

**DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION OF
THE STATE OF MONTANA**

IN THE MATTER OF Joint Application of
Liberty Utilities Co., Liberty WWH, Inc.,
Western Water Holdings, LLC, and
Mountain Water Company for Approval
of a Sale and Transfer of Stock

REGULATORY DIVISION
DOCKET NO. D2014.12.99

**CITY OF MISSOULA’S REPLY IN SUPPORT OF MOTION TO COMPEL
RESPONSES TO ITS DATA REQUESTS TO
WESTERN WATER HOLDINGS, MOUNTAIN WATER COMPANY, LIBERTY
UTILITIES CO., AND LIBERTY WWH, INC. AND
STAY THE PROCEEDING PENDING RESPONSES**

The City filed its motion to compel because Western Water, Mountain Water, and Liberty refuse to respond to the City’s data requests. They make blanket relevance objections without providing any explanation for those objections. They have selectively produced documents and withheld others that are less favorable to their case without any justification. And, despite orders in this case to the contrary, they continue to maintain that the financial future of the water system and value of the proposed sale is not relevant to this case.

In their response, Western Water, Mountain Water, and Liberty provide little in terms of substance. Instead, they express confusion over the meaning of words such as “you” or “evaluation, due diligence, and analysis.” All the while, they claim the City’s requests are inadequate because, unlike Western Water, Mountain Water, and Liberty,

the City “lack[s] . . . familiarity with the Commission.” (Liberty Response Br., p. 9–10.)

The City might not appear before the PSC on a daily basis, but it is knowledgeable enough to know when a party is gaming the discovery process rather than participating in it. Western Water, Mountain Water, and Liberty have shown they have no qualms in making meritless relevance objections, among others, and they have continued to do so in response to the City’s requests. The City respectfully requests the PSC grant its motion and order Western Water, Mountain Water, and Liberty to fully respond to the City’s requests.

I. Western Water, Mountain Water, and Liberty offer no justification for their identical impermissible, blanket relevance objections.

Western Water and Mountain Water make no attempt to explain their blanket relevance objections. Liberty at least claims that its objections were “sufficiently specific to allow the Commission to rule on Liberty’s objection.” (Response Br., p. 3.) But, much like the relevance objections themselves, Liberty offers no explanation for how the objections were “sufficiently specific.” Simply saying the objections were specific does not make it so.

Indeed, Liberty’s, as well as Mountain Water and Western Water’s, responses to the City’s data requests show that their blanket relevance objections were not “sufficiently specific.” Consider, for example, the City’s very first data request – CITY-001:

<p>CITY-001</p> <p>Regarding: Project Orchard Confidential Information Memorandum</p> <p>Witness:</p> <p>In the Project Orchard Confidential Information Memorandum of June 2014, it was represented, on page 112, that the “Year End Rate Base” for Mountain Water would increase from 39.7 in 2013 to 59.6 in 2019.</p> <ol style="list-style-type: none"> a. Did you perform any evaluation, due diligence, or analysis regarding this reported anticipated increase in the rate base? b. If so, please describe, in detail, the evaluation, due diligence, or analysis you performed, including but not limited to your conclusions. c. Please produce all documents reviewed, prepared, or relied upon in the evaluation, due diligence, or analysis referenced above. <p>Objection:</p> <p>Liberty objects to this request to the extent it seeks information not relevant to the subject matter of the instant proceeding, information not reasonably calculated to lead to the discovery of evidence admissible in the instant proceeding, and on the grounds the reference to “you” is vague and ambiguous.</p> <p>Response:</p> <ol style="list-style-type: none"> a. Yes. b. Liberty reviewed the data Seller made available through the Confidential Information Memorandum (“CIM”) and electronic data room. Ultimately, Liberty accepted the Seller’s rate base forecast for purposes of its evaluation of the transaction. c. See the CIM (WWH000799-WWH000898) produced by WWH and Mountain Water in response to PSC-028(b).
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Right out of the gate, Liberty makes its relevance objection, as well as the other objections that were cut and pasted from Western Water and Mountain Water’s objections (or vice versa, as the case may be). But then Liberty offers no explanation for why the requested information is irrelevant. It simply isn’t there.

A specific objection on the basis of relevance might take the form, “The requested information is not relevant because” For the myriad relevance objections it makes, though, Liberty offers an explanation for its objection with respect to only one data request—the City’s request for documents that were provided to Liberty in order to calculate the purchase price of \$327 million (PSC-020). Ironically, this is one of the

most relevant requests the City made, as discussed below. (See Order No. 7392e, ¶ 10, from this proceeding “Parties have an interest in determining just how extensive this external and internal analysis was, to understand whether the parties did indeed conduct adequate due diligence.”) Regardless, Liberty’s responses speak for themselves – with the exception of that one explanation, Liberty’s and Western Water and Mountain Water’s pro forma relevance objections are devoid of justification.

Western Water, Mountain Water, and Liberty’s failure to offer specific explanations for their relevance objections means the City and the PSC have to guess at why the three corporations believe the requests are irrelevant. The City cannot adequately respond to the objections without those explanations, and there is no indication of whether any documents were actually withheld on the basis of relevance.

“Discovery is broad and liberal.” (Or. No. 7392e, ¶ 10.) Western Water, Mountain Water, and Liberty’s blanket objections violate the procedural order, which provides: “Objections must be sufficiently specific for the Commission to adequately rule on whether to sustain or object.” Or. No. 7392, ¶ 11. The PSC should order Western Water, Mountain Water, and Liberty to produce any and all documents withheld on the basis of relevance or to provide a “sufficiently specific” explanation for each objection so that the City can adequately respond to and the PSC can adequately rule on the objection.

II. Specific requests

CITY-002 (Mountain Water)

Western Water and Mountain Water’s response to CITY-002 is truly indicative of its responses to most of the City’s other data requests. Instead of responding to the

City's straightforward request, Western Water and Mountain Water claim they were confused by the word, "you," or they make unjustified assumptions about the City's use of the words, "evaluation, due diligence or analysis." Western Water, Mountain Water, and Liberty should be compelled to respond to CITY-002.

First, the City's use of the word "you" is not vague or ambiguous. It means "the ones being addressed." The requests were served on Western Water, Mountain Water, and Liberty, so "you" means them. The City was not able to identify a specific witness for some of its data requests because it is not aware of whom all might have conducted the requested analyses or who all might possess the requested documents. That is the very point of the data request – to learn that information. Indeed, the PSC also had to take this same approach in its own data requests, designating the witness as "unknown" in its first 28 data requests. Had the City named a specific witness for some of these requests, Western Water, Mountain Water, and Liberty would have inevitably refused to respond to the request if only some other person was able to respond.

In Order 7392d, the PSC observed that discovery should encourage the "free flow of information" and concluded that Western Water and Mountain Water were applying exacting interpretations of the requests that hampered the discovery process. (Or. No. 7392d, ¶ 8.) They continue to do so here by feigning confusion over the word, "you." The PSC should reject this objection.

Second, Western Water and Mountain Water claim the City's use of the words "evaluation, due diligence, or analysis" must necessarily mean that the request was only directed at Liberty. (*See* WWH/MWC Response Br., p. 4.) How is that so? Has Western Water or Mountain Water ever conducted analyses regarding potential or

anticipated rate increases? If so, they must respond to CITY-002. Apparently, though, they claim they have never conducted and could not conduct such an analysis—only Liberty can conduct that analysis. Western Water and Mountain Water’s objection makes no sense—any prudent utility owner would perform an evaluation or analysis of a potential rate increase before seeking the rate increase. The City is requesting any analyses that Western Water and Mountain Water did related to potential or anticipated rate increases. It is as simple as that.

Apparently recognizing that it might have done such analyses, Western Water and Mountain Water then claim the information has no bearing on this matter because this matter does not involve a proposed rate increase. In other words, Western Water and Mountain Water want the PSC to view this matter in a vacuum—in complete isolation of future rate increases that are levied in order to recoup the purchase price. The PSC, in two separate orders, has already rejected this argument: “These documents are responsive because they answer questions regarding acquisition premium. The Commission has found that acquisition is a relevant topic in past sale and transfer dockets.” (See Or. No. 7392d, ¶ 6; Or. No. 7392e, ¶¶ 8-9.)

Any analyses that Western Water, Mountain Water, and Liberty have done in relation to anticipated or potential rate increases will offer insight into the future operations and financial health of the water system. Western Water, Mountain Water, and Liberty should be compelled to provide that information.

CITY-002 (Liberty)

Like Western Water and Mountain Water, Liberty attempts to read language into the City’s request in order to justify its refusal to respond. In CITY-002, the City asked:

“Have you ever performed any evaluation, due diligence, or analysis regarding this potential or anticipated increase in rates charged to customers of Mountain Water?” In response, Liberty wrote: “In an effort to provide responsive information, Liberty states affirmatively that it has not performed a stand-alone evaluation, due diligence or analysis of potential or anticipated increases in Mountain Water rates.” (Emphasis added.)

The City did not ask for a “stand-alone” analysis. It asked for “any evaluation, due diligence, or analysis,” whether or not it was stand-alone or part of some broader evaluation, due diligence, or analysis. As it indicated in its opening brief, for example, the City is aware that Liberty sent representatives to Missoula to conduct due diligence. Did those representatives do any analysis, evaluation, or due diligence related to rate increases? Liberty does not answer that question. Instead, it simply states that it did not conduct any “stand-alone” analysis.

The PSC and the parties are entitled to know the nature of Liberty’s due diligence because they will help the parties and the PSC better understand the impact of the sale on the utility and customers. (*See* Or. No. 7392e, ¶ 10.) The PSC should order Liberty to respond to the request the City made, not the request as reframed by Liberty.

CITY-003 (Western Water and Mountain Water)

In CITY-003, the City asked Western Water, Mountain Water, and Liberty to provide, among other things, “any evaluation, due diligence, or analysis regarding Mountain Water’s intention to begin filing a rate case every year.” The request is straightforward. Nevertheless, Western Water and Mountain Water again object to this request because they are baffled by the word “you” and believe the City’s use of the

words “evaluation, due diligence, and analysis” can only mean the request is directed at Liberty. Western Water and Mountain Water rhetorically ask: How can Mountain Water evaluate or analyze its own intent? How can it not? If Western Water and Mountain Water intended at one point to file rate cases every year, did they do any analysis related to that decision? One would certainly hope that a water utility would put some thought and analysis into its decision to annually file rate increases, rather than capriciously make the decision without any basis or research.

Remarkably, notwithstanding their expressed confusion as to how Western Water and Mountain Water can conduct any analyses, Western Water and Mountain Water then claim in their response that they have provided the requested information in response to PSC-028(b) – i.e. the Project Orchard memo. Western Water and Mountain Water then state, “It is unclear what additional information the City is looking for based on this request.” The City’s request is simple: Did Western Water and Mountain Water conduct any evaluation, due diligence, or analysis related to annual rate increases? Mountain Water’s plans for future rate increases reflect its financial health going forward, which, as the PSC has stated is “highly relevant.” (Or. No. 7392e, ¶ 10.) The PSC should compel Western Water and Mountain Water to fully respond to the City’s request.

CITY-004 (Liberty)

In CITY-004, the City asked Liberty whether rate cases would be filed annually or every two years if the PSC approves the proposed sale. Liberty stated it “generally supports the rate gradualism allowed by more frequent rate increases” and then stated

the rationale for its position in subpart (b). When asked to produce documents that it relied on in explaining that rationale, it wrote, “N/A.”

In its response brief, Liberty claims it did not provide any documents supporting its rationale because the rationale is based on its “corporate philosophy” and was “gleaned from a variety of general sources, not documents.”

Consider a couple statements in Liberty’s rationale:

- “The capital investment plan for Mountain Water will require an increase in rates.”
- “[T]he primary tool available to avoid rate shock for customers will be frequent rate cases.”

If this is part of Liberty’s rationale for annual rate increases, did it truly reach these conclusions without any sort of documentation or written analysis? If so, then this should raise a red flag with the PSC: If the sale goes through and Liberty asks for rate increases in the future, Liberty will have nothing to offer in support of its request other than its own “corporate philosophy” and “general sources, not documents.” If, on the other hand, Liberty’s decision to file annual rate increases is based on something more than a whim, the PSC should compel Liberty to provide that documentation.

CITY-007 and CITY-028 (Liberty)

In CITY-007 and CITY-028, the City asked Liberty to describe capital improvements it would make in the first five years of operation (CITY-028 referred to specific, necessary improvements). Liberty simply stated it would follow Mountain Water’s capital improvement plan and would make additional improvements on an as-needed basis.

In other words, Liberty has no plan other than to continue doing what Mountain Water has done all along. If that is Liberty's answer, then that is its answer. But how can Liberty take the position that it will be business as usual going forward when Mountain Water is presently losing more water than it delivers?

Contrary to the testimony of its own executives, Liberty now, in its response brief, takes the untenable position that the water system is in "good shape":

The engineering evidence and testimony presented at the right-to-take trial clearly established that the Mountain Water System is in good shape, that it is operated adequately and properly by Mountain Water Company, and that Mountain Water Company is properly and adequately addressing water leaks.

(Response Br., p. 6.) The water system is undisputedly not in "good shape." It loses between 40% and 50% of its water by Mountain Water's own assessment. How can a water system possibly be in "good shape" if it wastes that much water, forcing its consumers to pay for and pump water that is never delivered?

Greg Sorenson, Liberty Utilities' Vice President and General Manager plainly stated at trial that Mountain Water's capital improvement is not sustainable. And it now asserts in its response brief that "Liberty certainly does not intend to allow [the water system] to degrade under Liberty's 'watch'." Yet, in its response to the City's data request, Liberty states it is committed to continuing down that path of unsustainability by following Mountain Water's capital improvement plan, unless something else is "warranted and necessary." If losing more water than delivering is not enough reason for Liberty to do something different than what Mountain Water has done, what will be enough? What does Liberty have to offer in terms of preventing the continued degradation of Missoula's water system other than a robust safety coin

program and a commitment to enshrine Mountain Water's legacy of leakage? The PSC should compel Liberty to answer this question.

CITY 009 and CITY-029 (Liberty)

In CITY-009, the City asked Liberty how it would pay for capital improvements in the next five years. Liberty does not know how it will pay for those capital improvements: "At this time, Liberty cannot identify how particular capital improvements will be financed over the next five years." Liberty did state, though, that it "strives to maintain its capital structure as close as possible to the structure approved by the relevant regulatory commission." As with Liberty's other responses that show it has no plan going forward, if this is Liberty's answer, then that is its answer. But Liberty's inability to provide any meaningful response to the City's request and instead assert that it has no idea how it will finance capital improvements is yet another example of why this proposed sale would do more harm than good to the people of Missoula.

In request CITY-029(b), the City asked Liberty to "[d]escribe the optimal capital structure for the Mountain Water business." Liberty objected to this request because it does not understand the meaning of the word "optimal." As the City explained in its Motion to Compel, the word "optimal" means "best or most effective" or "most desirable or satisfactory." In its response, Liberty claims that, since "optimal" or "desirable" are not "terms of art," Liberty does not know how to define it.

According to Liberty, the "optimal" capital structure depends on the facts and circumstances, so Liberty has no idea how it could respond to the City's request. Liberty can respond, though. If Liberty believes the optimal capital structure can vary

depending on the facts and circumstances, then it can describe those facts and circumstances and how they would affect the capital structure. Instead of providing that response, Liberty is simply throwing up its hands and saying, "It depends." The PSC explained that a company's capital structure informs the "overall financial health of the company that owns the utility [and] is highly relevant." (Or. No. 7392e, ¶ 9.) The City's data request is therefore an important one because it will provide insight into Liberty's financial future if the sale is approved. Liberty, though, is again feigning confusion in order to avoid answering the request. The PSC should order Liberty to respond.

CITY-010 (Western Water and Mountain Water)

In CITY-010, the City asked Western Water and Mountain Water to identify, describe, and provide "any evaluations, due diligence, or analysis regarding Mountain Water's ability to acquire small water utilities." Western Water and Mountain Water responded that it conducted such analyses and then explained the analyses. But, when asked to produce documents that it relied on in identifying and explaining the analyses, they responded, "N/A."

The City moved to compel the production of these documents. Western Water and Mountain Water responded by, again, claiming they are bewildered by the word, "you." That objection should be rejected for the reasons above.

More substantively, Western Water and Mountain Water explained they do not have to provide the requested analyses, due diligence, and evaluations because they did not have to prepare any evaluations, analyses, or due diligence to respond to the City's request:

Unlike the City, Mountain Water has experience operating a water system in Montana, and specifically in and around Missoula, and employees with years of knowledge in water issues and the current and prior operations of Mountain Water. Mountain Water did not need to prepare any evaluation, analysis, or due diligence to answer this question.

(Response Br., p. 9.) Western Water and Mountain Water's argument, then, is that they do not need to provide evaluations, analyses, and due diligence because it's all in their head—Western Water and Mountain Water can describe them from memory without having to refer back to them.

The City, though, did not ask whether Western Water and Mountain Water can describe the analyses from memory. And the City did not ask whether Western Water and Mountain Water had to prepare any separate analyses in order to answer the City's requests about the underlying evaluations, analyses, and due diligence. The City's request was simple: (1) Did Western Water or Mountain Water prepare any analyses related to Mountain Water's ability to acquire smaller water utilities?, (2) please explain those analyses, and (3) please provide those analyses.

The PSC encourages the "free flow of information" during discovery, not game playing. (Or. No. 7392d, ¶ 8.) Instead of providing the requested analyses, evaluations, and due diligence they had already identified and explained, Western Water and Mountain Water chose to withhold them based on a tortured reading of the City's requests. Western Water and Mountain Water have now spent more time and energy resisting the City's request than they would have spent by simply providing the analyses that are readily at hand. The PSC should order Western Water and Mountain Water to provide the analyses, evaluations, and due diligence they identify and describe in response to CITY-010.

CITY-011 (Western Water and Mountain Water)

In CITY-011, the City asked Western Water, Mountain Water, and Liberty to identify, describe, and provide “any evaluation, due diligence, or analysis regarding leakage at Mountain Water, including capital expenditures and maintenance to address the problem.” The relevance of this request is clear and unchallenged.

In response to the City’s request for the evaluations, due diligence, or analyses, Western Water and Mountain Water responded – as it did in response to CITY-010 – by writing “N/A.” The City moved to compel. In response, Western Water and Mountain Water parrot the response they gave related to CITY-010. Western Water and Mountain Water’s objection to CITY-011 should be rejected for the same reasons that their objection to CITY-010 should be rejected.

What is perhaps more troubling, though, than Western Water and Mountain Water’s objection to CITY-011 is their decision to selectively supplement their response to the request. Western Water and Mountain Water decided to provide a supplemental response to the City’s request after Liberty indicated that Western Water and Mountain Water would be providing responsive documents (and after the City moved to compel).¹ But, rather than providing a complete response, they provided only selected documents that appear to show the leakage rate is lower than what is shown in more recent documents. Those newer documents – showing higher leakage rates (*see* Ex. B) – were and are undisputedly in Western Water and Mountain Water’s possession, yet they continue to withhold them.

¹ As a side note, Liberty, unlike Western Water and Mountain Water apparently had not trouble understanding that the City’s request asked Western Water and Mountain Water to provide the analyses, due diligence, and evaluations rather than a “N/A” response.

In their response brief, Western Water and Mountain Water offer no explanation whatsoever for why they chose to selectively produce documents that show lower (but still abhorrent) leakage rates but withheld more recent documents that show higher leakage rates. They just ignore the issue. The water system's leakage rate is appalling whether it is greater than 40 percent or greater than 50 percent. What is perhaps more telling about Western Water and Mountain Water's response than the actual leakage rate is their deliberate decision to pick and choose the documents they produced depending on how favorable the documents are to their case. The PSC should order Western Water and Mountain Water to provide a complete – not a selective – response to the City's request.

CITY-020 (Liberty)

In CITY-020, the City asked Liberty to provide valuation documents it was provided in order to calculate the purchase price of \$327 million for all three water systems. Liberty objected on the basis of relevance. In response to the City's motion to compel, Liberty offers no response other than to incorporate by reference its briefing on the PSC's data request PSC-033(b).² The PSC subsequently rejected Liberty's objection:

² In footnote 3 of its response brief (p. 2), Liberty writes:

A perfect illustration of the City's tactics is the statement on page three of its motion that "[t]he people of Missoula will inevitably help finance this sale through their rates if the sale goes through. If the people are going to pay for it, they deserve to know that they are getting in return." Motion to Compel, p. 3. Again, the record is undisputed that Liberty is not seeking any acquisition adjustment relating to the sale price. That means that Mountain Water customers will not pay for the sale price in rates. Rates will be determined by the Commission in future rate cases under Liberty ownership based on used and useful plant, approved operating expenses and other standard ratemaking determinations. The City is flatly misstating both the law and facts on this issue. The Commission will have the ability to review and evaluate future Mountain

Considering the broad and liberal nature of discovery, as well as the fact that the overall financial health of the company that owns the utility is highly relevant, the Commission must overrule Liberty's relevance objections. Liberty must provide the subject information.

(Or. No. 7392e, ¶ 9.) The PSC should likewise reject Liberty's objection with respect to CITY-020. The requested information is relevant. Financial projections, due diligence, evaluations, and analyses will help the PSC determine whether Liberty will be able to provide adequate service going forward and whether Liberty's ownership would harm or benefit the people of Missoula.

Liberty also objected on the basis of confidentiality but did not move for a protective order. While the City is mindful that the PSC has ordered Western Water, Mountain Water, and Liberty to move for protective orders after rejecting their relevance objections, the procedural order nonetheless requires a party asserting confidentiality to file a motion for a protective order before serving responses to the data requests. (Or. No. 7392, ¶ 12.) The purpose of this rule is presumably to prevent unnecessary delay and to allow requesting parties to meaningfully participate in the proceedings. Neither Western Water, Mountain Water, nor Liberty address the effect of this rule.

Water rate cases under Liberty ownership. On that issue, the City of Missoula has been openly and publicly critical of the Commission's expertise in regulating utilities and the Commission should not allow the City to turn that criticism into an illusory discovery issue in this docket.

The Commission, though, has rejected Liberty's argument in two orders – Orders 7392d and 7392e. As the PSC explained in those orders, acquisition premium is a relevant topic. (Or. No. 7392d, ¶ 6; *see also* Or. No. 7392e, ¶¶ 8–9.) “No prudent business owner would make such a sizeable investment unless it could recover its costs. The obvious question is: how does BBIL plan to recover the acquisition premium.” (*See* Or. No. 6754e, ¶ 145 Docket D2006.6.82.) Liberty will attempt to recover its acquisition premium, whether it is through this proceeding or future rate cases. The public is entitled to know the extent to which it will be called upon to bankroll this proposed transaction through future rate increases.

Here, Western Water, Mountain Water, and Liberty are gaming the system by making baseless relevance objections followed by motions for protective orders that keep important, relevant information out of the hands of the PSC and the City for as long as possible. Their tactic is to provide the City and PSC with requested information only at the last minute and only if directly ordered to do so. That strategy plays in their favor, of course, because it allows them to provide only information they want to provide. Western Water, Mountain Water, and Liberty are solely to blame for the delay. The PSC should stay this case—including the hearing—pending complete responses to the City's and PSC's data requests.

CITY-030/CITY-031 (Liberty)

Liberty is correct that the City offered a clarification regarding the scope of its request. The City told Liberty that it was requesting Liberty's and its corporate parents' board minutes that relate to the proposed sale, as well as tax records for the last two years. Liberty agreed to provide copies of (1) board minutes related to the proposed sale, as well as the board resolution and (2) tax records for the past two years. But Liberty would provide these documents only if the City kept them confidential. Liberty also agreed to allow the City to view two PowerPoint presentations given to the Algonquin board. Liberty would not provide copies of these presentations, though. Instead, Liberty would only allow the City to view the presentations at Crowley Fleck's Missoula or Helena offices.

The City rejected Liberty's offer because Liberty would not explain how the PSC and Montana Consumer Counsel would have access to the information. Would, for example, Liberty also require the PSC to travel to Crowley Fleck's office to view the

presentations? The City cannot agree that the requested information should be kept secret in the first place. The requested information is relevant, and the PSC should order Liberty to produce this information, as the City requested.

CONCLUSION

For the reasons above, the City asks that the PSC grant its motion to compel, vacate the scheduling order, and stay the current proceeding pending complete, supplemental responses to the City's data requests.

Dated this 4th day of June 2015.



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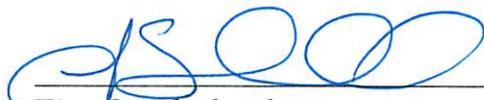
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CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail and email upon the following counsel of record at their addresses this 4th day of June 2015:

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