U.S. Court of Appeals Docket Nos. 17-55115 & 17-55354

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD L. BALDWIN AND KAREN BALDWIN,
Plaintiff/Appellees,

vs.

UNITED STATES OF AMERICA
Defendants/Appellant.

On Appeal From Judgment and Order
Of The United States District Court
For The Central District of California
U.S.D.C Case No. 2:15-cv-06004-RGK-AGR
The Honorable R. Gary Klausner, U.S. District Judge

RESPONSE BRIEF OF APPELLEES HOWARD L. BALDWIN; KAREN BALDWIN

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I. INTRODUCTION

This action arises from Plaintiffs-Appellees Howard L. Baldwin and Karen Baldwin's (collectively hereinafter "Appellees" or "the taxpayers") claim for refund filed in the district court for the Central District of California. The district court ruled that the taxpayers were the prevailing parties in the case and entered a judgment in favor of the taxpayers and against the United States for $167,663, plus statutory interest and $25,515 in litigation fees and costs.

II. JURISDICTIONAL STATEMENT

Appellees agree with Appellant's statement as to the basis of jurisdiction in the district court and the basis for jurisdiction in this Court.

III. STATEMENT OF ISSUES

1. Whether the district court correctly found that Treas. Reg. § 301.7502-1(e) is not entitled to *Chevron* deference, and thus properly determined that the taxpayers' refund claim was timely filed.

2. If the district court erred in ruling that Treas. Reg. § 301.7502-1(e) is not entitled to *Chevron* deference, whether the rule set forth in the Treasury Regulation should be given retroactive effect in this case.

3. Whether the district court correctly found that the taxpayers established that they were entitled to the net operating loss upon which their tax refund claim was based.

4. Whether the district court properly awarded litigation fees and costs to taxpayers under 26 U.S.C. § 7430.

IV. APPLICABLE STATUTES AND REGULATIONS

The statutes and regulations relevant to the disposition of these appeals are included as an addendum to Appellant's brief.

V. STATEMENT OF THE CASE

A. Claim for Refund

On October 24, 2006, the IRS received the taxpayers' U.S. Individual Income Tax Return (Form 1040) for tax year 2005 reflecting a tax liability for 2005 of $170,951, which was paid by the taxpayers. ER 9. On November 1, 2010, the IRS received a Form 1040 from the taxpayers for the tax year 2007, reflecting a net operating loss for 2007 of $2,569,969. ER 9-10. Only $1,294,278 of the $2,569,969 net operating loss was required to establish the $167,663 overpayment reflected on the 2005 Form 1040X claim for refund. ER 29-30, ¶ 39; 45 ¶ 50. An amended claim for refund in the amount of $167,663 was prepared on the taxpayers' behalf seeking a refund for tax year 2005 based upon the 2007 net operating loss carry back. ER 1. Under 26 U.S.C. § 6511(d)(2), the deadline for the taxpayers to file their 2005 claim for refund was October 15, 2011. ER 6-7.

Taxpayers' former assistant Ryan Wuerfel, testified via deposition admitted into evidence at trial, that on June 21, 2011, he was provided tax documents and an

envelope from Nicholas Ruta (another employee of the taxpayers), that he placed the tax documents in a pre-addressed envelope, that he affixed the proper amount of postage for the weight of the envelope and documents and that he drove to the local post office and mailed the envelope. ER 21, 218-24. The district court, relying on the common-law mailbox rule and *Anderson v. United States*, 966 F.2d 487 (9th Cir. 1992), found that timely filing was made by the taxpayers of the claim for refund. ER 7-8.

B. Evidence at the trial.

Evidence at the trial was also submitted through stipulated joint exhibits, the declarations of Appellees Howard and Karen Baldwin and Nicholas Ruta. ER 47-101. Howard Baldwin and Nicholas Ruta also testified at the trial. ER 125-155.

Baldwin Entertainment Group Ltd. ("BEG") was an independent film producer. ER 22-23, ¶ 3. Through the hard work of its principals Howard and Karen Baldwin, BEG acquired options to stories to make movies and developed projects by "attaching enough creative elements" that would hopefully attract the proper financing to allow the movie to be made. ER 138, lns. 3-11. The acquisition of the story rights was always done with an option. ER 139, lns. 21-22. Then a screenwriter was hired to develop a proper screenplay. ER 139, lns. 22-23. It was a long process that often took many years to complete. ER 139, lns. 23-25.

The cost of completing a screenplay could be hundreds of thousands of dollars. ER 146, lns. 6-7.

Usually an option to develop a story lasted a year and a half. ER 141, lns. 17-18. If the option was exercised to buy the story rights, it meant that the movie was going to be made. ER 141, lns. 21-22. Sometimes, even though the option rights technically expired, BEG would continue to negotiate with the owner to acquire the story rights after the expiration of the option. ER 142, lns. 10-12; 154, lns. 22-25; 155, lns. 1-7. If the relationship was good, the owner gave BEG what was called a "courtesy" window to keep developing the film project until the owner found another buyer. ER 142, lns. 12-8; 154, lns. 22-25; 155, lns. 1-7.

Nicholas Ruta, an employee of the taxpayers, testified by declaration (which was admitted into evidence at the start of the trial) that in 2007, BEG reported $4,177,256 of losses under 26 U.S.C. § 165(a), which resulted from worthless and valueless projects and lapsed options for film projects. ER 41, ¶ 34. Because Appellee Howard Baldwin had only $2,555,037 of basis in his BEG stock, only $2,555,037 of the 2007 BEG loss was reported on the taxpayers' 2007 Form 1040. ER 45 ¶ 48. Nicholas Ruta testified that the losses reported on the 2007 BEG Form 1120S were primarily attributable to "expired projects." ER 129, lns. 21-23.

Appellee Howard Baldwin testified by declaration (also admitted into evidence at the beginning of trial) and during trial that BEG entered into legal

agreements that assigned certain intellectual property to BEG with respect to all projects reflected on Joint Exhibit 26, pages 9-10. ER 24, ¶ 14; 152-155. Howard Baldwin further testified that the legal rights to various BEG film project options expired in 2006 and 2007, but that BEG continued to negotiate to renew the rights which expired in 2006 into 2007 without success. ER 24-26, ¶¶ 14-19; 145, lns. 19-25; 154, lns. 22-25; 155, lns. 1-7. In 2007, BEG decided to no longer pursue the renewal of these rights and the film projects were discontinued. ER 26-27, ¶ 21. Not all film projects are successfully turned into motion pictures. ER 27, ¶ 22. Sometimes even very good film projects are never finished because of outside forces, such as the availability of financing. *Id.* The film projects set forth in Joint Exhibit 26 were no longer worth pursuing in 2007, so BEG decided to discontinue these projects in 2007. *Id.*

Howard Baldwin testified that the Mandrake film project had $1,199,596.47 of capitalized costs and the option rights to this project expired by their terms in 2007. ER 25, lns. 1-7. The Phantom film project had $444,378.93 of capitalized costs and the option rights to this project expired by their terms in 2006, but an extension of these rights was still being negotiated in 2007. ER 25, ¶ 16. The Da Miracle film project had $688,502.55 of capitalized costs and the option rights to this project expired by their terms in 2007. ER 25, ¶ 17. The Indiscretion film project had $247,544.92 of capitalized costs and the option rights to this project

expired by their terms in 2006, but an extension of these rights was still being negotiated in 2007. ER 25-26, ¶ 18. The Shadow Ball film project had $452,022.17 of capitalized costs and the option rights to this project expired by their terms in 2006, but an extension of these rights was still being negotiated in 2007. ER 26, ¶ 19. BEG incurred $4,177,256 of § 165(a) losses in 2007, but only $660,653.00 of these losses were attributable to worthless option rights. ER 26, ¶20. BEG had discontinued these movie projects in 2007. ER 26-27, ¶ 21. They were discontinued because BEG determined the projects were no longer worth pursuing. ER 27, ¶ 22.

Howard Baldwin also provided the following testimony during trial: With respect to projects with options that expired in 2006, BEG still had hope the projects could be continued in 2007. ER 155, lns. 5-7. There were also several film projects had expired as of December 31, 2007. ER 145, lns. 19-22; 236-237. The capitalized film expenses, film project costs and option costs for the Mandrake project and for the DaMiracle project, whose option rights expired by their own terms in 2007, totaled $1,888,099.02. ER 24-25, ¶¶ 15 & 17; 145, lns. 19-25; 236-237. In 2007, because of financial difficulties at BEG, the company stopped doing business because "we just--we just weren't able to sustain the company at that point in time." ER 140, lns. 13-21.

The elements required to establish the taxpayers' claim for refund are that the taxpayers (i) paid the tax which is the subject of the refund action; (ii) timely filed a claim for refund of the subject tax and (iii) filed a refund action within two (2) years after the IRS denied the refund claim. 28 U.S.C. § 1346(a)(1).

It was undisputed that the taxpayers paid the tax which is the subject of this refund action and that the taxpayers timely filed their refund suit in the district court on August 7, 2015. ER 1-2. The district court, acting as the trier of fact, found that the taxpayers had timely filed a claim for refund of the subject tax with the Internal Revenue Service. ER 8.

C. District Court's Findings of Facts.

On December 7, 2016, the district court entered a judgment in favor of Appellees and against the United States for $167,663, plus statutory interest. ER 10-11. On January 24, 2017, the district court awarded taxpayers $25,515 in attorneys' fees and litigation costs. ER 15.

The district court overruled any evidence objections with respect to evidence upon which the court relied to reach its decision. ER 8. Based on the evidence submitted by the taxpayers at trial, the district court found that the taxpayers proved by a preponderance of the evidence the following facts:

1. On October 24, 2006, the IRS received [taxpayers'] individual income tax return form and payment of the full $170,951 in liability for the tax year 2005 ("2005 Return"). ER 6.
2. For tax year 2007, [taxpayers] requested and were granted an extension of time to file their return until October 15, 2008. ER 6.
3. On November 1, 2010, the IRS received [taxpayers'] individual income tax return form for tax year 2007 indicating a net operating loss for that year and that the taxpayers then prepared an individual income tax return ("Amended Return") on a Form 1040X, claiming the 2007 net operating loss ("NOL") as a carry back deduction for the tax year 2005 and a refund in the amount of $167,663. ER 6-7.
4. [Taxpayers] had sufficient losses from Baldwin Entertainment Group LTD included on their 2007 Return to entitle them to a refund in the amount of $167,663 when carried back to tax year 2005. ER 7. [Taxpayers] also had sufficient tax basis in Baldwin Entertainment Group LTD to deduct losses on their 2007 Return that would allow for a refund in the amount of $167,663 when carried back to tax year 2005. ER 7.
5. On June 21, 2011, [taxpayers'] assistant, Ryan Wuerfel, mailed the Amended Return to the IRS via regular mail at the Hartford post office. ER 7. The Amended Return was mailed in a green and white envelope, which was

addressed to the IRS service center in Andover, MA. ER 7. The Amended Return would have arrived at the IRS service center in the ordinary course well before the October 15, 2011 deadline. ER 7. While the IRS Form 1040X instructions indicated that the Amended Return should have been sent to the service center in Kansas City, MO, the Andover service center would have forwarded the Amended Return to Kansas City in the ordinary course of operations. ER 7.

6. IRS records do not reflect that the Amended Return was ever received by either service center, but the IRS offers no affirmative evidence calling into question that the Amended Return was mailed by [taxpayers] on June 21, 2011. ER 7. [Taxpayers'] evidence that the Amended Return was indeed mailed on that date was credible. ER 7.

7. When [taxpayers] later inquired about the status of their refund claim, the IRS looked into the matter. ER 7. The IRS never asked [taxpayers] for documentation to support their claim for refund during the administrative consideration of their claim, and at no time during the process did the IRS challenge the validity of the claim for refund. ER 7. The IRS ultimately denied [taxpayers'] refund claim on August 12, 2013, however, because they contended that the claim had not been timely filed. ER 7.

VI. SUMMARY OF ARGUMENT

1. The district court correctly found that Treas. Reg. § 301.7502-1(e) is not entitled to *Chevron* deference and that the holding of *Anderson v. United States*, 966 F.2d 487 (9th Cir. 1992) (the common-law mailbox rule is a permissible method to prove timely filing of a claim for refund) is the controlling law in the Ninth Circuit.

2. If the district court should have found that Treas. Reg. § 301.7502-1(e) is entitled to *Chevron* deference, the rule set forth in the Treasury Regulation cannot be applied retroactively in this case.

3. The district court properly concluded that the taxpayers properly established by a preponderance of the evidence that they were entitled to the net operating loss upon which their tax refund claim was based.

4. The district court properly awarded attorneys' fees and litigation costs to taxpayers under 26 U.S.C § 7430, which the United States does not dispute if the district court's finding that the taxpayers were entitled to the refund sought in this matter was correct.

The district court did not commit reversible error and the Judgment should be affirmed in full.

VII. ARGUMENT

A. The district court properly found that Treas. Reg. § 301.7502-1(e) is not entitled to *Chevron* deference and the holding of *Anderson v. United States*, 966 F.2d 487 (9th Cir. 1992) (the common-law mailbox rule is a permissible method to prove timely filing of a claim for refund) is the controlling law in the Ninth Circuit.

1. Statutory interpretation of 26 U.S.C. § 7502.

Congress enacted 26 U.S.C. § 7502 to mitigate the harshness of the old common-law physical delivery rule which had required that tax documents must be physically received by the IRS on time to be timely filed. The old common-law physical delivery rule left taxpayers vulnerable to postal service malfunctioning. Section 7502 carves out an exception to the physical delivery rule by creating a statutory mailbox rule. The statute allows a taxpayer to prove timely filing on the basis of timely mailing notwithstanding the date of physical delivery of the tax return to the IRS. *Anderson*, *supra*, at 490.

Under § 7502(a), taxpayers may avail themselves of the statutory mailbox rule by producing the postmark. Section 7502 provides that a timely postmark satisfies the timely filing requirement even if the document reaches the IRS after the deadline.

As an additional taxpayer safeguard, § 7502(c) allows a taxpayer to prove timely filing by producing the date shown on the postal receipt given for tax

returns sent to the Internal Revenue Service by registered or certified mail. Under § 7502(c), a claim sent by certified or registered mail is presumed *delivered* on the date shown on the registered or certified mail receipt. *Anderson*, *supra*, at 490.

By its own terms, the beneficial treatment afforded by § 7502(c) applies *only* when the document is sent by registered or certified mail. However, the language of § 7502 itself does not indicate that subsection (c) is the only exception to the statutory mailbox rule, and it does not follow from the language of the statute that the statutory mailbox rule set forth in § 7502 is the exclusive means of proving timely mailing and filing. *Anderson*, *supra*, at 490.

It is undisputed that the 2011 amendment to the Treasury Regulations is in direct conflict with the common-law mailbox rule in the Ninth Circuit which allows credible evidence of mailing to create a presumption of receipt. ER 3. The amendment to Treas. Reg. § 301.7502-1(e) was published on August 23, 2011 (two months after the Form 1040X in this case was mailed) and was purportedly applicable to any documents mailed and delivered after September 21, 2004. 76 Fed. Reg. 52561-01 (Aug. 23, 2011); Treas. Reg. § 301.7502-1(g)(4).

Treas. Reg. § 301.7502-1(e)(2)(i) provides that "[o]ther than direct proof of actual delivery, proof of proper use of registered or certified mail, and proof of proper use of a duly designated PDS as provided for by paragraph (e)(2)(ii) of this section, are the exclusive means to establish *prima facie* evidence of delivery of a

document to the agency, officer, or office with which the document is required to be filed. No other evidence of a postmark or of mailing will be *prima facie* evidence of delivery or raise a presumption that the document was delivered."

Even if this Treasury Regulation was applicable at the time the taxpayers mailed their Form 1040X, the regulation only applies to taxpayers who are using § 7502 to have their date of filing be the date of *mailing* because such taxpayers' date of *delivery* was after the applicable due date. In this case, the date of *delivery* was well before the due date (October 15, 2011), and as such, the statutory mailbox rule set forth in § 7502 is not required by the taxpayers in this case to meet the timely filing requirement. The taxpayers in this case used the mailbox rule not to set the date of *mailing* as the date of filing, but rather to prove that the Form 1040X was actually *delivered* before October 15, 2011.

As this Court stated in *Anderson*, § 7502 carves out an exception to the physical delivery rule by creating a statutory mailbox rule. The statute allows a taxpayer to prove timely filing on the basis of timely mailing notwithstanding the date of physical delivery of the tax return to the Internal Revenue Service. *Anderson*, *supra*, at 490. Appellees were not required to avail themselves of the mitigating provisions in § 7502 in order to prove timely filing because they mailed their claim for refund several months before the due date. Under basic principles of *stare decisis*, the amended Treasury Regulation is not applicable in this case.

2. Treas. Reg. § 301.7502-1(e) is not entitled to *Chevron* deference.

The United States asserts that the adoption of Treas. Reg. § 301.7502-1(e) published as a final regulation on August 23, 2011, repeals the common-law mailbox rule in the Ninth Circuit for mailing of tax documents after September 21, 2004. The United States erroneously contends that the decision in *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) supports their conclusion "because the statute does not directly and precisely address the common-law mailbox rule's viability." The United States asserts that because the mailbox rule is not addressed in the text of § 7502, the issue of preemption is ambiguous and ripe for *Chevron* deference. But as the Supreme Court stated in *Chevron*, if Congress has directly spoken to the precise question at issue, the court must give effect to that Congressional intent. The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to Congressional intent. *Chevron, supra,* at 843, n. 9. On this issue, the Ninth Circuit previously found that Congress did speak to the precise issue in question, and held that Congress did not intend that § 7502 override the common-law mailbox rule, but merely added an additional statutory mailbox rule that made *mailing* the date of filing instead of *delivery* as the date of filing. *Anderson, supra*, at 491.

The United States contends that because § 7502 is silent on whether it replaces the common-law mailbox rule, it means that Congress has not directly addressed the precise question at issue, giving the Treasury Department gap-filling power, citing *United States v. Home Concrete & Supply, LLC*, 132 S.Ct. 1836, 1843 (2012) ("Thus, in *Chevron* the Court wrote that a statute's silence or ambiguity as to a particular issue means that Congress has not 'directly addressed the precise question at issue' (thus likely delegating gap-filling power to the agency).")

The United States fails to note that in *Home Concrete*, the Supreme Court determined that the rule of *stare decisis* overrode the *Chevron* argument of the United States in the case of a Treasury Regulation that directly contradicted an earlier ruling of the Supreme Court. In *Home Concrete*, the language of the statute did not directly address the issue under review. After reviewing the language in *Chevron* that the United States cites as supporting its position, the Supreme Court stated that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Home Concrete, supra,* at 1844. When an appellate court has determined that Congress has "directly spoken to the question at hand" there is "no gap for the agency to fill." *Id.* Only if Congress has not so spoken is *Chevron* deference applicable. The Court in *Home Concrete*

concluded that an earlier Supreme Court decision interpreting the statute met this test and thus could not be overrode by a later Treasury Regulation. *Home Concrete* at 1844:

> "It may be that judges today would use other methods to determine whether Congress left a gap to fill. But that is beside the point. The question is whether the Court in *Colony* concluded that the statute left such a gap. And, in our view, the opinion (written by Justice Harlan for the Court) makes clear that it did not. Given principles of *stare decisis*, we must follow that interpretation. And there being no gap to fill, the Government's gap-filling regulation cannot change *Colony*'s interpretation of the statute."

In *Anderson,* this Court (former Justice Pregerson authored the opinion) applied traditional tools of statutory interpretation when it determined that Congress had "directly spoken to the question at hand" and § 7502 was not intended to eliminate the common-law mailbox rule. Under traditional methods of statutory interpretation, "absent a clear manifestation of contrary intent, a newly-enacted statute is presumed to be harmonious with existing law and its judicial construction." *Anderson, supra,* at 491; *Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Company of Virginia*, 464 U.S. 30, 35 (1983). ("It is a well-established principle of statutory construction that '[t]he common law ... ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.'" (citation omitted)).[1] It is clear that

[1] The Supreme Court has made clear that positive law is not "writ[ten] upon a clean slate," and " 'courts may take it as a given that Congress has legislated with

existing law and its judicial construction permitted the admission of extrinsic evidence to prove *delivery* of a package under the common-law mail box rule. *Anderson, supra,* at 491. The statute was only meant to create a statutory mailbox rule that expanded, not limited, the cases that would meet the requirement of timely filing.

The United States has failed to proffer any authority which would allow an administrative agency, such as the Treasury Department, to adopt regulations which purport to overrule controlling Ninth Circuit authority on whether Section 7502 repeals the common-law mailbox rule. Accordingly, under the rules set forth in *Home Concrete*, Treas. Reg. § 301.7502-1(e) is not entitled to *Chevron* deference because there is "no gap for the agency to fill," and under basic principles of *stare decisis*, the common-law mailbox rule applied in *Anderson* remains the law in the Ninth Circuit, at least in cases such as this one where the common-law mailbox rule is used only to prove the date of *delivery*, and the

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an expectation that … [common law] principle[s] will apply' " under that positive law. *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 108 (1991)). To that end, " '[s]tatutes which invade the common law … are to be read ***with a presumption favoring*** the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.' " *Id.* (emphasis added) (citations omitted). The burden to overcome the presumption is high; "[i]n order to abrogate a common-law principle, the statute must ***speak directly*** to the question addressed by the common law." *Id.* (emphasis added) (quotation marks and citations omitted).

protections of § 7502 (the date of *mailing* is deemed to be the date of *delivery*) were not needed.

While the United States is correct that there is a split in the circuits regarding whether the common-law mailbox rule was abrogated by § 7502, the majority of appellate courts that have addressed this issue have concluded that the common-law mailbox rule was not repealed by § 7502. In addition, only the Supreme Court and Congress have the power to resolve a split among the Circuit Courts of Appeal.

The Second Circuit and the Sixth Circuit have found that the common-law mailbox rule was preempted by § 7502. *See Deutsch v. Commissioner*, 599 F.2d 44 (2d Cir. 1979); *Miller v. United States*, 784 F.2d 728 (6th Cir. 1986). This Court, the Eighth Circuit, the Tenth Circuit and the Third Circuit have all ruled that the common-law mailbox rule was not preempted by § 7502. *See Anderson*, *supra, 491; Estate of Wood v. Comm'r of Internal Revenue,* 909 F.2d 1155, 1159–61 (8th Cir.1990); *Sorrentino v. IRS*, 383 F.3d 1187 (10th Cir. 2004); *Philadelphia Marine Trade Association-International Longshoremen's Association Pension Fund v. Commissioner*, 523 F.3d 140 (3rd Cir. 2008). As noted in *Philadelphia Marine Trade Association-International* at 152, the Six Circuit expressed some doubts about its earlier decision in *Miller*, despite reluctantly adhering to the case's

holding as a binding precedent. See *Carroll v. Commissioner*, 71 F.3d 1228, 1232 n. 2 (6th Cir. 1995).

In a very thorough opinion, the Third Circuit explained in *Philadelphia Marine Trade Association-International* at 147-152, why § 7502 did not preempt the common-law mailbox rule. As the Third Circuit explained, the mailbox rule is merely a method for determining the date of physical delivery under the "physical delivery" rule. It does not ignore the physical delivery requirement, but merely creates a presumption that physical delivery occurred in the ordinary time after mailing. After the enactment of § 7502, there are at least two types of the common-law "mailbox rule" that a taxpayer might seek to invoke. First, a taxpayer relying on § 7502—because it mailed the document before the deadline, but too late for that document to arrive on time in the ordinary course of post office business—might seek to invoke a presumption of eventual delivery. It would need this presumption because § 7502(a)(1) protects the taxpayer only where the IRS actually receives the document at some later time. A second, more classic mailbox rule arises when a taxpayer who mailed its refund request with time for it to arrive *before* the deadline. Such a taxpayer does not need the protection of § 7502, as the statute's function is to excuse taxpayers for *late* receipt. The mailbox rule is only used to allow a presumption of delivery, as was the situation in this case.

The Third Circuit went on to explain why it did not follow the decision in

the Second Circuit:

> The Second Circuit's reasoning in *Deutsch*—essentially that Congress' desire was to create an easily applied and objective standard—is insufficient under the well-established principle that Congress must clearly indicate its intent to repeal a common-law rule. *See Norfolk Redevelopment*, 464 U.S. at 35, 104 S.Ct. 304. Even assuming the common-law mailbox rule is neither easily applied nor objective, an assumption about which we are skeptical, that alone is insufficient. It does not clearly follow from Congress' enactment of an additional taxpayer protection with easily applied standards that it sought simultaneously to repeal an existing common-law protection with less easily applied standards. *Id.* at 151-152.

In addition, the Third Circuit noted *Id.* at footnote 8:

> If anything, that one portion of the legislative history suggests that Congress did not intend § 7502's provisions to preclude other evidence of mailing. In the legislative history relating to a 1968 amendment covering mailed tax deposits, Senate and House Reports state that although the date of mailing can be proven by the date of registration for registered mail, "[t]he taxpayer, of course, could also establish the date of mailing by other competent evidence." S.Rep. No. 90–9014 (1968), 1968 U.S.C.C.A.N. 2354, 2373; H.R.Rep. No. 90–1104 (1968), 1968 U.S.C.C.A.N. 2341, 2354. Although this language is not directly on point, as it explicitly speaks only to § 7502(e) rather than the subsections of § 7502 at issue here, it lends support to the notion that Congress did not intend courts to prevent evidence of mailing where the statute itself does not direct that result.

This reasoning suggests that there was no ambiguity in § 7502 regarding the common-law mailbox rule. Without ambiguity, Treas. Reg. § 301.7502-1(e) does not meet the first test of *Chevron*. Moreover, under *Home Concrete*, *supra*, at 1844 once the Ninth Circuit determined that Congress did not intend to repeal the existing common-law mailbox rule

there is no ambiguity and thus, no gap to fill.

3. Ninth Circuit caselaw does not override the rule set forth in *Home Concrete*

The United States relies upon *Oregon Restaurant and Lodging Ass'n v. Perez*, 816 F.3d 1080, 1088 (9th Cir. 2016) for the proposition that silence in a statute is automatically a gap that the Treasury Department may appropriately fill. In *Oregon Restaurant*, this Court concluded that 26 U.S.C. § 203(m)'s "clear silence as to employers who do not take a tip credit has left room for the DOL to promulgate the 2011 rule," applying the reasoning in *Christensen v. Harris Cty.*, 529 U.S. 576 (2000). The language in § 203(m) was totally silent about employers who do not take a tip credit. This is not the case with § 7502. As this Court in *Anderson* made clear, under traditional methods of statutory interpretation, because there was no clear manifestation of contrary intent, § 7502 "is presumed to be harmonious with existing law and its judicial construction" which means the statute affirmatively includes the common-law mailbox rule in its application and there is no gap to fill. *Anderson, supra,* at 491.

Likewise, the other authorities relied upon by the United States where this Court overruled a prior decision based on *National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967 (2005) did not involve overturned cases where this Court, "employing traditional tools of statutory construction,

ascertain[ed] that Congress had an intention on the precise question at issue," finding that intention is the law and must be given effect. *Home Concrete*, *supra*, at 1844. *See Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235 (9th Cir. 2013) (observing that "[a]lthough *Orthopaedic Hospital* [this Court's prior decision] was grounded in the language of the statute—as are all of our statutory interpretation cases—we did not hold that our view of [a particular statutory provision] represented the *only* reasonable interpretation of that statute"); *Garfias-Rodriquez v. Holder*, 702 F.3d 504, 512 (9th Cir. 2012) (en banc) ("In *Brand X*, the Supreme Court held that '[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.' (citations omitted) We believe that *Acosta* [this Court's prior decision] was not such a decision."); *Gonzales v. Department of Homeland Sec.*, 508 F.3d 1227, 1242 (9th Cir. 2007) (noting that "despite some language to the contrary, *Perez-Gonzalez* [this Court's prior decision] was based on a finding of statutory ambiguity that left room for agency discretion").

As the United States points out, in each of these cases, this Court determined that its interpretation of the statute was not the only reasonable interpretation. However, in *Anderson*, this Court specifically concluded that Congress intended to

keep the common-law mailbox rule in place under § 7502, finding no statutory ambiguity. Under *Home Concrete*, there does not need to be a specific finding that the statute is unambiguous. In *Home Concrete*, the Supreme Court was faced with a prior decision of the Court which had observed that "it cannot be said that the language is unambiguous." *Home Concrete, supra,* at 1843. Nevertheless, the test adopted by the Supreme Court in *Home Concrete*, is whether an appellate court has already interpreted the Congressional intent, and thus there is no longer any different construction that is consistent with such interpretation available for adoption by the agency. *Id*. at 1843.

B. If the district court should have found that Treas. Reg. § 301.7502-1(e) is entitled to *Chevron* deference, the rule set forth in the Treasury Regulation cannot be applied retroactively in this case

1. Rules applicable to determine retroactive application.

In *Garfias-Rodriguez, supra,* at 516, this Court set forth the rule that when this Court overturns its own precedent following a contrary statutory interpretation by an agency authorized under *Brand X,* the Court will analyze whether the agency's statutory interpretation to which the Court defers applies retroactively under the five-factor test set forth in *Montgomery Ward & Co. v. FTC,* 691 F.2d 1322, 1328 (9th Cir. 1982). These five factors are set forth in *Garfias-Rodriguez* and *Beneli v. National Labor Relations Board*, 873 F.3d 1094 (9th Cir. 2017).

2. Application of the *Montgomery Ward* factors.

Factor One: This is a case of first impression.

Because it was the United States that brought about the change in the law, the first factor does not weigh in favor of either side. *Garfias-Rodriguez, supra,* at 521.

Factor Two: The new rule represents an abrupt departure from well-established practice.

In the Ninth Circuit, the mailbox rule was applicable under § 7502 for nearly two decades following *Anderson*. The new rule under Treas. Reg. § 301.7502-1(e) represents an abrupt departure from a well-established practice and strongly favors prospective application of the rule set forth in the amended regulation in this case. *Beneli, supra,* at 1100.

Factor Three: The taxpayers relied on the validity of the mailbox rule.

As with hundreds of thousands of Americans who line up each April 15th at the mailboxes in front of the post office, the taxpayers in this case believed in good faith that the Postal Service would deliver the envelope with their refund claim in the ordinary course of business and mailed their amended return well before the applicable due date. The mailbox rule was still in place in the Ninth Circuit (and presumably in all other circuits except for the Second and Sixth Circuits) when the

tax returns at issue were mailed in June of 2011.[2] It was not until August of 2011, that the adoption of the Treasury Regulation was published as a final regulation, alerting taxpayers that certified or registered mail was the only method to prove filing. The taxpayers' reliance upon the then existing and well established common-law mail box rule supports the prospective application of the rule set forth in the later adopted Treasury Regulation in this case. Moreover, any ruling by this Court that the Treasury Regulation overrules *Anderson* and repeals the well settled common-law would occur seven years after the subject claim for refund was filed.

Factor Four: Retroactive application of the rule would severely burden the taxpayers.

If the Treasury Regulation is applied retroactively, the taxpayers will lose the ability to recover a substantial tax refund which they were properly entitled to. Such a burden favors prospective application of the rule set forth in the Treasury Regulation in this case. *Id.* at 1101.

Factor Five: The statutory interest in applying a new rule.

This factor at first favors retroactive application because non-retroactivity impairs the uniformity of a statutory scheme. However, as this Court stated in

[2] At no time were the taxpayers residents of the Second Circuit or the Sixth Circuit.

Garfias-Rodriguez at 523, when "the government cannot claim that the new rule follows from the plain language of the statute, the factor only leans in the government's direction." The new rule set forth in Treas. Reg. § 301.7502-1(e) clearly does not follow from the plain language of the statute, giving this factor minimal weight in this case.

Under the five-factor retroactivity analysis of *Montgomery Ward*, this Court should not apply the rule set forth in Treas. Reg. § 301.7502-1(e) retroactively to the taxpayers under the facts of this case.

C. The district court properly found that Appellees demonstrated by a preponderance of the evidence that they were entitled to the net operating loss upon which their tax refund claim was based.

1. Limitations on the Government's Appeal.

The United States appealed only the issue of whether the taxpayers sufficiently proved at trial that BEG sustained a loss under 26 U.S.C. § 165(a). The United States did not appeal the issues of whether the taxpayers proved at trial that BEG had sufficient basis in the worthless assets to permit such deduction and whether Howard Baldwin had sufficient basis in his BEG stock to permit any BEG losses under § 165(a) to be used by the taxpayers to calculate a net operating loss under 26 U.S.C. § 172. Because these fact issues were not raised in this appeal, only the issue of deductibility under § 165(a) is reviewable by this Court. *City of*

Phoenix v. Com/Systems, Inc., 706 F.2d 1033, 1038 (9th Cir. 1983). ("This court will not review an issue not raised or objected to below unless necessary to prevent manifest injustice, *In re Southland Supply, Inc.*, 657 F.2d 1076, 1079 (9th Cir.1981), or unless the issue not objected to in the district court is one of law and does not affect or rely upon the factual record, *Telco Leasing, Inc. v. Transwestern Title Co.*, 630 F.2d 691, 693 (9th Cir. 1980); *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978)."). This Court's standard of review with respect to the sufficiency of the evidence to sustain a damage award is narrow. *Kotz v. Bache Halsey Stuart, Inc.*, 685 F.2d 1204, 1208 (9th Cir. 1982). A damage award will be disturbed only when it is clear that the evidence does not support it. *Flores v. Pierce*, 617 F.2d 1386, 1392 (9th Cir. 1980), cert. denied, 449 U.S. 875, 101 S.Ct. 218, 66 L.Ed.2d 96 (1980).

2. Losses under § 165(a).

Under § 165(a), a taxpayer is entitled to take a deduction for any loss sustained during the taxable year that is not compensated for by insurance or otherwise. Section 165(b) provides that for purposes of subsection (a), the basis for determining the amount of the deduction for any loss shall be the adjusted basis provided in 26 U.S.C. § 1011 for determining the loss from the sale or other disposition of property. Section 165(c) provides that in the case of an individual, the deduction under subsection (a) shall be limited to (1) losses incurred in a trade

or business, (2) losses incurred in any transaction entered into for profit, though not connected with a trade or business; and (3) except as provided in subsection (h), losses of property not connected with a trade or business or a transaction entered into for profit, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft. In the case at bar, the loss was incurred in a trade or business.

BEG properly capitalized the costs that it incurred with respect to the worthless or abandoned property under the rules of 26 U.S.C. § 263. These capitalized costs were included in the basis of such property under 26 U.S.C. § 1012. Under § 1011, this basis is the amount used to calculate the worthless loss deduction under § 165(a). This basis amount was $4,177,256, and a loss under § 165(a) was properly reported on the BEG 2007 Form 1120S. ER 26, ¶ 20.

26 U.S.C. § 1366(d)(1) limits the amount of any loss that a shareholder in an S corporation may take in any taxable year to the adjusted basis such shareholder has in such stock. A taxpayer's basis in his S corporation stock is initially equal to his or her capital contributions to such corporation under § 1012. In addition, this outside tax basis is increased by the amount of taxable income reported by such taxpayer with respect to such S corporation and decreased by the amount of any distributions or losses from such S corporation under 26 U.S.C. § 1367(a).

The evidence admitted at trial established that Howard Baldwin made cash contributions to BEG in the amount of $916,792.07. ER 24, ¶ 10. He received

distributions from BEG before 2005 in the amount of $1,300,000. ER 27, ¶ 24. He was allocated various items of income and loss before the tax year 2007. ER 29, ¶ 37. This made his adjusted tax basis in his BEG stock equal to $2,541,736.07 in 2007. *Id.* Appellees properly reported $13,301 of short term capital gain and $2,555,037 of ordinary business loss (a net loss of $2,541,736) from BEG on their 2007 Form 1040. ER 28, ¶¶ 34 & 35. Thus, the taxpayers had sufficient tax basis in his BEG stock in 2007 to take this net loss on Appellees' 2007 Form 1040.

Section 172 permits a taxpayer with a net operating loss to carry back such loss to the tax year that is two years before the tax year that gave rise to such loss. The taxpayers properly carried back a net operating loss of $2,569,969 to their 2005 tax year. ER 29, ¶ 39. This carryback was reported on the properly completed 2005 Form 1040X filed by the taxpayers on June 21, 2011. ER 29, ¶ 39; ER 21, 218-24.

3. Alternative grounds for taking a deduction under § 165(a).

As a general proposition, a taxpayer may claim a loss deduction under § 165(a) on any of three alternative grounds: (i) abandonment, (ii) worthlessness, or (iii) obsolescence of nondepreciable property. *Echols v. Commissioner of Internal Revenue*, 935 F. 2d 703, 707 (5th Cir. 1991); Treas. Reg. § 1.165-2(a).

Abandonment

The test for abandonment is an objective test and requires an abandoning party to manifest an intent to abandon by some overt act or statement reasonably calculated to give a third party notice of the abandonment. *Echols*, *supra,* at 707. This act of abandonment occurred in this case when BEG fairly determined that its investment in these movie projects was lost and should be abandoned as worthless, it stopped its attempts to renew the expired intangible property rights with respect to various film projects that were in development, and it discontinued its movie development business. The evidence introduced at trial established that happened in 2007. ER 24-27, ¶¶ 14-22; ER 140, lns. 1-21. These events were clearly overt acts that gave third parties (the owners of the underlying story rights) notice of the abandonment. *See Gulf Oil Corp. v. Commissioner*, 914 F.2d 396, 402 (3rd Cir. 1990) (evidence of abandonment of oil leases would include nonpayment of delay rentals). *See also A. J. Industries v. United States*, 503 F.2d 660 (9th Cir. 1974):

> It is not essential that legal title to the property be lost. Whether the property actually did lose its useful value in a particular year, and whether the owner actually did abandon it as an asset during that year, are questions of fact to be determined from a consideration of all the surrounding facts and circumstances. The issue as to whether the loss was actually sustained calls for a practical, not a legal test, and the standard requires a flexible approach according to the circumstances of each case. The determination as to the year an asset loses its useful value or becomes worthless is a matter of sound business judgment, and that judgment should be given effect unless it appears from the facts that the decision as to the year of loss was unreasonable or unfair

> at the time the decision was made. Thus, the test is whether the plaintiff has established that under all the facts and circumstances and in the exercise of reasonable business prudence, it fairly determined that its investment in its mine was lost and should be abandoned as worthless in 1958.

Worthlessness.

Worthlessness, on the other hand, is a mixed question of objective and subjective indicia. The property must objectively not have substantial value and, more importantly, the taxpayer must have subjectively determined that the property was worthless. Unlike abandonment, the timing of worthlessness is largely a judgment call by a taxpayer based on his own particular, highly personal set of economic factors, including tax effects. *Echols, supra*, at 707-708.

In this case, the fact of worthlessness was established by testimony of Howard Baldwin and the stipulated exhibits admitted at trial. ER 24-27, ¶¶ 14-22; ER 140, lns. 1-21; ER 236-237. The property rights to the underlying stories owned by BEG had expired by their terms in 2005, 2006 and 2007. ER 145, lns. 19-25; 146, lns. 1-4; ER 236-237. While hard work and determined efforts to renew these property rights may have breathed life back into them, in 2007 BEG determined that such effort was not worth taking and the rights were allowed to expire, giving the intangible movie projects little if any value, and allowing a subjective determination of worthlessness under *Echols, supra,* at 707-708.

Obsolescence of nondepreciable property.

Treas. Reg. § 1.165-2(a) provides the third alternative for deducting a loss under § 165(a):

> **Allowance of deduction.** A loss incurred in a business or in a transaction entered into for profit and arising from the sudden termination of the usefulness in such business or transaction of any nondepreciable property, in a case where such business or transaction is discontinued or where such property is permanently discarded from use therein, shall be allowed as a deduction under section 165(a) for the taxable year in which the loss is actually sustained. For this purpose, the taxable year in which the loss is sustained is not necessarily the taxable year in which the overt act of abandonment, or the loss of title to the property, occurs.

The capitalized costs written off by BEG in 2007 were attributable to intangible property rights and development costs that were nondepreciable property covered by the rules of Treas. Reg. § 1.165-2(a).

The evidence admitted at trial established that BEG discontinued its movie development business in 2007. ER 140, lns. 1-21. At this point in time, it was appropriate for BEG to take a worthless property loss under § 165(a) and Treas. Reg. § 1.165-2(a) because there was a sudden termination of the usefulness of the film projects and the business with respect to these projects was discontinued by BEG in 2007. Under Treas. Reg. § 1.165-2(a), there was no need to prove an overt act of abandonment in the year the business was discontinued to take the deduction in that year.

Evidence at trial.

The taxpayers introduced uncontroverted evidence at trial which met their burden of proving the existence of sufficient net operating losses for 2007, which when carried back to 2005, supported a refund in the amount of $167,663. ER 29-30, ¶ 39. The taxpayers introduced uncontroverted evidence at trial which met their burden of proving that Appellee Howard Baldwin had adequate basis in BEG to permit the loss deduction in 2007 to be carried back to 2005 in a sufficient amount to support a refund in the amount of $167,663. ER 29, ¶ 37.

The district court, as the trier of fact, found that the taxpayers had sufficient losses from BEG included on their 2007 Return to entitle them to a refund in the amount of $167,663 when carried back to tax year 2005 and that taxpayers had sufficient tax basis in BEG to deduct losses on their 2007 Return that would allow for a refund in the amount of $167,663 when carried back to tax year 2005. ER 7.

4. Best Evidence Rule.

Evidence objected to at trial.

The United States objected to limited evidence at trial as not being admissible under the best evidence rule. Specifically, the United States objected under the best evidence rule to the admission of (i) the declaration of Appellee Karen Baldwin stating that the legal rights to the projects reflected on Joint Exhibit 26 had expired during 2005, 2006 and 2007 (ER 78); (ii) the declaration of

Appellee Howard Baldwin regarding the expiration by their terms in 2007 of the Mandrake project rights (ER 87); (iii) the declaration of Appellee Howard Baldwin regarding the expiration by their terms in 2006 of the Phantom project rights (ER 88); (iv) the declaration of Appellee Howard Baldwin regarding the expiration by their terms in 2007 of the Da Miracle project rights (ER 89); (v) the declaration of Appellee Howard Baldwin regarding the expiration by their terms in 2006 of the Indiscretion project rights (ER 90); and (vi) the declaration of Appellee Howard Baldwin regarding the expiration by their terms in 2006 of the Shadow Ball project rights (ER 91). No other evidence was objected to at the trial under the best evidence rule, and because all of the other evidence was factual evidence, no issues regarding the admission of any other evidence may be reviewed by this Court. *City of Phoenix, supra*, at 1038.

Review of a district court's decision to admit evidence is under an abuse of discretion standard. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); *United States v. Curtin*, 489 F.3d 935, 943 (9th Cir. 2007)(en banc). Reversal of an evidentiary ruling under an abuse of discretion standard occurs only when the reviewing court is "'convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances.'" *Boyd v. City and Cnty. of San Francisco*, 576 F.3d 938, 943 (9th Cir. 2009) (quoting *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000)). A

party seeking reversal for evidentiary error must show that the error was prejudicial, and that the verdict was "more probably than not" affected as a result. *McEuin v. Crown Equip. Corp*., 328 F.3d 1028, 1032 (9th Cir. 2003) (internal quotation marks omitted).

Best Evidence Rule Not Applicable.

The United States asserts that the best evidence rule required the production of the original contracts to prove that the options had expired under their terms, citing *United States v. Diaz-Lopez*, 625 F.3d 1198, 1201 (9th Cir. 2010). But the best evidence rule applies only if the party seeking to admit evidence does so to prove the specific contents of the writing. *Id.* at 1202; *Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1543 (11th Cir.1994); see also *United States v. Castro*, 89 F.3d 1443, 1455 (11th Cir.1996) (finding that the best evidence rule did not prevent the government from using testimony, rather than a detailed federal fund report, to show that a county received federal grants). Because the taxpayers in this case sought to demonstrate a company policy of BEG, the district court did not err in overruling the objections of the United States to the testimony provided by declaration.

The testimony of Howard Baldwin during trial and the declarations of Karen and Howard Baldwin admitted in evidence during the trial establish that film options usually had a term of a year and a half (ER 141, lns. 17-18), and they were

aware that the option rights had expired in 2005, 2006 and 2007. ER 24-27, ¶¶ 14-21; ER 32-33, ¶ 9. To keep the projects alive, the options would need to be renewed, but BEG had not been successful in renewing these options in 2007. ER 26-27, ¶ 21; 140, lns. 1-21. Based on the belief that the options had expired, and more importantly, based on the fact that no financing was available to complete the film projects, BEG determined that the film projects were no longer worth pursuing and these projects were discontinued. ER 26-27, ¶ 21. Howard Baldwin further testified that BEG stopped doing business in 2007. ER 140, lns. 15-21.

When BEG discontinued pursuing these projects and ceased doing business, the assets became worthless. Evidence of which year the options had expired was not necessary to prove worthlessness or abandonment under § 165(a) or Treas. Reg. § 1.165-2(a), making the best evidence rule not applicable in this case.

Best Evidence Rule Not Material.

Even if this Court determines that the best evidence rule is applicable to prove the date the options expired, the evidence submitted at trial showed only $660,653.00 of the total loss of $4,177,255.81 of § 165(a) losses were attributable to the lapse of the option rights. ER 26, ¶20. This left sufficient other losses available to the taxpayers for the claimed refund even if the best evidence rule was applicable, and the admission of the testimony about these options did not materially affect the verdict. *United States v. Bennett*, 363 F.3d 947, 954 (9th Cir. 2004).

5. Waiver of Best Evidence Objection.

When Appellee Howard Baldwin testified during trial about the expiration of certain contract rights, the United States did not assert a best evidence objection. ER 145, lns. 19-25; 152, lns. 7-17. Because the United States did not raise the best evidence objection to this testimony, this objection is waived with respect to his trial testimony regarding when the options had expired. *City of Phoenix, supra,* at 1038.

D. The district court properly awarded litigation fees and costs to Appellees under 26 U.S.C. § 7430.

The United States does not challenge the award of legal fees and costs if the judgment in this case is not overturned. This Court should not reverse the award of

legal fees and costs since judgment in this case was proper.

VIII. CONCLUSION

The district court was correct in finding that the taxpayers were the prevailing parties in that case and entering a judgment in favor of Appellees, and against the United States, for $167,663 plus statutory interest and $25,515 in litigation costs. Accordingly, for all of the reasons set forth above, the judgment should be affirmed in full.

Dated: December 26, 2017 **Chamberlin & Keaster LLP**

By: s/ Robert W. Keaster
Robert W. Keaster
Attorneys for Plaintiffs-Appellees
HOWARD L. BALDWIN AND
KAREN BALDWIN

IX. STATEMENT OF RELATED CASES

Appellees are not aware of any cases pending in this Court that would be deemed related pursuant to Ninth Circuit Rule 28-2.6.

X. CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. This brief contains 10,318 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 typeface using Microsoft Office Word 2007 in Times New Roman, size 14 font.

Dated: December 26, 2017

Chamberlin & Keaster LLP

By: s/ Robert W. Keaster
Robert W. Keaster
Attorneys for Appellees-Appellees
HOWARD L. BALDWIN AND
KAREN BALDWIN

XI. CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2017, I electronically filed the foregoing with the Clerk of the court for the United States Court of Appeals 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 by the appellate CM/ECF system.

s/ Robert W. Keaster
Robert W. Keaster