No. 125978

IN THE

SUPREME COURT OF ILLINOIS

WEST BEND MUTUAL INSURANCE COMPANY,

Plaintiff-Appellant,

vs.

KRISHNA SCHAUMBURG TAN, INC. and KLAUDIA SEKURA,

Defendants-Appellees,

On Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-19-1834.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 16 CH 7994.
The Honorable **Franklin U. Valderrama,** Judge Presiding.

BRIEF OF APPELLEE

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Nature of the Case

This is an insurance coverage dispute arising out of an underlying action filed by Klaudia Sekura ("Sekura") against Krishna Schaumburg Tan, Inc. ("Krishna") for damages resulting from Krishna's alleged violation of the Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* ("BIPA"). West Bend Mutual Insurance Company sought a declaration that its Businessowners Liability insurance policies issued to Krishna did not provide coverage for Sekura's underlying lawsuit. The circuit court granted summary judgment in favor of Krishna as to West Bend's duty to defend, and the appellate court affirmed that judgment.

Issues Presented For Review

1. Whether the underlying action falls within "personal injury" coverage under the West Bend policy.

2. Whether the underlying action was not excluded by a policy exclusion for "violation of statutes that govern e-mails, fax, phone calls or other methods of sending material or information."

3. Whether the Data Compromise Endorsement triggers coverage.

Statement of Facts

West Bend issued its Businessowners Liability Policy numbered NAD0969996 to Krishna as named insured for the effective policy periods

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of December 1, 2014 to December 1, 2015 and December 1, 2015 to December 1, 2016 (R. C42 – 361).

The West Bend policies of insurance provide in their respective Insuring Agreements, as follows:

> **A. Coverages**
>
> **1. Business Liability**
>
> a. We will pay those sums that the Insured becomes legally obligated to pay as damages because of "bodily injury", "property damage", "personal injury" or "advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages.
>
> * * * * *
>
> b. This insurance applies:
>
> * * * * *
>
> (2) To:
>
> (a) "Personal injury" caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you;

(R. C181; C306).

The policies define the term "personal injury" as follows:

> "Personal injury" means injury, other than "bodily injury", arising out of one or more of the following offenses:
>
> * * * * *

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e. Oral or written publication of material that violates a person's right of privacy.

(R. C193; C318).

The policies contain a certain exclusion which provides in relevant part as follows:

> **EXCLUSION-VIOLATION OF STATUTES THAT GOVERN E-MAILS, FAX, PHONE CALLS OR OTHER METHODS OF SENDING MATERIAL OR INFORMATION**
>
> ****
>
> This insurance does not apply to:
>
> **DISTRIBUTION OF MATERIAL IN VIOLATION OF STATUTES**
>
> "Bodily injury", "property damage", "personal injury" or "advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:
>
> * * * * *
>
> (3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

(R. C169; C322).

The 2015-16 policy contains an endorsement providing additional coverage and modifying the insurance provided under the Businessowners Coverage Form in two separate sections. The endorsement provides, in relevant part, as follows:

ILLINOIS DATA COMPROMISE COVERAGE

* * * * *

The following is added as an Additional Coverage.

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* * * * *

SECTION 1 – RESPONSE EXPENSES

DATA COMPROMISE COVERED CAUSE OF LOSS

Coverage under this Data Compromise Coverage endorsement applies only if all of the following conditions are met:

1. There has been a "personal data compromise"; and

2. Such "personal data compromise" is first discovered by you during the policy period for which this Data Compromise Coverage endorsement is applicable; and

3. Such "personal data compromise" is reported to us within 60 days after the date it is first discovered by you.

(R. C223).

The second portion of the endorsement also adds additional coverage to each policy, and states, in pertinent part, as follows:

SECTION 2 – DEFENSE AND LIABILITY

DEFENSE AND LIABILITY COVERED CAUSE OF LOSS

*** * * * ***

Only with regard to Section 2 – Defense and Liability coverage, the following conditions must also be met:

1. You have provided notifications and services to "affected individuals" in consultation with us pursuant to Response Expenses coverage; and

2. You receive notice of a "data compromise suit" brought by one or more "affected

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> individuals" or by a governmental entity on behalf of one or more "affected individuals"; and
>
> 3. Notice of such "data compromise suit" is received by you within two years of the date that the "affected individuals" are notified of the "personal data compromise"; and
>
> 4. Such "data compromise suit" is reported to us as soon as practicable, but in no event more than 60 days after the date it is first received by you.
>
> **COVERAGE – SECTION 2**
>
> If all of the conditions listed above in DEFENSE AND LIABILITY – COVERED CAUSE OF LOSS have been met, then we will provide coverage for "data compromise defense costs" and "data compromise liability" directly arising from the covered cause of loss.

(R. C225).

The endorsement further provides under "Exclusions, Additional Conditions and Definitions applicable to both Section 1 and Section 2" as follows:

> **ADDITIONAL CONDITIONS**
>
> The following Additional Conditions apply to all coverages under this endorsement.
>
> **A. Data Compromise Liability Defense**
>
> 1. We shall have the right, and the duty to assume the defense of any applicable "data compromise suit" against you. You shall give us such information and cooperation as we may reasonably require.

(R. C226).

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The endorsement defines the terms "Affected Individual" and "Data Compromise Suit," in relevant part, as follows:

> 1. "Affected Individual" means any person who is your current, former or prospective customer, client, member, owner, director or employee and whose "personally identifying information" or "personally sensitive information" is lost, stolen, accidentally released or accidentally published by a "personal data compromise" covered under this endorsement.
>
> * * * * *
>
> 4. "Data Compromise Suit" means a civil proceeding in which damages to one or more "affected individuals" arising from a "personal data compromise" or the violation of a governmental statute or regulation are alleged.

(R. C228-29).

The endorsement defines the term "personal data compromise," in pertinent part, as follows:

> the loss, theft, accidental release or accidental publication of "personally identifying information" or "personally sensitive information" as respects to one or more "affected individuals". If the loss, theft, accidental release or accidental publication involves "personally identifying information", such loss, theft, accidental release or accidental publication must result in or have the reasonable possibility of resulting in the fraudulent use of such information. This definition is subject to the following provisions:
>
> * * * * *
>
> b. "Personal data compromise" includes disposal or abandonment of "personally identifying information" or "personally sensitive information" without appropriate safeguards

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such as shredding or destruction, subject to the following provisions:

1) The failure to use appropriate safeguards must be accidental and not reckless or deliberate; and

2) Such disposal or abandonment must take place during the time period for which this Data Compromise Coverage endorsement is effective.

c. "Personal data compromise" includes situations where there is a reasonable cause to suspect that such "personally identifying information" or "personally sensitive information" has been lost, stolen, accidentally released or accidentally published, even if there is no firm proof.

(R. C229).

The endorsement defines the term "Personally Identifying Information," in pertinent part, as follows:

> information, including health information, that could be used to commit fraud or other illegal activity involving the credit, access to health care or identity of an "affected individual."

(R. C230).

The endorsement defines the term "Personally Sensitive Information," in pertinent part, as follows:

> private information specific to an individual the release of which requires notification of "affected individuals" under any applicable law.

(R. C230).

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Krishna has been named as a defendant in a certain class action brought by Sekura under Cause No. 2016 CH 4945 in the Circuit Court of Cook County, Illinois (the "Underlying Lawsuit") (R. C25-41).

Sekura alleges that in April 2015 she enrolled in a membership with Krishna to use its tanning salon. Sekura alleges that as a condition of her membership, she was required to provide it with a scan of her fingerprints to enroll her in L.A. Tan Enterprises, Inc.'s national membership database (R. C26). She alleges that Krishna failed to inform her and its other customers that it disclosed their fingerprint data to an out-of-state third party SunLync or other third parties, failed to obtain written releases from her or its other customers before collecting their fingerprint data, failed to inform her or its other customers of any biometric data retention policy and whether her fingerprint data will ever be permanently deleted, failed to provide guidelines for permanently destroying its customers' fingerprints when the initial purpose for collecting or obtaining their fingerprints is no longer relevant in violation of BIPA (R. C27).

The underlying complaint additionally alleges that BIPA prohibits private entities from disclosing a person's or customer's biometric identifier or biometric information to third parties and that Krishna disclosed the information to SunLync, an out-of-state third party, which advertises that its services include marketing to customers by utilizing information collected. See Exhibit A attached hereto (R. C36-37).

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Krishna tendered its defense of the *Sekura* lawsuit to West Bend, which accepted the defense subject to reservation and filed a complaint for declaratory judgment seeking a declaration that it owed no duty or obligation to defend Kirshna because: (1) the *Sekura* complaint did not allege facts within coverage for "bodily injury," "advertising injury" or "personal injury;" (2) the *Sekura* complaint did not allege facts within the Illinois Data Compromise Coverage endorsement because there were no facts within the endorsement's definition of "personal data compromise" and because the condition concerning providing notifications and services to "affected individuals" was not met; and (3) the allegations of the *Sekura* complaint fall within the policy exclusion for Distribution of Material in Violation of Statutes (R. C13-24).

Krishna filed an Answer and Counterclaim, seeking a declaration that West Bend owed a duty to defend Krishna in the *Sekura* action and seeking relief from West Bend pursuant to Section 155 of the Illinois Insurance Code (R. C453-78).

The parties to this action ultimately filed cross-motions for summary judgment as to West Bend's duty to defend Krishna and Krishna's claims for relief under Section 155.

In a 22-page written Memorandum Opinion and Order, the circuit court found that West Bend owed a duty to defend Krishna (R. C800-21). The appellate court affirmed that judgment. 2020 IL App (1st) 191834.

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Standard of Review

Review of the issue of West Bend's duty to defend is *de novo*. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill.2d 90, 102 (1992).

Argument

Sometimes referred to as "litigation insurance," the duty to defend "protects the insured from the expense of defending suits brought against it," including the expense of "being wrongly sued." *Ill. Tool Works, Inc. v. Travelers Cas. and Sur. Co.,* 2015 IL App (1st) 132350, ¶ 46. "To determine whether an insurer has a duty to defend its insured from a lawsuit, a court must compare the facts alleged in the underlying complaint to the relevant provisions of the insurance policy." *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 223 Ill.2d 352, 363 (2006). Unlike the duty to indemnify, the actual facts underlying the allegations are not used in this comparison. See *U.S. Gypsum Co. v. Admiral Ins. Co.*, 268 Ill.App.3d 598, 624 (1st Dist. 1995). If the facts alleged are covered or potentially covered by the policy, the insurer is obligated to defend its insured, even if those allegations are groundless, false, or fraudulent. *Gen. Agents Ins. Co. of America, Inc. v. Midwest Sporting Goods Co.*, 215 Ill.2d 146, 155 (2005). "An insurer may not refuse to defend its insured unless it is clear from the face of the underlying complaint that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage." See *Ill. Tool Works Inc.*, 2015 IL App (1st) 132350, ¶ 27 (citations omitted).

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Further, a court will look only to the four corners of the complaint brought against the insured to determine if a potential for coverage exists. *Farmers Auto. Ins. Ass'n. v. Country Mut. Ins. Co.,* 309 Ill.App.3d 694, 698 (4th Dist. 2000). A court must construe the policy as a whole and take into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill.2d 384, 391 (1993). "Standard commercial liability policies are issued to cover all hazards incident to the operation of a business with the exception of certain excluded risks." *Oakley Transp. v. Zurich Ins. Co.*, 271 Ill.App.3d 716, 726 (1st Dist. 1995). Exclusions which limit coverage must be liberally construed in favor of the insured and against the insurer. *State Farm Mut. Auto. Ins. Co. v. Villicana*, 181 Ill. 2d 436, 441-42 (1998).

I. The Underlying Complaint Triggers "Personal Injury" Coverage.

The "personal injury" coverage of the West Bend policies applies to claims—such as Sekura's—which involve the "oral or written publication of material that violates a person's right of privacy" (R. C193; 318). Indeed, allegations that Krishna violated BIPA by disclosing Sekura's fingerprint data to an out-of-state third-party vendor fall squarely within this coverage.

West Bend disputes that the alleged dissemination of Sekura's biometric information constitutes "written publication." But

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unfortunately for West Bend, it cannot point to a location in its policy where the term "written publication" is defined—because West Bend repeatedly chose not to define that term.

Rather than rely on a policy definition, West Bend clutches to a phantom and unduly narrow "definition" of "publication," which it extracts from this Court's decision in *Valley Forge Ins. Co. v. Swiderski Electronics, Inc.*, 223 Ill.2d 352 (2006). The lower courts properly rejected West Bend's interpretation of *Valley Forge* and this Court should do the same.

As the appellate court correctly held:

> [I]t is clear to us that the supreme court did not define the term "publication" as being limited to requiring communication to any number of persons. Rather, the court recognized that "publication" included the actions alleged in the underlying complaint— sending numerous unsolicited faxes to the plaintiffs in the underlying case. Our supreme court specifically recognized that the complaint in the underlying case alleged a violation of the "fax recipient's privacy interest in seclusion" and that there was "publication" by "faxing advertisements to the proposed class of fax recipients. [*Valley Forge*] at 366-67.
>
> As the circuit court observed in this case, both the appellate and supreme courts in *Valley Forge* looked to what a reasonable person would understand the plain, ordinary

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meaning of the word "publication" to be and consulted dictionary definitions and common understanding. [Citations omitted.] As our supreme court recognized in *Valley Forge*, where policy terms are not defined, the courts must give them their "plain, ordinary, and popular meanings," consulting "dictionary definitions." *Valley Forge,* 223 Ill. 2d at 366 (citing *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 115-17 (1992)).

To the extent that West Bend suggests that "publication" means something different in the context of defamation than it does in the context of privacy rights, the policies use the exact same terminology of "[o]ral or written publication of material" as the basis for both a defamation-related injury and a privacy-related injury. These two definitions are immediately sequential in the policies. When construing insurance policies, " 'it is a general rule that absent language to the contrary, a word or phrase in one part is presumed to have the same meaning when it is used in another part of a policy.' " *Universal Underwriters Insurance Co. v. LKQ Smart Parts, Inc.*, 2011 IL App (1st) 101723, ¶ 19 (quoting *Hartford Accident & Indemnity Co. v. Case Foundation Co.*, 10 Ill. App. 3d 115, 123 (1973)). This should be particularly true where, as here, the two policy provisions are in the same section of the policies.

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> We also note that if West Bend wished the term "publication" to be limited to communication of information to a large number of people, it could have explicitly defined it as such in its policy. But it did not, choosing instead not to provide any definition of "publication." "There is a strong presumption against provisions that easily could have been included in the contract but were not." *Wright v. Chicago Title Insurance Co.*, 196 Ill. App. 3d 920, 925 (1990).
>
> The parties do not dispute that Ms. Sekura alleges facts that fit within the rest of the "personal injury" definition—that there was a provision of material in violation of her right to privacy. Because a common understanding of "publication" encompasses Krishna's act of providing Ms. Sekura's fingerprint data to a third party, there also exists potential that Ms. Sekura's claim against Krishna is covered by the policies. As such, West Bend has a duty to defend Krishna against the underlying complaint pursuant to the "personal injury" coverage provision.

2020 IL App (1st) 191834, ¶¶ 33-38. Krishna urges this Court to follow the sound reasoning of the lower courts to find that a common understanding of "publication" encompasses Krishna's act of providing Ms. Sekura's fingerprint data to a third party.

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Krishna adopts and incorporates herein that part of Sekura's brief labeled "Ms. Sekura's Complaint Alleges A Covered 'Publication' Offense."

II. The Methods Exclusion Is Inapplicable.

The lower courts also correctly concluded that the Methods Exclusion does not apply to bar coverage.

As the Appellate Court correctly held:

> The violation of statutes exclusion read in its entirety makes clear, however, that it was not intended to bar coverage for a violation of a statute like the Act. In fact, the exclusion is meant to bar coverage for the violation of a very limited type of statute that is evidenced first from the exclusion's title which West Bend conveniently shortens to "Violation of Statutes." The title, as a whole, is: "Violation of Statutes That Govern E-Mails, Fax, Phone Calls or Other Method of Sending Material or Information." (Emphasis added.) The title makes clear that the exclusion applies to statutes that govern certain methods of communication, i.e., e-mails, faxes, and phone calls, not to other statutes that limit the sending or sharing of certain information.
>
> The text of the exclusion can easily be read consistently with the title. The exclusion explicitly applies to the TCPA and the CAN-SPAM Act—both statutes that regulate certain methods of communication. See, e.g., *Standard Mutual*

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Insurance Co. v. Lay, 2013 IL 114617, ¶ 27 ("The purposes of the TCPA are to protect the privacy interests of residential telephone customers by restricting unsolicited automated telephone calls to the home, and facilitating interstate commerce by restricting certain uses of fax machines and automatic dialers."); *Martin v. CCH, Inc.*, 784 F. Supp. 2d 1000, 1004 (N.D. Ill. 2011) (noting that the purpose of the CAN-SPAM Act is to, in part, " 'prohibit senders of [e-mail] for primarily commercial advertisement or promotional purposes from deceiving intended recipients or Internet service providers as to the source or subject matter of their e-mail messages' " (quoting S. Rep. No. 108-102, at 1 (2003), as reprinted in 2004 U.S.C.C.A.N. 2348, 2348). So only after listing two specific statutes—the violation of which the exclusion applies to—each with a clear purpose of governing methods of communication such as e-mails and phone calls, does the exclusion include a final catch-all provision for a statute "that prohibits or limits the sending, transmitting, communication or distribution of material or information." In light of the title and the two specific statutes listed in the exclusion, the more reasonable reading of this third item is that it is meant to encompass any State or local statutes, rules, or ordinances that, like the TCPA and the CAN-SPAM Act, regulate methods of communication.

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> We are also unconvinced by West Bend's argument that the exclusion was meant to apply to statutes that "lend themselves to class action litigation [and] pose serious insurance risks." Nothing in the exclusion's language suggests that was the purpose of the exclusion and if West Bend wanted the exclusion to have such an application, it could have written it so. As we stated above, "[t]here is a strong presumption against provisions that easily could have been included in the contract but were not." *Wright*, 196 Ill. App. 3d at 925.
>
> In short, the violation of statutes exclusion applies to bar coverage to violations of statutes that regulate methods of communication. The Act says nothing about methods of communication. It instead regulates "the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(g) (West 2014). As Ms. Sekura's complaint alleges a violation of the Act, this exclusion does not apply to bar coverage to Krishna.

2020 IL App (1st) 191834, ¶¶ 42-45.

Krishna adopts that part of Sekura's brief labeled "The Policy's Statutory Exclusion Does Not Preclude Coverage."

Krishna urges this Court to follow the sound reasoning of the lower courts to find that the Methods Exclusion does not apply to bar coverage.

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III. The Data Compromise Endorsement Also Triggers A Duty To Defend.

Although the lower courts chose not to address the Data Compromise Endorsement because they (rightly) found coverage in other parts of the policy, this Court may affirm for any reason in the record.

For the 2015-16 policy period, Krishna purchased "Illinois Data Compromise Coverage." Under that additional coverage part for which Krishna paid a premium, West Bend conditionally agreed that it had the duty to assume the defense of any applicable "data compromise suit" against Krishna.

West Bend defined the term "data compromise suit" to mean "a civil proceeding in which damages to one or more 'affected individuals' arising from a 'personal data compromise' or the violation of a governmental statute or regulation are alleged."

In this case, the *Sekura* lawsuit clearly triggers West Bend's duty to defend under the Data Compromise Endorsement. Section 2 – Defense and Liability of the Data Compromise Endorsement expressly provides that West Bend will "provide coverage for 'data compromise defense costs'…directly arising from the covered cause of loss" (R. C225). The endorsement defines "data compromise defense costs" to include "defense and appeal of any 'data compromise suit' against you" (R. C229). The *Sekura* lawsuit meets the definition of a "data compromise suit," because it is a civil proceeding filed by an "affected individual," namely, Sekura, arising from the violation of a governmental statute or

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regulation, namely, BIPA (see R. C229). Since the Sekura lawsuit falls within or potentially within the ambit of "Illinois Data Compromise Coverage," this Court should find that West Bend also owes a duty to defend Krishna under that Endorsement.

Conclusion

For the foregoing reasons, Krishna Schaumburg Tan, Inc. respectfully requests this Court to affirm the appellate court's judgment finding that West Bend owes a duty to defend Krishna for the *Sekura* lawsuit.

Respectfully submitted:

/s/ Richard Burgland

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Supreme Court Rule 341(c) Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) an (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 19 pages.

/s/ Richard Burgland
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NOTICE OF FILING and PROOF OF SERVICE

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WEST BEND MUTUAL INSURANCE CO.,	)	
Plaintiff-Appellant,	)	
v.	)	No. 125978
KRISHNA SCHAUMBURG TAN, INC., et al.,	)	
Defendant-Appellees.	)	

The undersigned, being first duly sworn, deposes and states that on December 22, 2020, there was electronically filed and served upon the Clerk of the above court the Brief of Defendant-Appellee. Service of the Brief will be accomplished by email as well as electronically through the filing manager, File and Serve Illinois, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Brief bearing the court's file-stamp will be sent the above court.

/s/ Richard M. Burgland
Richard M. Burgland

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Richard M. Burgland
Richard M. Burgland

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