D072378

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

JOSE LUIS MORALES, DONALD SCHMITTER, ARTHUR SENTENO, AND SHAYLEE ZELLER

Plaintiffs and Appellants,

v.

22nd DISTRICT AGRICULTURAL ASSOCIATION

Defendant and Respondent.

After An Appeal From the Superior Court For the State of California, County of San Diego, Case Number 37-2013-00040938-CU-OE-CTL, The Honorable Joel R. Wohfeil

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APPLICATION OF LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES FOR LEAVE TO FILE AMICI CURIAE BRIEF; PROPOSED AMICI CURIAE BRIEF BY LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENT 22ND DISTRICT AGRICULTURAL ASSOCIATION

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Pursuant to California Rules of Court, Rule 8.200, subdivision (c), the League of California Cities (hereinafter, the "League") and the California State Association of Counties (hereinafter "CSAC") hereby request leave from this Court to file the accompanying brief as amici curiae in support of Respondent 22nd District Agricultural Association (hereinafter "Respondent"). This application is timely based on this Court granting the League and CSAC an extension of time to and including April 23, 2018 in which to file it. No persons or entities other than the League, CSAC, and

their counsel made a monetary contribution to the preparation or submission of this amici curiae brief. The brief was authored in its entirety by the League, CSAC, and their counsel.

A. The Amici Curiae

The League is an association of 474 California cities dedicated to protecting and restoring local control of municipal affairs to provide for the public health, safety, and welfare of city residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the state. The Legal Advocacy Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as having such significance.

CSAC is a non-profit corporation whose membership consists of all 58 California counties. CSAC sponsors a Litigation Coordination Program administered by the County Counsels' Association of California and overseen by CSAC's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case directly impacts counties of this State.

B. Interest of the Amici Curiae

The issues presented in this case are common and relevant to all California cities and counties. Specifically, the League and CSAC have an interest in the issue of whether general provisions of the Labor Code, from which public entities are exempt, become applicable to those public entities when they enter into in an allegedly joint employer relationship with a private entity.

The outcome of this case has the potential to render provisions of the Labor Code applicable to Respondent and other public entities, despite the fact those Labor Code provisions currently are inapplicable to them, solely as a result of an alleged joint employer relationship with a private sector entity. Such an outcome will result in the potential for public entities across the state incurring substantial liabilities and will infringe on the sovereign authority of such entities. Additionally, such a result would lead to a dramatic decrease in the ability and willingness of cities, counties, or other public entities to undertake joint endeavors with private sector entities. As associations made up entirely of California local government entities, the amici have an interest in making the argument to this Court that public entities previously exempted from certain provisions of the Labor Code should remain exempt from such statutes regardless of the existence of an alleged joint employer relationship with a private sector entity.

C. Conclusion

For all of the foregoing reasons, amici curiae the League of California Cities and the California State Association of Counties respectfully request leave to file the accompanying amici curiae brief in this action.

DATED: April 23, 2018

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation

By: /s/ David W. Tyra
David W. Tyra
Attorneys for Amici Curiae League of California Cities and California State Association of Counties

AMICI CURIAE BRIEF BY LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENT 22ND DISTRICT AGRICULTURAL ASSOCIATION

I.

INTRODUCTION

In its earlier decision in this case, this Court held Labor Code section 510 is inapplicable to Respondent due to its status as a public entity. (*Morales v. 22nd Dist. Agricultural Assn* (2016) 1 Cal.App.5th 504 ("*Morales I*").) The issue now pending before this Court is whether, despite that earlier holding in *Morales I*, section 510 can be applied to Respondent based on allegations it was a joint employer with a private sector entity. Appellants seek to apply section 510 to Respondent vicariously through an

alleged joint employer relationship with a private sector entity despite the fact Respondent cannot independently be held liable for a violation of that code section.

Appellants' contention that allegations of a joint employer relationship establish a sufficient basis for applying Labor Code section 510 to Respondent is contrary to recent appellate decisions holding that an employer cannot be vicariously or jointly and severally liable for Labor Code violations that do not impose such liability through their express terms. These cases hold that unless an employer is independently liable for the alleged Labor Code violations, liability cannot be imposed merely as a result of a joint employment relationship. Because Respondent cannot be independently liable for violating Labor Code section 510 because it is a public entity, liability for alleged violations of that code section cannot be imposed based on allegations of a purported joint employment relationship with a private sector entity.

From amici's perspective, applying otherwise inapplicable Labor Code sections to public entities based on allegations of a joint employer relationship poses a substantial risk of infringing on the sovereign authority of public entities and jeopardizing public-private partnerships that are beneficial to the residents of amici's member cities and counties. Such a result in this case would not only be contrary to the established case law, but also contrary to sound public policy. Accordingly, amici urge this Court to

find Appellants' allegations of a joint employer relationship insufficient, as a matter of law, to impose liability on Respondent for alleged violations of Labor Code section 510 and to thereby affirm the trial court's judgment in favor of Respondent.

II.

STATEMENT OF FACTS

Amici curiae the League and CSAC hereby adopt the Factual Background provided by Respondent in its Brief filed with this Court. The Respondent's Brief provides a complete and accurate discussion of the facts in this case.

III.

LEGAL ANALYSIS

A. This Court Already Has Determined That Respondent, As A Public Entity, Is Exempt From Labor Code Section 510.

In its prior decision in *Morales I*, this Court concluded that Labor Code section 510 does not apply to Respondent. (*Id*. at p. 538.) That holding was the result of this Court's application of the decision in *Johnson v. Arvin-Edison Water Storage District* (2009) 174 Cal.App.4th 729, 736-739 ("*Johnson*"), which held that Labor Code section 510 is inapplicable to public entities. In finding Labor Code section 510 inapplicable to Respondent, this Court also relied on the language of IWC Wage Order No. 10, which provides that those provisions of the wage order relevant here are inapplicable to "any employees directly employed by the State or any

political subdivision thereof, including any city, county, or special district." (Cal. Code Regs., tit. 8, § 11100, subd. 1(C); see *Morales I, supra*, 1 Cal.App.5th at p. 541.)

Appellants now attempt to avoid this Court's prior holding by misapplying the joint employer doctrine. Appellants allege in their amended complaint that Respondent entered into a joint employment arrangement with a private sector employer. Appellants contend these allegations are sufficient, as a matter of law, to state a claim against Respondent for violating Labor Code section 510, a statute this Court already has ruled is inapplicable to Respondent. Appellants' misapplication of the joint employer doctrine is contrary to case law and without legal support. Accordingly, this Court should affirm the judgment entered in favor of Respondent following the trial court's ruling sustaining Respondent's demurrer to Appellants' amended complaint without leave to amend.

B. The "Joint Employer" Doctrine Cannot Be Used to Render A Statute Applicable to a Public Entity When that Statute Is Otherwise Inapplicable.

Joint employment "occurs when two or more persons engage the services of an employee in an enterprise in which the employee is subject to the control of both." (*In-Home Supportive Services v. Workers Comp. Appeals Bd.* (1984) 152 Cal.App.3d 720, 732.) Appellants argue their allegation of such a relationship between Respondent and a private sector entity is sufficient to subject Respondent to liability for purported violations

of Labor Code section 510. Appellants' argument, however, is contrary to recent cases finding that an entity in a joint employment relationship may be liable for Labor Code violations *only* if the employer would be *independently* liable under the specific statute at issue. (See *Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 333-334 ("*Noe*"); *Serrano v. Aerotek, Inc.* (2018) 21 Cal.App.5th 773, 784-785 ("*Serrano*").)

Parties are not jointly and severally liable under provisions of the Labor Code that do not otherwise provide for joint and several liability, nor are agency principles applicable for purposes of rendering a public entity subject to a labor code provision from which it is exempt. (See *Noe, supra,* 237 Cal.App.4th at pp. 333-334.) In *Noe,* plaintiffs filed suit against three employers for, among other things, willfully misclassifying them as independent contractors in violation of Labor Code section 226.8. (*Id*. at p. 319.) Labor Code section 226.8 makes it unlawful for an employer to "engage in" a "[w]illful misclassification of an individual as an independent contractor." (Lab. Code, § 226.8 subd. (a)(1).) Only one of the employers misclassified the employees as independent contractors, but the plaintiffs argued the remaining two employers were liable based on "principles of agency and joint and several liability." (*Noe, supra,* 237 Cal.App.4th at p. 332.) The appellate court rejected this theory, stating "[w]e are aware of no authority suggesting that, under California law, joint employers are generally treated 'as if they were each other's agents' or that joint employers are

normally held jointly liable for Labor Code violation committed by a co-employer." (*Ibid*.)

The plaintiffs in *Noe* relied on *Martinez v. Combs* (2010) 49 Cal.4th 35 ("*Martinez*"), a case in which plaintiffs alleged multiple defendants were liable for various Labor Code violations based on a purported joint employment relationship. As the court in *Noe* recognized, however, *Martinez* does not support a theory that defendants are liable for Labor Code violations on the basis of a joint employment relationship. (*Noe, supra,* 237 Cal.App.4th at p. 333.) Rather, "*Martinez* merely confirms the unremarkable proposition that to establish employer liability for a Labor Code violation, the claimant…must demonstrate the employer violated the terms of the specific Labor Code provision at issue." (*Ibid*.)

As the *Noe* court found, when the Legislature intends to impose joint and several liability, it does so via express language in the statute, such as in Labor Code sections 2753[1] and 2810.3.[2] In contrast to such provisions, section 226.8, the section at issue in *Noe*, lacks express language imposing

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[1] Labor Code section 2753 provides: "A person who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for that individual shall be jointly and severally liable with the employer if the individual is found not to be an independent contractor." (Emphasis added.)

[2] Labor Code section 2810.3 provides: "A client employer shall share with a labor contractor all civil legal responsibility and civil liability for all workers supplied by that labor contractor" for the payment of wages and failure to secure workers' compensation coverage. (Emphasis added.)

joint and several liability. As a result, courts should not "presume that the Legislature intended joint and several liability to apply." (*Id*. at p. 333.)

While the *Noe* court concluded liability under Labor Code section 226.8 may "extend to employers who know that a co-joint employer has willfully misclassified their joint employees and fail to remedy the misclassification" (*Noe, supra,* 237 Cal.App.4th at p. 328), it ultimately determined that "whether an employer is liable under the Labor Code depends on the duties imposed under the particular statute at issue," not as a result of the existence of a joint employer relationship. (*Noe, supra*, 237 Cal.App.4th at p. 334.)

Recently, the Court of Appeal in *Serrano* followed *Noe* under similar factual circumstances, holding that an employer was not liable for failing to provide meal breaks under Labor Code sections 226.7 and 512 based solely on the violations of its co-employer. (*Serrano v. Aerotek, Inc., supra,* 21 Cal.App.5th at pp. 784-785.) In *Serrano,* Aerotek, Inc., a staffing agency and the plaintiff's employer, placed plaintiff as a temporary employee with Bay Bread LLC, a food production facility. (*Id.* at p. 776.) The contract between Aerotek and Bay Bread stated that temporary employees would be under Bay Bread's management and supervision, but Aerotek was responsible for establishing policies and training applicable to its temporary employees on assignment. (*Ibid*.)

Plaintiff sued both Aerotek and Bay Bread for, among other things,

failure to provide meal periods under Labor Code sections 226.7 and 512. (*Id*. at p. 778.) The facts in the case established that Aerotek provided its meal period policy to temporary employees and trained them on it during orientation. (*Id*. at p. 781.) The policy required them to notify Aerotek if they believed they were being prevented from taking meal breaks. (*Ibid*.) The plaintiff never informed Aerotek she was not receiving breaks or meal periods while working for Bay Bread. Furthermore, there was no evidence Aerotek took any actions to prevent her from taking lawful meal breaks. (*Id*. at pp. 778.) On this basis, the court of appeal affirmed the trial court's decision that Aerotek had complied with its obligations with regard to meal breaks in accordance with state law. (*Id*. at p. 780, citing *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.)

In *Serrano*, plaintiff attempted to impose vicarious liability on Aerotek for meal period violations committed by Bay Bread as a joint employer. (*Id*. at p. 782-783.) The plaintiff based this argument on a footnote in *Noe* in which the court commented that Labor Code sections such as 226.7 and 512 (the code sections at issue in *Serrano*) impose a "duty on every employer" because they do not require a showing of *mens rea* ("willfulness"), unlike section 226.8 (the code section at issue in *Noe*). (See *Noe*, *supra*, 237 Cal.App.4th at p. 334, fn. 10.) The *Serrano* court rejected this argument, finding the footnote in *Noe* was dicta and inconsistent with the California Supreme Court's decision in *Brinker* to the extent it suggested

the imposition of liability on an employer who makes meal periods available to its employees. (*Id*. at pp. 783-784; see *Brinker, supra*, 53 Cal.4th at p. 1040.) The *Serrano* court concluded, "*Noe* is not authority for the proposition that an employer that has fulfilled its own duty to provide meal periods is nevertheless liable for any meal period violation by a co-employer." (*Id*. at p. 784.) Of critical importance for this case, the *Serrano* court reaffirmed the principle from *Noe* that "whether an employer is liable for a co-employer's violations depends on the scope of the employer's own duty under the relevant statutes, not 'principles of agency or joint and several liability.'" (*Id*. at p. 783 [citing *Noe, supra*, 237 Cal.App.4th at pp. 333-334].)

Following the decisions in *Noe* and *Serrano*, it is clear that an alleged joint employer may be liable for purported violations of the Labor Code only if the employer would be *independently* liable under the specific statute at issue and not on the basis of a joint employer relationship. When applied to the present case, it is apparent that Appellants' allegations of a joint employment relationship in their amended complaint are insufficient, as a matter of law, to impose liability on Respondent, a public entity, for violations of Labor Code section 510 because there is no basis for *independent* liability under the section due to the fact that section 510 is inapplicable to Respondent, as this Court already has held (*Morales I, supra*,

1 Cal.App.5th at p. 538.)[3]

C. Local Governments Will Be Harmed If They Become Subject to Labor Code Sections From Which They Otherwise Are Exempt Simply By Entering Into Business Relationships With Private Entities.

When applying a statute in circumstances in which that application is uncertain, courts "may also consider the consequences of a particular interpretation**,** *including its impact on public policy*." (*Martinez v. Combs* (2010) 49 Cal.4th 35, 50 [citing *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190] [emphasis added]; see also *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387 ["Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation"].) In this case, finding that Labor Code section 510, which is inapplicable to public entities based on the holdings in *Johnson v. Arvin-Edison Water Storage District, supra,* and this Court's own holding in *Morales I,* suddenly becomes applicable as a result of an alleged joint employment relationship is contrary to sound public policy and would have numerous and substantial detrimental effects.

First, applying the joint employer doctrine in the manner Appellants advocate would run counter to the fundamental public policy favoring the

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[3] In fact, applying Labor Code section 510 to Respondent under the circumstances of this case would lead to the incongruous, and ultimately absurd, result of granting Appellants a right none of their fellow employees have, namely, the ability to assert claims under section 510, solely based on the fortuity of their having been selected to perform work under a contract with a private entity.

protection of the sovereign powers of public entities. This policy underlies one of the central maxims of statutory interpretation, the "sovereign powers canon of statutory interpretation." (*Morales I, supra*, 1 Cal.App.5th at p. 538, citing *Johnson v. Arvin-Edison Water Storage Dist., supra*, 174 Cal.App.4th 729.) Under this long standing principle, a general statute should not be applied to a public entity if its sovereign powers would be infringed upon. (*Johnson, supra*, 174 Cal.App.4th at p. 738; see also, e.g., *Regents of University of Cal. v. Superior Court of Alameda County* (1976) 17 Cal.3d 533, 536; *Hoyt v. Board of Civil Service Comm'rs* (1942) 21 Cal.2d 399, 402; *Miles v. Ryan* (1916) 172 Cal. 205, 207 ["the state is not bound by general words in a statute, which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it…"].) A statute infringes upon a public entity's sovereign powers if the statute affects the entity's governmental purposes and functions. (*Johnson, supra*, 174 Cal.App.4th at p. 738.)

In *Johnson*, the court determined the Legislature did not intend for sections 510 and 512 to apply to public entities because, in part, "if the District were subjected to sections 510 and 512, its sovereign powers would be infringed upon," specifically the District's power to set employees' compensation. (*Id*. at pp. 738-739; see also *California Correctional Peace Officers' Assn. v. State of California* (2010) 188 Cal.App.4th 646 [affirming and relying on *Johnson's* rationale in holding that Labor Code section 512

does not apply to the State].) In this case, applying the joint employer doctrine to find section 510 applicable to Respondent would similarly infringe on its Respondent's sovereign authority by subjecting it to liability under that code section.

Such a result would, in turn, jeopardize the sovereign authority of other cities, counties, and other public agencies in similar circumstances. For example, under Appellant's joint employer theory of liability, if a district such as the defendant in *Johnson* partnered with a private entity on a future project, the public entity may be liable under the very Labor Code provisions that the court in *Johnson* determined would infringe its sovereign powers. (See *Johnson, supra,* 174 Cal.App.4th at p. 738.) As such, application of previously inapplicable statutory provisions to public entities based solely on a joint employer relationship circumvents the holding of *Johnson* and undermines the basic public policy in favor of protecting the sovereign authority of local governments.

In addition, there is a strong public policy favoring partnerships between public and private entities. One court has noted that "such partnerships…have been authorized, encouraged, or mandated by our Legislature in connection with such diverse purposes as the provision of educational and placement services for foster children and other youth (Ed. Code, § 48853.5, subd. (d)(6); Welf. & Inst. Code, §§ 16124, subd. (j), 16605, subds. (a), (b), 18986.2, subd. (d), 18986.11, subd. (e)); redesign and

reformation of high schools (Ed. Code, § 52070, subd. (c)); construction of educational facilities (Ed. Code, § 81004, subds. (a), (b), (c)); provision of architectural and engineering services for certain infrastructure projects (Gov. Code, § 4529.10, Initiative Measure, Prop. 35 (2000), § 2(b) [Cal. Const. Art. XXII]); assessment of technologies available for improved emergency alerts (Gov. Code, § 8593.6); satisfaction of local housing needs (Health & Saf. Code, §§ 50843, subd. (d)(1), 50843.5, subds. (a), (b)); protection, acquisition, restoration, preservation, and management of wetlands (Pub. Resources Code, §§ 5811, subd. (c), 5814, subd. (a)(3)); stewardship of agricultural and grazing land (Pub. Resources Code, § 10282, subds. (a), (e)(5)); and the improvement of water supply, quality, and infrastructure (Wat. Code, § 79205.10, subd. (c).)" (*Coastside Fishing Club v. California Resources Agency* (2008) 158 Cal.App.4th 1183, 1200, fn. 9 [upholding agreement between public agency and private nonprofit organization for the purpose of facilitating the Marine Life Protection Act].)

Adopting Appellant's theory, that otherwise exempt public entities become unexpectedly subject to Labor Code provisions on the basis of a joint employer relationship with a private entity, would have a substantial chilling effect on the creation of such relationships. In the present case, Respondent may no longer choose to work with private entities in putting on various productions and events, which may reduce the number or quality of those events. On a broader scale, it would likely mean the cessation of a variety of

undertakings and services across the state as many local governments reexamine their willingness to enter into partnerships with private entities for fear of those relationships subjecting the public entity to liability under statutes previously thought inapplicable to them. Imposing Labor Code liabilities on public entities based solely on an alleged joint employer status would thus have a chilling effect on the creation of favored public-private partnerships.

In sum, adopting Appellant's theory of joint employer liability harms local governments by infringing on their sovereign authority and essentially forcing them to refrain or withdraw from partnerships with private entities, thereby negatively impacting their ability to carry out their functions and purposes, and, ultimately, harming the communities that the public entities represent and serve. In the interest of the policy considerations discussed above, amici respectfully request that this court affirm the decision of the trial court.

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IV.

CONCLUSION

Based on the foregoing discussion, amici the League and CSAC respectfully urge this Court to find in favor of the 22nd District Agricultural Association by affirming the decision of the trial court.

DATED: April 23, 2018

KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
A Professional Corporation

By: /s/ David W. Tyra
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CERTIFICATE OF WORD COUNT

I, David W. Tyra, Attorney for Amici Curiae League of California Cities and California State Association of Counties, hereby declare under penalty of perjury that the number of words in the Application of League of California Cities and California State Association of Counties For Leave to File Amici Curiae Brief; Proposed Amici Curiae Brief By League of California Cities and California State Association of Counties in Support of Respondent 22nd District Agricultural Association equals 4,909 words, as per the word count feature in Microsoft Word.

DATED: April 23, 2018

KRONICK, MOSKOVITZ,
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A Professional Corporation

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PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 400 Capitol Mall, 27th Floor, Sacramento, CA 95814.

On April 23, 2018, I served true copies of the following document(s) described as **APPLICATION OF LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES FOR LEAVE TO FILE AMICI CURIAE BRIEF; PROPOSED AMICI CURIAE BRIEF BY LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENT 22ND DISTRICT AGRICULTURAL ASSOCIATION** on the interested parties in this action as follows:

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BY TRUEFILING SYSTEM: I electronically filed the document(s) with the Clerk of the Court by using the TRUEFILING System. Participants in the case who are registered TRUEFILING System users will be served by TRUEFILING. Participants in the case who are not TRUEFILING users will be served by mail or by other means permitted by the court rules.

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Kronick, Moskovitz, Tiedemann & Girard for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Sacramento, California.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on April 23, 2018, at Sacramento, California.

/s/ May Marlowe
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