

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

**BAP DOCKET NUMBER SC-16-1227
BANKRUPTCY CASE NO. 3:16-bk-00629-MM7**

[CHAPTER 7]

In re RW Meridian LLC,

Debtor.

APPELLANT

COUNTY OF IMPERIAL TREASURER – TAX COLLECTOR

APPELLEES

RONALD E. STADTMUELLER, Trustee;
RW MERIDIAN, LLC,

**MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF THE
CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE
CALIFORNIA ASSOCIATION OF COUNTY TREASURERS AND TAX
COLLECTORS IN SUPPORT OF APPELLANT COUNTY OF IMPERIAL
TREASURER – TAX COLLECTOR**

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INTRODUCTION

Pursuant to Rule 8017 of the Federal Rules of Bankruptcy Procedure, the California State Association of Counties ("CSAC") and the California Association of County Treasurers and Tax Collectors ("CACTTC") request leave to file the accompanying *amicus curiae* brief in support of Appellant Imperial County Treasurer – Tax Collector (the “Appellant” or “County”).

Pursuant to Rule 8017, CSAC and CACTTC endeavored to obtain the consent of all parties to the filing of the *amicus curiae* brief before moving the Court for permission to file the proposed brief. Although the Appellant consented to the filing of the *amicus curiae* brief, Brian A. Kretsch, attorney for Appellee, Ronald E. Stadtmueller, Trustee, did not consent.

IDENTITY AND INTEREST OF AMICI CURIAE

This motion is respectfully submitted by both the CSAC and the CACTTC in support of the Appellant.

CSAC is a non-profit corporation. The membership consists of the 58 California Counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsel's Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Committee monitors litigation of concern to counties statewide and has submitted *amicus curiae* briefs in prior appellate court cases

involving matters that impact county government in general and the collection of property taxes in particular.

CACTTC is a professional association formed in 1981 comprised of the duly elected and appointed County Treasurers and Tax Collectors in California.¹ Its purpose is to promote the general interests of the active members and the respective counties they represent. CACTTC also monitors litigation of concern and has submitted amicus curiae briefs in prior appellate court cases involving matters that impact California Counties and the collection of property taxes in particular.

A critical issue in the appeal involves the County's position that because the Appellee RW Meridian, LLC, the Debtor in this case, did not redeem the real property as required by California Revenue and Taxation Code § 3707, the Bankruptcy Court erred in ruling that the County's sale violated the automatic stay. Both CSAC and CACTTC have an interest that dovetails with the public interest in assuring that property tax laws are properly administered and that property tax revenues for the provision of public services are collected. They have determined that this case will severely affect the collection of property tax revenue in all counties. Any determination that diminishes or eliminates the right of redemption

¹ Prior to 1981, there were two Associations: The California Association of County Tax Collectors and the California Association of County Treasurers.

termination at the close of business on the last business day prior to the start of a county property tax sale would adversely affect the processes by which counties conduct the sales.

This issue is vital to the administration of property tax collection. The decision of the bankruptcy court, if sustained, will not only seriously impair the ability of counties and their tax collectors to ensure the collection of real property taxes, but it will subject the counties to a finding by the courts that they violated the automatic stay. Therefore, CSAC and CACTTC have an immediate and direct interest in this litigation and the resolution of the pending appeal.

THE *AMICUS CURIAE* BRIEF WILL ASSIST THE COURT AND IS RELEVANT TO THE DISPOSITION OF THE CASE

The CSAC and the CACTTC offer this *amici curiae* brief in order to assist the Court with regard to the interpretation of a salient state statute involving this appeal. California Revenue and Taxation Code § 3707(a)(1) provides that "the right of redemption terminates at the close of business on the last business day prior to the date of sale." The *amici curiae* brief will assist the court in deciding the appeal by describing California's recognition of the difference between the lapsing of the redemption period at the close of business on the last business day prior to the start of a county property tax sale versus the lapsing of the redemption period upon the sale of the property.

As set forth above, the Bankruptcy Court determined that the County violated the automatic stay by selling the real property after the redemption period had lapsed. This *amici curiae* brief is offered to describe the legal standard that this Court should apply when evaluating whether the County violated the automatic stay. The *amici curiae* brief will also illustrate the negative impact that the Bankruptcy Court's decision will have on the collection of property tax revenues by all counties if its decision is not reversed. The foregoing issues are relevant — and indeed even central — to the disposition of this appeal.

In short, the brief offered by CSAC and the CACTTC will help the Court by drawing the Court's attention to law that might otherwise escape consideration. Acceptance of this *amici curiae* brief is also appropriate because movants have a special interest in this litigation that is not already represented by the parties.

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CONCLUSION

For the reasons stated herein, CSAC and the CACTTC respectfully request that they be granted leave to file the attached *amicus curiae* brief.

DATED: October 14, 2016 Respectfully submitted,

MARY C. WICKHAM
County Counsel

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California Association of County Treasurers
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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2016, I electronically filed the following documents:

(1) MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE CALIFORNIA ASSOCIATION OF COUNTY TREASURERS AND TAX COLLECTORS IN SUPPORT OF APPELLANT COUNTY OF IMPERIAL TREASURER – TAX COLLECTOR;

(2) AMICI CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE CALIFORNIA ASSOCIATION OF COUNTY TREASURERS AND TAX COLLECTORS IN SUPPORT OF APPELLANT COUNTY OF IMPERIAL TREASURER – TAX COLLECTOR; with the Clerk of the Court for the Bankruptcy Appellate Panel for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished through the appellate CM/ECF system.

The parties of record who are being served through the CM/ECF system are as follows:

See attached Service List

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IDENTITY AND INTEREST OF AMICI CURIAE

This brief is submitted by the California State Association of Counties ("CSAC") and the California Association of County Treasurers and Tax Collectors ("CACTTC"). CSAC and CACTTC respectfully submit this brief in support of Appellant Imperial County Treasurer-Tax Collector ("County").

CSAC is a non-profit corporation. The membership consists of the 58 California Counties. CSAC monitors litigation of concern to counties statewide and has submitted amicus curiae briefs in prior appellate court cases.

CACTTC is a professional association formed in 1981 comprised of the duly elected and appointed County Treasurers and Tax Collectors in California. CACTTC also monitors litigation of concern and has submitted amicus curiae briefs in prior appellate court cases involving matters that impact California Counties and the collection of property taxes in particular.

CSAC and CACTTC have determined that this case will affect the collection of property tax revenue in all counties. This issue is vital to the administration of property tax collection.

Pursuant to Federal Rule of Bankruptcy Procedure 8017, no party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person

other than amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

I.

INTRODUCTION

The California State Association of Counties ("CSAC") and the California Association of County Treasurers and Tax Collectors ("CACTTC") incorporate by reference the Jurisdictional Statement, Statement of Issues, Standard of Review, Statement of the Case, and the Procedural History set forth in the Appellant's Brief previously filed with the court.

II.

ARGUMENT

A. THE CALIFORNIA LEGISLATURE DEVELOPED A COMPREHENSIVE STATUTORY SCHEME REGARDING REAL PROPERTY TAXES AND THE SALE OF TAX DEFAULTED PROPERTY WHICH MUST REMAIN PRACTICAL, CLEAR, AND CONSISTENT.

Longstanding bankruptcy law recognizes that property rights are created and defined by state law. (*Butner v. United States*, 440 U.S. 48, 54-55 (1979).) Consequently, the Bankruptcy Code does not create property rights that do not otherwise exist under state law.

The 9th Circuit Court of Appeals in its recent published opinion, affirming the Bankruptcy Appellate Panel for the Ninth Circuit's ("BAP") opinion, *In re*

Tracht Gut, LLC, 2016 U.S. App. LEXIS 16513, at page 13, citing *BFP v. Resolution Trust Corp.*, 511 U.S., at 539, stated “[a]bsent a clear statutory requirement to the contrary, we must assume the validity of this state-law regulatory background and take due account of its effect.”

As stated by the BAP, “federal courts should pay considerable deference to state law on matters related to real estate.” *In re Tracht Gut*, 503 B.R. 804, 816 (2014) (“*Tracht Gut*”).

Here, the bankruptcy court failed to abide by the California statutory scheme concerning duly noticed County tax sales and must be reversed.

The California legislature developed a comprehensive statutory scheme regarding real property taxes and how property can become tax defaulted and eventually sold at a county tax sale. Importantly “[a] tax sale proceeding is wholly a creature of statute.” (*Craland v. State of California* (1989) 214 Cal.App.3d 1400, 1403 (*Craland*)). Importantly, the exclusive means of enforcing payment of taxes on the secured roll is by sale of the property securing the tax. (2 Ehrman & Flavin, *Taxing Cal. Property* (4th ed. 2015) *Collecting Tax*, § 29:14, pp. 29-20.)

A complete statutory understanding is essential in this case. Indeed the 9th Circuit in reviewing the BAP's *Tracht Gut* decision, stated that “[l]ike mortgage foreclosures, tax foreclosure sales conducted by state and local governments are governed by state law.” *In re Tracht Gut*, 2016 U.S. App. LEXIS 16513, at pages

13-14.) It then went on to examine the statutory scheme. (*Id.* at pp. 14-16.) The 9th Circuit found nothing wrong with it.

We start by acknowledging that real property taxes can be paid in two installments. The first installment is due on November 1st pursuant to California Revenue and Taxation Code (“RTC”) § 2605. If not paid by December 10th, a 10% delinquent penalty attaches. (RTC § 2617.) The second installment is due February 1st. (RTC § 2606.) If not paid by April 10th, a 10% delinquent penalty attaches. (RTC § 2618.) If the taxes are still not paid by July 1st, a redemption penalty is assessed at the rate of 1.5% per month. (RTC § 4103.) Also on July 1st, the property is declared tax defaulted. (RTC §§ 3436, 126.) This tax defaulted declaration is important because it serves as a trigger to when the tax collector gets the power to sell the property. In the past, as will be discussed below, the property would be deeded to the State. Now, there is no deed transferred. Instead, the tax collector just gets the power to sell. The tax collector gets the power to sell residential property five years after the property is declared tax defaulted, and in cases of non-residential commercial property, three years after the property is declared tax defaulted. (RTC § 3691.)

The tax collector must attempt to sell the property within four years of getting the power to sell. (RTC § 3692.) All sales must be by public auction to the highest bidder, public auction includes the Internet. (RTC § 3693(a).)

There are a series of steps that the tax collector must take to get the property on the auction block, like notices, publication, etc. (RTC §§ 3351, 3361, 3371, 3701, 3704.7.)

During this time of delinquency, the taxpayer has a right to redeem the property. (RTC § 4101.) To redeem the property the total amount of all prior year defaulted taxes must be paid, together with penalties, costs, and fees. (RTC § 4102.) The taxpayer must redeem the property prior to the close of business on the last business day prior to the date of the sale. (RTC § 3707.)

It is of the utmost importance to the integrity of the statutory scheme to keep things uniform. As will be explained below, RW Meridian LLC ("Meridian"), the debtor in this case, did not redeem the property as required by RTC § 3707 before the bankruptcy case was filed, therefore, the bankruptcy court was wrong to rule that the sale violated the automatic stay.

B. MERIDIAN FILED ITS BANKRUPTCY PETITION AFTER THE TIME THE REDEEM THE PROPERTY LAPSED UNDER STATE LAW. THEREFORE, THE PROPERTY WAS NOT PART OF THE BANKRUPTCY ESTATE.

The pertinent section here is RTC § 3707(a)(1), which provides that "the right of redemption terminates at the close of business on the last business day prior to the date of sale." RTC § 3692.1 defines the term "date of sale " as "the date upon which a public auction begins." In this case, the public auction began on Saturday, February 6, 2016. Therefore, the right of redemption ended a 5:00

p.m. on February 5, 2016. Meridian filed its bankruptcy petition February 8, 2016, well beyond the lapsing of the redemption period. Once the redemption period lapsed, Meridian could not redeem the property and the bankruptcy trustee could not redeem the property either.

"Effective September 11, 1984, the legislature substantially revised and simplified the procedures for collecting taxes on the secured roll. Prior to the revision property was first sold to the state by operation of law and became 'tax-sold' property. After five years the tax-sold property was in turn deeded to the state, becoming 'tax-deeded' property and then was sold to satisfy the tax lien. The 1984 revision substituted the term 'tax –defaulted' for 'tax-sold' and 'tax-deeded' property and eliminated the formalities of the sale and deed to the state. Instead of being first sold to the state, property is now simply declared 'tax-defaulted,' starting the running of the five year redemption period. After the expiration of the redemption period, instead of being first deeded to the state and then sold to a third party, the tax collector simply exercises the power to sell the tax-defaulted property." (2 Ehrman & Flavin, *Taxing Cal. Property* (4th ed. 2015) *Collecting Tax*, § 29:13 pp. 29-19, 20 [Footnotes omitted]; *See also Craland, supra*, 214 Cal.App.3d 1400, 1403-1404.)

The legislature amended RTC § 3707 in 1986 [effective January 1, 1987], and it substituted the current subdivision (a) for former subdivision (a) which

provided that "[i]f not previously terminated, on completion of any sale under this chapter the right of redemption is terminated." (*See* History/Amendments, Deering's Ann. RTC § 3707 (2016) p. 154.) Consequently, under the previous statutory scheme, the redemption period lapsed on completion of the sale. But now, the redemption period lapses at the close of business on the last business day prior to the date of sale. The bankruptcy court neglected this important distinction.

Additionally, the tax defaulted property statutory scheme is in contrast to the scheme regarding non-judicial foreclosures where the sale terminates the redemption period. A properly conducted non-judicial foreclosure sale constitutes a final adjudication of the rights of the borrower and lender. Once the trustee's sale is completed, the trustor has no further rights of redemption. (*Moeller v. Lien* (1994) 25 Cal.App.4th 822.)

The bankruptcy court erroneously focused on the sale instead of the redemption termination deadline.

The California Legislature did away with the "sale" being the determining factor of ascertaining when the redemption period lapses, and instead opted for a bright-line rule.

Evidently, using the sale as the determining factor creates confusion. For example, does the sale occur when a winning bidder at the auction raises his hand and is identified? Or is it when the winning bidder puts down the deposit? Or is it

when the winning bidder pays the balance of the purchase price? Or is it when the deed is recorded? Or when all of the after sale remedies are exhausted?

If the sale date is used as the guideline, it creates a rolling deadline. For example, California law states that unless otherwise specified by the tax collector, payment is due on or before the close of auction. (RTC § 3693(a).) But the tax collector may make the sale of any property a cash or deferred-payment transaction. If the tax collector approves the sale as a deferred-payment transaction, the tax collector may require a deposit in the amount of five thousand dollars (\$5,000) or 10 percent of the minimum bid price, whichever is greater. The balance of the purchase price shall be paid within a period specified by the tax collector not to exceed 90 days from the date of the close of auction as a condition precedent to the transfer of title to the purchaser. (RTC § 3693.1)

This is significant because the 58 counties in California can have variations as to if and when the sale will be a deferred-payment transaction and when the balance must be paid. In other words, if this court uses the sale as the date when the redemption period lapses, it will not be uniform because each county may do things differently. Debtors will be protected by the automatic stay for different time periods depending on the rules set by the tax collector for each county. In one county the redemption period could be interpreted as lapsing at the close of the auction because payment in full is required at the auction. In another county the

redemption period would lapse within 90 days or less of the deposit date because that's when they have to pay the balance.

Additionally, these rules can be changed by each county tax collector. Further, even in counties that provide for the balance to be paid within 30 days for example, the purchaser could pay the balance earlier if it wishes, let's say 15 days. Consequently, debtors in bankruptcy will be treated differently depending on what county the property is located.

Importantly, the legislature knew when to use the word sale in several different contexts, like in RTC § 3707(c), where it states that "The sale shall be deemed complete when full payment has been received by the tax collector." But this subdivision does not control the redemption deadline, it is RTC 3707 § (a)(1), that determines the deadline, which is "...the close of business on the last business day prior to the date of the sale." The legislature created this bright-line rule, a specific point in time in which the redemption period lapses. Consequently, it amended RTC § 3707 into what it is today, avoiding confusion.

The bankruptcy court should have looked at the simplicity of RTC § 3707(a)(1), which dictated that since Meridian could not redeem the property when it filed for bankruptcy, the trustee could not either. There was no contingency because Meridian did not redeem the property by the deadline. In other words, it

lost its right to redeem the property. Anything that occurs after this is not a real contingency.

Bankruptcies can be filed electronically basically 24 hours a day. The bankruptcy court's ruling would find that a particular county's actions violate the automatic stay every time the redemption period lapses and a bankruptcy petition is filed prior to the sale (whatever the definition of sale is). The bankruptcy court made RTC § 3707 meaningless in cases of bankruptcy and erroneously found that the property was part of the bankruptcy estate under 11 U.S.C. ("Bankruptcy Code") § 541.

The BAP, in *Tracht Gut*, which was affirmed by the 9th Circuit Court on September 8, 2016, acknowledged that the owner's right of redemption regarding real property lapses the day before a scheduled tax sale under RTC § 3707. Therefore, any action by a County concerning a property would not run afoul of the automatic stay. The BAP stated "[i]n the original complaint, Debtor claimed that its legal title in the Properties was not extinguished until the tax deeds were recorded. Because this occurred postpetition, Debtor argued that the recordings of the deeds violated the automatic stay under § 362(a). There are at least two flaws in Debtor's argument. First, Debtor's right of redemption as to the Properties lapsed the day before the tax sales occurred. RTC § 3707. A tax deed subsequently provided to a purchaser 'conveys title to the purchaser free of all

encumbrances of any kind.' RTC § 3712. [footnote omitted] Under these facts, since Debtor's interest in the Properties lapsed before it filed for bankruptcy, the Properties never became property of the estate under § 541, and any action by the County concerning those Properties would not run afoul of the automatic stay under § 362(a)." (*Tracht Gut, supra*, 503 B.R. 804, 811-812.)

Secondly, the BAP court found that the County's recordation of the tax deed after the tax sale was purely a ministerial act required by state statute, and therefore would not violate the automatic stay. (*Tracht Gut, supra*, 503 B.R. 804, 812.)

In sum, the BAP stated two reasons why there was no violation of the automatic stay. These two reasons were not dependent on each other. They were two distinct reasons. The bankruptcy court in this matter basically made them dependent and argued that its case is different because in *Tracht Gut* the property was "sold" prior to the bankruptcy petition being filed. But the BAP correctly said that once the redemption period lapses the property does not become part of the bankruptcy estate and therefore no violation occurs because of *any* action by the County.

The BAP citing another redemption section, said that RTC § 3701 "provides the property owner's right of redemption expires at the close of business of the last business day preceding the sale. Debtor did not redeem the Properties prior to the sales." (*Tracht Gut, supra*, 503 B.R. 804, 818.) Likewise, Meridian never

redeemed the properties, nor could they because they had no legal right to do so. Further, like in *Tracht Gut*, Meridian is not challenging that the actual sale was not regularly conducted in compliance with all applicable statutes. Meridian would only have an interest in the property if the right to redemption is revived, but in this case, like in *Tracht Gut* it never revived.

Granted, the *Tracht Gut* facts are slightly different in that not only did the redemption period lapse, but a winning bidder was identified at the sale, except that the deeds were not recorded prior to the bankruptcy petition being filed. But as previously explained, the sale is not relevant under the current statutory scheme. What's important is the lapsing of the redemption period prior to the bankruptcy filing.

1. The bankruptcy estate is entitled to claim the excess proceeds of the sale.

When a tax defaulted property is sold at a tax sale, the prior owner can claim the excess proceeds. The trustee who steps in the shoes of the debtor can exercise this right. The bankruptcy court should have focused on the right to claim the excess proceeds of the sale, and not the property itself. Once the right of redemption is terminated, the prior owner is entitled to file a claim for excess proceeds if the tax sale of the property resulted in money above and beyond the taxes, penalties, costs and fees. (RTC § 4674.) Under RTC § 4675(a) any party of interest may file a claim for excess proceeds. RTC § 4675(e)(1)(B) lists as one of

the persons of interest, any person with title or record to the property prior to the recordation of the tax deed to the purchaser. Consequently, in this case, the trustee can use the excess proceeds to pay creditors in the bankruptcy case.

2. The bankruptcy court's analysis of never ending contingencies is exactly what the California Legislature wanted to avoid.

The bankruptcy's court confusion was self-created because it started looking at all of the “what ifs,” i.e., contingencies, instead of focusing on the bright-line rule. The court fixated itself on the right of redemption being revived under several scenarios. But in this case, like in *Tracht Gut*, the redemption right never revived. All that's left is the right to claim the excess proceeds. Additionally, like in *Tracht Gut* there are no facts indicating that Meridian or the trustee will challenge the sale for some irregularity.

If we follow the bankruptcy court's theory on contingencies to its logical conclusion, we are going to find that it will be very difficult to ascertain when the sale is final and when all of the contingencies expire. For example, the redemption period is revived in counties that use the deferred payment option if the balance of the purchase price is not paid within the time set forth by the tax collector pursuant to RTC § 3693.1. The BAP recognized that the redemption period could even be revived after the deed is recorded. It analyzed this in footnote 6 of its opinion and cited the case of *Lona v. Citibank, N.A.*, 202 Cal.App. 4th 89, 104, a case not dealing with a tax defaulted property but a non-judicially foreclosed property,

which suggests that a "foreclosure sale induced by fraud or irregularities might be set aside and consequently the power to redeem revived." (*Tracht Gut, supra*, 503 B.R. 804, 812, footnote 6.) But the BAP did not think this was important, realizing that once a deed is recorded it transfers the property free of encumbrances. The BAP realized that even though redemption rights could be revived, they hadn't.

In fact, the logical conclusion of the bankruptcy court's ruling is that there are even more contingencies. For example, for tax sales occurring after January 2, 2012, before filing a suit in court, there must first be filed (absent some exceptions) a petition with the Board of Supervisors for rescission within one year of the execution of the Tax Collector's deed. (RTC §§ 3725(a)(1), 3731.) And if the supervisors determine that a tax deed sold under this part should not be rescinded the claimant has an additional year within to file a suit in court. (RTC §§ 3725(a)(2), 3731.) So two years can go by before this contingency expires.

Further, there is even an exception to the 1-year statute of limitations to challenge a tax sale where the owner is in undisturbed possession. (*Mayer v. L.B. Real Estate* (2008) 43 Cal.4th 1231.) Possession is not disturbed until the owner receives adequate notice of a tax sale. And the time limitation begins to run when the possession is disturbed.

This is why the bright-line rule pursuant to RTC § 3707(a)(1), must be maintained as confirmed by the 9th Circuit's affirmation of the BAP Opinion. No

one has to guess as to when the sale occurred or when the debtor's rights are cut-off, or when all of the contingencies have expired. Consequently, the bankruptcy court should not have ruled that the tax sale violated the automatic stay.

III.

CONCLUSION

Amici Curiae, for the reasons stated above, respectfully urge that the bankruptcy court decision be reversed.

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CERTIFICATE OF COMPLIANCE

Federal Rules of Bankruptcy Procedure 8015(a)(7) and 8017

Pursuant to Federal Rule of Bankruptcy Procedure 8015(a)(7) and 8017, the undersigned certifies that this Brief complies with the type-volume limitation and that this Brief contains 3,451 words (excluding the cover page, tables, signature blocks and required certificates) as counted by the computer program used to prepare this Brief.

Dated: October 14, 2016

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