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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

TINA JACOBSON, Plaintiff, vs. JOHN DOE and/or JANE DOE, Defendants.	Case No. CV2012-3098 REPLY MEMORANDUM OF COWLES PUBLISHING COMPANY IN SUPPORT OF MOTION TO QUASH SUBPOENA DUCES TECUM

COMES NOW Cowles Publishing Company (hereinafter "Cowles Publishing" or "*Spokesman-Review*"), acting by and through its attorneys, Witherspoon Kelley, and hereby respectfully files the following Reply Memorandum of Points and Authorities in Support of its Motion to Quash the subpoena served on it in this matter.

I. INTRODUCTION

Fortunately the bluster[1] of Plaintiff in her Memorandum in Response to the Motion to Quash Subpoena does not override nor defeat the significant Constitutional issues raised by the *Spokesman-Review's* Motion to Quash the subpoena served on it in this matter.

II. ARGUMENT

1. Plaintiff Does Not Refute that Anonymous Speech is Entitled to First Amendment Protection.

In the words of Chief Magistrate Judge Larry Boyle of the United States District Court, District of Idaho, "there is no doubt that the First Amendment protects the right to speak anonymously." *S103, Inc. v. Bodybuilding.com, LLC,* Case No. CV07-6311-EJL, Order at p. 4 (2008). Any attempt to compel identification of an anonymous internet speaker is subject to review under a test of strict scrutiny. *Reno v. ACLU,* 521 U.S. 844 (1997).

> If internet users could be stripped of . . . anonymity by a civil subpoena and forced into the liberal rules of civil discovery, this would have a significant chilling effect on internet communications and thus on basic First Amendment rights. Therefore, discovery requests seeking to identify anonymous internet users must be subject to careful scrutiny by the courts.

Doe v. 2theMart.com, Inc., 140 F.Supp.2d 1088, 1093 (W.D. Wash. 2001).

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[1] In her Memorandum, Plaintiff accuses the *Spokesman-Review* of filing a "motion to protect the guilty," apparently equating her asserted defamation case against one anonymous poster in this case to criminal activity by the poster, which, of course, it is not. Plaintiff also imputes some degree of "guilt" to the two anonymous posters whose identities she seeks merely because they commented on the allegedly defamatory post. Apparently this equates to "guilt" by association. "Guilt," of course, is not the issue; but rather the potential stifling of criticism of Plaintiff in her capacity as County Chairperson of the Republican Party.

At the same time, Plaintiff accuses the *Spokesman-Review* of being a "shill" for legally impermissible speech and asserts that its brief constitutes a "myopic invocation of law," references to the *Spokesman-Review* that could certainly be viewed as derogatory and baseless. However, the *Spokesman-Review* recognizes that the context in which these derogatory terms have been thrown about is one in which opinions are expressed and that, as a result, they do not constitute statements of fact, a distinction which Plaintiff apparently fails to recognize or ignores when it comes to the speech of others. It is unfortunate that such bluster is used to denigrate a serious discussion concerning anonymous speech, particularly in an atmosphere, as recognized by Chief U.S. Magistrate Judge Larry Boyle of the United States District Court for the District of Idaho, where "increasingly, the target of disparaging comments respond by filing lawsuits against various unknown 'John Doe' defendants, claiming among other things, libel, misappropriation of trade secrets, breach of confidentiality agreements, or violation of security laws. In these lawsuits, subpoenas are issued to the message board host in an effort to obtain identifying information about the authors. Because companies can abuse the subpoena power to silence legitimate speech, courts have had to determine when it is appropriate to order an internet service provider ('ISP') to disclose the identity of the author behind an anonymous posting." *S103, Inc. v. Bodybuilding.com, LLC,* Case No. CV07-6311-EJL, p. 6 (2008). The *Spokesman-Review* asks nothing more in its Motion than such determination by this Court.

In asserting that individuals have the Constitutional right to speak anonymously on the internet, the *Spokesman-Review* does not argue that this right is absolute and identities of parties can never be compelled. Rather, in its Motion to Quash the subpoena issued in this case, the *Spokesman-Review* is requesting the Court to apply the test of strict scrutiny to forced identification of the three anonymous posters under the facts of this case and the context in which the postings were made.

Contrary to Plaintiff's assertion, the *Spokesman-Review* has the right to pursue First Amendment issues related to forced identification of the three posters. First, it is unclear at this point in time whether the anonymous posters, because of practical issues related to responding to the Subpoena, will assert their own First Amendment rights. In addition, the *Spokesman-Review*, as expressed in the Affidavit of Dave Oliveria, has significant concerns about the impact of voluntarily identifying posters who use its various blog sites because such non-compelled disclosure could affect the *Spokesman-Review's* ability to maintain its client base of blog users. Hopefully, as evidenced by the *Spokesman-Review's* expressed position in this matter, it is an adequate advocate for the rights of anonymous posters. For these reasons, courts have recognized that an internet service provider, such as the *Spokesman-Review* in its capacity as administrator of the *Huckleberries* blog site, has standing to assert the First Amendment rights of anonymous posters on the blog site. *See*, e.g., *Enterline v. Pocono Medical Center*, No. 3:08-CV-1934, 2008 U.S. Dist. Lexis 100033 (M.D. Pa. 2008).

2. <u>Plaintiff Fails to Demonstrate Any Compelling Reason for Forced Identification of Posters Phaedrus and OutofStaterTater</u>.

The essence of Plaintiff's lawsuit is that a posting by almostinnocentbystander defamed her. There is no claim, however, that posters Phaedrus and OutofStaterTater published any defamatory statements concerning Plaintiff. Nevertheless, Plaintiff attempts to lump together the alleged "guilty" party with these other two posters who did nothing more than post statements on the blog in response to the original post of almostinnocentbystander. The only assertion in the Affidavit of Plaintiff relating to Phaedrus and OutofStaterTater is they were posters "who were looking for more detail of the lie." Affidavit of Tina Jacobson, ¶ 10. Plaintiff's Memorandum asserts merely that these two posters are "fact" witnesses.

However, their testimony provides no facts concerning Plaintiff's allegations that cannot be obtained elsewhere. There is no dispute concerning the publication on *Huckleberries* of the alleged defamatory statement, so any testimony of theirs as to publication is superfluous and not necessary to the resolution of the lawsuit. Their admitted postings speak for themselves. Compelling the identities of two "innocent" parties to be disclosed violates the strict scrutiny and compelling need for disclosure mandated by the First Amendment.

Certainly, compelling the identification of these two posters presents a different issue than compelling the identification of almostinnocentbystander. Nothing would violate the recognized First Amendment right of individuals to speak anonymously on the internet more than being "outed" merely because they posted in response to an alleged defamatory statement, without participating in the defamation themselves. There is no basis for compelling the identification of Phaedrus and OutofStaterTater, nor does the success or failure of Plaintiff's defamation lawsuit rise or fall on their testimony.

Forcing disclosure of identifying information concerning the posters Phaedrus and OutofStaterTater is particularly sensitive given the context of how complaints about the original posting of almostinnocentbystander arose. The original complaint about the exchanges on the Huckleberries blog site came not from Plaintiff, but rather from John Cross of the Region 1 Republicans, who sought the identification of almostinnocentbystander. Affidavit of Dave Oliveria, ¶ 12. As has been noted in several cases, many times defamation lawsuits are used as vehicles to force disclosure of the identity of persons who are critical of persons or organizations in power. While the posts of Phaedrus and OutofStaterTater have not been alleged to be defamatory, they can be read as not favorable to Plaintiff or the Republican Party. The Subpoena and underlying lawsuit should not be used as a ruse to force disclosure of critics as opposed to the identity of posters who have posted allegedly defamatory content.[2]

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[2] That Plaintiff's lawsuit appears aimed at stifling criticism of her is reflected in the relief sought by Plaintiff, which includes a prayer to have the court enjoin John Doe defendant from "committing such further actions adverse to" Plaintiff. Not only is this a request for an impermissible prior restraint, see *Near v. Minnesota*, 283 U.S. 697 (1931), it flies in the face of Art. I, § 9 of the Idaho Constitution, which states that "every person may freely speak … being responsible for the abuse for that liberty."

3. Whether Plaintiff's Notice to the Three Anonymous Posters is Sufficient is a Question for the Court to Address.

As set out in court cases involving forced identification of anonymous internet posters, including the two key cases of *Dendrite v. Doe* and *Doe v. Cahill,* the party seeking to compel identification is required to make an attempt to notify the posters of a pending subpoena.

Clearly, the burden is on Plaintiff to provide the notice, and not on the internet service provider seeking to quash the Subpoena. *See,* e.g., *In re Anonymous Online Speakers,* 661 F.3d 1168 (9th Cir. 2011), and *Dendrite International, Inc. v. Doe No. 3,* 775 A.2d 756 (N.J. Super 2001). The *Spokesman-Review* published on the Huckleberries blog site the notice requested by Plaintiff. It is for the Court to decide whether this notice satisfies the requirements set out in the various cases cited, or whether more should be required of Plaintiff.

4. Plaintiff Has Not Satisfied the Test for Compelling Disclosure, Requiring the Party Seeking Identification to Establish the Elements of Defamation as if Withstanding a Motion for Summary Judgment by a Defamation Defendant.

As indicated in the opening Memorandum of the *Spokesman-Review*, the test for requiring disclosure of anonymous speakers on the internet requires the party seeking disclosure to establish that it could survive a motion for summary judgment on the underlying cause of action. Failure to establish the elements of a cause of action for defamation will result in quashing of a subpoena seeking identities of anonymous posters. *See,* e.g., *Independent Newspapers, Inc. v. Brodie,* 966 A.2d 832 (Md. 2009). Because of the significant First Amendment protection offered to anonymous speakers on the internet, the purpose of this requirement is to sort out potentially frivolous or baseless lawsuits from those that have validity before compelling disclosure of the identities of anonymous posters. Once identification is compelled, then the protection of anonymity provided by the First Amendment is irrevocably lost, even if the underlying lawsuit proves to be meritless.

The *Spokesman-Review* urges the Court to consider carefully whether the original posting is one that could be construed as a statement of hyperbole or opinion as opposed to a statement of fact. Whether a statement is one of opinion or fact is a question of law to be decided by the Court. *Milkovich v. Lornin Journal Co.,* 497 U.S. 1 (1990). Certainly, the

question by almostinnocentbystander as to whether $10,000 was stuffed in Tina Jacobson's blouse is fanciful in nature and could not be construed as a statement of fact. In other words, the context in which the posting occurred suggests that almostinnocentbystander was opining on Plaintiff's appearance and not asserting a statement of fact. almostinnocentbystander's comment followed other posters' comments on the appearance of other persons in the photograph, which included Ms. Jacobson.

The second comment of almostinnocentbystander on the Huckleberries blog site is even more ambiguous and contains questions about whether Plaintiff "makes her living as a bookkeeper" and whether Idaho is high on the list for embezzlements. The posting ends with the nebulous comment, "Not that any of this is related or anything …" Nowhere is there an accusation Plaintiff stole $10,000. Oliveria Affidavit at Ex. "B".

Questions are indicative that a statement is not one of fact but rather of opinion. *See, e.g., Partington v. Bugliosi*, 56 F. 3d 1147 (9th Cir. 1995) (holding question as to whether a lawyer was properly prepared non-actionable); *Koch v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987) (holding non-actionable the question, "Is [the Plaintiff Ilse Koch] the same [as the notorious Nazi] Ilse Koch? Who knows?). In *Benjamin v. Cowles Publishing Co.*, 37 Wn.App. 916, 684 P.2d 739 (1984), the court held non-actionable as opinion the following question at the end of a news column about the owner of a drugstore, "The question is: Who is stealing from whom?", referencing the store owner's request that the parents of a juvenile shoplifter of a pack of gum pay the storeowner $100, as allowed under Washington law.

Both of almostinnocentbystander's postings are premised on questions, not affirmative statements, suggesting that they are not assertions of fact but rather rhetorical hyperbole that is non-actionable opinion, particularly given the internet blog site context in which they were made amid general comments about political public figures, including Plaintiff.

Courts have recognized that posters on blogs engage in speech where readers are less likely to view statements as assertions of fact. *Necosia v. DeRooy,* 72 F.Supp.2d 1093, 1101 (N.D. Cal. 1999). "Internet blogs, message boards and chat rooms are, by their nature, typically casual expressions of opinion." *Doe v. Cahill*, 884 A.2d 451, 465 (Del. 2005).

Chief Magistrate Judge Boyle, in his Order in the *S103, Inc. v. Bodybuilding.com, LLC* case attached to the initial Memorandum of the *Spokesman-Review* herein, stresses that "in the context of internet postings and the casual dialogue that typically accompanies such 'cyber-smackdowns,' name-calling, hyperbole and, generally, juvenile behavior is not unusual; indeed, it is not only expected at times, but often encouraged. In this type of setting, as here, a reasonable reader would view a poster's use of the words 'shill,' 'shady,' and 'rotten egg protein,' for example, as the author's critical opinion and not as reliable facts. . . Such statements should not be considered in isolation, but must, instead be considered in the appropriate context and tenor as well." Order at 19-20.

Similarly, while generally online speech stands on the same footing as other speech, "blogs are a subspecies of online speech which inherently suggests that statements made there are not likely provable assertions of fact." *Obsidian Finance Group, LLC,* 812 F.Supp.2d 1220, 1223 (D. Ore. 2011). Courts have noted that there is a low barrier to speaking online and that an internet connection allows individuals to publish their thoughts online, fulfilling a quasi-empowerment theory of unfettered communication on the internet. With this empowerment comes freedom from editorial constraints that serve as gatekeepers for more traditional means of disseminating information, resulting in more informal and relaxed communications, bringing with it a recognition that readers give less deference to allegedly defamatory remarks published on online message boards, chat rooms and blogs than to similar remarks made in other contexts. *See,* e.g., *Sandals Resort Intl., Ltd. v. Google, Inc.*, 925 N.Y.S.2d 407, 415-16, 86 A.D.3d 32, 43-44 (N.Y. App. Div. 2011).

Thus, the context of the *Huckleberries* blog is significant in evaluating whether the complained-of statements by almostinnocentbystander were opinion or fact. As Mr. Oliveria indicated in his Affidavit, "the purpose of the *Huckleberries* blog is to stimulate conversation, discussion and opinions by individuals concerning issues of national, local and regional importance in North Idaho." Oliveria Affidavit, ¶ 4.

The *Spokesman-Review* suggests to the Court that the complained of statement of almostinnocentbystander, given the context in which the statement was made, constitutes a

statement of opinion. Dave Oliveria's withdrawal of almostinnocentbystander's post from the blog site is not a concession that it was a statement of fact, but rather, according to his Affidavit, that it was an *ad hominem* attack against Plaintiff that Dave Oliveria decided was not appropriate on the blog site. Because opinions, as evidenced by Plaintiff's statements concerning the *Spokesman-Review* in her Memorandum submitted herein, can be both derogatory and baseless, Dave Oliveria's statement that almostinnocentbystander's posting was also baseless is not a concession that it was a statement of fact, but merely that it was inappropriate under his discretionary standards.

5. Identity of almostinnocentbystander is Protected by Reporter's Privilege.

Plaintiff is erroneous in her assumption that the identity of a poster is obtained by the *Spokesman-Review* as a result of a person posting on a *Spokesman-Review* blog site. What the *Spokesman-Review* possesses, as the result of a blog posting, is an e-mail address and IP address information (metadata) that identifies a computer. The *Spokesman-Review* does not automatically obtain a poster's name. Rather, in order to learn the identity of a poster, it is necessary to trace the IP address to a specific computer and potentially the name of an individual could be derived from that information. Similarly, an e-mail address generally does not contain the name of an individual. Further information would have to be uncovered in order to learn the identity of the person who uses a specific e-mail address.

Nevertheless, in his capacity as reporter and editor for the *Spokesman-Review* as indicated in his Affidavit, Dave Oliveria frequently obtains the identity of posters, not through data obtained as part of the posting process, but because of subsequent e-mail communications or perhaps phone calls from posters who identify themselves to Mr. Oliveria. Dave Oliveria learned in confidence the identity of almostinnocentbystander through a subsequent e-mail communication and then phone conversations with almostinnocentbystander. In this process of communication outside of postings on the *Huckleberries* blog site, Dave Oliveria is acting in his capacity as a reporter/columnist for the *Spokesman-Review* and derives information that later may be posted by him on the *Huckleberries* website or in his *Huckleberries* column. That is what occurred in the case at bar when he made subsequent postings about the original

posting, including posting of the content of the e-mail that had been sent to him by almostinnocentbystander.

Thus, while almostinnocentbystander's original posting was made on the *Huckleberries* blog site and received by the *Spokesman-Review* in its capacity as internet service provider,[3] subsequent postings by Mr. Oliveria, based on communications by him with almostinnocentbystander that were outside of the exchange of posts on the blog site, were assembled by him in his capacity as a reporter/columnist for the *Spokesman-Review*, and, as such, are subject to protection under the doctrine of reporter's privilege.

Since, as he stated in his Affidavit, these communications were provided to him in a situation where the identity of almostinnocentbystander was to remain confidential, Mr. Oliveria cannot be compelled to provide identifying information about almostinnocentbystander unless Plaintiff satisfies the test for compelling production of confidential information from a reporter as required under Idaho case law. Idaho courts require that a party seeking the identity of a confidential source must show that (1) the information is clearly related to the pending action, (2) the information cannot be obtained by less intrusive alternative means, and (3) there is a compelling and overriding interest in the information. *In re Contempt of Wright*, 168 Idaho 418, 700 P.2d 40 (1985). That showing, which is similar to the showing required to compel an internet service provider to produce information concerning the identities of the anonymous posters, two of whom are not alleged to have

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[3] Plaintiff correctly recognizes that, in providing the service that allows almostinnocentbystander and others to post comments, the *Spokesman-Review* is immune from any liability under the Communications Decency Act of 1996, Section 230. 47 U.S.C. § 230. In adopting immunity under Section 230, Congress specifically rejected an approach that had been followed by some courts placing some degree of liability and responsibility on the shoulders of service providers for what was posted on websites or blogs sponsored by them. *See*, e.g., *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 31063/94, 1995 W.L. 323 710, 1995 N.Y. Misc. Lexis 712 (N.Y. Sup.Ct. 1995). As a result of Section 230, the *Spokesman-Review* is immune from any liability for the postings that are at issue in this case. *See*, e.g., *Carafano v. Metrosplash.com*, 339 F.3d 1119 (9th Cir. 2003). Section 230 basically removes from internet service providers the responsibility for editing postings on websites or blogs provided by them, the theory being that this will promote more open and free-flowing discussion on the internet forum, which is the underlying rationale of the Communications Decency Act of 1996. This concept of free-flowing communication, empowered by Congress, must be taken into account in analyzing the forced disclosure of the identity of anonymous posters, particularly where two of the posters are not accused of publishing any defamatory comment, because of the perceived harm to such free flow of communication in the future.

produced defamatory comment and whose testimony is not critical to the underlying defamation action, has not been satisfied in the case at bar.

6. Plaintiff's Motion to Strike Portions of Dave Oliveria's Affidavit Should Be Denied.

Plaintiff asserts that paragraphs 13 and 14 of Dave Oliveria's Affidavit contain inadmissible hearsay. However, nothing in paragraph 14 consists of any statements made by a third party. Rather, Mr. Oliveria states that his conversations and e-mail exchanges with almostinnocentbystander were confidential, and he certainly may testify as to his understanding of those communications. Moreover, based on his 28 years of experience as a reporter, editor and blog site administrator for the *Spokesman-Review*, he may render his opinion about the repercussions of compelling a reporter to identify confidential news sources and his fear that "the free flow of information and opinion would be stifled." Oliveria Affidavit at ¶ 14. Similarly, he is qualified to testify concerning his impressions of his conversations with almostinnocentbystander. These impressions are not being submitted here for the purpose of establishing the truth of what almostinnocentbystander said, but rather Dave Oliveria's impressions of the atmosphere in which those conversations occurred. These two paragraphs do not violate any rules of evidence concerning inadmissible hearsay.[4]

In addition, Plaintiff fails to identify the objectionable specific statements in paragraphs 13 and 14 of Oliveria's Affidavit. For this reason alone, Plaintiff's Motion to Strike should be denied. This Court is under no obligation to peruse the two paragraphs and guess at which sentences Plaintiff finds objectionable.

Perhaps Plaintiff is referring to the following sentence in paragraph 13: "It was my impression, based on conversations and e-mail exchanges with almostinnocentbystander, that

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[4] Tina Jacobson's Affidavit submitted in support of the Memorandum in Response to Motion to Quash Subpoena contains several items of hearsay. She states that "the blog comments are now known to other party officials, my family, my employer, members of my church, my book club, and my closest friends." Thus, she is relaying communications from these third parties in her Affidavit. She also states that "individuals have questioned me about the blog entries." That also constitutes a hearsay statement. She also makes reference to a report by Republican Party officials that "no funds are missing from Republican Party coffers." That is clearly a hearsay statement. Nevertheless, the Spokesman-Review believes that there are more significant issues involved in this matter related to the rights of anonymous speakers on the internet, and the Court's attention is better directed at those issues rather than extraneous issues as to alleged hearsay statements.

almostinnocentbystander was fearful of repercussions that might be levied against him/her as a result of the postings that occurred on February 14, 2012, if the identity was revealed." This sentence fits within the "then existing mental, emotional, or physical condition" exception to the hearsay rule set forth in I.R.E. 803(3). In other words, the above statements are offered to prove that it is and was Oliveria's impression, after conversing with "almostinnocentbystander," that he or she was fearful of repercussions of speaking out against Plaintiff. This hearsay exception has been recognized by several Idaho courts. *See,* e.g., *Vulk v. Haley*, 112 Idaho 855, 736 P.2d1309 (1987) and *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299 (1989).

The *Spokesman-Review* cannot discern which portion or portions of paragraph 14 Plaintiff finds objectionable.

Plaintiff's Motion to Strike the undesignated portions of the Affidavit of Mr. Oliveria should be denied.

III. PLAINTIFF IS NOT ENTITLED TO ATTORNEYS' FEES.

The *Spokesman-Review* asserts, and case law supports, that there are significant Constitutional issues presented by the Subpoena that has been filed. These issues involve both the right of individuals to post anonymously on the internet, a right that has been accorded First Amendment protection by the United States Supreme Court and other courts throughout the United States, and the right of a reporter/columnist not to reveal confidential sources under Idaho's recognition of a reporter's privilege, which arises out of both the First Amendment and Article I, § 9 of the Idaho Constitution. Even if Plaintiff were to prevail concerning the Motion to Quash Subpoena, the *Spokesman-Review* has acted in good faith in asserting these important Constitutional principles and bringing them to the attention of the Court, and in such case, Plaintiff is not entitled to recover any attorneys' fees.

Further, the only authority Plaintiff cites in her Motion for Attorneys' fees is I.R.C.P. 45(h). I.R.C.P. 45(h) merely provides that failure to obey a subpoena without adequate excuse may be deemed a contempt of court. Contempt of court proceedings are governed by I.R.C.P. 75 and do not relate to award of attorneys' fees. None of the procedural prerequisites of

I.R.C.P. 75 have been met in this case. In short, Plaintiff has abjectly failed to cite a statute or rule under which she is entitled to attorneys' fees.

Plaintiff's Motion for an Award of Attorneys' Fees should be denied for failure to cite any applicable authority for an award of attorneys' fees.

IV. CONCLUSION

For the reasons set out above in this Memorandum and the Points and Authorities filed herein, the *Spokesman-Review* respectfully requests that its Motion to Quash Subpoena be granted.

DATED this ____ day of May, 2012.

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CERTIFICATE OF SERVICE

I certify that on this the _____ day of May, 2012, I caused a true and correct copy of REPLY MEMORANDUM OF COWLES PUBLISHING IN SUPPORT OF MOTION TO QUASH SUBPOENA DUCES TECUM to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

C. Matthew Andersen Winston & Cashatt 250 Northwest Blvd., Suite 206 Coeur d'Alene, ID 83814	☐ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Via Fax: (208) 765-2121

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