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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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| UNITED STATES OF AMERICA<br>Plaintiff,<br>v.<br>REAL PROPERTY LOCATED AT 6415 NORTH HARRISON AVE., FRESNO, FRESNO COUNTY, CA. APN: 407-751-08, INCLUDING ALL APPURTENANCES AND IMPROVEMENTS THERETO,<br>Defendant. | Case No. 11-CV-00304-OWW-GSA<br><br>CLAIMANT BOK HEE EE's REPLY TO THE UNITED STATES' RESPONSE TO CLAIMANT'S MOTION TO WITHDRAW AS COUNSEL AND APPLICATION FOR APPOINTMENT OF COUNSEL FOR BOK HEE EE<br><br>DATE: September 9, 2011<br>TIME: 9:30 a.m.<br>COURTROOM: 10 |
| BOK HEE EE,<br>Claimant. | |

The United States' Response to the Motion to Withdraw and for Appointment of Separate Counsel for Bok Hee Ee is alarming.

First, without citing any ethical standards or case law interpreting them, the government made light of counsel's ethical dilemma, suggesting counsel was merely trying to get out of representing Bok Hee Ee because the claimants were unable to pay for the representation, and describing counsel's ethical dilemma as an "overblown reaction and claim of criminal investigation against Bok

Hee Ee." Doc. 40 p. 3 line 2 - 5. Claimants' counsel's reaction was not overblown – it is a serious ethical dilemma which the courts and State Bar take very seriously. See part I below.

More alarming is the government's claim that the language in the United States' Opposition to Motion to Dismiss (Doc. 15) does not show Bok Hee Ee is under criminal investigation. The actual language from Doc. 15 goes farther than the excerpts the government quoted in its Response:

> Beginning in February 2009, the Untied [sic] States Department of Homeland Security Immigration and Customs Enforcement ("ICE") began a year-long investigation that revealed that Choi, assisted by Bok Hee Ee, engaged in a widespread series of investment scams that defrauded victims of millions of dollars.

Doc. 15 p. 2 (emphasis added.) Doc. 15 page 3 alleges: "After defrauding the victims of several million dollars, Choi and Bok Hee Ee engaged in an elaborate scheme to conceal the source of the fraudulently obtained funds." There is no reasonable interpretation of that language *but* that Bok Hee is a subject of the criminal investigation. The government argues this is mere "descriptive verbiage" (Response p. 3) or "bare descriptive language" (Response p.2), suggesting the words are mere puffing, of no import. Accusing a person of "assisting" in a scheme to defraud and "engaging in an elaborate scheme to conceal the source of fraudulently obtained funds" is defamation per se if the accusation is unfounded. Although a prosecutor enjoys immunity from suit for the statements made in the pleadings filed in cases he or she litigates, Rule 11 of the Federal Rules of Civil Procedure prohibits him from making such statements in pleadings without a factual basis.[1] An attorney for the U.S. government is subject to the same ethical standards as any other attorney

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[1] Rule 11 provides:

> By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: ... (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

Since the statements were made without qualification, Rule 11 requires the factual support to exist at the time the statement was made.

licensed in the state. 28 U.S.C. § 530B(a). Cal. Business & Professions Code 6068(d) makes it the duty of the attorney "never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact...." Therefore the statements in Doc. 15 either demonstrate that for the past year Bok Hee Ee has been under criminal investigation for involvement with Choi's fraud, which investigation "revealed" Bok Hee "assisted" in Choi's fraud scheme – or the government attorney committed an ethical violation for suggesting such in Doc. 15.

The Response is rife with factual contentions that misquote the record and conclusions that do not flow from the facts in the record. There is no basis for the government's claim on page 4 that "the financial institutions themselves are giving little credence to [Bok Hee's] claim of identity theft," nor the claim that she failed to be diligent. Response p. 4. The banks are asserting a UCC statute that prevents customers from suing banks for fraud that could have been discovered by reading the bank statements, unless the fraud was reported within one year. Bok Hee left her friend of many years to house-sit and make sure her bills were paid, etc., and regularly spoke to her on the phone to ensure that everything was in order. Doc. 38 p. 3 para. 3. It turned out her friend could not be trusted. Furthermore, her failure to review her U.S. bank statements while in Korea does not show that "Bok Hee Ee obviously has other bank accounts in Korea which she uses to support herself financially." Response p. 4. Bok Hee's employment in South Korea was assisting her brother who was running a kindergarten - not herself "run[ning] a kindergarten" as the government misquoted her as saying on page 4. It is unlikely that a kindergarten teacher or teacher's assistant in Korea makes any more than they make in the U.S., and certainly not enough to amass a substantial bank account in Korea.

Bok Hee has sworn in her declarations that she has no bank accounts in Korea or any other foreign country[2] and her CJA affidavit and credit report shows she has only minimal amounts on deposit in bank accounts in this country. She declared under penalty of perjury that the funds that she sent to Korea in 1996 from her own account and from Choi's accounts were all sent according

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[2] Doc. 38 p. 2 para. 2.

to Choi's instructions, purportedly (according to Choi) for his attorney's fees, and that once she sent the money it was gone and she had no further control over it. Doc. 38 p. 2 para. 2. These bank transactions were conducted five years ago, and the government obviously has the ability to track these transactions. Bok Hee does not, and her memory is hazy after these years. The government's chart, Response p. 5, lists the bank accounts that received the money, and lists churches as several of the recipients. The government with its superior financial tracking resources certainly can determine whether Bok Hee is a signatory on any of these church accounts. The fact that the transfers went to churches is entirely consistent with Choi's story, which Bok Hee believed, that he was a Christian missionary and a minister and that his for profit business was somehow connected to the missionary work. For a trusting, devout Christian like Bok Hee, having a church be the intermediary to retain counsel for Choi would inspire trust, not alarm. The wire transfer records do not disprove Bok Hee's statement, and certainly are not relevant to whether Bok Hee is indigent now.

The government's statement that Bok Hee did not "move into" and occupy the defendant property upon her return from Korea, Response p. 6, is not supported by the facts in Bok Hee's declarations, or any other evidence. Bok Hee's possessions remained in her home the entire time she was in Korea, and were there when she returned. Although she stayed with her daughter much of the time, after her return to the U.S. Bok Hee's belongings remained in her home. From time to time she and her daughter, son-in-law and granddaughter traveled back to Fresno and stayed in her home for several days at a time. That continued until June 2011 when she put her belongings in storage and temporarily rented her house. Doc. 38 pp. 3-4. She had no transportation because the government has seized her former car, and the entire family – three adults and one infant – had to share one car, requiring them to stay or travel, together. Doc. 38 p. 3.

Finally, the government's gratuitous accusation that "the attorney-client relationship is no longer desirable to either side" p. 3, is obnoxious and could not be farther from the truth. Counsel is very fond of both clients, and has a very positive relationship with both of them, but it is not ethically feasible for counsel to continue representing both claimants.

## I. The interests of the two claimants have diverged such that the California Rules of Professional Conduct require separate counsel

The government characterizes counsel's motion to withdraw as a ruse based on her "dissatisfaction over the lack of payment for her services." Response p. 3. If that were the case, counsel would have moved to withdraw from both cases, and certainly would not have put so much effort into getting separate counsel appointed for Bok Hee.

Nor is Claimant using the inference that she is under criminal investigation to justify appointment of counsel under the Criminal Justice Act, as the government suggests in the last paragraph on page 2. She is seeking appointment of counsel under CAFRA. Nothing in Claimants' motions or affidavits suggest that she should be "considered as if she were a criminal defendant." Response p. 2. As much as it irks the government to have taxpayers pay the legal fees[3] of unindicted persons when the government seizes and seeks to forfeit their residences, the right to counsel is a statutory right created by Congress. If the CAFRA provision applies, the government has no right to interfere with such an appointment.

California Rule of Professional Conduct 3-310(C) provides:

> A member shall not, without the informed written consent of each client:
> (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
> (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict...

When counsel was asked to represent both claimants in this case, she explained the potential for a conflict of interest and had them sign her standard conflict of interest form, which consents to the multiple representation so long as the conflict is only potential, but advises that if an actual conflict were to arise the attorney could not continue to represent both absent another written waiver.

When counsel agreed to represent both claimants, it appeared that they both had consistent innocent owner defenses. Details subsequently revealed by the government of its investigation of Bok Hee, including its questions regarding the transactions detailed in the chart in Doc. 40, illustrate that the claimants' defenses are diverging. If Bok Hee were to reveal any Fifth Amendment

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[3] See Response p. 3.

privileged information to joint counsel, counsel would have an actual conflict which would require her to withdraw in both claimants' cases.

"An attorney may not represent multiple clients if an actual conflict of interest between clients exists and may not accept representation of multiple clients if there is a reasonable likelihood an actual conflict of interest between them may arise." *Carroll v. Superior Court*, 101 Cal. App. 4th 1423 (Cal. App. 4th Dist. 2002). The ABA Model Code of Professional Responsibility EC 5-15 states:

> If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation.

It is the professional judgment of counsel that, under present circumstances, there is now a reasonable likelihood that an actual conflict of interest may arise in the presentation of the differing defenses of Bok Hee, who is suspected by the government of involvement in the fraud scheme, and Judy, who had no involvement.

Although Bok Hee initially waived the potential conflict of interest, she is not willing to waive an actual conflict, which now appears reasonably likely, and does not want to confide any potentially incriminating attorney client privileged information to an attorney who also represents her daughter. She does however, consent to counsel continuing on as counsel for Judy. Because she has not confided any potentially incriminating information to joint counsel, the duty of confidentiality is not compromised. It is not economically feasible for either client to retain another attorney at this time.

As an additional reason justifying withdrawal, as discovery progresses Bok Hee will need to be advised on Fifth Amendment issues by an attorney capable of representing her in relation to the criminal proceedings, should they occur. Undersigned counsel is primarily a civil litigator. Although she occasionally handled federal criminal appeals in drug cases, her practice has focused primarily on asset forfeiture defense for over 20 years. Counsel has never defended criminal defendants in fraud cases or money laundering cases at the trial level. Undersigned counsel believes someone qualified to represent Bok Hee Ee in criminal court, if she is indicted, should be advising her with regard to her Fifth Amendment privilege in the civil forfeiture case.

Rule of Professional Conduct 3-700(B)(2) requires withdrawal if "[t]he member knows or should know that continued employment will result in violation of these rules [of Professional Conduct] or of the State Bar Act." Counsel cannot continue to represent Bok Hee effectively without learning her potentially incriminating secrets pertinent to the financial transactions, and she cannot keep such secrets from Judy without violating her duty of loyalty to Judy.

Before undertaking the joint representation of both Claimants, Counsel informed them of the potential conflict of interest and obtained their written consent to the joint representation so long as no actual conflict of interest occurred. Upon discovering that an actual conflict appeared imminent, counsel moved to withdraw, as Rules 3-310(c)(2) and 3-700(B)(2) require. Counsel lacks the knowledge and experience to represent Bok Hee in criminal charges for fraud and money laundering, and such representation is beyond the scope of the representation agreed to by the parties. Under Rule 3-110(B) and (C), Counsel's duty to represent clients competently requires her to refuse to shoulder such responsibilities if she lacks the expertise. Rule 3-700(A)(2) requires counsel to withdraw and Rule 3-700(B)(2) requires her to seek competent substitute counsel, as she has done.

## II. CAFRA requires appointment of counsel for Bok Hee

The government deprived Bok Hee of the ability to hire counsel by seizing all of her remaining assets, and have no right to complain about spending taxpayer money to fund a court-appointed CAFRA lawyer. The prosecutor has a duty to enforce the statutes of Congress, including CAFRA's provision ***mandating*** the appointment of counsel when the government is trying to forfeit the claimant's primary residence. Common sense says that the statute applies in this case.

The government is urging a hyper-technical construction of the term "used as a primary residence," relying on the fact that Bok Hee was staying in Korea from 2008 - 2011, and is now staying with her daughter in Sunnyvale as disqualifying the only home she owns from being considered her primary residence.

The context in which the term is used does not support such an artificial distinction. There is no principled reason why a person would have to spend every night in her home in order to qualify for counsel to defend it against forfeiture. Would homeowners be disqualified if hospitalized? Could they not go on vacation, or visit relatives to spend time with a new grandchild? How long a visit is long enough to lose the right to counsel? There is no principled reason why such things should matter with regard to the appointment of counsel.

The government points to the past four years and says Bok Hee was not physically staying there most of the time. But what about the previous 20+ years,[4] during which Bok Hee lived there exclusively? If the period of use is measured from the time when it became her residence until the present, she would clearly qualify for counsel.

It seems more logical that Congress used the term "used as a primary residence" to distinguish between a person's home and his/her separate vacation home or business property, loss of which would not be a brutal as the loss of the person's home.

**A. CAFRA's legislative history shows "used as a primary residence" should be interpreted liberally, to grant counsel in a situation such as this**

Claimant previously researched the legislative history and saw there was no committee report explaining the change in language between the House bill and the Senate bill, which added the "used as a primary residence language," and thought there was no relevant legislative history. However, it now appears that the legislative histories of prior forfeiture reform bills which led up to CAFRA shed some light on the legislative intent behind that provision.

According to Stefan D. Cassella, then Assistant Chief of the Asset Forfeiture and Money Laundering Section of the U.S. Department of Justice and the principal drafter of the Department of Justice's version of the forfeiture reform bills:

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[4] There is a typo in Bok Hee's first declaration. Counsel used 1993 (the date stated in the Complaint) as the date Bok Hee purchased the property. Bok Hee did not catch the typo when reading over the declaration. Bok Hee and her first husband purchased the property in 1986, as she stated in her second declaration. 1993 was the year she refinanced and put Judy's name on title, substituting for her late father.

> Section 983(b) authorizes pretrial appointment of counsel in cases involving residences, and authorizes CJA attorneys to represent criminal defendants in related civil forfeiture cases. This provision is the remnant of a much broader provision first included in H.R. 1916 in 1996 and ultimately passed by the House in 1999 that would have provided for the appointment of counsel in virtually all civil forfeiture cases upon a showing that the claimant was indigent.

The Civil Asset Forfeiture Reform Act of 2000: Expanded Forfeiture Authority and Strict Deadlines, by Stefan D. Cassella, p. 19.[5]

> The appointment of counsel provision was derived from H.R. 1916, and was included in the H.R. 1965 in 1997 in greatly revised form. That version is discussed in the 1997 Committee Report. Another version was included in H.R. 1658 as it passed the House in 1999 and is discussed in the 1999 Committee Report. The final, narrower version was included in S.1931.

*Id* at 19 n. 82 (internal citations to a non-public DOJ document omitted).

The earliest version of the provision was in H.R. 1916, introduced in 1995, which gave the court discretion to appoint counsel in all civil forfeiture cases in which the claimant was indigent, but provided no guidance on how this discretion should be exercised:

> If the person filing a claim under subsection (a), or a claim regarding seized property under any other provision of law that incorporates by reference the seizure, forfeiture, and condemnation procedures of the customs laws, is financially unable to obtain representation of counsel, the court may appoint appropriate counsel to represent that person with respect to the claim.

104th CONGRESS 1st Session, H. R. 1916 (June 22, 1995). There were hearings with testimony from forfeiture victims and lawyers, but no committee reports on that statute.

The 1997 version, H.R. 1965, provided:

> ''(d) APPOINTMENT OF COUNSEL.—(1) If the person filing a claim is financially unable to obtain representation by counsel and requests that counsel be appointed, the court may appoint counsel to represent that person with respect to the claim.
> In determining whether to appoint counsel to represent the person filing the claim, the court shall take into account—
> ''(A) the nature and value of the property subject to forfeiture, including the hardship to the claimant from the loss of the property seized, compared to the expense of appointing counsel;
> ''(B) the claimant's standing to contest the forfeiture; and
> ''(C) whether the claim appears to be made in good faith or to be frivolous.

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[5] This article is on the internet at http://works.bepress.com/stefan_cassella/14/. It was also published in the JOURNAL OF LEGISLATION 27.1 (2001): 97-151.

This bill provided for an evidentiary hearing with regard to the above factors, at which time the government could present evidence and cross-examine the claimant. It limited the use of such testimony to the uses permitted for testimony at suppression hearings.

The committee report on H.R. 1965 explained the rationale for the right to counsel provision:

> There is no Sixth Amendment right to appointed counsel for indigents in civil forfeiture cases, since imprisonment is not threatened.[6] This is undoubtedly one of the primary reasons why at least 80% of civil forfeiture cases are not challenged: "The reason they are so rarely challenged has nothing to do with the owner's guilt, and everything to do with the arduous path one must journey against a presumption of guilt, often without the benefit of counsel, and perhaps without any money left after the seizure with which to fight the battle."[7] This Committee believes that given the punitive, quasi-criminal nature of civil forfeiture proceedings, legal representation should be provided for those who are indigent in appropriate circumstances.
>
> H.R. 1965 provides that a federal court may appoint counsel to represent an individual filing a claim in a civil forfeiture proceeding who is financially unable to obtain representation. In determining whether to appoint counsel, the court shall take into account (1) the nature and value of the property subject to forfeiture, including the hardship to the claimant from the loss of the property seized, compared to the expense of appointed counsel, (2) the claimant's standing to contest the forfeiture, and (3) whether the claim appears to be made in good faith or to be frivolous. The first consideration described in the preceding sentence should not be a simple dollar comparison. There will be many instances in which a court should appoint counsel even if the cost of counsel will likely exceed the value of the seized property. Conversely, there will be instances in which a court should not appoint counsel even if the cost of counsel will likely be less than the value of the seized property. The court needs to consider the nature of the property and the hardship that will be caused by its loss. Compensation for appointed counsel will be equivalent to that provided for court-appointed counsel in federal felony cases.
>
> An owner would certainly suffer great hardship where the loss of property would prevent the owner from working, leave the owner homeless, or prevent the functioning of a business. These are just illustrative examples of situations where great hardship would result from the forfeiture of property.

That bill did not pass.

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[6] Footnote: "See *United States v. $292,888.04 in U.S. Currency*, 54 F.3d 564, 569 (9th Cir. 1995); *United States v. 7108 West Grand Ave., Chicago, Illinois*, 15 F.3d 632, 635 (7th Cir. 1994), cert. denied, 114 S. Ct. 2691 (1994)."

[7] Footnote in text: "1996 Hearing at 289-90 (statement of E.E. (Bo) Edwards III, David Smith, and Richard Troberman, cochairs, National Association of Criminal Defense Lawyers Asset Forfeiture Abuse Task Force)."

The next version of CAFRA was H.R. 1658, introduced in 1999. The version that passed the House contained the following provisions regarding the appointment of counsel:

> (4)(A) If the person filing a claim is financially unable to obtain representation by counsel, the court may appoint counsel to represent that person with respect to the claim.
> `(B) In determining whether to appoint counsel to represent the person filing the claim, the court shall take into account such factors as--
> `(i) the claimant's standing to contest the forfeiture; and
> `(ii) whether the claim appears to be made in good faith or to be frivolous.

Unlike the previous bill, H.R. 1658 did not contain any provisions for an evidentiary hearing to determine whether the claimant should be appointed counsel.

The committee report on H.R. 1658 contained an abbreviated version of the language from the H.R. 1916 committee report:

> There is no Sixth Amendment right to appointed counsel for indigents in civil forfeiture cases, since imprisonment is not threatened. This is undoubtedly one of the primary reasons why so many civil seizures are not challenged. As the cochairs of the National Association of Criminal Defense Lawyers' Forfeiture Abuse Task Force stated before this Committee in 1996: "The reason they are so rarely challenged has nothing to do with the owner's guilt, and everything to do with the arduous path one must journey against a presumption of guilt, often without the benefit of counsel, and perhaps without any money left after the seizure with which to fight the battle." This Committee believes that civil forfeiture proceedings are so punitive in nature that appointed counsel should be made available for those who are indigent, or made indigent by a seizure, in appropriate circumstances.
>
> H.R. 1658 provides that a federal court may appoint counsel to represent an individual filing a claim in a civil forfeiture proceeding who is financially unable to obtain representation. In determining whether to appoint counsel, the court shall take into account the claimant's standing to contest the forfeiture and whether the claim appears to be made in good faith or to be frivolous.

(Footnotes, which are the same as in the H.R. 1916 committee report, were omitted). H.R. 1658 passed in the House of Representatives by a vote of 375 to 48.

When H.R. 1658 went to the Senate, it was revised to the present language, and passed by both houses. There was no conference committee report explaining the Senate changes.

Several things can be inferred from the prior bills and committee reports.

First, clearly Congress replaced a system which gave judges great discretion to determine whether counsel should be appointed, with an objective standard requiring the appointment of counsel when a primary residence is seized. The discretionary standard would have allowed inconsistencies in the right to counsel. Given Congress' recognition that forfeiture claimants generally fail to defend their cases competently without counsel, one can see why Congress substituted an objective standard, requiring the appointment of counsel in an entire category of cases where the forfeiture would be exceedingly harsh.

Secondly, Congress justified the need for appointed counsel by the severity of the punishment that civil forfeiture can inflict. The committee report for H.R. 1965 stated: " The court needs to consider the nature of the property and the hardship that will be caused by its loss." The more serious the punishment the greater the need for counsel. "[W]here loss of the property would ... leave the owner homeless" the H.R. 1965 committee report concluded, the hardship was great enough to require the appointment of counsel.

**B. Application of these factors to this case**

In her remarks to Congress on April 11, 2000, the day CAFRA passed, Rep. Jackson-Lee of Texas stated: "These reforms simply balance the scales so that innocent people have a level playing field on which to challenge improper seizures." 106 Cong. Rec. H2046, H2051 (April 11, 2000). The right to counsel is pivotal in leveling the playing field, particularly in a case such as this, where the claimant was educated in Korea and has a limited command of English. There is no possibility that Bok Hee could competently represent herself.

Given the prior legislative gloss, "used as a primary residence" should be interpreted as applying to the one and only home owned by a claimant, where he/she ordinarily lives and "calls home." This property remained Bok Hee's primary residence while she was visiting in Korea, for she had not changed her citizenship, she left all of her furniture and belongings there, had her mail delivered there, and used it as her mailing address for bills, bank statements, voting, DMV, taxes and all other purposes. She had a reason to be staying temporarily to Korea - to be near her incarcerated husband who would be out of prison eventually. The stay in Korea is not inconsistent with the home remaining her primary residence. Certainly she did not abandon her residence by leaving it. Similarly, her temporary stay with her daughter is for a justifiable reason – she had no transportation, with the one vehicle she previously owned being seized by the government, and her daughter needed her to babysit her infant grand-daughter who was too young for day care. The financial necessity of this temporary arrangement is no reason to disqualify her from her entitlement to counsel. In that small apartment, the time will come that Bok Hee will need her own place.

If Bok Hee were to lose her home she would lose all of her life's savings – all that she has left to fall back on in her retirement. Although, as long as she can stay with her daughter she would not have to live on the street, forfeiture of her home would certainly deprive her of the wherewithal to live in her own place ever again. Her monthly Social Security check is not enough to rent an apartment and also purchase food, clothing and other necessities. With so much at stake the Court should interpret the CAFRA appointment of counsel provisions liberally in her favor.

For the foregoing reasons, undersigned counsel should be allowed to withdraw as counsel for Bok Hee Ee and separate counsel should be appointed to represent her.

Respectfully submitted,

/s/ Brenda Grantland

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