Case No.: S236208

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HELLER EHRMAN, LLP,

Plaintiff and Petitioner,

vs.

DAVIS WRIGHT TREMAINE LLP,

Defendant and Respondent.

AND RELATED CASES

SUPREME COURT
FILED

MAY 02 2017

Jorge Navarrete Clerk

Deputy

QUESTION CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CASE NOS. 14-14314/14-16315/14-16317/14-16318

APPEAL FROM THE U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION,
CASE NOS. 14-01236/14-01237/14-01238/14-01239

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER; *AMICUS CURIAE* BRIEF

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APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, The Official Committee of Unsecured Creditors of Heller Ehrman, LLP ("Statutory Committee") requests permission to file the accompanying brief *amicus curiae* in support of Petitioner. The Statutory Committee is a statutory fiduciary created by Congress to represent the numerous unsecured creditors in the bankruptcy case of Heller Ehrman, LLP ("Heller"). *See* 11 U.S.C. § 1102((a)(1) (requiring appointment of a general unsecured creditors' committee "as soon as practicable" after the commencement of a chapter 11 case).

The Statutory Committee has a unique role in the bankruptcy process. While a chapter 11 debtor-in-possession (and the plan administrator in this instance) owes a fiduciary duty to the entire estate, the Statutory Committee "is fiduciary for [the general unsecured creditors] whom it represents, not for the debtor or the estate generally." *In re SPM Mfg. Corp.* (1st Cir. 1993) 984 F.2d 1305, 1315; *see also In re AKF Foods, Inc.* (Bankr. E.D.N.Y. 1984) 36 B.R. 288, 289 ("The function of a creditors' committee is to act as a watchdog on behalf of the larger body of creditors which it represents."). In the federal context, creditor committees have been granted permission to file *amicus curiae* briefs based on their unique perspective and stake in the outcome of the case. *F.V. Steel & Wire Co. v. Houlihan Lokey Howard & Zukin Capital. L.P. (In re F.V. Steel & Wire Co.)* (E.D. Wis. July 31, 2006) 2006 U.S. Dist. LEXIS 53297.).

The Statutory Committee was formed early in Heller's chapter 11 bankruptcy case and continues to exist under Heller's confirmed chapter 11 plan ("Plan").[1] The Statutory Committee has standing under section 1109(b) of the United States Bankruptcy Code to be heard on any issue in Heller's bankruptcy case. Counsel submitting this brief has represented the Statutory Committee since its formation.

The unsecured creditors represented by the Statutory Committee include the secretaries, paralegals, associates, retired partners, senior of counsel, and many others who helped create the Heller business brand, as well as lease and trade creditors. Given that the Statutory Committee represents the diverse interests of Heller's numerous unsecured creditors and has a unique perspective concerning the bankruptcy proceedings, the Statutory Committee has a substantial interest in the outcome of this certified question. The Statutory Committee believes that its viewpoint will assist the Court in deciding the certified question presented because, as the representative of those parties that have suffered the most harm in Heller's bankruptcy, it is uniquely situated to comment on the proposed disparate treatment of assets in law firm partnerships and non-law firm partnerships.

Pursuant to Rule 8.520(f)(4) of the California Rules of Court, the Statutory Committee states that, while upon confirmation of the Plan, counsel for the Statutory Committee has concurrently represented the plan administrator respecting bankruptcy issues, such

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[1] *See In re Heller Ehrman LLP*, Case No. 08-32514 (Bankruptcy Court, Northern District of California), Docket No. 1431, at pages 42-43.

counsel acted only on behalf of the Statutory Committee in authoring the proposed *amicus* brief, and no party nor counsel for a party in this appeal authored in whole or in part the proposed *amicus* brief. Fees and costs of counsel for the Statutory Committee are paid by Heller as provided for under 11 U.S.C. § 1103(b) and the Plan.

Accordingly, the Statutory Committee asks this Court to permit the filing of the attached *amicus curiae* brief and allow the Statutory Committee to appear through its counsel as *amicus curiae* in support of Petitioner.

Date: April 20, 2017

Respectfully submitted,

FELDERSTEIN FITZGERALD
WILLOUGHBY & PASCUZZI LLP

By:____________________________

Thomas A. Willoughby
Counsel for The Official Committee
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AMICUS CURIAE BRIEF OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF HELLER EHRMAN, LLP IN SUPPORT OF PETITIONER

INTRODUCTION

The Official Committee of Unsecured Creditors of Heller Ehrman, LLP ("Statutory Committee"), in its statutory role as the representative of those parties that have suffered the most Harm[2] in the bankruptcy case of Heller Ehrman LLP ("Heller"), is uniquely situated to comment on the disparate treatment of assets in law firm partnerships and of identical assets in non-law firm partnerships that will result if the position of Respondents is embraced by this Court.

ISSUE ADDRESSED

The Statutory Committee respectfully submits that a crucial issue before the Court is whether it is appropriate to treat the assets of law firm partnerships differently from non-law firm partnerships by presuming, as a matter of law, that ongoing hourly rate work in existence when a law firm partnership dissolves is not an asset of the dissolving law firm even though such ongoing work is an asset of every other type of business venture upon dissolution (the "Proposed Legal Fiction"). In other words, as a matter of law, should law firm partnerships be treated differently? The Statutory Committee submits that they should not be as there is no legal basis for doing so.

[2] The unsecured creditors in the present case include the secretaries, paralegals, associates, retired partners, senior of counsel, and many others who helped create the Heller business brand, as well as lease and trade creditors.

This issue was highlighted in Judge Breyer's discussion on the record:

> when we just talk about partnership law because it's not any partnership; it's a partnership of lawyers providing legal services. So that is the lens upon which one has to view the reasonableness of the application of partnership law. You may disagree with that, but that's where you and I will part because it's clear that a law partnership is fundamentally different from many other types of partnerships.

Transcript from June 5, 2014 hearing in *Heller Ehrman LLP v. Davis Wright Tremaine LLP, et al.*, Case No. C 14-01236, et al. (District Court, Northern District of California), Docket No. 23, at page 11.

Judge Breyer's question impliedly concedes that unfinished hourly work that is taken to a new business by an existing partner in a non-law firm partnership business is an asset under the California Uniform Partnership Act of 1994 ("RUPA"). (*See*, *e.g.*, *McNeny v. Touchstone* (1936) 7 Cal. 2d 429, 437 (real estate brokerage partnership, unfinished business was an asset); *Smith v. Bull* (1958) 50 Cal. 2d 294 (advertising agency partnership, unfinished business was an asset); *Freese v. Smith* (1952) 114 Cal. App. 2d 283, 289 (fire insurance adjuster partnership, unfinished business was an asset); *Mashon v. Haddock* (1961) 190 Cal. App. 2d 151 (construction partnership, unfinished business was an asset).

UNIQUE INTEREST OF THE STATUTORY COMMITTEE

The Statutory Committee is a statutory fiduciary created by Congress to represent the numerous unsecured creditors in Heller's bankruptcy case. *See* 11 U.S.C. § 1102(a)(1) (requiring appointment of a general unsecured creditors' committee "as soon as practicable" after the commencement of a chapter 11 case). The Statutory Committee was formed early in Heller's chapter 11 bankruptcy case and continues to exist under Heller's confirmed chapter 11 plan ("Plan").[3] The Statutory Committee's counsel submitting this *amicus curiae* brief has represented the Statutory Committee since its inception.

The Statutory Committee has a unique role in the bankruptcy process. While a chapter 11 debtor-in-possession (and the plan administrator in this instance) owes a fiduciary duty to the entire estate, the Statutory Committee "is fiduciary for [the general unsecured creditors] whom it represents, not for the debtor or the estate generally." *In re SPM Mfg. Corp.* (1st Cir. 1993) 984 F.2d 1305, 1315; *see also In re AKF Foods, Inc.* (Bankr. E.D.N.Y. 1984) 36 B.R. 288, 289 ("The function of a creditors' committee is to act as a watchdog on behalf of the larger body of creditors which it represents.").

To fulfill this role, the Statutory Committee exercises a "wide and important array of authority and responsibility . . . [because] the Bankruptcy Code contemplates a significant and central role for committees[.]" *In re Penn-Dixie Indus., Inc.* (Bankr. S.D.N.Y. 1981) 9 B.R. 941, 944.). Moreover, under section 1109(b) of the United States Bankruptcy Code, the Statutory Committee has standing to be heard on any issue in Heller's bankruptcy case.

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[3] *See In re Heller Ehrman LLP*, Case No. 08-32514 (Bankruptcy Court, Northern District of California), Docket No. 1431, at pages 42-43.

ARGUMENT

PROPOSED LEGAL FICTION THAT LAW FIRMS ARE DIFFERENT UPON DISSOLUTION THAN OTHER BUSINESSES VIOLATES THE RIGHTS OF CALIFORNIA'S UNSECURED CREDITORS

I.
PROPOSED LEGAL FICTION VIOLATES CALIFORNIA SUPREME COURT PRECEDENT

In *Smith v. Bull*, the Court in the context of a professional firm providing advertising services clearly drew a line of "demarcation between 'unfinished business,' being business covered by contracts of employment at the time of dissolution, and other matters not covered by contracts of employment" such as future contracts. *Smith*, 50 Cal. 2d at 304. The *Smith* Court specifically defined "unfinished business" as contracts of employment whereby the partnership has a "duty to perform services . . . at the time of dissolution[.]" *Id.* The *Smith* Court relied in part on *Little v. Caldwell* (1894) 101 Cal. 553, a law firm case, which the *Smith* Court described as a case where the "surviving partner had to account to the estate of deceased partner for proceeds obtained from contracts made prior to the death of the partner." *Smith*, 50 Cal. 2d at 304.

The *Smith* Court did not in any way treat the advertising partnership as different from a law firm.

The Proposed Legal Fiction not only contravenes the direct provisions of RUPA but it is completely inconsistent with the Court's definition of "unfinished business" in *Smith v. Bull.* The Proposed Legal Fiction is a clear violation of the valuable rights that unsecured creditors of law firms currently possess under California law in general and under RUPA in specific.

II.
PROPOSED LEGAL FICTION IS LEGALLY INAPPROPRIATE

California Corporations Code section 16807 provides in relevant part that, upon dissolution, "the assets of the partnership . . . shall be applied to discharge its obligations to creditors[.]" Only if a surplus exists shall any amount be distributed to partners (the "RUPA Distribution Waterfall"). Cal. Corp. Code § 16807(a-b).

There is no statutory basis for differentiating between types of partnerships with respect to what are partnership assets, including but not limited to whether, as a matter of law, a particular asset exists. The RUPA Distribution Waterfall is clear that all partnership assets are to be liquidated, paid to creditors first, and then, in solvent partnership dissolutions, to partners.

California and Federal statutes also govern the priorities of payments made to different creditors of a dissolving law firm. For example, and outside of the bankruptcy context, when an entity is insolvent, any amount owed to the United States government or any agency of the United States has the highest priority. 31 U.S.C. § 3713.) . The holders of secured claims also have property interests in the proceeds of the liquidation of their collateral. *See, e.g.*, Cal. Civ. Code §§ 1214, 2897-2898; Cal. Comm. Code §§ 9203, 9315, 9615.) California Revenue and Taxation Code section 19253 provides that any unpaid California income tax, including interest and penalties, is to be paid first if an entity is insolvent or makes a voluntary assignment of assets. Cal. Rev. & Tax Code § 19253. California Code of Civil Procedure sections 1204 and 1204.5 provide where there is an assignment for the benefit of creditors, claims are to be paid in the following order: (1) certain employee wage or other earnings earned within 90 days of the cessation of business; (2) certain obligations to employee benefit plans; (3) certain deposits received from customers for purchase or lease of any real property, personal property, goods or services; and (4) other general unsecured creditors. Cal. Code Civ. Proc. §§ 1204, 1204.5. The priority of payment to creditors under California law is hereafter and collectively referred to as the "California Statutory Distribution Waterfall."

Consistent with the RUPA Distribution Waterfall, there is nothing in the California Statutory Distribution Waterfall that grants to certain "Power" partners of a dissolving law firm the right to the value of the firm's unfinished business. Yet Respondents advocate just such a right.

If a federal bankruptcy proceeding is filed by or against an entity, the federal Bankruptcy Code has its own set of priorities which govern payments to creditors. Under the Bankruptcy Code, claims are paid in the following order of priority: (1) administrative expenses of the bankruptcy estate; (2) certain employee wage or other earnings earned within 180 days of the bankruptcy petition or cessation of business, whichever is first; (3) certain obligations to employee benefit plans arising within 180 days of the bankruptcy petition or cessation of business, whichever is first; (4) certain deposits received from customers for purchase, lease or rental of property; (5) certain tax claims; (6) general unsecured claims; and (7) equity interests (hereafter, the "Bankruptcy Distribution Waterfall"). 11 U.S.C. §§ 507, 1129.

Just like the RUPA Distribution Waterfall and the California Statutory Distribution Waterfall, there is nothing in the Bankruptcy Distribution Waterfall that bestows a right of distribution of the value of the unfinished business on a few privileged Power partners of a dissolving law firm at the expense of the partnership's creditors.

The Statutory Committee respectfully submits that the Proposed Legal Fiction is actually a backdoor amendment of the RUPA Distribution Waterfall, the California Statutory Distribution Waterfall, and even the Bankruptcy Distribution Waterfall, and manufactures out of whole cloth a new judicially-created super-priority distribution for the benefit of the select group of partners who control the unfinished business and the top law firms, as listed by American Lawyer, who bid on the books of business of those partners (the "Power Partners and Firms").[4]

This new super-priority distribution right primes the distribution rights of the unsecured creditors in direct violation of RUPA.

Set forth below is a table describing the RUPA Distribution Waterfall for an insolvent law firm partnership and the alternative waterfall under the Proposed Legal Fiction:

[4] The four Respondents involved in these related cases, along with the listing on the 2016 American Lawyer ("AM Law") ranking, are: Davis Wright Tremaine LLP (AM Law 104); Foley & Lardner LLP (AM Law 49); Jones Day (AM Law 6); and Orrick, Herrington & Sutcliffe LLP (AM Law 31).

RUPA and California Statutory Distribution Waterfall		Proposed Legal Fiction Waterfall
Secured Creditors		The Power Partners and Firms
Post-Dissolution Costs of Dissolving Partnership		
United States Government Obligations		
California Tax Obligations		
Certain Employee Claims		
Unsecured Creditors (aka the "Least Powerful")[5]		

Preferring the Power Partners and Firms with respect to some specific assets over the interests of creditors is not legally permissible under RUPA.

Creation of the Proposed Legal Fiction is especially inappropriate given that RUPA was adopted after the California Rules of Professional Responsibility. If the California legislature believed that an exception for law firm partnerships was appropriate, it could have excluded law firm unfinished business from RUPA. (California Rules of Professional Conduct generally adopted on November 28, 1988, with other significant changes effective in 1992; RUPA adopted in 1996. This was not done.

Finally, there is no need for such a Proposed Legal Fiction. The Power Partners and Firms have two fail-safes. First, they can amend their respective partnership agreements prior to insolvency to

[5] This table illustrates that the reason the unsecured creditors are defined as the Least Powerful in a dissolution setting is because they are at the bottom of the food chain in every case.

provide partners with a *Jewel*[6] waiver. Second, if, based on the facts, Heller's unfinished business had no value, no damages will be awarded in the forthcoming damages trial.[7]

III.
PROPOSED LEGAL FICTION FACTUALLY FALSE

The Statutory Committee further submits that factually the distinction between law firms and non-law firm partners contained in the Proposed Legal Fiction also is inappropriate, and respectfully requests that the Court consider the following hypothetical, which compares the dissolution of a Porsche repair shop partnership with the dissolution of law firm partnership.

The table below represents hypothetical findings of fact after trial for the Porsche repair shop partnership and a dissolving law firm similar to Heller:

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[6] *Jewel v. Boxer*, (1984) 156 Cal.App.3d 171.

[7] A responsible approach is for the Power Partners and Firms to recognize that their secretaries, paralegals, associates, of counsel, and retired partners, as well as other unsecured creditors, helped build up the reputation of the firm for many years (in Heller's case in excess of 100 years) and these creditors should participate in the final profits from the final matters. A simple amendment to the partnership agreement that requires repayment of an agreed upon percentage, such as 30% of the gross recoveries from unfinished business moved by the Power Partners to the new firms, would provide such warranted protection.

Porsche Repair Partnership	**Law Firm Under Proposed Legal Fiction**
All assets other than the value of unfinished business have been liquidated, and the senior priority creditors, including the secured creditors, the IRS, the priority state taxes, the employee priority claims have been paid. Only the general unsecured creditors remain unpaid	Same
Client 999 signed a retention agreement to rebuild a priceless Porsche that was estimated to incur 1,000 hours of mechanic time at $100 per hour to be supervised by Power Partner 2.	Same except the unfinished project was a 100 hour transactional project and the rate $1,000 per hour.
The Retention Agreement signed by Client 999 and the partnership was on an hourly basis with client ability to terminate at any time for any reason.	Same
The partnership agreement signed by all partners provided that all clients were clients of the partnership firm.	Same
Due to an unforeseen business difficulty unrelated to Client 999's project, the partnership was forced to dissolve after 10% of work was done and paid for on project.	Same
After dissolution, Power Partner 2 became a partner of a competitor of the now dissolved partnership (the "Competitor").	Same
Client 999 signed a new retention agreement with the Competitor charging the same rate. The estimate for the remaining work was 900 hours, and Power Partner 2 remained in charge of the project.	Same, except estimate for remaining work was 90 hours.

Porsche Repair Partnership	Law Firm Under Proposed Legal Fiction
Power Partner 2 continues to work on and supervise the project, and it is completed in the estimated 900 hours and Client 999 pays competitor $90,000.	Same, except hours completed was 90 hours, but because of higher hourly rate, $90,000 is paid when project is completed within the estimated 90 hours
The total cost to the Competitor to complete Client 999's project, including the payment of reasonable compensation to Power Partner 2, was 70% of the gross recovery, or $63,000.	Same.
The value of the unfinished business transferred to the Competitor from the dissolved partnership, but reserved under RUPA for unsecured creditors of the dissolved partnership, was $27,000 (i.e., 900 x 100 x (1-.7) = $27,000).	Same, except the $27,000 in value is retained by the Competitor and/or Power Partner 2.
Net Result Under RUPA Distribution Waterfall	**Net Result Under Proposed Legal Fiction Waterfall**
The Least Powerful (aka the unsecured creditors) share pro rata in the $27,000 value of the unfinished vintage Porsche project. The Power Partner 2 and Competitor receive $0 profit from the unfinished work, but do get reasonable compensation for completing the work and receive the benefit of all future revenues from the same client for future matters.	The Power Partner 2 and AM Law 100 firm he or she joined receive the $27,000 value of the unfinished litigation matter plus reasonable compensation plus the value of all future revenues from the same client for future matters. The Least Powerful receive $0.

There is no true factual distinction between the Porsche repair shop hourly retention and a similar law firm's hourly retention. Upon a partnership's dissolution, the client for an unfinished piece of litigation or a Porsche reconstruction will virtually always follow the chief partner or chief mechanic to whichever firm he or she chooses. Otherwise the client will need to reeducate the new lawyer or mechanic. There is an inherent sunk cost in every unfinished business matter. The existing unfinished business and the anticipation of repeat business from present clients is, for all practical purposes, the largest component of the overall value of either a law firm or Porsche repair shop.

CONCLUSION

The Statutory Committee in conclusion requests that the Court consider the following unfinished business hypothetical:

> Assume that an in-house counsel from New York knows a paralegal in a 100-lawyer law firm in Sacramento. This paralegal has thirty years of experience and worked with the in-house counsel during their prior tenure at an AM Law 100 firm. This relationship leads directly to the Sacramento firm being hired to defend a multi-district class action in San Francisco.
>
> The partner in charge supervises a team of ten lawyers. The retention is on an hourly basis. This case alone accounts for 30% of the total income to the Sacramento firm on an annual basis and is anticipated to continue for another seven years. After approximately 25% of the work is completed, the volume of case specific knowledge acquired by the litigation team would

cost the client in excess of $2,000,000 to educate a replacement litigation team.

Unfortunately, the Sacramento firm becomes insolvent after a failed attempt to open a New York office so that it could bring in more "A" level work similar to that brought in by the super source paralegal. There is no *Jewel v. Boxer* waiver in the Sacramento firm's partnership agreement prior to dissolution, but one is included in the dissolution resolution at the insistence of the senior partners of the firm, including the partner in charge of the defense case. The partner in charge (aka "Power Partner 1") takes unfinished business and the ten junior partners, associates and of counsel working on the project to a Sacramento branch office of an AM Law 100 firm.

Power Partner 1 is able to leverage control of the class action defense project into a pay package that not only pays his reasonable compensation based on hourly work, but 100% of the projected profit that is built into this unfinished defense matter. The source paralegal was never put on the litigation team because of existing work conflicts.

Upon dissolution, the source paralegal loses her job. There is no money to pay her unpaid wages at dissolution, her lost retirement claims, or her WARN Act claim. Losing her anticipated retirement benefits, and

> being 61 years old, she is never able to find an equivalent job.
>
> Uncontested expert testimony presented as part of a motion for summary judgment in a fraudulent conveyance action brought in a subsequent bankruptcy case determines that the cost to complete the class action defense project including the payment of reasonable compensation to the Power Partner is 70% of the gross recovered by the successor firm.

Our super source paralegal is of course an amalgam of all the retired partners, worker partners, senior of counsel attorneys, associates, paralegals, secretaries, back office employees, and even general unsecured creditors, who since 1890 collectively contributed to Heller becoming one of the top law firms in the United States (the "Amalgam"). But for the Amalgam, most, if not all, of the unfinished business at Heller would not have existed.

If the Court adopts the Proposed Legal Fiction, the Power Partners and Firms will reap a windfall from the *Jewel v. Boxer* waver executed in Heller's dissolution agreement. The Statutory Committee whose sole fiduciary duty is to the Amalgam respectfully requests that

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the Court follow RUPA, the RUPA Distribution Waterfall, and the California Statutory Distribution Waterfall as drafted, and reject the Proposed Legal Fiction.

Date: April 20, 2017

FELDERSTEIN FITZGERALD
WILLOUGHBY & PASCUZZI LLP

By:____________________________
Thomas A. Willoughby
Counsel for The Official Committee of Unsecured Creditors of Heller Ehrman, LLP

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately one and one half spaced, 14 point, Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 4536 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on April 20, 2017

FELDERSTEIN FITZGERALD
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By:______________________________
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Case No.: S236208

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PROOF OF SERVICE

I, Lori N. Lasley, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 400 Capitol Mall, Suite 1750, Sacramento, CA 95814. On April 20, 2017, I served the within documents:

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER; *AMICUS CURIAE* BRIEF

☑ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I am employed in the office of a member of the bar of this court at whose direction the service was made.

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

Executed on April 20, 2017, at Sacramento, California.

Lori N. Lasley