

Appeal No. 15-55174

In The
United States Court of Appeals
For The Ninth Circuit

Rita Medellin,

Plaintiff-Appellant,

v.

IKEA U.S. West, Inc.,

Defendant-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
Case No. 3:11-CV-00701-WQH(BGS) HON. CYNTHIA A. BASHANT

**APPELLEE IKEA U.S. WEST, INC.'S OPPOSITION TO APPELLANT RITA
MEDELLIN'S MOTION TO DISMISS APPEAL FOR LACK OF SUBJECT MATTER
JURISDICTION WITH DIRECTIONS TO DISTRICT COURT TO REMAND**

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I.
INTRODUCTION

In the district court, Plaintiff-Appellant Rita Medellin contended that “Plaintiff need not allege anything more than a statutory violation of Section 1747.08 to establish standing.” (Dkt. 67 at 4:2-3.) Now, she has moved to dismiss her appeal and vacate the district court’s decertification order and judgment arguing that the district court lacked subject matter jurisdiction under Article III based upon *Spokeo, Inc. v. Robins*, No. 13-1339, 2016 U.S. LEXIS 3046, *16 (May 16, 2016). See Dkt. 37-1. In *Spokeo*, the Supreme Court held that Article III standing cannot be established by a statutory violation that is not accompanied by injury in fact. However, unlike *Spokeo*, the operative complaint in this case expressly alleged injury in fact resulting from the alleged statutory violation as follows: “*As a direct result of Ikea’s unlawful conduct described herein, plaintiff suffered injury in fact.*” (Dkt. 25, ¶ 6; ER1013.) No more was required to establish standing under Article III. And no more is required to deny the current motion.

While post-removal events do not deprive the district court of jurisdiction as a matter of law, here they reconfirm the allegation of an injury sufficient to support Article III standing. In the district court, among

other things, Plaintiff argued in opposition to the motion to decertify that “Plaintiff ... possesses the same interest in seeking civil penalties *for the same injury* caused by Defendant's violations of Section 1747.08” as other members of the class she seeks to represent. (Dkt. 67 at 22:6-9 (emphasis added).) She continued that, whether the alleged violations occurred at self-checkout kiosks or with a cashier, “Defendant's conduct gives rise to the same statutory violations and *injures its customers* in the same way.” (Dkt. 67 at 22:9-11 (emphasis added).) She redoubled her contention by invoking actual injury to bolster the claim for penalties in the opinions of her expert. Thus, she is judicially estopped from disavowing the complaint’s allegation of injury in fact and original basis for jurisdiction.

There is no reason to render five years of litigation a nullity based upon Plaintiff’s refusal to accept the content of her own complaint. Because she alleged (and but for decertification would have urged) injury in fact in the court below, Article III standing exists and her motion must be denied.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

This action proceeded in the name of Plaintiff Reid Yeoman from its removal on April 6, 2011 through the entry of judgment on January 7, 2015.

Yeoman originally filed his putative class action complaint in California state court, on March 2, 2011. (Dkt. 1-2.) In it, he alleged, “As a direct result of Ikea's unlawful conduct described herein, plaintiff suffered *injury in fact.*” (Dkt. 1-2 at 2:17-18 (emphasis added).) It was also alleged that Yeoman’s claims are typical of the class he sought to represent and that he was an adequate class representative. (Dkt. 1-2 at 4:24-28.)

The action was removed under the Class Action Fairness Act’s diversity jurisdiction. (Dkt. 1 at 3:24.) Among the allegations cited in support was that “Plaintiff suffered injury in fact.” (Dkt. 1 at 3:8.)

Plaintiff-Appellant Rita Medellin also originally filed her complaint against Ikea in California state court. (Case No. 3:11-CV-00921-WQH(BGS), Dkt. 1.) It too was removed to the federal district court based upon diversity jurisdiction under the Class Action Fairness Act. (*Id.* at 4:1.) Neither Yeoman nor Medellin contested the district court’s subject matter jurisdiction, and neither sought remand. On August 25, 2011, they jointly moved to consolidate the cases, explaining that the actions “involve common questions of law and fact, involve the same defendant, and assert claims on behalf of an identical Class.” (Dkt. 18 at 2:8-10.)

On October 27, 2011, the district court granted the motion to consolidate. (Dkt. 22.) The Court invited a motion for leave to file a First Amended Complaint that included Medellin and her counsel, and upon the filing the *Medellin* action would be administratively closed. (*Id.* at 2:22.) The Motion for Leave to file the First Amended Complaint was filed (Dkt. 23) and granted (Dkt. 24), and the First Amended Complaint was filed on November 8, 2011 (Dkt. 25.)

As in the original complaint, the First Amended Complaint alleged:

During the credit card transaction, the cashier asked plaintiff for his ZIP code and, believing he was required to provide the requested information to complete the transactions, provided it. The cashier entered plaintiff's ZIP code into the electronic point of sale register and then completed the transaction. At the end of both transactions, Ikea had plaintiff's credit card number, name and ZIP code recorded in its database. **As a direct result of Ikea's unlawful conduct described herein, plaintiff suffered injury in fact.**

Id. at ¶ 6 (emphasis added.) The First Amended Complaint did not expressly include the same allegation as to Medellin, but did allege that Plaintiffs' claims are typical of the claims of the putative class. *Id.* at ¶ 18.

The First Amended Complaint remained the operative complaint through trial. (See, e.g. Dkt. 38; Dkt. 270 at 1:27-28.)

Plaintiff's assertion of an injury common to the class continued in pretrial proceedings. The opposition to IKEA's motion to decertify argued that "Plaintiff ... possesses the same interest in seeking civil penalties *for the same injury* caused by Defendant's violations of Section 1747.08" as other classmembers. (Dkt. 67 at 22:6-9 (emphasis added).) It was also urged that regardless of the form of the transaction, "Defendant's conduct gives rise to the same statutory violations and *injures its customers* in the same way." (Dkt. 67 at 22:9-11 (emphasis added).)

Plaintiff also invoked actual injury to the classmembers to bolster the claim for penalties in the expert opinions to be offered at trial. Plaintiff's expert Chris J. Hoofnagle was to explain how IKEA's request for customers' personal identification information ("PII") subjected those customers to an increased risk of identity theft and stalking by IKEA employees, and their attendant costs (such as credit report monitoring). (See Dkt. 179-3, Hoofnagle Expert Report)

Hoofnagle's deposition made it even clearer that Plaintiff intended to establish injury in fact, or at least a concrete and particularized risk of injury in fact, to class members. He explained that merely asking a customer for a ZIP code violates the customer's privacy rights, regardless

of whether a ZIP code is provided in response. (Dkt 179-4 at 131:20-132:17.) He also opined that most consumers conceive of there being an incremental assault on privacy rights by having their ZIP codes in a database and receiving additional mailings. (Dkt. 179-4 at 203:4-204:6.) And even while arguing that the existence of actual harm or injury is irrelevant, Plaintiff-Appellant argued that “Whether IKEA's conduct puts consumers at additional risks for harm should certainly be a factor the Court considers as the entire purpose of Section 1747.08 is to minimize such risks to consumers.” (Dkt. 198 at 1:25-2:2.)

The case proceeded to trial on November 11-12, 2014. After tentatively ruling from the bench at the close of the first phase of trial, on December 4, 2014, the district court issued its order decertifying the class. (Dkt. 270.) The parties later stipulated to judgment for \$48.00 on Medellin’s individual claim in the interests of judicial economy and to avoid the costs of the second phase of trial. (Dkt. 271.) On January 6, 2015, the parties jointly moved to dismiss without prejudice Yeoman’s claim, which the court granted on January 7, 2015. (Dkt. 272, 273). The Court entered Judgment on the same day, January 7, 2015. (Dkt. 274.) This appeal followed.

III.

THE COURT HAS ALWAYS HAD SUBJECT MATTER JURISDICTION

Nothing in the *Spokeo* decision negates plaintiff's allegation of injury in fact. And Plaintiff's continued pursuit of statutory penalties based upon concrete and particularized risks of harm also demonstrates the Court has had subject matter jurisdiction over this case since its removal and through this appeal. Plaintiff is judicially estopped from taking a contrary position in this unabashed attempt for a second chance to litigate failed class claims.

A. Subject Matter Jurisdiction In Class Actions Is Shown By One Class Representative's Article III Standing At the Time of Removal

To establish Article III standing, a plaintiff must plead: (1) injury-in-fact; (2) causation; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The "injury-in-fact" element requires a plaintiff to plead the "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* In a class action, named plaintiffs representing a class "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Gratz v. Bollinger*, 539 U.S. 244, 289, 123 S. Ct. 2411, 156 L. Ed. 2d

257 (2003) (internal quotation marks and citations omitted). This Court of Appeals has repeatedly held that the district courts have subject matter jurisdiction over entire class actions so long as one named plaintiff/class representative has Article III standing. *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1970, 182 L. Ed. 2d 819 (2012).

Thus, even if Medellin disclaims any actual injury (which she cannot do in light of her arguments in the district court and her expert's proposed opinion testimony), Yeoman's allegation of injury-in-fact supports subject matter jurisdiction for the entire case. And because Yeoman was a party in the case from the date of its removal through the date of judgment, his absence after the judgment does not deprive the Court of Appeals of jurisdiction to decide the propriety of the judgment either.

Indeed, the propriety of subject matter jurisdiction is determined based upon the facts at the time of removal, even in the case of a class action. "Post-filing developments do not defeat jurisdiction if jurisdiction was properly invoked as of the time of filing." *United Steel v. Shell Oil Co.*, 602 F.3d 1087, 1091-1092 (9th Cir. 2010). *See also Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 n.12 (11th Cir. 2009) ("jurisdictional facts are assessed at

the time of removal" and "post-removal events [(including non- or de-certification)] do not deprive federal courts of subject matter jurisdiction."); *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 806-07 (7th Cir. 2010); This principle holds in the class action context where jurisdiction is based upon the Class Action Fairness Act – i.e. after class certification is denied. *United Steel v. Shell Oil Co.*, 602 F.3d 1087 (9th Cir. 2010); *Helm v. Alderwoods Group*, 2011 U.S. Dist. LEXIS 77370 (N.D. Cal. July 18, 2011) (same); *In re Intel Laptop Battery Litig.*, 2010 U.S. Dist. LEXIS 132655, *17 (N.D. Cal. Dec. 15, 2010); *Cabral v. Supple, LLC*, 2016 U.S. Dist. LEXIS 39671 (C.D. Cal. Mar. 24, 2016) (citing *United Steel v. Shell Oil Co.*, 602 F.3d 1087 (9th Cir. 2010)).

B. The Original and Operative Complaints Allege Injury In Fact.

Plaintiff-Appellant argues that Article III standing is lacking here because only a “bare procedural violation” was alleged but not injury in fact. Motion at 7. This argument is belied by the original complaint, and the First Amended Complaint on which trial was held and judgment entered. As above, they plainly allege injury in fact: “**As a direct result of Ikea’s unlawful conduct described herein, plaintiff suffered injury in fact.**”

Any argument that this language pertains only to Plaintiff Reid Yeoman is baseless. Yeoman was a party to the action all the way through

trial and the district court's decertification order. It was only after the class was decertified that his claim was voluntarily dismissed without prejudice on the same day judgment was entered. Thus, for the entire time the case was pending before the district court, he was a party and subject matter jurisdiction existed.

Spokeo does not divest this Court of jurisdiction where injury in fact is sufficiently pled. In *Spokeo*, plaintiff Robins alleged that the defendant violated the Fair Credit Reporting Act by publishing inaccurate information about him. *Spokeo, Inc. v. Robins*, No. 13-1339, 578 U.S. ____ (May 16, 2016), slip op. at 1. The district court dismissed for the lack of Article III standing but the Ninth Circuit reversed, concluding Robins had alleged a particularized injury by alleging the violation of a statutory right. *Id.* at 1-2. The Supreme Court disagreed, holding the analysis of Article III's injury-in-fact requirement was incomplete, as a plaintiff must allege his injury is both "concrete *and* particularized." *Id.* at 2. The Supreme Court then discussed whether an alleged violation of a statutory procedural right can constitute a "concrete" injury under Article III. Where a procedural violation creates "the risk of real harm," standing may be established. *Id.* at 9-10. But allegations of "a bare procedural violation" resulting in no harm

cannot satisfy Article III. *Id.* at 10. None of this speaks to the present case where Plaintiff-Appellant expressly alleged and attempted to prove injury in support of penalties, and the violation alleged was a substantive one.

C. **Plaintiff-Appellant argued and offered evidence to prove injury in fact on behalf of absent class members.**

In addition to avoiding the express allegations in the original and amended complaints, the motion also ignores Plaintiff-Appellant's attempts to represent a class of IKEA customers who, in Plaintiff-Appellant's view, were subjected to onerous requests for PII and an increased risk of identity theft, credit card fraud, and stalking based upon their PII being provided to IKEA's employees and being retained in its database. (See Dkt. 198 at 1:25-2:2, Dkt. 179-3, and Dkt. 179-4 at 131:20-132:17). Even without the dispositive effect of the allegation of an injury in fact in the complaint, the attempts to demonstrate injury in fact in the district court further discredit the claimed lack of jurisdiction now.

Although IKEA contests the *merits* of Plaintiff-Appellant's claims that class members were subjected to harassing inquiries or heightened risk of identity theft or stalking, or that those injuries could be subject to common proof, Article III standing exists where such claims are made and accepted

by the court. *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010).

Thus, Plaintiff-Appellant's intention to prove facts constituting injury in fact further discredits her present claims and undermines any ground for dismissal.

D. **Spokeo Has No Application Where, As Here, The Statute Sued Upon Is Intended To Remedy Concrete And Particularized Harm.**

Spokeo held that "Article III standing requires a concrete injury even in the context of a statutory violation." Slip op. at 2. However, the opinion did *not* hold that Article III standing was lacking where a claim is premised upon the violation of a statute that necessarily contemplates the existence of a concrete and particularized injury. In fact, the Supreme Court expressly recognized that, "The violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact; **in such a case, a plaintiff need not allege any *additional* harm beyond the one identified by Congress.**" *Spokeo*, slip op. at 2 (emphasis added). While *Spokeo* concerned a federal statute, it provides no rationale for limiting the application of its rule to federal statutes since a satisfactory injury under Article III can arise from state statutes and common law. That is, Article III

standing may be based upon a statutorily conferred right so long as the injury in fact requirement is met. *Spokeo*, slip op. at 2.

The statute here protects against the risk of identity theft and data-based fraud among other invasions of privacy. Indeed, plaintiff's own expert opines that violations of the subject statute create a credible threat of harm that is real and immediate, not conjectural or hypothetical. (See Dkt 179-3.) Thus, unlike the Fair Credit Reporting Act at issue in *Spokeo*, the Song-Beverly Credit Card Act contemplates an injury from its violation, even if one that is difficult to quantify.

The legislative history of California Civil Code section 1747.08 is replete with references to the statute providing a remedy for concrete and particularized harm to consumers stemming from requests for and recording of PII while using credit cards. (See Dkt. 198-4, Selections from Legislative History of California Civil Code § 1747.08 (formerly § 1747.8, as amended by Statutes of 1990, Chapter 999, § 1 (Assembly Bill 2920)- Areias) at p. 13 (“**the goal of this bill [is] to protect consumers from unwarranted invasions of privacy and potential credit card fraud**”); Dkt. 198-5, Selections from Legislative History of California Civil Code § 1747.08 (formerly § 1747.8, as amended by Statutes of 1991, Chapter 1089, § 2

(Assembly Bill 1477)- Areias) at p. 8 (“[AB2920 was] introduced **to protect consumer privacy and stop fraud.**”); Dkt. 198-6, Selections from Legislative History of California Civil Code § 1747.08 (formerly § 1747.8, as amended by Statutes of 1995, Chapter 458, § 2 (Assembly Bill 1316) – Bustamante) (“[AB2920 was] **designed to help protect consumers, merchants, and credit card issuers from credit card fraud;** i.e., by prohibiting sellers from recording ...the customer’s address and phone number on a credit card transaction form. **Prior to this legislation, anyone with access to a consumer’s credit card number and address...could access their credit history, open credit in their name, or charge something in their name.**”)(emphasis added)).

Thus, the California Legislature plainly intended Section 1747.08 to prevent various types of injuries suffered by California consumers – i.e. fraud and invasions of privacy. Other courts have agreed these types of injuries are sufficiently concrete and particularized to confer Article III standing. *See, e.g., Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010) (“credible threat of real and immediate harm stemming from the theft of a laptop containing their unencrypted personal data”); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 961 (S.D.

Cal. 2014); *Pisciotta v. Old National Bancorp*, 499 F.3d 629, 634 (7th Cir. 2007) (increased risk of identity theft). *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011) (violation of common law right of publicity from use of names and likenesses in advertisements); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1211, 2014 U.S. Dist. LEXIS 81042, *40 (N.D. Cal. 2014).

Indeed, because these types of injuries can be difficult to quantify, Section 1747.08(e) specifies that the civil penalties awarded are to be paid “as appropriate, to the person paying with a credit card who brought the action, or to the general fund of whichever governmental entity brought the action to assess the civil penalty.” By providing for the civil penalty to be paid to the person paying with the credit card, the Act inherently contemplates that payment as a substitute for restitution of otherwise difficult to prove damages.

The characterization of the recovery as a “civil penalty” is of no moment since the California Legislature commonly uses civil penalties both to compensate victims for their injuries and for other purposes such as deterrence. *See, e.g., Los Angeles County Metropolitan Transportation Authority v. Superior Court*, 123 Cal.App.4th 261, 270–276 (2004) (in addition to advancing Legislature's intent to encourage and aid private parties to help

enforce civil rights laws, civil penalty under the Unruh Civil Rights Act “also helps to ensure that plaintiffs receive ample compensation, irrespective of their actual damages”).

In addition to the intent of the statute, subdivision (f) of Section 1747.08 strongly implies the Legislature’s recognition that actual damage is a necessary statutory prerequisite to an award of civil penalties under subdivision (e). Subdivision (f) governs an action for injunctive relief that is brought by a public prosecutor. In relevant part, it provides, “If it appears to the satisfaction of the court that the defendant has, in fact, violated subdivision (a), the court may issue an injunction restraining further violations, *without requiring proof that any person has been damaged by the violation.*” (Emphasis added.) There is no similar exemption from proof of damage in subdivision (e). “Under the maxim of statutory construction, *expressio unius est exclusio alterius*, if exemptions are specified in a statute, [courts] may not imply additional exemptions unless there is a clear legislative intent to the contrary.” *Imperial Merch. Services, Inc. v. Hunt*, 47 Cal. 4th 381, 389 (2009) (quoting *Rojas v. Superior Court*, 33 Cal.4th 407, 424 (2004)) (internal quotations omitted). Thus, the Legislature either contemplated that the commission of a violation of the Act automatically

results in damage, or such proof is required to establish an entitlement to civil penalties. Either way, proof of a violation and entitlement to civil penalties would support the existence of a concrete and particularized injury sufficient to support standing under Article III.

Even absent this legislative intent, the fact that the statute provides for a range of statutory penalties, dependent upon circumstances, demonstrates that the differing degrees of injury suffered by consumers is a factor to be considered in by courts in awarding penalties. *See* Cal Civ Code § 1747.08(e) (“ Any person who violates this section shall be subject to a civil penalty not to exceed two hundred fifty dollars (\$250) for the first violation and one thousand dollars (\$1,000) for each subsequent violation”). Indeed, courts applying the Act have looked to the level of injury as a factor in determining the amount of penalties. *See In Re Payless Shoesource, Inc.*, 2009 U.S. Dist. LEXIS 93677, at *9 (E.D. Cal. Sept. 11, 2009) (“the purpose of Section 1747.08 is to ... deter conduct that would put consumers' privacy at risk.”); *Hernandez v. Restoration Hardware*, 2014 Cal. Super. LEXIS 1550, *13 (Cal. Super. Ct. July 3, 2014) (“Whether the harm to these consumers is characterized as a minor annoyance or a fundamental interference with the right to be left alone, it must be accounted for in

assessing the appropriate penalty.”) Plaintiff has made the very same argument in this litigation. (See Dkt.198 at 1:25-2:2 (“Whether IKEA's conduct puts consumers at additional risks for harm should certainly be a factor the Court considers as the entire purpose of Section 1747.08 is to minimize such risks to consumers.”))

Thus, *Spokeo* does not support Plaintiff’s argument that she lacks Article III standing. The nature of a Section 1747.08 violation in itself is sufficient to confer Article III standing, particularly where, as here, Plaintiff has urged that the degree of injury suffered by her and the absentee class warrant the imposition of substantial penalties.

E. Plaintiff-Appellant Should Be Judicially Estopped From Disavowing The Allegations Of Her Operative Complaint.

The allegations in the First Amended Complaint are judicial admissions which Plaintiff-Appellant is estopped from contesting in order to secure an unfair litigation advantage. Judicial estoppel "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996). "Judicial estoppel is a flexible equitable doctrine based on the estoppel of

inconsistent positions in which a litigant who has obtained one advantage through the court by taking a particular position is not thereafter permitted to obtain a different and inconsistent advantage by taking a different position." *In re JZ L.L.C.*, 371 B.R. 412, 420 (9th Cir. BAP 2007). As the Supreme Court has explained: "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S.Ct. 555, 39 L. Ed. 578 (1895).

Here, Plaintiffs alleged injury in fact sufficient to confer Article III standing and subject matter jurisdiction and received the benefits of that allegation – the full litigation of their claim through judgment in federal court. Now, unhappy with the result in the district court, Plaintiff-Appellant takes a directly contrary position for the unabashed purpose of seeking a “do over” in state court. Allowing her to do so would prejudice IKEA by forcing it to relitigate her individual and class claims. Judicial estoppel bars such gamesmanship.

IV.
CONCLUSION

For all the foregoing reasons, Plaintiff-Appellant's motion to dismiss for lack of subject matter jurisdiction should be denied. Appellant's case was properly before the district court because she and her co-plaintiff adequately alleged (and attempted to prove) injury in fact sufficient to demonstrate Article III standing. The current, opportunistic attempt to adopt a contrary position does not destroy the Article III standing that existed throughout the case in the district court. Indeed, it does nothing more than bolster the district court's conclusion that individual questions predominate over common ones, and that decertification was proper. This Court should refuse to dismiss this appeal and affirm the judgment and the underlying order decertifying the class.

Respectfully submitted,

Dated: June 9, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2016, I electronically filed the foregoing with the Clerk and the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List. I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: June 9, 2016

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