Case No. S156598

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BROWN, WINFIELD & CANZONERI, INC.

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

GREAT AMERICAN INSURANCE COMPANY,

Real Party in Interest/Petitioner.

PETITION FOR REVIEW

After Orders Filed August 28, 2007, and September 12, 2007, in the Court of Appeal
Second Appellate District, Division Three, Case No. B201396
(Los Angeles County Superior Court Case No. BC331601)

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I.

ISSUES PRESENTED FOR REVIEW

1. In the absence of exceptional circumstances, does a "speaking" *Palma* notice - i.e., a court of appeal "order" that purports to notify the parties that the court is considering issuing a peremptory writ in the first instance, but in fact decides the merits of a writ petition and directs the superior court to "change and correct its erroneous order" - violate *Palma v. U.S. Industrial Fasteners* (1984) 36 Cal.3d 171 and real party in interest's due process rights?

2. When an insurance coverage declaratory relief action has been stayed pending the outcome of the underlying action, may a trial court consider the delay in the prosecution of the underlying action as a factor in determining whether or not to lift the stay, especially when the declaratory relief action does not involve the "classic" situation where the declaratory relief action should be stayed as contemplated in *Montrose Chemical Corp. of Calif. v. Superior Court* (1993) 6 Cal.4th 287?

II.

WHY REVIEW SHOULD BE GRANTED

A. "Speaking" *Palma* Notice Procedure

In *Palma*, this Court stated that issuing a peremptory writ in the first instance should be a "rarity." (*Palma, supra*, 36 Cal.3d 171, 179.) This Court further emphasized that this type of procedure is reserved for exceptional cases. (*Id.*, at p. 180.)

In *Ng v. Superior Court*, this Court said that the accelerated procedure authorized in *Palma* should not become "routine." (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.)

In *Lewis v. Superior Court*, this Court amplified on *Palma* by stating that even in cases of apparently clear trial court error, unless there is a real emergency, the court of appeal should refrain from granting a peremptory writ in the first instance without affording the real party in interest a meaningful opportunity to respond. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1236, 1261.)

In this case, the Second District has violated these cases and the important due process principles upon which they are based. This case has been pending for years and there is no emergency. Yet, in response to a writ petition, the Second District issued an order that although dressed-up as a *Palma* notice, in fact decided the merits of the issue raised in the writ

petition. (See Exhibit A to Petition for Review.) The Second District's *Palma* notice characterized the trial court's decision as "erroneous" and strongly encouraged the superior court "to change and correct its erroneous order and to enter a new order in accord with the views expressed herein." Given that language, it is not surprising that *within 24 hours* of the filing of the Second District's speaking *Palma* notice, the superior court reversed itself. In effect, then, the Second District issued a writ without ever affording real party in interest a meaningful opportunity to respond.

This misuse of *Palma* is no isolated occurrence. To the contrary, it appears to have become a routine tool used in the Second District to effectively issue a writ without issuing a writ. For example, in *Smith v. Bayer Corp.* ((2001) 2001 WL 1660064)[1], the trial court vacated its prior order four days after a speaking *Palma* notice was issued by the Second District and, as in the instant case, before opposition to the writ petition was even due. Later, on appeal, the Second District even acknowledged that it erred by issuing a *Palma* notice and ended up having to reverse itself. (*Smith, supra,* 2001 WL 1660064 at p. 14.)

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[1] This unpublished opinion from the Second District, and the ones that follow, are not being cited as precedent. GAIC presents these opinions simply to illustrate what has been occurring in the Second District. (9 *Witkin* Cal. Proc. 4th (1997), § 715, p. 749. [distinguishing between citing unpublished opinions and relying on them].)

In *Chase v. County of Los Angeles* ((2007) 2007 WL 646241), after the denial of summary judgment by the trial court, the moving parties sought a peremptory writ of mandate from the Second District. The Second District issued a "notice of its intention to grant a peremptory writ in the first instance," to which the trial court responded by vacating its order and issuing new orders granting summary judgment to the petitioners. (*Chase v. County of Los Angeles*, *supra*, at pp. 1, 2.)

And there are at least two more instances of this speaking *Palma* notice procedure utilized by the Second District. (*Hill v. County of Los Angeles* (2003) 2003 WL 22022035; *Markey v. Superior Court* (2004) 2004 WL 1576447.)

Accordingly, review should be granted in this case because as a matter of practice, in cases not involving an "unusual urgency," the Second District is issuing speaking *Palma* notices that result in a de facto issuance of a writ without affording the real party in interest a meaningful opportunity to respond. In the exercise of its supervisory authority over the courts of appeal, this Court should grant review to disapprove of this practice because it violates *Palma* and due process rights of real parties in interest.

Here, Great American Insurance Company ("GAIC") was denied its due process rights by the Second District's *Palma* procedure. The Second

District issued its speaking *Palma* notice on August 28, 2007.

The next day, in response to the Second District chararcterizing the superior court's ruling as "erroneous," the superior court vacated its prior order lifting the stay in the present declaratory relief action and entered a new order reinstating the stay. (Exhibit B to Petition for Review.) The superior court complied so quickly (within 24 hours) with the *Palma* notice that GAIC did not have enough time to submit any type of opposition before the relief requested by BWC was granted.[2]

The peremptory writ in the first instance is subject to severe restrictions. As the exception to the rule, the procedure may only be used in the limited situation where "entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue." (*Lewis*, *supra*, 19 Cal.4th 1232, 1241, citing *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1223; quoting *Ng*, *supra*, 4 Cal.4th 29, 35.) Moreover, on those rare occasions where a reviewing court resorts to use of a peremptory writ in the first instance, it is constrained to comply with the procedural safeguards of *Palma* - - **that is, to receive or solicit opposition before directing issuance of the writ**. (Emphasis added.) (*Lewis*, *supra*,

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[2] The Second District's *Palma* order allowed GAIC to file opposition only if the superior court did not reverse itself. Because the superior court reversed itself within 24 hours of the *Palma* notice, GAIC was effectively prevented from opposing the writ petition before it was de facto granted.

19 Cal.4th at p. 1239.)

Opposition from the party adversely affected will determine whether the reviewing court issues a peremptory writ in the first instance or follows the standard operating procedure of using the alternative writ or order to show cause.

> "If the opposition presents any reasonable argument that the applicable law is unsettled or does not govern the precise issue presented in light of the particular undisputed facts, or if the application of legal principles set forth in various sources of law might lead to different results, and there is no compelling need for an expedited decision, the court must follow the usual writ procedure and issue an alternative writ or order to show cause." (*Lewis*, *supra*, 19 Cal.4th at p. 1261.)

First, the *Palma* procedure should never have been used here. Granting relief to BWC was not so obvious that plenary consideration of the issue would not have assisted the Court of Appeal.

Second, even if the *Palma* procedure was appropriate, there were no exceptional circumstances that required immediate attention in this case. The Second District, in issuing its "speaking" *Palma* notice and triggering an about-face by the superior court the next day, failed to give GAIC, the party who was adversely affected by the August 28, 2007, order, any meaningful opportunity to oppose it. When the trial court immediately reversed its prior order (lifting the stay) within twenty-four hours of receiving the Second District's *Palma* notice, GAIC's due process rights

were thereby violated.

Accordingly, the Second Appellate District's orders in this case merit review because:

(1) This Court, in its supervisory role over the courts of appeal, should curb the Second District's apparently routine use of the speaking *Palma* notice procedure to ensure that proper writ procedures are being followed and the due process rights of parties are not being violated; and

(2) GAIC was denied due process when the Second District issued its "speaking" *Palma* notice on August 28, 2007, and the trial court followed the Second District's order immediately thereafter and vacated its prior July 3, 2007, order without affording GAIC a meaningful opportunity to respond.

This Court should grant review to secure uniformity of decision and to settle important questions of law concerning the manner and propriety of use of the *Palma* notice procedure by the courts of appeal. (Cal. Rules of Court, rule 28(b)(1).)

B. *Montrose* Factors Regarding Stay Of Declaratory Relief Action

The instant declaratory relief action involves GAIC's assertion of a coverage defense that its insured, BWC, a law firm, did not timely report

the underlying "claim" within the subject "claims made and reported" policy period. On July 3, 2007, the superior court lifted the stay in the instant action to allow GAIC to proceed with the action. However, the superior court reversed itself on August 29, 2007, in response to the Second District's speaking *Palma* order and the declaratory relief action is now stayed again pending resolution of the underlying malpractice action.

This Court's decision in *Montrose Chemical Corp. of California v. Superior Court* identified the "classic" situation where there is a risk of inconsistent factual determinations that could prejudice the insured and, in that case, the declaratory relief action should be stayed. That type of case is when a third party seeks damages on account of the insured's negligence, and the insurer seeks to avoid providing a defense by arguing that its insured harmed the third party by intentional conduct. (*Montrose Chemical Corp. of California v. Superior Court* (1993) 6 Cal.4th 287, 301-302.) ("*Montrose I*".)

This is not that case. BWC has even previously acknowledged so in its motion to stay papers.

In its August 28, 2007, speaking *Palma* order, the Second District gave a cursory analysis of the propriety of the stay in the instant declaratory relief action. Even though this is not the "classic" situation where a stay is obviously appropriate, the Second District was quick to judge (without even

seeking opposition) that the trial court had erroneously lifted the stay. (Exhibit A to Petition for Review, pp. 2-3.)

Here, the trial court properly lifted the stay because there is no logical relationship between the facts that are to be determined in the underlying action and the facts in the declaratory relief action. The declaratory relief action is rather simple - did BWC timely report the claim to GAIC on June 21, 2004 (during the relevant 2004-2005 policy period)? In determining the answer to this question, GAIC will need to discover when Azusa Pacific University, BWC's client, first made a demand for money or services to BWC.[3] This "fact" is unrelated to any of the underlying claims for breach of contract and legal malpractice, where the parties will seek facts pertaining to the professional conduct of BWC.

Additionally, the superior court was criticized by the Second District for having a concern about the "delays in resolution of the underlying malpractice case" as being a basis for lifting the stay. (Exhibit A to Petition for Review, p. 2.) Although this proposition is technically correct as stated in *Montrose Chemical Corp. of Calif. v. Superior Court* ((1994) 25 Cal.App.4th 902, 909) ("*Montrose II*"), the Court of Appeal in *Montrose II*

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[3] It does not matter in the declaratory relief action whether BWC actually committed malpractice or actually breached the contract. The important fact is whether Azusa ever made any "demands for money or services" to BWC because it was unhappy with BWC's services and, if so, when was the first time Azusa made such a demand.

also somewhat contradicted itself by stating that the trial court "must consider the burden on the carriers." (*Montrose II*, supra, at p. 910.)

In lifting the stay on July 3, 2007, the superior court astutely took into account the delay that had occurred in the underlying action. (Appx. 285-288.) The instant declaratory relief action had been stayed for two years and virtually no progress had been made in the underlying action. Meanwhile, for more than two years, GAIC had been paying significant fees and costs to defend BWC in the underlying action. (Appx. 77.) Prejudice to the insurer - its delay in having its day in court while at the same time paying for the defense of its insured - *should* be a factor that the trial court may consider in determining whether the declaratory relief action may proceed.

Review should be granted to clarify what a court may consider in deciding whether or not to lift the stay in a declaratory relief action. The passage of time should be permitted to be a consideration when the coverage question is not logically related to the issues of consequence in the underlying case.

Accordingly, the Second District's Orders in this case merit review on this additional issue because it will settle an uncertainty as to the application of *Montrose I and II* to "stays" in insurance coverage declaratory relief actions, and will avoid the adverse policy consequences

on an insurer's decision to defend its insured. (Cal. Rules of Court, rule 28(b)(1).)

III.

FACTUAL AND PROCEDURAL BACKGROUND

A. BWC's Representation Of Azusa In The Mt. San Jacinto Litigation

In October 2000, Mt. San Jacinto Community College District ("Mt. San Jacinto") commenced an eminent domain proceeding against Azusa, a private educational corporation, seeking to condemn approximately 30 acres of vacant land owned by Azusa in the Menifee area of Riverside County. The action was entitled *Mt. San Jacinto Community College District v. Azusa Pacific University* (Riverside County Superior Court Case No. RIC 349900.) (Also referred to herein as "the eminent domain proceeding.") (Appendix of Exhibits in Support of BWC's Petition for Writ of Mandate, Prohibition or Other Appropriate Relief ("Appx.") 79.)

In November 2000, Azusa hired the law firm of BWC and one of its attorneys, Edward Szczepkowski, to defend the eminent domain proceeding and represent Azusa in connection with the potential development of the real property that was the subject of the eminent domain proceeding. (Appx. 78, 86-89.)

On December 15, 2000, Mt. San Jacinto deposited into court $1.789

million as "probable compensation" for the property. (*Mt. San Jacinto Community College District v. Superior Court* (2007) 40 Cal.4th 648, 654.)[4]

In October 2001, Mt. San Jacinto applied for a prejudgment order for possession. The trial court issued a prejudgment order for possession, effective upon Azusa's completion of improvements to the property. (*Id.*, at p. 654.)

Mt. San Jacinto took possession of the property in January 2002, after the improvements were completed. Azusa did not move to stay the order for possession on hardship grounds or pending the trial court's adjudication of Mt. San Jacinto's right to take the property. In addition, Azusa did not withdraw any portion of the deposited funds. (*Id.*, at p. 654.)

In February 2002, Azusa petitioned the trial court to increase the deposit of probable compensation from $1.789 million to $4.2 million, on the grounds that the property was worth $4.2 million on December 15, 2000. The trial court denied the petition, and determined that the value of the property on December 15, 2000, and the amount of Azusa's probable compensation, was $1.789 million. (*Id.*, at pp. 654-655.)

Following a bifurcated trial addressing issues of law, the trial court

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[4] The eminent domain action led to a companion inverse condemnation action which became the subject of this Court's opinion in *Mt. San Jacinto Community College District v. Superior Court* ((2007) 40 Cal.4th 648). To the extent facts from that decision are relevant to the instant declaratory relief action, GAIC cites to the Court's opinion herein.

ruled in **June 2002** that Mt. San Jacinto had a right to take the property. As a jury trial on the issue of just compensation approached, the parties filed cross-motions in *limine* to establish the date of valuation. Mt. San Jacinto argued that the date of valuation should be December 15, 2000. Azusa argued that the date of valuation should be the date of trial on the compensation issue, because the property had substantially increased in value since December 15, 2000. (*Id.*, at p. 655.)

The trial court granted Mt. San Jacinto's motion denying compensation to Azusa for the costs of the building and other improvements due to Azusa's failure to comply with the requirements of Code of Civil Procedure § 1263.240. The court also denied Azusa's motion. (Appx. 80.)

B. BWC Agrees To Prosecute The Inverse Condemnation Action At No Cost to Azusa

Immediately after the court's ruling in the eminent domain action denying Azusa compensation for any of its improvements on the subject property, BWC advised Azusa to file a separate inverse condemnation action against Mt. San Jacinto to attempt to recover the value of the improvements. **BWC agreed to prosecute the inverse condemnation action at BWC's "sole expense" and at no cost to Azusa.** The inverse condemnation was then filed by BWC on behalf of Azusa in the Riverside County Superior Court. (Appx. 81.)

C. BWC Tenders the Claim to GAIC in 2004

BWC waited until June 21, 2004, before it tendered the defense and indemnification of the claim made by Azusa to GAIC under Policy Number LPL 540-5563-04 ("the subject insurance policy"). After an investigation and careful consideration, GAIC subsequently issued a reservation of rights letter to BWC under the subject insurance policy for the claims made by Azusa. (Appx. 72.)

D. The Subject GAIC Insurance Policy

GAIC issued the subject insurance policy to BWC for the policy period of February 1, 2004 to February 1, 2005. The policy provided BWC with professional liability insurance under a "claims made and reported" form, meaning that the claim must be made during the policy period and reported in writing to GAIC during the same policy period. The policy also contained, in relevant part, the following insuring provision:

> "Subject to all terms and conditions of this policy, we will pay on your behalf all Damages and Claim Expenses arising out of a Claim or Early Reported Incident **which you first become aware of and you report to us in writing during the Policy Period.**" (Emphasis added.) (Appx. 72)

The subject insurance policy also contained the following definition of "Claim":

". . . **any demand received by you for money or services**: (a) arising out of your acts, errors or omissions in providing Professional Services; or (b) for Personal Injury arising out of your performance of Professional Services." (Emphasis added.) (Appx. 72.)

The subject insurance policy also contained the following coverage exclusion:

". . .6. Any Claim arising out of acts, errors, omissions or Personal Injuries which occurred prior to the effective date of this policy if, on or prior to such date, you knew or had a reasonable basis to believe that a professional duty had been breached or that a Claim would be made." (Appx. 72.)

E. The Legal Malpractice Action (Azusa Pacific University v. BWC)

On March 29, 2005, Azusa filed a Complaint for legal malpractice and breach of contract against BWC. The action was entitled *Azusa Pacific University v. Brown, Winfield & Canzoneri, Inc., et al.* (Los Angeles County Superior Court Case No. BC331055.) (Also referred to herein as "the legal malpractice action.") (Appx. 77-89.) The Complaint alleged, in relevant part, as follows:

"BW&C . . . failed to use the skill and care that reasonably careful attorneys handling similar matters in the community would have used in these circumstances. They should have advised APU (Azusa) not to build or make any other improvements on the 30-acre parcel unless and until the order available under CCP § 1263.240 had been applied for and issued by the court; defendants should have known and made APU fully aware of this statutory procedure for obtaining court approval, and the risks and consequences of failing to do so before APU began construction." (Appx. 83.)

Azusa further alleged that:

"After the court's rulings in the Eminent Domain suit denying APU compensation for any of its improvements on the 30-acre parcel, BW&C advised APU to filed (sic) a second lawsuit for inverse condemnation ("the Inverse action") against Mt. San Jacinto seeking compensation from Mt. San Jacinto for the value of the improvements. **BW&C effectively admitted its prior malpractice in representing APU in the Eminent Domain suit by offering to represent APU in the new Inverse action at no expense to APU.** On that basis, APU authorized BW&C to pursue the Inverse action at BW&C's sole expense. The Inverse action was filed by BW&C on behalf of APU in the Riverside Superior Court as Case No. 382397. . ." (Emphasis added.) (Appx. 81.)

F. The Declaratory Relief Action (GAIC v. BWC)

1. Allegations of the Complaint

On April 8, 2005, GAIC filed the subject declaratory relief action against BWC. GAIC alleged that it does not, and never had, a duty to defend or indemnify BWC under the subject insurance policy against the claims made by Azusa related to BWC's representation of Azusa in the Eminent Domain Proceeding. (Appx. 5.)

The Complaint in the declaratory relief action further alleged that:

"An actual controversy has arisen between GAIC and BWC herein, and each of them, concerning their respective rights and duties under the subject insurance policy issued by GAIC as follows:

(a) GAIC contends that it has no duty to defend BWC from any legal consequences from the claim brought by Azusa against BWC **because BWC failed to timely report the claim to GAIC**; and

(b) BWC contends that GAIC has a duty to defend BWC pursuant to the terms of the subject insurance policy from any and all legal consequences from the claim brought by Azusa against BWC." (Emphasis added.) (Appx. 5, 6.)

2. BWC's Motion to Stay is Granted

On or about June 7, 2005, BWC filed a Motion to Stay in the instant action. (Appx. 11-55.) GAIC filed an Opposition to the motion on or about June 17, 2005. (Appx. 56-102.) On July 11, 2005, the trial court granted the motion. (Appx. 115.)

3. June 11, 2007 Status Conference

At a status conference in the declaratory relief action on June 11, 2007, the trial court scheduled another status conference for July 3, 2007. The court also scheduled an Order to Show Cause hearing for the same date regarding the status of the stay and requested further briefing on the issue of whether the stay should be lifted. (Appx. 116.)

4. July 3, 2007 OSC Hearing

On June 27, 2007, GAIC submitted briefing in support of its position that the stay should be lifted. (Appx. 223-282.) Similarly, on June 27, 2007, BWC filed its own brief in support of the contrary position that the stay should not be lifted. (Appx. 117-222.)

On July 3, 2007, the trial court conducted the Order to Show Cause hearing and ordered that the stay in the declaratory relief action be lifted. A trial date of January 14, 2008, was also set. (Appx. 283.)

5. GAIC Propounds Discovery To BWC

On August 1, 2007, GAIC propounded written discovery to BWC

and noticed three depositions in the case. (Appx. 292-316.)

G. BWC's Petition for Writ of Mandate

On August 17, 2007, BWC filed a Petition for Writ of Mandate, Prohibition or Other Appropriate Relief with the Second District. In the Petition, BWC requested that the Court of Appeal issue an immediate stay of all proceedings in the trial court, including vacation of the trial date and a stay of all discovery, pending the final determination of the Petition. BWC further requested that a peremptory writ of mandate issue in the first instance or, in the alternative, that the Court issue an alternative writ of mandate, prohibition or other appropriate relief directing the trial court to set aside the July 3, 2007 order lifting the stay and to enter a new and different order vacating the trial date and staying all other activity until after conclusion of the malpractice action. (BWC's Petition, p. 11.)

H. The Court Of Appeal's Order Dated August 28, 2007

On August 28, 2007, the Court of Appeal issued an Order notifying the trial court and the parties of the Court's intention to issue a peremptory writ of mandate in the first instance pursuant to *Palma*, directing the trial court to vacate the July 3, 2007, order and to enter an order staying all proceedings pending resolution of the underlying malpractice case. (Exhibit A to Petition for Review.)

The Order further conferred upon the trial court:

> "the power and jurisdiction to change and correct its erroneous order, and to enter in its place a new order in accord with the views expressed herein. If the respondent court vacates the order at issue here and enters an order in compliance with the requirement for a stay of such related actions, a copy of the new order should immediately be forwarded to this court. Upon receipt of the new order, this petition will be dismissed." (Exhibit A, p. 3.)

The Order further stated that if the trial court failed to comply with the directive set forth herein, any opposition to the issuance of a peremptory writ of mandate in the first instance compelling it to do so may be filed on or before September 10, 2007. (Emphasis added.) (Exhibit A, p. 3.)

I. The Trial Court's August 29, 2007 Order

On August 29, 2007, following the Court of Appeal's Order from the day before, the trial court vacated its July 3, 2007, order and entered a new order reinstating the stay of the declaratory relief action pending resolution of the underlying malpractice action.[5] (Exhibit B to Petition for Review.) Therefore, the trial court complied with the Court of Appeal's August 28, 2007, order within 24 hours, and GAIC did not have an opportunity to submit written Opposition to BWC's Petition for Writ of Mandate. As of August 29, 2007, the trial court had already complied with the Court of Appeal's directive.

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[5] According to the Court of Appeal's website, the trial court's August 29, 2007 Order was received by the Court of Appeal on August 29, 2007, the same day the trial court's order was issued.

J. The Court Of Appeal's Order Dismissing The Petition

On September 12, 2007, after having received the trial court's August 29, 2007, order providing BWC with the relief requested, the Court of Appeal dismissed BWC's Petition as "moot." (Exhibit C to Petition for Review.)

IV.

DISCUSSION

A. There Are No "Exceptional Circumstances" In This Case That Warrant The "Speaking" *Palma* Notice Procedure Utilized By The Court of Appeal

In *Palma*, this Court outlined the procedure under which a court may issue a peremptory writ of mandate in the first instance (Code of Civil Procedure § 1088) in lieu of the usual alternative writ procedure. This Court noted that CCP § 1088:

> "requires, at a minimum, that a peremptory writ of mandate of prohibition not issue in the first instance unless the parties adversely affected by the writ have received notice, from the petitioner or from the court, that the issuance of such a writ in the first instance is being sought or considered. In addition, an appellate court, **absent exceptional circumstances, should not issue a peremptory writ in the first instance without having received, or solicited, opposition**

from the party of parties adversely affected." (Emphasis added.) (*Palma*, *supra*, 36 Cal.3d 171, 180.)

This Court also made clear in *Palma* that a peremptory writ in the first instance should not issue unless "it appears that the petition and opposing papers on file adequately address the issues raised by the petition, that no factual dispute exists, and that the additional briefing that would follow issuance of an alternative writ is unnecessary to disposition of the petition." (*Id.*, at p. 178.) This procedure was deemed by this Court as a "rarity." (*Id.*, at p. 179.)

More recently, in *Ng v. Superior Court*, this Court cautioned that the accelerated procedure authorized in Code of Civil Procedure section 1088, and described in *Palma*:

> ". . . is the exception; **it should not become routine**. Generally, that procedure should be adopted only when petitioner's entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue - for example, when such entitlement is conceded or when there has been clear error under well-settled principles of law and undisputed facts - or when there is an unusual urgency requiring acceleration of the normal process. **If there is no compelling temporal urgency, and if the law and facts mandating the relief are not entirely clear, the normal writ**

procedure, including issuance of an alternative writ . . . should be followed." (Emphasis added.) (*Ng v. Superior Court*, *supra*, 4 Cal.4th at p. 35.)

Ng involved an extradited criminal defendant's application for accelerated writ relief directing, in effect, immediate multiple arraignment on charges pending in two California jurisdictions. This Court acknowledged that the Defendant presented the Court of Appeal with a novel contention. Although the relevant facts were generally undisputed, any legal entitlement to immediate multiple arraignments was far from clear. Defendant had been incarcerated in Canada for years, much of the time resisting extradition to California. There was no apparent need for the sudden rush to judgment when he finally was extradited. This Court noted: "[W]e thus doubt that the rare procedure of issuing a peremptory writ in the first instance was appropriate." (*Ng*, *supra*, 4 Cal.4th at p. 34.)

In *Alexander v. Superior Court*, this Court addressed the issue of whether the "rare" procedure of using a peremptory writ of mandate in the first instance was appropriate. (*Alexander v. Superior Court*, *supra*, 5 Cal.4th 1218).[6] The plaintiffs in *Alexander*, alleging medial malpractice, sought to discover defendant physicians' applications and reapplications for

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[6] Disapproved on other grounds in *Hassan v. Mercy American River Hosp.* ((2003) 31 Cal.4th 709.)

staff privileges at defendant hospital. The trial court declined to order discovery, but the Court of Appeal issued a peremptory writ of mandamus in the first instance, directing the trial court to order discovery. (*Id.*, at pp. 1221-1222.)

This Court reversed the court of appeal because none of the requirements referred to in *Ng* were met. The record did not suggest any "unusual urgency" justifying expedited resolution of the writ application, and plaintiffs' entitlement to relief was not so obvious that no purpose could reasonably be served by plenary consideration of the issue, or that the matter involved clear error under well-settled principles of law. (*Id.*, at p. 1223.)

Here, BWC's entitlement to a reversal of the trial court's order lifting the stay was not so obvious that no purpose could reasonably be served by plenary consideration of the issue. The Court of Appeal relied on the *Montrose I and II* decisions in support of its August 28, 2007, order notifying the trial court that it was "considering" issuing a peremptory writ of mandate in the first instance. (Exhibit A to Petition for Review, pp. 2, 3.) A close examination of these two opinions reveal that the trial court's decision to lift the stay was not clearly erroneous.

Interestingly, *Montrose I* identified a classic situation when a declaratory relief action *should* be stayed pending the resolution of the

underlying action:

> "For example, when the third party seeks damages on account of the insured's negligence, and the insurer seeks to avoid providing a defense by arguing that its insured harmed the third party by intentional conduct, the potential that the insurer's proof will prejudice its insured in the underlying case is obvious. This is the classic situation in which the declaratory relief action should be stayed." (*Montrose I, supra*, at p. 302.)

This is not the "classic" case here. Indeed, BWC even acknowledged in its original motion to stay papers that this case is not the "paradigm" case described in *Montrose I.* (Appx. 21-22.)

Both *Montrose I* and *II* acknowledged that there are situations "when the coverage question is logically unrelated to the issues of consequence in the underlying case," and the declaratory relief action may properly proceed to judgment. *(Montrose I, supra,* at pp. 301-302*; Montrose II, supra*, at p. 908.)

Moreover, the underlying facts of the *Montrose* decisions could not have been more different than the case at hand. The *Montrose* cases involved environmental contamination claims in the underlying action and several complicated insurance coverage actions concerning "occurrence" comprehensive general liability policies that spanned a period of more than 20 years.

On the other hand, in the present declaratory relief action, BWC seeks to enforce its coverage defenses related to timing of when a claim was made to BWC. The insurance policy at issue is a "claims made and reported" professional liability insurance policy, not an "occurrence-based" policy. Furthermore, BWC is being sued in the underlying malpractice action for breach of contract and legal malpractice.

Finally, the record in this case did not suggest any "unusual urgency" justifying expedited resolution of the subject writ application. Along the same lines, the Court of Appeal did not cite to any such circumstances as a reason for issuing its August 28, 2007, order.

B. By Using A "Speaking" *Palma* Notice, The Court Of Appeal Effectively Issued The Writ In 24 Hours - With No Meaningful Opportunity for GAIC To Respond

The Court of Appeal in the present action did not issue a peremptory writ of mandate in the first instance typical to the procedure contemplated in *Palma*. Here, the Court of Appeal issued a "speaking" *Palma* notice that notified the trial court that the Court of Appeal was "considering" the issuance of a peremptory writ of mandate in the first instance. (Exhibit A to Petition for Review, p. 1.)

By signaling the trial court of its intentions (but not actually granting the writ petition and, instead, "encouraging" the trial court to comply with the directive), the Court of Appeal effectively deleted the important step of soliciting or receiving Opposition from GAIC. (*Palma, supra*, at p. 180.) The Court of Appeal only requested Opposition if the trial court did not comply with the directive. (Exhibit A to Petition for Review.) Yet, here, the trial court in this case *did* comply with the directive and immediately vacated its July 3, 2007, order and entered a new order within 24 hours of the "speaking" *Palma* notice. (Exhibit B to Petition for Review.)

After the August 29, 2007, order from the trial court was issued, GAIC did not file an Opposition to BWC's Petition because BWC had already obtained the relief that it had sought and the Court of Appeal had already stated that it would be dismissing the Petition as moot. (Exhibit A to Petition for Review.)

GAIC did not have a meaningful opportunity to oppose the Petition - its due process rights were violated because the Court of Appeal did not solicit an Opposition. The Court of Appeal failed to comply with the procedural safeguard of affording the real party in interest a meaningful opportunity to respond before effectively directing the issuance of the peremptory writ of mandate.

C. There Is A Practice In The Second Appellate District That Potentially Sacrifices Due Process For The Sake Of Efficiency

"Efficiency cannot be favored over justice." (*Estate of Meeker* (1993) 13 Cal.App.4th 1099, 1106.) The Second Appellate District is currently the most efficient appellate district at disposing of its appeals.[7] Unfortunately, some of its efficient practices may be costing certain litigants their due process rights.

By issuing a "notice of intention to grant a peremptory writ in the first instance" without soliciting opposition or, in other words, issuing a *Palma* notice that "speaks" to the trial court, the Court of Appeal affords the trial court the chance to reverse itself on its own without the normal alternative writ procedure that would require further briefing and oral argument before the Court of Appeal. If the trial court acts quickly and follows the Court of Appeal's directive, as it did here, the real party in interest does not have a meaningful opportunity to respond. Moreover, when the trial court complies with the *Palma* notice, the Court of Appeal is able to dismiss the Petition for Writ of Mandate as "moot" (as the Court of Appeal did here). By issuing a three-page advisory order without soliciting

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[7] The Second District had 24 fully briefed appeals per 100 appeals disposed of by opinion in 2005-2006, the lowest ratio among the six appellate districts. Moreover, the Second District reported the lowest number of pending fully briefed appeals per authorized justice. (Request for Judicial Notice, Exhibit 1; Statewide Caseload Trends 1996-1997 through 2005-2006, pp. 15-16.)

or receiving opposition, the Court of Appeal is able to circumvent the normal alternative writ procedure that might congest the appellate court's docket and take time away from pending appeals.

It appears that the Second District's practice of issuing *Palma* notices have become more "routine" than the rare exception contemplated by this Court in *Palma* and its progeny. This case is hardly the first time where the Second Appellate District has issued "speaking" *Palma* notices. (Please see *Smith v. Bayer Corp.*, *supra*, 2001 WL 1660064; *Hill v. County of Los Angeles*, *supra*, 2003 WL 22022035; *Markey v. Superior Court*, *supra*, 2004 WL 1576447; *Chase v. County of Los Angeles*, *supra*, 2007 WL 646241.)[8]

It was not the intent of the *Palma* Court for the type of procedure employed in this case to become routine. It was only intended to be a "rarity" in exceptional circumstances.

D. Under the *Montrose I* and *Montrose II* Decisions, The Superior Court Properly Exercised Its Discretion To Lift The Stay

Declaratory relief is appropriate so long as facts to be determined in the declaratory relief action are not the same as the facts to be determined in the liability case. (*Montrose I*, *supra*, at p. 301).

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[8] Again, these unpublished opinions are not being cited for their reliance upon them. GAIC presents these opinions as examples of what has been occurring in the Second District.

"There are at least two exceptions to the general rule barring declaratory relief on the insurer's duty to defend. First, declaratory relief is available if the insurer can establish the lack of coverage by means of facts that the insured does not dispute. Second, declaratory relief is available if the insurer's defense to coverage hinges on factual issues that are unrelated to the issues in the third party liability action. In each of these situations, the duty to defend can be determined without forcing the insured to litigate issues that may arise in the third party action." (*Montrose I, supra*, at pp. 305-306 (Justice Kennard's concurring opinion).)

In situations where (as here) the insurance coverage question is unrelated to the issue in the underlying action, courts have held that it is proper for a declaratory relief action to proceed while the underlying action is still pending. (*Northland Ins. Co. v. Briones* (2000) 81 Cal.App.4th 796, 806-807; *State Farm Mut. Auto. Ins. Co. v. Flynt* (1971) 17 Cal.App.3d 538.)

GAIC's coverage defenses asserted in the instant declaratory relief action are related to the timing of the claim(s) made by Azusa.[9] Based on

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[9] Disclosure of the date of the claim will not reveal any privileged communication. Since Azusa and BWC are adverse, the adversarial "claim" was not confidential. Similarly, whether Azusa's claim was omitted or misrepresented in the GAIC application and/or renewal is not an issue in the underlying legal malpractice case. Because none of these matters are at issue in the underlying action and none

the "claims made and reported" nature of the subject insurance policy, the important coverage question in the present declaratory relief action is when did Azusa communicate its claim (defined in the GAIC policy as "demand for money or services") to BWC? (Appx., pp. 5, 6.)

Discovery in the declaratory relief action is focused on the date and content (i.e., did Azusa demand money or services? if so, when?) of the communications between Azusa and BWC in 2002 and thereafter. The critical inquiry is whether Azusa made a "claim" to BWC prior to the inception of the subject policy period (before February 1, 2004). Specifically, did Azusa demand money or services from BWC at or around the time that BWC agreed to work on the inverse condemnation action at no expense to Azusa (sometime in June or July of 2002)? If Azusa did, in fact, demand money or services from BWC before February 1, 2004, and BWC then waited nearly two years (and two policy periods) to report the claim to GAIC, it was too late.

Simply because GAIC intends to discover the facts relating to the date that Azusa first made a "claim" to BWC is not sufficient overlap to stay the declaratory relief action. The date Azusa demanded money or services from BWC is not an issue in the underlying legal malpractice

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will be determined by the underlying action, there is no prejudice to the insured and GAIC should be permitted to prosecute its declaratory relief action to judgment.

action. The primary issue in the legal malpractice action is whether BWC's failure to make a motion under Section 1263.240 in the Eminent Domain Proceeding before constructing the improvements constitutes malpractice. (Appx. 83.) In the legal malpractice action, Azusa must show that BWC's actions fell below the standard of care for an attorney. On the other hand, BWC will contend that its representation of Azusa met the standard of care. None of these issues will be litigated in the declaratory relief action.

Moreover, the concern about BWC being prejudiced because it would be "litigating on two fronts" is not a substantial factor in this case. BWC is a law firm experienced in litigation. They litigate for a living. Additionally, BWC will not be financially prejudiced in a two-fold manner during the pendency of the two actions because GAIC has been paying (and will continue to pay) for BWC's defense fees and costs in the underlying malpractice action until the coverage issues are decided.

The facts of this case do not present a situation where BWC will be prejudiced in the legal malpractice action due to a factual finding in the declaratory relief action. Therefore, the superior court correctly lifted the stay to afford GAIC an opportunity to litigate the coverage issues.

E. This Court Should Clarify Or Modify The *Montrose* Decisions

Insurance carriers should be entitled to their day in court just like all other litigants. The burden on insurance carriers when faced with paying

the defense fees and costs while at the same time pursuing a declaratory relief action was even acknowledged in *Montrose II*:

> "Notwithstanding this emphasis on the potential prejudice to Montrose, the trial court must consider the burden on the carriers. They have paid millions of dollars for defense costs and they must continue to pay until the underlying actions are resolved unless, of course, they are allowed to litigate the indemnity issues. (*Montrose II*, *supra,* at p. 910.)

Here, in lifting the stay on July 3, 2007, the superior court took into account the delay that had occurred in the underlying action. (Appx. 285-288.) The instant declaratory relief action had been stayed for two years and a trial date in the underlying malpractice action had not even been set. Meanwhile, GAIC had been paying fees and costs to defend BWC in the underlying action that was filed on March 29, 2005. (Appx. 77.)

This Court should modify the *Montrose* decisions to clarify that "delay" can be a factor that the trial court may consider in deciding whether or not to impose a stay (or, alternatively, to lift a stay) in the declaratory relief action. Considerations are already given to an insured's financial burden in fighting a "two-front" war. Similarly, in the situation where there is no clear overlap in the facts between a declaratory relief action and its underlying liability action, the fact that an insurance carrier has had to endure a long delay without having its day in court (all the time paying out substantial defense fees and costs in the underlying action), should be a

further consideration for the trial court when deciding whether a stay is appropriate.

As previously stated, the instant declaratory relief action is not the "classic" or "paradigm" case where the it is clear that the declaratory relief action should be stayed pending the resolution of the underlying action. However, without further guidance from the Court as to which declaratory relief actions should be stayed, the practical effect is that insurance carriers are left to guess as to the outcome.

This type of uncertainty could thus lead to insurance carriers being more prone to denying coverage to their insureds when the coverage question is uncertain. Instead of defending the claim under a reservation of rights with the anticipation that the coverage issues might be litigated expeditiously, carriers might be inclined to "take their chances" and simply deny coverage since any declaratory relief action would likely be stayed pending the outcome of the underlying action. If this trend occurs, insureds would be left without insurance coverage (even under a reservation of rights), and would be less able to defend themselves. Lack of insurance coverage also makes settlement of the underlying action more difficult.

Accordingly, this Court should grant review and further clarify the *Montrose* decisions to modify the factors that a trial court can consider

when ruling on whether or not to lift a stay of a declaratory relief action while the underlying action is pending.

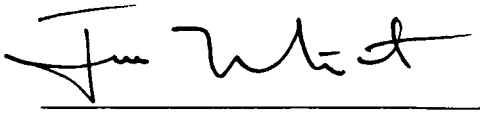
V.

CONCLUSION

For the foregoing reasons, Great American Insurance Company respectfully requests that this Court grant review of the issues presented in the instant Petition.

Dated: September 21, 2007

THOMPSON & ALESSIO, LLP



Kris P. Thompson
Jeffrey K. Miyamoto
Attorneys for Petitioner
Great American Insurance Company

WORD COUNT CERTIFICATE

I certify that this Petition for Review contains 7695 words, including footnotes, as calculated by the WordPerfect application used to create this document.

Dated: September 21, 2007

Jeffrey K. Miyamoto

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BROWN, WINFIELD & CANZONERI, INC.,	B201396
Petitioner,	(Super. Ct. No. BC331601) (Elihu M. Berle, Judge)
v.	ORDER
THE SUPERIOR COURT OF LOS ANGELES COUNTY,	
Respondent;	
GREAT AMERICAN INSURANCE COMPANY,	
Real Party in Interest.	

BY THE COURT:

Petitioner Brown, Winfield & Canzoneri (BWC) seek a writ of mandate directing the trial court to stay all proceedings, including discovery, pending conclusion of an underlying malpractice action. Having reviewed the record, it appears the trial court erred in lifting the stay in Los Angeles Superior Court Case No. BC331601 prior to determination of the underlying action. Accordingly, all proceedings in Los Angeles Superior Court Case No. BC331601 are stayed except as specified herein.

The parties to the petition are notified this court is considering the issuance of a peremptory writ of mandate in the first instance (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171), directing the respondent court to vacate the order entered on

July 3, 2007, and to enter an order reinstating the stay pending resolution of an underlying malpractice action brought against BWC by Azusa Pacific University concerning BWC's representation in an eminent domain proceeding. BWC was insured by Great American Insurance Company (GAIC). GAIC provided a defense to BWC in the malpractice action under a reservation of rights and brought this declaratory relief action. On July 11, 2005, the trial court granted BWC's motion to stay the declaratory relief action pending resolution of the malpractice action.

At a status conference on July 3, 2007, the trial court issued an order to show cause re the status of the stay and directed the parties to file briefs regarding whether the stay should be continued. Following the hearing on the OSC the trial court lifted the stay and set trial for January 14, 2008.

There has been no change in the facts common to both cases since the initial stay order was issued in July 2005. Both cases are based on the facts relating to the representation of Azusa by BWC. An insurer's action seeking a declaration of non-coverage is stayed where the coverage issue may be dependent upon facts at issue in the underlying action. The trial court's concern about delays in resolution of the underlying malpractice case *cannot* serve as a basis for lifting the stay.

"To eliminate the risk of inconsistent factual determinations that could prejudice the insured, a stay of the declaratory relief action pending resolution of the third party suit is appropriate when the coverage question turns on facts to be litigated in the underlying action." (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 301 ("*Montrose I*").)

The need for a stay in such circumstances was further discussed in *Montrose Chemical Corp. v. Superior Court* (1994) 25 Cal.App.4th 902 ("*Montrose II*"). "When the courts talk about prejudice to the insured from concurrent litigation of the declaratory relief and third party actions, they are stating, in effect, that the insurer must not be permitted to join forces with the

plaintiffs in the underlying actions as a means to defeat coverage. Another sort of prejudice occurs when the insured is compelled to fight a two-front war, doing battle with the plaintiffs in the third party litigation while at the same time devoting its money and its human resources to litigating coverage issues with its carriers. And, of course, there is the collateral estoppel issue. If the declaratory relief action is tried before the underlying litigation is concluded, the insured may be collaterally estopped from relitigating any adverse factual findings in the third party action, notwithstanding that any fact found in the insured's favor could not be used to its advantage." (*Id.* at pp. 909-910.)

BWC's " ' "entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue . . . ." [Citation.]' " (*Lewis v. Superior Court, supra,* 19 Cal.4th at p. 1241.) Accordingly, the trial court and the parties are notified it is our present intention to issue a peremptory writ of mandate in the first instance (*Palma v. U.S. Industrial Fasteners, Inc., supra,* 36 Cal.3d at p. 178), directing the respondent court to vacate the July 3, 2007, order and to enter an order staying all proceedings pending resolution of the underlying malpractice case.

We confer upon the respondent court the power and jurisdiction to change and correct its erroneous order, and to enter in its place a new order in accord with the views expressed herein. If the respondent court vacates the order at issue here and enters instead an order in compliance with the requirement for a stay of such related actions (*Montrose I, supra,* 6 Cal.4th at p. 301; *Montrose II, supra,* 25 Cal.App.4th at pp. 909-910), a copy of the new order should immediately be forwarded to this court. Upon receipt of the new order, this petition will be dismissed.

If the respondent court fails to comply with the directive set forth herein, any opposition to the issuance of a peremptory writ of mandate in the first instance compelling it to do so may be filed on or before September 10, 2007. Any reply must be filed on or before September 20, 2007.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 08/29/07			DEPT. 42
HONORABLE ELIHU M. BERLE	JUDGE	N DIGIAMBATTISTA	DEPUTY CLERK
HONORABLE 11	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
C ELLIS/C.A.	Deputy Sheriff	NONE	Reporter

1:30 pm	BC331601	Plaintiff Counsel	
	GREAT AMERICAN INSURANCE VS BROWN WINFIELD & CANZONERI	Defendant Counsel	NO APPEARANCES

NATURE OF PROCEEDINGS:

NON-APPEARANCE CALENDAR (CASE REVIEW)

This court has received the order of the Court of Appeal filed August 28, 2007, notifying this court that the Court of Appeal has the "present intention to issue a peremptory writ of mandate in the first in stance" (Palma v. U.S. Industrial Fasteners (1984) 36Cal.3d 171), directing this court "to vacate the July 3, 2007, order and enter an order staying all proceedings pending resoluation of the underlying mal-practice case." The Court of Appeal further conferred upon this court the power and jurisdiction to change and correct "the July 3, 2007, order and to enter in its place a new order in accordance with the Court of Appeal order.

Based upon the Court of Appeal order of August 28, 2007, this court hereby vacates the order dated July 3, 2007, and enters a new order reinstating the stay of this action pending resolution of the under-lying malpractice case brought against defendant Brown Winfield & Canzoneri by Azusa Pacific University.

A status conference regarding the status of the under-lying case is scheduled for February 29, 2008, at 8:30 a.m. in Department 42. Counsel are to file a report concerning the status of the underlying case five days prior to the status conference.

MINUTES ENTERED
08/29/07
COUNTY CLERK

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BROWN, WINFIELD & CANZONERI, INC. Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; GREAT AMERICAN INSURANCE COMPANY, Real Party in Interest.	B201396 (Los Angeles County Super. Ct. No. BC331601) (Elihu M. Berle, Judge) ORDER

BY THE COURT:

We received a copy of the respondent court's order providing to petitioner the relief requested in the above-captioned petition. Accordingly, the stay entered on August 28, 2007, is lifted and the petition is dismissed as moot.

Great American Insurance Company v. Brown, Winfield & Canzoneri, Inc.
Supreme Court of California No. S_____
Los Angeles Superior Court No: BC 331601
2nd Dist. Court of Appeal No.: B201396

PROOF OF SERVICE

I, the undersigned, declare as follows:

I am over the age of eighteen years and not a party to the case. I am employed in the County of San Diego, State of California, where the mailing occurs; and my business address is 2550 Fifth Avenue, Suite 600, San Diego, CA 92103.

On September 21, 2007, the foregoing document(s) were served as follows:

1. PETITION FOR REVIEW

on the interested party(ies) in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Bruce A. Friedman
BINGHAM MCCUTCHEN LLP
The Water Garden
1620 26th Street, 4th Flr., North Tower
Santa Monica, CA 90404-4060

Attorneys for Brown Winfield, et al
Phone: (310) 907-1000
Fax: (310) 907-2000

Clerk of the Court
Second Appellate District, Division Three
300 S. Spring Street, Floor 2, North Tower
Los Angeles, CA 90013-1213

Clerk of the Court
Superior Court of Los Angeles
111 N. Hill Street
Los Angeles, CA 90012-3014

☒ BY MAIL. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing with the United States Postal Service, and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business pursuant to Code of Civil Procedure §1013a(1).

☐ BY FAX. In addition to service by mail as set forth above, a copy of said document(s) also were delivered by facsimile transmission to the addressee pursuant to Code of Civil Procedure §1013(e).

Executed on September 21, 2007, at San Diego, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

LaVernie Hayes