Case No. S227270

IN THE SUPREME COURT OF CALIFORNIA

TRI-FANUCCHI FARMS,
Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD, et al.
Respondent.

and

UNITED FARM WORKERS OF AMERICA, a labor union,
Real Party-In-Interest.

AFTER A DECISION BY THE COURT OF APPEAL, FIFTH DISTRICT
Case No. F066648

JOINT REPLY TO RESPONDENT AGRICULTURAL LABOR RELATIONS BOARD'S AND REAL PART-IN-INTEREST UNITED FARM WORKERS OF AMERICA'S RESPONSE TO PETITIONER TRI-FANUCCHI FARMS' PETITION FOR REVIEW

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I.

INTRODUCTION

By all standards, the UFW's neglect of Fanucchi's employees in this case is deplorable, and should not be tolerated. The UFW's abandonment for over twenty-four years must be seen for what it is -- a signal that it intentionally repudiated its role as the employee's true bargaining representative.

Fanucchi has always taken the position that due to the UFW's long-term absence and egregious inactivity, the UFW's certification status was terminated by abandonment. Under Fanucchi's analysis, the ALRA prohibited it from bargaining with the UFW because it was no longer the true, certified bargaining representative.

Despite the UFW's irreparable conduct for over twenty-four years, the Board and the UFW boldly assert that Fanucchi's abandonment claim is an attempt by Fanucchi to unilaterally withdrawal recognition from a certified union in violation of the clear mandate of the Agricultural Labor Relations Act ("ALRA") prohibiting interference by the employer in the designation of representation. The Board and UFW, and the Court of Appeal for that matter, completely misapprehend Fanucchi's position in seeking this judicial review on the issue of union abandonment. Fanucchi is not seeking to interfere or make decisions about the employees' desire for union representative, but instead is seeking this Court's clear guidance

as to whether a union can be held to forfeit its certification status. Fanucchi had nothing to do with the Union's twenty-four-year absence.

II.

ARGUMENT

THE ALRB AND THE UFW PRESENT NO PERSUASIVE REASON TO DENY REVIEW

A. The ALRB is Incorrect that the Board's Precedent is Consistent with the Policies and Purposes of the ALRA.

The Board's Answer only highlights the deficiencies in the Court of Appeal's holding rejecting the abandonment defense. The Board contends that the Court's holding is based on longstanding Board precedent and does not represent a departure from the underlying legislative intent of the ALRA. In support of this claim, the Board asserts that pursuant to the "certified until decertified" rule, there are no circumstances under which an employer can challenge a union's status as the bargaining representative of its employees, even where the union has completely abandoned the bargaining unit and failed to carry out its statutory duties for a period of more than twenty-four years. (ALRB Answer, pp. 10 – 17.)

Although it is consistent with the ALRA that the right to select or remove unions is placed in the hands of the employees, the policies of the Act do not support the application of a strict rule prohibiting an employer from raising a meritorious objection to bargaining with a union that has forfeited its role as the exclusive bargaining representative due solely to the

Union's misconduct. Such a rule undermines the broad purpose of the ALRA to ensure stability in labor relations and encourage collective bargaining. (Stats. 1975, Third Ex. Sess., ch. 1, § 1, p. 4013; Lab. Code, § 1140.2.) In fact, it does the opposite. If the abandonment defense, which is recognized under the National Labor Relations Act (NLRA) is applied, then unions would be required to actively negotiate, rather than ignore their statutory duty to represent the bargaining unit.

Fanucchi does not dispute that under the ALRA the right to select or remove unions is in the hands of the employees and free from employer influence. The issue presented by Fanucchi is whether *a union should be held to have forfeited its status as the certified bargaining agent of the employees* that it has failed to represent, let alone keep in contact with, for an unreasonably long period of time, i.e. twenty-four years. If a union is determined to have forfeited its status as the exclusive bargaining representative of the bargaining unit, pursuant to the ALRA, the employer is a prohibited from bargaining with that union. (Lab. Code, § 1153, subd. (f).)

Thus, contrary to the Board's assertions, Fanucchi is not playing an active role in the removal of the UFW as the employee's bargaining representative, but is seeking judicial resolution of an important question of law and statutory construction. If this Court determines that a union forfeits its status as the exclusive bargaining representative of the

bargaining unit by long-term absence and egregious inactivity, therefore establishing that the employer has no duty to bargain with the union, the employer cannot be held to have interfered with the selection of the bargaining representative. The result would be that the union, by its own conduct, has demonstrated its intent to renounce the bargaining unit, and at that point, is no longer the employee's true bargaining representative[1].

The Board's imposition of the "certified until decertified" rule in the context of complete abandonment by the union, as presented in this case, cannot be squared with the statutory purpose of the ALRA to have actual employee representation by the union and promoting the collective bargaining relationship. In enacting the ALRA, the Legislature clearly did not foresee that a certified bargaining representative would abandon its statutory obligations to the bargaining unit for several decades and that the employees would be denied the negotiated contracted they elected the

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[1] The Board has recognized similar exceptions to the "certified until decertified rule." For example, the Board recognizes that certifications terminate through union disclaimer of interest (the affirmative act by the union of unequivocally relinquishing its certification) and union defunctness (the institutional death of the certified union). (*Dole Fresh Fruit Co.* (1996) 22 ALRB No. 4, pp. 12-14; *Bruce Church, Inc.* (1991) 17 ALRB No. 1, p. 13.) The Board distinguishes these exceptions on the grounds that they do not "call upon *the employer* to assess the quality of representation provided by the certified union." Fanucchi's position is that under the ALRA, certification terminates through the union's long-term absence and egregious inactivity. In other words, union conduct demonstrating full abandonment of the bargaining unit terminates the union's status as certified bargaining representative. Thus, the employer is not assessing the quality of representation or making the decision to terminate the bargaining obligation.

union to secure. Instead, the Legislature anticipated that the certified bargaining unit would actively negotiate the terms and conditions of employment on behalf of the agricultural employees it represents (Lab. Code, §§ 1140.2, 1152) and would bargain in good faith (Lab. Code, § 1155.2, subd. (a).) As noted by the ALRB, the Legislature's intent to promote collective bargaining was further demonstrated in 2002 when the Legislature amended the ALRA to add the Mandatory Mediation and Conciliation ("MMC") procedures. (Lab. Code, § 1164, et seq.) The ALRB and the UFW conveniently pointed out in their Answers that in adding MMC to the Act, the Legislature was particularly concerned with addressing circumstances in which employees "have waited for years" and "continue to languish without the negotiated contracts they have elected to secure." (ALRB Answer, p. 16, fn. 10, citing Office of Assembly Floor Analysis, concurring in Senate Amendments of Assembly Bill No. 2596 (2001 – 2002 Reg. Sess.) August 31, 2002, pages 7-8; UFW Answer p. 12.) This legislative history shows legislative intent to encourage bargaining and the creation of contracts which employee elections sought to secure. It does not suggest legislative support for a union to completely abandon and disregard a bargaining unit for decades, failing entirely to negotiate a contract the employees elected the union to secure. This legislative history, taken together with the wider stated legislative purpose of the Act

to promote collective bargaining, is thwarted by both the Board and Court of Appeal's rejection of the abandonment theory.

In ascertaining legislative intent, courts are called upon to consider the consequences that flow from a particular interpretation of a statute. (*United Farm Workers of America v. Agricultural Labor Relations Bd.* (1995) 41 Cal.App.4th 303, 315.) The result of the imposition of the certified until decertified rule in the present case demands that an employer bargain with a union that has been entirely absent from the scene and had no contact whatsoever with the employees or the employer for over twenty-four years. Under the Board's precedent, a union elected decades prior and that has failed to carry out any of its statutory duties since that election, is still presumed to be the true representative of the bargaining unit's own choosing. The application of certified until decertified rule under these circumstances gives no consequence to the fact that for the past twenty-four years the employer and employees have had a stable working relationship. During these twenty-four years, the employees have never sought intervention from the UFW for the purpose of collective bargaining or other aid or protection. [2] Under the Board's precedent, the burden is on the

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[2] The UFW makes a desperate attempt to mislead this Court by asserting that the UFW maintained contact with Fanucchi's employees throughout the 24-year period and that the UFW represented Fanucchi's employees on many non-bargaining matters. (UFW Answer, p. 4.) These assertions are unsupported record. The Court of Appeal chastised the UFW for making similar claims during oral argument. This Court should

employees, who the Act seeks to protect, to prove that the absent union is no longer their true bargaining representative. The consequence of the Board's precedent is unreasonable and plainly inconsistent with the purpose of the ALRA to enable agricultural employees to designate "*representatives of their own choosing ... for the purpose of collective bargaining.*" (Lab. Code, § 1140.2, italics added; also see *J.R. Norton Co. v. Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1, 30.)

Further, the Board's decision signals to unions throughout the state that as long as they have been certified as bargaining agent, they are secure to disregard their statutory responsibilities to the bargaining unit for decades without the risk of forfeiting their status as bargaining representative. This result is antithetical to the ALRA policies of having actual employee representation by the elected union and of promoting the collective bargaining relationship. (Lab. Code, §§ 1140.2, 1152, and 1155.2, subd. (a).)

Contrary to the Board's assertions, the fact that a union has completely disregarded the bargaining unit it was elected to represent for over twenty-four years presents a novel legal principle for this Court to consider. Although the appellate courts have recognized the general rule that an employer's duty to bargain with a certified union continues until

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similarly give no consequence to the UFW's inexcusable effort to assert facts unsupported by the record.

that union is decertified, those cases did not present an issue of long-term complete and total abandonment by the union. (*Montebello Rose Co. v. Agricultural Labor Relations Bd.* (1981) 119 Cal.App.3d 1[3]; *F & P Growers Assn. v. Agricultural Labor Relations Bd.* (1985) 168 Cal.App.3d 667.) In contrast to those cases, Fanucchi is asserting its duty to bargain with the UFW ended when the UFW forfeited its status as bargaining representative by such long-term abandonment (i.e., twenty-four years) and egregious inactivity. At some point, a union's abandonment has be recognized for what it is – a signal that the union has repudiated its role as the employee's true bargaining representative.

B. The Board is Incorrect that the Court Correctly Deferred to the Board's Interpretation of the ALRA in Rejecting Fanucchi's Abandonment Claims.

The Board also argues that this Court should deny review because the appropriateness of the Court of Appeal's judicial deference to the Board's interpretation of the ALRA is a firmly established principle. (ALRB Answer, p. 22-23.) The Board argues the Court must uphold the Board's interpretation of the ALRA as long as it is "reasonable." (*Ibid.*)

As Fanucchi has demonstrated at length, the Board's interpretation of the ALRA to reject the abandonment defense is unreasonable and clearly erroneous because it undermines important policies of the ALRA, such as

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[3] In reaching this conclusion, the *Montebello* court followed applicable NLRA precedent as required by Lab. Code, § 1148.

encouraging stability in labor relations, promoting collective bargaining, and ensuring that employees are represented by a union of their own choosing. (*Ruline Nursery Co. v. Agricultural Labor Relations Bd.* (1985) 169 Cal.App.3d 247, 259 [holding that the Board's interpretation of the ALRA will be followed unless it is "clearly erroneous"].) It also flies in the face of applicable NLRA precedents.

Additionally, the Court should not have afforded the Board's interpretation deference, and in fact was obligated to strike down the Board's rule denying Fanucchi's abandonment defense because it varies the terms of the ALRA, therefore exceeding the authority conferred to it by the Legislature. (*Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 436; *J.R. Norton Co., supra,* 26 Cal.3d at p. 29.)

The Board fails to acknowledge that its decision rejecting the abandonment theory based on the Board's blanket rule that a "union is certified until decertified" varies the terms of the ALRA because it fails recognize that there may be circumstances outside the election procedures that support termination of a union's certification status. Specifically, the ALRA was enacted "to provide for collective-bargaining rights for agricultural employees" by putting into place a system of laws. (Lab. Code, § 1140.2.) When a certified union fully abandons the bargaining unit it was elected to represent and engages in no collective-bargaining efforts on the bargaining unit's behalf whatsoever, the broad purpose of the ALRA

undermined. The expansive protections for agricultural employees are also threatened when unions disregard their statutory obligations to the bargaining unit. (Lab. Code, § 1140.2) Thus, by failing to recognize circumstances in which the union has forfeited its representative status, and the resulting termination of union certification status, the Board has varied the terms of the ALRA by obstructing agricultural employees' rights to collective bargaining and to designate representatives of their own choosing.

C. The Court of Appeal's Ruling in This Case Cannot Be Reconciled with Other Appellate Court Precedent Recognizing that Circumstances May Exist To Support Termination of the Union's Certification Status.

The Board and the UFW feebly contend that Fanucchi misstates the holdings of *Montebello Rose, supra,* 119 Cal.App.3d 1 and *F & P Growers, supra,* 168 Cal.App.3d at 667. (ALRB Answer, p. 25-26; UFW Answer, p. 8-9.) In doing so, the Board and the UFW impermissibly narrow the context of the *Montebello Rose* by asserting that it was limited to the issue of whether the duty to bargain with a certified union automatically terminated at the conclusion of the 1 year certification bar. (*See* ALRB Answer, pp. 25 – 27.) That is simply not true. The *Montebello Rose* court clearly reached its decision based on the broader principle enunciated in the NLRA that the presumption of continued majority support is rebuttable. (*Montebello Rose, supra,* 119 Cal.App.3d at 24 [holding that "[u]ntil the

presumption is rebutted, a prima facie case is established that an employer is obligated to continue bargaining with the union (citations omitted)"].)

The UFW cites dicta in *Montebello Rose* in which the court asserted that "[s]o long as the employees can petition for a new election if they wish to remove the union, the employer has no real cause for concern about whether it is bargaining with the true representative of its employees." (UFW Answer, p. 8, citing *Montebello Rose, supra,* 119 Cal.App.3d at 28.) However, the facts in this case are virtually the opposite of those presented in *Montebello Rose.* The lawsuit in *Montebello Rose* developed as a result of several unsuccessful negotiation sessions between the union and the employer within the year following certification of the union. (*Id.* at p. 10-13.) The statement cited by the UFW in *Montebello Rose* is misplaced in the context of the present case whey the Union abandoned negotiations for twenty-four years.

Both the UFW and Board suggest, without justification, that the presumption recognized by the *Montebello* Court can only be rebutted in one way – decertification through a secret ballot election. (ALRB Answer, p. 27; UFW Answer, p. 9.) The UFW goes as far as to state that under the certified until decertified rule, "a union continues to *enjoy* its representative status until it loses this status through a secret ballot election." (ALRB Answer, p. 9 [emphasis added].) Clearly, UFW has *enjoyed* its representative status of Fanucchi's employees seeing as it ignored its

obligations to the bargaining unit for over 24-years. The ALRA was not enacted so that the UFW can *enjoy* its representative status. The ALRA was enacted "to provide for collective-bargaining rights for agricultural employees." (Lab. Code, § 1140.2.)

As demonstrated herein, there are circumstances, such as extreme dereliction by the union in the form of long-term and complete abandonment, which can rebut the presumption of continued majority support. Therefore, the Board's narrow interpretation of legislative intent cannot be reconciled with the appellate court's holding *Montebello Rose, supra,* 119 Cal.App.3d 1.

Fanucchi maintains that the lower court erred in relying on the flawed analysis of the California Fourth District Court of Appeal in *F & P Growers, supra,* 168 Cal.App.3d at 667 which addressed the issue of whether the rebuttable presumption rule may be used by an employer as a basis for refusing to bargain with a union it believed in good faith had lost its majority support. The lower court mistakenly found Fanucchi's abandonment defense to be "clearly analogous" to the loss of majority defense asserted by the employer in *F & P Growers,* and summarily disposed of the issue. (*Tri-Fanucchi Farms v. Agricultural Labor Relations Bd.* (2015) 187 Cal.Rptr.3d 247, 257.) In doing so, the Court of Appeal overlooked the significant difference between the loss of majority defense and the abandonment defense – under the abandonment defense the

employer is not interfering in the selection and removal of bargaining representative, but is asserting that the union, by its own conduct, has forfeited its role as bargaining representative of the employees by its long-term disappearance from the scene. The Board and the Court of Appeal overlooked this important distinction.

D. The Board is Incorrect In Asserting That Court of Appeal's Recognition of the Abandonment Defense in *Gerawan* Does Not Conflict With Its Rejection of the Abandonment Defense in the Present Case.

The Answers of both the Board and the UFW assert that the Court of Appeal's decision in *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2015) 236 Cal.App.4th 1024 was incorrect, yet remarkably argue that the Court of Appeal did not error in the present case. (ALRB Answer, p. 30-32; UFW Answer, p. 12-13.) In fact, the UFW itself admits that the Court of Appeal's "distinction between raising abandonment in the face of MMC and raising it as a defense to regular bargaining" is erroneous. (UFW Answer, p. 12-13.) This concession in and of itself highlights the necessity for this Court's review.

The Board and the UFW's contentions that the Court of Appeal's holding on abandonment in *Gerawan* has no impact on the instant case are based entirely on the Court of Appeal's statements that its recognition of MMC abandonment did *not* extend to situations where the duty to bargain was involved. (*Gerawan, supra,* 236 Cal.App.4th at 1058.) Fanucchi

maintains that the Court of Appeal's reasoning that there is a meaningful distinction between an employer asserting abandonment in defending against an MMC request and an employer asserting abandonment against a union's demand to bargain. In each context, the employer is seeking to challenge the union's representative status. Whether that assertion is made as a defense to bargaining or as a defense to the MMC process, which results in a collective bargaining agreement being imposed, the conclusion is the same; either the union is or is not the rightful bargaining representative of the agricultural employees at issue. If the union is not the bargaining representative of the agricultural employees, then negotiating a CBA that will be enforced against said employees, whether reached voluntarily between the union and the employer, or compelled, would contravene the underlying purpose of the ALRA to protect the rights of agricultural workers.

The Board makes numerous incorrect statements in their Answer that have significant implications. For example, Gerawan did *not* concede that even if it established "abandonment" on the part of the UFW precluded referral to MMC, Gerawan's duty to bargain would continue in force. (ALRB Answer, p. 33.) In contrast, Gerawan distinguished bargaining from the MMC process on the basis that MMC is a compulsory procedure that mandates the imposition of a CBA. (*Gerawan, supra,* 236 Cal.App.4th at 1054.) The issue of an employer's duty to bargain after a union is

determined to not be the certified bargaining representative of the employees was never addressed by the Court of Appeal in either *Gerawan* or *Tri-Fanucchi.*

Notably, the Board and UFW do not mention, let alone defend, Fanucchi's identification of the inherit problem with the Court of Appeal's recognition of the abandonment defense in the context of the MMC process. Simply put, if it is determined that the union is not the true, certified bargaining representative of the employees, the agricultural employer is prohibited from bargaining with that union. (Lab. Code, § 1153, subd. (f) [provides that it is an unfair labor practice for an agricultural employer to "recognize, bargain with, or sign a collective bargaining agreement with any labor organization not certified pursuant to the provisions of this part."].) Thus, Fanucchi's assertion that the UFW has forfeited its status as certified bargaining representative by its long-term, full abandonment of the bargaining unit is a defense that is consistent with the ALRA.

The UFW contends that permitting employers to raise the abandonment defense in normal bargaining would eviscerate, not protect employee rights. In making this argument, the UFW again reverts to its argument that the ALRA "precludes employers from having an active role in the selection of a bargaining representative and prevents employers from refusing to bargain based on the claims that the union does not represent its

employee." (UFW Answer, p. 13-14.) However, the ALRA does not prevent employers from refusing to bargain with a union on the basis that it does not represent the employer. Quite the opposite – the ALRA prohibits employers from bargaining with a union that it is not the certified bargaining representative of the employees. (Lab. Code, § 1153, subd. (f).) Further, as detailed at length above, Fanucchi is not playing an "active" role in the selection of a bargaining representative. Fanucchi's assertion that the UFW forfeited its role as the certified bargaining representative of its employees is based on the UFW conduct, i.e. long-term abandonment and egregious inactivity. Thus, Fanucchi is not making the decisions about the employees' desire for union representative, but instead is seeking this Court's guidance as to whether a union can be held to forfeit its certification status.

The arbitrary distinctions made by the Court of Appeal to justify its conclusion that the abandonment defense is applicable to the MMC process but not bargaining creates a serious discrepancy necessitating this Court's review.

E. The Board is Incorrect that Fanucchi's Abandonment Argument Fails Under the NLRB Precedent.

The Board's Answer cites three NLRB cases that, it says, have held that a union may "cure" a period of inactivity by reasserting its bargaining rights, after which any evidence of inactivity becomes irrelevant as a matter

of law. (ALRB Answer, p. 29-30.) Notably, the facts of this case are fundamentally different from the cases cited by the Board.

Only two of the cases cited by the Board involve abandonment and the periods of time were significantly less than the twenty-four year absence at issue in this case. (*Spillman Co.* (1993) 311 NLRB No. 18 [6-months of union activity]; *Pioneer Inn* (1977) 228 NLRB No. 160 [4-years of union inactivity].) Secondly, in all three of the cases union had engaged in negotiations of a collective bargaining agreement. (*Spillman, supra,* at p. 3 [parties met of 18 occasions in efforts to agree on a contract]; *Pioneer Inn, supra,* at p. 10 [parties actually entered into a collective-bargaining agreement that renewed yearly]; *Whisper Soft Mills v. NLRB* (9th Cir. 1984) 754 F.2d 1381, 1383 [the parties engaged in 19 bargaining sessions before the employer withdrew recognition of the union asserting good faith doubt as to majority support].) Finally, in all three of these cases, the employer argued that union inactivity, or abandonment, evidenced lack of majority support. (*Spillman, supra,* at p. 4; *Pioneer Inn, supra,* at p. 17; *Whisper Soft Mills, supra,* 754 F.2d at p. 1387.) Therefore, the Board's reliance on these cases does not support the Board's assertion that Fanucchi's abandonment claim fails.

The Board also contends that Fanucchi's abandonment claim fails under NLRB precedent because the UFW was actively representing Fanucchi's employees when the union's status was challenged after the

twenty-four-year hiatus. The Board's argument collapses on itself. Notably, the Board at length and in much detail throughout its Answer describes why the NLRB cases regarding abandonment and loss of majority status are not applicable to the ALRA. Then to support the Board's argument that the UFW resumed its bargaining status, the Board conveniently cites solely to NLRB decisions involving attempts by employers to raise the loss of majority defense that the Board has clearly stated is not applicable to the ALRA. As such, the Board's claim that Fanucchi's abandonment argument fails under the NLRB precedent necessarily fails.

III.

CONCLUSION

In conclusion, the Board and UFW present no persuasive reason to deny review.

Dated: July 22, 2015

SAGASER, WATKINS & WIELAND PC

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 4,173 words as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: July 22, 2015

SAGASER, WATKINS & WIELAND, PC

By: _____

Howard A. Sagaser
Counsel for Petitioner
TRI-FANUCCHI FARMS

PROOF OF SERVICE
(Code of Civil Procedure § 1013a(3))

STATE OF CALIFORNIA, COUNTY OF FRESNO

I am employed in the County of Fresno, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 7550 North Palm Avenue, Suite 100, Fresno, California 93711.

On July 23, 2014, I served the following document described as **JOINT REPLY TO RESPONDENT AGRICULTURAL LABOR RELATIONS BOARD'S AND REAL PART-IN-INTEREST UNITED FARM WORKERS OF AMERICA'S RESPONSE TO PETITIONER TRI-FANUCCHI FARMS' PETITION FOR REVIEW**, on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

☒ **BY MAIL**: I deposited such envelope in the mail at Fresno, California. The envelope(s) was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presume invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 23, 2015, at Fresno, California.

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