IN THE CIRCUIT COURT FOR
THE TWENTY-SECOND JUDICIAL CIRCUIT
ST. LOUIS CITY
STATE OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 1822-CR00642
	)	Div. 16
ERIC GREITENS	)	
	)	
Defendant.	)	

MOTION TO DISQUALIFY DEFENSE COUNSEL JAMES BENNETT AND DOWD AND BENNETT LLP

COMES NOW the Circuit Attorney for the City of St. Louis, by and through Ronald S. Sullivan Jr., Special Assistant Prosecutor, and moves this Court to Disqualify Defense Counsel James Bennett and Dowd and Bennett LLP (collectively "Dowd and Bennett").

For over two months, Dowd and Bennett knowingly engaged in a concurrent conflict of interest. At the same time that Dowd and Bennett was representing the State, regarding whether state actors, including the Governor, was using Confide – a confidential messaging service – to conduct state business in violation of state law, Dowd and Bennett was also representing Defendant in a proceeding against the State. This, by itself, is grounds for disqualification. While there is no need for the two matters, subject to conflict of interest prohibition, to be related, the fact that the instant two matters are significantly related illustrates the manifest need for disqualification in this case. The application Confide software application is at the center of both matters. Dowd and Bennett represented the Defendant *qua* State (i.e. the State) in a lawsuit filed over Defendant's use, in his official capacity, of the application Confide software application. At the same time, in the instant matter, Confide is relevant, material, and plays a key role.

Defendant is charged with photographing his victim and then transmitting said photograph. On information and belief, Defendant's use of Confide, Signal and/or other similar applications to engage in criminal behavior is alleged in the Indictment. The law imposed is an irrebuttable presumption that confidences are disclosed during an attorney-client relationship. Therefore, even though not necessary to show, the fact that the matters *are* related increases the need for disqualification.

Moreover, case law demonstrates that even if the conflict of interest is no longer active, the fact that, at some point during the litigation, there was a concurrent conflict of interest is grounds for disqualification. This case law is even more damning because James Bennett and Dowd and Bennett were involved first-hand and saw their co-counsel disqualified in this very similar matter. Thus, despite knowing how strict Missouri courts view conflicts of interest, Dowd and Bennett actively engaged in a concurrent conflict of interest for over two months. Such knowledge in the face of a clear conflict of interest constitutes a blatant violation of the Rule further necessitates disqualification.

Once it is established that a concurrent conflict of interest exist, the Court should disqualify Dowd and Bennett. The law provides only way for Dowd and Bennett to evade disqualification: Defendant has to meet all four elements of the exception to the concurrent conflict of interest rule. However, Dowd and Bennett cannot possibly satisfy even the first element of the test; to wit, Dowd and Bennett must demonstrate that he reasonably believed that he could provide competent and diligent representation to each client. However, the very fact that Dowd and Bennett withdrew from the Confide case indicates his understanding of the existence of a conflict of interest and his inability to satisfy his ethical obligations to both clients. Even more, that Defendant's spokesperson misrepresented the reason for Dowd and Bennett

withdrawing from the Confide case further shows that Dowd and Bennett knew he could not provide competent and diligent representation to both.

Indeed, Dowd and Bennett was right to withdraw since it was impossible to meet this standard. They represented the State, with access to all of the State's resources and knowledge about Confide, while, at the same time, Defendant's use of Confide to engage in activity, in violation of Missouri law, is a key issue in the instant case.

The failure to satisfy this first factor alone necessitates disqualification. However, there are two more elements which Dowd and Bennett similarly cannot meet. The second element which mandates disqualification is if the representation was prohibited by law. There is a requirement that a lawyer not undertake a representation that will require him or her to cross-examine another client. Due to Confide being at the heart of both cases, Dowd and Bennett fails this factor as well. There is a likelihood that in representing Defendant, Dowd and Bennett will have to cross-examine State actors about Defendant's use of Confide. This is in direct violation of their requirement not to undertake a representation that will require them to represent another client. Therefore, the Court should grant the State's Motion to Disqualify Defense Counsel James Bennett and Dowd and Bennett on this basis, as well.

Finally, there was no informed consent. The issue of consent was only potentially implicated by a letter from the Attorney General's Office to James Bennett mentioning the existence of a conflict. This, quite clearly, does not suffice to meet Dowd and Bennett's burden of demonstrating consent. *First*, the Attorney General cannot consent on behalf of the Circuit Attorney. There is no Missouri law that stands for such a proposition. *Second,* even assuming that the Attorney General could consent on behalf of the Circuit Attorney, Dowd and Bennett cannot meet their burden of proving that he made reasonable efforts to make sure the Attorney

General possessed enough information, including that he understood the advantages and disadvantages of the decision to allow the conflict of interest. Moreover, the Attorney General must have perfectly understood the adverse interest. Not only is there no proof that this occurred, but since the Attorney General did not know any details regarding the Circuit Attorney's investigation, it was simply impossible for the Attorney General to have perfectly understood the situation. Therefore, there was no informed consent to this dual representation, and Dowd and Bennett cannot meet three of the elements. Failure to meet just one necessitates disqualification. Accordingly, the Court should Grant the State's Motion to Disqualify Defense Counsel James Bennett and Dowd and Bennett.

Furthermore, even if, the Court were to somehow find that there was no concurrent conflict of interest, disqualification is still necessary based on Dowd and Bennett's duties to former clients. It is indisputable that he did at one point have an attorney-client representation with the State. Furthermore, the State's interest is materially adverse to Dowd and Bennett's current client. Quite plainly, the State is prosecuting the Defendant while Dowd and Bennett's role is to thwart the prosecution initiated by State. Moreover, the matters are substantially related since, as explained above, Confide is at the center of both cases. Here, both the actual conflict of interest and the appearance of a conflict of interest necessitates disqualification. In the course of representing the State, Dowd and Bennett received confidential information regarding Confide, which Dowd and Bennett is now using to press interests antagonistic to the State. On this basis, as well, the Court should grant the State's Motion to Disqualify Defense Counsel James Bennett and Dowd and Bennett.

ARGUMENT

"Under Missouri law, an attorney owes a duty of undivided loyalty to the client." *In re McGregory*, 2006, 340 B.R. 915; *State v. Crockett* (Sup.1967) 419 S.W.2d 22 ("A lawyer forced, or attempting, to serve matters with conflicting interests cannot give to either the loyalty each deserves."). This is because "Sound public policy requires that an attorney should not represent conflicting interests." *Gardine v. Cottey* (1950) 230 S.W.2d 731, 360 Mo. 681. Defense Counsel's representation of Defendant is unavoidably tainted by their blatant violation of this basic tenet of Missouri law.

For at least two months, James Bennett, and the law firm Dowd and Bennett represented the Defendant Eric Greitens ("Defendant") in this criminal matter adverse to the State, while concurrently representing the State of Missouri in a proceeding directly averse to this proceeding. Over two months ago, following news reports that Defendant was using the "Confide" application for official State of Missouri business, Plaintiff Ben Sansone filed a "Sunshine Law" lawsuit against Defendant. This lawsuit explicitly sued Defendant "in his official capacity as the Governor of the State of Missouri." Exhibit 1 at 3. The law is unequivocally clear that "a suit against a state official acting in his or her official capacity is no different than a suit against the state itself." *Williston v. Vasterling*, 536 S.W.3d 321, 336 (Mo. Ct. App. 2017); Kentucky v. Graham, 473 U.S. 159, 105 (1985) ("suits against state officials in their official capacity...should be treated as suits against the state."); *Whitfield v. Brooks,* No. 4:15–CV–1386–SPM, 2015 WL 5316588 at *2 (E.D.MO Sept. 11, 2015) ("Naming a government official in his or her official capacity is the equivalent of naming the government entity that employs the official, in this case the State of Missouri."). The Attorney General of Missouri hired Dowd and Bennett to represent Defendant in that lawsuit against the State. *See*

Exhibit 2. Therefore, Dowd and Bennett represented the State beginning, at least, from January 5, 2018. *See id.* Dowd and Bennett continued this representation of the State until March 12, 2018.[1] *See* Kurt Erickson, St. Louis Post-Dispatch, *Greitens' Attorneys In Lawsuit Over Use Of Message-Destroying App Withdraw From Case*, (March 12, 2018), http://www.stltoday.com/news/local/crime-and-courts/greitens-attorneys-in-lawsuit-over-use-of-message-destroying-app/article_8129f009-28ef-5be0-8f02-116e785bcf2d.html. Attorneys from Dowd and Bennett have appeared and filed numerous motions for the State in the Confide matter.

From that initial January 5, 2018 email, there was the understanding that a conflict may have existed due to Dowd and Bennett's representation of Defendant in this criminal matter. *See* Exhibit 2 at 1 ("This letter confirms your appointment, due to a potential conflict"). Certainly, by January 11, 2018, the conflict with this case was clear. First Assistant and Solicitor D. John Sauer wrote that "Based on public statements made by James Bennett of the Dowd and Bennett firm . . . it appears that the same firm also represents Governor Greitens and/or his wife in their individual capacities relating to recently reported allegations of personal misconduct by the Governor." Exhibit 2 at 2. The purpose of this letter was to ensure the proper use of funds. *See id.* Despite being directly alerted to the existence of a concurrent conflict of interest, Dowd and Bennett did not withdraw.

On February 22, 2018 an Indictment was filed by the State charging Defendant in his personal capacity with Invasion of Privacy. Still Dowd and Bennett did not withdraw or disclose to this Court or the Circuit Attorney's Office the existence of the conflict of interest. It was only close to three weeks later that Dowd and Bennett withdrew from the Confide case. Thus, for more than two months Dowd and Bennett represented the State in the Confide matter knowing

[1] It was at this time that the Circuit Attorney's office became aware of this conflict of interest.

that they would also be involved in an adverse proceeding against the State. Three weeks of that time were *after* the Indictment was filed when Dowd and Bennett should have surely withdrawn and notified the Court and the Circuit Attorney's Office. This failure to do so warrants disqualification.

Missouri Supreme Court Rules of Professional Conduct 4-1.7 states in relevant part:

> **(a)** Except as provided in Rule 4-1.7(b), **a lawyer shall not represent a client if the representation involves a concurrent conflict of interest**. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client
> . . .
>
> **(b)** Notwithstanding the existence of a concurrent conflict of interest under Rule 4-1.7(a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.

MO R BAR Rule 4-1.7 (emphasis added); *see also State ex rel. Horn v. Ray*, 325 S.W.3d 500, 505–06 (Mo. Ct. App. 2010) ("except for its internal references to other paragraphs of Rule 4–1.7, the Missouri rule is identical to Rule 1.7 of the American Bar Association's Model Rules of Professional Conduct."). Thus, if a concurrent conflict of interest exists, Dowd and Bennett will have to demonstrate that *all* four parts of Rule 4-1.7(b) are met in order for there to not be a conflict of interest. As this Motion will show, Dowd and Bennett cannot hope to meet this burden. Therefore, the Court should grant State's Motion to Disqualify Defense Counsel James Bennett and Dowd and Bennett.

I. THE REPRESENTATION OF THE DEFENDANT IN HIS CRIMINAL MATTER AGAINST THE STATE IS DIRECTLY AVERSE TO REPRESENTING THE STATE IN THE CONFIDE MATTER.

The representation of the State in the Confide matter is clearly directly adverse to the simultaneous representation of Defendant in this criminal proceeding against the State. Comment 6 to the Rule explains "directly adverse" as, "a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, **even when the matters are wholly unrelated**." MO R BAR Rule 4-1.7 (emphasis added).

In this case, Dowd and Bennett acted as advocate in this matter against the State while at the same time representing the State in the Confide matter. This, by itself, would be enough to form a conflict of interest under Rule 4-1.7. *See id.* ("even when the matters are wholly unrelated"); *see also Commonwealth Land Title Ins. Co. v. St. Johns Bank & Tr. Co.*, No. 408CV1433CAS, 2009 WL 3069101, at *5 (E.D. Mo. Sept. 22, 2009) ("Even though the simultaneous representations may have nothing in common, and there is no risk that confidences to which counsel is a party in the one case have any relation to the other matter, disqualification may nevertheless be required.").

However, providing further support for the existence of a conflict of interest, these matters are indisputably *related.* In the Confide lawsuit, Dowd and Bennett represented Defendant *qua* State in a lawsuit over the use of Confide since it "automatically destroys text messages, after the messages have been read, leaving no record or trace of the message exchange." Exhibit 1 at 3. In the instant matter, Defendant is charged with having "knowingly photographed" the victim and then having "subsequently transmitted the image." Indictment at 1. Thus, the application Confide is at the very heart of both matters. On information and belief, Confide is one of the applications that Defendant used to violate Missouri's Invasion of Privacy

law. The quintessential reasons for using an application like Confide is to exchange messages and photographs which one does not want others to see. The law maintains that dual representations do not have to be related in the slightest to be considered "directly adverse." Inasmuch as the dual representations are intimately related in matter at bar, Dowd and Bennett's representation of both the State and Defendant in a proceeding against the State is, *a fortiori* "directly adverse.": The question exists, if Dowd and Bennett as representatives of the State were aware evidence that the photograph of KS had been erased by the Confide or a similar application, would they have had an obligation to disclose that to their client, the State? This is the ethical conundrum created with, Dowd and Bennett's representing the State and being directly adverse to the State.

Hamilton v. City of Hayti is illustrative that the representations in this case constitute a conflict of interest. In this strikingly similar case, an attorney represented both a plaintiff suing the city of Hayti and the mayor in a criminal matter. *See Hamilton v. City of Hayti*, No. 1:14-CV-109 CEJ, 2014 WL 7157329 (E.D. Mo. Dec. 15, 2014). The city challenged this dual representation arguing that "confidential communications . . . concerning litigation strategies and other information" could be exchanged. *Id.* at *2. Applying Missouri Supreme Court Rule 4-1.7, the federal court ruled that "[t]he existence of an ongoing attorney-client relationship raises an **irrebuttable presumption that confidences are disclosed.**" *Id.* at *3 (emphasis added). The Court therefore ruled that "[t]o protect the principles of confidentiality and loyalty and integrity of these proceedings, therefore, **it is necessary to disqualify plaintiff's counsel.**" *Id.* (emphasis added).

The same logic applies here. Dowd and Bennett's represented the State in a lawsuit over Confide. There is an **irrebuttable presumption** that confidences regarding this matter were

disclosed in the course of representing the State. For over two months this irrebuttable presumption obtained. While receiving this confidential information, Dowd and Bennett was also representing Defendant in a matter where this information could be useful. Therefore, the Court should disqualify Dowd and Bennett.[2]

Further support is provided by *Process Controls Intern, Inc. v. Emerson Process Mgmt.*, No. 4:10CV645 CDP, 2011 WL 1791714 (E.D. Mo. May 10, 2011). In this additional, strikingly similar case, the plaintiff sought to disqualify Glenn Davis and the firm Gallop Johnson (collectively "Davis") who were representing the defendant. *See id.* at *3. In support of their claim they showed that another attorney at the firm represented plaintiff from January 2009 through December 2010. *See id.* Meanwhile, plaintiff showed that the complaint was filed in April 2010 and they provided evidence that Davis entered appearances on behalf of defendant Emerson in May 2010. *See id.* They further demonstrated that Davis had filed motions to dismiss the plaintiff's case during the concurrent conflict of interest. *See id.*

Similar to the instant case, the concurrent conflict of interest in *Process* was not discovered until after the dual representation had ceased to exist. It was not until March of 2011, at least 3 months after the last time the firm represented both parties that the conflict was discovered. *See id.* at *3. Similarly, here, the Circuit Attorney's Office only discovered the conflict of interest once Dowd and Bennett announced that they would be stepping down from representing Defendant *qua* State in the Confide matter. Predictably, in *Process*, the Defendant

[2] Even if it was only James Bennett who was hired to represent Defendant *qua* State, Missouri law is clear that this bars his entire law firm from engaging in work which would be a conflict of interest for him. *See* MO R BAR Rule 4-1.10 ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 4-1.7 or 4-1.9"); *see also Commonwealth Land Title Ins. Co. v. St. Johns Bank & Tr. Co.*, No. 408CV1433CAS, 2009 WL 3069101, at *4 (E.D. Mo. Sept. 22, 2009) ("The rule is based on the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client" and "the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated") (internal quotations omitted).

argued that Rule 4-1.7 did not apply because, by the time the claim was raised, there was no longer a concurrent conflict of interest. *See id.* They further argued that Davis only billed Defendant for 3.9 hours during that time. *See id.* at 4. The court disagreed and ruled that Rule 4-1.7 did nonetheless apply. The Court ruled that this was a concurrent conflict of interest covered by Rule 4-1.7 since, at some concurrent point, the "firm actually represented both Automation and Emerson during this litigation." *Id.* at 5. Therefore, the Court ruled that "this concurrent representation is prohibited by the Rules of Professional Conduct and subjects Davis and the Gallop Law Firm to disqualification." *Id.*

Process unequivocally demonstrates that there is a conflict of interest in this case. From January of 2018 through March 2018, Dowd and Bennett represented both the State and Defendant in a proceeding against the State. Therefore, like the courts in *Process* and *Hayti*, the Court should grant the State's Motion to Disqualify Defense Counsel.

What is striking here is that James Bennett and Dowd and Bennett were involved in the *Process* litigation. James Bennett and Dowd and Bennett were listed as co-counsel, with Davis, representing the defendant in that case. Dowd and Bennett watched as their co-counsel was disqualified for having a concurrent conflict of interest. Dowd and Bennett witnessed, first hand, how Missouri courts view conflicts of interest. Yet, for over two months they ignored this glaring conflict of interest. They filed a motion to dismiss in the instant case as well as several other motions, all while knowing that a conflict of interest existed. Dowd and Bennett knew that this was grounds for disqualification yet failed to act accordingly. Therefore, the Court should grant the State's Motion and disqualify Defense Counsel, James Bennett and Dowd and Bennett.

"[W]hen it is apparent that a conflict of interest exists that threatens a breakdown of the adversarial process, courts have the inherent power and duty to intervene." *State v. Planned*

Parenthood of Kansas, 66 S.W.3d 16, 20 (Mo. 2002). Allowing counsel to sneer in the face of conflict of interest rules certainly threatens the adversarial process. James Bennett is a partner of a respected law firm that certainly has conflict of interest checks in place. Dowd and Bennett was further a part of the *Process* litigation where it saw its co-counsel disqualified for the same violation of Missouri ethical rules. Therefore, "the public's interest in maintaining the fairness and integrity of the judicial process" and the State's interest in "a trial free from the risk that confidential information has been unfairly used" demands disqualification in this case. *Hallmark Cards, Inc. v. Hallmark Dodge, Inc.*, 616 F. Supp. 516, 521–22 (W.D. Mo. 1985) (internal quotations omitted).

II. DEFENSE COUNSEL FAILS TO MEET ALL FOUR OF THE ELEMENTS IN 4-1.7(b) NECESSARY TO ALLOW A LAWYER TO REPRESENT A CLIENT NOTWITHSTANDING A CONCURRENT CONFLICT OF INTEREST.

"[I]n all but a few cases, a per se rule of disqualification exists." *Commonwealth*, 2009 WL 3069101, at *5. Per Rule 4-1.7 a lawyer involved in a concurrent conflict of interest can withstand disqualification only by meeting *all* four of the factors in Rule 4-1.7(b). If Dowd and Bennett fails to meet any of the four, then the Court should disqualify them. As the succeeding sections will show, Dowd and Bennett cannot hope to do so. However, even if the Court finds that Dowd and Bennett does, when taking into account Dowd and Bennett's flagrant violation of the Rule the court should use its "inherent power and duty to intervene" and disqualify Dowd and Bennett. *Planned Parenthood*, 66 S.W.3d at 20.

A. Dowd and Bennett could not have reasonably believed that they could provide competent and diligent representation to each affected client.

From January of 2018 through March 12, 2018, Dowd and Bennett represented both parties – the State and Defendant. This is a textbook conflict of interest. It appears as though

Dowd and Bennett had an interest extrinsic to its professional obligation in representing Defendant Eric Greitens. Significantly, Dowd and Bennett's representation of Defendant *qua* State was on a pro-bono basis. *See* Kurt Erickson, St. Louis Post-Dispatch, *Greitens' Attorneys In Lawsuit Over Use Of Message-Destroying App Withdraw From Case*. This representation was at odds with Dowd and Bennett's own, articulated pro bono practices, which suggests personal reasons for the representation.[3] Despite the foregoing, on March 12, 2018, Dowd and Bennett announced that the firm would no longer represent Defendant in the Confide matter. *See id.* In its place, a new firm was hired to represent Defendant in that matter.[4] *See id.*

There is one obvious reason why Dowd and Bennett withdrew as counsel: counsel realized that it could not provide competent and diligent representation to each affected client. Defendant's spokesperson claimed that Dowd and Bennett withdrew due to the Attorney General's investigation having reached its completion and that Dowd and Bennett was only hired to defend Defendant from the Attorney General's probe. *See* Kurt Erickson, St. Louis Post-Dispatch, *Greitens' Attorneys In Lawsuit Over Use Of Message-Destroying App Withdraw From Case*. This is factually inaccurate. The Appointment Letter states that "At the request of the Office of the Governor, on January 5, 2018, the Attorney General's Office authorized Mr. James Bennett of Dowd and Bennett LLP to represent Governor Greitens and members of his

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[3] One would hope that free legal services to help the governor of Missouri is not what Dowd and Bennett intends to count towards its pro bono hours commitment in the 2018 Hon. Richard B. Teitelman Memorial St. Louis Pro Bono Challenge. *See* https://www.bamsl.org/index.cfm?pg=ProBono. Per the Pro Bono Challenge Announcement Letter, co-signed by Ed Dowd, it appears that pro bono hours are intended to be used to help "low income litigants," "small business owners," people "who cannot obtain effective legal representation either because of insufficient financial resources or lack of knowledge," and "pro-se litigants." *See https://s3.amazonaws.com/membercentralcdn/sitedocuments/bamsl/bamsl/0136/826136.pdf?AWSAccessKeyId=0D2JQDSRJ497X9B2QRR2&Expires=1521512103&Signature=odaz8aLwMP4kBAnIMrvyPpE3NM4%3D&response-content-disposition=inline%3B%20filename%3D%222018ProBonoChallengeLetter%2Epdf%22%3B%20filename%2A%3DUTF-8%27%272018ProBonoChallengeLetter%252Epdf.*

[4] The Circuit Attorney's office presumes this means that James Bennett is no longer representing Defendant either in the Confide matter.

administration sued in their *official* capacities in the matter *Sansone et al. v. Greitens, et al.*" Exhibit 2 at 1 (emphasis in original); *see also* Exhibit 3 (filings in *Sansone* case showing various actions by Attorneys Gore, Hoops, and Hoppenjans who are all employed by Dowd and Bennett, LLP); Exhibit 4 (motion in *Sansone* case filed under Dowd and Bennett's name). It strains credulity and assaults common sense to suggest that the firm Dowd and Bennett was not representing the State qua State. The clear misrepresentation that Dowd and Bennett was representing Defendant in the Confide matter, in his personal capacity only, appears only to make sense in an effort to avoid the force of this very conflict of interest argument.

Plainly, Dowd and Bennett could not provide competent and diligent representation to each client. On the one hand, they were representing the State, privy to all of the State's resources, discovery, and testimony regarding Confide. On the other hand, they represented Defendant against the State in a case where, as explained above, Confide an essential part of the case. Recognizing this tension, Dowd and Bennett withdrew from the Confide matter. However, they withdrew more than two months too late. For over two months they had access to State resources. When a conflict of interest exists, "Courts *presume* that confidential disclosures have been made." *See, e.g.*, *Hallmark*, 616 F. Supp. at 519–20.

Dowd and Bennett cannot meet its burden of proving that it could have reasonably believed that it could provide competent and diligent representation to both the State and the State's opposition. There is too much overlap between the two cases for any reasonable lawyer to think that he could do so. This is evidenced by Dowd and Bennett's decision to withdraw from the case and the subsequent misrepresentations made by Defendant's spokesperson regarding the reasons for withdrawal. Because Dowd and Bennett cannot hope to demonstrate that a reasonable lawyer would have thought he or she could provide competent and diligent representation to both

clients in such cases, Dowd and Bennett cannot meet this first of four factors all necessary to avoid disqualification. Moreover, Defendant has other counsel who are certainly in a position to provide competent and diligent representation. *See United States v. Anderson*, No. 4:14CR00246AGF (NAB), 2016 WL 194081, at *9 (E.D. Mo. Jan. 14, 2016) (ruling that new counsel could provide competent and diligent representation while here Defendant already has a team of non-conflicted lawyers in place). Therefore, the Court should grant the State's Motion to Disqualify Defense Counsel James Bennett and Dowd and Bennett.

B. This representation was prohibited by law.

At this point there is no need to demonstrate that Dowd and Bennett cannot satisfy the other three factors under Rule 4-1.7(b). Dowd and Bennett has the burden of proving *all* 4 and as just shown it cannot satisfy its burden as to the first factor. Nonetheless, the State will demonstrate that Rule 4-1.7(b)(1) is not the only factor that Dowd and Bennett cannot meet.

"[A] lawyer may not undertake representation that will require cross-examination of another client as an adverse witness." *Hamilton*, 2014 WL 7157329, at *4. In this case, Confide reasonably may become a keystone issue. At trial, Dowd and Bennett might be required to cross-examine State witnesses, such as investigators, about Confide. When Bennett signed on to represent Defendant in his personal capacity in this criminal matter, he undertook representation that would require him to cross-examine his other client, the State, about Confide. There was a just completed investigation into Defendant's practices in using Confide. Surely, State witnesses could testify about Defendant's use of Confide, which would require Dowd and Bennett to cross-examine them. This is unlawful. Therefore, Dowd and Bennett's dual representation was prohibited by law. Accordingly, even if the Court finds that they reasonably could have believed that they could provide competent and diligent representation to both adverse parties, Dowd and

Bennett fails to meet the second prong. Accordingly, the Court should grant the State's Motion to Disqualify Defense Counsel James Bennett and Dowd and Bennett.

There was no informed consent.

In addition to being unable to meet 4-1.7(b)(1) and (2), Dowd and Bennett cannot meet 4-1.7(b)(4). Of course, the failure to meet any one of them necessitates disqualification due to the concurrent conflict of interest. This is the third of four necessary conditions that Dowd and Bennett fails to meet.

The State's consent was necessary to avoid disqualification as a result of the concurrent conflict of interest. Under Missouri Rule 4-1.7, consent must be clearly given by all affected parties.

Dowd and Bennett's only possible argument for consent is the January 11, 2018, letter from the First Assistant and Solicitor of the Attorney General's Office to Defendant, James Bennett, and Dowd and Bennett. The letter stated:

> Based on public statements made by James Bennett of the Dowd and Bennett firm that have been reported in the media, it appears that this same firm also represents Governor Greitens and/or his wife in their individual capacities relating to recently reported allegations of personal misconduct by the Governor. We understand this law firm is also representing the Governor and/or members of his staff in connection with this Office's ongoing inquiry into their record-retention and open-records practices related to the publicly reported use of the "Confide" app.

Exhibit 2 at 2. Based on this letter, Dowd and Bennett has no legitimate argument that consent was given by the State.

First, there is no consent from the St. Louis Circuit Attorney's Office. No Missouri precedent reasonably stands for the proposition that the State Attorney General, let alone the First Assistant and Solicitor of the Attorney General's Office, could feasibly consent on behalf of the Circuit Attorney's Office. Not only are the Attorney General and the Circuit Attorney

different entities with different jurisdictional reach, but the Attorney General has no special statutory power to consent on behalf of the Circuit Attorney.[5] To illustrate, the Attorney General had no special insight into the workings of the St. Louis Circuit Attorney's Office. The Attorney General did not know if charges would be brought, and if they were, under what statutes and facts. It simply makes no sense to assert that, in such a circumstance, the Attorney General would have the power to consent on behalf of the Circuit Attorney.

Second, even if the Attorney General could for some reason consent on the behalf of a completely different office (i.e., the Circuit Attorney), Dowd and Bennett cannot reach the high burden of proving that the State gave informed consent, both under clear statutory language and Missouri common law.

Rule 4-1.0(e) defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." MO R BAR Rule 4-1.0. The lawyer, in this case Dowd and Bennett, bears the burden to "make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision." MO R BAR Rule 4-1.0 cmt. 6. There is no evidence to show that Dowd and Bennett made reasonable efforts to ensure that the State possessed reasonably adequate information.

The comments further elaborate that "ordinarily, **this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material**

[5] Unlike in other states, the Missouri Attorney General does not have the authority to step in and take over investigation from the Circuit Attorney's Office. *See* Mo. Ann. Stat. § 27.030 (West); *see also State v. Steffen*, 647 S.W.2d 146, 153 (Mo. Ct. App. 1982). In fact, the Missouri Attorney General has virtually nothing to do with the Circuit Attorney's Office.

advantages and disadvantages of the proposed course of conduct, and a discussion of the client's or other person's options and alternatives." MO R BAR Rule 4-1.7 cmt. 6 (emphasis added). In other words, simple awareness or acknowledgment of a conflict is not enough to constitute informed consent. Discussion of the facts, circumstances, advantages, and disadvantages is absolutely necessary. Dowd and Bennett cannot show that any discussion, let alone one regarding the material advantages and disadvantages of the conflict of interest, took place between Dowd and Bennett and the State. Therefore, under Rule 4-1.0, the State has not given informed consent.

Missouri case law further demonstrates the high standard of proof that Dowd and Bennett must reach in order to prove informed consent was given. *See generally In re Weier*, 994 S.W.2d 554, 558 (Mo. 1999); *see also Shaffer v. Terrydale Management Corp.*, 648 S.W.2d 595 (stating that attorney must expressly tell client about his adverse interest); *see generally Morton v. Forsee*, 155 S.W. 765, 775 (Mo. 1913). In Missouri, informed consent can only be obtained "after a full disclosure of the facts." *In re Schaeffer*, 824 S.W.2d 1, 3 (Mo. 1992). In order to prove full disclosure, the attorney "must prove by clear proof that his adverse interest was disclosed to the client and was **perfectly understood**." *In re Weier*, 994 S.W.2d 554 at 558 (quoting *Portman v Madesco*, 760 S.W.2D 457 (Mo. App. 1988)) (emphasis added). Thus, in order to show informed consent was given, Dowd and Bennett must show that they first disclosed their adverse interest and that it was "perfectly understood." *In re Weier*, 994 S.W.2d 554 at 558. In order to waive conflict of interest, all affected parties must give "knowing, intelligent, and voluntary" consent. *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729 (Mo. 2004) (quoting *In re Schaeffer*, 824 S.W.2d 1 at 3). Even in cases where conflict of interest was more technical than actual, "representation of adverse interests could be

only **after full and complete disclosure and with express consent of all parties concerned.**" *Acorn Printing Co. v. Brown*, 385 S.W.2d 812, 817 (Mo. App. 1964) (Emphasis added).

Dowd and Bennett has no basis upon which it can posit that the Attorney General "perfectly understood" Dowd and Bennett's adverse interest, which forms the basis any claim of informed consent. In *In re Weier,* an attorney represented a partnership of doctors who owned a medical device that was leased to a corporation in which the attorney was a shareholder. *In re Weier*, 994 S.W.2d 554, 555. Thus, the attorney had a conflict of interest in that his financial interest in the corporation conflicted with his representation of the doctors. Id at 555. As in the case at hand, there was some evidence to suggest that some of the affected parties were aware of the conflict. Id. at 556. However, the court held that the attorney did not reach the standard necessary to meet full disclosure, because the conflict of interest was "never clearly defined" and Mr. Weier "remained idle where confusion regarding his representation persisted." Id. at 557. The same logic should follow in the case at hand. Mere awareness of a conflict, as demonstrated by the letter from the Attorney General's Office, is simply not enough to constitute disclosure. Without this disclosure, the claim for informed consent fails completely.

It is obvious that the Attorney General cannot consent on behalf of the Circuit Attorney. Regardless, there was no informed consent rising to the level necessary to withstand disqualification for a concurrent conflict of interest. There is no evidence that there was communication in which Dowd and Bennett explained all of the advantages and disadvantages of the dual representations. There is similarly no evidence that the adverse interest was perfectly understood. In fact, because the Attorney General was not privy to the Circuit Attorney's knowledge and decision-making it is impossible for him to have perfectly understood the extent of the adverse interest. Therefore, this is yet another element which Dowd and Bennett cannot

meet. Therefore, Dowd and Bennett has no hope of being a rare exception to disqualification in the case of a concurrent conflict of interest.

It is overwhelmingly clear that a concurrent conflict of interest existed. It is equally clear that Dowd and Bennett cannot hope to meet *all* four of the elements which can justify non-disqualification. When considering the issue in light of Bennett's open flouting of Missouri's conflict of interest law, it is unambiguous that disqualification is the proper remedy in this case. Therefore, the Court should grant the State's Motion to Disqualify Defense Counsel James Bennett and Dowd and Bennett.

III. EVEN IF THE COURT FINDS THAT THERE WAS NO CONCURRENT CONFLICT OF INTEREST, DOWD AND BENNETT VIOLATED ITS DUTIES TO A FORMER CLIENT BY REPRESENTING THE DEFENDANT IN THIS LITIGATION AND THEREFORE MUST BE DISQUALIFIED.

As persuasively shown above, James Bennett violated Rule 4-1.7 since him and his firm, Dowd and Bennett, had a concurrent conflict of interest with the State while representing Defendant in this proceeding against the State. Furthermore, Dowd and Bennett cannot meet all four elements of Rule 4-1.7(b), which would allow the Court to not disqualify Dowd and Bennett. Therefore, disqualification based on Rule 4-1.7 is the proper route for this Court to take.

Moreover, the court in *Process* unequivocally proved that even if the concurrent conflict of interest is no longer happening, as long as there was a concurrent conflict at some point in the litigation, Rule 4-1.7 applies. *See Process*, 2011 WL 1791714 at *5. However, even if the Court declines to apply the *Process* precedent, Dowd and Bennett must still be disqualified.

Pursuant to Rule 4-1.9 of the Missouri Supreme Court Rules of Professional Conduct, an attorney may not represent a new client whose interests in "the same or a substantially related matter" are "materially adverse" to the interests of a former client. Mo. S. Ct. R. Prof. Conduct

4-1.9(a); *see also Polish Roman Catholic St. Stanislaus Parish v. Hettenbach*, 303 S.W.3d 591, 600 (Mo. Ct. App. 2010) (same). Rule 4-1.9(a) is "prophylactic, aimed at "preventing even the potential that a former client's confidences and secrets may be used against him." *Zerger & Mauer LLP v. City of Greenwood*, 751 F.3d 928, 932 (8th Cir. 2014) (citing *In re Carey*, 89 S.W.3d 477, 493 (Mo. 2002)); *see also Fant v. City of Ferguson*, No. 4:15-CV-00253-AGF, 2017 WL 3392073, at *3 (E.D. Mo. Aug. 7, 2017) (same).

Attorney disqualification is granted under this rule when: (1) an attorney had a former attorney-client relationship with the movant; (2) the interests of the attorney's current client are materially adverse to the movant's interests; and (3) the current representation involves the same or a substantially related matter as the attorney's former representation of the movant. *Id.* at 600-601. Like Rule 4-1.7, informed consent, confirmed in writing, is an exception to Rule 4-1.9. Dowd and Bennett's concurrent representation of the State in the Confide case, and of Defendant in this case, easily meet these three prongs, and, since there was no informed consent, the Court should grant the State's Motion to Disqualify Defense Counsel James Bennett and Dowd and Bennett.

A. An attorney-client relationship existed between the State and Dowd and Bennett.

As explained above, Dowd and Bennett had an attorney-client relationship with the State of Missouri. He represented Defendant in his official capacity as Governor of Missouri in the *Sansone* lawsuit. *See, e.g.*, *Williston*, 536 S.W.3d at 336 ("a suit against a state official acting in

his or her official capacity is no different than a suit against the state itself.").[6] Therefore, the first prong of this test is easily satisfied.

B. The State's interest is materially adverse to Dowd and Bennett's current client's interest.

Whether a former client and current client have "materially adverse" interests is "not a difficult question" when two clients are "directly involved" in the same litigation. *See Zerger & Mauer LLP v. City of Greenwood*, 751 F.3d 928, 933 (8th Cir. 2014) (quoting *Simpson Performance Prods., Inc. v. Robert W. Horn, P.C.*, 92 P.3d 283, 288 (Wyo.2004)). Here, the conflict is obvious: Dowd and Bennett's former client in the Confide case, the State, is pursuing criminal charges against Dowd and Bennett's new client, Defendant. Because both clients are directly involved in the current litigation, the second prong is also easily met.

Moreover, under this second prong, a key aspect is to "evaluate the degree to which the current representation may actually be harmful to the former client." *Id.* (internal quotations omitted). Here, the current representation of Defendant directly harms the former client, namely, the State. The State is attempting to prove Defendant's guilt. Dowd and Bennett is trying to impede the State's efforts, as the defense is obligated to do. Thus, Dowd and Bennett's instant representation injures his former client by definition.

C. The matters are substantially related.

Finally, because the Confide application plays a significant role in both cases, the two are "substantially related." Matters are considered substantially related if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially

[6] "Payment for legal services is not a prerequisite to the formation of an attorney-client relationship." *Polish Roman Catholic St. Stanislaus Par. v. Hettenbach*, 303 S.W.3d 591, 601 (Mo. Ct. App. 2010).

advance the client's position in the subsequent matter. Mo. S. Ct. R. Prof. Conduct 4–1.9, Cmt. 3. To obtain disqualification, only the "*possibility*, or appearance of the possibility that the attorney *may have* received confidential information during the prior representation" is necessary. *See In re Carey*, 89 S.W.3d 477, 492 (Mo. 2002) (emphasis added). As explained previously, issues involving Defendant's use of Confide are at the heart of both cases. While representing the State in the Confide case, there is little question that Dowd and Bennett was privy to information pertaining to Defendant's use of Confide. This is precisely the type of information that could be used to aid Dowd and Bennett's defense of Defendant in this case. Thus, there is a very strong "possibility" that Dowd and Bennett received information that could be used to aid Defendant. Therefore, even if the Court rules that there was not a concurrent conflict of interest, the Court should still disqualify Dowd and Bennett under Rule 4-1.9.

C. There was no informed consent.

As explained above, there was no consent to this conflict of interest. Therefore, this section will provide just a quick summary. *First*, the Attorney General cannot consent on behalf of the Circuit Attorney. *Second,* Dowd and Bennett cannot prove that he made reasonable efforts to make sure the Attorney General possessed enough information, including that he understood the advantages and disadvantages of the decision. Moreover, the Attorney General must have perfectly understood the adverse interest. Not only is there no proof that this occurred, but since the Attorney General did not know what was happening in the Circuit Attorney's Office it was simply impossible for him to have perfectly understood the situation. Therefore, there was no consent to this dual representation.

The interconnectedness of material issues between the Confide case and this litigation, most importantly Defendant's role and usage of the Confide application, is undeniable. This

Court has a duty to disqualify Dowd and Bennett if there is even the appearance of the possibility that Dowd and Bennett received confidential information from its representation of the State. *See Carey*, 89 S.W.3d at 492. The facts here overwhelmingly satisfy all three elements required to disqualify counsel under Rule 4-1.9. When, like here, a substantial relationship is found the Court "presume[s] that confidences were disclosed for conflict of interest purposes." *Id.* Similarly, it is clear that the high burden necessary for consent cannot be met here. Therefore, even if the Court rules that there was no concurrent conflict of interest, in order to ensure the integrity of this litigation and to prevent further violation of Dowd and Bennett's duties to its former client, the State, the Court should disqualify Dowd and Bennett as Defendant's Counsel for violating Rule 4-1.9 Duties to Former Clients.

CONCLUSION

For all the foregoing reasons, the State respectfully asks this Honorable Court to GRANT the State's Motion to Disqualify Defense Counsel James Bennett and Dowd and Bennett.

Respectfully submitted,

/s/KIMBERLY M. GARDNER
KIMBERLY M. GARDNER #56780
CIRCUIT ATTORNEY OF THE
CITY OF ST. LOUIS

Ronald S. Sullivan Jr.
Special Prosecutor

/s/Robert Steele
Robert Steele #42418
Assistant Circuit Attorney
steeler@stlouiscao.org
1114 Market St., Rm. 230
St. Louis, MO 63101
314-622-4941

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

BEN SANSONE, on behalf of
THE SUNSHINE PROJECT

Plaintiff,

v.

ERIC GREITENS, Governor of Missouri

Serve:
Office of the Governor
State Capitol Building, Room 218
Jefferson City, Missouri 65102

and

MICHELLE HALLFORD, Custodian of
Records for Missouri Governor Greitens

Serve:
Office of Administrator
301 West High Street, Room 270
Jefferson City, Missouri 65101

and

JOHN DOES 1 through 20.

Defendants.

JURY TRIAL DEMANDED

PETITION SEEKING INJUNCTION AGAINST MISSOURI GOVERNOR ERIC GREITENS AND HIS STAFF FROM USING COMMUNICATION PURGING SOFTWARE AND CLAIM FOR CONSPIRACY AND DAMAGES FOR VIOLATING MISSOURI'S SUNSHINE LAWS AND MISSOURI'S STATE AND LOCAL RECORDS LAW

1. The use of automatic communication destroying software by elected officials and government employees is illegal and constitutes an ongoing conspiracy to violate the Missouri

Sunshine law and Missouri State and Local Records law, not to mention a significant affront to the open government and democratic traditions of Missouri and the United States.

2. Pursuant to §109.270 RSMo "all records made or received by or under the authority of or coming into the custody, control or possession of state or local officials in the course of their public duties are the property of the state or local government and *shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of*, in whole or in part, except as provided by law." (emphasis added)

3. The use of automatic communication destruction software, like *Confide*, violates both Missouri's State and Local Records law and the Missouri Sunshine Act.

4. Defendants' failure (and/or inability) to provide access to the requested records and defendant's alleged use of automatic communication destroying software constitute knowing and purposeful violations of the Sunshine Law and Missouri's State and Local Records Laws.

5. This action is brought pursuant to the Missouri "Sunshine Law", Chapter § 610 of the Missouri Revised Statutes and Missouri "State and Local Records Law" Chapter §109 of the Missouri Revised Statutes.

6. This Court has jurisdiction over this action pursuant to § 610.010, RSMo. *et seq*.

7. This Court has jurisdiction to issue injunctions to enforce provisions of the Sunshine Law pursuant to § 610.030, RSMo and Chapter § 109 RSMo.

8. Venue for this action is proper in this Court pursuant to Mo. Rev. Stat. § 610.027(1), as the principal place of business for the governor of the State of Missouri is Cole County, Missouri.

9. Plaintiff Ben Sansone is a resident of the state of Missouri.

10. Defendant Eric Greitens is being sued in his official capacity as the governor of the state of Missouri.

11. Defendant Michelle Hallford, being sued in her official capacity, is the custodian of records for the governor responsible for the maintenance of the governor's records and for making such documents available for inspection and copying pursuant to Mo. Rev. Stat. § 610.023.

12. Defendants John Does 1 through 20 are staff of the governor or employees of the state of Missouri otherwise governed by the Sunshine Act and/or State and Local Records Law and are alleged to have automatically destroyed government communications while employed by the state of Missouri.

13. On December 7, 2017, the Kansas City Star reported that Gov. Eric Greitens and his senior staff use a mobile phone application *Confide* that automatically destroys text messages, after the messages have been read, leaving no record or trace of the message exchange, raising concerns that these actions violated Missouri Sunshine laws.[1]

14. On December 20, 2017, Plaintiff Ben Sansone submitted a written Sunshine request, by and through counsel, Mark Pedroli, upon the custodian of records for Defendant Governor Eric Greitens seeking documents related to the governor's alleged use of text message and communication destroying software, download and use logs, and retention policies.

15. On the same day, December 20, 2017, Missouri Attorney General Josh Hawley also announced an inquiry into the matter.

16. Pursuant to § 610.023(3) RSMo, the custodian of records for the Governor had three business days in which to act upon the Sunshine request. On December 26, 2017, Sarah Madden,

[1] http://www.kansascity.com/news/politics-government/article188405944.html

Special Counsel for Governor Greitens, mailed a letter in reply that stated, in part, that she "would be able to provide a response or a time and a cost estimate (if applicable) for records you have requested in no more than twenty business days. We will contact you at that time."

17. Pursuant to Mo. Rev. Stat 610.023(3) "If access to the public record is not granted immediately, the custodian shall give a detailed explanation of the cause for further delay and the place and earliest time and date that the record will be available for inspection".

18. Special Counsel's letter didn't give any explanation, let alone a statutory "detailed explanation" of the cause for further delay. In fact, by responding that she "would be able to provide ***a response***" a full month later, she is suggesting, quite accurately, that her first response was really not a response at all, and certainly not a legally sufficient Sunshine response.

19. In fact, the Special Counsel's letter didn't even commit to the notion that Plaintiff would in fact ultimately be granted access to the requested records. This vague and non-responsive response, lacking in any explanation, is a facial violation of the Sunshine law and constitutes a de facto denial of access.

20. Therefore, Defendant governor and Defendant custodian of records is in violation of Mo. Rev. Stat 610.023(3) and (4).

21. The information and documents requested by Plaintiff are open records.

COUNT I: IMMEDIATE INJUNCTION AGAINST ALL DEFENDANTS

22. Plaintiff incorporates by reference and restates allegations 1 through 21 above.

23. The CLEAR AND IMMEDIATE interests of the State of Missouri and its citizens demand this court issue an IMMEDIATE INJUNCTION enjoining the governor, his staff, and all employees of the governor's office from using the software *Confide* and/or any other automatic communication destruction software. FURTHEMORE, along with the injunction, it is

in the public interest for this court to ORDER ALL DEFENDANTS to provide an immediate accounting (within three days) of the names of all John Does and Missouri government employees who have used or were using text message and/or communication destroying software so that this court can fully understand the breadth of the document destruction.

24. AN IMMEDIATE INJUNCTION will prevent more government communications from being destroyed in violation of Missouri's "State and Local Records Law", Chapter 109, specifically §109.270 RSMo, and in violation of Missouri's "Sunshine Law", particularly those communications not yet destroyed in the period between the date of this lawsuit and this court's final judgment. *An immediate injunction has the potential to preserve thousands of government communications.* In the absence of an immediate injunction, potentially thousands of government communications and/or government property will be destroyed. The risk of harm and loss of government records clearly and significantly outweigh any possible prejudice to defendants of preventing them from destroying more government communications.

25. AN IMMEDIATE INJUNCTION will not prejudice the governor or his staff in any way whatsoever. In that respect, this request for injunctive action is rare. The governor's remedy is simple, as simple as it was for governors and staff members before them; to simply communicate through other advanced means of communications, including SMS or text messaging, emailing, and/or one of the many forms of communication that do not self-immolate like a Mission Impossible directive. The injunction will not harm, prevent, or slow down government communication. An injunction will prevent the immediate, automatic, and permanent destruction of government records.

COUNT II – VIOLATION OF MISSOURI'S SUNSHINE LAWS AGAINST THE GOVERNOR AND CUSTODIAN OF RECORDS

26. Plaintiff incorporates by reference and restates allegations 1 through 25 above.

27. On December 20, 2017, the custodian of records for the governor received an Sunshine Request from Ben Sansone, by and through his counsel, Mark Pedroli.

28. The governor and the custodian of records failed to provide access within three days, violating Mo Rev. Stat 610.023(3).

29. The governor and the custodian of records failed to provide a detailed explanation of the cause of delay, within three days, violating Mo. Rev. Stat 610.023(3).

30. Both violations were knowing and purposeful.

WHEREFORE, Plaintiff Ben Sansone respectfully requests that the Court enter judgment on Count I in his favor and against Defendants Custodian and Governor; find that these defendants acted knowingly and purposefully; award the maximum civil penalty for both blatant violations by the highest office in the state; award Plaintiff his reasonable attorneys' fees and costs incurred herein; and grant such other and further relief as this Court deems just and proper.

COUNT III: CIVIL CONSPIRACY TO VIOLATE MISSOURI'S SUNSHINE LAWS AGAINST ALL DEFENDANTS

31. Plaintiff incorporates by reference and restates allegations 1 through 30 above.

32. A claim for civil conspiracy must establish that: (1) two or more persons; (2) with an unlawful objective; (3) after a meeting of the minds; (4) committed at least one act in furtherance of the conspiracy; and (5) the plaintiff was thereby damaged. Gettings v. Farr, 41 S.W.3d 539, 542 (Mo. App. E.D. 2001) (citing Gibson v. Brewer, 952 S.W.2d 239, 245 (Mo. banc 1997).

33. It is alleged that the governor, Custodian, and John Does 1 through 20, by using automatic message destroying software, *conspired to prevent public access to public records* by automatically destroying said government records.

34. Potentially thousands of government communications that were knowingly and purposefully destroyed, including communications by Missouri Governor Eric R. Greitens.

WHEREFORE, Plaintiff Ben Sansone respectfully requests that the Court enter judgment on Count III in his favor and against all Defendants; award Plaintiff damages in an amount to be proven at trial; award Plaintiff his reasonable attorneys' fees and costs incurred herein; and grant such other and further relief as this Court deems just and proper.

COUNT IV: VIOLATION OF MISSOURI'S STATE AND LOCAL RECORDS LAW

35. Plaintiff incorporates by reference and restates allegations 1 through 34 above.

36. Pursuant to the State and Local Records Law, a "record" is defined as any "document, book, paper, photograph, map, sound recording or other material, regardless of physical form or characteristics, made or received pursuant to law or in connection with the transaction of official business" §109.210(5) RSMo. According to the Secretary of State, this definition includes those records created, used and maintained in electronic form.

37. The use of automatic communication destroying software is a violation of Chapter 109 of Missouri Revised Statutes.

38. Based on information and belief, troves of government records have been destroyed because of the actions of all Defendants.

WHEREFORE, Plaintiff Ben Sansone respectfully requests that the Court enter judgment on Count IV in his favor and against all Defendants; award Plaintiff damages in an amount to be proven at trial; award Plaintiff his reasonable attorneys' fees and costs incurred herein; and grant such other and further relief as this Court deems just and proper.

COUNT V: CIVIL CONSPIRACY TO VIOLATE MISSOURI'S STATE AND LOCAL RECORDS LAWS AGAINST ALL DEFENDANTS

39. Plaintiff incorporates by reference and restates allegations 1 through 38 above.

40. It is alleged that the governor, custodian of records, and John Does 1 through 20, by using automatic message destroying software, separate from their obligations under the Sunshine Act, also *conspired to destroy public records* in violation of Chapter 109 RSMo, the State and Local Records Law.

41. Potentially thousands of government communications were destroyed, in violation of Chapter 109 RSMo, including communications by Missouri Governor Eric R. Greitens.

WHEREFORE, Plaintiff Ben Sansone respectfully requests that the Court enter judgment on Count V in his favor and against all Defendants; award Plaintiff damages in an amount to be proven at trial; award Plaintiff his reasonable attorneys' fees and costs incurred herein; and grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

Mark J. Pedroli, MBE 50787
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314.669.1817
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ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

JOSHUA D. HAWLEY
ATTORNEY GENERAL

P.O. Box 899
(573) 751-3321

January 5, 2018

James F. Bennett
DOWD BENNETT LLP
7733 Forsyth Blvd., Suite 1900
St. Louis, Missouri 63105

Re: ***Sansone, et al. v. Greitens, et al.*, No. 17AC-CC00635 (Cole County Circuit Court)**

Dear Mr. Bennett:

This letter confirms your appointment, due to a potential conflict, to represent the defendants in the above-referenced case. This appointment extends only to the representation of those defendants in connection with that pending litigation, and not to any other matter.

A copy of this office's billing policy for outside counsel is enclosed, and its provisions are made a part of the terms for your appointment. Pursuant to that policy's provisions on staffing, we note that this appointment is of you personally and not an appointment of your firm; if you wish to use the assistance of other attorneys or paralegals in this matter, we require that they be approved as provided in the attached policy.

This letter confirms your billing rate of one hundred forty dollars ($140.00) per hour. Please direct all billing statements to me in the care of the Attorney General's Office.

Sincerely,

D. John Sauer
First Assistant and Solicitor

cc: Lucinda Luetkemeyer

ATTORNEY GENERAL OF MISSOURI

JOSHUA D. HAWLEY
ATTORNEY GENERAL

JEFFERSON CITY
65102

P.O. BOX 899
(573) 751-3321

January 11, 2018

Lucinda Luetkemeyer
Counsel to the Governor
Office of Governor Eric Greitens
(573) 751-0290
(573) 526-3291 (fax)
Lucinda.Luetkemeyer@governor.mo.gov

Re: *Sansone, et al. v. Greitens, et al.*, No. 17AC-CC00635 (Cole County Circuit Court) – Scope of representation and LEF coverage

Dear Ms. Luetkemeyer:

At the request of the Office of the Governor, on January 5, 2017, the Attorney General's Office authorized Mr. James Bennett of Dowd Bennett LLP to represent Governor Greitens and members of his administration sued in their *official* capacities in the matter *Sansone et al. v. Greitens, et al.*, No. 17AC-CC00635 in Cole County Circuit Court. This representation was authorized at the standard government rate of $140 per hour. That suit involves allegations of Sunshine Law violations by the Governor's Office. This Office authorized outside representation, at your request, because of this Office's own pending review of Sunshine Law violations allegedly committed by the Office of the Governor. Our letter authorizing outside counsel clearly stated that "[t]his appointment extends only to the representation of those defendants in connection with that pending litigation, and not to any other matter."

Based on public statements made by James Bennett of the Dowd Bennett firm that have been reported in the media, it appears that this same firm also represents Governor Greitens and/or his wife in their individual capacities relating to recently reported allegations of personal misconduct by the Governor. We understand this law firm is also representing the Governor and/or members of his staff in connection with this Office's ongoing inquiry into their record-retention and open-records practices related to the publicly reported use of the "Confide" app.

The purpose of this letter is to emphasize that the State Legal Expense Fund (LEF) will not cover any charges or expenses related to legal representation of the Governor in his *personal* capacity for personal matters. The Attorney General's Office will not authorize payment on any bills that appear to relate to such matters. We remind you and counsel to engage in careful separation and accounting of time and expenses incurred in these distinct representations, and to

ensure that no invoice submitted to the Attorney General's Office includes any charges that were not fairly and directly incurred in representing the defendants in *Sansone v. Greitens*.

Please let me know if you have any questions.

Sincerely,

D. John Sauer
First Assistant and Solicitor

cc: James Bennett, Dowd Bennett LLP

17AC-CC00635 - BEN SANSONE V ERIC R GREITENS ET AL (E-CASE)

Case Header | Parties & Attorneys | Docket Entries | Charges, Judgments & Sentences | Service Information | Filings Due | Scheduled Hearings & Trials | Civil Judgments | Garnishments/ Execution

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03/15/2018 **Hearing Scheduled**

Scheduled For: 04/06/2018; 3:00 PM ; JON EDWARD BEETEM; Cole Circuit

Hearing Held

Plaintiff by Atty Pedroli. Atty's Thompson and Russell enter for Defendant's/ Case set for argument on 04/06/2018 at 3 pm, 1 hour allowed. Attys Gore, Hoops & Hoppenjans granted leave to withdraw. Discovery due on 04/10/2018. /s/JEB/jw

Scheduled For: 03/15/2018; 8:45 AM ; JON EDWARD BEETEM; Cole Circuit

03/13/2018 **Cert Serv of Interrog Filed**

Cert of Serv Interrogatories to Gov Greitens and Custodian Hallford; Electronic Filing Certificate of Service.

Filed By: Mark Joseph Pedroli

On Behalf Of: BEN SANSONE

Response Filed

Response to Motion for Protective Order and Stay of Discovery; Exhibit A; Exhibit B; Electronic Filing Certificate of Service.

Filed By: Mark Joseph Pedroli

On Behalf Of: BEN SANSONE

03/12/2018 **Proposed Order Filed**

Proposed Order Granting Motion for Withdrawal of Counsel;Forwarded to Div I queue for Judge's review. msh

Filed By: JEFFREY SCOTT RUSSELL

PENGAD 800-631-6989 STATE'S EXHIBIT 3

Motion of Withdrawl of Counsel

Motion for Withdrawal of Counsel; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Entry of Appearance Filed

Entry of Appearance for Barbara Smith; Electronic Filing Certificate of Service.

Filed By: BARBARA ANNE SMITH

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Entry of Appearance Filed

Entry of Appearance; Electronic Filing Certificate of Service.

Filed By: JEFFREY SCOTT RUSSELL

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Entry of Appearance Filed

Entry of Appearance; Electronic Filing Certificate of Service.

Filed By: ROBERT M. THOMPSON

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Suggestions in Support

Suggestions in Support of Motion for Protective Order and to Stay Discovery; Exhibit A; Exhibit B; Exhibit C; Exhibit D; Exhibit E; Exhibit F; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Proposed Order Filed

Proposed Order Granting Motion for Protective Order and to Stay Discovery;Forwarded to Div I queue for Judge's review. msh

Filed By: JEFFREY ROBERT HOOPS

Motion to Stay

Motion for Protective Order and to Stay Discovery; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

03/07/2018 **Order Granting Leave**

By consent of all the parties, Plaintiff is granted leave to file their First Amended Petition. Defendants to file responsive pleading within 30 days of filing. Same deemed filed today. /s/JEB/jw

Filed By: JON EDWARD BEETEM

03/06/2018 **Certificate of Service**

Certificate of Service Interrogatories and Second Request for Admissions; Electronic Filing Certificate of Service.

Filed By: Mark Joseph Pedroli

On Behalf Of: BEN SANSONE

Consent to Ruling Filed

Amended Petition Consent order to file amended petition; Plaintiffs Amended Petition; Electronic Filing Certificate of Service.Forwarded to Div I queue for Judge's review. msh

Filed By: Mark Joseph Pedroli

On Behalf Of: BEN SANSONE

03/02/2018 **Notice of Hearing Filed**

Notice of Hearing; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

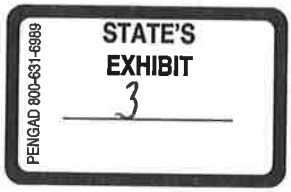
Conference Call Scheduled

Associated Entries: 03/15/2018 - Hearing Held

Scheduled For: 03/15/2018; 8:45 AM ; JON EDWARD BEETEM; Cole Circuit

Hearing Continued/Rescheduled

Hearing Continued From: 03/02/2018; 9:00 AM Case Review



02/16/2018 **Affidavit Filed**

Affidavit in Support of Motion to Dismiss; Exhibit 1; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Suggestions in Support

Suggestions in Support of Motion to Dismiss; Exhibit A; Exhibit B; Exhibit C; Exhibit D; Exhibit E; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Motion to Dismiss

Motion to Dismiss; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

02/13/2018 **Order for Continuance**

Consent motion is sustained. Defendants' Answer due 2/16/18. /s/JEB/msh

Filed By: JON EDWARD BEETEM

Associated Entries: 02/09/2018 - Motion for Continuance

02/09/2018 **Cert Serv of Prod of Docs, etc**

Certificate of Service Request for Production of Documents; Electronic Filing Certificate of Service.

Filed By: Mark Joseph Pedroli

On Behalf Of: BEN SANSONE

Motion for Continuance

Motion for Continuance of the Date on which Defendants Response to Plaintiffs Petition is Due; Affidavit in Support of Defendants Motion for Continuance; Electronic Filing Certificate of Service.

Filed By: GABRIEL E. GORE

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Associated Entries: 02/13/2018 - Order for Continuance

02/08/2018 **Cert Serv of Req for Admission**

CERTIFICATE OF SERVICE - RFA; Electronic Filing Certificate of Service.

Filed By: Mark Joseph Pedroli

On Behalf Of: BEN SANSONE

02/05/2018 **Case Review Scheduled**

Associated Entries: 03/02/2018 - Hearing Continued/Rescheduled

Scheduled For: 03/02/2018; 9:00 AM ; JON EDWARD BEETEM; Cole Circuit

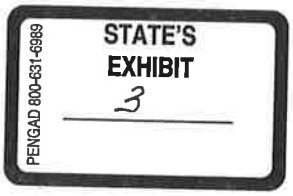
02/02/2018 **Judge/Clerk - Note**

Evidence taken by Court Reporter K. Asel on 2-2-18.

Hearing Held

Plaintiff by Atty Pedroli. Respondent by Atty Gore. Respondent by Hoppenjans. Parties present argument. Case set for status review on 03/02/2018 at 9 am. This is a law day docket only and not a day on which trials and hearings will be conducted. Counsel to arrange a telephone conference at least 72 hours prior to that date and time in lieu of appearance. The court does not conduct telephone conferences on law days. TRO denied on issue of irreparable injury. No other findings made. /s/JEB/jw

Scheduled For: 02/02/2018; 1:00 PM ; JON EDWARD BEETEM; Cole Circuit



02/01/2018 **Amended Affidavit Filed**

Amended Affidavit in Support of Suggestions in Opposition to Plaintiffs Motion for Temporary Restraining Order and Preliminary Injunction; Exhibit 1; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

01/31/2018

Entry of Appearance Filed

Entry of Appearance of Lisa S Hoppenjans on behalf of Eric Grietens and Michelle Hallford; Electronic Filing Certificate of Service.

Filed By: LISA SUZANNE HOPPENJANS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Hearing Scheduled

Associated Entries: 01/31/2018 - Case Review Held

Associated Entries: 02/02/2018 - Hearing Held

Scheduled For: 02/02/2018; 1:00 PM ; JON EDWARD BEETEM; Cole Circuit

Case Review Held

Plaintiff by Atty Pedroli. Respondent by Atty Gore. Co-Counsel Hoops for Respondent. Case reviewed. Case set for TRO HEARING ONLY on 02/02/2018 at 1 pm. Counsel to bring draft order, made in compliance with Rule 92 to hearing. /s/JEB/jw

Scheduled For: 01/31/2018; 2:00 PM ; JON EDWARD BEETEM; Cole Circuit

Response Filed

Response to Motion for Continuance; Electronic Filing Certificate of Service.

Filed By: Mark Joseph Pedroli

On Behalf Of: BEN SANSONE

01/30/2018

Affidavit Filed

Affidavit in Support of Suggestions in Opposition to Plaintiffs Motion for Temporary Restraining Order and Preliminary Injunction; Exhibit 1; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Suggestions in Opposition

Suggestions in Opposition to Plaintiffs Motion for Temporary Restraining Order and Preliminary Injunction; Exhibit A; Exhibit B; Exhibit C; Exhibit D; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Affidavit Filed

Affidavit in Support of Motion to Continue; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

Motion for Continuance

Motion to Continue; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

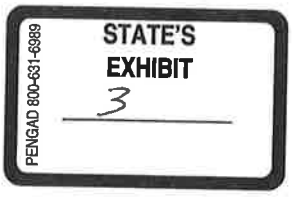
Hearing Scheduled

Associated Entries: 01/31/2018 - Case Review Held

Scheduled For: 01/31/2018; 2:00 PM ; JON EDWARD BEETEM; Cole Circuit

Amended Notice of Hrng Filed

Amended notice of hearing for Jan 31 2pm; Electronic Filing Certificate of Service.



Filed By: Mark Joseph Pedroli
On Behalf Of: BEN SANSONE

Affidavit in Support of Pet
Affidavit in support of TRO; Electronic Filing Certificate of Service.
Filed By: Mark Joseph Pedroli
On Behalf Of: BEN SANSONE

Mot for Temp Restraining Order
Amended Motion for TRO; Electronic Filing Certificate of Service.
Filed By: Mark Joseph Pedroli
On Behalf Of: BEN SANSONE

01/29/2018

Order for Change of Judge
Change of judge granted. Case assigned to DIV 1 for assignment. PSJ/rlo

Conference Call Held
Attorneys Pedrolli and Gore appear by phone. Change of judge granted. Case assigned to DIV 1 for assignment. Hearing cancelled for 1-30-18. PSJ/rlo
Scheduled For: 01/30/2018; 2:00 PM ; PATRICIA S JOYCE; Cole Circuit

Judge Assigned

01/26/2018

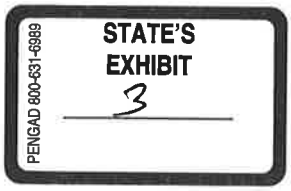
Notice of Hearing Filed
Notice of Hearing; Electronic Filing Certificate of Service.
Filed By: JEFFREY ROBERT HOOPS
On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Application Filed
Application for Change of Judge; Electronic Filing Certificate of Service.
Filed By: JEFFREY ROBERT HOOPS
On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

01/23/2018

Notice of Hearing Filed
Notice of hearing TRO and amended notice of prior hearing to correct date.
Filed By: Mark Joseph Pedroli
On Behalf Of: BEN SANSONE

Mot for Temp Restraining Order
Motion for TRO and Preliminary Injunction.
Filed By: Mark Joseph Pedroli
On Behalf Of: BEN SANSONE



Motion for Leave
Motion leave amend petition by interlineation.
Filed By: Mark Joseph Pedroli
On Behalf Of: BEN SANSONE

Entry of Appearance Filed
Entry of Appearance of Jeffrey R Hoops on behalf of Eric Grietens and Michelle Hallford; Electronic Filing Certificate of Service.
Filed By: JEFFREY ROBERT HOOPS
On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Entry of Appearance Filed

Entry of Appearance of Gabriel E Gore on behalf of Eric Grietens and Michelle Hallford; Electronic Filing Certificate of Service.

Filed By: GABRIEL E. GORE

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Hearing Scheduled

Associated Entries: 01/29/2018 - Conference Call Held

Scheduled For: 01/30/2018; 2:00 PM ; PATRICIA S JOYCE; Cole Circuit

01/20/2018 **Notice of Hearing Filed**

NOTICE OF HEARING.Forwarded to Div IV queue for Judge's review. msh

Filed By: Mark Joseph Pedroli

On Behalf Of: BEN SANSONE

01/16/2018 **Corporation Served**

Document ID - 17-SMCC-1025; Served To - CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR; Server - COLE COUNTY SHERIFF'S DEPARTMENT; Served Date - 12-JAN-18; Served Time - 13:09:00; Service Type - Sheriff Department; Reason Description - Served; Service Text - Served to Debbie Gaeller, designee. jlb

Corporation Served

Document ID - 17-SMCC-1024; Served To - GREITENS, ERIC R.; Server - COLE COUNTY SHERIFF'S DEPARTMENT; Served Date - 12-JAN-18; Served Time - 13:09:00; Service Type - Sheriff Department; Reason Description - Served; Service Text - Served to Debbie Gaellner, designee. jlb

12/29/2017 **Summons Issued-Circuit**

Document ID: 17-SMCC-1025, for CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR.Attorney to print two copies of service document created to issue for service and return. Service copy to include filings to serve, if applicable. msh

Summons Issued-Circuit

Document ID: 17-SMCC-1024, for GREITENS, ERIC R..Attorney to print two copies of service document created to issue for service and return. Service copy to include filings to serve, if applicable. msh

Confid Filing Info Sheet Filed

Filing Info Sheet.

Filed By: Mark Joseph Pedroli

On Behalf Of: BEN SANSONE

Filing Info Sheet eFiling

Filed By: Mark Joseph Pedroli

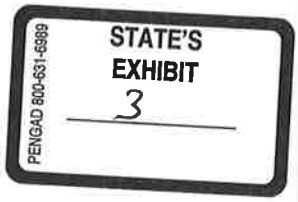
Pet Filed in Circuit Ct

PETITION FOR INJUNCTION AND DAMAGES. msh

Filed By: Mark Joseph Pedroli

On Behalf Of: BEN SANSONE

Judge Assigned



IN THE CIRCUIT COURT OF COLE COUNTY MISSOURI
NINETEENTH JUDICIAL CIRCUIT

BEN SANSONE, on behalf of THE SUNSHINE PROJECT, Plaintiff,	)	
v.	)	Case No. 17AC-CC00635
ERIC GREITENS, Governor of Missouri, et al., Defendants	)	Division No. 1

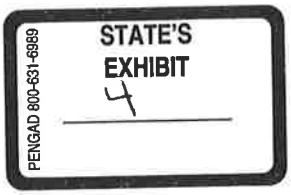
MOTION FOR PROTECTIVE ORDER AND TO STAY DISCOVERY

Defendants Eric Greitens, Governor of Missouri, and Michelle Hallford, Custodian of Records for the Office of the Governor, through counsel, pursuant to Missouri Rule of Civil Procedure 56.01(c)(2), move this Court to enter an Order staying all discovery in this matter and to enter a protective order relieving Defendants from responding to Plaintiff's outstanding discovery requests pending resolution of Defendants' motion to dismiss Plaintiff's Petition

1. Plaintiff filed his Petition on December 29, 2017, alleging violations of the Sunshine Law and the State and Local Records Law, Chapter 109 RSMo, related to the use of Confide, a messaging application that automatically deletes messages sent or received by the application, by employees of the Office of the Governor on their personal mobile phones, as well as Plaintiff's related Sunshine Law requests for records related to Defendants' use of Confide and similar applications.

2. On February 8, 2018, Plaintiff served the Governor of Missouri with 31 requests for admission, and on February 9, 2018, Plaintiff served the Custodian of Records for the Office of the Governor with 29 requests for documents.

3. On February 16, 2018, Defendants moved to dismiss Plaintiff's Petition on multiple grounds, including (1) Plaintiff lacks standing to bring his claims; (2) Plaintiff's claims



are not ripe; (3) Plaintiff fails to state a claim upon which relief may be granted; and (4) Plaintiff's claims are moot.

4. On March 6, 2018, Plaintiff filed a Consent Order to file his First Amended Petition and permitting Defendants to file their responsive pleading within 30 days of filing. On March 7, 2018, the Court granted the Consent Order and deemed the First Amended Petition to be filed as of that date.

5. The First Amended Petition, like the original petition, alleges violations of the Sunshine Law and the State and Local Records Law, Chapter 109 RSMo, related to the use of Confide by employees of the Office of the Governor and to responses to Plaintiff's Sunshine Law requests for records related to Defendants' use of Confide and similar applications.

6. Plaintiff's baseless and speculative claims that the Office of the Governor has used Confide to unlawfully destroy "government records" rely on a December 7, 2017 media report that individuals in the Office of the Governor have Confide on their personal mobile phones. First Am. Pet. ¶ 24. This report provides no basis to conclude that the Office of the Governor has violated either the Sunshine Law or the State and Local Records Law, and Plaintiff's speculative allegations to the contrary have no basis in law or fact.

7. Plaintiff also relies on a report issued by the Attorney General's office on March 1, 2018. First Am. Pet. ¶¶ 45-49. However, this report concluded, after an investigation, that there was no evidence to support a finding that the Office of the Governor had violated Missouri law through the use of Confide.

8. On March 6, 2018, Plaintiff served Defendants with 33 interrogatories and a second set of 37 requests for admissions, for a total of 68 requests for admissions and 130 discovery requests altogether.

9. Currently, Defendants' responses to Plaintiff's first set of requests for documents are due Monday, March 12, 2018.

10. Plaintiff's first set of requests for admissions are invalid because Plaintiff served them earlier than is permitted under Missouri Rule of Civil Procedure 59.01(c)(2)(B).

11. Defendants intend to move to dismiss Plaintiff's First Amended Petition on the grounds that (1) Plaintiff lacks standing to bring his claims; (2) Plaintiff's claims are not ripe; (3) Plaintiff fails to state a claim upon which relief may be granted; and (4) Plaintiff's claims are moot, among other potential bases.

12. If the forthcoming motion to dismiss is granted in full or in part, it will eliminate or narrow the causes of action and relevant issues in this action. Staying discovery until the Court decides the motion to dismiss will permit the parties, with the guidance of this Court, to define the appropriate scope of discovery for the remaining claims, if any.

13. Pursuant to Missouri Rule of Civil Procedure 56.01(c)(2), upon motion by a party and for good cause shown, "the court may make any order which justice requires to protect a party . . . from annoyance, oppression, or undue burden or expense," including an order "that the discovery may be had only on specified terms and conditions."

14. Courts often stay actions in these circumstances, and the Office of the Governor should not be forced to incur the burden of responding to Plaintiff's overbroad and oppressive discovery requests when the forthcoming motion to dismiss will potentially eliminate this entire action or, at a minimum, may narrow the causes of action and relevant issues in this action.

15. This is especially true here, where Plaintiff failed to plead any factual allegations in support of his conclusory claims. Plaintiff's burdensome discovery requests are a blatant

attempt to backfill his claims with the type of factual information that is required to plead a valid cause of action under Missouri law in the first instance.

16. Counsel for Defendants contacted Plaintiff's counsel to seek an extension of the time to respond to Plaintiff's discovery requests. Plaintiff's counsel refused to grant any extension unless Defendants would commit to providing responses to outstanding Plaintiff's discovery requests. It would be inefficient and unduly burdensome for Defendants to be required to respond to Plaintiff's overbroad and oppressive discovery requests, however, where the forthcoming motion to dismiss may render much of Plaintiff's sought-after discovery moot.

17. Thus, in the interests of justice and judicial efficiency, this Court should exercise its discretion and enter a protective order with respect to Plaintiff's outstanding discovery requests and stay discovery pending resolution of the forthcoming threshold motion to dismiss Plaintiff's First Amended Petition.

WHEREFORE, Defendants Eric Greitens, Governor of Missouri, and Michelle Hallford, Custodian of Records for the Office of the Governor, requests this Court grant a stay of all discovery, and enter a protective order that relieves the Office of the Governor and the Custodian of Records for the Office of the Governor from responding to Plaintiff's discovery requests, until the Court rules on Defendants' forthcoming motion to dismiss the First Amended Petition, and order such other relief as it deems appropriate. In the event that the Court grants Defendants' motion for a protective order and to stay discovery, Defendants request that the Court permit Defendants to respond to Plaintiff's discovery requests either (1) three days after the Court rules on Defendants' forthcoming motion to dismiss, or (2) the date Defendants' discovery responses are due under the Missouri Rules of Civil Procedure, whichever date is later. In the alternative, if the Court denies a stay of discovery pending resolution of the forthcoming motion to dismiss,