure to do something; esp., a neglect of duty...." BLACK'S LAW DICTIONARY 1121 (8th ed. 2004). The Complaint alleges specific and abundant failures and derelictions of fiduciary duties to plausibly establish the Individual Defendants' omissions causing injury to Dr. Colucci. (Complaint, ¶¶55, 69, 74, 81, 93-94, 96-97, 104, 116(a).)

Finally, pages 10 – 11 of the Motion cites Section 7.6 of the Board Policy Manual, and Article V, Section 3, of the NBCE Bylaws for the proposition that removal of a board member is within the functions and duties of the board. Those sections, however, only apply to removal of "officers." (Ex. J to the Motion at § 7.6; Ex. K to the Motion at Art. V, § 3.) Both the Board Policy Manual and Bylaws define "officer" as the president, vice-president, secretary, and treasurer. (Exhibit J to the Motion at § 7.1; Exh. K to the Motion at Art. V § 1.) Dr. Colucci was not an "officer." (Complaint, ¶¶3-6.) Therefore, these provisions of the Board Policy Manual and Bylaws regarding removal of "officers" do not apply to her. And in any event, nothing in the Board Policy Manual or Bylaws allows the removal of a board member in breach of fiduciary duties. (*See* Ex. J to the Motion at §§ 2.1, 2.9, 2.11.)

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corporate charter or by law." *Id.* at 1559.

DATED: May 22, 2018

HOFFMAN CREWS NIES
WAGGENER & FOSTER LLP

s/S. Kato Crews

S. Kato Crews, #31927
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of May, 2018, a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE OPPOSING MOTION TO DISMISS** was filed and served via Colorado Courts E-Filing to all attorneys of record:

Tamara Seelman, #29391
Kaitlin Marsh-Blake, #50592
Gordon Rees Scully Mansukhani LLP
555 Seventeenth Street, Suite 3400
Denver, CO 80202
tseelman@grsm.com
kmarsh-blake@grsm.com
Attorneys for Defendants

s/Delany Hill
Delany Hill