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11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF NEVADA**

13 MINISTERIO ROCA SOLIDA)	Case No.: 2:12-cv-01488-RCJ-VCF
)	
14 Plaintiff,)	OPPOSITION TO
)	DEFENDANT'S MOTION TO
15 v.)	DISMISS SHARON MCKELVEY
)	IN HER INDIVIDUAL
)	CAPACITY
16 UNITED STATES, UNITED STATES FISH)	
17 AND WILDLIFE SERVICE; and SHARON)	
18 MCKELVEY in her official and)	
19 individual capacities,)	
)	
20 Defendants.)	
)	

21 COMES NOW, Plaintiff MINISTERIO ROCA SOLIDA (hereinafter SOLID ROCK), by
22 and through its attorney, NPRI CENTER FOR JUSTICE AND CONSTITUTIONAL
23 LITIGATION, and hereby respectfully requests that this Court deny DEFENDANT'S MOTION
24 TO DISMISS SHARON MCKELVEY in her Individual Capacity, based upon the following
25 Memorandum of Points and Authorities and/or Plaintiff's First Amended Complaint filed
26 concurrently.

27 ...

28 ...

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. STATEMENT OF FACTS**

3
4 On August 22, 2012, Plaintiff SOLID ROCK filed a Complaint in this Court against
5 Defendants U.S. FISH & WILDLIFE SERVICE and SHARON MCKELVEY (in her official and
6 individual capacities) alleging the tort of negligence and a number of violations of its
7 constitutional rights by named Defendants.
8

9 On September 21, 2012, pursuant to FRCP 4(i)(1)(2), Counsel for Plaintiff served the
10 UNITED STATES, the U.S. FISH & WILDLIFE SERVICE, and SHARON MCKELVEY in her
11 official capacity, via U.S. certified mail to each, copies of the Summons and Complaint. (In
12 addition, a Request for Waiver of Service and Complaint was also sent by certified mail to
13 Sharon McKelvey (in her individual capacity) and accepted by her on September 27, 2012).
14

15 On November 20, 2012, the Defendants filed two MOTIONS TO DISMISS; the first to
16 dismiss U.S. Fish and Wildlife Service and Sharon McKelvey in her *official* capacity from all
17 claims and the second to dismiss Sharon McKelvey in her *individual* capacity (both on
18 jurisdictional grounds and for lack of specificity of the Complaint). On that same date, the
19 United States also filed a NOTICE OF SUBSTITUTION, substituting THE UNITED STATES,
20 itself, for SHARON MCKELVEY with respect to the Federal Torts Claim Act (hereinafter
21 “FTCA”) claim in Plaintiff’s original Complaint.
22

23
24 With respect only to the FTCA claim, Plaintiff believes Defendants’ Substitution of
25 “THE UNITED STATES” for SHARON MCKELVEY in her official capacity is appropriate and
26 warranted under the FTCA and Defendants’ request that this Court include THE UNITED
27 STATES as a named Defendant is unopposed. Plaintiff also believes that THE UNITED
28 STATES is the appropriate Defendant for the Takings Claim contained in the original Complaint

1 and is so referenced in Plaintiff's First Amended Complaint. Failing at the time to make the
2 distinction between THE UNITED STATES itself (and its agencies), THE UNITED STATES,
3 pursuant to FRCP 4(i)(1), was served with a copy of the original Summons and Complaint on
4 September 21, 2012, (as indicated above).

5 Plaintiff, however, takes issue with all other challenges to jurisdiction and lack of
6 specificity of the original Complaint for the reasons specified below, for reasons specified in its
7 OPPOSITION to Defendants' other Motion of November 20, 2012 filed concurrently, and/or as
8 remedied by Plaintiff's First Amended Complaint also filed concurrently with this
9 OPPOSITION.
10

11 **II. INTRODUCTION**

12 Pastor Victor Fuentes, (a Cuban political refugee who swam 7 miles in open ocean to
13 escape Fidel Castro's tyrannical regime) and his SOLID ROCK church, were harmed by
14 Defendants UNITED STATES, the U.S. FISH AND WILDLIFE SERVICE ("USF&W"), and its
15 employee, SHARON MCKELVEY when, without due process, MCKELVEY and USF&W
16 confiscated vested water rights belonging to SOLID ROCK by way of a water diversion project
17 that, as initially constructed, ultimately flooded and damaged SOLID ROCK's property with the
18 very water that was both illegally and unconstitutionally confiscated in the first place.
19

20 Defendant MCKELVEY, in her individual capacity, now hopes to evade (or delay)
21 liability for her misconduct brought under a *Bivens*¹ action stating, in essence, that (1) the first
22 and fifth amendments are somehow less significant and less enforceable against encroachment
23 than the fourth and eighth amendments; (2) depriving a church of its right to free exercise and
24 property does not constitute an act MCKELVEY should have known to be "clearly unlawful;"
25

26
27
28 ¹ *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

1 and (3) the vagaries of SOLID ROCK’s original Complaint are such that she is somehow
2 deprived of “fair notice” as to why she is being sued.

3 That an aggrieved citizen may not seek legal damages against a federal government
4 employee violative of *any* of its constitutional rights in a constitutional republic is
5 incomprehensible to Plaintiff. In fact, Pastor Fuentes already suffered under just such a regime
6 until seeking political asylum in a most dramatic fashion.

7
8 Fortunately for SOLID ROCK, in addition to being dead-right on principle, there is
9 more-than-ample legal authority for this Court’s jurisdiction over Defendant MCKELVEY in her
10 individual capacity in this case.

11 For each of the reasons listed below as well as those remedied by Plaintiff’s First
12 Amended Complaint (filed concurrently), Defendant's Motion to Dismiss SHARON
13 MCKELVEY IN HER INDIVIDUAL CAPACITY should be denied.

14
15 **III. LEGAL ARGUMENT**

16 **A. This Court has Jurisdiction over SHARON MCKELVEY in her Individual**
17 **Capacity on Plaintiff’s First and Fifth Amendment Claims.**

18
19 In its Motion to Dismiss SHARON MCKELVEY in her individual capacity on
20 substantive legal grounds (i.e. those unrelated to Plaintiff’s alleged insufficiency of pleading),
21 Defendant makes three arguments that will be addressed in turn. They are: (1) *Bivens*
22 jurisdiction over federal employees sued in their individual capacity does not extend to blatant
23 violations of the first and fifth amendment in the way *Bivens* jurisdiction applies to violations of
24 the fourth and eighth amendments; Defendant’s Motion p. 4-8; (2) MCKELVEY has qualified
25 immunity because her conduct did not violate “clearly established rights of which a reasonable
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1 person would know;” Defendants’ Motion 9-12; and (3) there is “no supervisory liability under
2 *Bivens*;” Defendants’ Motion at 8-9.

3 **1. The First and Fifth Amendments are not Inferior to the Fourth and Eighth**
4 **Amendments.**

5 Pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, a
6 plaintiff may bring an action for damages against federal officials such as MCKELVEY in their
7 individual capacities for violations of constitutional rights. 403 U.S. 388 (1971).
8

9 Plaintiff properly claims that Defendant MCKELVEY violated its first amendment rights
10 of free exercise² and, under the fifth amendment, its right to “free exercise” as a “liberty
11 interest,” its right to its vested water as a property and liberty interest, and rights to substantive
12 and procedural due process prior to deprivation thereof.³
13

14 Defendant, on the other hand, asserts that *Bivens* should not be extended to violations of
15 the first and fifth amendments. While Defendant couches this assertion by writing “[t]he
16 Supreme Court has not extended *Bivens* to contexts like those of Plaintiff’s allegations,” Motion
17 p. 3, it is more accurate to say “the Supreme Court has not specifically decided this issue.”
18 *Marcavage v. National Park Service, et al.*, 777 F.Supp.2d 858, 863 (2011).
19

20 In *Ashcroft v. Iqbal*, an individual detained pre-trial as a person of “high interest”
21 following the terrorist attacks of September 11, 2001, brought a *Bivens* action against federal
22 officials, in which he claimed that his First Amendment right to the free exercise of religion was
23 violated. 556 U.S. 662, 666-68 (2009). Although, as Defendant points out, the Supreme Court
24 has been reluctant to extend *Bivens* liability to any new context or new category of defendants,
25

26 ² Congress shall make no law respecting an establishment of religion or prohibiting the free
27 exercise thereof” U.S. Const. amend I.

28 ³ “No person . . . shall be deprived of life, liberty, or property without due process of law.” U.S.
Const. amend V.

1 that court assumed, without deciding, that violations of the first amendment were actionable
2 under *Bivens. Id.* at 675.

3 The Third Circuit has already decided this question in favor of Plaintiff. In *Paton v. La*
4 *Prade*, that court considered this same issue (applicability of *Bivens* to first amendment claims).
5 524 F.2d 862, 869–70 (3rd Cir. 1975). There, a high school student sought damages after the
6 Federal Bureau of Investigation conducted an investigation into her correspondence with the
7 Socialist Workers Party. *Id.* at 865–66. The court explained that since it had already recognized
8 a claim for violation of the First Amendment right to free speech under 42 U.S.C. § 1983 against
9 state officials, there was “no reason to allow federal officials to act with impunity in this
10 context.” *Id.* at 870. The court held that the extension of *Bivens* to redress violations of the First
11 Amendment was “both justifiable and logical.” *Id.*

14 As such, this Court should hold that violations of the first amendment are actionable
15 under *Bivens*, as well.

16 Contrary to Defendant’s inference, the U.S. Supreme Court has already held that
17 violations of the fifth amendment are actionable under *Bivens* (having allowed a *Bivens* action to
18 redress a violation of the equal protection component of the Due Process Clause of the fifth
19 amendment in *Davis v. Passman*, 442 U.S. 228 (1979)).

21 Even outside the “equal protection component” of the due process clause of the fifth
22 amendment, the Fifth Circuit has already held that a party may recover for malicious acts by IRS
23 agents that infringe upon a taxpayer’s liberty interests. See *Rutherford v. United States*, 702 F.2d
24 580, 583–84 (5th Cir.1983). Moreover, Defendant cites *F.E. Trotter, Inc. v. Watkins*, 869 F.2d
25 1312 (9th Cir. 1989) wherein the Ninth Circuit “assumed without deciding, the availability of a
26 *Bivens* remedy for a taking.”) Motion at 7, fn. 6.
27
28

1 Given these extensions of *Bivens* by the U.S. Supreme Court, the Third, Fifth, and Ninth
2 Circuits to first and fifth amendment claims, for Defendant MCKELVEY to suggest
3 “[a]mendment is futile,” Motion at 1, is disingenuous.

4 **2. Deprivation of a Church’s Baptismal Waters and Property Interests Rises to the**
5 **Level of Violating Plaintiff’s “Clearly Established” Rights.**

6 Defendant next argues that qualified immunity bars any recovery by SOLID ROCK.
7 Under the doctrine of qualified immunity, the Court must ask whether, “[t]aken in the light most
8 favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated
9 a constitutional right?” *Scott v. Harris*, 550 U.S. 372, 377 (2007) (quoting *Saucier v. Katz*, 533
10 U.S. 194, 201 (2001)). Here, Plaintiff has adequately pleaded facts and identified the
11 constitutional violations. To the extent this was done in a less-than-artful manner in the original
12 Complaint, Plaintiff has remedied any vagaries in its First Amended Complaint. “Taken in the
13 light most favorable to the party asserting the injury,” *id*, deprivation of free exercise and liberty
14 and property interests protected by the first and fifth amendments are abundantly clear.
15

16 However, the Court must also inquire “whether the right was clearly established ... in
17 light of the specific context of the case.” *Id* at 377. A constitutional right is clearly established if
18 “[t]he contours of the right [are] sufficiently clear that a reasonable official would understand
19 that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).
20 Thus, qualified immunity does not protect officials from suit if they are “plainly incompetent” or
21 “knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341(1986).
22

23 As alleged in both the Original Complaint and/or as augmented by Plaintiff’s First
24 Amended Complaint, Defendant MCKELVEY acted in an *ultra vires* manner in violating both
25 the law and Plaintiff’s constitutional rights. MCKELVEY (1) undertook a water diversion
26
27
28

1 project that prevented SOLID ROCK's water from entering its property and, instead, diverted
2 said water completely around the borders of the Plaintiff's forty-acre parcel; (2) undertook the
3 aforementioned water diversion project without the requisite legal permit from the U.S. Army
4 Corps of Engineers; (3) took actions to ensure a series of regulators would hinder Plaintiff's
5 ability to operate their church camp despite no such harassment of the former, non-religious,
6 non-hispanic property owner (including regulators such as the State Fire Marshall, the State
7 Health Department, and the Nye County Flood Planning Department); (4) submitted a Water
8 Impact Statement to the Nevada Division of Water Resources devoid of any reference to or
9 indication that private landowners with vested water rights were situated within the affected land
10 and would be directly impacted and denied access to their vested water rights by the diversion
11 project; (5) undertook the diversion project in contravention of Defendant USF&W's own
12 Comprehensive Refuge Recovery Plan to "restore the area to its natural historic condition."

15 Additionally, the aforementioned water project undertaken by MCKELVEY did,
16 in fact, deprive SOLID ROCK of its constitutionally protected, vested water rights;
17 interfered with its constitutionally protected right to conduct baptisms and religious
18 prayer and meditation; resulted in the loss of the church camp's recreation pond; and
19 otherwise greatly reduced the utility and value of the forty-acre parcel.
20

22 Moreover, the water diversion project itself was conducted in a defective manner -
23 - routing the water to the "high side" of Plaintiff's property and into an artificial channel
24 incapable of accommodating historic flow capacities -- and otherwise in such a manner
25 that on December 23, 2010, the first day of any measurable, post-diversion rainfall, the
26 newly diverted water overflowed the USF&W's artificially created channels and flooded
27 portions of the forty-acre parcel as it made its way back to its historical path. This
28

1 flooding resulted in damages of at least \$86,639.00 to the land, structures, and animals on
2 church campgrounds.

3 In short, to enjoy “qualified immunity,” MCKELVEY will have to demonstrate that
4 absconding with Plaintiff’s holy water (to which it has vested rights) and then flooding Plaintiff
5 with that very same water (while violating various procedural requirements along the way), is
6 something “a reasonable official would understand” to somehow be non-violative of Plaintiff’s
7 rights. Plaintiff believes it is untenable that MCKELVEY can so demonstrate.
8

9 **3. Contrary to Defendant’s Assertion, Supervisory Liability Post-*Iqbal* is Alive and**
10 **Well Under *Bivens*.**

11
12 Defendant MCKELVEY would have this Court believe that under *Iqbal*, “[t]here [i]s [n]o
13 [s]upervisory [l]iability under *Bivens*.” Defendant’s Motion p. 8 (heading 3). However, just two
14 months ago, the Ninth Circuit called this notion an “absurd proposition.”

15 According to the Ninth Circuit, “*Iqbal* does not stand for *the absurd proposition that*
16 *government officials are never liable under . . . Bivens* for actions that they take as supervisors.
17 Nobody would argue, for example, that a supervisor who orders subordinates to violate
18 constitutional rights escapes liability under *Iqbal*.” *OSU Student Alliance v. Ray*, 699 F.3d 1053,
19 fn. 15 (9th Cir. 2012)(emphasis added).
20

21 As the Ninth Circuit held in *Starr*,⁴ even a supervisor's knowledge and acquiescence will
22 suffice for liability in some circumstances. 652 F.3d at 1206–07; *see also Ammons v. Wash.*
23 *Dep't of Soc. & Health Servs.*, 648 F.3d 1020, 1026, 1031 (9th Cir. 2011) (holding that a
24 psychiatric patient adequately stated a due process claim against hospital administrator for failing
25 to provide safe conditions through knowledge and acquiescence).
26
27

28

⁴ *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011).

1 “*Iqbal* holds simply that a supervisor's liability, like any government official's liability,
2 depends first on whether he or she breached the duty imposed by the relevant constitutional
3 provision.” *OSU Student Alliance* at fn. 15 (9th Cir. 2012).

4 The Seventh Circuit recently held likewise (referring also to *Starr* in the 9th Circuit):
5 “We recently indicated that mere knowledge and acquiescence is not sufficient to impose such
6 [supervisory] liability, but that *Iqbal* did not disturb the ... principles holding that a supervisor
7 may be liable as an individual for wrongs he personally directed or authorized his subordinates to
8 inflict.” *Arnett v. Webster*, 658 F.3d 742, 757 (7th Cir. 2011) (internal quotations and citations
9 omitted).
10

11 Thus, the notion that Defendant MCKELVEY could direct employees and paid
12 contractors to blatantly violate the constitutional rights of SOLID ROCK and be able to escape
13 liability under a legal theory of no “supervisory liability under *Bivens*” is likewise untenable.
14

15 **B. The Original Complaint was Adequate to Provide Fair Notice to Defendant**
16 **MCKELVEY, “Plausibility of Relief” for the Court, and, Moreover, the First**
17 **Amended Complaint Provides Even More Specificity.**

18 Relying upon the very cases cited by Defendant, “Federal Rule of Civil Procedure 8(a)(2)
19 requires only ‘a short and plain statement of the claim showing that the pleader is entitled to
20 relief,’ in order to ‘give the defendant fair notice of what the ... claim is and the grounds upon
21 which it rests.’” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) “and a complaint
22 must contain a ‘short and plain statement of the claim showing that the pleader is entitled to
23 relief.’ ‘[D]etailed factual allegations’ are not required.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663-64
24 (2009) (internal citations omitted). “When there are well-pleaded factual allegations, a court
25 should assume their veracity and then determine whether they plausibly give rise to an
26 entitlement to relief.” *Id.*
27
28

1 **1. Plaintiff Has Provided Fair and Ample Notice to Defendant of its Bases For**
2 **Claims.**

3 As evidenced by its own Motion to Dismiss, the government has been provided “fair
4 notice” as to why it is being sued. Defendant’s own words make it quite clear that Defendant
5 fully understands the thrust of the lawsuit having written: “Plaintiff alleges . . . Federal
6 Defendants engaged in a water diversion project which (1) deprived Plaintiff of water rights, and
7 (2) in conjunction with rainfall, resulted in flooding and property damage.” Defendant’s Motion
8 p.2. Plaintiff was, of course, much more factually and legally specific as to the basis for its
9 lawsuit and relief sought and easily satisfied the liberal notice pleading requirements of FRCP
10 Rule 8(a). Defendant also correctly gleaned this to be a *Bivens* action based upon the facts,
11 claims, and relief sought as pled. Motion at 2-3.⁵

12 As demonstrated below, the Original Complaint contains much more than “conclusory
13 allegations of law” and/or facts (completely devoid of law) as Defendant would have this Court
14 believe. Such facts include:

- 15
- 16 • That Plaintiff Church purchased a forty-acre camp facility for \$500,000. ¶ 7.
 - 17 • Structures on the forty acres made it well-suited for operation of a church camp. *Id.*
 - 18 • Location of the parcel is within the Ash Meadows Wildlife refuge (in Nevada). *Id.*
 - 19 • Appurtenant to the \$500,000, forty-acre property are [at least some] water rights to a
20 desert stream dating back to the year 1881. ¶ 8.
 - 21 • The aforementioned water was used for baptisms, livestock watering, other religious
22 purposes, and recreational use by the church campers. *Id.*
 - 23
 - 24
 - 25
 - 26
 - 27

28 ⁵ For clarity, Plaintiff’s First Amended Complaint now includes specific language with respect to
invoking jurisdiction under *Bivens* and 28 U.S.C. §§ 2201 and 2202.

- In August 2010, Defendants engaged in a water diversion project denying Plaintiffs access to these water rights by diverting water completely around their forty acre parcel.

¶ 9.

- Defendants’ water diversion project harmed the Plaintiff including interference with baptisms, recreation and livestock watering and other harmful effects. ¶ 10.
- In December of 2010, shortly after completion of the diversion project undertaken by Defendants, the newly diverted water overflowed the Defendants’ artificially created re-routing channels and flooded Plaintiff’s parcel as the water made its way back to its historical path.⁶ ¶ 11.
- This flooding resulted in \$86,639.00 in damage to Plaintiff’s Property. *Id.*

Under Defendant’s cited authority, when, as here, “there are well-pleaded factual allegations, a court should *assume their veracity* and then determine whether they plausibly give rise to an entitlement to relief.” *Ashcroft v. Iqbal* at 664.

2. Plaintiff has met the Plausibility of Relief Standard For the Court

Although again narrowly interpreted by Defendant in her Motion to Dismiss so as to justify her dismissing certain claims, the grounds for relief are also well laid out in Plaintiff’s Claims for Relief in the Original Complaint.

From these aforementioned facts, Plaintiff believes (1) its first amendment rights to free exercise of religion were violated inasmuch as the water rights of which Plaintiff was deprived were used for religious purposes including baptisms; (2) its procedural and substantive due process rights under the fifth amendment were violated in the removal of water to which Plaintiff

⁶ The Complaint alleges this diversion project was conducted negligently – a legal term of art and therefore, arguably a legal conclusion.

1 has vested rights;⁷ (3) the means by which Defendant executed the water diversion project were
2 done in such a way that Defendant flooded Plaintiff's land and committed a tort⁸ actionable
3 under *Bivens*.⁹ and (4) a "taking" under the fifth amendment is already ongoing given the
4 temporary deprivation of Plaintiff's water rights and, to the extent this Court does not grant the
5 declaratory and injunctive relief requested, a permanent taking will have resulted from these
6 actions.

7
8 **3. Even if, *arguendo*, Plaintiff's Original Complaint was Insufficient, Plaintiff's**
9 **First Amended Complaint Remedies Any Alleged Shortcomings.**

10 In addition to amending the Original Complaint with additional jurisdictional bases as
11 mentioned above, Plaintiff, without conceding any shortcomings with respect to alleged facts,
12 law, or claims for relief in the Original Complaint, also amended the Original Complaint in its
13 First Amended Complaint in the following ways, thus, hopefully, providing additional clarity to
14 both the Court and Defendant.

- 15
- 16 • More specificity as to how the water diversion project was defective.
 - 17 • More specificity as to Plaintiff's vested water rights.
 - 18 • An allegation of illegal activity in Defendant's failure to obtain the required Army Corps
19 of Engineer permit(s).
- 20

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23
24 ⁷ Plaintiff also believes the church has a liberty interest to free religious exercise under the fifth
25 amendment of which Plaintiff was denied without substantive and procedural due process.

26 ⁸ Even without more the doctrine of *res ipsa loquitur* make these pleadings sufficient in Nevada
27 given that Defendant exercised exclusive control of the instrumentality causing harm, the
28 accident is one that does not ordinarily occur in the absence of negligence, and the Defendant is
in a better position to explain the cause of the accident.

⁹ Even if, *arguendo*, Plaintiff had no vested water rights, Defendant had a legal duty to
administer the water diversion project in a way that did not result in the flooding of Plaintiff's
private property.

- Allegation of deception by Defendant in her submission of a Water Impact Statement to the Nevada Division of Water Resources devoid of any indication of impact on Plaintiff and Plaintiff's vested water rights.
- Allegation that Defendant took remedial action to prevent future flooding by altering the design of the initial (and defective) water diversion channel.
- Allegation that four contractors who witnessed the resultant, extensive damage to Plaintiff's property provided estimates for repair.

IV. CONCLUSION

For the reasons explained above, Defendant's MOTION TO DISMISS SHARON MCKELVEY IN HER INDIVIDUAL CAPACITY should be denied by this Court.

Respectfully submitted this 7th day of December, 2012.

/s/ Joseph F. Becker
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PROOF OF SERVICE

I, Joseph F. Becker, certify that the following individual(s) were served with copies of the foregoing **OPPOSITION TO DEFENDANT’S MOTION TO DISMISS SHARON MCKELVEY IN HER INDIVIDUAL CAPACITY**, by the below identified method of service:

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