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13
14 **BEFORE THE INSURANCE COMMISSIONER**
15 **OF THE STATE OF CALIFORNIA**

16 In the Matter of the Accusation Against:

17
18 **PACIFICARE LIFE AND HEALTH**
19 **INSURANCE COMPANY**

20
21 Respondent.
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Case No. UPA 2007-00004

OAH No. 2009061395

**CALIFORNIA DEPARTMENT OF
INSURANCE'S REQUEST FOR
OFFICIAL NOTICE**

Judge: Hon. Ruth Astle

Hrg. Date: December 7, 2009, continuing
from day to day

1 The California Department of Insurance ("Department") hereby requests that official
2 notice be taken of the following documents concerning PacifiCare Life and Health Insurance
3 Company v. Poizner, Los Angeles Superior Court No. BS 121081:

- 4 1. Exhibit A, consisting of a Certified Copy of Order Granting Reconsideration of Demurrer
5 and Sustaining Demurrer Without Leave to Amend, dated November 5, 2009.
- 6 2. Exhibit B, consisting of a Certified Copy of Judgment Dismissing Petition for Writ of
7 Mandate and Complaint for Declaratory Relief and Injunction, dated November 19, 2009.

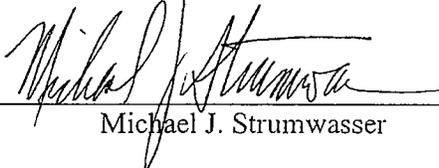
8 Official notice is requested because Respondent PacifiCare Life and Health Insurance
9 ("PLHIC") Company has requested on this record that official notice be taken of a prior order of
10 the Superior Court in the same matter, overruling the Demurrer of the Insurance Commissioner
11 and the Department to PLHIC's Petition for Writ of Mandate and Complaint. The instant request
12 completes the record of this proceeding with respect to that action and corrects PLHIC's
13 representations about the Superior Court action.

14 Date: December 4, 2009

Respectfully submitted,

15 STRUMWASSER & WOOSER LLP

16 CALIFORNIA DEPARTMENT OF INSURANCE
17 LEGAL DIVISION

18 By: 
19 _____

20 Michael J. Strumwasser

21 *Attorneys for the California Department of*
22 *Insurance*

EXHIBIT A

PacifiCare Life and Health Insurance
Company v. Poizner
BS 121081

Tentative decision on motion for
reconsideration: granted; demurrer sustained
without leave to amend

85 1/19
FILED
Superior Court of California
County of Los Angeles

NOV 05 2009
John A. Clarke, Executive Officer/Clerk
By A. Saindo, Deputy
ANNETTE FARRARDO

Respondents Steven Poizner, in his official capacity as Insurance Commissioner, State of California ("Commissioner") and California Department of Insurance ("Department") move for reconsideration of the court's ruling on their demurrer to the Petition for Writ of Mandate filed by PacifiCare Life and Health Insurance Company ("PacifiCare"). The court has read and considered the moving papers, opposition and reply, and renders the following tentative decision.

A. Statement of the Case

Petitioner PacifiCare commenced this proceeding on June 9, 2009, alleging claims for traditional mandamus and declaratory relief.

The Petition alleges in pertinent part as follows. PacifiCare sells life and disability insurance in California. In this action, PacifiCare seeks a determination as to the validity of regulations promulgated by the Commissioner. PacifiCare contends that the regulations codified at 10 CCR sections 2591.3(d) and 2695.2(y) are invalid on their face as inconsistent with the statutory scheme of the Insurance Code.

The Department has issued and currently is actively prosecuting an "Order to Show Cause; Statement of Charges/Accusations; Notice of Monetary Penalty" ("Accusation") dated January 25, 2008, in which the Department seeks to impose a fine on PacifiCare based on these provisions. Under Section 790.035(a) of the Insurance Code, the Commissioner may impose a civil penalty on any person who engages in certain defined unfair or deceptive acts or practices. The civil penalty may not exceed five thousand dollars (\$5,000) for each act, unless the act is "willful." Where the act is "willful," the Commissioner may impose a civil penalty of up to ten thousand dollars (\$10,000) per act. The Commissioner promulgated 10 CCR section 2695.2(y), among other regulations, to implement Insurance Code § 790.035(a). Under this regulation, the Commissioner defines "willful" as an act done or omitted with "a purpose or willingness to commit the act, or make the omission It does not require any intent to violate law, or to injure another, or to acquire any advantage."

PacifiCare contends that 10 CCR section 2695.2(y) directly contradicts multiple Insurance Code statutes and controlling California case law. The California Legislature consistently has defined "willful" conduct as conduct undertaken with a specific intent to cause harm or injury. See Insurance Code §§533, 1850.5, 11750.1(d) and 12340.9.

PacifiCare also believes that the Commissioner has undermined the definition of "willful" in Insurance Code § 533 by promulgating 10 CCR section 2591.3, which imposes penalties for "willful" vicarious conduct. The Commissioner promulgated this provision, among others in the article, to apply "to those provisions of the California Insurance Code that allow the commissioner discretion in pursuing a penalty against an insurer or in setting the penalty amount." 10 CCR §2591.1(a). Accordingly, section 2591.3 sets forth a number of categories that the Department "shall consider" in selecting the appropriate amount of the penalty from the applicable range of penalty amounts that could be assessed. Among these categories that the Department must consider is "[t]he knowledge or willfulness of the non-compliant act." 10 CCR § 2591.3(d). An agent's "willfulness" is expressly imputed to the insurer: "[i]n case of an

employee, agent or contract entity conducting business on the insurer's behalf, knowledge or willfulness shall be attributed to the insurer unless the employee, agent or contract entity has acted outside the scope of the employment, agency or contract." 10 CCR §2591.3(d)(2). This regulation directly contradicts Insurance Code § 533, which expressly provides that "willful" acts do not include vicarious conduct.

PacifiCare seeks mandamus commanding the Commissioner to withdraw 10 CCR sections 2591.3 and 2695.2(y).

B. Applicable Law

Code of Civil Procedure sections 1008(a) and (b) provide for reconsideration or renewal, respectively, of court orders. Section 1008(a)'s motion to reconsider is broader in scope and allows any party affected by the order to seek reconsideration and modification, amendment or vacation of prior orders. Section 1008(b)'s renewed motion is limited to the moving party on the original motion/application. Relief under section 1008(a) is strictly limited; motions to reconsider must be brought within 10 days of service of written notice of the original order. Relief under section 1008(b) is unlimited; the provision contains no express time limits for renewal of a motion.

A motion for reconsideration constitutes the exclusive means for a party seeking modification, amendment or revocation of an order. Morite of Calif. v. Sup. Ct. (1993) 19 Cal.App.4th 485, 490. A party seeking reconsideration of an order based on "new evidence" must present "a satisfactory explanation for failing to provide the evidence earlier, which can only be described as a strict requirement of diligence." Garcia v. Hejmadi (1997) 58 Cal.App.4th 674, 690. A motion for reconsideration cannot be granted on the ground that the court misapplied the law in its initial ruling. Gilberd v. AC Transit (1995) 32 Cal.App.4th 1494, 1500.

Apart from the parties, the court has inherent power to reconsider its rulings in a particular case for any reason. Darling, Hall & Rae v. Kritt, (1999) 75 Cal.App. 4th 1148. The court may even entertain suggestions from the parties for such *sua sponte* reconsideration. However, the inherent power to reconsider, unlike the power under section 1008, is entirely up to the court. Other than a "suggestion," the court need not, and will not, entertain argument from a party as to why it should exercise this inherent power.

C. Analysis

Respondents on demurrer contended that an administrative proceeding is pending against PacifiCare in In the Matter of PacifiCare and Health Insurance Company, and PacifiCare must exhaust its administrative remedies by completing that proceeding before attacking the regulations which may or may not be applied to it in that proceeding.

At the September 3, 2009 hearing on the demurrer, the court issued a tentative ruling to sustain without leave to amend. After hearing oral argument, the court did not adopt its tentative ruling and instead overruled the demurrer. The court stated that it was doing so based on the representation of PacifiCare's counsel, Ronald Kent, Esq., that the Department did not file the accusation against PacifiCare until June 29, 2009, after the June 9, 2009 date on which PacifiCare commenced this proceeding. Respondents' counsel, Diane Shaw, Esq., did not dispute this representation.

Now, the Department seeks reconsideration claiming that there are new facts, unknown to its counsel at the time of the hearing, proving that the representation of PacifiCare's counsel at hearing was false.

1. General Law Concerning Exhaustion

The exhaustion requirement applies to both administrative and traditional mandamus. Exhaustion of administrative remedies is not required for a constitutional challenge to an agency's enabling statute. State v. Superior Court, (1974) 12 Cal.3d 237, 250. Exhaustion also is not required where an agency has commenced an investigation but no accusation has been filed before the constitutional challenge is made; jurisdiction has not attached to the administrative body and exhaustion of remedies is not required. Eye Dog Foundation v. State Board of Guide Dogs for the Blind, (1967) 67 Cal.2d 536, 543.

In Tushner v. Griesinger, (1959) 171 Cal.App.2d 599, 605-06, the court held that a constitutional challenge to a statute sought to be applied and enforced by the agency in a pending administrative proceeding was subject to the exhaustion requirement.

Although Tushner did not address section 11350 or its predecessor statute, Govt. Code section 11440, K. & W. Pharmacy, Inc. v. State Dept. of Social Welfare, (1969) 275 Cal.App.2d 139, 142, did. In K & W, the court considered a claim that a regulation concerning the computation of amounts payable by the state's medical care program was invalid. The court noted the language of section 11440, which is similar to that of section 11350, relying on the declaratory relief provisions of the Code of Civil Procedure. The court noted that one of the settled bases for denying declaratory relief is an accrued cause of action for breach. As the state's claim against the petitioner had accrued, there was no basis for declaratory relief. The court also concluded that the purpose of section 11440 was to enable a person potentially subject to an administrative regulation to determine whether or not the regulation needed to be followed before committing himself to a course of action. As the regulation imposed no duty on the petitioner to fill prescriptions for covered persons, the purpose of section 11440 was not met. The court held that petitioners could defend any subsequent action by the state to recover overpayments.

Additionally, exhaustion is not required for a challenge of a regulation or ordinance as inconsistent with statutory authority where the administrative remedies required by the regulation do not apply if the challenge is upheld. Professional Fire Fighters, Inc. v. City of Los Angeles, (1963) 60 Cal.2d 276, 287. It is also true that the courts are particularly suited to determine whether a regulation conflicts with the agency's enabling statutes, and the agency's expertise is not required for this determination. See Sheyko v. Sanez, (2003) 112 Cal.App.4th 675, 686.

However, it is not true that a challenge to an agency's regulation as inconsistent with its enabling statute may not be made in the first instance to an agency. Indeed, the agency had to make that determination in the first instance in promulgating the regulation. The case law simply states that the courts will not defer to an agency's position on the issue.

Government Code section 11350 ("section 11350") provides that "any interested person may obtain a judicial declaration as to the validity of any regulation ... by bringing an action for declaratory relief in the Superior Court in accordance with the Code of Civil Procedure." By enacting section 11350, the Legislature created an immediate right to a facial challenge of a

regulation. Whether section 11350 authorizes a facial challenge of a regulation's inconsistency without meeting the exhaustion requirement depends on whether the petitioner has ongoing activities subject to regulation.

3. The Tentative's Analysis and the Court's Change at Hearing

From this case law, it was clear at the September 3 hearing that PacifiCare could not make a facial challenge to the regulations based on ongoing activity encompassed by the regulations for which it needed to determine a course of action to follow.

Although PacifiCare contended that it has ongoing activity encompassed by the regulations, it could not show that it needs to make any decision about following a course of action based on them. The regulations concern when an unfair or deceptive act is "willful" under Insurance Code section 790.035(a), and whether the willful acts of agents will be imputed to an insurer. As such, the regulations address only historical violations and the punishment that will be imposed for violations. PacifiCare could not contend that it will change the way it conducts business based on the validity of the regulations. Therefore, section 11350 did not authorize PacifiCare's facial challenge without exhaustion of administrative remedies.¹

This left PacifiCare only with the prospect of a facial challenge to the regulations as inconsistent with statutory authority in order to defend its conduct at issue in the Accusation. This determination turned on whether the Department had filed the Accusation before the challenge was made under Eye Dog, *supra*, 67 Cal.2d at 543.²

The tentative concluded that the Department had served the Accusation on January 28, 2009, and PacifiCare filed this action on June 9, 2009 in the face of that Accusation. Therefore, PacifiCare commenced this proceeding precisely because the Commissioner began enforcement proceedings against it and to enable it to defeat a portion of the claims against it.

At the September 3 hearing, PacifiCare's counsel successfully argued that the Department did not file the Accusation on January 28, 2009. Instead, the Department waited to file the Accusation until after PacifiCare had filed this Petition. Specifically, the Department filed the Accusation with the Office of Administrative Hearings ("OAH")³ on June 29, 2009, twenty days after the Petition was filed. The clear inference from this representation was that the Department filed the Accusation in the face of the Petition.

3. New Facts on the Motion to Reconsider

Respondents argue that the representation of PacifiCare's counsel at the September 3 hearing that it did not file its Notice of Defense until June 29, 2009, the same day on which

¹The regulations have been on the books since 1992. For unexplained reasons, Respondents did not contend that PacifiCare's facial challenge was time-barred.

²The Eye Dog exception applies to constitutional challenges. PacifiCare's facial challenge is to the regulations as inconsistent with enabling authority, but is not a constitutional challenge. It is not clear that Eye Dog would apply to this situation.

³Unfair claims practices proceedings are conducted by the OAH and governed by the Administrative Procedures Act ("APA"), Govt. Code §11400 *et seq.*

Respondents sought a hearing from OAH. They also argue that PacifiCare's contention at hearing that the Department sat on the Accusation for 18 months before seeking a hearing is false.

The facts as currently presented are as follows. The Department served the Accusation on PacifiCare on January 25, 2008. PacifiCare was obligated to file its Notice of Defense within 15 days unless the Department authorized an extension. Govt. Code §11506(b). PacifiCare requested an extension to discuss settlement which the Department granted. The settlement discussions occurred from January 2008 to March 2009, with several more extensions of time for the notice of defense and discovery granted at PacifiCare's request.

By March 2009, it was clear that no settlement would be reached. About that time, the Department learned of a possible conflict of interest by PacifiCare's counsel. The Department objected and the parties negotiated a conflict waiver based on PacifiCare's hardship claim that it would suffer a hardship in changing counsel after more than a year of involvement in the administrative process. The waiver agreement was completed on June 2, 2009.

The next day, June 3, 2009, PacifiCare filed its Notice of Defense with the Department. On June 5, 2009, the Department propounded discovery requests on PacifiCare. On June 9, 2009, PacifiCare file this Petition.

PacifiCare argues that the facts that it served its Notice of Defense on June 3, the settlement discussions, and the June 5 discovery requests are not "new facts" justifying reconsideration. In any event, the Attorney General's explanation that she did not know these facts was not justified because PacifiCare's opposition to the demurrer squarely placed the commencement of the administrative proceeding at issue.

The court does not agree with PacifiCare. The Department's counsel could have been better versed in the facts concerning commencement of the proceeding, but the fact is that PacifiCare's counsel led the court to believe at hearing that the Department sat on the administrative proceeding for 18 months. The Department is entitled to present new facts in a motion to reconsider to show that this is not true. Even if the Department was not so entitled, the court would *sua sponte* reconsider its decision based on the parties' actions over that 18 month period.

PacifiCare also argues that these new facts are irrelevant on demurrer because the court cannot consider facts not alleged in the Petition.

PacifiCare is correct that facts outside the Petition cannot be considered, but that argument proves too much. The Petition alleges that the Department began prosecuting the Accusation on January 25, 2008. ¶8. Based solely on the Petition's allegations, the demurrer should have been sustained. The court attempted to bypass an issue of sustaining the demurrer, granting PacifiCare leave to amend, and overruling a subsequent demurrer based on the representation of PacifiCare at the hearing that the Accusation was not filed until late June 2009 and the Department sat on the matter for 18 months.

Plainly, the court's effort to save time and focus on the merits was a mistake. But having received the benefit of that mistake, PacifiCare can hardly complain that the court considers the facts newly presented by the Department. In any event, the court is not considering these facts for purposes of ruling on the demurrer, but rather on leave to amend as discussed below.

4. Significance of the New Facts and Law

PacifiCare also argues that the new facts are irrelevant under Eye Dog. It argues that an administrative proceeding begins "by filing an accusation." Govt. Code §11503. Insurance Code section 790.05 sets forth the steps the Commissioner must take to initiate a proceeding, and they include service of the Accusation and a notice of hearing for the purpose of determining whether the Commissioner shall order the person to pay a penalty. PacifiCare points out again that the Department did not ask OAH for a hearing until June 29, 2009, and the administrative proceeding did not begin until then.

The Department effectively shows this position is wrong. The proceeding began when the Accusation was served on PacifiCare. This is shown by Govt. Code section 11503's requirement that a hearing "shall be initiated by filing an accusation" and Govt. Code section 11506(b)'s requirement that the Notice of Defense be filed with the agency within 15 days.⁴ The Department, not OAH, is the agency before which the Accusation is pending and where both the Accusation and Notice of Defense are filed. The reason why section 11503 does not mention where the accusation should be filed is that the agency's issuance of the accusation is its filing.⁵

The court made an error of law in concluding that the Department's filing of the Accusation with OAH meant anything. The OAH conducts many hearings under the APA because most state administrative agencies do not have the ability to conduct their own hearings. *See* Govt. Code §11502. But OAH is not the agency before which the proceeding is filed, and it is not involved until the agency assigns the case to it, usually after the notice of defense has been filed. The governing date is the date that a pleading was filed with the agency, not with OAH. Cal.Admin. Hearing Practice (Cont. Ed. Bar 2d ed. 2008) §3.26, p.162.

The motion to reconsider is granted. The new facts and citation of Govt. Code section 11506 demonstrate that the Accusation was filed, and the proceeding against PacifiCare began, in January 2008. The Department did not sit on the proceeding for 18 months, and even if it had, PacifiCare cannot rely on the Eye Dog exception to justify this mandamus proceeding. Even if the new facts and law did not warrant reconsideration, the court would reconsider its decision *sua sponte*. PacifiCare must exhaust its administrative remedies and complete the administrative hearing before seeking judicial relief.

5. Remedy

The question is what remedy to impose? The court cannot accept these new facts as part of a ruling on demurrer. When the court accepted the representation of PacifiCare's counsel at the September 3 demurrer hearing, it was essentially taking an offer of proof from PacifiCare's counsel at the September 3 hearing that it could amend the Petition to show that exhaustion was not required. The Department has now shown that offer of proof is not true and that amendment could not be permitted.

⁴Govt. Code section 11506 is a statute not cited to the court on demurrer, or at least the court was not aware of it.

⁵As the Department argues, Insurance Code section 709.05 is not inconsistent with this conclusion as it merely sets forth the procedures that the Department must follow in bringing an enforcement action under the Unfair Practices Act.

The motion to reconsider is granted, and the demurrer is sustained without leave to amend.

~~_____~~
~~_____~~
~~_____~~
~~_____~~



I certify that this is a true and correct copy of the original ORDER on file in this office consisting of 1 pages. JOHN A. CLARKE, Executive Officer/Clerk of the Superior Court of California, County of Los Angeles.
Date: NOV 23 2009 By: [Signature], Deputy

D. KNOWLES

EXHIBIT B

ORIGINAL

FILED
Superior Court of California
County of Los Angeles

NOV 19 2009

John A. Clarke, Executive Officer/Clerk
By ~~John A. Clarke~~, Deputy
ANNETTE FAJARDO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

**PACIFICARE LIFE AND HEALTH
INSURANCE COMPANY,**

Plaintiff and Petitioner,

v.

**STEVE POIZNER, in his official capacity as
Insurance Commissioner for the State of
California; and CALIFORNIA
DEPARTMENT OF INSURANCE,**

Defendants and
Respondents.

BS121081

**JUDGMENT DISMISSING PETITION
FOR WRIT OF MANDATE AND
COMPLAINT FOR DECLARATORY
RELIEF AND INJUNCTION**

The above-entitled matter came on for hearing on Defendants' and Respondents' Motion for Reconsideration of Demurrer, on November 5, 2009, before the Honorable James C. Chalfant, in Department 85 of the above entitled court.

Sonnenschein, Nath & Rosenthal, LLP, by Ronald D. Kent and Steven A. Velkei, appeared on behalf of Plaintiff and Petitioner Pacificare Life and Health Insurance Company. Edmund G. Brown Jr., Attorney General of the State of California, by Diane Spencer Shaw and Christine

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1 Zarifian, Deputy Attorneys General, appeared on behalf of Defendants and Respondents Steve
2 Poizner, in his official capacity as Insurance Commissioner for the State of California; and
3 California Department of Insurance.

4 The Court granted Defendants' and Respondents' Motion for Reconsideration of Demurrer
5 and sustained the demurrer without leave to amend.

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

7 1. The Petition for Writ of Mandate and Complaint for Declaratory Relief and Injunction is
8 dismissed with prejudice. *aff demurrer sustained without leave to amend.*

9 2. Defendants and Respondents Steve Poizner, in his official capacity as Insurance
10 Commissioner of the State of California, and California Department of Insurance are awarded
11 costs in the amount of _____

12
13 Dated: _____

11/19/09

J. Chalfant
The Honorable James C. Chalfant
Judge of the Los Angeles Superior Court

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: PacificCare Life and Health Insurance Company v. Steve Poizner

Case No.: BS121081 (Los Angeles Superior Court)

I declare:

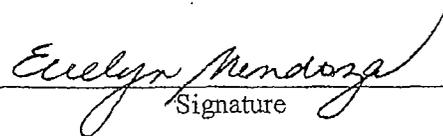
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On November 16, 2009, I served the attached **JUDGMENT DISMISSING PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTION** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Ronald D. Kent, Esq.
Sonnenschein Nath & Rosenthal LLP
601 South Figueroa Street, Suite 2500
Los Angeles, CA 90017-5704
Telephone: (213) 882-5000
Fax: (213) 882-0300
E-Mail:
rkent@sonnenschein.com
acahill@sonnenschein.com

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 16, 2009, at Los Angeles, California.

Evelyn Mendoza
Declarant


Signature

PROOF OF SERVICE

Re: *In the Matter of PacifiCare Life and Health Insurance Company*
File No. UPA 2007-00004
OAH No. 2009061395

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 10940 Wilshire Boulevard, Suite 2000, Los Angeles, California 90024.

On, **December 4, 2009**, I served the foregoing document(s) described as **CALIFORNIA DEPARTMENT OF INSURANCE'S REQUEST FOR OFFICIAL NOTICE** on all appropriate parties in this action, as listed, by the method stated.

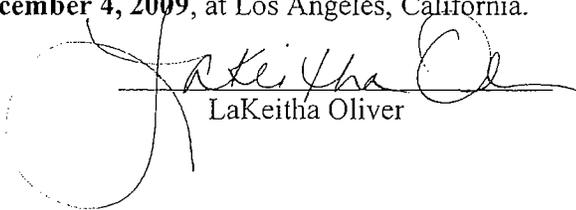
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If electronic-mail service is indicated, by causing a true copy to be sent via electronic transmission from Strumwasser & Woocher LLP's computer network in Portable Document Format (PDF) this date to the e-mail address(es) stated, to the attention of the person(s) named.

If U.S. Mail service is indicated, by placing this date for collection for mailing true copies in sealed envelopes, first-class postage prepaid, addressed to each person as indicated, pursuant to Code of Civil Procedure section 1013a(3). 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 at Los Angeles, California, 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 contained in the affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **December 4, 2009**, at Los Angeles, California.


LaKeitha Oliver