No. 18-17270

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FAST TRACK INVESTMENT COMPANY, LLC,
a Delaware limited liability company,
Plaintiff/Appellee,

v.

RICHARD PHILIP SAX, individually and as principal for
The Law Offices of Richard Sax;
LAW OFFICES OF RICHARD SAX,
a sole proprietorship,
Defendant/Appellant.

Court of Appeals Case No. 18-17270

United States District Court
Northern District of California
Case Number 4:17-cv-00257-KAW
The Honorable Kandis A. Westmore, Presiding Magistrate Judge

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This is an action for breach of contract, to compel arbitration, for breach of fiduciary duty, and for a writ of attachment and temporary protective order (see Complaint, Excerpts of Record Bates Nos. 443-544 [hereinafter "ER 443-544"]) involving claim funding, also referred to as litigation funding, alternative litigation funding, third-party funding, and litigation finance, among other labels. Pursuant to U.S.C. § 1332(a), this is a diversity action with jurisdiction in the District Courts.

This action was brought by plaintiff Fast Track Investment Company, LLC, a Delaware limited liability company ("Appellee" or "Fast Track"), against defendants Richard P. Sax, individually and as principal for The Law Offices of Richard Sax, and The Law Offices or Richard Sax, as sole proprietorship ("Appellant" or "Sax"). (See Defendants' First Amended Answer to Complaint, ER 545-550.)

Sax is 66 years of age and has been a licensed attorney for over 40 years, since 1978, during which he has built a small general practice and litigation firm in Santa Rosa, California. (ER 417, paragraph 2 ["ER 417, ¶ 2"].)

This matter involves a dispute between Fast Track and Sax, arising from a set of agreements between the parties beginning in approximately February of 2013, which was entered into for the purpose of filing and prosecuting personal injury cases (ER 417, ¶¶ 3-4; ER 53, ¶ 4).

Fast Track provided funds to Sax for the sole purpose of bringing litigation to make money, in exchange for the assignment of "…SAX's entire right, title and interest in attorneys fees and disbursements recoverable in the matters set forth in Exhibit 'A'…" (ER 72, ¶ ii; ER 417, ¶ 4.)

Sax asserts that the trial court erred when it granted Fast Track's motion for summary judgment, thereby denying Sax's affirmative defense of champerty. The claims of Fast Track against Sax are champertous. Further, there are triable issues of material fact in this matter:

1. The parties acted with the intent, and for the purpose, of bringing an action or proceeding on personal injury claims;
2. The sale involves a bare litigation claim, not a debt instrument;
3. The sale does not qualify for the New York Judiciary Law §489 (2) safe harbor;
4. The sale involved litigation in numerous cases, including primary cases, that had not yet commenced;
5. The subject transactions were usurious; and,
6. The parties intended the subject transactions to be recourse loans.

A. The Substantive Law Of New York State Applies In This Matter

Sax is located in California, where this lawsuit was filed (ER 417, ¶ 2). Fast Track is apparently currently located in New Jersey, although it is a Delaware limited liability company. At the time it entered into the subject disputed agreements with Sax, its principal place of business was in the Bronx, New York (ER 24, lines 25-26 ["ER 24:25-26"]; ER 56, ¶ 2; ER 53, ¶ 2).

In its decision granting Fast Track's Motion for Summary Judgment, the District Court held "…that the contracted choice of law provisions requiring the application of New York law is enforceable." (ER 25:9-10.)

Thus, the District Court determined that the substantive law of New York applies in this matter. (ER 24:12-28; 25:1-10.)

B. New York's Champerty Law Is Applicable To This Case

New York's champerty law prohibits the purchase of notes, securities, or other instruments or claims with the intent and for the primary purpose of bringing a lawsuit. In its decision granting Fast Track's motion for summary judgment (ER 19-29), the District Court appears to have totally ignored the holding of the recent Justinian Capital SPC v. WestLB AG action.

In Justinian Capital SPC v. WestLB AG, the New York Court of Appeals found a funding agreement champertous under a New York statute that "prohibits the purchase of notes, securities, or other instruments or claims with the intent and for the primary purpose of bringing a lawsuit," despite a safe harbor that exists when the aggregate purchase price of the notes or other securities is at least $500,000. (Justinian Capital SPC v. WestLB AG, 65 N.E.3d 1253 (New York 2016).)

New York Judiciary Law §489 bars certain forms of trading in litigation claims. Justinian Capital SPC v. WestLB AG, *Id,* breathes new life into the doctrine of champerty.

The funder in that case, Justinian Capital, had taken an assignment of notes that had declined in value for a purchase price of one million dollars. (*Id* at p. 1254-1255.) The very essence of the assignment was to bring suit against the issuer of the notes. The lawsuit was not merely an incidental or secondary purpose of the assignment, but its very essence. (*Id* at p. 1257.) Because the notes were acquired for the sole purpose of bringing litigation, the acquisition was champertous. (*Id* at p. 1259.)

The court also found that the safe harbor did not apply because Justinian had not actually paid any portion of the purchase price and had no binding or bona fide obligation to pay it independent of the successful

outcome of the lawsuit. (*Id.* at p. 1259.) The court described the agreement as, in essence, a sham transaction between the owner of a claim that did not want to bring it and an undercapitalized assignee that did not want to assume the $500,000 risk to qualify for the safe harbor protection in New York Judiciary Law §489 (2). (*Id.* at p. 1259.)

In the instant case, Fast Track, in the Schlesinger Declaration of its motion for summary judgment, stated that "Fast Track has no involvement in the underlying litigation.." (ER 56, ¶ 5(b).)

However, Fast Track also stated, "In at least one case…is a 'disbursement' noting that in the Pacheco case Sax voluntarily withdrew and Pacheco dismissed the case." (ER 59, ¶ 19.)

Even though Fast Track avers that it wishes to have no control over the litigation matters, it would seem to be complaining that Sax withdrew from a case he ultimately decided was without merit, which is his professional duty as an attorney licensed in the State of California.

C. The Doctrine Of Champerty

1. The Subject Agreements Are Illegal Champertous Recourse Loans

Sax asserts that the claim-funding agreements, in which Fast Track loaned money to him so that he could file and prosecute certain personal injury cases, were illegal, usurious, and champertous recourse loans. (ER 417, ¶ 4). Some of the cases upon which Fast Trak advanced money were cases where litigation had not already commenced, especially the primary Monigan cases which Fast Trak persuaded Sax to take on.

Recourse loans are those in which a borrower gives an undertaking to repay a debt, even if the funded asset cannot be liquidated to cover the loan amount.

Fast Track asserts that it made a "non-recourse agreement," or a loan that will be repaid based on the success of the project. (ER 53, ¶ 8.)

Fast Track was misleading when it stated throughout its motion for summary judgment that the subject transaction was the non-recourse *purchase of an interest* in a legal claim. (ER ¶¶ 5, 8.) Fast Track also claims that the realization of proceeds from any pledged primary or secondary case was a condition precedent for the agreements between Sax and Fast Track. (ER ¶ 8.)

Fast Track's assertions are illusory, because Fast Track provided funds to Sax in exchange for the assignment of "…SAX's entire right, title and interest in attorneys fees and disbursements recoverable in the matters set forth in Exhibit 'A'…" (ER 72, ¶ ii; ER 417, ¶ 4.)

Fast Track's loan is fully secured by "…SAX's entire right, title and interest in attorneys fees and disbursements recoverable in the matters set forth in Exhibit 'A'…" (ER 72, ¶ ii; ER 417, ¶ 4.)

Fast Track would thus recover unless Sax lost each and every case that was pledged in its entirety. (ER 72, ¶ ii; ER 417, ¶ 4.)

Fast Track, in the Schlesinger Declaration of its motion for summary judgment, stated that "Fast Trak has no involvement in the underlying litigation.." (ER 56, ¶ 5(b).) However, Fast Track also stated, "In at least one case…is a 'disbursement' noting that in the Pacheco case Sax voluntarily withdrew and Pacheco dismissed the case." (ER 59, ¶ 19.)

Even though Fast Track alleges that it wished to have no control over the litigation matters, it would seem to be complaining that Sax withdrew from a case he ultimately decided was without merit, which is his professional duty.

Fast Track was actually making a recourse loan, because if the primary actions upon which it loaned funds did not provide an adequate return, Fast Track would simply rely upon the lengthy list of “secondary” cases as backup collateral, thereby collecting its investment. (ER 458; ER 418-419, ¶ 11.)

No matter for Fast Track: even if the “Primary Cases” did not deliver adequate returns, Fast Track would not lose its investment, because it had demanded the right to collect the “entirety” of Sax’s attorney fees from a string of secondary cases in his law firm, by way of an ambiguous, even incomprehensible, contract of adhesion. (ER 72, ¶ ii; ER 417, ¶ 4.)

Fast Track originally loaned Sax approximately $125,000.00. Fast Track was making a recourse loan, because it risked nothing. According to the manner in which Fast Track set the transactions up, its loans were secured by numerous others: each primary case was secured by the many other secondary cases (ER 72, ¶ ii; ER 417, ¶ 4). Therefore, even if Sax lost one or more of the “Primary Cases,” Fast Track was going to be paid by another case that resulted in a favorable verdict or settlement.

II. STANDARD OF REVIEW

The standard of review in this appeal is de novo. In reviewing a district court's order on a motion for summary judgment, the appellate court reviews de novo whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. The court draws all reasonable inferences in favor of the non-moving party. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52, 106 S. Ct. 2505, 2510-12, 91 L. Ed. 2d 202 (1986).

III. ISSUES PRESENTED

The trial court erred in granting Fast Track's motion for summary judgment as a matter of law, in particular regarding Fast Track's defense of Champerty. There are genuine disputes of material facts and inherently factual inquires in this matter as to:

1. Whether the parties acted with the intent and for the purpose of bringing an action or proceeding on personal injury claims;

2. Whether the subject transaction was champertous;

3. Did the sale involve a debt instrument or a bare litigation claim?

4. Did the sale qualify for the §489 safe harbor?

5. Did the sale involve litigation that had already commenced?

6. Whether the parties intended the subject transaction to be recourse or non-recourse;

7. Whether subject transaction was an illegal recourse loan; and

8. Whether the subject transaction was usurious.

IV. STATEMENT OF FACTS

Sax has been licensed to practice in the State of California since 1978. Sax is 66 years of age and has been an attorney for over 40 years, during which he has built a small general practice and litigation firm in Santa Rosa, California. (ER 417, ¶ 2.)

This matter involves a dispute between Fast Track and Sax, arising from a set of Agreements between the parties beginning in approximately February of 2013, which was entered into for the purpose of filing and prosecuting personal injury cases (ER 417, ¶¶ 3-4; ER 53, ¶ 4).

Fast Track provided a loan to Sax for the sole purpose of bringing litigation to make money, in exchange for the assignment of "…SAX's entire right, title and interest in attorneys fees and disbursements recoverable in the matters set forth in Exhibit 'A'…" (ER 72, ¶ ii; ER 417, ¶ 4.)

It is unknown exactly what Fast Track meant by the term, "disbursements." (ER 417, ¶ 4.)

Fast Track alleges that the Agreements state that "SAX has not entered into this Agreement for the sole or primary purpose of bringing litigation or the support thereof." (ER 57, ¶ 5(f).)

Fast Track may be correct that the Agreement contained that phrase, but this is an absurd provision, since the collateral for the loan clearly consisted of litigation cases. At least three of the cases, including the "Secondary Cases" (Monigan cases and McQuaid case), resulted in defense verdicts, although Sax can attest that those cases were hard-fought. (ER 75; ER 417, ¶ 6.) In total, there were 17 cases pledged by Sax, with Sax obtaining attorney's fees in 12 cases. (ER 3:3-4).

Fast Track stated in its motion for summary judgment that Sax received at least $306,805.00 (ER 39, lines 22-23). *This amount is incorrect.* Fast Track stated that Sax received $199,500.00 on April 28, 2014 in a specific case (ER 39, lines 14-15). *This is also incorrect*. Sax received $79,800.00 in attorney fees in that case. (ER 185, line 24; ER 417, ¶ 8.) Fast Track's figure of "199,500.00" referred to the *Gross Settlement* in that case (ER 185, line 22), not to the attorney fees that Sax received.

The subject agreements state that Sax owes Fast Track the amount loaned to him, even if they exceeded his recovery of Sax's attorney's fees and disbursements. This would be an impossible condition for anyone to

meet. Under Fast Track's theory, Sax would have been put out of business. Fast Track's contract seems impossible to comply with without being driven into bankruptcy. (ER 418, ¶ 10.)

Assignment, Springing Assignment & Equitable Lien Agreement provides, in relevant part, as follows:

"Section A1. The Agreement Part 1

> …(c) If there has not been a monetary recovery in the "Primary" case great enough to pay the entire balance due pursuant to Section B at the time when the first (first means "earliest to occur") "Secondary" case yields any monetary recovery by settlement, judgment or otherwise; SAX shall than (sic) pay to FAST TRAK an amount equal to the entire remaining balance then due as per Section B of this agreement; or if the amount of attorneys fees and disbursements recovered in said Secondary case is less than the entire balance due as per Section B, than (sic) SAX shall pay to FAST TRAK the entirety of the attorneys fees and disbursements recovered in the first said Secondary case, and;
>
> (d) If there has not been a monetary recovery in the "Primary" case great enough to pay the entire balance due pursuant to Section B at the time when the second "Secondary" case yields a monetary recovery by settlement, judgment or otherwise; SAX shall than (sic) pay to FAST TRAK an amount equal to the entire remaining balance then due as per Section B of this agreement; or if the amount of attorneys fees and disbursements recovered in said Secondary case is less than the entire balance due as per Section B, than (sic) SAX shall pay to FAST TRAK the entirety of the attorneys fees and disbursements recovered in the second said Secondary case, and;
>
> (e) If there has not been a monetary recovery in the "Primary" case great enough to pay the entire balance due pursuant to Section B at the time when the third "Secondary" case yields a monetary recovery by settlement, judgment or

otherwise; SAX shall than (sic) pay to FAST TRAK an amount equal to the entire remaining balance then due as per Section B of this agreement; or if the amount of attorneys fees and disbursements recovered in said Secondary case is less than the entire balance due as per Section B, than (sic) SAX shall pay to FAST TRAK the entirety of the attorneys fees and disbursements recovered in the third said Secondary case, and;

(f) If there has not been a monetary recovery in the "Primary" case great enough to pay the entire balance due pursuant to Section B at the time when the third "Secondary" case yields a monetary recovery by settlement, judgment or otherwise; SAX shall than (sic) pay to FAST TRAK an amount equal to the entire remaining balance then due as per Section B of this agreement; or if the amount of attorneys fees and disbursements recovered in said Secondary case is less than the entire balance due as per Section B, than (sic) SAX shall pay to FAST TRAK the entirety of the attorneys fees and disbursements recovered in the fourth said Secondary case, and;

(g) If there has not been a monetary recovery in the "Primary" case great enough to pay the entire balance due pursuant to Section B at the time when the third "Secondary" case yields a monetary recovery by settlement, judgment or otherwise; SAX shall than (sic) pay to FAST TRAK an amount equal to the entire remaining balance then due as per Section B of this agreement; or if the amount of attorneys fees and disbursements recovered in said Secondary case is less than the entire balance due as per Section B, than (sic) SAX shall pay to FAST TRAK the entirety of the attorneys fees and disbursements recovered in the fifth said Secondary case, and;

(h) If there has not been a monetary recovery in the "Primary" case great enough to pay the entire balance due pursuant to Section B at the time when the third "Secondary" case yields a monetary recovery by settlement, judgment or otherwise; SAX shall than (sic) pay to FAST TRAK an amount equal to the entire remaining balance then due as per Section B

> of this agreement; or if the amount of attorneys fees and disbursements recovered in said Secondary case is less than the entire balance due as per Section B, than (sic) SAX shall pay to FAST TRAK the entirety of the attorneys fees and disbursements recovered in the fifth (sic) said Secondary case, and;
>
> (i) The Parties further agree that at any time when payment is made on the Primary case or the disbursements and attorney fees on a Secondary case are paid by SAX to FAST TRAK pursuant to paragraph (b), (c), (d), (e), (f), (g) and/or (h) of Section A1 herein, that FAST TRAK will apply the payment, amend the payback schedule set forth in Section B of this agreement to reflect the payment; and sahall provide Sax with a copy of the amended payback schedule within seven (7) days of any payment received by FAST TRAK pursuant to this agreement."

(ER 418-419, ¶ 11.)

Fast Track alleges that the agreements were non-recourse and that it would only receive payment if the specified condition occurred, and that if it did not receive payment, Fast Track would lose its entire investment. This is misleading. Fast Track's loan was secured by other cases, so that unless Sax lost each and every case, Fast Track still had the right to collect from the "Secondary Cases." To lose each and every case would be highly unlikely. (ER 3; ER 420, ¶ 14.)

The Agreement provides that the Agreement was non-recourse, and that there is no obligation to repay Fast Track, except from the proceeds of the matter/litigation. (ER 420, ¶ 15.)

Despite multiple requests, Fast Track never provided Sax with an accounting of the monies claimed to be due until it was forced to do so by the District Court, which ordered supplemental briefing regarding the amount of damages on May 22, 2018 (ER 12:17-18). Sax had made multiple

requests of Fast Track for an accounting, but could not obtain it. (ER 420, ¶ 16.)

After Fast Track's first supplemental briefing regarding damages, Sax filed a response in which he objected to Fast Track's claim for damages on the grounds that Fast Track did not explain how the damages were calculated. (ER 12:20-21.) The District Court agreed with Sax, and ordered Fast Track "to file a second supplemental brief that included 'a robust explanation of how the damages were calculated…'" (ER 12:22-24.) Fast Track "was advised that that this was its final opportunity to brief the damages issue, and that the failure to sufficiently explain the calculation would result in the undersigned [District Court] making a damages calculation of its own based on the incomplete information provided. (ER 12:25-28.)

After Fast Track filed a second supplemental brief on damages, the trial court awarded $315,600.00 in damages for the first and second third causes of action in Fast Track's complaint. (ER 15:24-25.)

Fast Track sought $15,987.50 in attorney fees and $1,587.96 in costs, for a total of $17,575.46. (ER 16:1-2.) However, Fast Track's furnished time records did not provide a summary of the time spent by each person or a description of the relevant qualifications or the prevailing hourly rate where its counsel was located. (ER 16:20-22.)

The trial court noted that Fast Track had been afforded an additional opportunity to brief the damages issue after the first supplemental brief failed to explain how damages were calculated, and the court had "advised against seeking the recovery of the attorneys' fees and costs incurred in connection with any of its supplemental briefs." (ER 16:23-28.)

The court noted that "Despite this admonition," Fast Track sought additional attorney fees for its supplemental briefs. Because Fast Track "failed to request attorney's fees in accordance with the Civil Local Rules," the District Court deducted fees for the supplemental briefing and awarded "50% of the remaining amount, which totals $6,706.25." (ER 16:28; 17:1-15.)

IV. LAW OF THE CASE

A. The Law of Summary Judgment

In deciding summary judgment motions, courts should simply identify triable material issues of fact, and may not invade the province of the jury by making credibility determinations or weighing the probative force of the evidence presented by each side (Vega c. Restani Constr. Corp., 18 NY3d 499, 505, 965 NE2d 240, 942 NYS2d 13 [2012]). On such a motion, the facts must be viewed in the light most favorable to the nonmoving party. (Jacobsen v. New York City Health & Hosps. Corp., 22 NY3d 824, 833, 988 NYS2d 86, 11 NE3d 159 [2014]).

Summary judgment is a drastic remedy and is therefore to be granted cautiously: "Neither do we suggest that the trial courts should act other than with caution in granting summary judgment…" Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 255.

Summary judgment cannot be granted where there is a "genuine dispute" as to any "material fact." FRCP 56(a).

A fact is material if it might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 248; United States v. Kapp (9th Cir. 2009) 564 F3d 1103, 1114.

The requirement that there be "no genuine dispute" about a material fact is determined under federal (Rule 56) standards. The federal judge must

determine whether a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 248-250.

However, "(T)he non-movant need not match the movant witness for witness, nor persuade the court that her case is convincing, she need only come forward with appropriate evidence demonstrating that there is a pending dispute of material fact." Waldridge v. American Hoechst Corp. (7th Cir. 1994) 24 F3d 918, 921.

The party moving for summary judgment has both an initial burden of production and the ultimate burden of persuading the court that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FRCP 56(a).

A party may move for summary judgment on the ground that there is no genuine dispute of material fact as to its own claims or defenses. In such cases, the moving party bears the initial burden of proof (production) as to each material fact upon which it has the burden of persuasion at trial: "Where the moving party has the burden—the plaintiff on a claim for relief or the defendant on an affirmative defense—his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." Calderone v. United States (6th cir. 1986) 799F2d 254, 259, quoting from *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Face* (1984) 99 FRD 465, 487-488; Southern Calif. Gas Co. v. City of Santa Ana (9th Cir. 2003) 336 F3d 885, 888.

This requires the moving party to establish beyond controversy every essential element of its claim or defense: "If the movant bears the burden of proof on an issue, either because he is the plaintiff or as a defendant he is

asserting an affirmative defense, he must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in his favor." Fontenot v. Upjohn Co. (5th Cir. 1986) 780 F2d 1190, 1194; Torres Vargas v. Santiago Cummings (1st Cir. 1998) 149 F3d 29, 35—party with burden of proof on dispositive issue must provide *conclusive evidence;* Southern Calif. Gas Co. v. City of Santa Ana (9th Cir. 2003) 336 F3d 885, 888.

The opposing party cannot rest on its pleadings. It must make an affirmative showing on all matters placed in issue by the motion as to which it has the burden of proof at trial: "Where the nonmoving party will bear the burden of proof at trial on a dispositive issue, (former) Rule 56(e) requires the non-moving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett (1986) 477 US 317, 323-324; Simmonds v. Genesee County (6th Cir. 2012) 682 F3d 438, 445; Federal Ins. Co. v. Burlington Northern & Santa Fe Ry. Co. (CD CA 2003) 270 F.Supp.2d 1183, 1185.

The test is whether the opposing party "has come forward with sufficiently 'specific' facts from which to draw reasonable inferences about other material facts that are necessary elements of the (opposing party's) claim." Triton Energy Corp. v. Square D Co. (9th Cir. 1995) 68 F3d 1216, 1221 (parentheses added).

Inferences drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Eastman Kodak Co. v. Image Technical Services, Inc. (1992) 504 US 451, 456.

Rule 56 does not permit trial by affidavits. The court's function on a motion for summary judgment is issue-finding, not issue-resolution. United States v. One Tintoretto Painting (2nd Cir. 1982) 691 F2d 603, 606.

"The judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial…Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions…" Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 249-255.

B. This Was A Recourse Loan

Sax asserts that the claim-funding agreements, in which Fast Track loaned money to Sax so that he could file and prosecute certain personal injury cases, were illegal, usurious, and champertous recourse loans. Recourse loans are those that allow the lender, if the borrower defaults, not only to attach the collateral but also to seek judgment against the borrower's personal assets. (See Black's Law Dict. (Second Pocket Ed. 2001) p. 425, col. 2.)

Fast Track asserts that it made a "non-recourse agreement." A nonrecourse loan is a secured loan that allows the lender to attach only the collateral, not the borrower's personal assets, if the loan is not repaid. (See Black's Law Dict. (Second Pocket Ed. 2001) p. 425, col. 2.)

Fast Track was misleading when it states throughout its motion for summary judgment that the subject transaction was the non-recourse *purchase of an interest* in a legal claim. Fast Track also claimed that the realization of proceeds from any pledged primary or secondary case was a condition precedent for the agreements between Sax and Fast Track.

Fast Track was actually making a recourse loan, because if the action upon which Fast Track loaned funds did not provide an adequate return, it would simply rely upon a lengthy list of "secondary" cases as backup collateral, thereby collecting its investment.

Fast Track claims that the realization of proceeds from any pledged primary or secondary case was a condition precedent for the agreements between Sax and Fast Track. However, Fast Track's assertion is illusory and misleading, because Fast Track's loan was fully secured by "…SAX's entire right, title and interest in attorneys fees and disbursements recoverable in the matters set forth in Exhibit 'A'…" (ER 72, ¶ ii; ER 417, ¶ 4.)

Richard Geller, an attorney for Fast Track, contacted Sax and induced him to spend heavily in time and money, including the prosecution of a hard-fought jury trial, litigating the two "Monigan cases," which were the primary cases under the disputed agreements. Geller strongly encouraged Sax to take on the Monigan claims. Geller persuaded Sax to borrow money from Fast Track so that Sax could afford to take on the Monigan cases *prior to filing suit*. Geller stated words to the effect that he was a plaintiff's attorney, and this is how plaintiffs' attorneys could make a lot of money, in good cases like Monigan's; they were excellent cases that would make a considerable amount of money. Fast Track screens their clients and customers, but it failed to discover the past extraordinary criminal conduct of Monigan, which severely impacted his cases. (ER 185:1-9; 16-18.)

No matter for Fast Track: even if the Monigan cases did not deliver adequate returns, Fast Track would not lose its investment, because it had demanded the right to collect the "entirety" of Sax's attorney fees from a

string of secondary cases in his law firm, by way of an ambiguous, even incomprehensible, contract of adhesion.

Fast Track loaned Sax $125,000.00. Fast Track was making a recourse loan, because it risked nothing. According to the manner in which Fast Track set the transactions up, its loans were secured by numerous others: each Monigan case was secured by the many other secondary cases. Therefore, even if Sax lost one or more of the primary Monigan cases, Fast Track was going to be paid by another case that resulted in a favorable verdict or settlement.

C. The Law Of New York State

In New York, the party seeking to void the transaction must establish usury by clear and convincing evidence. Zhavoronkin v. Koutmine (2008) 860 N.Y.S.2d 561, 562.

The New York City Bar Association issued a formal opinion in 2011 that advised that "lawyers should be aware that in certain circumstances, courts have found that non-recourse litigation financing agreements violate usury laws," even where the financing companies "characterize non-recourse financing arrangements as a 'purchase' or 'assignment of the anticipated proceeds of the lawsuit (and therefore not subject to usury laws)." See the Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, Formal Op. 2011-12 (June 2011), 2011 WL 6958790, at p. 2.

D. Summary Judgment Should Not Be Granted As A Matter Of Law Regarding Sax's Affirmative Defense of Champerty, Because The Intent and Purpose Of The Parties Is A Factual Question To Be Decided Before Judge or Jury

The intent and purpose of the purchaser or assignee is usually a factual question that cannot be decided on summary judgment. Trust for the

Certificate Holders of the Merrill Lynch Mortg. Investors v. Love Funding Corp, 13 NY3d 190 at 200 (2009); Bluebird Partners v. First Fid. Bank 94 NY2d 726, 738 (2000).

E. The Contracts Are Champertous

To constitute the offense of champerty the primary purpose of the purchase must be to enable one to bring a suit and the intent to bring a suit must not be merely incidental and contingent. Under the primary purpose analysis there is a distinction between acquiring a thing in action in order to obtain costs and acquiring it in order to protect an independent right of the assigned with only the former being champertous. However the offense of champerty does not arise if a corporation or association takes an assignment for the purpose of collecting damages by means of a lawsuit for losses on a debt instrument in which it holds a preexisting proprietary interest. This is because there is a difference between one who acquires a right in order to make money from litigating it and one who acquires a right in order to enforce it. Universal Inv. Advisory SA v. Bakrie Telecom Pte., Ltd., (2017)154 A.D.3d 171, 180.

Champerty is a situation where a corporation or association solicits, buys, or takes and assignment of a thing in an action or any claim, with the intent and for the purpose of bringing an action or proceeding. This is implicated where a transaction occurs before the commencement of an action and assigns an interest in the proceeds of a claim. New York Judiciary Law Section 489.

In Justinian Capital SPC v. WestLB AG, 65 N.E.3d 1253 (New York 2016), the New York Court of Appeal held that a financial transaction in which the plaintiff had purchased securities for the purpose of filing suit

violated New York's champerty statute. This is exactly what happened in this case, when Fast Track induced and persuaded Sax to borrow money from Fast Track, so that Sax could afford to take on the primary Monigan claims.

Justinian Capital SPC v. WestLB AG, 65 N.E.3d 1253 (New York 2016) provides, in relevant part:

> The concept of champerty dates back to French feudal times (*Bluebird Partners v First Fid. Bank*, 94 NY2d 726, 733-734, 731 NE2d 581, 709 NYS2d 865 [2000]). In the English legal system, the word "champart" was used "as a metaphor to indicate a disapproval of lawsuits brought 'for part of the profits' of the action" (*id.* at 734 [citations omitted]). As we have explained, the champerty doctrine was developed "to prevent or curtail the commercialization of or trading in litigation" (*id.* at 729). New York's champerty doctrine is codified at Judiciary Law § 489 (1). As pertinent here, the statute prohibits the purchase of notes, securities, or other instruments or claims with the intent and for the primary purpose of bringing a lawsuit (*see id.* at 735-736).
>
> Justinian Capital SPC, a Cayman Islands company, brings this action against WestLB AG, New York Branch and WestLB Asset Management (US) LLC (collectively, WestLB), alleging that WestLB's fraud (among other malfeasance) in managing two investment vehicles caused a steep decline in the value of notes purchased by nonparty Deutsche Pfandbriefbank AG (DPAG). Justinian acquired the notes from DPAG days before it commenced this action.
>
> In this appeal, we must first decide whether Justinian's acquisition of the notes from DPAG is champertous as a matter of law. If the answer is "yes," we must then decide whether the acquisition falls within the champerty statute's safe harbor provision codified at Judiciary Law § 489 (2). The safe harbor provides that the champerty doctrine of section 489 (1) is inapplicable when the notes or other securities are

acquired for "an aggregate purchase price of at least five hundred thousand dollars" (Judiciary Law § 489 [2]).

As set forth below, we hold that Justinian's acquisition of the notes was champertous and, further, that Justinian is not entitled to the protection of the safe harbor provision. Therefore, the order of the Appellate Division should be affirmed.

I.

In 2003, nonparty DPAG invested close to €180 million (approximately $209 million) in notes (the notes) issued by two special purpose companies, Blue Heron Funding VI Ltd. and Blue Heron Funding VII Ltd. (collectively, the Blue Heron portfolios). The Blue Heron portfolios were sponsored and managed by defendants WestLB. By January 2008, the notes had lost much (if not all) of their value.

After the value of the notes declined, DPAG considered its options. In the summer of 2009, DPAG's board of directors approved filing a direct lawsuit against WestLB. Both DPAG and WestLB are German banks and, at the time, DPAG was receiving substantial support from the German government and WestLB was partly owned by the government. Because of these relationships the DPAG board expressed concerns about pursuing a direct action to vindicate its rights for fear that the government would withdraw support from DPAG if [3] it sued WestLB. This fear of repercussions from bringing a direct lawsuit led DPAG to consider another option in which a third party would bring the lawsuit and remit a portion of any proceeds to DPAG. In February 2010, DPAG discussed this option with plaintiff Justinian, a Cayman Islands shell company with few or no assets. A presentation submitted by Justinian in this action described Justinian's business plan as:

"(1) purchase an investment that has suffered a major loss from a company so that the company does not need to report such loss on its balance sheet; (2) commence litigation to recover the loss on the investment; (3) remit the recovery from such

litigation to the company, minus a cut taken by Justinian; and (4) partner with specific law firms . . . to conduct litigation."

Ultimately, the DPAG board approved the option of having Justinian bring suit because it presented the "best risk return profile" for DPAG.

In April 2010, DPAG and Justinian entered into a sale and purchase agreement (the agreement). Pursuant to the agreement, DPAG would assign the notes to Justinian and Justinian would agree to pay DPAG a base purchase price of $1,000,000 (representing $500,000 for the Blue Heron Funding VI notes and $500,000 for the Blue Heron Funding VII notes). The notes were assigned to Justinian shortly after execution of the agreement. The assignment, however, was not contingent on Justinian's payment of the $1,000,000. Nor did Justinian's failure to pay the $1,000,000 constitute an event of default under section 9 of the agreement. According to Justinian's principal and chief negotiator of the agreement, Thomas Lowe, Justinian's failure to pay the $1,000,000 did not constitute a breach of the agreement. Under the terms of the agreement, the only consequences of Justinian's failure to pay by the selected due date appear to be that interest would accrue on the $1,000,000 and that Justinian's share of any proceeds recovered from the lawsuit would be reduced from 20% to 15%. Justinian has not paid any portion of the $1,000,000 base purchase price, and DPAG has not demanded payment.

Within days after the agreement was executed and shortly before the statute of limitations was to expire, Justinian filed a summons with notice in Supreme Court commencing this action against WestLB. The subsequent complaint alleged causes of action in breach of contract, fraud, breach of fiduciary duty, negligence, negligent misrepresentation, and breach of the covenants of good faith and fair dealing, all in connection with WestLB's alleged purchase of ineligible assets for the Blue Heron portfolios that caused the value of the notes to deteriorate.

WestLB moved to dismiss, alleging that Justinian lacked standing to bring this action. Justinian opposed the motion. In reply, WestLB raised the affirmative defense of [4] champerty, arguing that Justinian's acquisition of the notes was champertous under Judiciary Law § 489. After oral argument, Supreme Court issued a written decision concluding that there were "questions of fact surrounding Justinian's actual purpose and intent in purchasing the [notes] that require further discovery to resolve" (37 Misc 3d 518, 528, 952 NYS2d 725 [Sup Ct, NY County 2012]). The court ordered discovery limited to the issues related to champerty and reserved judgment on the motion to dismiss.

After champerty-related discovery was complete, WestLB renewed its motion to dismiss, which Supreme Court treated as a motion for summary judgment. Supreme Court dismissed the complaint, concluding that the agreement was champertous because Justinian had not made a bona fide purchase of the notes and was, therefore, suing on a debt it did not own. Supreme Court also concluded that Justinian was not entitled to the protection of the champerty safe harbor of Judiciary Law § 489 (2) because Justinian had not made an actual payment of $500,000 or more (43 Misc 3d 598, 981 NYS2d 302 [Sup Ct, NY County 2014]). On appeal, the Appellate Division affirmed, largely adopting the rationale of Supreme Court (128 AD3d 553, 10 NYS3d 41 [1st Dept 2015]). This Court granted leave to appeal (25 NY3d 914, 16 NYS3d 519, 37 NE3d 1162 [2015]). We affirm, although our reasoning is somewhat different.

II.

Judiciary Law § 489 is New York's champerty statute. Section 489 (1) restricts individuals and companies from purchasing or taking an assignment of notes or other securities "with the intent and for the purpose of bringing an action or proceeding thereon."

In a prominent early champerty case, *Moses v McDivitt* (88 NY 62, 65 [1882]), we concluded that the language "with the intent

and for the purpose" contained in a predecessor champerty statute—language which Judiciary Law § 489 (1) has retained—was significant. We determined that simply intending to bring a lawsuit on a purchased security is not champerty, but when the purchase of a security was "made for the very purpose of bringing such suit" that is champerty because "this implies an exclusion of any other purpose" (88 NY at 65). Therefore, we held that "[t]o constitute the offense [of champerty] the *primary purpose* of the purchase must be to enable [one] to bring a suit, and the intent to bring a suit must not be merely incidental and contingent" (*id.* [emphasis added]). The primary purpose test articulated in *Moses* has been echoed in our courts for well over a century. In *Trust for the Certificate Holders of the Merrill Lynch Mortg. Investors v. Love Funding Corp.* (13 NY3d 190, 198-199, 918 NE2d 889, 890 NYS2d 377 [2009]), we endorsed the distinction in *Moses* "between acquiring a thing in action in order to obtain costs and acquiring it in order to protect an independent right of the assignee" and opined that "the purpose behind [the plaintiff's] acquisition of rights" is the critical issue in assessing whether such acquisition is champertous. Similarly, in *Bluebird Partners v First Fid. Bank* (94 NY2d 726, 736, 731 NE2d 581, 709 NYS2d 865 [2000]), we held that "in order to constitute champertous conduct in the acquisition of rights . . . the foundational intent to sue on that claim must at least have been the primary purpose for, if not the sole motivation behind, entering into the transaction."[3]

Here, the impetus for the assignment of the notes to Justinian was DPAG's desire to sue WestLB for causing the notes' decline in value and not be named as the plaintiff in the lawsuit. Justinian's business plan, in turn, was acquiring investments that suffered major losses in order to sue on them, and it did so here within days after it was assigned the notes. Contrary to the suggestion by the dissent, there was no evidence, even following completion of champerty-related discovery, that Justinian's acquisition of the notes was for any purpose other than the lawsuit it commenced almost immediately after acquiring the notes (dissenting op at 172-173). Justinian's principal speculated at his deposition as to other possible

sources of recovery on the notes—for example, that there "might have been" an insolvency or that there "might have been"a restructuring or distribution between the time of acquisition and 2047 when the notes were due. Such speculation does not suffice to defeat summary judgment. We have long held that " '[m]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' " to defeat summary judgment (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967, 520 NE2d 512, 525 NYS2d 793 [1988], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562, 404 NE2d 718, 427 NYS2d 595 [1980]). Indeed, "[t]he moving party need not specifically disprove every remotely possible state of facts on which its opponent might win" to be entitled to summary judgment, particularly when the opponent's "theorizing" is "farfetched" (*Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320, 908 NE2d 869, 880 NYS2d 879 [2009]). Here, the lawsuit was not merely an incidental or secondary purpose of the assignment, but its very essence. Justinian's sole purpose in acquiring the notes was to bring this action and hence, its acquisition was champertous.

F. This Transaction Does Not Fall Within The Safe Harbor Provision Of Judiciary Law § 489 (2)

This transaction involved less than $500,000.00.

Justinian holds in relevant part as follows:

III.

Conduct that is champertous under Judiciary Law § 489 (1) is nonetheless permissible if it falls within the safe harbor provision of Judiciary Law § 489 (2). Section 489 (2) exempts the purchase or assignment of notes or other securities from the restrictions of section 489 (1) when the notes or other securities "hav[e] an aggregate purchase price of at least five hundred thousand dollars" (Judiciary Law § 489 [2]). Here, although the price listed in the agreement, $1,000,000, satisfies the threshold dollar amount for the safe harbor, Justinian has not actually paid any portion of that price. Justinian argues that a binding

obligation to pay is sufficient to receive the protection of the safe harbor. WestLB argues that in order to come within the safe harbor an actual payment of at least $500,000 must have been made. The courts below endorsed WestLB's position. We do not agree. Actual payment of the purchase price need not have occurred to receive the protection of the safe harbor. Nonetheless, for the reasons set forth below, under the circumstances presented here, Justinian is not entitled to the protection of the safe harbor.

The parties disagree about whether the phrase "purchase price" in section 489 (2) is ambiguous. Justinian argues that it is unambiguous and means whatever amount is denominated the "purchase price" in a purchase agreement. WestLB argues that reading "purchase price" with " 'absolute literalness' "would violate the safe harbor's " 'purpose and intent' " (brief for defendants-respondents at 14, quoting *Matter of Long v Adirondack Park Agency*, 76 NY2d 416, 420, 559 NE2d 635, 559 NYS2d 941 [1990]). We agree with that statement.

Although the phrase "purchase price" may be unambiguous in some contexts, here it is not, and we must look to the legislative history to discern its meaning (*see* *Matter of Auerbach v Board of Educ. of City School Dist. of City of N.Y.*, 86 NY2d 198, 204, 654 NE2d 972, 630 NYS2d 698 [1995]). A review of draft versions of the safe harbor legislation introduced during the legislative session reveals that at least one version of the bill contemplated that the safe harbor would protect a purchaser of notes or securities if *either* the aggregate face amount of the notes or securities sued upon totaled at least $1,000,000 *or* the purchaser had paid, in the aggregate, at least $500,000 to acquire them (2003 NY Senate Bill S2992-A). The statute as enacted contained different language, requiring instead that the notes or securities have "an aggregate purchase price" of at least $500,000 (Judiciary Law § 489 [2]). The "purchase price" language effectively falls between the two earlier proposed safe harbor formulations—strong indication that the legislature did not intend either that actual payment necessarily had to have been made or that face value alone would suffice to obtain the protection of the safe harbor.

The legislative explanation of the safe harbor's purpose further supports our reading. New York has long been a leading commercial center, and our statutes and jurisprudence have, over many years, greatly enhanced New York's leadership as the center of commercial litigation. The safe harbor was enacted to exempt large-scale commercial transactions in New York's debt-trading markets from the champerty statute in order to facilitate the fluidity of transactions in these markets (*see* Assembly Mem in Support, Bill Jacket, L 2004, ch 394 at 4, 2004 NY Legis Ann at 282-283). The participants in commercial transactions and the debt markets are sophisticated investors who structure complex transactions. Requiring that an actual payment of at least $500,000 have been made for these transactions to fall within the safe harbor would be overly restrictive and hinder the legislative goal of market fluidity. The phrase "purchase price" in section 489 (2) is better understood as requiring a binding and bona fide obligation to pay $500,000 or more for notes or other securities, which is satisfied by actual payment of at least $500,000 or the transfer of financial value worth at least $500,000 in exchange for the notes or other securities. Such understanding conforms with the realities of these markets in which payment obligations may be structured in various forms, whether by exchange of funds, forgiveness of a debt, a promissory note, or transfer of other collateral. We emphasize that we find no problem with parties structuring their agreements to meet the safe harbor's requirements, so long as the $500,000 threshold is met, as set forth above.

However, as the dissent concedes, "[u]nquestionably, if the obligation to pay [at least $500,000] [i]s entirely contingent on a successful outcome in [the] litigation, it [does] not constitute a binding and bona fide debt" (dissenting op at 175). The legislative history reveals that a purchase price of at least $500,000 was selected because the legislature took comfort that buyers of claims would "not invest large sums of money" to pursue litigation unless the buyers believed in the value of their investments (*see* Assembly Mem in Support, Bill Jacket, L 2004, ch 394 at 4, 2004 NY Legis Ann at 283). This comfort is lost when a purchaser of notes or other securities structures an agreement to make payment of the purchase price contingent on

> a successful recovery in the lawsuit; such an arrangement permits purchasers to receive the protection of the safe harbor without bearing any risk or having any "skin in the game," as the legislature intended. The legislature intended that those who benefit from the protections of the safe harbor have a binding and bona fide obligation to pay a purchase price of at least $500,000, irrespective of the outcome of the lawsuit.
>
> That is precisely what is lacking here. The record establishes, and we conclude as a matter of law, that the $1,000,000 base purchase price listed in the agreement was not a binding and bona fide obligation to pay the purchase price other than from the proceeds of the lawsuit. The agreement was structured so that Justinian did not have to pay the purchase price unless the lawsuit was successful, in litigation or in settlement. The due date listed for the purchase price was artificial because failure to pay the purchase price by this date did not constitute a default or a breach of the agreement. The agreement permitted Justinian to exercise the option to let the due date pass without consequence and simply deduct the $1,000,000 (plus interest) from its share of any proceeds from the lawsuit.
>
> In sum, we hold that because the notes were acquired for the sole purpose of bringing litigation, the acquisition was champertous. Further, because Justinian did not pay the purchase price or have a binding and bona fide obligation to pay the purchase price of the notes independent of the successful outcome of the lawsuit, Justinian is not entitled to the protection of the safe harbor. In essence, the agreement at issue here was a sham transaction between the owner of a claim which did not want to bring it (DPAG) and an undercapitalized assignee which did not want to assume the $500,000 risk required to qualify for the safe harbor protection of section 489 (2) (Justinian).

The New York City Bar Association issued a formal opinion in 2011 addressing ethical issues that may arise when a lawyer represents a client who has entered into a non-recourse litigation financing agreement. The

opinion identified two potential legal barriers. First, it advised that "lawyers should be aware that in certain circumstances, courts have found that non-recourse litigation financing agreements violate usury laws," even where the financing companies "characterize non-recourse financing arrangements as a 'purchase' or 'assignment of the anticipated proceeds of the lawsuit (and therefore not subject to usury laws)." (Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, Formal Op. 2011-12 (June 2011), 2011 WL 6958790, at p. 2.) Second, the opinion advised lawyers to be mindful that although no New York courts appear to have found non-recourse funding arrangements unlawful under New York law, "courts in other jurisdictions have invalidated certain financing arrangements under applicable champerty laws." (*Id*. at p. 3.)

F. There Was No Breach Of Contract

There was no breach of contract because the contracts are not enforceable. The claim-funding agreements, in which Fast Track loaned money to Sax so that he could file and prosecute certain personal injury cases, were illegal, usurious, and champertous recourse loans. (ER 417, ¶ 4.)

There has been evidence of public policy concerns in scholarship, articles in the popular media, case law, and ethics opinions on claim funding. It has been pointed out that there exists "a sentiment that there is something fishy, even distasteful, about [alternative litigation funding]." (W. Bradley Wendel, *Alternative Litigation Finance and Anti-Commodification Norms*, 63 DePaul L. Rev. 655, 663 (2014).)

G. Sax Did Not Owe Or Breach A Fiduciary Duty To Fast Trak

Sax breached no fiduciary duty to Fast Track, because Fast Track's contracts are not enforceable. The claim-funding agreements, in which Fast

Track loaned money to Sax so that he could file and prosecute certain personal injury cases, were illegal, usurious, and champertous recourse loans. (ER 417, ¶ 4.)

V. ARGUMENT

Sax asserts that the trial court erred when it granted Fast Track's motion for summary judgment, thereby denying Sax's affirmative defense of champerty. The claims of Fast Track against Sax are champertous. Further, there are triable issues of material fact in this matter as to whether:

1. The parties acted with the intent, and for the purpose, of bringing an action or proceeding on personal injury claims;

2. The sale involves a bare litigation claim, not a debt instrument;

3. The sale does not qualify for the New York Judiciary Law §489 (2) safe harbor;

4. The sale involved litigation in numerous cases, including primary cases, that had not yet commenced;

5. The subject transactions were usurious; and,

6. The parties intended the subject transactions to be recourse loans.

VI. CONCLUSION

Based upon the foregoing facts and law, it is respectfully submitted that this matter be remanded to the District Court, and the following be overturned:

1. The Motion Granting Plaintiff's Motion for Summary Judgment filed on May 11, 2018.

2. The Order Awarding Damages dated August 21, 2018; and,

3. The Judgment dated October 26, 2018.

Dated: April 5, 2019

/S/ Richard Sax
Richard Sax, Attorney for
Defendant/Appellant,
Richard Sax, et al.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I state that there are no related bases pending in this Court.

Dated: April 5, 2019

/S/ Richard Sax
Richard Sax, Attorney for
Defendant/Appellant,
Richard Sax, et al.

ATTESTATION

I, Richard Sax, hereby attest that I have on file all holographic signatures corresponding to any signatures indicated by a conformed signature (/S/) within this e-filed document.

Dated: December 10, 2018

/S/ Richard Sax
Richard Sax, Attorney for
Plaintiff/Respondent,
Correy Alcantra

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DECLARATION OF RICHARD SAX AND CERTIFICATE OF COMPLIANCE

I, Richard Sax, hereby declare as follows:

1. I am the attorney for Defendant/Appellant Richard Sax, et al., in the above-entitled matter.

2. I have utilized the software program entitled Microsoft Word to determine the word count of Appellant's Opening Brief.

3. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the word count of Appellant's Opening Brief is 9,238 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

4. 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 proportionately-spaced typeface, using Microsoft Office, Times New Roman 14-point font.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was signed on April 5, 2019, in Santa Rosa, California.

By: /S/ Richard Sax

Richard Sax, Attorney for
Defendant/Appellant,
Richard Sax, et al.

CERTIFICATE OF SERVICE

I declare that: I am employed in the County of Sonoma, California. I am over the age of eighteen (18) years and not a party to the within case; my business address is 448 Sebastopol Ave, Santa Rosa, CA 95401. My facsimile number is 707-525-8119, and my electronic mail address is Richard@rsaxlaw.com. On April 5, 2019, I served **APPELLANT'S OPENING BRIEF** on the interested party or parties in said cause. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

SERVICE LIST

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(XX) ELECTRONIC SERVICE VIA CM/ECF SYSTEM: In accordance with the electronic filing procedures of this Court, service has been effected on the parties above, whose counsel of record is a registered participant of CM/ECF, via electronic service through the CM/ECF system. A copy of the "Filing Receipt" page will be maintained with the original document in our office.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Santa Rosa, California, on April 5, 2019.

/S/ Richard Sax
Richard Sax,
Attorney for
Defendant/Appellant,
Richard Sax, et al.