No. 15-17379

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL LINDER
Plaintiff-Appellant

v

GOLDEN GATE BRIDGE, HIGHWAY & TRANSPORTATION DISTRICT, *et al*.
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIVIL CASE NO. 3:14-cv-03861-SC

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

In their Answering Brief, Appellees Golden Gate Bridge, Highway and Transportation District ("Golden Gate") and Captain Lisa Locati ("Captain Locati") (collectively, "Appellees") effectively seek to vacate the judgment as entered, and thus waive their jurisdictional argument by never filing a cross-appeal.

On the substantive merits, Appellees continue to make arguments and cite authorities that befit summary judgment rather than the pleading stage. While success at the pleading stage does not guarantee triable issues of material fact, Appellant Paul Linder ("Appellant" or "Linder") has pleaded facts sufficient to permit fact discovery into his two constitutional claims, as well as *Monell* liability. Accordingly, he respectfully requests that this Court reverse and remand the District Court's decision for further proceedings.

II. LAW & ARGUMENT

A. APPELLEES WAIVED THEIR JURISDICTIONAL ARGUMENT BY NEVER FILING A CROSS-APPEAL TO MODIFY THE JUDGMENT AS ENTERED BY THE DISTRICT COURT.

Appellees' jurisdictional argument necessarily attacks the District Court's entry of judgment. (Answering Brief, p. 13, 26-30). Yet, since they indisputably never filed a cross-appeal, Appellees have waived their right to modify the judgment as entered. Fed. R. App. Proc. 4(a)(3).

"Generally, a cross-appeal is required to support **modification of the judgment**, but . . . arguments that **support the judgment as entered** can be made without a cross-appeal." *Engleson v. Burlington N. R. Co.*, 972 F.2d 1038, 1041 (9th Cir. 1992) (emphasis added; internal quotations omitted). Rather than support the judgment "as entered," Appellees expressly contend that "no appealable order or judgment resulted." (Answering Brief, p. 13; see also *id*. at p. 26-27). Requesting that this Court effectively vacate the existing judgment is nothing short of a "modification."

"'[A]n appellee who fails to file a cross-appeal cannot attack a judgment with a view toward enlarging its own rights.'" *Gulliford v. Pierce Cty.*, 136 F.3d 1345, 1351 (9th Cir. 1998) (quoting *Spurlock v. FBI,* 69 F.3d 1010, 1018 (9th Cir. 1995)). Appellees attack the judgment and attempt to enlarge their own rights by seeking a dismissal of this appeal that forgoes any consideration of its merits.

This Court declines to hear issues not properly raised via cross-appeal. *Turpen v. City of Corvallis*, 26 F.3d 978, 980 (9th Cir. 1994); *United States v. Poulsen*, 41 F.3d 1330, 1333 n.1 (9th Cir. 1994). While it is true that the cross-appeal requirement is discretionary, this Court does not deviate from the general rule where the party "knew" of its intention to file a cross-appeal but failed to do so nonetheless. *S.M. v. J.K.*, 262 F.3d 914, 923 (9th Cir. 2001). Here, Appellees

admit that they knew of Linder's intention to seek an appealable judgment. (Answering Brief, p. 27; Supplemental Excerpts of Record ("SEOR") 156:26-27). Then, they fully opposed Linder's motion for relief—and lost. (SEOR 166-173, 187-189; *see also* Answering Brief, p. 28). Yet they still did not file a cross-appeal.

This Court need not excuse a procedural defect for which Appellees offer no explanation or any justifying authority: "We will not extend any leniency that is not demanded by these cases to one where the party is represented by an attorney." *Munden v. Ultra-Alaska Assocs.*, 849 F.2d 383, 388 (9th Cir. 1988) (superseded in part by statute on other grounds). Furthermore, it should be noted that Appellees have also failed to file a motion to dismiss with this Court for lack of jurisdiction. *See e.g.*, Fed. R. App. P. 27; Cir. R. 27-1.

Appellees cannot now overcome its own uncured procedural defect by attempting to cast aspersions on Linder's motives[1] without any competent

1 Appellees contend that appealing federal constitutional claims with this Court while litigating the only remaining state law claim in state court somehow constitutes "manipulation." (Answering Brief, p. 30-31). Yet they fail to articulate how the District Court erred by stating that "[b]ecause the dismissal of that [state law] claim was without prejudice, no apparent bar precluded plaintiff from refiling in state court. Doing so was also appropriate given that this court could have declined to exercise jurisdiction if only a state law claim remained in the case." (SEOR 188:26-27).

evidence. Accordingly, Linder respectfully requests that this Court reject Appellees' jurisdictional argument and decide this appeal solely on its merits.

B. LINDER'S CONSTITUTIONAL CLAIMS ARE NOT RIPE FOR ADJUDICATION AT THE PLEADING STAGE.

The role of the pleading stage is to determine whether fact discovery is appropriate for "plausible" claims. A claim is plausible when "the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). This definition of plausibility also applies even to claims subject to a heightened pleading standard.[2] *Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1055 (9th Cir. 2011) ("[T]he pleading must state 'enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the misconduct alleged].'") (citing *Twombly*, 550 U.S. at 556).

Even post-*Twombly* and *Iqbal*, summary judgment remains the appropriate device to resolve the factual merits of any given claim: "Federal courts 'must rely on summary judgment and control of discovery to weed out unmeritorious claims.'" *Motorola, Inc. v. AU Optronics Corp. (In re TFT-LCD (Flat Panel)*

2 To be clear, no heightened pleading standard applies in employment discrimination suits. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (overruled in part on other grounds).

Antitrust Litig.), 785 F. Supp. 2d 835, 846 (N.D. Cal. 2011) (quoting *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-169 (1993)). This Court has recognized its "more limited" role at the pleading stage in a case involving a First Amendment Retaliation claim:

> Because the district court granted a Rule 12(b)(6) motion to dismiss, our task is not to resolve any factual dispute, but merely to determine whether [the plaintiff]'s allegations support a reasonable inference that he acted outside of his professional duties in each instance. At the motion to dismiss stage, we take [his] well-pleaded factual allegations as true.

Dahlia v. Rodriguez, 735 F.3d 1060, 1076 & n.17 (9th Cir. 2013).

It is true that "a showing of facial plausibility at the pleading stage does not necessarily mean that Plaintiffs will ultimately prevail on summary judgment or at trial." *Felix v. Dep't of Developmental Servs.*, 2013 U.S. Dist. LEXIS 97756, at *17 n.4 (E.D. Cal. July 12, 2013); see also *Davis v. City of San Jose*, 69 F. Supp. 3d 1001, 1006 n.5 (N.D. Cal. 2014) ("At the pleading stage, Plaintiff is not required to plead his whole case, and the Court looks only at what the plaintiff has alleged."). Linder does not seek judicial affirmation that any triable issues of material fact yet exist. Rather, this appeal aims to reaffirm the bifurcation between the pleading and summary judgment stages concerning inherently factual questions.

1. Linder Stated a Viable Claim of First Amendment Retaliation.

Appellees' Answering Brief imports summary judgment analysis and cases to dispute that Linder stated a First Amendment retaliation claim.[3] This contravenes established notice pleading standards and must be reversed.

a. *Linder Adequately Pleaded that He Spoke as a Private Citizen*.

At the pleading stage, "[a]ll well-pleaded allegations of material fact in the complaint are accepted as true and are construed in the light most favorable to the non-moving party." *Faulkner v. ADT Sec. Servs.*, 706 F.3d 1017, 1019 (9th Cir. 2013). Appellees ignores this and attempts to rewrite the First Amended Complaint by claiming that their communications with Linder were a "request" meant to "facilitate [the BSIS/CDOJ] investigations." (*Compare* Answering Brief, p. 32 *to* EOR 023, 025, ¶¶ 19, 32).

Appellees' largely semantical arguments fail at the pleading stage for two reasons. First, they sidestep the First Amendment's inherent concern with the nexus between the *content* of the plaintiff's speech and his job duties. See *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) ("The First Amendment limits the ability of a

3 Appellees admit that they "never argued" that Linder's speech was unrelated to a matter of public concern, and thus effectively concede that element. (Answering Brief, p. 32). Linder thus will not belabor that point any further.

public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."). One might reasonably infer at the pleading stage that Appellees plausibly terminated Linder after he revealed, *inter alia*, that Golden Gate paid off a retired former employee to falsify certifications and that Captain Locati's own husband misrepresented a material fact to the BSIS prior to the permit revocation. (EOR 023-024, ¶¶ 19-25). Moreover, one could reasonably infer that he might have avoided his *first* termination had his speech not been a cause of the revocation, or his *second* termination had he not continued to cooperate in the BSIS investigation upon reinstatement. (EOR 024, 025, 028-029, ¶¶ 24, 32, 48-49).

Second, Appellees cannot escape that determining the scope of Linder's job duties is inherently an issue of fact. *Dahlia*, 735 F.3d at 1076 (noting on remand that "the parties will have an opportunity to conduct discovery as to [the plaintiff]'s professional duties"). Appellees oddly cite their own legal brief as evidence[4] that

4 Answering Brief, p. 32 (*citing* SEOR 62:4-11). "[A]rguments in briefs are not evidence." *Comstock v. Humphries*, 786 F.3d 701, 709 (9th Cir. 2015).

his speech was part of his job duties, while also referencing Linder's allegation denying that he had no "official duty to report mismanagement and wrongdoing within Golden Gate," and that his speech was not "part of the tasks he was paid to perform." (EOR 042, ¶ 106). Moreover, most of Appellees' cited authorities were decided at summary judgment. *Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1264 (9th Cir. 2016) (identifying the plaintiff's job responsibilities from her own declaration); *Jacobson v. Schwarzenegger*, 650 F. Supp. 2d 1032, 1059 (C.D. Cal. 2009) (citing from excerpts of the plaintiff's deposition). These cases are wholly inapposite to this stage of the litigation: "In ruling on a 12(b)(6) motion, a court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007).[5]

Lastly, Appellees incorrectly attempt to impose two requirements into the First Amendment retaliation analysis: that the plaintiff must be the first to initiate the speech related to a matter of public concern, and that his supervisor must threaten him. (*See* Answering Brief, p. 33, 35). Neither of these are part of the five-step balancing test used by this Court. *Eng v. Cooley*, 552 F.3d 1062, 1070

5 Appellees' only procedurally relevant case was an *unreported* memorandum opinion devoid of any facts useful to the present analysis. *Hines v. Cal. Pub. Util. Com.*, 467 F. App'x 639, 641 (9th Cir. 2012).

(9th Cir. 2009). Moreover, any distinctions drawn regarding who spoke first cut against the recognition that "the First Amendment interests at stake extend beyond the individual speaker […] [because of] the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion." *Garcetti*, 547 U.S. at 419 (2006).

b. *Linder Adequately Pleaded that Appellees Intended to Chill His Free Speech*.

Appellees primarily[6] fault Linder for pleading circumstantial evidence, rather than direct evidence (e.g., threats), of their intent to chill his free speech, even though the law does not favor either method of proof over the other. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003). While admitting that scienter is a factual question (Answering Brief, p. 38), Appellees launch into an analysis befitting of summary judgment, not the pleading stage. (Answering Brief, p. 35-41). *See* Fed. R. Civ. P. 8(a)(2).

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6 Appellees' waiver argument is incorrect. (*See* Answering Brief, p. 35-36). This Court reviews Fed. R. Civ. P. 12(b)(6) dismissals *de novo* because whether a complaint satisfies notice pleading requirements is essentially a question of law. *Williams v. Boeing Co.*, 517 F.3d 1120, 1130 (9th Cir. 2008); *Dominguez v. Miller (In re Dominguez)*, 51 F.3d 1502, 1508 n.5 (9th Cir. 1995). In Appellees' cited authority, this Court creates an exception to the general waiver rule "when the issue presented is purely one of law and either does not depend on the factual record developed below." *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985). Additionally, invocation of *Cruz v. Int'l Collection Corp.*, 673 F.3d 991, 998 (9th Cir. 2012) is inapposite because Linder did not fail to argue the legal sufficiency of the relevant allegations in his Opening Brief.

Appellees conclude that Linder insufficiently pled facts to support intent, and hence causation, only by isolating individual allegations. This is not the law of the pleading stage. In *Bastidas v. Good Samaritan Hosp. LP*, 2016 U.S. Dist. LEXIS 33405, at *12 (N.D. Cal. Mar. 15, 2016), the district court used a "totality of the circumstances" approach in denying Rule 12(b)(6) relief based on causation, applying this Court's approach of inferring causation from the employer's "pattern of antagonism following the protected conduct." *Porter v. California Dep't of Corr.*, 419 F.3d 885, 895 (9th Cir. 2005). Close temporal proximity between the protected activity and the adverse employment actions also creates a reasonable inference of causation. *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987). Linder's factual allegations satisfy either approach.

After April 30, 2012, Linder engaged in protected activities regarding weapons permitting and licensing improprieties that resulted in a BSIS/CDOJ investigation. (*See* EOR 023-024, ¶¶ 19-22). His protected activities—a cause in the loss of Golden Gate's permits—occurred within weeks of his *first* termination on July 9, 2012, when he was escorted from the premises under threat of force. (*See* EOR 024, ¶¶ 25-27). *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) ("[C]ausation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity.").

Even after reinstatement, Linder suffered a pattern of adverse employment actions by Captain Locati, whose own husband Linder had reported as having misrepresented a material fact to the BSIS (*see* EOR 023, 024, 025, ¶¶ 17, 22, 29):

- Linder returned to a wholly idiosyncratic Friday-Morning evening schedule. Captain Locati consistently refused to reinstate his Bridge Lieutenant duties, despite orders to the contrary. She also prohibited him from accessing ammunition lockers, essentially resulting in him suffering a de facto demotion. (EOR 025, ¶¶ 29-31).

- Captain Locati further retaliated against Linder by locking him into his wholly idiosyncratic Friday-Morning evening schedule. (EOR 026, ¶ 33).

- Captain Locati did not return him to his full duties. (EOR 026, ¶ 35).

- Captain Locati restricted where Linder could keep his belongings. (EOR 026-027, ¶ 38).

- Captain Locati threatened to damage his professional reputation with a *Brady* motion. (EOR 026-027, ¶ 38 & fn. 1).

- Linder was disciplined for alleged offenses for which other Golden Gate personnel have not been disciplined. (EOR 027, ¶ 42).

- Captain Locati ordered Linder's "fitness for duty" examination without apparent justification. (EOR 028, ¶ 45).

- Captain Locati initiated an Intent to Terminate memorandum against Linder which resulted in his wrongful termination. (EOR 028-029, ¶¶ 48-49).

Linder had no history of discipline in his employment record for nearly 21 years at Golden Gate. (EOR 022, ¶ 14). Only after engaging in protected activities was he

subjected to this laundry list of adverse employment actions and "performance issues" which directly or indirectly implicated the conduct of Captain Locati as a decisionmaker and/or someone who acted with final policymaking authority concerning employee discipline. (*See e.g.*, EOR 021, ¶¶ 7, 10). Hence, even without the direct evidence of "threats," Captain Locati's pattern of conduct creates a reasonable inference that Appellees "knew" of his speech and intended to chill it. *Lang v. Illinois Dept. of Children and Family Services*, 361 F.3d 416, 419-421 (7th Cir. 2004) (noting that an employer's sudden dissatisfaction with an employee's performance after that employee engaged in a protected activity may constitute circumstantial evidence of causation). Hence, Linder's factual allegations are sufficient at the pleading stage to warrant fact discovery.

2. Linder Stated a Viable Fourteenth Amendment Claim.

Appellees effectively argue that Golden Gate's enabling statute *per se* forecloses the existence of Linder's property interest in continued employment. (*See* Answering Brief, p. 41-42, 45). However, in *McGraw v. City of Huntington Beach*, 882 F.2d 384 (9th Cir. 1989), this Court precisely rejected such a mechanical approach by considering the plaintiff's reasonable belief in continued employment even though she was terminated during an at-will "probationary" period. *Id*. at 386, 390-392. In other words, labels are not dispositive.

Here, Appellees again trespass beyond the four corners of the First Amended Complaint, and impermissibly cite Linder's opposition brief as evidence of allegedly at-will provisions in Golden Gate's human resources manual. (Answering Brief, p. 41-42) (*citing* SEOR 84:17-18). This is completely inappropriate at the pleading stage.

To the contrary, the First Amended Complaint adequately pleads that:

- Linder was served with a letter of intent to terminate his employment. (EOR 024, ¶ 25).
- Golden Gate accepted and considered evidence supporting Linder's innocence. (*See* EOR 025, ¶ 28).
- Linder's termination was overturned based on that evidence. (*See* EOR 024, ¶ 29).
- In January 2013, Linder filed a grievance regarding his reasonable belief that Captain Locati's post-reinstatement conduct towards him was retaliatory; Human Resources formally rejected this grievance. (*See* EOR 026, 027, ¶¶ 38, 41).
- In late December 2013, Linder was subjected to a *Brady* hearing that was not subject to review or due process. (EOR 028, ¶ 46).
- In late December 2013, Linder was kept on administrative leave until termination hearing had concluded. (EOR 028, ¶ 47).
- In late December 2013, Captain Locati initiated an "Intent to Terminate Memorandum," which he believed to be "the condition precedent to an evidentiary hearing, at which time a Hearing Officer would collect evidence and issue a recommendation, based on information and belief, to the General Manager for the final decision, pursuant to the California Supreme Court

> decision in *Skelly v. State Pers. Bd.*, 15 Cal. 3d 194, 124 Cal. Rptr. 14, 539 P.2d 774 (1975)." (EOR 028, ¶ 48 & n. 2).

The implied existence of policies and procedures[7] governing each of Linder's *two* terminations, including evidentiary hearings, creates a reasonable inference that Linder had plausibly developed an "informal understanding" that he had a property interest in his two-decade public service career. See *McGraw*, 882 F.2d at 389; *Ling La v. San Mateo Cty. Transit Dist.*, 2014 U.S. Dist. LEXIS 131316, at *32 (N.D. Cal. Sep. 16, 2014).

Presumably, Golden Gate could have simply implemented the default prerogative of at-will employment, ending Linder's career "'at any time without cause,' for any or no reason, and subject to no procedure except the statutory requirement of notice." *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 335 (2000). The mere of existence of the foregoing procedures—and the consideration of evidence—does not automatically convert Linder's employment into "for cause" employment, yet it does create a reasonable inference that he had plausibly developed a "informal understanding" that he had property interest in continued employment, especially after surviving one termination attempt by Captain Locati.

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7 Appellees claim that Linder's allegations only reflect his belief that "he was *denied* due process." (Answering Brief, p. 44) (emphasis in original). This is nonsensical because it was the deprivation of his Fourteenth Amendment rights that prevented him from maintaining continued employment. (*See* EOR 045, ¶ 122).

Appellees deride the *La* decision as "poorly reasoned" (Answering Brief, p. 43), yet the district court there demonstrated a procedurally correct understanding of the pleading stage: it is not designed to resolve factual disputes. The public employer's written documentation in *La* was relevant to, but not by itself dispositive of, whether the plaintiff had a viable Fourteenth Amendment. *La*, 2014 U.S. Dist. LEXIS 131316 at *31. This denial of the public employer's Rule 12(b)(6) motion there did not guarantee success at summary judgment or trial, only the plaintiff's ability to conduct fact discovery to confirm those "informal" understandings.

3. Linder Adequately Pleaded *Monell* Liability.

Appellees incorrectly claim that Linder failed to articulate his basis for imposing *Monell* liability in his Opening Brief. (*See* Appellant's Opening Brief, p. 10-11; EOR 021, 029, 042-043, ¶¶ 7-10, 50-53, 109-110). In any case, Linder has adequately pled *Monell* liability.

First, contrary to Appellees' argument, Linder has articulated a "policy" or "custom"[8]:

8 Appellees primarily consider whether Linder stated a "policy" without any consideration as to whether he stated a "custom," i.e., "a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage' with the force of law." *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (citation and internal quotation marks omitted).

> The **above-described conduct** of [Captain] Locati, Witt, and Mulligan was done within the scope of their employment and pursuant to a **custom or policy** of permitting Bridge Lieutenants and other employees to be deprived of due process rights at evidentiary termination hearings by permitting the introduction of anonymously sourced and/or undisclosed evidence, not subject to cross-examination or rebuttal.

(EOR 029, ¶ 51) (emphasis added). This is sufficiently pled compared to Appellees' invocation of *Young v. City of Visalia*, 687 F. Supp. 2d 1141, 1149 (E.D. Cal. 2009), wherein the complaint did "not identify what the [relevant] practices were, how the [relevant] practices were deficient, or how the [relevant] practices caused Plaintiffs' harm." *Id*. (*See also e.g.*, EOR 024, ¶ 25).

Next, Appellees claim that Linder has not sufficiently pleaded that either Kary Witt ("Witt") or Denis Mulligan ("Mulligan") ratified Captain Locati's conduct, even though ratification is ordinarily a jury question. *Christie v. Iopa*, 176 F.3d 1231, 1238-1239 (9th Cir. 1999). This is incorrect. It is true that Linder must show ratification that the "'authorized policymakers approve a subordinate's decision and the basis for it.'" *Christie v. Iopa*, 176 F.3d 1231, 1239 (9th Cir. 1999) (quoting *Praprotnik*, 485 U.S. at 127). Here, it is plausible that Witt and/or Mulligan,[9] who at all times acted with delegated final policy-making authority as unreviewable decisionmakers over employee discipline, ratified Linder's

9 Appellees effectively admit that Mulligan has final policymaking authority in employment matters under Cal. Sts. & High. Code § 27151. (*See* Answering Brief, p. 48).

termination by overturning the first termination initiated by Captain Locati after receiving exculpatory evidence as to the basis of the termination—but not the second termination. (EOR 021, 024, 025, 028-029, ¶¶ 7, 25-26, 28-29, 48-50). Accordingly, Plaintiff has adequately pled *Monell* liability.

III. CONCLUSION

Based on the foregoing, Linder respectfully requests that this Court reverse and remand the District Court's Fed. R. Civ. P. 12(b)(6) decision for further proceedings.

Respectfully submitted this 21st day of November, 2016,

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PAUL LINDER

CERTIFICATE OF COMPLIANCE

I, DOW W. PATTEN, counsel of record for Plaintiff-Appellant, hereby certify that the foregoing Appellant's Reply Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,849 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Apache OpenOffice 4.1.1, in 14-point Times New Roman.

Dated: November 21, 2016

SMITH PATTEN

/s/ Dow W. Patten
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PAUL LINDER

9th Circuit Case Number(s) 15-17379

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