

WRITTEN DECISION - NOT FOR PUBLICATION

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BY <u>ll</u>	DEPUTY

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

11	In re:)	Bankruptcy No. 14-03742-LT7
12	PAUL MOREV,)	Adversary No. 14-90144-LT
13	Debtor.)	

14	LEONARD J. ACKERMAN,)	MEMORANDUM DECISION
15	Plaintiff,)	
16	v.)	
17	ESCROW COMPANY, INC.)	
18	Defendant.)	

20	ESCROW COMPANY, INC. a California)	
21	corporation,)	
22	Cross-Claimant,)	
23	v.)	
24	LEONARD J. ACKERMAN, Trustee;)	
25	THE WAGE JUSTICE CENTER, a)	
26	California Non-Profit corporation; ETTA)	
27	M. KEELER, an individual; SOUTHERN)	
28	WINE AND SPIRITS OF AMERICA,)	
	INC., a Florida corporation; SYSCO SAN)	
	DIEGO, INC., a Delaware corporation,)	
	Cross-Defendants.)	

1 ¹ **Background**

2 In 2009, cross-defendant Etta M. Keeler ("Keeler") obtained a judgment against
3 Robert Dale Walker, Jr. ("Walker") pursuant to which, Keeler was entitled to the proceeds
4 of California Liquor License #444033 ("Liquor License") held by Walker.³ In 2011, Paul
5 Morev ("Debtor") agreed to purchase the Liquor License from Walker. On February 6,
6 2012, the Department of Alcoholic Beverage Control ("DABC") approved the transfer of
7 the Liquor License from Walker to Debtor. Debtor executed a promissory note in favor of
8 Walker ("Note"). Walker assigned his rights under the Note to Keeler.

9 By virtue of the Note and assignment, Debtor was to have paid Keeler \$72,000,
10 payable at \$3,000 monthly. Debtor apparently made three payments and one partial
11 payment, leaving an unpaid balance of approximately \$61,700.

12 On March 12, 2013, Keeler sued Debtor in the Superior Court of California on the
13 assigned Note. Keeler filed a motion for a writ of attachment, a hearing on which was set
14 for August 2, 2013. Judge Ronald S. Prager issued a tentative ruling indicating that the writ
15 would be issued. However, prior to the hearing, Keeler and Debtor reached a settlement
16 pursuant to which Debtor agreed to assign his interest in the Liquor License to Keeler and
17 Keeler agreed to sell the Liquor License to recoup the amounts owed by the Debtor.
18 Accordingly, Keeler withdrew her motion.

19 Judge Prager entered a Minute Order dated August 2, 2013 which set forth the terms
20 of the settlement:

21 [D]efendant agrees to provide assignment of liquor license and equipment back to
22 plaintiff within 1 week. This includes rights to and interest in liquor license,
23 furniture and equipment. Plaintiff will not seek further writ of attachments.

24
25 ¹ This opinion is intended only to resolve the dispute between these parties and is not intended
for publication.

26 ² Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy
27 Code, 11 U.S.C. §§101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

28 ³ In her complaint against Debtor the Liquor License is referred to as #444033.
However, in other documents, including the motion for writ of attachment discussed below,

1 Defendant represents there are no holds or liens on the license.

2 Plaintiff will make maximum effort to sell license, furniture and equipment to recoup
3 \$67,700 plus costs.

4 Any recovery in excess of that amount will go back to defendant....

5 Any deficiency, the plaintiff [sic] come ex parte and be entitled to judgment.

6 *See Exhibit 11.*

7 On August 2, 2013, either Debtor or Keeler filed with the DABC a "License Action
8 Request," signed by Debtor. The Request provided:

9 I voluntarily surrender my license for a period of not more than one year. I intend to
10 transfer this license. I understand (a) the license must be renewed at the time renewal
11 fees are due or the license will be automatically canceled; (b) the Department will
12 proceed to cancel the license after one year if not transferred, and (c) I must report
13 any change in my address to the Department.

14 Surrender effective Immediately.

15 *See Exhibit 10.*

16 On August 8, 2013, Debtor executed an "Assignment of Liquor License," which
17 provided:

18 I, PAUL MOREV, hereby assign all my rights to and interest in
19 CALIFORNIA LIQUOR LICENSE # 513028, to ETTA M. KEELER, effective
20 AUGUST 2, 2013, as so ordered by Judge Ronald S. Prager, San Diego Superior
21 Court.

22 It is hereby agreed that ETTA M. KEELER will make maximum effort to sell
23 the license, to recoup \$68,000, which represents the amount I owe her for the
24 purchase of the liquor license, plus legal costs.

25 I will execute a Power of Attorney appointing ETTA M. KEELER as my Attorney-
26 in-Fact so that the sale of the license can be carried out forthwith.

27 *See Exhibit 4.*

28 the number is #513028. The discrepancy has no bearing on this Court's decision.

1 On the same date Debtor granted Keeler a limited and irrevocable power of attorney
2 with respect to "all matters pertaining to" the Liquor License. See Exhibit 3.

3 In November 2013, Keeler opened an escrow in Debtor's name with ABC Escrow,
4 Inc., ("Escrow Company"), to accomplish the sale of the Liquor License to Pedigree
5 Provisions, LLC ("Buyer") for \$65,000.00. See Exhibit 5.

6 Two trade creditors of the Debtor, Sysco San Diego and Southern Wines and Spirits
7 (collectively "Trade Creditors"), asserted claims in escrow for goods sold in the amounts of
8 \$12,651.88 and \$14,912.61 respectively. See Exhibits 6 & 7.

9 On May 4, 2014, the DABC submitted to Escrow Company, Form 226 approving the
10 transfer of the Liquor License to Buyer.

11 On May 7, Escrow Company transferred the Liquor License to Buyer. Escrow
12 Company has retained the sale proceeds ("Escrow Funds").

13 On May 9, 2014, Escrow Company informed Keeler that the Trade Creditors had
14 asserted claims to the proceeds of the sale.

15 On May 10, 2014, Debtor filed a petition commencing the bankruptcy case.
16 Leonard J. Ackerman was appointed chapter 7 trustee ("Trustee").

17 On May 14, 2014, Keeler wrote to Escrow Officer Amy Kwak, denying the claims of
18 the Trade Creditors. On May 21, 2014, the Trade Creditors were notified by Escrow
19 Company that their claims had been disapproved by the seller, and that payment would be
20 held. The record before the Court does not indicate that the claims and disapproval thereof
21 has been resolved. At any rate, it was not resolved as of the petition date.

22 After the petition was filed, Keeler renewed her request for a writ of attachment in
23 the Superior Court. On May 19, 2014, Judge Prager issued a writ of attachment in favor of
24 Keeler *nunc pro tunc* to August 2, 2013. The Minute Order explained in part:

25 [T]he Court was unaware of collateral claims that could prejudice plaintiff by other
26 creditors in the event Writ was not issued....

27 The Court also corrects the record in light of defendant's representations in open
28 Court that there were no holds or liens on the license. See Court minutes of 8/2/13.

1 *See Exhibit 12.*

2 On July 22, 2014, the Trustee filed a complaint against Escrow Company seeking
3 turnover of the Escrow Funds under Bankruptcy Code § 542. *See Exhibit 15.* Escrow
4 Company was the sole named defendant.

5 On or about September 14, 2014, Escrow Company filed a cross-claim in
6 interpleader naming as defendants the Trustee and all of the claimants to the Escrow Funds.
7 *See Exhibit 17.*

8 On August 13, 2015, the Court held a status conference which was attended by
9 counsel for Keeler, the Trustee, Escrow Company, and both Trade Creditors. After
10 extensive discussion with all parties, the Court set the matter for trial. The Court entered a
11 scheduling order which provided that trial briefs were to be filed by October 28, 2015, and
12 responsive briefs, if desired, were to be filed by November 4, 2015. Escrow Company, the
13 Trustee, and Keeler each filed trial briefs, the Trade Creditors did not. No responsive briefs
14 were filed.

15 On November 16, 2015, the Court conducted a trial. The trial revealed that before
16 the Court could reach the factual disputes, of which there are few if any, some legal issues
17 had to be addressed. The Court took the matter under submission to address those issues.

18 **Issues**

- 19 1. Whether the Trustee is entitled to turnover of the Escrow Funds.
- 20 2. Whether and to what extent Escrow Company is entitled to fees and costs
21 associated with this adversary proceeding.
- 22 3. Whether and to what extent the Trade Creditors are entitled to the Escrow
23 Funds.
- 24 4. Whether and to what extent Keeler is entitled to the Escrow Funds.
- 25 5. Whether Keeler's Writ of Attachment has any validity or effect.

26 **Analysis**

27 **Turnover**

28 Bankruptcy Code § 542 provides in relevant part:

1 [A]n entity, other than a custodian, in possession, custody, or control, during the
2 case, of property that the trustee may use, sell, or lease under section 363 of this title,
3 or that the debtor may exempt under section 522 of this title, shall deliver to the
4 trustee, and account for, such property or the value of such property, unless such
5 property is of inconsequential value or benefit to the estate.

6 11 U.S.C.A. § 542. It is well settled in the Ninth Circuit that where a seller of a liquor
7 license becomes a debtor in a bankruptcy case after the license is sold, but before the
8 proceeds are distributed from escrow, the proceeds become property of the bankruptcy
9 estate and must be distributed in accordance with the bankruptcy priority scheme. *In re*
10 *Leslie*, 520 F.2d 761, 762 (9th Cir. 1975). In *Leslie*, the court explained, "while a state, as
11 the creator of a liquor license, may validly impose conditions on its transferability for the
12 state's own benefit, it may not, consistently with paramount federal law, impose conditions
13 which discriminate in favor of particular classes of creditors." *Id.* at 736. *See also Gough v.*
14 *Finale*, 39 Cal. App. 3d 777 (1974).

15 *Leslie* was decided under the Bankruptcy Act, but its holding applies under the
16 Bankruptcy Code. *See In re Del Mission Ltd.*, 116 B.R. 734, 739 (Bankr. S.D. Cal. 1990)
17 *aff'd*, 130 B.R. 362 (B.A.P. 9th Cir. 1991) *aff'd*, 998 F.2d 756 (9th Cir. 1993).

18 Escrow Company attempts to distinguish *Leslie* on the ground that Debtor had
19 assigned his interest in the Liquor License to Keeler prior to the petition:

20 By virtue of the Assignment and the Irrevocable Power of Attorney, whatever
21 interest the Debtor had in either the liquor license (which interest is irrelevant at the
22 time of the Chapter filing as the license had already transferred) or the net proceeds,
23 had been transferred to Keeler. The Debtor had no legal power to "transfer" the net
24 proceeds, nor could the proceeds be subject to levy or legal process against the
25 Debtor Without such "power", the Trustee could not be vested in such property,
26 which no longer belonged to the Debtor, Paul Morev.

27 Escrow Company Trial Brief 8:2-8.

28

1 This is an intriguing argument. Had Debtor assigned his interest in the Liquor
2 License and the proceeds to Keeler outright, and had such assignment been legally valid and
3 binding, this case might be distinguishable from *Leslie*. However, in the present case
4 Debtor did not effectively assign his interest in the Liquor License. Further, nothing in the
5 record indicates an attempt by Debtor to specifically assign his interest in the proceeds of
6 the Liquor License.

7 Escrow Company relies on the August 8, 2013, "Assignment of Liquor License," and
8 the power of attorney for its contention that Debtor assigned away his interest in the Liquor
9 License and/or proceeds. As discussed above, in the Assignment Debtor purported to
10 "assign all my rights to and interest in CALIFORNIA LIQUOR LICENSE # 513028, to
11 ETTA M. KEELER..." In the determining the effect of the Assignment, it is helpful to
12 consider what it could not have done.

13 The Assignment cannot be considered an outright transfer of Debtor's interest in the
14 Liquor License to Keeler, as that would have been ineffective under state law. In California
15 a liquor license cannot be transferred without the prior approval of the DABC. Cal. Bus. &
16 Prof. Code § 24070. In order to obtain such approval, seller and buyer must establish an
17 escrow and follow other procedures not followed by Debtor and Keeler. *See* Cal. Bus. &
18 Prof. Code § 24074. No party has suggested that the Assignment transferred ownership of
19 the Liquor License to Keeler. Had they, such a position would not, as argued by ABC
20 Escrow, been supported by the power of attorney, but rather belied thereby. That is, had the
21 Assignment effectively transferred ownership, such a power of attorney would have been
22 unnecessary. Consistent with this determination is the fact that Keeler opened escrow in
23 Debtor's name; she acted as his agent not as owner in her own right.

24 Another possibility is that the parties intended to grant Keeler a security interest in
25 the Liquor License to secure repayment of Debtor's obligation to her. This too though
26 would have run afoul of California law which provides "[n]o licensee shall enter into any
27 agreement wherein he pledges the transfer of his license as security for a loan or as security
28 for the fulfillment of any agreement...." Cal. Bus. & Prof. Code § 24076. Further, there is

1 no indication on the record that Keeler took steps to perfect a security interest in the license
2 or proceeds.

3 Thus, the Assignment was neither an outright transfer of, nor a grant of security
4 interest in, the Liquor License. Rather, the Court finds that it was at most a grant by Debtor
5 to Keeler of control of the license for the sole purpose of allowing Keeler to sell the license
6 and to control (not own) the proceeds. This control divested Debtor of no ownership
7 interest and gave Keeler no legal rights to the License or to the Escrow Funds except as a
8 creditor of Debtor and a contracting party therewith. Thus, as in *Leslie*, at the time the
9 petition was filed Debtor had an interest in the sales proceeds sufficient to render them
10 property of the estate subject to turnover.

11 In support of its position that Debtor had no interest in the Escrow Funds, Escrow
12 Company relies upon the curious case of *Business Title Corp. v. U.S.*, 21 Cal.3d 710 (1978),
13 in which the court held that after a liquor license was transferred, but before the proceeds
14 were disbursed from escrow, there was no property of the transferor to which a federal tax
15 lien could attach.⁴ It is possible to distinguish *Business Title* factually.

16 In *Business Title* the trial court had found that the seller of the liquor license was
17 completely divested of any interest in the license – it had not only delivered the license to
18 escrow but had made or attempted to make, a partial assignment of its interest in the
19 proceeds to a trustee for the benefit of creditors. *Id.* at 714.⁵ Unlike the case at hand,
20 seller's rights to dispute claims had been extinguished. *Id.* at 721. Further, all claims to the
21 proceeds had been resolved and escrow company had notified all creditors of what they
22 would be paid. *Id.* at 715. The funds were not distributed only because the business
23 premises had been destroyed by fire. *Id.* at 710. The trial court had found:

24
25 ⁴ The Court says "curious," because in the 37 years since *Business Title* was decided, not a
26 single case has cited to it.

27 ⁵ The Court notes that the Court of Appeals questioned the efficacy of the assignment for the
28 benefit of creditor and held that the assignment "must be left out of account in determining rights to
the cash interpleaded by *Business Title*." *Bus. Title Corp. v. United States*, 75 Cal. App. 3d 659,
142 Cal. Rptr. 370, 373 (Ct. App. 1977) vacated, 21 Cal. 3d 710, 581 P.2d 627 (1978).

1 [A]t the time of the United States of America's assessment and later filing of notice
2 of tax lien, there was no property or rights to property belonging to the delinquent
3 taxpayer herein to which the United States of America's lien could attach then being
held by the plaintiff interpleader escrow company.

4 *Id.* at 717. The California Supreme Court confirmed, finding that as of the time the federal
5 tax lien came into existence, seller lacked any interest in the license or proceeds to which
6 lien could attach:

7
8 Whatever 'property' or 'rights to property' the seller may have in the proceeds because
9 of his power to dispute claims of creditors filed prior to transfer, such rights are
10 extinguished when, as here (1) he does not dispute any claim so filed, and (2) the
11 assets remaining in escrow at the time of transfer are insufficient to pay the claims in
full. At that point he loses all power to establish a claim to any portion of the
12 proceeds and the matter of distribution becomes wholly one between the creditors
and the escrow holder.

13 *Id.* at 721-22 (citations omitted).

14 More important than the factual distinctions, though, is the fact that *Business Title*
15 case dealt with a completely different legal issue – whether a federal tax lien attached to the
16 proceeds of the sale as opposed to whether the bankruptcy estate had an interest. The Court
17 in *Business Title* considered and did not disagree with the Ninth Circuit's holding in *Leslie*.

18 Rather, the California court recognized that it was dealing with a distinctive legal issue:

19
20 In any event we do not believe that principles applicable in the case of a voluntary
21 filing of bankruptcy by the seller-taxpayer are necessarily applicable in cases
22 involving the attachment of a federal tax lien.
23

24 *Id.* at 722.

25 The Court finds that the Ninth Circuit's holding in *Leslie* is controlling in this case.
26 *Business Title* differs in fact, but more importantly in the legal issue addressed. Further, to
27
28

1 the extent *Leslie* and *Business Title* are irreconcilable, the Court is bound to follow the
2 rulings of the Ninth Circuit.

3 **Escrow Company's Fees and Costs**

4 Escrow Company seeks allowance and payment of the attorneys' fees and costs it
5 incurred in connection with this interpleader action. Escrow Company has submitted as
6 exhibits invoices from its counsel, Steven H. Gardner, PLC, which include fees and costs for
7 the period July 30, 2014 (eight days after the Trustee's Turnover Action was filed) through
8 November 17, 2015, (one day after the trial in this Court.) The invoices reflect fees of
9 \$17,362.50 and costs of \$1,822.25 for a total of \$19,184.75.

10 Federal Rule of Civil Procedure ("FRCP") 22 authorizes a stakeholder to join
11 "[p]ersons with claims that may expose [the stakeholder] to double or multiple liability" and
12 requires such persons to interplead. Fed.R.Civ.P. 22(a)(1). FRCP 22 is made applicable to
13 bankruptcy cases through Rule 7022 of the bankruptcy rules. Though not stated in Rule 22,
14 courts "hold interpleading stakeholders to a good faith standard." *Michelman v. Lincoln*
15 *Nat. Life Ins. Co.*, 685 F.3d 887, 893 (9th Cir. 2012). The standard though is not "onerous,"
16 but merely requires that the interpleading party "have a good faith belief that there are or
17 may be colorable competing claims to the stake." *Id.* at 894.

18 In the present case the Court finds that Escrow Company had a good faith belief that
19 there were competing and colorable claims to the Escrow Funds including by the Debtor,
20 Keeler, the Trade Creditors, the Trustee, and itself. The cross-complaint was filed in good
21 faith. It was necessary because, though Escrow Company had requested that the Trustee
22 name as defendants to the turnover action all claimants to the Funds, he had declined to do
23 so.

24 Having determined that the interpleader cross complaint was filed in good faith, the
25 Court may award fees and costs associated therewith. Though "there is no explicit statutory
26 authority requiring a federal court to award attorney fees and costs in an interpleader
27 action.... [i]t has since evolved under the common law that a federal court may award a
28

1 plaintiff who files an interpleader action reasonable costs and attorney fees out of the
2 interplead funds." *In re Express Fin. Servs., Inc.*, No. 07-27374JAD, 2009 WL 8556805, at
3 *3-4 (Bankr. W.D. Pa. Feb. 13, 2009) (citations omitted).

4 The issue then is what a reasonable award is. The fees and costs requested represent
5 nearly 30% of the total sales price of the Liquor License. Since the Court has determined
6 that the sales proceeds are property of the estate subject to the claims of all creditors of the
7 Debtor, the amount of any award will impact all creditors, not just the parties to this
8 adversary. Accordingly, the Court will require ABC Escrow to make application to the
9 Court for the fees and costs sought with notice to all creditors, giving all an opportunity to
10 review and oppose.

11 **Claims of the Trade Creditors**

12 Despite the opportunity to do so, discussed at the status conference and in the
13 scheduling order, Trade Creditors did not file trial briefs. The trial briefs filed by the other
14 parties, did not address this issue. Based upon its own analysis, however, the Court is
15 prepared to rule that the Trade Creditors have no special claim to the Escrow Funds.

16 As the court explained in *Leslie*, "while a state, as the creator of a liquor license, may
17 validly impose conditions on its transferability for the state's own benefit, it may not,
18 consistently with paramount federal law, impose conditions which discriminate in favor of
19 particular classes of creditors." 520 F.2d at 763. The Escrow Funds are property of the
20 bankruptcy estate which the Trustee may use to pay creditors in accordance with the
21 bankruptcy priority scheme. To the extent the Trade Creditors have claims against the
22 Debtor, they must assert those claims in the bankruptcy case.

23 **Claim of Keeler**

24 The same is true of the claim of Keeler. There is no evidence that Debtor executed
25 any documents purporting to grant Keeler a security interest in the Liquor License or the
26 proceeds. Furthermore, to the extent Debtor had done so, such an agreement would have
27 violated California Business & Professional Code § 24076 which provides "[n]o licensee
28 shall enter into any agreement wherein he pledges the transfer of his license as security for a

1 loan or as security for the fulfillment of any agreement." Finally, there is no evidence on the
2 record that Keeler took steps to perfect any security interest.

3 As discussed below, her postpetition Writ of Attachment is void.

4 **Keeler's Writ of Attachment**

5 The Writ of Attachment, obtained postpetition, is void as a violation of the automatic
6 stay. "[V]iolations of the automatic stay [are] void, not voidable." *In re Tippett*, 542 F.3d
7 684, 690-91 (9th Cir. 2008), citing *Schwartz v. United States (In re Schwartz)*, 954 F.2d
8 569, 571 (9th Cir.1992). Here the writ violated the automatic stay as a continuation of a
9 judicial proceeding to recover a prepetition claim against the debtor (§ 362(a)(1)); as an act
10 to obtain possession of property of the estate (§ 362(a)(3)); as an act to create a lien against
11 property of the estate (§ 362(a)(4)); as an act to create a lien that secures a claim that arose
12 prepetition (§ 362(a)(5)) ; and as an act to collect a claim against the debtor that arose
13 prepetition (§ 362(a)(6)).

14 It appears from the evidence before the Court that Keeler was unaware that Debtor
15 had filed his petition. She clearly was not scheduled. However, neither her lack of
16 knowledge nor Debtor's failure to schedule her claim are relevant to the question of the
17 validity of the postpetition Writ of Attachment. *See In re Weatherford*, 413 B.R. 273, 284
18 (Bankr. D.S.C. 2009).

19 **Conclusion**

20 For the reasons set forth above, the Court orders that Escrow Company must turn the
21 Escrow Funds over to the Trustee. The Escrow Funds are property of the bankruptcy estate,
22 subject to administration under the Bankruptcy Code and any other applicable law. The
23 Escrow Funds, however, must be retained by the Trustee pending a determination after
24 notice and hearing of the fees and costs to be awarded Escrow Company from those Funds.

25 Otherwise, the Funds are not subject to any specific claims of the Trade Creditors nor

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1 Keeler. The Trade Creditors and Keeler are free of course to assert any claims they have
2 against the Debtor in this bankruptcy case, and they will be addressed in due course.
3 IT IS SO ORDERED.

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DATED: December 17, 2015



LAURA S. TAYLOR, Chief Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West "F" Street, San Diego, California 92101-6991

In re: Paul V. Morev , CASE NO.: 14-03742-LT7

Leonard J. Ackerman v. ABC Escrow, ADV. NO.: 14-90144-LT

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified employee in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

MEMORANDUM DECISION

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed via first class mail to the party at their respective address listed below:

Philip H. Dyson, Esq.
Law Offices of Philip H. Dyson
8461 La Mesa Boulevard
La Mesa, CA 91942

Steven H. Gardner, Esq.
Steven H. Gardner, P.C.
8730 Wilshire Blvd #400
Beverly Hills, CA 90211

Mr. Leonard J. Ackerman
6977 Navajo Road, Suite 124
San Diego, CA 92119

ABC ESCROW
12304 Santa Monica Blvd, Suite 100
Los Angeles, CA 90025

Craig E. Dwyer, Esq.
8745 Aero Drive, Suite 301
San Diego, CA 92123

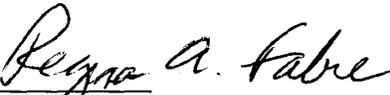
Nick I. Iezza, Esq.
Kenneth Moss, Esq.
Spiwak & Iezza, LLP
555 Marin Street, Suite 140
Thousand Oaks, CA 91360

Ray Garwacki, Jr. Esq.
Garwacki & Associates
631 S. Olive St. #120
Los Angeles, CA 90014

Mr. Paul V. Morev
2323 Caringa Way #15
Carlsbad, CA 92009

James M. McNair, Esq.
Law Office of James M. McNair
734 Ridgemont Circle
Escondido, CA 92027

Said envelope(s) containing such document was deposited by me in the City of San Diego, in said District on December 17, 2015.


Regina A. Fabre, Judicial Assistant