No. S246102

In the Supreme Court of California

THE PEOPLE,

Plaintiff, Cross-defendant and Respondent,

v.

CONAGRA GROCERY PRODUCTS COMPANY et al.,

Defendants and Appellants;

THE SHERWIN-WILLIAMS COMPANY,

Defendant, Cross-complainant and Appellant.

CONAGRA GROCERY PRODUCTS COMPANY'S REPLY TO CONSOLIDATED ANSWER TO PETITION FOR REVIEW AND JOINDER IN REPLIES TO ANSWERS TO PETITIONS FOR REVIEW OF NL INDUSTRIES, INC. AND THE SHERWIN-WILLIAMS COMPANY

From a Decision Announced in an Opinion Certified for Publication
Court of Appeal, Sixth Appellate District, Case No. H040880

On Appeal from a Judgment Following a Bench Trial
Superior Court of the County of Santa Clara, Case No. 1-00-CV-788657
Judge James P. Kleinberg

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I. INTRODUCTION

In its Consolidated Answer to the Petitions for Review, plaintiff's own arguments make clear that the Court of Appeal has taken California law in a direction that differs from this Court's precedents that, among other things, require that a manufacturer's liability be measured by the state of scientific knowledge at the time it manufactured a product, and limit liability to only those harms that the plaintiff proves resulted from each defendant's own conduct. The Court of Appeal's new direction also differs from the law applied in sister states on identical important questions that have huge ramifications for millions of California homeowners, as well as millions of others that will be impacted by the new law announced in the published opinion below. This Court should decide whether California law should travel into such uncharted waters.

II. PLAINTIFF FAILS TO DEFEAT CONAGRA'S SHOWING THAT THIS COURT SHOULD GRANT REVIEW

A. Plaintiff Is Wrong: Review Is Warranted To Settle Important Questions Of Law And To Resolve Issues Involving The Application Of The Law Of Public Nuisance

Plaintiff argues that this Court should not grant review because the issues presented supposedly involve only the application of settled law of public nuisance to the facts of this case and do not involve articulation of the law that governs public nuisance actions. (*See* Consol.Ans./2-3; *see also id.* at 17-32, 48-51) Plaintiff is twice wrong: this case involves the articulation, and not merely

application, of public nuisance law, and even the application issues alone raise questions worthy of review.

1. Review Is Warranted To Settle The Law

First, and contrary to plaintiff's assertion, the law of public nuisance is *not* well settled as to the issues presented.

Prior to the Court of Appeal's published opinion, the law had been settled in California that a defendant could not be liable for public nuisance simply because it manufactured and promoted a product. *See City of San Diego v. U.S. Gypsum Co.*, 30 Cal.App.4th 575, 585-87 (1994) (no public nuisance liability for asbestos); *City of Modesto Redevelopment Agency v. Superior Court*, 119 Cal.App.4th 28, 42 (2004) (no public nuisance liability for perchloroethylene or trichloroethylene). That law made sense: products liability law has evolved over many decades to establish requirements that carefully balance all relevant considerations in holding a defendant liable for manufacturing or promoting a product, so the extension of public nuisance liability into this area would cause public nuisance to " 'become a monster that would devour in one gulp the entire law of tort ….' " *San Diego*, 30 Cal.App.4th at 586 (quoting *Tioga Public School Dist. v. U.S. Gypsum* 984 F.2d 915, 921 (8th Cir. 1993)); *accord Modesto*, 119 Cal.App.4th at 39.

More specifically, prior to the Court of Appeal's published opinion, the law had been settled that a defendant could not be liable for public nuisance simply because it manufactured and promoted interior residential lead paint. *See State v. Lead Industries Ass'n, Inc.*, 951 A.2d 428, 442-58 (R.I. 2008); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 113-17 (Mo. 2007); *In re Lead Paint Litigation*, 191 N.J. 405, 413-40 (2007); *City of Chicago v. American Cyanamid Co.*, 355 Ill.App.3d 209, 212-25 (2005).

By its published opinion, however, the Court of Appeal has unsettled the law of public nuisance for *any* defendant that manufactures and promotes *any* product. The unsettling of the law will yield unjust consequences: In holding ConAgra, NL, and SWC liable for public nuisance, the trial court acknowledged that it held them liable "retroactively" [134AA/39735], that is to say, based on conduct that was deemed actionable only after the fact. The consequences will also be dire: In holding ConAgra, NL, and SWC "retroactively liable" [*id.*], the lower courts have ordered them to pay vast sums into a fund for "abatement" of the supposed public nuisance, with each of them jointly and severally liable for the entire sum. (Opn./19-20, 48)

Devoting even less than one page to an attempt to distinguish the sister-state decisions that foreclosed similar public nuisance claims, plaintiff asserts that the existence of a "public right" is more broadly defined under California statutory law than it is under the

common law, which governs the sister-state decisions in question. (*See* Consol.Ans./21)

But *this Court* has never held that a "public right" is more broadly defined under California statutory law than the common law—which gave rise to California's law of nuisance. Thus, by plaintiff's own argument, the decision below rests on an important, but unsettled, point of law—whether California's definition of "public right" is indeed different from that in other states.

Moreover, there is ample reason to review that unsettled question. The Court of Appeal offers no support for its assertion that "California's … statutory definition" is "broader." (Opn./131) The only support that plaintiff offers for its similar assertion is this citation: "See Rest.2d Torts, § 821B, com. g & reporter's note [citing *Wade v. Campbell* (1962) 200 Cal.App.2d 54 as an example of this more expansive statutory definition of the public right]." (Consol.Ans./21) *Wade*, however, does not even refer to "public right." In the more than 50 years since it was decided, *Wade* has never been read—either by this Court or by any Court of Appeal—as an "example" of any "definition" of "public right."

If indeed "public right" is more broadly defined under California statutory law, it is this Court that should so hold after granting review.

Plaintiff also asserts that, since this Court denied review in 2006, it should deny review today. (*See* Consol.Ans./1, 13)

As though nothing has happened in the interim.

In 2006, this Court had before it a decision by the Court of Appeal that reversed a judgment, prior to trial, sustaining a demurrer without leave to amend as to a claim for public nuisance. *See County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal.App.4th 292, 333 (2006).

Today, this Court has before it a decision by the Court of Appeal on a judgment after trial. In that decision, the Court of Appeal held ConAgra liable to inspect all homes built before 1951 in all of the ten jurisdictions even though plaintiff did not attempt to connect the promotion of lead paint by Fuller to any homes in which lead paint was applied due to those Fuller promotions. The Court of Appeal's causation theory conflicts with a post-2006 decision of this Court that requires that a defendant be held liable only for harms that are proven to result from defendant's own conduct. *O'Neil v. Crane,* 53 Cal.4th 335 (2012). Plaintiff confirms the decision below cannot be reconciled with *O'Neil* because plaintiff does not even try to reconcile the two—its answer does not even mention *O'Neil*. Neither the court of appeal's causation analysis, nor *O'Neil*, existed in 2006, and the conflict between those decisions presents today an important issue in need of settling.

Moreover, in 2006, only one sister-state decision had addressed whether a lead paint manufacturer could be liable for public nuisance under a similar theory, and that decision held that the manufacturer was not liable. *See City of Chicago v. American Cyanamid Co.*, 355 Ill.App.3d at 212-25.

Today, three additional sister-state decisions have addressed similar theories, and all have held that the lead paint manufacturers could not be liable for one or more of the reasons that defendants have urged in their petitions for review. *See State v. Lead Industries Ass'n, Inc.*, 951 A.2d at 442-58; *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d at 113-17; *In re Lead Paint Litigation*, 191 N.J. at 413-40.

If indeed the issues presented were not ripe for review in 2006, intervening events have shown that they are ripe now.

2. Review Is Also Warranted To Resolve Issues Involving The Application Of The Law

This case involves the articulation of new, important, but unsettled law, which alone justifies review. But, contrary to plaintiff's implication, this Court also grants review regularly to resolve issues involving the application of the law to the facts of the case. *See*, *e.g.*, *People v. Gonzales*, 56 Cal.4th 353, 356 (2013) (granting review to determine whether, on the facts of the case, the trial court properly applied the psychotherapist-patient privilege);

Ameron Int'l Corp. v. Ins. Co. of Pa., 50 Cal.4th 1370, 1377 (2011) (reviewing whether, on the facts of the case, certain comprehensive general liability insurance policies imposed on the insurer duties to defend and indemnify in an administrative law proceeding).

This Court grants review to resolve such issues because the erroneous application of law to facts may cause as much mischief as the erroneous articulation of law. *See*, *e.g.*, *Menendez v. Superior Court of Los Angeles County*, 3 Cal.4th 435, 440, 447 (1992) (granting review to prevent and cure mischief from the erroneous application of the psychotherapist-patient privilege).

Plaintiff has itself presented an issue involving the application of the law to the facts. (*See* Consol.Ans./4 (whether there was substantial evidence to support liability for the presence of interior residential lead paint in residences built after 1950))

The issues presented that involve application of the law to the facts are particularly worthy of review in light of the unprecedented nature of these issues. To defendants' knowledge, no prior California case has ever attempted to hold a defendant liable so many years after the defendant promoted a product—when the scientific knowledge regarding the product's risks had changed so dramatically in the intervening decades. The Court of Appeal's application of the law regarding the knowledge required to impose liability to these facts thus threatens to open up an entire new species of lawsuits—actions that reach back decades in attempts to impose

liability for "drugs, facilities, foods and products of all kinds that were at one time viewed as harmless [yet] are later shown to be anything but." (138AA 41014 [trial court statement of decision].)

Similarly, no California case has permitted so many disputed facts to be determined based on evidence that consisted almost entirely of experts parroting hearsay of which the experts had no percipient knowledge. This unprecedented approach likewise threatens to open up an entire new species of trials.

In short, although this case presents important and unsettled questions involving the articulation of the law, and not merely its application, the additional questions presented that involve application of the law to facts are themselves worthy of review.

B. Plaintiff Is Wrong: The First Issue, Involving The Causation Standard That Governs Public Nuisance Claims Under California Law, Is Worthy Of Review

Quoting this Court's decision in *Bockrath v. Aldrich Chem. Co.*, 21 Cal.4th 71, 79 (1999), the Court of Appeal ruled that "each individual defendant's promotion of lead paint for interior residential use … were [*sic*] at least 'a very minor force' in leading to the current presence of interior residential lead paint in a substantial number of homes in the 10 jurisdictions" represented by plaintiff, and that each defendant was "liable for the entire harm" jointly and severally with the others. (Opn./51, 58) That ruling raises an important question of law: is the correct causation test (a) whether

each defendant's promotion played some unspecified role in the presence of lead paint inside homes in the jurisdictions generally, viewing all homes as an indivisible unit, as the Court of Appeal held below, or (b) does the correct causation rule require a plaintiff to prove *which homes or how many homes* were painted with lead as a result of each defendant's promotions, and to impose liability on each defendant only for those homes that its own conduct caused to contain lead paint? The rule that this Court declared was "fundamental" in *O'Neil* is that a defendant may be liable only for the harm that its own conduct caused. 53 Cal.4th at 349. Accordingly, under *O'Neil*, the correct rule is (b), and the Court of Appeal's new causation rule is incorrect.

The need to settle the correct causation standard is manifest. Under *O'Neil*, a plaintiff that claims a defendant caused hazards at a vast number of separate sites must proceed site by site and show which hazards resulted from each defendant's own conduct. The Court of Appeal's new causation rule instead permits causation to be determined by treating all of the alleged hazards at many separate sites as an indivisible collective harm and permits liability to be imposed on a single entity for the entirety of the collective harms caused by thousands or millions of contributors if the plaintiff merely shows the defendant made some unspecified contribution to the collective harms. That is a complete transformation of the previously settled law of causation. This Court should decide whether California law should be so transformed.

In its answer, plaintiff simply assumes its collective and indivisible approach to causation is the correct legal standard. Thus, plaintiff does not even mention *O'Neil*, much less explain how plaintiff's approach can be reconciled with *O'Neil*'s causation requirements. But, the legal premise that plaintiff assumes is the important and unsettled question for review—is the indivisible approach the correct causation rule; or does *O'Neil* instead require the plaintiff to prove which homes or how many homes contain lead paint as a result of each defendant's own conduct?

Plaintiff attempts to salvage the Court of Appeal's erroneous causation "rule" by arguing that the Court of Appeal followed *Bockrath*. (*See* Consol.Ans./28-32, esp. 28-29) But although the Court of Appeal quoted the phrase "a very minor force" from *Bockrath*, it deviated from *Bockrath*'s substance. In *Bockrath*, this Court held that, in an action against defendants that manufactured toxic substances, a plaintiff must plead, and inferentially prove, that each defendant caused the plaintiff harm by exposing plaintiff to the toxic substance each defendant had manufactured. 21 Cal.4th at 79-80. *Bockrath* thus required plaintiff to connect each defendant's conduct to each home that plaintiff contended each defendant was liable to inspect and abate, and *Bockrath* precludes the indivisible approach that the Court of Appeal adopted.

Falling back, plaintiff attempts to salvage the Court of Appeal's erroneous causation "rule" by asserting that ConAgra's "quarrel lies with the trial court's refusal to apportion liability, and

not with its finding of causation." (*See* Consol.Ans./31) Not true. ConAgra's quarrel lies with the fact that the trial court and Court of Appeal applied the wrong causation test to establish liability in the first instance. Were it not for the lower courts' error in articulating an incorrect causation rule, those courts would have been unable to find causation and impose liability in any amount because plaintiff never even attempted to show which homes or how many homes contain lead paint as a result of Fuller's alleged promotions.

Plaintiff also asserts that "[t]he evidence fully supported the trial court's finding" of causation. (Consol.Ans./29) Plaintiff, however, fails to cite any of that "evidence." Instead, plaintiff quotes *City of Modesto v. Dow Chemical Co.*, No. A134419, 2018 BL 5955 (Cal. App. 1st Dist., Div. 4, Jan. 08, 2018): "Direct proof of each link in a chain of causation is not required. '[C]ircumstantial evidence of sufficient substantiality' from which reasonable inferences can be drawn will support a finding of causation in fact." *Id.* at *16 (quoting *Smith v. Lockheed Propulsion Co.*, 247 Cal.App.2d 774, 780). Of course, direct proof of each link in a chain of causation is not required. But contrary to plaintiff's implication, there was not even circumstantial evidence to make up for the absence of direct proof because there was simply no evidence linking the alleged Fuller promotions to any harms that resulted from those promotions. The only Fuller promotion that the Court of Appeal identifies as actionable was a 1931 brochure. (Opn. 50) But no document or witness supplied any evidence as to who (if anyone) relied on that brochure, and instead, plaintiff

stipulated that it had no evidence that anyone relied on defendants' promotions. (78AA 22969-70)

Plaintiff's inability to reconcile the Court of Appeal's erroneous causation rule with this Court's causation precedents, and inability to salvage the Court of Appeal's erroneous causation analysis confirms that the causation rule and analysis below has created a conflict among decisions and has unsettled the law.

C. Plaintiff Is Wrong: The Second Issue, Involving The Limitations On Liability For Public Nuisance Under The Due Process Clause Of The United States And California Constitutions, Is Worthy Of Review

As shown above and in the Petition for Review [*see* ConAgra Pet.Rev./32-33], the trial court imposed liability on ConAgra for public nuisance without individualized proof that tied any Fuller promotion of the use of interior residential lead paint to identified harm that resulted from those promotions.

The Court of Appeal erroneously rejected ConAgra's claim that the trial court violated due process on the ground that *Wal-Mart Stores, Inc. v. v. Dukes*, 564 U.S. 388 (2011) was a class action case and this was a public nuisance case. (Opn./73) However, the Court of Appeal closed its eyes to the fact that *Dukes* was a due process case too—and that it prohibited the imposition of liability without individualized proof.

Plaintiff repeats the Court of Appeal's "*Dukes*-was-a-class-action-case-and-this-was-a-public-nuisance-case" statement. (Consol.Ans./38-39) Plaintiff's repetition of the Court of Appeal's unsound statement, however, does not make it any sounder. Neither does plaintiff's citation of *Tyson Foods, Inc. v. Bouaphakeo*, ___ U.S. ___ [136 S.Ct. 1036] (2016), provide any support: *Tyson* does not even refer to due process.

Most importantly, Plaintiff never addresses the key point. As noted, the Court of Appeal found it sufficient for plaintiff to prove that Fuller promoted lead paint and that Fuller's promotions were "at least 'a very minor force' in leading to the current presence of interior residential lead paint in a substantial number of homes in the 10 jurisdictions." (Opn./51, 58) This standard fails to determine *which homes or how many homes* contain lead paint as a result of Fuller's promotion, and instead holds ConAgra liable for *all home*s on the ground that Fuller's promotions supposedly caused *some* homes to contain lead paint. No court previously has allowed such a non-individualized determination of liability. Whether due process permits such an approach is therefore yet another important question in need of settling.

The Court of Appeal also stated Fuller's "conduct" "caused the existing public nuisance" that ConAgra is "being ordered to abate." (Opn./73) But the assertion that Fuller caused the nuisance rests on an unconstitutional causation test that fails to make individualized determinations of Fuller's liability. Fuller certainly

did *not* cause the presence of interior residential lead paint in *all* of the residences in *all* of the ten jurisdictions built before 1951. Yet it was held liable to inspect and abate them all without any showing of which homes or how many homes Fuller caused to contain lead paint. It is the latter showing that due process requires, but which was never made here.

Plaintiff asserts that the proportionality requirements in *BMW of North America, Inc. v Gore*, 517 U.S. 559 (1996) do not apply because *Gore* was a punitive damages case and this was a public nuisance case. (Consol.Ans./40-41) But *Gore* was a due process case too—and it bars the imposition of disproportionate liability.

Plaintiff adds that ConAgra's liability was not disproportionate because Fuller's conduct was "reprehensible." (*Id.* at 41) The trial court disagreed. It acknowledged that Fuller's "knowledge" of the hazard at the time of its conduct was "nascent" and that hence its liability was "retroactive[ ]." (138AA/41014) In any event, however "reprehensible" Fuller's conduct might be deemed, the consequences of its conduct cannot be deemed severe. As shown, there was no substantial evidence that Fuller's conduct caused children to be exposed to any paint that was hazardous.[1]

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[1] In its Petition for Review, ConAgra raised three additional due process concerns: (1) the Court of Appeal's interpretation of Civil Code section 3490 and the laches doctrine; (2) its ruling that ConAgra was liable as Fuller's successor; and (3) its silence on the

(footnote continued on following page)

For these reasons, the Court of Appeal's erroneous rejection of due process claims threatens conflict among decisions and the unsettling of the law. The claims warrant review.

D. Plaintiff Is Wrong: The Third Issue, Involving The Conditions For The Sufficiency Of Expert Opinion To Prove Liability Under The Principles In *People v. Sanchez*, 63 Cal.4th 665 (2016), Is Worthy Of Review

Lastly, plaintiff argues that ConAgra's third issue, which involves the sufficiency of expert opinion to prove liability under the principles in *Sanchez*, 63 Cal.4th 665, is not worthy of review. (*See* Consol.Ans./48-51) Yet again, plaintiff is wrong.

The Court of Appeal erroneously excused the absence of independent proof of case-specific facts by pretending that the trial court had admitted the documents underlying the experts' opinions for their truth under the hearsay exception for ancient documents contained in California Evidence Code section 1331. (Opn./102-03)

(footnote continued from preceding page)

trial court's statement that it was holding defendants "retroactively liable." (*See* ConAgra Pet.Rev./35-37) Plaintiff asserts that ConAgra forfeited (1) and (2) because it did not argue either as a due process violation. (Consolid. Ans./41-42) But as a review of the record will show, ConAgra argued each as a due process violation in substance if not in label. (*See* ConAgra AOB/39-53 (including record citations); ConAgra ARB/31-47 (including record citations)) Plaintiff then asserts that (3) is meritless because the Court of Appeal stated that "[t]here is no … 'retroactive liability' " [Opn./74]. But it was the trial court that imposed liability—and the trial court stated, expressly, that it was imposing liability "retroactively." (134AA/39735)

The trial court, however, did not do so. (*See* 25RT/3723-27) Indeed, the court could not have done so, inasmuch as plaintiff did not make the requisite threshold showing that any statement in any document more than 30 years old "has been since generally acted upon as true by persons having an interest in the matter" [Cal. Evid. Code § 1331].

Plaintiff attempts to make the Court of Appeal's errors disappear through both procedural and substantive arguments.

Procedurally, plaintiff argues that ConAgra, NL, and SWC had forfeited any claim in the trial court. (Consol.Ans./48-49) Not so. The Court of Appeal acknowledged that ConAgra, NL, and SWC "did make a "relevant objection" in the trial court. (Opn./101)

Substantively, plaintiff argues the opinion *of an historical expert* has evidentiary value even if it is not supported by independently-proved case-specific facts *because an historical expert can supply any case-specific facts he or she may need*. (*See* Consol.Ans./50-51) Wrong again. If an historical expert's "expertise" could relieve a party of its obligation to prove case-specific facts independently, any party could relieve itself of its obligation at will by styling any expert—say, a "gang" expert as in *Sanchez*—a "historical" expert—say, a "gang *history*" expert.

The parties sharply disputed what defendants knew at the time they supposedly promoted lead paint, the extent to which existing lead mitigation programs have reduced or eliminated lead hazards from current housing, and the necessity of expanding lead mitigation efforts beyond the successful programs that the Legislature and regulatory bodies have enacted. Every one of those disputes was not decided based upon case specific facts presented through witnesses with percipient knowledge of the facts. In fact, the record shows that the fact witnesses often contradicted plaintiff's expert on many disputed points, such as whether enforcement of existing regulations is the most effective way to prevent exposure; whether children can live safely in houses with properly maintained lead paint; whether interior lead paint is the primary source of lead poisoning in every jurisdiction and regarding the growing concern for lead in soil from gasoline and lead in water. Yet, the disputes were decided based almost entirely upon the testimony of experts who averred to supposed facts of which the experts lacked personal knowledge and which percipient fact witnesses in many instances had contradicted.

We are aware of no trial in the history of California that has permitted anything even remotely approaching what transpired below. The Court of Appeal's analysis thus threatens to open up an entire new species of lawsuit. If that analysis remains published, why would a plaintiff bother to undertake the more burdensome—but time-honored and more reliable—method of proving the case specific facts through percipient witnesses to testify to what the witnesses did, saw, or knew? According to the Court of Appeal, the

plaintiff could instead merely proffer "experts" to testify to what the experts had read about what someone else had supposedly done, seen, or knew. This was the expedient—but unreliable—maneuver that this Court barred in *Sanchez*. The Court of Appeal's unsettling of the law as to the conditions for expert opinion warrants review.

III. JOINDER IN NL'S AND SWC'S REPLIES

ConAgra joins in, and incorporates, NL's and SWC's Replies to the Consolidated Answer to the Petitions for Review.

IV. CONCLUSION

For the reasons stated by ConAgra, NL and SWC in their respective Petitions and Replies, this Court should grant review.

DATED: January 29, 2018

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By /s/ Raymond A. Cardozo
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WORD COUNT CERTIFICATE

This Reply to the Consolidated Answer to the Petitions for Review contains 4,172 words (not including the cover, the tables, the signature block, and this certificate). In preparing this certificate, I have relied on the word count generated by Microsoft Word 2010, the computer program used to prepare the petition.

DATED: January 29, 2018

/s/ Raymond A. Cardozo
Raymond A. Cardozo

PROOF OF SERVICE

***The People v. ConAgra Grocery Products Company, et al.*,**
California Supreme Court S246102,
Sixth District No. H040880, Santa Clara Superior No. 1-00-CV-788657

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, CA 94105. On January 29, 2018, I served the following document(s) by the method indicated below:

CONAGRA GROCERY PRODUCTS COMPANY'S REPLY TO CONSOLIDATED ANSWER TO PETITION FOR REVIEW
AND
JOINDER IN REPLIES TO ANSWERS TO PETITIONS FOR REVIEW OF NL INDUSTRIES, INC. AND THE SHERWIN-WILLIAMS COMPANY

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☑	by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

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I declare under penalty of perjury under the State of California that the above is true and correct. Executed on January 29, 2018, at San Francisco, California.

/s/ Eileen Kroll
Eileen Kroll