No. 15-___

IN THE

Supreme Court of the United States

ALFREDO ROSILLO,

Petitioner,

v.

MATT HOLTEN AND JEFF ELLIS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether a federal court of appeals may exercise jurisdiction when a notice of appeal does not identify correctly the order to be reviewed, but the briefs resolve any potential confusion.

II.

Whether a federal court of appeals may exercise jurisdiction when an error in the designation of the order to be reviewed neither prejudices nor misleads the appellee.

III.

Whether the more lenient standard of *Foman v. Davis*, 371 U.S. 178 (1962), or the more stringent standard of *Torres v. Oakland Scavenger Co*., 487 U.S. 312 (1988), determines if appellate jurisdiction is defeated by an error in the designation of the order to be reviewed.

PARTIES TO THE PRCOCEEDING AND RULE 29.6 STATEMENT

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Alfredo Rosillo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 817 F.3d 595 and is reproduced in the appendix to this petition at Pet. App. 1a. The relevant judgments and orders of the District of Minnesota are unpublished and are reproduced at Pet. App. 5a, 21a, and 25a.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on March 24, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Appellate Procedure 3(c) provides:

> Contents of the Notice of Appeal.
>
> (1) The notice of appeal must:
>
> (A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";
>
> (B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

STATEMENT OF THE CASE

The decision of the Eighth Circuit in this case represents a position on three separate circuit splits on how an appellate court should proceed when a notice of appeal incorrectly designates the order or judgment from which the appeal is taken. First, the courts of appeals are deeply split with each other, and in many cases also beset by intra-circuit splits, as to whether an appellate court may look to the briefs of the parties to cure a defect in the designation of the order contained in the notice of appeal. Second, the circuits are also split as to whether an error that neither misleads nor prejudices the appellee defeats appellate jurisdiction. And the division of authority over these two issues is symptomatic of a third, and broader, conflict among the circuits over which standard governs errors in the designation of the relevant order. Some circuits apply the more lenient standard of *Foman v. Davis*, 371 U.S. 178 (1962), others the more stringent standard of *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). On all three of these questions, the Eighth Circuit took the more restrictive view, ultimately holding that it lacked jurisdiction over the appeal.

Petitioner Alfredo Rosillo brought suit against Officers Matt Holten and Jeff Ellis in the United States District Court for the District of Minnesota on July 19, 2013, asserting a cause of action for excessive force. R.1 at 1. The complaint alleged that Rosillo hid face down in a field of grass to conceal himself after his girlfriend called the police about him. R.1 at 2. Once discovered by Holten and Ellis, Rosillo showed no signs of flight or resistance and remained prostrate.

R.1 at 4. Holten, standing six feet away, unleashed a police dog who tore into Rosillo's buttocks. R.1 at 4. Then Ellis punched and kicked Rosillo in the head, leaving a boot print on his face. R.1 at 4-5.

Holten moved for summary judgment, which the district court granted in December of 2014, on the ground that the complaint did not expressly state that Holten was sued in his individual capacity, and there was not sufficient evidence to support an official capacity claim. Pet. App. 11a-12a. Ellis did not request summary judgment. Later that month, Ellis and Rosillo jointly filed a stipulation of dismissal with prejudice, having settled Rosillo's claim against Ellis. Pet. App. 17a.

The district court mistakenly entered an order of dismissal with prejudice on "all of Plaintiff's claims," without distinguishing between Ellis and Holten. Pet. App. 19a. Roughly one week later, the district court corrected itself under Federal Rule of Civil Procedure 60(a), stating that the claims against Holten had been dismissed on summary judgment, while the claims against Ellis were being dismissed pursuant to settlement. Pet. App. 23a-24a. The court entered judgment against Rosillo in favor of Ellis. Pet. App. 25a-26a.

Rosillo timely filed a notice of appeal, which included both Defendants, Holten and Ellis, as parties in the caption. Pet. App. 27a. The text of the notice of appeal stated:

> Pursuant to Fed. R. App. P. 3(c)(1) and 4(a), notice is hereby given that the Plaintiff, Alfredo Rosillo in the above-named case appeal to the United States Court of Appeals for the Eighth Circuit. The above-named

> parties appeal from the January 5, 2015, Order [Doc. No. 38] and Judgment [Doc. No. 39] entered by the U.S. District Court for the District of Minnesota in their entirety.

Pet. App. 27a.

Docket entry 38, referenced in the notice of appeal, was the order in which the district court clarified that the claims against Holten had been dismissed on summary judgment and the claims against Ellis had been dismissed pursuant to settlement. Pet. App. 23a-24a. Docket entry 39 was the entry of judgment against Rosillo in favor of Ellis. Pet. App. 25a-26a. Thus, the notice of appeal did not specify the order in which the district court granted summary judgment to Holten (docket entry 33), but Rosillo was careful to note that he was appealing from the judgment "in [its] entirety." Pet. App. 27a.

Rosillo included Holten in the caption of the notice of appeal, Pet. App. 27a, and electronically served Holten's counsel with the notice of appeal via the district court's electronic filing system. The court of appeals docketed the case with both Holten and Ellis listed as appellees, and the district court immediately transmitted docket entry 33, the order granting summary judgment to Holten, to the court of appeals. Appellate R.1 at 3; Appellate R.2 at 6-15.

On March 12, 2015, less than two weeks after the appeal was docketed, Holten moved to dismiss the appeal as to himself on the ground that the notice of appeal did not list docket entry 33. Mot. to Dismiss Appeal 1-6. This omission, he contended, divested the Eighth Circuit of appellate jurisdiction over the claims against him. *Id.* In the motion to dismiss the appeal, Holten acknowledged that he understood—by March

12 at the latest—that Rosillo intended to appeal "the order dismissing Holten from the lawsuit." *Id.* at 3.

The court of appeals denied Holten's motion to dismiss the appeal without prejudice to his ability to reassert the argument in his merits brief. Appellate R. 10. Rosillo's appellate brief focused solely on the dismissal of Holten. Appellant's Br. 1-13. Holten's brief, in turn, both reasserted his argument that the erroneous notice of appeal defeated appellate jurisdiction and fully argued the merits of the underlying case against Holten. Appellee's Br. 1-46.

The Eighth Circuit ultimately adopted Holten's argument that it lacked appellate jurisdiction because the notice of appeal did not cite docket entry 33, the order dismissing the claims against Holten. Pet. App. 4a. In doing so, the court did not consider whether Holten was misled or prejudiced by the error in the notice of appeal, nor did the court consider whether Rosillo's briefs sufficed to cure the error. Pet. App. 1a-4a. The court further held that any claims against Ellis had been abandoned on appeal, Pet. App. 4a, which Rosillo does not dispute.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL COURTS OF APPEALS ARE DEEPLY DIVIDED AS TO WHETHER THEY HAVE JURISDICTION TO CONSIDER AN ISSUE WHERE A NOTICE OF APPEAL OMITS THE RELEVANT ORDER BUT THE PARTIES BRIEF THE ISSUE FULLY.

When a notice of appeal correctly designates the parties to the appeal—but incorrectly designates the order from which the appeal is taken—the federal

courts are divided over how to proceed. The Fourth, Fifth, Ninth, and Tenth Circuits apply what might be called the "consider the briefs" rule: They examine the briefs and other filings, reasoning that if the appellant's brief fully presents an issue, the appellee suffers no prejudice or unfair surprise. In contrast, the First, Second, Eighth, and Eleventh Circuits apply a "face of the notice" rule, confining their analysis to the four corners of the notice of appeal.

The "consider the briefs" rule: In the Fourth Circuit, "[t]he appellant simply needs to address the merits of a particular issue in her opening brief in order to demonstrate that she had the intent to appeal that issue . . ." *Bogart v. Chapell*, 396 F.3d 548, 555 (4th Cir. 2005). In *Bogart*, the notice of appeal cited only a summary judgment order, failing to reference a separate order denying a Federal Rule of Civil Procedure 59(e) motion. *Id*. Despite the incorrect identification of the order from which the appeal was taken, the Fourth Circuit held that it had jurisdiction over the appeal because the appellant's intent to appeal the Rule 59(e) order "can be readily inferred from the discussion in her opening brief . . ." *Id*.

The Ninth Circuit takes a similar approach. In *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 691 (9th Cir. 1993), the notice of appeal identified an order dismissing the complaint but failed to cite an order denying leave to amend. The court exercised jurisdiction over both issues because "the denial of leave to amend the complaint was addressed in [the appellant's] opening brief," and "this is enough to demonstrate that the appellee had notice of the issue and did not suffer prejudice from the appellant's failure to specify the order in the notice of appeal." *Id*;

see also One Indus., LLC v. Jim O'Neal Distrib., Inc., 578 F.3d 1154, 1159 (9th Cir. 2009).

The same rule prevails in the Fifth Circuit, which considers whether "the intent to appeal an unnamed . . . ruling is apparent (from the briefs or otherwise)." *United States v. Knowles*, 29 F.3d 947, 949 (5th Cir. 1994) (quoting *United States v. Ramirez*, 932 F.2d 374, 375 (5th Cir. 1991)). In *Knowles*, the court exercised jurisdiction over an appeal regarding a conviction and a constitutional challenge to the statute of conviction, even though the notice of appeal designated only the sentence because the appellant "demonstrated his intent to appeal his conviction . . . in his brief to this Court." 29 F.3d at 950.

So too in the Tenth Circuit. In *United States v. Valencia*, 472 F.3d 761, 762-63 (10th Cir. 2006), an appellant seeking to challenge the denial of her habeas petition incorrectly designated a different order, but the court stated that her "application for [a certificate of appealability] and accompanying brief . . . make clear that she intends to appeal the district court's dismissal of her original habeas petition." The court held that "misstating the relevant order in a Notice of Appeal does not require our dismissal." *Id*.

The "face of the notice" rule: The First, Second, Sixth, Eighth, and Eleventh Circuits apply a more stringent approach that considers only the four corners of the notice of appeal. *See Constructora Andrade Gutierrez, S.A. v. Am. Int'l Ins. Co. of P.R.*, 467 F.3d 38, 44-45 (1st Cir. 2006) ("[Appellant] is the master of its notices, and we are limited to reviewing only those orders fairly raised within those notices."); *New Phone Co. v. City of New York*, 498 F.3d 127, 131 (2d Cir. 2007) ("Our jurisdiction . . . depends on whether the intent to appeal from [a] decision is clear on the face of, or can

be inferred from, the notices of appeal."); *Schramm v. LaHood*, 318 F. App'x 337, 343-44 (6th Cir. 2009) ("[W]e hold firm to the requirements of Rule 3(c)(1) and look to the notice of appeal to ascertain the judgments and orders the notice encompasses."); *Bosley v. Kearney R-1 Sch. Dist.*, 140 F.3d 776, 781 (8th Cir. 1998) (holding that appellate jurisdiction was lacking over an order where the appellant "failed to provide any reference in her notice of appeal to the district court's order"); *White v. State Farm Fire & Cas. Co.*, 664 F.3d 860, 863-64 (11th Cir. 2011) ("Although we generally construe a notice of appeal liberally, we will not expand it to include judgments and orders not specified unless the overriding intent to appeal these orders is readily apparent on the face of the notice" (quoting *Osterneck v. E.T. Barwick Indus., Inc.*, 825 F.2d 1521, 1528 (11th Cir. 1987))); *see also A.L. v. Jackson Cty. Sch. Bd.*, 635 Fed. Appx. 774, 786 (11th Cir. 2015) ("We have determined that we lack jurisdiction to consider an appeal of an order not specifically mentioned in the appellant's notice of appeal."); *Biltcliffe v. CitiMortgage, Inc.*, 772 F.3d 925, 928-30 (1st Cir. 2014); *Elyse v. Bridgeside Inc.*, 367 F. App'x 266, 268 (2d Cir. 2010).

The Third Circuit follows yet another rule that considers a number of different factors: "whether there is a connection between the specified and unspecified orders, whether the intention to appeal the unspecified order is apparent, whether the opposing party was prejudiced by the appellant's failure to specify the correct order, and whether the opposing party has had a full opportunity to brief the issues." *Benn v. First Judicial Dist. of Pa.*, 426 F.3d 233, 237 (3d Cir. 2005); *see also Williams v. Guzzardi*, 875 F.2d 46, 49 (3d Cir. 1989).

Not only do the circuits differ on the rules for distinguishing fatal and non-fatal errors in the designation of the judgment or order, but, as Wright and Miller observe, "caselaw appears to vary even within a given circuit." 16A Charles Alan Wright et al., *Federal Practice & Procedure: Jurisdiction* § 3949.4 (4th ed. 2008). For example, despite the Second and Eleventh Circuit "face of the notice" cases cited above, these courts have exercised jurisdiction over appeals even where the notice designated the wrong order because the issues raised in the omitted order were fully briefed by the parties. *See Mendez v. Jarden Corp.*, 503 F. App'x 930, 934 (11th Cir. 2013); *Krause v. Bennett*, 887 F.2d 362, 367 n.2 (2d Cir. 1989).

In this case, the Eighth Circuit applied the "face of the notice" rule, holding that "[w]here an appellant specifies one order of the district court in his notice of appeal, but fails to identify another, the notice is not sufficient to confer jurisdiction to review the unmentioned order." Pet. App. 3a. Under the "consider the briefs" rule of the Fourth, Fifth, Ninth, and Tenth Circuits, the issue would have been resolved differently. Although Rosillo did not specify the correct order in his notice of appeal, his intention to appeal the summary judgment order in favor of Holten was apparent. Holten was included in the caption of the notice as a party to the appeal, and both the briefing on the motion to dismiss the appeal and the subsequent merits briefs discussed but one topic—the claims against Holten. Pet. App. 27a; Mot. to Dismiss Appeal 1-6; Appellant's Br. 1-13; Appellee's Br. 1-46.

II. THE FEDERAL COURTS OF APPEALS ARE ALSO DIVIDED OVER WHETHER A DEFICIENT NOTICE OF APPEAL SUFFICES TO CONFER APPELLATE JURISDICITON WHERE THE APPELLEE IS NEITHER PREJUDICED NOR MISLED.

Many courts of appeals hold that errors in a notice of appeal that neither prejudice nor mislead the appellee do not defeat appellate jurisdiction. *See, e.g.*, *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 55 (2d Cir. 2004) (holding that the appellant's designation of the wrong order did not defeat appellate jurisdiction where "the government does not argue that it was prejudiced or surprised"); *Taylor v. United States*, 848 F.2d 715, 718 (6th Cir. 1988) (holding that appellate jurisdiction existed despite the designation of an incorrect portion of a district court order where "appellee was evidently not misled, as he indicated no prejudice"); *Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co., LLC*, 476 F.3d 436, 440-41 (7th Cir. 2007) ("'[I]nept' attempts to comply with Rule 3(c) are accepted as long as the appellee is not harmed."); *Cornelius v. Home Comings Fin. Network, Inc.*, 293 F. App'x 723, 726 (11th Cir. 2008) (holding that appellate jurisdiction exists despite an erroneous designation of the order appealed from and stating, "[w]here the defect in the notice of appeal 'did not mislead or prejudice the respondent,' we do not narrowly read the notice of appeal" (quoting *Foman v. Davis*, 371 U.S. 178, 181 (1962))).

The rule, however, is not uniform among the circuits, some of which hold that errors in a notice of appeal defeat appellate jurisdiction regardless of prejudice to the appellee. *See Brooks v. Toyotomi Co.*, 86 F.3d 582, 586 (6th Cir. 1996) ("'Notwithstanding the absence of prejudice, we take it, a defective notice

of appeal can never confer jurisdiction on an appellate court unless 'the filing is timely under [Appellate] Rule 4 and conveys the information required by [Appellate] Rule 3(c).'" (quoting *Smith v. Barry,* 502 U.S. 244, 249 (1992))); *Schramm v. LaHood*, 318 F. App'x 337, 344 (6th Cir. 2009) ("It matters not that Schramm's intent to appeal the March 25, 2008 order is obvious from his appellate briefs and that the Secretary was not prejudiced by his mistake in identifying the wrong order.")

Here, the Eighth Circuit relied upon a blanket rule that applies regardless of whether the appellee is prejudiced or misled: "Where an appellant specifies one order of the district court in his notice of appeal, but fails to identify another, the notice is not sufficient to confer jurisdiction to review the unmentioned order." Pet. App. 3a.

The case would have been decided differently under the majority rule, which considers whether the appellee was prejudiced or misled. Holten could not have been misled by the notice of appeal as to the order appealed from, for two reasons. First, the caption designated him as an appellee and there was only one order dismissing claims against him—the order that granted him summary judgment, docket entry 33. Pet. App. 5a, 27a. Second, the notice of appeal stated that Rosillo was appealing from the judgment "in [its] entirety." Pet. App. 27a. Nor did Holten suffer any prejudice since, by his own admission, he realized no later than March 12, 2015, that Rosillo intended to appeal Holten's dismissal from the case. Mot. to Dismiss Appeal 3.

III. THERE IS WIDESPREAD CONFUSION AMONG LOWER COURTS OVER HOW TO RECONCILE THIS COURT'S DECISIONS IN *FOMAN V. DAVIS* AND *TORRES V. OAKLAND SCAVENGER COMPANY.*

Significant in their own right, the two circuit splits described above are also symptoms of a deeper problem. Federal appellate courts are tied in knots over which errors in a notice of appeal constitute forgivable sins, and which defeat appellate review. As Wright and Miller put it, lower court decisions in this area reveal a "sometimes unpredictable line-drawing exercise" that begets "a variegated, and not always entirely consistent, body of lower court case law." 16A Charles Alan Wright et al., *Federal Practice & Procedure: Jurisdiction* § 3949.6 (4th ed. 2008). Treatises tell the bar in one breath that "many of the circuit courts of appeal will take a forgiving approach to the review of notices of appeal for compliance with Rule 3(c)," and in the next breath that practitioners should not "presume that the liberal construction of the rule will protect the interests of a client," especially in the "Fourth and Eleventh Circuits." Roger P. Freeman, Annotation, *Sufficiency of "Designation" Under Federal Appellate Procedure Rule 3(c) of Judgment or Order Appealed From*, 141 A.L.R. Fed. 445 n.5 (1997).

The lines are difficult for the lower courts to draw in large part because this Court's decisions in *Foman v. Davis*, 371 U.S. 178 (1962), and *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), point in different directions, and this Court has not clearly resolved how to reconcile the two decisions. *See Osterberger v. Relocation Realty Serv. Corp.*, 921 F.2d 72, 73 (5th Cir. 1991) ("[T]he Supreme Court [in *Torres*] cast doubt on

the ability of courts to interpret Rule 3(c) liberally."); Philip A. Pucillo, *Rescuing Rule 3(c) from the 800-Pound Gorilla: The Case for A No-Nonsense Approach to Defective Notices of Appeal*, 59 Okla. L. Rev. 271, 272 (2006) (stating that, "in fairness to the courts of appeals, their disordered enforcement of [Appellate] Rule 3(c) stems from faulty direction on the part of the Supreme Court of the United States" in *Foman* and *Torres*); Jeffrey L. Kirchmeier, Note, *Torres v. Oakland Scavenger Co.*: *What's in A Name? Everything in a Federal Appeal*, 39 Case W. Res. L. Rev. 943, 953 (1989) ("[T]he Court [has] failed to provide the means to predict when a *Torres* strict application of the Rules will be applied, and when a *Foman* liberal application will be applied."). This case is an opportunity to provide guidance to the lower courts on this important question.

The facts in *Foman* closely resemble this case. After filing a premature notice of appeal, the Petitioner filed a second notice of appeal, in which she cited an order denying motions to vacate the judgment and amend the complaint. *Foman*, 371 U.S. at 179. She omitted, however, an earlier judgment dismissing the complaint, an error the court of appeals deemed fatal to appellate jurisdiction over that judgment. *Id*. at 179-80. This Court reversed, finding the notice sufficient to confer appellate jurisdiction over the dismissal of the complaint, even though the notice, like Rosillo's here, specified the wrong order. *Id*. at 182.

The *Foman* Court applied the "consider the briefs" rule, noting "the parties briefed and argued the merits of the dismissal of the complaint." *Id*. at 180. The Court held: "Taking the two notices and the appeal papers together, petitioner's intention to seek review

of both the dismissal and the denial of the motions was manifest." *Id*. at 181 (emphasis added).

More fundamentally, *Foman* declared: "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Id.* Consistent with *Foman*, other decisions of this Court have forgiven a range of technical errors in notices of appeal. *See Smith v. Barry*, 502 U.S. 244, 248 (1992) (holding that a prisoner's informal brief satisfied the notice of appeal requirements, and stating, "[c]ourts will liberally construe the requirements of Rule 3"); *Becker v. Montgomery*, 532 U.S 757, 768 (2001) (holding that the failure to sign a notice of appeal does not defeat appellate jurisdiction).

Torres took a stricter line on an imprecise designation of the appellant, holding that "et al." designations fail to support appellate jurisdiction over parties not identified by name.[1] The *Torres* Court found "et al." to be an overly "vague designation," one which failed to provide "fair notice of the specific individual or entity seeking to appeal." 487 U.S. at 317-18.

While *Torres* did not purport to overrule *Foman*, the decision, both in spirit and outcome, reflected greater formalism. Most courts of appeals to decide the question have held that the more forgiving standards of *Foman* continue to govern cases—like this case—that involve the designation of the order from which the appeal is taken under Appellate Rule 3(c)(1)(B).

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[1] The Rule was later amended to overrule *Torres* and now permits *et al.* designations. *See* Fed. R. App. P. 3(c)(1)(A); Fed. R. App. P. 3, advisory committee note to 1993 amendment.

These courts have confined *Torres*-style exactitude to the precise provision at issue in that case—designation of the party taking the appeal under Appellate Rule 3(c)(1)(A). *See Chaka v. Lane*, 894 F.2d 923, 924 (7th Cir. 1990) (Easterbrook, J.) ("*Torres* did not overrule *Foman* . . . [I]t makes sense to treat the first two clauses of [Appellate Rule 3(c)] differently."); *see also Turnbull v. United States*, 929 F.2d 173, 177 (5th Cir. 1991) (stating that under *Foman* and *Torres*, "defects in the judgment specified in the notice of appeal are treated somewhat more liberally than defects in specifying the parties taking the appeal" (quoting *Warfield v. Fidelity & Deposit Co*., 904 F.2d 322, 325 (5th Cir.1990))); *United States v. Ramirez*, 932 F.2d 374, 375 (5th Cir. 1991); *Osterberger v. Relocation Realty Serv. Corp*., 921 F.2d at 73-74 (stating that *Torres* does not affect the applicability of *Forman* to the designation of the order from which the appeal is taken); *Dunson v. United States*, 87 F.3d 1315 (6th Cir. 1996) ("[W]hile the first half of Fed.R.App.P. 3(c), stipulating that the notice of appeal must specify parties, is jurisdictional, the second half of the rule, requiring that the notice of appeal designate the proper judgment, is construed broadly."); *Le v. Astrue*, 558 F.3d 1019, 1022 (9th Cir. 2009) (distinguishing between *Foman* and *Torres* and stating, "[t]he Supreme Court has interpreted Rule 3(c)(1)(A) narrowly . . . By contrast, the Supreme Court has rejected a literal interpretation of Rule 3(c)(1)(B) . . . ").

Other circuits, however, have interpreted *Torres* as extending not only to the designation of the appellant, but also to the specification of the order from which the appeal is taken. *Durr v. Nicholson*, 400 F.3d 1375, 1382 (Fed. Cir. 2005) (extending *Torres* to designation of the order from which the appeal is taken and

stating, "failure to designate the judgment appealed from under FRAP 3(c)(1)(B) would lead to uncertainty as to the scope of an appellate decision"); *Berdella v. Delo*, 972 F.2d 204, 208 (8th Cir. 1992) (citing *Torres* and holding that the appellant's "omission of any reference to the district court's July 11, 1990, order in his notice of appeal is more than a mere technical deficiency," and refusing to exercise appellate jurisdiction); *Klaudt v. U.S. Dep't of Interior*, 990 F.2d 409, 411 (8th Cir. 1993) (citing *Torres* and *Berdella* and concluding, "we lack jurisdiction to hear appellants' arguments arising from the district court's order of March, 1991" due to defects in the designation of the order from which the appeal was taken).

The formalistic approach taken in the opinion below—the lower court's refusal to consider whether the briefs provided sufficient notice and its reliance on a rule that applies irrespective of prejudice to the appellee—owes more to *Torres* than it does to *Foman*. Most of the circuits, however, would apply *Foman* to the circumstances here, which involve the designation of the relevant order or judgment, not the designation of the appellant. This case therefore would allow the Court to answer a basic question that has vexed the lower courts and produced much of the disarray described above: In a case involving errors in the designation of the order from which an appeal is taken, is *Foman* or *Torres* the order of the day?

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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June 21, 2016

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15-1425

ALFREDO ROSILLO,

Plaintiff-Appellant,

v.

MATT HOLTEN,

Defendant-Appellee,

JEFF ELLIS,

Defendant.

Appeal from United States District Court
for the District of Minnesota – Minneapolis

Submitted: October 20, 2015
Filed: March 24, 2016

Before MURPHY, COLLOTON, and BENTON, Circuit Judges.

COLLOTON, Circuit Judge.

Alfredo Rosillo sued Matt Holten of the Austin Police Department and Jeff Ellis of the Mower County Sheriff's Office under 42 U.S.C. § 1983, alleging that they used excessive force while taking Rosillo into

custody. The district court[1] then entered several orders disposing of the case. Rosillo filed a notice of appeal, and he eventually filed a brief challenging only the district court's dismissal of the claim against Holten. The notice of appeal, however, specified that Rosillo was appealing only a different order in the case. We therefore lack jurisdiction to review the order that Rosillo now challenges.

The district court's first relevant order, entered on December 23, 2014, granted summary judgment for Holten and ordered him dismissed from the action. The case against Ellis continued, and the court ordered Rosillo and Ellis to submit briefing on whether Ellis was entitled to summary judgment. Before filing briefs, however, Rosillo and Ellis reached a settlement and stipulated to dismissal with prejudice of the claims against Ellis. Accordingly, on December 31, 2014, the court ordered the action dismissed with prejudice and entered a judgment of dismissal.

A few days later, pursuant to Federal Rule of Civil Procedure 60(a), the court vacated the order and judgment filed December 31, because those documents did not make clear that the stipulation that prompted the order did not involve Holten. In an order dated January 5, 2015, the court clarified that it approved the settlement between Rosillo and Ellis and dismissed Rosillo's claims against Ellis with prejudice. The court entered a judgment to that effect on the same date. The judgment reflected that the action between Rosillo and Ellis was dismissed with prejudice.

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[1] The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota.

Because the voluntary dismissal of Rosillo's claims against Ellis under the settlement agreement left nothing for the district court to resolve, the district court's earlier grant of summary judgment for Holten became a final judgment. *Hope v. Klabal*, 457 F.3d 784, 790 (8th Cir. 2006). The district court never entered its judgment in favor of Holten in a separate document, as directed by Federal Rule of Civil Procedure 58(a), but judgment for Holten was entered by operation of law 150 days after the order granting summary judgment was entered on the docket. Fed. R. Civ. P. 58(c)(2)(B).

Rosillo filed a notice of appeal, stating that he "appeal[s] from the January 5, 2015, Order [Doc. No. 38] and Judgment [Doc. No. 39] entered by the U.S. District Court for the District of Minnesota in their entirety." R. Doc. 40, at 1. His notice of appeal did not mention the order that he now seeks to appeal—the December 23 order granting summary judgment for Holten.

Where an appellant specifies one order of the district court in his notice of appeal, but fails to identify another, the notice is not sufficient to confer jurisdiction to review the unmentioned order. The governing rule of procedure specifies that a notice of appeal must "designate the judgment, order, or part thereof being appealed." Fed. R. App. P. 3(c)(1)(B). While a notice of appeal that designates the final judgment in a case ordinarily will "bring up for review all of the previous rulings and orders that led up to and served as a predicate for that final judgment," *Greer v. St. Louis Reg'l Med. Ctr.*, 258 F.3d 843, 846 (8th Cir. 2001), a notice is construed differently where the appellant specifies a particular order to the exclusion of others. As we said in *Parkhill v.*

Minnesota Mutual Life Insurance Co., 286 F.3d 1051, 1058 (8th Cir. 2002), "a notice which manifests an appeal from a specific district court order or decision precludes an appellant from challenging an order or decision that he or she failed to identify in the notice." *Id*. at 1058-59. Where a district court dismisses one claim at an early stage of the case, and later enters an order and judgment dismissing a second claim, a notice of appeal that cites only the later order and judgment does not confer appellate jurisdiction to review the earlier order. *Bosley v. Kearney R-1 Sch. Dist.*, 140 F.3d 776, 781 (8th Cir. 1998); *see Klaudt v. U.S. Dep't of Interior*, 990 F.2d 409, 411 (8th Cir. 1993).

Rosillo's notice designated an appeal from the order and judgment dated January 5, 2015. Both referred only to the dismissal of Rosillo's claims against Ellis. Rosillo did not designate the order of December 23, which dismissed the claim against Holten. Rosillo relies on the notice's language that he appeals from the January 5 order and judgment "in their entirety," but the quoted language adds nothing to the documents designated. As the district court emphasized when it vacated the December 31 order and judgment and corrected them on January 5, the order and judgment that Rosillo designated resolved only his claims against Ellis.

For these reasons, we lack jurisdiction to review the district court's order granting Holten's motion for summary judgment. Rosillo has abandoned any challenge to the district court's order and judgment dismissing his claims against Ellis. We therefore affirm the judgment of the district court entered on January 5, 2015.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

[Filed 12/23/14]

No. 13-cv-1940 (JNE/SER)

ALFREDO ROSILLO,

Plaintiff,

v.

MATT HOLTEN and JEFF ELLIS,

Defendants.

ORDER

Plaintiff Alfredo Rosillo has brought this action under 42 U.S.C. § 1983 against Austin, Minnesota police officer Matt Holten and Mower County Sheriff's deputy Jeff Ellis. The matter is currently before the Court on Holten's motion for summary judgment. For the reasons discussed below, the motion is granted and Holten is dismissed from the case.

Background

The events giving rise to this lawsuit occurred in June of 2011, following an incident at the home of Rosillo's girlfriend in Austin, Minnesota. Rosillo concedes that he was present, but admits to no wrongdoing. That position is at odds with the Minnesota criminal courts' determination that Rosillo "assaulted his girlfriend, broke into her home, assaulted her again and stole money from her purse,

and fled on foot while tossing bags of methamphetamine into a neighbor's yard." *State v. Rosillo*, No. A13-0502, 2014 WL 1660641, at *1 (Minn. Ct. App. Apr. 28, 2014), *review denied* (July 15, 2014).

Nevertheless, it is undisputed here that, when the police were called, Rosillo ran away from the home and through a swampy area before stopping several blocks away and lying down in a field covered with waist-high grass.

Austin police officer Holten and Mower County Sheriff's Deputy Ellis were dispatched to apprehend Rosillo. Accompanied by Holten's police dog, Ghost, the officers tracked Rosillo to the field where he lay and proceeded to take him into custody. Rosillo alleges that, in doing so, the officers used excessive force, which they deny.

Following his arrest, Rosillo was tried and convicted of domestic assault, first-degree burglary, first-degree aggravated robbery, and fifth-degree possession of methamphetamine, while being acquitted of several other charges. *Id.* at *2. He was sentenced to 240 months' imprisonment. *Id.*

Several months later, Rosillo filed this civil action under 42 U.S.C. § 1983, asserting in a single-count Complaint that, during the arrest, Holten and Ellis "separately and in concert, under the color of state law, knowingly and willfully deprived [him] of his clearly established and well settled civil rights to due process and to be free from an unreasonable K9 attack, prolonged K9 biting, use of excessive, unreasonable force and unreasonable seizure."

Holten's motion for summary judgment has now followed.

Discussion

Under Federal Rule of Civil Procedure 56(a), summary judgment is warranted if Holten "shows that there is no genuine dispute as to any material fact and [he] is entitled to judgment as a matter of law." In this procedural posture, the facts are viewed in the light most favorable to Rosillo, and all reasonable inferences from those facts are drawn in his favor. *E.g., Chambers v. Pennycook*, 641 F.3d 898, 904 (8th Cir. 2011).

With his motion, Holten argues that he should be dismissed from this case for either of two reasons: first, Rosillo has sued him only in his official capacity, but has no evidence to sustain such a claim; and second, even if Rosillo's Complaint is construed to include an individual capacity claim against Holten, he is entitled to qualified immunity.

The first point is determinative.

I. Official v. individual capacity.

The threshold issue presented by the motion is whether Rosillo has asserted his § 1983 claim against Holten in either his official or individual capacity (or perhaps both). Holten argues that Rosillo has sued him in his official capacity only, while Rosillo contends that he has sued Holten in his individual capacity only. Holten has the better of this dispute.

"[T]he distinction between official-capacity suits and personal-capacity suits is more than a mere pleading device." *Hafer v. Melo*, 502 U.S. 21, 27 (1991) (quotation omitted). A § 1983 claim against a public official in his official capacity is qualitatively different than one arising from the same set of facts and asserted against the same official in his individual capacity: the

former is "functionally equivalent to a suit against the employing governmental entity," while the latter is a claim against the official personally. *Veatch v. Bartels Lutheran Home*, 627 F.3d 1254, 1257 (8th Cir. 2010). "For many reasons, including exposure to individual damage liability and [the availability of different] immunity [defenses], these are different causes of action." *Baker v. Chisom*, 501 F.3d 920, 923 (8th Cir. 2007).

As a result, the Eighth Circuit has for decades required a plaintiff intending to sue a public official in his individual capacity to say so explicitly in his pleadings:

> [T]his court has often considered [whether] a plaintiff [has] properly asserted § 1983 claims against a public official acting in his individual capacity. We have repeatedly stated the general rule: "If a plaintiff's complaint is silent about the capacity in which [he] is suing the defendant, we interpret the complaint as including only official-capacity claims." *Egerdahl v. Hibbing Cmty. Coll.,* 72 F.3d 615, 619 (8th Cir. 1995); *see Nix. v. Norman,* 879 F.2d 429, 431 (8th Cir. 1989). "If the complaint does not specifically name the defendant in his individual capacity, it is presumed he is sued only in his official capacity." *Artis v. Francis Howell N. Band Booster Ass'n, Inc.,* 161 F.3d 1178, 1182 (8th Cir. 1998). . . .
>
> [O]ur cases require more than ambiguous pleading. *See Andrus ex rel. Andrus v. Arkansas,* 197 F.3d 953, 955 (8th Cir. 1999) ("specific pleading of individual capacity is required"); *Johnson v. Outboard Marine*

> *Corp.,* 172 F.3d 531, 535 (8th Cir. 1999) ("only an express statement that [public officials] are being sued in their individual capacity will suffice"); *Murphy v. State of Arkansas,* 127 F.3d 750, 754 (8th Cir. 1997) ("a clear statement that officials are being sued in their personal capacities" is required). A "cryptic hint" in plaintiff's complaint is not sufficient. *Egerdahl,* 72 F.3d at 620.

Id.

Nowhere in his Complaint does Rosillo specifically, expressly, or clearly state that he is suing Holten in his individual capacity. Neither, for that matter, does Rosillo state in the Complaint that he is suing Holten in his official capacity. In light of the precedent above, this silence is all that need to be noted.

Nevertheless, it is worth considering that, though the Complaint lacks an express statement as to Holten's capacity, it was in other ways sufficient to put Holten on notice that Rosillo intended to sue him in his individual capacity, either solely or in conjunction with an official capacity claim. For instance, Rosillo alleges in his Complaint that "[p]unitive damages are available against [Holten]," which would be true only if he was sued in his individual capacity. *See City of Newport v. Fact Concerts, Inc*., 453 U.S. 247, 271 (1982) (holding "that a municipality is immune from punitive damages under 42 U.S.C. § 1983"). What's more, in answering Rosillo's Complaint, Holten himself asserted the defense of qualified immunity, which would be relevant only if he were sued in his individual capacity. *See Owen v. City of Independence, Mo.*, 445 U.S. 622, 650 (1980) (holding that, under § 1983, municipalities are not entitled to "qualified immunity based on the good faith of their officers").

And in fact, Holten has argued his qualified immunity defense here as an alternative basis for summary judgment.

Even this, however, affords no basis for overlooking Rosillo's failure to specifically assert his § 1983 claim against Holten in his individual capacity in the Complaint. The Eighth Circuit has emphasized that its requirement of express pleading of individual capacity claims is strict,[1] in contrast with the "more

[1] The Eighth Circuit's strict pleading rule was born both of a concern that defendants receive clear notice of the claims against them and of jurisprudence establishing that "[t]he Eleventh Amendment presents a jurisdictional limit on federal courts in civil rights cases against states and their employees." *Murphy*, 127 F.3d at 755 (quoting *Nix v. Norman*, 879 F.2d 429, 431 (8th Cir. 1989)).

The rule, having been established, applies equally to § 1983 complaints against county and municipal officials, where the Eleventh Amendment is not implicated. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) ("The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances, . . . but does not extend to counties and similar municipal corporations.") (citations omitted). *See Johnson v. Outboard Marine Corp*., 172 F.3d 531, 535 (8th Cir. 1999) (applying pleading rule and finding that complaint included claim against county sheriff only in his official capacity); *Artis v. Francis Howell North Band Booster Ass'n, Inc.*, 161 F.3d 1178, 1182 (8th Cir. 1998) (applying pleading rule and finding that complaint included claim against school district band director only in his official capacity); *D.E.S. v. Kohrs*, 187 F.3d 641, 641 (8th Cir. 1999) (unpublished) (applying pleading rule sua sponte to complaint against city detective and finding that it "failed to state an individual capacity claim," even where "both parties and the district court construed the 1983 suit as against [the defendant] in his individual capacity"). *See also Baker*, 501 F.3d at 926-27 (Gruender, J., concurring in part and

lenient" and flexible § 1983 pleading rules that prevail in other circuits. *Murphy v. State of Ark.*, 127 F.3d 750, 755 (8th Cir. 1997). *See also Baker*, 501 F.3d at 924 n.2 (explaining that the "flexible approach" to pleading individual capacity claims urged on the panel by the plaintiff is foreclosed by circuit precedent and therefore may only be adopted by the court sitting en banc).

Consistent with this strict approach to pleading, the Eighth Circuit has found that a complaint did not state an individual capacity claim under § 1983 even where its "substantive paragraphs included a reference to [the defendants] as 'individual Defendants' and [the plaintiff] prayed for 'exemplary damages' that may not be recovered in an official capacity suit." *Id.* at 924. The Eighth Circuit has also determined that a "district court erred in excusing [the plaintiff's] failure to clearly assert personal capacity claims in his initial complaint" based on a conclusion that the defendants otherwise had adequate notice that the plaintiff intended the claims as such. *Murphy*, 127 F.3d at 754-55.

Precedent therefore dictates that Rosillo's Complaint, which contains no express statement as to the capacity in which Holten was sued, be interpreted to assert only an official capacity claim against him.

II. Municipal liability.

Consequently, Rosillo's § 1983 claim against Holten is effectively a claim against the government entity that employs him, the City of Austin. *See Johnson*, 172

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dissenting in part) (discussing basis of circuit precedent establishing "bright-line presumption" against individual capacity claim where it is not expressly pled).

F.3d at 535 ("A suit against a public employee in his or her official capacity is merely a suit against the public employer."). To establish Austin's liability, Rosillo bears the burden of proving both that Holten violated his constitutional rights and that the city is at fault for that violation. *Veatch*, 627 F.3d at 1257. Rosillo may meet this burden by showing that Holten committed a constitutional violation that "resulted from (1) an 'official municipal policy,' . . . (2) an unofficial 'custom,' . . . or (3) a deliberately indifferent failure to train or supervise . . . ." *Atkinson v. City of Mountain View, Mo.*, 709 F.3d 1201, 1214 (8th Cir. 2013) (citing *Monell v. Department of Social Services*, 436 U.S. 658, 690-91 (1978) and *City of Canton, Ohio v. Harris,* 489 U.S. 378, 388 (1989)).

Rosillo argues that he has sufficient evidence to sustain his allegation that Holten violated his constitutional rights during the arrest. But even were that the case, Rosillo makes no attempt at all to establish the requisite link between that alleged violation and any policy, custom, action, or inaction on the part of the City of Austin.

Summary judgment for Holten is therefore proper on the official capacity claim that Rosillo pled against him.

III. Amendment of pleadings.

In his memorandum in opposition to Holten's motion, Rosillo writes: "If this Court perceives Plaintiff's Complaint as a claim against Holten's employer, I request an Order that Holten is sued in his individual capacity, while he was acting under the color of law." The Court understands Rosillo thus to be seeking leave to amend his Complaint to add a claim against Holten in his individual capacity.

As an initial matter, Rosillo has not complied with the District of Minnesota's Local Rule 15.1, which requires a party seeking leave to amend to submit a motion to that effect, accompanied by the proposed amended pleading. Furthermore, the Eighth Circuit has held "that granting leave to amend a complaint where the plaintiff has not submitted a proposed amendment is inappropriate." *Popoalii v. Correctional Medical Services*, 512 F.3d 488, 497 (8th Cir. 2008) (citing *Wolgin v. Simon*, 722 F.2d 389, 394 (8th Cir. 1983)). Nevertheless, the change that Rosillo proposes to make to the Complaint – adding the requisite statement expressly naming Holten as a defendant in his individual capacity – is not a mystery here.

Rosillo's failure to justify that amendment at this stage of the litigation, however, is of far more significance. The Scheduling Order entered in this case set a deadline of April 1, 2014 for filing "all motions which seek to amend the pleadings to add claims . . . ." Rosillo's request to amend appears in his summary judgment briefing, filed more than seven months after that deadline expired. Consequently, leave to amend may only be granted in accordance with Federal Rule of Civil Procedure 16(b), under which "[a] schedule may be modified only for good cause and with the judge's consent." *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 716 (8th Cir. 2008). Yet Rosillo – who is represented by counsel here – has made no effort to demonstrate good cause for amending his Complaint at this late stage. His request should therefore be denied. *See Harris v. FedEx Nat. LTL, Inc.*, 760 F.3d 780, 786 (8th Cir. 2014) ("A district court acts 'within its discretion' in denying a motion to amend which made no attempt to show good cause.") (citations omitted).

Even looking past Rosillo's failure to support his request, the only possible justification for a late amendment that can be gleaned from Rosillo's submissions is that he believed from the start that he had properly pled an individual capacity claim against Holten, and therefore saw no reason to amend the pleadings within the deadline set by the Scheduling Order.

This does not satisfy the good cause standard. *See Schenk v. Chavis*, 259 F.App'x 905, 907 (8th Cir. 2008) (unpublished) (affirming denial of leave to amend based on conclusion "that the failure to recognize the need for amended claims at an earlier date did not constitute good cause to excuse the untimeliness of [the plaintiff's] motion to amend"). "The primary measure of good cause is the movant's diligence in attempting to meet the [scheduling] order's requirements." *Rahn v. Hawkins,* 464 F.3d 813, 822 (8th Cir. 2006). And "[i]t hardly bears mention . . . that 'carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief'" under Rule 16(b). *N. Star Mut. Ins. Co. v. Zurich Ins. Co.*, 269 F.Supp.2d 1140, 1144 (D.Minn. 2003) (quoting *Johnson v. Mammoth Recreations, Inc.,* 975 F.2d 604, 609 (9th Cir. 1992)). "[T]he focus of Rule 16(b) [is] on the diligence of the party seeking to modify a Scheduling Order, as opposed to the litany of unpersuasive excuses, inclusive of inadvertence and neglect, which commonly undergird an untimely Motion to Amend." *Scheidecker v. Arvig Enterprises, Inc.*, 193 F.R.D. 630, 632 (D.Minn. 2000) (citations omitted).

Eighth Circuit precedent on pleading an individual capacity claim under § 1983 is clear and long-standing. Its straightforward requirement that a plaintiff expressly state in the pleadings his intention to sue

the defendant in his individual capacity, though strict, is not onerous, and it certainly has not changed since this case began. There is no question that, had he been diligent, Rosillo could have recognized the deficiency in his Complaint and moved to amend it, either by adding or substituting an individual capacity claim against Holten, within the timeframe for doing so set by the Scheduling Order. In these circumstances, leave to amend out of time under Rule 16(b) is not available.[2] *See* Fed. R. Civ. P. 16(b), advisory committee note (1983 amendment) ("[T]he court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension."); *Hartis v. Chicago Title Ins. Co.*, 694 F.3d 935, 948 (8th Cir. 2012) ("Where there has been no change in the law, no newly discovered facts, or any other changed circumstance . . . after the scheduling deadline for amending pleadings, then we may conclude that the moving party has failed to show good cause.") (internal quotation omitted).

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[2] Holten additionally opposes Rosillo's request to amend the Complaint by arguing that he would be prejudiced if Rosillo were allowed to add an individual capacity claim against him at this late juncture. The Court is inclined to disagree. Discovery may or may not have proceeded differently if the Complaint adequately alleged an individual capacity claim. As noted above, Holten asserted a qualified immunity defense in his Answer and has argued it here as an alternative basis for summary judgment.

Nevertheless, in a Rule 16(b) good cause analysis, a lack of prejudice to Holten does not undo the consequences of Rosillo's lack of diligence. *See Sherman*, 532 F.3d at 716 ("While the prejudice to the nonmovant resulting from modification of the scheduling order may . . . be a relevant factor, generally, we will not consider prejudice if the movant has not been diligent in meeting the scheduling order's deadlines.").

Rosillo's request to amend the Complaint is therefore denied, and Holten is dismissed from this action.

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. Defendant Holten's Motion for Summary Judgment [ECF No. 17] is GRANTED.
2. Defendant Holten is DISMISSED from this action.

Dated: December 23, 2014

/s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

[Filed 12/29/14]

Case No. 13-cv-01940 JNE/SER

ALFREDO ROSILLO,

Plaintiff,

vs.

MATT HOLTEN and JEFF ELLIS,

Defendants.

STIPULATION OF DISMISSAL WITH PREJUDICE

The undersigned attorneys hereby advise the Court that all of Plaintiff's claims as to Jeff Ellis in the above-entitled cause of action have been fully compromised and settled. Therefore,

IT IS HEREBY STIPULATED BY AND BETWEEN all the parties hereto, through their respective undersigned attorneys, that this entire lawsuit as it relates to Jeff Ellis may be, and hereby is, dismissed on its merits and with prejudice, pursuant to the terms set forth in the Release of All Claims and without costs or disbursements to any of the parties.

IT IS FURTHER STIPULATED, that without further notice, a Judgment of Dismissal with Prejudice and upon the merits of all of Plaintiff's claims against

Jeff Ellis, without costs or disbursements to any of the parties, may be entered herein.

KENNEDY LAW OFFICE

Dated: December 23, 2014

By /s/ Duane Kennedy
Duane Kennedy, #55128
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Attorney for Plaintiff

IVERSON REUVERS CONDON

Dated: December 23, 2014

By /s/ Jason M. Hiveley
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APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

[Filed 12/31/14]

Civil No. 13-1940 (JNE/SER)

ALFREDO ROSILLO,

Plaintiff,

vs.

MATT HOLTEN and JEFF ELLIS,

Defendants.

ORDER FOR DISMISSAL WITH PREJUDICE

The foregoing Stipulation [Docket No. 35], having been presented to the Court on behalf of the above parties:

IT IS HEREBY ORDERED that the settlement of this action as set forth in the Release of All Claims, is approved and, as a result, the above-entitled action may be, and the same hereby is, dismissed with prejudice and on its merits and without costs or disbursements to any party.

IT IS FURTHER ORDERED that without further notice, a Judgment of Dismissal with Prejudice and upon the merits of all of Plaintiff's claims, without costs or disbursements to any of the parties, may be entered herein.

BY THE COURT:

Dated: December 31, 2014

/s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

[Filed 12/31/14]

Civil No. 13-1940 (JNE/SER)

ALFREDO ROSILLO,

Plaintiff,

vs.

MATT HOLTEN and JEFF ELLIS,

Defendant(s).

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

The settlement of this action as set forth in the Release of All Claims, is approved and, as a result, the above-entitled action may be, and the same hereby is, dismissed with prejudice and on its merits and without costs or disbursements to any party.

Without further notice, a Judgment of Dismissal with Prejudice and upon the merits of all of Plaintiff's claims, without costs or disbursements to any of the parties, may be entered herein.

Date: 12/31/2014

RICHARD D. SLETTEN, CLERK

/s/ M. Price

(By) M. Price, Deputy Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

[Filed 01/05/15]

No. 13-cv-1940 (JNE/SER)

ALFREDO ROSILLO,

Plaintiff,

v.

MATT HOLTEN and JEFF ELLIS,

Defendants.

ORDER

In an Order that issued on December 23, 2014, the Court granted Defendant Matt Holten's motion for summary judgment and dismissed him from this case. ECF No. 33. The Court then ordered Plaintiff Alfredo Rosillo and Defendant Jeff Ellis to submit briefing on whether summary judgment should not also be granted to Ellis on the same grounds. ECF No. 34.

Before that briefing was due, Rosillo and Ellis stipulated to the dismissal with prejudice of all of Rosillo's claims against Ellis. ECF No. 35. The Court subsequently filed an order dismissing the case with prejudice, ECF No. 36, and the Clerk entered judgment accordingly, ECF No. 37.

As that Order for Dismissal with Prejudice and the judgment entered thereon do not make clear that the stipulation filed by Rosillo and Ellis does not involve or pertain to Holten, they are vacated. Pursuant to

Federal Rule of Civil Procedure 60(a), the Court now clarifies that, as set forth below, Rosillo and Ellis' stipulation is approved and all of Rosillo's claims against Ellis are dismissed with prejudice and without costs or disbursements to either party. *See Pattiz v. Schwartz*, 386 F.2d 300, 303 (8th Cir. 1968) (finding that "the trial court possessed the power, under Rule 60(a)," to correct a judgment so that it reflects "only what was understood, what was intended, what was agreed, and what the court itself had accepted as the resolution of the litigation then pending").

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. The Order of Dismissal of December 31, 2014 [ECF No. 36] is VACATED.
2. The Judgment of December 31, 2014 [ECF No. 37] is VACATED.
3. The settlement of this action between Plaintiff Alfredo Rosillo and Defendant Jeff Ellis, as set forth in their Stipulation of Dismissal with Prejudice [ECF No. 35], is APPROVED.
4. This action between Plaintiff Alfredo Rosillo and Defendant Jeff Ellis is DISMISSED WITH PREJUDICE and upon the merits of all of Plaintiff's claims, without costs or disbursements to either party.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 5, 2015

s/Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

[Filed 01/05/15]

Civil No. 13-1940 JNE/SER

ALFREDO ROSILLO,

Plaintiff,

vs.

MATT HOLTEN and JEFF ELLIS,

Defendants.

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. The Order of Dismissal of December 31, 2014 [ECF No. 36] is VACATED.
2. The Judgment of December 31, 2014 [ECF No. 37] is VACATED.
3. The settlement of this action between Plaintiff Alfredo Rosillo and Defendant Jeff Ellis, as

set forth in their Stipulation of Dismissal with Prejudice [ECF No. 35], is APPROVED.

4. This action between Plaintiff Alfredo Rosillo and Defendant Jeff Ellis is DISMISSED WITH PREJUDICE and upon the merits of all of Plaintiff's claims, without costs or disbursements to either party.

January 5, 2015
Date

RICHARD D. SLETTEN, CLERK

/s/ A. Linner

(By) A. Linner, Deputy Clerk

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Case No. 13-CV-1940 (JNE/SER)

ALFREDO ROSILLO,
Plaintiff,

vs.

MATT HOLTEN AND JEFF ELLIS,
Defendants.

NOTICE OF APPEAL

Pursuant to Fed. R. App. P. 3(c)(1) and 4(a), notice is hereby given that the Plaintiff, *Alfredo Rosillo* in the above-named case appeal to the United States Court of Appeals for the Eighth Circuit. The above-named parties appeal from the January 5, 2015, Order [Doc. No. 38] and Judgment [Doc. No. 39] entered by the U.S. District Court for the District of Minnesota in their entirety.

Dated: February 2, 2015

Respectfully submitted
/s/ A.L. Brown

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