

No. 10-17329

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHINGLE SPRINGS BAND OF MIWOK INDIANS,

Plaintiff-Appellee,

v.

CESAR CABALLERO,

Defendant-Appellant.

On Appeal from the Order of the
United States District Court for
the Eastern District of California
Honorable John A. Mendez
No. 08-CV-03133-JAM-DAD

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

1. United States Subject Matter Jurisdiction: The U.S. District Court for the Eastern District of California asserted subject matter jurisdiction over the underlying action pursuant to 28 U.S.C. §§ 1331 and 1367 based on Appellee/Plaintiff Shingle Springs Band of Miwok Indians' (hereinafter Plaintiff) claims for trademark infringement and unfair competition under 15 U.S.C. §1125(a) and 15 U.S.C. §1121.

2. Statutory Basis for Appellate Jurisdiction: Appellant/Defendant Cesar Caballero (hereinafter Defendant) is appealing the District Court's order granting a preliminary injunction. This Court has appellate jurisdiction to review the District Court's order 28 U.S.C. §1292(a)(1). An order granting a preliminary injunction is an appealable order under Federal Rule of Civil Procedure 54(a). *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1417 (9th Cir. 1984).

3. Dates applicable to appeal:

a. *Date of entry of order granting preliminary injunction*: September 15, 2010

b. *Notice of appeal filed*: October 14, 2010

c. *Rule under which appeal is timely*: Federal Rule of Appellate Procedure 4(a)(1)(A)

STATEMENT OF THE ISSUES

1. Whether the preliminary injunction infringes Defendant Caballero's First Amendment rights by restricting non-commercial political and social speech.

2. Whether the District Court erred by adopting Plaintiff's incorrect view of Ninth Circuit law, concluding Plaintiff had shown a likelihood of success on the merits where Plaintiff applied for a preliminary injunction on the basis that the Lanham Act does not require commercial use of a mark.
3. Whether the District Court committed clear error in finding that either party engaged in a commercial use of the name Shingle Springs Band of Miwok Indians.
4. Whether the District Court committed clear error by failing to include findings of fact and conclusions of law which constitute the grounds for its decision as required by Federal Rule of Civil Procedure 52(a).
5. Whether the District Court committed clear error by finding a likelihood of success on the trademark claims where Plaintiff does not have a protectable interest in the name Shingle Springs Band of Miwok Indians.
6. Whether the District Court committed clear error by relying on declarations which the court discredited openly and counsel submitting them admitted their inaccuracy.

STATEMENT OF THE CASE

On December 23, 2008, Plaintiff, Shingle Springs Band of Miwoks, filed a four count complaint asserting the following causes of action: I. Trademark Infringement and Unfair Competition under 15 U.S.C. § 1125(a); II. Common law

trademark and trade name infringement; III. Unfair competition under the California Business and Professions Code; IV. Declaratory Judgment.

Defendant filed his answer and class action cross-complaint on February 17, 2009. The cross-complaint alleged six causes of action: I. Declaratory Judgment; II. Trademark and Trade Name Infringement under 15 U.S.C. § 1125(a); III. Common Law Trademark and Trade name Infringement; IV. Unfair Competition under California Business and Professions Code; V. Intentional Interference with Prospective Economic Advantage; VI. Negligent Interference with Prospective Economic Advantage.

On March 26, 2009, Plaintiff moved to dismiss the cross-complaint on grounds of sovereign immunity. (Docket (hereafter 'Dckt') #16). On May 6, 2009, Defendant filed his opposition to the motion to dismiss. (Dckt#22). Plaintiff filed a reply on May 13, 2009. (Dckt#25). Following the hearing on May 20, 2009, the court dismissed Defendant's cross-complaint on grounds that the court lacked subject matter jurisdiction because the Plaintiff is a sovereign Indian tribe. (Dckt#33).

On July 20, 2009 Defendant acting in *pro per* filed a notice of appeal from the court's dismissal of his cross-complaint. (Dckt#40). The appeal was dismissed for lack of jurisdiction on October 22, 2009. (Dckt#66).

Brad Clark, Defendant's attorney of record filed a motion on August 18, 2009 to withdraw as the attorney of record. (Dckt#44). On September 28, 2009,

Judge Mendez signed an order denying Brad Clark's motion to withdraw as the attorney of record for Defendant. (Dckt#58).

On September 9, 2009 Plaintiff moved to amend its complaint to include allegations of Cyber squatting. (Dckt#50). On November 20, 2009, the court granted the motion to amend. (Dckt#69). On November 23, 2009, Plaintiff filed a first amended complaint, adding a count for Cyber squatting. (Dckt#70).

On May 6, 2010, Plaintiff moved to amend their complaint for a second time. (Dckt#76). On May 10, 2010, Appellate filed a motion to compel further discovery responses. (Dckt#81). On May 27, 2010, the parties stipulated that Plaintiff would have the right to file a second amended complaint and agreed to a three month stay of the action for the purpose of facilitating settlement negotiations. (Dckt#84). On August 20, 2010, Plaintiff filed a second amended complaint. (Dckt#88).

On September 2, 2010, Plaintiff filed an ex parte motion for a temporary restraining order and application for preliminary injunction. (Dckt#90; Excerpts of Records (hereafter 'EOR') Tab-9). At a hearing on September 3, 2010, the court granted the motion for the temporary restraining order; and also heard argument on Plaintiff's motion to compel further discovery responses. (Dckt#91; EOR-8). Plaintiff's motion to compel was granted in part and denied in part by order of the court September 7, 2010. (Dckt#93).

On September 8, 2010, Defendant filed his opposition to the application for the preliminary injunction. (Dckt#94; EOR-7). Plaintiff filed a reply brief on September 13, 2010 simultaneously with a proposed order to show cause why Defendant should not be held in contempt. (Dckt##95, 96; EOR-5; EOR 6). On September 15, 2010, Defendant filed declarations in response to Plaintiff's reply brief and supporting attachments.

The hearing on the preliminary injunction and order to show cause on contempt was held September 15, 2010. The court granted the motion and ordered a preliminary injunction against Defendant on September 15, 2010, but declined to hold Defendant or his counsel in contempt. (Dckt#99; EOR-2).

STATEMENT OF FACTS

A. In General

The crux of this case is the question of which party has the right to use the name "Shingle Springs Band of Miwok Indians." Defendant represents a tribe identifying itself as the Shingle Spring Band of Miwok Indians because his tribe of Miwoks' ancestral home was located in Shingle Springs, El Dorado County, California. (Dckt#11-1; EOR-11). Plaintiff also represents a tribe calling itself the Shingle Spring Band of Miwok Indians; however, Plaintiff's tribe is not Miwok and is not indigenous to Shingle Springs, California. Plaintiff is an Indian tribe primarily composed of Maidu Indians that historically lived in Sacramento and or Sutter County. (Dckt#19, 2; EOR-11).

Plaintiff's tribe has adopted several names throughout its history, and those names have generally corresponded with how the Bureau of Indian Affairs (hereinafter "BIA") identified by the land base which the tribe occupied. (Dckt#19 EOR -11). Among the names that the Plaintiff has used to identify itself in the past is the name "Sacramento Verona Band of Homeless Indians." In the early 1900's the BIA made efforts to settle several Indian groups at the Shingle Springs Rancheria in El Dorado County, California. The various tribes which the BIA settled at the Shingle Springs Rancheria were tribes originally located in Sacramento, Sutter, and El Dorado County, and included the tribes of both parties herein. Sometime in the late 1970's after the Plaintiff's tribe began to organize and take occupancy of the Shingle Springs Rancheria, they adopted the name "Shingle Springs Band of Miwoks" notwithstanding the fact that they are not Miwoks or indigenous to Shingle Springs, California.

Consistent with Appellee's historic geographical homeland, Plaintiff's criteria for membership in its tribe has included: "(a) person whose name appears on a 1916 census roll of the persons at or near Verona, Sutter County, California; also living in Sacramento," and "(b) persons who are lineal descendants of individuals eligible for membership under (a) above, regardless of whether the ancestor through whom eligibility is claimed is living or dead, provided such descendants possess at least 1/16 degree Indian blood." (Dckt#19, 2; EOR-11).

Because the use of the name of the tribe is in issue and to prevent confusion with this Court, the Defendant's tribe shall hereinafter be referred to as the 'Indigenous Shingle Springs Band of Miwok Indians,' whereas, Plaintiff shall hereinafter be referred to as the 'Sacramento Verona Band of Homeless Indians.'

The Sacramento Verona Band of Homeless Indians now occupies the Shingle Springs Rancheria Indian Reservation in El Dorado County, California and operates a casino and marketing business under the name 'Red Hawk Casino.' The Sacramento Verona Band of Homeless Indians is a well funded tribe that receives significant financial profit from the gaming proceeds of its operation of the Red Hawk Casino. The Sacramento Verona Band of Homeless Indians admittedly does not use the name Shingle Springs Band of Miwok Indians in commercial activities. (Dckt#90-1, 10:18-20; EOR-10). The Sacramento Verona Band of Homeless Indians admits that its usage of the name Shingle Spring Band of Miwok Indians is limited to the operation of a tribal government and education of the public about the Tribe's culture, government, and history. (Dckt#90-7, EOR-10).

Defendant is Chief of the descendents of the indigenous Miwok Indians of El Dorado County, California. Defendant is employed by the Indigenous Shingle Springs Band of Miwok Indians whose main occupation is herding goats for the purpose of maintaining grasslands. The Indigenous Shingle Springs Band of Miwok Indians offers this grazing service under the business name 'Mow-Goats.' Defendant designs and maintains signs under the business name (name.)

Defendant has no other employment. Neither Defendant nor the Indigenous Shingle Springs Band of Miwoks Indians are involved in any competing business with the Sacramento Verona Band of Homeless Indians. (Dckt#94-1; EOR-7).

Defendant has registered several URLs that contain configurations of the disputed name, including: <shinglespringsmiwoktribe.com>
<shinglespringsreservation.com> <shinglespringsreservation.org>
<shinglespringsrancheria.org> <shinglespringsmiwoktribe.org>
<shinglespringsindianreservation.com> <redhawkcasino.info>
<redhawkcasino.net> and <redhawkcasino.org>.

The site at <shinglespringsreservation.org> takes viewers directly to a Sacramento news station's (KCRA channel 3) website containing a report on this lawsuit. The website includes a short interview of Defendant by the news station and documents the legal dispute over tribal identity between the parties. The news report covers Defendant's efforts to gain federal recognition for the Indigenous Shingle Springs Band of Miwok Indians as well as the health and educational benefits that federal recognition provides.

The site at <shinglespringsmiwoktribe.com> is simple and informational in character. That site includes a map of the shingle springs reservation and contact information for questions concerning enrollment. Similarly, the four sites at <shinglespringsreservation.com> <shinglespringsrancheria.org>
<shinglespringsmiwoktribe.org> <shinglespringsindianreservation.com> are very

simple and feature identical content which is also informational in character.

Those four cites also reference Senate Resolution 115 on Indian Affairs, census data for Indian populations, and other historical documents relating to Indian affairs.

The sites at <redhawkcasino.info> <redhawkcasino.net> and <redhawkcasino.org> direct viewers to the Red Hawk Casino's own website.

None of the websites above are commercial in nature. Defendant and the Indigenous Shingle Springs Band of Miwok Indians earn no money from any aspect of these sites. Defendant has no interest or investment in any business that competes with the Red Hawk Casino. (Dckt#94-1; EOR-7).

On July 31, 2010, Defendant had a telephone conversation with Diana Wuerth, a representative of the Fiduciary Trust Services of the BIA. (Dckt#94-1; EOR-7). During that phone call, Defendant learned that fiduciary trust services had been attempting to reach the Indigenous Shingle Springs Band of Miwok Indians for years. (Id). Diana Wuerth, informed Defendant that she was 'disturbed' that she had been receiving no responses to her written correspondence. (Dckt#94-1; EOR-7). Defendant resolved to contact the post office in order to inquire about the presumably missing mail and made a visit to the United States Post Office in Placerville, El Dorado County, California, for exactly that purpose on August 23, 2010. (Id.)

On August 23, 2010, Defendant spoke with postal clerk Lark Stone, and informed her that “there are two tribes that are linked to the Shingle Springs Rancheria” and “that Fiduciary Trust Services has been trying to get a hold of us.” (Dckt#94-1; EOR-7). Defendant was informed that measures could be taken to determine what mail belongs to whom. (Id).

Thus, in an effort to prevent continued non-delivery of mail from the BIA, Defendant placed a hold on the mail and filled out four changes of address forms. (Dckt#94-1; Dckt#97-2; EOR-7; EOR-4). Lark Stone was the only postal clerk assisting Defendant on August 23, 2010, and is the postal employee with personal knowledge of the relevant events occurring on that day.

On August 27, 2010, Nicholas Fonseca, Chairman of the Plaintiff Indian tribe and an attorney, visited the Placerville post office to inquire about the mail situation because they had not been receiving mail. (Dckt#97-2; EOR-4). Upon showing identification, neither Lark Stone, nor her supervisor, Teresa Ulrich, were convinced that the identification Mr. Fonseca presented was sufficient to lift the mail hold, but instead it would be turned over to a postal inspector. (Id).

Later that day (August 27, 2010) Defendant returned to the Placerville post office and learned that the mail would be on hold and safe until further notice. (Id). Defendant presented no objection to this. (Id).

On September 7, 2010, Defendant visited the Placerville post office to see “what the status was of our mail.” (Dckt#97-4; EOR-4) Upon visiting the post

office, Defendant learned that mail had resumed delivery to the original post office box without Defendant having had an opportunity to speak with the postal inspector. (Id). Later on that same day (September 7, 2010) Gregory Wayland, a law clerk at the Law Office of Brad Clark, spoke to Lark Stone (the postal clerk who had previously assisted Defendant) at the Placerville post office in an effort to gain an understanding of what had been occurring. (Dckt#97-1; EOR-4). After Speaking with Ms. Stone for some time Mr. Wayland was informed by a Teresa Ulrich (Lark Stone's supervisor) that further communications with Ms. Stone in regard to the matter would be prohibited absent a subpoena. (Dckt#97-1; EOR-4). The only clerk that Mr. Wayland spoke with on September 7, 2010 was Lark Stone.

B. Preliminary Injunction Proceedings

On September 2, 2010, Plaintiff filed an ex parte application for temporary restraining order and preliminary injunction. (Dckt.# 90; EOR-9). The Temporary restraining order was granted by Magistrate Judge Drozd, and a hearing on the application for preliminary injunction was set for September 15, 2010. (Dckt.# 91; EOR-8).

Plaintiff's application for a temporary restraining order and motion for a preliminary injunction are fundamentally flawed in three ways. First, they do not allege that the disputed name has a "commercial" use despite the fact that the order is based on a cause of action for trademark infringement. Indeed, Plaintiff's admit

that they engage in no commercial usage of the name Shingle Springs Band of Miwoks. (Dckt#90-1, 10; EOR-10). Second, Plaintiff's application and motion does not allege definite conduct sought to be enjoined. And, third, the application and motion presume a risk of irreparable harm based upon speculative use of the disputed names for any purpose. (Dckt#90-1; EOR-10).

Defendant filed his opposition to the motion for a preliminary injunction on September 8, 2010. (Dckt#94, EOR-7). Defendant contended that Plaintiff had no valid, protected trademark in the name Shingle Springs Band of Miwok Indians, that Plaintiff failed to allege a commercial use of the disputed name, and there was no likelihood of confusion by Defendant's continued use of the name.

Additionally, Defendant contended that the proposed injunctive relief was overbroad, based on speculative injury, and infringed Defendant's First Amendment rights by enforcing a prior restraint on speech.

Plaintiff's reply brief in support of its preliminary injunction argued that a commercial use was not required under the Lanham Act. (Dckt#95, 6:16-7:18; EOR-5). Additionally, Plaintiff alleged that Defendant sought to repeat his efforts to hold mail and change of addresses which would irreparably harm Plaintiff. (Dckt#95; EOR-5) Further, Plaintiff submitted to the trial court declarations of postal inspector Chavez and post office supervisor Teresa Ulrich. Those two declarations acted as the primary evidence used by Plaintiff to support its motion for a preliminary injunction. Neither inspector Chavez nor Ms. Ulrich has any

personal knowledge of the events described in their declarations because, as stated above, Lark Stone was the only postal employee to speak with Defendant on August 23, 2010, and Mr. Wayland on September 7, 2010. Further proof that neither of the declarants relied on by the Plaintiff have any personal knowledge of the events in their declarations is evidenced by the fact that Lark Stone initially thought that Mr. Wayland's name was actually Weylant. (Dckt97-2; EOR-4). Both the declaration of Mr. Chavez and Ms. Ulrich misspell Mr. Wayland's name as Weylant because Lark Stone relayed that name to Mr. Chavez and Ms. Ulrich ex post facto. Therefore, neither of the declarants relied on by the Plaintiff had personal knowledge of the events at issue, and Lark Stone is the only person with such knowledge. (See Dkt## 95-3; 95-5; Dckt97-2; EOR-5; EOR-4).

Simultaneous with filing the filing of its reply, Plaintiff filed a proposed order to show cause why Defendant, Brad Clark, and Greg Wayland should not be held contempt for violation of the temporary restraining order. (Dckt.##95,96; EOR-5; EOR-6).

The hearing on the preliminary injunction was held on September 15, 2010. The Court first addressed whether the temporary restraining order was complied with. During the hearing the Court questioned certain misrepresentations of facts presented by the Plaintiff. The Court's questioning regarding the facts resulted in the Plaintiff admitting in open court that the affidavit of Teresa Ulrich (which was central evidence for Plaintiff's motion) contained misstatements

“based upon the evidence presented by Defendant this morning and filed at 5:00 a.m. or 4:38”(Dckt#101, 4:3-6; EOR-3).

The court then proceeded to express doubts and concerns regarding the credibility of Plaintiff stating:

Now you're covering up for a statement you made in support of asking me to hold an order to show cause and to hold them in contempt. So now you're backing off of that. And that really concerns me.

(Dckt#101, 4:12-15; EOR-3). The court continued:

You can't make allegations like that and expect me to take action if then you come into court this morning and say, well, maybe it wasn't true. If you're going to make an allegation such as this, then you better have the correct facts. I'm not going to get into this any more between the two of you. But it concerns me that you're throwing allegations back and forth without actually having support for a statement like that.

(Dckt#101, 4:21-5:3; EOR-3).

In fact, Plaintiff's misrepresentations are even more extensive. As indicated by Lark Stone, Plaintiff completely mischaracterizes Defendant's conduct at the post office. (Dckt#97-2; EOR-4). Specifically, Defendant was concerned about the safety of **his** mail and never purported to act on behalf of the Plaintiff Indian tribe. (Id).

Notwithstanding the glaring misrepresentations of facts presented by the Plaintiff and the fundamental flaws of the Plaintiffs legal argument, the District Court issued a preliminary injunction on September 15, 2010.

The order substantially restricts Defendant's right to free speech and to petition the government for grievances in that he may not "use or represent to third parties, including the United States government, that he is associated with or a representative of, the 'Shingle Springs Band of Miwok Indians,' or any confusingly similar variation thereof." (Dckt#99). However, the Court declined to grant Plaintiff's motion for contempt.

On October 14, 2010 Plaintiff filed timely notice of appeal with the District Court. Notice was transmitted to the Ninth Circuit Court of Appeals on October 15, 2010.

SUMMARY OF ARGUMENT

This Court should overrule the preliminary injunction because the order acts as a prior restraint of Defendant's right to engage in protected speech. Even if Plaintiff possesses a valid trademark in the name Shingle Springs Band of Miwok Indians (which Defendant contends they do not), a non-commercial use of that name for political or social speech does not violate the Lanham Act. This is because the purpose and protections of the Lanham Act only apply to commercially misleading usages of speech; whereas, the First Amendment protects non-commercial, political, and social speech.

Plaintiff is not likely to succeed on their Lanham Act claims because it does not use the disputed name for a commercial purpose. The commercial use requirement extends to all Lanham act claims, including cyber squatting claims which requires Plaintiff prove bad faith intent to profit. Plaintiff offers no evidence that either party profits in any way by any usage of the disputed name. Plaintiff offers no evidence that Defendant registered any domain name with bad faith intent to profit. Defendant has not engaged in any commercial activity under the Lanham Act, therefore Plaintiff is not likely to prevail on the merits.

Plaintiff's motion for a preliminary injunction was based on false and misleading facts. Plaintiff relied on affidavits that were discredited on substantial points. Additionally, Plaintiff did not attempt to obtain the testimony of the one postal clerk who had actual, first hand knowledge of the transactions, Lark Stone. Moreover, Plaintiff's contentions with respect to irreparable harm were entirely speculative because it was based on one instance of specific past conduct rather than allegations of certain irreparable harm in the future. Thus, there was no proper basis for the trial court to award a preliminary injunction.

The preliminary injunction ordered by the court was overly broad and unconstitutional. Defendant is working to protect his tribe's identity and obtain benefits that would relieve many impoverished members. Defendant's efforts to that end have been severally frustrated by the existing order and the Sacramento Band of Homeless Indians who have essentially usurped the identity of his native

tribe. Presenting a correct history of his tribe to governmental entities necessarily involves the very geographic and descriptive designations that the trial court's order restricts. Therefore, this Court should overrule the preliminary injunction.

ARGUMENT

I. STANDARD OF REVIEW

A. In General

An order for a preliminary injunction is generally reviewed for abuse of discretion. *Ashcroft v. ACLU*, 542 U.S. 656, 664-665 (2004); *Southwest Voter Registration Ed. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003). The District Court's preliminary injunction decision is an abuse of discretion when it is based on clearly erroneous findings of fact or an erroneous legal standard. *Johnson v. Couturier*, 572 F.3d 1067, 1078-1079 (9th Cir. 2009); *California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 849 (9th Cir. 2009). The District Court's decision is based on an erroneous legal standard if the court (1) failed to employ the appropriate legal standards governing the issuance of the preliminary injunction, or, (2) misapprehended the law with respect to the underlying issues in the litigation. *Koon v. United States*, 518 U.S. 81, 100 (1996) (A district court abuses its discretion when it makes an error of law.); *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 730 (9th Cir. 1999).

When the District Court is alleged to have relied on an erroneous legal premise, this Court reviews the underlying issues of law de novo. *Earth Island*

Institute v. United States Forest Service, 351 F.3d 1291, 1298 (9th Cir. 2003); *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 2002).

B. First Amendment Issues

This Court conducts review of First Amendment issues de novo, even if the issue is essentially factual. *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142, 1152 (9th Cir. 2007); *Jacobsen v. United States Postal Serv.*, 993 F.2d 649, 653-654 (9th Cir. 1993).

Because the District Court in this case is alleged to have relied on an erroneous legal premises and the existing order restrains Defendant's First Amendments rights, this Court should review the case de novo.

II. THE COURT'S ORDER INFRINGES DEFENDANT CABALLERO'S FIRST AMENDMENT RIGHTS.

The injunction against Defendant cannot stand because it limits his rights to free speech and to petition the government for the redress of grievances.

Organization for a Better Austin v. Keefe, 402 U.S. 415, 418 (1971); *Cardtoons v. Major League Baseball Players Association*, 95 F.3d 959, 968 (1996). The District Court's order violates the First Amendment on its face because it prevents Defendant from using or representing "to third parties, including the United States government, that he is associated with or a representative of, the "Shingle Springs Band of Miwok Indians," or any confusingly similar variation thereof". Thus, the

order of the District Court acts as a prior restraint against Defendant's right to free speech and petition.

Even if the District Court properly found that Plaintiff has a protectable trademark in the name Shingle Springs Band of Miwok Indians (which the Court did not find), any usage of that name by Defendant must not be restricted because that name is not associated with commercial speech.

Where restriction of non-commercial speech for political or social purposes is sought, courts have readily held the First Amendment rights as a bar to trademark claims. *L.L.Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 33 (1987). Indeed, in such circumstances the application of trademark laws alone may violate First Amendment rights. *Id.* The Supreme Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Cardtoons v. Major League Baseball Players Association*, supra, 970; *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980). It is speech that merely advertises a product or service for business purposes. *Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495, 1504 (1996). In such circumstances the application alone of trademark laws may violate First Amendment rights. *L.L.Bean, Inc. v. Drake Publishers, Inc.* 811 F.2d 26, 33 (1987).

No question of speech related to business purposes was brought before the District Court. Here neither party uses the name "Shingle Springs Band of Miwok

Indians,” for a commercial purpose. Defendant’s usage of the name Shingle Springs Band of Miwok Indians is non-commercial speech and thus it should be entitled to full First Amendment protection. The name Shingle Springs Band of Miwok Indians appears on documents and informational websites as identification of the tribe Defendant represents because his tribe actually consists of Miwok Indians (not Maidu Indians) and his tribe is indigenous to the Shingle Springs area. The name has been used in a flyer Defendant distributed which contains information on the harms that tribal exclusion causes for outcast tribal members. (Dckt#90-4; EOR-9). That flyer indicated that tribal corruption is bad, and displays the words ‘tribal corruption, greed, and disenrollment.’ (Id). Consequently, the District Court’s order restricts non-commercial speech. Therefore, the existing order extends beyond the boundaries of commerce and into non-commercial, politically, and socially motivated speech.

Plaintiff has admitted that Defendant’s speech is political in nature. Plaintiff has declared that it is “generally concerned about proceedings before the BIA, especially where such proceedings bear on the Tribe’s interests. The Plaintiff has never faced a challenge before that agency (or any other agency) with respect to its federally-recognized status, whether brought by Defendant or anyone else.” (Dckt#19; EOR-19).

Plaintiff’s own statements through-out their moving papers for the preliminary injunctions indicate the political nature of Defendant’s speech. For

instance, in their application for the preliminary injunction Plaintiff states: “He has caused the tribes mark to become affiliated with his own political and social causes, by deceiving the public regarding his affiliation with the Tribe.” (Dckt90-1; EOR-10).

The District Court seems to understand the political and social nature of Defendant’s speech yet the court ignored Defendant’s Constitution rights by enjoining that speech. The court stated: “Mr. Caballero is free to make his case for federal recognition of his tribe to any government official or anyone else in authority who will listen, but he may not do so in a way that violates the plaintiff’s trademark rights by fraudulently usurping the tribe’s identity.” (Dckt#101, 16:14-18; EOR-3). Defendant’s assertion of the name of his people as “Shingle Springs Miwok Indians’ could not be found as a fraud because it is the truth.

The District Court made this ruling notwithstanding Defendant’s argument that it is impossible for Defendant to petition government entities without using the name Shingle Spring Band of Miwok Indians and thus violating the courts order because the right to use that name is precisely the issue which is causing Defendant to petition the government. Further, the District Court did not tailor its order in a manner to that would allow the Defendant to continue his efforts to redress his grievances with government entities. (Dckt#101, 17:10-18:1; EOR-3).

The Court’s order plainly restricts Defendant’s ability to petition government entities and engage in political speech. The District Court erred in not finding that

all alleged uses of the name Shingle Springs Band of Miwok Indians by the Defendant were non-commercial speech and that trademark claims against them are barred by Defendant's First Amendment rights. Therefore, this Court should overrule the preliminary injunction.

III. TRADEMARK LAWS APPLY ONLY TO COMMERCIAL USES AND NO EVIDENCE OF COMMERCIAL USE OF THE NAME "SHINGLE SPRINGS BAND OF MIWOK INDIANS" WAS PRESENTED.

Though the District Court omitted the basis of its findings of law and fact, the District Court necessarily did not apply a 'commercial use' requirement in rendering its decision to issue the preliminary injunction. The error is reviewable de novo by this Court and is an abuse of discretion requiring reversal of the preliminary injunction. *Johnson v. Couturier*, supra, 1078-1079 (9th Cir. 2009); *California Pharmacists Ass'n v. Maxwell-Jolly*, supra, 849 (9th Cir. 2009).

The scope of the Lanham Act is limited to commercial uses by the language of statutes and case law. This commercial limitation on trademark law follows from the limitations placed on the government's authority to restrict free speech. *Taubman v. Webfeats*, 319 F.3d 770, 774 (6th Cir. 2003). Plaintiff did not address the commercial use requirement in their Application for Temporary Restraining Order and Preliminary Injunction. However, Plaintiff did address the commercial use requirement in its reply in support of its motion for preliminary injunction in a footnote which argued that no commercial use requirement exists. (Dckt#95, 7;

EOR-5). Plaintiff is wrong. The law of the Ninth Circuit requires Plaintiff to allege both interstate commerce and also use in a commercial or competitive context. *Stanislaus Custodial Deputy Sheriff's Association v. Deputy Sheriff's Association of Stanislaus County*, 2010 U.S. Dist. Lexis 21729, 18-19 (E.D. Cal. 2010).

This Court ruled in *Bosley Medical Institute, Inc. v. Kremer*, 403 F.3d 672, 676 (9th Cir. 2005) that Lanham Act claims are subject to a commercial use requirement. Further, trademark confusion must relate to mistaken purchasing decisions; and absent such commercial usage there cannot be a finding of confusion for Lanham Act purposes. *Id.*, 676; *Stanislaus Custodial Deputy Sheriff's Association v. Deputy Sheriff's Association of Stanislaus County*, *supra*, 20.

In *Hancock Park Homeowners Association v. Hancock Park Homeowners Association*, 2006 U.S. Dist. LEXIS 96211 (C.D. Cal. 2006) a dispute arose out of a claim that the defendant in that case attempted to assume the plaintiff's identity and take control of plaintiff's service mark and logo. There, Plaintiff was a non-profit corporation which had been incorporated in 1948. Plaintiff alleged long term use of the trade name and service mark in dispute. The organization was funded through voluntary annual dues of \$25, and by larger donations from individuals. Plaintiff claimed to have assisted the community in several ways by: (1) opposing the building of the Beverly Hills Freeway (2) participating in filming

regulation with the City of Los Angeles (3) participating in land use planning with the City of Los Angeles (4) assisting in developing community safety standards, and (5) assisting in developing community traffic management and calming measures. Additionally Plaintiff claimed generally participating in regular government proceedings, and being vital to a Historic Preservation Overlay Zone. *Id.*, 3. Plaintiff in that case further claimed that Defendant made false and deceptive representations to the public, through the instrumentalities of interstate commerce and that defendant in that case falsely claimed to be the same entity as plaintiff, but under “new management.” *Id.*

Relying on this Court’s decision in *Bosley Medical Institute v. Kremer*, supra, the Central District held that Plaintiff’s allegations concerning their activities failed to state a claim under the Lanham act because they were not commercial. Neither the plaintiff’s nor the defendant’s activities in purportedly imitating Plaintiff involved commercial transactions in any sense, nor were they acting with a motive for profit under the disputed names. *Hancock Park Homeowners Association*, supra, 13-14.

Plaintiff’s claims are similar to those made by the plaintiff in *Hancock Park Homeowners Association*. First, here, like in *Hancock*, Plaintiff does not allege any profit motive or commercial activity in conjunction with their usage of the name Shingle Springs Band of Miwok Indians. As was the case in *Hancock*, Plaintiff has stated that their uses are non-commercial: “the Tribe uses the Mark in

connection with virtually identical services [to Defendant]: operating a Tribal government and educating the public about the Tribe's culture, government, and history. (Dckt#90-1, 10:18-20; EOR-10) see *Hancock Park Homeowners Association v. Hancock Park Homeowners Association*, supra, 14. (Plaintiff's brief even explicitly concedes that "both Plaintiff and Defendant's marks at issue are noncommercial names").

In granting the preliminary injunction, the District Court relied on Plaintiff's assertion that they have "used the name" Shingle Springs Band of Miwok Indians "for over thirty years." (Dckt#101, 13:14-15; EOR-3). If it is assumed that by "usage" the District Court referred to Plaintiff's bare assertion of federal recognition by the Bureau of Indian Affairs and their operation of a tribal government (as they claim their usage of the name is limited to) the District Court appears to have ignored the Lanham Act's commercial use requirement. Because the District Court did not find that Plaintiff's have a commercial use of the disputed name while evidence that there is no commercial use of that name is on record, the District Court abused its discretion in finding a likelihood of success on the merits. Therefore, this Court should overrule the preliminary injunction.

IV. THE DISTRICT COURT COMMITTED CLEAR ERROR BY FAILING TO MAKE SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW

The District Court clearly erred in failing to comply with the Federal Rules of Civil Procedure. A failure to comply with the requirement that the District

Court provide any findings of fact and conclusions of law is an abuse of discretion. *Walczak v. EPL Prolong, Inc.*, supra, 730 (9th Cir. 1999). The District Courts decided to issue a preliminary injunction without informing the parties or this Court of the basis for it, that decision requires reversal.

Pursuant to Federal Rule of Civil Procedure 52(a) requires that the court make findings of fact and conclusions of law that support the courts orders. Federal Rule of Civil Procedure 65(d) requires the court to (a) state the reasons why its preliminary injunction was issued (b) state its terms specifically and (c) describe in reasonable detail—and not by referring to the complaint or other document- the act or acts restrained or required.

These specific findings of fact and conclusions of law are necessary to permit meaningful review by this court. *Federal Trade Commission v. Enforma Natural Products, Inc.*, 362 F.3d 1204, 1212 (9th Cir. 2004); *LGS Architects, Inc. v. Concordia Homes of Nevada*, 434 F.3d 1150, 1155 (9th Cir. 2006). The District Court failed completely to provide any meaningful findings of fact or conclusions of law in rendering its decision for Plaintiff. The District Courts order does not comply with any of these procedural requirements as indicated below:

A. Irreparable Injury, Balance of Hardships, and the Public Interest

The basis for the District Court's order cannot be reasonably ascertained where the court limited it's discussion to conclusions within a single sentence: "In terms of the other factors for the injunction, the Court does find that the plaintiffs

are likely to suffer irreparable injury, that the balance of hardships favors the plaintiffs, and that it is in the public interest that this injunction issue.”(Dckt#101, 15:1-5; EOR-3). The order proposed by Plaintiff and signed by Judge Mendez is no more explicit and fails to explicitly state the reasons why the court finds the elements of irreparable injury, balance of hardships, and the public interest are met.

B. The Court’s Order as given at the Hearing of September 15, 2010 is inconsistent with Plaintiff’s proposed order signed in its Entirety.

The court after expressing ‘serious concerns’ concerning the credibility of Plaintiff’s affidavits, especially with regard to the alleged transactions at the post office, proceeded to not find Defendant in contempt. (Dckt#101, 16:20-21; EOR-3). The court then signed Plaintiff’s proposed order which states that Defendant intentionally violated the temporary restraining order without making any such findings on the record. (Dckt#99, 2:8-13; EOR-2).

C. The District Court made no Factual Findings regarding the Commercial Use Requirement or any other Aspect of the Lanham Act Claims

Neither at the hearing nor in Plaintiff’s order signed by Judge Mendez does the court mention any aspect of the elements of a Lanham Act claim but only repeats in different ways that he is ‘certain [Plaintiff] will succeed on “all the elements necessary.”(Dckt#101, 13:6-10; 14:23-25; 15:1-5; EOR-3). No mention is made anywhere at the hearing on the preliminary injunction or the draft order

signed by Judge Mendez of secondary meaning, likelihood of confusion, validity of the mark, or any other aspect of a trademark infringement claim.

D. The Court's order is Not Specific Regarding the Equitable Relief it Grants, Defendant is Left to Speculate whether in Acting pursuant to his First Amendment Rights, he is violating the Court's Order

The court enjoined Defendant from using or representing to third parties, including the United States government that he is associated with or representative of the Shingle Springs Band of Miwok Indians, the Shingle Springs Reservation, the Shingle Springs Miwok Tribe, the Shingle Springs Miwok Indians' or any confusingly similar variation thereof. Defendant has no way to ascertain what would be confusingly similar to the name Shingle Springs Band of Miwok Indians considering the fact that the existing order prevents the use of "any" variation regardless of whether the variation is a registered trademark or used in commerce. Additionally, the court's order completely stifles any attempt that Defendant could make to petition government entities for the proper identification of his tribe because it prevents him from presenting any variation of the name of his tribe (Shingle Springs Band of Miwoks) to government entities despite the fact that his tribe is composed of Miwok Indians that are indigenous to the Shingle Springs area. The Defendant cannot petition the government for recognition of his indigenous heritage when the existing order not only prevents him from identifying the ethnic and geographical origins of his tribe but also prevents him for using "any

variation” of the name which would imply or use the same ethnic and geographic signifiers.

Accordingly, the District Court clearly erred in failing to comply with the Federal Rules of Civil Procedure in ordering the preliminary injunction. On that basis the order should be reversed and remanded for further proceedings in the District Court.

V. THE RIGHT TO INJUNCTIVE RELIEF WAS NOT DEMONSTRATED

The District Court expressed its own doubt as to the basis of the preliminary injunction where it questioned the declarations on which the order was based. The affidavits, discredited in open court as evidenced on the transcript to the hearing, are also contradictory to evidence offered by Defendant. Plaintiffs affidavits are not credible and are entitled to no consideration. Thus, if the basis for the district court’s preliminary injunction was the conduct alleged to have occurred, the reliance on Plaintiffs affidavits is clearly erroneous and requires reversal.

A preliminary injunction is an extraordinary remedy that will not issue unless it is clearly demonstrated (1) there is a likelihood of success on the merits (2) there is a likelihood of irreparable injury in the absence of preliminary relief (3) the balance of equities tips sharply in the applying parties favor and (4) an injunction is in the public interest. *Winter v. Natural Resources Defense Council*,

Inc. 129 S.Ct. 365, 374 (2008); *Johnson v. Couturier*, supra, 1079. Here, Plaintiff demonstrates none of the elements.

A. Likelihood of success on the Merits

As demonstrated above, Plaintiff's alleged trademark claims are not substantiated by uncontroverted evidence. A Lanham Act claim for trademark infringement requires proof that (1) there is a valid, protectable trademark in the disputed marks, and (2) that Defendant used a similar mark that is likely to cause consumer confusion, deception or mistake. *Summit Entertainment, LLC v. Beckett Media, LLC*, 2010 U.S. Dist. LEXIS 7833, 6 (2010); *Brookfield Communications v West Coast Entertainment*, 174 F.3d 1036, 1046 (9th Cir. 1999).

Plaintiff does not possess a valid protectable trademark in the name Shingle Springs Band of Miwok Indian. Plaintiff's relies on the Bureau of Indian Affairs list of entities recognized as Indian Tribes as proof that they have a trademark in the name. The Bureau of Indian affairs does not confer trademarks. Tellingly, Plaintiff has never, in their claimed 30 years of "usage" of the trademark, registered the mark with the trademark office.

Rather a trademark is entitled to protection when it has been commercialized to a degree and in an geographic area that justified protecting its economic value therein as an intellectual property right. *Bosley Medical Institute v. Kremer*, supra, 676; *Stanislaus Custodial Deputy Sheriff's Association v. Deputy Sheriff's Association of Stanislaus County*, supra, 13-16. Under the Lanham Act a

trademark or service mark is a mark used to identify a person or entity with goods or services used in commerce. 15 U.S.C. § 1127. Plaintiff has offered no such allegations or evidence of either party's commercial usage of the name Shingle Springs Band of Miwok Indians.

Alternatively, the alleged mark Shingle Springs Band of Miwok Indians, is descriptive. A descriptive mark requires proof secondary meaning. *Yellow Cab Company of Sacramento v. Yellow Cab of Elk Grove, Inc.*, 419 F.3d 925, 930 (9th Cir. 2005). In *Yellow Cab*, this court applied a four part test to determine secondary meaning: (1) whether actual purchasers of the product bearing the claimed trademark associate the trademark with the producer, (2) the degree and manner of advertising under the claimed trademark (3) the length and manner of use of the claimed trademark, and (4) whether use of the claimed trademark has been exclusive.

There is no evidence offered of any 'purchasers' of any product or service under the name Shingle Springs Band of Miwok Indians. Plaintiff admits that their name is not used in conjunction with the sale of any good or service consequently this element cannot be satisfied. (Dckt#90-1, 10:18-20).

Plaintiff does not purport to advertise the name Shingle Springs Band of Miwok Indians for commercial purposes because Plaintiff simply has no commercial use. (Dckt#90-1, 10:18-20; EOR-10).

There is no 'Use' of Plaintiff's purported trademark. Under the Lanham act 'use' is a term of art signifying a use that is commercial. *Stanislaus Custodial Deputy Sheriff's Association v. Deputy Sheriff's Association of Stanislaus County*, supra, 15-16. Plaintiff alleged no such use.

Furthermore, any use of the claimed trademark by Plaintiff has not been exclusive. Defendant is a chief of the indigenous Miwok Indians who have been present in the Shingle Springs area long before Plaintiff Indian Tribe was located there. (Dckt#11-1; Dckt#19; EOR-12; EOR-11) Defendant has used his ethnic and historic identity continuously, and his tribe has been present and similarly existed as Miwok Indians through their history. (Id). Thus, any usage by Plaintiff of the name Shingle Springs Band of Miwok Indians would not be exclusive.

There is no evidence of consumer confusion between Plaintiff's usage of the terms and Defendant's usage. Case law holds that 'confusion' under the Lanham Act refers to mistaken purchasing decisions. *Bosley Medical Institute v. Kremer*, supra, 677; *Lang v. Ret. Living Publ'g Co., Inc.*, 949 F.2d 576, 582-583 (2nd Cir. 1991). Accordingly, when allegations focus on confusion, 'confusion' is unlikely where there is no commercial use. *Stanislaus Custodial Deputy Sheriff's Association v. Deputy Sheriff's Association of Stanislaus County*, supra, 19-20.

Plaintiff never alleged any commercial use. Plaintiff merely states their usage as "the Tribe uses the Mark in connection with virtually identical services [to Defendant]: operating a Tribal government and educating the public about the

Tribe's culture, government, and history. (Dckt#90-1, 10:18-20; EOR-10). The Plaintiffs stated usage is not in the realm of commercial usage and therefore beyond the scope of the Lanham Act. *Hancock Park Homeowners Association v. Hancock Park Homeowners Association*, supra, 14.

B. There is no Risk of Irreparable Injury.

There is no evidence that Defendant caused Plaintiff any injury, nor evidence of any risk of future injury that could be prevented by the Lanham Act. Indeed, if any harm could have come to Plaintiff it has been avoided by Plaintiff's act of forcing the post office to take actions to insure their mail was not diverted mistakenly or otherwise. Thus, the alleged injury is not irreparable, it has been repaired by actions that were not supported by and need not be supported by injunctive relief.

Moreover, the injury that the District Court's order prevents is not a type of harm that trademark law is designed to protect. "Trademark Infringement protects only against mistaken purchasing decisions and not against confusion generally." *Stanislaus Custodial Deputy Sheriff's Association v. Deputy Sheriff's Association of Stanislaus County*, supra, 15; *Bosley Medical Institute v. Kremer*, supra, 679.

The harm alleged by Plaintiff does not concern a purchasing decision. The behavior by Defendant that Plaintiff attempts to enjoin is beyond the scope of this matter. The Lanham Act does not contemplate the type of harm that Plaintiff alleges, therefore the district court was not free to order the preliminary injunction.

Plaintiff alleged that Defendant returned to the post office and attempted to resume holds and address changes on mail potentially addressed to either tribe. Plaintiff further alleged that it would be harmed by diverted mail if Defendant had succeeded. The District Court discredited the allegations made by Plaintiff yet inexplicably relied on those allegations as support for its issuance of a preliminary injunction:

Now you're covering up for a statement you made in support of asking me to hold an order to show cause and to hold them in contempt. So now you're backing off of that. And that really concerns me.

(Dckt#101, 4:12-15; EOR-3). The court continued:

You can't make allegations like that and expect me to take action if then you come into court this morning and say, well, maybe it wasn't true. If you're going to make an allegation such as this, then you better have the correct facts. I'm not going to get into this any more between the two of you. But it concerns me that you're throwing allegations back and forth without actually having support for a statement like that.

(Dckt#101, 4:21-5:3; EOR-3).

In fact, Plaintiff's misrepresentations are even more extensive. As indicated by Lark Stone, the Plaintiff completely mischaracterizes Defendant's conduct at the post office. (Dckt#97-2; EOR-4). Specifically, Defendant was concerned about the safety of **his** mail and never purported to act on behalf of the Plaintiff Indian tribe.

(Id). The District Court clearly erred in relying on the discredited statements provided by Plaintiff and no harm was caused by Defendant's actions.

The District Court clearly erred in its findings of fact and abused its discretion in applying the wrong legal standard by enjoining Defendant from pursuing acts which do not constitute the type of harm may that the Lanham Act seeks to prevent.

C. Balance of Hardships Favors Reversal

Plaintiff contends that that it may encounter an action by the BIA adverse to their interests (Dckt#19; EOR-11). If Plaintiff does encounter an action by the BIA adverse to its interests that action will be based upon the merit of Defendant's truthful assertion that it is his people are Miwok Indians indigenous to the Shingle Springs area and that the Plaintiff is not. Any action by the BI A will not be based on a trademark infringement it will be based on merits of Defendant's assertions that his tribe is the true Shingle Springs Band of Miwok Indians. The BIA is not a consumer and thus would not be confused by Defendant's use of the disputed name. Further, the name Shingle Springs Band of Miwok Indians is not associated with any product.

On the other hand, Defendant is drastically harmed by the exist6ing order because it restricts his First Amendment rights to speech and petition and his ability to function as chief of the Indigenous Shingle Springs Band of Miwok Indians. Defendant cannot work to secure rights for his people, many of whom are

'homeless and desolate,' without identifying his truthful Miwok heritage and his authority to represent Miwok Indians from the Shingle Springs area (Dckt#94-1; EOR-7). Therefore, the balance of hardships weighs in heavily in favor of overruling the preliminary injunction.

D. An Injunction is not in the Public Interest

The public interest supports consistent application of Ninth Circuit law and the protection of Native Americans who are subject to the consequences of tribal self-government and sovereign immunity. Further, the public interests are best served by protecting free speech that is political and social in nature, as well as the right to petition government for the redress of grievances. The imposition of an injunction on Defendant is not in the public interest.

CONCLUSION

The preliminary injunction ordered by the District Court was overly broad and unconstitutional. The District Court's order violates the First Amendment because it acts as a prior restraint on protected speech. Further, the non-commercial use of a mark for political or social speech does not violate the Lanham Act. The protections of the Lanham Act only apply to commercially misleading usages of speech; whereas, the First Amendment protects non-commercial, political, and social speech.

Plaintiff is not likely to succeed on their Lanham Act claims because it does not use the disputed name for a commercial purpose and thus does not have a

protected mark. Further, Defendant has not engaged in any commercial activity under the Lanham Act. Plaintiff's motion for a preliminary injunction was based on false and misleading facts. Plaintiff relied on affidavits that were discredited on substantial points. Furthermore, Plaintiff's contentions of irreparable harm were entirely speculative because they are based on one instance of specific past conduct which has already been corrected.

Defendant is working to protect his tribe's identity and obtain benefits that would relieve many impoverished members. Defendant's efforts to that end have been unjustly frustrated by the existing order. Therefore, this Court should overrule the preliminary injunction.

DATED this 12th day of November, 2010, at Placerville, California.

Respectfully submitted,

/s/ Brad Clark
BRAD CLARK

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE
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CASE NO. 10-17329

I certify that this brief complies with thy type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

1. This brief contains 8,396 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007, font size 14, Times New Roman.

Respectfully submitted,

/s/ Brad Clark
BRAD CLARK

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellant Cesar Caballero states that he is not aware of any related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief 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 11/12/2010.

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

I further certify that I caused a copy of Appellant's Excerpt of Record to be served by a third party commercial carrier to be served within three calendar days on counsel for the parties as follows:

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