No. _____

In the Supreme Court of the United States

SUMOTEXT CORP.,

Applicant,

v.

ZOOVE, INC., DBA STARSTAR MOBILE, VIRTUAL HOLD TECHNOLOGY, LLC, VHT STARSTAR, LLC, STARSTEVE, LLC, AND MBLOX, INC.,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI

To the Honorable Elena Kagan, Associate Justice of the United States and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

1. Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.2 of this Court, Applicant Sumotext Corp. respectfully requests an extension of time of 14 days, to and including February 24, 2022, for the filing of a petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit dated October 27, 2021 (Exhibit 1). A petition for

rehearing was denied on November 12, 2021 (Exhibit 2). The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

2. Unless an extension is granted, the deadline for filing the petition for certiorari will be February 10, 2022. Although this application is filed within 10 days of that date, extraordinary circumstances exist for the delay because counsel for the Petitioner originally filed the application on January 28, 2022, but neglected to file the certificate of service associated with the application. Counsel apologizes for the error.

3. This case involves important questions under the Sherman Act, 15 U.S.C. §§ 1, 2, and Rule 702 of the Federal Rules of Civil Procedure. These include:

> Whether the court below violated the evidentiary standards under the Sherman Act applicable to establishing the boundaries of the relevant market and whether they include economic substitutes.
>
> Whether the Ninth Circuit's standard for admitting expert testimony—which departs from other circuits' standards—is inconsistent with this Court's precedent and Federal Rule of Evidence 702.

4. Applicant Sumotext Corporation brought an antitrust competitor suit against Respondents Zoove, Inc., Virtual Hold Technology, LLC, VHT StarStar, LLC, StarSteve, LLC, and Mblox, Inc., in March 2016, relating to

the market for ** or (StarStar) numbers. These abbreviated mobile dial codes allow a mobile phone caller to dial an abbreviated number and be connected to a particular service provider's full 10-digit phone number. For instance, calling "**LAW" would connect to the lawyer that registered that **LAW from the National Mobile Dial Code Registry. Some service providers like Applicant also provided a servicing function that allowed the StarStar number to connect the user to additional functionality such as text messaging or geofencing. Applicants accused Respondents of successfully deploying a horizontal group boycott of their rivals by terminating their registered StarStar number leases and usurping their downstream customer relationships and revenues after acquiring "complete control" of the Registry.

5. To determine whether a restraint on trade violates the federal antitrust laws under the "rule of reason," federal courts utilize a "three-step, burden-shifting framework" where "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers *in the relevant market*." *Ohio* v. *American Express Co*., 138 S. Ct. 2274, 2284 (2018) (emphasis added). And the "relevant market is defined as the area of effective competition," *id.* at 2285, which includes "the product at issue as well as all economic substitutes for the product." *Newcal*

Indus., Inc. v. *Ikon Off. Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008) (citing *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962)).

6. Sumotext's economic expert, Dr. Sullivan, conducted an independent relevant market analyses in which he concluded that the area of effective competition was limited to leasing and servicing of ** numbers, after determining that these products had no economic substitutes. He therefore identified two relevant markets: (i) a market for *leasing* ** numbers in the United States; and (ii) an aftermarket for *servicing* ** numbers in the United States.

7. In sharp contrast, Respondents' economic expert, Dr. Debra Aron, (i) refused to conduct an independent relevant market analysis; (ii) refused to proffer an alternative market definition; and (iii) refused to even proffer a list of potential economic substitutes—let alone validate any of her client's broader relevant market theories by submitting the purported economic substitutes to any type of methodology or testing. Yet the district court denied Applicant's motion to exclude her testimony under the standards of Rule 702 and *Daubert*.

8. At trial, executives from Respondents testified that they thought the relevant market was broader than StarStar numbers, because they viewed

a number of products as competitors, including the internet, mobile apps, social media, text messaging, and all 10-digit phone numbers. And Dr. Aron testified, based on these executives' testimony, that she thought Dr. Sullivan's market definition was too narrow, because there were so many alternatives that "appear to serve a similar need" as StarStar numbers.

9. But under substantive antitrust legal standards, such alternative products can only be considered "economic substitutes," and included in the relevant market, if they enjoy "cross-elasticity of demand." *See Thurman Industries, Inc.* v. *Pay'N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir. 1989). This concept of "cross-elasticity of demand" requires that "sales of one product" change in response to "price changes in another." *See also Los Angeles Mem'l Coliseum Comm'n* v. *Nat'l Football League*, 726 F.2d 1381, 1393 (9th Cir. 1984).

10. Yet Dr. Aron provided no analysis, market testing, or economic analysis of any methodology to demonstrate that sales for any of the purported substitutes identified actually changed based on price changes in the market for StarStar numbers, or vice versa. She simply accepted that these products could serve as part of the relevant market based on other witnesses' testimony—thus allowing subjective opinion to stand in for the economic rigor

and scientific analysis *Daubert* and antitrust law requires. And after trial, the district court rejected Applicant's challenge to the sufficiency of the evidence, rendering judgment on the jury's verdict in favor of Respondents.

11. The court of appeals affirmed the district court's rulings, applying the standard employed in the Ninth Circuit under which the Rule 702 inquiry is viewed as "flexible" and "applied with a liberal thrust favoring admission." Op. at 5 (quoting *Wendell* v. *GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017). The court of appeals concluded that that because Aron's testimony "clear[ed] relevancy's low bar" in the Ninth Circuit, Op. at 6, Applicant's methodological challenges to her opinion were simply part of the "battle of expert witnesses" that was "properly reposed in the jury." Op. at 9.

12. That conflicts with the standards of *Daubert*, which requires trial courts to play "a gatekeeping role" to ensure that expert opinions are reliable, 509 U.S. at 597, and with Federal Rule of Evidence 702, which requires expert opinions to be the product of "reliable principles and methods," "reliably applied * * * to the facts of the case," Fed. R. Evid. 702(c)-(d). The admissibility ruling also departs from other circuits' precedent, which would have likely rejected the testimony at issue based on the methodological flaws in the opinion. As Thomas Shrader, chair of the Advisory Rules Committee's

Subcommittee on Rule 702 has observed, "Ninth Circuit caselaw appears to interpret *Daubert*" in ways that "set it apart from most" circuits. Thomas Schroeder, *Toward A More Apparent Approach to Considering the Admission of Expert Testimony*, 95 Notre Dame L. Rev. 2039, 2050 & n.85 (2020). And under the standards employed in these circuits, the admitted fact that Dr. Aron failed to employ economic analysis or testing to confirm her conclusion would have prohibited her testimony from being admitted into evidence or used to sustain the jury's verdict.

13. Counsel of Record, J. Carl Cecere, who was only recently retained, and was not involved in the proceedings before the court of appeals, requires additional time to research the factual record and important legal issues presented in this case.

14. For the foregoing reasons, Applicant Sumotext requests that an extension of time to and including Thursday, February 24, 2022, be granted within which applicant may file a petition for writ of certiorari.

Respectfully submitted,

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Exhibit 1

NOT FOR PUBLICATION

FILED

OCT 27 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUMOTEXT CORP., Plaintiff-Appellant, v. ZOOVE, INC., DBA Starstar Mobile; et al., Defendants-Appellees.	No. 20-17245 D.C. No. 5:16-cv-01370-BLF MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Beth Labson Freeman, District Judge, Presiding

Submitted October 22, 2021**
San Francisco, California

Before: BADE and BUMATAY, Circuit Judges, and SESSIONS,*** District Judge.

Sumotext Corp. appeals the district court's dismissal of Mblox, Inc. at the pleadings stage and the district court's entry of judgment, after a jury trial, in favor

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

of Zoove, Inc., Virtual Hold Technology, LLC ("VHT"), StarSteve, LLC, and VHT StarStar, LLC (collectively, the "Joint Defendants"). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court properly dismissed Sumotext's claims against Mblox under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. To withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, Sumotext's complaint had to plead "enough facts to state a claim to relief that [was] plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To state a § 1 claim, Sumotext needed to plead evidentiary facts establishing (1) an agreement or conspiracy, (2) to harm or restrain trade, (3) which injured competition. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008). To state a plausible claim under § 2, Sumotext had to allege "(1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust injury." *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003).

Sumotext's complaint is devoid of evidentiary facts which, if true, would establish that Mblox joined a conspiracy to restrain trade. Sumotext argues that a letter of intent executed by Mblox and StarSteve is "direct evidence" that Mblox entered an anticompetitive agreement. But the terms that Sumotext complains of were part of a "proposal" for a "Possible Acquisition," and nothing suggests that

those terms were incorporated into a definitive agreement or that Mblox otherwise agreed to be bound by them. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295–96 (9th Cir. 1998) ("[W]e are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint."). Mblox's decision to assign its contracts to Zoove and then sell the company to VHT could just as easily suggest a lawful, arms-length transaction as it could an illegal conspiracy. *See Kendall*, 518 F.3d at 1049 ("Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws."). And Sumotext's allegation that Mblox engaged in a horizontal restraint on trade does not save its claim from dismissal. *See William O. Gilley Enters., Inc. v. Atl. Richfield, Co.*, 588 F.3d 659, 663 (9th Cir. 2009) ("Whether a plaintiff pursues a per se claim or a rule of reason claim under § 1, the first requirement is to allege a contract, combination in the form of trust or otherwise, or conspiracy." (internal quotation marks omitted)).

Sumotext's § 2 claim is also deficient because the complaint does not adequately allege that Mblox joined a conspiracy to monopolize. Sumotext baldly alleges that Mblox "joined, furthered, [and] profited from a Conspiracy to monopolize the national Market for dial codes." But the complaint is "devoid of further factual enhancement," and thus fails to "state a claim to relief that is

plausible on its face." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). Sumotext's arguments against dismissal are not well taken. Sumotext contends "the district court failed to even address [its] separate § 2 allegations," but this contention is baseless. The district court addressed both of Sumotext's antitrust claims against Mblox and dismissed the claims because Sumotext "failed to allege facts showing that Mblox joined the alleged conspiracies." Sumotext's argument suggesting Mblox withdrew from the alleged conspiracy misconstrues the district court's order. The district court did not assess whether Mblox withdrew from an alleged conspiracy to monopolize; instead, the district court correctly found that Sumotext did not allege facts showing that Mblox joined the alleged conspiracy in the first place. Therefore, dismissal of Sumotext's claims against Mblox was warranted.

2. The district court applied the correct legal standard when resolving Sumotext's motion to exclude the testimony of Debra Aron, Ph.D., the Joint Defendants' expert witness. Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony. *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014) (en banc), *overruled on other grounds by United States v. Bacon*, 979 F.3d 766 (9th Cir. 2020) (en banc). To satisfy Rule 702, expert testimony must be relevant and reliable. *Id.* The district court acknowledged these requirements and performed a "flexible inquiry" because

"Sumotext's challenges [were] not framed in terms of the four factors discussed in *Daubert*." *See Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017) (noting the Rule 702 "inquiry is flexible" and "should be applied with a liberal thrust favoring admission" (internal quotation marks omitted)). The district court therefore applied the correct legal standard when resolving Sumotext's motion to exclude.

The district court did not abuse its discretion in finding Dr. Aron's testimony to be sufficiently reliable. *Barabin*, 740 F.3d at 460 (reviewing the admission of expert testimony for an abuse of discretion). Dr. Aron's testimony had a "reliable basis in the knowledge and experience of [her] discipline." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148 (1999) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993)). She formed her opinions based on a variety of sources, including industry publications and industry executives' deposition testimony.

Even assuming the district court abused its discretion by failing to make an express relevancy finding, the error was harmless. *See United States v. Jawara*, 474 F.3d 565, 583 (9th Cir. 2007). Dr. Aron's testimony did not prejudice Sumotext because "it is more probable than not that the jury would have reached the same verdict even if the evidence had not been admitted." *Barabin*, 740 F.3d at 465 (quoting *Jules Jordan Video, Inc. v. 144942 Can. Inc.*, 617 F.3d 1146, 1159

(9th Cir. 2010)). Moreover, "the record shows that [Dr. Aron's] testimony satisfied the requirements for admission." *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1190 (9th Cir. 2019) (internal quotation marks omitted). Expert testimony is relevant if "it logically advances a material aspect of the proposing party's case." *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995). By highlighting alleged flaws in Dr. Sullivan's methodology and market definitions, Dr. Aron's testimony undermined Sumotext's antitrust claims and "logically advance[d]" the Joint Defendants' defense. *Id.* Her testimony thus clears relevancy's low bar. *Messick v. Novartis Pharms. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014).

We also reject Sumotext's argument that Dr. Aron improperly testified as a summary witness. "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." Fed. R. Evid. 703. Dr. Aron formed her opinions based on, inter alia, her experience as an economist, her review of customer data and financial data provided by the parties, independent industry research, and her review of deposition testimony. Synthesizing that information, Dr. Aron criticized Dr. Sullivan's opinions. Dr. Aron did not simply repeat testimony offered by lay witnesses at trial. Accordingly, the district court

did not commit reversible error.[1]

3. The district court properly required Sumotext to prove by a preponderance of the evidence a relevant antitrust market. Sumotext challenges the application of the burden of proof on three grounds, none of which are persuasive. First, Sumotext's argument that the district court required it "to prove the existence of the relevant market circumstantially" is belied by the record. The district court instructed the jury to consider both direct and circumstantial evidence, and Sumotext presented what it describes as "direct evidence" of harm to competition and supracompetitive prices to the jury.

Second, Sumotext contends "the district court erroneously heightened [its] burden of proof" by "making the relevant market definition a threshold issue at trial." We construe this argument as a challenge to the jury instructions and verdict form and conclude that Sumotext waived its objections. Sumotext stipulated to a jury instruction that stated it was Sumotext's "burden to prove the existence of a relevant market," and Sumotext proposed the verdict form that listed the relevant market definitions as threshold questions. Consequently, Sumotext waived review of its challenges to the jury instruction and verdict form. *See Crowley v. Epicept*

[1] Sumotext identifies three objections that it made at trial, but it does not develop an argument based on those objections. We conclude that Sumotext has abandoned the issue, and our refusal to review the issue will not result in manifest injustice. *See Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988); *see also* Fed. R. App. P. 28(a)(8)(A).

Corp., 883 F.3d 739, 748 (9th Cir. 2018) (per curiam) ("Waiver of a jury instruction occurs when a party considers the controlling law . . . and, in spite of being aware of the applicable law, proposed or accepted a flawed instruction." (internal quotation marks omitted)); *see also United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998) ("Verdict forms are, in essence, instructions to the jury.").

Sumotext's third argument—that the district court "heightened [its] burden of proof by requiring it to disprove a scattershot of economic theories asserted without economic evidence or expert foundation"—fares no better. An antitrust plaintiff generally bears the burden of proving a relevant market. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284–85 (2018). A "relevant market is defined as the area of effective competition." *Id.* at 2285 (internal quotation marks omitted). It includes "the product at issue as well as all economic substitutes for the product." *Newcal Indus., Inc. v. Ikon Off. Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008) (citing *Brown Shoe Co. v United States*, 370 U.S. 294, 325 (1962)). Sumotext's expert, Dr. Sullivan, offered two market definitions, both narrowly construed to include only StarStar numbers. The Joint Defendants called witnesses at trial who testified about various products that compete with StarStar numbers and criticized Dr. Sullivan's market definitions. The district court properly allowed the Joint Defendants to rebut Dr. Sullivan's opinion. We reject Sumotext's attempt to disclaim its burden of proof.

4. The jury's verdict is supported by substantial evidence. *See Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002) ("A jury's verdict must be upheld if it is supported by substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion."). The jury found that Sumotext failed to prove by a preponderance of the evidence a relevant market for leasing or servicing StarStar numbers in the United States. Testimony from industry executives provided substantial evidence showing that the relevant markets were broader than Sumotext proposed. Dr. Aron's testimony criticizing Dr. Sullivan's market definitions, as well as his methodology, provided additional support for the jury's verdict. *See Humetrix, Inc. v. Gemplus S.C.A.*, 268 F.3d 910, 919 (9th Cir. 2001) ("Authority to determine the victor in such a 'battle of expert witnesses' is properly reposed in the jury."). Thus, because the jury's verdict is supported by substantial evidence, it must stand.

5. The district court did not abuse its discretion in denying Sumotext's motion for a new trial under Rule 59 of the Federal Rules of Civil Procedure. *Flores v. City of Westminster*, 873 F.3d 739, 755–56 (9th Cir. 2017) (reviewing a "district court's denial of a motion for new trial for abuse of discretion"). When evaluating Sumotext's Rule 59 motion, the district court properly weighed the evidence presented at trial, including expert testimony, evidence of price increases, evidence of reduced output, evidence of excluded competitors, and other

restraining factors. *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (noting that when assessing a "Rule 59 motion of the party against whom a verdict has been returned, the district court has the duty . . . to weigh the evidence as [the court] saw it" (alterations in original) (internal quotation marks omitted)). After conducting a thorough analysis, the district court concluded that the jury's verdict was not against the clear weight of the evidence. *Flores*, 873 F.3d at 748 ("We will grant a new trial only if the verdict is against the clear weight of the evidence, and not simply because the evidence might have led us to arrive at a different verdict."). Sumotext has not demonstrated that this decision was "a plain error, discretion exercised to an end not justified by the evidence," or "clearly against the logic and effect of the facts as are found." *Rabkin v. Or. Health Scis. Univ.*, 350 F.3d 967, 977 (9th Cir. 2003) (internal quotation marks omitted).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

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*(use "*s/[typed name]*" to sign electronically-filed documents)*

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Reply Brief / Cross-Appeal Reply Brief			$	$
Supplemental Brief(s)			$	$
Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee				$
			TOTAL:	$

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Exhibit 2

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUMOTEXT CORP., Plaintiff-Appellant, v. ZOOVE, INC., DBA Starstar Mobile; et al., Defendants-Appellees.	No. 20-17245 D.C. No. 5:16-cv-01370-BLF Northern District of California, San Jose ORDER

Before: BADE and BUMATAY, Circuit Judges, and SESSIONS,* District Judge.

Appellant's petition for rehearing and request for publication are DENIED. (Dkt. 78.)

* The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.