IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
and	)	
	)	
DR. RACHEL TUDOR,	)	
	)	
Plaintiff/Intervenor,	)	
	)	
v.	)	Case No. 5:15-CV-00324-C
	)	
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY,	)	
	)	
and	)	
	)	
THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,	)	
	)	
Defendants.	)	

DR. RACHEL TUDOR'S RESPONSE AND OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Ezra Young
Law Office of Ezra Young
30 Devoe Street, 1a
Brooklyn, NY 11211
P: 949-291-3185
F: 917-398-1849
ezraiyoung@gmail.com

Brittany Novotny
National Litigation
Law Group, PLLC
42 Shepherd Center
2401 NW 23rd St.
Oklahoma City, OK 73107
P: 405-429-7626
F: 405-835-6244
bnovotny@nationlit.com

Marie Galindo
Law Office of Marie Galindo
1500 Broadway, Str. 1120
Wells Fargo Building
Lubbock, TX 79401
P: 806-549-4507
F: 806-370-2703
megalindo@thegalindofirm.com

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I. Introduction

Ten years ago, Dr. Rachel Tudor bravely announced to her colleagues at Southeastern Oklahoma State University ("Southeastern") that she would be transitioning from male to female. Neither Southeastern nor its governing board, the Regional University System of Oklahoma ("RUSO"), had express protections in place. Though Tudor received tremendous support from her colleagues and students, a small but powerful cadre of administrators placed Tudor in their crosshairs.

Tudor endured years of hostilities. She was threatened with termination if she used women's restrooms on campus. She endured a health plan that specially excluded care she needed which was otherwise available to her nontransgender female peers. She also endured sporadic slights and ridicule. For fear of losing her job, Tudor suffered much of this in silence and set her eyes on tenure and promotion—a means to stay at a school she to this day still loves, alongside her colleagues who still miss her.

Of course, no federal lawsuit results where things end well. Over a two-year period, Southeastern's top administrators deprived Tudor of a fair and impartial evaluation of her tenure and promotion portfolio. In the 2009-10 cycle, they denied her application and refused to even proffer explanations for their denials. Those same administrators later manufactured rationales that cannot stand up to scrutiny. Close in time to Tudor stepping up her

complaints, the administration barred her from attempting a reapplication in the 2010-11 cycle on the incredible pretense that her reapplication would tear apart the university (it would not) and reapplication violated policy (it did not). Despite the Southeastern faculty standing behind Tudor and support pouring in from within and outside of Oklahoma, the administration nonrenewed Tudor, kicking her to the curb at a time when she should have been celebrating a major and hard-earned career milestone.

Over the last ten years, Southeastern and the rest of our nation have made great strides towards welcoming women, like Tudor, whose path in life is a bit different but nonetheless deserving of both basic decency and the full protection of Title VII. For all the reasons set forth below, Dr. Tudor respectfully requests that that the Court deny Defendants' Motion for Summary Judgment and allow Tudor to bring the facts to a jury of her peers.

II. Response to Defendants' Statement of Undisputed Facts

1. The deposition excerpt Defendants cite establishes Tudor's year of and name at birth, both of which she admits. *See* ECF No. 177-1 at 188:4–8. If Defendants intended to argue Tudor "was born male" and/or her "biological sex" is male because she is a transgender woman, this is disputed. *See* **Exhibit 1** at 2 (providing medical definition of "sex"); *id.* at 3 (providing medical definition of "biological sex" and distinguishing "birth sex" from "biological sex").

2. Admitted.

3. Tudor presented herself as male at Southeastern from Fall 2004 until just prior to Fall 2007; Tudor has presented herself as female from Fall 2007 through present.

4. Partially denied. Tudor complained orally and in writing and otherwise opposed hostilities and discrimination prior to and during the 2009-10 application process. *See, e.g.*, **Exhibit 3** at 3–12 (collecting complaints between 2007 and end 2009-10 cycle).

5. Admitted that Southeastern had multiple stages of tenure and promotion review. However, tenure and promotion decisions were ultimately the providence of the faculty. In rare situations where there was disagreement between the faculty and administration, policy required that the administration provide rationales justifying a departure from the faculty's decision. *See, e.g.*, **Exhibit 18** ¶ 6(b)(ii); *id.* ¶ 6(b)(iii); *id.* ¶ 6(d); *id.* ¶ 6(e).

6–8. Tudor denies that paragraphs 6 to 8 are material to the resolution of this Motion because her 2008-09 application does not speak to the discrimination, retaliation, and hostilities she faced in connection with the 2009-10 and 2010-11 cycles.

9. Admitted.

10. The English Department committee voted as a unit to approve

Tudor's 2009-10 application. **Exhibit 4** at 155: 6–12 (committee had "one vote"); **Exhibit 5** at 141:6–15 (similar). Moreover, Defendants misrepresent the role of administration in tenure and promotion decisions. *See, e.g.*, evidence cited *supra* Resp. 5.

11. Tudor admits that her 2009-10 portfolio was reviewed by Dean Scoufos. However, Scoufos' original denial letter did not provide a rationale for denial beyond curiously suggesting (but not specifying) her decision turned on a supposed lack of documentation rather than merit (**Exhibit 65).** After the 2009-10 cycle, Tudor got back her portfolio and discovered Scoufos placed (see, e.g., **Exhibit 66; Exhibit 68)** a backdated letter (**Exhibit 27)** in the portfolio. Scoufos' rationale in the backdated letter is mere pretext for discrimination (see, e.g., **Exhibit 68**). *See infra* Part III ¶¶ 10–11.

12. Admitted.

13. Tudor admits that McMillan did not recommend her for promotion and tenure in the 2009-10 cycle. But McMillan's denial letter did not articulate any rationale (**Exhibit 67**). McMillan never provided his rationale to Tudor (see, e.g., **Exhibit 8** at EEOC183). Curiously, McMillan did write a letter to Tudor dated in April 2010 but dispatched to Tudor in June 2010, wherein he claims to tell Tudor Minks' rationale for denial but not his own (**Exhibit 9** at PI1200–01 [letter]; *id.* at PI1202 [envelope postmarked June 9, 2010]). Minks/McMillan's articulated rationale is mere

pretext for discrimination. *See infra* Part III ¶¶ 10–11.

14. Admitted.

15. Denied. *See* **Exhibit 3** at 65–66.

16. Denied. Dean Scoufos' and McMillan's characterizations of the "offer" does not speak to whether the discrimination or retaliation occurred and thus are immaterial. Moreover, Mischo did not characterize the "offer" as a "generous." *See, e.g.*, **Exhibit 5** at 199:9–15 (characterizing the "offer" as an "ultimatum"); *id.* at 197–200 (agreeing with the overall veracity of **Exhibit 3** at 65–66).

17. Denied. Tudor declined to withdraw her 2009-10 application on April 6, 2010 (see evidence cited *supra* Resp. 15 and 16), but her decision did not necessitate that her application be rejected by Minks. Indeed, Tudor tried to speak with Minks to answer any questions he might have (see, e.g., **Exhibit 41**), but he refused Tudor and denied her application (**Exhibit 40**). Similarly, Tudor's refusal to withdraw her application did necessitate that the administration prohibit her reapplication—policy at the time allowed reapplication (see, e.g., **Exhibit 10** [April 1, 2010 email between administrators and counsel discussing fact that Tudor could reapply next cycle]; **Exhibit 43** at 55:5–25, 56:4–16, 57:2–5, 57:24–25 [reapplication permitted even if president previously denied application]).

18. Tudor received a perfunctory denial letter from Minks in late

April 2010 (**Exhibit 40**), but received McMillan's letter which contained Mink's purported rationales for denial in June 2010 (**Exhibit 9** at PI1202 [postmarked June 9, 2010]).

19. Denied. During this period, neither Southeastern nor RUSO policy prohibited reapplication.[1]

20. Tudor admits that she sent a letter to the U.S. Department of Education on or about August 31, 2010 wherein she alleged gender discrimination and hostilities.

21. Tudor denies that paragraph 21 is material. The fact that males and/or females were granted promotion and/or tenure in the 2009-10 and 2010-11 cycles is immaterial as to whether Tudor faced discrimination because of her gender.

22. Admitted.

23. Admitted.

24. Admitted.

25. Admitted.

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[1] *See, e.g.*, **Exhibit 10** (policy would "let [Tudor] reapply" in the 2010-11 cycle); **Exhibit 11** at 243:12–21 (agreeing with "options" in **Exhibit 10**); **Exhibit 12** ("The policy states that an application for tenure may occur in the fifth, sixth or seventh year. I recognize that the policy does not proscribe a subsequent application . . . ."); **Exhibit 43** at 55:5–25, 56:4–16, 57:2–5, 57:24–25 (reapplication permitted even if president previously denied application); **Exhibit 17** ¶ 6(b) (reapplication permitted); *id.* ¶ 6(d) (others reapplied after denial). *See also* **Exhibit 14** at 23:23–25 and 24:1–2 (Southeastern's policies subject to RUSO's); **Exhibit 15** (RUSO professors allowed to reapply); **Exhibit 39** (Oct. 1, 2010 email from Prus to Scoufos notifying of formation of Tudor's 2010-11 tenure and promotion committee).

26–31. Tudor denies that paragraphs 26–31 are material to resolution of this Motion. Tudor's claims deal exclusively with the work environment at Southeastern and the circumstances surrounding her 2009-10 and attempted 2010-11 tenure and promotion applications. Moreover, Defendants' Exhibit 11 (ECF No. 177-11) is inadmissible for use at summary judgment for the reasons set forth in Tudor's motion *in limine* (ECF No. 189).

32. Admitted.

33. Tudor denies that paragraph 33 is material to resolution of this motion. See substantive response and evidence cited *supra* Resp. 26–31.

34. Admitted that Southeastern had a harassment policy, but it did not reach the kind of hostilities Tudor endured.[2]

35. Admitted that Southeastern had a discrimination policy, but it did not reach the kinds of discrimination Tudor endured. See evidence cited *supra* Resp. 34.

36. Denied. Tudor complained about hostilities, including some objectionable utterances. *See, e.g.*, **Exhibit 3** at 3–20 (gathering dozens of complaints); **Exhibit 2** ¶ 10(a)–(c); **Exhibit 61** at 221:2–4; *id.* 221:22–25

[2] *See, e.g.*, **Exhibit 17** ¶ 8(a)–(d); *id.* ¶8(5) ("faculty members were are risk of being fired if they made their gay and/or transgender status public"); *id* ¶ 8(f) (absence of express protections had a "chilling effect on faculty"); *id.* ¶ 8(g); **Exhibit 18** ¶ 10(a)–(h); **Exhibit 2** ¶ 2(b)–(d); **Exhibit 19** at EEOC66 ("being transgender is not a protected status"); **Exhibit 20** (March 2, 2011 emails discussing the need to revise policies so that they protect the "LGBTs"); **Exhibit 31** at 190:2–8; **Exhibit 13** at 157:7–17.

(confirming Tudor made complaints about Scoufos' pronoun use).

37. Denied. The restroom restriction was imposed on Tudor as a condition of her employment.[3]

38. Tudor admits she thanked Conway for not summarily firing her in 2007 (**Exhibit 2** ¶ 2(a)).

III. FACTS PRECLUDING JUDGMENT AS MATTER OF LAW

1. Some Southeastern staff and administrators did not consider Tudor to be female because she is a transgender woman.[4]

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[3] *See, e.g.*, **Exhibit 3** at 22–23 (describing June 1, 2007 call with Conway); **Exhibit 2** ¶ 2(b). *See also* **Exhibit 5** at 39–42 (Mischo was told Tudor would not use the women's restrooms); *id.* at 41 ("someone other than Dr. Tudor had decided Dr. Tudor would use the unisex restroom"); **Exhibit 14** at 67:3–13 (Southeastern "made arrangements for a gender-neutral bathroom" for Tudor); *id.* at 68:12–18 (gender-neutral restroom in Morrison was Southeastern's "solution" for Tudor); **Exhibit 43** at 39–43 (Weiner directed Conway to place restroom restriction on Tudor); *id.* at 45–46 (Weiner thought women in Tudor's department objected to her using women's restrooms and thus imposed restroom restriction). *But see* **Exhibit 18** ¶ 5(c) (women in Tudor's department accepted her as female); *id.* ¶ 5(e) (no problems with Tudor's gender within the department); **Exhibit 17** ¶ 5(d) (similar).

[4] **Conway** had obvious discomfort with transgender people, restroom access, and Tudor's gender in particular. *See, e.g.*, **Exhibit 31** at 40:13–23 (might not be legal in Tenth Circuit to allow transgender woman to use restroom matching her gender); *id.* at 127 ("law" might require genital reconstruction surgery in order for a transgender person to use restroom); *id.* at 61–63 (call with Babb about Tudor's restroom use [referencing notes taken during call, **Exhibit 32** at DOJ12] and law concerning restroom access); *id.* at 70:13–23 (did not know if Tudor was female thus used male pronouns to refer Tudor); *id.* at 91–94 (uncomfortable with Tudor's gender transition; feared others at Southeastern would object due to Tudor's presumed genital configuration); *id.* at 209 (uncertain if Tudor is female given "[a]ll this documentation is about her being transgender"); **Exhibit 30** (using male pronouns to refer to Tudor in 2010; Stubblefield making light of the pronoun misuse in response).

Because **Minks** knew Tudor is transgender (**Exhibit 33** at 31: 8–16), he attests he did not know if she was female (*id.* at 32:8–11) or male (*id.* at 31:13–16). Minks'

2. Since Tudor's separation, Southeastern revised its harassment and discrimination policies so that they expressly protect transgender persons who face gender discrimination and hostilities.[5]

3. During Tudor's employ, Defendants' fringe benefit health plans categorically excluded coverage of treatments sought for gender dysphoria by transgender persons despite otherwise covering the same treatments for nontransgender persons seeking care for other conditions.[6] In Fall 2016,

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discomfort identifying Tudor's gender (and refusal to identify the gender of anyone else at his deposition other than Attorney Coffey) suggests Minks has a bias against transgender persons and tried to hide it by disclaiming the ability to discern the gender of others. *Compare* **Exhibit 33** *id.* at 32–34 (Minks claiming inability to identify genders of persons attending deposition) *with* **Exhibit 34** (memorialization of gender presentations of persons whom Minks was asked to identify).

McMillan testified under oath to struggling with Tudor's gender and transgender people more generally. *See, e.g.*, **Exhibit 35** at 221–22 (describing religious beliefs about gender and change of gender); *id.* at 223 (similar discussion with regards to Tudor); *id.* at 239–40 (unsure if transgender people should use restroom matching their presented gender); *id.* at 240 (uncertain whether possible to change gender); *id.* at 241–42 (contrasting transgender restroom restrictions with race based restroom restrictions, concluding it is wrong to exclude based on race but uncertain whether exclusion based on being transgender is okay).

[5] *See, e.g.*, **Exhibit 21** (May 2015 email publicizing change); **Exhibit 22** at PI002073 (May 2017 policy—identifying old policies amended by new policy); *id.* at PI002113 ("freedom from discrimination and harassment based on gender identity or transgender status"); *id.* (treat employees in accordance with gender identity); *id.* at 2114 (mandating that restroom be accessible "consistent with an individual's gender identity"); **Exhibit 17** ¶ 9(a)–(c); **Exhibit 18** ¶ 14(a)–(b).

[6] *See* ECF No. 28 ¶ 67 (admitting exclusion); ECF No. 29 ¶ (67) (admitting exclusion). Defendants' plans covered breast reconstruction (**Exhibit 23** at 125) and hormones such as estrogen (*id.* at 111) for conditions other than gender dysphoria, but their plan excluded reconstructive surgery (*id.* at 107–09) and hormones (*id.* at 108–09) sought by transgender persons to treat gender dysphoria. During this period, Defendants were empowered to seek out plans without the exclusion (*id.* at 114).

Defendants removed the exclusion, showing it was feasible to have a plan without the exclusion. *See* **Exhibit 24** at PI002065 (partially removing exclusion); *id.* at PI002121 (removing surgical component of exclusion).

4. During Tudor's employ, Defendants did not evaluate whether their health plans complied with federal laws. *See, e.g.*, **Exhibit 23** at 93–94; *id.* at 128–29; **Exhibit 31** at 179:11–16. Defendants had no policies to redress employee complaints about the health plan (**Exhibit 23** at 73). None of Defendants' employees grieved their health plan or otherwise challenged an exclusion (*id.* at 82), showing there was no avenue to grieve exclusions.

5. During Tudor's employ, there were virtually no safeguards against bias during the tenure and promotion process. The only check on bias from the Dean was the VPAA or President (**Exhibit 14** at 185:14–25 and 186: 2); the only check on the VPAA's decision was the President (*id.* at 188:3–5.). There was no written policy or established process allowing a faculty member to grieve the President's tenure and promotion decision, even if the President was accused of bias (*id.* at 188:6–16; **Exhibit 64** at 108:22–25 and 109:1–10; 165:13–21 and 166:1; 169:14–18; 172:8–15). Defendants' polices now allow redress of all decisions, including those made by the President (*see, e.g.*, **Exhibit 28** ¶ 22(b); **Exhibit 14** at 188:10–16; **Exhibit 64 at** 166–69).

6. During Tudor's employ at Southeastern: Tenure was granted

where the candidate qualified in the combined areas of teaching, scholarship, and service. *See, e.g.,* **Exhibit 16** at 3. "Excellence" only had to be shown in two of three criteria. *See* **Exhibit 18** ¶ 6(a). Southeastern weighed teaching more heavily than other criteria. *See, e.g.,* **Exhibit 16** at 3–4 (interpreting Southeastern's policies). Aside from Tudor, administrators provided their rationales for voting for or against promotion/tenure directly to the candidate before the process was over.[7]

7. "Peer review" of a tenure and promotion application can reveal whether university decision-makers inappropriately took into account factors other than merit in making a decision on an application. *See, e.g.*, **Exhibit 14** at 183:15–25; *id.* at 184:14–23.

8. Dr. Parker, an expert on tenure and promotion, attests that Tudor's 2009-10 and 2010-11 portfolios were on par with if not better than portfolios of successful English Department comparators. *See generally* **Exhibit 16**.

9. As to Tudor's 2009-10 application: She was qualified as to

[7] *See, e.g.*, **Exhibit 25** ¶¶ 9–11 (Mark Spencer's experience); **Exhibit 14** at 201:17–25 and 202:2–6 (typical practice to provide decision and rationale directly to candidate during process; agreeing it was "inappropriate" for Scoufos and McMillan to withhold rationales until "the process was over"); **Exhibit 43** at 62:8–15 (similar); *id.* at 63:5–23 (Tudor is the only person not given rationales for denial mid-process). Administrators also allowed professors other than Tudor to get feedback on their application while it was still pending and improve it prior to the president's final decision. *See, e.g.,* **Exhibit 25** ¶¶ 12–17 (Mark Spencer's experience).

teaching,[8] scholarship[9], *and* service[10].

10. Scoufos (**Exhibit 27**) and McMillan/Minks (**Exhibit 9**) did not actually believe the rationales they cited for rejecting Tudor's 2009-10 application.[11]

11. Scoufos' (**Exhibit 27**) and McMillan/Minks' (**Exhibit 9**)

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[8] *See, e.g.*, **Exhibit 27** ("there is evidence that Tudor is a generally effective classroom teacher"); **Exhibit 16** at 6 ("ample evidence that Tudor is an excellent teacher").

[9] *See, e.g.*, **Exhibit 16** at 17–18 (evaluating Tudor's scholarship at time of 2009-10 portfolio and concluding it is stronger than comparators in English Department).

[10] *See, e.g.*, **Exhibit 16** at 25–26 (describing Tudor's service as on par with comparators).

[11] **Scoufos**'s original denial letter (**Exhibit 65**) claimed Tudor lacked documentation to support her application but did not claim Tudor lacked merit. When Scoufos replaced the original denial letter with a backdated letter (**Exhibit 27** [backdated letter]; see also **Exhibit 68** and **Exhibit 66**) she set forth rationales that she did not believe to be true in January 2010. For example, Scoufos claimed Tudor had only one peer review publication and this was insufficient (but see **Exhibit 36**, where Scoufos inquires months after January 2010 whether open mic publication should be counted as scholarship). For example, Scoufos claimed there was no recommendation from the Department Chair (**Exhibit 27**) but in January 2011, Scoufos told Walkup that the Department Chair's evaluation form (which she had) was the equivalent to a letter of recommendation (**Exhibit 42**).

McMillan never provided his rationales to Tudor, but he did write a letter on Minks' behalf articulating rationales that neither actually believed (**Exhibit 9**). *Compare* **Exhibit 9** at PI1200 (claiming deficiency in number scholarship activities, and that three activities meet tenure standard but five do not) *with* 83:9–17 (must be "ongoing, continuous element" of scholarship to warrant tenure) and **Exhibit 35** at 99:5–10 (McMillan claiming he asked Scoufos what an open mic chapbook was when he evaluated Tudor's portfolio in February 2010) and **Exhibit 26** (Scoufos inquiring as to what an open mic chapbook is in April 2010). *Compare* **Exhibit 9** at PI1200 (construing Southeastern's Native American Symposium as local and thus not scholarship) *with* **Exhibit 50** at DOJ456 (Southeastern self-study report authored in part by Minks, McMillan, and Scoufos; identifying the Symposium as a "regional conference that brings in international participants to Southeastern's campus"). *Compare* **Exhibit 9** at PI1201 (service was deficient because it was heavily stacked with departmental committees) *with* **Exhibit 35** at 88:14–18 (identifying "continuousness" as "most critical piece" of service demonstration).

rationales for denying Tudor's 2009-10 application are not worthy of credence.[12]

12. As to Tudor's 2010-11 application: She was qualified as to teaching[13], scholarship (even stronger than in the 2009-10 cycle)[14], and service[15].

13. McMillan did not actually believe the rationales he cited in the October 2010 memorandum (**Exhibit 12**) wherein he barred Tudor's reapplication in the 2010-11 cycle.[16]

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[12] **Tudor's scholarship: Exhibit 16** at 17–18 (Tudor's 2009-10 portfolio demonstrated she had more peer review articles than comparators who got tenure and promotion); *id.* at 18 (Scoufos' and McMillan's low ratings of Tudor's scholarship were "puzzling"); *id.* (Scoufos and McMillan both undercounted Tudor's peer review publications); *id.* (Scoufos and McMillan counted as scholarship accepted but not yet published peer review articles for comparators but not Tudor); **Exhibit 16** at 17 ("[b]ecause Parrish's record shows no scholarship produced during her time at Southeastern, I see no reasonable cause for rating her record of scholarship above the record of scholarship for Professor Tudor"). **Tudor's service: Exhibit 16** at 25 ("Given the difficulty of making meaningful distinctions among the service records of various candidates, it seems perplexing that all candidates except Tudor were considered by the administrators beyond their department to have served the University with distinction.")

[13] *See* evidence cited *supra* note 8. *See also* **Exhibit 29** at PI1299 ("Tudor's teaching is exemplary").

[14] *See, e.g.*, **Exhibit 16** at 19 (evaluating eight peer review articles which should count towards scholarship in Tudor's 2010-11 portfolio and concluding on balance portfolio "shows an even much stronger scholarly profile, stronger than Cotter-Lynch's in terms of actual accomplished publication, and far stronger than Parrish's and Spencer's portfolios"); **Exhibit 29** at PI1300 ("Tudor has far exceeded any stated or unstated standard for scholarly production at this university").

[15] **Exhibit 16** at 25; **Exhibit 29** at PI1299–300 ("Tudor not only amply fulfills service expectations for faculty members, but is exemplary in the range, depth, and dedication she has shown in service to our university").

[16] Among other things, McMillan knew that university policy allowed Tudor to reapply in the 2010-11 term—as evidenced by an email chain months prior where

14. There is also evidence that the rationales McMillan listed in the October 2010 memorandum (**Exhibit 12**) are not worthy of credence.[17]

15. Southeastern administrators and RUSO general counsel Charles Babb repeatedly interfered with, sabotaged, and otherwise undermined Tudor's efforts to grieve mistreatment at Southeastern.

a. **"FAC1" appeal.** Tudor filed an appeal with the Faculty Appellate Committee in February 2010 (**Exhibit 45**) demanding that Scoufos and McMillan provide her with rationales for their decisions to deny her 2009-10 application. The FAC1 found a violation of policy and ordered Scoufos and McMillan to provide their rationales to Tudor (**Exhibit 46**). McMillan interfered with the FAC1 process by advising Weiner to not timely notify Tudor of FAC1's decision and to later send Tudor a letter

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Tudor's entitlement to reapply was settled (**Exhibit 10** at EEOC919). *See also* **Exhibit 37** (former Regent Ogden expressing concern the bar on application and denial of 2009-10 application rationales were pretextual).

[17] For example, though McMillan claimed it would be "impossible" for Tudor to fix deficiencies he identified in 2009-10 cycle in a single year (**Exhibit 12**), others disagree. *See, e.g.*, **Exhibit 4** at 149–50. There was also no evidence Tudor's reapplication would sow discord at Southeastern. *Compare* **Exhibit 12** (claiming not in "best interests of the university" and would be "disruptive to School of Arts and Sciences" and "will potentially inflame the relationship between faculty and administration") *with* **Exhibit 17** ¶ 7(e)–(h); **Exhibit 18** ¶ 8 ("administration's refusal to allow Tudor's reapplication made things exponentially more tense between the faculty and administration"). *See also* **Exhibit 18** ¶ 13(b)–(c) (McMillan claimed Southeastern's faculty did not support her and did not want her to return in 2014; Cotter-Lynch attests faculty did not feel this way and endeavored to disprove McMillan's false claims to President Burrage).

(**Exhibit 8**) wherein the administration refused to provide McMillan's and Scoufos' rationales to Tudor. *See also* **Exhibit 43** at 64–71 (Weiner describing McMillan's rationale for delaying delivery of **Exhibit 8** to Tudor).

b. **"FAC 2" appeal.** Tudor filed another appeal with the Faculty Appellate Committee in August 2010 (**Exhibit 48**) regarding the administration's improprieties during her 2009-10 cycle. Defendants interfered with this process. Babb, Stubblefield, and Bryon Clark attended a FAC2 meeting (**Exhibit 6**). Babb advised FAC2 that Tudor's appeal could not be heard by FAC2 because he deemed it to not be a due process complaint. Babb also directed that, to the extent Tudor's appeal pointed to discrimination, FAC2 also could not hear it (setting up Tudor's discrimination issues to only be assessed by Stubblefield). The FAC2 ultimately dismissed Tudor's appeal on the grounds articulated by Babb (see, e.g, **Exhibit 60**).

c. **Stubblefield "investigation."** Tudor filed an internal discrimination and environment complaint in August 2010 (**Exhibit 47**), grieving mostly issues in the 2009-10 cycle. In October 2010, Tudor advised Stubblefield of McMillan's bar on her application (see, e.g., **Exhibit 52**) and formally amended

her complaint to add a retaliation claim (**Exhibit 53**). Despite Stubblefield being close friends with McMillan and deeming him incapable of discrimination (*see, e.g.*, **Exhibit 61** at 24:14–25 and 25:1–3; *id.* at 129:22–25 and 130:1–16; *id.* at 132:23–25 and 133:1–3), she was assigned to investigate. Stubblefield conducted a sham investigation. She did not ask McMillan whether he was biased against Tudor because of her presented gender (*see, e.g.*, **Exhibit** 61 at 129:11–15; *id.* 138:5–11 and 138:17–21). She sought out legal opinions stating that transgender people were not protected by law or policy (see, e.g., **Exhibit 19)**. She did only perfunctory interviews (see, e.g., **Exhibit 18** ¶ 9; **Exhibit 2** ¶ 10(f)). She took no steps to investigate Tudor's retaliation claim (*see, e.g.*, **Exhibit 61** at 163:2–15; **Exhibit 54** at [investigatory notes ending in mid-Sept. 2010—weeks before Tudor even filed retaliation claim]). She fed sensitive information about her investigation to the respondents (see, e.g., **Exhibit 58**) and did not share similar information with Tudor (**Exhibit 2** ¶ 10(h). Stubblefield also shared working drafts of her investigatory report with McMillan and gave him the opportunity to edit and make corrections as he saw fit (see, e.g.,

Exhibit 59).[18] Stubblefield's final report found that Tudor did not face discrimination, but failed to address Tudor's hostile work environment (**Exhibit 61** at 218:13–25 and 219:1–7 [claiming Tudor's "hostile attitude" complaint was construed as a direction to investigate whether Tudor got "what she wanted"]), and retaliation claims. Tudor appealed Stubblefield's report (**Exhibit 56**), which was heard by Minks—despite the fact that his own actions were the subject of her discrimination and retaliation complaints. Minks summarily sided with Stubblefield (**Exhibit 57**).

d. **"FAC3" appeal.** Tudor filed another appeal with the Faculty Appellate Committee in late October 2010 (**Exhibit 44**) after she was barred from reapplication. McMillan conspired with Clark for the latter to serve as the liaison, which would be "cleaner," contemplating court action (**Exhibit 7**). Clark was tasked with keeping deadlines, sharing information, and making up new rules for the process. The FAC3 ordered the administration (**Exhibit 55**) to let Tudor reapply. The administration refused to comply with the FAC3 order, and

[18] Stubblefield admits that asking someone being investigated what she should or should not do is inappropriate. *See* **Exhibit 61** at 173:21–25 and 174:1–9.

Clark created new rules mid-process (**Exhibit 49**) that allowed the President to sit over the FAC3 as final appellate reviewer despite the fact that his own actions were the subject of the appeal. The new rules were never approved by the Faculty Senate (as was required at the time) and they have never been used in any other appeal (before or since). Tudor grieved the new rules (**Exhibit 62**) but her grievance was summarily denied (**Exhibit 63**). Minks overruled the FAC3 order (**Exhibit 51**).

16. During the 2010-11 cycle, English Department instructor Wilma Shires was promoted to a tenure-track assistant professor position. Ever since, Shires has taught the same classes Tudor taught. In the 2017-18 cycle, Dr. Shires is applying for promotion from assistant to associate professor with tenure. If Shires succeeds, she will have the same physical office, hold the same job, and teach the same classes Tudor would have if she had been given promotion and tenure in the 2009-10 or 2010-11 cycles. *See* **Exhibit 18** ¶ 15(a)–(j).

17. Defendants learned of many of the issues Tudor grieves in this lawsuit from third parties prior to Tudor's separation at the end of May 2011. *See, e.g.,* **Exhibit 38** (sampling of complaints); **Exhibit 18** ¶ 12(a)–(d) (describing complaints and authenticating supporting exhibits of complaints).

IV. STANDARD OF REVIEW

In addition to the standard articulated by Defendants (SJ Mot. at 177 at 9–10), Dr. Tudor points out that employers must do more at summary judgment than proffer a bald, self-serving defense. "An articulation not admitted into evidence will not suffice. Thus, the [employer] cannot meet its burden merely through an answer to the complaint or by argument of counsel." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.9 (1981).

V. ANALYSIS & AUTHORITIES

A. Tudor is protected by Title VII.

Defendants argue Tudor cannot make out a *prima facie* case on her discrimination (SJ Mot. at 19–20) and retaliation (*id. at* 28) claims because she is a transgender woman. Defendants' rehash the argument they posed in their motion to dismiss (see, e.g., ECF No. 30 at 3 n.1). But this Court has already decided that Tudor is a member of a protected class,[19] which is law of the case.[20]

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[19] In denying Defendants' motion to dismiss, this Court held that Tudor is protected under Title VII insofar as she is female but Defendants regarded her as male and further held that insofar as the discrimination Tudor alleges occurred "because of Dr. Tudor's gender […] she falls within a protected class." ECF No. 34 at 5.

[20] "The law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *United States v. Monsisvais*, 946 F.2d 114 (10th Cir. 1991) (*citing Arizona v. California*, 460 U.S. 605, 618 (1982) (cleaned up). *See also United States*

Moreover, Defendants fail to convincingly explain why *Etsitty v. Utah Transit. Auth.*, 502 F.3d 1215, 1220 (10th Cir. 2007)[21] deprives Tudor of any protection from gender discrimination. Defendants' reliance on the United States Attorney General's recent pontifications on the nature of sex are neither sacrosanct nor evidence of scientific fact. *Contra* SJ Mot. at 19–20. Moreover the United States recognizes Tudor as female (**Exhibit 26**) and its former expert in this case (now assumed by Tudor), has provided the Court with an report opining on this issue which is supported by fact, rather than Defendants' wishful thinking on the eve of trial. *See generally* **Exhibit 1.**

B. Hostile Work Environment Claim

1. Tudor has established a *prima facie* case.

For Tudor to survive summary judgment on her hostile work environment claim, she must show that a rational jury could find the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment and that she was targeted because of her gender. *Morris v. City of Colo. Springs*, 666 F.3d 654, 663–64 (10th Cir. 2012). Tudor must also show that she was offended by the

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v. Webb, 98 F.3d 585, 587 (10th Cir. 1996) ("Under law of the case doctrine, findings made at one point during the litigation become law of the case for subsequent stages of the same litigation.").

[21] Though not dispositive, perhaps of interest to the Court: **Exhibit 13** at 147–53.

work environment and a reasonable person would likewise be offended. *Id.* at 664.

Evidence supports Tudor's environmental claim. Tudor experienced more than a handful of sporadic insults, incidents, or comments.[22] Every single day over the course of a four-year period, Tudor endured restrictions on her restroom access (Part II ¶ 37), restrictions on her dress and make-up (**Exhibit 2** ¶ 2(b), and her fringe benefit health plan subjected her to unequal coverage of treatment (Part III ¶ 3). Tudor was targeted by these policies because she presented herself as female but Defendants treated her as if she were male.[23] *See* ECF No. 34 at 5. Peppered throughout this same period, Tudor was also subjected to discrete hostilities

[22] Defendants argue Tudor's environmental claim cannot be predicated on hostilities she did not immediately grieve at Southeastern or individually list in her EEOC filings (SJ Mot. at 12–13). But with an environmental claim, an employee need only file a charge within the statutory time period to redress like constituent hostilities. "It does not matter . . . that some of the component acts of the hostile work environment fall outside of the statutory time period." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002). So long as "an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court." *Id.* Where there is a relationship between the acts alleged after and before the filing period, all acts shall be considered part of the same environmental claim. *Duncan v. Manager, Dep't of Safety, City and Cnty. of Denver*, 397 F.3d 1300, 1308–09 (10th Cir. 2005). Here, Tudor grieves polices, practices, and discrete hostilities which targeted her because of her presented gender and/or retaliatory hostilities related to the former. The hostilities are linked in time—clustered in unbroken four year period—making them part of the same hostile environment.

[23] Part III ¶ 1 (evidence of individual actors failure to regard Tudor as female); Part III ¶ 3 (evidence that Tudor's health plan exclusion operated by regarding her as other than female because she is transgender thereby depriving her of coverage of care accessible to other females).

from administrators targeting her gender (see, e.g., Part II ¶ 36 [complaints about pronoun misuse by Scoufos]), as well as gender neutral hostilities[24] (see, e.g., **Exhibit 3** at 65–66 [Scoufos' ultimatum in April 2010]), and the Kafkaesque appeals and grievance proceedings she desperately pursued in hopes of securing the job she earned (Part III ¶ 15(a); Part III ¶ 15(b); Part III ¶ 15(c)).

Looking at the totality of the circumstances, the environment was subjectively hostile as evidenced by Tudor's many complaints and the environment's impact on her (**Exhibit 2** ¶ 5; *id.* ¶ 8(a)–(d); *id.* ¶ 9(a)–(c))). The environment is also objectively hostile—as rationale person in Tudor's shoes would deem it objectionable. Indeed, Tudor's as well would be deemed colleague Cotter-Lynch attests to as much (see, e.g., **Exhibit 18** ¶ 11(a)–(d)).

2. Defendants cannot invoke *Faragher/ Ellerth* defense.

Under *Faragher/Ellerth*, an employer may avoid liability for hostilities it failed to redress where it establishes two elements: (1) the employer exercised reasonable care to prevent and promptly correct any statutorily prohibited harassment, and (2) the employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer.

[24] "Facially neutral abusive conduct [Tudor grieves] can support a finding of [gender] animus sufficient to sustain a hostile work environment claim when that conduct is viewed in the context of overly [gender]discriminatory conduct." *O'Shea v. Yellow Tech. Servs., Inc.*, 185 F.3d 1093, 1098 (10th Cir. 1999).

Stapp v. Curry Cty. Bd. Comm'rs, 672 Fed.Appx. 841 (10th Cir. 2016).

Defendants fail at the first step. The bare fact that Defendants had policies in place during Tudor's employ is insufficient to warrant summary judgment in their favor. Defendants must demonstrate (and Tudor must fail to counter) that the policies could redress the hostilities alleged. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72–73 (1986) (general nondiscrimination policy or one that fails to expressly identify the kind of discrimination complained of does not alert employees to the employer's interest in correcting that form of discrimination); *Debord v. Mercy Health Sys. of Kan., Inc.*, 737 F.3d 642, 653 (10th Cir. 2013) (employee whom points to deficiencies in policies rebuts employer's showing that policies satisfy the first element of *Faragher/Ellerth*). Defendants cannot meet this bar.

At the time of Tudor's employ, Defendants' policies did not expressly reach the kinds of discrimination and hostilities Tudor endured (see, e.g., Part II ¶¶ 34–35; Part III ¶¶3–4; Part III ¶ 5). Moreover, since Tudor's departure, Defendants have changed their policies so that they now expressly protect transgender persons from gender hostilities (Part III ¶ 2) and the health plan no longer contains the illicit exclusion (Part III ¶ 3). These changes are evidence that Defendants' policies were deficient during Tudor's employ. *See Debord*, 737 F.3d at 653.

Defendants also fail at step two. Despite believing her complaints

to be futile (**Exhibit 2** ¶¶ 6, 7(a)–(e)), Tudor pursued remedial measures available to her at Southeastern (see, e.g., **Exhibit 61** at 218–19 [admitting Tudor grieved hostile environment at Southeastern]) as well as many discrete hostilities that are constituent parts of her environmental claim (see, e.g., Part III ¶ 15(a); *id.* ¶ 15(b); *id.* ¶ 15(c)). *Contra* SJ Mot. at 15 ("Defendants were deprived of any opportunity to conduct an investigation of the alleged harassment.")

Second, the evidence makes clear that Defendants had actual knowledge of a critical mass of constituent hostilities. For instance, because Defendants themselves imposed and controlled hostile policies, like the health plan exclusion and about the restroom restrictions—no grievance notifying them of these repugnant policies was necessary. Additionally, Tudor grieved the environment generally, citing specific incidents through internal grievances and appeals *in writing* through her many grievances and appeals. As to other constituent hostilities, Tudor complained repeatedly to coworkers, mid-level administrators, and high-level administrators dozens of times both orally and in writing (**Exhibit 3** at 3–20). Tudor and third parties also complained publicly and directly to RUDO about many of the hostilities; Defendants still did nothing (see, e.g., Part III ¶ 17; **Exhibit 13** at 60–61 [RUSO detailing timing of response and steps to investigate]).

In response to all of these complaints—Defendants did nothing. This

deafening response defeats a *Faragher/Ellerth* defense. *See Fuller v. City of Oakland*, 47 F.3d 1522, 1529 (9th Cir. 1995) ("An employer whose sole action is to conclude that no harassment has occurred cannot in any meaningful sense be said to have 'remedied' what happened. Denial does not constitute a remedy.").

C. Sex Discrimination (Failure to Promote Claim[25])

Tudor has shown a* prima facie *case. In order to establish her *prima face* case, Tudor needs to show that she is a (1) member of a protected class; (2) she applied for and was qualified for a position; (3) despite being qualified, she was rejected; and (4) after her rejection, the position was filled. *Jones v. Barnhart*, 349 F.3d 1260, 1266 (10th Cir. 2003).

Tudor can show a *prima facie* case. She is a member of a protected class (ECF No. 34 at 5–6). It is undisputed that Tudor applied for promotion and tenure in the 2009-10 cycle. There is also evidence that Tudor was qualified for the position (see, e.g., Part III ¶ 9), which is sufficient to survive summary judgment.[26] As to the fourth factor, Tudor need not necessarily show another

[25] In her Complaint, Tudor alleges that Defendants discriminated against because of her sex when they (a) denied her tenure and promotion application in the 2009-10 cycle ("failure to promote claim") (see ECF No. 24 ¶¶ 162, 172) and (b) denied her the opportunity to reapply for tenure and promotion in the 2010-11 cycle, resulting in her termination ("termination claim") (see ECF No. 24 ¶¶ 163, 164, 171, 172). But, Defendants move for summary judgment only on Tudor's failure to promote claim. *See* SJ Mot. at 17–27.

[26] *Edwards v. Okla.*, 2017 WL 401259, at *2 (W.D.Okla. 2017) (Cauthron, J.) (*quoting EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1193 (10th Cir.

person was promoted at the exact time she was not. *Cf. Weinberger v. Okla.*, 2007 WL 593572 at *6 (W.D.Okla. 2007) (Cauthron, J.) (evidence of disfavorable treatment sufficient in university setting). Tudor points to evidence that similarly situated colleagues received promotions around the same time with substantially similar credentials (see generally **Exhibit 16**). *See also* **Exhibit 18** ¶ 15(a)–(j) (providing background on Wilma Shires, whom has ostensibly taken Tudor's spot at Southeastern, evidence "same job" still exists). Defendants contention that Tudor cannot show discrimination because male and female comparators were treated better is without merit. Tudor need only show she was unfavorably treated; she need not show persons of her same gender were uniformly mistreated. *See Perry v. Woodward*, 199 F.3d 1126, 1137 (10th Cir. 1999).

Nondiscriminatory rationale is pretextual. Defendants argue that they denied Tudor's 2009-10 application because it was "deficient" (SJ Mot. at 26). To survive summary judgment, Tudor need only show that there is a genuine dispute of material fact as to whether Defendants' articulated reason is pretextual. *Perry*, 199 F.3d at 1135. She can establish pretext by pointing to "such weaknesses, implausibilities, inconsistencies, incoherencies,

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2000) ("relevant inquiry at the prima facie stage is not whether an employee is able to meet all the objective criteria adopted by the employer, but whether the employee has introduced some evidence that she possesses the objective qualifications necessary to perform the job sought").

or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy of credence." *Jones v. Barnhart*, 349 F.3d 1260, 1266 (10th Cir. 2003). Examples of pretext include, "prior treatment of plaintiff," "disturbing procedural irregularities (e.g., falsifying or manipulating . . . criteria); and the use of subjective criteria." *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1217 (10th Cir. 2002) (cleaned up).

Tudor points to disturbing procedural irregularities in the 2009-10 cycle. For example, Scoufos refused to give her rationales to Tudor and later planted a backdated letter in Tudor's portfolio spelling out rationales after the fact (Part II ¶ 11). McMillan refused to provide *his* rationales for denial to Tudor, which he held to even after FAC1 ordered him to disclose them (Part III ¶¶ 15(a)). After Minks denied Tudor's application, he directed McMillan to write to Tudor purportedly memorializing Minks' (but not McMillan's) rationales. Making this odder still, McMillan's letter, dated in April 2010, was not dispatched to Tudor until June 2010 (Part II ¶ 13). Other oddities include that mid-process, the administration pressured Tudor to withdraw her application and threatened her with retaliation if she failed to comply (Part II ¶¶ 16–17).

Even if we treat the rationales in Scoufos' backdated letter and the Minks/McMillan letter as Defendants' nondiscriminatory rationales—these

evidence subjectivity giving rise to pretext. As Dr. Parker's report explains in excruciating detail, Scofous' and McMillan/Minks' evaluations of Tudor's scholarship (**Exhibit 16** at 17–18) and service (*id.* at 24–25) are puzzling—they do not map onto Southeastern's articulated criteria for tenure and promotion evaluation and they are totally irreconcilable with decisions made with regards to comparators whom qualified for tenure and promotion. On balance, construed in Tudor's favor, Scoufos and McMillan/Minks' undervaluing of Tudor's qualifications, taking into account their prior acts and biases (see, e.g., Part III ¶ 1) can be construed as evidencing sex-based bias against Tudor. *Cf. Weinberger*, at *6.

Taken together, the foregoing facts are more than enough to give rise to pretext. *See Edwards*, at *4 (*quoting Johnson v. Weld Cnty., Colo.*, 594 F.3d 1202, 1211 (10th Cir. 2010)) (summary judgment improper where employee combats employers' reasons with "evidence that the employer didn't really believe its proffered reasons for action and thus may have been pursuing a hidden discriminatory agenda").

D. Retaliation Claim

Tudor has made a* prima facie *case. In order to establish her *prima facie* case, Tudor must show that she (1) engaged in protected activity; (2) she suffered an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse action.

Timmerman v. U.S. Bank, N.A., 483 F.3d 1106, 1123–24 (10th Cir. 2007).

Tudor meets this bar. First, it is beyond dispute that Tudor engaged in protected activities (both participatory and oppositional). For example, on August 30, 2010, Tudor filed internal grievances at Southeastern (see, e.g., Part III ¶ 15(b); *id.* ¶ 15(c)) and sent a letter to the U.S. Department of Education ("DOE") complaining of discrimination and hostilities (Part II ¶ 20) in connection with the 2009-10 cycle. Tudor also informally complained to her colleagues (see, e.g., **Exhibit 3** at 13–15; **Exhibit 66**). Second, Tudor also suffered an adverse action. Being denied the opportunity to apply for tenure and promotion both deprived Tudor of an opportunity to seek promotion and tenure at Southeastern (a promotion) *and*, because 2010-11 was her "terminal year," had the effect of triggering a nonrenewal, which resulted in her termination at the end of Spring 2010. Both the denial of an opportunity to apply and a decision triggering termination are adverse actions. Third, there was a causal connection between Tudor's opposition to the administration's treatment of her in the 2009-10 cycle. Within 36 days of Tudor filing the FAC2 appeal, the grievance initiating the Stubblefield "investigation," and sending a letter to the DOE, McMillan issued his memorandum barring her reapplication in the 2010-11 cycle (**Exhibit 12**). *See Ramirez v. Okla. Dep't of Mental Health*, 41 F.3d 584, 596 (10th Cir. 1994) (one and one-half month period between protected activity and adverse

action may, by itself, establish causation).

Nonretaliatory rationale is pretextual. To avoid summary judgment Tudor need only point to a dispute of material fact undergirding Defendants' proffered nonretaliatory rationale. She can do so. Defendants argue that Tudor's reapplication in the 2010-11 cycle was barred because reapplication was "extraordinary [] and contrary to administrative practice" where a professor's application had been denied by the President in a prior cycle (SJ Mot. at 28–29). Yet, evidence shows that there was no automatic bar on reapplication and others were treated more favorably (see Part II ¶ 19). Moreover, to the extent that McMillan now claims policy prohibited reapplication after denial by the president, this is a shift from McMillan's rationale memorialized in the very memorandum he wrote to bar Tudor's reapplication and is thus unworthy of credence. **Exhibit 12** ("I recognize that the policy does not proscribe a subsequent application").

VI. Conclusion

For the reasons set forth herein, Dr. Tudor respectfully requests the Court deny Defendants' Motion for Summary Judgment.

Dated: October 13, 2017

/s/ Ezra Young
Ezra Young (NY Bar No. 5283114)
Law Office of Ezra Young
30 Devoe, 1a
Brooklyn, NY 11211
P: 949-291-3185
F: 917-398-1849
ezraiyoung@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2017, I electronically filed a copy of the foregoing with the Clerk of Court by using the CM/ECF system, which will automatically serve all counsel of record.

/s/ Ezra Young
Ezra Young (NY Bar No. 5283114)