No. S249248

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT E. WHITE,

Plaintiff and Petitioner

vs.

SQUARE, INC.,

Defendant and Respondent.

On Certification from the U.S. Court of Appeals for the Ninth Circuit
No. 16-17137

U.S. District Court for the Northern District of California
No. 3:15-cv-04539 JST

MOTION AND REQUEST FOR JUDICIAL NOTICE

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MOTION AND REQUEST FOR JUDICIAL NOTICE

In accordance with California Rules of Court, rules 8.520(g) and 8.252(a), Respondent Square Inc. hereby respectfully requests and moves for judicial notice of certain court records from *White v. Square*, No. 16-17137 (9th Cir.), the underlying Ninth Circuit proceeding that gave rise to the certified questions now pending before this Court. The records for which Square seeks judicial notice are as follows:

1. Appellant's Motion for Court to Determine its Own Subject Matter Jurisdiction dated January 12, 2017, Docket Entry 4-1, a copy of which is attached hereto as Exhibit 1;
2. Defendant-Appellee's Response to Appellant's Motion for Court to Determine its Own Subject Matter Jurisdiction dated January 26, 2017, Docket Entry 6-1, a copy of which is attached hereto as Exhibit 2; and
3. Appellant's Reply in Support of His Motion for Court to Determine its Own Subject Matter Jurisdiction dated February 3, 2017, Docket Entry 8, a copy of which is attached hereto as Exhibit 3.

This motion and request is based on the accompanying Memorandum.

Dated: November 21, 2018

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

/s/ Fred A. Rowley, Jr.
Fred A. Rowley, Jr.

Attorneys for Defendant and Respondent Square, Inc.

MEMORANDUM

In this appeal on certification from the United States Court of Appeals for the Ninth Circuit, Respondent Square Inc. respectfully requests that the Court take judicial notice of the attached briefing on a motion filed by Plaintiff/Petitioner Robert White ("White") in the underlying Ninth Circuit appeal. The briefing is reflected in the Ninth Circuit's docket (Docket Entry Nos. 4-1, 6-1, 8), but was not included in the Excerpts of Record filed by White in the Ninth Circuit and later transmitted to this Court. Because the motion briefing is part of the underlying case, and because it is relevant to the certified questions now pending before this Court, which relate to the standards for a cognizable injury and standing under the Under Civil Rights Act, this Court can and should take judicial notice of the briefing papers, which are attached hereto as Exhibits 1-3.

The attached records were initially filed in the Ninth Circuit on appeal after entry of judgment in the trial court, and could not have been included in the record of the federal district court that entered the underlying judgment. Under Evidence Code section 459, subdivision (a), this Court may take judicial notice of "any matter specified in Section 452." Section 452, in turn, states that "Judicial notice may be taken" of, inter alia: "(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States . . . ." (Cal. Evid. Code § 452.) The attached Exhibits 1-3 are accordingly properly subject to judicial notice under Evidence Code Section 452(d) as records of the Ninth Circuit proceeding. (See, e.g., *Flannery v. Prentice* (2001) 26 Cal.4th 572, 576 fn.2 [taking judicial notice of the appellate record in a related case]; accord *Stephenson v. Drever* (1997) 16 Cal.4th 1167, 1170 fn.1.)

The attached motion briefing was part of the record of the underlying Ninth Circuit appeal, and bears on the Court's consideration of

the Questions certified by the Ninth Circuit. In his motion, White asked the Ninth Circuit to examine its jurisdiction and made related arguments and statements characterizing the nature and extent of his alleged injury. (See, e.g., RJN003 ["White concedes ... that he suffered no tangible, concrete injury from Square's discrimination . . . ."]). Because this Court is weighing the appropriate standard for injury and standing under the Unruh Civil Rights Act on a factual record framed by White's allegations, White's characterization of his own alleged injury is directly relevant to the Court's consideration of this matter.

Dated: November 21, 2018

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

/s/ Fred A. Rowley, Jr.
Fred A. Rowley, Jr.

Attorneys for Defendant and Respondent Square, Inc.

Ex. 1

No. 16-17137

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT WHITE,
individually and on behalf of all others similarly situated,
Plaintiff-Appellant

v.

SQUARE, INC.,
a Delaware corporation,
Defendant-Appellee

On Appeal from the United States District Court
For the Northern District of California
Case No. 3:15-cv-04539 JST
The Honorable Jon S. Tigar, United States District Judge

APPELLANT'S MOTION FOR COURT TO DETERMINE ITS OWN SUBJECT MATTER JURISDICTION

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ROBERT WHITE,
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RELIEF SOUGHT

Plaintiff-Appellant Robert White (White) requests, pursuant to Fed. R. App. P. 27, that the Court consider whether it has jurisdiction over this case in light of the Supreme Court's decision in *Spokeo v. Robbins* (*Spokeo*), 136 S. Ct. 1540 (2016).

GROUNDS FOR THE RELIEF SOUGHT

AND LEGAL ARGUMENT

I. THE ARTICLE III ISSUE

The underlying appeal is from a Fed. R. Civ. P. 12(b)(6) dismissal of Plaintiff-Appellant's claim for statutory damages under the California Unruh Civil Rights Act, Cal. Civil Code sections 51–52. (RJN Exhibit A.[1])

Defendant-Appellant Square, Inc. (Square) offers a credit card processing service to businesses whereby the business can accept credit card payments from customers without having to open its own merchant account with a bank. (RJN, Exhibit A at ¶ 5.) In effect, Square acts as the merchant of record in relation to a bank. A provision in Square's Terms of Service states that Square will not allow its service to be used by bankruptcy lawyers. (RJN, Exhibit A at ¶ 6.) White, a bankruptcy lawyer, would like to use Square's services but was deterred from

[1] The record for this appeal has not yet been prepared. White has compiled the relevant docket entries in the accompanying Request for Judicial Notice.

signing up with Square when he learned of the prohibition. (RJN, Exhibit A at ¶ 10 *et seq.*).

Such occupational discrimination violates the Unruh Civil Rights Act, Cal. Civil Code sections 51–52 (Unruh Act). *See, e.g., Sisemore v. Master Financial, Inc.*, 151 Cal. App. 4th 1386, 1405–1406 (2007) ("[A]n announcement such as 'You can't eat at my diner because you are a lawyer, bricklayer, female, or Indian chief' would be actionable under the Unruh Act.")

White concedes, however, that he suffered no tangible, concrete injury from Square's discrimination in that: White continued to do business as he had before being deterred; there are other merchant-of-record services that do not discriminate against bankruptcy lawyers, and White cannot point to any loss of business or similar injury that resulted from his inability to use the Square services.

The issue in this case is whether Square is liable for the statutory penalties provided for by in section 52 of the Unruh Act by dint of its deterring certain classes of potential users from its public accommodation.[2]

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[2] Below, Square argued, and the Court agreed, that White did not demonstrate *statutory* standing—i.e., that White failed to allege facts stating a claim of violation of the Unruh Act—because: (1) deterrence alone did not violate the Unruh Act, relying on *Surrey v. TrueBeginnings, LLC*, 168 Cal. App. 4th 416–19 (2008), and (2) White needed to show that he actually signed up for the Square service and was then rejected. (RJN, Exhibit C at 5:12–7:14.) White argued, based this Court's decision in *Botosan v. Paul McNalloy Realty*, 216 F.3d 827 (9th Cir. 2000), which approved of *Arnold v UA Theatre Circuit, Inc.*, 866 F. Supp. 433 (N.D. Cal. 1994) that: (1) He did everything he could short of signing up to demonstrate his interest

In *Spokeo,* the Supreme called into question when and whether a claim for statutory damages is a sufficient "case or controversy" for purposes of Article III of the U.S. Constitution. Before *Spokeo*, the lack of a tangible, concrete injury was not vital to a claim for statutory damages. *See Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014). The Supreme Court remanded *Spokeo* to the Ninth Circuit, which heard oral argument on December 13, 2016.

White takes no position on this controversy. His claim, and the claims of the class he would represent, can be brought in the California courts, where there is no "case or controversy" requirement. *See Jasmine Networks, Inc. v Superior Court*, 180 Cal. App. 4th 980, 990 ("There is no similar [case or controversy] requirement in our state Constitution."). White initially filed his case in federal court—on October 1, 2015, well before *Spokeo* was decided—in recognition of the inevitability of removal under the Class Action Fairness Act, 28 U.S.C. § 1332(d).[3]

---

in Square's services (and that signing up would have been futile), (2) deterrence is sufficient to violate the Unruh Act (RJN, Exhibit B) and (2) in any event, the District Court was bound to follow the Ninth Circuit's precedent on this issue (RJN, Exhibit D at Exh. A, 1:11 –3:17). The deterrence theory is also supported by the California Court of Appeal's recent decision in *Osborne v Yasmeh*, 1 Cal. App. 5th 1118 (2016).

[3] An action dismissed for lack of Article III standing is dismissed without prejudice to re-filing in state court. *See Case v. Hertz Corp.*, No. 15-cv-02707-BLF, 2016 U.S. Dist. LEXIS 162097, at *13 (N.D. Cal. Nov. 21, 2016); *Nokchan v. Lyft, Inc.*, No. 15-cv-03008-JCS, 2016 U.S. Dist. LEXIS 138582, at *27 (N.D. Cal. Oct. 5, 2016).

White brings this Article III matter to the attention of the Court because, as explained in *Sadat v. Mertes*, 615 F.2d 1176, 1188 (7th Cir. 1980):

> 'The first duty of counsel is to make clear to the court the basis of its jurisdiction as a federal court. The first duty of the court is to make sure that it exists.' Hart & Wechsler, The Federal Courts and the Federal System 835 (2d ed. 1973). Consequently, it has been the virtually universally accepted practice of the federal courts to permit any party to challenge or, indeed, to raise *sua sponte* the subject matter jurisdiction of the court at any time and at any stage of the proceedings.

II. ARGUMENTS FOR JURISDICTION

In *Spokeo,* the plaintiff claimed that Spokeo, Inc. posted incorrect information about him on its website, in violation of the Fair Credit Reporting Act., 15 U.S.C. §§ 1681 *et seq.* The Ninth Circuit held that plaintiffs' claims raised a sufficient case or controversy under Article III. The Supreme Court vacated the Ninth Circuit's decision and remanded for reconsideration of the concrete element of standing. In doing so, the Supreme Court intangible injuries may support standing:

> To establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U. S., at 60, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (internal quotation marks omitted). We discuss the particularization and concreteness requirements below
>
> ***

"Concrete" is not, however, necessarily synonymous with "tangible." Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete. [Citations omitted.]

***

In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in *Lujan* that Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law."

***

Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.

***

This does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness .... Just as the common law permitted suit in [slander *per se*] instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified. *See Federal Election Comm'n v. Akins*, 524 U. S. 11, 20-25, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998) (confirming that a group of voters' "inability to obtain information" that Congress had decided to make public is a sufficient injury in fact to satisfy Article III); *Public Citizen v. Department of Justice*, 491 U. S. 440, 449, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989) (holding that two advocacy organizations' failure to obtain information subject to disclosure under the Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue").

***

Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the FCRA's procedural requirements may result in no harm. For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or

> present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.

Id., 136 S. Ct. at 1548–1550.

In White's case, the intangible injury he suffered would be the inherent harm of discrimination in and of itself. It could be said that this type of injury goes to the heart of the Unruh Act, whose purpose was to eliminate all arbitrary discrimination. *See, e.g., Rotary Club of Duarte v. Bd. of Dirs.*, 178 Cal. App. 3d 1035, 1047 (1986) ("[Both] [the] history and [the] language [of the Unruh Act] disclose a clear and large design to interdict all arbitrary discrimination by a business enterprise.")

III. ARGUMENTS AGAINST JURISDICTION

In *Spokeo*, 2016 U.S. LEXIS at *13, the Court explained that:

> To establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."

Id., 136 S. Ct. at 1543.

In the previous quotation from *Spokeo*, in Part II above, Justice Alito pointed to the need to prove a *material* risk of harm. The wrong zip code was given as an example of an immaterial risk. Critics of the Supreme Court were quick to note that getting someone's zip code wrong could make a person subject to illegal redlining or wind up making their child go to a different school far from home.

See, e.g., Jeff John Roberts, Supreme Court Rejects Privacy Claim in Data Broker Case, Fortune, http://fortune.com/2016/05/16/supreme-court-spokeo-decision/ (last visited Jan. 12, 2017).

What these instant critics all miss is that—*while a wrong zip code may not always absolutely be completely immaterial in the abstract (as nothing could ever meet that standard)*—such a small error is nonetheless (in the Supreme Court's authoritative view) a prime example of something which *is always absolutely sufficiently harmless in the real world* as to never present any tangible concrete risk of future injury. And thus such zip code errors will always be unable, on their own, to support Article III jurisdiction.

The fact that White observed that Square would not accept bankruptcy lawyers and therefore decided not to try to sign up may not be enough of a discriminatory impact to qualify as a "concrete" injury.

CONCLUSION

Federal jurisdiction must be determined before any merits determination of the underlying appeal can be made. White requests that the motion panel assigned to this matter not defer the issue of federal subject matter jurisdiction to the merits panel and instead take up the motion without delay.

Dated: January 12, 2017

McGRANE PC

By: /s/ *William McGrane*
William McGrane
Attorneys for Plaintiff Robert White, an individual, and all others similarly situated

Ex. 2

No. 16-17137

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT WHITE,
individually and on behalf of all others similarly situated,

Plaintiff- Appellant,

v.

SQUARE, INC.,
a Delaware corporation.,

Defendant- Appellee.

On Appeal from the United States District Court
for the Northern District of California
Case No. 3:15-CV-04539-JST
The Honorable Jon S. Tigar, United States District Judge

DEFENDANT-APPELLEE'S RESPONSE TO APPELLANT'S MOTION FOR COURT TO DETERMINE ITS OWN SUBJECT MATTER JURISDICTION

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January 26, 2017

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I. INTRODUCTION

Since initiating this litigation in October 2015, Plaintiff-Appellant Robert White ("Appellant") has sought redress through multiple complaints and extensive litigation – all in federal court. Appellant waited until losing his case with prejudice on September 14, 2016, then losing two motions for reconsideration and a motion for new trial, to seek a do-over from this Court. Only now that the District Court concluded that Appellant never pleaded a statutory violation because he never attempted to sign-up for Square's service does Appellant suggest that he may not have Article III standing. Apparently, Appellant hopes to re-file the same defective complaint in state court. Yet even now, he refuses to take a firm position on subject matter jurisdiction – apparently for tactical reasons – instead seeking to assign that responsibility to the Court. His motion should be denied because (1) as the party invoking the Court's jurisdiction, he is required to identify the basis for it, and (2) his motion fails to comply with the requirements of Federal Rule of Appellate Procedure 27(a)(2) because it does not state the relief it seeks and the support for that relief.

II. FACTS

Appellant filed this action in the District Court on October 1, 2015. It was the second in a trio of cases brought by Appellant's counsel that purport to allege claims against Defendant-Appellee Square, Inc. ("Square") under California's Unruh Civil Rights Act.[1]

---

[1] *See shierkatz RLLP v. Square, Inc.*, No. 3:15-cv-02202-JST (N.D. Cal.) (ordered to arbitration on December 17, 2015); *Abu Maisa, Inc. v. Google, Inc. et al.*, No. 3:15-cv-06338-JST (N.D. Cal.) (dismissed with prejudice on December 8, 2016).

On January 26, 2016, Square moved to dismiss Appellant's complaint for failure to state a claim under the Unruh Act because Appellant was never subject to the policy he claims to be discriminatory and therefore could not possibly have suffered injury cognizable under the Act.[2] Instead, Appellant alleged only that he was "aware" of the policy and "deterred" from signing up for the Square service, which is insufficient under established California law to confer Unruh Act standing.[3] The District Court granted Square's motion without prejudice, ruling that Appellant lacked statutory standing because he had never signed up for the Square service whose policy he sought to challenge. *See* Ex. A, ECF No. 38, April 19, 2016 Order Dismissing FAC.[4]

On April 29, 2016, Appellant filed an amended complaint, but still alleged only that he was aware of the policy he sought to challenge, but never subject to it, because he had not sought to sign up for the Square service.

On September 14, 2016, the District Court granted Square's motion to dismiss the amended complaint with prejudice, for the same reasons it dismissed his claims

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[2] *See Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 175 (2007) ("[I]njury occurs when the discriminatory policy is *applied* to the plaintiff[.]") (emphasis in original).

[3] *See, e.g., Surrey v. TrueBeginnings, LLC*, 168 Cal. App. 4th 414, 420 (2008) (plaintiff who "did not attempt to or actually subscribe to [defendant's] service . . . lack[ed] standing to seek relief"); *Osborne v. Yasmeh*, 1 Cal. App. 5th 1118, 1133 (2016) (agreeing that the *Surrey* decision was correctly decided; "[A] plaintiff who only learns about the defendant's allegedly discriminatory conduct, but has not personally experienced it, cannot establish standing.").

[4] "Ex. _" refers to the exhibit to the Declaration of Colleen Bal filed concurrently with this motion. "ECF No. _" refers to the corresponding ECF event in the District Court in this matter.

the first time around. *See* Ex. B, ECF No. 54, September 14, 2016 Order Dismissing SAC. Appellant filed three motions asking the District Court to reconsider or reverse its decision. *See* Exs. C, D, E, ECF Nos. 55, 61, 67. The District Court denied all three. *See* Exs. F, G, H, ECF Nos. 58, 66, 68. Appellant then initiated this appeal on November 22, 2016.

On January 12, 2017, without contacting opposing counsel, Appellant filed the instant motion.

III. ARGUMENT

Appellant's motion should be denied for two reasons.

As the party invoking the Court's jurisdiction, Appellant bears the burden to establish Article III standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1543 (2016) ("A plaintiff invoking federal jurisdiction bears the burden of establishing the 'irreducible constitutional minimum' of standing"); *see also* Fed. R. App. P. 28(a) ("The appellant's brief must contain . . . a jurisdictional statement, including: the basis for the district court's . . . subject matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction."). Indeed, Appellant admits that "[t]he first duty of counsel is to make clear to the Court the basis of its jurisdiction as a federal court." Motion at 4 (quoting *Sadat v. Mertes*, 615 F.2d 1176, 1188 (7th Cir. 1980)). Yet Appellant ignores that requirement and expressly refuses to take a position on subject matter jurisdiction. *Id.* at 3 ("White takes no position on this controversy."). He questions whether jurisdiction exists and provides arguments for and against subject matter jurisdiction. *Id.* at 4-7. Appellant

should be required to explain the basis on which he invoked this Court's jurisdiction (and the District Court's).[5]

Appellant's abdication of his responsibility to determine subject matter jurisdiction is particularly improper given the history of this case. Square questioned the basis for subject matter jurisdiction at the outset of the case. *See* Ex. I, ECF No. 22, Joint Case Management Statement, at 1.

Despite Appellant's awareness of the issue, he continued to pursue the litigation over the course of 15 months, multiple complaints, multiple requests for reconsideration, and a motion for new trial. Only now that the District Court has rejected his position to the end, and after Appellant invoked the jurisdiction of this Court, does Appellant claim that he might never have had Article III standing in the first place. Appellant should have raised this issue long ago in the trial court, rather than force Square and the District Court to invest more than a year and hundreds of thousands of dollars on the case. *See* Ex. J, *Abu Maisa* Order Denying Leave For Motion for Reconsideration at 3 (plaintiff's motion for reconsideration alleging that it may lack Article III standing is an attempt to "get a second bite at the apple by ref-filing in state court."); *see also Schmeir v. United States*, 279 F.3d 817, 824 (9th Cir.

[5] Appellant seems to argue that he only considered the possibility that he lacked Article III standing as a result of the Supreme Court's decision in the *Spokeo* case. *See* Motion at 1, 3. But *Spokeo* was decided more than eight months ago – well before much of his activity in the District Court and before he filed the current appeal – and in any event, is distinguishable from the current case in which Appellant has failed even to state a claim for a statutory violation.

2002) (affirming district court's grant of motion to dismiss for lack of subject matter jurisdiction with prejudice).[6]

Appellant's evasiveness on the issue of injury and standing is improper. He should be required to state whether his claim of having been "deterred" from signing up for a service to which he never even tried to subscribe, constitutes injury sufficient to confer Article III standing, and the legal basis for that position.

Separately, the Court should deny Appellant's motion because it violates Federal Rule of Appellate Procedure 27(a)(2). That rule requires that "[a] motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it." Appellant's motion fails to state what relief he seeks – An order ruling that subject matter jurisdiction exists? An order ruling that it does not exist? – and how the law supports that relief. This alone is sufficient grounds for denial. *See Nepomuceno v. Holder*, 502 F. App'x 706, 707 (9th Cir. 2013)

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[6] This case is indistinguishable from several others that Appellant's counsel has filed. In each, he claims that his client was deterred from signing up for a service because it knew of an allegedly discriminatory policy, and that supposed deterrence, without any actual attempt to sign up, is actionable under the Unruh Act. Appellant's counsel has litigated those cases just as exhaustively as this one. For instance, he refused to dismiss the indistinguishable case of *Abu Maisa, Inc. v. Google, Inc. et al.*, No. 3:15-cv-06338-JST (N.D. Cal.), even after the District Court dismissed this action with prejudice. The District Court predictably dismissed that case with prejudice, as well, for lack of standing. Plaintiff's counsel then filed a request to seek reconsideration. The District Court's denial of that request marked *the seventh time* it rejected the contention that a party has standing under the Unruh Act based on an allegation that it was deterred from seeking a defendant's service based on knowledge of the defendant's supposed policy. Appellant's counsel plainly hopes now to wipe the slate clean and start again in state court, while avoiding taking a position on whether his client(s) have suffered injury. He should not be permitted to do so.

(denying motion because "it fails to specify the grounds for relief or identify the relief sought.").

Moreover, because Appellant takes no position on subject matter jurisdiction, neither Square nor the Court can meaningfully respond to his (absent) position. *See Registration Control Sys., Inc. v. Compusystems, Inc.*, 922 F.2d 805, 807-08 (Fed. Cir. 1990) ("The purpose of the particularity requirement in [the analogous Fed. R. Civ. P. 7(b)] is to afford notice of the grounds and prayer of the motion to both the court and to the opposing party, providing that party with a meaningful opportunity to respond and the court with enough information to process the motion correctly.").[7]

[7] Rule 27(a)(2) is akin to Federal Rule of Civil Procedure 7(b) which requires that a movant identify "with particularity the grounds for seeking the order" and "the relief sought." Courts interpreting F.R.C.P 7(b) have denied motions where, as here, the movant failed to identify the relief sought and the basis for that relief. *See, e.g., U.S. v. Stute Co.*, 402 F.3d 820, 824 (8th Cir. 2005) (statement that Defendant had no objection to the extent the District Court needed to amend a judgment failed to satisfy Rule 7(b) because it did "not seek any relief or order"); *Rhodes v. Robinson*, 399 F. App'x 160, 164 (9th Cir. 2010) (affirming denial of motion for cross-summary judgment for failure to comply with Rule 7(b) because plaintiff "did not provide any argument or evidence supporting such a motion.").

IV. CONCLUSION

For the foregoing reasons, Square respectfully requests that the Court deny Appellant's Motion. Appellant should be required to explain the basis on which he has invoked this Court (and the District Court's) jurisdiction, as all other plaintiff/appellants are required to do.

Dated: January 26, 2017

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/ *Colleen Bal*
Colleen Bal

Attorneys for Defendant-Appellee
Square, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 26, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 26, 2017

By: /s/ *Colleen Bal*
Colleen Bal

Ex. 3

No. 16-17137

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT WHITE
individually and on behalf of all others similarly situated,
Plaintiff-Appellant

v.

SQUARE, INC.
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APPELLANT'S REPLY IN SUPPORT OF HIS MOTION FOR COURT TO DETERMINE ITS OWN SUBJECT MATTER JURISDICTION

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U.S. Constitution

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SUMMARY OF REPLY

White would much prefer to have the California state court decide the California state law issue of his statutory standing to sue Square for violating his civil rights under California's Unruh Law.[1]

Whether White's preferred outcome is the correct one following *Spokeo* and despite the otherwise applicable Class Action Fairness Act (CAFA) (28 U.S.C. § 1332(d)) is admittedly uncertain, however. While White admits he suffered no concrete tangible injury in fact by virtue of anything Square ever did to him (and seeks only statutory fines and statutory injunctive relief as remedies), *Spokeo* leaves open the possibility that even those sorts of *de minimis* allegations may be enough concrete intangible injury to satisfy Article III when deprivation of a person's civil rights are alleged.

Square suggests White is late off the mark in raising the Court's subject matter jurisdiction as an issue here. SAB at 1. Along these same lines, Square points out it raised Article III concerns at the outset of the case. SAB at 4. In response, White notes that he first sued Square in 2015. There was no way for anyone to know back then that the Supreme Court would ultimately require

[1] This reply brief adopts all abbreviations previously employed in Dkt 4-1. Dkt 6-1 is hereafter referred to as Square's Answer Brief or SAB. The terms Article III and subject matter jurisdiction are used interchangeably throughout this brief.

allegations of more than a bare technical violation of the Unruh Law to create Article III jurisdiction.

Square points out that *Spokeo* is now more than eight months old. SAB at 4 n.5. What Square ignores, however, is that *Spokeo* was remanded to the Ninth Circuit, which heard oral argument on December 13, 2016. *See* http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010737. White represents to the Court that it was only following review of that oral argument that his counsel formed the opinion that Article III jurisdiction is likely not present here.

ARGUMENT

The District Court held White had to defy Square's refusal-of-service list boycotting bankruptcy lawyers and sign up as Square's customer anyway in order to have standing to sue Square under the Unruh Law. *See* SAB Exhibit B at 5:12–6:1. The District Court made this ruling despite White's contention that he was reasonably deterred from becoming a Square customer in that way because he believed signing up as a Square customer despite being a bankruptcy lawyer would have been a deceitful act on his part, potentially invoking State Bar of California discipline against his law license on grounds of moral turpitude. *See* SAB Exhibit G at 5:7–7:6.

The issue presented below was whether, as a matter of state law, allegations of such reasonable stand-alone deterrence sufficed to create Unruh Law standing. *See* SAB Exhibit A at 6:3–7:2; Exhibit B at 5:19–23. A related issue was whether the Ninth Circuit has already determined that such reasonable stand-alone deterrence creates Unruh Law standing, with the consequence that the District Court necessarily violated the doctrine of vertical *stare decisis* by holding otherwise. *See* SAB Exhibit C at Exh. A 1:11–3:17; Exhibit F at 1:25–2:2.

There is never anything wrong with asking a federal court to decide its own jurisdiction at any time such an issue first arises. *See Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) ("This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate."); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1194 n.2 (9th Cir. 1988) ("It is elementary that the subject matter jurisdiction of the district court is not a waivable matter and may be raised at any time by one of the parties, by motion or in the responsive pleadings, or sua sponte by the trial or reviewing court."); *Khan v. K2 Pure Sols., LP*, No. 12-cv-05526-WHO, 2013 U.S. Dist. LEXIS 169855, at *15 (N.D. Cal. 2013) ("the [Article III] issue and supporting authorities are appropriate to raise at any time.").

If the Court finds it lacks subject matter jurisdiction, then a dismissal *without prejudice* is the ordinary result. *See Mo. ex rel. Koster v. Harris*, No. 14-17111, 2017 U.S. App. LEXIS 806, at *20 (9th Cir. Jan. 17, 2017) ("In general, dismissal

for lack of subject matter jurisdiction is without prejudice."; *see* also *Steel Co. v. Citizens for a Better Env't* (*Steel Co.*), 523 U.S. 83, 94-95 (1998) (rejecting the doctrine of hypothetical jurisdiction and holding the District Court must decide Article III standing before it can properly decide anything else).[2]

CONCLUSION

Further merits proceedings are likely to be a waste of scarce judicial resources. To eliminate that risk, White respectfully requests the motion panel determine whether the Court has subject matter jurisdiction before any merits briefing is otherwise ordered to take place.

Dated: February 3, 2017

McGRANE PC

By: /s/ *William McGrane*
William McGrane
Attorneys for Plaintiff Robert White, an individual, and all others similarly situated

[2] In *Steel* Co., *supra*, Justice Scalia explained that—while there are different shades of meaning to the word "standing"—regardless of semantics a District Court must always determine that Article III jurisdiction exists in the first instance. *See Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005) (same holding, citing *Steel Co.*); *see also* 2-12 Moore's Federal Practice - Civil § 12.30 (2016) (same conclusion, citing *Steel Co.*). In Exhibit J to Square's Answer Brief at 3:3–11, however, Judge Tigar erred by expressly refusing to decide whether he had Article III jurisdiction before he next ordered a companion case dismissed *with prejudice* on account of plaintiff's supposed lack of statutory standing under the Unruh Law.

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 560 Mission Street, 27th Floor, San Francisco, CA 94015.

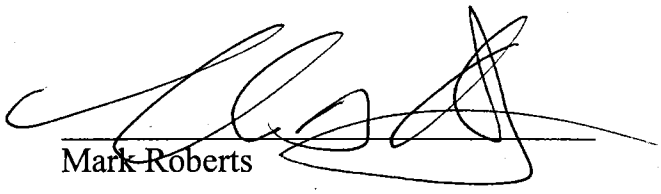
On November 21, 2018, I served true copies of the following document(s) described as **MOTION AND REQUEST FOR JUDICIAL NOTICE** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 21, 2018 at San Francisco, California.



Mark Roberts

SERVICE LIST

Case No. S249248
U.S. Court of Appeals for the 9th Circuit 16-17137

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No. S249248

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT E. WHITE,

Plaintiff and Petitioner

v.

SQUARE, INC.,

Defendant and Respondent.

On Certification from the U.S. Court of Appeals for the Ninth Circuit
No. 16-17137

U.S. District Court for the Northern District of California
No. 3:15-cv-04539 JST

[PROPOSED] ORDER GRANTING RESPONDENT'S MOTION AND REQUEST FOR JUDICAL NOTICE

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Attorneys for Defendant and Respondent
SQUARE, INC.

[PROPOSED] ORDER

IT IS HEREBY ORDERED that the Court will take judicial notice of the following documents in *White v. Square*, No. 16-17137 (9th Cir.), included as exhibits to Respondent's Motion and Request for Judicial Notice:

1. Appellant's Motion for Court to Determine its Own Subject Matter Jurisdiction dated January 12, 2017, Docket Entry 4-1, a copy of which is attached to Respondent's RJN as Exhibit 1;
2. Defendant-Appellee's Response to Appellant's Motion for Court to Determine its Own Subject Matter Jurisdiction dated January 26, 2017, Docket Entry 6-1, a copy of which is attached to Respondent's RJN as Exhibit 2; and
3. Appellant's Reply in Support of His Motion for Court to Determine its Own Subject Matter Jurisdiction dated February 3, 2017, Docket Entry 8, a copy of which is attached to Respondent's RJN as Exhibit 3.

IT IS SO ORDERED

Dated: _____

_____
Chief Justice

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 560 Mission Street, 27th Floor, San Francisco, CA 94015.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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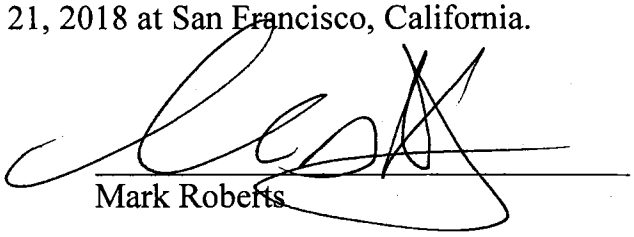

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