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7 Hon. David P. Yaffe, Judge of the Superior Court  
of California, County of Los Angeles  
8

9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA  
11 WESTERN DIVISION

12  
13 RICHARD I. FINE,  
14 Petitioner,  
15 v.  
16 SHERIFF OF LOS ANGELES  
COUNTY,  
17 Respondent.

CASE NO. CV 09-1914-GW (CW)  
RESPONSE OF THE SUPERIOR  
COURT OF CALIFORNIA,  
COUNTY OF LOS ANGELES, *ET*  
*AL*, TO PETITION FOR WRIT OF  
HABEAS CORPUS; ETC.;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT

[DECLARATION OF KEVIN M.  
MCCORMICK FILED  
CONCURRENTLY HEREWITH]

Date: Taken Under Submission  
Time: N/A  
Ctrm: 640  
255 East Temple Street  
Los Angeles, California

M. Judge: Hon. Carla M. Woehrle

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24 COME NOW RESPONDENTS, the Superior Court of California, County of  
25 Los Angeles (“Superior Court”), and the Hon. David P. Yaffe, Judge of the  
26 Superior Court of California, County of Los Angeles and pursuant to this  
27  
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RESPONSE OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF  
LOS ANGELES, *ET AL*, TO PETITION FOR WRIT OF HABEAS CORPUS

1 court's April 23, 2009 Order submit their Response to the Petition for Writ of  
2 Habeas Corpus of and Ex Parte Application for Immediate Release filed by  
3 petitioner in *pro se*, Richard I. Fine ("Fine").

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Dated: May 1<sup>st</sup>, 2009

BENTON, ORR, DUVAL & BUCKINGHAM

By: Kevin M. McCormick  
Kevin M. McCormick  
Attorneys for Respondents, Superior Court of  
California, County of Los Angeles and the Hon.  
David P Yaffe, Judge of the Superior Court of  
California, County of Los Angeles

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION<sup>1</sup>**

On June 14, 2007, Fine, as attorney for Marina Strand Colony II Homeowners Association (hereafter "Marina Strand"), filed a petition for writ of mandate in the matter of *Marina Strand Colony II, Homeowners Association, Petitioner, v. County of Los Angeles, Respondent, Del Rey Shores Joint Venture; Del Rey Shores Joint Venture North, Real Parties in Interest* (hereafter "Real Parties in Interest"), Superior Court of California, County of Los Angeles, Case No. BS109420.<sup>2</sup> The Marina Strand state action was thereafter assigned to the Writs and Receivers Department, the Hon. David P. Yaffe ("Judge Yaffe"), Judge of the Superior Court of California, County of Los Angeles, pursuant to Superior Court of California, County of Los Angeles, Local Rule 2.5(j).<sup>3</sup>

On September 13, 2007, and after Fine had failed to timely request a hearing, Real Parties in Interest, Marina Strand, filed a motion to dismiss the Marina Strand litigation pursuant to *California Public Resources Code* section 21167.4.<sup>4</sup>

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<sup>1</sup> Real Parties in Interest will, or have, filed a response containing a lengthy and detailed procedural history which is incorporated herein by reference as though fully set forth. For purposes of clarity, an abbreviated factual summary is presented herein.

<sup>2</sup> See Exhibit "A," Judgment and Order of Contempt Re Richard I. Fine, Findings of Fact, page 5, para. 1.

<sup>3</sup> The procedural history provided herein relates to the actions in the Superior Court and subsequent appeals in state court. The only federal matter pending in regards to the Marina Strand litigation is the pending habeas corpus petition before this court.

<sup>4</sup> *Id.*, para. 2. Section 21167.4 provides that in actions, such as the Marina Strand litigation, "the petitioner shall request a hearing within 90 days from the date of filing the petition or shall be subject to dismissal on the court's own motion or on

1 On October 17, 2007, in an unrelated administrative proceeding, the  
2 California State Bar Court issued an order recommending the disbarment of Fine,  
3 and involuntarily enrolled him as an inactive member of the State Bar as of that  
4 date.<sup>5</sup> Ultimately, Fine's Disbarment became final on March 13, 2009.<sup>6</sup>

5 Notwithstanding the foregoing administrative ruling by the State Bar Court,  
6 on October 15, 2007, Fine (as the attorney for Marina Strand) filed a motion for  
7 relief from the dismissal pursuant to *California Code of Civil Procedure*, section  
8 473, based upon his personal affidavit of attorney fault.<sup>7</sup> Thereafter, the motion to  
9 dismiss and the motion for relief from dismissal were continued to January 8,  
10 2008, to permit the petitioners to retain new counsel due to the administrative  
11 action of the State Bar Court regarding Fine.<sup>8</sup>

12 The court granted the motion for relief, but ordered Fine, the attorney at  
13 fault, to pay reasonable compensatory legal fees and costs to opposing counsel or  
14 parties pursuant to *California Code of Civil Procedure*, section 473(b).<sup>9</sup>

15 On February 19, 2008, before the final determination of the amount of the  
16 compensatory legal fees and costs to be awarded pursuant to section 473, Fine  
17 filed what was described by Judge Yaffe as "a confusing" pleading purporting to

18 \_\_\_\_\_  
19 the motion of any party interested in the action or proceeding."

20 <sup>5</sup> See Exhibit "A," Judgment and Order of Contempt Re Richard I. Fine,  
21 Findings of Fact, page 5, para 4.

22 <sup>6</sup> See Exhibit "C," California State Bar website printout re Richard I. Fine.

23 <sup>7</sup> See Exhibit "B," Order Striking Notice of Disqualification, the Marina  
24 Strand state action, page 1, lines 15-19.

25 <sup>8</sup> See Exhibit "A," Judgment and Order of Contempt Re Richard I. Fine,  
26 Findings of Fact, page 5, para 4.

27 <sup>9</sup> See Exhibit "B," Order Striking Notice of Disqualification, page 1, lines 19  
28 to 22.

1 seek disqualification and seeking dismissal of the ordered sanctions and attorney's  
2 fees.<sup>10</sup>

3 On March 18, 2008, Judge Yaffe found that the purported disqualification  
4 in an affidavit in the body of another motion was insufficient to put the court on  
5 notice of a statement of disqualification for cause, that such a statement must be  
6 filed by a party or an attorney for a party (which Fine was not); and, as  
7 specifically authorized by *California Code of Civil Procedure*, section 170.4(b),  
8 struck the pleading as untimely and as failing to demonstrate, on its face, a legal  
9 ground for disqualification.<sup>11</sup> Fine was admonished that the disqualification  
10 determination was not an appealable order, and that *California Code of Civil*  
11 *Procedure*, section 170.3(d) provided that the exclusive means of reviewing the  
12 determination was a timely filed petition for a writ of mandate.<sup>12</sup> Fine failed to  
13 timely file a writ and, as a result, the determination became final and not subject to

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14  
15 <sup>10</sup> The pleading is entitled "NOTICE OF MOTION AND MOTION TO  
16 DISQUALIFY LA SUPERIOR COURT JUDGES RECEIVING MONEY FROM LA  
17 COUNTY, DISMISS ORDER TO PAY SANCTIONS AND ATTORNEYS FEES  
18 AND COSTS FOR LACK OF JURISDICTION OVER FORMER COUNSEL OF  
19 MARINA STRAND COLONY II HOA, LACK OF NOTICE OF IMPOSITION OF  
20 SANCTIONS, LEGAL FEES AND COSTS AND THAT HE DISCRETIONARY  
21 PROVISION OF CCP §473(B) DOES NOT ALLOW OR MANDATE THE  
22 IMPOSITION OF SANCTIONS, LEGAL FEES AND COSTS; MEMORANDUM  
23 OF POINTS AND AUTHORITIES; AND DECLARATION OF RICHARD I. FINE."

24 <sup>11</sup> See Exhibit "B," Order Striking Notice of Disqualification, page 2, line 14 to  
25 page 3, line 4.

26 <sup>12</sup> *Id.*, page 2, line 26 to page 3, line 4. The California Supreme Court has held  
27 that both the determination of a *California Code of Civil Procedure*, section 170.3  
28 statement of disqualification for cause and a *Code of Civil Procedure*, section 170.6  
peremptory challenge are governed by *Code of Civil Procedure*, section 170.3,  
subdivision (d), which provides that a petition for writ of mandate is the exclusive  
means of appellate review of those determinations. *People v. Hull* (1991) 1 Cal.4th  
266, 272-273.

1 further review.<sup>13</sup>

2 On April 15, 2008, The Superior Court made an order awarding the Real  
3 Parties in Interest the sum of \$46,329.01 in compensatory attorneys fees and costs  
4 against Fine.<sup>14</sup> On May 27, 2008, Fine was served with an Order Requiring  
5 Appearance (ORAP) to appear on June 18, 2008, before Superior Court  
6 Commissioner Murray Gross for a judgment debtor examination. Fine was also  
7 served with a Subpoena Duces Tecum requiring him to produce various  
8 documents at the judgment debtor examination.<sup>15</sup>

9 On June 18, 2008, Fine filed objections to both the examination and the  
10 subpoena; Commissioner Gross overruled all of Fine's objections and ordered the  
11 judgment debtor examination to proceed and for Fine to produce the documents  
12 called for in the subpoena.<sup>16</sup> Fine was sworn, but he refused to answer any  
13 questions other than stating his name, that he had been served with the Order to  
14 Appear and the subpoena, that he would not produce any of the subpoenaed  
15 documents in response to the subpoena, and that he had not obtained a stay of  
16 execution of the April 15, 2008, Order either from the Superior Court or from an  
17 appellate court.<sup>17</sup>

18 Commissioner Gross determined the questions that Fine refused to answer  
19 were proper, again overruled Fines objections, and ordered Fine to answer the  
20 questions and produce the subpoenaed documents. Fine continued to object and  
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22 <sup>13</sup> *Id.*

23 <sup>14</sup> *See* Exhibit "A," Judgment and Order of Contempt Re Richard I. Fine,  
24 Findings of Fact, page 6, para. 11

25 <sup>15</sup> *Id.*, page 6, para. 12.

26 <sup>16</sup> *Id.*, page 6, para. 15.

27 <sup>17</sup> *Id.*, page 6, para. 16.  
28



1 refused to answer any questions. Commissioner Gross found that he had the  
2 authority to rule on the objections and ordered the examination to go forward.  
3 Fine was ordered to return on August 25, 2008 for the completion of the judgment  
4 debtor examination.<sup>18</sup>

5 On August 25, 2008, Fine appeared, but again refused to answer any  
6 questions or produce any of the subpoenaed documents and refused to comply  
7 with Commissioner Gross' orders to answer the questions and produce documents  
8 pursuant to the subpoena. Commissioner Gross continued the judgment debtor  
9 examination to December 29, 2008.<sup>19</sup>

10 On December 29, 2008, Fine again refused to answer any questions,  
11 produce any of the subpoenaed documents or comply with Commissioner Gross'  
12 further orders to answer the questions and produce the subpoenaed documents.  
13 Fine continued his refusals and Commissioner Gross continued the hearing to  
14 March 16, 2009.<sup>20</sup>

15 Counsel for Real Parties in Interest in the Marina Strand state action filed an  
16 application for an Order to Show Cause re Contempt (OSC), pursuant to  
17 *California Code of Civil Procedure*, section 1211, which was granted.<sup>21</sup> The OSC  
18 set forth 16 specific charges of contempt, which were grouped into five categories  
19 for the purposes of trial.<sup>22</sup>

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21 <sup>18</sup> *Id.*, page 6, para. 17.

22 <sup>19</sup> *Id.*, page 7, para. 18.

23 <sup>20</sup> *Id.*, page 7, para. 20.

24 <sup>21</sup> *Id.*, page 2, para. 1.

25  
26 <sup>22</sup> *Id.*, page 4, para. 5. The charges are listed as follows: Charge 1: Failing to  
27 answer questions and produce documents at the Judgment Debtor Examination  
28 despite valid service of a subpoena and being lawfully ordered to do so by

1 Trial of the contempt proceeding was held on December 22, 24, 26, and 30,  
2 2008, and on January 8, 12, and 22, 2009. Fine was advised of his right to  
3 counsel, which he waived; and of his right against self incrimination, which he  
4 asserted.<sup>23</sup>

5 Following the trial the court found Fine not guilty with respect to charges 2,  
6 3, and 5, relating to attacking the integrity of the court and the State Bar, making  
7 repeated motions for reconsideration, and lying about his status with the State  
8 Bar.<sup>24</sup> Since Fine was not found guilty of these charges, these charges did not  
9 form the basis for any penalty or confinement and are not pertinent to the present  
10 petition for writ of habeas corpus.

11 Judge Yaffe found Fine guilty of charges 1 and 4: willful disobedience of  
12 Commissioner Gross' June 18, 2008, August 25, 2008, October 15, 2008, and  
13 December 29, 2008, orders to answer questions and produce documents at the  
14 Judgment Debtor examination; and that Fine unlawfully practiced law and held  
15 himself out as entitled to practice law.<sup>25</sup>

16 No confinement was imposed for unlawfully practicing law or holding  
17 himself out as entitled to practice law, and accordingly, that issue is not pertinent  
18 to this present petition for writ of habeas corpus.

19 \_\_\_\_\_  
20 Commissioner Gross; Charge 2: Attacking the integrity of the court in general and the  
21 State Bar; Charge 3: Making repeated motions for reconsideration in violation of  
22 *California Code of Civil Procedure*, section 1008; Charge 4: Practicing law, and/or  
23 holding himself out as entitled to practice law in the State of California when he was  
24 not entitled to practice law in the State of California; and Charge 5: Lying about his  
status with the State Bar in pleadings filed in court and in oral arguments before the  
court.

25 <sup>23</sup> *Id.*, page 4, paras. 7 & 8.

26 <sup>24</sup> *Id.*, page 12, paras. 2, 3, and 5.

27 <sup>25</sup> *Id.*, pages 11 to 12, paras. 1 and 4.  
28

1 The only confinement ordered was coercive civil contempt intended to  
2 compel Fine to comply with his mandatory obligation to answer the lawful  
3 questions and provide documents concerning his assets at the time of the judgment  
4 debtor examination. No penal confinement was imposed, and no issue concerning  
5 criminal contempt is presented by these proceedings.

6 Before imposing the coercive confinement, and at the hearing on March 4,  
7 2009, the Judge Yaffe inquired of Fine if he had any intention of answering the  
8 questions. Fine responded as follows:

9 "I am exercising my rights of petition for habeas corpus. At such  
10 times, those rights are entirely finished. **If, in fact, I lose with those**  
11 **writs, then I would answer the questions.**"<sup>26</sup> (Emphasis added.)

12 Pursuant to *California Code of Civil Procedure*, section 1219(a), the  
13 Superior Court ordered Fine incarcerated in the Los Angeles County Jail until he  
14 provides all the information concerning his assets as ordered by Commissioner  
15 Gross.<sup>27</sup> Judge Yaffe also detailed the manner by which Mr. Fine may end his  
16 confinement as follows:

- 17 • Mr. Fine may at any time file with the court a declaration stating that  
18 he is willing to answer the questions put to him in the Judgment  
19 Debtor examination which he was ordered to answer by  
20 Commissioner Gross;
- 21 • Upon receipt of that declaration the court will set a date and time for  
22 the resumption of the Judgment Debtor Proceeding and authorizing  
23 the Sheriff to transport Fine to the proceeding; and
- 24 • if Fine answers the questions concerning his assets that he has been

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25  
26 <sup>26</sup> See Exhibit "D," March 4, 2009, Reporter's Transcript, pages 8-10.

27 <sup>27</sup> *Id.*, pages 14-15.

1 ordered to answer, the court will authorize the Sheriff to release him  
2 from custody.<sup>28</sup>

3 Fine holds the key to his jail cell. By simply agreeing to answer the  
4 questions and produce documents concerning his assets, that he has a legal  
5 obligation to provide, his coercive confinement will end.

6 **II. THE USE OF COERCIVE CONFINEMENT IS AN APPROPRIATE**  
7 **JUDICIAL DEVICE FOR COMPELLING COMPLIANCE WITH**  
8 **VALID COURT ORDERS**

9 The use of coercive confinement resulting from a civil contempt has been  
10 approved and found appropriate by the United States Supreme Court, federal  
11 district and appellate courts and California state courts, regarding the right of a  
12 civil judgment creditor to pursue and of a trial court to impose for purposes of an  
13 individual's compliance with a valid court order. As stated in 7 Witkin, *California*  
14 *Procedure* (5th Ed. 2008), §173, Civil Contempt:

15 “When a valid court order for the benefit of a successful party in a  
16 civil action, e.g., an injunction or support decree, is disobeyed by the  
17 adverse party, the latter commits a civil contempt. This type of  
18 contempt is essentially a remedy of a party to enforce certain kinds of  
19 judgments or orders. (*See McCrone v. United States* (1939) 307 U.S.  
20 61, 59 S.Ct. 685, 686, 83 L.Ed. 1108, 1110 [‘a contempt is considered  
21 civil when the punishment is wholly remedial, serves only the  
22 purposes of the complainant, and is not intended as a deterrent to  
23 offenses against the public’]; *Penfield Co. of Calif. v. Securities &*  
24 *Exchange Com.* (1947) 330 U.S. 585, 67 S.Ct. 918, 921, 91 L.Ed.  
25 1117, 1123; *McComb v. Jacksonville Paper Co.* (1949) 336 U.S. 187,  
26

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27 <sup>28</sup> *Id.*, page 15.  
28

1 69 S.Ct. 497, 499, 93 L.Ed. 599, 604; *International Union, United*  
 2 *Mine Workers of America v. Bagwell* (1994) 512 U.S. 821, 114 S.Ct.  
 3 2552, 2557, 129 L.Ed.2d 642, 651, *infra*, §187; *In re Morris* (1924)  
 4 194 C. 63, 67, 227 P. 914 [quoting United States Supreme Court  
 5 decision; civil contempt proceedings are ‘remedial and coercive in  
 6 their nature, and the parties chiefly in interest in their conduct and  
 7 prosecution are the individuals whose private rights and remedies  
 8 they were instituted to protect or enforce’]; *People v. Derner* (1986)  
 9 182 C.A.3d 588, 592, 227 C.R. 344, citing the text [contempt  
 10 judgment for failure to return child as required by custody order was  
 11 civil rather than criminal contempt because it appeared from judge's  
 12 statement that ‘primary part of his purpose was coercive,’ i.e., to  
 13 dissuade defendant from further violations]; *Mulvany v. Superior*  
 14 *Court* (1986) 184 C.A.3d 906, 908.”

15 In this matter, the purpose of the finding of contempt, and the resulting  
 16 confinement, was coercive in nature, as the purpose is to compel Fine to answer  
 17 the questions and produce documents concerning his ability to satisfy the order  
 18 awarding attorney’s fees and costs to the Real Parties in Interest. Nothing more,  
 19 nothing less.

20 **III. FINE ADMITS THAT THE NATURE AND INDETERMINATE**  
 21 **LENGTH OF HIS CONFINEMENT WILL NOT AFFECT HIS**  
 22 **DECISION TO ANSWER QUESTIONS AND PRODUCE**  
 23 **DOCUMENTS AT THE JUDGMENT DEBTOR EXAMINATION**

24 While the duration of a coercive civil contempt confinement might  
 25 potentially be raised as an issue, it is not an issue here. Fine has already admitted  
 26 that in the event his attempt to obtain habeas relief fails, he will answer the  
 27 questions regarding his financial condition, thereby conceding that the coercive  
 28

1 and indeterminate nature of his confinement is the not the yardstick by which he  
2 will, or will not, answer those questions. Again, at the March 4, 2009 hearing,  
3 Fine stated “[i]f in fact, I lose those [habeas] writs, then I would answer the  
4 questions.”<sup>29</sup> Thus, Fine has conceded that his confinement is coercive in nature,  
5 not penal.

6 As a result, the “presence ... of a substantial likelihood that ... continued  
7 confinement” will accomplish the purpose of the order ...” becomes the focus of  
8 the court’s inquiry, and test on habeas review. *In re Farr* (1974) 36 Cal.App.3d  
9 577, 584, 111 Cal.Rptr. 649.

10 A reviewing court should normally be reluctant to conclude that as a matter  
11 of due process, confinement of an individual based upon a finding of civil  
12 contempt has lost its coercive impact. The determination as to whether a civil  
13 contempt sanction has lost its coercive effect upon a particular contemnor rests  
14 within the sound discretion of the district court. *Securities and Exchange*  
15 *Commission v. Elmas Trading Corporation*, 824 F.2d 732 (9th Cir.1987). See  
16 also *In re Grand Jury*, 851 F.2d 499, 502 (1st Cir.1988); *Simkin v. United States*,  
17 715 F.2d 34,d 37 (2d Cir.1983); *In re Grand Jury Investigation (Braun)*, 600 F.2d  
18 420, 427 (3d Cir.1979) (holding that, in the absence of unusual circumstances, a  
19 reviewing court should be reluctant to conclude, as a matter of due process, that a  
20 civil contempt sanction has lost its coercive impact at some point prior to the  
21 eighteen-month period prescribed as a maximum by 28 U.S.C. § 1826).

22 As stated, Fine has conceded that should his attempt to obtain habeas relief  
23 fail, he will answer the questions regarding his financial condition. As such, the  
24 confinement is coercive in nature and for the sole purpose of compelling Fine to  
25 comply with the Superior Court’s order to answer questions at a judgment debtor  
26

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27 <sup>29</sup> *Id.* at page 9, lines 4-5.  
28

1 examination.

2 **IV. CONCLUSION**

3 Based upon the foregoing, it is respectfully submitted that Fine's petition  
4 for a writ of habeas corpus and ex parte application for immediate release must be  
5 denied.

6  
7 Dated: May 1<sup>st</sup>, 2009

BENTON, ORR, DUVAL & BUCKINGHAM

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By: Kevin M. McCormick  
Kevin M. McCormick  
Attorneys for Respondents, Superior Court of  
California, County of Los Angeles and the Hon.  
David P Yaffe, Judge of the Superior Court of  
California, County of Los Angeles

**PROOF OF SERVICE**  
**Fine v. Sheriff of Los Angeles County**  
**Case No.: CV09-1914-JFW (CW)**

STATE OF CALIFORNIA, COUNTY OF VENTURA

I am employed in the County of Ventura, State of California. I am over the age of 18 and not a party to the within action. My business address is 39 N. California Street, Ventura, CA 93001.

On May 1, 2009, I served the foregoing document(s) described as: **RESPONSE OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ET AL, TO PETITION FOR WRIT OF HABEAS CORPUS; ETC.; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** on the interested parties in this action by placing \_\_\_\_\_ an original XXX a copy thereof enclosed in a sealed envelope addressed as follows:

Richard I. Fine, BK # 1824367  
Twin Towers Correctional Facility  
450 Bauchet Street  
Los Angeles, CA 90012

Aaron M. Fontana, Esq.  
Lawrence Beach Allen & Choi PC  
100 West Broadway Suite 1200  
Glendale, CA 91210

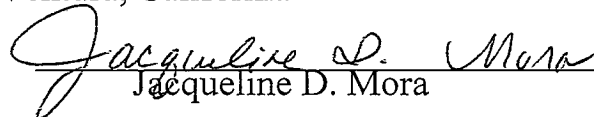
Frederick Bennett, Esq.  
Court Counsel, Superior Court of  
California, County of Los Angeles  
111 N. Hill Street, Room 546  
Los Angeles, CA 90012

Joshua L. Rosen, Esq.  
Law Offices of Joshua L. Rosen  
5905 Sherbourne Drive  
Los Angeles, CA 90056

XXX BY FIRST CLASS MAIL \_\_\_\_\_ (BY EXPRESS MAIL) I caused such envelope with postage thereon fully prepared to be placed in the United States mail at Ventura, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day 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 in affidavit.

XXX (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 1, 2009, at Ventura, California

  
Jacqueline D. Mora