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Attorneys for Defendant

**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

STATE OF UTAH,	Plaintiff,	<b>MOTION IN LIMINE TO EXCLUDE TESTIMONY OF CHILD WITNESS ADA MACNEILL.</b>
vs.		CASE NO. 121402323
MARTIN J. MACNEILL,	Defendant.	JUDGE SAMUEL D. MCVEY

**MOTION**

COMES NOW the Defendant, MARTIN J. MACNEILL, by and through his attorneys of record, Randall K. Spencer and Susanne Gustin, and respectfully requests the court to exclude the testimony of Ada MacNeill ("Ada") from the trial under Utah Rule of Evidence 403.

### **RELEVANT FACTS**

1. Ada MacNeill, “Ada”, age 6 at the time of her mother’s death, discovered her mother in the bathtub on April 11, 2007.
2. Alexis, sister of Ada, was a “mother figure” to Ada, both prior to and after the death of Michele MacNeill
3. Ada was interviewed by Sgt. Patty Johnson, on September 9, 2008. The following are the relevant excerpts from that interview:

P: Did you go to school that day?

A: We just walked home and then we..

P: Oh, who walked home with you?

A: My dad...

P:...so you and your dad walked home from school that day?

A: nods, “yes”

P(atty): “Oh, did you eat anything when you got home?”

A(da): We, I ate, but I didn’t eat right then because I think I went to lunch and I got McDonald’s that day.

P: Oh, that day? Was that before school or after school?

A: After.

P: It was after school. So you walked home with your dad and you said, “mom, I’m home.” But you didn’t hear your mom say anything. Did you go to McDonald’s then or later , or when did you go?

A: Before I came home.

P: Before you came home. Did you guys walk to McDonald’s?

A: No, I guess we were driving.

P: You guess you were driving?

A: I think we went to McDonald's (page 27 PH, lines 15-27)

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A: Um, [neighbor following death of Michele] said stay in the house and nobody else was there, but then she came back and she let us color for a little while. And then we were about to go to McDonald's and so we didn't ...to eat because I hadn't ate (sic)

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P: When you went into the bathroom, was the door open or closed?

A: I don't think there was a door for the thing . . .I think it's just something you like walk into. . .well, I think there was a door..

P: ..was that opened or closed when you went to go into the bathroom?...

A: ...I just don't think there was a door...I just don't know.

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P: Did you see her clothes?

A: ..I don't remember what she was wearing, but I just remember it was like a blue jacket or something...a blue jacket and she had blue jeans, not blue jeans but I don't remember...

P: but you remember she had on a blue jacket? Do you remember what she had on for bottoms?

A: I remember it was something that, I don't remember what it was.

P: Do you remember if it was like a skirt or shorts, or pants?

A: I know it's pants

P: Do you remember what color they were?

A: No (shakes head)

P: okay, so you went into the bathroom

A: she had her clothes on. A shirt and I remember the shirt I think was blue and the pants I think [were] blue and I think the jacket was blue too.

P: Were the blue pants, were they like blue jeans or like sweat pants?

A: I don't know

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P: What did you guys do when you got home?

A: We were like, I screamed, “mom, we’re home” and then we went in and it was like, kind of like a lake that was all brown

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P: What was your dad doing in the bathroom?

A: He was screaming, “Quick! Help! Go next door and get somebody!” So, I had to run next door. He kept screaming “Quick, emergency, call 911!

4. Utah County Attorney’s Office investigators requested that Alexis ask specific questions of Ada:

Investigator: Ada said that she saw your mother’s head above the water.

Alexis: Mmm Hmm [meaning yes]

Investigator: Okay.

Alexis: She said that the, that the uhhm water was like brownish red.

Investigator: So, did Ada ever tell you how close she got to the tub?

Alexis: No, I never asked her that actually.

Investigator: You know, I’d be, I’d be interested in knowing. Did she actually walk over and ...in order for her to see those [jogging suit bottoms] on, she would have had to have walked over close enough to see, basically the whole body.

Investigator #2: Yeah, especially if her bottoms would have been down in the water.

Alexis: Yeah.

Investigator #2: **Can you ask her about that?** (*emphasis ours*)

Alexis: **Yeah, I can ask her.** (*emphasis ours*). Let me write that down so I can remember.

p. 17, interview with Alexis MacNeill, January 5, 2011.

5. On February 26, 2009, Alexis sent the following email to Doug Whitney, UCAO investigator:

This is what Ada told me after questioning her numerous times: (correct wording??)

Ada's account:

Ada said that my father picked her up from school and they drove home. When she got home she jumped out of the car and ran in the house before my dad. She then said...Mommy, Mommy I'm home. No one answered, so she ran back to my parents room and found her in the tub. She then ran out into the hallway and told my dad to, "come quick, come quick." She said that she stayed in the hall and my dad went into the bathroom and then screamed at her to run for help. She asked him where she should go, and he told her next door. She then ran next door for help.

6. On March 30, 2011, when prosecutors had settled on drowning as a cause of death,

Alexis sent another email to UCAO Investigator Doug Whitney:

I talked to Ada and she told me a few other things about the morning my mother died. She stated that my mom promised to pick her up from school and take her to McDonalds for lunch. She was surprised when my Dad picked her up. He was a little late, probably 5 minutes. Only a few people left from her school were waiting for rides. She asked where my mom was and he said that she was busy and couldn't pick her up. She asked my Dad if they could go to McDonalds and he said No. They drove and parked in front of the house. Ada ran in to go say hi to my mom. She first went into the room and noticed that my mom was not in her bed. She said that she remembers all of her medicine next to her bed on an ironing board. She then walked into the bathroom. She says that the bathroom door was open. She couldn't see my mom in the tub from the door so she went up on the bathtub step. She then noticed red all in the water. She saw that my mom's eyes were halfway open. She said that she was wearing her dark sweatpants with the dark bluish jacket with the white strip. She said that the top was zipped up all the way. She said that my mother was submerged half way in water. She saw that her chest moved in and out once or twice. Her hair was floating in the water. She then ran out. My father was in the kitchen. She ran into the kitchen screaming DAD. DAD, ITS AN EMERGENCY...YOU HAVE TO COME NOW! She grabbed his arm and pulled with all of ther weight and tried to drag him toward the bedroom. She said that he has walking very slowly...she said come on...but he still walked very very slowly to the bathroom.

7. There are certain protocols that must be followed when interviewing a child witness. A child witness must be interviewed by a trained professional because of the

impressionability and fallibility of child testimony. *See attached* report of Dr. Vickie Gregory.

## **ARGUMENT**

### **A. The Proper Remedy For The Contamination Of A Child's Memory Is Exclusion Under Rule 403, Not Reliance Upon Cross-Examination And The Ability Of A Jury To Gauge Witness Credibility.**

The Utah Supreme Court held in *State v. Fulton* that when determining the competency of a child witness, Rule 403, not Rule 601, is to be used. The purpose of Rule 601 is “to ensure that the jury would not be exposed to unreliable testimony.” P.2d 1208, 1218 (Utah 1987).

False memories are not attacks on a witness's character for truthfulness. *State v. Johnson*, 784 P.2d 1135 (Utah 1989). The challenge that false memories have been implanted in a child's memory as a result of suggestive interviewing techniques is different in nature than a challenge to a child witness's credibility. Most credibility problems such as bias, self-interested fabrication, undue influence or duress can be countered with typical cross-examination. Cross-examination is the "greatest legal engine ever invented for the discovery of truth," *California v. Green*, 399 U.S. 149, 158 (1970). Courts have also put considerable faith in the ability of a jury to apply its collective human experience and reason in order to judge the verbal and non-verbal cues of dishonesty and testimony that is not credible.

False memories, on the other hand, are not susceptible to cross-examination techniques. A witness who harbors a false memory is unaware of its false nature, and experiences the memory and recollects it verbally with an unselfconscious belief that it is an accurate representation of his or her lived experience. According to developmental psychologist Stephen Ceci, one of the leading scholars of child and eye-witness testimony, and author of a recent article in Nature concerning false memories, "there are ways in which traumatic memories of real

events can be recalled after being buried for years, but without hard evidence, it is impossible to distinguish false memories from real ones in court." Moheb Costandi, Corrupted Memory, Nature, Aug. 15, 2013 at 270.

Robert Rosenthal agrees with Ceci's description of the fundamental obstacle of recollected memories extracted from a child's memory. "[O]nce children have been subjected to suggestive interviews, their inaccurate reports are indistinguishable from accurate ones." Robert Rosenthal, J.D., 22 DEVELOPMENTAL REVIEW 334, 342 (2002). The unique danger of implanted memories is that they generally are beyond the reach of cross-examination. Further, scientific research proves that "once a child has been subjected to suggestive interviews, there is no way to determine whether the child's statements are the product of the child's experience or the interviewer's bias and suggestive methods." *Id.* at 341, 347. Accordingly, if "it is established that suggestive methods were used to obtain a report, absent some independent indicia of reliability (e.g., some showing that the child's statement has not been tainted by suggestion), statements elicited pursuant to suggestive questioning should not be admitted." *Id.* at 343.

Cross-examination of a child witness without the benefit of either hard evidence or contradictory testimony of the same events by another eye witness is not an adequate safeguard. "Qualifying" a child witness by checking their awareness of the moral and practical consequences of lying, and eliciting a promise from them to refrain from lying, is ineffective in a case of false memories because of the child's inability to distinguish between the false and actual memories.

*i. The Factors Provided In State v. Fulton To Guide A Trial Court's Determination Of The Admissibility Of Testimony By Children Are Helpful, But Do Not Completely Address The Problem Of False Memories.*

To guide the trial court in judging the admissibility of child testimony, the Utah Supreme

Court outlined in *State v. Fulton* a non-exhaustive list of factors to consider when evaluating the admissibility of a child's testimony:

. . . the child's ability to function in the courtroom setting, i.e., to understand questions, to communicate those facts to the jury, to distinguish truth from fantasy or falsehood, etc. The court may also consider the age of the child at the time the relevant events occurred, the amount of time that has elapsed, and the degree of recollection the child demonstrates. In addition, the court may take into account the child's susceptibility to suggestion and whether the child has been intentionally prepared or unconsciously influenced by adults in such a way that it is likely the child is only parroting what others have said about the relevant facts.

742 P.2d at 1218. These factors deal specifically with the unique nature of a child's testimony, but they are largely a reformulation of the now-abandoned "competency" test for children. While the second half of this memorandum analyzes Ada's recollections in depth, it is worth noting here how the instant case fares under *Fulton's* factors. The most troubling of the facts before the court is the lapse of six (6) plus years between Michele's death and Ada's expected trial testimony. In addition, while it was certainly not the first time Ada recalled the events of finding her mother on April 11, 2007, the first recorded interview with Ada happened 17 months after Michele MacNeill passed away. Ada was only six at time of her mother's passing. Also worth mentioning is the general lack of detail in Ada's preliminary testimony. The frequency of Ada's inability to recollect contextual details about April 11, 2007 does not inspire confidence in her ability to recollect, and also illustrates the deleterious effect of her young age and the passage of time has had on her ability to accurately recall the details of what she saw.

The defendant urges the position that, as a matter of law, a child's testimony should be deemed excluded under 403 *as a matter of law* if 1) there is evidence manifest that the child has been exposed to improper interview techniques or conditions, and 2) the child's testimony does not bear independent indicia of reliability.

#### **B. Ada Has Been Subjected On Multiple Occasions To Interview Techniques That Bear A**



## **High Risk Of Inducing Later False Recollections, And Her Preliminary Testimony Suggests The Presence Of False Memories.**

The first recorded interview of Ada occurred September 9, 2008. The interviewer was Sgt. Patty Johnson. Prior to the preliminary hearing, this is the only direct recording of Ada's account of April 11, 2007. However, Ada was informally interviewed by Alexis multiple times—some of which were at the UCAO's request. On February 26, 2009, Alexis emailed Investigator Doug Witney that she had "talked to Ada several times" about April 11. Two years later, in January of 2011, UCAO requested Alexis to question Ada about several important issues. Two months later, in an email on March 30, 2011, Alexis recounted information from Ada to the UCAO investigators. Ada's preliminary hearing testimony was most consistent with Alexis's report from March of 2011.

There is no way of knowing how many times Ada was interviewed informally by Alexis, but it is clear that it happened repeatedly over the six years since Michele MacNeill passed away. Despite repeated questioning at the preliminary hearing, Ada said she could not recall her interview with Patty Johnson, nor could she recall speaking to anyone about her mother's death. Preliminary Hearing, p. 178, l.12 - 179 l.4. Later, Ada does recall that she has spoken to her sisters about finding her mother, but that it was "a few years later." PH Transcript, p. 193, l. 15-17. On further cross-examination, Ada indicates that she spoke to her sisters about April 11, 2007, a few months later. PH Transcript, p. 195, l.5-11 (See pp.192-195 for full exchange.

In addition, Ada is at a high risk for false memory because of the manner in which she has been asked to recall details of April 11, 2007. While we have little contemporaneous accounts or reports of how Alexis has posed questions to Ada, it is clear that Ada has been asked for specific details about that day on multiple occasions. Active and repeated attempts to elicit information heighten the risk of a false recollection later. This is known as "multi-trial forced

recall," and the dangers of this have been demonstrated. In *Interviewing Victims and Witnesses of Crime*, Ronald P. Fisher summarizes the research about the dangers of this technique:

Although it is possible to recover some of the unrecalled information, not all techniques are equally successful in doing so. Simply requesting the witness to produce more responses has no salutary effects. In an interesting laboratory analog of this approach, Roediger, Challis, and Wheeler (reported in Roediger, Wheeler, & Rajaram, 1993) presented a series of 60 pictures to participants. Shortly thereafter, the participants were asked to free recall as many items (names of the pictures) as they could. On the average, participants recalled 35.9 pictures, and with very few intrusions (0.8). Another group of participants (forced recall) was requested to make a fixed number of responses (60), guessing if necessary to complete the list. **This instruction, which is tantamount to forcing witnesses to respond even after they have indicated that they cannot remember any more information, was a disaster.** This condition produced no more correct responses (35.6) than did the control condition; however, forced recall did elicit many more intrusions (5.0). **Furthermore, participants in the forced recall condition also incorrectly "recognized" many of these incorrect items on a later test.** Similar results were found by Roediger and Payne (1985): Uninfluenced free recall yielded responses that were very accurate. **Requiring participants to make additional responses did not yield any more correct answers, although it did lower the accuracy rate considerably.**

1 PSYCH. PUB. POL. AND L. 732, 742 (December 1995) (emphasis added). Both the investigators for UCAO and Alexis have demonstrated a heightened desire to retrieve or extract additional information from Ada. At the interview in 2008, Ada seemed reluctant to answer questions, but this did not deter Sgt. Johnson from pressing for details:

P[atty Johnson]: What about your dad, do you miss your dad?

A[da]: **I don't want to talk about it.**

P: You don't want to talk about it. You did a really good job, Ada, helping me understand some things about your mom. You did a really good job. I know it's kind of hard to talk about but I feel like I understand a lot better about your mom and what happened. Do you think you can help me understand just a few things about your dad?

A: (nods "no")

P: Maybe what he looks like

A: (nods "no")

P: No?

A: **I don't want to talk about it.**

P: How do you feel when you're around your dad?

A: **I don't want to talk about it.**

P: You don't want to talk about it, okay. You've done a good job today. I think we're about done. Does that make you happy?

A: (nods "yes")

Interview with Ada MacNeill, Sept. 9, 2008, p. 34 l. 27 – p. 35 l. 14. Even Sgt. Johnson, evidently trained in the Cognitive Interview ("CI") technique, designed to prevent problems of eliciting or suggesting false information, repeated her request for information three times after Ada initially declined to provide information. It is unknown how many times Ada has been asked for specific details in the last six years. This would be an important detail for the jury to know as they evaluate the possibility that Ada's responses are actually false recollections, but Ada herself simply cannot recall but few details about her conversations with Alexis and others about finding her mother.

The defendant does not suggest that the entirety of information offered in testimony by Ada is the result of suggestion. We do have some ability to compare Ada's preliminary hearing testimony to at least her recollections recorded in September of 2008. But even a single false memory could be devastating to the defendant and put him at the risk of unfair prejudice.

For example, Alexis recounted to Doug Witney in her email of March 30, 2011, that Ada recollected the following to her:

[Ada] ran into the kitchen screaming DAD, DAD, IT'S AN EMERGENCY ... YOU HAVE TO COME NOW! She grabbed his arm and pulled with all her weight and tried to drag him toward the bedroom. She said that he has[sic] walking very slowly ... she said come on... but he still walked very very slowly to the bathroom.

This account is similar to Ada's preliminary hearing testimony, wherein Ada testified that she had to "pull" her father to the bathroom, suggesting that the defendant had no desire to preserve

his wife's life:

Q. Okay. And you said he was in the kitchen?

A. Yeah.

Q. And did you go speak to him?

A. Yeah.

Q. And what did he do?

A. Kinda just pulled him along. He came.

Q. He came with you? You said you pulled him along?

A. Yeah.

Prelim. Hrng. Trans. p. 168, l. 1-9. The details of Ada getting her father and how exactly they went to the bathroom was not recounted in the September 2008 interview. What that does indicate is that these details were not striking enough to Ada in her memory; there were other details that Ada readily volunteered. For example, Ada volunteered the information that the tub water was brown without Sgt. Johnson asking about it, indicating at least that Ada does have some independent recollections. But in the case of the damaging testimony that Ada had to "pull" her father to the bathroom, it is likely that this information was elicited by "forced recall" at some later time after the 2008 interview, after which it became more of a fixture of Ada's memories of the day.

Repeated questioning has been shown to increase the likelihood of tainting a child's memory:

When a child does not provide information sought by an interviewer during a single interview, additional interviews are sometimes conducted until the child provides reports that are consistent with the interviewer's bias. Several studies have shown that when misleading questions or inaccurate information are repeated across multiple interviews, children's final reports become highly tainted. [citation omitted]

Rosenthal, 341. Without an accurate record of when and how Ada was questioned by Alexis, and perhaps others, it is impossible for the defense to put forth any information

regarding whether the most damaging portions of Ada's testimony are the product of suggestions. Again, if Ada is recollecting false memories, she will not be aware of it, and it is evident that she has a difficulty recollecting some details of April 11, 2007, but also remembering what Alexis asked her over the six years.

Another extremely troubling indication of the tainting of Ada's memory is the way she described Alexis's attitude towards the defendant. The following exchange is from her preliminary hearing testimony:

Q. Was -- were you -- was Alexis ever upset with your dad?

Q. I think so.

Q. Okay. And what was she upset by?

A. Him killing my mom.

Q. Killing your mom? Ok. Exactly what did she say about that?

A. Well, I don't know. Don't remember. I don't think she said anything about it.

Just knew she was mad.

Prelim. Hrng. Trans. p. 200 l. 18 – p. 201 l. 4. The first troubling aspect of this portion of testimony is that Ada is unable to recall when she first heard that Alexis believes the defendant killed Michele. Instead of simply saying, "I don't know" and leaving her response at that, Ada continues and testifies that she "do[es]n't think she said anything about it." It is not a problem that Ada is perceptive enough about emotions and social cues to know that Alexis and others in her family believe that the defendant killed Michele; the problem is her willingness to assert that she does not believe that Alexis ever said explicitly that the defendant killed his wife. It is hard to believe that Ada has never heard that from Alexis directly, as Alexis has been very forthright to the UCAO, the media, and anyone who will listen about her belief about the defendant's culpability. It raises questions about Ada's ability to testify truthfully when she rather easily asserts something that is highly improbable.

The most troubling aspect of Ada's testimony here is that it suggests that Ada has accepted Alexis's belief about her mother's death as fact. In this case, Ada did not say "Alexis thinks he killed our mom;" instead, she simply reports the substance of Alexis's belief as if it were fact: "Him killing my mom."

Ada's comment also is an indication that she has become tainted against her father by the fact that the family members closest to her are convinced that Martin MacNeill killed Michele and have consistently expressed contempt and hatred of the defendant. Rosenthal says this of "stereotype induction":

Stereotype induction is the process of conveying negative characteristics of a suspect. With stereotype induction, the interviewer tells the child that the suspect is a bad person. Telling a child that the suspect "does bad things" or "tries to scare children." Stereotype induction can powerfully influence a child's ability to make an accurate report. [citation omitted]

Rosenthal, 341.

Alexis is a "mother figure" to Ada, therefore using Alexis to extract information from Ada is highly improper. The literature identifies clearly that interviews by both high-credible and biased people raise the probability of memory taint. See e.g. Rosenthal at 339–350; Fisher, 1 PSYCH. PUB. POL. AND L. 732 at 739–40. This taint is evident in Ada's testimony at the preliminary hearing.

### **C. The Circumstantial Nature Of The Case Multiplies The Danger Of Unfair Prejudice Admitting Ada's Testimony Poses.**

Finally, one last consideration unique to this case heightens the prejudice facing the defendant. Citing Professor David McCord, the Supreme Court of Utah in *State v. Rimmasch*<sup>1</sup> applied the following reasoning in their formulation of the test for admitting expert scientific

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<sup>1</sup> superseded by statute, see *State v. Maestas*, 2012 UT 46, 299 P.3d 892, 936. See also *State v. Clopten*, 2009 UT 84, ¶ 38 ("Because the current version of rule 702 incorporates an updated reliability analysis for expert testimony, the *Rimmasch* test has been subsumed in the new rule.")

evidence under U.R.E. 701:

... there is a strong correlation between reliability and importance. The greater the importance of the testimony, the greater should be its guarantees of reliability in order to gain admission. **Testimony which is dispositive, or virtually dispositive of a case if believed, should have strong guarantees of reliability.** On the other hand, if the testimony is less important, and thus will not be dispositive of the case, then the court usually should be willing to accept a lesser degree of reliability.

775 P.2d 388, 412 (Utah 1989) (emphasis added, citing David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19, 41 (1987)).

Simply put, the importance of expected testimony heightens the need for independent indicia of reliability, and this is true in the case of tainted child testimony. The State's charge of obstructing justice is almost entirely based on the State's reliance on Ada's testimony regarding the position of Michele's body and how she was clothed (MacNeill reported that Michele was initially face down while Ada reported that she was sitting up; MacNeill reported that Michele did not have any pants on while Ada reported that Michele was in a blue jogging suit which the UCAO alleges must have been removed by MacNeill—the police photos of Michele's clothing document a garment top, bra, and light black top).

This case is almost entirely a circumstantial case, and the testimony of the defendant's daughter is a central part of the state's case. Ada is also the only witness that will characterize the defendant's actions immediately prior to the discovery of Michele. Not only does this make her testimony extremely important to the State's theory, but it also means that the possibility of independent corroboration of much of her testimony is not possible.

## CONCLUSION

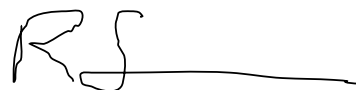
Under a 403 analysis, Ada's testimony is not admissible. Ada's testimony has been tainted through a number of factors, highlighted above. The tainting of Ada's testimony is

evident in her preliminary hearing testimony. The consensus amongst the academic literature is that false memories are almost entirely impossible to detect without hard evidence. The witness herself is not aware of false memories. The lack of independent indicia of reliability to counter Ada's reliability problems posed increases the danger of unfair prejudice.

Finally, in an entirely circumstantial case, the testimony of the defendant's young daughter - the only family member alone with the defendant when he discovered Michele - will be particularly persuasive to the jury. A child who has lost both parents and may be suffering from trauma as a result of finding her mother's body will undoubtedly raise the natural sympathy of the jurors.

Between these factors, the danger of unfair prejudice is substantially higher than the probative value. The tools that courts regularly use to defend against untruthful testimony, cross-examination and first-hand observation by the jury, are inadequate to ameliorate the high danger of admitting false testimony. For the foregoing reasons, the defendant requests the court to exclude Ada's expected testimony from trial pursuant to Rule 403.

Submitted this 13th day of September, 2013.

A handwritten signature in black ink, appearing to read 'RS', followed by a horizontal line.

Randall K. Spencer  
**Fillmore Spencer LLC**



## **CERTIFICATE OF DELIVERY**

I hereby certify that I caused to be delivered by Email and Mail, the forgoing Motion and Memorandum to Exclude Testimony of Child Witness Ada MacNeill to:

CHAD GRUNANDER

SAM PEAD

JARED PERKINS


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Dated this 13th day of September, 2013.



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