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| DISTRICT COURT, CITY AND COUNTY OF<br>DENVER, COLORADO<br>Court Address: 1437 Bannock Street<br>Denver, Colorado 80202  | <p style="color: red; text-align: center;"> <b>EFILED Document</b><br/> <b>CO Denver County District Court 2nd JD</b><br/> <b>Filing Date: Jul 30 2009 1:08PM MDT</b><br/> <b>Filing ID: 26364073</b><br/> <b>Review Clerk: Orathay Khiem</b> </p> |
| Plaintiff: COLORADO ETHICS WATCH<br><br>v.<br><br>Defendant: COLORADO INDEPENDENT<br>ETHICS COMMISSION  | <p style="text-align: center;">▲ <b>COURT USE ONLY</b> ▲</p> Case Number: 2009CV4989<br><br>Division: 5  |
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| <b>RESPONSE TO MOTION TO DISMISS</b>  |  |

Plaintiff, Colorado Ethics Watch (“Ethics Watch”), by its undersigned attorneys, respectfully submits this brief in opposition to the Motion to Dismiss (“Motion”) filed by Defendant Colorado Independent Ethics Commission (“IEC”).

**I. BACKGROUND AND INTRODUCTION**

In 2006, Colorado voters passed Amendment 41, which added Article XXIX to the Colorado Constitution. Among other things, Article XXIX imposed a ban on gifts valued at more than \$50 to state legislators and other public servants, subject to certain enumerated exceptions, and created the IEC to interpret and enforce the gift ban. Colo. Const. art. XXIX, §§ 3, 5; *see also Developmental Pathways v. Ritter*, 178 P.3d 524, 532 (Colo. 2008). The Supreme Court has described the IEC as a “super-agency”

independent of the legislative and executive branches, “given the authority to administer, implement, and enforce the Amendment's provisions.” *Id.* at 535.

Ethics Watch filed its complaint for judicial review pursuant to C.R.S. § 24-4-106 of the State Administrative Procedure Act (“State APA”), and for declaratory judgment after the IEC issued Advisory Opinion 09-04, entitled “Travel Expenses from a Nonprofit Entity: Travel to Turkey.” Ethics Watch also alleged that Advisory Opinion 09-04 should be declared null and void as a result of the IEC’s violation of the Colorado Open Meetings Law, C.R.S. § 24-6-402. The IEC has filed a partial answer to that claim and does not challenge the sufficiency of Ethics Watch’s pleading of that claim in the Motion.

The IEC ruled in Advisory Opinion 09-04 that “[i]t would not be a violation of Colorado Constitution Art. XXIX for a member of the General Assembly and her spouse to accept travel-related expenses on a trip to Turkey.” Exhibit 3 to the Complaint, p.1. The IEC candidly admitted that the gift could not be justified under the plain language of Colo. Const. art. XXIX, § 3(3), which exempts from the gift ban the payment of travel expenses by, among others, a non-profit that receive less than 5% of its funding from for-profit entities. Yet it approved the legislator’s acceptance of the gift under the theory that if certain criteria set forth in a non-binding position statement were deemed satisfied by the IEC, the gift would somehow be transformed into a gift to the State of Colorado and not a gift to the individual legislator. *See id.*

Before this Court, the IEC now acts as though Advisory Opinion 09-04 was a frivolity, a mere expression of opinion with no legal effect. It is apparent that this argument is being made only to support an argument that the IEC’s actions are immune from judicial review. To the contrary, when it issues an advisory opinion the IEC is

taking a constitutionally mandated action. The constitutional scheme, and the language of Advisory Opinion 09-04 itself, make it plain that the advisory opinion is intended to provide guidance as to how government employees subject to Amendment 41 are to conduct themselves and what conduct the IEC will consider to violate ethics standards.

## II. ARGUMENT

### A. Standard of Review.

When a motion to dismiss is filed under Colo.R.Civ..P. 12(b)(5), the Court must take as true all of the material allegations of the complaint. *Public Service Co. of Colorado v. Van Wyk*, 27 P.3d 377, 386 (Colo. 2001). Rule 12(b)(5) motions to dismiss are “looked upon with disfavor, and a complaint should not be dismissed unless it appears beyond a doubt that a plaintiff can prove *no* set of facts in support of her claim which would entitle her to relief.” *Id.* at 385-86; *see also Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996). If a plaintiff can demonstrate even one single set of facts in support of its claim, the motion to dismiss for failure to state a claim must be denied. *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1291 (Colo. 1992) (motion to dismiss cannot be granted “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”) (internal citation omitted).

In the context of actions for declaratory judgment, arguments about the merits of the defendants’ position (e.g., the IEC’s argument that advisory opinions have no legal effect) are not a basis to grant a motion to dismiss under Rule 12(b). *Karsh v. Denver*, 490 P.2d 936, 938 (Colo. 1971). Rather, if the Court agrees with the defendant’s position

at the close of the case, it should enter a declaratory judgment instead of an order of dismissal. *Id.*

As to the IEC's motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), an evidentiary hearing would normally be required; however, "the district court may determine the jurisdictional issue without an evidentiary hearing if it accepts all the plaintiff's assertions of fact as true." *Hansen v. Long*, 166 P.3d 248, 250 (Colo. App. 2007). In this case, because Ethics Watch's complaint was timely even under the IEC's disputed version of events, the Court should summarily deny the IEC's Rule 12(b)(1) motion.

**B. An Advisory Opinion Is A Reviewable Final Action Of The IEC.**

**1. Advisory Opinions Are Final Actions.**

An administrative agency's action is "final" for purposes of judicial review when the agency action is complete and there is "nothing further for the agency to decide." *Cadnetix Corp. v. Boulder*, 807 P.2d 1253, 1254 (Colo. App. 1991); *accord Baker v. City of Dacono*, 928 P.2d 826, 827 (Colo. App. 1996). The IEC does not seriously dispute that Advisory Opinion 09-05 was final; indeed, elsewhere in the Motion the IEC argues that Ethics Watch waited too long after the final action to file its complaint. *See* Section II.C. below. Rather, the IEC argues that the advisory opinion is merely the expression of an opinion with no legal impact on anyone, and therefore, presumably not an "action" that a court could review. The litigation position taken by the IEC in an attempt to avoid judicial review contradicts both the IEC's own conduct in crafting a lengthy opinion on the legislator's proposed trip to Turkey and the language of the constitutional provision that created the IEC.

The issuance of an advisory opinion is a constitutionally mandated function of the IEC that is meant to declare the IEC's official interpretation of an ethical standard of conduct. The plain language of Article XXIX of the Colorado Constitution, which established the IEC, treats advisory opinions as equally important as complaints in fulfilling the IEC's function of interpreting and enforcing ethics laws. Article XXIX provides that "[t]he purpose of the independent ethics commission shall be to hear complaints, issue findings, and assess penalties, **and also to issue advisory opinions**, on ethics issues arising under this article and under any other standards of conduct and reporting requirements as provided by law." Colo. Const. Art. XXIX, Section 5(1) (emphasis added); *see also Developmental Pathways*, 178 P.3d at 527 (IEC's constitutional purposes are to hear complaints and issue advisory opinions).

Article XXIX mandates that the IEC respond to advisory opinion requests:

Any public officer, member of the general assembly, local government official, or government employee may submit a written request to the independent ethics commission for an advisory opinion on whether any conduct by that person would constitute a violation of this article, or any other standards of conduct or reporting requirements as provided by law. The commission **shall** render an advisory opinion pursuant to written rules adopted by the commission.

*Id.* § 5(5) (emphasis added). This language should be read together with Article XXIX's purpose and finding that public officers, members of the general assembly, local government officials, and government employees ("covered persons") "must have the benefit of specific standards to guide their conduct." Colo. Const. Art. XXIX, § 1(e). Article XXIX contemplates that covered persons have the right to submit advisory opinion requests, receive formal advice from the IEC through the advisory opinion, and most importantly, **rely** on those opinions to guide their conduct. The IEC's argument that

advisory opinions have no legal effect would strip covered persons of their right to submit advisory opinion requests and rely on the IEC's response.<sup>1</sup>

According to the IEC, a person such as Ethics Watch that wishes to challenge the IEC's interpretation of an ethics rule is required to wait for the covered person to rely on the advisory opinion, file a complaint against that person, then challenge the IEC's ultimate resolution of the complaint in district court – assuming the IEC did not in the meantime change its mind and decide that the conduct it previously approved was actually an ethical violation. The plain language of Article XXIX, which treats the complaint and advisory opinion processes as two distinct methods for the IEC to promote ethical conduct, indicates that when the IEC issues an advisory opinion, it is taking an official action with legal consequences.

The IEC's argument is also belied by the language of Advisory Opinion 09-04 itself. Nothing in the opinion remotely suggests that “[n]o legal right or obligation should attach to an advisory opinion rendered before any action is taken by the opinion's requestor,” as the IEC argues in the Motion (at p. 8) as a way to avoid judicial review. To the contrary, Advisory Opinion 09-05 itself states that the IEC had received a request “asking whether a member of the General Assembly and her spouse may accept the travel-related expenses of accommodations, meals, ground transportation, and museum visits from The Multicultural Mosaic Foundation, while participating in an intercultural trip to Turkey.” Exhibit 3 to the Complaint, p. 1. In response to this request, the IEC engaged in a lengthy analysis of the relevant facts and law and concluded that “[i]t would

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<sup>1</sup> The IEC Rules of Procedure provide for the use of “position statements” to provide the kind of general, nonbinding guidance the IEC now wishes to pretend is given through formal advisory opinions. *See* IEC Rules of Procedure 1.A.14, 6.A.

not be a violation of Colorado Constitution Art. XXIX for a member of the Colorado General Assembly, and her spouse, to accept travel-related expenses to Turkey under the facts presented here.” *Id.* at p.9. The clear implication of Advisory Opinion 09-05’s plain language is that it is intended to determine whether the requesting party was legally entitled to accept the proposed gift.

The Court should reject the IEC’s litigation-driven reinterpretation of the advisory opinion and rule that the advisory opinion is a final agency action having the legal effect of bestowing approval of acceptance of the gift by the agency charged with “administering and enforcing” the provisions of Article XXIX. *Developmental Pathways*, 178 P.3d at 530.

**2. There Is No Conflict Between C.R.S. § 24-18.5-101(9) and C.R.S. § 24-4-106.**

In a related vein, the IEC argues that because C.R.S. § 24-18.5-101(9) provides that final actions regarding complaints are subject to judicial review in Denver District Court, review of advisory opinion requests under is somehow barred. To the contrary, the State APA applies to all state agencies with statewide territorial jurisdiction except those in the legislative and judicial branches, except where a specific statute conflicts with the State APA. C.R.S. § 24-4-107. The IEC is subject to the APA because it is an agency with statewide territorial jurisdiction, and is not part of either the legislative or judicial branches. *See Developmental Pathways*, 178 P.3d at 532 & n.4 (IEC is placed for administrative purposes in the Department of Personnel but is independent from both the executive and legislative branches). Therefore, the administrative review provisions

of C.R.S. § 24-4-106 must apply unless there is a conflict between that statute and C.R.S. § 24-18.5-101(9).

Courts will not find a conflict between a specific agency statute and the State APA “where none plainly appears.” *Dep’t of Revenue v. District Court*, 568 P.2d 1157, 1159 (Colo. 1977). Applying this standard in an analogous situation, the Colorado Supreme Court held the State APA governs actions of the Public Utilities Commission (“PUC”) subject only to two exceptions: “a special statutory provision of the Public Utilities Law expressly made applicable to the actions of the PUC will control over the general provisions of the State [APA], and any provision of the Public Utilities Law directly conflicting with the State [APA] will also govern.” *Home Builders Ass’n v. Public Utilities Comm’n*, 720 P.2d 552, 559 (Colo. 1986). The same rule should apply here: the State APA governs actions of the IEC unless there is a direct conflict between Article XXIX or C.R.S. § 24-18.5-101 and the State APA.

There is no conflict, much less one that “plainly appears,” between the language of C.R.S. § 24-18.5-101(9) regarding district court review of final actions on complaints, and the general rule that final agency action is subject to judicial review under the State APA under C.R.S. § 24-4-106. All subsection (9) does is make it clear that, despite superficial similarities between the Article XXIX complaint process and the process for campaign finance complaints under Article XXVIII, § 9(2)(a), appeals of final actions regarding ethics complaints are to be filed in district court, not the Court of Appeals. When the General Assembly has intended to immunize a category of final agency action from judicial review, it has done so expressly. *See Crawford v. State*, 895 P.2d 1156, 1157 (Colo. App. 1995); C.R.S. § 1-17-111 (providing that agency actions regarding

“placement, assignment, management, discipline, and classification of inmates shall not be subject to section 24-4-103, 24-4-105, or 24-4-106, C.R.S.”). It is not reasonable to infer from the General Assembly’s silence that it intended to deprive courts of jurisdiction to review final actions of the IEC on matters other than complaints, particularly in view of the controlling law that courts will not interpret a statute as conflicting with the State APA where no conflict “plainly appears.” *Dep’t of Revenue*, 568 P.2d at 1189.

The IEC does not cite, and Ethics Watch is not aware of any case in which silence in an agency-specific statute has been interpreted as creating a conflict with the State APA’s general provision for administrative review of final agency actions and rendering final agency action unreviewable. The Court should not take the unprecedented action of interpreting C.R.S. § 24-18.5-101’s silence on the topic of judicial review of advisory opinions or other final actions of the IEC as “plainly” rendering the State APA inapplicable to those actions. *See Dep’t of Revenue*, 568 P.2d at 1159. Rather, it should recognize that review of IEC actions on matters other than complaints under the State APA can comfortably co-exist with review of complaints under C.R.S. § 24-18.5-101(9).

**C. The Complaint is Timely.**

The IEC next argues that Ethics Watch should have filed the complaint no later than Friday, May 15, 2009, only twenty-eight days after the date the opinion was issued on April 17<sup>2</sup>, notwithstanding that C.R.S. § 24-4-106(4) allows a challenge to be filed

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<sup>2</sup> The parties dispute whether the thirty day time period began on April 16, the date the IEC voted to approve the Advisory Opinion, or April 17, the date the Advisory Opinion was first released to the public. This dispute is not material, however, because the thirtieth day fell on a Saturday according to the IEC, and a Sunday according to Ethics Watch, and the complaint was filed the following Monday.

within thirty days. The IEC argues that when, as here, the thirtieth day after the challenged action falls on a weekend or holiday, a complaint filed on the following Monday is untimely, effectively reducing the time to challenge agency action. The IEC's argument ignores well-established Colorado law construing statutory time periods that would otherwise expire over a weekend to carry over to the following Monday.

C.R.S. § 2-4-108(2), which sets forth a general rule of construction of time periods in Colorado statutes, provides that “[i]f the last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day which is not a Saturday, Sunday, or legal holiday.” C.R.S. § 24-11-110 provides that if any document is required to be filed on any day when a public office is closed, the obligation to file “shall stand continued to the next succeeding full business day at such office at the same time and place.” Thus, a plaintiff who filed her notice of claim under the Colorado Governmental Immunity Act on the one hundred eighty-first day after her alleged injury satisfied the jurisdictional requirement that the notice be filed within one hundred eighty days, when the defendant city's offices were closed on the one hundred eightieth day. *Matthews v. City and County of Denver*, 20 P.3d 1227 (Colo. App. 2000). As the Court of Appeals explained, these statutes do not toll, waive or extend the statutory time period, they merely “provide a uniform method for determining when a statutory period begins and ends.” *Id.* at 1229.

The case primarily relied upon by the IEC, *ICAO v. Zarlingo*, 57 P.3d 736 (Colo. 2002), does not suggest a different result. That case held only that appeals from decisions of the Industrial Claims Appeals Office are not governed by C.A.R. 4(a) and that under the governing C.A.R. 3.1 and C.R.S. § 8-43-301(10), the time to file an appeal

was not extended by three days by virtue of the fact that the order appealed from was served by mail. *Zarlingo*, 57 P.3d at 737. If anything, *Zarlingo* reinforces Ethics Watch's point that the question presented is one of statutory interpretation. C.R.S. §§ 2-4-106(4) and 24-11-110 require the Court to consider Ethics Watch's petition to be timely filed because it was filed on the first business day after the thirtieth calendar day after the challenged agency action, which fell on a weekend. *See Matthews*, 20 P.3d at 1229; *accord Austin v. Weld County*, 702 P.2d 293 (Colo. App. 1985).

**D. Ethics Watch Has Standing.**

The IEC argues that Ethics Watch does not have standing to bring its first claim because it is not subject to enforcement action by the IEC. Motion at 10, *citing CFI Steel Corp. v. Colorado Air Pollution Control Comm'n*, 610 P.2d 85 (Colo. 1980). Actually, Ethics Watch aptly alleges that it expects the IEC will invoke Advisory Opinion 09-04 as a bar to complaints that Ethics Watch has a constitutional right to file complaints with the IEC. There is more to Ethics Watch's standing, however. The IEC's argument is based on the false assumption that only those persons who may be targeted for agency enforcement action have a legal interest in challenging an agency decision.

To the contrary, Colorado law expressly recognizes that watchdog groups, such as Ethics Watch, that have a mission of promoting enforcement of existing laws in a given area (here, government ethics), have standing to challenge an agency's failure to adequately enforce those laws. "In Colorado, parties to lawsuits benefit from a relatively broad definition of standing." *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004). A plaintiff need only satisfy a two-prong test to establish standing: (1) that the plaintiff has a legally protected right, and (2) that the defendant's action caused an injury in fact. *Id.*

These two prongs essentially collapse into one when, as here, a plaintiff “has averred a violation of a specific constitutional provision.” *Barber v. Ritter*, 196 P.3d 238, 247 (Colo. 2008). Ethics Watch sufficiently alleged that it has legally protected interests in filing complaints under Article XXIX and in seeing that Article XXIX is effectively enforced. Complaint ¶¶ 1, 16-18. Ethics Watch suffered an injury in fact when the IEC issued an advisory opinion that directly contradicts Article XXIX. *Id.*, ¶ 19.

An argument practically identical to the one made by the IEC in its Motion here was rejected in *Rocky Mountain Animal Defense v. Colorado Div. of Wildlife*, 100 P.3d 508 (Colo. App. 2004). In that case, an animal-welfare organization alleged that the Division of Wildlife violated Amendment 14, which enacted Article XVIII, § 12b of the Colorado Constitution, by failing to insure that protected wildlife was not harmed by the lawful poisoning of prairie dogs. *Id.* at 511-12. Under the IEC’s analysis, the organization should not have been found to have standing because it was not subject to regulation under Amendment 14, had no plans to poison any animals of its own, and was interested only in making sure that Amendment 14 was properly implemented. The Court of Appeals affirmed that “[h]arm to intangible values is sufficient” to establish standing. *Id.* at 513 (quoting *Friends of Black Forest Reg’l Park v. Bd. of County Comm’rs of County of El Paso*, 80 P.3d 871, 877 (Colo. App. 2003)). It observed that plaintiff’s complaint alleged that it was a “nonprofit corporation authorized to transact business in Colorado, organized to enforce laws protecting wildlife, to prevent human-imposed suffering of animals, to appreciate wildlife throughout the Rocky Mountain region, including Colorado, and to pursue policies and laws that preserve and promote wildlife habitats.” *Id.* Because “[e]nvironmental organizations have a legitimate role in

ensuring the proper interpretation and implementation of' Amendment 14, plaintiff had standing to challenge the Division of Wildlife's alleged failure to properly implement that amendment. *Id.*

More recently, the Colorado Supreme Court embraced a broad view of standing in cases alleging that the state government has failed to properly implement a constitutional amendment. *Barber*, 196 P.3d at 247. In *Barber*, two individuals and a corporation challenged the state government's transfer of money from various special funds into the General Fund as a violation of Amendment 1, codified as Colo. Const. art. X, § 20. *Id.* at 241. The Supreme Court held that the plaintiffs had a legally protected interest in ensuring "that governmental units conform to the state constitution under the terms of Amendment 1." *Id.* at 246 (quotation omitted).

What is true of Amendments 1 and 14 is also true of Amendment 41. Ethics Watch, an organization devoted to the strict enforcement of ethics standards, has a legally protected interest in ensuring that the IEC conforms to the letter of Article XXIX in determining whether to approve gift requests. Moreover, Ethics Watch reasonably is concerned that its ability to prosecute complaints before the IEC will be impaired as a result of the IEC's unlawful action in approving Advisory Opinion 09-04. Based on the foregoing, Ethics Watch has standing.

**E. C.R.C.P. 57 Is Properly Used To Litigate Constitutional Issues Regarding Agency Action.**

The IEC's last argument strains credibility – that there is no actual dispute between the IEC and Ethics Watch. Unless the IEC is prepared to admit that Advisory Opinion 09-04 violates the plain language of Article XXIX, § 3 of the Colorado

Constitution, then of course there exists an actual controversy between the parties that can properly be adjudicated in a C.R.C.P. 57 action. *See Utah International, Inc. v. Board of Land Comm'rs*, 579 P.2d 96, 98 (Colo. App. 1978) (Plaintiff correctly joined its § 24-4-106 action to review board action with a claim for declaratory judgment, but no dispute existed because board agreed with plaintiff's position). Contrary to the IEC's argument, a person is not required to defy an agency's decision and suffer adverse consequences (in this case, dismissal of a future complaint regarding the acceptance of a gift from a non-profit that receives more than 5% of its funding from for-profit entities) in order to obtain declaratory judgment regarding the validity of agency action. *See Colorado State Board of Optometric Examiners v. Dixon*, 440 P.2d 287, 290 (Colo. 1968). Such a requirement would contradict the rule that C.R.C.P. 57 and the Declaratory Judgment Act must be liberally construed to effectuate its purpose of eliminating uncertainty and insecurity about the meaning and effect of documents, here Advisory Opinion 09-04. *See id.*

Ethics Watch is entitled to plead declaratory judgment as an alternative remedy to obtain review in the event the Court were to determine that "the remedy afforded by section 24-4-106(4) or certiorari review would be inadequate." *Collopy v. Wildlife Com., Dep't of Natural Resources*, 625 P.2d 994, 1004 (Colo. 1981). An action for declaratory judgment is a proper method to raise constitutional questions regarding final agency action. *See, Native Am. Rights Fund, Inc. v. City of Boulder*, 97 P.3d 283 (Colo. App. 2004). Declaratory judgment is also a proper remedy to review the substance of agency action de novo where, as here, there has been a failure to provide proper notice. *Norby v. City of Boulder*, 577 P.2d 277, 281 (Colo. 1978).

As a government ethics watchdog organization, Ethics Watch contends that Advisory Opinion 09-04 violates the state Constitution by approving a gift of travel to a legislator when the specific criteria set forth in Colo. Const. art. XXIX, § 3(3) are not satisfied. It is not obligated to make the futile gesture of filing a complaint and having it dismissed based on the authority of Advisory Opinion 09-04 before asking the Court to enter declaratory judgment that the IEC violated the state constitution by issuing that opinion. *Colorado State Board of Optometric Examiners*, 440 P.2d at 290; *see also People v. Green*, 884 P.2d 339, 343 (Colo. App. 1994) (“the law does not require a futile act”).

### III. CONCLUSION

Ethics Watch respectfully submits that, for the reasons set forth above, the Court should deny the IEC’s Motion and require the IEC to file a complete answer to the Complaint. In the event the Court disagrees with Ethics Watch on any point raised by the IEC, however, it should not dismiss the complaint without first giving Ethics Watch an opportunity to file an amended complaint. *See Bristol Co., L.P. v. Osman*, 190 P.3d 752, 759 (Colo. App. 2007), *cert. denied* (2008).

**DATED:** July 30, 2009.

COLORADO ETHICS WATCH

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[Original Signature On File]  
Luis Toro, #22093

**CERTIFICATE OF SERVICE**

I certify that on July 30, 2009, I served the foregoing RESPONSE TO MOTION TO DISMISS via LexisNexis File and Serve to the following:

Lisa Brenner Freiman, Esq.  
Jack M. Wesoky, Esq.  
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[Original Signature On File]  
Luis Toro