The Law Office of
Andrew W. Twietmeyer

July 23, 2015

Via U.S. Mail

Hon. Chief Justice Tani Gorre Cantil-Sakauye, and Associate Justices
California Supreme Court
350 McAllister St.
San Francisco, CA 94102

Re: Opposition to the July 17, 2015 Request to Depublish *Cosentino vs. Fuller et al.*, Ct. App. Case No. G050923, Supreme Ct. Case. No. S227157

To the Honorable Chief Justice and Associate Justices:

Pursuant to California Rule of Court 8.1125, I respectfully request that the Court deny the Request of the Barona Band of Mission Indians, Cabazon Band of Mission Indians, Coyote Valley Band of Pomo Indians of California, Iipay Nation of Santa Ysabel, Pala Band of Mission Indians, Redding Rancheria, San Pasqual Band of Mission Indians, Shingle Springs Band of Miwok Indians, Sycuan Band of the Kumeyaay Nation, Table Mountain Rancheria, the Tuolumne Band of Me-Wuk Indians, United Auburn Indian Community, and Yocha Dehe Wintun Nation, (hereinafter collectively referred to as the "Group of 13") to depublish *Cosentino vs. Fuller* (the "Request").

I. Procedural Background

The Court of Appeal filed its decision and certified it for publication on May 28, 2015. The Court modified the decision on June 22, 2015 without changing the judgment, and again on June 25, 2015 without changing the judgment. Therefore, under CRC 8.264(b)(1), (b)(3) and (c)(2), the decision became final on June 27, 2015. *See* CRC 8.264(b)(1) and (c)(1). On June 17, 2015, prior to the decision becoming final, the Lytton Rancheria ("Lytton") filed a depublication request with this Court. I filed an opposition to Lytton's depublication request which I sent by FedEx Overnight on June 26, 2015. (the "June 26 Opposition"). On July 16, 2015, the Court received another request for depublication from the Viejas Band of Kumeyaay Indians. I timely opposed that depublication request on July 21, 2015. (the "July 21 Opposition"). The Group of 13 filed the instant Request on July 17, 2015. I hereby timely oppose. CRC 8.1125(b)(1).

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II. Interest of Person Opposing Depublication

In the interest of brevity, I hereby incorporate my statements of interest from my June 26 Opposition and my July 21 Opposition herein by this reference.

III. The Group of 13's Request for Depublication Should Be Denied.

The Group of 13's Request raises the same arguments that were raised by Lytton, the Viejas Band, and the Defendants—arguments which the Court of Appeal correctly rejected. I hereby incorporate my arguments from my June 26, and July 21 Oppositions herein by this reference, and I address these tired arguments only to the extent that the Group of 13 re-casts them.

A. A *Statutorily*-Unauthorized *Vote* Is a Statutorily-Unauthorized *Act* Which Gives Rise to Individual Tort Liability under Longstanding Precedent.

The thrust of the Group of 13's Request is that tribal officials are immune for civil suit related to votes those officials took in their official capacities. That is just another way of arguing that Tribal officials are immune for all acts taken in their official capacities. That simply is not the law—and it never has been. That is why the Court of Appeal rejected that argument when the Defendants made it. The precedents are all very clear that even when acting in his or her official capacity, a tribal official's *statutorily-unauthorized* acts are *individual* acts—*not* the acts of the tribe, and that, therefore, a tribal official is subject to suit in his or her individual capacity for injuries he or she has caused by those acts. *See Boisclair v. Superior Court* (1990) 51 Cal.3d. 1140, 1157; *see also Turner v. Martire* (2000) 82 Cal.App.4th 1042, 1055 (request for review denied) quoting *Larson v. Domestic & Foreign Corp.* (1949) 337 U.S. 682, 689 ("Where an officer of a sovereign acts beyond his or her delegated authority, his or her actions 'are considered individual and not sovereign actions.'"). A statutorily-unauthorized *vote*, is just such an unauthorized act. Stated otherwise, there is nothing special about the act of voting as an official. And ***no case*** holds otherwise. The Group of 13 do not identify any such case in their Request; just as Lytton did not; just as the Viejas Band did not; just as the Defendants did not.

Great Western Casinos, Inc. v. Morongo Band of Mission Indians (1999) 74 Cal.App.4th 1407 ***does not*** hold that tribal officers are shielded from suit whenever they vote in their official capacities. As I explained in my June 26 Opposition, the *Great Western* Court found that there were no allegations in that case that the Defendants' votes were unauthorized. "In other words, the allegations of the complaint do not suggest any individual council member acted beyond his or her official authority in so voting." *Great Western, supra*, 74 Cal.App.4th at p. 1422.

Cosentino vs. Fuller is exactly the opposite. Mr. Cosentino pleaded, and proved by un-rebutted evidence that the Defendants did not have authority to take any action against his license (whether by *voting* or otherwise) because the Defendants did not have any evidence that Mr. Cosentino was unfit for a license as required by IGRA, the Compact, and the Pechanga

Gaming Ordinance. Accordingly, by first *threatening* to revoke, and then *voting* to revoke Mr. Cosentino's license without any evidence that he was unfit, the Defendants violated their statutory authority. *See* 25 U.S.C. § 2710(c)(2); 25 C.F.R. §§ 558.2(a) & 558.5(c) and (d) (2011)[1]; Compact §§ 6.4.3, 6.4.8, 6.5.1, 6.5.5[2]; Pechanga Gaming Ordinance §§ 10(p)(1), 10(m) & 10(j). In other words, Defendants' votes were a violation of Defendants' statutory authority. Therefore, Defendants' votes were *not* tribal action. *Turner, supra*, 82 Cal.App.4th at p. 1055; *Boisclair, supra*, 51 Cal.3d at p. 1157; *Larson, supra*, 337 U.S. at p. 689.

Imperial Granite Company v. Pala Band of Mission Indians (9th Cir. 1991) 940 F.2d 1269 is similarly distinguishable. In that case, the Court similarly observed that "The complaint alleges no individual actions by any of the tribal officials named as defendants." Precedents make clear that to allege an individual action, the plaintiff in *Imperial Granite* needed to allege facts showing that the tribal officers acted outside the scope of their authority. *Turner, supra*, 82 Cal.App.4th at p. 1055; *Boisclair, supra*, 51 Cal.3d at p. 1157; *Larson, supra*, 337 U.S. at p. 689. In other words, unlike *Cosentino vs. Fuller,* the plaintiff in *Imperial Granite* did not allege or prove that the tribal officers were not authorized to vote in that case. Therefore, those officers votes "individually have no legal effect; it is the official action of the Band, following the votes, that caused Imperial's alleged injury." *Imperial Granite, supra,* 940 F.2d at p. 1271.

Finally, the Group of 13 contends that "Only the official action of the sovereign Tribe could divest Plaintiff of his gaming license—and Plaintiff alleges no other actionable injury." Request at 6. That is simply false. Defendants' unauthorized and unlawful revocation of his license did not *need* to be the sovereign act of the tribe in order to injure Mr. Cosentino. Whether or not the Defendants' conduct had the legal effect of divesting Cosentino of his license is an abstract question of no significance in this. Here in the real world, Defendants' actions (whether legally effective or not) induced the Pechanga Resort and Casino to terminate his employment. Defendants' conduct thus, interfered with, and continues to interfere with, Cosentino's economic relations—for how is he to explain to casino employers why he was terminated from the Pechanga Resort and Casino? The Defendants actions also interfered with Cosentino's exercise of his constitutional rights to free speech and pursuit of a lawful occupation in violation of California Civil Code § 52.1. All of the foregoing conduct has caused (and continues to cause) Mr. Cosentino serious emotional distress. Those are all actionable injuries that the *Defendants* caused. It simply is not true that Mr. Cosentino's injuries arise from a tribal act. That is the whole point of the doctrine of tribal-official immunity. Acts exceeding a tribal official's authority are not sovereign tribal acts. *Turner, supra*, 82 Cal.App.4th at p. 1055; *Boisclair, supra*, 51 Cal.3d at p. 1157; *Larson, supra*, 337 U.S. at p. 689.

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[1] Section 558.5 has been amended. I cite to the controlling Regulation in 2011 when the events alleged in the Complaint took place. For the Court's convenience a copy of the 2011 Regulations are attached hereto as Exhibit "A."

[2] The Tribal-State Compact between the State of California and the Pechanga Band of Luiseno Mission Indians is available online at <http://www.cgcc.ca.gov/?pageID=compacts>.

B. *Cosentino vs. Fuller* Does Not Involve Any "Quintessentially Sovereign Acts."

The Group of 13 contends that Mr. Cosentino's suit "rests entirely on the quintessentially sovereign action of the Pechanga Gaming Commission: revocation of Plaintiff's gaming license." Request at p. 5.

Quintessentially sovereign action? Let us be perfectly clear. The Pechanga Gaming Commission and Pechanga Gaming licenses exist because the United States Congress mandated that tribes license all of their casinos' "Key Employees." *See* 25 U.S.C. § 2710(d)(1)(A)(ii) & (b)(2)(F) (requiring a system of licensing all key employees). The Pechanga Gaming Commission has the power to revoke a gaming license only to the extent that the United States Congress, the National Indian Gaming Commission—a federal regulatory agency, and the U.S. Secretary of the Interior have authorized or approved. *See* 25 U.S.C. § 2710(d) (mandating the Tribal-State Compact and the Pechanga Gaming Ordinance and subjecting both to federal approval); *see also* 25 C.F.R. §§ 558.2(a) & 558.5(c) (2011) (dictating tribes' license suspension and revocation authority and procedure); *see also* § 2710(d)(1)(C) and (d)(2)(C) (directing that gaming must be conducted in conformance with a federally-approved tribal-state compact); *see also* Tribal-State Compact § 2.20 (requiring a "Tribal Gaming Agency" [which is the Pechanga Gaming Commission] to carry out the Tribe's regulatory responsibilities under IGRA and the federally-approved tribal gaming ordinance.); *see also* Compact § 6.4.3 (mandating the Tribal Gaming Agency's licensing standards in language taken directly from the California Gambling Control Act, Cal. Bus. & Prof. Code § 19856); *see also* Pechanga Gaming Ordinance §§ 10(m), 10(p) (setting forth the Commission's suspension and revocation authority in language taken directly from 25 U.S.C. § 2710(c)(2) and 2710(b)(2)(F)(ii)(II).)

Tribal Gaming Commissioners are, quite possibly, *the most federally-regulated officials of any independent sovereign*. These officials exist because of IGRA (a federal statute). Their authority arises entirely from IGRA, the Compact (a State-Tribal law mandated by IGRA which is ineffective until approved by the United States Secretary of the Interior), and the Pechanga Gaming Ordinance (a tribal statute that is also mandated by IGRA and must be approved by the National Indian Gaming Commission—a federal agency).

The Group of 13 cites to 25 U.S.C. 2701 as purported authority that "Congress has recognized that regulation of gaming on tribal lands is central to tribal self-governance." Request at p. 5. It is frankly ludicrous to draw that conclusion from the language of section 2701 or any other provision of IGRA. The entirety of IGRA is an exercise of Congress's plenary authority to *limit* the sovereignty of Indian Tribes. Congress, after all, could have remained silent in the wake of *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 221-222, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (which held that States lacked any regulatory authority over gaming on Indian lands.) But Congress did not remain silent. Instead Congress enacted comprehensive

legislation to federally-regulate tribal gaming. IGRA's declaration of policy states in relevant part:

> The purpose of this chapter is…(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702.

All of the foregoing shows that *Cosentino vs. Fuller* is not like *Allen v. Smith* (No. 12CV1668-WQH-KSC, 2013 WL 950735 (S.D. Cal. Mar. 11, 2013) *aff'd,* 597 Fed. Appx. 442 (9th Cir. 2015). In *Allen*, tribal membership was at issue. Membership *is* a "quintessentially sovereign" issue. *See Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, n.32 ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. [citations] Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.")

Nor is *Cosentino vs. Fuller* similar to *Hardin v. White Mountain Apache Tribe* (9th Cir. 1985) 779 F.2d 476 because the issue in that case was whether or not the tribe could exclude the plaintiff from its reservation—which is also a "quintessentially sovereign" issue over which tribes have long been recognized to exercise inherent authority. *See id.* at p. 479, *compare* Cohen's Handbook of Federal Indian Law § 4.01[2][e] (Nell Jesssup Newton et al. eds., 2012) ("Because the exclusionary power is a fundamental sovereign attribute intimately tied to a tribe's ability to protect the integrity and order of its territory and the welfare of its members, it is an internal matter over which the tribes retain sovereignty.") *see also Water Wheel Camp Rec. Area Inc. v. Larance* (9th Cir. 2011) 642 F.3d 802, 810-11 (quoting the above passage from Cohen's as authority for its conclusion that tribe had power to exclude.)

In other words, the Courts concluded that *Allen* and *Hardin* were masked official capacity suits because those cases centered on those quintessentially sovereign issues of membership and territorial integrity—issues going to "the very core of tribal sovereignty." *Maxwell v. City of San Diego* (2013) 708 F.3d 1075, 1089. Gaming licensure, by stark contrast, is a matter of federal regulatory law that has been imposed upon tribes by Congress to protect, among others, people like Mr. Cosentino. Therefore, I respectfully submit that the revocation of a gaming license is clearly not a "quintessentially sovereign act." Quite the contrary.

C. *Cosentino vs. Fuller* Does Not Diminish Tribal Sovereignty.

The Group of 13 argues, like the Viejas Band, that because Congress has plenary authority over Indian affairs, *Cosentino vs. Fuller* invades the exclusive province of Congress. I hereby incorporate my arguments from section III(B)(4) of my July 21 Opposition herein by this reference.

The Group of 13 additionally contends that the United States Supreme Court in *Bay Mills* "admonished" lower courts not to carve out exceptions to sovereign immunity's broad protections and that, therefore, California Courts must tread lightly. *See* Request at p. 8, I find no such "admonishment" in the *Bay Mills* Opinion. In any case, as I have explained above, the Court in *Cosentino vs. Fuller* did not create a new exception to the doctrine of sovereign immunity. *See Turner, supra*, 82 Cal.App.4th at p. 1055; *Boisclair, supra*, 51 Cal.3d at p. 1157; *Larson, supra*, 337 U.S. at p. 689.

Moreover, as I pointed out in my July 21 Opposition, Congress has not made any statement as to the scope of tribal-official immunity. Tribal-official immunity (like the broader doctrine of sovereign immunity) is a judicially-created doctrine. *See Turner v. Martire, supra*, 82 Cal.App.4th at p. 1046-1047 (explaining that lower federal courts extended the doctrine of sovereign immunity to cover tribal officials and identifying *Davis v. Littell* (9th Cir. 1968) 398 F.2d 83 as the earliest such instance.) Accordingly, to "tread lightly," California's courts simply should follow established judicial precedent. The Court of Appeal did exactly that. *See Turner, supra*, 82 Cal.App.4th at p. 1055; *Boisclair, supra*, 51 Cal.3d at p. 1157; *Larson, supra*, 337 U.S. at p. 689. Lytton, the Viejas Band, and now the Group of 13 have all protested that *Cosentino vs. Fuller* breaks with long established precedent. I ask again: *Where is that precedent?*

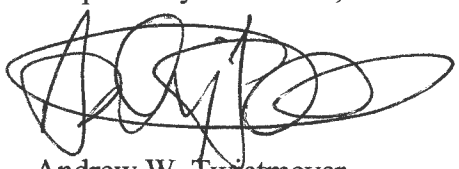
D. *Cosentino vs. Fuller* Will Clarify the Law, Not Confuse Courts.

I argued in the Court of Appeal, as I have argued in this Court, that long established precedent holds that a tribal official is liable in his or her individual capacity for tortious conduct that violates the scope of his or her authority. *See Turner, supra*, 82 Cal.App.4th at p. 1055; *Boisclair, supra*, 51 Cal.3d at p. 1157; *Larson, supra*, 337 U.S. at p. 689. The Court of Appeal unanimously agreed with me. I have now addressed three requests for depublication of *Cosentino vs. Fuller*. Every request has stated that the Court of Appeal and I are wrong. But, as I have noted above, no one has been able to identify a single case backing that claim up. I went into Riverside Superior Court in *Cosentino vs. Fuller* confident that we had the law on our side. And yet, the trial court dismissed the case. I respectfully submit that the trial court was confused because a case like *Cosentino vs. Fuller*, which properly applies the law of tribal official immunity to permit suit against tribal officials was absent from our state's case law. *Cosentino vs. Fuller* fills that gap. *Cosentino vs. Fuller* will assist trial courts in correctly applying the law.

IV. Conclusion

The five Defendants in *Cosentino vs. Fuller* are not sovereigns. They have no sovereign immunity. They *argued* that they were shielded by the *Pechanga Band's* sovereign immunity. The Court of Appeal correctly held that they are not, because Mr. Cosentino's suit against them does not in any way intrude upon the Pechanga Band's sovereign authority. Mr. Cosentino does not seek by this action to sanction or deter any conduct that the Pechanga Band could have ever lawfully authorized the five Defendants to engage in. Nor is Mr. Cosentino seeking any monetary remedy from the Pechanga Band's tribal treasury by this action. Nor does his case involve any core issues of tribal sovereignty such as membership or territorial integrity. Instead, Mr. Cosentino is suing the five individual Defendants, in their individual capacities, for conduct that the Pechanga Band did not (and in fact could not) authorize because that conduct violated federal, state, and tribal regulatory law. In other words, he is suing the five Defendants for conduct that violated the Defendants' statutory authority. And that is precisely the circumstance under which the Pechanga Band's sovereign immunity does not shield the Defendants from suit. *Cosentino vs. Fuller* was correctly decided. It should remain published.

Respectfully Submitted,



Andrew W. Twietmeyer
Attorney for Plaintiff and Appellant
Benedict Cosentino

Exhibit A

Commission a completed application containing the information listed under § 556.4(a)(1)–(13) of this part.

(b) Before issuing a license to a primary management official or to a key employee, a tribe shall forward to the Commission an investigative report on each background investigation. An investigative report shall include all of the following:

(1) Steps taken in conducting a background investigation;

(2) Results obtained;

(3) Conclusions reached; and

(4) The bases for those conclusions.

(c) When a tribe forwards its report to the Commission, it shall include a copy of the eligibility determination made under § 558.2 of this chapter.

(d) If a tribe does not license an applicant—

(1) The tribe shall notify the Commission; and

(2) May forward copies of its eligibility determination under § 558.2 and investigative report (if any) under § 556.5(b) to the Commission for inclusion in the Indian Gaming Individuals Record System.

PART 557 [RESERVED]

PART 558—GAMING LICENSES FOR KEY EMPLOYEES AND PRIMARY MANAGEMENT OFFICIALS

Sec.

AUTHORITY: 25 U.S.C. 2706, 2710, 2712.

SOURCE: 58 FR 5814, Jan. 22, 1993, unless otherwise noted.

§ 558.1 Scope of this part.

Unless a tribal-state compact allocates responsibility to an entity other than a tribe:

(a) The licensing authority for class II or class III gaming is a tribal authority.

(b) A tribe shall develop licensing procedures for all employees of a gaming operation. The procedures and standards of part 556 of this chapter and the procedures and standards of this part apply only to primary management officials and key employees.

(c) For primary management officials or key employees, a tribe shall retain applications for employment and reports (if any) of background investigations for inspection by the Chairman or his or her designee for no less than three (3) years from the date of termination of employment.

(d) A right to a hearing under § 558.5 of this part shall vest only upon receipt of a license granted under an ordinance approved by the Chairman.

[58 FR 5814, Jan. 22, 1993, as amended at 58 FR 16494, Mar. 29, 1993]

§ 558.2 Eligibility determination for granting a gaming license.

(a) An authorized tribal official shall review a person's prior activities, criminal record, if any, and reputation, habits and associations to make a finding concerning the eligibility of a key employee or a primary management official for granting of a gaming license. If the authorized tribal official, in applying the standards adopted in a tribal ordinance, determines that licensing of the person poses a threat to the public interest or to the effective regulation of gaming, or creates or enhances the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming, an authorizing tribal official shall not license that person in a key employee or primary management official position.

(b) All tribal gaming ordinances and ordinance amendments that have been approved by the Chairman prior to the effective date of this section and that reference this section do not need to be amended to comply with this section. All future ordinance submissions, however, must comply.

[74 FR 36939, July 27, 2009]

§ 558.3 Procedures for forwarding applications and reports for key employees and primary management officials to the Commission.

(a) When a key employee or a primary management official begins work at a gaming operation, a tribe shall:

(1) Forward to the Commission a completed application for employment that contains the notices and information listed in §§ 556.2, 556.3 and 556.4 of this chapter; and

(2) Conduct a background investigation under part 556 of this chapter to determine the eligibility of the key employee or primary management official for continued employment in a gaming operation.

(b) Upon completion of a background investigation and a determination of eligibility for employment in a gaming operation under paragraph (a)(2) of this section, a tribe shall forward a report under § 556.5(b) of this chapter to the Commission within 60 days after an employee begins work or within 60 days of the Chairman's approval of an ordinance under part 523. A gaming operation shall not employ a key employee or primary management official who does not have a license after 90 days.

(c) During a 30-day period beginning when the Commission receives a report submitted under paragraph (b) of this section, the Chairman may request additional information from a tribe concerning a key employee or a primary management official who is the subject of a report. Such a request shall suspend the 30-day period until the Chairman receives the additional information.

§ 558.4 Granting a gaming license.

(a) If, within the 30-day period described in § 558.3(c) of this part, the Commission notifies a tribe that it has no objection to the issuance of a license pursuant to a license application filed by a key employee or a primary management official for whom the tribe has provided an application and investigative report to the Commission pursuant to § 558.3 (a) and (b) of this part, the tribe may go forward and issue a license to such applicant.

(b) If, within the 30-day period described in § 558.3(c) of this part, the Commission provides the tribe with a statement itemizing objections to the issuance of a license to a key employee or to a primary management official for whom the tribe has provided an application and investigative report to the Commission pursuant to § 558.3 (a) and (b) of this part, the tribe shall reconsider the application, taking into account the objections itemized by the Commission. The tribe shall make the final decision whether to issue a license to such applicant.

§ 558.5 License suspension.

(a) If, after the issuance of a gaming license, the Commission receives reliable information indicating that a key employee or a primary management official is not eligible for employment under § 558.2 of this part, the Commission shall notify the tribe that issued a gaming license.

(b) Upon receipt of such notification under paragraph (a) of this section, a tribe shall suspend such license and shall notify in writing the licensee of the suspension and the proposed revocation.

(c) A tribe shall notify the licensee of a time and a place for a hearing on the proposed revocation of a license.

(d) After a revocation hearing, a tribe shall decide to revoke or to reinstate a gaming license. A tribe shall notify the Commission of its decision.

PART 559—FACILITY LICENSE NOTIFICATIONS, RENEWALS, AND SUBMISSIONS

Sec.

AUTHORITY: 25 U.S.C. 2701, 2702(3), 2703(4), 2705, 2706, 2710 and 2719.

PROOF OF SERVICE

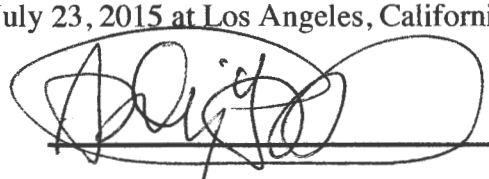
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 10780 Santa Monica Blvd. Suite 401, Los Angeles, California 90025. On July 23, 2015, I served the foregoing document described as: **Opposition to the July 17, 2015 Request to Depublish *Cosentino vs. Fuller et al.*, Ct. App. Case No. G050923, Supreme Ct. Case. No. S227157** on the interested parties in this action by placing [ ] the original [**X**] a true copy thereof enclosed in a sealed envelope addressed as set forth below:

See Service List below

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

I declare under penalty of perjury under the laws of the State of California and that the foregoing is true and correct. Executed on July 23, 2015 at Los Angeles, California.



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