No. 18-55688

United States Court Of Appeals For The Ninth Circuit

MELISSA MATHER BOBKA,

Plaintiff and Appellant,

vs.

TOYOTA MOTOR CREDIT CORPORATION,

Defendant and Appellee.

Appeal from United States District Court, Southern District of California, Case No. 3:17-cv-02380-GPC-AGS • Hon. Gonzalo P. Curiel

Brief Of Amicus Curiae American Financial Services Association In Support Of Appellee And Affirmance

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CORPORATE DISCLOSURE STATEMENT

[Fed. R. App. 26.1]

Pursuant to Fed. R. App. Proc. 26.1, amicus curiae American Financial Services Association states that it is not a publicly held corporation or other entity. It has no parent corporation. No publicly held corporation or other entity owns 10% or more of it.

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I.

INTEREST OF AMICUS CURIAE

Amicus American Financial Services Association ("AFSA") is the nation's largest trade association representing providers of financial services to consumers and small businesses. AFSA has a broad membership, ranging from large international financial services firms and banks to single-office, independently owned consumer finance companies.

For over 100 years, AFSA has represented financial services companies that hold a leadership position in their markets and conform to the highest standards of customer service and ethical business practices. AFSA is dedicated to protecting access to credit and consumer choice. It encourages ethical business practices and supports financial education for consumers of all ages.

AFSA advocates before legislative, executive and judicial bodies on issues affecting its members' interests. See, e.g., *Am. Fin. Serv. Ass'n v. City of Oakland*, 34 Cal.4th 1239 (2005). AFSA has previously appeared as an amicus in Ninth Circuit appeals that raise issues of concern to AFSA's members. *See, e.g., Meyer v. Portfolio Recovery Assoc., LLC*, No. 11-56600.

Many AFSA members lease cars to consumers. Therefore, they and the association have a direct interest in the outcome of this appeal.

II.

COMPLIANCE WITH RULE 29

All parties have consented to the filing of this brief.

No party or its counsel authored this brief in whole or in part. No person other than AFSA, its members and its counsel contributed money that was intended to fund the preparation or filing of this brief.

III.

SUMMARY OF ARGUMENT

Contrary to plaintiff's and her amici's arguments, discharge of pre-petition debt alone does not achieve Chapter 7's goal of a fresh start. More is required. Specifically, "the provision [to the debtor] of adequate property for a return to normal life." H.R. Rep. 95-595, 95th Cong., 1st Sess. 125 (1977), 1978 U.S.C.C.A.N. 5963, 6086.

For most debtors today, a car is just as necessary for a return to normal life as food, shelter, and clothing. The car takes them from home to work as well as to church, the grocery store and elsewhere. In many American cities and certainly in less populous areas, there is no viable substitute for a car.

A Chapter 7 debtor who owns a car can use the motor vehicle exemption under 11 U.S.C. § 522(d)(2) to keep and use the car as needed for his or her fresh start.

However, many debtors nowadays do not own their cars. Escalating car prices in recent years have led Americans, in increasing numbers, to choose leasing as a

means of car finance, since lease payments are usually lower than monthly payments on a credit sale or a direct loan for a car purchase. A lessee has no ownership interest in the car and so cannot exempt it under § 522(d)(2). Lessees were left in the lurch, with no easy means of retaining the cars they needed for a fresh start.

Section 365(p) was adopted in 2005 to remedy this problem. It allows a debtor to assume the existing lease as a way to keep a leased car needed for the debtor's return to normal life.

While the debtor can choose whether to invoke this new remedy, he or she cannot impose a lease assumption on an unwilling lessor. The lessor owns the car. Allowing the debtor to keep it over the lessor's objection would raise obvious Fifth Amendment taking issues. So § 365(p) requires the lessor's consent.

To secure the lessor's consent, § 365(p) must and does offer the lessor some advantages over the lessor's alternative remedies. It is those advantages that plaintiff and her amicus assail on this appeal. If their mis-construction of § 365(p) is accepted, lessors will have no incentive to consent to lease assumption.

In particular, plaintiff's idea that § 365(p) allows a debtor to assume the lease on a non-recourse basis ignores basic car-leasing economics. No economically rational lessor would agree to a non-recourse assumption. Relieved of personal liability for excess mileage and wear and tear, a lessee could drive the car as far as he or she desired and fail to maintain it in good condition. At lease end, the lessor would

be left with a worthless hunk of metal and plastic rather than a car worth the residual value used to compute lease payments.

So, if section 365(p) is interpreted as plaintiff and her amicus urge, the subsection will be effectively nullified. No lessor will agree to a lease assumption on those terms. Debtors with leased cars will once again face the same difficulties in achieving a true fresh start that led to § 365(p)'s enactment.

For that reason, as well as those stated in the appellee's answer brief, the Court should reject plaintiff's arguments and affirm the judgment.

IV.

THE COURT SHOULD AFFIRM THE DECISIONS BELOW

A. A Fresh Start Requires More Than Discharge Of Pre-Petition Debt

A fresh start—the goal of a Chapter 7 bankruptcy—is not achieved simply by shielding the debtor from his or her creditors' efforts to collect pre-petition debt initially through the automatic stay and later by the discharge injunction.

In enacting the Bankruptcy Code, Congress was well aware that more was required. An equally "important aspect[] of the fresh start … [is] the provision of adequate property for a return to normal life." H.R. Rep. 95-595, 125. Exemptions were the principal means by which the Code sought to assure that the debtor would emerge from bankruptcy with the property needed to return to normal life.

> The historical purpose of these [state] exemption laws has been to protect a debtor from his creditors, to provide him

> with the basic necessities of life so that even if his creditors levy on all of his nonexempt property, the debtor will not be left destitute and a public charge. …
>
> Though exemption laws have been considered within the province of state law under the current Bankruptcy Act, H.R. 8200 adopts the position that there is a federal interest in seeing that a debtor that goes through bankruptcy comes out with adequate possessions to be his fresh start.

H.R. Rep. 95-595, 126.

"In order to facilitate a debtor's fresh start, exemption statutes were enacted to protect a debtor and his dependents against pauperism and to provide them means of reasonable comfort so that a debtor could follow his vocation and provide support for himself and his family." *In re Dipalma*, 24 B.R. 385, 390 (Bankr. D. Mass. 1982) (citations omitted); *see also In re Cole*, 104 B.R. 736, 738 (Bankr. D. Md. 1989) ("The purpose of exemptions ... is that the debtor should not be stripped bare of his belongings and property so as to be rendered a pauper").

Second among the Bankruptcy Code's list of exemptions is the debtor's interest in a motor vehicle. 11 U.S.C. § 522(d)(2). After his or her home, the debtor's car is likely to be his or her most valuable and necessary asset. As is true of many states', including New York's, similar motor vehicle exemption, § 522(d)(2) recognizes that a car is a practical necessity of modern American life and is crucial to providing the debtor a true fresh start.

> Exemption statutes facilitate the goal of affording a fresh start to those who seek bankruptcy protection. New York's

> Debtor and Creditor Law recognizes that financial rehabilitation requires the debtor's retention of reasonable means for earning a livelihood and for otherwise satisfying basic family needs. Although many exemptions reflect archaic concepts concerning survival in an agrarian society, the motor vehicle exemption acknowledges the necessity of auto transportation in America today. Realistically, debtors need a means for travel to their employment as well as in the conduct of their daily lives.

In re Semrau, 187 B.R. 96, 97 (Bankr. W.D.N.Y. 1995) (citation & fn. omitted).

Statistical studies fully support *Semrau's* observation that a car is an essential means of transportation to work and so is a practical necessity for a debtor's fresh start. The 2000 Census revealed that 76% of adult workers drive a car alone to work. *See* Urvi Neelakantan*, Importance and Impact of Cars for Family Economic Success*, 3 (Fed. Reserve Bank, Richmond; 2010) (*citing* Journey to Work: 2000, Census 2000 Brief).[1] Moreover, workers with cars have higher rates of employment and shorter spells of unemployment. *Id.*, 9, 12.

> There is growing evidence that transportation—particularly access to automobiles—plays an important role in shaping the residential location choices and economic outcomes of low-income households. Automobiles … can enable participants to better search for housing as well as provide access to potential employment, services, and other opportunities within a reasonable travel time.

[1] The cited study is publicly available at https://www.nclc.org/images/pdf/conferences_and_webinars/auto_webinars/presentations/ImportanceAndImpactOfCars12.10.pdf.

Rolf Pendall, et al., *Driving to Opportunity: Understanding the Links among Transportation Access, Residential Outcomes, and Economic Opportunity for Housing Voucher Recipients*, i (Urban Inst. 2014); *see also id.* at ii ("Over time, households with automobiles experience less exposure to poverty and are less likely to return to high-poverty neighborhoods than those without car access."); *id.* at 3 ("[E]mployment access by public transit—even in the transit-richest of urban areas—still pales in comparison to access by automobile.")[2]

In fact, access to "a car is more important to getting, and maintaining, employment than one's education or work experience." Miriam Northcutt Bohmert, *Transportation Strategies of Female Offenders*, 80 Fed. Probation J. 45 (Dec. 2016) (*citing* Sara Lichtenwalter, et al., *Examining transportation and employment outcomes: Evidence for moving beyond the bus pass*, 10 J. Poverty 93-115 (2006)).

In short, for most debtors, access to an automobile is essential for a "return to normal life," for continued employment, and for the fresh start a Chapter 7 bankruptcy is intended to provide.

[2] The cited study is publicly available at https://www.urban.org/sites/default/files/publication/22461/413078-Driving-to-Opportunity-Understanding-the-Links-among-Transportation-Access-Residential-Outcomes-and-Economic-Opportunity-for-Housing-Voucher-Recipients.PDF

B. Exemptions Can No Longer Assure That The Debtor May Retain Property Needed For A Fresh Start

By 2005, when Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), adding subsection (p) to 11 U.S.C. § 365, the § 522(d)(2) exemption was no longer fulfilling its intended purpose for an increasing number of Chapter 7 debtors.

An exemption keeps property in a debtor's hands only when the debtor has a pre-petition ownership interest in that property. However, a growing cohort of Americans no longer own the cars they drive to work, to buy food, and for other purposes.

Car prices have increased to the point that few Americans can buy one outright, and many can no longer afford to buy one through a traditional credit sale or loan transaction.[3] "As prices for new vehicles continue to rise, the cost of an average new car may be a stretch for typical households. A new analysis from Bankrate.com found that a median-income household could not afford the average price of a new vehicle in any of the 50 largest cities in the country …." Ann Carrns, *Your Money Adviser: New*

[3] Even for those who can buy a car on credit or by a loan-financed purchase, the exemption may be of little use since to redeem the car and use the exemption, the debtor must pay the creditor the car's value—often a sum that a Chapter 7 debtor cannot afford.

Cars Are Too Expensive for the Typical Family, Study Finds (N.Y. Times; July 1, 2016)[4]

To afford a car, a rapidly increasing number of Americans have switched from buying to leasing a car. Auto leasing was almost non-existent in 1985.[5] By 2016, car leases accounted for 4.3 million vehicles, nearly a third of all new car transactions. Edmunds, Lease Market Rept., 2 (Jan. 2017).[6] In June 2018, finance companies held $193 billion in new car leases. *See* n. 4 below. The reason for this surge in auto leasing is clear: "2016 lease payments averaged $120 less than average finance payments." Edmunds, 1, 8.

The increasing attraction of car leases has caused a problem in Chapter 7 bankruptcies. For the growing portion of Chapter 7 debtors who lease cars, § 522(d)(2)'s exemption of a motor vehicle no longer serves its intended purpose of permitting the debtor to keep the car he or she needs for a fresh start after discharge. The car lessee owns no interest in the car and so cannot invoke the exemption.

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[4] Publicly available at https://www.nytimes.com/2016/07/02/your-money/new-cars-are-too-expensive-for-the-typical-family-study-finds.html.

[5] Fed. Reserve Econ. Data, Consumer Motor Vehicle Leases Owned by Finance Companies, Outstanding, Millions of Dollars, Monthly, Not Seasonally Adjusted; publicly available at https://fred.stlouisfed.org/series/DTCORVHFNM.

[6] Publicly available at https://dealers.edmunds.com/static/assets/articles/lease-report-jan-2017.pdf.

C. Section 365(p) Affords The Debtor An Attractive Means Of Keeping A Leased Car With The Lessor's Consent

Before the enactment of § 365(p) in 2005, only the trustee could assume an executory contract like a car lease. Only in extremely rare cases would a Chapter 7 trustee assume the debtor's car lease since doing so did not benefit the bankrupt estate or result in a larger distribution to creditors. And, in those rare cases, the trustee's assumption of the car lease did not benefit the debtor, but only his or her pre-petition creditors.

The debtor could try to reaffirm the lease under 11 U.S.C. § 524, but that avenue often proved unsatisfactory. Car lessors often were unwilling to incur the time and expense of a reaffirmation. Simply repossessing the car was often seen as a more viable option for the lessor. Also, since a reaffirmation cannot occur after discharge, a debtor had to act speedily if he or she wished to reaffirm the car lease. And, reaffirmation became an even more difficult, time-consuming, and unsatisfactory alternative with the 2005 amendments to § 524. Not only is reaffirmation more difficult and costly to obtain, but the disclosures now required for a reaffirmation agreement are plainly intended for reaffirmation of a debt, not a lease.[7]

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[7] *See* 11 U.S.C. § 524(k)(3)(E)-(G) which require disclosure of the annual percentage rate, the fact the obligation is subject to a variable interest rate "if the underlying debt transaction was disclosed as a variable rate transaction on the most recent [TILA] disclosure, and the fact a security interest or lien in goods or property is asserted over some or all of the debts the debtor is reaffirming , "[i]f the debt is secured

(Fn. cont'd)

Congress added § 365(p) in 2005 in order to address these problems and provide a means by which more Chapter 7 debtors could retain leased cars needed for their post-bankruptcy fresh start. *See* Dennis J. LeVine, *A Lessor's Dilemma: Is There an Intersection Between § 365(p)(2) and 524(c)?*, 34-APR Am. Bankr. Inst. J. 14 (Apr. 2015).

The new section allows a debtor to choose whether to assume a car lease. The debtor initiates the assumption process by "notify[ing] the creditor in writing that the debtor desires to assume the lease." 11 U.S.C. § 365(p)(2)(A). If the debtor thinks lease assumption undesirable for any reason, he or she need do nothing at all. The lease will be terminated by the trustee's rejection, the car will not be property of the estate or subject to the automatic stay, and the lessor will most likely repossess it promptly. *See* 11 U.S.C. § 365(d)(1), (p)(1).

However, as Congress recognized in enacting § 365(p), lease assumption will often be an attractive option for a Chapter 7 debtor. Most importantly, lease assumption is a convenient way for the debtor to keep the car he or she needs for the fresh start that Chapter 7 is intended to provide. Section 365(p) thus provides a substitute

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(Fn. cont'd)
by a security interest which has not been waived in whole or in part or determined to be void by a final order of the court at the time of the disclosure." *See also* Bankruptcy Form No. 427, items 3, 4; NCBRC Amicus, Addendum A, items I(C), (E)-(H).

for § 522(d)(2)'s motor vehicle exemption, which for the reasons already stated cannot serve its intended function in the car lease context.

Economically, lease assumption will also often be beneficial to a debtor. The assumed lease's monthly payments are likely to be lower than the debtor would have to pay to obtain a car by other means. The lease's monthly payment will, in most cases, be lower than a payment on a credit sale or loan for a comparable car. *See* Edmunds, 1, 8. A debtor can obtain a different new car lease instead of assuming the existing lease, but a new lease will likely cost more for a variety of reasons, including the higher price of the later model new car and the debtor's impaired credit score.[8] Although not an available option when § 365(p) was enacted in 2005, it might now be possible for a debtor to lease a used car, but those leases, while somewhat cheaper, are still difficult to find even by consumers with good credit scores, and they have their own risks and disadvantages.[9]

[8] "While it's still possible, don't expect leasing to be as easy following bankruptcy. Some of the common obstacles you may run into include: [Para.] Your credit score. [Para.] Following a bankruptcy, your credit score will be affected. [Para.] This will limit your options as you search for a lender and make approval more difficult. [Para.] High interest rates. [Para.] To combat the risk, the lender may require you to pay a higher interest rate. [Para.] Larger required down payments. [Para.] In order to get approved, some lenders will require more money up front." https://www.dmv.org/buy-sell/leasing/leasing-post-bankruptcy.php.

[9] *See* John M. Vincent, *Can You Lease a Used Car?* (U.S. News & World Rpt.; July 20, 2018), publicly available at https://cars.usnews.com/cars-trucks/can-you-lease-a-used-car; Matt Jones, *Yes, you can lease a used car* (Edmunds); publicly available at https://www.edmunds.com/car-leasing/yes-you-can-lease-a-used-car.html.

Also, for a debtor, lease assumption may provide a comparatively easy means of demonstrating post-bankruptcy creditworthiness through fully performing an existing lease rather than breaching it and then having to overcome that ding to his or her credit score by performing under a new lease or purchase contract—if the debtor is lucky enough to obtain one.

D. Lease Assumption Requires The Lessor's Consent

While the debtor initiates a lease assumption under § 365(p), the debtor cannot impose a lease assumption on the lessor.

To avoid Fifth Amendment taking challenges,[10] § 395(p)(2)(A) allows lease assumption only with the lessor's consent. As lessors generally are not charitable institutions, they are unlikely to consent unless lease assumption is to their, as well as the debtors', economic benefit.

The section expressly suggests one such economic benefit. The lessor may condition its consent to lease assumption on "the debtor's curing any existing default under the lease." 11 U.S.C. § 365(p)(2)(A). Also, the lease assumption may benefit the lessor if the debtor fully performs the assumed lease, thereby saving the lessor from a likely loss upon repossession and sale or other disposition of the car. But the

[10] *See United States v. Sec. Indus. Bank*, 459 U.S. 70, 75 (1982) ("The bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation.") (*citing Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935)).

debtor may not fully perform an assumed lease. Having once defaulted and declared bankruptcy, the debtor is a poorer credit risk and would ordinarily receive less favorable terms than the assumed lease allows. So, Congress added another benefit as well: a swift, inexpensive assumption unaccompanied by the trouble and expense required for a reaffirmation under § 524.

Congress could reasonably conclude that this added benefit to lessors came at only a small price to the lease-assuming debtor. Only amounts needed to cure an existing default under the lease would represent compensation for past debt. As noted, § 365(p)(2)(A) expressly allows a creditor to demand that the debtor cure such a default as a condition of assuming the lease. The amount needed to cure a default is likely to be relatively small. A Chapter 7 normally proceeds quickly; repossession is not stayed for lengthy periods. So, rarely will the debtor still have the car and yet be far behind in lease payments. In unusual cases where the delinquency is large, the debtor can simply choose not to assume the lease.

Apart from cure amounts, payments under an assumed car lease will be for post-petition use of the car. And, if as is normally true, the debtor needs the car for his or her fresh start, those payments are likely to be lower than the debtor could otherwise achieve by leasing or buying a different car.

Hence, there is little opportunity in the assumed lease context for the type of creditor overreaching which Congress sought to curtail through the stringent limits it imposed on reaffirmation agreements.

E. Plaintiff And Her Amicus Would Render § 365(p) Ineffective

Plaintiff and her amicus champion a different interpretation of § 365(p). Under their proposed reading, the subsection would permit the lessee to continue the lease without incurring any personal liability under it, absent a court-approved reaffirmation agreement.[11] (See AOB 16-17, 22-23; NCBRC Amicus, 7, 16-18.)

This mis-interpretation of the Bankruptcy Code would eliminate lease assumptions as a practical matter, returning debtors with car leases to the same difficult position from which Congress sought to rescue them in 2005.

No economically rational car lessor will ever agree to a non-recourse car lease —that is, one in which the lessee incurs no personal liability under the lease. The reason is simple. The lessor gets two economic benefits from the lease: the lessee's payments and return of the car at the end of the lease term. The car's value at lease-end—i.e., its "residual value"—is highly dependent on the car's mileage and condition

[11] We use "continue the lease" rather than "assume the lease," because "[t]he law has always been clear that assumption of a lease is *cum onere*, meaning that an assumed lease is assumed subject to all of its provisions, including the *in personam* liabilities flowing from assumption." *In re Abdemur*, 587 B.R. 167, 172 (Bankr. S.D. Fla. 2018). Thus, as Toyota's answer brief more fully explains, plaintiff's and her amicus' interpretation also misreads § 365(p)'s plain language.

at lease termination.[12] That is why every ordinary car lease provides for additional charges for excess mileage and excessive wear and tear when the car is returned at lease end.

If the lessee bears no personal liability under the lease, he or she may ignore the excess mileage and wear and tear provisions of the lease with impunity. Hence, the car lessor risks receiving at lease end, a car that has been driven far more than it bargained for and is in far worse condition—poorly maintained, filthy, with ripped seats and stained carpets. Such a car cannot be sold for the estimated residual value used to compute the monthly payments at the outset of the lease. So, the lessor will likely suffer a significant loss on the lease.

Since a non-recourse car lease is an economically irrational contract from the lessor's point of view, § 365(p) will be a dead letter if the Bankruptcy Code is interpreted as plaintiff and her amicus advocate. Any lessor who was willing to allow lease assumption will require a reaffirmation agreement and approval under § 524 as well to assure that the lessee is personally liable on the lease. That would return car leasing debtors to the same unsatisfactory situation they were in before 2005 which led to the enactment of § 365(p).

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[12] *See* John M. Vincent, *What Does Residual Value Mean for a Car Lease?* (U.S. News & World Rpt.; Apr. 21, 2017); publicly available at https://cars.usnews.com/cars-trucks/what-does-residual-value-mean-for-a-car-lease.

Not only would plaintiff's and her amicus' mis-interpretation nullify § 365(p) as a practical matter, but it would also eliminate any possibility of a post-discharge lease assumption which § 365(p)(2)(C) clearly contemplates. Reaffirmation occurs, if at all, only before discharge. 11 U.S.C. § 524(c)(1); *see Abdemur*, 587 B.R. at 171-72 ("To accept that *in personam* liability under an assumed lease requires reaffirmation under subsection 524(c) would mean that, notwithstanding subsection 365(p)(2)(C), which clearly contemplates assumption post-discharge, assumption post-discharge would not be possible, or would be limited to non-recourse assumption, because reaffirmation must occur *prior to* discharge.").

V.

CONCLUSION

The Court should affirm the judgments below. They correctly interpret § 365(p) in a manner that implements the evident intent of that subsection to permit debtors a quick, convenient means of assuming their car leases, with the lessor's consent, as a way of providing debtors the cars they need to make a fresh start and return to normal life.

DATED: October 29, 2018

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CERTIFICATE OF COMPLIANCE
With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

[Fed. R. App. P. 32(a)(7)(B)]

1. This brief complies with the type-volume limitation of Fed. R. App. Proc. 32(a)(7)(B), because this brief contains 4,030 words, excluding the parts of the brief exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. Proc. 32(a)(5) and the type style requirements of Fed. R. App. Proc. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word for Windows 2010, in Times New Roman, 14 point type.

DATED: October 29, 2018

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PROOF OF SERVICE
Bobka v. Toyota Motor Credit Corporation, et al.
Ninth Circuit Court of Appeals, Case No. 18-55688

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is 19100 Von Karman Ave., Suite 700, Irvine, CA 92612.

On the below date, I served true copies of the following document(s):

BRIEF OF AMICUS CURIAE AMERICAN FINANCIAL SERVICES ASSOCIATION IN SUPPORT OF APPELLEE AND AFFIRMANCE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 29, 2018.

I certify that all participant in the case are registered CM/ECF users and that service will accomplished by the appellate CM/ECF system.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on October 29, 2018, at Irvine, California.

/s/ Ryan J. Brooks
RYAN J. BROOKS

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