OFFICE OF THE ATTORNEY GENERAL
STATE OF NEVADA

In the matter of:
CITY COUNCIL OF BOULDER CITY

OAG FILE NO.: 13897-354

BACKGROUND

Peggy Leavitt filed a complaint with the Office of the Attorney General ("OAG") alleging violations of the Nevada Opening Meeting Law ("OML") by the City Council of Boulder City ("City Council"), regarding a meeting held by the City Council on October 22, 2019. The allegations relate to the City Council’s alleged inclusion on its agenda and consideration of an agenda item related to the discussion and possible retention of a special counsel by the City Council to review and provide advice on Nevada Open Meeting Law, Employment Contracts of Municipal Officers, and “other issues as determined by a majority of [the] City Council.” The Complaint specifically allege violations of the OML as follows:

ALLEGATION NO. 1: Agenda Item No. 18(b) violated the requirement that agenda items be “clear and complete”.

ALLEGATION NO. 2: Agenda Item No. 18(c) violated the requirement that agenda items be “clear and complete”.

ALLEGATION NO. 3: Unilateral removal of an agenda item violates the Open Meeting Law.

ALLEGATION NO. 4: The City Council violated the OML by approving the agenda for the October 22, 2019 meeting that included Agenda Item No. 18.

ALLEGATION NO. 5: The OML was violated when Mayor McManus disregarded the City Attorney’s warnings and attempted to persuade other Councilmembers that they were not obligated to follow the City Attorney’s advice.
ALLEGATION NO. 6: Mayor McManus’ practice of sending memoranda to City staff, Councilmembers, and the public prior to the meeting constitutes deliberation and/or serial communication.

ALLEGATION NO. 7: Agenda Item Nos. 18(a), 18(b) and 18(c) were attempts to circumvent City Staff and the OML and steps toward terminating the employment of the City Clerk, City Attorney, and City Manager.

ALLEGATION NO. 8: Mayor Kiernan McManus, Councilwoman Tracy Folda, and Councilwoman Claudia Bridges, in their individual capacities, violated the OML.

ALLEGATION NO. 9: There may be additional OML violations by the City Council, and the OAG should investigate all potential OML violations.

The OAG has statutory enforcement powers under the OML and the authority to investigate and prosecute violations of the OML. NRS 241.037; NRS 241.039; NRS 241.040. The OAG’s investigation of the Complaint included a review of the following: the Complaint and the attached exhibits; the meeting agenda for the City Council’s October 22, 2019 meeting; the meeting packet and supplemental materials for the City Council’s October 22, 2019 meeting (including the e-mail correspondence and memoranda related to Agenda Item 18); minutes for the October 22, 2019 Board meeting; the visual recordings for the October 22, 2019 meeting; the written response by the City Council of Boulder City to the Complaint and the supporting materials attached thereto; and the written response by Mayor Kiernan McManus, individually, and Councilwoman Tracy Folda, individually, and the supporting materials attached thereto.

After investigating the Complaint, the OAG determines that the City Council did not violate the OML.

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FINDINGS OF FACT

1. The City Council of Boulder City is a “public body” as defined in NRS 241.015(4) and is subject to the OML.

2. Mayor Kiernan McManus is the Mayor of Boulder City, Nevada, and serves as a member of the City Council.

3. Councilwoman Tracy Folda is a member of the City Council.

4. Councilwoman Claudia Bridges is a member of the City Council.

5. Steven Morris is the City Attorney of Boulder City, Nevada, and serves as legal counsel to the City Council.

6. On October 3, 2019, Mayor McManus in a Memorandum made a request to City Clerk Lorene Krumm to include various topics in the City Council’s upcoming City Council meeting, including the following:

   2. For possible action and direction to City Staff: Retention of special counsel by the City Council to review and advise on the following issues.
      a) Nevada Open Meeting Law standards and requirements.
      b) Employment contracts of Municipal Officers including the City Manager, City Clerk, City Attorney and Municipal Judge.
      c) Other issues as determined by a majority of City Council.

7. On October 7, 2019, City Attorney Steven Morris sent e-mail correspondence to Mayor McManus responding to the October 3, 2019 Memorandum. Specifically, with regards to proposed Agenda Item No. 2(a), City Attorney Morris asserted that there was a lack of rationale as to why or how the City Attorney would be unable to perform the duties of his office relative to advising the City Council on Nevada’s OML and that the agenda item failed to explain any legitimate interests of the City that would require employing assistant or special counsel to review and advise the City Council on Nevada’s OML. With regards to proposed Agenda Item No. 2(b), City Attorney Morris cautioned that he did not believe that the proposed agenda item was “clear and complete”, that it required a higher

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2 The items listed as 2(a), 2(b), and 2(c) in Mayor McManus’ October 3, 2019 Memorandum eventually became Agenda Item Nos. 18(a), 18(b), and 18(c), respectively, at the City Council’s October 22, 2019 meeting.
degree of specificity to satisfy the OML, and that more detail would be required to put the
public on notice of the desire or intent of employing assistant or special counsel to review
and advise the City Council on the employment contracts of the appointed city officers.
Additionally, City Attorney Morris cautioned with regards to proposed Agenda Item No.
2(c) that that item was not “clear and complete” and the phrase “Other issues as determined
by a majority of City Council” did not comply with the OML.

8. On October 14, 2019, Mayor McManus sent a Memorandum to City Clerk
Krumm, which included additional information regarding the proposed agenda items, and
requested the same be included as part of the agenda packet for the City Council’s October
22, 2019 meeting. Therein, Mayor McManus stated his position that he believed
circumstances existed that required the retention of special counsel to provide advice and
information to the City Council. Mayor McManus also indicated that the purpose of the
agenda item was to discuss “...whether a special counsel should be employed in the
interests of the City. The discussion of the reasons for doing so or for not doing so are to be
discussed by members of the City Council if they choose to do so.”

9. On October 15, 2019, City Attorney Morris sent correspondence to Mayor
McManus again reiterating his position that it remained his position that the proposed
agenda items were not “clear and complete” and therefore violated the OML.

10. On October 15, 2019, Mayor McManus sent a Memorandum to City Attorney
Morris regarding his interpretation of the City Charter as well as the OML. Therein,
Mayor McManus expressed that “[t]he purpose of requesting an agenda item to discuss the
issue of employing a special counsel is to provide the basis for discussion and deliberation
by the Council as a whole for that purpose. I believe we are all aware that I cannot know
in advance of such discussions what the thinking of a majority of the Council may be for

3 The OAG notes that there also may be a disagreement as to whether the City Charter
allows the City Council to retain special counsel. However, the OAG does not make an
opinion whether the City Charter would allow for the retention of special counsel in this
instance, as the OAG only has statutory authority to investigate alleged violations of NRS
Chapter 241. NRS 241.039.
A primary purpose of the Open Meeting Law is to have such discussions and deliberations held during a public meeting. To say that each Council member must specify each though regarding the issue of employing a special counsel published prior to the meeting voids the purpose of having discussion and deliberation on the issue.” Mayor McManus further clarified, “I requested the inclusion of the agenda item to discuss the retention of a special counsel and provided two of the reasons I believe such action is necessary. I also included the statement ‘Other issues as determined by a majority of City Council.’ as I cannot know the thoughts on the issues of all the members of the Council prior to the discussion occurring.” Mayor McManus went on to state, “My request is for a specific purpose. That purpose is to provide the opportunity for the Council to discuss the possible reasons for retaining a special counsel to advise the Council.”

11. On October 18, 2019, Mayor McManus sent an additional Memorandum to City Attorney Morris, providing citation to various OAG opinions that had discussed the OML’s “clear and complete” standard and maintaining his position that he would proceed with the at-issue agenda item.

12. On October 22, 2019, the City Council held a public meeting.

13. Ultimately, the agenda for the City Council’s October 22, 2019 meeting included the following:

18. For possible action: Discussion and possible staff directive regarding retention of a special counsel by the City City Council to review and advise on the following issues: (as requested by Mayor McManus)

A) Nevada Open Meeting Law standards and requirements
B) Employment contracts of Municipal Officers including the City Manager, City Clerk, City Attorney, and Municipal Judge
C) Other issues as determined by a majority of City Council[].

14. During initial public comment at the October 22, 2019 meeting, several individuals express their concern regarding Agenda Item No. 18. Duncan McCoy expressed that Agenda Item No. 18(c) was too vague to be useful and did not describe what the conversation may cover. Additionally, Richard Stuart stated that the description of Agenda
Item No. 18 was too vague and that the City Council should be more open about what exactly it was proposing. Rod Woodbury stated that Agenda Item No. 18 was confusing, requested the reason for suggesting hiring of special counsel, and believed that the title of the agenda item was too vague. Victor Miller stated that Agenda Item No. 18 was unclear and that he had no ability to prepare for the meeting because the item was not clear or concise.

15. During the October 22, 2019 meeting, the City Council deliberated on the Agenda Item, “For Possible Action: Approval of Regular Agenda.” City Attorney Morris recommended the removal of Agenda Item No. 18. In response, Mayor McManus explained that he had requested Agenda Item No. 18 and would not remove it from the agenda. The City Council, by a vote of three (3) to one (1), voted to approve the agenda, with Mayor McManus and Councilmembers Claudia Bridges and Tracy Folda voting in favor of approval, Councilmember James Howard Adams voting in opposition of approval, and Councilmember Warren Harhay absent.

16. When Agenda Item No. 18 was called during the meeting, Mayor McManus stated that City Attorney Morris had a “tremendous amount” of conflict of interest and that it was inappropriate for him to recommend removal of the agenda item. In response, City Attorney Morris repeated his objection and stated that he had an ongoing obligation to protect the City Council from possible OML violations. City Attorney Morris indicated that matters of public concern required “heightened obligation for specificity” and that the agenda item completely lacked specificity. Mayor McManus asserted that he had spoken to the Attorney General’s Office and received opinions that substantiated that the agenda item was clear and complete, including opinions relative to OAG File No. 13897-215, OAG File No. 13897-204, and OAG File No. 13897-191.4

4 An e-mail dated October 17, 2019 from Michael D. Detmer, Deputy Attorney General, to Kiernan McManus was included in the response by Mayor McManus and Councilwoman Folda to the instant OML Complaint. The e-mail reflects that AGO Opinions OMLO 13897-215 (Jan. 27, 2017), OMLO 13897-204 (Sept. 30, 2016), and OMLO 13897-191 (Jun. 2, 2016) were provided to Mayor McManus.
17. Mayor McManus withdrew Agenda Item 18(c) from discussion at the October 22, 2019 City Council meeting.

18. The City Council took Agenda Item Nos. 18(a) and 18(b) separately. With regards to Agenda Item No. 18(a), Mayor McManus indicated that his intent was that he needed additional advice from an attorney regarding Nevada’s OML. With regards to Agenda Item No. 18(b), Mayor McManus indicated that he was the only member of the City Council involved in the hiring of the City Attorney and City Manager and that other Councilmembers should have the opportunity to have consult with someone with a legal background to assist with forming a decision on the contracts.

19. As to Agenda Item 18 as a whole, Mayor McManus clarified, “The discussion tonight does not concern the process for employing special counsel. If the majority of the Council determines the need for a special counsel, an agenda item for that purpose may be requested for a future council meeting. . . . The discussion tonight does not include a discussion of the person that may be employed as a special counsel, any such discussion would also need to be placed on the agenda of a future council meeting.”

20. Councilwoman Bridges did not vote to remove Agenda Item 18 from the Agenda because she wanted to share her opinions on the topic. She did not personally feel that there was any reason to support the employment of a special counsel for the City.

21. Councilwoman Folda stated that retention of a special counsel was appropriate because the City Attorney had a conflict and could not review his own contract.

22. After discussing the agenda item, Mayor McManus moved that “a special counsel be employed by the City to review and advise the city Council on matters related to open meeting law issues and the employment contracts of the City Manager, City Clerk, City Attorney, and Municipal Judge. The employment is in the interest of the City and the special counsel will be employed by and will report directly to the City Council as provided for by the City Charter.”

23. The motion was seconded by Councilwoman Folda. Councilmembers Adams and Bridges voted in opposition of the Motion. Because of the tie vote, the motion failed.
LEGAL STANDARDS AND CONCLUSIONS OF LAW

1. The OML requires that the City Council’s agenda include a clear and complete statement of the topics to be considered at the meeting.

An agenda for a meeting of a public body must include a “clear and complete statement of the topics to be considered during the meeting.” NRS 241.020(2)(d)(1). The “clear and complete statement” requirement of the OML stems from the Legislature’s belief that “incomplete and poorly written agendas deprive citizens of their right to take part in government’ and interferes with the ‘press’ ability to report the actions of government.” Sandoval v. Bd. Of Regents of Univ., 119 Nev. 148, 154 (2003). Strict adherence with the “clear and complete” standard for agenda items is required for compliance under the OML. Id. The OML “seeks to give the public clear notice of the topics to be discussed at public meetings so that the public can attend a meeting when an issue of interest will be discussed.” Id. at 155. The OAG previously explained:

Sandoval’s holding means that use of catch-all phrases such as ‘and all matters related thereto’ do[] not comply with the statute’s requirement that each agenda contain a clear and complete statement of topics. Related matters, should they come up during a meeting, must be agendized for discussion at a future meeting.


Further, “a ‘higher degree of specificity is needed when the subject to be debated is of special or significant interest to the public.” Id. at 155-56. (quoting Gardner v. Herring, 21 S.W.3d 767, 773 (Tex. App. 2000)).

2. The City Council’s descriptions on its October 22, 2019 meeting agenda for Agenda Item No. 18 provided sufficient “clear and complete statements of topics to be considered.”

Agenda Item Nos. 18(a) and 18(b) are clear and complete on their face. The agenda items complied with the statutory requirement that the public be provided clear notice that the Board would deliberate and possibly take action to retain special counsel to review and advise specifically on Nevada OML standards and requirements and the employment contracts of Municipal Officers. A plain reading of the agenda items establish that the City
Council intended on discussing the possibility of retaining special counsel. It did not appear from a review of the documents received by the OAG that the City Council intended to, nor actually deliberated or took any action on, the topics on which special counsel would have advised the City Council had the City Council voted to employ outside counsel, namely Nevada’s OML or the actual employment contracts of Municipal Officers.

While generally the plain language of the OML does not authorize a public body to rely on information contained in its supporting materials in order to meet the “clear and complete statement” requirement, see NRS 241.020(2)(d)(1), a review of the meeting materials further supports the finding that the agenda provided sufficient clear and complete statements of topics to be considered. In particular, in Mayor McManus’ October 14, 2019 Memorandum to City Clerk Krumm, Mayor McManus stated that the purpose of the agenda item was to discuss “... whether a special counsel should be employed in the interests of the City. The discussion of the reasons for doing so or for not doing so are to be discussed by members of the City Council if they choose to do so.” In a subsequent Memorandum dated October 15, 2019, Mayor McManus further indicated that “[t]he purpose of requesting an agenda item to discuss the issue of employing a special counsel is to provide the basis for discussion and deliberation by the Council as a whole for that purpose.” During the October 22, 2019 meeting, Mayor McManus then explained that the discussion did not concern the process for employing special counsel or the names of potential candidates for special counsel, as Mayor McManus acknowledged that such topics would need to be placed as future agenda items. Rather, the October 22, 2019 agenda simply focused on whether the City Council believed that there was a need to employ special counsel.

Based on the foregoing, the OAG finds that Agenda item 18(a) and 18(b) were clear and complete and that no OML violations occurred.
3. **The OML was not violated when Agenda Item No. 18(c) was removed from discussion at the October 22, 2019 meeting without a vote from the City Council.**

The Complaint alleges that Mayor McManus’ attempt to remove Agenda Item No. 18(c) without a vote of the Councilmembers is an OML violation in and of itself.

Nevada’s OML requires that agendas include notification that the public body may “remove an item from the agenda or delay discussion relating to an item on the agenda at any time.” NRS 241.020(2)(d)((6)(III). In *Schmidt v. Washoe County*, 123 Nev. 128, 135, 159 P.3d 1099, 1104 (2007 (abrogated on other grounds by *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224 (2008)), the Nevada Supreme Court confirmed:

> [T]here is no statutory provision requiring public bodies to discuss, or take action on, all agenda items. The agenda requirement merely prohibits a public body from considering or taking action on items without providing proper notice. Because the removal of agenda items does not equate to taking action on those items, we conclude that public bodies are free to remove agenda items at any time.

*Id.*

Nevada’s OML is silent on what procedures a public body must follow in order to remove an item from the agenda or delay discussion related to an agenda item and generally reserves the procedure for removal or delay of discussion of an agenda item to the public body. Nevada’s OML merely authorizes a public body to remove an agenda item or delay discussion on such agenda item and requires that the public be made aware of such authority in its agenda. Accordingly, the OAG does not find that the City Council violated the OML by removing Agenda Item No. 18(c) without the Chair first entertaining a motion to remove Agenda Item 18 and taking a vote of City Council thereto.

4. **The City Council did not violate the OML where Mayor McManus provided copies of memoranda to councilmembers and the public prior to the October 22, 2019 meeting.**

The OAG has previously explained that before the OML may be invoked, two criteria must be present: (1) a quorum or constructive quorum must be present, and (2) the quorum must deliberate or vote on a matter under the supervision of the public body. *In the Matter of Humboldt County School Board*, OAG File No. 07-015.
In *Del Papa*, 114 Nev. at 400, 956 P.2d 778, the Nevada Supreme Court held:

[A] quorum of a public body using serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction or advisory power violates the Open Meeting Law. *That is not to say that in the absence of a quorum, members of a public body cannot privately discuss public issues or even lobby for votes.* (emphasis added).

“In *McKay v. Board of County Commissioners*, 103 Nev. 490, 746 P.2d 124 (1987), the Court stated that sensitive information may be discussed in serial meetings where no quorum is present in any gathering. However, there can be no deliberation, action, commitment, or promise made regarding a public matter in such a serial meeting.” OML Manual Section 4.08. Further, in *Dewey v. Redevelopment Agency of City of Reno*, 119 Nev. 87, 64 P.3d 1070 (2003), the Nevada Supreme Court held that “absent substantial evidence of serial communications to support a finding of action or deliberation towards a decision, private-back-to-back briefings of less than a quorum of a public body do not violate the Open Meeting Law.”

In this case, the Memoranda by Mayor McManus does not amount to serial communication and deliberation in violation of the OML. Mayor McManus’ Memoranda were addressed solely to City Clerk Krumm and not to any other City Councilmembers. Moreover, the e-mail responses by City Attorney Morris were not addressed to any City Councilmembers other than Mayor McManus and only City Clerk Krumm and City Manager Al Noyola were copied on the correspondence. There was no evidence submitted that indicated that any other Councilmembers provided any input on the matter in advance, or outside of, the October 22, 2019 meeting.

Nevertheless, the OAG would like to remind the City Council that possible OML violations may occur through collective discussions of the Councilmembers, even where less than a quorum of the City Council is present, if serial communications were had outside the purview of the public by a number of City Councilmembers constituting a quorum.

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5. Mayor McManus’ actions do not warrant individual liability under the OML.

The OML provides that it is a misdemeanor for a member of a public body to knowingly attend a meeting of that public body where action is taken in violation of the OML. NRS 241.040(1). Further, each member of a public body is subject to a civil penalty for knowingly participating in a willful violation of the OML. NRS 241.040(4). “Enforcement against a member of a public body based on ‘participation’ only may occur when the member makes a commitment, promise, or casts an affirmative vote to take action on a matter under the public body’s jurisdiction or control when the member knew his/her commitment, promise, or vote was taken in violation of the OML.” (OML Manual, Section 10.14 – Monetary penalty for willful violation; one-year limitations period.) However, the OML contains a safe harbor provision that shields against a criminal penalty or administrative fine against a member of a public body, where such violation was a result of legal advice provided by an attorney employed or retained by the public body. NRS 241.040(6).

Here, the Complaint asserts that Mayor McManus violated the OML by disregarding the City Attorney’s warnings about potential OML violations and attempted to persuade other Councilmembers that they were not obligated to follow the City Attorney’s advice. However, nothing in the OML bans a public body from disregarding its counsel’s warnings regarding potential OML violations. This is not to say that the City Council should disregard the advice from its counsel or that such conduct may not constitute potential liability under other rules, regulations, or statutes. The OAG simply finds that there is no violation of the OML based on the allegations in the Complaint.

The OAG also finds that there is insufficient evidence to find that Mayor McManus knowingly attended a public meeting or participated in a willful violation of the OML. While the City Attorney may have advised caution of potential OML violations, prior to the October 22, 2019 meeting, Mayor McManus also contacted OAG and was provided several opinions by the OAG on the “clear and complete” standard. As stated above, the OAG does
not find that the agenda for the October 22, 2019 meeting violated the “clear and complete” standard. It follows, then, that no personal liability may attach to Mayor McManus or any City Councilmember for discussing Agenda Item No. 18 at the October 22 meeting.

6. The OML did not require the City Council to approve the agenda for the October 22, 2019 meeting and any action by the City Council related to the approval of the agenda is not an OML violation.

Nevada’s OML does not require a public body to approve a proposed agenda prior to proceeding with the public meeting. Rather, Nevada’s OML only requires that a public body approve the minutes of a meeting within 45 days after the meeting or at the next meeting of the public body, whichever occurs later. NRS 241.035(1).

The Complaint appears to assert that Councilwoman Folda, individually, violated the OML when she seconded the motion by Mayor McManus to approve the agenda as published. This act alone does not rise to a willful violation of the OML, as again, Nevada’s OML does not require a public body to approve a proposed agenda prior to proceeding with the public meeting. Additionally, Councilwoman Folda’s action in seconding the motion to approve the agenda as published does not rise to the level warranting criminal penalties, as the OAG has found no proof that Councilwoman Folda attended the meeting “with knowledge of the fact that the meeting is in violation” of the OML. NRS 241.040(1). Because the OAG has found no violations under the OML, it also follows that Councilwoman Folda may not be found civilly or criminally liable for participating in the October 22, 2019 City Council meeting.

Similarly, it appears that the alleged OML violation against Councilwoman Bridges, individually, stems from the fact that she voted in favor to approve the agenda as published. Again, as with Councilwoman Folda, the OAG has found no proof that Councilwoman Bridges attended the meeting “with knowledge of the fact that the meeting is in violation” of the OML. NRS 241.040(1). The OML does not require a public body to vote to approve an agenda for a public meeting. Nevertheless, the October 22, 2019 agenda provided “for possible action” the approval of the regular agenda. The OAG does not find that this action item to approve the October 22, 2019 agenda violated the OML, as it was clear from a plain
reading of the agenda that the intended possible action by the City Council was to approve the agenda.

Similarly, voting by Councilmembers Folda and Bridges on Agenda Item Nos. 18(a) and 18(b) does not amount to a violation of the OML. As stated above, the OAG does not find that the description for Agenda Item Nos. 18(a) and 18(b) for the October 22, 2019 meeting violated the “clear and complete” standard. It follows, then, that no personal liability may attach to City Councilmembers Folda and Bridges for discussing Agenda Item No. 18 at the October 22 meeting. Because the OAG has found no violations under the OML, it also follows that Councilwoman Bridges may not be found civilly or criminally liable for participating in the October 22, 2019 City Council meeting.

7. The OAG will abstain from making any determinations on additional OML violations not asserted.

The OML delineates that a complaint that alleges a violation of NRS Chapter 241 may be filed with the Office of the Attorney General. NRS 241.039(1). In addition, the OML provides that generally, the OAG “[s]hall investigate and prosecute any violation of this chapter alleged in a complaint filed not later than 120 days after the alleged violation with the Office of the Attorney General.” NRS 241.039(2)(a) (emphasis added). The OAG has investigated and addressed all alleged OML violations lodged in the Complaint. However, to the extent that the Complaint has not alleged additional specific OML violations, the OAG will abstain from addressing the same, if any.

SUMMARY

While the OAG has found that no OML violations occurred at the October 22, 2019 City Council meeting, this Opinion should not be construed as providing an opinion as to whether the City Council violated any provisions of the City Charter or whether the City Attorney violated any ethical duties pursuant to NRS Chapter 281A. The OAG has reviewed the available evidence and determined that no violation of the OML has occurred.
The OAG will close its file regarding this matter.


AARON FORD
Attorney General

By: /s/ Justin R. Taruc
Justin R. Taruc (Bar No. 12500)
Deputy Attorney General
CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of July, 2020, I served the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW by depositing a copy of the same in the United States mail, properly addressed, postage prepaid, CERTIFIED MAIL addressed as follows:

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/s/ Debra Turman
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