16-748cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ANONYMOUS,
Plaintiff,

MATTHEW CHRISTIANSEN,
Plaintiff-Appellant,

v.

OMNICOM GROUP, INCORPORATED, DDB WORLDWIDE COMMUNICATIONS GROUP INCOPORATED, JOE CIANCIOTTO, PETER HEMPEL, AND CHRIS BROWN,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE* NATIONAL CENTER FOR LESBIAN RIGHTS IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* National Center for Lesbian Rights certifies that it has no parent corporation and no corporation or publicly held entity owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

The National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in promoting equal opportunity for LGBT people in the workplace through legislation, policy, and litigation, and represents LGBT people in employment and other cases in courts throughout the country.

[1] The parties have consented to the filing of this brief. Counsel for the parties have not authored this brief. The parties and counsel for the parties have not contributed money that was intended to fund preparing or submitting the brief. No person other than the *amicus curiae* contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000), this Court held that "Title VII does not prohibit harassment or discrimination because of sexual orientation." The briefs filed by Plaintiff-Appellant Matthew Christiansen and other *amici* explain in detail why this Court's holding in *Simonton* was erroneous and should not be followed, particularly in light of the Equal Employment Opportunity Commission's (EEOC's) conclusion that Title VII's sex discrimination protections include a prohibition on discrimination based on sexual orientation. *Amicus* NCLR is fully in agreement with those arguments. NCLR submits this brief to point out an additional reason why this Court's holdings in *Simonton* and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005) should not be construed to require dismissal of Plaintiff's Title VII claim in this case: those decisions' prohibitions on "bootstrapping" sexual orientation claims into claims based on nonconformity with gender stereotypes have proven confusing and unworkable for lower courts, and have led to inequitable results that cannot be reconciled with the language and intent of Title VII.

The Court in *Simonton* recognized that a lesbian, gay, or bisexual (LGB) plaintiff can establish discrimination on the basis of sex by demonstrating that "the harassment he endured was based on his failure to conform to gender norms, regardless of his sexual orientation." *Id.* at 38. The Court declined to consider

whether the plaintiff in *Simonton* could prevail on a sex-stereotyping theory because it concluded such a claim had not been adequately pled. *Id.* at 37.

This Court again considered the application of Title VII to LGB employees in a case involving a plaintiff who described herself as "a lesbian female, who does not conform to gender norms in that she does not meet stereotyped expectations of femininity and may be perceived as more masculine than a stereotypical woman." *Dawson*, 398 F.3d at 217. The Court noted the difficulty of discerning whether various acts of discrimination alleged by the plaintiff were "motivated by animus toward her gender, her appearance, her sexual orientation, or some combination of these." *Id.* at 217. The Court further stated that, when utilized by a LGB plaintiff, "gender stereotyping claims can easily present problems for an adjudicator" because "[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality." *Id.* at 218 (quoting *Howell v. North Cent. Coll.*, 320 F.Supp.2d 717, 723 (N.D. Ill. 2004).[2]

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[2] As one example of the difficulty (and, *amicus* contends, frequent impossibility) of distinguishing between sexual orientation and gender-based stereotypes, the plaintiff in *Dawson* based her hostile work environment claim on comments such as one co-worker's "declaration that he thought she 'needed to have sex with a man.'" *Id.* at 223. This Court sympathized with the district court's uncertainty about the relevance of such comments "because they appeared to relate to Dawson's sexual orientation and not merely to her gender," but offered no guidance as to how courts should treat offensive workplace comments that are directed to both sex and sexual orientation. *Id.*

Rather than accepting that this close connection between sexual orientation and gender-related stereotypes suggests *both* may constitute forms of sex discrimination, however, the Court in *Dawson* instead reiterated "that a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII.'" *Id.* (quoting *Simonton*, 232 F.3d at 38.).

In light of this conclusion, the Court in *Dawson* required the plaintiff to carefully disaggregate whether the alleged acts of discrimination were motivated by (1) her sexual orientation, (2) her nonconformity with gender stereotypes based on her behavior, or (3) her nonconformity with stereotypes concerning appearance. Having found that sexual orientation discrimination is not prohibited under Title VII and that the plaintiff had not alleged discrimination based on gender-nonconforming behavior, the Court concluded that the plaintiff's "claim with respect to gender stereotyping thus rest[ed] upon the contention that her appearance was unacceptable" to her employer. *Id.* at 221. The Court found the record "devoid of any substantial evidence that Dawson was subjected to any adverse employment consequences as a result of her appearance." *Id.*

Dawson stands as this Court's most direct guidance to lower courts concerning the application of Title VII to LGB workers. As one district court recently summarized the state of the law in this Circuit:

> [N]onconformity with gender stereotypes is stereotypically associated with homosexuality—and Title VII . . . prohibits discrimination on the

> basis of such nonconformity insofar as it is discrimination on the basis of the gender stereotypes but not insofar as it is discrimination on the basis of homosexuality. Thus, for example, a woman might have a Title VII claim if she was harassed or fired for being perceived as too "macho," but not if she was harassed or fired for being perceived as a lesbian, and *courts and juries have to sort out the difference on a case-by-case basis.*

Fabian v. Hosp. of Cent. Connecticut, No. 3:12-cv-1154 (SRU), 2016 WL 1089178, at *11 n.8 (D. Conn. Mar. 18, 2016) (emphasis added).

The fine (and ultimately illusory) distinction this Court and others have attempted to draw between gender-based stereotypes and those based on sexual orientation has led to inconsistent decisions among district courts about whether and in what circumstances homophobic slurs and other anti-LGB conduct can constitute evidence of sex discrimination. To make matters worse, the ultimate result of this confusion has been that LGB workers have at times been held to have *no protection* under Title VII against conduct that would plainly be deemed evidence of sex discrimination if that identical conduct had been directed against a heterosexual co-worker. The very fact that the "bootstrapping" analysis has led to some employees obtaining greater protection than other employees against otherwise identical acts of sex discrimination, based solely on their sexual orientation, strongly indicates that the anti-bootstrapping rule is not only unworkable and inequitable, but also erroneous.

In the present case, the District Court observed that "[t]he lesson imparted by the body of Title VII litigation concerning sexual orientation discrimination and sexual stereotyping seems to be that no coherent line can be drawn between these two sorts of claims." *Christiansen v. Omnicom Grp., Inc.*, No. 15 Civ. 3440 (KPF), 2016 WL 951581, at *14 (S.D.N.Y. Mar. 9, 2016); *see also Fabian*, 2016 WL 1089178, at *11 n.8; *Roberts v. United Parcel Serv., Inc*., 115 F. Supp. 3d 344, 348 (E.D.N.Y. 2015) (recognizing that the law regarding workplace behavior is evolving alongside the nation's understanding of sexual orientation). In light of "the demonstrated impracticability of considering sexual orientation discrimination as categorically different from sexual stereotyping," the District Court expressly asked this Court to consider "whether that line should be erased." *Id.* at *15. As shown below, the courts' continuing confusion over the application of Title VII to LGB employees is strong evidence that, as one district court recently concluded, "the line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist, save as a lingering and faulty judicial construct." *Videckis v. Pepperdine Univ.*, No. CV 15-00298 DDP (JCx), 2015 WL 8916764, at *6 (C.D. Cal. Dec. 15, 2015).

ARGUMENT

I. THIS COURT'S DECISIONS IN *SIMONTON* AND *DAWSON* HAVE CAUSED CONFUSION AND INCONSISTENCY IN THE APPLICATION OF TITLE VII TO CLAIMS BROUGHT BY LESBIAN, GAY, AND BISEXUAL WORKERS

In the years since *Simonton* and *Dawson* were decided, numerous district courts in this Circuit have been called upon to apply those decisions in cases involving employees who alleged sex discrimination claims based in whole or in part on negative comments or other discriminatory conduct related to the plaintiff's actual or perceived sexual orientation, or on homophobic slurs or conduct not addressed to the plaintiff specifically but allegedly contributing to a hostile work environment. A review of those decisions reveals substantial inconsistency and confusion among the district courts concerning whether and in what circumstances such sexual orientation-related comments or conduct can constitute evidence of prohibited sex discrimination.

One group of district court decisions appears to interpret this Court's precedents to mean that sexual orientation-related speech or behavior can *never* constitute evidence of sex discrimination. These decisions, however, offer no principled basis for distinguishing evidence of sexual orientation-related discrimination from evidence of sex discrimination or sex-based stereotypes, and courts have not been consistent in placing workplace behavior into one category or the other.

For example, in *Morales v. ATP Health & Beauty Care, Inc.*, No. 3:06CV01430 (AWT), 2008 WL 3845294, *8 (D. Conn. Aug. 18, 2008) the plaintiff, a transgender woman who identified as heterosexual, alleged that she had experienced a hostile work environment based in part on evidence that her supervisor:

> (1) told her that she had "a big pussy" on a day when she wore tight jeans to work; (2) asked her which of the men with whom [the supervisor] was standing was most attractive to her; (3) asked her if her ovaries hurt as she was holding her stomach while walking to the restroom; (4) told Morales that "[his] dick is curved" and "if [he sticks] it up [Morales'] ass, [he] will take shit out of it"; and (5) told Morales that she would not "fool around" with Morales as a female but probably would have done so when she was a boy.

Id. The court concluded that the second and fourth comments "appear to be directed at Morales' sexual orientation, and therefore, they are not actionable under Title VII. However, the first, third, and fifth comments appear to be directed at Morales' failure to conform to societal stereotypes about how men should appear [and therefore are actionable]." *Id.*

There is no readily apparent basis for the distinctions the court drew in *Morales*. For example, comment (2) seems no less related to gender stereotypes than does comment (5), and comment (4) is similar to comment (1) in its offensive sexual content. The court offered no reasoning to explain why each comment was placed in one category or the other.

Similarly, in *Magnusson v. County of Suffolk*, No. 14-CV-3449 (SJF)(ARL), 2016 WL 2889002, *8 (E.D.N.Y. May 17, 2016), the plaintiff, a lesbian, alleged that her employer had created a sex-based hostile work environment based on various comments and actions relating to her appearance, dress, and sexual orientation. The court declined to consider certain facts as evidence of sexual harassment based on its conclusion that those facts related to the plaintiff's sexual orientation, not her sex. The court stated:

> Plaintiff alleges: (i) in 2005, Beck told Plaintiff that the practice of carrying her wallet in her back pocket is "gay"; (ii) in 2006 or 2007, Beck asked Plaintiff if she was "one of those gay people"; (iii) in 2007, Beck asked Plaintiff "whether [she] had a boyfriend or a girlfriend" and "insist[ed] that he would figure [her] out"; (iv) in February 2010, in "yet another attempt to ascertain [Plaintiff's] sexuality... [Beck] asked to take [Plaintiff] to Atlantic City for the weekend"; (v) at unspecified times between "as early as 2002 [and] as recently as November 2010," Beck and/or Spence "falsely stat[ed] that [Plaintiff] ha[s] had sexual affairs with co-workers" in an attempt to "goad [Plaintiff] to discuss her sexuality"; and (vi) in March 2011, Beck asked Plaintiff whether her "friendship ring" was "a gay thing." . . . Sexual orientation discrimination is not actionable under Title VII, and plaintiffs may not shoehorn what are truly claims of sexual orientation discrimination into Title VII by framing them as claims of discrimination based on gender stereotypes, as Plaintiff at times attempts to do here.

Id.

Again, there appears to be no principled basis for the court's exclusion of these facts as evidence of a sex-based hostile work environment merely because they also concerned sexual orientation. Comments (i) and (vi), for example, appear to reflect gender-based stereotypes concerning how women should dress. Comments (iii) and

(v) are similar to the comment concerning the plaintiff's sexual attractions that the *Morales* court found to be actionable as sex discrimination. The court in *Magnusson* appears to have excluded any facts that related in any way to sexual orientation, even if they also plainly reflected gender stereotypes. *See also Tyrrell v. Seaford Union Free School District*, 792 F. Supp. 2d 601, 623 (E.D.N.Y. 2011) (holding, in Title IX case, that *Dawson* precluded homophobic slurs from being considered as evidence of a sex-based hostile environment).

A second set of district court decisions hold that homophobic slurs or similar conduct can, at least in some circumstances, constitute evidence of sex-based animus as well as sexual orientation-based animus. These decisions are at odds with the decisions of courts, such as those cited above, that have construed *Dawson* to mean that evidence of sexual orientation-related discrimination can never support a Title VII claim.

In *Boutillier v. Hartford Pub. Sch.*, No. 3:13CV1303 WWE, 2014 WL 4794527, *1 (D. Conn. Sept. 25, 2014), the plaintiff was a teacher who was married to a same-sex spouse. She alleged that her supervisor began to berate her, scream at her and criticize her after learning about her sexual orientation. *Id.* The court concluded that the plaintiff's allegation that "she was subjected to sexual stereotyping during her employment on the basis of her sexual orientation" was

sufficient to "set forth a plausible claim she was discriminated against based on her non-conforming gender behavior." *Id.* at *2.

In *Riccio v. New Haven Bd. of Educ*., 467 F. Supp. 2d 219, 226 (D. Conn. 2006), a Title IX case, a parent sued a school board for "tolerating and failing to cure a pattern of sexual harassment" against her daughter. The plaintiff alleged that students taunted her daughter with "derogatory names including 'bitch,' 'dyke,' 'freak,' 'lesbian,' and 'gothic.'" *Id.* at 222. The court concluded that such taunts constituted evidence of a sex-based hostile environment:

> The verbal taunting targeted at Andree is clearly gender-oriented language. If not for her status as a female, a reasonable trier of fact could conclude that Andree would not have been called the offending slurs. As such, Andree, a female student, targeted by other female students and called a variety of pejorative epithets, including ones implying that she is a female homosexual, has established a genuine issue of fact as to whether this harassment amounts to gender-based discrimination, actionable under Title IX.

Id. at 226. In so ruling, the court implicitly understood the close connection between gender-based stereotypes and ideas about same-sex sexuality, and the futility of attempting to artificially separate one from the other.

Finally, as a third interpretation of *Simonton* and *Dawson*'s anti-bootstrapping rule, at least one district court in this Circuit has concluded that homophobic slurs and conduct can be evidence of sex discrimination, *but only if the plaintiff is actually heterosexual.* Such an interpretation leads to the astonishing result that *precisely the*

same conduct by a supervisor or co-worker will be deemed evidence of sex discrimination if the plaintiff is heterosexual, but not if the plaintiff is LGB.

In *Estate of D.B. by Briggs v. Thousand Islands Cent. Sch. Dist*., No. 7:15-CV-0484 (GTS/ATB), 2016 WL 945350, *8 (N.D.N.Y. Mar. 14, 2016), a Title IX case brought by the estate of a student who had died by suicide, the plaintiff alleged a claim for sex discrimination based in part on the use of homophobic slurs by other students. Citing *Dawson*, the district court stated:

> The critical fact under the circumstances is the actual sexual orientation of the harassed person. If the harassment consists of homophobic slurs directed at a homosexual, then a gender-stereotyping claim by that individual is improper bootstrapping. *Dawson*, 398 F.3d at 218. If, on the other hand, the harassment consists of homophobic slurs directed at a heterosexual, then a gender-stereotyping claim by that individual is possible.

Id. Because the pleadings contained no allegations suggesting the plaintiff was LGB, the court concluded that the plaintiff could allege a Title IX claim for gender stereotyping based on the homophobic slurs. *Id*. at 9. The court made clear, however, that the result would have been different if the plaintiff had actually been lesbian or bisexual. *See also Maroney v. Waterbury Hosp.*, No. 3:10-CV-1415 JCH, 2011 WL 1085633, *2 n.2 (D. Conn. Mar. 18, 2011) ("The Second Circuit has suggested that these gender stereotyping claims may be especially difficult for gay plaintiffs to bring.").

As this brief survey shows, there has been little consistency and much confusion in the lower courts' application of the *Simonton* and *Dawson* anti-bootstrapping rule. The inherent difficulty and artificiality of distinguishing complex fact patterns to determine which events involve sex discrimination, and which involve only sexual orientation discrimination, has led to an untenable situation in which virtually identical acts of discrimination may or may not be deemed actionable under Title VII, depending on how a particular court reads *Dawson*, and even depending on whether the plaintiff is actually LGB or not.

II. THE COURTS' CONFUSION HAS LED TO LESBIAN, GAY, AND BISEXUAL WORKERS RECEIVING LESS PROTECTION AGAINST SEX DISCRIMINATION THAN OTHER WORKERS

The courts' inconsistent application of *Simonton* and *Dawson* would be reason enough to call into doubt the rule established in those cases even if the impact of that inconsistency fell equally on all plaintiffs. But that is not the case. As shown above, at least one district court has held that a claim of sex discrimination may be based on homophobic slurs if the plaintiff is heterosexual, but not if the plaintiff is LGB. Even beyond that expressly unequal interpretation of Title VII, however, this Court's anti-bootstrapping precedents have caused lower courts in other cases to minimize or discount evidence of sex discrimination when the plaintiff is LGB. So concerned are these courts with policing a plaintiff's complaint to ensure that no "bootstrapped"

claims based on sexual orientation are present that they strain to disregard other clear evidence of sex discrimination.

In *Dollinger v. New York State Ins. Fund*, No. 3:14-CV-00908 (MAD/DEP), 2015 WL 1446892, *2 (N.D.N.Y. Mar. 30, 2015), the plaintiff alleged that he had been the recipient of "emails that contain[ed] sexual content, profanity, and nudity" as well as homophobic messages. He also alleged "that male co-workers often mock[ed] him for being 'overly sensitive' and 'too emotional'" and that a female manager "talk[ed] about putting subordinates on meat hooks and [told] male co-workers to 'cowboy up.'" *Id.* at *3. The court dismissed the plaintiff's Title VII claim, concluding that:

> Plaintiff's claim for relief is largely based on discriminatory conduct directed toward Plaintiff's *sexual orientation*, and not his failure to conform to traditional masculine stereotypes. The few instances of potential sex discrimination that Plaintiff alleges in the amended complaint are far too minor to permit the inference that sex discrimination played a role in Defendant's failure to promote Plaintiff. The mere presence of a male co-worker in Plaintiff's workspace "wearing camouflage ... and talk[ing] about guns and gutting animals in the woods," combined with trivial comments about Plaintiff being "too sensitive," does not allow for the inference that Plaintiff's failure to conform to masculine stereotypes is the true rationale for Defendant's denial of his promotion.

Id. at *5. The court discounted the plaintiff's allegations of sex-based stereotyping because if found those allegations were "too minor" compared to the allegations of homophobic conduct, and because the plaintiff's complaint was *primarily* based on sexual orientation discrimination.

Likewise, in *Swift v. Countrywide Home Loans, Inc*., 770 F. Supp. 2d 483, 485 (E.D.N.Y. 2011), the plaintiff, a gay man, alleged that a co-worker referred to him "as acting and dressing like 'a girl,' 'a pussy' and a 'fag,' and told him to 'man up.'" Despite the gender-based nature of these comments, the court concluded that "this a clear case where Plaintiff is attempting to bootstrap a non-cognizable claim of sexual orientation discrimination into a cognizable claim of gender stereotyping." *Id.* at 488. The court relied on the fact that the plaintiff was gay and had previously referred to the discrimination against him as sexual-orientation discrimination as a basis to dismiss his sex discrimination claim, despite his clear allegations of gender stereotyping:

> Even accepting the argument that such terms refer not to Plaintiff's homosexuality, but to the non-conformism of his behavior, other evidence points decidedly to a different conclusion. Most importantly, Plaintiff's complaint to Countrywide's CEO makes clear that his claim of discrimination is based upon his sexual orientation, and not gender stereotyping. Thus, before commencing this lawsuit, Plaintiff complained that he was a victim of discrimination because he is "gay man in a straight man's world," and was a victim of harassment due to an alleged "deep hatred for gay people." It is clear to the court that before commencing this lawsuit, and perhaps also before becoming aware that Title VII does not prohibit discrimination based upon sexual orientation, Plaintiff believed he was subject to discrimination based upon his sexual orientation. It was only after commencement of this action that he re-framed his claim as one for gender stereotyping. This is precisely the bootstrapping claim prohibited by Second Circuit precedent.

Id.

As these cases demonstrate, this Court's decisions in *Simonton* and *Dawson* have caused some lower courts to be so concerned with avoiding "bootstrapped" sexual orientation claims that they have engaged in an analysis that involves weighing the evidence of sexual orientation discrimination against the evidence of other gender stereotyping to determine whether the claim is "really" one about sexual orientation as opposed to sex discrimination. No such weighing occurs in cases brought by non-LGB plaintiffs, who need only meet the ordinary Title VII standard of presenting evidence sufficient to establish a prima facie case of sex discrimination.

In sum, this Court's rulings in *Simonton* and *Dawson* have sown confusion and inconsistency in Title VII cases involving LGB plaintiffs. Indeed, in some district courts, the ultimate effect of those decisions has been to create a new legal hurdle for LGB plaintiffs that is not present for other Title VII plaintiffs alleging sex discrimination: LGB employees seeking to establish a Title VII violation based on gender stereotyping must satisfy the court that the employer's use of those gender-based stereotypes was not in fact directed to the plaintiffs' sexual orientation, but only to their sex. Nothing in the text or history of Title VII supports engrafting additional proof requirements based on the sexual orientation of the plaintiff, or providing less protection against clear acts of sex discrimination or gender

stereotyping to some plaintiffs than to other plaintiffs based on their sexual orientation.

In its decision below, the District Court was entirely correct to call into question the continuing viability of *Simonton* and *Dawson* given the "demonstrated impracticability" of applying those decisions' anti-bootstrapping rule in a consistent and principled way. *Christiansen,* 2016 WL 951581, at *15. The erratic and inequitable results caused by the courts' continuing struggle to apply these precedents is strong evidence that "no coherent line can be drawn between these two sorts of claims." *Id.* at *14.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that the Court reverse the District Court's dismissal of Plaintiff's claims under Title VII of the Civil Rights Act of 1964.

DATED: June 28, 2016

Respectfully submitted,

By: s/ Christopher F. Stoll
Attorneys for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,019 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman type style.

Dated: June 28, 2016

s/ Christopher F. Stoll
Attorneys for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate ECF system on June 28, 2016.

I certify that all participants in the case are registered ECF users and that service will be accomplished by the ECF system.

I hereby certify that I filed one original plus six paper copies of the foregoing brief with the Court by Federal Express overnight delivery on June 28, 2016.

s/ Christopher F. Stoll