

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 08-cv-00251-MSK-KMT

KENNETH L. SMITH,

Plaintiff,

v.

HON. DAVID M. EBEL, in his official capacity as Judge of the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, THE UNITED STATE DISTRICT COURT FOR THE DISTRICT OF COLORADO, THE TENTH CIRCUIT COURT OF APPEALS, THE COLORADO COURT OF APPEALS, THE SUPREME COURT OF COLORADO, and JOHN DOES 1-99,

Defendants.

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**COLORADO SUPREME COURT AND COLORADO COURT OF APPEALS'  
MOTION TO DISMISS**

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Defendants the Colorado Supreme Court and Colorado Court of Appeals (“the state courts”), by and through undersigned counsel and the Office of the Colorado Attorney General, hereby respectfully file this motion to dismiss this action, and as grounds therefor, state as follows. Undersigned counsel contacted Plaintiff Smith (“Smith”) regarding this motion; he opposes the relief requested herein

**FACTS**

Smith brings this action pursuant to 42 USC. § 1983. *Complaint (Doc. 1) at 1, ¶1.* With regard to the state courts, the relief Smith requests in the complaint is preliminary and permanent injunctive relief as follows. The state courts and their “agents, employees, and/or

representatives” are to be enjoined “from engaging in or performing any of the following acts” with regard to appellate opinions:

1. “Issuing appellate opinions designated as being without precedential effect”;
2. Failing to directly address “all the legal arguments and/or contentions of fact raised in” briefs and at oral argument “in a manner sufficient to facilitate adequate appellate and/or en banc review”; and
3. Issuing rulings that “are at variance with federal and/or other [binding] precedent,” except if the ruling “clearly states the rationale for said variance” and “does so in a manner sufficient to ensure that [appellate courts and the public are] aware of the variance.”

*Complaint (Doc. 1) at 22, ¶¶D.1.-3 .*

The most significant facts about this matter concern Smith’s history of litigation.<sup>1</sup> For purposes of this motion, the summary contained in *Smith v. United States Court of Appeals for the Tenth Circuit*, 484 F.3d 1281 (10<sup>th</sup> Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008), provides the following information. That litigation concerned “the [federal] district court’s dismissal of two separate lawsuits stemming from the denial of [Smith’s] application for admission to the Colorado bar.” 484 F.3d at 1283. After Smith had completed law school and other necessary prerequisites and had applied for admission to the Colorado bar, the state court bar admission officials required that he “submit to a mental status examination,” which he refused to do. *Id.* He then embarked on a wide-ranging course of overlapping federal and state court litigation. *Id.* at 1283-84. The instant action is barred on a number of grounds.

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<sup>1</sup> This history will be presented in detail if the state courts seek filing restrictions.

## ARGUMENT

I. All claims against the state courts are barred by the Eleventh Amendment or sovereign immunity, so that this action must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

A. Burden of proof: The burden of establishing subject-matter jurisdiction is on the party asserting jurisdiction, i.e., Smith. *Montoya v. Chao*, 296 F.3d 952, 955 (10<sup>th</sup> Cir. 2002), citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

B. Elements not supported by Complaint: The complaint fails to allege or establish that any exception to the state courts' immunity is applicable herein. *Griess v. State of Colorado*, 841 F.2d 1042, 1044 (10<sup>th</sup> Cir. 1988).

The state courts assert Eleventh Amendment or sovereign immunity from suit in this matter.<sup>2</sup> The Eleventh Amendment states as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by citizens or subjects of any foreign state.

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<sup>2</sup> The Supreme Court has said that it sometimes refers to the States' immunity from suit as "Eleventh Amendment immunity," but that the phrase is merely "convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 711 (1999). The Court's "recognition of sovereign immunity has not been limited to the suits described in the text of the Eleventh Amendment," but instead respects "the broader concept of immunity, implicit in the Constitution, which we have regarded the Eleventh Amendment as evidencing and exemplifying." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267-68 (1997). This motion will employ the term "Eleventh Amendment immunity" with this understanding in mind.

*U.S. Const. amend. XI.* Thus, by its very terms, the amendment provides that federal courts have no jurisdiction to hear claims against a state.

This withdrawal of jurisdiction effectively confers an immunity from suit. [The Supreme Court] has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. Absent waiver, neither a State nor agencies acting under its control may be subject to suit in federal court.

(internal quotation marks and citations omitted) *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993).

The Eleventh Amendment was enacted early on in this country's history. The amendment was a response to and rejection of the Supreme Court's assertion of jurisdiction over an action in which a South Carolina citizen sued the State of Georgia. *Chisolm v. Georgia*, 2 U.S. 419, 2 Dall. 419, 1 L. Ed. 440 (1793). The holding in *Chisolm* created "such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." *Principality of Monaco v. Mississippi*, 292 U.S. 313, 325 (1934).

A motion to dismiss on Eleventh Amendment grounds "involves a claim to a fundamental constitutional protection." *Puerto Rico Aqueduct*, 506 U.S. at 145. Any exception to such immunity is "narrow," and "has no application in suits against the States and their agencies, which are barred regardless of the relief sought." *Id.* at 146. "The very object and purpose of the 11<sup>th</sup> Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties," quoting *In re Ayers*, 123 U.S. 443, 505 (1887). *Id.* See also *Elam Constr., Inc. v. Regional Transp. Dist.*,

129 F.3d 1343, 1345 (10<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1047 (1998) (“The Eleventh Amendment immunizes states from suits in law or equity, including injunctive relief.”).

This immunity from suit is enjoyed not only by the state itself, but by entities that are considered an alter-ego or arm of the state. The Supreme Court has consistently drawn a distinction between an arm of the State which “partake[s] of the State’s Eleventh amendment immunity” versus municipal corporations, counties, and “other political subdivision[s] to which the Eleventh Amendment does not extend.” *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). Colorado’s state appellate courts, defendants herein, are by their very nature an actual component of the State; it is surely beyond cavil that they, in fact, make up one of the actual branches of State government. The question of whether a state’s judicial branch enjoys Eleventh Amendment immunity has apparently not even frequently arisen in the case law. *Cf. Greater L.A. Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (9<sup>th</sup> Cir. 1987) (Superior Court of State of California enjoys Eleventh Amendment immunity: it “derives its power from the State and is ultimately regulated by the State, [j]udges are appointed by California’s governor, and their salaries are established and paid by the State.”).

The Constitution of Colorado distributes the power of the State into three branches:

The powers of the government of this state are divided into three distinct departments, - the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

*Colo. Const., art. III.* The “Executive Department” is established in Article IV; the “Legislative Department” in Article V; and the “Judicial Department” in Article VI. Article VI provides:

The judicial power of the state shall be vested in a supreme court, district courts, a probate court in the city and county of Denver, a juvenile court in the city and county of Denver, county courts, and such other courts or judicial officers with jurisdiction inferior to the supreme court, as the general assembly may, from time to time establish . . . .

*Colo. Const., art. VI, § 1.* Pursuant to this constitutional grant of authority, the Colorado General Assembly has created the Colorado Court of Appeals. § 13-4-101, *Colo. Rev. Stat.*

Thus the state courts, constituting one of the branches of the State of Colorado, have Eleventh Amendment immunity.

There are only two instances in which a state’s sovereign immunity is overcome.

While this immunity from suit is not absolute, [the Supreme Court has] recognized only two circumstances in which an individual may sue a State. First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment - an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance. Second, a State may waive its sovereign immunity by consenting to suit.

(internal citations omitted) *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999).

The Supreme Court has determined that in enacting § 1983 Congress did not intend to override the States’ Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332, 342

(1979). With regard to the second instance, a waiver will be found only in very narrow and stringent circumstances.

[S]olicitude for States' sovereign immunity underlies the standard that [the Supreme] Court employs to determine whether a State has waived that immunity. The Court will give effect to a State's waiver of Eleventh Amendment immunity only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.

*Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 307 (1990).

The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one. Generally, we will find a waiver either if the State voluntarily invokes our jurisdiction, or else if the State makes a clear declaration that it intends to submit itself to our jurisdiction. [A] State's consent to suit must be unequivocally expressed. Thus, a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation. Nor does it consent to suit in federal court merely by stating its intention to sue and be sued, or even by authorizing suits against it in any court of competent jurisdiction. We have even held that a State may, absent any contractual commitment to the contrary, alter the conditions of its waiver and apply those changes to a pending suit.

(alterations, internal citations, and quotation marks omitted) *College Sav. Bank*, 527 U.S. at 675-76. Neither the state courts, nor the State of Colorado, meet any of these tests, and they have not waived their immunity. The state courts and the State of Colorado have not invoked federal jurisdiction herein, and there has been no declaration of submission to federal jurisdiction. *Cf. Crumpacker v. Kansas Dep't of Human Resources*, 338 F.3d 1163 (10<sup>th</sup> Cir. 2003), *cert. denied*, 540 U.S. 1180 (2004).

II. Smith lacks standing to bring this action.

A. Burden of proof: “The party invoking federal jurisdiction bears the burden of establishing [the elements of standing]. . . . At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.” (alterations, internal citations, and quotation marks omitted) *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

B. Elements not supported by Complaint: The complaint contains no general factual allegations of injury resulting from the state courts’ conduct. While the complaint begins with the conclusory allegation that defendants (assumedly including the state courts) are engaging in “current and imminent violations of [Smith’s] rights,” this is nowhere borne out by any allegations (general or specific) in the text of the complaint. *Complaint (Doc. 1) at 1, ¶1*.

The complaint does state that “Smith is the plaintiff in a matter currently before the Colorado Court of Appeals,” in *Smith v. Mullarkey*, No. 04-CA-949, filed May 14, 2004. *Complaint (Doc. 1) at 4, ¶11*. Upon information and belief, this is incorrect. On August 18, 2005, due to the nature of the issues raised, the Colorado Supreme Court assumed jurisdiction over Colorado Court of Appeals No. 04CA949, *Smith v. Mullarkey*, as Case Number 05SA238. In an opinion announced on October 17, 2005, the Colorado Supreme Court affirmed the state trial court’s holding of a lack of jurisdiction. 121 P.3d 890. Smith filed a petition for writ of *certiorari* with the United States Supreme Court, No. 05-1055,

which was denied on April 17, 2006. 547 U.S. 1071. Thus as of the date he filed this federal complaint, February 6, 2008, he had no case pending before the state courts.

Article III of the United State Constitution confines the judicial power of the federal courts to “cases” and “controversies.” *U.S. Const. art. III, § 2.*

Article III standing enforces the Constitution’s case-or-controversy requirement. No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.

(ellipsis, internal quotation marks, and citations omitted) *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2562 (2007). Standing is one of “the controlling elements in the definition of a case or controversy under Article III.” 127 S. Ct. at 2562.

The requisite elements of Article III standing are well established: A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.

(internal quotation marks omitted) *Id.* Federal courts have no freestanding jurisdiction to decide issues in the absence of a plaintiff with standing.

[F]ederal courts sit solely, to decide on the rights of individuals, and must refrain from passing upon the constitutionality of an act unless obliged to do so in the proper performance of [their] judicial function, when the question is raised by a party whose interests entitle him to raise it.

(ellipses, alterations, internal quotation marks, and citations omitted) *Id.*

Stated another way, there are three “irreducible constitutional minimums” required to confer standing on a federal plaintiff. *Lujan*, 504 U.S. at 560. First, the plaintiff must have suffered an “injury in fact,” which is an invasion of a legally protected interest. This injury

in fact must be concrete and particularized; and it must be actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. Third, it must be likely that the injury complained of will be redressed by the court's favorable decision. *Id.* at 560-61. These elements "are not mere pleading requirements but rather an indispensable part of the plaintiff's case," and "[t]he party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561. The requirement that the injury in fact must be particularized means that "the injury must affect the plaintiff in a personal and individual way." *Id.* at 560, n.1.

In the instant case, Smith is unable to demonstrate standing. Aside from the initial conclusory allegation that defendants are engaging in "current and imminent violations of [Smith's] rights" (*Complaint [Doc. 1] at 1, ¶1*), the complaint fails to meet the first prong of the standing test, injury in fact that is particularized, imminent, and not conjectural. Imminence "cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes - that the injury is certainly impending." (internal quotation marks and ellipses omitted) *Lujan*, 504 U.S. at 564, n.2.

There is no reason to suppose that Smith is unfamiliar with the concept of standing. In *Smith v. United States Court of Appeals for the Tenth Circuit*, 484 F.3d 1281 (10<sup>th</sup> Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008), Smith sued the 10<sup>th</sup> Circuit, various judges thereof, a Colorado federal district court judge, a Colorado state district court judge, and the justices of the Colorado Supreme Court, objecting "to the resolution of cases by non-precedential unpublished decisions" in both federal and state courts, as he does herein. 484

F.3d at 1283. Having consolidated two separate federal district court cases “stemming from the denial of [Smith’s] application for admission to the Colorado bar,” Judge Blackburn then dismissed the case. *Id.* With regard to standing, in that case Smith “had just taken his state appeal when he filed this action.” *Id.* at 1285. This is in contrast to the instant case, where no actions are pending in the state courts. Even when there was an action pending, the appellate court found him to be without standing:

[Smith] was in no position to challenge the adequacy of state appellate review in cases culminating in unpublished opinions unless he could show that he would in fact receive such review from the state court of appeals (and from the state supreme court as well, if it took the case on certiorari).

*Id.*

Relying on *Lujan*, and quoting from *Nova Health Sys. v. Gandy*, 416 F.3d 1149 (10<sup>th</sup> Cir. 2005), the circuit court stated:

[A]n injury in fact must be actual or imminent, not conjectural or hypothetical. Allegations of possible future injury do not satisfy the requirements of Article III. A threatened injury must be certainly impending to constitute injury in fact. An Article III injury must be more than a possibility. The threat of injury must be both real and immediate. Mr. Smith cannot make this required showing because the manner of resolution of his future appeals is entirely speculative.

(quotation marks, ellipses, and citations omitted) 484 F.3d at 1285. The circuit court affirmed “the [federal] district court’s order dismissing Mr. Smith’s challenge to Colorado’s non-publication practice,” on the basis that he lacked standing with respect to an actual or imminent injury in fact (as opposed to a conjectural and hypothetical one), and termed his

claim as being “so speculative and riddled with assumptions that it cannot serve as the basis for standing.” *Id.*

The circuit court explicitly affirmed the district court’s disposition on the issue of standing. The district court had invoked Article III and held that Mr. Smith lacked standing to challenge the state's non-publication practice.

The district court concluded that Mr. Smith could not relate the practice he challenges to any cognizable injury to himself. In its view, Mr. Smith “ha[d] alleged nothing more than an interest in the problem concerning the defendants' rules and practices [on publication],” and “[t]hat interest, unaccompanied by a showing that the application of the rule or practice has somehow personally and actually harmed the plaintiff, cannot alone constitute the injury-in-fact contemplated by the standing doctrine.”

*Id.* at 1284-85. This 2007 case controls, and Smith has no standing herein.

Finally, Smith appears to be seeking “not remediation of [his] own injury...but vindication of the rule of law - the undifferentiated public interest in faithful execution” of the law. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 106 (1998). The *Steel Co.* Court concluded, “This does not suffice [for purposes of standing].” *Id.* Since Smith makes no cognizable or identifiable claim of actual or imminent future violation with respect to himself, “Nothing supports the requested injunctive relief except [a] generalized interest in deterrence, which is insufficient for purposes of Article III.” 523 U.S. at 108-09.

III. The complaint fails to allege that a constitutional right has been violated.

A. Burden of proof: The plaintiff must establish that the defendant's actions violated a constitutional or statutory right. *Kirkland v. St. Vrain Valley School Dist.*, 464 F.3d 1182, 1188 (10<sup>th</sup> Cir. 2006).

B. Elements not supported by Complaint: The complaint fails to allege or establish that Smith has any constitutional right to have published opinions; or to have the state courts address all legal arguments and/or contentions of fact raised in briefs and at oral argument; or for rulings that are (to his mind) not at variance with federal and/or other binding precedent.

In disposing of Smith's challenge to the federal court's non-publication practice, the 10<sup>th</sup> Circuit stated that Smith's federal litigation had never even argued that "the use of unpublished decisions was unconstitutional," apart from an unsupported statement that he had "a right to insist" that his case be decided "in a published opinion with precedential value." *Smith*, 484 F.3d at 1286, n.4. This is exactly the case herein. No constitutional violations have been properly identified. The 10<sup>th</sup> Circuit also recognized Smith's failure to follow accepted appellate procedure, instead "generating an entirely new stream of litigation." *Id.* at 1286. This same characterization is equally applicable to the instant case. Smith is a recalcitrant litigant who apparently seeks to burden both state and federal courts with mischievous, duplicative lawsuits until he gets the answer he wants. The complaint does not establish that there is any constitutional right to the practices Smith seeks.

IV. Smith does not qualify for injunctive relief, and the requests for relief with regard to the state courts are too vague to support injunctive relief.

A. Burden of proof: A party requesting injunctive relief bears the burden of proof. *Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175, 1180 (10<sup>th</sup> Cir. 2003). Further, requests for injunctive relief must comply with Rule 65's specificity requirement and cannot be too vague to be understood. *Keyes v. Denver School Dist. No. 1*, 895 F.2d 659, 668 (10<sup>th</sup> Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991).

B. Elements not supported by Complaint: The complaint does not meet even the first test for issuance of injunctive relief. Also, requests for relief D.2. and D.3. are too vague to qualify for injunctive relief. *Complaint (Doc. 1) at 22, ¶¶D.2. and D.3.*

The standards for granting a preliminary injunction and those for granting a permanent injunction are essentially the same.

The only measurable difference between the two is that a permanent injunction requires showing actual success on the merits, whereas a preliminary injunction requires showing a substantial likelihood of success on the merits.

*Prairie Band of Potawatomi Nation v. Wagon*, 476 F.3d 818, 822 (10<sup>th</sup> Cir. 2007). The four standards that a moving party must show in order to obtain injunctive relief are "well established." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10<sup>th</sup> Cir. 2004). The first and paramount showing is that of probable irreparable harm.

Because a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered.

(internal quotation marks and alteration omitted) *Id.* at 1260, quoting *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2<sup>nd</sup> Cir. 1990). Also, because such relief constitutes an extraordinary remedy, “the right to relief must be clear and unequivocal.” *Greater Yellowstone Coalition. v. Flowers*, 321 F.3d 1250, 1256 (10<sup>th</sup> Cir. 2003).

Because Smith has no litigation currently pending before the state courts (and even if he had, based on *Smith*, 484 F.3d 1284), he cannot show probable irreparable injury. *See also* discussion above regarding standing. The complaint in no way shows that Smith is subject to probable irreparable harm, and therefore the other standards need not be considered. The complaint also fails to show a clear and unequivocal right to relief.

Further, both case law and Fed. R. Civ. P 65(d) require that “an injunction must describe the prohibited conduct with reasonable specificity.” *United States v. Pentrack*, 428 F.3d 986, 990 (10<sup>th</sup> Cir. 2005). The reasons for such a requirement are compelling and obvious:

[B]oth to give notice to the defendant of what is prohibited, and to guide an appellate court in reviewing the defendant's compliance or noncompliance with the injunction. An injunction too vague to be understood violates [Rule 65] and, generally, injunctions simply requiring the defendant to obey the law are too vague.

(internal quotation marks and citations omitted) *Keyes*, 895 F.2d at 668. The complaint's requests for relief concerning appellate opinions addressing all arguments and contentions of fact, and not conflicting with precedent are vague and indefinite.

Therefore, the complaint does not satisfy even the first standard for injunctive relief, likely irreparable injury that will affect Smith in a personal and individualized way. The

second and third requests for relief from the state courts are too indefinite and vague to support issuance of injunctive relief.

**CONCLUSION**

WHEREFORE, based on the above-stated authority and argument, the state courts respectfully request that their motion to dismiss be granted and that this action be dismissed.

Dated: May 27, 2008

Respectfully submitted,

JOHN W. SUTHERS  
Attorney General

*s/ Dianne E. Eret*

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CERTIFICATE OF SERVICE

This is to certify that on May 27, 2008, I electronically filed this **COLORADO SUPREME COURT AND COLORADO COURT OF APPEALS' MOTION TO DISMISS** with the Clerk of court using the CM/ECF system, and I hereby certify that I have mailed this document to the following individuals by U.S. mail as indicated below:

Kenneth L. Smith  
23636 Genesee Village Rd.  
Golden, CO 80401

and that a courtesy copy was sent to:

Hon. Kathleen M. Tafoya  
United States Magistrate Judge  
Alfred A. Arraj United States Courthouse  
A641  
901 19th Street  
Denver, CO 80294-3589

*s/ Pamela Ponder*  
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PAMELA PONDER