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Attorneys for the Federal Trade Commission

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA

)	
FEDERAL TRADE COMMISSION,)	
)	
Petitioner,)	
)	
v.)	Case No.
)	
APOLLO EDUCATION GROUP, INC.,)	UNOPPOSED PETITION FOR AN ORDER GOVERNING COMPLIANCE WITH CIVIL INVESTIGATIVE DEMANDS ISSUED IN FURTHERANCE OF A LAW ENFORCEMENT INVESTIGATION
and)	
)	
THE UNIVERSITY OF PHOENIX, INC.,)	
Respondents.)	
)	
)	

The Federal Trade Commission petitions this Court under Section 20 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. § 57b-1, and Section 1232g of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §§ 1232g(b)(1)(J)(ii) and 1232b(b)(2)(B), for an order requiring Respondents Apollo Education Group, Inc., and the University of Phoenix, Inc. (collectively, the Companies) to produce education records sought by civil investigative demands (CIDs) issued by the FTC without disclosing the contents of CIDs, or any information provided in response thereto, as permitted by FERPA. The Companies do not oppose the Petition, and no previous application for the relief sought herein has been made to this Court or any other.

The Declaration under penalty of perjury of Thomas J. Widor, which verifies the statements in this Petition, is attached as Exhibit 1. The Commission's Resolution Directing Use of Compulsory Process in a Nonpublic Investigation of Secondary or Postsecondary Education Products and Services or Educational Accreditation Products and Services, November 14, 2013 (FTC File No. P138402) is attached as Exhibit 2.

Petition Statements

In support of this Unopposed Petition, the Commission states as follows:

1. The Commission is an administrative agency of the United States, organized and existing pursuant to the FTC Act, 15 U.S.C. § 41 *et seq.* The Commission is authorized and directed by Section 5 of the FTC Act, 15 U.S.C. § 45(a), to prevent the use of unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.

2. Section 3 of the FTC Act, 15 U.S.C. § 43, empowers the Commission to prosecute any inquiry necessary to its duties in any part of the United States. Section 6 of the Act, 15 U.S.C. § 46, empowers the Commission to gather and compile information concerning, and to investigate from time to time, the organization, business, conduct, practices and management of,

any person, partnership or corporation engaged in or whose business affects commerce, with certain exceptions not relevant here. Section 20 of the FTC Act, 15 U.S.C. § 57b-1, empowers the Commission to require by CID the production of documents or other information relating to any Commission law enforcement investigation.

3. This Court has jurisdiction to enforce the Commission's duly issued CIDs under Section 20(e) of the FTC Act, 15 U.S.C. § 57b-1(e), which provides, in pertinent part:

Whenever any person fails to comply with any civil investigative demand duly served upon him under this section, or whenever satisfactory copying or reproduction of material requested pursuant to the demand cannot be accomplished and such person refuses to surrender such material, the Commission, through such officers or attorneys as it may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person, a petition for an order of such court for the enforcement of this section.

Respondents reside, are found, and transact business in this district. Pet. Exh 1, ¶¶ 3-4.

4. Apollo Education Group, LLC ("Apollo") is a private education provider incorporated in Arizona and headquartered in Phoenix, Arizona. The University of Phoenix, Inc. ("University") is a for-profit university that is wholly-owned by Apollo. The University is also incorporated in Arizona and headquartered in Phoenix, Arizona. The University offers undergraduate and graduate degrees in nine schools, and operates through a series of campuses and centers nationwide. The University currently has approximately 200,000 students and 900,000 alumni. Pet. Exh. 1, ¶¶ 3-4.

5. On November 14, 2013, the Commission issued a Resolution Directing Use of Compulsory Process in a Nonpublic Investigation of Secondary or Postsecondary Educational Products or Services or Educational Accreditation Products or Services (P138402). Pet. Exh 1, ¶ 5; Pet. Exh. 2. The Resolution authorized all compulsory process available to the Commission

to be used in connection with an investigation into possible violations of Section 5 of the FTC Act. Pet. Exh. 1, ¶ 5; Pet. Exh. 2.

6. Following this resolution, on July 23, 2015, the Commission issued the CIDs to the Companies to investigate possible violations of Section 5 in connection with their advertising, marketing, and sale of their educational products or services. Pet. Exh. 1, ¶ 6. The CIDs require the Companies to produce material relevant to the Commission's investigation, including information and documents relating to complaints, marketing and recruiting, student advisement, call recordings, and billing and debt collection. Pet. Exh. 1, ¶ 6. (The return dates of the CIDs were modified by letter dated January 11, 2016. *Id.*)

7. Many of the materials requested by the CIDs are "records, files, documents, and other materials" maintained by the Companies that "contain information directly related to a student," which are known as "education records" under the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C. § 1232g(a)(4)(A); 34 CFR § 99.31. Educational institutions such as the University of Phoenix risk the loss of federal funding if they violate FERPA by disclosing education records without written consent from the affected parents and students. 20 U.S.C. § 1232g(b)(1). However, in some circumstances FERPA does not require such consent. Most pertinent here, FERPA allows an educational institution to disclose education records without obtaining consent in response to a "subpoena issued for a law enforcement purpose." 20 U.S.C. § 1232g(b)(1)(J)(ii); *see also* 34 C.F.R. § 99.31(a)(9). The CIDs at issue are "subpoena[s] issued for a law enforcement purpose" within the meaning of FERPA.

8. FERPA generally requires educational institutions to notify affected students and their parents before making such a disclosure. 20 U.S.C. 1232g(b)(2)(B); 34 C.F.R. §

99.31(a)(9)(ii). For good cause, however, a court or the issuing agency may relieve an educational institution of the obligation to provide such notice by entering an order directing the institution to not “disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena.” 20 U.S.C. §§ 1232g(b)(1)(J(ii), 1232g(b)(2)(B); 34 C.F.R. § 99.31(a)(9)(ii)(B).

9. To date, the Companies have made several productions of documents called for in the CIDs, but have not provided education records called for in the CIDs. They assert that providing the notice required by FERPA would be impractical and complex given the nature of the responsive material, the number of current and former students, and the difficulty in locating students or their families. Pet. Exh. 1, ¶¶ 7-8. The FTC acknowledges that this notice process would be costly, time-consuming, resource-intensive, and that it potentially will require multiple attempts to contact affected students. Pet. Exh. 1, ¶ 8.

10. In addition, the contents of the CID have not been made public by either the FTC or the Companies. Pet. Exh. 1, ¶ 7.

11. The CIDs directed to the Companies are within the Commission’s statutory authority, and the information and documents sought are reasonably relevant to the Commission’s investigation. However, due to the unique circumstances imposed by FERPA and its disclosure requirements, and the number of current and former students at issue, requiring Companies to provide notice before producing these educational records would result in significant delays that will impede the Commission’s investigation and prevent completing it in a timely manner. Pet. Exh. 1, ¶¶ 8-9. Moreover, no harm will result from the absence of notice in this instance because the governing FTC statutes protect the information from any public disclosure. See 15 U.S.C. §§ 46(f), 57b-2. For these reasons, there is good cause for

entry of an order requiring the Companies to produce responsive education records without disclosing the contents of the CIDs, or information provided in response, in accordance with Sections 1232g(b)(1)(i) and 1232g(b)(2)(B). Pet. Exh. 1, ¶ 9. The Companies do not oppose this request.

Prayer for Relief

WHEREFORE, the Commission invokes the aid of this Court and prays:

- a. for an order requiring the Companies to produce responsive education records to the FTC without disclosing the contents of the CIDs or any information furnished in response;
- b. For such other relief as the Court deems just and proper.

Respectfully submitted,

Dated: January 12, 2016

JONATHAN E. NUECHTERLEIN
General Counsel

LESLIE RICE MELMAN
Assistant General Counsel for Litigation

/s/ Burke Kappler
BURKE KAPPLER
Attorney, Office of General Counsel
FEDERAL TRADE COMMISSION
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Fax: (202) 326-2477
E-mail: bkappler@ftc.gov

Attorneys for the Federal Trade
Commission

Petition Exhibit 1

Declaration of Thomas J. Widor
(January 12, 2016)

JONATHAN E. NUECHTERLEIN
General Counsel
 LESLIE RICE MELMAN
Assistant General Counsel for Litigation
 BURKE KAPPLER
Attorney
 FEDERAL TRADE COMMISSION
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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA

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FEDERAL TRADE COMMISSION,)	Case No.
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Petitioner,)	DECLARATION OF ATTORNEY
)	THOMAS J. WIDOR
v.)	
)	
APOLLO EDUCATION GROUP, INC.,)	
)	
and)	
)	
THE UNIVERSITY OF PHOENIX, INC.,)	
)	
Respondents.)	

I, Thomas J. Widor, pursuant 28 U.S.C. § 1746, declare as follows:

1. I am an attorney employed by the Federal Trade Commission in Washington, D.C. I am assigned to the FTC's non-public investigation of Apollo Education Group, Inc. and the University of Phoenix, Inc. (collectively, the Companies).

2. I am authorized to execute a declaration verifying the facts that are set forth in the Unopposed Petition for an Order Governing Compliance with Civil Investigative Demands Issued in Furtherance of a Law Enforcement Investigation. I have read the petition and the exhibits thereto and verify that the exhibits are true and correct copies of the original documents. The facts set forth herein are based on my personal knowledge or information made known to me in the course of my official duties.

3. Apollo Education Group, Inc. is a public company, incorporated in Arizona, with its principal place of business in Phoenix, AZ. Apollo Educ. Grp., Inc., Annual Report (Form 10-K) (Oct. 22, 2015). Apollo Education Group is one of the world's largest private education providers. *See id.* Apollo Education Group is engaged in, and its business affects "commerce," as that term is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

4. The University of Phoenix, Inc. is a wholly-owned subsidiary of Apollo Education Group, incorporated in Arizona, with its principal place of business in Phoenix, AZ. *Id.* The University of Phoenix offers undergraduate and graduate degrees through nine schools in a wide range of program areas. *Id.* A majority of the University's students attend classes exclusively online, and the University also offers educational programs and services at ground locations in selected metropolitan areas throughout the United States. *Id.* At present, the University of Phoenix has approximately 200,000 students and 900,000 graduates. University

of Phoenix is engaged in, and its business affects “commerce,” as that term is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

5. On November 14, 2013, the Commission issued a Resolution Directing Use of Compulsory Process in a Nonpublic Investigation of Secondary or Postsecondary Educational Products or Services or Educational Accreditation Products or Services (P138402). This Resolution authorized the use of compulsory process

[t]o determine whether unnamed persons, partnerships, corporations, or others have engaged or are engaged in deceptive or unfair acts or practices in or affecting commerce in the advertising, marketing, or sale of secondary or postsecondary educational products or services, or educational accreditation products or services, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. The investigation is also to determine whether Commission action to obtain redress for injury to consumers or others would be in the public interest.

Pet. Exh. 2. The Resolution also authorized all compulsory processes available to the Commission to be used in connection with an investigation into possible violations of Section 5.

Pet. Exh. 2.

6. Following this resolution, on July 23, 2015, the Commission issued civil investigative demands (CIDs) – a form of compulsory process – to the Companies to investigate possible violations of Section 5 in connection with their advertising, marketing, and sale of their educational products or services. The CIDs were issued consistent with Commission regulations and were signed by Commissioner Terrell McSweeney. The CIDs require the Companies to produce material that includes information and documents relating to complaints, marketing and recruiting, student advisement, call recordings, and billing and debt collection. This information is relevant to the Commission’s investigation. For example, call recordings with prospective, current, or former students may reveal whether the Companies or its employees engaged in deceptive acts or practices when advertising, marketing, or selling the Companies’ educational

products or services. Consumer complaints provide extrinsic information about the nature and prevalence of any potentially deceptive or unfair acts or practices, and material related to the Companies' investigation and resolution of these complaints will likely show how and whether the Companies are addressing potentially deceptive or unfair acts or practices. (The return dates of the CIDs were modified by letter dated January 11, 2016.)

7. Since issuance of the CIDs, I have discussed with the Companies' counsel on several occasions the status of the Companies' compliance with the CIDs and the effect of the Family Educational Rights and Privacy Act (FERPA). During those discussions, the Companies expressed a willingness to produce responsive information, and indeed have made several productions of documents called for in the CIDs. The Companies also stated, however, that many of the responsive materials sought by the CIDs constitute "education records" pursuant to FERPA, 20 U.S.C. § 1232g(a)(4), and that, absent a nondisclosure order from a court or an issuing agency, the Companies would risk the loss of federal funds if they produced these records to the Commission without individually notifying affected students and parents. The Companies further stated that compliance with this notification requirement would be costly, time-consuming, and resource-intensive given the nature of the responsive records, the number of current and former students, and the difficulty in locating students or parents. To my knowledge, neither the Companies nor the FTC has publicly disclosed the contents of the CIDs.

8. The FTC acknowledges that, to provide notice under FERPA, the Companies would first have to undertake a time-consuming, resource intensive process of reviewing responsive material to determine if the material constitutes an education record and to identify the student or students referenced in or associated with the material. The Companies then would have to locate each student's last known physical or email address and send notice to

each such address, following up with additional email, regular mail, and telephone calls for returned or invalid notifications or for students who simply would not respond or otherwise verify receipt. Providing such notice would require the Companies to devote significant resources to the effort, necessitating, for example, dedicated personnel to review the material, identify the affected students, locate their last known addresses, distribute notices, follow up on non-responses, track responses, field inquiries from students by telephone, mail, and email, and receive and process objections. Because of these impediments, and the Companies' and the FTC's ongoing discussions regarding how best to comply with FERPA in producing education records in response to the CIDs, the Companies have not produced any educational records responsive to the CIDs and thus have not fully complied with the Commission's CIDs.

9. The FTC's inability to obtain these materials has deprived the Commission of valuable information and significantly delayed the investigation. Further, due to the unique circumstances imposed by FERPA and its notice requirements, requiring the Companies to provide notice before producing these educational records to the Commission would result in significant delays that could impede the Commission's investigation and prevent the Commission from completing the investigation in a timely manner, contrary to the public interest. In addition, no harm would result from not providing notice in this case because education records provided by respondents would be statutorily protected from any public disclosure by the Commission, which is entrusted to protect the rights of consumers. These circumstances thus constitute good cause for entry of an order that would require the Companies to produce responsive education records without providing notice that would otherwise be required.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 12, 2016.

A handwritten signature in black ink, appearing to read "T. Widor", written over a horizontal line.

THOMAS J. WIDOR

Attorney

FEDERAL TRADE COMMISSION

Petition Exhibit 2

Resolution Directing Use of Compulsory
Process in a Non-Public Investigation of
Secondary or Postsecondary Education Products
and Services or Educational Accreditation
Products and Services, November 14, 2013
(FTC File No. P138402)

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Edith Ramirez, Chairwoman**
 Julie Brill
 Maureen K. Ohlhausen
 Joshua D. Wright

**RESOLUTION DIRECTING USE OF COMPULSORY PROCESS IN A NON-PUBLIC
INVESTIGATION OF SECONDARY OR POSTSECONDARY
EDUCATIONAL PRODUCTS OR SERVICES OR
EDUCATIONAL ACCREDITATION PRODUCTS OR SERVICES**

File No. P138402

Nature and Scope of Investigation:

To determine whether unnamed persons, partnerships, corporations, or others have engaged or are engaging in deceptive or unfair acts or practices in or affecting commerce in the advertising, marketing, or sale of secondary or postsecondary educational products or services, or educational accreditation products or services, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. The investigation is also to determine whether Commission action to obtain redress for injury to consumers or others would be in the public interest.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation for a period not to exceed five (5) years from the date of issuance of this resolution. The expiration of this five-year period shall not limit or terminate the investigation or the legal effect of any compulsory process issued during the five-year period. The Federal Trade Commission specifically authorizes the filing or continuation of actions to enforce any such compulsory process after the expiration of the five-year period.

Authority to Conduct Investigation:

Sections 6, 9, 10, and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50, and 57b-1, as amended; and FTC Procedures and Rules of Practice, 16 C.F.R. § 1.1 *et seq.*, and supplements thereto.

By direction of the Commission.



Donald S. Clark
Secretary

Issued: November 14, 2013

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Civil Cover Sheet

This automated JS-44 conforms generally to the manual JS-44 approved by the Judicial Conference of the United States in September 1974. The data is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. The information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is authorized for use only in the District of Arizona.

The completed cover sheet must be printed directly to PDF and filed as an attachment to the Complaint or Notice of Removal.

Plaintiff(s): **Federal Trade Commission**

County of Residence: Outside the State of Arizona

County Where Claim For Relief Arose: Outside the State of Arizona

Plaintiff's Atty(s):

**Burke W. Kappler , Attorney
Office of General Counsel
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
202-326-2043**

Defendant(s): **Apollo Education Group, Inc. ; The University of Phoenix, Inc.**

County of Residence: Maricopa

Defendant's Atty(s):

**Gil M. Soffer , Partner
Katten Muchin Rosenman LLP
525 W. Monroe Street
Chicago, Illinois 60661-3693
312-902-5474**

**Terence A. Gonsalves , Partner
Katten Muchin Rosenman LLP
525 W. Monroe Street
Chicago, Illinois 60661-3693
312-902-5615**

II. Basis of Jurisdiction: **1. U.S. Government Plaintiff**

III. Citizenship of Principal Parties
(Diversity Cases Only)

Plaintiff:-N/A
Defendant:-N/A

IV. Origin : **1. Original Proceeding**

V. Nature of Suit: **410 Antitrust**

VI. Cause of Action: **Proceeding for order governing production of education records subject to nondisclosure pursuant to 15 U.S.C. s. 57b-1, 20 U.S.C. 1232g(b)(1)(J)(ii), and 20 U.S.C. s. 1232b(b)(2)(B).**

VII. Requested in Complaint

Class Action:No
Dollar Demand:
Jury Demand:No

VIII. This case is **not related** to another case.

Signature: s/ Burke W. Kappler

Date: 1/12/2016

If any of this information is incorrect, please go back to the Civil Cover Sheet Input form using the *Back* button in your browser and change it. Once correct, save this form as a PDF and include it as an attachment to your case opening documents.

Revised: 01/2014

Petition Exhibit 1

Declaration of Thomas J. Widor
(January 12, 2016)

JONATHAN E. NUECHTERLEIN
General Counsel
 LESLIE RICE MELMAN
Assistant General Counsel for Litigation
 BURKE KAPPLER
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I, Thomas J. Widor, pursuant 28 U.S.C. § 1746, declare as follows:

1. I am an attorney employed by the Federal Trade Commission in Washington, D.C. I am assigned to the FTC's non-public investigation of Apollo Education Group, Inc. and the University of Phoenix, Inc. (collectively, the Companies).

2. I am authorized to execute a declaration verifying the facts that are set forth in the Unopposed Petition for an Order Governing Compliance with Civil Investigative Demands Issued in Furtherance of a Law Enforcement Investigation. I have read the petition and the exhibits thereto and verify that the exhibits are true and correct copies of the original documents. The facts set forth herein are based on my personal knowledge or information made known to me in the course of my official duties.

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[t]o determine whether unnamed persons, partnerships, corporations, or others have engaged or are engaged in deceptive or unfair acts or practices in or affecting commerce in the advertising, marketing, or sale of secondary or postsecondary educational products or services, or educational accreditation products or services, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. The investigation is also to determine whether Commission action to obtain redress for injury to consumers or others would be in the public interest.

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8. The FTC acknowledges that, to provide notice under FERPA, the Companies would first have to undertake a time-consuming, resource intensive process of reviewing responsive material to determine if the material constitutes an education record and to identify the student or students referenced in or associated with the material. The Companies then would have to locate each student's last known physical or email address and send notice to

each such address, following up with additional email, regular mail, and telephone calls for returned or invalid notifications or for students who simply would not respond or otherwise verify receipt. Providing such notice would require the Companies to devote significant resources to the effort, necessitating, for example, dedicated personnel to review the material, identify the affected students, locate their last known addresses, distribute notices, follow up on non-responses, track responses, field inquiries from students by telephone, mail, and email, and receive and process objections. Because of these impediments, and the Companies' and the FTC's ongoing discussions regarding how best to comply with FERPA in producing education records in response to the CIDs, the Companies have not produced any educational records responsive to the CIDs and thus have not fully complied with the Commission's CIDs.

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Executed on January 12, 2016.

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THOMAS J. WIDOR

Attorney

FEDERAL TRADE COMMISSION

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BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Edith Ramirez, Chairwoman**
 Julie Brill
 Maureen K. Ohlhausen
 Joshua D. Wright

**RESOLUTION DIRECTING USE OF COMPULSORY PROCESS IN A NON-PUBLIC
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Authority to Conduct Investigation:

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By direction of the Commission.



Donald S. Clark
Secretary

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Office of General Counsel
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
202-326-2043**

Defendant(s): **Apollo Education Group, Inc. ; The University of Phoenix, Inc.**

County of Residence: Maricopa

Defendant's Atty(s):

**Gil M. Soffer , Partner
Katten Muchin Rosenman LLP
525 W. Monroe Street
Chicago, Illinois 60661-3693
312-902-5474**

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II. Basis of Jurisdiction: **1. U.S. Government Plaintiff**

III. Citizenship of Principal Parties
(Diversity Cases Only)

Plaintiff:-N/A
Defendant:-N/A

IV. Origin : **1. Original Proceeding**

V. Nature of Suit: **410 Antitrust**

VI. Cause of Action: **Proceeding for order governing production of education records subject to nondisclosure pursuant to 15 U.S.C. s. 57b-1, 20 U.S.C. 1232g(b)(1)(J)(ii), and 20 U.S.C. s. 1232b(b)(2)(B).**

VII. Requested in Complaint

Class Action:No
Dollar Demand:
Jury Demand:No

VIII. This case is **not related** to another case.

Signature: s/ Burke W. Kappler

Date: 1/12/2016

If any of this information is incorrect, please go back to the Civil Cover Sheet Input form using the *Back* button in your browser and change it. Once correct, save this form as a PDF and include it as an attachment to your case opening documents.

Revised: 01/2014