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Case No. S_____

IN THE SUPREME COURT OF CALIFORNIA

DR. LEEVIL, LLC, Plaintiff and Respondent, v. **WESTLAKE HEALTH CARE CENTER,** Defendant and Appellant.	SUPREME COURT FILED APR 18 2017 Jorge Navarrete Clerk Deputy

CRC 8.25(b)

After a Decision of the Court of Appeal
Second Appellate District, Division Six
Court of Appeal No. B266931
Superior Court, County of Ventura Case No.: 56-2015-00465793-CU-UD-VTA
The Honorable Vincent J. O'Neill, Jr.

PETITION FOR REVIEW

*Teri T. Pham, Esq. (SBN 193383)
tpham@enensteinlaw.com
Courtney M. Havens, Esq. (SBN 301116)
chavens@enensteinlaw.com
ENENSTEIN RIBAKOFF LAVIÑA & PHAM
12121 Wilshire Boulevard, Suite 600
Los Angeles, California 90025
Telephone: (310) 899-2070
Fax: (310) 496-1930
Attorneys for Defendant-Petitioner and Appellant
Westlake Health Care Center

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Defendant-Petitioner and Appellant,

v.

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Plaintiff-Respondent.

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12121 Wilshire Boulevard, Suite 600
Los Angeles, California 90025
Telephone: (310) 899-2070
Fax: (310) 496-1930
Attorneys for Defendant-Petitioner and Appellant
Westlake Health Care Center

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I.

STATEMENT OF ISSUES PRESENTED.

1. Whether California Code of Civil Procedure section 1161a requires title be perfected before a notice to quit is served following a foreclosure sale.

2. Whether inclusion of a nondisturbance clause in a lease modifies an "automatic" subordination clause contained in the lease.

3. Whether the trial court erred in summarily ruling on the issues presented for the first time at trial without sufficient notice and opportunity for Petitioner to present full argument and evidence.

II.

WHY REVIEW SHOULD BE GRANTED

The issues presented in this Petition concern two matters of first impression before this Court. The first involves a split of authority created by the Second Appellate District's Opinion and Order in this case, filed on March 7, 2017,[1] regarding whether California Code of Civil Procedure section 1161a[2] requires title be recorded before a three-day notice to quit is served following a foreclosure sale.

In its Order, the Second Appellate District, Division Six, determined that California Code of Procedure section 1161a does not require that title be recorded before a notice to quit is served. However, the recent opinion ordered published by this Court in *U.S. Financial, L.P. v. McLitus*, 6 Cal.App.5th Supp.

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[1] The Second Appellate District, Division Six's Order Filed March 7, 2017 is attached hereto as Exhibit "A," and throughout this Petition will be referred to as the "Order."

[2] Unless otherwise specified, all statutory references are to the California Code of Civil Procedure.

1, 211 Cal. Rptr. 3d 149 (Cal. App. Dep't Super. Ct. 2016), *as amended* (Dec. 2, 2016) (*McLitus*) holds to the contrary:

> [T]he sale was perfected at the time the three-day notice was served, but not the title. Thus, the plaintiff could not provide defendant with a valid three-day notice. The court below mixed the issues of sale and title, but perfecting title is not interchangeable with perfection of the sale under this statutory scheme.
>
> Unless and until the Plaintiff has duly perfected title, an unlawful detainer action for possession is not yet ripe for determination. (*Stonehouse Homes v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540-541.)

Although the Second Appellate District was aware of this holding, having ordered supplemental briefing on *McLitus*, the Appellate Court stated that it was "not persuaded by the reasoning of *McLitus*" and rejected Petitioner's contention that the Notice to Quit served by Respondent was premature as title had not yet been recorded. (See Exhibit A, pp. 6-7). The factual positioning of this case and *McLitus* are virtually identical.

The decision by the Appellate Court creates a split of authority on the issue of whether title needs to be recorded as a prerequisite to filing a notice to quit and commencement of an unlawful detainer action. Therefore, the Court should grant this Petition in order to secure uniformity of decision on this issue.

This uniformity of law is especially key where, as under the unlawful detainer statutes being interpreted here, the law requires strict compliance in order to obtain a judgment. Such an area of law is not tolerant of splits of authority, and the issue should be decisively resolved.

The second issue raised on this appeal also requires this Court to settle an important question of law not previously addressed by this Court, which has led to confusion and ambiguity in the interpretation of contracts involving common "SNDAs" or subordination, nondisturbance and attornment clauses. Specifically, the question of whether a party can enforce a subordination clause in a lease without being bound by a corresponding nondisturbance clause in that same lease is not only an important question for the interpretation of leases containing such clauses, but it is also a novel issue for the California Courts.[3] Subordination, nondisturbance, and attornment clauses are common in commercial leases. *Miscione v. Barton Development Co.*, 52 Cal.App.4th 1320, 1339 (1997); *Miller & Starr California Real Estate*, 1 Cal. Real Est. Digest 3d, Deeds of Trust § 14. In general. Therefore, the issue of how to interpret a lease after foreclosure that has both a subordination and nondisturbance clause is an important question of law, and one that has yet to be considered by this Court.

Finally, the role of the courts in the interpretation of these clauses and application of extrinsic evidence regarding the drafting and intent of the parties is also an important issue of law for this Court's determination. Here, the trial court summarily ruled on these issues without sufficient notice and opportunity for Petitioner to present full argument and evidence. The trial court's actions essentially deprived Petitioner of its right to a jury trial as there were factual questions to be resolved. Whether or not, even in an unlawful detainer action,

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[3] There are cases discussing whether or not a party in possession of a property after foreclosure can enforce an attornment clause in a lease, in order to make the lessor pay rent under the lease, but no cases considering the issue of whether a lessor may enforce the lease's nondisturbance clause to resist eviction. (See, e.g., *Miscione v. Barton Dev. Co.*, 52 Cal. App. 4th 1320, 1326 (1997); *Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman*, 65 Cal. App. 4th 1469 (1998); *Dover Mobile Estates v. Fiber Form Products, Inc.*, 220 Cal. App. 3d 1494 (1990).

the trial court can order a late briefing and hearing on issues raised on the first day of a trial and deprive a party of a jury trial is an important question of public policy.

Therefore, this Petition should be granted as to all of the issues stated above.

III.

FACTUAL BACKGROUND

A. Background

Prior to entry of Judgment in this action, Petitioner Westlake Healthcare Center was the licensed operator and tenant of a 99-bed residential care facility located at 250 Fairview Rd., in Thousand Oaks, California (the "Premises"). (2AA at T49 402 ¶2.)[4] Petitioner operated the facility under a licensed granted by the State of California. (2AA at T49 402 ¶2.)

B. The 2002 Lease.

Until February 2015, the Premises was owned by nonparty Westlake Village Property L.P. ("Westlake L.P."). On March 12, 2002, Petitioner entered into a written Lease with Westlake L.P. pursuant to which Petitioner leased the Premises from Westlake L.P. for a term of 20 years. (2AA at T37 301-307.)

Among other things, the Lease contained the following provision at Paragraph 19:

> 19. Subordination. Landlord shall have the right to subordinate this Lease to any deed of trust or mortgage encumbering the Premises, any advances made on the security thereof and any renewals, modifications, consolidations, replacements or extensions thereof, whenever

[4] Citations to Appellant's Appendix shall be in the following format: ([Volume]AA at T[tab number] [page number].)

> made or recorded. Tenant shall cooperate with Landlord and any lender which is acquiring a security interest in the Premises or the Lease. Tenant shall execute such further documents and assurances as such lender may require, provided that Tenant's obligations under this Lease shall not be increased in any material way, and Tenant shall not be deprived of its rights under this Lease. Tenant's right to quiet possession of the Premises during the Term shall not be disturbed if Tenant pays the rent and performs all of Tenant's obligations under this Lease and is not otherwise in default. If any beneficiary or mortgagee elects to have this Lease prior to its deed of trust or mortgage and gives written notice thereof to Tenant, this Lease shall be deemed prior to such deed of trust or mortgage whether this Lease is dated prior or subsequent to the date of said deed of trust or mortgage or the date of recording thereof.

(2AA at T37 304-05.) The Lease also included a standard subordination provision at Paragraph 21 in the "General Provisions" section of the lease, which reads: "Subordination. This lease is and shall be subordinated to all existing and future liens and encumbrances against the Premises." (2AA at T37 306.)

C. Loan Secured by the Premises.

In 2008, Westlake L.P. obtained a loan from TomatoBank, N.A. (the "Bank") to refinance the property ("2008 Loan"). (1AA at T23 135-37.) The note was dated July 10, 2008, and had a maturity date of July 10, 2013. (Id.)

In 2013, Westlake L.P. obtained an extension to the 2008 Loan. (1AA at T23 139-47.) The Extension Agreement between Westlake L.P. and the Bank was entered into on September 16, 2013. In connection with that extension, the Bank alleged that Petitioner executed a Subordination Agreement that made the Lease subordinate to the 2008 Loan. (1AA at T2 15-21.) Petitioner denies ths allegations and contends that the Subordination Agreement was fraudulently induced or was signed by mistake. (1AA at T17 101-03.)

D. Transfer of the Debt to Respondent and Foreclosure.

In 2014, the Bank sold the loan to Respondent. (1AA at T23 149-52.) Respondent subsequently foreclosed on that loan via the power of sale contained in the Deed of Trust. (1AA at T2 11-12.) On February 19, 2015, Respondent proceeded with a non-judicial foreclosure sale and purchased the Premises via a trustee's deed upon sale. (1AA at T2 11-12.) Respondent recorded the trustee's deed upon sale on February 25, 2015. (1AA at T2 11.)

E. Service of Three-Day Notice to Quit

On February 20, 2015, before the trustee's deed was even recorded, Respondent purported to serve a three-day notice to quit on Petitioner's office manager. (1AA at T23 154-57.)

Respondent thereafter commenced the underlying unlawful detainer action on April 1, 2015. (1AA at T2 9.)

IV.
PROCEDURAL BACKGROUND

On April 1, 2015, Respondent filed its Complaint for Unlawful Detainer after Completion of Power of Sale from a Foreclosure by a Trustee's Deed ("Complaint"). (1AA at T2 9.) On the caption page of the Complaint, Respondent cites "CCP §§ 1161/1161a(b)(3)" and states that this is an "Action Based on Code of Civil Procedure Section 1161a." (1AA at T2 11.)

The Complaint alleges that Respondent "acquired title on February 19, 2015 via a trustee's deed upon sale recorded on February 25, 2015. The trustee's deed upon sale granted, plaintiff a 100% ownership interest. Title has been duly perfected." (1AA at T2 11.)

After demurrer, Petitioner filed its Answer on April 30, 2015. (1AA at T17 99.) After various continuances, the case was set for trial on July 15, 2015. (2AA at T36 289.)

Pursuant to the trial court's order, on July 1, 2015 and July 2, 2015, Petitioner timely filed five motions in limine, including a Motion in Limine No. 1 for Judgment on the Pleadings. (1AA at T23 119; 1AA at T24 163; 1AA at T25 168; 1AA at T26 207; 1AA at T29 222.) The Motion for Judgment on the Pleadings ("MJOP") was made on the grounds that (1) Respondent did not properly serve its Notice to Quit or Pay Rent, as it had not perfected title at the time it served the Notice to Quit; and (2) Respondent sought to evict "all occupants," although the patient occupants were not named in the Complaint. (1AA at T29 222-23.)

On July 15, 2015, on the first day of trial, Respondent filed a "Request for Evidence Code Section 402 Hearing and/or For Separate Trial on Issue of the Automatic Lease Subordination Provision in the Former Lease" ("402 Motion"). (2AA at T37 290.) The 402 Motion requested that the trial court have a separate hearing regarding the subordination clause in the Lease. (2AA at T37 290-91.) Although styled as a request for a 402 hearing, the 402 Motion was essentially an untimely motion for summary judgment.

Over Petitioner's strenuous objection, on July 16, 2015, the trial court determined that it would hold a "bench trial" on the issues raised in the 402 Motion. (Reporters' Transcript ("RT") 26:4-16.) The trial court ordered both parties to submit any briefs on the issue by 3:00 p.m. on Saturday, July 18, 2015. (RT 38a:23-38b:3.)

Both Petitioner and Respondent filed their briefs on July 18, 2015 as requested by the trial court. (2AA at T41 313; 2AA at T42 338.) In its brief, Respondent raised for the first time the argument that it was not in privity with

Petitioner and therefore was not bound by the nondisturbance clause under the Lease.

On July 20, 2015, the trial court held a "bench trial" on the issues raised in Respondent's 402 Motion, which consisted of basically oral argument by counsel. The trial court did not allow Petitioner to present any evidence on the issues. At the hearing, the trial court ruled that Respondent was not bound by the nondisturbance provision in the lease. (RT 39:24- 40:23; RT 57:9-23.) Relying on the argument raised for the first time by Respondent in its Saturday briefing, the trial court held that there was a lack of privity with Respondent and Petitioner therefore could not bind Respondent to the nondisturbance clause. (Id.)

The Motion for Judgment on the Pleadings was also heard on July 20, 2015. The trial court determined that the deed was "deemed recorded as a matter of law." (RT 59:7-17.)

The remaining issues after the bench trial were whether or not the notice to quit was properly served on Petitioner, and whether or not there would be holdover damages. (RT 74:18-23, 75:3-6.) On July 21, 2015, Petitioner and Respondent stipulated to an agreement to resolve those issues. (RT 155:8-156:26.) Petitioner withdrew its defense on the issue of proper service of the notice to quit, and judgment was entered by the trial court in favor of Respondent. (Id.)

The Notice of Entry of Judgment was filed on July 21, 2015, and was entered onto the docket on July 22, 2015. (1AA at T1 1; 2AA at T45 354.)

On September 16, 2015, Petitioner filed its notice of appeal. (2AA at T46 358.) Petitioner filed its opening brief on April 12, 2016 and Respondent filed its brief on July 14, 2016. Oral argument before the Court of

Appeal was heard on November 9, 2016 and the matter was taken under submission.

On December 5, 2016, after Oral Argument, the Court of Appeals ordered that the submission be vacated for further briefing. Specifically, the Court of Appeal requested "letter briefs on *U.S. Financial, L.P. etc., v. McLitus*, San Diego County Superior Court, Appeal Division (Case No. 37-2016-00201 1 16-CL-UD-CTL), ordered published by the California Supreme Court on December 2, 2016 (S237852)." (See Order Vacating Submission and Order For Supplemental Letter Briefs, dated December 5, 2016.)

The parties subsequently submitted letter briefs regarding *U.S. Financial, L.P. etc., v. McLitus*, San Diego County Superior Court, Appeal Division (Case No. 37-2016-002011 16-CL-UD-CTL), ordered published by the California Supreme Court on December 2, 2016 (S237852) (hereinafter referred to as "*McLitus*").

The Appellate Court issued its Order on March 7, 2017, affirming the trial court's ruling. (See Exhibit A.) In particular, the Appellate Court rejected the arguments raised by Petitioners on appeal and the decision by the *McLitus* court and held that perfected title is not required prior to service of a three-day notice to quit. (Order at p. 8-9). The Appellate Court further departed from the reasoning of the trial court holding that Respondents were not bound by the nondisturbance clause, but nonetheless reached the same conclusion by interpreting the Lease against Petitioner and in favor of Repondent, even though Respondent was not a party to the Lease. The Appellate Court also rejected Petitioner's arguments that it should have been allowed to present testimony and evidence regarding the intent of the parties to the Lease in including the nondisturbance clause in the Lease.

V.

LEGAL DISCUSSION

A. This Petition for Review Should be Granted as There is Currently a Split of Authority as to Whether or Not Title Must be Recorded Prior to Service of a Notice to Quit.

As discussed above, the Appellate Court's Order regarding whether "perfected title" is required prior to service of a notice of quit has created a split of authority in the courts. This split of authority warrants review by the Supreme Court in order to create uniformity of decision.

Section 1161a provides in pertinent part:

> (b) In any of the following cases, a person who holds over and continues in possession of a manufactured home, mobilehome, floating home, or real property after a three-day written notice to quit the property has been served upon the person, or if there is a subtenant in actual occupation of the premises, also upon such subtenant, as prescribed in Section 1162, may be removed therefrom as prescribed in this chapter:
>
> . . .
>
> (3) Where the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by such person, or a person under whom such person claims, ***and the title under the sale has been duly perfected.***

Code of Civ. Proc. §1161a(b)(3) (emphasis added).

The *McLitus* case, ordered published by the Supreme Court, and interpreting section 1161a in conjunction with section 2924h of the foreclosure statutes, holds, in relevant part:

> Contrary to the plain reading of the statute, the trial court erroneously concluded "... that under California Civil Code section 2924h(c), *title* is deemed perfected as of 8 a.m. on the

date of the sale because the trustee's deed upon sale was recorded within 15 calendar days." (Statement of Decision, italics added.)

In this case, the sale was perfected at the time the three-day notice was served, but not the title. Thus, the plaintiff could not provide defendant with a valid three-day notice. ***The court below mixed the issues of sale and title, but perfecting title is not interchangeable with perfection of the sale under this statutory scheme.***

Unless and until the Plaintiff has duly perfected title, an unlawful detainer action for possession is not yet ripe for determination. (*Stonehouse Homes v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540-541.)

> Title is duly perfected when all steps have been taken to make it perfect, i.e., to convey to the purchaser that which he has purchased, valid and good beyond all reasonable doubt ..., which includes good record title ..., but is not limited to good record title, as between the parties to the transaction. The term 'duly' implies that all of those elements necessary to a valid sale exist, else there would not be a sale at all.

(*Kessler v. Bridge* (1958) 161 Cal.App.2d Supp. 837, 841, 327 P.2d 241.)

***

"A valid three-day pay rent or quit notice is a prerequisite to an unlawful detainer action. [Citations.] Because of the summary nature of an unlawful detainer action, a notice is valid only if the lessor strictly complies with the statutorily mandated notice requirements. [Citation.]" (*Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 697, 32 Cal.Rptr.2d 635.)

A defective notice cannot support an unlawful detainer judgment for possession. Respondent's interpretation, on the other hand, would suggest that a post-foreclosure plaintiff could routinely prematurely issue a three-day notice that includes legal and factual misstatements (e.g., that the purchaser has already duly perfected title when it had not yet done so). And as argued

> by Appellant, such a practice would practically prevent a defendant from effectively verifying the identity of the alleged purchaser of a property as a search of recorded documents would prove futile.
>
> Absent a sale in accordance with Section 2924 of the Civil Code *and* a duly perfected title prior to the issuance of the notice, a post-foreclosure purchaser cannot avail itself of a summary unlawful detainer eviction proceeding. Respondent's prematurely issued notice was fatally defective, and the unlawful detainer judgment must be reversed. This matter is remanded to the trial court to vacate the January 20, 2016 judgment and to conduct any further proceedings as necessary consistent with this Decision.

McLitus, 211 Cal. Rptr. 3d at 151-52. Under the *McLitus* ruling, the trial court's ruling in this case would have been reversed, as Respondent's pleadings show that it did not have good record title at the time that it served the three-day notice to quit. Respondent alleged in its Complaint that it purchased the property at the foreclosure sale on February 19, 2015, and that it served its Notice to Quit on February 20, 2015. (1AA at T2 12.) However, title was not recorded until February 25, 2015. (1AA at T2 11.) Therefore, under the *McLitus* ruling, at the time Respondent purported to give its Notice to Quit, title had not been perfected, as it had not yet been recorded.

The Appellate Court considering Petitioner's case, however, directly disagreed with *McLitus*. In particular, the Appellate Court held:

> *McLitus* relies on the language of section 1161a, subdivision (b)(3), which provides that "a person who holds over and continues in possession of . . . real property after a three-day written notice to quit the property has been served . . . may be removed therefrom . . . [w]here the property has been sold in accordance with [s]ection 2924 of the Civil Code . . . and the title under the sale has been duly perfected." The statute does not require that title be perfected (i.e., that the trustee's deed be recorded) before service of the three-day notice. It requires that

> title be perfected before a tenant "may be removed" from the property.

(Exhibit A, pp, 6-7.)

This is a direct disagreement between the two cases, warranting review by this Court.

Moreover, this issue is an important issue of law that should be resolved due to the nature of unlawful detainer actions. The unlawful detainer statutes require strict compliance in unlawful detainer actions. *Culver Ctr. Partners E. No. 1, L.P. v. Baja Fresh Westlake Vill., Inc.*, 185 Cal. App. 4th 744, 749 (2010) (in order to take advantage of the summary remedy of unlawful detainer, a "landlord must demonstrate strict compliance with the statutory notice requirements contained in section 1161 et seq."). As stated above, section 1161a(b)(3) requires that a person may be removed after being served with a three-day notice to quit "Where the property has been sold in accordance with Section 2924 of the Civil Code . . . and the title under the sale has been duly perfected." Duly perfected title includes, but is not limited to, good record title. *Bank of New York Mellon v. Preciado*, 224 Cal. App. 4th Supp. 1, 9-10 (2013) (citing *Kessler v. Bridge*, 161 Cal.App.2d Supp. 837, 841 (1958)).

Therefore, it is important that this Court resolve what the strict requirements are that a party must adhere to in order to avail itself of the summary remedy of unlawful detainer in order evict a tenant after foreclosure. Review is therefore warranted in this case.

B. Review Should Be Granted On The Proper Interpretation Of A Lease With Both A Subordination Clause And Nondisturbance Clause After A Foreclosure Of A Junior Lien.

1. This Court Should Determine Whether The Rules Of Contract Interpretation Require That, Where A Lease Contains Both A

Nondisturbance Provision Coupled With A Subordination Clause, Both Should Be Interpreted And Enforced.

Whether or not a nondisturbance clause can be enforced against a purchaser after foreclosure in a lease purported to be extinguished by virtue of a subordination clause in that same lease is an important issue of law which should be adjudicated by this Court. The issue is one of first impression for the California Courts. Moreover, it is important that this issue of law be resolved as subordination, nondisturbance, and attornment clauses (collectively referred to as "SNDA" clauses) are common in commercial leases, and are commonly included together in commercial leases. *Miscione v. Barton Development Co.*, 52 Cal.App.4th 1320, 1339 (1997) ("*Miscione*"); *Miller & Starr California Real Estate*, 1 Cal. Real Est. Digest 3d, Deeds of Trust § 14. In general. The effect of these clauses on each other, therefore, is important as a matter of public policy.

Generally speaking, under California law, a subordinate lease is extinguished by operation of law upon foreclosure of a superior trust deed or lien. *Dover Mobile Estates v. Fiber Form Products, Inc.*, 220 Cal. App. 3d 1494, 1499 (1990), *modified* (June 7, 1990) ("*Dover*") ("foreclosure 'wipes out' all liens, encumbrances, and leases subsequent in time to the trust deed so that there is no landlord tenant relationship between a foreclosure purchaser and the occupant of the premises.") Subordinate in this context simply refers to the time of formation. The Lease at issue here was entered into in 2002, while the 2008 Loan was obtained in 2008. Thus, the lien created by the 2008 Loan was technically "subordinate" to the Lease.

However, parties to a real estate contract may contractually alter the priorities and their rights otherwise fixed by law. *Miscione*, 52 Cal. App. 4th at 1326. Thus, whether a lease is extinguished depends upon not only the timing

of the various liens and contracts, but also whether the lease contains SNDAs, and the effect and interpretation of those clauses.

The effect of the nondisturbance clause on the subordination clause was briefed extensively by the parties on appeal. However, the parties were not able to find law directly on point, making this a case of first impression. The cases principally relied on by the parties, *Miscione, Dover*, and *Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman*, 65 Cal. App. 4th 1469 (1998) ("*Principal*"), all dealt mainly with the effect of subordination and attornment clauses, or the lack thereof, on the rights of property owners to enforce leases after foreclosure. They do not directly address the effect of a lease with both a nondisturbance clause and a subordination clause where the lessee wishes to retain the lease and possession of the premises.

However, the cases do address the intent behind a nondisturbance clause. When discussing the effect of SNDA clauses the *Principal* court stated:

> In order to protect itself from the loss of its lease through foreclosure of the landlord's property, a tenant asked to subordinate its lease to any future encumbrances may negotiate with the landlord to obtain a nondisturbance agreement from any future lenders. Such an agreement provides that a foreclosing lender with a superior lien will not disturb the tenant's possession so long as the tenant has not defaulted on the lease.

Principal Mut. Life Ins., 65 Cal. App. 4th at 1479. Thus, under a nondisturbance provision, the parties may agree that, in the event of a foreclosure, the tenant will remain on the leased premises so long as the tenant continues to comply with the terms of the lease and the lease is not in default. *See* Feinstein & Keyles, *Foreclosure: Subordination, Non-Disturbance and Attornment Agreements* (Aug. 1989) Prob. & Property, 38, 39, *cited* in *Miscione,* 52 Cal.App.4th at 1327. In fact, "the concept of non-disturbance is

frequently intended to refer not only to non-disturbance of the tenant's right of possession, but also to full recognition of all of the tenant's rights under its lease." *See* Fisher & Goldman, *The Ritual Dance Between Lessee and Lender* (Fall 1995) 30 Real Property, Prob. & Trust J. 355, 357, *cited* in *Miscione*, 52 Cal.App.4th at 1327. Thus, a nondisturbance clause protects ***the tenant's rights*** to enforce the lease.

The cases are also clear where a lease also contains an attornment provision or a nondisturbance provision in addition to a subordination clause, the lease is ***not*** automatically extinguished and may continue. In *Dover*, the new purchaser/landlord sought to enforce a lease post-foreclosure. Relying upon the automatic subordination clause contained in the parties' lease, the court held that the lease was automatically extinguished upon foreclosure, and the landlord had no right to hold the tenant to its obligations under the lease. *Dover*, 220 Cal.App.3d at 1498-1499. The *Dover* court further stated, however:

> Finally, we note that the tenant under a subordinate lease can obtain some protection by requiring the landlord to obtain from its lender a non-disturbance agreement in favor of the tenant. Such an agreement provides that the lender with a superior lien will not, "by foreclosure or otherwise, disturb the tenant's possession, as long as the tenant is not then in default under the lease." (*Johnson & Moskovitz*, Cal. Real Estate Law & Practice § 153.50, p. 153-94.) In addition, the tenant could bargain with its landlord for the right to cure the landlord's default. (*Ibid.*)

Dover, 220 Cal.App.3d at 1500. The implication of *Dover* is that, even where the lease contains a so-called automatic subordination clause, other provisions in the lease may alter the priorities and automatic termination clause.

That is analogous to the situation here where Petitioner contracted to include a nondisturbance provision in its Lease. The specific SNDA provisions here were expressly bargained for by the parties to the Lease and set

forth in a separate section in the Lease at Paragraph 19, while the so-called automatic subordination provision relied upon by Respondent simply appears as a sub-paragraph in the "Miscellaneous" section of the Lease. (2AA at T37 304-05.) Since the Lease predated the trust deed, the original lender, and Respondent as its successor, had full knowledge of ***all*** of the conditions in the lease and were bound by those conditions.[5]

Therefore, review of the Appellate Court's Order regarding the subordination clause is appropriate. The Order focused on the "automatic subordination" issue but only impliedly ruled that the nondisturbance clause did not serve to keep the Lease in place. Petitioner argues that effect must be given to both the nondisturbance and subordination provisions in the Lease. A subordination clause and a nondisturbance clause can be read together with both given full effect. *Chumash Hill Properties, Inc. v. Peram*, 39 Cal. App. 4th 1226, 1233 (1995) (nondisturbance clause enforceable by sublessee against prime lessor). An interpretation that ignored the nondisturbance provision while enforcing the subordination provision runs afoul of the rules of construction. Cal. Civ. Code § 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."); *accord Milazo v. Gulf Ins. Co.*, 224 Cal. App. 3d 1528, 1536 (1990).

As "SNDAs" are commonly included together in commercial leases, and are intended to be accorded their full meaning and intent as a whole, this Court should grant the petition for review in order to determine a key issue of law with a great impact on commercial leases.

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[5] The lender's knowledge of the nondisturbance provision can be inferred from the timing of the documents, but to the extent Respondent disputes this fact, it is yet another error created by the trial court's decision to adjudicate the matter without a full trial.

2. This Court Should Grant Review In Order To Determine Whether A Lender Who Seeks To Enforce Certain Clauses In A Lease As A Third Party Beneficiary Is Thus Bound By Limitations In That Lease.

The Appellate Court's Order did not consider the issue of Respondent's position as a third party beneficiary due to its ruling on the subordination issue. However, this misses a key issue of law: Petitioner's position regarding the nondisturbance clause is enhanced by the fact that Respondent's rights were derived as a third party to the Lease. It is well-established that a non-party to a contract can only have rights to enforce the contract as a third party beneficiary. *Jones v. Aetna Casualty & Surety Co.*, 26 Cal. App. 4th 1717, 1724, 33 Cal. Rptr. 2d 291 (1994) ("it is well settled that Civil Code section 1559 excludes enforcement of a contract by persons who are only incidentally or remotely benefited by it"); Cal. Civ. Code § 1559. In this case, Respondent is clearly attempting to enforce the terms of the Lease by invoking the subordination clause in the Lease,[6] which it can only do as a third party beneficiary -- and only if it complies with all conditions, including the nondisturbance provision. *Brown v. Boren*, 74 Cal. App. 4th 1303, 1315 (1999).

As the Court of Appeal in *Brown* explained:

> A claim of loss of priority is based on principles of contract law. A lender's claim to priority flows from the agreement between the seller and the buyer. It is only as a result of the seller's waiver of his statutory right to a first lien that the lender achieves priority. ***Thus, the lender is a third party beneficiary in the seller-buyer agreement, but only to the extent that it abides by the conditions of subordination. If the lender does not comply with the seller's conditions it does not achieve priority.*** Since one condition to priority is the proper use of the construction loan

[6] Respondent's Complaint expressly alleges and relies upon the subordination provision in the lease as the basis for its unlawful detainer claim. (1AA at T2 12, ¶6.)

> funds, the priority of the construction loan lien does not vest until such time as the funds are applied to the construction purpose.

Id. (emphasis added, internal citations omitted); *Protective Equity Trust #83, Ltd. v. Bybee*, 2 Cal. App. 4th 139, 149-50 (1991) ("the lender is a third party beneficiary in the seller-buyer agreement, but only to the extent that it abides by the conditions of subordination."); *see also Miller and Starr California Real Estate*, 4 Cal. Real Est. § 10:201 (4th Ed.) ("As an issue of contract law, the alteration of priorities requires compliance with the terms and conditions of the subordination agreement. When the conditions of subordination are not satisfied, there is a breach of contract and no alteration of priority; the seller's lien remains as a senior lien upon a failure of the conditions of subordination. The third-party lender is a third-party beneficiary to the subordination agreement and is able to enforce the subordination by compliance with the conditions of subordination.")

A lender is an intended third party beneficiary of the subordination clause in the Lease and has the right to enforce it. *Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman*, 65 Cal. App. 4th 1469, 1485–86 (1998) (a lender's rights as a third party beneficiary with respect to attornment provisions). Therefore, there can be no question that Respondent was a third party beneficiary to the Lease. What is at issue is whether Respondent may ignore the corresponding nondisturbance clause in that same Lease.

As stated above, California law is clear that Respondent, as a party seeking to enforce a subordinate agreement, whether or not they are a signatory or a third party seeking to enforce it, must abide by the terms of that agreement. *Sanders v. Am. Cas. Co. of Reading, Pa.*, 269 Cal. App. 2d 306, 310 (1969) ("When plaintiff seeks to secure benefits under a contract as to which he is a third-party beneficiary, he must take that contract as he finds it. As the rules above stated make clear, the third-party cannot select the parts

favorable to him and reject those unfavorable to him."). By accepting or invoking the benefits of the subordination agreement, Respondent has implicitly accepted the conditions thereof, including the nondisturbance provision.

The issue of whether a person attempting to enforce a lease after foreclosure is bound by its terms is a key issue of law. The Appellate court's ruling impliedly gives a third party beneficiary greater rights to a contract than a party intended – a position contrary to established law. This Court should therefore grant this Petition for Review.

C. This Court Should Grant Review of Whether or Not Petitioner Was Deprived of Its Right to Present Its Case Fully.

The issue of whether Petitioner was denied the right to present its case is an important issue of law, and thus the Supreme Court should grant review on this issue. It is inherent in our system of law that there is a "policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his case." *Jorgensen v. Jorgensen*, 32 Cal.2d 13, 18 (1948) (In Bank). This is a key issue affecting public policy and the right to a fair trial.

The Appellate Court's Order found that Petitioner "made no showing that the trial court failed to consider any relevant facts." (Exhibit A p. 4.) Not only did Westlake Health make an offer of proof regarding an ambiguous clause in the Lease, but this ruling ignores the procedurally improper nature of the trial court's consideration of this issue at a bench trial.

As discussed in the Statement of Facts above, the trial court summarily ruled on Respondent's 402 Motion on the day of trial with only 48 hours to brief the issue (including Saturday), and without allowing Petitioner to present any testimony or evidence on the issue.

It is clear that the trial court viewed the 402 Motion as, essentially, a motion for summary judgment. As such, Petitioner, as the non-moving party and defendant, should have been allowed full notice and opportunity to respond, including presentation of additional arguments, evidence and testimony.

Petitioner's offer of proof included testimony from Petitioner's principal regarding the intent of the provisions in the Lease, as well as its attorney on that issue. (Exhibit A p. 4.) Petitioner's apparent intent in including the nondisturbance provision should have been given conclusive effect, as, as Respondent acknowledges, Petitioner's principals were the only parties to the Lease. As such, their testimony concerning the intent of the nondisturbance provisions -- had such testimony been allowed -- would have been undisputed and binding. (Reporter's Transcript ("RT") 15:5-17:10.)

As a matter of public policy and in the interest of a fair tribunal, the trial court erred in not allowing the jury to decide the issue with the assistance of testimony from the parties to the Lease and experts. *Wolf v. Walt Disney Pictures & Television*, 162 Cal. App. 4th 1107, 1127 (2008), *as modified on denial of reh'g* (June 4, 2008) ("When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law. . . . If, however, there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the jury.").

When interpreting a contract, "A contract ***must*** be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Cal. Civ. Code § 1636 (emphasis added); *accord Moss Dev. Co. v. Geary*, 41 Cal. App. 3d 1, 9 (1974) ("in the interpretation of contracts, the paramount consideration is the intention of the contracting parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."). Here, however, the trial court interpreted Paragraph

19 of the Lease against its plain meaning, ignoring the intent of the parties to the Lease and the nondisturbance clause altogether in violation of the rules of contract construction and interpretation.

This Court should thus grant review, as Petitioner was deprived of its right to present evidence before a jury due to what amounted to a tardy summary judgment motion by Respondent.

VI.

CONCLUSION.

For all the foregoing reasons, Petitioner respectfully requests that this Court grant review.

Dated: April 17, 2017

Respectfully submitted,

Enenstein Ribakoff Lavina & Pham

By:_____

Teri T. Pham, Esq.
Courtney M. Havens, Esq.
Attorneys for Petitioner-Defendant and Appellant

CERTIFICATE OF WORD COUNT

Cal. Rule of Court 8.520

Pursuant to California Rule of Court 8.520, I certify that the foregoing Petition for Review was produced on a computer and, according to the word count of the computer program used to prepare the brief, contains 7,370 words.

Dated: April 17, 2017

Teri T. Pham

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DR. LEEVIL, LLC,

Plaintiff and Respondent,

v.

WESTLAKE HEALTH CARE CENTER,

Defendant and Appellant.

2d Civil No. B266931
(Super. Ct. No. 56-2015-00465793-CU-UD-VTA)
(Ventura County)

A purchaser at a foreclosure sale seeks to evict the occupant of the property as soon as possible. It serves a notice to quit after the sale but before recording title to the property. Here we reject the occupant's claim that the notice to quit is premature, and hold that Code of Civil Procedure section 1161a[1] does not require that title be recorded before the notice to quit is served. We affirm.

[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

BACKGROUND

Jeoung Hie Lee and Il Hie Lee own Westlake Village Property, L.P. (Westlake Village), a business entity that formerly owned a skilled nursing facility. In 2002, Westlake Village leased the facility to Westlake Health Care Center (Westlake Health), a corporation also owned and controlled by the Lees. The lease had an automatic subordination clause and a permissible subordination clause with a nondisturbance provision. It was for a 20-year term.

Six years into the lease, Westlake Village took out a five-year loan from TomatoBank, N.A., secured by a deed of trust on the nursing facility. When Westlake Village defaulted on the loan and filed for bankruptcy, TomatoBank sold the loan to Dr. Leevil, LLC (Leevil). Leevil obtained relief from the bankruptcy stay, instituted a nonjudicial foreclosure, and purchased the nursing facility at a trustee's sale.

The day after it purchased the facility, Leevil served Westlake Health with a notice to quit. Leevil recorded title to the facility five days later. Westlake Health did not vacate the facility, and Leevil sued for unlawful detainer. Westlake Health's answer alleged that its lease was senior to the deed of trust and that the notice to quit was invalid because it was served before title was recorded. At a bifurcated trial, the court found that the lease was subordinate to the deed of trust and was extinguished by the trustee's sale. The court also found that the notice to quit was valid.

Westlake Health agreed to surrender possession of the facility and pay damages before the second phase of trial began. The parties stipulated that the judgment would "not affect any party's appellate rights." The sheriff evicted Westlake

Health and Leevil leased the facility to another skilled nursing provider.

After Westlake Health filed its opening brief, Leevil filed a motion to dismiss the appeal as moot. We deferred ruling on the motion until after oral argument. While this case was under submission, our Supreme Court ordered publication of *U.S. Financial, L.P. v. McLitus* (2016) 6 Cal.App.5th Supp. 1 (*McLitus*). In *McLitus*, the Appellate Division of the San Diego County Superior Court held that a property owner's service of a notice to quit before it perfects title to the property renders invalid any subsequent unlawful detainer proceeding. (*Id.* at pp. Supp. 3-5.) We vacated submission and ordered supplemental briefing.

DISCUSSION

The Motion to Dismiss

Leevil asks us to dismiss the appeal as moot because Westlake Health is no longer in possession of the facility and cannot operate it without a license. We deny this request.

Westlake Health reserved the right to appeal in the stipulation, and correctly argues that this court can restore its possession of the facility. (*Old National Financial Services, Inc. v. Seibert* (1987) 194 Cal.App.3d 460, 467-468.) Moreover, Westlake Health could apply to renew its license if possession were restored. The appeal is not moot.

The Opportunity to Present Argument and Evidence

Westlake Health complains that it was denied the opportunity to present extrinsic evidence concerning the intent and purpose behind the lease's subordination clauses. We are not persuaded.

During the proceedings below, Westlake Health made offers of proof as to the testimony that would be provided: (1) testimony from Ms. Lee, who "would simply say that [the lease] was negotiated on behalf of, yes, her as the principal of the lessee, as well as the principal of the landlord" and that "[o]bviously the lender was not a party to the contract at that time"; and (2) testimony from the attorney who drafted the lease to explain why the subordination and nondisturbance clauses were included. The court then indicated how it intended to rule, and asked Westlake Health whether it intended to submit additional evidence. Westlake Health stated that it did not.

In the absence of disputed facts, interpretation of lease provisions presents a question of law for the court to decide. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 396 (*City of Hope*).) Westlake Health has made no showing that the trial court failed to consider any relevant facts. There was thus no need for it to consider extrinsic evidence.

The Lease Provisions

Westlake Health claims that the trial court erred in finding the lease subordinate to the deed of trust. We disagree.

A lease made before the execution of a deed of trust survives a subsequent foreclosure and requires that the purchaser take the property subject to the lease. (*Principal Mutual Life Ins. Co. v. Vars, Pave, McCord & Freedman* (1998) 65 Cal.App.4th 1469, 1478.) A tenant can, however, agree to subordinate its lease to a future deed of trust. (*Id.* at pp. 1478-1479.) This is usually done through an automatic subordination clause, which provides that the lease will be subordinate to encumbrances on the property that later attach. (*Id.* at p. 1479.)

It can also be done through a permissible subordination clause, which permits the deed holder to compel the lessee to subordinate its interest. (*Miscione v. Barton Development Co.* (1997) 52 Cal.App.4th 1320, 1328 (*Miscione*).) If the lease contains both a permissible subordination clause and a nondisturbance provision, the lessee can compel the new owner to abide by the terms of the lease. (*Ibid.*)

Westlake Health's lease contains both an automatic subordination clause[2] and a permissible subordination clause with a nondisturbance provision.[3] There is no evidence that TomatoBank, as the deed holder, ever invoked the permissible subordination clause. It had no need to; its position was fixed by the automatic subordination clause. Under that clause, Westlake

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[2] The automatic subordination clause is at paragraph 21.6 of the lease: "This Lease is and shall be subordinated to all existing and future liens and encumbrances against the Premises."

[3] The permissible subordination clause with a nondisturbance provision is at paragraph 19: "Landlord shall have the right to subordinate this Lease to any deed of trust or mortgage encumbering the Premises . . . . Tenant shall cooperate with Landlord and any lender which is acquiring a security interest in the Premises or the Lease. Tenant shall execute such further documents and assurances as such lender may require, provided that Tenant's obligations under this Lease shall not be increased in any material way, and Tenant shall not be deprived of its rights under this Lease. Tenant's right to quiet possession of the Premises during the Term shall not be disturbed if Tenant pays the rent and performs all of Tenant's obligations under this Lease and is not otherwise in default."

Health's lease was automatically subordinate to TomatoBank's deed of trust. (*Miscione, supra*, 52 Cal.App.4th at p. 1328.) The trustee's sale extinguished the lease. (*Dover Mobile Estates v. Fiber Form Products, Inc.* (1990) 220 Cal.App.3d 1494, 1498-1499.)

The permissible subordination clause with its nondisturbance provision does not compel a contrary finding. Westlake Health interprets the clause as prohibiting termination of the lease so long as it is not in default. But TomatoBank never invoked the permissible subordination clause. Moreover, Westlake Health's interpretation fails to reconcile the lease's automatic subordination clause with the permissible subordination clause. Westlake Health argued below that the "ambiguities in the contract" present "an issue that may require some factual interpretation" to be decided by a jury. But interpretation of the lease's provisions presents a legal question for the court. (*Miscione, supra*, 52 Cal.App.4th at p. 1325.) And contract ambiguities are construed against the drafter. (*City of Hope, supra*, 43 Cal.4th at pp. 397-398; see also Civ. Code, § 1654.) The trial court correctly construed the subordination clauses against the drafter, i.e., Westlake Health.[4]

The Notice to Quit

Relying on *McLitus*, Westlake Health contends that the trial court should have granted judgment on the pleadings because Leevil did not perfect title before it served the notice to quit. It claims the notice to quit was premature and nullified the

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[4] Given our conclusion, there is no need to consider Westlake Health's claim that the trial court erred in finding that Leevil was not bound by the nondisturbance clause as a third-party beneficiary. (*Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1216.)

unlawful detainer proceedings that followed. We are not persuaded by the reasoning of *McLitus* and reject this contention.

McLitus relies on the language of section 1161a, subdivision (b)(3), which provides that "a person who holds over and continues in possession of . . . real property after a three-day written notice to quit the property has been served . . . may be removed therefrom . . . [w]here the property has been sold in accordance with [s]ection 2924 of the Civil Code . . . and the title under the sale has been duly perfected." The statute does not require that title be perfected (i.e., that the trustee's deed be recorded) before service of the three-day notice. It requires that title be perfected before a tenant "may be removed" from the property.

Westlake Health concedes that it held over in possession after the three-day notice to quit was served. It does not contend that the trustee's sale failed to comply with section 2924 of the Civil Code, or that Leevil failed to perfect title before Westlake Health was removed from the property. Section 1161a's requirements were strictly complied with.

To conclude otherwise, this court would have to impose an additional requirement onto the statutorily required notice to quit, i.e., perfection of title *before* service. *McLitus* held that unless the trustee's deed was recorded prior to service of the notice to quit, the tenant would be prevented "from effectively verifying the identity of the alleged purchaser of a property as a search of recorded documents would prove futile." (*McLitus*, *supra*, 6 Cal.App.5th at p. Supp. 4.) But here, if Westlake Health were concerned with verifying Leevil as the purchaser of the property, it had more than five weeks between service of the notice to quit and filing of the unlawful detainer complaint to do

so. And, in any event, Westlake Health was free to challenge Leevil's claimed ownership in court. (*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1010 [title can be litigated in a section 1161a unlawful detainer action].)

None of the cases cited in *McLitus* support the requirement that title be perfected before service of the notice to quit: *Baugh v. Consumers Associates, Limited* (1966) 241 Cal.App.2d 672, 674-675 and *Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 697 (*Bevill*), consider the required contents of a notice to quit served in a landlord-tenant dispute, not one served after a trustee's sale. The contents of the two notices are different. (Compare § 1161, subd. (2) with § 1161a, subd. (b)(3).) *Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540-541, discusses when a controversy is ripe in a declaratory judgment action, not the type of proceeding here. *Kessler v. Bridge* (1958) 161 Cal.App.2d Supp. 837, 841, describes the steps required to perfect title, an issue not raised in this case. *Garfinkle v. Superior Court* (1978) 21 Cal.3d 268, 275 (*Garfinkle*) and *Salazar v. Thomas* (2015) 236 Cal.App.4th 467, 480, suggest, in dicta, that the purchaser of property at a trustee's sale "is entitled to bring an unlawful detainer action" (*Garfinkle*, at p. 275) after recording the trustee's deed: precisely what happened here.

The *McLitus* court read *Bevill*'s statement that a three-day notice "is a prerequisite to an unlawful detainer action" (*Bevill, supra*, 27 Cal.App.4th at p. 697) as holding that service of the three-day notice marks the start of an unlawful detainer action. But one does not "bring an unlawful detainer action" by serving a notice to quit.

A trial court acquires jurisdiction over the parties when the plaintiff serves the defendant with the unlawful detainer summons and complaint. (*Borsuk v. Appellate Division of Superior Court* (2015) 242 Cal.App.4th 607, 612.) Service of the notice to quit is an element of the action that must be alleged in the complaint and proven at trial (*id.* at pp. 612-613), but it does not give the court jurisdiction over the parties (*id.* at pp. 616-617). Filing of the complaint is the beginning of an unlawful detainer action. Because title was perfected before the complaint was filed, the unlawful detainer proceedings were valid. To conclude otherwise, we would have to rewrite section 1161a, subdivision (b)(3) to add the requirement that title be perfected before the notice to quit is served. That, however, is a legislative function.

DISPOSITION

The motion to dismiss the appeal is denied. The judgment is affirmed. Leevil is awarded costs on appeal.

CERTIFIED FOR PUBLICATION.

TANGEMAN, J.

We concur:

YEGAN, Acting P. J.

PERREN, J.

Vincent J. O'Neill, Jr., Judge

Superior Court County of Ventura

Enenstein Ribakoff LaViña & Pham, Teri T. Pham and Courtney M. Havens, for Defendant and Appellant.

Law Offices of Ronald Richards & Associates, Ronald N. Richards, Nicholas Bravo; Law Offices of Geoffrey Long and Geoffrey S. Long, for Plaintiff and Respondent.

PROOF OF SERVICE

STATE OF CALIFORNIA,
LOS ANGELES COUNTY

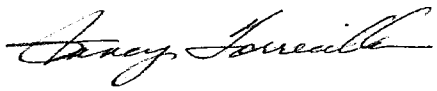
I reside in Los Angeles County in the State of California. I am over the age of 18. I am not a party to this action. My business address is 12121 Wilshire Boulevard, Suite 600, Los Angeles, California 90025. On April 17, 2017, I served the foregoing document described as: **PETITION FOR REVIEW** on the interested parties in this action addressed below:

Geoffrey S. Long, Esq. L/O of Geoffrey Long APC 1601 N. Sepulveda Blvd., No. 729 Manhattan Beach, CA 90266 Attorneys for Respondent/Plaintiff Dr. Leevil, LLC **Supreme Court of California** **350 McAllister Street, Room 1295** **San Francisco, CA 94102** **By U.S. Mail** Ronald N. Richards, Esq. L/O Ronald Richards & Assoc., APC P.O. Box 11480 Beverly Hills, California 90213	Office of the Clerk Ventura County Superior Court Hall of Justice 800 S. Victoria Avenue Ventura, California 93009 Attn: The Honorable Vincent J. O'Neill, Jr. Office of the Clerk 2nd District Court of Appeal Division 6, Court Place 200 East Santa Clara Street Ventura, California 93001

[X] **BY UNITED STATES MAIL:** I placed a true copy of the document in a sealed envelope addressed to **Ronald N. Richards, Esq.,** the individual named above, with prepaid postage, in the U.S. mail in Los Angeles, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business.

[X] **BY OVERNIGHT MAIL:** I placed a true copy of the document in a sealed envelope addressed to the individuals and/or entity listed above, via Norco Overnite/GSO (Golden State Overnight), next business day delivery.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed this 17th day of April, 2017 at Los Angeles, California.



NANCY TORRECILLAS