Case No. S180862

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

Robert A. Brown and Susana Brown,
Guardians Ad Litem for KI and KA, minors,
Robert A. Brown, individually,
and all others similarly situated,

Plaintiffs and Appellants,

v.

Stewart Mortensen,

Defendant and Respondent.

SUPREME COURT
FILED

MAY 14 2010

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DEPUTY

Appellants' Opening Brief on the Merits

After Appeal in the Court of Appeal, Second Appellate District,
Division One, Case No. B199793, from the Superior Court of California,
County of Los Angeles, The Honorable, Anthony Mohr, Judge Presiding
Los Angeles Superior Court Case No. BC289546

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Summary of Appellants' Complaint and Appeal

Appellants appealed to the Court of Appeal, Second Appellate District, Division One, from an order of dismissal in the Los Angeles Superior Court after the trial court sustained a demurrer to petitioners' 3rd and 4th Causes of Action in a Fourth Amended Complaint. Appellants' 3rd and 4th Causes of Action alleged that respondent, Stewart Mortensen ("Mortensen"), violated California's Confidentiality of Medical Information Act, California Civil Code §§56 et. seq. ("CMIA") by disclosing appellants' confidential medical information to credit reporting agencies without appellants' consent. Appellants sought statutory damages and injunctive relief.

The CMIA defines "medical information" as "medical history, mental or physical condition, or treatment" and includes "identifying information" such as name, address, telephone number and social security number. Civ. Code §56.05(g), formerly Civ. Code §56.05(f).

Civil Code §§56.10(a), 56.11 and 56.13 prohibit health care providers and their recipients from disclosing confidential medical information without the patient's consent. ***The CMIA does not include an exception for reporting to credit reporting agencies.*** Although a health care provider is authorized under the CMIA to disclose confidential medical information

to an "administrator" or to a "billing agent," the CMIA expressly prohibits the administrator or billing agent from making any "further disclosure" of the patient's confidential medical information. Civ. Code §56.10(c)(3).

The Court of Appeal concluded that the federal Fair Credit Reporting Act, 15 U.S.C. §§1681 et. seq. ("FCRA"), preempts the CMIA; the Court of Appeal then interpreted §1681s-2 of the FCRA, which requires that information furnished to a credit reporting agency be ***accurate***, to mean that a patient cannot sue under the CMIA for disclosure of confidential medical information to a credit reporting agency, even if the patient never consented to such disclosure in the first instance.

Appellants timely petitioned for rehearing in the Court of Appeal, which was denied on February 19, 2010.

On April 14, 2010, the Supreme Court granted appellants' petition for review.

Issue Presented

Does the Federal Credit Reporting Act (15 U.S.C. § 1681 et seq.) preempt causes of action for improper disclosure of medical information to credit reporting agencies under California's Confidentiality of Medical Information Act (Civ. Code, section 56 et seq.)?

The above question[1] of law is an issue of first impression. No other issues were requested for review by appellants or respondent, and the Supreme Court has not ordered any other issues on review.

Argument

A. The CMIA is not preempted by 15 U.S.C. §1681s-2.

The general rule is that the federal Fair Credit Reporting Act, 15 U.S.C. §1681 et. seq., "FCRA," does ***not*** preempt state law. 15 U.S.C. §1681t(a) provides:

> "1681t(a) In general
>
> Except as provided in subsections (b) and (c) of this section, this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

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1. The above language was taken from the court's website which, apparently, slightly reworded the language from appellants' Petition For Review.

In support of its conclusion that the federal FCRA preempts California's CMIA, the Court of Appeal relied on 15 U.S.C. §1681t(b)(1)(F), which provides as follows:

> "1681t(b) General exceptions
>
> No requirement or prohibition may be imposed under the laws of any State -
>
> (1) with respect to any subject matter regulated under -
>
> * * *
>
> (F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies . . ."

So, 15 U.S.C. §1681t(b)(1)(F) preempts any "requirement" or "prohibition" under any state law with respect to "subject matter regulated under . . . 15 U.S.C. §1681s-2." In turn, 15 U.S.C. §1681s-2 places statutory responsibility on furnishers of information to consumer credit reporting agencies that such information be ***accurate***. The subsections of 15 U.S.C. §1681s-2 provide as follows:

- 15 U.S.C. §1681s-2(**a**) places responsibility on furnishers of information to provide ***"accurate information."***

- 15 U.S.C. §1681s-2(**b**) places responsibility on furnishers of information when a consumer disputes the ***accuracy*** of the information.

- 15 U.S.C. §1681s-2(**c**) and (**d**), as written prior to the amendments in December 4, 2003, give administrative agencies and attorneys general authority to enforce the provisions in §1681s-2(a) (accuracy), §1681s-2(e) (accuracy guidelines) and §1681m(e) (identify theft); under 15 U.S.C. §1681s-2(c), private civil damage actions by consumers were and are expressly permitted for consumers who ***dispute*** the accuracy of information furnished to a consumer credit reporting agency after the furnisher has "investigated" the accuracy of the information under 15 U.S.C. §1681s-2(b).

- 15 U.S.C. §1681s-2(e), enacted December 4, 2003, is outside the period alleged in appellants' 4th Amended Complaint and is, therefore, irrelevant to the present case.

The conclusion that 15 U.S.C. §1681s-2 preempts the CMIA is flawed. First, 15 U.S.C. §1681s-2 is not relevant to the CMIA. Nothing in the CMIA regulates whether a disclosure of confidential medical

information is accurate or inaccurate. There is nothing in the CMIA which affords relief for ***inaccurate*** disclosure of confidential medical information, or any relief for ***disputing*** the ***accuracy*** of such disclosure. Nothing in the CMIA is "preempted" by 15 U.S.C. §1681s-2 because there is nothing to preempt. Liability under the CMIA depends upon ***unauthorized*** disclosure ***in the first instance***, regardless of the accuracy of such disclosure.

Second, the reasoning that 15 U.S.C. §1681t(b)(1)(F) ***authorizes*** disclosure of confidential medical information, as long as the disclosure is ***accurate***, and preempts state law which does not authorize such disclosure, would have the direct effect of nullifying the language in 15 U.S.C. §1681t(b)(1)(E) which gives deference to any state law in effect on September 30, 1996. 15 U.S.C. §1681t(b)(1)(E), through 15 U.S.C. §1681c, expressly regulates "information contained in consumer reports." 15 U.S.C. §1681t(b)(1)(E) provides as follows:

> "1681t(b) General exceptions
>
> No requirement or prohibition may be imposed under the laws of any State -
>
> (1) with respect to any subject matter regulated under -

* * *

(E) section 1681c of this title, relating to information contained in consumer reports, ***except that this subparagraph shall not apply to any State law in effect on September 30, 1996***;"

(emphasis added).

California Civil Code §1785.13, in existence on September 30, 1996, prohibits certain disclosures also prohibited in 15 U.S.C. §1681c, but also goes further in prohibiting additional information from being disclosed. Most importantly, and quite salient to the present case, is that Civil Code §1785.13(f), like the CMIA, ***prohibits disclosure of confidential medical information***, regardless of whether or not the information is accurate:

"1785.13(f) Consumer credit reporting agencies shall not include medical information in their files on consumers or furnish medical information for employment or credit purposes in a consumer credit report without the consent of the consumer."

The CMIA, Civil Code §56 et. seq., was also in effect on September 30, 1996; both the CMIA and Civil Code §1785.13(f) prohibit disclosure of

a person's medical information, and both, under the exception for state laws in effect on September 30, 1996, are not preempted under the FCRA.

In Sanai v. Saltz (2009)170 Cal.App.4th 746, the Court of Appeal in Sanai concluded:

> "Exempting specific state statutes from preemption is very unusual in federal statutes. To suppose Congress would do so for little or no purpose -- as would be the case if the private cause of action under California law were preempted -- is simply not plausible." Sanai v. Saltz, supra,170 Cal.App.4th 746, 779.

Appellants alleged, in their 3rd Cause of Action, 4th Amended Complaint, that defendant, Mortensen, commencing about June 12, 2001 and continuing through August 2003, disclosed confidential medical information about petitioners' minors, KI and KA, ***in "consumer credit reports" under a written agreement with national credit reporting agencies.*** (C.T. 623-625, 4th Am. Complaint, ¶70). Appellants alleged, in their 4th Cause of Action, 4th Amended Complaint, that, also during the foregoing dates, Mortensen disclosed confidential medical information

about petitioner, R. Brown, ***in "consumer credit reports" under a written agreement with national credit reporting agencies.*** (C.T. 630-632, 4th Am. Complaint, ¶99). Appellants alleged that such disclosures were never consented and not authorized. Ibid at C.T. 625 (lines 8-9) and 632 (lines 7-9). Appellants have a cause of action under the CMIA, whether or not Mortensen accurately disclosed such information.

15 U.S.C. §1681t(b)(1)(E), by its express terms, does not preempt state laws enacted prior to or on September 30, 1996. An interpretation that 15 U.S.C. §1681t(b)(1)(**F**) and 15 U.S.C. §1681s-2 actually authorize all of the disclosures prohibited under the CMIA, by reason of preemption of state confidentiality laws, would suddenly expose ***tens of millions of records of information, which are presently protected and privileged from disclosure under California's confidentiality laws for patients, consumers, clients, borrowers, customers and others, to disclosure in such persons' credit reports. Nothing in 15 U.S.C. §1681s-2 makes such a sweeping grant of authority of disclosure in the first instance.***

Ignoring the language in 15 U.S.C. §1681t(b)(1)(E) excepting state laws in effect on September 30, 1996, also impacts other provisions in California Civil Code §1785.13 which prohibit disclosure of specific types of information in consumer credit reports, including bankruptcies

(§1785.13(a)(1)), suits and judgment (§1785.13(a)(2)), unlawful detainer actions (§1785.13(a)(3)), paid tax liens (§1785.13(a)(4)), collection accounts (§1785.13(a)(5)), certain criminal records (§1785.13(a)(6)), and a California catch-all, i.e. any adverse information antedating the consumer report by more than 7 years (§1785.13(a)(7)). The foregoing provisions would all be preempted under the Court of Appeal's ruling in the present case, in addition to the above mentioned preemption of Civil Code §1785.13(f) and the CMIA, which expressly prohibit disclosure of confidential medical information.

Ignoring the language in 15 U.S.C. §1681t(b)(1)(E) giving effect to state laws in effect on September 30, 1996, also impact another provision in California Civil Code §1785.13 which ***mandates*** a certain disclosure. Under California Civil Code §1785.13(e), a "furnisher" of credit information about a consumer's open-end account is ***required*** to disclose whether the consumer has closed the account. The foregoing subdivision in §1785.13 would be nullified under the Court of Appeal's ruling in the present case.

If 15 U.S.C. §1681t(b)(1)(**F**) is read to mean that all disclosures are permitted, as long as they are ***accurate***, then there is no point to the language in 15 U.S.C. §1681t(b)(1)(**E**) and 15 U.S.C. §1681c which gives

effect to state laws in effect on September 30, 1996. It is simply not reasonable to interpret 15 U.S.C. §1681t(b)(1)(**F**) and 15 U.S.C. §1681s-2 to mean that anyone under contract with a credit reporting agency as a furnisher of information has authority to fully (accurately) disclose in a consumer credit report information about a consumer which is expressly prohibited from disclosure under any state law satisfying the September 30, 1996 exception under 15 U.S.C. §1681t(b)(1)(E). Such an interpretation means that bankruptcies, civil suits and judgments, paid tax liens, collection accounts, certain criminal records and, yes, even confidential medical information, all prohibited from disclosure according to the rules in California Civil Code §1785.13, would, under 15 U.S.C. §1681t(b)(1)(**F**) and 15 U.S.C. §1681s-2, all be subject to disclosure in a consumer credit report forever, as long as the disclosure is "accurate." If 15 U.S.C. §1681t(b)(1)(**F**) and 15 U.S.C. §1681s-2 are allowed to negate 15 U.S.C. §1681t(b)(1)(**E**) and 15 U.S.C. §1681c on grounds of "accuracy," the result is a huge train wreck in the statutory scheme. Hence, in Sanai, the Court of Appeal correctly concluded:

> ***"[T]he enforcement scheme of Congress under [15 U.S.C.] § 1681s-2(d) . . . concerns only violations of 15 U.S.C. § 1681s-2(a) -- the duty to***

provide accurate information -- not all possible claims against furnishers of consumer credit information." Id. at 777.

The Court of Appeal's expansive interpretation of 15 U.S.C. §1681t(b)(1)(F) in the present case effectively nullifies 15 U.S.C. §1681t(b)(1)(**E**) and 15 U.S.C. §1681c(a) and, therefore, is neither a permissible nor reasonable statutory construction.

15 U.S.C. §1681t(b)(1)(E) and 15 U.S.C. §1681c(a) preempt state laws, but only those laws enacted after September 30, 1996. The CMIA was enacted in 1981 and is, therefore, not preempted. The CMIA statutes, California Civil Code §§56.10(c)(3), 56.11, 56.13, prohibit disclosure of confidential medical information obtained from a health care provider, regardless of whether the disclosure is accurate. 15 U.S.C. §1681s-2 is just not relevant to the CMIA.

B. The CMIA affords greater protection than federal law for medical privacy and is, therefore, not preempted under federal law.

The Ninth Circuit has held that ***the FCRA does not preempt state laws which give the consumer "more protection" than the FCRA***. Credit Data of Arizona Inc. v. State of Arizona, 602 F.2nd 195, 198 (9th. Cir.

1979).

In Credit Data, the Ninth Circuit held that an Arizona statute was not preempted by the FCRA; the FCRA permitted credit reporting firms to charge disclosure fees after 30 days after a denial of credit; the Arizona statute expressly prohibited such fees. The Ninth Circuit said:

> "We agree with the district court. The philosophy behind both statutes is the protection of the consumer and it is clear that the Federal Act permits Arizona to go further than the Federal Act does to protect consumers so long as the Arizona Act is not inconsistent with the Federal Act. Moreover, the Federal Act does not require the imposition of charges, but merely provides that credit reporting agencies may impose a reasonable charge under the circumstances specified. This does not establish preemption under the standards laid down by Mr. Justice Marshall in *Jones v. Rath Packing Co., supra. [Jones v. Rath Packing Co., (1977) 430 U.S. 519 [97 S.Ct. 1305, 51 L.Ed.2d 604].* In the first place, compliance with the

> Arizona Act prohibiting charges would not trigger a federal enforcement action on the ground that the Arizona Act is inconsistent with the Federal Act. Moreover, the Arizona Act does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the Federal Act since it merely adds an additional protection to the consumer for whose protection both statutes were enacted." Credit Data of Arizona Inc. v. State of Arizona, supra, 602 F.2nd 195, 198 (9th. Cir. 1979); accord Davenport v. Farmers Ins. Group, 378 F.3d 839 (8th Cir. 2004).

A copy of the Ninth Circuit's opinion in Credit Data and a copy of the Eighth Circuit opinion in Davenport are filed herewith in Appendix of Federal Authorities.

California state court authority follows Credit Data. Cisneros v. U.D. Registry, Inc. (1995) 39 Cal.App.4th 548 , 46 Cal.Rptr.2d 233 [2nd Dist., Div. 4]:

"In enacting FCRA, Congress did not attempt to reserve to itself all efforts to regulate the consumer reporting business. (See 15 U.S.C. § 1681t ["This subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency."]; Credit Data of Arizona, Inc. v. State of Ariz. (9th Cir. 1979) 602 F.2d 195, 197.) California is not foreclosed from enacting greater protections for consumers injured by the activities of reporting agencies. . . .

"Under the supremacy clause, state law is preempted only if it "is in direct conflict with federal law such that compliance with both is impossible, or the state law is an obstacle to the accomplishment of the full purposes and

objectives of Congress ...." (Gomon v. TRW, Inc. (1994) 28 Cal.App.4th 1161 , 1173 [34 Cal.Rptr.2d 256]; accord, Doyle v. Board of Supervisors (1988) 197 Cal.App.3d 1358 , 1363 [243 Cal.Rptr. 572].) The remedies afforded to injured consumers by CCRAA are not inconsistent with, but are in addition to, remedies provided by FCRA. * * *

We find further support for this view in the FTC's official commentary on the FCRA's preemption provision. According to the FTC, "State law is pre-empted by the FCRA only when compliance with inconsistent State law would result in violation of the FCRA." (16 C.F.R., pt. 600, appen. § 622, ¶ 1 (1995) italics added). This interpretation "is based on an unequivocal statement in the principal report in the FCRA's legislative history by the Senate Committee on Banking and Currency that, under the pre-emption provision, 'no State law would be preempted

unless compliance would involve a violation of Federal law.' S. Rep., 91-517, 91st Cong., 1st Sess. 8 (November 5, 1969)." (FTC Commentary, 55 Fed.Reg. 18804, 18808, supra.)." Cisneros v. U.D. Registry, Inc., supra, 39 Cal.App.4th 548, 577-578.

California's Confidentiality of Medical Information Act ("CMIA"), Civil Code §56 et. seq., gives the consumer more protection than the FCRA. Under the CMIA, confidential medical information cannot be reported to credit reporting agencies. At the time of filing of appellants' complaint on January 31,2003 there was no such protection afforded under the FCRA or any other federal law. Indeed, the FCRA did not address the issue of disclosures concerning confidential medical information. There is no inconsistency between the CMIA and the FCRA because the FCRA simply did not address the issue of the confidentiality of medical information in consumer credit reports.

The Court of Appeal's Opinion in the present case is in direct conflict with Cisneros.

In Sanai, the Court of Appeal, consistent with Cisneros, pointed out that federal preemption exists ***only to the extent of inconsistency with the federal law.*** Since the subject federal statutes are intended for consumer protection, states are free to enact laws which provide ***greater*** protection than the federal law. In reversing the trial court in Sanai, the Court of Appeal referenced the error in the trial court's ruling that the state damage remedy, which afforded greater protection than the federal law, was preempted by federal law:

> "To be sure, as the trial court observed, 15 U.S.C. § 1681t(a) preempts not only state law "requirements and prohibitions," but also "laws [that] are inconsistent with any provision of this subchapter." (See also Liceaga v. Debt Recovery Solutions, LLC, supra , 169 Cal.App.4th at p. ___ ["Subdivision (a) of section 1681t of the Reform Act unequivocally provides that any state law that is not consistent with the FCRA is preempted. Since the FCRA has certain preconditions to proceeding with an action against a furnisher of credit information, and the California statute does

not, a [170 Cal.App.4th 778] clear inconsistency would exist."].) ***But the trial court failed to complete the quotation from 15 U.S.C. § 1681t(a), which continues, "and then only to the extent of the inconsistency."*** This express statutory command to limit the scope of preemption, combined with the general presumption against preemption repeatedly articulated by the United States Supreme Court, particularly "where federal law is said to bar state action in fields of traditional state regulation" (New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co. (1995) 514 U.S. 645, 655 [115 S.Ct. 1671, 131 L.Ed.2d 695]), belies the trial court's conclusion recognizing a private cause of action under section 1785.25 would be inconsistent with the FCRA's purported prohibition of a private right of action. Indeed, in Medtronic, supra , ___ U.S. at p. ___ [128 S.Ct. at p. 1011] the Supreme Court recognized that

federal law preempting state statutory or common law requirements different from, or in addition to, the requirements imposed by federal law "does not prevent a State from providing a damages remedy for claims premised on a violation of [federal] regulations; the state duties in such a case 'parallel,' rather than add to, federal requirements." Similarly, because ***Congress itself has recognized that the requirements of section 1785.25, subdivision (a), are fully consistent with the obligations imposed by federal law***, nothing in the FCRA prevents California from providing a damages remedy for Mr. Sanai's claims based on a violation of that statute. (See Gorman v. Wolpoff & Abramson LLP, supra, 552 F.3d at p. 1032 ["[E]xempting specific state statutes from preemption is very unusual in federal statutes. To suppose Congress would do so for little or no purpose -- as would be the case if the private cause of action under California law were preempted --

is simply not plausible."].) fn. 22 [170 Cal.App.4th 779]." Sanai v. Saltz, supra, 170 Cal.App.4th 746, 777-778.

The Opinion of the Court of Appeal in the present case is in direct conflict with the above law as stated in Sanai.

C. Although appellants' claims precede the FACTA, Congress did not preempt state laws such as the CMIA, which afford greater protection for medical privacy, even after FACTA became law.

Appellants alleged that respondent used and disclosed appellant's confidential medical information during the period from June 12, 2001 through August 2003 (3rd Cause of Action, C.T. 623) and during the period from June 12, 2001 through June 2003 (4th Cause of Action, C.T. 630).

On December 4, 2003, Congress passed, and the President signed, a major overhaul of the FCRA, i.e. the **Fair and Accurate Credit Transactions Act of 2003** ("FACTA"), Public Law 108-159, Dec. 4, 2003, amending various provisions in 15 U.S.C. §1681 et seq. A copy of FACTA was filed in the Court of Appeal in the Appellants' Appendix of Federal Authorities.

In the FACTA, Congress added 15 U.S.C. §1681b(g), i.e. "Protection of Medical Information." Medical information cannot be included in a consumer credit report "unless the consumer provides specific written consent for the furnishing of the report that describes in clear and conspicuous language the use for which the information will be furnished," 15 U.S.C. §1681b(g)(1)(B)(ii), or, if no such consent is provided, the information is "coded" so as not to identify the provider or the nature of the services. 15 U.S.C. §1681b(g)(1)C).

Both of the periods of time alleged by appellants in their pleadings ***precede*** the enactment of FACTA, including 15 U.S.C. §1681b(g) and regulations thereto. Nevertheless, it is noteworthy that 15 U.S.C. §1681b(g) has no language preempting any state law affording greater protection for medical privacy than FACTA. Indeed, Congress actually did the opposite. 15 U.S.C. §1681b(g)(6) provides:

> "(6) Coordination with other laws: No provision of this subsection shall be construed as altering, affecting, or superseding the applicability of any other provision of Federal law relating to medical confidentiality."

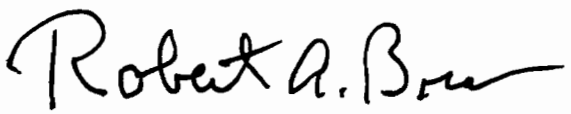
California's CMIA was in effect on September 30, 1996. It affords greater protection for medical privacy, since the patient's authorization would be required for disclosures of medical information to credit reporting agencies, even if the information is "coded."

Since 15 U.S.C. §1681t(b)(1)(E) (expressly ***not*** preempting state laws in effect on said date) is not altered, affected or superceded under FACTA, the CMIA remains good law, **not** preempted under the FACTA as well.

Conclusion

The decision of the Court of Appeal should be reversed.

Respectfully submitted,



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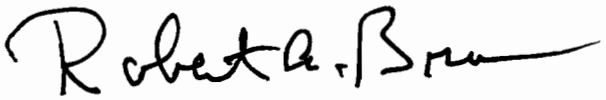
Word Count

I certify that the word count in the above Petition is 3914 words, 14 point characters, using Word Perfect, v. 12, word count, not including the cover, tables and Proof of Service



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Proof of Service

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On May 13, 2010, I deposited in the U.S. Mail in sealed envelope, postage paid, APPELLANTS' OPENING BRIEF addressed as follows:

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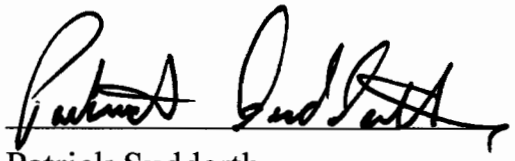
I declare under penalty of perjury under the laws of the state of California that the above is true and correct. Executed May 13, 2010 at Los Angeles, California.



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