DISTRICT COURT COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	DATE FILED: July 22, 2019 5:14 PM FILING ID: 36F53B3CF4991 CASE NUMBER: 2019CV32214
Plaintiff: AUTUMN SCARDINA, **v.** **Defendants:** MASTERPIECE CAKESHOP INC. and JACK PHILLIPS	**▲ COURT USE ONLY ▲** Case No.: 2019CV32214 Division/Courtroom: 275
Attorneys for Defendants: *Jonathan A. Scruggs (AZ Bar No. 030505) *Jacob P. Warner (AZ Bar No. 033894) ALLIANCE DEFENDING FREEDOM 15100 N. 90th Street Scottsdale, Arizona 85260 (480) 444-0020 (480) 444-0028 (facsimile) jscruggs@adflegal.org jwarner@adflegal.org **Admission Pro Hac Vice* Samuel M. Ventola, Atty. Reg. #18030 1775 Sherman Street, Suite 1650 Denver, CO 80203 (303) 864.9797 (303) 496.6161 (facsimile) sam@samventola.com Nicolle H. Martin, Atty. Reg. #28737 P.O. Box 270615 Littleton, CO 80127 (303) 332-4547 nicollem@comcast.net	

DEFENDANTS' MOTION TO DISMISS COMPLAINT UNDER COLO. R. CIV. P. 12(b)(1), 12(b)(5) AND 9(b)

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Introduction

Defendants Jack Phillips and Masterpiece Cakeshop (collectively, Phillips) sketch, sculpt, and paint custom cakes that convey messages. As part of his religious calling to love his neighbors, Phillips creates cakes for all people. But his religious beliefs prevent him from creating custom cakes that convey messages against his conscience. For exercising his faith this way, the state tried to punish Phillips twice and lost each time. That second time Plaintiff Autumn Scardina intervened and also lost. Scardina now seeks to continue that case through this one.

This began in 2012 when Phillips declined to create a custom cake celebrating a same-sex wedding. The state tried to punish him for violating the Colorado Anti-Discrimination Act (CADA), which the Supreme Court stopped because of the state's hostility toward Phillips's religious beliefs. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018) (*Masterpiece I*).

Not long after media began covering that case, Scardina emailed Phillips twice in mid-2012, calling him a "bigot" and a "hypocrite" and mocking his religious beliefs. Then in 2017, moments after news broke that the Supreme Court would hear Phillips's case, Scardina called and asked Phillips to create a custom pink and blue cake to celebrate Scardina's gender transition.

Phillips declined because he would not create a cake celebrating that message for anyone. But Scardina filed a charge with the Colorado Civil Rights Division (Division) accusing Phillips of violating CADA. The Colorado Civil Rights Commission (Commission) then filed a formal complaint against Phillips, Scardina intervened, and the Commission dismissed the case with prejudice in 2019.

But Scardina did not like that result. Scardina could have objected to or appealed that dismissal but chose not to do so. Scardina instead filed this lawsuit, accusing Phillips of (1) violating CADA by declining that gender-transition cake and (2) violating the Colorado Consumer Protection Act (CPA) for false advertising when

Phillips discussed his Supreme Court case in the media and said he serves all people but cannot create every cake requested of him.

This lawsuit fails for many reasons. As for the CADA claim, Scardina does not satisfy the jurisdictional requirements to bring this claim in district court. Nor can Scardina bring this claim in *this* district court because Phillips's alleged acts occurred outside Denver. Next, res judicata bars this claim because Scardina already brought this CADA claim in the earlier administrative case and lost. Scardina also fails to state a CADA claim because the complaint does not allege that Phillips treats differently other customers who seek cakes expressing the *same message*. Scardina never alleges that Phillips would create an identical-looking cake that expressed the same message for other customers. Finally, the federal and state constitutions protect Phillips's religiously motivated decision not to express a message.

As for the CPA claim, it depends on faulty logic. Scardina mistakes Phillips's general willingness to create "birthday cakes" for people as a promise to create *any* cake labeled a "birthday cake." But no one could reasonably think that Phillips promised to create *every* cake requested of him just because someone calls it a "birthday cake." That would mean Phillips promised to create "birthday cakes" with racist messages, to create those cakes for $1, and to create those cakes as large as a house. This isn't deception. It's common sense.

In light of this, Scardina's CPA claim fails because Scardina fails to allege a deceptive practice with any sufficiency or specificity, fails to allege that Phillips was speaking in the course of his business, fails to allege any harm, fails to allege any public impact, and fails to allege causation. In reality, Scardina's CPA claim seeks to hold Phillips liable for defending himself and discussing his Supreme Court case in the media—in other words, to silence Phillips' views, not stop fraud.

Phillips has suffered enough. The state's past prosecutions generated death threats and vandalism and cost Phillips seven years of his life, 40% of his family

income, and most of his employees—harms that endure even though he eventually won his legal fights. The potential toll is greater this time. Unlike past prosecutions, more money is on the line: Scardina seeks more than $100,000, plus attorney fees.

This crusade against Phillips and his faith should stop once and for all. Phillips moves to dismiss the complaint and requests costs and attorney fees if the motion is granted. *See* Colo. Rev. Stat. §§ 13-17-201; 13-16-113(2); 6-1-113(3). Under Rule 121 § 1-15(8), Phillips's counsel conferred with plaintiff's counsel about this motion, and plaintiff's counsel oppose.

Background

Phillips is an "expert" cake artist and owner of Masterpiece Cakeshop. *Masterpiece I*, 138 S. Ct. at 1724; Compl. ¶ 7. He is also a "devout Christian." *Masterpiece I*, 138 S. Ct. at 1724. Phillips "serves everyone," no matter their personal characteristics. Ex. A at 1.[1] But he declines to "create cakes that express messages or celebrate events in conflict with his religious beliefs." *Id*. For example, Phillips does not create cakes that "promote Halloween," "atheism," or "racism." *Id*. at 2.

In 2012, two customers asked Phillips to create a wedding cake that would celebrate a same-sex marriage. Compl. ¶ 10. *Masterpiece I*, 138 S. Ct. at 1724. Phillips declined because that cake's message violated his religious beliefs; but he offered to sell the customers other items or to create a different cake for them. *Masterpiece I*, 138 S. Ct. at 1724. The customers filed a CADA charge against

[1] This Court may examine documents "referred to" or "relied upon" in a complaint "without converting the motion to dismiss into a motion for summary judgment." *Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005). When alleged facts "run counter" to facts in these documents or to facts "of which the court can take judicial notice," this Court may reject the complaint's rendition and accept the facts in the approved documents. *Walker v. Van Landingham*, 148 P.3d 391, 394 (Colo. App. 2006); *see Peña v. Am. Family Mut. Ins. Co.*, __ P.3d __, 2018 Colo. App. 56, at ¶ 15 (2018). Because Scardina refers to and relies on Exhibit A—the "fundraising website," Compl. ¶ 11—the Court may accept it as part of the complaint itself.

Phillips, the Division then issued a probable cause determination against Phillips, and the Commission filed a formal complaint against him. *Id*. at 1725-26.

Meanwhile, a man named William Jack asked three other cake shops to create cakes "that conveyed disapproval of same-sex marriage." *Id*. at 1730. After the shops declined because they found the messages offensive, that customer filed religious discrimination charges. But the Division found—and the Commission agreed—that the shops "acted lawfully in refusing service." *Id*. at 1730. In so doing, the Division and Commission (collectively, "Colorado") interpreted CADA to contain an "offensiveness" rule, which allows cake shops to decline "messages [they] consider[] offensive," *id*. at 1728—a rule that Colorado did not apply in Phillips's case.

The Supreme Court reversed the Commission's ruling because Colorado acted with hostility toward his faith. That hostility was evidenced by (1) Colorado's unequal treatment of Phillips and the three other cake shops and (2) commissioners' bigoted comments about religion—saying people of faith are not "welcome in Colorado's business community" and calling Phillips's plea for religious freedom a "despicable piece[] of rhetoric." *Id*. at 1729, 1730-31.

During that litigation, Phillips defended himself publicly. Compl. ¶¶ 2, 10. He was caught in a "widespread media campaign." *Id*. at ¶ 39. As part of that push, Phillips often answered questions about his cake design policy. Compl. ¶ 11; Ex. B.[2] He would respond with statements "similar" to one found on a fundraising website, which reads: "Jack serves everyone, including people within the LGBT community. What he can't do is create cakes that express messages or celebrate events in conflict with his religious beliefs." Compl. ¶ 11; Ex. A at 1. At some point, Scardina "heard" some of these statements and hoped that they were true. Compl. ¶ 13.

[2] The complaint refers to and relies on Exhibit B—a "Westword" article from "2012," Compl. ¶ 11. *See* Note 1 *supra*.

On the day the Supreme Court announced it would hear Phillips's case, Scardina called Masterpiece and requested a custom cake with a "blue exterior and a pink interior" that would "celebrate" a "transition from male to female." Ex. C at 2.[3] The shop declined that request not because of who Scardina was but because the cake's design expressed messages contrary to Phillips's faith: Phillips does not create "cakes celebrating gender changes"; that would violate his "religious beliefs." *Id.* That unusual request looked like a "setup." Ex. A at 3.

The next month, Scardina filed a CADA charge against Phillips. Compl. ¶ 24; Ex. C. As statements in that charge confirm, Scardina requested much more than a "birthday cake." *Cf.* Compl. ¶¶ 13, 15, 20, 34, 40. The cake's blue and pink design would reflect and celebrate a gender transition:

- "[Masterpiece] refused to prepare my order for a cake with pink interior and blue exterior, which I disclosed was intended for the celebration of my transition from male to female." Ex. C at 1.

- "I wanted my birthday cake to celebrate my transition by having a blue exterior and a pink interior." *Id.* at 2.

- "I requested that its color and theme celebrate my transition from male to female. The woman on the phone told me they do not make cakes celebrating gender changes." *Id.* at 2.

The Division issued a probable cause determination almost a year later. Compl. ¶ 25; Ex. D.[4] In that determination, the Division accepted that (1) Scardina told Masterpiece that the cake's "design was a reflection of the fact that [Scardina] transitioned from male-to-female," and (2) Masterpiece's representative recalled Scardina saying that the cake was "to celebrate a sex-change from male to female." Ex. D at 2. The Division offered only one reason for its decision: Phillips's faith

[3] The complaint refers to and relies on Exhibit C—the "charge of discrimination" against Phillips. Compl. ¶ 24. *See* Note 1 *supra*.

[4] The complaint refers to and relies on Exhibit D—the determination in which the Division "found probable cause" that Phillips violated CADA. Compl. ¶ 25.

prevents him from expressing through his cake art "the idea that a person's sex is anything other than an immutable God-given biological reality." *Id*. at 3.

A couple months later, Phillips sued Colorado in federal court. Compl. ¶ 26. Throughout that litigation, Phillips explained and defended his cake design policy. Compl. ¶ 30. And while it's true that Phillips said he would create an identical-*looking* cake that expressed a different message, *id*., Phillips also said: "I would create a custom cake with a blue exterior and a pink interior for Autumn Scardina so long as the cake does not visually represent and celebrate a gender transition or otherwise express messages that conflict with my religious beliefs...." Ex. E at ¶ 18.[5]

With the federal case pending, the Commission issued its formal complaint, which declared that Phillips "denied service to Scardina based on her … transgender status" in violation of CADA. Ex. F at ¶ 15; Comp. ¶ 27.[6] The complaint recognized that (1) Scardina told Masterpiece that the cake's "design was a reflection of the fact that [Scardina] had transitioned from male to female" and (2) Masterpiece declined the request "because it does not make cakes to celebrate a sex-change." Ex. F at ¶ 6. It also scheduled a formal hearing on the matter, which occurred on February 4, 2019. *Id*. at 1. Then, on March 5, 2019, the Commission "voted … to dismiss with prejudice" the formal complaint against Phillips. Ex. G at 4.[7] On March 22, 2019, the Commission entered a closure order. Compl. ¶ 29; Ex. G.

Following that, Scardina had 49 days to appeal the Commission's final order to the court of appeals. On appeal, Scardina could have moved to "remit the case" to

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[5] The complaint refers to and relies on statements Phillips made throughout "the federal … proceeding[]," Compl. ¶ 30, which includes the statements in Exhibit E. Those statements are also proper for judicial notice. *See* Note 1 *supra*.

[6] The complaint refers to and relies on Exhibit F—the "Notice of Hearing and Formal Complaint" against Phillips. Compl. ¶ 27. *See* Note 1 *supra*.

[7] The complaint refers to and relies on Exhibit G—the order that "formally closed the charge of discrimination" against Phillips. Compl. ¶ 29. *See* Note 1 *supra*. This document is also proper for judicial notice.

the Commission for factual development and specific findings, *see* Colo. Rev. Stat. § 24-34-307(5), or challenged the administrative proceeding's fairness or propriety. But Scardina did not do so. Instead, Scardina filed this lawsuit early last month.

Argument

I. This Court lacks jurisdiction over Scardina's CADA claim.

Scardina's CADA claim should be dismissed under Rule 12(b)(1) for lack of jurisdiction. Scardina must prove that this Court has jurisdiction over the claims raised. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). Scardina has not done so. The complaint does not allege, much less prove, one of the three conditions necessary for filing a CADA claim in district court or the facts to justify filing in *this* district.

A. Scardina does not satisfy any of CADA's three conditions for filing a claim in district court.

According to CADA, a person who files a charge with the Commission can proceed to district court if (1) the Commission does not issue a notice of hearing and formal complaint within the allowed time, (2) the party "has requested and received a notice of right to sue" under Colo. Rev. Stat. § 24-34-306(15), or (3) the formal administrative hearing "is not commenced" within a prescribed period. Colo. Rev. Stat. § 24-34-306(11). Scardina does not satisfy any of these conditions.

First, the Commission issued a notice of hearing and formal complaint in the administrative case between Scardina and Phillips on October 9, 2018. *See* Compl. ¶ 27; Ex. F. Scardina does not allege that the Commission missed its statutory deadline to issue this notice. And the Commission complaint says that CADA's "[t]imeliness" requirement was "satisfied." Ex. F at ¶ 3.

Second, the complaint never alleges that Scardina asked for or received a right to sue letter from the Division. That makes sense. CADA barred Scardina from requesting or receiving one after the Commission issued its notice of hearing and

formal complaint. *See* Colo. Rev. Stat. § 24-34-306(15) ("The charging party … may request the division to issue a written notice of right to sue at any time *prior to service of a notice and complaint*…." (emphasis added)). That strategic decision was critical because Scardina cannot exhaust administrative remedies without receiving a right to sue letter. *See* Colo. Rev. Stat. 24-34-306(15) ("A notice of right to sue shall constitute final agency action and exhaustion of administrative remedies and proceedings…."); *Brooks v. Denver Pub. Sch.*, No. 17-CV-01968-REB-MEH, 2017 WL 5495793, at *7 (D. Colo. Nov. 16, 2017) ("To exhaust claims under CADA, a plaintiff must receive a notice of right to sue….").

Third, Scardina never alleges that the formal administrative hearing failed to commence within 120 days after the Commission issued its hearing notice and formal complaint. Nor could Scardina. If that hearing did not commence (it did), the Commission would have lost jurisdiction over the administrative case and Scardina would have missed the deadline for filing a CADA claim in district court. *See* Colo. Rev. Stat. § 24-34-306(11) (imposing a 90-day filing deadline in this situation).

In sum, this Court lacks jurisdiction because Scardina does not satisfy any of the three conditions for filing a CADA claim in district court. And that's the fair result. If someone could seek relief from the Commission, participate in a formal hearing, receive an adverse final judgment, refuse to object, refuse to appeal, and then start over elsewhere, the Commission would become merely advisory and its closure orders invitations for needless litigation. That's both unjust and a waste of resources. And CADA forbids it. A person who seeks relief from the Commission waives their right to seek relief from this Court. *See* Colo. Rev. Stat. § 24-34-602(3).

B. Scardina cannot bring a CADA claim in *this* district court.

Colo. Rev. Stat. § 24-34-306(11) provides the exclusive procedure for invoking a district court's jurisdiction over CADA claims. If a plaintiff can satisfy the

jurisdictional conditions to sue in district court, they still must sue in the *correct* district court—that is, "the district court for the district in which the alleged [CADA violation] occurred." Colo. Rev. Stat. § 24-34-306(11). Scardina has not done so.

According to CADA, an alleged violation can only occur in "*the* district in which the alleged [violation] occurred." Colo. Rev. Stat. § 24-34-306(11) (emphasis added). The word "the" in that statute "particularizes the subject" that follows. *Brooks v. Zabka*, 450 P.2d 653, 655 (Colo. 1969). "It is a word of limitation." *Id.* "[T]he district" cannot mean "a district" or "any district"; it must instead mean one specific district. *See People v. Enlow*, 310 P.2d 539, 546 (Colo. 1957) (affirming this logic). Just as courts have interpreted phrases like "the district" to mean one exclusive subject in other contexts, this Court should interpret "the district" in CADA the same way. *See United States v. Davis*, 139 S. Ct. 2319, 2328-29 (2019) (declining to treat same phrase differently in the same or different statutes).

So in which district did the alleged CADA violation occur? There are two options: (1) in Denver where Scardina called or (2) in Jefferson County where Phillips declined to create the cake. Because all of Phillips's alleged acts violating CADA occurred at Masterpiece Cakeshop—which is in Jefferson County, *see* Compl. ¶¶ 6, 14-23—Jefferson County makes more sense.

To be sure, the legislature could have allowed plaintiffs to sue in the district where the alleged impact was felt. But if the legislature wanted that, it would have used language that allow plaintiffs to sue in "any" district where the alleged violation occurred. *Compare* 42 U.S.C. § 2000e-5(f)(3) (allowing claims "in *any* judicial district…."), *with* Colo. Rev. Stat. § 24-34-306(11) (allowing claims "in *the* district…."). It didn't. For CADA, the legislature chose only one district, and it's best to interpret that district as where the defendant committed the alleged acts.

Finally, when the legislature statutorily limits a court's jurisdiction, plaintiffs must strictly comply with those provisions. *Barber v. People*, 254 P.2d 431, 434 (Colo.

1953). Scardina did not do so here. Because Scardina sued in Denver, where the alleged CADA violation did *not* occur, this Court "has no jurisdiction to act." *Id.* *See State v. Borquez*, 751 P.3d 639, 644 (1988) (confirming that plaintiffs must "comply with the procedures prescribed" when seeking to "exercise a statutory right"). As a result, the Court may not "hear the matter" or even "order a change of venue"; it should instead dismiss the case. *Id.* at 645.

II. Scardina does not state a claim upon which relief can be granted.

Scardina's complaint also fails to state a claim under Rule 12(b)(5). Under that rule, this Court should dismiss the complaint if the "law does not support the claims asserted" or if the facts "do not, as a matter of law, support a claim for relief." *Peña*, 2018 Colo. App. 56, at ¶ 13. While this Court should accept the complaint's facts as true and construe them in plaintiff's favor, this Court need not accept "legal conclusions … couched as factual allegations." *Id.* at ¶ 15.

A. Scardina does not state a CADA claim.

Scardina does not state a CADA claim for three reasons: (1) claim preclusion bars it; (2) Scardina does not allege facts to support a key element; and (3) the federal and state constitutions protect Phillips's expressive decision.

1. Claim preclusion bars Scardina's CADA claim.

Scardina cannot relitigate an already-decided CADA claim. Claim preclusion protects people like Phillips from "perpetual re-litigation of the same claim or cause of action." *Foster v. Plock*, 394 P.3d 1119, 1122 (Colo. 2017).[8] It applies when: (1) the judgment in a prior proceeding was final; (2) the current and prior proceedings involve identical subject matter; (3) the current and prior proceedings involve

[8] Claim preclusion applies to administrative actions the same as judicial proceedings. *Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d 20, 32 (Colo. 2006).

identical claims; and (4) the parties to both proceedings are identical or in privity with one another. *Id*. at 1123. Each of these elements is met here.

First, the Commission entered a final judgment dismissing Scardina's CADA claim against Phillips in the administrative case. "A dismissal with prejudice is a final judgment; it ends the case and leaves nothing further to be resolved." *Foothills Meadow v. Myers*, 832 P.2d 1097, 1098 (Colo. App. 1992). On March 5, 2019, the Commission voted to "dismiss with prejudice" the formal administrative complaint against Phillips. *See* Compl. ¶ 29; Ex. G at 4. The Commission then formally closed the administrative case on March 22, 2019. Compl. ¶ 29; Ex. G at 1. Following that, Scardina had 49 days to appeal. *See* Colo. Rev. Stat. § 24-34-307(2); Colo. Rev. Stat. § 24-4-106(11) (imposing 49-day deadline to appeal Commission orders). Scardina did not do so. The Commission's dismissal with prejudice, therefore, became final no later than May 11, 2019—50 days after the Commission's closure order.

Second, this case involves the same subject matter as the administrative case. As Scardina alleges, the Commission issued a notice of hearing and formal complaint against Phillips on October 9, 2018. Compl. ¶ 27. That complaint concerned Phillips's decision not to create a custom "cake with a blue exterior and a pink interior" for Scardina that would celebrate a gender transition. Ex. F at ¶¶ 4-7. This case involves the same subject. Compl. ¶¶ 13-23.

Third, this case raises the same claim as the administrative case. The Commission complaint alleged that Phillips violated "Colo. Rev. Stat. § 24-34-601(2)(a)." Ex. F at ¶¶ 4-7, 15. Scardina asserts the same, seeking relief (again) under "C.R.S. § 24-34-600 *et seq*." Compl. at 6 (heading).

Fourth, this case and the prior administrative one involve the same parties. Even Scardina acknowledges this. Compl. ¶¶ 27-30. Indeed, if Phillips and Scardina were not parties to the administrative case, this court would not have jurisdiction over the CADA claim. *See* Colo. Rev. Stat. 24-34-306(14).

The facts bear this out. Scardina had "notice, standing, and an opportunity to be heard" in the administrative case. *K9Shrink, LLC v. Ridgewood Meadows Water & Homeowner's Ass'n*, 278 P.3d 372, 375 (Colo. App. 2011). Scardina received notice of the administrative hearing and complaint when Phillips did, and Scardina's counsel actually attended the commencement hearing in that case. *See* Ex. F at 5. CADA allowed Scardina to make objections. After any adverse ruling, Scardina could have submitted "exceptions" to the Commission, who would then review those exceptions and make a final ruling. *See* Colo. Rev. Stat. § 24-4-105(14)-(15).

But that's not all. Scardina also had notice, standing, and an opportunity to be heard before the Colorado Court of Appeals. The Commission notified Scardina that it dismissed the administrative case with prejudice. Ex. G. Scardina could have then (1) appealed the Commission's decision, Colo. Rev. Stat. § 24-34-307(1); (2) moved the court of appeals to "remit the case" to the Commission for factual development and specific findings, Colo. Rev. Stat. § 24-34-307(5); or (3) challenged the Commission proceeding's fairness or propriety, *see Agnello v. Adolph Coors Co.*, 689 P.3d 1162, 1165 (Colo. App. 1984). But Scardina did none of this.

Because Scardina had ample notice, standing, and many opportunities to be heard, Scardina was a party to the administrative case. Indeed, Colorado courts have found people were parties when they had far less. *See K9Shrink, LLC*, 278 P.3d at 375 (finding that a woman was a party when she only "received notice" about and "had standing to file, and could have filed, an objection" in a case).

With all four preclusion elements met, Scardina's CADA claim is barred. Claim preclusion rests on fairness principles that "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and … encourage reliance on adjudication." *Foster*, 394 P.3d at 1122. Scardina already had one chance to sue Phillips; this Court shouldn't give Scardina another.

2. Scardina does not allege that Phillips would create a custom cake that expresses the same message for a different customer.

To state a CADA claim, Scardina must show that Phillips treated Scardina differently than other customers "because of" Scardina's transgender status. Colo. Rev. Stat. § 24-34-601(2)(a). In particular, Scardina must allege that Phillips would create *for someone else* a custom blue and pink cake celebrating a gender transition. *See* Br. for Resp't Colo. Civil Rights Comm'n at 35, *Masterpiece I*, 138 S. Ct. 1719 (2018) (No. 16-111) (U.S. Oct. 23, 2017) (urging that CADA claims turn on whether defendant would provide "the same … service to others"). Yet Scardina does not. Scardina instead says Phillips declined to "sell a birthday cake to Ms. Scardina because she is transgender." Compl. ¶ 1. But that is a legal conclusion. This Court need not accept it. *See Peña*, 2018 Colo. App. 56, at ¶ 13.

To be sure, Scardina alleges that Phillips declined to create a birthday cake for Scardina although Phillips will create birthday cakes for others. Compl. ¶ 1. But that "defines the type of cake requested too generally." Order, *Masterpiece Cakeshop Inc. v. Elenis*, No. 1:18-CV-2074-WYD-STV, at 21 (D. Colo. Jan. 4, 2019), ECF No. 94. *See Masterpiece I*, 138 S. Ct. at 1738-39 (Gorsuch, J., concurring) (chastising Colorado for "gerrymander[ing]" the analysis by describing a cake requested of Phillips at a high "level of generality").

As the administrative charge confirms, Scardina's cake request was much more specific. Scardina asked Phillips to create a custom cake with a "blue exterior and a pink interior" that would "celebrate" and reflect a "transition from male to female." Ex. C at 2. *See* Compl. ¶¶ 19, 25. Phillips said he does not create cakes that express that message for anyone. *See* Ex. C at 2 (acknowledging Phillips said he does not create "cakes celebrating gender changes"). Both Scardina and Phillips understood that Scardina's custom cake would be more than a birthday cake; it

would "celebrate" and reflect a gender transition. *Id*. Just because Phillips declined to create that cake expressing *that message* does not mean Phillips would decline to create a cake for Scardina that looks identical but expresses a different message.

This explains Scardina's claim that "[t]hroughout both the federal and administrative proceedings," Phillips indicated he "would happily make the exact same cake … for other customers." Compl. ¶ 30. That is only part of the truth. As Phillips also says in one of the documents that Scardina relies on: "I would create a custom cake with a blue exterior and a pink interior for Autumn Scardina so long as the cake does not visually represent and celebrate a gender transition or otherwise express messages that conflict with my religious beliefs. For example, if Autumn requested a custom cake with a blue exterior and pink interior because Autumn's favorite colors are blue and pink, I would create it." Ex. E at ¶ 18. The full picture alleged in the complaint proves that Scardina had (and still has) access to any custom cake that Phillips would create for any other customer.

3. The federal and state constitutions protect Phillips's decision not to express messages.

The Colorado Constitution, Article II, Section 10, and the First Amendment protect "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).[9] This latter right means the government cannot compel unwanted expression. Indeed, "the fundamental rule of protection under the First Amendment" is "that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995).

Scardina seeks to punish Phillips for declining to express a message through his custom cakes. That triggers the compelled-speech defense. This defense has three

[9] "Article II, Section 10 provides greater protection of free speech than does the First Amendment." *Bock v. Westminster Mall Co.*, 819 P.2d 55, 59 (Colo. 1991).

elements: "(1) speech; (2) to which [defendant] objects; that is (3) compelled by some governmental action." *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015) (*Cressman II*). Each element is established here.

First, Scardina asked Phillips to create a custom cake with a "blue exterior and a pink interior" that would "celebrate" and reflect a "transition from male to female." Ex. C at 2. *See* Compl. ¶ 19. As Scardina's own words admit, that cake's design and theme would have expressed a message—that a person can transition from male to female and that such an event should be celebrated. The requested cake therefore constitutes expression.

"[T]he Constitution looks beyond written or spoken words as mediums of expression." *Hurley*, 515 U.S. at 569. Speech includes "pictures, … paintings, drawings, and engravings," "custom-painted clothing," and "stained-glass windows." *Cressman II*, 798 F.3d at 952. People purchase such creations and pay extra for them precisely because of their expressive quality. The same holds for Phillips's custom decorative cakes. Indeed, Scardina admits to requesting the gender-transition cake for this very reason. Ex. C at 2. Neither the icing nor fondant material alters the analysis: "'[T]he basic principles of freedom of speech … do not vary' when a new and different medium for communication appears." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011).

At a minimum, the gender-transition cake is symbolic speech. The Supreme Court originally adopted a two-prong test to evaluate whether something is symbolic speech: (1) whether "[a]n intent to convey a particularized message was present"; and (2) whether "the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). *Hurley* later erased the "particularized" message requirement. 515 U.S. at 569. The first prong is automatically satisfied in compelled-speech cases like this one. *See Cressman v. Thompson*, 719 F.3d 1139, 1154 n.15 (10th Cir. 2013) (*Cressman I*). As for the second

prong, people viewing the gender-transition cake—those attending the celebration of the anniversary of the transition—would understand that the pink and blue design reflected the gender transition and expressed celebration for it. The gender-transition cake is at least symbolic speech. *See Cressman II*, 798 F.3d at 958-60.

Second, Phillips "serves everyone"; he just cannot "create cakes that express messages or celebrate events in conflict with his religious beliefs." Ex. A at 1-2. Phillips declined to create the gender-transition cake not because of who Scardina was but because Phillips cannot create "cakes *celebrating* gender changes"—as Scardina noted. Ex. C at 2 (emphasis added). Objecting to this message while otherwise serving LGBT customers is constitutionally protected. *See Hurley*, 515 U.S. at 572-73 (acknowledging parade organizers could exclude pro-LGBT message because they did not exclude "homosexuals as such" from parade).

Third, Scardina seeks "to enlist the government—through the exercise of this Court's powers—to impose 'a penalty'" on Phillips's decision not to express a message. *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 442 (S.D.N.Y. 2014). That is government action. Scardina can only sue Phillips because CADA allows it. Courts entertain constitutional defenses in situations like this. *See Hurley*, 515 U.S. at 568-81 (allowing party to invoke First Amendment defense in civil action brought by private party); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (same).

Scardina must therefore satisfy strict scrutiny. *See Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 19 (1986) (plurality) (applying strict scrutiny to law compelling speech). To clear this bar, Scardina must prove that CADA's application is narrowly tailored to serve a compelling interest. *Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1028 (10th Cir. 2008). But public accommodation laws do not serve compelling interests when they compel speech. *See Hurley*, 515 U.S. at 578-79 (ruling that this is a "decidedly fatal objective").

4. The federal and state constitutions bar discrimination against Phillips because of his religious exercise.

The Colorado Constitution, Article II, Section 4, and the First Amendment protect the "free exercise" of religion. To comply with those mandates, government cannot "target[] religious conduct for distinctive treatment," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)—which includes imposing "[a] rule that is … discriminatorily applied to religious conduct," *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004).[10] When officials target religion, that creates a per se violation. *Masterpiece I*, 138 S. Ct. at 1729-30.

In *Masterpiece I*, the Supreme Court recognized that Colorado had created an "offensiveness" rule that allowed cake shops to decline to express "messages [they] consider[] offensive." *Id.* at 1728. Colorado applied that rule to protect three cake shops that declined "to create cakes with images that conveyed [religious] disapproval of same-sex marriage." *Id.* at 1730. But the state refused to apply that rule to Phillips because of its hostility to Phillips's faith. *See id.* at 1730-31. That violated the First Amendment. *Id.* at 1731.

Scardina would have this Court reinstate the rule condemned in *Masterpiece I*. While Phillips would gladly create for Scardina a custom cake expressing a message that Phillips would create for another customer, Phillips cannot create "cakes celebrating gender changes" for anyone. Ex. C at 2. That would violate his "religious beliefs." Compl. ¶ 23. To punish Phillips here, this Court must interpret CADA to forbid him from declining to express messages offensive to his faith but allow others to decline to express messages that offend their non-religious beliefs. The Supreme Court already said that discrimination is off limits.

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[10] The Colorado Constitution, Article II, Section 4, also subjects CADA's application here to at least strict scrutiny. *See In re Custody of C.M.*, 74 P.3d 342, 344 (Colo. App. 2002) (applying strict scrutiny to laws that infringe fundamental rights).

B. Scardina does not state a CPA claim.

Scardina does not state a CPA claim for two reasons: (1) Scardina does not allege facts that support a CPA claim; and (2) the federal and state constitutions protect Phillips's noncommercial speech.

1. Scardina does not allege sufficient or specific facts to support the elements of a CPA claim.

To state a CPA claim, Scardina must allege that: (1) "the defendant engaged in an unfair or deceptive trade practice;" (2) "the challenged practice occurred in the course of defendant's business, vocation, or occupation;" (3) "it significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property;" (4) "the plaintiff suffered injury in fact to a legally protected interest;" and (5) "the challenged practice caused the plaintiff's injury." *Rhino Linings USA, Inc. v. Rocky Mtn. Rhino Lining, Inc.*, 62 P.3d 142, 146-47 (Colo. 2003).

Scardina must also meet Rule 9's heightened pleading requirement. *See Duran v. Clover Club Foods Co.*, 616 F. Supp. 790, 793 (D. Colo. 1985). Rule 9 requires Scardina to state "the circumstances constituting fraud … with particularity." *State Farm Mut. Auto. Ins., Co. v. Parrish*, 899 P.2d 285, 288 (Colo. App. 1994). The complaint must "sufficiently 'specify the statements it claims were false or misleading, give particulars [about how] plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements.'" *Id*.

Because Scardina does not allege sufficient or specific facts to support any elements of a CPA claim, Scardina fails to state a CPA claim.

First, Scardina does not sufficiently or specifically allege that Phillips engaged in unfair or deceptive trade practices. Scardina limits the CPA claim to two theories: (1) that Phillips "knowingly advertised … goods and services with the intent not to sell them as advertised…"; and (2) that Phillips used "'bait and switch' advertising

by publicly advertising that [he] would [create cakes for] the general public including the LGBT community, but then refused to [create the cake that] Scardina [requested]…." Compl. ¶ 12. *See* Colo. Rev. Stat. § 6-1-105(1). To bolster these theories, Scardina offers a 2012 news article—relaying that Phillips said he would "supply LGBT customers with 'birthday cakes and graduation cakes and everything else'"—and other unspecified statements that Phillips supposedly made in a prior "litigation and media campaign" (e.g. that Phillips would be "happy" to create cakes for LGBT customers) and on a fundraising website. Compl. ¶¶ 2, 10-13.

Those meager allegations do not "sufficiently 'specify'" any "false or misleading" statements. *Parrish*, 899 P.2d at 288. Nor do they state "when and where the statements were made." *Id*. They wholly lack particularity. The Court should dismiss Scardina's CPA claim for that reason alone under Rule 9.

In addition, those allegations (without more context) involve "statement[s] of opinion." *Park Rise Homeowners Ass'n, Inc. v. Res. Const. Co.*, 155 P.3d 427, 436 (Colo. App. 2006). Their meaning "depend[s] on the speaker's frame of reference." *Id*. Phillips's statement—that he is "happy" to create cakes for LGBT customers, Compl. ¶¶ 2, 10-11, 13, 37—"is extremely general." *Park Rise*, 155 P.3d at 436. While Phillips does happily create cakes for LGBT customers, the above statement does not mean Phillips would create every cake for LGBT customers no matter the content or message conveyed by the cake. *See* Section II.A.2 *supra*. This illustrates why "happiness" is "not a specific representation of fact subject to measure or calibration" and why such statements do "not constitute a deceptive trade practice." *Id*.

Adding context shows that Phillips did not commit a deceptive trade practice for another reason: he did not make a misleading statement. *Martinez v. Lewis*, 969 P.2d 213, 222 (Colo. 1998) (construing Colo. Rev. Stat. § 6-1-105(1)(i) to forbid advertising "that creates false or misleading [customer] expectations…."); *Gen. Steel*

Domestic Sales, LLC v. Hogan & Hartson, LLP, 230 P.3d 1275, 1281-82 (Colo. App. 2010) (construing Colo. Rev. Stat. § 6-1-105(1)(n) similarly).

Take the news article. Contrary to the complaint's description of this article, the article reports how Phillips said he would be "happy to supply *gay* customers with 'birthday cakes and graduation cakes and everything else.'" *Compare* Ex. B at 2 (emphasis added) *with* Compl. ¶ 11 (claiming Phillips told the reporter he would be "happy to supply LGBT customers with 'birthday cakes….'"). But the complaint does not allege that Scardina is gay. So regardless whether that news statement reflects Phillips's disposition (it does), Scardina does not allege that Phillips declined to create any birthday cake or graduation cake for any gay customer.

The fundraising website shows more of the same. Scardina says Phillips made "a similar representation" on that site. But the site really says this: "Jack serves everyone, including people within the LGBT community. What he can't do is create cakes that express messages or celebrate events in conflict with his religious beliefs." Ex. A at 1. That is Phillips's cake design policy. If Scardina actually relied on that representation, Scardina should not have been "stunned" when Phillips declined to create the requested gender-transition cake; Scardina got a response consistent with that policy: Phillips said he does not "make cakes celebrating gender changes" because of his "religious beliefs." Ex. C at 2.

Scardina also "ignores the practical realities" of how cake artists receive requests. *Gen. Steel*, 230 P.3d at 1280. Phillips "cannot guarantee" that he will create every custom cake requested. *Id.* A "prospective" request may not "comply with" Phillips's design policy; a customer may be "unable to pay" Phillips's fee; or Phillips may be "unavailable, due to workload." *Id.* Like other cake artists, Phillips "evaluate[s] [cake requests] based on each one's unique facts and circumstances" and makes "individualized determinations." *Id. See* Ex. A at 2 (explaining that Phillips

cannot create cakes that express every message). In light of this, Scardina cannot show any unfair or deceptive trade practice.

Second, Scardina does not sufficiently or specifically allege that the challenged practices occurred in the course of Phillips's business. Instead, Scardina alleges that Phillips made misleading statements when he was "defending" himself in prior "litigation" and in a connected "media campaign." Compl. ¶¶ 2, 10. Those statements (the exact ones are unclear) are legal and political speech. But the CPA only targets "regular commercial activity" (i.e., commercial speech). *Cleary Bldg. Corp. v. David A. Dame, Inc.*, 674 F. Supp. 2d 1257, 1271 (D. Colo. 2009).

Commercial speech "does no more than propose a commercial transaction." *Harris v. Quinn*, 573 U.S. 616, 648 (2014). But Phillips's statements did much more than propose a commercial transaction. He sought to defend himself from legal and media attacks. Scardina implies this—theorizing that Phillips made those statements "to legitimize … discriminatory conduct" that was part of a prior lawsuit. Compl. ¶ 39. That allegation (although untrue) shows that Scardina really just seeks to punish Phillips's legal and political speech, a goal not permitted by the CPA.

Third, Scardina does not sufficiently or specifically allege that the challenged practice significantly impacts the public. To determine if a practice creates a public impact, courts consider: (1) "the number of consumers directly affected by the challenged practice;" (2) "the relative sophistication and bargaining power of the consumers affected by the challenged practice;" and (3) "evidence that the challenged practice has previously impacted other consumers or has the significant potential to do so in the future." *Rhino Linings*, 62 P.3d at 149.

To begin, Scardina does not sufficiently or specifically allege that Phillips's statements directly affected anyone else. The complaint does not identify a single person other than Scardina who reviewed the 2012 news article, visited the fundraising site, or scoured Phillips's court documents. But even if it did, or even if

it alleged that Phillips's statements appeared in "widespread advertising," that still would not allege a public impact under the CPA. *Colo. Coffee Bean, LLC v. Peaberry Coffee Inc.*, 251 P.3d 9, 25 (Colo. App. 2010). Consumers suffer no "direct effect" from business communications when they "merely read" publicly available postings—especially when those communications, like the ones at issue here, are true. *Id. See Gen. Steel*, 230 P.3d at 1279 ("[E]ven mass advertising cannot … create a public impact unless it contains … deceptive information.").

Next, the complaint does not sufficiently or specifically allege that Phillips had more sophistication or greater bargaining power than Scardina. Phillips runs a small family cake shop. Ex. A at 2. Scardina is an "attorney." *Id.* at 3. The complaint does not allege that Phillips has advanced degrees, sophisticated marketing schemes, or in-house attorneys. In contrast, Scardina is "relatively sophisticated," having received formal "education and knowledge" about negotiations and commercial transactions. *Rhino Linings*, 62 P.3d at 150.

Finally, Scardina does not sufficiently or specifically allege that Phillips's statements impacted other consumers or has a significant potential to do so in the future. The complaint identifies no one besides Scardina who has construed Phillips's statements as a promise to create every cake requested of him, much less as a promise to create a custom blue and pink cake to celebrate a gender transition. But even when plaintiffs can highlight multiple affected parties, courts only find a public impact when the challenged practices affect more than a low percentage of possible customers. *See id.* Because this case involves "no more than a private dispute," Scardina does not allege a CPA claim. *Id*.

Fourth, the complaint does not sufficiently or specifically allege that Scardina suffered an injury to a legally protected interest. While the complaint concludes that Scardina "experienced illegal discrimination," (Compl. ¶ 40), the alleged facts show

that Phillips treated Scardina the same way he would treat any other customer in that situation. *See* Section II.A.2 *supra*.

Fifth, Scardina does not sufficiently or specifically allege any challenged practice *caused* any injury. The complaint never asserts that Phillips's statements induced Scardina to contact Masterpiece Cakeshop. For example, the complaint does not show that Scardina knew about, much less read, the 2012 news article before calling Phillips. The same goes for the fundraising website and Phillips's court documents. For all we know, Scardina could have first discovered (or read) those items a week before filing this lawsuit.

The only proof of causation then comes from a vague assertion that Scardina "heard" unspecified "advertisements" about Phillips being "happy" to create cakes for LGBT people and that Scardina was "hopeful" those statements were true when Scardina called Masterpiece. Compl. ¶¶ 13, 14. That allegation leaves Phillips (and this Court) in the dark. What were those exact statements? When were they made? Did they come from noncommercial advertisements? Through what medium? Scardina does not say. But Rule 9 requires those details. *See Parrish*, 899 P.2d at 288. What's more, Scardina's knowing about Phillips's statements would not mean those statements induced Scardina's call. "Knowledge … does not prove causation." *Chappell v. Bilco Co.*, 675 F.3d 1110, 1117 (8th Cir. 2012).

Because Scardina does not sufficiently or specifically allege facts that support any of the CPA elements, Scardina does not state a CPA claim.

2. The federal and state constitutions forbid punishing Phillips's noncommercial speech under the CPA.

The Colorado Constitution, Article II, Section 10, and the First Amendment forbid laws that aim "at fraud or other abuses" from suppressing noncommercial speech. *Thomas v. Collins*, 323 U.S. 516, 532 (1945). Yet that is what Scardina conscripts the CPA to do here.

Scardina's complaint targets statements that Phillips allegedly made to a reporter, on a fundraising website, and in court documents while "defending" himself in prior "litigation" before the Supreme Court and in a connected "media campaign." Compl. ¶¶ 2, 10-11. One of those statements reads: "Jack serves everyone, including people within the LGBT community. What he can't do is create cakes that express messages or celebrate events in conflict with his religious beliefs." Ex. A at 1; *see* Compl. ¶ 11. Scardina says the other statements are "similar." Compl. ¶ 11.

While Scardina does not reveal much about Phillips's statements, the complaint at least shows that those statements did far "more than simply propose a commercial transaction." *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975). Consider their context. Phillips was "defending" himself, Compl. ¶ 2; he was in "litigation" before the U.S. "Supreme Court," *id.* at ¶¶ 2, 10; the lawsuit concerned his decision not to create a custom "wedding cake" that would celebrate a "same-sex" marriage, *id.* at ¶ 2; and he was caught in a "widespread media campaign," *id.* at ¶ 39.

Phillips's design policy was a public issue. When Phillips defended that policy, he "participate[d] in [a] public debate" on a "controversial" issue "of national interest and importance." *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 535 (1980). He gave the public insight into the debate. That speech is protected. Free speech ensures that *both* sides have the freedom to speak on matters of public interest. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784-86 (1978).

At the very least, this case typifies the situation when commercial speech and noncommercial speech are "inextricably intertwined." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). While Phillips's statements were not "merely" commercial, even "commercial" statements do not retain their "commercial character when [they are] inextricably intertwined with otherwise fully protected speech." *Id.* As a result, the Court must apply the "test for fully protected expression." *Id.*

Scardina seeks to punish Phillips's noncommercial speech about his cake design policy "because of its message." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Phillips sees that policy as a content-based filter to protect his conscience; Scardina translates it as a blueprint for "discrimination," Compl. ¶ 40. That row remains a topic of national debate. Yet Scardina would "give one side" of that public debate a state-sanctioned "advantage in expressing its views." *Bellotti*, 435 U.S. at 785. Such content and viewpoint discrimination must survive strict scrutiny.

Scardina must prove that this application of the CPA is narrowly tailored to serve a compelling interest. *Savage*, 550 F.3d at 1028. Scardina cannot do so. While litigants can stop fraud all they want, they have no legitimate, much less compelling interest in banning noncommercial speech on one side of a nationally debated issue.

C. Scardina does not state a claim against Phillips in his personal capacity.

Scardina sues Phillips in his representative capacity as "owner and operator of Masterpiece Cakeshop." Compl. ¶ 7. The complaint does not allege that Scardina is suing Phillips in his personal capacity. Nor does it allege that Phillips acted outside of his representative capacity. These omissions comport with the general rule that officers "acting in their representative capacity for a corporation are not personally liable for those acts." *Leonard v. McMorris*, 63 P.3d 323, 327 (Colo. 2003). So Scardina does not state a claim against Phillips in his personal capacity.

Conclusion

Phillips wants to peacefully live out his faith as a cake artist by serving all people while declining to express messages that violate his beliefs. After losing in court, the state was content to leave Phillips alone to do just that. But Scardina won't allow it. Phillips requests that the Court dismiss the complaint so that he can return to the life he had before the state and Scardina targeted him and his faith.

Respectfully submitted this 22nd day of July, 2019.

By: s/ Jonathan A. Scruggs

Samuel M. Ventola
1775 Sherman Street, Suite 1650
Denver, CO 80203
(303) 864.9797
(303) 496.6161 (facsimile)
sam@samventola.com
Colorado Bar No. 18030

Nicolle H. Martin
P.O. Box 270615
Littleton, CO 80127
(303) 332-4547
Not designated (facsimile)
nicollem@comcast.net
Colorado Bar No. 28737

Jonathan A. Scruggs
Jacob P. Warner
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
(480) 444-0028 (facsimile)
jscruggs@adflegal.org
jwarner@adflegal.org
Arizona Bar No. 030505
Arizona Bar No. 033894

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have on this 22nd day of July 2019, served a true and correct copy of the foregoing via the Colorado Courts E-Filing system and U.S. Regular Mail (as designated below) on:

John M. McHugh
Reilly Pozner, LLP
1700 Lincoln St., Suite 3400
Denver, CO 80203
jmchugh@rplaw.com

Paula Greisen
King & Greisen
1670 York Street
Denver, CO 80206
greisen@kinggreisen.com

Samuel M. Ventola
1775 Sherman Street, Suite 1650
Denver, CO 80203
sam@samventola.com

Nicolle H. Martin (by U.S. Regular Mail)
P.O. Box 270615
Littleton, CO 80127
nicollem@comcast.net

/s/Jonathan A. Scruggs
Jonathan A. Scruggs
Attorney for Plaintiffs