No. S232582

IN THE SUPREME COURT OF CALIFORNIA

STEVE RYAN,

Plaintiff and Petitioner,

v.

MITCHELL ROSENFELD, *et al.*,

Defendants and Respondents.

ON PETITION FOR REVIEW FROM THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION FOUR, APPEAL NO. A145465
ON APPEAL FROM AN ORDER OF THE SAN FRANCISCO SUPERIOR COURT
CASE NO. CGC-10-504983, HONORABLE CYNTHIA M. LEE, TRIAL JUDGE

ANSWER BRIEF ON THE MERITS

DANIEL L. ALEXANDER (STATE BAR NO. 214149)
FISHERBROYLES, LLP
5405 WILSHIRE BLVD., STE. 257
LOS ANGELES, CALIFORNIA 90036
TEL: 213.297.7301
FAX: 213.297.7311
daniel.alexander@fisherbroyles.com

Attorneys for Defendants and Respondents,
Mitchell Rosenfeld, et al.

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STATEMENT OF ISSUES

"Is the denial of a motion to vacate the judgment under Code of Civil Procedure section 663 separately appealable?" (Order, April 27, 2016.)

INTRODUCTION

Petitioner asks the Court to create by judicial fiat a bright-line rule that any order denying a motion to vacate brought pursuant to Code of Civil Procedure section 663[1] is appealable. "Doing so," petitioner says, "would be fully consistent with *statutory* law allowing appeals from the denial of JNOV motions . . . ." (Opening Brief on the Merits at 1 [emphasis added].)

This Court and the Courts of Appeal have an inconsistent history with denials of section 663 motions. That inconsistency does not mean that the rules do not exist. There is as bright-line a rule regarding the appealability of section 663 motions as there is for any post-judgment motion: If the issues raised in the appeal are different from those that would arise from an appeal from the judgment, the order denying the motion is appealable under section 904.1, subdivision (a)(2).

The Court does not create appellate jurisdiction; that is a legislative function. And the legislature has demarcated appellate jurisdiction over orders ruling on section 663 motions.

Timely-filed section 663 motions extend filing deadlines for notices of appeal. There is no policy reason to substitute California's one final judgment rule with a "two final judgment" rule by vesting litigants with the unilateral power to circumvent both section 904.1 and deadlines regarding

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[1] Unless otherwise noted, all statutory references herein are to the Code of Civil Procedure.

notices of appeal. Sections 663 and 663a, together with section 904.1, subdivisions (a)(1) and (a)(2) and California Rules of Court, rule 8.108(c), represent a comprehensive guide about what is and is not appealable and about when notices of appeal must be filed for litigants who choose to file section 663 motions.

There is nothing about the Petitioner's case that warrants the special treatment he seeks for all section 663 motions. Though he argues it, the silent record exception does not apply to the Petitioner's case. Petitioner's section 663 motion was untimely and was overruled by operation of law *one day after it was filed.*

The Court should decline the invitation to create by judicial opinion something that should be left to the legislature. And the Court should affirm the Court of Appeal's dismissal of the Petitioner's appeal.

ARGUMENT

I. DENIALS OF MOTIONS TO VACATE UNDER CCP SECTION 663 ARE GENERALLY NOT APPEALABLE.

The Court has said – and the parties agree – that bright-line rules distinguishing between appealable and nonappealable orders are essential. (*See In re Baycol Cases I and II* (2011) 51 Cal.4th 751, 761, and fn. 7 ["We readily agree that bright lines are essential in this area, to avoid both inadvertent forfeiture of the right to appeal and excessive protective appeals by parties afraid they might suffer such a forfeiture."] (hereafter *Baycol*).)

The legislature added section 663 to the Code of Civil Procedure in 1897, and this Court grappled with its effect on the "one final judgment" rule as soon as 1899. (*Patch v. Miller* (1899) 125 Cal. 240, 241.) In *Patch*, the Court decided that section 663 and its companion section 663 ½ "were not intended to affect the remedy by appeal already existing [from a final

judgment], but were intended to provide a remedy in addition thereto." (*Ibid.*) The Court explained that "an appeal from a final judgment entered in the superior court has the same effect and is to be heard and determined in the same way as before the enactment of" sections 663 and 663 ½. (*Ibid.*)

In 1911, as Petitioner notes, this Court found that the denial of a motion to vacate under section 663 was "clearly an appealable order" because under former section 963 (presently codified in section 904.1, subdivision (a)(2)), "an appeal may be taken from any special order made after final judgment . . . [and t]his order is one of that kind." (*Bond v. United Railroads of San Francisco* (1911) 159 Cal. 270, 273.) The Court repeatedly interpreted section 963, subdivision 2, to allow appeals "where the law makes express provision for a motion to vacate-as under section . . . 663 [and] 663a." (*Winslow v. Harold G. Ferguson Corp.* (1944) 25 Cal.2d 274, 282.)

But the Court's rulings have not been entirely consistent. In 1905, the Court dismissed an appeal from the denial of an order refusing to vacate a judgment because the appeal "does not present any facts for the consideration of the court other than those which are presented upon appeal from the judgment itself." (*Kent v. Williams* (1905) 146 Cal. 3, 11.) In 1911 – in the same reporter volume as the *Bond* case – the Court considered a motion to vacate an order and said that the general rule is that "an order refusing to vacate a prior order is not itself appealable . . . . And even where there is a right of appeal from a judgment or order, a party cannot ordinarily take an appeal from a subsequent order denying a motion to vacate the judgment or order complained of." (*Title Ins. & Trust Co. v. California Development Co.* (1911) 159 Cal. 484, 487.) In *Title Ins. & Trust Co.*, the Court said that orders refusing to vacate were not appealable unless they

were themselves "of a class of orders designated by the code as appealable." (*Id.* at 489; *see also Southern Pac. R. Co. v. Willett* (1932) 216 Cal. 387, 390 ["The motion to vacate the order dismissing the case is not appealable."].)

A. Section 904.1 subdivision (a)(2) does not create appellate jurisdiction over all orders denying section 663 motions to vacate.

Time has passed and the law has evolved. "This order" is no longer "one of that kind," as the *Bond* Court called it. Denials of section 663 motions are no longer appealable as "special order[s] made after final judgment" or, as section 904.1, subdivision (a)(2) now reads, as "order[s] made after a judgment made appealable by paragraph (1)."

"Despite the inclusive language of Code of Civil Procedure section 904.1, subdivision (b), [now 904.1, subdivision (a)(2),] not every postjudgment order that follows a final appealable judgment is appealable." (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651 (hereafter *Lakin*).) *Now*, to be appealable under section 904.1, subdivision (a)(2), "a postjudgment order must satisfy two additional requirements." (*Ibid.*) Denials of motions to vacate judgments under section 663 *generally* do not satisfy the first: "that the issues raised by the appeal from the order must be different from those arising from an appeal from the judgment." (*See id.* [citing *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, 358].)

B. There is a bright-line rule for appealability of section 663 motions.

That is the bright-line rule for appealability of motions to vacate under section 663: if the issues raised in the appeal are different from those

that would arise from an appeal from the judgment, the order denying the motion is appealable. (*See, e.g.*, *Lamb v. Holy Cross Hospital* (1978) 83 Cal.App.3d 1007, 1011 ["The case law relating to civil appeals generally has established the principle that 'if the grounds upon which the party sought to have a judgment vacated existed before the entry of judgment and would have been available upon an appeal from the judgment, an appeal will not lie from an order denying the motion.'"] [quoting *Litvinuk v. Litvinuk* (1945) 27 Cal.2d 38, 44].)

II. THE STATUTORY APPELLATE FRAMEWORK PROVIDES THE GUIDANCE AND PROTECTIONS LITIGANTS NEED TO PRESERVE APPEALS.

There are "two independent mandatory requirements for appellate jurisdiction: There must be *both* (1) a statute that allows for an appeal, *and* (2) an appealable order." (*Katzenstein v. Chabad of Poway* (2015) 237 Cal.App.4th 759, 771 [citations omitted].) More simply, "[a] trial court's order is appealable when it is made so by statute." (*Griset v. Fair Political Practices Com'n* (2001) 25 Cal.4th 688, 696 (hereafter *Griset*).)

"The right to appeal is wholly statutory." (*Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5.) This Court and the Courts of Appeal have tried to strictly respect the rule that statutes confer appealability. In *Griset*, for example, this Court was not able to find a statute "that makes an order denying a writ of administrative mandate petition separately appealable when, as here, the petition has been joined with other causes of action that remain unresolved." (*Griset, supra*, 25 Cal.4th at pp. 696-97.) In *Gastelum v. Remax International, Inc.* (2016) 244 Cal.App.4th 1016, 1021-22, the Court of Appeal was unable to find a statute "identif[ying] an order setting aside a litigation stay as appealable."

First, then, the proposition that the Court *could* create appealability where the legislature has not done so appears to run directly contrary to the Court's authority and judicial restraint.

Second, however, creating a judicial carveout of the one final judgment rule would imply (at the very least) that the legislature is incapable of discerning between appealable and non-appealable when it drafts legislation.

The courts recognize that "[a]n order granting a motion to compel arbitration is not appealable under California law." (*Gastelum*, *supra*, 244 Cal.App.4th at p. 1023.) But there is a statute that expressly makes appealable "[a]n order dismissing or denying a petition to compel arbitration." (Code Civ. Proc. § 1294, subd. (a).) Orders denying petitions to compel arbitration are, therefore, appealable. (*See Montano v. The Wet Seal Retail, Inc.* (2015) 232 Cal.App.4th 1214 [182 Cal.Rptr.3d 220, 224].)

Likewise, orders *granting* motions to vacate under section 663 are appealable: "An order of the court granting a motion may be reviewed on appeal in the same manner as a special order made after final judgment." (Code Civ. Proc. § 663a, subd. (e).) The legislature – as it has similarly bisected other statutory frameworks – did not make orders *denying* motions to vacate under section 663 appealable.

The legislature is free to make policy decisions about the appealability of certain orders. It is free to decide as a policy matter that arbitration is to be favored and that, consequently, orders *granting* motions to compel arbitration are not appealable but orders *denying* motions to compel arbitration *are* appealable. Likewise, the legislature may very well have recognized that an order *granting* a motion to vacate a judgment *dramatically alters the nature of the previously appealable, but now*

vacated, order and an order *denying* that motion results in the *status quo*. In either case, it is the legislature's prerogative to create appellate jurisdiction – *or not*. (*Lund v. Superior Court* (1964) 61 Cal.2d 698, 709.)

A. There are protections in place for those who request relief under section 663.

Not all orders denying motions to vacate under section 663 are equal. And while bright lines are desirable, one reason we have courts is to decide on which side of the legal line a given factual scenario falls. Although we disagree about their application to this case, the section 663 appealability exceptions Petitioner outlines in his brief are exceptions for which the current statutory framework accommodates.

Cases that are true "silent record" cases are appealable as "order[s] made after a judgment made appealable by paragraph (1)." (Code Civ. Proc. § 904.1, subd. (a)(2).) If the case is a true "silent record" case, then the issues raised by the appeal from the order will be different from those that would arise from an appeal from the judgment and the order would necessarily "affect the judgment or relate to it by enforcing it or staying its execution." (*Lakin, supra*, 6 Cal.4th at pp. 651-52.)

The California Rules of Court also contemplate litigants who may want that extra bite at the apple in the trial court that section 663 affords them and still want the right to appeal the judgment if their 663 motion is unsuccessful. Motions to vacate under section 663 and appeals of final judgments are not mutually exclusive; there is nothing that would have prevented the Petitioner here or *any* litigant who receives an adverse judgment in the trial court from filing a timely notice of appeal.

California Rules of Court, rule 8.108(c) extends the time to file a notice of appeal after "any party serves and files a valid notice of intention

to move—or a valid motion—to vacate the judgment . . . ." The rules of court – through various iterations – have long dealt with the possibility that one who files a motion to vacate may also want to appeal the judgment they seek to vacate. (*See In re Corcofingas' Estate* (1944) 24 Cal.2d 517, 521-22 [dismissing appeal because motion to vacate was not filed within the time allowed by the California Rules of Court and therefore did not extend the time to file a notice of appeal from the underlying judgment].)

B. This case is not a "silent record" case.

The Opening Brief on the Merits points to CT 163-166 and argues that in the motion to vacate, the Petitioner's "version of the events leading to the dismissal painted a different picture than what had previously been argued in his behalf." (Opening Brief on the Merits at 17.)

The trial court disagreed. In denying the motion to vacate, the trial court found that "nothing has changed since the Court dismissed Plaintiff's action." (CT 186.)

With his "silent record exception" argument, Petitioner has made the sequence of events in this case important. Petitioner filed his motion to vacate four days after the trial court denied his amended motion to reconsider the order dismissing the action. (CT 186.) *Nothing had changed.*

That is because *everything that was in the record on the motion to vacate was also in the record on the motion to reconsider and was also in the record on Petitioner's opposition to his attorney's pre-trial motion to withdraw*. All of the language in CT 163-166 that Petitioner claims "painted a different picture than what had previously been argued in his behalf" is *in* the record that *could* have gone to the Court of Appeal had Petitioner filed a timely notice of appeal.

In his motion to vacate, for example, Petitioner argued that:

> My Attorney abandoned me. It is he who did not prepare for trial. He did not subpoena witnesses, prepare me and other witnesses, request documents to be produced at trial, or do anything other than try to get out of my case one month prior to trial.
>
> * * *
>
> I was abandoned by my Attorney, who knew a month before trial that he had just that time remaining to prepare, and did nothing to do so. And of course, preparation for a trial does not start one month before it. It was his abandonment and misdirection of facts in his Trial Readiness Statement that led to the denial of motion to continue and subsequent dismissal, not my inability to attend trial or my alleged lack of assistance. I am tired of being thrown under the bus by my past attorney to artfully cover his malpractice and abandonment.

(CT 164-65.)

In his reply brief on his motion for reconsideration, which was denied four days before Petitioner filed his motion to vacate, Petitioner argued that:

> [M]y attorney did not prepare for trial. He did not subpoena witnesses, one defendant resides in Arizona, prepare me and other witnesses, speak with the experts to make sure they were prepared, request documents to be produced at trial, or do anything other than try to get out of my case on multiple occasions till finally Judge Goldsmith denied his request one month prior to trial.
>
> * * *
>
> I argued that he was abandoning me when I objected to his motion for withdrawal UNLESS

> I was given a continuance to obtain counsel to actually prepare for trial, I could not release him I argue that it this motion. I was abandoned by my Attorney, who knew a month before trial that he had just that he had a short period remaining to prepare, and did nothing to do so. And of course, preparation for a trial does not start one month before it. It was his abandonment and misdirection of facts in his Trial Readiness Statement that led to the denial of motion to continue and subsequent dismissal, not my inability to attend trial or my alleged lack of assistance. I am tired of being thrown under the bus by my past attorney to artfully cover his malpractice and abandonment.

(CT 156-57.)

Not only was all of the information already in the record before Petitioner filed his motion to vacate, it was in the record before the case was *dismissed.*

A month before the trial court dismissed the case, Petitioner filed a "Response of Plaintiff Steve Ryan to Ex Parte Application of Ian Kelley to Withdraw as Attorney of Record." Petitioner argued: "**I am being abandoned**. . . . There is no greater prejudice to me than to abandon my case before trial in a month, leaving me to fend for myself, knowing that my attempts to obtain counsel have failed." (CT 030.) He explained that a letter from his attorney to the trial court "appears to be a cover your '. . . .' letter in which [Mr. Kelley] misstates fact and tries to get around the fact that [Mr. Kelley] did not do what [Petitioner] asked him to do (add a defendant and complete discovery, etc.) that should have been done immediately after [Mr. Kelley] obtained a continuance of the trial date in early March of this year." (CT 028.)

This is not a "silent record" case. A silent record exists when the appeal "raises issues which are not disclosed or could not be disposed of on appeal from the judgment itself." (*Rooney v. Vermont Investment Corp.*, *supra*, 10 Cal.3d at p. 359.) The record after a notice of appeal from the order dismissing the case here would have disclosed the same facts and asked the Court of Appeal to decide the same issues Petitioner identified in his section 663 motion.

C. Regardless of any exception that might apply, the motion to vacate was untimely, the untimely motion was denied by operation of law, and the notice of appeal was untimely.

The Court does not need to determine whether the silent record exception applies here. The record demonstrates that the motion to vacate was untimely.

> (a) *A party intending to make a motion to set aside and vacate a judgment, as described in Section 663, shall file with the clerk and serve upon the adverse party a notice of his or her intention*, designating the grounds upon which the motion will be made, and specifying the particulars in which the legal basis for the decision is not consistent with or supported by the facts, or in which the judgment or decree is not consistent with the special verdict, either:
>
> (1) After the decision is rendered and before the entry of judgment.
>
> (2) *Within 15 days of the date of* mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5, or *service upon him or her by any party of written notice of entry of judgment*, or within 180 days after the entry of judgment, whichever is earliest.

> (b) *Except as otherwise provided in Section 12a, the power of the court to rule on a motion to set aside and vacate a judgment shall expire* 60 days from the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5, or *60 days after service upon the moving party by any party of written notice of entry of the judgment*, whichever is earlier, or if that notice has not been given, then 60 days after filing of the first notice of intention to move to set aside and vacate the judgment. *If that motion is not determined within the 60-day period, or within that period, as extended, the effect shall be a denial of the motion without further order of the court.* A motion to set aside and vacate a judgment is not determined within the meaning of this section until an order ruling on the motion is (1) entered in the permanent minutes of the court, or (2) signed by the judge and filed with the clerk. The entry of an order to set aside and vacate the judgment in the permanent minutes of the court shall constitute a determination of the motion even though that minute order, as entered, expressly directs that a written order be prepared, signed, and filed. The minute entry shall, in all cases, show the date on which the order actually is entered in the permanent minutes, but failure to comply with this direction shall not impair the validity or effectiveness of the order.

(Code Civ. Proc. § 663a, subds. (a) & (b) [emphasis added].)

In his "Notice of Motion and Motion for Reconsideration," the *pro per* Petitioner noted that he "was served with written notice of entry of the order [dismissing the case] on October 24, 2014 by facsimile." (CT 093 at ll. 25-27.) Petitioner filed the same admission along with his "Amended" Motion for Reconsideration. (CT 124.)

Petitioner filed his motion to vacate on December 22, 2014. (CT 161.) The deadline to file the motion to vacate expired on November 10, 2014. (Code Civ. Proc. § 663a, subd. (a)(2).)

Even if it had been timely filed, the motion to vacate was denied by operation of law on December 23, 2014 – *the day after Petitioner filed it.* (Code Civ. Proc. § 663a, subd. (b).)

Under even the most generous of circumstances and ignoring the motion's untimeliness, Petitioner's deadline to file a notice of appeal expired on March 23, 2015. (California Rules of Court, rule 8.108(c)(2); Code Civ. Proc. § 12a, subd. (a).)

III. THERE IS NO VALID POLICY REASON FOR ADOPTING THE OPEN-ENDED JUDICIALLY-CREATED STANDARD THE PETITIONER ADVANCES.

There is no policy to be served by creating a judicial exception to the one final judgment rule. The "one final judgment" rule is presently codified as section 904.1. (*Baycol, supra*, 51 Cal.4th at p. 756.) The one final judgment rule is that "[g]enerally, an appeal may be taken only from the final judgment in an entire action." (*Tenhet v. Boswell* (1976) 18 Cal.3d 150, 153.) "'The theory is that piecemeal disposition and multiple appeals in a single action would be oppressive and costly, and that a review of intermediate rulings should await the final disposition of the case.'" (*Griset, supra*, 25 Cal.4th at 697 [quoting 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 58, p. 113].) The rule "is 'a fundamental principle of appellate practice' recognized and enforced in this state since the 19th century." (*Baycol, supra*, 51 Cal.4th at p. 756.)

Petitioner's proposed "bright-line rule" – a judicially-created exception to the one final judgment rule – would effectively swallow the

one final judgment rule whole. There is no reason for the Court to eliminate the one final judgment rule and replace it with a "two final judgments" rule or a "trial litigants who receive adverse rulings get as many opportunities as they want to appeal from one ruling" rule.

This Court has recognized departures from the one final judgment rule in only the rarest of circumstances; "'[E]xceptions to the one final judgment rule should not be allowed unless clearly mandated.'" (*Baycol, supra*, at pp. 756-57 [quoting *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 967].) Where the Court viewed an order as "in essence a final judgment" – where it viewed all of the "substantial policy considerations underlying" the one final judgment rule as having been satisfied by what essentially constituted a final judgment – it departed from the one final judgment rule. (*Id.* at 757.)

Denials of motions to vacate do not "effectively" or otherwise represent final judgments, nor do they implicate any of the policy considerations underlying the one final judgment rule. The cases that have considered the appealability of trial court orders entered after final judgment in a case have outlined good reasons for declining to create judicial exceptions to the one final judgment rule: creating exceptions like this one "permit[s], in effect, two appeals for every appealable decision and promotes the manipulation of the time allowed for an appeal." (*Reese v. Wal-Mart Stores, Inc.* (1999) 73 Cal.App.4th 1225, 1242.) This Court has considered the policy before:

> "The party aggrieved by a judgment or order must take his appeal from such judgment or order itself, if an appeal therefrom is authorized by statute, and not from a subsequent order refusing to set it aside. . . . . [T]he right of appeal from the order is denied because it

> would be virtually allowing two appeals from the same ruling, and would, in some cases, have the effect of extending the time for appeal, contrary to the intention of the statute. A further reason is that the order on the motion is merely a negative action of the court declining to disturb its first decision. The first decision being reviewable, *the refusal any number of times to alter it does not make it less so*."

(*Spellens v. Spellens* (1957) 49 Cal.2d 210, 228 [quoting 3 Cal.Jur.2d, Appeal and Error, § 57] [emphasis added].)

CONCLUSION

Respondents respectfully request that the Court affirm the Court of Appeal's dismissal of Petitioner's appeal and award the costs of this appeal to the Respondents.

Dated: November 22, 2016 **FISHERBROYLES, LLP**

By: _____
Daniel L. Alexander

Attorneys for Respondents
MITCHELL ROSENFELD, SACHIKO ROSENFELD, MICHAEL SORANTINO, and MOEJOE PROPERTIES, LLC

CERTIFICATION OF WORD COUNT
(California Rules of Court, Rule 8.204(c)(1))

The foregoing brief contains 4,218 words (including footnotes, but excluding the table of contents, table of authorities, certificate of service, and this certificate of word count), as counted by the Microsoft Word 2016 word processing program used to generate the brief.

Dated: November 22, 2016

FISHERBROYLES, LLP

Daniel L. Alexander

PROOF OF SERVICE

I am a citizen of the United States and employed in the County of Los Angeles, City of Los Angeles, California. I am over the age of eighteen years and not a party to the within action. My business address is FISHERBROYLES, LLP, 5405 Wilshire Boulevard, Suite 257, Los Angeles, California 90036.

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ANSWER BRIEF ON THE MERITS

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Robert Cooper, Esq.
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
555 S. Flower Street, 29th Floor
Los Angeles, CA 90071

Counsel for Petitioner, Steve Ryan
1 copy

Hon. Cynthia M. Lee
Dept. 606
San Francisco Superior Court
400 McAllister Street
San Francisco, CA 94102-4514

Case No. CGC-10-504983
1 copy

Court of Appeal
First Appellate District, Division Four
350 McAllister Street
San Francisco, CA 94102-7421

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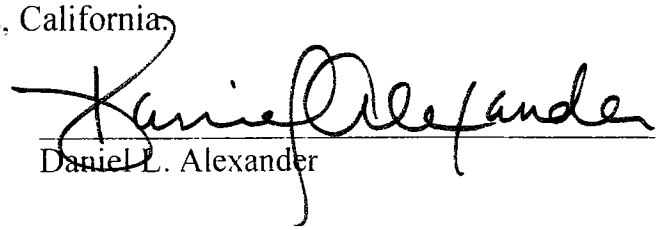

Daniel L. Alexander