

No. 13-30077

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL ALLAN DREYER,

Defendant-Appellant.

On Appeal from United States District Court
Western District of Washington at Seattle
District Court No. CR12-119MJP

The Honorable Marsha J. Pechman
United States District Judge

DEFENDANT-APPELLANT'S REPLY BRIEF

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Introduction

Without any basis for its extraordinary request, the government asks this Court to overrule established circuit precedent and find that the Naval Criminal Investigation Service ("NCIS") is a civilian agency that may investigate and enforce civilian laws against non-military personnel without limitation. In the alternative, it argues that the NCIS is not "directly" enforcing civilian criminal laws when it conducts undercover internet surveillance and subpoenas internet subscriber data on civilians. Finally, the government advocates for an exception to the Posse Comitatus Act, 18 U.S.C. § 1385 ("PCA"), and related authority, that will swallow the rule: that an NCIS investigation into civilian internet activity furthers U.S. military interests because of the mere possibility that the NCIS might encounter someone over whom it does have jurisdiction to prosecute.

Although the government concedes that Detective Schrimpsheer made numerous misrepresentations and omissions in his search warrant affidavit, it urges this Court not to suppress the fruits of the search warrant arguing that setting aside Schrimpsheer's false statements, the warrant application supports probable cause. The government is wrong. Once Schrimpsheer's falsehoods are corrected, the warrant does not establish probable cause to believe that contraband would be found in Mr. Dreyer's home.

Next, the government maintains that Detective Luckie's onsite search of the desktop computer was authorized by the search warrant. A fair reading of warrant, however, demonstrates otherwise. Nor does this Court's recent decision in *United States v. Schesso*, 730 F.3d 1040 (9th Cir. 2013) support the government's argument that a general search of electronic media, without any effort to protect the confidentiality of intermingled document, is permissible. In fact, *Schesso* held that the protocols required for the search of electronic media were to be determined on a case-by-case basis. And under the facts of this case, Luckie's search violated Mr. Dreyer's rights under the Fourth Amendment.

Finally, the district court abused its discretion in permitting the government to use RoundUp both to verify that Mr. Dreyer possessed "known child pornography" and as evidence of his distribution of child pornography without first conducting a *Daubert* hearing to determine that the program was reliable.

Argument

I. The NCIS investigation should be suppressed because it violated the prohibition against military enforcement of civilian laws.

The government asks this Court to overturn *United States v. Chon*, 210 F.3d 990 (9th Cir. 2000), without any basis for this extraordinary request, and hold that NCIS Agents are civilian, despite the Navy's determination to the contrary. In the alternative, it argues that conducting undercover internet surveillance of civilians,

and subpoenaing their personal subscriber data is only "indirect" enforcement of civilian laws, when the Navy has already defined such activity as prohibited "direct" enforcement of civilian laws. The government maintains that investigating possession of child pornography by Washington State resident is a military interest because of the possibility that an investigation target may be a member of the military.

Not only is the government is wrong, but its insistence (and Agent Logan's belief) that the NCIS need not follow the PCA limitations demonstrates that suppression is necessary to curb future violations.

A. The Posse Comitatus Act applies to the NCIS.

The government urges this Court to overrule established circuit precedent and find that the Naval Criminal Investigation Service is a civilian law enforcement agency that may participate directly in civilian law enforcement without limitation under the Posse Comitatus Act, 18 U.S.C. § 1385, and related authority. In *United States v. Chon*, however, this Court held to the contrary that "the PCA-like restrictions adopted by the DoD with respect to the Navy apply to the NCIS." 210 F.3d at 993.

The government has failed to present this Court with a change in controlling authority, which is required to overrule circuit precedent. It is well established that circuit precedent may not be overruled, without taking the case en banc, unless an

intervening Supreme Court decision “undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.” *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). *See Norita v. N. Mariana Islands*, 331 F.3d 690, 696 (9th Cir. 2003) (a three-judge panel cannot reconsider or overrule circuit precedent unless “an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point.”) (quoting *United States v. Gay III*, 967 F.2d 322, 327 (9th Cir. 1992) (emphasis removed).

Instead of presenting the Court with intervening controlling authority, the government recycles the same arguments this Court rejected in *Chon*. In *Chon*, the government argued that since most of its agents were civilians, it was not bound by the limitations embodied in the PCA. *Id.* at 993. This Court rejected that argument finding that “while DoD personnel may participate in civilian law enforcement activities in their private capacities, they may not do so under the auspices of the military.” *Id.* As this Court noted, “When the civilian world is confronted by agents of the Navy, it is unlikely to make the fine distinctions asserted by the government between military and civilian NCIS agents.” *Id.*

Here, as in *Chon*, the government argues that the NCIS should be exempt from PCA-like restrictions because “it is headed by a civilian director with a civilian chain of command.” *Id.* at 993-4; *See Answering Brief of the United States*

("Gov't Br.") 24 ("Given the purely civilian nature of the NCIS and the absence of any reporting relationship to a military officer, the provisions of the Posse Comitatus Act do not apply[.]") This Court explicitly rejected that argument in *Chon* holding that "Despite a civilian director, the NCIS continues to be a unit of, and accountable to, the Navy. We thereby hold that the NCIS is bound by the limitations of § 375." *Id.* at 994.

The government's argument is premised on the Navy's decision to replace Instruction 5520.3B with Instruction 5430.107, which the government argues "eliminated any reporting relationship between the Director of the NCIS and the Chief of Naval Operations." Gov't Br. 23. This argument misreads Instruction 5430.107 and misrepresents the relationship between the NCIS Director and the Chief of Naval Operations, a military officer.

Under the prior Instruction 5520.3B(4), "the Director, NCIS reports to the Chief of Naval Operations for physical, personnel and information security as Special Assistant for Naval Investigative Matters and Security" ADD 53.¹ Replacing Instruction 5520.3B(4) with Instruction 5430.107 modified slightly the relationship between the NCIS Director and the Chief of Naval Operation, it did not, as the government argues, "eliminate[]" any reporting relationship between the Director of NCIS and the Chief of Naval Operations." Gov't Br. 23. Nor did it

¹ ADD_ refers to the Addendum to the Answering Brief of the United States.

make the NCIS "[un]accountable[] to the Navy." *Chon*, 210 F.3d at 994. To the contrary, Instruction 5430.107 reaffirmed the authority of the Chief of Naval Operations over the NCIS Director. Under Instruction 5340.107(5)(a), "the Director NCIS serves as Special Assistant for Naval Investigative Matters and Security to the Chief of Naval Operations." ADD 35. Instruction 5340.107 strengthened the relationship between the NCIS and the military. Under Instruction 5430.107(5)(c), the NCIS is now governed by a Board of Directors that includes the Vice Chief of Naval Operations and the Assistant Commandant of the Marine Corps. ADD 35.

The thrust of the government's argument – that the NCIS is a civilian agency – is also fatally undermined by Department of Defense Directive 5525.5 which governs DoD cooperation with civilian law enforcement officials. Under this directive, the Department of Defense defines "civilian agency" to include "The United States (*other than the Department of Defense*, but including the U.S. Coast Guard)." ADD 1-2 (emphasis added). And it defines "civilian law enforcement official" to include "[a]n officer or employee of a civilian agency[.]" 5525.5 at 3.2 (ADD 2). Even the Department of Defense disagrees with the government's position.

The government also argues that NCIS autonomy in conducting criminal investigations makes it a civilian agency. Gov't Br. 23-4. This argument lacks

merit. The fact that the NCIS may conduct criminal investigations without command approval is nothing new. NCIS authorization to conduct investigations always fell outside of the chain of "Navy and Marine Corp commands" since NCIS had the primary responsibility for conducting criminal investigations within the Department of the Navy. *Compare* 5430.107(6)(a) *with* 5520.3B(6)(a)(1). The NCIS had this authority when this Court in *Chon* found it to be a part of the military. The same holds true today.

The NCIS's primary responsibility for conducting criminal investigation explains why Marine Special Agents have more limited jurisdiction than NCIS Agents. *See* Gov't Br. 24. While commands retain "organic investigative capability" their jurisdiction is limited to "minor offenses. . . purely military offense . . . or cases the NCIS has declined to investigate." Instruction 5430.107(b)(5). The NCIS, on the other hand, has broader power within the Department of the Navy to investigate offenses.

NCIS jurisdiction has limits. The government ignores that the NCIS is limited to advancing Navy interests. Instruction 5430.107(6)(a) makes it clear that "[t]he Director, NCIS is the senior official for criminal investigations . . . within the [Department of the Navy.]" (ADD 36). *See* 5430.107(7)(b)(2). It limits "criminal operations" to include "criminal activities or enterprises *that significantly affect the naval establishment*[" 5430.107(3)(c) (emphasis added) (ADD 33).

In short, there is simply no reason to overrule *Chon* and find the Naval Criminal Investigation Service to be civilian.

B. Agent Logan's investigation directly assisted the enforcement of civilian law in violation of the PCA.

The government argues that Agent Logan's investigation amounted to "indirect" assistance in the form of transfer of information permissible under Department of Defense Directive 5525.5 at E4.1.7.1 and SECNAVINST 5820.7C(5)(a) (ADD 20, 66). In the alternative, it argues that if Agent Logan rendered direct assistance, it was done "for the primary purpose of furthering a military or foreign affairs function of the United States." Directive 5525.5 at E41.2. The government is wrong.

First, Agent Logan's investigation, which involved undercover internet surveillance and administrative subpoena searches, amounted to "direct" civilian law enforcement activity as that term is defined in Directive 5525.5 at E4.1.3. *See id.* (posse comitatus rule "prohibits the following forms of direct assistance . . . [including] search or seizure. . . . [u]se of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators.") This Court, in *United States v. Hitchcock*, found as much when it concluded the use of NCIS personnel to conduct surveillance or searches amounted

to direct assistance in violation of Directive 5525.5 at E4.1.3. 286 F.3d 1064, 1070 (9th Cir.), *as amended by* 298 F.3d 1021 (9th Cir. 2002).

Contrary to the government's suggestion, Agent Logan did not merely provide information to a civilian law enforcement agency; he initiated an undercover investigation in which he surveilled file sharing by Washington state residents and caused an administrative subpoena to be issued for internet subscriber data. Logan's surveillance and search (in the form of an administrative subpoena), are both forms of direct assistance proscribed by DoD directive and Secretary of the Navy Instruction. *See* Directive 5525.5 at E4.1.3.2 and E4.1.3.4; Instruction 5820.7C(8)(b)(2) & (4). (ADD 17, 69)

Moreover, the record is clear that Agent Logan's investigation was not "taken for the primary purpose of furthering a military or foreign affairs function of the United States[.]" Directive 5525.5 at E4.1.2.1. (ADD 14). The Uniform Military Code of Justice applies only to a limited group of individuals with a connection to the military. *See* 10 U.S.C. § 802. While distribution of child pornography is a crime under Article 134 of the Uniform Military Code of Justice, 10 U.S.C. § 934, it is only so if the accused is, *inter alia*, a member of the armed forces. 10 U.S.C. § 802. The government has conceded that Logan had no reason to believe that the targets of his investigation had any affiliation with the military. (ER 57; 7/5/12 RT 170). Thus, Agent Logan had no reason to believe he was

furthering military affairs. His investigation was, first and foremost, a civilian law enforcement investigation.

In contrast to *United States v. Hitchcock*, 286 F.3d 1064, 1070 (9th Cir.), *as amended* by 298 F.3d 1021 (9th Cir. 2002), in which the NCIS investigation targeted the sale of illegal drugs on a military base, here Agent Logan had no reason to believe his investigation concerned anyone over whom he had jurisdiction. For this reason, the government reliance on *United States v. Holloway*, 2011 WL 304580 (W.D.Ky. Jan 27, 2011), is misplaced. *Holloway* did not even consider the jurisdictional limits of the Uniform Code of Military Justice. In contrast, this Court noted in *Chon* that "the military purpose exception . . . sanction[s] military assistance in law enforcement activities where the illegal acts were perpetrated by military personnel or where civilians committed illegal acts on military bases." 210 F.3d at 994.

In essence, the government advocates for a limitless exception to the PCA that will swallow the rule, something the Department of Defense has warned against. The government suggests that the military purpose exception applies any time there is a possibility (no matter how remote) that military personnel could be involved. This exception has no practical limits and would, in effect, reduce the PCA to a nullity. As the Department of Defense has warned, the PCA exception for direct assistance taken for the primary purpose of furthering a military affairs

function "must be used with caution, and does not include actions taken for the primary purpose of aiding civilian law enforcement officials or otherwise serving as a subterfuge to avoid the restrictions [of the PCA.]" Directive 5525.5 at E4.1.2.1 (ADD 14).

C. Suppression is appropriate in this case because of the manifest need to deter future violations of the PCA.

The government asks this Court to disregard its own precedent and find that violations of the PCA cannot merit suppression. Gov't Br. 29-32. To be clear, in *United States v. Roberts*, this Court held that the exclusionary rule is an appropriate remedy for violations of 10 U.S.C. § 375 when "a need to deter future violations is demonstrated." 779 F.2d 565, 568 (9th Cir. 1986). In this case, the record establishes there is a need to stem future abuses and therefore exclusion is an appropriate remedy.

Logan testifies he does not believe there to be any limits to his jurisdiction. As testified, he has the authority to investigate child pornography regardless of the status of investigation target because "[p]ossession and distribution of child pornography across the internet is a federal crime and we are credentialed U.S. federal agents." (ER 113; 9/24/12 RT 175). According to Logan, "[m]onitoring computers that are trading child pornography in the United States, there are areas of interest of the Department of Navy[.]" (ER 145; 9/24/12 RT 207). Agent Logan

testified that he routinely investigates child pornography because he has the equipment, namely RoundUp, a web-based computer program, and that it is his standard practice "to monitor all computers in a geographic area." (ER 361, 336-8; 6/22/12 RT 29, RT 4-6). The NCIS has been engaging in civilian child pornography investigations as far back as 2008. *See, e.g., Holloway*, 2011 WL 304580.

The government agrees with Agent Logan that the NCIS is authorized to function as a civilian law enforcement entity without any limitation under the PCA. Not only is this conclusion wrong, it provides powerful evidence that suppression is needed in order to curb future abuses of the PCA. For these reasons, the Court should suppress the evidence obtained as a result of the NCIS investigation.

II. The search warrant should be suppressed because the omissions and misrepresentations in the affidavit were material.

The government concedes that Detective Schrimpsheer made numerous misrepresentations and omissions in his search warrant affidavit. Gov't Br. 35-36. It argues these are not fatal to the warrant because Schrimpsheer's affidavit "made clear to the state judge reviewing the application that that Agent Logan had conducted the investigation of Dreyer, not Schrimpsheer" Gov't Br. 36-7. The government is wrong.

Schrimpsheer's affidavit made it clear that *he* had conducted the investigation of Mr. Dreyer. His affidavit falsely represented that he had personally downloaded the child pornography directly from Mr. Dreyer's computers using specialized software (called E-Phex) designed to verify the source of the contraband. (ER 281-3; Government Hearing Exhibit 2). None of this was true.

The government argues that the flawed search warrant affidavit suffices because, according to Schrimpsheer, he appended a copy of the NCIS report to it. The government's argument relies on Schrimpsheer's credibility. The government omits that Schrimpsheer had been terminated from his prior employment at the King County Sheriff's Office for dishonesty during an Internal Affairs investigation into three separate allegations of official misconduct by Schrimpsheer. *See* Opening Br. 24.²

² On October 15, 2013, the government disclosed additional impeachment evidence relating to Detective Schrimpsheer that it had failed to turn over to Mr. Dreyer's defense counsel.

Included among the new revelations is that while Schrimpsheer was working for the Phelps County Sheriff's Department in Missouri as evidence supervisor it was discovered that evidence went missing in hundreds of investigations. It was also revealed that the King County Prosecutor's Office dismissed at least one prosecution that relied on Schrimpsheer's testimony in the interests of justice after that conviction was overturned because of the prosecutor's failure to reveal the investigation of Schrimpsheer. Counsel's investigation has revealed that there may be other cases that the King County Prosecutor's Office dismissed because of Schrimpsheer's dishonesty.

Following the submission of this brief, counsel for Mr. Dreyer will move to remand the matter to the district court for an evidentiary hearing into the

Even if Schrimpscher did append Logan's report, the application still fails to demonstrate probable cause because Logan's report failed to correct Schrimpscher's misrepresentations and omissions and contained additional material misrepresentations and omissions. Logan's Report falsely claimed he downloaded three files *directly* from an IP address later determined to belong to Mr. Dreyer. Only later, he testified he was connected to the multiple IP addresses through web-based software RoundUp when he downloaded the three files. *See* Opening Br. 42. He also failed to indicate that RoundUp—like the E-Phex program Schrimpscher falsely claimed he used—could isolate the source of the download, a noted issue with file sharing networks. *See* Opening Br. 26.

Schrimpscher was the only one to verify that child pornography was downloaded from Mr. Dreyer's IP address. Once his misrepresentations were corrected, however, there is no verification that the download came from Mr. Dreyer's IP address and thus there is no basis to believe that any contraband would be found at Mr. Dreyer's home. *Cf. United States v. Fernandez*, 388 F.3d 1199, 1252 (9th Cir. 2004) ("Probable cause exists when, considering the totality of the circumstances, the affidavit shows that there is a fair probability that contraband or

government's violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).

evidence of a crime will be found in a particular place.") (internal quotation marks and citation omitted).

For these reasons, the Court should suppress the fruit of the search warrant.

III. Detective Luckie's computer search should be suppressed because it exceeded the scope of the warrant and was tantamount to a general search.

The government concedes that Detective Luckie conducted an on-site search of the desktop computer and failed to take any steps "to maintain the privacy of materials that are intermingled with seizable materials, and to avoid turning a limited search for particular information into a general search of . . . file systems and computer databases." *United States v. Comprehensive Drug Testing, Inc.* ("CDT III"), 621 F.3d 1162, 1170 (9th Cir. 2010). Nor did Luckie adhere to this Court's rejection of the plain view doctrine in the context of data searches and its disapproval of the government's "deliberate overreaching" in seizing electronic data. *Id.* at 1170-2. Instead, Luckie conducted a general search of the desktop computer for pictures, images, and graphics and reviewed thousands of files before identifying approximately six images of suspected child pornography. *See* Opening Br. 34-5.

The government argues that the search warrant authorized him to do this onsite search. Gov't Br. 40. (citing ER 287, 291-3). This is simply not true. The warrant was clear that "[i]f there is a computer(s) or computer related equipment

found we request permission to remove those items as instrumentalities. We also request permission to remove those items for searching offsite[.]" (ER 286).

The application did inform the Court that, "[i]n those cases where it is technically feasible and situational circumstances deem that it is appropriate, investigators attempt to conduct an initial preview of the computers at the scene" (ER 287). This was not presented to request permission for an onsite search. It was included in a section requesting permission "to remove those items for searching offsite[.]" (ER 286).

The government also argues that the Court should reject this argument as a new ground for suppression. Gov't Br. 39-40, n.9. The government is wrong. Mr. Dreyer's trial counsel specifically objected to the scope of the search when he argued at the close of the suppression hearing that Luckie's search exceeded the warrant. (ER 17; 7/5/12 RT 130). As he argued, "nowhere does it say that the officers can, in addition to coming and searching the house and seizing the property, can bring their gear into the house, their computers, and their analysis programs, and begin an on-site analysis at the house, which is exactly what they did." (ER 17-8; 7/5/12 RT 130-1).

Contrary to the government's suggestion, *United States v. Schesso*, 740 F.3d 1040 (9th Cir. 2013), does not settle the matter. *See* Gov't Br. 42. First, *Schesso* is readily distinguishable from Mr. Dreyer's case. In contrast to Mr. Dreyer, *Schesso*

did not allege that the search exceeded the scope of the warrant. And unlike Mr. Dreyer, Schesso conceded there was probable cause for the search.

Instead, Schesso challenged the warrant as facially overbroad because of a lack of search protocols. In rejecting his claim, this Court rejected found that "the exercise of 'greater vigilance' did not require invoking the *CDT III* protocols in Schesso's case[.]" 740 F.3d at 1050. This Court did not find that the *CDT III* protocols were inappropriate in every case. Rather, this Court emphasized that "the proper balance between the government's interest in law enforcement and the right of the individual to be free from unreasonable searches and seizures of electronic data must be determined on a case-by-case basis" 740 F.3d at 1050.

In this case, the manner in which this search was conducted makes it unreasonable for law enforcement not to have included any protective protocols. For this reason, the Court should suppress the fruits of Luckie's search.

IV. The district court abused its discretion when it permitted the government to introduce evidence obtained through and authenticated by the RoundUp program.

The government acknowledges that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny, governs the admissibility of technical and scientific evidence, but argues that RoundUp, a computer-based program, is neither scientific nor technical. According to the government, RoundUp is simply a tool that is not subject to *Daubert*. Gov't. Br. 47.

Ironically, the case the government cites, *United States v. Chiaradio*, 684 F.3d 265, 276-8 (1st Cir. 2012), was one in which the trial court did conduct a *Daubert* hearing to determine the reliability of similar software used by the FBI. In order to avoid that result, the government misconstrues how RoundUp was used in the investigation and prosecution of Mr. Dreyer.

Contrary to the government's argument, RoundUp was far more than a tool. With respect to the possession of child pornography count, RoundUp provided critical evidence that Mr. Dreyer possessed "known child pornography" that RoundUp validated through a comparison to its database and identified as "known child pornography" by highlighting the file in red. *See* Opening Br. 40. RoundUp also played an indispensable role in the government's proof of the distribution of child pornography count. The government relied on RoundUp to prove the actus reus of the distribution count, which it based exclusively on files obtained through RoundUp. *See* Opening Br. 41.

The government argues that Mr. Dreyer received the "functional equivalent of a *Daubert* hearing" when he had an opportunity to question NCIS Agent Logan at the suppression hearing. Gov't. Br. 48 (quoting *Chiaradio*, 684 F.3d 277-78). The government concedes, however, that Agent Logan was wholly unqualified to testify about RoundUp's reliability or functionality. *Id.* at 49.

Logan testified that he didn't know how RoundUp has been tested or its error rate. *Id.* at 49. He did not know how RoundUp was written, its specifications, or whether the program had been tested by any independent third parties. (ER 146; 9/24/12 RT 208). Nor is it likely that any independent third party has tested RoundUp since it is not commercially available. (ER 145-6; 9/24/12 RT 207-8). Logan was unaware of RoundUp's error rates or whether his agency had even produced a test or validation report. (ER 147; 9/24/12 RT 209).

Thus, the district court's conclusion that RoundUp was reliable was totally unfounded. Without a proper basis from which to determine whether RoundUp was reliable, the district court abdicated its responsibility as a gatekeeper and simply took "the expert's word for it" something this Court has found to be "not enough." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995). For these reasons, the district court abused its discretion in admitting evidence obtained and authenticated through RoundUp.

Conclusion

For the reasons set forth above, the Court should find that the district court erred when it denied Mr. Dreyer's motion to suppress the fruits of the NCIS investigation, the state search warrant, the onsite search of the desktop computer, and the resulting federal search warrant, and that it erred in admitting evidence obtained and authenticated through the RoundUp program. As a result, this Court should vacate Mr. Dreyer's convictions, and remand the matter for further proceedings.

DATED: November 15, 2013.

Respectfully submitted,

s/Erik B. Levin

Erik B. Levin

Attorney for Michael Allan Dreyer

Certificate of Compliance

Pursuant to Ninth Circuit Rule 32(a)(7)(C)(i), I certify that this brief is proportionately spaced using 14 point Times New Roman and consists of -----
4520 words.

DATED: November 15, 2013.

s/Erik B. Levin

Erik B. Levin

Certificate of Related Cases

Counsel is not aware of any related cases now pending before this Court.

DATED: November 15, 2013.

s/Erik B. Levin

Erik B. Levin

Certificate of Service

I hereby certify that on November 15, 2013, I filed the foregoing **Defendant-Appellant's Reply Brief** with the Clerk of 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.

DATED: November 15, 2013.

s/Erik B. Levin

Erik B. Levin