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

No. D072954

SAN DIEGO UNIFIED PORT DISTRICT,
Plaintiff and Respondent,

v.

CALIFORNIA COASTAL COMMISSION,
Defendant and Appellant,

SUNROAD MARINA PARTNERS, LP,
Real Party in Interest and Respondent.

On Appeal from the Superior Court of San Diego County
Case No. 37-2015-00034288-CU-WM-CTL
Honorable Ronald Styn, Judge

BRIEF AMICUS CURIAE OF THE SAN DIEGO PORT TENANTS ASSOCIATION AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF AND RESPONDENT SAN DIEGO UNIFIED PORT DISTRICT

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL FOURTH **APPELLATE DISTRICT, DIVISION** ONE	COURT OF APPEAL CASE NUMBER: D072954
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 235101 NAME: Damien M. Schiff FIRM NAME: Pacific Legal Foundation STREET ADDRESS: 930 G Street CITY: Sacramento STATE: CA ZIP CODE: 95814 TELEPHONE NO.: (916) 419-7111 FAX NO.: (916) 419-7747 E-MAIL ADDRESS: dschiff@pacificlegal.org ATTORNEY FOR (*name*): Amici Curiae San Diego Port Tenants Ass'n & Pacific Legal Found.	SUPERIOR COURT CASE NUMBER: 37-2015-00034288-CU-WM-CTL
APPELLANT/ PETITIONER: CALIFORNIA COASTAL COMMISSION RESPONDENT/ REAL PARTY IN INTEREST: SAN DIEGO UNIFIED PORT DISTRICT; SUNROAD MARINA PARTNERS, LP	
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Date: June 6, 2018

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INTRODUCTION

Plaintiff and Respondent San Diego Unified Port District wishes to amend its master plan. The amendment would replace an existing authorization for a single 500-room hotel on East Harbor Island in San Diego Bay with an authorization for three hotels in the same location that would provide the same total number of rooms. Appellant's Appendix (AA) at 304-05. Defendant and Appellant California Coastal Commission has denied the amendment twice because it wants the District and its lessees to provide more "lower cost" accommodations. AA306, AA322. In other words, the Commission wants the power to establish hotel room rates by mandating the creation of accommodations that are "inherently lower cost." AA303, AA324. This purported authority would significantly injure the District's and its tenants' property interests in the areas to be developed.

The Commission's actions are unconstitutional. The United States and California Constitutions prohibit the taking

of private property for public use without just compensation. U.S. Const. amend. V; Cal. Const. art. I, § 19(a). Relevant to the District's lawsuit, the courts have interpreted these "Takings" Clauses to circumscribe substantially an agency's authority to demand, in exchange for a permit, an applicant's forfeiture of a property right. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996). Specifically, an agency may not require, as a condition of approval, that an applicant give up a protected property interest that is unrelated to any impact of the applicant's project. Such a demand amounts to an unconstitutional "exaction" of the protected interest. *See Koontz*, 570 U.S. at 595; *Nollan*, 483 U.S. at 837; *Ehrlich*, 12 Cal. 4th at 860.

The Commission's lower-cost accommodations condition—whether expressed as a room rate or instead as a set-aside for "intrinsically" or "inherently lower cost" facilities, AA324—is an unconstitutional exaction. In exchange for

approval of the plan amendment, the Commission demands that the District and its lessees substantially forego their rights to use and develop their fee and leasehold interests. This significant impingement of their property interests has nothing to do with the proposed plan amendment. That amendment, which would facilitate the production of market-rate hotel rooms, neither causes nor contributes to any need for lower-cost accommodations. Therefore, the Commission's renewed denial of the plan amendment is unconstitutional; the judgment of the superior court setting aside the Commission's denial should be affirmed.

LEGAL AND FACTUAL BACKGROUND

The Doctrine of Land-Use Exactions and Its Limitations on Land-Use Regulation

The Fifth Amendment to the United States Constitution, as incorporated through the Fourteenth Amendment, forbids states and their agencies from taking property without just compensation. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 306 n.1 (2002). The

California Constitution provides congruent protections. *San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal. 4th 643, 664 (2002). These protections impose direct as well as indirect limitations on government power. For example, the government may not directly condemn an easement without paying compensation. *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) ("And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation."). Also, the government is forbidden from indirectly exacting—such as through conditions on land-use approvals—protected property interests, when the exaction is not reasonably related to mitigating the impacts of the permitted activity. The seminal decision for this "indirect" limitation on the power of land-use agencies is *Nollan v. California Coastal Commission*.

In *Nollan*, the property owner sought a permit to demolish and replace a beach bungalow. *Nollan*, 483 U.S. at 827-28. The Commission granted the permit but only on the

condition that the property owner dedicate a public easement across his hitherto private beach. *Id*. at 828. The United States Supreme Court ruled that the permit condition was unconstitutional. *See id*. at 837 (likening the condition to an "out-and-out plan of extortion" (quoting *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981))). An agency, the Court allowed, can impose conditions on proposed development that are designed to mitigate the impacts of that development. *Id*. at 836. But the agency may not impose a condition that it could not impose directly, outside the permitting context, if that condition lacks an "essential nexus" to the proposed development's impacts. *Id*. at 836-37. Because the Commission could not, outside the permitting context, simply demand an uncompensated easement from the Nollans, *id*. at 831, the Commission therefore lacked the power to condition the bungalow replacement on the dedication of a public access easement, in the absence of any connection between the

bungalow replacement and an increased need for public access, *id*. at 837.

In its defense, the Commission argued that the easement condition was necessary to ameliorate the loss of various types of public access to the beach resulting from the bungalow replacement. *See id*. at 829. The Court found this argument unconvincing. The proposed easement would not have provided any type of access—visual or otherwise—for those off the beach. Rather, it would have provided access for those already on the beach to continue to cross the beach in front of the Nollans' home. Because the Commission's condition was directed at remedying the wrong access problem, *see id*. at 838-39 (finding no nexus between (i) "a requirement that people already on the public beaches be able to walk across the Nollans' property" and (ii) any visual, "psychological," or other barrier for members of the public wishing to access the beach), it therefore lacked an essential nexus and could not be imposed, *id*. at 841-42.

Since *Nollan*, the United States Supreme Court and the California Supreme Court have applied the essential nexus principle to a variety of mitigation conditions, including development fees. *See Koontz*, 570 U.S. at 607-08; *Dolan v. City of Tigard*, 512 U.S. 374, 394-96 (1994); *Ehrlich*, 12 Cal. 4th at 860. *See generally* Christina M. Martin, *Nollan and Dolan and Koontz—Oh My! The Exactions Trilogy Requires Developers to Cover the Full Social Costs of Their Projects, But No More*, 51 Willamette L. Rev. 39 (2014) (discussing the origins of the essential nexus requirement and its application to a variety of exactions, including fees). Moreover, the United States Supreme Court has held that a permitting agency cannot avoid the limitations of the essential nexus principle by denying a permit outright in lieu of issuing a conditioned permit. *Koontz*, 570 U.S. at 606-07.

The California Coastal Act and the District's Regulation of Development on East Harbor Island

The California Coastal Act of 1976, Pub. Res. Code §§ 30000-30900, comprehensively regulates land use throughout California's coastal zone. *Yost v. Thomas*, 36 Cal. 3d

561, 565 (1984). The Act does so through a partnership between state and local government. *See McAllister v. Cal. Coastal Comm'n*, 169 Cal. App. 4th 912, 922 (2008). Consistent with that partnership, the Act directs the state's port districts to produce master plans to govern land use within those portions of their jurisdictions subject to the Coastal Act. Pub. Res. Code § 30711. The Act gives the Commission the authority to approve or deny the plans. *Id*. § 30714. The Act also allows for their amendment. *Id*. § 30716.

Pursuant to these provisions, in 1980 the District approved and the Commission certified the District's master plan. AA012. In 1990, the District approved and the Commission certified an amendment to the master plan. This amendment authorized the construction of one high-end, 500-room hotel on the eastern portion of Harbor Island in San Diego Bay. AA311. In 2014, the District submitted another proposed amendment governing the East Harbor Island area. This amendment would maintain the same number of hotel rooms, but would allow

them to be constructed in three separate hotels. The amendment also would facilitate the construction of an already planned hotel on East Harbor Island that would produce 175 of the previously approved 500 hotel rooms. AA016-017, AA311. Although not presented with a formal land-use permit application, the Commission nevertheless recognized that the plan amendment was necessary to carry out the 175-room hotel development which the District had already approved. *See* AA310 (Commission staff report noting that the proposed hotel is "the catalyst" for the master plan amendment).

The Commission rejected the plan amendment. It relied on Public Resources Code section 30213, which directs that "[l]ower cost visitor and recreational facilities shall be . . . , where feasible, provided." *See* AA159-160. The agency concluded that the proposed amendment did not adequately provide for lower-cost accommodations, which the Commission defined as no more than $106 per night. *See* AA160.

The District then sued. Agreeing with the District, the superior court ruled that the Commission's lower-cost accommodation demand would illegally set room rates, thereby "impermissibly set[ting] policy." AA160. On remand, the Commission again denied the proposed plan amendment because "it does not include policy language that reserves a portion" of the relevant District territory "as a potential site for lower cost overnight accommodations," AA322, such as "hostels, tent camping, cabins/yurts, and low cost hotels/motels," AA326.

The District then challenged the Commission's renewed denial. Again, the superior court sided with the District. The court ruled that, even without the explicit setting of room rates, the Commission's denial, based on the agency's demand for lower-cost accommodations, still "infringes on the wide discretion afforded to the District to determine the contents of land use plans and how to implement these plans." AA553.

ARGUMENT

I

The Commission Lacks the Constitutional Authority To Condition the Approval of Market-Rate Hotel Rooms on the Provision of Lower-Cost Accommodations

The Commission is constitutionally forbidden from imposing a property-based condition in connection with a land-use approval that lacks an essential nexus to the impacts of the proposed land use. *See Nollan*, 483 U.S. at 837. To determine whether a permit condition amounts to an unconstitutional exaction requires a three-part analysis. First, does the condition divest a protected property-related right? *See Cal. Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 457 (2015). Second, could the condition be constitutionally imposed directly, outside the permitting context? *See id*. at 462. Third, does the condition bear an essential nexus to the impacts of the proposed development? *See Bowman v. Cal. Coastal Comm'n*, 230 Cal. App. 4th 1146, 1152 (2014). According to this framework, the Commission's demand

on the District for lower-cost accommodations amounts to an unconstitutional exaction.

A. The Condition Divests the District and Its Lessees of Protected Property Rights

The District is the owner of the land on which East Harbor Island sits. *See* Harb. & Nav. Code App. 1, § 14 (conveyance to the District of tidelands and submerged lands in San Diego Bay). The developers of the proposed hotels would be lessees of the District. *See* AA311. Both interests receive substantial protection under the law. *See*, *e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) (observing that a fee interest "is an estate with a rich tradition of protection at common law"); *Tahoe-Sierra Preservation Council*, 535 U.S. at 322 (observing that compensation is required for the taking of a leasehold). These interests would be significantly burdened by the Commission's lower-cost accommodations condition. The District would not be able to direct the development of its property consistent with its understanding of the public welfare and its obligations under the public trust doctrine. *Cf.* Harb. &

Nav. Code App. 1, § 4(a) (authorizing the district to manage "the tidelands and lands lying under the inland navigable waters of San Diego Bay, and for the promotion of commerce, navigation, fisheries, and recreation thereon"). Developer-lessees would not be able to build the projects that they would prefer. Even worse, the Commission's condition might render existing or future projects economically infeasible. *See* AA034 (the Commission's demands for more lower-cost accommodations has resulted in a "*de facto* moratorium on hotel development and served to discourage otherwise interested developers"). Thus, the Commission's condition would divest the District and its lessees of significant property-related interests.

B. The Commission Cannot Impose Its Condition Directly on the District

The Commission would not be able to impose its lower-cost accommodations condition directly on the District, for two reasons.

First, the Coastal Act expressly forbids the Commission to "require that overnight room rentals be fixed at an amount

certain for any privately owned and operated hotel, motel, or other similar visitor-serving facility located on either public or private lands." Pub. Res. Code § 30213. The Commission's current condition—adoption of a "policy [to] reserve[] a portion of [East Harbor Island] as a potential site for lower-cost overnight accommodations," AA322—violates this prohibition, even though it is no longer formulated as an express cap on room rates. The violation persists because the Commission's demand requires that a certain amount of land on East Harbor Island be set aside for "intrinsically" or "inherently lower cost" facilities, AA324—in other words, accommodations the market rate for which will not exceed what the Commission believes to be "lower cost," and thus accommodations that serve as a proxy for the agency's now disapproved cap on room rates.[1]

Second, the Coastal Act forbids the Commission from imposing any condition or other amendment directly on a port

[1] The Commission concedes that, given East Harbor Island's desirability, "it is unlikely that any new hotel" (as opposed to, for example, a "yurt") "would be lower cost." AA324.

district. *See* Pub. Res. Code § 30714 ("The commission may not modify the plan as submitted as a condition of certification."); *id*. § 30716(a) (requiring that port master plan amendments be first adopted by a port district before submission to the Commission). Hence, outside the plan amendment process, the Commission would be unable to impose any demand for lower-cost accommodations directly on the District.

C. The Condition Bears No Nexus to Any Impact of the Proposed Master Plan Amendment

The Commission's lower-cost accommodations condition is intended to remedy the purported lack of adequate lower-cost accommodations in the District's portion of the coastal zone. *See* AA320-322. But the District's proposal has neither created nor contributed to any such need. East Harbor Island does not currently afford lower-cost accommodations, such that the construction of market-rate hotel rooms would end that use. *See* AA320 (noting that the only existing "lower cost" accommodations are located in Chula Vista). Nor is there, as far as Amici are aware, any pending proposal to develop lower-cost

accommodations in the area that would compete with market-rate projects. Thus, the construction of market-rate accommodations on East Harbor Island does not create the need for any lower-cost accommodations. *See* Michael Floryan, Comment, *Cracking the Foundation: Highlighting and Criticizing the Shortcomings of Mandatory Inclusionary Zoning Practices*, 37 Pepp. L. Rev. 1039, 1071 (2010) (noting the absence of a nexus between the construction of market-rate housing and the creation of affordable housing). *See also* Michelle DaRosa, Comment, *When Are Affordable Housing Exactions an Unconstitutional Taking?*, 43 Willamette L. Rev. 453, 474-75 (2007) (observing that conditioning a permit for market-rate units on the provision of affordable units would violate the *Nollan* nexus requirement).

It is true that the development of market-rate units in a given location necessarily precludes the construction of "affordable" units in the same location. *See* DaRosa, *supra*, 475-76 (discussing the link between market-rate development and the need to preserve areas for sub-market-rate development).

That link, however, is present with every development. If such a connection constituted a sufficient "nexus" to impose a mitigation condition, then every development would be subject to a myriad of mitigation conditions or fees. Indeed, under this theory, even a permit for lower-cost overnight facilities would require a mitigation condition to provide for open space or other uses favored by the Commission that otherwise could have been preserved on a site. For good reason, that has never been the practice of the Commission or any other land-use agency.

If a real need for lower-cost accommodations exists in the San Diego Bay area, then that need is the result of local governments' zoning policies, independent market decisions that make other uses of land in the coastal zone more profitable, or a combination of these and other factors. But whatever the precise reason for that need, the decision to build market-rate hotel rooms on East Harbor Island neither creates nor contributes to it. In fact, just the opposite. *See* Floryan, *supra*, at

1071 n.193 ("Market-rate production makes affordable housing production possible . . . ."). The Commission's condition is unconstitutional.[2]

II

Setting Aside the Condition Is Consistent with *California Building Industry Association v. City of San Jose*

In *California Building Industry Association v. City of San Jose*, the California Supreme Court addressed the

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[2] Contrary to the Commission's view, Reply Br. at 32, simply because the property at issue is owned by a government agency—the District—does not preclude the application of the Takings Clause, or the essential nexus principle, because public as well as private property is protected from government expropriation. *See United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) ("[T]he reference to 'private property' in the Takings Clause . . . [encompasses] the property of state and local governments when it is condemned by the United States [and] the same principles of just compensation presumptively apply . . . ." (footnote omitted)). *See also Marin Mun. Water Dist. v. City of Mill Valley*, 202 Cal. App. 3d 1161, 1165-66 (1988) ("[A] public entity whose property has been damaged by another public entity suffers no less a taking merely because of its public entity status. . . . One public entity should not be allowed to take property belonging to another public entity without compensation."). In any event, part of what the Commission's condition seeks to impinge is the private property interests of developers in their leaseholds from the District.

constitutionality of affordable housing mandates. The City of San Jose enacted an ordinance requiring developers who build 20 or more units of market-rate housing to set aside 15% of those units as "affordable," or pay an appropriate in-lieu fee. *See* 61 Cal. 4th at 449-50. The California Building Industry Association challenged the ordinance as a violation of the exactions doctrine, relying on *Nollan* and its federal and California progeny. *See id*. at 456-57. The California Supreme Court rejected the challenge, *see id*. at 443-44, holding that the City's affordable housing ordinance should not be analyzed under the exactions cases but instead under the very generous standards applicable to traditional land-use regulation. *See id*. at 455-56, 461. Superficially, the Commission's lower-cost accommodations condition appears to parallel the affordable housing ordinance approved in *California Building Industry Association*. But on closer review, the California Supreme Court's decision is distinguishable in three significant ways.

First, the California Supreme Court's analysis was largely based on an analogy between the City's affordable housing ordinance and a run-of-the-mill land-use regulation, *see id*. at 461, 466, such as a requirement for set-backs or aesthetic controls, *see id*. at 455. That analogy was key because it allowed the Court to characterize the ordinance as a police power regulation subject to a much less demanding standard of review. *See id*. at 461 ("Rather than being an exaction, the ordinance falls within what we have already described as municipalities' general broad discretion to regulate the use of real property to serve the legitimate interests of the general public and the community at large."). *Cf. id*. at 455 ("We begin with the well-established principle that under the California Constitution a municipality has broad authority, under its general police power, to regulate the development and use of real property within its jurisdiction to promote the public welfare."). In contrast to the City of San Jose, the Commission has no general police power. *Compare* Pub. Res. Code § 30330

("The commission . . . shall have the primary responsibility for the implementation of the provisions of [the Coastal Act] . . . .") *with* Cal. Const. art. XI, § 7 ("A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."). In fact, following the 1980 certification of the District's master plan, the Commission's already limited authority over the District was reduced further. *See* Pub. Res. Code § 30715(a) ("After a port master plan . . . has been certified, the permit authority of the commission . . . shall no longer be exercised by the commission over any new development contained in the certified plan . . . and shall at that time be delegated to the appropriate port governing body . . . ."). Hence, the California Supreme Court's reliance on the substantial regulatory authority of municipalities to uphold San Jose's affordable

housing ordinance does not carry over to a similar analysis of the Commission's lower-cost accommodations condition.[3]

Second, the California Supreme Court's analysis also depended in part on its view that the City's affordable housing ordinance was akin to a typical price control. *See Cal. Bldg. Indus. Ass'n*, 61 Cal. 4th at 463-64. Because price controls generally can be imposed directly without any conditions, the Court concluded that San Jose's affordable housing ordinance—as a "conditional" price control regulation—could not constitute an exaction. *See id*. at 465. In sharp contrast here, the Commission could not impose its lower-cost accommodations condition directly. As previously noted, such a direct imposition would violate the Coastal Act's prohibition on Commission room rate fixing. *See* Pub. Res. Code § 30213. It also would violate the Act's prohibition on the Commission's direct amendment of a

[3] Distinguishable on the same ground is the Second District's decision in *616 Croft Ave., LLC v. City of West Hollywood*, 3 Cal. App. 5th 621 (2016), upholding an affordable housing in-lieu fee under *California Building Industry Association*. *See id*. at 628.

certified master plan. *See id*. §§ 30714, 30716(a). Thus, on this critical score as well, an analogy drawn between the Commission's lower-cost accommodations condition and the City of San Jose's ordinance would fail.

Third, the Supreme Court emphasized that the City's affordable housing ordinance would not, based on the record before it, result in developers' subsidization of affordable housing for others. *See Cal. Bldg. Indus. Ass'n*, 61 Cal. 4th at 466 n.14. *See also id*. at 487 (Chin, J., concurring) (suggesting that an affordable housing ordinance that required developers "to provide subsidized housing . . . would appear to be an exaction"). The ordinance would not necessarily result in impermissible subsidization, the Court reasoned, because the ordinance provided a number of potentially valuable credits to developers who complied, *e.g*., "a density bonus, a reduction in parking requirements, and potential financial subsidies." *Id*. at 466 (majority op.). Unlike the City's ordinance, the Commission's condition would provide no benefits to the District or to

potential hotel developers in exchange for compliance with its lower-cost accommodations demand. *See* AA322-326. That the Commission's actions here have resulted in a de facto building moratorium and have discouraged potential developers, *see* AA034, in fact confirms that the Commission's condition would result in impermissible developer subsidization of lower-cost accommodations.

In light of these significant differences, *California Building Industry Association* is no obstacle to a determination that the Commission's lower-cost accommodations condition is unconstitutional.

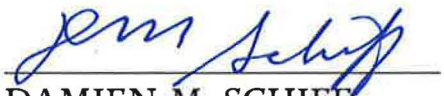
CONCLUSION

Making the coast accessible to people of all economic means is a worthy goal. And the need for lower-cost accommodations to achieve that goal can be extraordinary. But "[e]xtraordinary conditions do not create or enlarge constitutional power." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528 (1935). The superior court's order

setting aside the Commission's renewed denial of the District's master plan amendment should be affirmed.

DATED: June 6, 2018.

Respectfully submitted,



DAMIEN M. SCHIFF

Attorney for Amici Curiae
San Diego Port Tenants
Association and
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing BRIEF AMICUS CURIAE OF THE SAN DIEGO PORT TENANTS ASSOCIATION AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF AND RESPONDENT SAN DIEGO UNIFIED PORT DISTRICT is proportionately spaced, has a typeface of 13 points or more, and contains 3,941 words.

DATED: June 6, 2018.

DAMIEN M. SCHIFF

DECLARATION OF SERVICE

I, Tawnda Elling, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On June 6, 2018, a true copy of BRIEF AMICUS CURIAE OF THE SAN DIEGO PORT TENANTS ASSOCIATION AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF AND RESPONDENT SAN DIEGO UNIFIED PORT DISTRICT was electronically filed with the Court through Truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's efiling system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

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Court Clerk
San Diego County Superior Court
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Court Clerk
Supreme Court of California
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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 6th day of June, 2018, at Sacramento, California.

TAWNDA ELLING