Case No. S239686

SUPREME COURT
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IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

STANLEY WILSON,
Plaintiff and Appellant,

v.

CABLE NEWS NETWORK, INC. et al.,
Defendants and Respondents.

After a Decision By the Court of Appeal
Second Appellate District, Division 1, Case No. B264944
Los Angeles Superior Court Case No. BC559720 (Hon. Mel Red Recana)

RESPONDENTS' REPLY IN SUPPORT OF PETITION FOR REVIEW

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I

INTRODUCTION

Respondents' Petition for Review presents two important issues on which the Courts of Appeal have split:

1. Whether a defendant's alleged discriminatory or retaliatory motive is relevant under the first prong of the anti-SLAPP statute?

2. Whether the "public interest" requirement under the first prong can be satisfied only when the plaintiff was a "celebrity" or "in the public eye"?

As to the first issue, the existing conflict has deepened further with a recent 2-1 decision from the Second Appellate District (with Justice Lui writing the dissent), in which the majority followed *Hunter v. CBS Broadcasting, Inc.* (2013) 221 Cal.App.4th 1510 (hereinafter *Hunter*) and *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257(hereinafter *Tuszynska*) and ruled that the plaintiff's claims of racial harassment under California law were subject to dismissal under the anti-SLAPP statute. (*Daniel v. Wayans* (Feb. 9, 2017, B261814) __ Cal.App.5th __ [2017 Cal.App.LEXIS 103].)

In contrast, the Opinion of Court of Appeal below (with Justice Lui writing for the majority) and the decision in *Nam v. Regents of University*

of California (2016) 1 Cal.App.5th 1176 (hereinafter *Nam*), held that a plaintiff's allegation that the defendant's conduct constituted discrimination, retaliation or harassment itself was enough to carve the complaint out from under the protections afforded defendants by the anti-SLAPP statute.

In his Answer to the Petition, plaintiff and appellant Stanley Wilson ("Wilson" or "Plaintiff") virtually ignores this growing conflict, burying his very brief discussion of *Hunter* and *Tuszynska* on pages 30-33 of his brief (and making no mention at all of *Daniel*). There, he acknowledges that, "the appellate court disagrees with some reasoning in *Hunter* and *Tuszynska*," (Plaintiff's Answer To Petition for Review ("Ans."), p. 32), but contradictorily argues that the Court of Appeal below "ruled consistently with precedent." (Ans. p. 30.) Wilson's argument that the Court of Appeal followed precedent is directly at odds with the ruling of the Court of Appeal that *Hunter* and *Tuszynska* were erroneously decided:

> As previously noted, *Hunter*, *supra*, 221 Cal.App.4th 1510, upon which defendants principally rely, adopted the erroneous view that discrimination is merely a motive and the erroneous principle, derived ultimately from a misreading of *Navellier* in *Tuszynska*, *supra*, 199 Cal.App.4th at pages 268–269, that a defendant's motives are always irrelevant to a determination of whether the defendant's acts were in furtherance of its free speech or petitioning rights. (221 Cal.App.4th at pp.

1521–1523.) (Court of Appeal Opinion ("hereinafter "Opinion" or "Opn.") p. 13.)

The Court of Appeal declined to follow *Hunter* and *Tuszynska*, expanding the conflict that started with *Nam*.

Faced with a clear conflict in the Courts of Appeal, Wilson attempts in vain to distinguish *Hunter* and *Tuszynska* on several factual grounds. But the factual differences Wilson seizes upon are of no legal consequence. As Presiding Justice Rothschild succinctly summarized in her dissent, the legal dispute amongst the Courts of Appeal is undeniable: "'The Majority rejects *Hunter* and relies on *Nam v. Regents of the University of California* (2016) 1 Cal.App.5th 1176." (Dis. Opn., p. 4.) This Court is needed to step in to clarify the law and provide the Courts of Appeal with crucial guidance.

On the second issue upon which review is sought, Wilson protests that the Court of Appeal did not rely on his lack of notoriety and celebrity in ruling that his termination for plagiarism was not a matter of "public interest." (Ans. p. 34.) But he completely ignores that the Court of Appeal first found that there was no evidence that Wilson was "in the public eye" (Opn., p. 14), and then distinguished *Hunter* on that ground that Wilson "worked hidden from the public view." (Opn., p. 15.) The Opinion of the Court of Appeal conflicts with numerous cases where the "public interest"

requirement was found to have been satisfied in connection with claims brought by persons of far less notoriety than Wilson, including a businessman, a football coach and a participant in a contest. Review is necessary to provide further guidance to the Courts of Appeal regarding what is necessary to demonstrate a "connection with a public issue or an issue of public interest" under Section 425.16(e)(4).

II

ARGUMENT

A. THE SPLIT AMONGST THE COURTS OF APPEAL CONCERNING THE RELEVANCE UNDER THE FIRST PRONG OF THE ANTI-SLAPP STATUTE OF A DEFENDANT'S ALLEGED MOTIVE REQUIRES REVIEW

Wilson acknowledges that there is a split amongst the Courts of Appeal. (Ans. p. 30.) He attempts to minimize its significance, however, by (1) seeking to factually distinguish this matter from *Hunter* and *Tuszynska*, (2) arguing that the analysis of the Court of Appeal below was correct; and (3) attacking CNN's arguments (and, by implication, the reasoning of *Hunter* and *Tuszynska*). In the process, Wilson's scattershot arguments serve only to demonstrate that this Court's review is necessary

to provide further guidance on the important issue presented by Respondents' Petition.

1. This Case Is Not Factually Distinguishable From *Hunter*

Instead of addressing the legal conflict concerning the relevance of "motive" under the first prong of the anti-SLAPP statute, Wilson attempts to factually distinguish *Hunter* based on three immaterial differences between the two cases.

First, Wilson argues that unlike *Hunter* his "claims do not target the way a content provider chooses to deliver, present or publish news content on matters of public interest." (Ans. p. 33.) This is irrelevant. The anti-SLAPP statute does not require that the challenged claim target the content of speech. It requires only that the gravamen of the challenged claim be conduct "in furtherance" of the exercise of free speech rights. (*Haight Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1186,1190 ["[C]auses of action do not arise from motives; they arise from acts. ... [W]hile it is often said that the first prong of the anti-SLAPP analysis calls us to ascertain the 'gravamen' of the cause of action, for anti-SLAPP purposes this gravamen is defined by the acts on which liability is based, not some philosophical thrust or legal essence of the cause of action."]); *Ashbury*

Free Clinics, Inc. v. Happening House Ventures (2010) 184 Cal.App.4th 1539, 1551, fn. 7.

Here, Wilson complains of his termination as a producer for CNN where he wrote hundreds of news stories for publication on CNN.com. Clearly, the termination of his employment was "in furtherance" of CNN's free speech activity of publishing online news stories written by producers of its choosing.

Second, Wilson attempts to distinguish *Hunter* on the ground that *Hunter* was a discriminatory failure to hire case, but his action involves an alleged discriminatory termination. (Ans. pp. 31-32.) But, here again, this is a distinction without significance under the anti-SLAPP statute. Both the hiring and the termination of news producers like Wilson satisfy the "in furtherance" requirement. In other words, CNN's election to not use Wilson to write or produce news stories for publication was just as much in furtherance of free speech rights as its decision to hire and use someone else.

Third, Wilson attempts to distinguish *Hunter* on the basis that *Hunter* involved an on-air weather anchor, whereas Wilson worked off-camera as a news producer. (Ans. p. 31.) Again, this fact has no bearing on the "in furtherance" requirement. News written "off camera" is just as

much "in furtherance" of protected free speech as that communicated "on air."

Indeed, as to each of the foregoing three factual distinctions, courts have held that decisions to reassign or terminate "behind the scenes" news producers, reporters and editors are protected by the First Amendment. (*See, infra,* Section A.2.) It is axiomatic that if such decisions are themselves protected by the First Amendment, then, as a matter of law, they are "in furtherance" of protected speech.

2. Wilson Misconstrues The Opinion of The Court of Appeal

Wilson argues that the Court of Appeal, "did not hold that mere allegations of a discriminatory or retaliatory motive are sufficient to take a case outside the protections of the anti-SLAPP statute." (Ans. p. 12.) But, that is the exactly the result of the Court of Appeal's Opinion.

The Court of Appeal rejected Respondents' argument that the gravamen of Wilson's claims was CNN's conduct of terminating his employment, and instead found that the gravamen was alleged discrimination and retaliation, which, it held, was not "in furtherance" of free speech rights. (Opn. p. 10 ["the discrimination and retaliation he has alleged are not acts in furtherance of defendants' free speech rights."].) But

"discrimination" and "retaliation" are not "actions" or "conduct" -- they are legal claims that are dependent on proof of an adverse action and an unlawful discriminatory or retaliatory motive. (*See Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [a plaintiff must prove that his protected status (for example, race, gender, or age), was a "substantial motivating factor/reason" for the adverse employment action under the Fair Employment and Housing Act)]; *Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 479.)

In *Hunter* the "action" that was the focus of the anti-SLAPP analysis was the decision to not hire the plaintiff as a weather anchor, in *Tuszynska* it was the decision to not assign the plaintiff cases to handle, and in *Daniel* it was the use of racially tinged speech directed at the plaintiff. (*See also Ingels v. Westwood One Broad. Services, Inc.* (2005) 129 Cal.App.4th 1050, 1064 [plaintiff "contends there is no nexus between his claim for age discrimination and a chilling of respondents' *First Amendment* rights. We disagree with this proposition. The nature of the cause of action alleged is not dispositive"].) In each of these cases, the Courts of Appeal correctly focused on the challenged conduct or action, not on the legal terminology affixed to that conduct or action by the plaintiff in his or her complaint.

Here, in contrast, the Court of Appeal erroneously focused on the labels of "discrimination" and "retaliation" alleged by Wilson. (Opn. p. 12

["Discrimination and retaliation are not simply motivations for defendants' conduct, they are the defendants' conduct."].) This was an error. By erroneously shifting the focus away from a defendant's actual conduct or actions to the legal claim alleged by the plaintiff, the Court of Appeal effectively removed from the protections of the anti-SLAPP statute any and all conduct which a plaintiff labels as "discrimination" or "retaliation" in his complaint. The Court of Appeal effectively granted employment plaintiffs a "free pass" under the anti-SLAPP statute – a plaintiff need only allege that conduct was "discrimination" or "retaliation" and the statute no longer applies. This result violates this Court's ruling that "[n]othing in the statute itself categorically excludes any particular type of action from its operation." *Navellier v. Sletten* (2002) 29 Cal.4th 82, 92.[1] Furthermore,

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[1] Under the labels of discrimination and retaliation, Wilson also complained about other aspects of his duties and assignments, including that he receive no promotion after 2003 (V1AA/8:1), sought and was denied other job openings (V1AA/8:4-5, 10:11-13), had only a "minor role[]" in the "coverage of major breaking news or events" (V1AA/8:6-8) and was "relegated to inferior assignments." (V1AA/10:1-2) Indeed, even in his Answer, Wilson complains, "Janos assigned Hannah to high profile field assignments and prime time documentary programs, and Wilson was frequently relegated to in-house packaging and fill-in work on the Assignment Desk." (Ans. p. 16.) Further, though Wilson repeatedly argues in his Answer that he is not challenging CNN's decisions regarding what stories to publish, (*see* Ans. p. 12: "[h]ad Wilson sued to have some story/article published, for damages from non-publication of an article… -- that would be completely different," and Ans. p. 25: Wilson "does not contest CNN's right to publish whatever stories it wants…."), this assertion is belied by his own complaint, in which he claims that the Copy Editor and Janos decided "without first talking to Plaintiff" not to publish his

(continued…)

the Court of Appeal's conclusion that discrimination and retaliation cannot be "in furtherance" of protected speech is itself erroneous. Indeed, it is well established that First Amendment protections extend even to discriminatory or otherwise unlawful conduct in furtherance of an employer's exercise of free speech rights. (*McDermott v. Ampersand Publ'g, LLC* (9th Cir. 2010) 593 F.3d 950 [newspaper publisher's alleged discrimination against newsroom employees in violation of National Labor Relations Act was protected by First Amendment]; *Ampersand Publ'g, LLC v. NLRB* (D.C.Cir. 2012) 702 F.3d 51, 56 [same; holding that "otherwise valid laws may become invalidated in their application when they invade constitutional guarantees, including the First Amendment's guarantee of a free press."]; *Nelson v. McClatchy Newspapers* (1997) 131 Wn.2d 523, 544 [newspaper publisher's alleged discrimination against newsroom employee for political activities in violation of Washington law was protected by First Amendment]; *see also Ingels*, *supra*, 129 Cal.App.4th at p. 1072 [radio station's alleged discrimination against caller in violation of California age

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(...continued)
plagiarized story on Sheriff Baca. (V1AA/10:25-27) Regardless, each of the foregoing claims is a direct challenge to decisions and actions engaged in by CNN in furtherance of its free speech right to determine which employees would be assigned to write particular kinds of stories or specific news items for CNN.com. *See Nelson v. McClatchy Newspapers* (1997) 131 Wn.2d 523 (Washington Supreme Court held that reassignment of the plaintiff from reporter position to copy editor in violation of state law was protected by First Amendment).

discrimination laws protected by the First Amendment];*Claybrooks v. ABC, Inc.* (M.D. Tenn. 2012) 898 F.Supp.2d 986, 993 ["casting decisions are part and parcel of the creative process behind a television program...thereby meriting First Amendment protection against the application of anti-discrimination statutes to that process"].)

3. Wilson Misconstrues Existing Precedent And Respondents' Arguments

Wilson complains that accepting CNN's argument regarding application of the first prong of the anti-SLAPP statute will mean that "employees of media conglomerate[s] lose their basic rights under California law." (Ans. p. 8.) The fallacy of this argument was eloquently addressed in Justice Rothschild's dissent:

> The majority, however, concludes that if CNN's actions are covered by the first prong of the anti-SLAPP statute, it will have a "special immunity from generally applicable laws." (Maj. opn. *ante*, at p. 13.) This point, like a similar argument rejected in *Hunter*, is "predicated on the 'fallacy that the anti-SLAPP statute allows a defendant to escape the consequences of wrongful conduct by asserting a spurious First Amendment defense. [Citation.] In fact, the statute does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning [citation],' nor does it confer 'any kind of "immunity"' on protected activity. [Citation.] Instead, under Code of Civil Procedure section

> 425.16, a plaintiff may pursue a discrimination claim or any other cause of action based on protected activity if he or she is able to present the 'minimal' evidence necessary to demonstrate a reasonable probability of prevailing on the merits." (*Hunter*, *supra*, 221 Cal.App.4th at p. 1525.) The anti-SLAPP law thus provides no exception to laws protecting employees from unlawful discrimination. When the anti-SLAPP law applies, it only requires the plaintiff to show that the lawsuit has some "'minimal merit'" before proceeding. (*Hunter*, *supra*, 221 Cal.App.4th at pp. 1525-1526.) It does not require dismissal of the case. (Dis. Opn., p. 4)

Plaintiff argues that the press has no special immunity from generally applicable laws (Ans. p. 24), but CNN has never argued otherwise. Instead, CNN argues in its Petition that it, like all other employers in California, is entitled to the protections of the anti-SLAPP statute provided that its requirements are met. Because CNN is a news organization in the business of producing and publishing speech protected by the First Amendment, the anti-SLAPP statute has particular significance for it. As illustrated in *Hunter*, *Daniel* and *Ingels*, the anti-SLAPP statute is particularly well-suited to addressing claims that are based on a media organization's exercise of its First Amendment rights.

Wilson also asserts that "applying CNN's logic here, all of its employment-related decisions will be subject to special motions to strike." (Ans. p. 8.) CNN has never made such an argument. Instead, CNN has

argued that in this case, where Wilson is an award winning producer whose job involved writing news stories for publication on CNN.com to its worldwide audience, CNN has a First Amendment right to terminate his employment for admitted plagiarism, and a claim seeking to interfere with that free speech right is subject to the anti-SLAPP statute.

Wilson also falsely claims that "[u]nder CNN's approach, whether the media employer's actions 'giving rise' to the employee's claim (e.g., actions alleged to be discriminatory) actually 'furthered' its rights to free speech and how attenuated the connection is between its tortious conduct and the news produced are both irrelevant." (Ans. p. 9.) However, CNN has never made that argument. Instead, CNN has argued that its motive for the complained of actions is irrelevant. That is the precise ruling made by the Courts of Appeal in *Hunter*, *Tuszynska* and now *Daniel*.

The anti-SLAPP statute requires a moving defendant to demonstrate that the gravamen of the complaint -- the actions or decisions about which the plaintiff complains -- were in furtherance of free speech activities. Here, Wilson complains about his termination, and CNN has demonstrated that the decision to not use Wilson as a news producer writing stories for CNN.com was "in furtherance" of its free speech rights.

Wilson also claims that his "connection to the news is incidental to his discrimination and retaliation claims." (Ans. p. 13.) Again, not true. Plaintiff's discrimination and retaliation claims arise from his termination as a news producer writing stories for CNN.com. Plaintiff was terminated because he admitted to plagiarism on a story he submitted for publication. (V1AA/62:12-16, V1AA/110:13-28) Plaintiff's connection to the news is at the core of his claims.

Similarly, Plaintiff argues that the protected activity at issue is incidental or collateral. (Ans. p. 30.) But the decision regarding who will write news stories that will be published to an international viewership are far from collateral to free speech. Indeed, Courts have held that such decisions are themselves protected by the First Amendment. (*See* Section II(A)(2), *supra.*)

B. WILSON FAILS TO ADDRESS THE CONFLICT BETWEEN THE COURT OF APPEAL'S OPINION AND THIS COURT'S DECISION IN *NAVELLIER*

Wilson makes no attempt to address the conflict between the Court of Appeal's Opinion and this Court's decision in *Navellier*, discussed at length in the Petition. (Petition, pp. 32-39.) As a result, he has failed to show the absence of a conflict between the Court of Appeal's Opinion and

this Court's direction that "[t]he anti-SLAPP statute's definitional focus is *not the form of the plaintiff's cause of action* but, rather, *the defendant's activity that gives rise to his or her asserted liability*—and whether that activity constitutes protected speech or petitioning." (*Navellier, supra*, 29 Cal.4th at p. 92, emphasis added.)

C. THE COURT OF APPEAL APPLIED A FLAWED STANDARD FOR DETERMINING A PUBLIC ISSUE OR AN ISSUE OF PUBLIC INTEREST

The Court of Appeal ruled that CNN's termination of Wilson was not "in connection with an issue of public interest," citing to the fact that Wilson lacked "name recognition" and was not otherwise "in the public eye." (Opn. p. 15.) Wilson insists that the Court of Appeal did not find this factor determinative and thus there is no conflict with precedent. However, it is clear from the Opinion of the Court of Appeal that Wilson is wrong.

First, the Court of Appeal made several factual findings concerning Wilson's lack of celebrity status. For example, the Court of Appeal found that "the record does not show that plaintiff was a person in the public eye. He was a producer and Web article writer, not a reporter appearing on camera." (Opn. p. 14.) Similarly, the Court of Appeal found that, "nothing indicates that plaintiff was a celebrity at any level or that his participation

in producing a program for CNN had any effect whatsoever upon the newscast ratings."[2] (Opn. p. 15.)

Second, the Court of Appeal expressly relied on Wilson's lack of celebrity to find that his plagiarism is not a matter of public interest, whereas plagiarism by "an international news figure" would be. (Opn. p. 16.) Similarly, the Court of Appeal factually distinguished *Hunter* on the ground that the plaintiff in *Hunter* worked on air:

> Plaintiff's role in shaping the news CNN broadcast was hidden from public view, unlike the local television "weather news anchor" role sought by the plaintiff in *Hunter*, *supra*, 221 Cal.App.4th 1510, upon which defendants principally rely. (Opn. p. 15.)

However, neither Wilson's celebrity status, nor the public's knowledge of him, is determinative on the question of "public interest." Instead, the focus is on whether the gravamen of the complaint -- here, CNN's termination of an award winning news producer who admitted to plagiarism -- is in connection with an "issue of public interest," as opposed

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[2] But Wilson, according to his own declaration (V2AA/348:1-6), "'received more than two dozen journalism awards for breaking news, investigative reporting, and documentary programs, including Emmy Awards . . . ; two Associated Press Awards; a Gracie Award; a Vision Award from NAMIC (National Association for Multi-Ethnicity in Communications); and the International Documentary Association award.' He was also 'part of the CNN team honored with a George Foster Peabody Award for coverage of Hurricane Katrina.'" (Dis. Opn. p. 2.)

to a purely private matter. (*Hunter*, *supra*, 221 Cal.App.4th at p. 1527 ["As Hunter concedes, weather reporting is a matter of public interest. CBS's decisions regarding who would present those reports to the public during its broadcasts was necessarily "in connection" with that public issue"]; *McGarry v. Univ. of San Diego* (2007) 154 Cal.App.4th 97 [abrupt termination of college football coach in middle of season was a matter of public interest]; *Nygård, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1039-1042 [matter of public interest was at issue in an employer's lawsuit against a former employee]; *Ingels*, *supra*, 129 Cal.App.4th at pp. 1062-64 [matter of public interest was at issue in an age discrimination lawsuit against a radio station and call-in show host]; *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798 [holding that matters of public interest were at issue in lawsuit by participant in television contest to marry a millionaire]; *Chaker v. Mateo* (2012) 209 Cal.App.4th 1138, 1142,1145-1147 [businessman's defamation lawsuit against former romantic partner and her mother "f[e]ll within the broad parameters of public interest"].)

As the Court of Appeal explained in *Chaker*:

> An issue of public interest is *any issue in which the public is interested.* [Citation.] A matter of public interest should be something of concern to a substantial number of people. [Citation.] (*Chaker*, *supra*, 209 Cal.App.4th at p. 1145,

emphasis in original, quote marks and citations omitted.)

Here, it is undeniable that the public has an interest in the integrity and accuracy of news organizations like CNN and their reporting. The public also has an interest in the termination of an award winning news producer for plagiarism.[3] Accordingly, the absence of evidence that Wilson was a "celebrity" was not proper grounds upon which to conclude that his termination was not a matter of "public interest."

D. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant this Petition.

DATED: February 23, 2017

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By _____
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[3] Though not determinative of "public interest," it bears noting that a search on Google of "Stanley Wilson CNN" results in numerous mainstream news stories of his "$5 million bias and wrongful termination suit," as well as the decision of the Court of Appeal below.

WORD COUNT CERTIFICATION

Pursuant to CRC 28.1(d)(1), counsel for Defendants hereby certifies that this Petition was produced using 13-point Times New Roman type and contains approximately 4,180 words, excluding the Tables of Contents and Authorities. In doing so, counsel relies on the word count of the computer program used to prepare this Petition.

DATED: February 23, 2017

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PROOF OF SERVICE

Stanley Wilson v. Cable News Network Inc., et al.
Supreme Court No. S239686; Court of Appeal No. B264944;
LASC Case No. BC 559720

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles , State of California, I am over the age of eighteen years and am not a party to this action; my business address is Mitchell Silberberg & Knupp LLP, 11377 West Olympic Boulevard, Los Angeles, CA 90064-1683, and my business email address is egd@msk.com.

On February 23, 2017, I served a copy of the foregoing document(s) described as **RESPONDENTS' REPLY IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action at their last known address as set forth below by taking the action described below:

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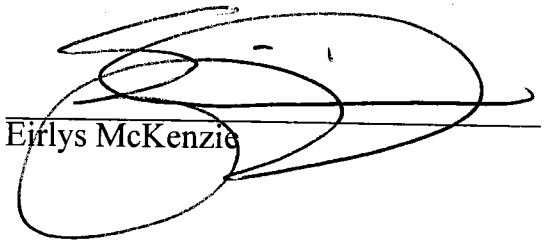
Executed on February 23, 2017, at Los Angeles, California.



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