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IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MONTANA, MISSOULA DIVISION

FAWN CAIN, TANYA ARCHER, and  
SANDI OVITT,

Relators and Plaintiffs,

-vs-

SALISH KOOTENAI COLLEGE, INC.,  
SALISH KOOTENAI COLLEGE  
FOUNDATION, ROBERT FOUTY,  
individually, JIM DURGLO, individually,  
RENE PEIRRE, individually, ELLEN  
SWANEY, individually, LINDEN PLANT,  
individually, TOME ACEVEDO,  
individually, ZANE KELLY, individually,  
ERNEST MORAN, individually, LUANA  
ROSS, individually, CARMEN TAYLOR,  
individually, ELAINE FRANK,  
individually, LISA LACKNER HARMON,  
individually, REBEKKAH HULEN,  
individually, DAWN BENSON,  
individually, and DOES 1-10,

Defendants.

CV 12-181-M-BMM

**BRIEF IN SUPPORT OF  
INDIVIDUAL DEFENDANTS'  
MOTION TO DISMISS**

Defendants Robert Fouty, Jim Durglo, Renee Pierre, Ellen Swaney, Linden

Plant, Tom Acevedo, Zane Kelly, Ernest Moran, Luana Ross, Carmen Taylor, Elaine Frank, Lisa Harmon, Rebekkah Hulen, and Dawn Benson (collectively, “Individual Defendants”)<sup>1</sup> file this brief in support of their motion to dismiss this matter for failure to state a claim under the False Claims Act and, because the False Claims Act is the sole basis for federal jurisdiction, for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1), (6).

### **Introduction**

The only defendants remaining in this matter are the Individual Defendants. They are former and current employees (Ross, Taylor, Frank, Harmon, Hulen, and Benson (“Administrators”)) and Board Members (Fouty, Durglo, Pierre, Swaney, Plant, Acevedo, Kelly, and Moran (“Board Members”)) of Salish Kootenai College, and the allegations in the Amended Complaint concern their actions as such.

Plaintiffs insist they are suing the Individual Defendants in their individual capacities because they are seeking to hold them personally liable under the False Claims Act. But the allegations are not adequately pled under Rules 8 and 9 of the Federal Rules of Civil Procedure. The allegations are conclusory and lack sufficient factual detail to satisfy the plausibility standard under *Iqbal* and *Twombly*. Further, the allegations are not particularized as required to inform each

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<sup>1</sup> Please note that the names of Tom Acevedo, Renee Pierre, and Luana Ross are misspelled in the Plaintiffs’ caption.

Individual Defendant of the specific misconduct with which he or she is charged. The Amended Complaint also seeks to hold the Individual Defendants liable for others' acts, but neither vicarious liability nor a retaliation claim can be stated against the Individual Defendants, who were not the Plaintiffs' employer.

This matter should be dismissed with prejudice because Plaintiffs have failed to state a claim giving rise to federal subject matter jurisdiction despite having nearly six years to do so.

### **The Federal Claims**

The three claims in the Amended Complaint that supply federal subject matter jurisdiction all arise under the False Claims Act ("FCA" or "Act").

Claims I and II assert that each of the Individual Defendants (except Dawn Benson) violated two provisions of § 3729. (*See e.g.* Amend. Compl. ¶¶ 30, 63.) The two provisions quoted and paraphrased in the Amended Complaint, without attribution, provide that a person is liable under the Act if he or she:

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval [or]

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim[.]

31 U.S.C. § 3729(a)(1)(A)–(B).

Claim III of the Amended Complaint asserts that each of the Individual Defendants took adverse employment actions against the Plaintiffs for reporting the allegedly false claims and records, violating the False Claims Act's anti-

retaliation provision, 31 U.S.C. § 3730(h).

Damages under § 3729 are “essentially punitive in nature.” *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768–69 (2000). Liability gives rise to a treble damages award, responsibility for the costs and attorney fees associated with the civil action, and a civil penalty that is currently between \$11,181 and \$22,363 for each false claim. 31 U.S.C. § 3729(a)(1), (3); 83 F.R. 3944-01. Damages under § 3730(h) include reinstatement; two times the amount of back pay, plus interest; and compensation for any special damages, including litigation costs and attorney fees. § 3730(h)(2).

**I. Plaintiffs’ claims under § 3729 do not meet the pleading standards of Rule 8 and Rule 9 of the Federal Rules of Civil Procedure.**

A motion to dismiss brought pursuant to Rule 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6). Claims under § 3729 of the False Claims Act must be adequately pled under both Rules 8 and 9 of the Federal Rules of Civil Procedure. *Universal Health Servs., Inc. v. U.S. ex rel Escobar*, 136 S. Ct. 1989, 2003–04 n. 6 (2016).

Under Rule 8, the Amended Complaint must contain “sufficient factual matter” that, taken as true, “state a claim for relief is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation and quotation marks omitted). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*

This duty is heightened when a plaintiff asserts fraud or mistake. Rule 9 requires that a party state the circumstances constituting fraud or mistake “with particularity.” Fed. R. Civ. P. 9(b). This requirement applies to the allegations against each defendant. Plaintiffs may not “merely lump multiple defendants together” but must “differentiate their allegations . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.” *United States v. Corinthian Colleges*, 655 F.3d 984, 997–98 (9th Cir. 2011) (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 764–65 (9th Cir. 2007)). At a minimum, plaintiffs must “identify the role of each defendant in the alleged fraudulent scheme,” *Swartz*, 476 F.3d at 764–65, setting out the “who, what, when, where, and how” as to each defendant. *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010).

As with individual-capacity claims brought under other federal statutes, specific allegations of knowing, personal involvement are essential when pleading FCA claims against individual defendants. *Stoner v. Santa Clara County Off. of Educ.*, 502 F.3d 1116, 1124 (9th Cir. 2007) (applying reasoning from *Hafer v. Melo*, 502 U.S. 21, 27 (1991) (§ 1983) and *Alden v. Maine*, 527 U.S. 706, 757 (1999) (Fair Labor Standards Act), to individual-capacity claims under FCA). It is not sufficient to allege that individuals monitored or even approved of false submissions. *Corinthian Colleges*, 655 F.3d at 998. The pleading must include

“sufficient factual matter,” *Iqbal*, 556 U.S. at 678, to support the inference that each defendant “oversaw or actively participated in the alleged fraudulent scheme,” *Corinthian Colleges*, 655 F.3d at 998.

Vicarious liability, respondeat superior, and supervisory liability are inapplicable to individual-capacity claims. *Iqbal*, 556 U.S. at 676-77; *Meyer v. Holley*, 537 U.S. 280, 285-86 (2003); *Alden*, 527 U.S. at 757; *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1069 (9th Cir. 2012) cert. denied, 134 S. Ct. 70 (2013). As the United States Supreme Court held in *United States v. Bornstein*, the FCA “penalizes a person for his own acts, not for the acts of someone else.” 423 U.S. 303, 312–13 (1976). Further, the officer must have been “sufficiently involved personally” in the submission of a false claim for personal liability to attach. *United States ex rel. Burlbaw v. Regents of N.M. St. U.*, 324 F. Supp. 2d 1209, 1216 (D.N.M. 2004). Plaintiffs must allege *each* defendant “acted with the state of mind required,” *id.*, and establish a causal connection between each defendant’s actions and the alleged false submission. *W. v. U.S. Sec. of Def.*, 07-5580 RBL, 2008 WL 2481890 (W.D. Wash. 2008).

The purposes of Rule 9(b) are to ensure that defendants have adequate notice of the “precise misconduct” with which they are charged and to protect defendants from “spurious charges of immoral and fraudulent behavior.” *United States ex rel. Clausen v. Laboratory Corp. of Am., Inc.*, 290 F.3d 1301, 1309–10 (11th Cir.

2002). Although the requirements of Rule 9(b) may make it more difficult for plaintiffs to bring a qui tam action, they are necessary to prevent “[s]peculative suits against innocent actors for fraud” and charges of “guilt by association.” *Id.* at 1308 (internal quotation marks and citation omitted).

**A. Despite being granted the opportunity to amend their complaint against the Individual Defendants, Plaintiffs still have not satisfied the federal pleadings standards.**

Since Plaintiffs’ original complaint against the Board Members was dismissed for failure to particularize the allegations (*see* Order, doc. 39 at 21–23, 29), Plaintiffs made a halfhearted attempt to differentiate the allegations against the Individual Defendants in their Amended Complaint. Paragraphs 7 through 21 each concern a different defendant.<sup>2</sup> However, these paragraphs are nearly identical and contain only conclusory statements devoid of any factual matter to support the FCA claims. The remaining paragraphs of the Amended Complaint improperly lump all the Individual Defendants together and fail to identify the role of each defendant in the alleged scheme.

**1. Board Members**

All of the “individualized” paragraphs concerning the Board Members are identical, but for the name of the board member:

Individual Defendant [Board Member Name] is or was, during the relevant time period, a Montana resident and member of the SKC

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<sup>2</sup> Paragraphs 18 and 19, which are identical, both concern Defendant Lisa Harmon.

Board of Directors. Defendant [Name] oversaw and participated in the planning, development, operation and evaluation of SKC, and in formulating SKC goals, objectives and policies consistent with U.S. Department of Education guidelines. Defendant [Name] oversaw and participated in planning, application, receipt and utilization of federal funds applied for and received by the SKC nursing program and oversaw and participated in the operation of that program. Defendant [Name] supervised SKC President, Luanna Ross and SKC Acting President, Elaine Frank. Defendant [Name] oversaw and participated in the implementation and conduct of the SKC employee grievance process. Relators reported to Defendant [Name] the falsification of student grades and the presentation of false claims to the United States agencies and officials, and the use of false records or statements material to the false claims. Despite the reports, Defendant [Name] continued to knowingly cause the presentation of false claims and the use of false records or statements material to the false claims; and oversaw or participated in adverse employment actions against Relators such as threats, harassment, suspension and termination, which conduct constitutes unlawful retaliation against the Relators for reporting the presentation of false claims and the use of false records or statements material to the false claims.

(Amend. Compl. ¶¶ 7–14.) Repeating the paragraph eight times is no different from lumping the defendants together in a single paragraph, which is impermissible under Rule 9. *Corinthian Colleges*, 655 F.3d at 997–98.

Furthermore, most of the statements have nothing to do with the alleged fraud. The first five sentences generally describe what Plaintiffs believe was the role of the College’s Board of Directors—to oversee and supervise the College, the Nursing Department, and College administrators. Such allegations hint that Plaintiffs believe the individual Board Members are therefore liable for anything done by the College, the Nursing Department, or College administrators, but such



vicarious or supervisory liability is not available under the False Claims Act.

*Bornstein*, 423 U.S. at 312–13.

The only allegations that the Board Members knew about or were personally involved in the submission of false claims or reports are conclusory and devoid of the factual enhancement required under *Iqbal* and *Twombly*. *Iqbal*, 556 U.S. at 678. Indeed, the single sentence concerning the submission of false claims is merely “a formulaic recitation of the elements” of the claim. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555): “Defendant [Name] continued to knowingly cause the presentation of false claims and the use of false records or statements material to the false claims.” *Compare with* 31 U.S.C. § 3729(a)(1)(A)–(B).

The paragraphs do not describe what was reported to each Board Member, when such reports were made, what specific action each defendant took, how each defendant “caused” the submission of false claims or the presentation of false reports, or when such false claims or reports “caused” by that defendant were made. *Ebeid*, 616 F.3d at 998. Containing only “naked assertions” of liability, the paragraphs do not state a plausible claim against any of the Board Members. *Iqbal*, 555 U.S. at 678

Despite the Court’s guidance when it granted leave to amend, Plaintiffs still have only sued the Board Members *because of* their official capacities. *Maxwell v. County of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013). Plaintiffs may not

subject the Board Members to the FCA’s punitive liability regime merely because they served on the College’s Board. *1849 Condominiums Assn., Inc. v. Bruner*, 2:09-CV-3339-JAM-EFB, 2011 WL 646352 (E.D. Cal. 2011) (holding FCA claims against board members should be dismissed because the complaint lacked non-conclusory allegations that the individuals authorized, directed, or meaningfully participated in the wrongful conduct); *Juliano v. Fed. Asset Disposition Assn.*, 736 F. Supp. 348, 353 (D.D.C. 1990) aff’d sub nom. 959 F.2d 1101 (D.C. Cir. 1992).

As in *Corinthian Colleges*, and as with the original complaint in this matter, the Amended Complaint against the Board Members should be dismissed because it lacks allegations of personal participation in the alleged fraud. Such charges of “guilt by association” do not satisfy the pleading standard for claims under the False Claims Act. *Id.* at 998; *Clausen*, 290 F.3d at 1308.

## **2. Administrators**

The “individualized” paragraphs concerning the Administrators are also substantially similar and devoid of factual matter sufficient to state a plausible claim for relief. (*See* Amend. Compl. ¶¶ 15–20.)

The first three sentences of these paragraphs vary slightly, but in ways that are immaterial to the § 3729 claims. The first sentence identifies the individual’s position at the College: “Individual Defendant [Name] is or was, during the

relevant time period, a Montana resident and [position at SKC].” The second sentence generally describes the Administrators’ roles, with minor variations (italicized below):

- Defendant [Ross/Frank/Taylor] *oversaw and participated in the* operation of *SKC and* its nursing program, including the application, receipt and utilization of federal funds for the nursing program
- Defendant [Harmon/Hulen] *directed* the operation of the SKC nursing program, including the application, receipt and utilization of federal funds for the nursing program

The third sentence describes the positions supervised by each individual:

“Defendant [Name] supervised [positions].” (¶¶ 15–20.)

These allegations do not concern fraud, and as with the paragraphs concerning the Board Members, appear to be an attempt to establish an inference of supervisory or vicarious liability, which is not permissible under an individual-capacity claim. *Bornstein*, 423 U.S. at 312–13. Though these sentences are particularized for each individual to some extent, the variations are immaterial to Plaintiffs’ claims.

The only allegations concerning the Administrators’ alleged involvement in submitting false claims or records to the United States are, again, conclusory and devoid of the factual enhancement required under *Iqbal* and *Twombly*. *Iqbal*, 556 U.S. at 678. The paragraphs concerning Defendants Ross and Frank parrot the paragraphs concerning the Board Members, alleging that “Relators reported to

Defendant [Ross/Frank] the falsification of student grades and the presentation of false claims to the United States agencies and officials, and the use of false records or statements material to the false claims” and that “[d]espite the reports, Defendant [Ross/Frank] continued to knowingly cause the presentation of false claims and the use of false records or statements material to the false claims.” (¶¶ 15–16.) Similarly, the paragraphs concerning Defendants Harmon and Hulen allege that they “knowingly caused the presentation of false claims to the United States agencies and officials and the use of false records or statements material to the claims.” (¶¶ 18–20.) And the paragraph concerning Defendant Taylor alleges that she “oversaw and participated in the presentation of false claims to the United States agencies and officials and the use of false records or statements material to the false claims” and “knowingly caused the presentation of false claims and the use of false records or statements material to the false claims.” (¶ 17.)

These allegations merely recite or paraphrase the statutory language of 31 U.S.C. § 3729(a)(1)(A)–(B). They do not contain the “who, what, when, where, and how” necessary to describe the role of each defendant in the alleged fraudulent scheme. *Ebeid*, 616 F.3d at 998; *Swartz*, 476 F.3d at 764–65.

The paragraphs concerning Defendants Taylor, Harmon, and Hulen (¶¶ 17–20) also allege that they “authorized or directed the falsification of student grades,” but no factual matter is presented to support this allegation, identify when or how it

occurred, or show how, if true, it “caused” the submission of false claims. As with the “individualized” paragraphs concerning the Board Members, the paragraphs concerning each Administrator fail to satisfy the standard required under Rule 9(b).

### **3. The remaining paragraphs**

Besides paragraphs 7 through 21, the Amended Complaint contains no allegations particular to any Individual Defendant. The remaining paragraphs lump all the defendants together, attributing the same knowledge and conduct to everyone (Amend. Compl. ¶¶ 30, 36–39, 57–58, 63–64, 66, 72–73, 76–77), or fail to identify any individual actor at all except, at times, the College (“SKC”) (Amend. Compl. ¶¶ 29, 31–35, 40–56, 62, 65, 67–71, 74–75). The Ninth Circuit has rejected such pleading practice under the False Claims Act, affirming the dismissal of a complaint that contains no “detail as to the nature of [any of the Individual Defendants’ particular] involvement in the fraudulent acts, but simply attributes wholesale all of the allegations” to all Defendants. *Corinthian College*, 655 F.3d at 998.

Although personally overseeing and actively participating in the submission of false claims may establish liability under the Act, “additional facts” are required to render the allegations plausible as to each defendant. *Corinthian Colleges*, 655 F.3d at 998. Merely asserting that all the Individual Defendants “oversaw and participated in” the same conduct does not magically satisfy the pleading standard.

It is implausible that each of the Individual Defendants “oversaw and participated in” notifying the IHS Project Officer if a scholarship recipient encountered problems, that each of the Individual Defendants “oversaw and participated in the preparation, review, and submittal of” grant applications, reports, and supporting records; or that each of the Individual Defendants “improperly modif[ied] grades and student progress reports” or “omitt[ed] or [kept] intentionally vague references to student failure and attrition.” (Amend. Compl. ¶¶ 36, 39, 64, 66.) The Individual Defendants’ liability cannot stem solely from their status as Board Members or Administrators of the College. *Corinthian Colleges*, 655 F.3d at 998. The FCA does not allow “guilt by association,” but focuses on the particular misconduct of each defendant. *Bornstein*, 423 U.S. at 312–13; *Clausen*, 290 F.3d at 1308.

It is also notable that the alleged false claims occurred over the course of four years, yet Plaintiffs make no attempt to identify each Individual Defendant’s role in the alleged scheme over that period of time. The Complaint is devoid of specific allegations that any Individual Defendant, “through the official’s own individual actions,” *OSU Student Alliance*, 699 F.3d at 1069, “participat[ed] in the fraudulent scheme,” had a “role in making a false statement to the United States government,” or possessed the requisite intent at any relevant time, *Corinthian Colleges*, 655 F.3d at 998.

Given the illusory and conclusory nature of the “individualized” paragraphs,

and the lumped allegations in the remaining paragraphs, Plaintiffs have not identified with “particularity” the ““who, what, when, where, and how of the misconduct charged.”” *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (quoting *Ebeid*, 616 F.3d at 998). “Rule 9(b) undoubtedly requires more.” *Corinthian Colleges*, 655 F.3d at 998.

**B. Plaintiffs have not alleged any facts to support their bald assertion that the alleged false statements or omissions were “material.”**

The Plaintiffs’ conclusory allegations that the alleged false statements were “material” (e.g. ¶¶ 32, 74) are not sufficient to satisfy the False Claims Act’s materiality standard. The Supreme Court has emphasized that the standard for pleading materiality is “rigorous” and must be “strictly enforce[ed].” *Universal Health Services*, 136 S. Ct. at 2003.

The materiality standard is demanding. The False Claims Act is not “an all-purpose antifraud statute,” *Allison Engine*, 553 U.S., at 672, 128 S.Ct. 2123, or a vehicle for punishing garden-variety breaches of contract or regulatory violations. A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance.

*Id.* at 2004. The Supreme Court expressly noted that the pleading standard for FCA claims must be strict because “the False Claims Act is not a means of imposing treble damages and other penalties for insignificant regulatory or contractual violations.” *Id.*

Here, Plaintiffs have not pled any factual matter in support of their conclusory statements that the allegedly false statements were material. Lacking any “proof of materiality,” the Complaint does not adequately plead materiality under the standard set out in *Universal Health Services*.

**II. Plaintiffs cannot state a claim against the Individual Defendants for retaliation under § 3730(h) of the False Claims Act because the Individual Defendants were not Plaintiffs’ employer.**

The overwhelming majority of courts have held that the False Claims Act’s anti-retaliation provision creates a cause of action against the plaintiff’s *employer*; it does not create a cause of action against supervisors, co-employees, or board members sued in their individual capacities. *Howell v. Town of Ball*, 827 F.3d 515, 529 (5th Cir. 2016), *cert. denied sub nom. Town of Ball, La. v. Howell*, 137 S. Ct. 815 (2017); *Yesudian ex rel. U.S. v. Howard U.*, 270 F.3d 969, 972 (D.C. Cir. 2001); *U.S. ex rel. Golden v. Arkansas Game & Fish Commn.*, 333 F.3d 867, 870, 2003 WL 21459021 (8th Cir. 2003); *United States v. Kiewit P. Co.*, 41 F. Supp. 3d 796, 813–14 (N.D. Cal. 2014); *Calisesi ex rel. U.S. v. Hot Chalk, Inc.*, CV-13-01150-PHX-NVW, 2015 WL 1966463, at \*15 (D. Ariz. May 1, 2015); *Irving v. PAE Govt. Services, Inc.*, 249 F. Supp. 3d 826, 830–36 (E.D. Va. 2017); *Roberto v. Kent State U.*, 5:16CV1305, 2017 WL 1155563, at \*2 (N.D. Ohio Mar. 28, 2017) (citing 25 cases). There is no reason to depart from the reasoning of these cases here.



As stated in the Complaint, the Plaintiffs were employed by Salish Kootenai College, not the Individual Defendants who were officers or employees of the College. Accordingly, the Individual Defendants are not subject to liability under § 3730(h), and the claim against them must be dismissed.

**III. Supplemental jurisdiction over the state law claims should be denied as a matter of comity.**

The remaining claims in the Amended Complaint arise under state law. Because the exercise of federal jurisdiction over activities taking place on tribal lands undermines the ability of tribes to govern themselves, supplemental jurisdiction over these claims should be denied. *Williams v. Lee*, 358 U.S. 217, 223 (1959); *United States v. Plainbull*, 957 F.2d 724, 728 (9th Cir. 1992).

**IV. Plaintiffs should not be granted leave to amend.**

The order dismissing Plaintiffs' original complaint explained that leave to amend was granted so that Plaintiffs could "add any facts to the complaint that rendered plausible the notion that individual defendants oversaw or actively participated in alleged fraudulent conduct." (Doc. 39 at 29.) The Court further specified that Plaintiffs needed to specifically allege that individual defendants "undertook specific acts that give rise to a claim." (*Id.*) Plaintiffs "failed to do this, continuing to make 'everyone did everything' allegations" and merely adding conclusory statements that the Individual Defendants violated the terms of the statute. *Destfino v. Reiswig*, 630 F.3d 952, 958 (9th Cir. 2011). "[W]here the

plaintiff has previously been granted leave to amend and has subsequently failed to add the requisite particularity to its claims, “[t]he district court’s discretion to deny leave to amend is particularly broad.” *Id.* (quoting *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009), *as amended* (Feb. 10, 2009)).

Denial of leave to amend is particularly appropriate here, since the case has been pending for nearly six years, the primary corporate defendants have been dismissed, and no particularized allegations establish any plausible wrongdoing by any individual.

DATED this 29th day of June 2018.

WORDEN THANE P.C.

/s/ Martin S. King  
Martin S. King

## CERTIFICATE OF COMPLIANCE

In accordance with U.S. District Court Local Rule 7.1(d)(2), the undersigned certifies that the word count of the above brief, as counted by the undersigned's word processing software and excluding the caption, table of contents, table of authorities, and certificates of service and compliance, is 3,970.

WORDEN THANE P.C.

/s/ Martin S. King  
Martin S. King