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In the United States Court of Appeals
for the Ninth Circuit

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American Bankers Association et al.,
Plaintiffs and Appellants,

VS.

Bill Lockyer, Attorney General of California, et al.,
Defendants and Appellees.

BRIEF OF *AMICUS CURIAE* E-LOAN, INC. IN SUPPORT
OF APPELLEES AND IN SUPPORT OF AFFIRMANCE OF
THE JUDGMENT

On Appeal From A Summary Judgment
United States District Court for the Eastern District of California
No. Civ. S 04-0778 MCE KJ, The Honorable Morrison C. England, Jr.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned certifies that *Amicus Curiae* E-LOAN, Inc. is a Delaware corporation. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

DATED: September 7, 2004.

E-LOAN, Inc.

By



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Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, E-LOAN, Inc. (E-LOAN), submits this brief as *amicus curiae*, with the consent of all the parties, in support of Appellees, urging this Court to affirm the judgment of the District Court upholding the validity of Senate Bill No. 1, 2003-04 Reg. Sess. (SB1), which resulted in the enactment of the California Financial Information Privacy Act.

I

INTRODUCTION AND IDENTITY AND INTEREST OF *AMICUS CURIAE*

E-LOAN, Inc. is an online consumer direct lender offering borrowers mortgage, auto, and home equity loans. E-LOAN is publicly traded on the NASDAQ National Market under the symbol "EELN." Since its inception, E-LOAN has originated more than \$21.5 billion in loans. Protecting consumers' financial privacy is of paramount concern, prompting E-LOAN to implement industry-leading privacy practices and to advocate strong consumer financial privacy protection laws.

E-LOAN does not have a direct financial interest in this case. E-LOAN does, however, have a strong policy interest in how the case is resolved. E-LOAN contributed to, and participated in, efforts that resulted in the passage of SB1. E-LOAN is deeply concerned that the outcome of this case will affect the rights California consumers have over their nonpublic personal

information, as well as the rights and duties of California to enact consumer protection laws.

II SUMMARY OF ARGUMENT

The question at the bottom of this debate is whether consumers or their financial institutions should have control over the sharing of nonpublic personal information consumers have provided to those institutions. The California Legislature, in the face of an inevitable ballot initiative, mindful of the California Constitution's right of privacy, and fully aware of common expectations, answered this question by coming down on the side of consumer protection when, in the exercise of its police powers, it enacted SB1.

In an ambitious attempt to stretch the scope of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x (FCRA), along with its preemption provisions, beyond its natural limits, Appellants contend that the FCRA preempts SB1 because the FCRA covers *all* information collected by *any* financial institution from *each and every* consumer. This argument ignores the language and purpose of the FCRA—which, as its name declares, concerns *credit reporting*, nothing more and nothing less. It also ignores the savings clause of Title V of the Gramm-Leach-Bliley Act of 1999, 15 U.S.C. §§ 6801-6809 (GLBA), which authorizes state statutes like SB1. The District Court, after carefully following the path established by the law of preemption, properly

rejected Appellants' argument and found that SB1, a financial privacy law, was *not* preempted by the FCRA.

Moreover, contrary to Appellants' protestations, the approach embodied in SB1 enhances business. The principles underlying SB1—which E-LOAN has employed since its inception—have helped E-LOAN communicate with existing and prospective customers more effectively and efficiently. In simple terms, E-LOAN knows its customers better as a result of the choices it has enabled them to make. Approximately 71 percent of E-LOAN's mortgage customers and approximately 66 percent of its home equity customers affirmatively "opt-in" and thereby authorize E-LOAN to offer them additional products and services. Despite this "opt-in" requirement—which is more stringent than SB1's counterpart—E-LOAN enjoys impressive positive response rates.

Furthermore, SB1, like many pieces of legislation, was a compromise, one in which several members of Appellants participated actively. E-LOAN has personal knowledge of this fact, since it acted both as a financial-services industry participant and as mediator throughout this process. In light of this participation, Appellants should hardly be allowed to complain now. Surely, Appellants' claims that SB1 is unworkable and will cause irreparable injury should fall on deaf ears.

The District Court correctly understood the issues and correctly resolved them in Appellees' favor. This Court accordingly should affirm the judgment.

III ARGUMENT

On August 27, 2003, Senate Bill No. 1, 2003-04 Reg. Sess., commonly known as SB1, became law with the approval of the Governor of California following its enactment by the California Legislature.

In enacting SB1, the California Legislature brought forth the California Financial Information Privacy Act, codified as Division 1.2 of the California Financial Code, §§ 4050-4060, operative on July 1, 2004, to prohibit the sharing, without consent, of a consumer's nonpublic personal information in the possession of financial institutions. In doing so, the California Legislature accepted the invitation extended to the states by Congress to grant consumers greater privacy than federal law provides, without conflicting with federal law. The savings clause of the GLBA contains this invitation: "Greater protection under State law. . . . [A] State statute, regulation, order, or interpretation is not inconsistent with the provisions of this [Act] if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this [Act]. . . ." 15 U.S.C. § 6807(b).

The purpose of SB1 is to require financial institutions to provide consumers with notice and meaningful choice about how those institutions share consumers' nonpublic personal information. Cal. Fin. Code § 4051(a). SB1 is intended both to permit consumers to exercise the right of privacy recognized in the California Constitution [*see id.* § 4051.5(a)(1)] and also to allow financial institutions to carry out the normal processes of commerce [*id.* § 4051.5(b)(5)].

To achieve its purpose, SB1 provides that (1) a financial institution may share a consumer's nonpublic personal information with an *affiliate* institution unless the consumer "opts out" [*see, e.g., id.* § 4053(b)], and (2) a financial institution may share such information with a *non-affiliate* institution if the consumer "opts in" [*see, e.g.,* § 4053(a)].

On April 19, 2004, Appellants, including the American Bankers Association, filed this action in the United States District Court for the Eastern District of California against Appellees, including Bill Lockyer in his official capacity as Attorney General of California. In their complaint, Appellants sought a declaration that the FCRA—which, as its name declares, concerns *credit reporting*—preempted SB1 and thereby rendered it invalid.

On June 30, 2004, on what it treated as cross motions for summary judgment, the District Court concluded that SB1 was consistent with the GLBA and hence was not preempted by the FCRA. As a result, the District Court ruled in favor of Appellees and against Appellants, and entered judgment accordingly. The following day, Appellants timely appealed from the judgment.

Because, as will appear, the District Court's conclusion that SB1 is not preempted is sound, this Court should affirm its judgment.

A. The Law Of Preemption Is Well Settled

The Supremacy Clause of the Constitution declares that "Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

Whether federal law preempts state law "fundamentally is a question of congressional intent" *English v. General Electric Co.*, 496 U.S. 72, 79 (1990); *accord, e.g., Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 30 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *see, e.g., New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-55 (1995).

As a general matter, the "presumption" is that Congress has *not* intended to preempt state law. *New York Conference of Blue Cross & Blue Shield Plans*, 514 U.S. at 654; *accord, e.g., De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 814 (1997).

But in a case implicating the historic police powers of the states, including consumer protection, that presumption is practically irrebutable. "Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be

superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.’” *Cipollone*, 505 U.S. at 516 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); accord, e.g., *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997); see, e.g., *English*, 496 U.S. at 79. The states’ historic police powers extend, of course, to consumer protection [e.g., *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989)]—reaching, among other things, the conduct of financial institutions, including even national banks [*Smiley v. Citibank*, 11 Cal. 4th 138, 148 (1995), *aff’d*, 517 U.S. 735 (1996)].

In brief, “[b]ecause consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area.” *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990).

B. The District Court’s Judgment Was Correct Under Well-Settled Preemption Principles

In reaching its conclusion that SB1 was not preempted by the FCRA, the District Court carefully followed the path established by the law of preemption as set out above. Because it proceeded in this fashion, its outcome is proof against challenge.

In their brief, Appellees demonstrate the soundness of the District Court’s reasoning and the correctness of its result. E-LOAN will not reiterate here Appellees’ compelling analysis. E-LOAN believes, however, that its

experience in the area of financial services and privacy, including its involvement with the passage of SB1, may be beneficial to this Court.

C. SB1 Places Control Over Nonpublic Personal Information In The Hands Of Consumers, Which Is Consistent With Sound Business Practices, The California Constitution, And Consumer Expectations

The question at the bottom of this debate, one that SB1 answers, is whether consumers or their financial institutions should have control over the sharing of nonpublic personal information consumers have provided to those institutions. The California Legislature, in the face of an inevitable ballot initiative, mindful of the California Constitution's right of privacy, and fully aware of common expectations, concluded that consumer control over nonpublic personal information was a fundamental principle that required codification to protect the interests of all Californians.

1. SB1 Is Rooted In The California Constitutional Right Of Privacy

The California Legislature drew explicitly upon constitutional principles in fashioning SB1. California Financial Code section 4051.5(a)(1), which is part of SB1, affirms that "[t]he California Constitution protects the privacy of California citizens from unwarranted intrusions into their private and personal lives."

Article I, section 1 of the California Constitution declares a right of privacy. Its pronouncement is express, and nothing is left to implication. "All

people . . . have [an] inalienable right[] . . . [to] pursu[e] and obtain[] . . . privacy.”

This right of privacy under the California Constitution guards Californians against *all* persons and entities—including financial institutions—that would “gather, keep, and disseminate sensitive personal information without . . . restricting its use to mutually agreed or otherwise legitimate purposes.” *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 17 (1994). In view of the fact that “ ‘[e]ach time [Californians] apply for a credit card or a life insurance policy, file a tax return, interview for a job[,] or get a drivers’ license, a dossier is opened and an informational profile is sketched’ ” [*id.* (emphasis omitted)], this right of privacy extends to the collection and dissemination of personal information by businesses as well as by government:

“[The right of privacy] prevents government and business interests from collecting and stockpiling unnecessary information . . . and from misusing information gathered for one purpose in order to serve other purposes or to embarrass

“Fundamental to . . . privacy is the ability to control circulation of personal information. . . . The proliferation of government and business records over which [Californians] have no control limits our ability to control [their] personal lives.”

White v. Davis, 13 Cal. 3d 757, 774 (1975) (emphasis omitted).

The California Constitution enunciates the privacy expectations of all Californians, and empowered the California Legislature to enact SB1, which was brought forth at a time when computerization and conglomeration make the unauthorized sharing of nonpublic personal information easier than it had ever been.

2. SB1 Is Good Business

Contrary to protestations by Appellants, the approach embodied in SB1 enhances the efficiency and effectiveness of business. E-LOAN, since its inception, has understood that the expectation of privacy regarding nonpublic personal information was fundamental and universal, and has built a business—originating more than 285,000 consumer loan totaling over \$21.5 billion in loans since its inception [E-LOAN, Inc., 2003 Annual Report (2004), http://media.corporate-ir.net/media_files/irol/99/99603/DataTableUpload/2003_Annual.pdf]
—that has followed consumer privacy practices exceeding the requirements of SB1.

E-LOAN adheres to the four privacy principles of (1) notice, (2) choice, (3) access, and (4) disclosure, as well as the requirement of the GLBA to give consumers conspicuous notice of its information-sharing practices. On each page of its website, www.eloan.com, E-LOAN provides a link to its privacy policy which gives consumers full disclosure of its practices regarding their nonpublic personal information. In addition, E-LOAN offers consumers information-sharing choices directly on its applications. Moreover, E-LOAN assigns consumers password-protected accounts that they can access

to update at their convenience to assure accuracy, to change their information-sharing preferences, and to opt out of receiving marketing messages from E-LOAN. E-LOAN also provides consumers notice of its offshore loan-processing practices and allows them to opt-out of these overseas services as well. These full-disclosure practices give consumers abundant control over their nonpublic personal information.

Rather than hurting E-LOAN's business, these practices have helped it communicate with existing and prospective customers more effectively and efficiently. The benefits are commonsensical—E-LOAN knows its customers better as a result of the choices it has enabled them to make. Knowing that a customer likely is receptive to a given message because he or she has indicated as much is powerful information. Knowing nothing specific regarding a customer's needs and interests is hardly as useful.

For instance, E-LOAN's knowledge that a mortgage customer is also interested in an auto loan dramatically improves the quality of future communications with that customer—and along with it the likelihood that E-LOAN will become the auto-loan lender for that customer. By comparison, sending auto loan information blanketly to all past mortgage customers without any indication that any of them might have an interest is much less effective.

Appellants contend that restrictions on the sharing of consumer nonpublic personal information by financial institutions with affiliate institutions would restrict the ability of these businesses to offer financial services to

consumers. This has not been E-LOAN's experience. According to E-LOAN's internal tracking system, approximately 71 percent of E-LOAN's mortgage customers and approximately 66 percent of its home equity customers follow E-LOAN's "opt-in" procedure to authorize E-LOAN to refer them to other providers of products and services. E-LOAN's "opt-in" procedure requires customers to take an affirmative act. Despite this requirement—which is more stringent than SBI's counterpart—E-LOAN enjoys impressive positive responses. Making offers to receptive audiences has been anything but restrictive; it has given E-LOAN the freedom to deploy its scarce marketing dollars in ways that increase the possibility of generating meaningful business and reducing waste.

Leaving control over nonpublic personal information with its customers has helped E-LOAN develop trust-based relationships with them. In June 2004, an independent study conducted by TRUSTe and The Ponemon Institute ranked E-LOAN as America's most trusted online financial-services company, and among the top 20 most trusted companies overall in the country. E-LOAN Corporate Summary, *available at* <http://www.eloan.com/s/show/corpsummary>. E-LOAN was one of three companies to receive a grade of "A" or higher in a 2004 survey of the major financial institutions doing business in California conducted by the Consumer Federation of California. Consumer Federation of California Educational Foundation, Financial Privacy Report Card (Jan. 2004), *available at* http://www.consumerfedofca.org/pdf/2004_financial_privacy_report_card.pdf. E-LOAN's privacy policy was responsible for these results. Trust-based relationships with its customers are

critical to E-LOAN's near-term and long-term growth plans, and E-LOAN's privacy policy is an ingredient vital to developing such relationships.

Appellants, on the other hand, appear to desire to use the raw customer data in their possession to broadcast messages repeatedly and indiscriminately. At a time when ignored spam, junk mail, and telemarketing overload have become the norm, it is curious that Appellants would react negatively to a practice that could make their communications more effective and would respect the right of their customers to choose the messages they do, and do *not*, want to hear.

3. Appellants Negotiated The Language Of SB1—This Action Constitutes Appellants' Second Bite At The Apple

SB1, like many pieces of legislation, was a compromise, one in which several members of Appellants participated actively. E-LOAN has personal knowledge of this fact, since it acted both as a financial-services industry participant and as mediator throughout this process. More importantly, the legislative history of SB1 confirms this fact time and again. *See, e.g.*, Senate Bill No. 1, 2003-04 Reg. Sess., as amended Aug. 18, 2003, Floor Analysis, Sen. Rules Committee; Senate Bill No. 1, 2003-04 Reg. Sess., as amended Aug. 18, 2003, Assem. Committee on Judiciary Report; Senate Bill No. 1, 2003-04 Reg. Sess., as amended Aug. 18, 2003, Sen. Third Reading Report.

“[SB1] represents an agreement based on countless hours of negotiations between the author, consumer groups and financial institutions.”

Senate Bill No. 1, 2003-04 Reg. Sess., as amended Aug. 18, 2003, Sen. Third Reading Report, at 5.

That agreement was hammered out in the face of an inevitable ballot initiative—one that would have allowed the sharing of nonpublic personal information by financial institutions only if the consumer “opted in.” Senate Bill No. 1, 2003-04 Reg. Sess., as amended Aug. 18, 2003, Assem. Committee on Judiciary Report, at 13.

More important, the agreement yielded “a workable, balanced product.” Senate Bill No. 1, 2003-04 Reg. Sess., as amended Aug. 18, 2003, Floor Analysis, Sen. Rules Committee, at 3. That product “offer[ed] Californians the chance to increase their financial privacy.” *Id.* At the same time, it “removed the opposition of several opponents,” including not only “the California Bankers Association, the California Chamber of Commerce and the Securities Industry Association” [*id.*], but also “American Electronics Association, . . . California Financial Services Association, California Mortgage Bankers Association, Capital One, Citigroup, Countrywide Financial, Farmers Insurance, Fidelity Investments, Financial Services Privacy Coalition, Household International, J.P. Morgan Chase, MBNA, Merrill Lynch, Personal Insurance Federation of California, Providian Financial, . . . State Farm

Insurance, Toyota Motor Sales USA, Washington Mutual, and Wells Fargo” [*id.* at 12-13].¹

Even financial institutions that had long been opposed to SB1 expressed the view that the measure in its final form was “reasonable, workable, and balanced.” Senate Bill No. 1, 2003-04 Reg. Sess., as amended Aug. 18, 2003, Assem. Committee on Judiciary Report, at 12 (internal quotation marks omitted).

The California Credit Union League summed up the matter this way: “[SB1] reflects a legitimate compromise between the needs of financial institutions that must implement this legislation and the need to provide consumers legitimate choice over the use of their personal financial information.” *Id.* (internal quotation marks omitted). It added: “[SB1’s final] form is significantly better than its original version. It represents a compromise between the needs of the consumer groups trying to ensure customers understand their rights and the process and the needs of financial institutions to explain the complicated consequences of a consumer’s action.” *Id.* at 12-13.

In light of the fact that several of their members participated in the process that resulted in SB1, Appellants should hardly be allowed to complain

¹ Contemporaneously, a representative of Citigroup was quoted in the press as stating: “We were part of this and are pleased with the work done—it’s a good fair result for everyone.” *Growling Over California Privacy Act Won’t Fade*, *The American Banker*, Aug. 25, 2003, at 1.

now. Surely, Appellants' claims that SB1 is unworkable and will cause irreparable injury should fall on deaf ears.

IV CONCLUSION

Appellants have mounted an ambitious attempt *both* to stretch the scope of the FCRA—which concerns only *credit reporting*—beyond its limits to include *all* information collected by *any* financial institution from *each and every* consumer, *and also* to ignore the savings clause of the GBLA, which authorizes state statutes like SB1. The District Court correctly rejected this attempt, as should this Court.

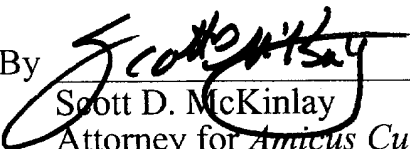
As a financial institution operating in California, E-LOAN believes that SB1 is a legitimate consumer protection statute that safeguards the interests of all Californians without impeding financial institutions in the lawful conduct of their business.

The District Court correctly understood the issues and correctly resolved them in Appellees' favor. This Court accordingly should affirm the judgment.

DATED: September 7, 2004.

Respectfully submitted,

E-LOAN, Inc.

By 

Scott D. McKinlay
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**CERTIFICATION OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C)
AND NINTH CIRCUIT RULE 32-1**

Pursuant to Fed. R. App. P. 29(d) and 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing Brief of *Amicus Curiae* E-LOAN, Inc. is double-spaced and was printed in proportionately-spaced 14-point CG Times type. It contains 3,430 words (inclusive of footnotes, but exclusive of tables, the Corporate Disclosure Statement, and this Certificate). In preparing this certificate, I relied on the word count generated by MS Word 97.

Executed on September 7, 2004, at Pleasanton, California.



Scott D. McKinlay

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. I am employed in the office of an attorney whose membership in the bar of this court is pending, and at whose direction the service was made. My business address is E-LOAN, Inc., 6230 Stoneridge Mall Road, Pleasanton, California 94588. On September 7, 2004, I served the following document by the method indicated below:

BRIEF OF *AMICUS CURIAE* E-LOAN, INC. IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE OF THE JUDGMENT

- by transmitting via facsimile on this date from fax number 925/520-6122 the document listed above to the fax number(s) set forth below. The transmission was completed before 5:00 p.m. and was reported complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting fax machine. Service by fax was made by agreement of the parties, confirmed in writing.
- by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pleasanton, California, addressed as set forth below. I am readily familiar with the office's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.
- by placing the document listed above in a sealed envelope and by causing personal delivery of the envelope to the person(s) at the address(es) set forth below. A signed proof of service by the process server or delivery service will be filed shortly.
- by personally delivering the document listed above to the person(s) at the address(es) set forth below.

- by placing the document listed above in a sealed envelope and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the addresses set forth below. A copy of the consignment slip is attached to this proof of service.

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I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed on September 7, 2004, at Pleasanton, California.



Karen Houk

SUPPLEMENTAL PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. I am employed in the office of an attorney whose membership in the bar of this court is pending, and at whose direction the service was made. My business address is E-LOAN, Inc., 6230 Stoneridge Mall Road, Pleasanton, California 94588. On September 8, 2004, I served a second copy of the following document by the method indicated below:

BRIEF OF *AMICUS CURIAE* E-LOAN, INC. IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE OF THE JUDGMENT

- by transmitting via facsimile on this date from fax number 925/520-6122 the document listed above to the fax number(s) set forth below. The transmission was completed before 5:00 p.m. and was reported complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting fax machine. Service by fax was made by agreement of the parties, confirmed in writing.
- by placing a second copy of the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pleasanton, California, addressed as set forth below. I am readily familiar with the office's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.
- by placing the document listed above in a sealed envelope and by causing personal delivery of the envelope to the person(s) at the address(es) set forth below. A signed proof of service by the process server or delivery service will be filed shortly.
- by personally delivering the document listed above to the person(s) at the address(es) set forth below.

- by placing the document listed above in a sealed envelope and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the addresses set forth below. A copy of the consignment slip is attached to this proof of service.

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