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*Attorneys for Fremont-Madison Irrigation
District and Idaho Irrigation District*

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

CITY OF POCATELLO,

Plaintiff,

vs.

IDAHO WATER RESOURCES BOARD,
IDAHO DEPARTMENT OF WATER
RESOURCES, GARY SPACKMAN, in his
capacity as Director of the Idaho Department
of Water Resources, and TONY
OLENICHAK, in his capacity as Water
District 01 Watermaster,

Defendants.

Case No. CV42-23-1668

**SPACEHOLDERS' MOTION TO
INTERVENE**

COME NOW, Burley Irrigation District, Fremont-Madison Irrigation District and Idaho Irrigation District (hereafter collectively referred to as "Spaceholders"), by and through their attorneys of record, and hereby seek leave to intervene as Defendant-Intervenors in the above captioned case pursuant to Idaho Rule of Civil Procedures 24(a) & 24(b). This motion is

supported by the *Memorandum in Support of Motion to Intervene* and the *Declaration of Travis L. Thompson*, filed concurrently herewith.

The Spaceholders move as follows:

1. The Spaceholders have significant, protectable interests in the subject matter of this litigation because it potentially involves a matter of first impression concerning the legitimacy of the Water District (“WD”) 01 Rental Pool Procedures. The Spaceholders hold unique storage water rights administered by WD 01 and the subject matter of this litigation has the potential of immediate and future impacts upon their water rights and delivery of those water rights.
2. This motion is timely as the *Amended Complaint* was recently filed and the stipulated due date for the State’s *Amended Answer* was May 16, 2023. This Court has not substantively nor substantially litigated the issues, and the Spaceholders’ intervention and participation in this case would not cause undue delay.
3. The Spaceholders satisfy the requirements for intervention of right under I.R.C.P. 24(a). The Spaceholders have a significant, protectable interest in the subject matter of this litigation, because it potentially involves a matter of first impression concerning the adoption of WD 01 Rental Pool Procedures. The Spaceholders hold various natural flow and storage water rights to the Snake River, and the subject matter of this litigation potentially has immediate and future impacts upon the administration of those natural flow and storage water rights relied upon by the Spaceholders to satisfy their water rights and delivery of water to their landowners.

4. Disposition of the action has the potential to impair or impede the Spaceholders' ability to protect their water rights, which are real property right interests in the State of Idaho and will prejudice their right to determine a matter of first impression regarding WD 01 Rental Pool Procedures.
5. The Spaceholders' interests are not adequately protected by the Defendants, the Idaho Water Resources Board ("IWRB"), the Idaho Department of Water Resources ("IDWR"), the Director of IDWR, Gary Spackman and the Watermaster of Water District 01, Tony Olenichak. The Defendants are state agencies and employees of state agencies with a particular duty and mandate to the citizens of the State of Idaho. The Defendants do not represent the Spaceholders' interests in their individual rights and positions, nor are Defendants' interests sufficiently aligned with the interests of the Spaceholders in this matter.
6. The Spaceholders also satisfy the requirements for permissive intervention under I.R.C.P. 24(b). The Spaceholders' defense has a question of fact or law in common with the main action, and intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.
7. Attached herewith as Exhibit A is a copy of Defendant-Intervenors' *Proposed Answer to Plaintiff's Complaint for Declaratory Relief to Find the WD01 Rental Pool Procedures Void, to Find Rule 7.3 Unconstitutional, and for Damages from the Unconstitutional Taking of Property.*
8. The Spaceholders request oral argument on this motion.

DATED this 17th day of May, 2023.

MARTEN LAW LLP

/s/ Travis L. Thompson
Travis L. Thompson

Attorneys for Burley Irrigation District

RIGBY, ANDRUS & RIGBY LAW, PLLC

/s/ Jerry Rigby
Jerry Rigby

*Attorneys for Fremont Madison Irrigation
District and Idaho Irrigation District*

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2023, the foregoing was filed electronically using the Court's e-file system, and upon such filing the following parties were served electronically.

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 /s/ Travis L. Thompson
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Exhibit

A

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*Attorneys for Fremont Madison Irrigation
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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

CITY OF POCA TELLO,

Plaintiff,

vs.

IDAHO WATER RESOURCES BOARD,
IDAHO DEPARTMENT OF WATER
RESOURCES, GARY SPACKMAN, in his
capacity as Director of the Idaho Department
of Water Resources, and TONY
OLENICHAK, in his capacity as Water
District 01 Watermaster,

Defendants.

Case No. CV42-23-1668

**SPACEHOLDERS' ANSWER TO
AMENDED COMPLAINT**

COME NOW, the Defendant-Intervenors, Burley Irrigation District, Fremont-Madison Irrigation District and Idaho Irrigation District (hereafter collectively the "Spaceholders"), by and through their attorneys of record, and in response to Plaintiff's *Amended Complaint for Declaratory Relief to Find the WD01 Rental Pool Procedures Void, to Find Rule 7.3 Unconstitutional and for Damages from the Unconstitutional Taking of Property ("Amended Complaint")*, and hereby deny and allege as follows:

GENERAL DENIAL

1. Answering Plaintiff's *Amended Complaint*, Defendant-Intervenors, the Spaceholders, deny each and every allegation contained therein unless such allegation is expressly admitted herein.

PARTIES

The numbered paragraphs below correspond to the numbered paragraphs of the *Amended Complaint*.

1. The Spaceholders admit the City of Pocatello is located in Bannock County. The Spaceholders lack sufficient information to form a belief as to the truth of the remaining allegations in paragraph 1 of the *Amended Complaint*, and therefore deny the same.

2. The Spaceholders admit that the Idaho Water Resource Board ("IWRB") is the "Water Resource Agency" authorized by the Idaho Constitution at Article XV, § 7 and I.C. § 42-1732. The Spaceholders deny the remaining allegations in paragraph 2.

3. The Spaceholders admit that the Idaho Department of Water Resources ("IDWR") is an executive department of the State of Idaho. I.C. § 42-1701(1). The Spaceholders deny the remaining allegations in paragraph 3.

4. The Spaceholders admit that Gary Spackman is the Director of IDWR ("Director") and that the language quoted in paragraph 4 is an accurate partial quote of I.C. § 42-602. The Spaceholders deny the remaining allegations of paragraph 4.

5. The Spaceholders admit that Tony Olenichak is the current legally appointed Watermaster ("Watermaster") of Water District 01 ("WD 01"), and that his authorities and duties are outlined

within and controlled by statute, including but not limited to I.C. § 42-605(3). The Spaceholders deny the remaining allegations in paragraph 5.

JURISDICTION AND VENUE

6. The Spaceholders deny the allegations and legal conclusions in paragraph 6.

7. The Spaceholders deny the allegations and legal conclusions in the introductory sentence of paragraph 7.

7.a. The Spaceholders deny that IWRB delegated its rulemaking authority to the Committee of Nine. The Spaceholders deny that the WD 01 Rental Pool Procedures are *ultra vires*. The Spaceholders further deny all other allegations and legal conclusions in paragraph 7.a.

7.b. The Spaceholders deny that IDWR has deprived right-holders of water rights “to which they are entitled.” The Spaceholders deny that the Watermaster’s act of applying Procedure 7.3 against WD 01 spaceholders is *ultra vires*. The Spaceholders further deny all other allegations and legal conclusions in paragraph 7.b.

7.c. The Spaceholders deny that the Rental Pool Procedures are “rules” under the Idaho Administrative Procedure Act (“IDAPA”). I.C. §§ 67-5201 through 5286. The Spaceholders deny that the IWRB’s adoption of the WD 01 Rental Pool Procedures denied due process guarantees of the Idaho Constitution. The Spaceholders further deny all other allegations and legal conclusions in paragraph 7.c.

8. The Spaceholders deny that this Court has jurisdiction under I.C. § 67-5278 because it only applies to “rules” promulgated pursuant to IDAPA and the WD 01 Rental Pool Procedures are not “rules” under IDAPA.

9. The Spaceholders deny the Court has jurisdiction under Article I, § 14 of the Idaho Constitution because there has been no taking of private property for public use in this matter. The Spaceholders deny the Court has jurisdiction under Article XV, § 3 of the Idaho Constitution because IDWR's administration of water under the prior appropriation doctrine is a final agency action subject to review under I.C. §§ 42-1701, 42-1701A (4), 67-5201 through 67-5286. Plaintiff is not "entitled to judicial review of an agency action until [Plaintiff] has exhausted all administrative remedies..." I.C. § 67-5271(1).

10. The Spaceholders deny that Rental Pool Procedure 7.3 "impairs" Plaintiff's storage water rights because the Rental Pool Procedures are voluntary, rather than mandatory, and apply only to storage spaceholders that voluntarily agree to them. The Spaceholders admit that Plaintiff filed its original Complaint in Bannock County District Court but deny that it was the proper venue for this matter.

11. The Spaceholders admit the allegations in paragraph 11.

ALLEGATIONS COMMON TO ALL COUNTS

12. The Spaceholders lack knowledge or information sufficient to form a belief about the truth of the allegations of paragraph 12, and therefore deny the same.

13. The Spaceholders admit the quoted language in paragraph 13 is included in the referenced storage contract between the Plaintiff and the U.S. Bureau of Reclamation, attached to the *Amended Complaint* as Exhibit 1. The Spaceholders lack sufficient information or knowledge to form a belief about the validity or relevance of Exhibit 1 attached to the *Amended Complaint* and therefore deny the remaining allegations of paragraph. 13.

14. The Spaceholders admit that Exhibit 2 attached to the *Amended Complaint* contains Amended Partial Decree 01-02068 that was issued by the SRBA Court on February 28, 2020. The Spaceholders deny the Partial Decree attached as Exhibit 2 to the *Amended Complaint* is the only water right applicable to Palisades Reservoir or to the allegations alleged herein. The Spaceholders deny all other allegations and legal conclusions in paragraph 14.

15. The Spaceholders admit the quoted language is an accurate partial recital of Amended Partial Decree 01-02068. The Spaceholders lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 15 and therefore deny the same.

16. The Spaceholders lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 16 and therefore deny the same.

17. The Spaceholders lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 17 and therefore deny the same.

18. The Spaceholders deny that “Pocatello’s Contract volume” was “adjudicated” in the “01-2068 Decree” or in any other water right decree issued by the Snake River Basin Adjudication Court. The quoted language is a partial quote. The full quote is “the district court’s decision is based on the assumption that storage rights are property rights entitled to legal protection.” *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 879, 154 P.3d 433, 450 (2007) (citing *Washington County Irrigation Dist. v. Talboy*, 55 Idaho 382, 385, 43 P.2d 943, 945 (1935)). The Spaceholders deny the partially quoted language fully captures the legal holding of the case. The Spaceholders deny all other allegations and legal conclusions in paragraph 18.

19. The Spaceholders admit that Palisades Reservoir is located within Water District 01 (“WD 01”). The Spaceholders admit the authority to create water districts includes, but is not limited to, I.C. § 42-604. The Spaceholders deny the remaining allegations in paragraph 19.

20. The Spaceholders admit the quoted language is an accurate recital of Article XV, § 3, with emphasis added by Plaintiff, but deny the allegation that section applies to “storage water.” The Spaceholders deny all other allegations and legal conclusions in paragraph 20.

21. The Spaceholders admit that the duties and authorities of the WD01 Watermaster are outlined within Chapter 6, Title 42, Idaho Code, which includes, but is not limited to, I.C. § 42-602. The Spaceholders deny the remaining allegations in paragraph 21.

22. The Spaceholders admit that the quoted language is an accurate recital of portions of I.C. § 42-605(6), with the exception of the insertion of the word “[water].” The Spaceholders deny the remaining allegations in paragraph 22.

23. The Spaceholders admit the allegations in paragraph 23.

24. The Spaceholders admit the allegations in paragraph 24. The Spaceholders further respond that in addition to the “involvement of the Committee of Nine”, upon information and belief, the “rental pool” operates with the approval of the WD 01 spaceholders.

25. The Spaceholders admit the allegations in paragraph 25.

26. The Spaceholders admit the allegations in paragraph 26.

27. The Spaceholders admit the allegations in paragraph 27.

28. The Spaceholders deny the Committee of Nine “promulgates” the Rental Pool Procedures because the Spaceholders deny the Rental Pool Procedures are rules under IDAPA. The

Spaceholders admit the 2023 Rental Pool Procedures are attached as Exhibit 4 to the *Amended Complaint*.

29. The Spaceholders deny the allegations in paragraph 29 because use of the terms “administration” and “storage rights” are vague and ambiguous and because the WD 01 Rental Pool Procedures do not apply to all water users, nor all storage spaceholders, within WD 01.

30. The Spaceholders lack sufficient knowledge or information to form a belief about the allegations in paragraph 30 and therefore deny the same.

31. The Spaceholders lack sufficient knowledge or information to form a belief about the allegations in paragraph 31 and therefore deny the same.

32. The Spaceholders admit I.C. § 42-1765 authorizes the IWRB to appoint a local rental pool committee and that the Committee of Nine is the currently appointed local rental pool committee for WD01. The Spaceholders deny WD01 Rental Pool Procedures are rules under the IDAPA, I.C. §§ 67-5201–67-5286, and therefore deny the Committee of Nine promulgates rules.

33. The Spaceholders admit the WD 01 Rental Pool Procedures are sometimes referred to as “rules,” however, the Spaceholders deny they are “rules” as defined by IDAPA, I.C. §§ 67-5201–67-5286. The Spaceholders deny that since 2005 that Procedure 7.3 has remained constant.

34. The Spaceholders admit the allegations in paragraph 34 regarding the name of Procedure 7.3. The Spaceholders deny that Procedure 7.3 is a “rule.”

35. The Spaceholders lack sufficient knowledge or information to form a belief about the allegations in paragraph 35 and therefore deny the same.

36. The Spaceholders deny the allegations in paragraph 36.

37. The Spaceholders deny the allegations in paragraph 37.

REQUEST FOR DECLARATORY RELIEF

RESPONSES TO COUNT 1:

38. The Spaceholders incorporate the proceeding paragraphs by reference as though set forth fully.

39. The Spaceholders deny the allegations of paragraph 39 because the WD01 Rental Pool Procedures are not “rules” for purposes of IDAPA, I.C. §§ 67-5201 through 67-5286. The Spaceholders deny that the WD 01 Rental Pool Procedures are an “agency statement of general applicability” as defined by I.C. § 67-5201(21).

40. The Spaceholders lack sufficient knowledge or information to form a belief about the allegations in paragraph 40 and therefore deny the same.

41. The Spaceholders admit I.C. § 42-1765 authorizes the IWRB to appoint a local rental pool committee and that the Committee of Nine is the currently appointed local rental pool committee for WD01. The Spaceholders admit that the quoted language, with the exception of the addition of italics, is an accurate recital of portions of I.C. § 42-1765. The Spaceholders deny the remaining allegations of paragraph 41.

42. The Spaceholders lack sufficient knowledge or information to form a belief about the allegations in paragraph 42 and therefore deny the same.

43. The Spaceholders admit that the IWRB has adopted Water Supply Bank Rules, IDAPA 37.02.03.000 to 37.02.03.040. The Spaceholders admit that IDAPA 37.02.03.040.01.a-k, sets forth certain criteria that must be included by a local rental pool committee when putting

together proposed rental pool procedures. The Spaceholders deny that IDAPA 37.02.04.040 is “the means by which [the IWRB] delegates to the Committee of Nine the task of promulgating the Procedures.”

44. The Spaceholders admit that the Committee of Nine is not statutorily authorized to adopt rules. The Spaceholders admit that IDAPA 37.02.03.040.01.a–k, sets forth certain criteria that must be included by a local rental pool committee when putting together proposed rental pool procedures, including prevention of injury to other water rights. The Spaceholders admit the WD 01 Rental Pool Procedures direct allocation of storage water in certain years, under certain circumstances, to prevent impacts to spaceholders. The Spaceholders deny the remaining allegations of paragraph 44.

45. The Spaceholders deny the WD01 Rental Pool Procedures are “promulgated” by the Rental Pool Subcommittee of the Committee of Nine or by the Committee of Nine because the Spaceholders deny the WD 01 Rental Pool Procedures are rules under IDAPA I.C. §§ 67-5201 through 67-5286. The Spaceholders admit the Committee of Nine has in the past approved procedures presented by the Rental Pool Subcommittee and that such procedures have been presented to the water users at the annual meeting through resolution.

46. The Spaceholders lack sufficient information to form a belief about the allegations of paragraph 46, and therefore deny the same.

47. The Spaceholders lack sufficient information to form a belief about the allegations of paragraph 47, and therefore deny the same.

48. The Spaceholders lack sufficient information to form a belief about the allegations of paragraph 48, and therefore deny the same.

49. The Spaceholders lack sufficient information to form a belief about the allegations of paragraph 49, and therefore deny the same.

50. The Spaceholders deny the State has “delegated” rulemaking authority because they deny the Rental Pool Procedures are rules under IDAPA. The Spaceholders deny the remainder of paragraph 50.

51. The Spaceholders deny the State has “delegated” rulemaking authority because they deny the Rental Pool Procedures are rules under IDAPA, I.C. §§ 67-5201 through 67-5286, and therefore, the Rental Pool Procedures are not *ultra vires*. The Spaceholders further deny the adoption of the Rental Pool is unlawful and *void ab initio*. The Spaceholders deny the remainder of paragraph 51.

52. The Spaceholders deny the WD01 Rental Pool Procedures “deprive spaceholders of water to which they are entitled and instead give that water to other spaceholders.” The Spaceholders admit the quoted language is an accurate recital of language found in the cited case, with the exception of the insertion of [Director] for “state engineer” and that it is a quote of a quote. The Spaceholders deny the quoted authority stands for the legal proposition alleged in paragraph 52. The Spaceholders deny the remainder of paragraph 52.

53. The Spaceholders deny that IDWR or the WD 01 Watermaster has acted contrary or in excess of their statutory authority under I.C. § 42-602. The Spaceholders further deny the remainder of paragraph 53.

RESPONSES TO COUNT 2:

54. The Spaceholders incorporate the preceding paragraphs by reference as though set forth fully.

55. The Spaceholders deny the procedures are subject to “promulgation” in compliance with the procedural requirements of IDAPA, I.C. §§ 67-5201–67-5286, because the WD 01 Rental Pool Procedures are not rules under IDAPA. The Spaceholders deny the Rental Pool Procedures violate due process or that they deprive any property owners of a property right. The Spaceholders deny the remainder of the introductory paragraph 55.

55.a. through 55.g. The Spaceholders lack sufficient information to form a belief about the allegations of paragraph 55.a. through 55.g, and therefore deny the same.

56. The Spaceholders lack sufficient information to form a belief about the allegations of paragraph 56, and therefore deny the same.

57. The Spaceholders deny the IWRB’s adoption, by resolution, of the WD01 Rental Pool Procedures violates the requirements of IDAPA I.C., §§ 67-5201–67-5286, or due process. The Spaceholders further deny the remainder of paragraph 57.

RESPONSES TO COUNT 3:

58. The Spaceholders incorporate the preceding paragraphs by reference as though set forth fully.

59. The Spaceholders admit the paragraph contains the quoted language from 2023 Rental Pool No. 7.3. The Spaceholders deny Plaintiff’s characterization of that language as a “Rule.”

60. The Spaceholders lack sufficient information to form a belief about the allegations of paragraph 60, and therefore deny the same.

61. The Spaceholders lack sufficient information to form a belief about the allegations of paragraph 61, and therefore deny the same.

62. The Spaceholders deny the allegations that the Rental Pool Procedures are unlawful, and therefore deny the allegations of paragraph 62.

63. The Spaceholders lack sufficient information to form a belief about the allegations of paragraph 63, and therefore deny the same.

64. The Spaceholders lack sufficient information to form a belief about the allegations of paragraph 64, and therefore deny the same.

65. The Spaceholders lack sufficient information to form a belief about the allegations of paragraph 65, and therefore deny the same.

66. The Spaceholders deny that any of the Rental Pool Procedures result in distributing or allocating water contrary to any alleged legal “entitlement.” The Spaceholders deny the remaining allegations of paragraph 66.

67. The Spaceholders deny the allegations of paragraph 67.

68. The Spaceholders deny the allegations of paragraph 68.

UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY

RESPONSES TO COUNT 1:

69. The Spaceholders incorporate the preceding paragraphs by reference as though set forth fully.

70. The Spaceholders admit the language quoted is an accurate recital of a portion of Article I, § 14 of the Idaho Constitution. The Spaceholders dispute that this language is relevant to this matter and, therefore, denies the allegations in paragraph 70.

71. The Spaceholders deny the allegations in paragraph 71.
72. The Spaceholders lack sufficient information to form a belief about the allegations of paragraph 72, and therefore deny the same.
73. The Spaceholders deny the allegations in paragraph 73.
74. The Spaceholders deny the allegations in paragraph 74.
75. The Spaceholders deny the allegations in paragraph 75.
76. The Spaceholders deny the allegations in paragraph 76.
77. The Spaceholders deny the allegations in paragraph 77.

RESPONSES TO COUNT 2:

78. The Spaceholders deny the allegations in paragraph 78.
79. The Spaceholders deny the allegations in paragraph 79.

RESPONSES TO REQUEST FOR ATTORNEY FEES AND COSTS

80. The Spaceholders deny the allegations in paragraph 80.
81. The Spaceholders deny the allegations in paragraph 81.

RESPONSES TO PRAYERS FOR RELIEF

The Spaceholders deny the Plaintiff is entitled to a judgment awarding the relief requested in the prayer for relief, deny the Plaintiff has stated facts entitling it to relief, deny that the Plaintiff has stated claims for which relief may be granted, deny that the Plaintiff is entitled to any relief whatsoever, and request that this Court dismiss the *Amended Complaint*.

- A. The Spaceholders deny prayer for relief A.
- B. The Spaceholders deny prayer for relief B.
- C. The Spaceholders deny prayer for relief C.
- D. The Spaceholders deny prayer for relief D.
- E. The Spaceholders deny prayer for relief E.
- F. The Spaceholders deny prayer for relief F.
- G. The Spaceholders deny prayer for relief G.
- H. The Spaceholders deny prayer for relief H.
- I. The Spaceholders deny prayer for relief I.

AFFIRMATIVE DEFENSES

- 1. Plaintiff's claims, or some of them, fail to state a claim upon which relief can be granted.
- 2. Plaintiff's claims are barred by the statute of limitations.
- 3. Plaintiff has failed to exhaust its administrative remedies.
- 4. Plaintiff's claims should be denied due to the equitable doctrine of waiver.
- 5. Plaintiff's claims should be denied due to the equitable doctrine of unclean hands.
- 6. Plaintiff's claims for special, or economic, damages must be dismissed because they are insufficiently pled in contravention of the requirements of the Idaho Rule of Civil Procedure 9(g).

7. The Spaceholders have the right to discovery from other parties to this action and reserve the right to amend this Answer to add additional affirmative defenses supported by the facts, and the exclusion of such defenses here should not be deemed to waive any such further amendment of this Answer.

THE SPACEHOLDER'S REQUEST FOR RELIEF

The Spaceholders respectfully request this Court to enter judgment in favor of the State and Defendant-Intervenors and against Plaintiff as follows:

1. That Plaintiff's claims be dismissed with prejudice in its entirety and judgment entered in the State's and Defendant-Intervenors' favor.
2. That the Defendant-Intervenors be awarded costs.
3. That the Defendant-Intervenors be awarded reasonable attorney's fees.
4. For such other and further relief as the Court deems just and proper.

DATED this 17th day of May, 2023.

MARTEN LAW LLP

/s/ Travis L. Thompson

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