UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Jason Kokinda, Plaintiff,	:	**CIVIL ACTION**
	:	
vs.	:	Case No. 2:16-cv-01303
Pennsylvania Department of Corrections, et al. Defendant(s),	:	

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

A. Mr. Kokinda had two choices: eat the soy-based prison diet and suffer severe allergy symptoms, or eat a commissary diet and suffer symptoms of acute hypertension attacks.

1. The Defendants have stonewalled all of the evidence that proves their **absolute culpability** in the instant case. Nonetheless, in such absence of evidence to the contest pleadings, there is no genuine issue of material fact.

2. The Defendants have limited their disclosures during Discovery to almost nothing beyond the medical records that Mr. Kokinda had already purchased copies of, before his release.
3. This Brief is to be read in comprehensive consideration of the Statement of Material Facts in Support of the MSJ narrative and Appendix. Exhaustive cross-referencing herein is unnecessary.

II. SCOPE AND STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "Neither party may rely on conclusory allegations or unsubstantiated denials ... to demonstrate either the existence or absence of an issue of fact." Magee v. United States, 121 F.3d 1, 3 (1st Cir. 1997); see also Quinones v. Houser Buick, 436 F.3d 284, 289 (1st Cir. 2006).

III. DISCUSSION

A. Eighth Amendment violation

Scope and Standard of Review

Ind. Prat. & Advocacy Servs. Comm'n v. Comm'r, Ind. Dep't of Corr., 2012 U.S. Dist. LEXIS 182974 (Prisoners are dependent upon the State for food, clothing, and necessary medical care. A prison's failure to provide sustenance for inmates "may actually produce physical 'torture or a lingering death.'" Estelle v. Gamble, 429 U.S. 97, 103, 97 S. Ct. 285, 50 L.Ed.2d 251 (1976) (quoting In re Kemmler, 136 U.S. 436,447, 10 S. Ct. 930, 34 L.Ed. 519 (1890)).

The Eighth Amendment protects prisoners from "cruel and unusual punishment" in the form of "unnecessary and wanton infliction of pain" at the hands of prison officials. Wilson v. Seiter, 501 U.S. 294, 297 (1991); Estelle v. Gamble, 429 U.S. 97, 104 (1976). The constitutional prohibition against cruel and unusual punishment includes the right to be free from conditions of confinement that impose an excessive risk to an inmate's health or safety. Farmer v. Brennan, 511 U.S. 825, 837 (1994); Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir. 1994). Prisoners are entitled to humane conditions of confinement that provide for their "basic human needs." Rice v. Corr. Med. Servs., 675 F.3d 650, 664 (7th Cir. 2012) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)). This includes "adequate food, clothing,

shelter, and medical care." Sain v. Wood, 512 F.3d 886, 893 (7th Cir. 2008) (quoting Farmer v. Brennan, 511 U.S. 825, 832 (1994)).

In order to establish an Eighth Amendment claim, the plaintiff must show that (1) he was incarcerated under conditions which posed a substantial risk of serious harm, and (2) prison officials acted with *deliberate indifference* to his health or safety. See Farmer, 511 U.S. at 834. "The *deliberate indifference* standard embodies both an objective and a subjective prong." Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir. 1994). Under the objective standard, a plaintiff must allege a deprivation "sufficiently serious" to constitute a constitutional violation. Hathaway, 37 F.3d at 66 (quoting Wilson v. Seiter, 501 U.S. at 298). "Because society does not expect or intend prison conditions to be comfortable, only extreme deprivations are sufficient to sustain a 'conditions- of-confinement' claim." Blyden v. Mancusi, 186 F.3d 252, 263 (2d Cir. 1999) (citing Hudson v. McMillan, 503 U.S. 1, 9 (1992) (only those deprivations denying "the minimal civilized measures of life's necessities" are sufficiently serious to form the basis of an Eighth Amendment violation) (emphasis added, internal quotations and citations omitted).

The subjective element of the Eighth Amendment analysis focuses on whether the defendant official acted with "a sufficiently culpable state of mind." Salahuddin v. Goord, 467 F.3d 263, 280 (2d Cir. 2006) (citing Wilson v. Seiter, 501 U.S. at 300). "Deliberate indifference" requires more than negligence, but less than conduct undertaken for the very purpose of causing harm. Farmer, 511 U.S. at 835. In order for a prison official to act with deliberate indifference, he must know of and disregard an excessive risk to an inmate's health or safety. Hathaway, 37 F.3d at 66. The official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. Id. See final on-point case-law applying these principles to soy allergy from *Munson v. Butler*, 2016 U.S. Dist. LEXIS 124817, at *conclusion (S.D.Ill. 2016) ("In this case, Defendants do not dispute that Munson's medical condition—chronic abdominal cramping and diarrhea—may constitute a serious medical need. Indeed, the Court finds that a layman would find this condition to be worthy of comment or treatment by a medical professional and, in this instance, Munson regularly sought treatment. The Court's inquiry does not end there, however, because the Court also must

find sufficient evidence that Defendants were deliberately indifferent to Munson's medical condition in order for his claims to survive summary judgment."); **see also** former decision in this case, applicable under law of the case doctrine, (ECF 5, Pg. 14, 9-6-16, R&R) "The Court recommends allowing Plaintiff's Eighth Amendment claim to proceed. The Eighth Amendment imposes a duty upon prison officials to provide inmates humane conditions of confinement and to ensure that inmates receive, *inter alia*, "adequate food." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *see also Laufgas v. Speziale*, 263 F. App'x 192, 198 (3d Cir. 2008) ("[P]risoners are guaranteed a *nutritionally adequate diet* under the Eighth Amendment.") (emphasis added) (citing *Ramos v. Lamm*, 639 F.2d 559, 571 (10th Cir. 1980) ("This includes providing nutritionally adequate food that is prepared and served under conditions which do not present an immediate danger to the health and well-being of the inmates who consume it.")); *Jackson*, 145 Fed. App'x 774, 776 (3d Cir. 2005) (inmate stated a claim under the Eighth Amendment when he alleged that prison officials knew that he was severely lactose intolerant and allergic to eggs but denied him a therapeutic diet). (emphasis added). Caldwell v. Caesar, 150 F.Supp.2d 50, 64-65

(D.D.C. 2001) (evidence that defendants did not provide a vegetarian diet, but just removed the meat and provided no alternative source of protein, supported a claim of nutritional inadequacy).

Eighth Amendment Analysis

1. As concluded in *Munson*, *supra*, the obviousness of allowing Mr. Kokinda to suffer chronic muscle cramps and diarrhea, asthmatic symptoms, and/or chronic hypertension risk (the silent killer) — as a result of the circumstances created solely by the DOC — is so obvious that a layman would see the risks.
2. Dr. Jin was expressly made aware of the serious problems that Mr. Kokinda was suffering on numerous occasions.
   (a) Dr. Jin **admittedly** did nothing at all to help Mr. Kokinda, other than telling him to impossibly avoid soy, out of sheer ignorance of the Weston-Price information Mr. Kokinda received that proved the diet was polluted with high-levels of soy.
   (b) Dr. Jin thereby admits that he knew that the cause of Mr. Kokinda's serious chronic ailments was from soy, and plainly did

not care how much evidence Mr. Kokinda had to prove the prison diet was loaded with soy; even taunting Mr. Kokinda to sue him.

3. In addition, Dr. Jin was aware that Mr. Kokinda had a record of hypertension and that he was intolerant to the blood pressure medications, and was doing serious damage to his cardiovascular system by relying on commissary diet to avoid soy.

   (a) Mr. Kokinda had expressly stated these exact issues on numerous occasions in writing, becoming righteously indignant with the desperate situation he was being forced into.

   (b) The "**intolerance**" to soy diagnosis, appears to be more of a code-word for the "hypertension medication **intolerance**" that they were hoping would eventually kill Mr. Kokinda.

      (1) This is supported by the malicious manner Mr. Kokinda was always injured (as expounded in his various lawsuits against the DOC), and the **inexplicable** criteria by which Dr. Jin made such an outrageous conclusion.

4. Aside from the fact Mr. Kokinda was retaliated against left and right for accessing the court, there is plainly a <u>lack of specific allergy policy</u>

issue that made Dr. Jin comfortable with abusing Mr. Kokinda some more (under the vague standards in place, and lack of mandatory testing and standardized allergy-free diets for persons with the eight(8) most common allergens recognized by the FDA, *inter alia*).

(a) That is, although Dr. Jin acted in a vindictive retaliatory manner against Mr. Kokinda, like many other defendants targeting him for his litigiousness, they felt comfortable in doing so from the lack of brightline policy rules regarding allergy-free diets.

(b) In this regard, the defendants formerly dismissed from the Complaint should also be held liable: Robert Gilmore, Mark DiAlesandro, Irma Vihlidal, Correct Care Solutions, Patricia Stover, and Christopher H. Oppman.

(c) When we consider how these are all supervisors and policy-makers, they have various degrees of *comparative fault* from *deliberate indifference* to the serious risks of injury — induced by the endless hassle obtaining diets from the lack of brightline rules regarding allergy-free diets creates.

See quote from Susan Berrier's Brief in 2:15-cv-1593 (ECF 46):

For a supervisory official to be liable, it "is not enough for a plaintiff to argue that the constitutionally cognizable injury would not have occurred if the superior had done more than he or she did." Sample v. Diecks, 885 F.2d 1099, 1118 (3d Cir. 1989). Rather, a plaintiff must "identify specifically what it is that [the supervisor] failed to do that evidences his deliberate indifference. Only in the context of a specific defalcation on the part of the supervisory official can the court assess whether the official's conduct evidenced deliberate indifference and whether there is a close causal relationship between the 'identified deficiency' and the 'ultimate injury.'" Sample, 885 F.2d at 1118. In that rare instance in which something akin to "supervisory" liability may be found, (1) there must have been a policy or procedures in effect at the time of the alleged injury that created an unreasonable risk of a constitutional violation; (2) the official had to have been aware that the policy created an unreasonable risk; (3) the official was indifferent to that known risk; and (4) the constitutional injury was

caused by the failure to implement the supervisory practice or procedure. Id. at 1118.

5. At issue here is that all of these defendants have collective roles in shaping the prison's food service and medical service policies.

   (a) Instead of ensuring that things are streamlined for prisoners to immediately be accommodated, and thereafter tested for the most severe IgE allergies using simple skin-prick test method, the existence of an allergy-free diet is more of a myth that may come after years of litigation or a fatal or near fatal incident.

      (1) Common sense would dictate that a place that mandates food service, would have brightline rules and easy to access accommodations for people with IgE food allergies.

      (2) Lacking a specific brightline rule allergy policy is incomprehensible *deliberate indifference* to very serious risks!

      (3) Christopher H. Oppman, not only failed to ensure that the staff in the prisons had easy access to food allergens in diet, but

intentionally conspired to deny the number one ingredient of "soy" was used at all.[1]

6. In the same manner that the DOC had quickly changed other policies under duress of litigation from Mr. Kokinda, it appears that the DOC has sought to mitigate damages by revising their allergy policy.
   (a) The newly revised standards appear to **mandate** RAST allergy testing for prisoners who are self-diagnosed, with the allowance of a thirty-day allergy-free diet while results are pending.
   (b) This inherently creates culpability, that the Defendants are agreeing that the former policy was unconstitutional and defective in form, for failing to establish such brightline rules.

B. ADA & *Monell* Violations

In summary

[1] The Defendants' evasiveness regarding the extent of soy in the diet, therefore holds no weight against the testimony of Mr. Kokinda that he was sick from all of the food, and that concentrated soy is being used nationwide in every element of the prison diet. They themselves have cited many such cases in the Dr. Jin MSJ brief, as explained in the counterbrief.

(1) Mr. Kokinda has a qualified disability of soy allergy; (2) he was excluded from participation in prison food services; (3) such exclusion was based on his disability — the allergy.

> Under Title II, the plaintiff must allege that: (1) he is a qualified individual with a disability; (2) he was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability. Brown v. Deparlos, 492 Fed. App'x 211, 215 (3d Cir. 2012).

More detailed analysis

1. Mr. Kokinda is part of a class of people with severe IgE allergies, who were discriminated against by the Penn. DOC and Correct Care Solution's mutual lack of a specific brightline rule allergy policy.[2]

   (a) Severe Allergies are recognized as disabilities under the 2008 Amendment to the American with Disabilities Act.[3]

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[2] Mr. Kokinda has tested positive for an IgE soy reaction that is generally associated with asthmatic reactions, possible anaphylaxis; and particularly with soy, severe diarrhea and muscle cramps. This is not a self-diagnosis. He was prescribed an epi-pen for possible anaphylaxis, with the allergy specialist agreeing that these symptoms fit the diagnosis for someone with a serious IgE soy allergy. (See Appendix, Pgs. 4-8).

[3] See *Knudsen v. Tiger Tots Cmty. Child Care Ctr.*, No. 12-0700, 828 N.W.2d 327 (unpublished table decision), 2013 WL 85798 (Iowa Ct. App. Jan. 9, 2013); and *Lopez-Cruz v. Instituto de Gastroenterologia de P.R.*, 960 F. Supp. 2d

(b) Failure to create a specific brightline allergy policy is *per se* proof of intentional discrimination.[4] It creates the certainty that violations of the ADA and Eighth Amendment will result. (See App. Pgs. 156-159, Exhibit-D, especially Prison Legal News article, a treatise concerning detailed national policy failures analyzed in all 50 states).[5]

> See *Natale v. Camden Cty. Corr. Fac.*, 318 F.3d 575, 583-84 (3d Cir. 2003) (citing *Monell v. Dep't of Social Servs.,* 436 U.S. 658, 691 (1978)). In order to state a § 1983 claim against CCS, Plaintiff must "identify a [CCS] policy or custom, and specify what the custom or policy was," *McTernan v. City of York, Pa.*, 564 F.3d 636, 658 (3d Cir. 2009), or, in the absence of an affirmative policy or custom, allege facts suggesting that CCS "turned a blind eye to an obviously inadequate practice that was likely to result in the violation of constitutional rights." *Natale*, 318 F.3d at 584.

2. Mr. Kokinda meets the criteria for an ADA violation by having a qualified disability of proven soy allergy. The allergy is not infrequent

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367 (D.P.R. 2013). (Holding that the ADAA has explicitly overruled the reasoning behind former Land standard with 2008 Amendments.)

[4] See App. 181-199, The Lesley University settlement proved this very issue.

[5] Munson v. Butler, 2016 U.S. Dist. LEXIS 124817, at *conclusion (S.D.Ill. 2016) (holding that *deliberate indifference* to chronic diarrhea itself is an Eighth Amendment violation; the Defendants noted this symptom, *inter alia*).

and manageable, considering how he was reliant on the prison diet which was almost entirely soy-based.[6]

3. The Defendants did everything possible to ignore Mr. Kokinda and intentionally discriminated against him by reason of his disability; and the intentionally discriminatory lack of **specific brightline rule allergy policy**, which prevented him from obtaining mandatory testing and the right to a soy-free nutritiously adequate diet.[7]
4. Mr. Kokinda was denied access to the prison food and medical services, by Defendants first lying to him that the food does not contain soy and perpetually denying him a "nutritionally adequate healthy diet" under prison **food service**.[8]

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[6] This would qualify the soy allergy as a disability even under former *Land* standards. **See** *Land v. Baptist Med. Ctr.*, 164 F.3d 423 (8th Cir. 1999). In *Land*, if the Plaintiff was forced to survive on a peanut-based mandatory diet, then he certainly would have been disabled by saint of circumstance even under the old ADA definitions of disability.

[7] There is no realistic way to confirm a soy allergy other than actual testing. If the Doctor is allowed to lie and say he doesn't believe the Defendants symptoms are associated with allergy. This does not then transform it into medical diagnosis.

[8] **Medical care** is one of the "services, programs, or activities" covered by the ADA. See Georgia, 126 S. Ct. at 881 (stating that the "deliberate refusal of prison officials to accommodate [the plaintiff's] disability-related needs in such fundamentals as ... medical care ... constituted `exclu[sion] from

5. Mr. Kokinda wasn't simply subjected to a practice that unpredictably affected his disability, or a disabled victim of medical malpractice; he was discriminated against by reason of his disability, that people with food allergies do not deserve the same right to health as others.

6. Both the ADA and Eighth Amendment use the same standard of *deliberate indifference*. Therefore, when the **denial of services** and **discrimination** reaches threshold of constitutional magnitude in injury, both standards are met.

   See *Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 260-264 (3d Cir. 2013) (intentional discrimination, based in substantive part upon disability, is proven by same deliberate indifference standard as Eighth Amendment violations). See also United States v. Georgia, (04-1203) 546 U.S. 151 (2006) 120 Fed. Appx. 785, reversed and remanded (prison case recognizing ADA violation when there is invidious discrimination compounding the 8th Amend. violation.)

7. Because Eighth Amendment violations and ADA violations both use the same standard of *deliberate indifference*, it is plain that the U.S. Supreme Court has excluded the *Turner* rational-basis logic from such analysis (which inherently undermines the seriousness of the violation).

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participation in or ... den[ial of] the benefits of' the prison's `services, programs, or activities'" (quoting 42 U.S.C. § 12132)).

(a) In *Johnson v. California*, 543 U.S. 499 (2005), the U.S. Supreme Court expressly stated that *Turner* doesn't apply in Eighth Amendment context, and that the logic of *Turner* is limited.

(b) In any regard, there is no *rational basis* for failing to streamline mandatory food services to accommodate those with serious (easy to test) IgE allergies.

8. Unlike the RA, the ADA only requires that the ***invidious discrimination*** against the handicap be a "significant factor," not the "sole factor." (A *proximate cause*, not the *sole proximate cause*).[9]

(a) Most discrimination against the handicapped has some sort of monetary force at the root.

[9] ***See*** Pg. 8, n.14 of Motion to Quash, Brief (ECF 122), (Unlike the RA, the ADA only requires that disability be "significant factor" in discrimination not the "sole factor.") ***see also*** *Price Waterhouse*, 490 U.S. at 242; *Head*, 413 F.3d at 1065 ("[W]e conclude that 'solely' is not the appropriate causal standard under any of the ADA's liability provisions."); *McNely*, 99 F.3d at 1074 ("[W]e believe that importing the restrictive term 'solely' from the Rehabilitation Act into the ADA cannot be reconciled with the stated purpose of the ADA.").

(1) It is expensive to build wheel chair ramps, and to provide sign language interpreters, and other infrastructure — such as large doors that open automatically to accommodate, and elevators.

(2) There is no logical basis for finding under the ADA that such a **mixed** (economic-rooted discrimination) **motive** is not liable.

C. <u>DOC Liability Under the ADA</u>

1. The DOC is liable for actions of third parties that it contracts with under the ADA. Contracting with private parties is expressly barred as a defense (*See* Title II Regulation 28 §35.130(b)(1)).[10]
2. And in this case, Mr. Kokinda was wholly dependent upon the DOC for food (being regulated through contracted parties), and was being tortured, eating much less than usual, and feeling like he quite possibly could die from fatal symptoms of either allergic reaction or hypertension symptoms every single day.

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[10] *Hahn ex rel. Barta v. Linn County*, the court explained that a public entity must, "ensure that the private entities with which it contracts comply with the public entity's Title II obligations." 191 F. Supp. 2d 1051, 1054 n.2 (N.D. Iowa 2002). The court in *James v. Peter Pan Transit Management* also held that public entities must ensure that private entities comply with title II, even if the private entity is an independent contractor. *See* No. 5:97-CV-747, 1999 WL 735173, at *9-10 (E.D.N.C. Jan. 20, 1999).

Ind. Prat. & Advocacy Servs. Comm'n v. Comm'r, Ind. Dep't of Corr., 2012 U.S. Dist. LEXIS 182974 (Prisoners are dependent upon the State for food, clothing, and necessary medical care. A prison's failure to provide sustenance for inmates "may actually produce physical 'torture or a lingering death.'" *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S. Ct. 285, 50 L.Ed.2d 251 (1976) (quoting *In re Kemmler*, 136 U.S. 436,447, 10 S. Ct. 930, 34 L.Ed. 519 (1890)). Adams v. Mathis, 458 F.Supp. 302, 308 (M.D. Ala. 1978), add'd, 614 F.2d 42 (5th Cir. 1980); see also Leeds v. Watson, 630 F.2d 674, 676 (9th Cir. 1980) (questioning adequacy of diet of TV dinners); Keenan v. Hall, 83 F.3d at 1091 (prison food must be "adequate to maintain health"); Antonelli v. Sheahan, 81 F.3d 1422, 1432 (7th Cir. 1996); Hazen v. Pasley, 768 F.2d 226, 228 n.2 (8th Cir. 1985) (diet causing "notable weight loss and mildly diminished health" was unconstitutional); Dearman v. Woodson, 429 F.2d 1288, 1290 (10th Cir. 1970) (two days' deprivation of food stated a constitutional claim). We think that evidence of the hunger pangs caused by 24 hours without food would demonstrate "the wanton and unnecessary infliction of pain' and the "unquestioned and serious

deprivations of basic human needs" forbidden by the Eighth Amendment. Rhodes v. Chapman, 452, U.S. 337, 346, 101 S. Ct. 2392 (1981); see Willis v. Bell, 726 F. Supp. 1118, 1123-24 (N.D. Ill. 1989) (12 hours without food in police custody was "obviously" unlawful).

3. The foregoing case-law also makes it plain that defendant Nedra Grego would be liable under revised policy, for effectively forcing Mr. Kokinda to wait over a week before he could plausibly obtain allergy-free diet.

4. Because this is a mutual policy failure that was substantially corrected in form, perhaps not in practice, the DOC is certainly at fault here in any regards.

   (a) The newly revised policy would create brightline liability for acting outside the scope of duties and medically established standard of care. It is impossible to imagine how this Court can not grant Summary Judgment on all of these issues.

(b) Mr. Kokinda has asserted the necessary facts in support of his new statement of policy liability theory. Mr. Kokinda makes this change based solely on his perception of Truth, after reading the said treatise on allergy policy failures in schools and prisons nationwide (See App., Exhibit-D, pgs. 156-159). He hopes that his litigation makes a difference!

The only true lover of humanity,

Jason Kokinda-308

/s/

Jason Kokinda, AR
Nemesis Paralegal Services
38 N. Main St., #1028
Waterbury, VT 05676
jkoda@jkoda.org

SWORN CERTIFICATION

I, Jason Kokinda, certify under penalty of perjury that the facts set forth in the foregoing documents are true and correct to the best of my personal knowledge and belief.

Date: April 22nd, 2018 /s/ Jason Kokinda-308

Authorized Representative

PROOF OF SERVICE

Date: April 22nd, 2018

I, Jason Kokinda, hereby certify under penalty of perjury that this day I am serving the foregoing documents in the manner listed below, which service satisfies the civil rules of procedure applicable to a civil rights action under 42 U.S.C.S. §§ 1983, 1985(3), and 1986.

Service by Online/ECF Mail to all of the following parties:

Plaintiff has rarely served filings on the Office of the Attorney General, since they began extorting him and criminalizing his filings in 2015. Because the criminalization of filings, implicates Fifth Amendment Rights; plaintiff is not able to seek appropriate redress in the Courts on this issue. The OAG attempts to fabricate evidence through discussion of malicious claims, as if they have merit. Seeking qualified language on words in filings to pursue irrational legal theories. The indelible record of corruption is their ultimate undoing.

Date: April 22nd, 2018

/s/ Jason Kokinda-308

Jason Kokinda, AR, Nemesis Paralegal Services, 38 N. Main St., #1028, Waterbury, VT 05676 (802)-391-0921 (jkoda@jkoda.org)