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**IN THE SUPREME COURT OF CALIFORNIA**

DIANA NIEVES NOEL, as Personal Representative of JAMES A. NOEL,
Plaintiff and Appellant,

v.

THRIFTY PAYLESS, INC.,
Defendant and Respondent.

Review of a decision by the Court of Appeal
First Appellate District, Division Four
Case No.: A143026

Marin County Superior Court Case No. CIV 1304712

# APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT AND SUPPORTING REVERSAL

CHAVEZ & GERTLER LLP
MARK A. CHAVEZ (SBN 90858)
42 Miller Avenue
Mill Valley, CA 94925
415-381-5599

Of counsel: Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
202-588-1000

Attorneys for Amicus Curiae Public Citizen

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Washington, DC 20009
202-588-1000

Attorneys for Amicus Curiae Public Citizen

## APPLICATION OF PUBLIC CITIZEN FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT

Pursuant to California Rule of Court 8.520(f), Public Citizen requests leave to file an amicus curiae brief in support of plaintiff and appellant Diana Nieves Noel. The proposed amicus brief is submitted with this application.

## INTEREST OF AMICUS CURIAE

Founded in 1971, Public Citizen, Inc. is a non-profit consumer advocacy organization with more than 300,000 members and supporters nationwide. Public Citizen advocates before Congress, administrative agencies, and the courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen often represents its members' interests in litigation and as amicus curiae.

Public Citizen believes that class actions are an important tool for seeking justice where a defendant's wrongful conduct has harmed many people and resulted in injuries that are large in the aggregate, but not cost-effective to redress individually. In that situation, a class action offers the best means for both individual redress and deterrence, while also serving the defendant's interest in achieving a binding resolution of the claims on a broad basis, consistent with due process. The interests of both named and absent class members, defendants, the judiciary, and the public at large are best served by adherence to the principles incorporated in the California class action rules and Federal Rule of Civil Procedure 23. Public Citizen has sought to advance this view by participating in many significant class actions, including either as counsel, *e.g.*,

*Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 591, or as amicus curiae, *e.g.*, *Devlin v. Scardelletti* (2002) 536 U.S. 1; *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. 338. Public Citizen has also appeared as amicus curiae in appeals addressing "ascertainability," including *Siegel v. Delta Airlines* (11th Cir. 2018) 714 Fed.Appx. 986, and *Leyse v. Lifetime Entertainment Services* (2d Cir. 2017) 679 Fed.Appx. 44.

**CERTIFICATION**

No party or any counsel for a party in the pending appeal authored the proposed amicus curiae brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the proposed amicus curiae brief.

Dated: September 28 2018

CHAVEZ & GERTLER LLP
PUBLIC CITIZEN LITIGATION GROUP

By: /s/ Mark A. Chavez
Mark A. Chavez

Attorneys for Public Citizen, Inc.

## CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, proposed amicus Public Citizen, Inc. makes the following disclosure regarding persons or entities having a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves: There are no interested persons or entities who must be identified pursuant to Rule 8.208.

Dated: September 28, 2018

CHAVEZ & GERTLER LLP
PUBLIC CITIZEN LITIGATION GROUP

By: /s/ Mark A. Chavez
Mark A. Chavez

Attorneys for Public Citizen, Inc.

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CHAVEZ & GERTLER LLP
MARK A. CHAVEZ (SBN 90858)
42 Miller Ave.
Mill Valley, CA 94925
415-381-5599

Of counsel: Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
202-588-1000

Attorneys for Amicus Curiae Public Citizen

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## INTRODUCTION

When a business exposes many consumers to the same deceptive practice, a class action is often the only way to redress the wrongdoing and to deter future wrongful conduct. "Individual actions by each of the defrauded consumers [are] often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action ...." (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 808; see also *Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 617.) In light of this problem, "the consumer class action is an essential tool for the protection of consumers against exploitative business practices." (*State of California v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 471 [citing *Vasquez v. Superior Court*, *supra*, 4 Cal.3d at pp. 807–809].)

Class certification requires the existence of a class that can be defined by objective criteria. (1 Rubenstein et al., Newberg on Class Actions (5th ed. 2011) § 3:3.) This implicit requirement, sometimes referred to as "ascertainability," prevents certification of vague or subjective classes (*e.g.*, persons "annoyed" by the defendant's misrepresentation), as well as so-called "fail-safe" classes defined by success on the merits (*e.g.*, persons with "Consumers Legal Remedies Act claims" against the defendant). (See *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (stating that class certification requires "an ascertainable" class).) The courts of appeal have generally understood ascertainability to mean a definition based on objective criteria that allow individuals to know whether they are class members. (See, e.g., *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 19.)

In this case, Rite Aid does not argue that the proposed class—"[a]ll persons who purchased the Ready Set Pool at a Rite Aid store located in California within the four years preceding the date of the filing of this action" (*Noel v. Thrifty Payless, Inc.* (2017) 17 Cal.App.5th 1315, 1326)—fails to meet this objective standard. Nonetheless, the court of appeal, invoking "ascertainability," upheld a denial of class certification. In the court's view, ascertainability represents a due process requirement that the plaintiff establish a means of identifying individual class members sufficiently to ensure personal notice of the pendency of the action. (*Noel v. Thrifty Payless*, *supra*, 17 Cal.App.5th at pp. 1328–1329.)

This amicus brief addresses the question whether, under these circumstances, class members can be notified of their opt-out rights, consistent with due process. As explained below, the heightened ascertainability requirement adopted by the court of appeal cannot be found in the California class action rules or the decisions of this Court, is not supported by case law construing "ascertainability" under Federal Rule 23, and is not a requirement of constitutional due process, which is satisfied when notice is "reasonably calculated" to reach the defined class. (*Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 812). And if upheld, the court of appeal's approach would undermine consumer class actions without advancing any legitimate countervailing interest.

## ARGUMENT

### I. Neither California law nor due process requires a means to provide individual notice to each class member.

"Ascertainability" represents the common-sense point that a class should be *defined* with reference to objective criteria. (1 Rubenstein et al., Newberg on Class Actions, *supra*, § 3:3.) A clear and objective definition enables courts to identify who is bound by a final judgment and thus to enforce its res judicata effect with respect to the class members.

The word "ascertainable" appears nowhere in the California class action statute (Code Civ. Proc., § 382) or the class action provisions of one of the statutes at issue in this case, the Consumers Legal Remedies Act (CLRA) (Civ. Code, § 1781, subd. (b)). This Court, however, "drawing on the language of Code of Civil Procedure section 382 and federal precedent," has held that ascertainability is an implicit requirement for class certification. (*Brinker Rest. Corp. v. Superior Court*, *supra*, 53 Cal.4th at 1021.) Thus, a party seeking class certification "must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Id.* at p. 1021.)

Although this Court has not defined ascertainability with any precision, four appellate districts have cited with approval the definition given in *Estrada v. FedEx Ground Package System, Inc.*, *supra*, 154 Cal.App.4th 1: "A class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics

sufficient to allow a member of that group to identify himself of herself as having a right to recover based on the description." (*Id.* at p. 14 [Second District]; see also *Nicodemus v. Saint Francis Mem'l Hosp.* (2016) 3 Cal.App.5th 1200, 1217 [First District]; *Aguirre v. Amscan Holdings, Inc.* (2015) 234 Cal.App.4th 1290, 1299–1300 [Third District]; *Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 920 [Fourth District]; *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1533 [Second District].) The *Estrada* definition is consistent with this Court's observation in *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, that "a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery." (*Id.* at p. 333 [quoting *Emp't Dev. Dep't v. Superior Court* (1981) 30 Cal.3d 256, 266].)

The *Estrada* standard follows naturally from *Sav-on* by allowing "[a]scertainability [to be] achieved 'by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary.'" (*Bomersheim v. Los Angeles Gay & Lesbian Center* (2010) 184 Cal.App.4th 1471, 1483 [quoting *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915].) That is, under *Estrada*, ascertainability is satisfied when the class is defined in a way that facilitates the "individual showing" of "eligibility" to participate in class relief contemplated by *Sav-on.*

Below, however, the First District adopted "a more demanding standard" that was not based on a failure to define the class using criteria that objectively determine

whether any individual is a class member. Rather, based on concerns about whether those criteria permit individualized notice, the court stated that "[c]lass members are 'ascertainable' where they may be readily identified without unreasonable expense or time by reference to official records." (*Noel v. Thrifty Payless*, *supra*, 17 Cal.App.5th at p. 1327 [quoting *Sotelo v. MediaNews Group, Inc.* (2012) 207 Cal.App.4th 639, 648].) Relying on this "refinement" of the ascertainability requirement, the court held that class certification was properly denied because the plaintiff did not establish a means for providing personal notice to the class members. (*Id.* at p. 1333.)

The heightened ascertainability requirement imposed in this case cannot be found in the California class action rules or the decisions of this Court. Ascertainability does not require a plaintiff to provide a class definition that identifies individual class members in a way that permits personal notice to each one, because individual notice is not required in a class action, either by the applicable rules or as a matter of due process.

To begin, California Rule of Court 3.766 provides:

> If personal notification is unreasonably expensive or the stake of individual class members is insubstantial, or if it appears that all members of the class cannot be notified personally, the court may order *a means of notice reasonably calculated to apprise the class members of the pendency of the action*—for example, publication in a newspaper or magazine; broadcasting on television, radio, or the Internet; or posting or distribution through a trade or professional association, union, or public interest group.

(Cal. Rules of Court, rule 3.766, subd. (f), italics added.) This "liberal" notice requirement "is designed to dispense under certain circumstances with actual personal

notice." (*Aguirre v. Amscan Holdings, supra*, 234 Cal.App.4th at p. 1301 [quoting *Haro v. City of Rosemead* (2009) 174 Cal.App.4th 1067, 1076].) The CLRA further provides that a party may give notice by publication "if personal notification is unreasonably expensive or it appears that all members of the class cannot be notified personally." (Civ. Code, § 1781, subd. (b).) Thus, the California class action rules envision certification of classes without a means to provide personal notice.

In this respect, the California rules mirror Federal Rule of Civil Procedure 23, which requires only "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." (Fed. Rules Civ. Proc., rule 23(c)(2)(B).) Courts construing the federal rule, including the Ninth Circuit, acknowledge that Rule 23 does not require class members to be individually identifiable, let alone individually notified. (*Briseno v. ConAgra Foods, Inc.* (9th Cir. 2017) 844 F.3d 1121, 1129.) An ascertainability requirement of personal notice frustrates the class action rules' express contemplation of classes where individual notice is not "practicable."

The decisions of this Court confirm that individual notice is not required in a class action—and, as a result, that class certification does not require a showing that individualized notice is possible. The Court has long held that "there is no need to identify ... individual members in order to bind all members by the judgment" in a class action. (See *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 706.) As this Court held in *Archibald v. Cinerama Hotels* (1976) 15 Cal.3d 853, "the representative plaintiff in a California class action is not required to notify individually every readily ascertainable

member of his class without regard to the feasibility of such notice." (*Id.* at p. 861.) The plaintiff "need only provide meaningful notice in a form that 'should have a reasonable chance of reaching a substantial percentage of the class members.'" (*Ibid.* [quoting *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974].)

This flexible notice requirement recognizes that "class actions should be permitted to proceed, where the economic realities involved in giving 'adequate' notice, compared to the small individual losses of class members, would effectively negate [them]." (*Cartt v. Superior Court*, *supra*, 50 Cal.App.3d at p. 971.) With a clear class definition—that is, an ascertainable class—and notice reasonably calculated to reach class members, the members can "identify [themselves] as having a right to recover based on the description." (*Estrada v. FedEx Ground Package System, Inc.*, *supra*, 154 Cal.App.4th at p. 14.)

The court below, however, described "[t]he ascertainability requirement" as "a due process safeguard, ensuring that notice can be provided." (*Noel v. Thrifty Payless*, *supra*, 17 Cal.App.5th at p. 1327.) It went on to hold that, here, the plaintiff's inability to demonstrate a "means of identifying members of the putative class so that they might be notified of the pendency of the litigation" "jeopardizes the due process rights of absent class members." (*Id.* at p. 1321.) Yet, as this Court has recognized, "[t]he essentials of due process of law in class suits would appear to be afforded by fair representation in the assertion of claims of class members against the opposing parties in any lawsuit, and notice of the pending suit." (*Chance v. Superior Court of Los Angeles Cty.* (1962) 58 Cal.2d 275, 290.) As to notice, due process is satisfied when

notice is "reasonably calculated to apprise interested parties of the pendency of the action ... and [afford them] an opportunity to present their objections." (*In re Vitamin Cases* (2003) 107 Cal.App.4th 820, 829; *see also Phillips Petroleum Co. v. Shutts*, *supra*, 472 U.S. at 812 [citing *Mullane v. Cent. Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314–315].) And once "reasonably calculated" notice is given, class members may be bound by a class judgment. (*Id.* at pp. 811–812.)

Thus, the question is not whether every class member can be identified sufficiently to provide individual notice. Rather, the question is whether members of an objectively defined class can be notified of their opt-out rights consistent with due process. (See *Mullins v. Direct Digital, LLC* (7th Cir. 2015) 795 F.3d 654, 665 ["While actual individual notice may be the ideal, due process does not always require it."].) The answer is two-fold: "When class members' names and addresses are known or knowable with reasonable effort, notice can be accomplished by first-class mail." (*Ibid.* [citing *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 174–175].) And where, as here, notice by first-class mail is not possible, as when the identity of each class member is not known, a court may use other methods, such as paid advertising or public postings, "all without offending due process." (*Ibid.* [citing *Hughes v. Kore of Ind. Enter., Inc.* (7th Cir. 2013) 731 F.3d 672, 676–677].)

In *Hughes*, for example, a case involving the claims of ATM users individually valued at $1,000 or less, the Seventh Circuit concluded that class members could not be identified through "*reasonable* effort, effort commensurate with the stakes," as the ATMs did not store users' names. (*Hughes Kore of Ind. Enter.*, *supra,* 731 F.3d at p.

676.) Allowing the case to proceed as a class action, the court held that "sticker notices on [the defendant's] two ATMs and publication of a notice in the principal Indianapolis newspaper and on a website" was "adequate in the circumstances." (*Id.* at p. 677.) Although publication notice carried a risk that some class members would not receive notice and therefore lose their opt-out rights, there was "no indication that any member of the class ... ha[d] a damages claim large enough to induce him to opt out." (*Ibid.*; see also Manual for Complex Litigation, Fourth (Fed'l Judicial Ctr. 2004) § 21.311, at 292 (discussing forms of non-first-class-mail notice regularly approved by courts "when individual names or addresses cannot be obtained through reasonable efforts" and citing representative cases).)

The constitutional propriety of alternative means of notice has been settled law for more than sixty years. (See *Mullane v. Cent. Hanover Bank & Trust Co.*, *supra*, 339 U.S. at pp. 314–319.) Due process provides no basis for a back-door overruling of those precedents by expanding the ascertainability requirement into a requirement that each class member be individually identified and receive individual notice.

## II. If upheld, the lower court's decision would harm class members without advancing any legitimate countervailing interest.

If allowed to stand, the decision below would make it impossible for many people injured by deceptive marketing or defective products to obtain relief, and would eliminate an important deterrent of illegal conduct. Yet the lower court's understanding of "ascertainability" would do nothing to protect the legitimate interests of absent class members. Enabling class actions and protecting absent class members' opt-out rights

are both important goals, and if the right balance is struck, neither needs to come at the expense of the other. The decision below does not strike that balance.

In both California and in federal courts, the overriding purpose of a class action "is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (*Amchem Prods., Inc. v. Windsor*, *supra*, 521 U.S. at p. 617 [quoting *Mace v. Van Ru Credit Corp.* (7th Cir. 1997) 109 F.3d 338, 344]. See *Vasquez v. Superior Court*, *supra*, 4 Cal.3d pp. 808.) "The smaller the stakes to each victim of unlawful conduct, the greater the economies of class action treatment and the likelier that the class members will receive some money rather than (without a class action) probably nothing ...." (*Hughes v. Kore of Ind. Enter., Inc.*, *supra*, 731 F.3d at p. 675.)

In small-claims cases, class actions offer the only means for achieving individual redress and deterrence of wrongful conduct. But "[i]f the class action is to prove a useful tool to the litigants and the court, pragmatic procedural devices [are] required to simplify the potentially complex litigation while at the same time protecting the rights of all the parties." (*Vasquez v. Superior Court*, *supra*, 4 Cal.3d at p. 820.) Thus, the requirements for class certification must be calibrated to preserve the availability of class actions to compensate injured parties, while also protecting the rights of absent class members.

In small-claims class actions like this one, where "only a lunatic or a fanatic" would litigate the claim individually (*Carnegie v. Household Int'l, Inc.* (7th Cir. 2004) 376 F.3d 656, 661), and opt-out rights are thus unlikely to be exercised, it is essential

that the requirement of adequate notice not be applied too stringently, so as to bar certification in the name of safeguarding class members' interests. (See *Mathews v. Eldridge* (1976) 424 U.S. 319, 334.) Otherwise, "the whole concept of a large class-action might easily be stultified by insistence upon perfection in actual notice to class-members." (*Hypertouch, Inc. v. Superior Court* (2005) 128 Cal.App.4th 1527, 1540 [quoting *Phila. Elec. Co. v. Anaconda Am. Brass Co.* (E.D.Pa. 1968) 43 F.R.D. 452, 459].) "[E]xaggerating the presumed requirements of due process" in the name of protecting absent class members is thus counter-productive, blocking use of the class-action device that is the only viable means of seeking relief for many consumer injuries. (*Ibid.*)

Empirical evidence confirms that class members are unlikely to opt out in cases like this one. One study found that, "on average, less than 1 percent of class members opt out," and opt-outs are rarest in consumer class actions. (Eisenberg & Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues* (2004) 57 Vand. L.Rev. 1529, 1532 ["The opt-out rate for thirty-nine consumer class action cases is less than 0.2 percent."].) According to another study, sponsored by the Federal Judicial Center, "the median percentage of members who opted out was either 0.1% or 0.2% of the total membership of the class and 75% of the opt-out cases had 1.2% or fewer class members opt out." (Willging et al., Fed'l Judicial Center, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (1996) p. 52.) The small number of opt-outs makes sense, given the low individual stakes in many class actions. An ascertainability

standard requiring individual identification of all class members at the time of certification no matter the circumstances serves a "theoretical interest of absent class members at the expense of any possible recovery for all class members—in precisely those cases that depend most on the class mechanism." (*Briseno v. ConAgra Foods, Inc.*, *supra*, 844 F.3d at p. 1129.)

The decision below, moreover, would allow defendants to avoid accountability for unlawful practices by minimizing their recordkeeping. As one court explained, allowing the contours of a class to be defined by defendants' own recordkeeping—"or declining to certify a class altogether, as defendants propose—would create an incentive for a person to ... keep no records of its activity, knowing that it could avoid legal responsibility for the full scope of its illegal conduct." (*Birchmeier v. Caribbean Cruise Line, Inc.* (N.D.Ill. 2014) 302 F.R.D. 240, 250; see also *Daniels v. Hollister Co.* (N.J.Ct.App. 2015) 113 A.3d 796, 801–802 ["Allowing a defendant to escape responsibility for its alleged wrongdoing by dint of its particular recordkeeping policies ... is not in harmony with the principles governing class actions."].) Thus, courts should not "let a quest for perfect treatment of one issue become a reason to deny class certification and with it the hope of any effective relief at all." (*Mullins v. Direct Digital, LLC*, *supra*, 795 F.3d at p. 662.)

In short, upholding the decision below would harm class members in many cases, such as this one, by making it impossible to pursue collective remedies in situations where class actions are the only practical means to vindicate class members'

rights. Although the decision extols the importance of class members' rights in principle, it renders them meaningless in practice.

## CONCLUSION

For the foregoing reasons and those set forth in plaintiff-appellant's brief, the decision below should be reversed.

September 28, 2018

Respectfully submitted,

CHAVEZ & GERTLER LLP
PUBLIC CITIZEN LITIGATION GROUP

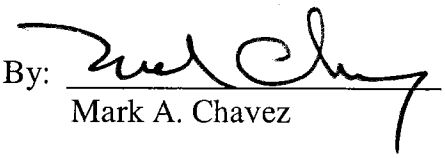
By: _____
Mark A. Chavez

Attorneys for Amicus Curiae
Public Citizen

## CERTIFICATE OF COMPLIANCE

As required by California Rules of Court, rule 8.520(c)(1), I certify that, according to the word-count feature in Microsoft Word, this Brief of Amicus Curiae Public Citizen, Inc. contains words 3,281, including footnotes, but excluding any content identified in rule 8.520(c)(3).

Dated: September 28, 2018

By: 
Mark A. Chavez

## CERTIFICATE OF SERVICE

I, the undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, and not a party to the subject cause. My business address is 42 Miller Avenue, Mill Valley, California 94925.

On September 28, 2018, I caused a true and correct copy of the attached Brief of Amicus Curiae Public Citizen, Inc. to be served by first-class mail on each party and person required to be served, as follows:

Leslie Brueckner
Public Justice, PC
475 14th Street, Suite 610
Oakland, CA 94612

Christopher A. Wimmer
Peter Roldan
Emergent LLP
535 Mission Street, 14th floor
San Francisco, CA 94105

Attorneys for Plaintiff and Appellant

Michael Early
Mark Iezza
Klein, Hockel, Iezza & Patel P.C.
455 Market Street, Suite 1480
San Francisco, California 94105

Attorneys for Defendant and Respondent

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at Mill Valley, California, on September 28, 2018.

Natalie Martin