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July 12, 2012

VIA FEDERAL EXPRESS

The Honorable Tani Gorre Cantil-Sakauye
and the Associate Supreme Court Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

Re: ***City of Livermore v. Baca*, 205 Cal.App.4th 1460; 141 Cal.Rptr.3d 271; 2012 Cal.App.LEXIS 579 (Cal.App. 6th Dist. 2012) (Request for Depublication (Cal. Rules of Court, rule 8.1125(a))**

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to California Rules of Court, rule 8.1125(a), the League of California Cities ("League") and California State Association of Counties ("CSAC") submit this request for depublication of the opinion – *City of Livermore v. Baca* (Cal.App. 6th Dist. 2012) 205 Cal.App.4th 1460; 141 Cal.Rptr.3d 271; 2012 Cal.App.LEXIS 579 ("Opinion").

1. Interest in the Opinion.

The League is an association of 469 California cities dedicated to protecting and restoring local control, providing for the public health, safety, and welfare of their residents, and enhancing 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 Committee monitors litigation of concern to municipalities, and identifies those cases that it feels are of statewide significance. The Committee has determined that this case is a matter affecting all cities.

CSAS is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association'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 is a matter affecting all counties.

2. Why The Opinion Should Be Depublished.

As the courts have recognized over the years, "[a] condemnation trial is a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner." (*Sacramento, etc. Drainage Dist. ex rel. State Reclamation Bd. v. Reed* (1963) 215 Cal.App.2d 60, 69.) In *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694 ("*Continental Development Corp.*"), this Court recognized that "taxpayers should not be required to pay more than reasonably necessary for public works projects. Stated another way, compensation for taking or damage to property must be just to the public as well as to the landowner." This Court acknowledged that "[f]airness requires parity of treatment." (*Id.* at p. 718.) As such, it adopted a rule to effectuate the evenhanded treatment of "damages" and "benefits" in determining severance damages in eminent domain proceedings. (*Id.* at p. 718.)

The League and CSAC believe that depublication of the Opinion is of vital importance to maintain the evenhanded treatment of damages and benefits in determining severance damages, and to maintain the balance between the economic interests of the public and those of the landowner. The Opinion's misapplication of the principles set forth by this Court in *Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 971 ("*Campus Crusade*") threatens to upset this balance. The Opinion also threatens to strip trial courts of their proper role in ruling on the admissibility of opinion testimony in eminent domain proceedings. The Opinion fails to provide a clear rule in an area of law where clarity and predictability are particularly important. Rather, it provides a loose standard permitting, and indeed encouraging, speculative claims of damage.

A. The "At Least Arguably" Standard Eviscerates the Age Old Exclusion of Damages Which Are Speculative, Remote, Imaginary, Contingent, or Merely Possible.

Depublication of the Opinion is appropriate because the decision adopts a new "at least arguably" evidentiary standard for the admissibility of opinion evidence in eminent domain proceedings that is contrary to the California Supreme Court's controlling authority in *Campus Crusade*. Instead of applying the burden of production standard outlined by this Court in *Campus Crusade*, i.e., evidence which tends to show that some aspect of the taking "naturally tends to and actually does decrease the market value" of the remaining property, the Opinion adopts a rule that allows property owners to go to a jury with damages that "at least arguably" have an effect on market value to be considered by the jury. (*Campus Crusade, supra*, 41 Cal.4th at p. 973 [emphasis added]; *City of Livermore v. Baca* (2012) 205 Cal.App.4th 1460, 1468 ("*Baca*").) This new "at least arguably" evidentiary standard will have the unintended consequence of setting a precedent for virtually any damage claim, even if the purported damage is based on mere speculation to the detriment of the public. (*See, e.g., City of Carlsbad v. Rudvalis* (2003) 109 Cal.App.4th 667, 678 ["[I]t is the duty of the state to see that compensation

is just "not merely to the individual whose property is taken, but to the public that is to pay for it."].)

In the Opinion, the Court of Appeal reversed a finding by the trial court excluding evidence of the property owner's claim for permanent severance damages based upon an alleged decrease in value of his property due to view changes,[1] effects on drainage,[2] changes in the depth of utility lines,[3] and increased traffic hazards[4] as a result of the City's project. The trial court excluded evidence of the effects on the basis that such evidence was conjectural and speculative. The Court of Appeal, however, concluded such evidence was admissible because "at least arguably" such evidence would have "the potential of affecting the market value of the remaining property." (*Baca, supra*, 205 Cal.App.4th at p. 1468 [emphasis added].)

The *Baca* court derived its "at least arguably" standard from language included in this Court's *Campus Crusade* decision. In *Campus Crusade*, this Court stated:

> The factors Campus Crusade identified below--e.g., fear that the pipeline will rupture in an earthquake, negative visual and aesthetic impacts on the landscaping, and limitations on potential development caused by grading restrictions and placement of the pipeline--at least arguably have the potential of affecting the market value of the remaining property. [Footnote 4 omitted.] As long as the effect of these factors on market value is not conjectural, speculative, or remote, it is for the jury to decide the extent to which they may affect the value of the property. (*City of Pasadena v. Stimson* (1891) 91 Cal. 238, 259 [27 P. 604] [trial court erred in precluding jury from deciding whether the temporary escape of sewer gas during reasonable repairs to the sewer reduced the market value of abutting prop-erty]; *San Diego Gas & Electric Co. v. Lux Land Co.* (1961) 194 Cal.App.2d 472, 482 [14 Cal.Rptr. 899] [whether appraisers should have considered the effects of unsightly towers, damage to existing views, the shape of the remaining land, and interference with radio reception "were questions of fact for the jury to determine"]; *People v. O'Connor*

[1] The Owner testified that the project would negatively affect the curb appeal, and affect his ability to secure tenants for the building, and in turn, affect the value of the property.

2 The Owner sought permanent severance damages for the new drainage conditions created by the reverse slope that was a result of the project. The Owner asserted the change of slope of this property to reverse down toward the building from the roadway would cause inferior drainage, and the increased risk of flooding.

3 The Owner sought permanent severance damages for the decrease in value to his property due to the increased depth of the existing utility lines on his property caused by the project. The Owner asserted the project would cause existing utility lines to be buried more deeply, which affects the value of his property due to increased costs associated with maintenance of the lines.

4 The Owner sought permanent severance damages for the increased risk of traffic hazards as a result of the project. Specifically, the Owner claimed the new reverse slope from the nine-foot elevated roadway would increase the risk of traffic accidents from the roadway embankment onto his property.

> (1939) 31 Cal.App.2d 157, 159 [87 P.2d 702] [the effects of widening the highway, such as decreasing the distance from the house to the highway, adverse impact on landscaping, and increased traffic noise and hazards, were proper subjects of expert testimony "and the jury could determine what weight to give the opinions in proportion to the weight the reasons had with them"]; see generally *Continental Development, supra,* 16 Cal.4th at p. 718 ["in determining a land-owner's entitlement to severance damages, the fact finder ... shall consider competent evidence relevant to any conditions caused by the project that affect the remainder property's fair market value, insofar as such evidence is neither conjectural nor speculative" (italics added)].) (*Campus Crusade, supra,* 41 Cal.4th at pp. 972-973 [emphasis added].)

In applying *Campus Crusade*, the *Baca* court failed to recognize the implication of Footnote 4. In Footnote 4, this Court noted that: "[w]e need not decide whether *Campus Crusade* satisfied its burden of production with respect to these factors inasmuch as that issue was not included in our grant of review." (*Campus Crusade, supra,* 41 Cal.4th at p. 973.)

In discussing the burden of production, the *Campus Crusade* court concluded effects that "at least arguably [had] the potential of affecting the market value of the remaining property" warrant consideration by the trial court under the burden of production test to determine whether the evidence tends to show that some aspect of the taking "naturally tends to and actually does decrease the market value" of the remaining property, before it is given to the jury to weigh its effect on the value of the property. (*Campus Crusade, supra,* 41 Cal.4th at p. 973 [emphasis added].) Thus, the proper test for the trial court is whether there is evidence tending to show that "some ... aspect of the taking ... 'naturally tends to and actually does decrease the market value' of the remaining property . . . ." (*Id.*) Only upon such showing to the trial court does the severance damage claim go to "the jury to weigh its effect on the value of the property." (*Ibid.*)

The Opinion also undermines the evenhanded treatment of damages and benefits fostered by the *Continental Development Corp.* decision. In *Continental Development Corp.*, this Court adopted a rule permitting offset of "all reasonably certain, immediate and nonspeculative benefits." (*Continental Development Corp., supra,* 16 Cal.4th at p. 717.) Adoption of the rule had "the virtue of treating benefits and severance damages evenhandedly." (*Ibid.*) Now, instead of limiting damages to those which are "reasonably certain, immediate and nonspeculative," the *Baca* court tips the balance by allowing the jury to consider evidence of damages that are "arguably possible."

Under the Opinion, the issue becomes when do alleged factors on market value rise to the level of being conjectural, speculative, or remote? The Opinion's adoption of an "arguably possible" standard blurs the discernable line between consideration of future events which are "reasonably certain, immediate and nonspeculative" (*Continental Development Corp., supra,* 16

Cal.4th at p. 717) and exclusion of events which are speculative, remote, imaginary, contingent, or merely possible.

This Court has had a historical and well-founded antipathy to speculative damages. (*City of San Diego v. Neumann*, (1993) 6 Cal.4th 738, 748-749 ("*Neumann*".) Damage which is speculative, remote, imaginary, contingent, or merely possible, historically could not serve as a legal basis for recovery. (*Ibid.* [quoting from *Arnerich v. Almaden Vineyards Corp.* (1942) 52 Cal.App.2d 265, 272].)

Historically, "merely possible" was not sufficient to support a severance damage claim. To be considered, benefits have to be "reasonably certain, immediate and nonspeculative." (*Continental Development Corp.*, *supra*, 16 Cal.4th at p. 717.) Now, however, the Opinion allows recovery based upon effects which "arguably possible" have an impact of value. "Possibility" is "an uncertain thing that may happen." (Black's Law Dictionary (2nd ed. (1910).) Arguably, the only thing which is not "arguably possible" is something that is "impossible."

This Court has consistently cautioned that severance damages not be based upon speculation regarding the future. In a case decided in 1866, *S.F., A & S. R.R. Co. v. Caldwell* (1866) 31 Cal. 367, 374-375 ("*Caldwell*"), this Court recognized that the exercise of the power of eminent domain may cause compensable damage to the landowner's remaining adjacent land, and that, unfortunately, "[w]hat shall be the measure of compensation to the owner of land taken for public use is involved in considerable confusion in the decisions of Courts on the subject." (*Id.*) The *Caldwell* Court warned, however, that the measure of damages should not include "conjectural or speculative estimations of consequential damages or benefits." (*Id.* at p. 375.)

In 1915, this Court again cautioned against taking an expansive view of severance damages, declaring that it is only when the "take" is truly part of a larger parcel that severance damages may be awarded for the remainder. (*Oakland v. Pacific Coast Lumber etc. Co.*, (1915) 171 Cal. 392, 398 ("*Pacific Coast Lumber*").) In that case, the remainder was not actually contiguous with the taken parcel, being a lumber mill separated by several hundred feet from the wharf and lumberyard property that was condemned. Although there was clearly unity of use between the two properties, as the lumberyard and wharf served the mill, this Court concluded that to indulge in such a construction would end in allowing compensation for business losses caused by condemnation, rather than loss to the value of the real property. (*Pacific Coast Lumber*, *supra*, 171 Cal. at pp. 398-399.)

In *Pacific Coast Lumber*, this Court warned against the introduction of evidence of speculative severance damages, cautioning in colorful terms that if such evidence were permitted, "it would be quite permissible for the witnesses to say, 'if oil were discovered upon the land it would be worth twenty thousand dollars an acre,' 'if a gold mine were discovered upon it, it would be worth ten thousand dollars an acre,' 'if a man wanted to buy it and establish a town site it would be worth three thousand dollars an acre,' and so on, until such inquiry in a condemnation suit would bear a close affinity to Lord Dundreary's famous question, 'If you had

a brother would he like cheese?'" (*Pacific Coast Lumber*, *supra*, 171 Cal. at p. 400; *see also*, *Neumann*, *supra*, 6 Cal.4th at p. 760.)

Under the Opinion, experts will be allowed to address Lord Dundreary's famous question, "If you had a brother would he like cheese?" For it is arguably possible that if an expert had a brother he would like cheese. Under the "arguably possible" standard, the balance of interests required by the law of eminent domain is disturbed and the government, i.e. taxpayers, are required to pay compensation for speculative claims. (*See*, *Neumann*, *supra*, 6 Cal.4th at p. 758.)

B. The Opinion Disarms the Trial Court of its Rightful Role and Ability to Review, Admit or Exclude Expert Opinion Evidence in Eminent Domain Proceedings.

The Opinion also effectively disarms the trial court of its rightful role as gatekeeper to the evidence and undermines the judicial discretion vested in the trial courts to review, admit or exclude expert opinion evidence in eminent domain proceedings.

In *Baca*, the trial court began evidentiary hearings in limine to determine if Baca's proffered evidence in support of his severance damages was sufficient. After ten (10) days of hearings, the trial court granted the City's in limine motions, and excluded all of Baca's evidence of temporary and permanent severance damages. On review, the Court of Appeal reviewed the trial court's evidentiary rulings *de novo* "because all of the admissions were on paper and were as easily reviewed by the court of appeal as the trial court, and because the court of appeal viewed the effect of use of motions in limine as a vehicle for nonsuit." (*Baca*, *supra*, 205 Cal.App.4th at p. 1473.)

Historically, trial courts have been vested with considerable judicial discretion in admitting or excluding evidence of value in eminent domain proceedings. (*County Sanitation Dist. v. Watson Land Co.* (1993) 17 Cal.App.4th 1268, 1282.) Trial courts were properly vested with the authority to exclude opinions which employ methodology not sanctioned by law. (*Id.* at pp. 1280-1281; *see also*, *Contra Costa Water Dist. v. Bar-C Properties* (1992) 5 Cal.App.4th 652, 660.) Whether an opinion should be held inadmissible in a particular case depends upon the extent to which the improper considerations have influenced the opinion. (*Ibid.*) As such, questions of admissibility of evidence in eminent domain proceedings have always been addressed to the sound discretion of the trial court. (*Ibid.*)

Bifurcated trials are commonly used in eminent domain proceedings to resolve issues, including evidentiary issues, before the issue of compensation is submitted to the jury. (*Redev. Agency v. Contra Costa Theatre, Inc.* (1982) 135 Cal.App.3d 73, 80.) Evidence Code section 402 allows a court to hold a hearing to determine evidentiary issues before trial. Furthermore, pursuant to Evidence Code section 803, the "court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion." When a valuation expert in a condemnation case employs an unsanctioned methodology, the opinion may be excluded in part or in whole in the

discretion of the trial court. (*City of Stockton v. Albert Brocchini Farms, Inc.* (2001) 92 Cal.App.4th 193, 198 (*"Brocchini Farms"*).)

The trial court is vested with the discretion to rule on the admissibility of expert testimony under Evidence Code section 801 (b). If the court excludes expert testimony on the ground that there is no reasonable basis for the opinion, the courts review the exclusion of evidence under the abuse of discretion standard. (*In re Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564 (*"Lockheed"*); *Geffcken v. D'Andrea* (2006) 137 Cal.App.4th 1298, 1310-1311.)

Instead of applying the abuse of discretion standard, the *Baca* court reviewed the trial court's evidentiary rulings *de novo*. The *Baca* court stated:

> "When, as in the present case, the court's order excludes all evidence on a particular claim and, as a result, operates as a motion for nonsuit, we review the court's order de novo, examining the record in the light most favorable to the party offering the evidence. *Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 Cal.App.4th 1396, 1403 [106 Cal.Rptr.3d 691].) In such cases, "all inferences and conflicts in the evidence must be viewed most favorably to the nonmoving party." (*Amtower v. Photon Dynamics, Inc.*, supra, 158 Cal.App.4th at p. 1595.)" (*Baca, supra*, 205 Cal.App.4th at p. 1465.)

However, the trial court's decision did not act as a motion for nonsuit. The trial court did not find the property owner was not entitled to compensation. Instead, the trial court found that some of the evidence it sought to introduce on severance damages was inadmissible because it was speculative and conjectural. Misapplication of this precedent could lead to unanticipated misuse as a means to eliminate the use of in limine motions to deal with evidentiary issues in eminent domain proceedings.

C. Over-Reliance on the Prospective Buyer to Determine Admissibility of Evidence Has Eroded the Preclusion of Speculative Evidence.

The Opinion also over emphasizes use of the definition "fair market value" to determine admissibility. The approach undermines the significance of the Rules of Evidence specifically created by the Legislature to control the evidence that may be presented on the value of property. (Evid. Code, §§801 *et seq.*)

In *Sacramento & San Joaquin Drainage Dist. ex rel. State Reclamation Board v. Reed* (1963) 215 Cal.App.2d 60, 69, the court noted the problems with an approach whereby a valuation witness may state as a "reason" for his opinion any detrimental factor which the witness might choose to attribute to a prospective purchaser, so long as the detriment in some way arises from the project in suit:

> The approach ignores the fact that the "prospective purchaser" is an abstraction, a ventriloquist's dummy who speaks only with the voice of the flesh-and-blood valuation witness. In feeding words to the fictional buyer, the witness -- be he appraiser or landowner -- is confined only by his own imagination and by such narrower limits as the law may impose on him. A condemnation trial is a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner. (See Kratovil and Harrison, Eminent Domain -- Policy and Concept, 42 Cal.L.Rev. 596, 626.) There is a limit to imaginative claims even when described in terms of a prospective buyer's mental reactions.. To say that only the witness' valuation opinion has probative value, that his "reasons" have none, ignores reality. His reasons may influence the verdict more than his figures. To say that all objections to his reasons go to weight, not admissibility, is to minimize judicial responsibility for limiting the permissible arena in condemnation trials. The responsibility for defining the extent of compensable rights is that of the courts. (*People ex rel. Dept. of Public Works v. Symons, supra*, 54 Cal.2d at p. 861; *People v. Ricciardi, supra*, 23 Cal.2d at p. 396.)

The Opinion opens the door for valuation witnesses to dream up effects which the expert says will "arguably possible" have some affect on market value. It places little to no limits on imaginative claims described as a prospective buyer's mental reaction. In the end, implementation of the "arguably possible" standard will give unbridled freedom to the ventriloquist's "prospective buyer" dummy.

Evidence Code section 801 states: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates … ." This rule has been construed to mean that the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible." (*Lockheed, supra,* 115 Cal.App.4th at p. 564.)

Pursuant to Section 814 of the Evidence Code, the opinion of a witness as to the value of property is limited to such an opinion as is based on matters perceived by, or personally known to the witness, or made known to the witness at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied on by an expert in forming an opinion as to value, unless the witness is precluded by law from using such matters as a basis for an opinion. (Evid. Code, § 814; *Brocchini Farms, supra,* 92 Cal.App.4th at p. 198.)

These rules recognize that the value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. Thus, where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. (*Lockheed*, *supra*, 115 Cal.App.4th at p. 563.)

D. The Opinion Erodes the Evenhanded Treatment of Damages and Benefits by Artificially Resurrecting Distinction Between General and Special Benefits.

Finally, the Opinion conflicts with precedent, namely *Continental Development Corp.*, *supra*, 16 Cal.4th 694, in which this Court confronted the disparity between the rules for admitting evidence of remainder damages and those for offsetting benefits. Before *Continental Development Corp.*, although a condemnee could generally introduce evidence about any decrease in market value from a project, the condemning entity that wished to show offsetting increases had a restricted menu of potential benefits from which to choose. To qualify as offsetting special benefits, project features had to confer market value increases that were both "reasonably certain to result from construction of the work" and "peculiar to the land in question." (*Beveridge v. Lewis* (1902) 137 Cal. 619.) For evidence of offsetting benefits, admissibility under this rule turned not on relevance to the remainder's fair market value but on the degree to which those benefits were or were not shared by the remainder and other nearby property. (*Compare, City of Hayward v. Unger* (1961) 194 Cal.App.2d 516 (holding increased traffic past retail store to be special benefit offsetting severance damages), *with Pierpont Inn, Inc. v. State of California* (1969) 70 Cal.2d 282 (holding freeway off-ramp near commercial property not to be special benefit offsetting severance damages).) The *Continental Development Corp.* court concluded that the distinction between special and general benefits was both outmoded and unworkable. Accordingly, this Court adopted a new rule to treat severance damages and offsetting benefits "evenhandedly" and reflect their parallel definitions in the Eminent Domain Law.

The Opinion unwinds this evenhanded treatment by holding that evidence of the project's benefits may be excluded if those benefits are created on property that is not being taken. The Opinion holds that any benefits from separate contracts may not be considered to offset severance damages because "the work included in [the] contract [i]s not in an area affecting Baca's commercial properties that were the subject of the takings." There is no authority for the Opinion's conclusion that the benefits that may be considered must be confined to either the property taken or the area immediately surrounding that property. In sum, the Opinion conflicts with clear statutory direction regarding consideration of project benefits and thereby creates uncertainty in eminent domain actions.

CONCLUSION

Under the law, the constitutional requirement for the payment of just compensation is not only for the benefit of the landowner, but also for the benefit of the public. (*City of Fresno v. Cloud* (1972) 26 Cal.App.3d 113, 123 (*"Cloud"*).) "Just as the landowner should not be shortchanged, the public should not be burdened with paying a king's ransom for a squire." (*San Diego County Water Authority v. Mireiter* (1993) 18 Cal.App.4th 1808, 1817.) Instead, the law of eminent domain is intended to strike a balance between the interests of the public and that of the individual landowner. (*See, People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 749. "The law of eminent domain is fashioned out of the conflict between the people's interest in public projects and the principle of indemnity to the landowner." (*U.S. ex rel. TVA v. Powelson* (1943) 319 U.S. 266, 280.) In over indulgence to the claims of a private owner for indemnification for future losses, the Opinion fails to recognize that the principles of just compensation must protect the public as well as the private landowner. (*Bauman v. Ross* (1897) 167 U.S. 548, 574; *Cloud, supra,* 26 Cal.App.3d at p. 123; *Neumann, supra,* 6 Cal.4th at p. 764. Depublication of the decision will ensure that trial courts continue to require both parties meet their burdens of production by producing evidence tending to show that some aspect of the taking "naturally tends to and actually does decrease (or increase) the market value" of the remaining property, before it is given to the jury to weigh its effect on the value of the property. Accordingly, the League and CSAC respectfully request depublication of the Opinion.

Sincerely,

James B. Gilpin and Kimberly Hood
of BEST BEST & KRIEGER LLP

JBG:lmg

PROOF OF SERVICE

(City of Livermore v. Dennis E. Baca, et. al
Supreme Court Case No. S203534.
Court of Appeal, Sixth Appellate District Case No. H034835
Santa Clara County Superior Court Case No. 108CV-119575)

I, Lisa Grennon, declare:

I am a citizen of the United States and employed in San Diego County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 655 West Broadway, 15th Floor, San Diego, California 92101. On July 12, 2012, I served a copy of the within document(s):

REQUEST FOR DEPUBLICATION OF OPINION

XX **BY U.S. MAIL**

By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below **(as indicated).**

XX **OVERNIGHT COURIER**

By placing the document(s) listed above in a sealed overnight courier envelope with an affixed pre-paid air bill, and caused the envelope to be delivered to an overnight courier agent for delivery to the addressees as indicated.

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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 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.

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. Executed on July 12, 2012, at San Diego, California.

Lisa Grennon