

OCT 16 2015

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. _____

DANIEL & VALERY O'CONNELL,

Petitioner(s),

v.

DISTRICT COURT OF THE FIFTEENTH
JUDICIAL DISTRICT OF MONTANA,
SHERIDAN COUNTY, THE HONORABLE
DAVID CYBULSKI, PRESIDING JUDGE,

Respondent.

**ORIGINAL PETITION FOR WRIT OF PROHIBITION OR ALTERNATE
WRIT OF REVIEW & FOR IMMEDIATE STAY PENDING DISPOSITION**

Concerning Dan & Val O'Connell vs. GLA INC. & Board of Directors, No.
DV-11-114, Sixth Judicial Dist. Court

Daniel O'Connell
Valery O'Connell
PO Box 77
Emigrant, Mt. 59027
(406) 5777-6339
dko@mac.com
Petitioners

Hon. Judge David Cybulski
573 Shippe Canyon Rd.
Plentywood, Mt. 59254
Respondent

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2. Did District Court erred to demand O’Connells conduct unsolicited “formal discovery process as the only means to obtain” GLA corporate documents from Defendants, because GLA is required to give O’Connells all corporate documents “upon request” under a prior case (DV-11-193) 2012 settlement agreement?	
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INTRODUCTION & NEED FOR IMMEDIATE RELIEF

The Supreme Court has “general supervisory control over all other courts.” MT Const. Art. VII §2(2), and may issue and determine necessary and appropriate writs, MT Const. Art. VII §1, §3-2-202(2), M.C.A., Rule 14 M.R.A.P. See also, Title 27, Chapters 25, 26, and 27, M.C.A.

(1) This is an original action for a writ of prohibition or other extraordinary writ to restrain the Respondent court and judge from continuing in force and/or enforcing a patently unconstitutional “Protective order” that:

*(issue #1) forbids Petitioners publication of lawfully acquired information about a publicly conducted civil judicial proceeding;

*(issue #2) and directly effects and denies Petitioners due process to exercising established rights under a prior 2012 settlement agreement, and effecting Plaintiffs election to GLA Board by denying documents (such as membership list for contacting members) as O’Connells are candidates to a scheduled GLA election to begin on Saturday, November 12, 2015.

(2) Both Petitioners request an immediate stay of the District Court’s proceeding, until the disposition of their Petitions. An immediate stay is also necessary because Orders require compliance or else “penalty for violation of this Order...include dismissing the [complaint] claims.” For these reasons above, immediate relief is required, at a minimum by means of this Court’s issuance of a writ of prohibition under Mont. Code Ann. §27-27-101, *et. seq.*, or alternative writ of certiorari known as writ of review under Mont. Code Ann. §27-25-101, *et. seq.*

STATEMENT OF THE FACTS & JURISDICTION

(3) This is an action in prohibition to remedy an unconstitutional judicial “Protective order” for prior restraint on O’Connells’ publication (issue #1) and denial of established rights

under a prior 2012 settlement agreement (issue #2). This Court has jurisdiction of the present action pursuant to Article II, Section 7 of the Constitution of Montana and pursuant to this Court's established precedents holding that prohibition is the appropriate remedy by which to challenge the constitutionality of a court's prior restraints on public publications:

In *Kuiper v. District Court* (1981), the Mt. Supreme Court found protective orders precluding the use of certain documents to be unconstitutional. *Kuiper* case cited three criteria that must first be satisfied: "(1) the harm posed by dissemination must be substantial and serious; (2) the restraining order must be narrowly drawn and be precise; (3) there must be no alternative means of protecting the public interest that would intrude less directly on expression" (p.698). Under the applicable free speech provision of the 1889 Montana Constitution, the court held that both the legislature and the courts were without authority to enjoin persons from speaking (*Empire Theatre Co. v. Cloke*, 1917).

(4) Enforcement of the "Protective order" by the District Court has yet to occur, and the violation of O'Connells' constitutional rights can still be prohibited. If this Court disagrees and considers the action to be prevented was the District Court's Order, rather than "Protective order" that forbids Petitioners' publication of judicial proceedings or enforcement of the Order thereafter, then, as an alternative, a writ of certiorari (as "writ of review,") is appropriate:

This Court has determined that where an appeal is not "an adequate remedy because of the time necessarily involved," the relief of an aggrieved party should properly be pursued through a writ of certiorari, habeas corpus, or supervisory control. See *Matter of K.H.* (1985), 216 Mont. 267, 268, 701 P.2d 720, 721.

Section 27-25-102, M.C.A., provides, in part:

A writ of review may be granted by: "(1) . . . ; or (2) the supreme court or the district court or any judge of those courts, when a lower . . . officer exercising judicial functions has exceeded the jurisdiction of the . . . officer and there is no appeal or, in the judgment of the court, any plain, speedy, and adequate remedy."

A request for the writ of prohibition may be treated as a petition for a writ of certiorari. 14 Am. Jur. 2d Certiorari 66. Prohibition is intended to prevent an action, whereas certiorari is designed to remedy or correct an error and its consequent evils. See, e.g., 63C Am. Jur. 2d Prohibition §7.

(5) This alternate application for writ of certiorari is timely, as this Petition was filed within 30 days of the Order. District Court should be prohibited from infringing on O'Connells' constitutional rights, & also may be corrected for its actions that direct such infringement.

(6) This matter involves purely legal questions of statutory and constitutional construction. The matter may be decided on the existing record created by the District Court. No factual issues exist that preclude this Court ruling. (See, e.g., *Gates v. Missoula County Comm'rs*, 253 Mont. 261, 766 P.2d 884 (1988); *State ex rel. Thompson v. School District*, 156 Mont. 79, 80, 474 P.2d 700, 701 (1970) (original action inappropriate in both because thorough examination of multiple factual issues was required)). This Court certainly is capable of declaring that the actions of the District Court in this instance are void.

(7) Urgent factors exist in this matter. As discussed at pp.1-2, recourse in the District Court is not adequate due to the time constraints and the futility of such an effort given the District Court's Order.

PARTIES

(8) There is now pending in the Respondent court a civil proceeding case number DV-11-114 *O'Connells v. GLA Inc. & GLA Board*.

(9) The O'Connells, are Plaintiffs in this civil case, and also prevailing parties in the prior 2012 settlement agreement with the GLA, and also candidates for the upcoming elections scheduled this November.

(10) The Respondent for this case is the Honorable Judge David Cybulski, a duly appointed judge for the district court.

STATEMENT OF THE ISSUES

This Court can read the following Order and also a prior 2012 settlement agreement contained in the Appendix. (App. 1):

(11) Respondent Cybulski previously entered an order on September 17, 2015 for "Protective order" against the O'Connell by its terms "forbidding" ONLY the O'Connells from

STANDARD OF REVIEW

Orders related to trial administration matters are reviewed for abuse of discretion. *Wamsley v. Nodak Mut. Ins. Co.*, 2008 MT 56, ¶23, 341 Mont. 467, 178 P.3d 102; *State v. English*, 2006 MT 177, ¶ 50, 333 Mont. 23, 140 P.3d 454; *Eatinger v. Johnson*, 269 Mont. 99, 105-06, 887 P.2d 231, 235 (1994).

Generally, an award of attorney fees is reviewed for abuse of discretion. *Emmerson v. Walker*, 2010 MT 167, ¶20, 357 Mont. 166, 236 P.3d 598.

Conclusions of law are reviewed de novo for correctness. *Emmerson v. Walker*, at ¶20; *Hidden Hollow Ranch v. Fields*, 2004 MT 153, ¶21, 321 Mont. 505, 92 P.3d 1185.

This Court exercises plenary review over constitutional issues. *Emmerson v. Walker*, at ¶20; *State v. Carter*, 2005 MT 87, ¶21, 326 Mont. 427, 114 P.3d 1001.

ARGUMENT

(15) The Respondents pre-publication “Protective order” forbidding publication constitutes a prior restraint. And the restraint forbids only O’Connell members from publishing the information. In this instance, moreover, the prior restraint operates to forbid their publication of information that is already public information disclosed by clerk of district court in the course of this (DV-11-114) judicial proceeding.

(16) Prior restraints on publication are repeatedly described as “presumptively unconstitutional” under the First Amendment to the United States Constitution, as well as under the Ohio Constitution. Ohio Court has noted, the United States Supreme Court has “never permitted a prior restraint on pure speech.” *News Herald*, supra, 77 Ohio St. 3d 40, 44. Ohio Court found a substantially similar order, purporting to forbid publication of information “lawfully obtained” in open court, “patently unconstitutional.” *Id.*

(17) Both as a matter of constitutional mandate and under centuries-old common-law traditions, judicial proceedings are public events and any member of the public is free to publish accounts of what occurs in judicial proceedings (open to the public) as state-wide importance.

(18) Montana Rule 14(3) M.R.A.P. specifies, in part, this Court “may, on a case-by-case basis, supervise another court by ... a writ of supervisory control” – “an extraordinary remedy” justified “when urgency or emergency factors exist making the normal appeal process inadequate, when the case involves purely legal questions, and when one or more of the following circumstances exist:” the “other court is proceeding under a mistake of law and is causing a gross injustice,” or “constitutional issues of state-wide importance are involved. . . .” See, e.g., *Plumb v. Montana Fourth Judicial. Dist. Court*, 279 Mont. 363, 368-70, 927 P.2d 1011, 1014-16 (1996). Every person in Montana has free speech and contractual due process rights.

(19) There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.” *Craig v. Harney* (1947), 331 U.S. 367, 374.

(20) To the extent that prior restraint on O’Connells speech or publications regarding judicial proceedings is intended to protect defendants for some unstated reason, no restraint can be entered or enforced when as *Kuiper* (cited infra, §2) there is no “harm posed by dissemination” of publicly available information; also there is no harm posed by exercise of state laws under a 2012 settlement agreement.

(21) Respondent Cybulski entered the September 17, 2015 Order without any evidence or specific findings at all, much less evidence and findings sufficient to deny free speech publication or establish this Montana Court three criteria in *Kuiper* that must first be satisfied: “(1) the harm posed by dissemination must be substantial and serious; (2) the restraining order must be narrowly drawn and be precise; (3) there must be no alternative means of protecting the public interest that would intrude less directly on expression” (p.698).

Indeed, the Respondent's Order of September 17, 2015 failed to make any findings whatsoever, because there is no evidentiary foundation upon which to rest.

VIOLATION OF FEDERAL AND STATE CONSTITUTIONAL, STATUTORY AND COMMON-LAW RIGHTS

(22) VIOLATION OF 42 U.S.C. § 1983: The conduct of Respondent constitutes a deprivation, under color of law, of rights, privileges, and immunities of O'Connells that are protected by the Constitution and laws of Montana (cited infra) and the United States, specifically of the rights to freedom of speech as guaranteed by the First Amendment to the United States Constitution and made applicable to the states by virtues of the Fourteenth Amendment to the United States Constitution.

A valid settlement agreement is enforceable like any other binding contract. In re Marriage of Mease, 2004 MT 59, ¶ 57, 320 Mont. 229, 92 P.3d 1148.

(23) Respondent's conduct deprives O'Connells of the freedom of speech, denial of contractual rights under their 2102 settlement agreement, and of the due process rights under the First and Fourteenth Amendments to the United States Constitution, as well as of speech under Article II, Section 7, of the Montana Constitution, and of its constitutional, statutory, and common-law rights to report on judicial proceedings.

ENTITLEMENT TO A WRIT OF PROHIBITION

(24) Respondents' conduct constitutes a continuous and on-going interference with the above-described rights. "Protective order" preventing publication of information that O'Connells lawfully obtained and is lawfully entitled to publish, and ordering O'Connells conduct unsolicited "formal discovery" contrary to contractual clause #2 (of 2012 settlement agreement), Respondent is engaged in an on-going and irreparable deprivation of O'Connell's rights, a deprivation that is both substantial and irreparable.

If O'Connells comply with the Order, the ordinary appeal process is not adequate to remedy the denial to report on matters that occur in public judicial proceedings, nor correct the ongoing constitutional, statutory, contractual, and common-law rights violations by appeal at the conclusion of the case.

(25) By issuing judicial orders that patently violate constitutional, statutory, contractual, and common-law rights, Respondent has exercised judicial power unauthorized by law and has usurped judicial power. Unless Respondent is immediately prohibited from enforcing these unconstitutional and unlawful orders, his conduct will compound the usurpation of judicial power by the enforcement or threatened enforcement of the orders. The very existence of the orders, exposes O'Connells to the risk of substantial penalties, including more sanctions, Respondent's stated "penalty for violation of this Order...include dismissing the [complaint] claims," if O'Connells exercise their plain constitutional right to report on matters that occur in public judicial proceedings. (see Cybulski Orders ¶ 2)

(26) O'Connells have no plain and adequate remedy in the ordinary course of law by which to relieve the harms done by Respondent's unconstitutional order. Only relief granted by this Court can realistically preserve O'Connells' plain constitutional right to report on matters that occur in public judicial proceedings and rights under 2012 settlement agreement contrary to "formal discovery."

(27) In reviewing the Order and briefs, and the other arguments in these Petitions, the Court should bear in mind that sometimes what a matter is not about is as important as what it is about. This matter is not about:

• **Abuse of Discovery**. O'Connells have no intention of conducting any further discovery for this case. O'Connells affidavit August 2015 swore that 'discovery is completed for this case at this

time' and O'Connells have already conducted numerous discovery for this case (114). Note that GLA protective motion cited Carbon County, Mt. pending *Sullivan v. Remington (2013)* district court case as authority for abuse of discovery, where Plaintiff-Sullivan admitted using member requests for informal discovery and refused to use formal discovery in that case; for this (114) case, there's NO evidence of discovery abuse since O'Connells already conducted extensive formal discovery; including hundreds of documents requested, written depositions, interrogatory requests, and admissions requests. At the same time starting 2007, O'Connells, as GLA members, requested AND received most (not all) member document requests of corporate records allowed (per §35-2-906, 907 MCA) for the stated purpose of "annual GLA elections." O'Connell Sept. 2015 affidavit evidence shows member requests for documents since 2011 were not part of discovery and have been used "for [member] election purposes only."

•**Undue Burden**. Plaintiff September 2015 affidavit was undisputed to say GLA already allowed O'Connell at least three member requests for documents under the 2012 settlement agreement at the same time O'Connells conducted numerous discovery for this case. GLA's protective motion (pp.3) admits O'Connells make their own copies of documents requested which avoided duplicity or cost to GLA; and such member documents were allowed (per 2012 Agreement & §35-2-906 &907); which facts all refute GLA's discovery abuse claim that these member document requests were somehow after several years an undue burden, and "improper communication between parties." Orders allows GLA to circumvent the 2012 GLA Settlement Agreement contrary to legislature laws (under §35-2-906, 907 and more) that freely allowed O'Connell members to have these past and future corporate documents. O'Connells as GLA corporate members are the ones unduly burdened if forced to now conduct unsolicited "formal discovery" after discovery is complete for this case, and forced to use the courts for document

requests allowed “upon request” under the 2012 settlement agreement; which denial of rights under this contract and state laws, delay settlement and trial, and increase pleadings and costs to all parties in this present case (114).

CONCLUSION

(28) Rather than safeguarding the constitutional privacy rights of litigants, the convince of preventing so called “discovery abuse” or “undue burden” on the basis of no evidence at all thereby to prohibit publication of information that O’Connells lawfully obtained and lawfully entitled to publish, and ordering O’Connells conduct unsolicited “formal discovery” (after discovery was complete contrary to 2012 settlement agreement) are not compelling state interests for the on-going and irreparable deprivation of O’Connell’s rights.

(29) Respondent’s issuance of a patently unconstitutional prior restraint against publication of public judicial information and, and Respondent’s restraint of a party on the basis of no evidence at all, as well as in the face of the patent unconstitutionality of the orders, all constituted action clearly in excess of Respondent’s jurisdiction. The present action constitutes “a proper proceeding for redress” of Respondent’s wrongful conduct within the meaning of 42 U.S.C. § 1983.

(30) The present action will provide a significant public benefit in confirming and vindicating the fundamental right to contractual and state laws under the 2012 settlement agreement, and of the public to speak and publish freely regarding publicly available judicial proceedings, thereby providing assurance that such proceedings will be fairly and properly conducted and assuring that the central institutions of a democratic government are responsible to the people from whom they derive their power and legitimacy. For that reason, the award of attorney fees that the “Protective order” imposed upon O’Connells should both be reversed.

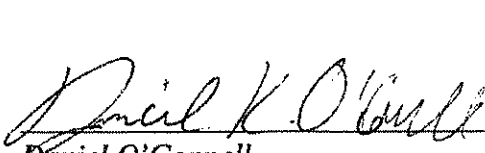
A writ of prohibition is appropriate and necessary in this instance. Rule 14, M.R.A.P. relief by extraordinary writ, or alternative writ of review, is appropriate and necessary.

What the District Court did was error. The intervention of this Court is required to correct the District Court on-going interference with the above-described constitutional and state rights.

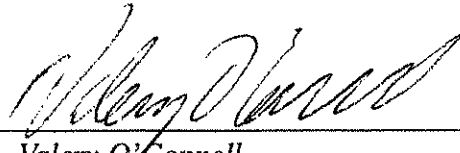
PRAYER

WHEREFORE, O'Connells pray:

- (1) The Court order a stay of District Court further proceedings pending disposition of 114 case.
- (2) That this Court immediately issue a peremptory writ of prohibition, or at a minimum an alternative writ of certiorari, forbidding Respondent from exercising judicial power to restrain O'Connells from speaking or publishing information that O'Connells lawfully obtained or will lawfully obtain in the course of the civil proceeding in *O'Connells v. GLA Inc. & GLA Board (cause DV-11-114)*; and allow for O'Connells 2012 settlement agreement document requests that concluded the civil proceeding in *O'Connells v. GLA Inc. & GLA Board (cause DV-11-193)*.
- (3) *That this Court issue a final writ of prohibition or certiorari forbidding Respondent from exercising judicial power to force unsolicited "formal discovery" contrary to 2012 settlement agreement, and restrain O'Connells from speaking or publishing information lawfully obtained in the course of the civil proceeding, and further commanding Respondent to vacate his unconstitutional unlawful orders of September 17, 2015.*
- (4) *That O'Connells be awarded its costs and expenses incurred in the pursuit of the present action, including reversal of attorney fees against them under the unconstitutional orders of September 17, 2015, and in excess of Respondent's jurisdiction.*
- (5) *That the Court award such other and further relief as the Court finds appropriate.*



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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Petition complies with Rule 11 of the Montana Rules of Appellate Procedure. The Petition is double-spaced and printed in Times New Roman proportionately spaced 14-point typeface with a total word count of less than 4,000 (not including the portions identified in Rule 11(4)(d) as "exclusions")



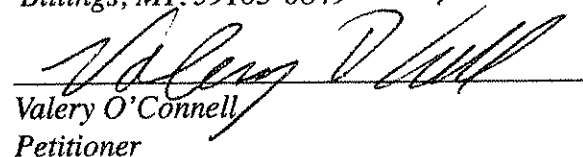
Valery O'Connell
Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition was served by U.S. Mail, postage prepaid, on the following this 14th day of October 2015.

Hon. Judge David Cybulski
573 Shippe Canyon Rd.
Plentywood, Mt. 59254

Brown Law Firm, P.C.
315 N. 24th St. (PO Drawer 849)
Billings, MT. 59103-0849



Valery O'Connell
Petitioner

APPENDIX I
(September 17, 2015 Orders & 2012 Settlement Agreement)

Hon. David Cybulski
15th Judicial District Court
100 West Laurel
Plentywood, MT 59254
Telephone: 406-765-3457

PARK COUNTY CLERK
OF DISTRICT COURT
JUNE LITTLE

2015 SEP 17 PM 12 53

FILED
BY *June Little*
DEPUTY

MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

DANIEL K. O'CONNELL and)
VALERY A. O'CONNELL)
Plaintiffs,)
vs.)
GLASTONBURY LANDOWNERS)
ASSOCIATION, INC. & Current GLA)
Board of Directors,)
Defendants.)

Cause No: DV-2011-114

**ORDER GRANTING
DEFENDANT'S MOTION
FOR PROTECTIVE ORDER**

Defendants have made a motion for protective order requiring Plaintiffs to use the formal discovery process and otherwise stop improperly using the materials they have accumulated during this litigation process. It sometimes seems that this case has created a life of its own beyond the original issues. It is appropriate to try to get the parties' focus back to the issues.

IT IS ORDERED that Defendant's Motion for a Protective Order is **GRANTED**.

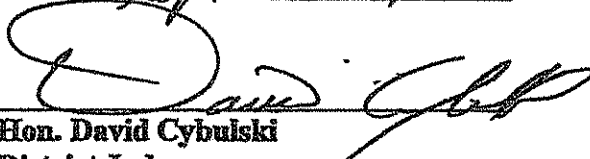
1. Plaintiffs are required to use the formal discovery process as the only means to obtain information from Defendants.
2. Plaintiffs are prohibited from communicating with Defendants except through counsel, in other words, Plaintiffs must only write or call Defendants' counsel.
3. Plaintiffs' s repeat requests for information previously provided may be denied by Defendants.
4. Plaintiffs are immediately prohibited from publicly disseminating any information acquired during this litigation to the public. This includes any recordings. The penalty for violation of this Order may include dismissing the Plaintiffs' claims with prejudice.

Exhibit 1

5. Plaintiffs must immediately return the minutes referenced. Immediately means within 5 business days of the date this order is filed.

Defendants are awarded their attorneys' fees and costs related to this motion.

Dated: September 19, 2015


Hon. David Cybulski
District Judge

CC: Daniel + Valerie O'Connell
Michael Heringer
Seth Cunningham
Alannah Griffith

} mld
9-17-15
SB

Exhibit 1

1 3. The GLA Board President will vote in accordance with the GLA By-Laws and not
2 solely for the purpose of breaking a tie vote.

3 4. The GLA Board will rescind the existing prohibition against recording member
4 meetings.

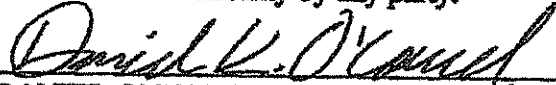
5 5. The parties will dismiss the above-captioned Complaint and Counter-claim with
6 prejudice.

7 6. The GLA Directors may not cast proxy votes for members in any capacity; however,
8 they may cast their own votes as landowners. The Proxy Authorization form will be amended
9 accordingly.

10 7. This Stipulated Agreement is subject to ratification by the GLA Board.

11 8. Each party shall bear its own attorney's fees and costs.

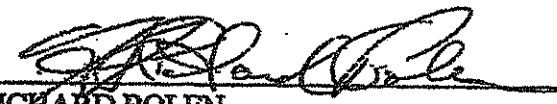
12 9. No provision included in this Stipulated Settlement Agreement shall be construed as
13 an admission of liability by any party.

14
15
16 
17 DANIEL O'CONNELL


18 Plaintiff
Date of Signature: 7/20/2012

19
20 
21 VALERY O'CONNELL

22 Plaintiff
Date of Signature: July 20, 2012

23
24 
25 RICHARD BOLEN

26 President, Glastonbury Landowners Association
27 Defendant
Date of Signature: 07/20/2012

28
29 
30 FREDERICK P. LANDERS, JR.
31 Counsel for Glastonbury Landowners Association
Date of Signature: 7-20-12

**ACTION TAKEN BY WRITTEN CONSENT OF THE
BOARD OF DIRECTORS OF THE
GLASTONBURY LANDOWNERS ASSOCIATION, INC.**

I, Richard Bolen, as President of the Glastonbury Landowners, Inc. (the "GLA"), hereby certify that the GLA Board of Directors has approved the Settlement Agreement dated July 20, 2012 between Daniel and Valery O'Connell and the GLA, which Agreement fully resolves the litigation pending between the O'Connells and the GLA in Park County District Court Cause No. DV-2011-193.

I further hereby certify that said action was taken by written consent without a meeting; that all of the Directors were contacted regarding said action; that a two-thirds majority of Directors consented in writing to said action; and that the Directors are empowered to take said action pursuant to their authority to conduct, manage and control the affairs and business of the GLA, as set forth in the GLA's Articles of Incorporation and Bylaws.


This 23rd day of August, 2012.

President:


Richard Bolen

ATTEST:

Secretary


Janet Naclerio