Case No. S241324

IN THE SUPREME COURT OF CALIFORNIA

WESTLAKE HEALTH CARE CENTER,
Defendant-Petitioner and Appellant,

v.

DR. LEEVIL, LLC,
Plaintiff-Respondent.

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.

PETITIONER'S REPLY

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*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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I.

REVIEW SHOULD BE GRANTED

In response to the Petition, Respondent has raised yet another issue which is grounds for granting review. Petitioner Westlake Health Care Center ("Petitioner") has already identified three grounds for review by this Court: (1) review is necessary to achieve uniformity of decision as to whether California Code of Civil Procedure section 1161a requires that title be perfected before a notice to quit is served; (2) review is necessary to settle an important issue of law as to the effect of inclusion of a nondisturbance clause on a subordination clause contained in the lease; and (3) review is necessary to settle whether a trial court may summarily rule on issues in an unlawful detainer trial without sufficient notice and opportunity for Petitioner to present full argument and evidence, where jury trial has been demanded. Respondent's contentions regarding the precedential value of an Appellate Division opinion now presents yet another ground for review in this case.

Respondent attempts to argue that there "is no split of authority" because, Respondent contends, the decision in *U.S. Financial, L.P. v. McLitus*, 6 Cal.App.5th Supp. 1, 211 Cal. Rptr. 3d 149 (Cal. App. Dep't Super. Ct. 2016) ("McLitus"), which was ordered published by this Court on December 2, 2016, has been overruled by the decision of the Second Appellate District in the underlying case, *Dr. Leevil, LLC v. Westlake Health Care Center*, 9 Cal. App. 5th 450 (2017) ("*Dr. Leevil*"). (Response to Petition at p. 2). Respondent's contentions are incorrect. The Second Appellate District does not have authority or jurisdiction to overrule a decision by the Appellate Division of the San Diego County Superior Court.

Moreover, Respondent conflates the binding effect of appellate decisions with precedential strength – neither court of appeal decisions nor

appellate division decisions are *binding* on other appellate courts. *In re Marriage of Hayden*, 124 Cal.App.3d 72, 77 (1981) (courts of appeal need not apply *stare decisis* to the holding first published). It is indisputable, however, that the *McLitus* decision is binding on, at the very least, the Superior Courts of the County of San Diego. Cal. Const., art. VI, § 11 ("(b) Except as provided in subdivision (a), the appellate division of the superior court has appellate jurisdiction in causes prescribed by statute."); Cal. Code Civ. Proc. § 77(a) ("In every county and city and county, there is an appellate division of the superior court."). Indeed, the Second Appellate District below effectively conceded that the *McLitus* decision has some precedential value in ordering the parties to brief the effect of the decision on the current appeal. (December 5, 2016, Order Vacating Submission and Order for Supplemental Letter Briefs [submission of the matter vacated for additional briefing on *McLitus* decision]). Furthermore, all cases cited by Respondent in support of its arguments predate the 1998 reorganization of the courts. (2 Witkin, Cal. Proc. 5th Courts § 339 (2008)). As the California Law Revision explained the change, "The appellate division is similar to the existing appellate department, but is intended to have ***greater autonomy*** so that it can exercise a true review function in a unified superior court." (28 Cal. Law Rev. Com. Reports, p. 74 [emphasis added]). No cases have interpreted the precedential effect of the Appellate Division Courts since then. Thus, the precedential authority of a published decision from an Appellate Division is an important question of law that this Court should now settle, as well. Absent such determination, it is clear that the current state of the law is not "uniform" and therefore warrants review by this Court.

Further, Respondent argues that the issue of service of a three day notice to quit in relation to the perfection of title is a "rare event used by very few litigants." However, Respondent states no support for this proposition, and the fact that two similar cases were heard before the Appellate Division in San

Diego and in the Second Appellate District in a relatively short period of time would seem to undercut this proposition.

The issue of whether inclusion of a nondisturbance clause in a lease modifies an "automatic" subordination clause contained in the lease, is more than a "simple matter of contract interpretation" as argued by Respondent. It is a novel issue for the California Courts, and an important issue of law for commercial leases, which commonly include "SNDAs" or subordination, nondisturbance and attornment clauses. The interplay of these common contract clauses is therefore important to the interpretation and enforcement of commercial leases in California, and review is necessary to settle this important question of law.

Finally, Respondent is similarly mistaken as to the import of the issue of whether or not the trial court can summarily rule on the interpretation of SNDA clauses in the Lease Agreement, as well as application of extrinsic evidence regarding the drafting and intent of the parties. The trial court essentially heard a summary judgment on the eve of trial. This deprived Petitioner of its right to put on its case in two ways. First, this gave Petitioner less than 48 hours to draft what amounted to an opposition to a motion for summary judgment. Second, it deprived Petitioner of a jury trial as to the meaning of the clauses in the lease agreement, and the ability to present testimony to clear up any ambiguity. Whether or not a trial court can exercise its discretion as to summarily deprive a party of its right to a jury without proper notice is an important question of public policy.

Therefore, Petitioner's Petition for Review should be granted.

II.

LEGAL DISCUSSION

A. The Court Should Grant Review as There is not a "Uniformity of Decision" in the California Courts as the *McLitus* and *Dr. Leevil* Decisions Directly Contradict Each Other.

California Rule of Court 8.500(b)(1) states that grounds for Supreme Court Review include "When necessary to secure ***uniformity of decision*** or to settle an important question of law." (Emphasis added.) There can be no argument that there are two contradictory published cases in the California Courts on the issue of whether California Code of Civil Procedure section 1161a requires title be recorded before a three-day notice to quit is served following a foreclosure sale. *McLitus* has held that title must be recorded in order that the three day notice be valid, and that "A defective notice cannot support an unlawful detainer judgment for possession." *McLitus* at 151-152. The appellate case underlying this matter, *Dr. Leevil,* directly contradicted *McLitus*, finding that "Because title was perfected before the complaint was filed, the unlawful detainer proceedings were valid." *Dr. Leevil* at 133.

These are two published opinions which directly disagree on the same issue. Respondent attempts to circumvent this obvious split by arguing that *McLitus* is not binding on the Courts of Appeal; this is, of course, true. While *McLitus* may not be binding on the appellate courts, neither is *Dr. Leevil* – appellate decisions are not binding on other appeal courts. *In re Marriage of Hayden*, 124 Cal.App.3d 72, 77 fn. 1 (1981); *accord* Comment to California rule of Court 8.1115 ("It has long been the rule that no published Court of Appeal decision has *binding* effect on any other Court of Appeal' [emphasis in original]). The *McLitus* decision is, however, binding upon, at the very least, the Superior Court of the County of San Diego. Indeed, if the *McLitus* decision

and other decisions of Appellate Divisions of California have no precedential value, there would be no reason for such decisions to be published.

The cases cited by Respondent do not compel a contradictory finding. First, none of them were decided after 1998, the year the appellate divisions of the Superior Courts were created during a reorganization of the courts. (2 Witkin, Cal. Proc. 5th Courts § 339 (2008)). While the Appellate Division does have its roots in the appellate departments, the new appellate division was "intended to have ***greater autonomy*** so that it can exercise a true review function in a unified superior court." (28 Cal. Law Rev. Com. Reports, p. 74 [emphasis added]). Second, the jurisdiction of the Appellate Division is "in all cases in which an appeal may be taken to the superior court or the appellate division of the superior court as provided by law, except where the appeal is a retrial in the superior court." Code Civ. Proc., § 77 (e); *see also* 28 Cal. Law Rev. Com. Reports, p. 74 ("The proposed law would make clear that the appellate jurisdiction of the appellate division covers limited civil cases and misdemeanor and infraction cases—causes traditionally within the original jurisdiction of the municipal courts."). Limited civil cases are not generally appealable to the Appellate Courts. *Anchor Marine Repair Co. v. Magnan*, 93 Cal.App.4th 525, 528 (2001) ("There is no statute authorizing us to hear appeals from the appellate division of the superior court. To the contrary, the general statute conferring jurisdiction on the Court of Appeal expressly excludes appeals in limited civil cases. (Code Civ. Proc., § 904.1, subd. (a).)"). Thus, Respondent's contention that the *McLitus* decision has been overruled by *Dr. Leevil* is without merit. The decision in *Dr. Leevil* was not an appeal from *McLitus*, and the Second Appellate District did not have authority or jurisdiction to overrule *McLitus*. Nor did the Second Appellate District claim to do so in its decision in *Dr. Leevil*. The Second Appellate District merely disagreed with the *McLitus* decision.

Thus, if *McLitus* is binding on the San Diego County Courts, and the Second Appellate Decision in *Dr. Leevil* is binding elsewhere, this would create a non-uniform system of law in California, even if *McLitus* is not binding on other Counties. This non-uniform result is exactly what the review function of the Supreme Court was designed to prevent – the law in San Diego County should not differ from the law in other areas of California.

Moreover, Respondent's statement that "The California Court of Appeal's opinion in this case is the binding precedent on all California Superior Courts, including all appellate departments of the Superior Court, and not the *McLitus* opinion," is not supported by the law it cites. Respondent cites *People v. Lazanis*, 209 Cal. App. 3d 49, 61 (1989) ("*Lazanis*") and *People v. Cowles* 142 Cal. App. 2d Supp. 865, 867 (1956) ("*Cowles*"). The section of *Lazanis* cited by Respondents is a dissent, and does not stand for the proposition that Respondent asserts but instead disagrees with an appellant department decision. *Cowles*, itself an appellate department decision, states that it is not bound by the decision of a neighboring county's appellate department. It does not settle the issue of whether the decision in *McLitus* would be trumped by the precedent of *Dr. Leevil* in the superior courts.

The cases cited by Respondent all considered the opinion of the appellate department in making their determination. In most cases, their refusal to follow the appellate division holding was based on other considerations rather than just the precedential value. For example, in *Suastez v. Plastic Dress-Up Co.*, 31 Cal.3d 774 (1982), the Court found that the cases under consideration were decided before the enactment of a relevant statute. *Id.* at 782. *San Diego White Truck Co. v. Swift*, 96 Cal.App.3d 88, 91(1979) found that, in addition to independently reviewing the decision of an appellate department court, that the case in question raised unique issues. In *Lazanis,* the

appellate court affirmed the decision in the appellate department. *Lazanis* at 59.

As there is not a uniformity of decision in the California Courts, this Court should grant review of this issue.

Further, this is an important issue of law warranting review. Two cases considering the issue of whether title must be recorded prior to service of the three day notice to quit under California Code of Civil Procedure section 1161a(b)(3) have been heard before California courts in short succession. The fact that this issue has not been raised previously in other appellate court decisions does not support Respondent's contention that the issue is a rare issue. The issue would be raised most often in unlawful detainer cases in courts of limited jurisdiction. Thus, it is the Appellate Divisions which would be the courts of first review. Therefore, a published opinion by an Appellate Division, while not directly controlling on other appellate courts, should carry great weight. Finally, because the unlawful detainer statutes require strict compliance,[1] uncertainty in this area of law should be especially disfavored and warrants review to establish certainty and uniformity.

B. Review Should Be Granted on the Proper Interpretation of a Lease with Both a Subordination Clause and Nondisturbance Clause Which are Commonly Included in Commercial Leases.

1. Interpreting a Nondisturbance Clause in Conjunction with a Subordination Agreement is an Issue of First Impression

The issue of interpreting a nondisturbance clause in conjunction with a subordination agreement is a unique one for this court, Respondent's argument that there "are a plethora of well-settled case authority and treatises" notwithstanding. First, treatises are not case law. Second, the case law in

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[1] *Culver Ctr. Partners E. No. 1, L.P. v. Baja Fresh Westlake Vill., Inc.*, 185 Cal. App. 4th 744, 749.

question deals mostly with lien priority and attornment clauses, not nondisturbance clauses. The cases cited by Respondent and *Dr. Leevil* [*Dover Mobile Estates v. Fiber Form Products, Inc.*, 220 Cal. App. 3d 1494, 1499 (1990), *modified* (June 7, 1990) ("*Dover*"), *Miscione v. Barton Development Co.*, 52 Cal.App.4th 1320, 1339 (1997) ("*Miscione*"), and *Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman*, 65 Cal. App. 4th 1469 (1998) ("*Principal*")] did not consider whether a party seeking to enforce an "automatic" subordination clause was also bound by a nondisturbance clause.

2. While this is a Novel Issue for This Court, the Provisions Considered are not Unique, so A Clear Statement of the Law is Important

Respondent's arguments that these are "unique contract provisions" in this case is incorrect. The existence of a nondisturbance clause in conjunction with a subordination clause is not unique. Indeed, SNDA clauses are common in commercial leases, and are commonly included together in commercial leases. *Miscione* at 1339; *Miller & Starr California Real Estate*, 1 Cal. Real Est. Digest 3d, Deeds of Trust § 14. There are unique facts in every case, but this core issue is not unique to this case or this lease, and a contrary interpretation to the one in *Dr. Leevil* would have resulted in a different decision. The effect of a nondisturbance clause on a subordination provision, therefore, is important as a matter of public policy. It impacts a great deal of current commercial leases.

The ruling in *Dr. Leevil* was not, as Respondent tries to argue, unique to the facts of the case, but interpreted a clause the Lease Agreement against the laws of contract interpretation. As this type of clause has previously not been interpreted by the courts, *Dr. Leevil's* interpretation of these clauses will be precedent in any subsequent cases deciding the impact of nondisturbance clauses. *Dr. Leevil's* interpretation, which ignored the nondisturbance

provision while enforcing the subordination provision, runs afoul of the rules of contract 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."). *Dr. Leevil* focused on the "automatic subordination" issue but only impliedly ruled that the nondisturbance clause did not serve to keep the Lease in place. Petitioner is arguing that effect must be given to both the nondisturbance and subordination provisions in the Lease, regardless of which provisions were "invoked" by the lender.

Moreover, the *Dr. Leevil* decision is seemingly contrary to *Miscione* and other cases which say nondisturbance clauses can be interpreted in conjunction with subordination clauses and are enforceable. *Miscione*, *Dover*, and *Principal* all stated that a tenant asked to subordinate its lease may ask for a nondisturbance clause to protect itself from the loss of a lease. *Miscione* at 1327; *Dover* at 1500; *Principal* at 1479. *Miscione* held in dicta[2] that:

> Under a nondisturbance agreement, a "mortgagee covenants 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." (*Foreclosure*, *supra*, at p. 39.) "Nondisturbance is a modern concept. In fact, *Black's Law Dictionary* does not even define the term." (*Ritual Dance*, *supra*, at p. 360.) "Realistically, the concept of nondisturbance is frequently intended to refer not only to nondisturbance of the tenant's right of possession, but also to full recognition of all of the tenant's rights under its lease." (*Ritual Dance*, *supra*, at p. 361.)

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[2] The lease in *Miscione* had a nondisturbance clause, but the case focused on the attornment clause in the lease as the plaintiff landlord was suing the defendant tenant for, among other things, breach of the lease. *Miscione* 1323. Defendant tenant was attempting to assert that the foreclosure of the trust deed had extinguished the lease, not seeking to enforce the lease against a buyer after foreclosure. *Id.*

Miscione at 1327.

The *Dr. Leevil* court, to the contrary, held that "Westlake Health interprets the clause as prohibiting termination of the lease so long as it is not in default. . . . Westlake Health's interpretation fails to reconcile the lease's automatic subordination clause with the permissible subordination clause." *Dr. Leevil* at 131. This holding directly contradicts the law in *Miscione* that a lease can be both subordinate to another lien, and have an enforceable nondisturbance clause. Contrary to the contention that this is a well-settled area of law, the *Dr. Leevil* court created new law that is contrary to the previous law in this area. The Court should grant review to settle this issue.

3. The Decision of the Appellate Court Did Not Turn on Factual Determinations

The determination of whether effect must be given to both the nondisturbance and subordination provisions of the lease is not a factual issue. Indeed, Respondent attempts to insert factual arguments into the *Dr. Leevil* decision where none exist. *Dr. Leevil's* holding was focused on the interplay of the clauses in the lease, and ultimately held that:

> 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 Health's lease was automatically subordinate to TomatoBank's deed of trust. (*Miscione*, *supra*, 52 Cal.App.4th at p. 1328, 61 Cal.Rptr.2d 280.) The trustee's sale extinguished the lease. (*Dover Mobile Estates v. Fiber Form Products, Inc.* (1990) 220 Cal.App.3d 1494, 1498-1499, 270 Cal.Rptr. 183.)
>
> 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, 61 Cal.Rptr.2d 280.) And contract ambiguities are construed against the drafter. (*City of Hope*, *supra*, 43 Cal.4th at pp. 397-398, 75 Cal.Rptr.3d 333, 181 P.3d 142; see also Civ. Code, § 1654.) The trial court correctly construed the subordination clauses against the drafter, i.e., Westlake Health.[4]

Id. at 131. There are only two factual situations which the decision is based on (1) that the lender did not invoke the permissible subordination clause; and (2) that Petitioner drafted the Lease, so any ambiguities were resolved against it.

The case ultimately turns on whether or not the nondisturbance clause should be given equal weight as the subordination clause. This issue did not turn on the facts of the case – indeed, the trial court prevented testimony on the intent behind the provisions.

4. Respondent's Arguments as to the Third Party Issue Go to the Merits of the Issue, Not to Its Importance as a Question of Law

Respondent's arguments as to the third party issue are equally unavailing, as Respondent is simply arguing the merits of the third party issue, rather than its status as an important issue of law. The impact of the *Dr. Leevil* decision is that it essentially states that a party can pick and choose the parts of a contract it wants to enforce. Respondent's ability to enforce the subordination clause is only due to its status 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"). However, the *Dr. Leevil* decision implicitly states that a third

party can ignore certain provisions of a contract if it is a lender coming in after foreclosure. This is contrary to established law on the rights of third parties and directly impacts the rights of commercial tenants and should be reviewed by this Court.

C. The Determination of Whether or Not Petitioner was Denied It's Right to Fully Present its Case Due to the Summary Nature of the Proceedings is an Important Issue of Law as Parties are Entitled to Fair Adversary Proceedings.

Petitioner argues that the actions of the trial court denied it the chance to fully present its case as the trial court 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 of an ambiguous clause in the lease. This was procedurally improper and barred Petitioner from presenting relevant evidence to a jury.

Indeed, the summary nature of proceedings amounted to a belated summary judgment on the part of Respondent, and the trial court treated it as such, with briefings on the issues raised in the 402 Motion. Summary disposition of case in summary judgment is "unusual and drastic" and because of "the importance of safeguarding the adverse party's right to a trial, the summary judgment procedure 'should be used with caution in order that it may not become a substitute for existing methods in the determination of issues of fact.'" *Cottle v. Superior Court*, 3 Cal.App.4th 1367, 1397 (1992). Petitioner, as the non-moving party and defendant, should have been allowed full notice and opportunity to respond to the improper 402 Motion, including presentation of additional arguments, evidence and testimony.

At trial, Petitioner made an offer of proof regarding the intent of the nondisturbance clause in the Lease, but the trial court refused to allow Petitioner to

prevent this testimony and instead ignored the clause on the ground that there was not privity. The Appellate Court, on the other hand, chose to affirm the judgment on the ground that the lease was ambiguous and therefore construed the language against Petitioner, without regard to the intent of the parties to the lease. *Dr. Leevil* at 131.

To the extent there were ambiguities in the lease, Petitioner should have been allowed an opportunity to present evidence on the intent behind the contract to help explain the ambiguities. 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. *Dr. Leevil* at 130. Given the Appellate Court's implied finding that there was an ambiguity, Petitioner's proof should have been evaluated by a jury. *Wolf v. Walt Disney Pictures & Television*, 162 Cal. App. 4th 1107, 1127 (2008) (If there is a dispute as to the meaning of contract terms, and "there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the jury."). As a matter of public policy and in the interest of a fair tribunal, the trial court erred in not allowing Petitioner to present its case in front of a jury. Therefore, this Court should grant review.

III.

CONCLUSION.

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

Dated: June 5, 2017

Respectfully submitted,

Enenstein Ribakoff Lavina & Pham

By: _____

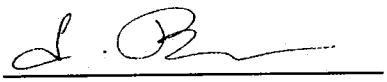
Teri T. Pham, Esq.
Courtney M. Havens, Esq.
Attorneys for Petitioner-Defendant and Appellant

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 4,064 words.

Dated: June 5, 2017



Teri T. Pham

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 June 5, 2017, I served the foregoing document described as: **PETITIONER'S REPLY** 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 5th day of June, 2017 at Los Angeles, California.

Omar Rodriguez