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Attorneys for Plaintiff and Proposed Class

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JAYSON HUNTSMAN, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

SOUTHWEST AIRLINES CO.,

Defendant.

Case No. 3:17-cv-03972-JD

DECLARATION OF PETER ROMER-FRIEDMAN IN SUPPORT OF CLASS COUNSEL’S UNOPPOSED MOTION FOR CONDITIONAL CERTIFICATION OF SETTLEMENT CLASS AND PRELIMINARY APPROVAL OF SETTLEMENT

I, Peter Romer-Friedman, declare under penalty of perjury of the laws of the United States:

1. I am competent to testify and have personal knowledge about what is written in this declaration.

2. I, along with co-counsel, am Class Counsel in the above-captioned matter.

1 Hubbell and have been recognized by Super Lawyers in the field of “Employment Law –
2 Employee.” The Legal 500 recognized Outten & Golden as belonging to the first tier of law firms
3 in the category of “Labor and Employment Disputes (Including Collective Actions): Plaintiff.”

4 7. I regularly represent employees in cases challenging discrimination based on military
5 service or status, sex, sexual orientation, race, and disability.

6 8. Since 2009, I have served as lead or co-lead counsel in actions that secured more
7 than \$1.4 billion in monetary relief and important programmatic changes to governmental and
8 corporate institutions, including one of the largest reported settlements in the history of the Equal
9 Credit Opportunity Act, two of the largest reported settlements in the history of the Fair Housing
10 Act, and several of the largest reported settlements in the history of the Uniformed Services
11 Employment & Reemployment Rights Act. Some of my representative matters include:

- 12 • *Keepseagle v. U.S. Dept. of Agriculture*, No. 99 Civ. 03119 (D.D.C.) – Served as co-lead
13 counsel in a class action that won a \$760 million settlement for Native Southwest farmers
14 and ranchers who were denied farm loans by U.S. Department of Agriculture from 1981
15 to 1999, as well as far-reaching programmatic relief.
- 16 • *National Fair Housing Alliance v. Wells Fargo & Co.*, HUD No. 09-12-0708-8 – Served
17 as lead counsel and obtained a \$42 million settlement with Wells Fargo in a Fair Housing
18 Act action brought by 13 fair housing groups who challenged the failure to properly
19 maintain and market foreclosed properties in predominantly black and Latino
20 communities nationally.
- 21 • *Tuten v. United Air Lines, Inc.*, No. 12 Civ. 01561 (D. Colo.) – Served as Class Counsel
22 and obtained a \$6.15 million settlement on behalf of 1,200 United pilots in a USERRA
23 action that challenged United’s failure to make the proper pension contributions during
24 periods of military leave from 2001 to 2012.
- 25 • *Allman v. American Airlines, Inc. Pilot Retirement Program Variable Income Plan*,
26 No. 14 Civ. 10138 (D. Mass.) – Served as Class Counsel and obtained more than \$6
27 million settlement on behalf of over 1,200 American Airlines pilots in a USERRA and
28 ERISA action that challenged the airline’s failure to make the proper pension

1 contributions during periods of military leave since 1997. A true and correct copy of
2 the Final Approval Order in this action is attached hereto as **Exhibit 1**.

- 3 • *Martin v. Washington State*, No. 14-2-00016-7 (Wash. Super. Ct.) – Served as Class
4 Counsel and obtained a settlement worth approximately \$15 million in wages and
5 pension benefits for 878 Washington State Patrol Troopers who were denied veterans’
6 preference in hiring and promotions over decades. A true and correct copy of the Final
7 Approval Order in this action is attached hereto as **Exhibit 2**.
- 8 • *Cote v. Wal-Mart Stores, Inc.*, No. 15 Civ. 12945 (D. Mass.) – Served as Class Counsel
9 and obtained a \$7.5 million settlement on behalf of a class of current and former Wal-
10 Mart employees who challenged Wal-Mart’s prior policy of not providing spousal
11 health insurance benefits to employees with same-sex spouses as a Title VII violation.
- 12 • *Greater New Orleans Fair Housing Action Center v. U.S. Department of Housing and*
13 *Urban Development*, No. 08 Civ. 01938 (D.D.C.) – Served as co-lead counsel and
14 obtained \$469 million of voluntary reforms in response to the lawsuit and negotiated a
15 \$62 million settlement in a Fair Housing Act class action that challenged racial
16 discrimination in the nation’s largest housing rebuilding program in post-Katrina New
17 Orleans.
- 18 • *Hill v. U.S. Postal Service*, No. 4H310009104 (EEOC Federal Sector) – Served as Class
19 Counsel and obtained an \$11 million settlement in a nationwide class action that
20 challenged the U.S. Postal Service’s pre-offer medical inquiries that violated the
21 Rehabilitation Act.
- 22 • *Levs v. CNN and Turner Broadcasting*, EEOC Charge No. 410-2014-00427 – Obtained
23 settlement in a Title VII action that challenged the amount of paternity leave biological
24 fathers were given by CNN and Turner Broadcasting as a violation of Title VII’s
25 prohibition on sex discrimination.
- 26 • *Podliska v. House Benghazi Committee and Rep. Trey Gowdy*, No. 15 Civ. 2037
27 (D.D.C.) – Obtained a settlement on behalf of a former investigator of the House
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1 Benghazi Committee who alleged that he was terminated in violation of USERRA due
2 to his military service.

- 3 • *Savage v. Federal Express*, 856 F.3d 440 (6th Cir. 2017) – Briefed and argued a
4 successful appeal in one of the first appellate decisions on the formula employers
5 should use to determine the pension or retirement benefits of reservists who take
6 military leave, and later obtained a settlement.

7 9. Prior to joining Outten & Golden in September 2016, I served as the Deputy Director
8 of Litigation of the Washington Lawyers' Committee for Civil Rights and Urban Affairs. As the
9 Deputy Director of Litigation, I litigated and supervised class and individual impact cases in a range
10 of areas, including employment discrimination, fair housing, and public accommodations.

11 10. I have been selected as a Rising Star in the District of Columbia by Super Lawyers
12 in 2014, 2015, 2016, 2017, and 2018. On two occasions, I was a finalist for Public Justice's Trial
13 Lawyer of the Year Award: in 2011 for my work on *Keepseagle v. Vilsack*, and in 2018 for my work
14 in *Cote v. Walmart*. In 2018, I was recognized as one of the 500 Leading Plaintiff Employment
15 Lawyers by Lawdragon.

16 11. From 2009 to 2015, I served as an associate in Cohen Milstein Sellers & Toll PLLC's
17 Civil Rights and Employment group, and collaborated regularly with the firm's Employee Benefits
18 Group on veterans' rights litigation.

19 12. From 2007 to 2009, I served as labor counsel to the Senate Committee on Health
20 Education Labor and Pensions ("HELP") and its Chairman, Senator Edward M. Kennedy. Among
21 my responsibilities as labor counsel, I served as the primary advisor to Chairman Kennedy and other
22 members of the HELP Committee on USERRA issues, and drafted several USERRA reform
23 proposals that were enacted by Congress and signed by President George W. Bush. I was also
24 responsible for the HELP Committee's work on the Railway Labor Act, the federal labor law that
25 applies to aviation and railway workers, and drafted legislation that Congress enacted to protect the
26 seniority rights of aviation workers when mergers occur. Since leaving the HELP Committee in
27 2009, I have regularly advised Senate and House Committees and members of Congress on labor,
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1 employment, civil rights, and veterans issues, and I am an active member of the National
2 Employment Lawyers Association's federal legislative advocacy in Washington, DC.

3 13. From 2006 to 2007, I served as a law clerk to Judge Stephen Reinhardt of the U.S.
4 Court of Appeals for the Ninth Circuit in Los Angeles. During law school, I was an extern to Judge
5 Shira Scheindlin of the U.S. District Court for the Southern District of New York.

6 14. In 2006, I graduated from Columbia Law School, where I was a James Kent Scholar
7 and a Harlan Fiske Stone Scholar. During law school, I served as a managing editor of the Columbia
8 Journal of Law & Social Problems.

9 15. Prior to law school, I was a legislative representative and union organizer for the
10 United Steelworkers and co-founded the Worker Rights Consortium, a non-profit organization that
11 monitors labor rights in apparel factories worldwide.

12 16. In 2001, I earned my B.A. in economics from the University of Michigan at Ann
13 Arbor, and was selected as a Truman Scholar by the Harry S. Truman Scholarship Foundation.

14 17. I have authored the following publications and articles focused on workers' rights:
15 *Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce State Wage and Hour*
16 *Laws*, 39 Columbia Journal of Law & Social Problems 495 (2006); *Modeling Wage Increases in the*
17 *Collegiate Apparel Industry*, Michigan Journal of Economics, Vol. 16, Issue 1 (2000) (co-authored
18 with Glenn Wright and Adam Levin).

19 **RACHEL WILLIAMS DEMPSEY'S BACKGROUND AND EXPERIENCE**

20 18. Ms. Dempsey is an associate at Outten & Golden in the Class Action Practice
21 Group. She graduated from Yale Law School in 2015 and clerked for Judge Richard Clifton of
22 the U.S. Court of Appeals for the Ninth Circuit in Honolulu, Hawaii, and for Judge John Kronstadt
23 of the U.S. District Court, Central District of California in Los Angeles. In 2017, she joined
24 Outten & Golden's San Francisco office, where she litigates employment matters on behalf of
25 plaintiffs. In addition to this case, Ms. Dempsey has worked on other employment and civil rights
26 class action cases, including *Perez v. Wells Fargo Bank, N.A.*, No. 17 Civ. 454 (N.D. Cal.); *del*
27 *Toro Lopez v. Uber Technologies, Inc.*, No. 17 Civ. 06255 (N.D. Cal.); *Gaston v. Valley National*
28 *Bancorp*, No. 17 Civ. 01855 (E.D.N.Y); *Menocal v. The GEO Group, Inc.*, No. 14 Civ. 02287 (D.

1 Colo); and *Scott v. Chipotle Mexican Grill, Inc.*, No. 12 Civ. 08333 (S.D.N.Y).

2 **FACTUAL BACKGROUND ON THE CLASS MEMBERS' CLAIMS**

3 19. Each month, Southwest Airlines Co. ("Southwest" or "SWA") pilots bid on their
4 flight schedules, which vary month-to-month, and pilots are compensated a base rate of pay for
5 every Trip For Pay ("TFP") that they fly a SWA plane. Each TFP roughly corresponds to a certain
6 number of miles flown.

7 20. When a pilot does not fly TFPs that he or she was scheduled to fly, the missed TFPs
8 are called "dropped trips."

9 21. Under the pilots' collective bargaining agreement with Southwest ("CBA"), pilots
10 accrue paid sick leave at a rate of 1 TFP of sick leave for every 10 TFP flown, and pilots may accrue
11 a sick leave balance of up to 1,600 TFP.

12 22. The CBA provides that when pilots retire, they can trade accrued sick leave for
13 continued coverage under SWA's health plan at a rate of 1 month of coverage per 10 TFP until they
14 run out of accrued TFP or they turn 65. When non-retiring pilots terminate employment with SWA
15 voluntarily or involuntarily, the CBA provides that their accrued sick leave is not paid out.

16 23. Since 2001, SWA has provided accrued sick leave to pilots who take bereavement
17 leave, jury duty leave, and union leave, but has not provided accrued sick leave to pilots who take
18 short-term military leave ("STML"). SWA denies that bereavement leave, jury duty leave and other
19 forms of leave for which sick leave accrues are comparable to STML under USERRA.

20 24. Until December 31, 2016, SWA provided matching contributions to pilots' 401(k)
21 retirement accounts, up to a maximum of 9.3% of compensation from 2010 to 2016, 7.8% in 2009,
22 and 7.3% from 1999 to 2008.

23 25. Each pilot could receive up to \$25,000 of retirement contributions from SWA
24 annually.

25 26. Most pilots my co-counsel and I spoke with in investigating this matter were unaware
26 they could make USERRA make-up contributions for STML. During our investigation, we found
27 that Jayson Huntsman and other pilots were rebuffed in their efforts to obtain information on deemed
28 earnings and pilots were told SWA had no process or procedure to give them relevant information.

1 27. SWA has maintained throughout the litigation that, under the CBA, the 401(k) Plan
2 Administrator (*i.e.*, the pilot's union), not SWA, bore the responsibility for calculating deemed
3 earnings for periods of STML, that the Plan Administrator was responsible for providing pilots with
4 information as to USERRA make-up contributions, and that SWA's Human Resources department
5 answered pilots' questions about their 401(k) contributions.

6 28. On January 1, 2014, SWA implemented a system for calculating USERRA deemed
7 compensation for periods of STML that was not previously provided to SWA pilots.

8 29. Since January 1, 2017, SWA has not made matching contributions to pilots'
9 retirement accounts, and instead makes an automatic, non-elective contribution to all eligible pilots
10 in the amount of 14.2% of the pilots' compensation (or deemed compensation).

11 **THE PROFESSIONAL SERVICES PROVIDED BY CLASS COUNSEL IN THIS CASE**

12 30. In 2012, members of Plaintiff's counsel began investigating the concerns of SWA
13 pilots that since 2001 pilots who took STML from SWA were denied accrued sick leave and were
14 denied matching retirement contributions during those periods of STML in violation of USERRA.

15 31. From 2012 until July 2017, when the action was filed, Plaintiff's counsel investigated
16 Southwest's sick leave and retirement policies and practices, including reviewing plan documents,
17 speaking with pilots and pilot union officials, and interviewing many pilots who had been impacted
18 by SWA's alleged practices of denying accrued sick leave and denying matching retirement
19 contributions for periods of STML in violation of USERRA.

20 32. From October 2017 to mid-June 2018, the parties and their counsel engaged in
21 informal discovery on liability and damages, and settlement discussions. During this time period,
22 Class Counsel and SWA engaged in the following activities:

- 23 A. In the fall of 2017, Plaintiff's counsel requested that Southwest produce numerous types
24 of data about each putative Class Member and a range of documents relevant to assessing
25 liability and damages. Plaintiff's counsel worked with our client to identify the
26 information requested, the format in which to receive the information, and how to
27 manipulate the data to ascertain the potential losses of the Class Members.

28

- 1 B. From January to June 2018, through five separate productions of documents, Southwest
2 produced voluminous personnel records for nearly 800 pilots who took STML between
3 2008 and 2013, and substantial documents on SWA's policies on leave, retirement,
4 wages, and scheduling. SWA produced additional data on other pilots who were
5 reservists in 2006 and 2007, but that data did not identify the pilots' periods of STML in
6 which they dropped trips—the critical information for evaluating pilots' claims.
- 7 C. From the fall of 2017 to June 2018, the Parties' counsel routinely conferred over the data,
8 the need to produce additional data to estimate potential losses, and various ways in
9 which they could estimate potential losses. A number of times, the conferences led to
10 further document and data productions from SWA.
- 11 D. From January to June 2018, Plaintiff's counsel worked with a damages analyst to
12 evaluate Southwest's documents, policies, and data, and Plaintiff's counsel and their
13 damages analyst developed models to calculate potential losses to the Class. Prior to the
14 June 26 and 27, 2018 mediation, Plaintiff's counsel described their models for
15 calculating potential losses to Southwest's counsel so that the parties could understand
16 each other's positions.
- 17 E. Concurrently with the document exchange and damages analysis, Plaintiff's counsel
18 interviewed a number of SWA pilots to develop evidence needed to establish liability
19 and damages, should the matter not settle and to bolster their arguments at mediation.
- 20 F. To prepare for mediation and litigation, Plaintiff's counsel conducted thorough research
21 to advance novel theories of liability for their USERRA claims (especially the USERRA
22 § 4318 claim, where there are no reported cases on the duty to give employees
23 information on deemed earnings), and to argue that the claims in this action, which date
24 back to 2001, are timely, *inter alia*.
- 25 G. Before the mediation, Plaintiff's counsel prepared and shared with SWA a 27-page,
26 single-spaced mediation statement to describe their factual investigation, legal theories,
27 class certification arguments, methodology and calculations of potential losses, and
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1 settlement proposal. They also provided SWA a 10-page single-spaced memo on the
2 timeliness of the Class' USERRA claims.

3 33. On June 26 and 27, 2018, the parties engaged in a two-day mediation in Dallas, Texas
4 conducted by the Honorable Deborah Hankinson, who served as a Texas Supreme Court justice and
5 a Justice on the Fifth District Court of Appeals of Texas. Judge Hankinson is an accomplished
6 mediator. She sits on the Board of the American Arbitration Association (AAA), has trained new
7 arbitrators, and speaks on key arbitration-related topics. She was selected Arbitration Lawyer of the
8 Year for Dallas in the 2019 edition of *The Best Lawyers in America*, and she has received many
9 other honors for her work as a mediator and an appellate lawyer.

10 34. The mediation resulted in an agreement in principle that the Parties used to draft the
11 Settlement Agreement, which was executed on September 12, 2018. A true and correct copy of the
12 Settlement Agreement and exhibits to the Settlement Agreement is attached hereto as **Exhibit 3**.

13 **INFORMATION ON THE CLASS AND THE SETTLEMENT**

14 35. SWA, through its personnel records, has identified 1,478 pilots who meet the Class
15 definition because they took STML from 2008 to 2018.

16 36. Southwest has represented to Plaintiff's counsel that it lacks personnel records on
17 which pilots took STML from 2001 to 2007. However, it does have records on which pilots
18 employed by Southwest from 2001 to 2007 had military status at some point during their
19 employment. There are approximately 500 pilots from 2001 to 2007 who had military status at
20 some point during their employment but were not identified as Class Members based on the data
21 from 2008 to 2018. Accordingly, the only feasible way to identify which pilots took STML from
22 2001 to 2007 is to send notice to all identified Class Members and pilots employed by Southwest
23 between 2001 and 2007 who had military status at some point during their employment, and have
24 them provide information about whether they took STML. Under the Settlement Agreement, Class
25 Members who have not been identified by SWA will also have an opportunity to demonstrate their
26 membership in the Class and participate in the Settlement by filing a Claim Form with the Settlement
27 Administrator.

28

1 37. Class Members who are current employees will recover under the Settlement
2 approximately 100% of the accrued sick leave that Plaintiff alleges they should have received from
3 2008 to the preliminary approval date. The additional amount of accrued sick leave that will be
4 added to their sick leave balances is 0.71 TFP of accrued sick leave for every scheduled day a pilot
5 dropped trips. The 0.71 TFP per day was calculated by multiplying 7.1 TFP per day (the average
6 number of TFP per day pilots earn when they fly) by 10 TFP (the accrued sick leave TFP pilots earn
7 for every 1.0 TFP flown).

8 38. Class Members who are current employees will receive an additional 8.5 TFP of sick
9 leave for every year that they took STML from 2001 to 2007, when SWA lacks records. 8.5 TFP is
10 77% of the average annual amount of TFP of sick leave Class Members will receive from 2008 to
11 2013. This figure was discounted by 23% to account for the defenses Southwest has for claims
12 during this time period, including laches and statute of limitations defenses. Class Members can
13 receive sick leave credit for 2001 to 2007 by filing a simple claim form that identifies when they
14 took STML each month from 2001 to 2007.

15 39. Class Members who are former employees will get a cash payment of \$1,000 from
16 the Settlement Fund in lieu of receiving sick leave, except that Class Members who are retired from
17 Southwest and have exchanged their accrued sick leave for continued health care coverage and are
18 still receiving continued healthcare coverage will receive accrued sick leave pursuant to the same
19 formula as current employees.

20 40. Plaintiff's counsel estimate that former employees are approximately 5% of the class.
21 Based on data provided by Southwest, 75 pilots who took STML from 2008 to the present are former
22 employees and the rest are current employees. Of the former employees, 39 worked at Southwest
23 for less than a year, 55 for less than two years, and 61 for less than three years.

24 41. Plaintiff's counsel estimate the value of the recovered sick leave at around \$13
25 million based on the following calculation. From 2008 to 2013, the years for which Southwest has
26 provided the most reliable data to date, Plaintiff's counsel multiplied the number of days of work
27 Class Members dropped trips to take STML, times 7.1 TFP per day (the average number of TFP per
28 day pilots earn when they fly), times .10 TFP (the accrued sick leave TFP pilots earn for every 1.0

1 TFP flown), times the Class Members' salary. This calculation represents the amount of money
2 pilots would have been paid based on their base pay rates if they had then used the amounts of
3 accrued sick leave that Plaintiffs allege they should have received from 2008 to 2013. This
4 calculation yielded on average an annual figure of \$895,871. (This calculation is, in fact,
5 conservative, because the wage rates from 2008 to 2013 used to generate the average annual value
6 of sick leave are significantly lower than the current wage rates that would represent the present
7 value of accrued sick leave if pilots used it today.) Multiplying this \$895,871 annual figure by the
8 10.75-year period (*i.e.*, 2008 through the Preliminary Approval Date, which is likely to be at or
9 towards the end of 2018) for which Class Members can recover the actual sick leave they were
10 denied yields the aggregate figure of \$9,630,613. The average yearly figure is then discounted by
11 23% for the seven-year period from 2001 to 2007, to reflect that Class Members' recovery for that
12 period is approximately 77% of the 2008 to 2018 recovery, to yield an aggregate figure of
13 \$4,828,746, for a total estimated value of \$14.5 million.

14 42. Next, this \$14.5 million figure is discounted by 10% to reflect a conservative estimate
15 that 10% of the Class Members may have terminated their employment with Southwest and thus
16 would not have a sick leave balance that can receive additional TFP of accrued sick leave, yielding
17 a figure of \$13,050,000. (As noted above, the actual percentage of terminated Class Members is
18 likely less than 10%). The resulting \$13 million figure, thus, reflects an estimate of the amount of
19 wages pilots would be paid if they receive all of the additional accrued sick leave they can possibly
20 claim under the Settlement and if the pilots were to use the sick leave in lieu of working. While
21 some Class Members have large amounts of sick leave that they have already accrued and may not
22 be able to use all of that existing leave before they retire, Class Members who retire before the age
23 of 65 will be able to exchange their accrued sick leave for health insurance until they turn 65 years
24 old.

25 43. Southwest maintains that sick leave is worth only a fraction of Plaintiff's estimated
26 value because many pilots carry large sick leave balances and because the CBA specifies both that
27 sick leave can only be used during periods of sickness and that sick leave is not payable upon
28 termination.

1 44. After all payments are made from the Settlement Fund besides retirement-related
2 payments, Class Members will receive a majority of the matching USERRA 401(k) contributions
3 they could have received from October 2004 to December 2013, and Class Members whose pre-
4 October 2004 claims have major timeliness issues will likely get about 17% of the potential recovery
5 for those years. We estimate that Class Members' shares of the Settlement Fund will represent a
6 higher share of the 401(k) contributions for which Class Members make claims on the Settlement
7 Fund (based on SWA's personnel data from 2008 to 2013 and the Claim Forms that Class Members
8 submit regarding STML from 2001 to 2007), because it is expected that some Class Members who
9 took STML from 2001 to 2007 will not submit Claim Forms. These percentages of recovery
10 estimates are based on the \$4.693 million of potential matching retirement contributions that we
11 identified for the 2008 to 2013 time period based on Plaintiff's potential losses methodology, the
12 \$4.555 million of potential matching retirement contributions that we identified for the 2001 and
13 2007 time period based on Plaintiff's potential losses methodology, and the proposed Plan of
14 Allocation, including the two-thirds discount in the Plan of Allocation for retirement claims
15 associated with STML that was taken between January 2001 and October 2004.

16 45. I and other members of Class Counsel have worked with many class representatives
17 in the past, and believe that Jayson Huntsman was a model class representative, undertaking his role
18 seriously and with the highest degree of professionalism, asking thoughtful and helpful questions,
19 and spending significant time on the tasks involved in this complex litigation. His work on the case
20 included speaking with Class Members, communicating regularly with Class Counsel, attending
21 pre-mediation planning meetings, and actively participating in a two-day mediation. The time he
22 spent on this case caused him to miss a number of work days.

23 46. In my experience, individual Class Members in cases like this one often lack the
24 resources to secure experienced, qualified counsel to prosecute their cases individually, or the desire
25 to individually prosecute their cases given the modest value of individual claims.

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1 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United
2 States that the foregoing is true and correct.

3 DATED: September 13, 2018

By: /s/ Peter Romer-Friedman
Peter Romer-Friedman (*pro hac vice*)

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