WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GARY ROBERTS, ***Applicant,*** **vs.** **TAMPA BAY LIGHTNING; PITTSBURGH PENGUINS; FLORIDA PANTHERS; TORONTO MAPLE LEAFS; CAROLINA HURRICANES; FEDERAL INSURANCE COMPANY / CHUBB GROUP OF INSURANCE COMPANIES; CALGARY FLAMES,** ***Defendants.***	**Case No. ADJ9065158** **(Oxnard District Office)** **OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION**

Defendant Federal Insurance Company (Federal), a part of Chubb Group Of Insurance Companies, petitions for reconsideration of the June 3, 2016 Findings Of Fact of the workers' compensation administrative law judge (WCJ) on behalf of the defendant employers it insured, including Tampa Bay Lightning (Tampa Bay), Florida Panthers (Panthers), Pittsburgh Penguins (Pittsburgh), Toronto Maple Leafs (Toronto), and Carolina Hurricanes (Carolina). The WCJ found in full that "[t]he California Workers' Compensation Appeals Board [WCAB] has jurisdiction in this matter as to each defendant."

Applicant claims he sustained cumulative industrial injury to multiple body parts while working for defendant employers as a professional hockey player from September 1, 1986 through March 1, 2009.

Defendant cites *Federal Insurance Co. v. Workers' Comp. Appeals Bd.* (*Johnson*) (2013) 221 Cal.App.4th 1116 [78 Cal.Comp.Cases 1257] (*Johnson*) in support of its contention that the number of California games and practices applicant participated in does not provide sufficient relationship with this state to hold defendants liable under California's workers' compensation law as a matter of due process. Defendant further contends that the WCJ failed to consider evidence of extra-territorial provisions in

Florida law that provide for reciprocity with California in accordance with Labor Code section 3600.5(b) and that supports dismissal of the Panthers as a defendant.[1]

An answer was received from applicant. The WCJ provided a Report and Recommendation on Petition for Reconsideration (Report) recommending that reconsideration be denied.

Having carefully reviewed the record, the petition, the answer and the Report, reconsideration is denied for the reasons expressed in the Report, which is incorporated by this reference, and for the reasons below. California has a legitimate and substantial interest in assuring that workers injured in the course of performing employment duties within this state receive workers' compensation as in this case. There is more than a de minimis connection between applicant's work in this state and his claimed cumulative injury and California's workers' compensation laws may be applied in this case consistent with the defendant's right to due process.

BACKGROUND

Applicant was employed as a professional hockey player in the National Hockey League (NHL) for 22 years from 1986 through 2009. He worked for several employers in the NHL over that time, including Calgary from September 1, 1986 to August 25, 1997, Carolina from August 25, 1997 to July 4, 2000, Toronto from July 4, 2000 to August 1, 2005, Panthers from August 1, 2005 to February 27, 2007, Pittsburgh from February 27, 2007 to June 28, 2008, and Tampa Bay from June 28, 2008 to March 3, 2009. None of applicant's employment contracts were made in California and he was never hired in this state.

Over the course of his NHL career, applicant practiced for and played in 1,399 total games, 59 of which were in California. (Applicant's Exhibit 2; Defendant's Exhibit B; April 27, 2016 Minutes of Hearing (MOH) 5:12-16.) While playing in California, applicant sustained injuries to his neck, which later required two surgeries in this state and other medical treatment by California providers. (MOH 4:5-26.) In addition, applicant sustained injuries to his knees, shoulders, leg, and head, including concussions, during games in San Jose and Los Angeles. (*Id*, 5:1-12.)

[1] Further statutory references are to the Labor Code.

After applicant filed his claim of cumulative trauma industrial injury in California, the defendants insured by Federal challenged WCAB jurisdiction, citing *Johnson*. The sole issue of "jurisdiction" was tried before the WCJ on April 27, 2016. (MOH, 2:24.) On June 3, 2016, the WCJ issued his decision finding "jurisdiction," as set forth above.

The WCJ explains the reason for his decision in his Report as follows:

> Applicant produced documentary and testimonial evidence of applicant's work, throughout the years, in the State of California and elsewhere.
>
> Although applicant was hired in various locations throughout the United States, he had significant contacts with the State of California, including playing some fifty-nine (59) professional hockey games in California over the course of his career.
>
> In [*Johnson*], a professional basketball player had played only one professional game in the state of California, had never received medical treatment in California and 'suffered no specific injury in California.' (*Id.* at 1119) The court opined that, '[i]f the workers' compensation law of another state exclusively should apply and California does not have a sufficient contact with the matter, California must, under the full faith and credit clause, accede to the other state to provide a forum.' (*Id.* at 1123) However, the 'forum state can grant relief if it has some substantial interest in the matter.' (*Id.* at 1124) The court states that, 'the test is not whether the interest of the forum state is relatively greater, but only whether it is legitimate and substantial in itself.' (*Id.*)
>
> The California Workers' Compensation Act applies to a worker injured while working in California even if the worker is employed in another state...
>
> Here, the applicant participated in some fifty-nine (59) professional hockey games in California, essentially equivalent to two-thirds of an entire NHL season (84 games).
>
> The applicant testified that he sustained a specific injury to his neck during the Stanley Cup playoffs against the Los Angeles Kings at the end of the 1988-1989 season [MOH, 4:5-7].
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> Applicant testified that he continued suffering the same problems over the next five years [MOH, 4:5-13].
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> Applicant testified as to multiple surgeries in California [MOH, 4:14-22].
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> The applicant testified as to a neck injury in Los Angeles during a fight [MOH, 5:7-9].
>
> The applicant testified as to a concussive injury in Los Angeles during a fight [MOH, 5:10-12].

> Furthermore, although not dispositive, the court takes judicial notice of the fact that the applicant paid California income tax for each game he played within California.
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> The Court notes that the PQME in this case stated in his report dated 11/4/15 [that applicant sustained cumulative trauma injury while playing professional hockey and there is no basis for apportionment].
>
> The Court notes that this is the only medical report offered into evidence and would appear dispositive as to the issue.
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> Finally, the Court references *Peter Forsberg v. Nashville Predators, et.al.* (March 25, 2015) ADJ8710981.
>
> In the *Forsberg* matter, a professional hockey player filed a cumulative trauma claim with a similar fact pattern and similar playing time(s). California jurisdiction was found in this matter.
>
> The Court found that these factors established that California has a substantial and legitimate interest regarding this injured worker's industrial injury.

DISCUSSION

As the WCJ notes in his Report, it has long been recognized that the WCAB has exclusive subject matter jurisdiction to hear claims of industrial injury when the claimed injury or portion of the injurious exposure causing the injury occurred in California. (Cal. Const., Article XIV, § 4; Lab. Code, § 3202 [the Act is to "be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment"]; Lab. Code, § 3600.5, 5300, 5301; *Daily v. Dallas Carriers Corp.* (1996) 43 Cal.App.4th 720, 726 [61 Cal.Comp.Cases 216] ["[T]he California Workers' Compensation Act applies to a worker employed in another state who is injured while working in California"]; *McKinley, supra*, 78 Cal.Comp.Cases at p. 27 [the WCAB will exercise jurisdiction "over claims of cumulative industrial injury when a portion of the injurious exposure causing the cumulative injury occurred within the state."].)

It is the Legislature that holds plenary authority under the state constitution to define the subject matter jurisdiction of the WCAB. (*Stevens v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1074, 1092 [80 Cal.Comp.Cases 1262] [Under the California Constitution, article XIV, section 4, the Legislature "is ... expressly vested with plenary power, unlimited by any provision of this Constitution,

to create, and enforce a complete system of workers' compensation, by appropriate legislation," italics deleted].)

The issue raised by *Johnson* involves the "threshold" due process question concerning a defendant's participation in a workers' compensation case in California, which is described by the Court in that case in pertinent part as follows:

> The issue... is which state's workers' compensation law applies, not which state has personal jurisdiction. The issue may be characterized as a 'conflicts issue,' which arises when there are contacts in multiple states. But here, we must decide if California law may be invoked at all. Thus, 'the question of jurisdiction ordinarily precedes the conflict of laws question, for only after the [workers' compensation] commissioner determines that he has authority to entertain the action does he proceed to the 'choice' of whether to award benefits under our Workers' Compensation Act or, rather, to defer to the earlier grant of benefits under the laws of another state' Thus, the WCJ's determination that '[p]laying in even one professional basketball game in California is sufficient to establish jurisdiction' mischaracterizes the issue, which is not one of personal jurisdiction but rather one of whether one or more state compensation laws apply and whether in this case California may provide a forum....
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> [W]hether California's workers compensation law governs depends on the application of the due process clause of the United States Constitution. If an employer or the insurer is subject to the workers' compensation law of a state that does not have a sufficient connection to the matter they are deprived of due process. Also, the determination may depend on the application of the full faith and credit clause of the United States Constitution. That is, if the workers' compensation law of another state exclusively should apply and California does not have a sufficient contact with the matter, California must, under the full faith and credit clause, accede to the other state to provide a forum...
>
> We are not, therefore, faced with an issue of which law to apply, but only with whether California's workers' compensation law applies in this case. That issue has been framed as one of due process under the 14th Amendment of the United States Constitution. If this state lacks a sufficient relationship with Johnson's injuries, to require the petitioner—the employer—to defend the case here would be a denial of due process such that the courts of this state do not have authority to act. This *might* be referred to as a lack of subject matter jurisdiction. (*Johnson, supra*, 221 Cal.App.4th at p. 1121-1123, 1128, citations deleted, italics added.)

The statement in *Johnson* that the due process issue addressed by the Court "might" be referred to as a "lack of subject matter jurisdiction" shows that the issue did not involve the "entire absence of power to hear or determine the case," which is subject matter jurisdiction in its most fundamental sense.

(See *Abelleira v. Dist. Court of Appeal* (1941) 17 Cal.2d 280, 288-289 ["The concept of jurisdiction embraces a large number of ideas of similar character...Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties"]; *New York Knickerbockers v. Workers' Compensation Appeals Board* (*Macklin*) (2015) 240 Cal.App.4th 1229, 1232 n.1 [80 Cal.Comp.Cases 1441] (*Macklin*).) Instead, *Johnson* analogizes the "due process" concept it addresses to an idea of similar character that is one of the "less fundamental circumstances" where the word "jurisdiction" is used, as noted in *Macklin, supra*, 240 Cal.App.4th at p. 1232, fn. 1.)

Thus, the question under *Johnson* is whether applicant's contacts with California provide sufficient interest in the matter to apply this state's workers' compensation law as a matter of constitutional due process. Here, the WCJ correctly found that the applicant's participation in 59 professional hockey games and practices in California supports the invocation of California law.

In *Johnson*, the Court of Appeal concluded that the injured worker's participation in one women's professional basketball game in California did not provide the state with a "*legitimate* interest in the injury" because the connection between it and the state could not be "traced factually to one game" and was "at best de minimis." (*Johnson, supra*, 221 Cal.App.4th at 1130, emphasis in original.)[2]

The record in this case shows that the injurious exposure applicant sustained during his 59 games and practices in this state was more than a de minimis cause of his cumulative injury and defendants are not denied due process by being held liable for the injury under the laws of California.

In addition, the Panthers did not prove entitlement to the one exemption from the provisions of California's workers' compensation law allowed by the Legislature for out-of-state employers and

[2] The holding in *Johnson* implicitly recognizes that California has a "substantial" interest in an injury if there is more than a "de minimis" connection to the state. That view is consistent with the Supreme Court's construction of the language in Government Code section 31720 which provides for a service-connected disability pension only if the employee's incapacity is "a result of injury or disease arising out of and in the course of the member's employment, *and such employment contributes substantially* to such incapacity." (Emphasis added.) As held by the Supreme Court, the statutory standard of "contributes substantially" is "far less restrictive" than a tort definition of probable cause, and it is met if the evidence shows a "real and measurable" connection between the disability and the employment that is more than "infinitesimal" or "inconsequential." (*Bowen v. Board of Retirement* (1986) 42 Cal.3d 572, 578, fn. 4 [51 Cal.Comp.Cases 639] citing *Gatewood v. Board of Retirement* (1985) 175 Cal.App.3d 311, 319 and *DePuy v. Board of Retirement* (1978) 87 Cal.App.3d 392.)

employees. (Former Lab. Code,§ 3600.5(b).)[3] For that statutory exemption to apply, the employer must show that it has similar workers' compensation coverage under the laws of another state that covers the employee's work *while in this state*, and that the other state recognizes California's extraterritorial provisions, and that the other state likewise exempts California employers and employees from the application of its workers' compensation laws. (*Id*; *Carroll v. Cincinnati Browns* (2013) 78 Cal.Comp.Cases 655 (Appeals Board en banc) (*Carroll*).) In short, to obtain the former section 3600.5(b) exemption the employer must prove that the injured worker had similar workers' compensation coverage on a reciprocal basis while working in this state.

The record in this case does not support a statutory exemption for any employer from the application of California's workers' compensation laws as allowed by former section 3600.5(b). The only evidence of a reciprocal statute is the Florida reciprocity statute received as Exhibit C. However, that statute was not in existence when applicant was employed by the Panthers, and the employer cannot now claim the exemption provided in section 3600.5(b).

Section 3600.5(b) on its face requires that the conditions required by that statute must exist, "*while the employee is temporarily within this state* doing work for his or her employer." In that Florida did not have a statute that reciprocated the provisions of section 3600.5(b) at the time applicant incurred injurious exposure while working in California, the Panthers are not entitled to the section 3600.5(b) exemption from California's workers' compensation law. It does not matter that the Florida statute includes a provision that states that it is effective as to claims made on or after July 1, 2011. While that provision may apply to claims made under Florida law, the Florida legislature has no jurisdiction or

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[3] Former section 3600.5(b) provided in pertinent part as follows: "Any employee who has been hired outside of this state and his employer shall be exempted from the provisions of this division while such employee is temporarily within this state doing work for his employer if such employer has furnished workmen's compensation insurance coverage under the workmen's compensation insurance or similar laws of a state other than California, so as to cover such employee's employment while in this state; provided, the extraterritorial provisions of this division are recognized in such other state and provided employers and employees who are covered in this state are likewise exempted from the application of the workmen's compensation insurance or similar laws of such other state."
Section 3600.5 was subsequently amended to specifically address claims by certain professional athletes, but those amendments only apply to claims filed "on or after September 15, 2013," and the claim in this case was filed before that date. (Lab. Code, 3500.5(h).) The new quantum requirement established by the Legislature is similar to those of some other states, such as New Jersey, which had previously established a statutory quantum for workers' compensation jurisdiction. (See, NJSA 34:15-31(a) [injury must be proven to be caused "in a material degree" to occupational exposure within the state]; *Williams v. Port Authority of New York* (2003) 175 N.J. 82; 813 A2d 531.)

authority to change the content or scope of California's statutes. The Panthers cannot now claim an after-the-fact exemption from California law based upon a Florida statute that was not in existence during the time it employed applicant.

The medical evidence establishes that it is reasonably probable that applicant sustained cumulative trauma industrial injury in connection with his work as a professional hockey player, and it further shows that the injurious exposure he sustained while working in California was more than a de minimis cause of that injury. (*McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660]; *Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692 [58 Cal.Comp.Cases 313].) California has a legitimate, fundamental public policy interest in adjudicating claims for workers' compensation for injuries sustained within this state, and the connection between the claimed cumulative injury and California is sufficient to support the application of this state's workers' compensation laws without violating due process. The WCJ's finding is affirmed.

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For the foregoing reasons,

IT IS ORDERED that defendant's petition for reconsideration of the June 3, 2016 Findings Of Fact of the workers' compensation administrative law judge is **DENIED.**

WORKERS' COMPENSATION APPEALS BOARD

DEPUTY RICHARD L. NEWMAN

I CONCUR,

DEPUTY ANNE SCHMITZ

I DISSENT (See attached Dissenting Opinion),

KATHERINE ZALEWSKI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUG 12 2016

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

GARY ROBERTS
HOWARD SILBER
COLANTONI COLLINS ET AL.

GMB

JFS/abs

DISSENTING OPINION OF COMMISSIONER ZALEWSKI

I dissent. The holding of the Court in *Johnson* is determinative. In order to adjudicate a claim for workers' compensation the interest of the forum state must be "legitimate and substantial in itself." (*Johnson*, *supra*, 221 Cal.App.4th at 1124, quoting 9 Larson, § 142.03[5], p. 142-9, fn. omitted.) In this case, the connection between the claimed injury and the state is not sufficient to support the application of this state's workers' compensation laws over defendants as a matter of due process.

Applicant is not a resident of this state and was never regularly employed in this state. None of his employers were located in this state. The large majority of applicant's work duties were performed outside of California. The only connection between the claimed injury and this state is the fact that applicant temporarily came into California on occasion to practice and play in hockey games. The question under *Johnson* is whether applicant's few games and practices in California establish a legitimate and substantial connection between the claimed injury and this state that allows the application of California's workers' compensation laws over defendants as a matter of due process. I conclude that they do not.

Over his 23 year career, applicant participated in a total of 1,399 professional hockey games in the NHL. However, only 59 of those games (approximately 4.2%) were in California. Those few games compared to the total number applicant played in other states do not establish a legitimate and substantial connection between the claimed injury and this state.

In *Johnson*, the Court addressed the cumulative injury claim of a nonresident basketball player who was never employed by any California team, who played a single game in California, who sustained no specific injury in California, and who received no medical treatment in California. The Court held that, under those circumstances, California did not have a sufficient interest in the injury, stating among other things as follows:

> "The effects of participating in one of 34 games do not amount to a cumulative injury warranting the invocation of California law. As the cases show, a state must have a *legitimate* interest in the injury. A single basketball game played by a professional player does not create a legitimate interest in injuries that cannot be traced factually to one game." (*Johnson*, *supra*, 221 Cal.App.4th at 1130, emphasis in original.)

Johnson does not provide a mathematical formula for determining when the state's laws may be constitutionally applied, and there is no bright line about how long an out-of-state employee must have worked in California. Instead, each claim must be assessed on a case-by-case basis. The factors relevant to that analysis appear to include, but are not necessarily limited to the following: (1) how long the injurious employment in California was in relation to the overall injurious employment (i.e., a quantitative factor); and (2) the extent to which the microtrauma in California causally contributed to the cumulative injury, e.g., whether the microtrauma sustained in the state was relatively long, intense, or severe in relation to the out-of-state work activities that also contributed to the cumulative trauma (i.e., a qualitative factor).

In considering whether the state has a legitimate and substantial connection to the injury, I am also guided by the view of the Legislature at the time it amended section 3600.5 to specifically address claims by certain professional athletes.[4] In the Assembly Floor Analysis of Assembly Bill 1309, the purposes of those amendments were described as follows:

> According to the author, out of state professional athletes are taking advantage of loopholes in California's workers' compensation system to the detriment of substantial California interests, and to the detriment of California sports teams. Specifically, as a result of the 'last employer over which California has jurisdiction' rule, and the absence of an enforceable one-year limitations period, California teams are facing cumulative injury claims from players with extremely minimal California contacts, but substantial playing histories for teams in other states. In addition, out of state sports teams are having claims filed against them in California that are resulting in a number of serious consequences to California, including: 1) clogging the workers' compensation courts with cases that should be filed in another state, thereby delaying cases of California employees, 2) causing all insured California employers to absorb rapidly escalating costs being incurred by CIGA, and 3) placing increasing pressure on insurers to raise workers' compensation rates generally in California to cover these rapidly rising unanticipated expenses. In many of these cases the players have already received workers' compensation benefits from other states, as well as employment benefits covering the same losses they are seeking compensation for in California.

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[4] As amended, section 3600.5 now provides in pertinent part as follows:
"With respect to an occupational disease or cumulative injury, a professional athlete and his or her employer shall be exempt from this division...unless both of the following conditions are satisfied:
(A) The professional athlete has, over the course of his or her professional athletic career, worked for two or more seasons for a California-based team or teams, *or the professional athlete has, over the course of his or her professional athletic career, worked 20 percent or more of his or her duty days either in California or for a California-based team...*
(B) The professional athlete has, over the course of his or her professional athletic career, worked for fewer than seven seasons for any team or teams other than a California-based team or teams as defined in this section." (Emphasis added.)

In this case, applicant's presence in California for about 4.2% of his games is far less than the 20% threshold now required by section 3600.5 for the WCAB to exercise jurisdiction. While the 20% threshold set forth in current section 3600.5(b) does not apply to the claim in this case, it is reasonable to consider that percentage as constituting a legitimate and substantial connection between California and the injury as described in *Johnson*.[5]

While applicant may have been exposed to injurious trauma in California that contributed to causing his cumulative injury, that is not sufficient in itself to support the application of this state's workers' compensation laws. Instead, as held in *Johnson*, the connection between the claimed injury and California must be sufficient to support application of this state's workers' compensation laws. Such a connection is not established on this record.

Nothing in applicant's testimony (or in the medical evidence) suggests that applicant's games in California were qualitatively more traumatic that his other games. While he claims to have incurred specific injuries, those are not at issue. Treatment was routine for all games and does not give rise to a presumption of liability or compel the WCAB to adjudicate the cumulative injury claim. (Lab. Code, §§ 5401 and 5402; *Johnson, supra.*)

In the absence of a contrary published decision by the Supreme Court or another Court of Appeal, the WCAB is bound to follow the legal principle set forth in *Johnson.* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *Brannen v. Workers' Comp. Appeals Bd.* (1996) 46 Cal.App.4th 377, 384, fn. 5 [61 Cal.Comp.Cases 554].) For the WCAB to lawfully adjudicate a claim of industrial injury, California must have legitimate and substantial connection to the injury. An employer or insurer is deprived of due process if subjected to the workers' compensation law of a state that does not have a legitimate connection to the injury that makes application of the state's laws reasonable. (*Id*, 221 Cal.App.4th at 1128.)

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[5] The holding of the Court in *Johnson* is consistent with the earlier en banc decision of the Appeals Board in in *McKinley*. During four years of employment by the Arizona Cardinals Mr. McKinley participated in a five-day training camp and seven football games in California. However, that "limited connection" was found in *McKinley* to be "insufficient" for the WCAB to adjudicate his claim for workers' compensation "in derogation of the Arizona forum he and the Cardinals reasonably identified in their employment contracts as the place where any claim for workers' compensation would be filed." (*McKinley, supra*, 78 Cal.Comp.Cases at pp. 30-31).

Applicant's few contacts with this state are not sufficient to support the application of this state's workers' compensation laws. I would rescind the WCJ's June 3, 2016 decision and enter a new finding consistent with the holding in *Johnson* that there is not a sufficient relationship between this state and the claimed cumulative injury to allow the application of California's workers' compensation law against the defendants as a matter of due process.

WORKERS' COMPENSATION APPEALS BOARD

KATHERINE A. ZALEWSKI, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUG 12 2016

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

GARY ROBERTS
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JFS/abs