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7

8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES - CENTRAL DISTRICT**
10

11 Coordination Proceeding
Special Title (Rule 1550(b))

12 **ANTELOPE VALLEY**
13 **GROUNDWATER CASES**

14 Included Actions:

15 *Los Angeles County Waterworks District*
No. 40 v.
16 *Diamond Farming Co., et al.*
Los Angeles County Superior Court, Case
17 No. BC 325 201

18 *Los Angeles County Waterworks District*
No. 40 v.
19 *Diamond Farming Co., et al.*
Kern County Superior Court, Case No.
20 S-1500-CV-254-348

21
22 *Wm. Bolthouse Farms, Inc. v. City of*
Lancaster
23 *Diamond Farming Co. v. City of Lancaster*
Diamond Farming Co. v. Palmdale Water
24 *Dist.*
Riverside County Superior Court,
25 Consolidated Action, Case Nos. RIC 353
840, RIC 344 436, RIC 344 668
26

27 **AND RELATED CROSS-ACTIONS**
28

) Judicial Council Coordination Proceeding
) No. 4408
)

) (For Filing Purposes Only: Santa Clara
) County Case No.: 1-05-CV-049053)
)

) Assigned for All Purposes To:
) Judge: Hon. Jack Komar
)

) (Filing Fees Exempt, Per Gov't Code § 6103)
)

) **CASE MANAGEMENT STATEMENT**
) **BY PHELAN PIÑON HILLS**
) **COMMUNITY SERVICES DISTRICT**
) **FOR CASE MANAGEMENT**
) **CONFERENCE SET FOR JULY 11, 2014**
)

) **DATE: July 11, 2014**
) **TIME: 9:00 a.m.**
) **LOCATION: Via CourtCall**
)

1 TO THE HONORABLE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF
2 RECORD HEREIN:

3 Phelan Piñon Hills Community Services District (“Phelan Piñon Hills”) hereby submits this
4 Case Management Statement pursuant to the Court’s Minute order dated May 23, 2014. As
5 explained herein:

- 6 (i) Phelan Piñon Hills is not part of the potential settlement amongst other parties;
7 (ii) Phelan Piñon Hills requests adequate time to prepare for trial between Phelan Piñon
8 Hills and a currently unknown set of parties who seek to challenge Phelan Piñon Hills, which
9 entails discovery between such parties on each party’s causes of action, claims, and issues; and,
10 (iii) Phelan Piñon Hills proposes the Court adopt a schedule for discovery and trial that
11 would resolve the causes of action, claims, and issues of Phelan Piñon Hills and any party with
12 whom Phelan Piñon Hills has not already settled, which consists of the two classes.

13 Phelan Piñon Hills also provides herein a “snapshot” of its key issues, though in no way
14 does Phelan Piñon Hills waive or otherwise limit its rights to establish each and every cause of
15 action, claim, or issue previously pleaded or invoked in this case.

16 **I. STATUS & SETTLEMENT UPDATE.**

17 As discussed with the Court during the May 23 conference, Phelan Piñon Hills was unlikely
18 to be among the settlement group that some counsel represented to be “global,” or close to
19 “global.” Following the May 23 conference (and consistent with its case history, evident from
20 settling with both classes), Phelan Piñon Hills again attempted settlement with a proposal/counter-
21 proposal as well as requesting from any party unwilling to settle with Phelan Piñon Hills that such
22 party identify itself and which of Phelan Piñon Hills’ causes of action, claims, and issues are
23 contested.

24 To date, Phelan Piñon Hills’ additional settlement effort was rejected, with two parties
25 responding and both unequivocally contesting “all” of Phelan Piñon Hills “claimed rights.” Based
26 upon those responses alone, Phelan Piñon Hills will not be included in the potential settlement that
27 is/has supposedly been reached amongst other parties. Instead, Phelan Piñon Hills and at least

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1 those two parties bear the right to contest each other's causes of action, claims, and issues in this
2 matter.

3 Accordingly, Phelan Piñon Hills reserves and seeks to exercise its rights to full discovery
4 and trial relating to its causes of action, claims, and issues, *as well as* the causes of action, claims,
5 and issues of any and all parties with whom Phelan Piñon Hills has not settled.

6 **II. DISCOVERY & TRIAL PLAN.**

7 Phelan Piñon Hills is entitled to full discovery and trial, and Phelan Piñon Hills in no way
8 waives or otherwise agrees to limit its rights to such. To facilitate efficient discovery and trial -
9 without jeopardizing rights to discovery and trial to which Phelan Piñon Hills is entitled under
10 constitutional, statutory, and case law - Phelan Piñon Hills respectfully requests the Court:

11 (i) Lift the current stay on discovery so that Phelan Piñon Hills may conduct discovery
12 in order to identify those parties contesting Phelan Piñon Hills and on what bases, with any party
13 *not* responding to Phelan Piñon Hills' discovery waiving any right to challenge Phelan Piñon Hills
14 at trial; and,

15 (ii) Adopt a schedule for discovery and trial similarly as done for previous phases of
16 trial, particularly Phase Four and Phase Five, that follows from any proceedings to approve the
17 potential settlement amongst other parties, with the idea being a structured process to minimize
18 disputes and ensure finality of this long-standing case. Phelan Piñon Hills cannot currently prepare
19 a proposed discovery and trial schedule for the Court's consideration because the parties potentially
20 settling seem to have fallen off pace for keeping the hearing on August 4, 2014 for preliminary
21 Court approval of the settlement, and even then, multiple settlement-approval steps are necessary
22 given the classes. Phelan Piñon Hills will gladly prepare a proposed schedule once settlement
23 status is fully known and if directed by the Court.

24 *Any pending settlement amongst other parties should proceed for potential Court*
25 *approval before trial* on Phelan Piñon Hills' causes of action, claims, and issues for at least the
26 following reasons:

27 (i) **Due process and timing:** Potential settlement amongst other parties is anticipated
28 to come before the Court for approval relatively soon, whether on August 4 as currently scheduled

1 or a date soon thereafter if changed by the Court, though August 4 is highly questionable due to a
2 necessary motion seeking approval not having been filed to date. Phelan Piñon Hills cannot
3 adequately prepare for trial until afforded the opportunity for discovery on outstanding causes of
4 action, claims, and issues. Prior phases of trial and related discovery have not involved many of
5 the unresolved issues (e.g., water rights).

6 (ii) **Which parties are “in” and which are “out”:** Any approval by the Court of a
7 settlement will define the scope of adverse parties, which then assists managing which parties are
8 contesting one another at trial. After all, some party currently in the potential settlement may fall
9 out for a number of legitimate reasons.

10 (iii) **The scope of contested issues and the related evidence:** Any approval by the
11 Court of a settlement will help define the scope of issues for trial, depending upon what is included
12 in the settlement and what is approved, or not approved, by the Court. For example, the settlement
13 may seek to allocate the entire safe yield, in which case, even if those settling parties were to prove
14 up their *water use* such as the parties including Phelan Piñon Hills did for Phase Four, doing so
15 would not establish that party’s *water right* nor would it establish - absent further evidence and
16 Court findings - such party applied water to “reasonable” *and* “beneficial” use as required by law.
17 Phelan Piñon Hills can better address this point once the potential settlement is publicly circulated,
18 but meanwhile, the above example illustrates the effect the settlement may have on trial.

19 The above example also illustrates any settlement approval process should be completed
20 prior to trial. However, simultaneous efforts can be made to help resolve this complex matter once
21 and for all, such as by lifting the discovery stay and allowing discovery to commence.

22 **III. The Snapshot.¹**

23 Among the rights that Phelan Piñon Hills seeks to establish are:

- 24 (i) Water right (Appropriation for Public Use);
- 25 (ii) Return flow right from native water use; and,

26 ¹ The legal and factual discussion herein is not intended to fully brief any particular case issue, but
27 instead serves to assist the Court and parties with a “roadmap” of key issues to Phelan Piñon Hills.
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1 (iii) Place of use right (Anti-Export) given that a significant portion of Phelan Piñon
2 Hills' service area lies over a portion of the Antelope Valley Groundwater Basin and/or is within
3 the Antelope Valley watershed.

4 Phelan Piñon Hills has pleaded it has acquired a prescriptive water right, and Phelan Piñon
5 Hills also pleaded it has an appropriative right. Intended only as a description of key trial issues is
6 an explanation below of each of these three items.

7 **A. Phelan Piñon Hills' Water Right.**

8 Phelan Piñon Hills claims an appropriative right, which in this case means Phelan Piñon
9 Hills was/is pumping as an appropriator of *surplus* for public use or was/is pumping as an
10 appropriator of *non-surplus* for public use. Case law often distinguishes the phrases above as being
11 for surplus or non-surplus water, but the common denominator is that the water is appropriated for
12 *public use*.

13 In *Peabody v. Vallejo* (1935) 2 Cal.2d 351, 378-379, the California Supreme Court stated:
14 "There is little doubt that the application of the doctrine may be invoked on either ground [estoppel
15 or public policy] when public use has attached prior to the commencement of the action and
16 depending on the circumstances of the case."² No clear line exists in this complex case as to when
17 the "action commenced," but the "public use" of Well 14 is as early as when Phelan Piñon Hills'
18 predecessor purchased from Los Angeles County in 1999 the parcel on which Well 14 is situated,
19 all of which went through various public processes in Los Angeles and San Bernardino Counties.
20 Phelan Piñon Hills was not actually named by an overlier (i.e., Bolthouse) until February 2009.³

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23 ² Hutchins, *supra*, at 492, fn.57. See also, *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935)
24 3 Cal.2d 489, 573-574; *Peabody v. Wright v. Goleta Water District* (1985) 174 Cal.App.3d 74, 90-
25 94; *City of Vallejo* (1935) 2 Cal.2d 351, 379-380; *Miller & Lux v. San Joaquin Light & Power*
Corp. (1937) 8 Cal.2d 427, 436; *Gurnsey v. Northern California Power Co.* (1911) 160 Cal. 699,
711-712.

26 ³ Bolthouse, as commonly referred to for simplicity in this case, sued Phelan Piñon Hills in this
27 case for inverse condemnation, which in effect, concedes the water that Phelan Piñon Hills is
28 appropriating is in fact for "public use."

1 Also, Phelan Piñon Hills' cross complaint - the second cause of action expressly claims an
2 appropriative right, while the fourth cause of action claims "municipal priority" with a "prior and
3 paramount" right to pump for current and future municipal demands, based on the "public policy of
4 the State of California" as proclaimed by Water Code Sections 106 and 106.5, the domestic and
5 municipal preference statutes. These two causes of action clearly count as a claim for an
6 appropriation for public use, first for surplus and, if none, per the prior and paramount "public
7 policy of the State of California," as legislatively authorized in Water Code Sections 106 and
8 106.5.

9 Obviously Phelan Piñon Hills is a public water supplier, and its appropriator status has
10 never been questioned. Nor to date has any party questioned the quantity of water produced by
11 Well 14 or its beneficial use as a municipal water supply. As to surplus or non-surplus water,
12 existing evidence establishes surplus existed in Well 14's area through at least 2009. Among this
13 evidence is the work of experts for other public water suppliers, namely the July 2010 *Summary*
14 *Expert Report, Phase 3 – Basin Yield and Overdraft, Antelope Valley Area of Adjudication*
15 ("Summary Expert Report"). The Court has relied heavily upon the Summary Expert Report.

16 *The Summary Expert Report at § 4.3.1.4 on page IV-13 states the following about the "East*
17 *Antelope Valley," which includes the Buttes subunit in which Well 14 is located: In general,*
18 *groundwater levels in the Buttes and Pearland subbasins have not changed significantly since 1951*
19 *and, in some cases have risen (06N/10W-22D1).* No change in the water level(s) demonstrates a
20 lack of overdraft, particularly absent other indicia of overdraft such as subsidence, which has not
21 occurred in the Southeast area near Phelan Piñon Hills' well.

22 Also, the Court has recognized different local conditions might require different findings:

23 (1) In its order of November 6, 2008, the Court determined that there were not "any
24 distinct groundwater sub basins within the valley that did not have hydrologic connection to other
25 parts of the aquifer underlying the valley" such that "such an area should be excluded from the
26 adjudication," but *the Court did leave open for later resolution the question as to whether*
27 *"portions of the basin should be treated as a separate area for management purposes in the event a*
28 *physical solution to water use is established."*

1 (2) In its Phase III Statement of Decision, the Court found that “[t]he evidence is
2 persuasive that current extractions exceed recharge and therefore that the basin is in a state of
3 overdraft,” but *the Court also did leave open for later resolution the question as to whether there*
4 *was overdraft in a specific area of the aquifer, ruling that “[b]ut having heard evidence about the*
5 *aquifer as a whole, the Court is not making historical findings that would be applicable to specific*
6 *areas of the aquifer or that could be used in a specific way to determine water rights in particular*
7 *areas of the aquifer.”* The Court also recognized that the aquifer is not like a “bathtub” due to
8 “regional” (local) differences and that “we have been talking about the basin as a whole but sub-
9 parts exist.”

10 *Thus, Phelan Piñon Hills can establish an appropriative water right and that surplus water*
11 *has been available within the local area of Well 14 for appropriation.*

12 **B. Phelan Piñon Hills’ Native Groundwater Return Flow Right.**

13 Phelan Piñon Hills previously provided briefing on this issue through its opposition to
14 Bolthouse’s Motion *In Limine* No. 2 for the Phase 5 trial, with that motion denied.

15 *Summary of Phelan Piñon Hills’ position for its return flow right is as follows:*

16 (1) The Court presides as a Court of Equity, and given the additional unique nature of
17 this litigation being a groundwater adjudication, and one that must be “comprehensive” for
18 purposes of the McCarran Amendment, the Court should find Phelan Piñon Hills has this right.

19 (2) Various authorities establish the legitimacy of Phelan Piñon Hills’ cause of action
20 for recapturing return flows from *native groundwater*, as a matter of law, science, and fact. To be
21 clear, Phelan Piñon Hills’ cause of action regarding return flow is *not* claimed as a “water right”
22 but instead a “return flow right” and Phelan Piñon Hills does *not* question an importer’s right to
23 return flows resulting from *imported water*.

24 (3) The “science” establishes several pertinent circumstances, including: (i) the
25 Antelope Valley Groundwater Basin (“Basin”) extends east of the Los Angeles/San Bernardino

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1 County line;⁴ (ii) a portion of Phelan Piñon Hills' service area lies over the Basin; (iii) Phelan
2 Piñon Hills produces groundwater from the Basin, which Phelan Piñon Hills distributes to
3 customers who are almost exclusively residential and unsewered users located within that portion
4 of the service that lies over the Basin; (iv) native groundwater return flow results from Phelan
5 Piñon Hills' production and distribution to these customers; and, (v) this return flow flows toward
6 the AVAA and Well 14, with Well 14 located hydrologically downgradient, placing Well 14 in a
7 position to recapture the native groundwater that was used by customers in that portion of Phelan
8 Piñon Hills' service area that lies over the Basin.

9 (4) Neither Phelan Piñon Hills' production nor its native groundwater return flow have
10 been factored into the evidence (despite Phelan Piñon Hills' earlier efforts during Phase III, but
11 objections by overliers were sustained, with the Court stating Phelan Piñon Hills reserves the
12 opportunity to later offer evidence), meaning that part of the natural recharge to the Basin is
13 unaccounted.

14 (5) Subsequent trial phase(s) or proceedings may lead to determinations that subject
15 Phelan Piñon Hills to liability, whether that be liability based upon existing complaints or cross-
16 complaints of other parties for alleged "takings," or, some other basis for potential liability such as
17 potential claims or concerns of that Phelan Piñon Hills is "exporting" groundwater it produces from
18 Well 14 in the AVAA that is distributed to and used by Phelan Piñon Hills customers in the portion
19 of service area that lies over part of the Basin. Such circumstances make the return flow right
20 sought by Phelan Piñon Hills an appropriate measure to offset any such liability.

21 *Ultimately, Phelan Piñon Hills' cause of action for a return flow right serves to be part of*
22 *the overall water balance with Phelan Piñon Hills' receiving an offset against potentially future*
23 *assessments or liabilities, anti-export provisions, or otherwise arising from the anticipated physical*
24 *solution to be fashioned by the Court.*

25 ⁴ Court's Order After Hearing on Jurisdictional Boundaries (November 3, 2006, Document No. 325
26 on the Court's website), p. 4:6-8 ["The court concludes that the alluvial basin as described in
27 California Department of Water Resources Bulletin 118-2003 should be the basic jurisdictional
28 boundary for purposes of this litigation."]

1 *A strong legal basis for Phelan Piñon Hills to have this return flow right exists.*⁵ “The
2 doctrine of physical solution is a practical way to carry out the mandate of Article X, Section 2, that
3 the state’s water resources be put to use ‘to the fullest extent of which they are capable’”; “[u]nder
4 the doctrine, as one text states, ‘[s]olution of water rights problems by *use of all available*
5 *information* and expertise is attempted in order that the *best possible use is made of the waters* in
6 their apportionment among contending parties.’”⁶

7 *Decisions of the United States Supreme Court constitute controlling authority in all*
8 *California appellate courts.*⁷ Also, where California law is uncertain, such as here, the decision of
9 a court of last resort of another state, though not binding as authority, is persuasive.⁸ Likewise, the
10 decisions of federal courts are persuasive.⁹

11 Starting at the top, the United States Supreme Court recently re-affirmed the “doctrine of
12 recapture” in an inter-state dispute.¹⁰ The recaptured water was “runoff and seepage water” from
13 surface water. In looking to other cases, Justice Thomas explained that an appropriator retains the
14 right to recapture, and in some narrow circumstances, even after the water leaves the appropriator’s
15 property.¹¹

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18 ⁵ Prior briefing on this issue has been filed with the Court during February 2014, including Phelan
19 Piñon Hills’ Opposition and Sur-Reply identified on the Court’s website as Document Nos. 8496
and 8606, respectively.

20 ⁶ Littleworth & Garner, *California Water II* (2d ed. 2007) Equitable Apportionment and the
21 Doctrine of Physical Solution, ch. 7, pp. 173-174; *see also*, at p. 174, *citing to*, Rogers and Nichols,
pp. 547-548.

22 ⁷ *See, Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455–456.

23 ⁸ *People ex rel. Morgan v. Hayne* (1890) 83 Cal. 111, 119.

24 ⁹ *See, Estate of Sloan* (1963) 222 Cal.App.2d 283, 293; *Silman v. Reghetti* (1935) 7 Cal.App.2d
25 726, 729; *People v. Herbert’s of Los Angeles, Inc.* (1935) 3 Cal.App.2d 482, 484.

26 ¹⁰ *State of Montana v. State of Wyoming* (2011) 131 S. Ct. 1765, 1774-1775, and fn. 7 (“*State of*
Montana”).

27 ¹¹ *State of Montana, supra*, 131 S. Ct. at 1774-1775; *see*, 1 Wiel §§ 38-40, at 37-43 and at fn.7.

1 As to the factual and technical basis to fit the circumstances for this right, see the summary
2 points above and Phelan Piñon Hills' Opposition as referenced above.

3 Ultimately, return flow from *imported* water typically *adds* to (or “augments”) the supply of
4 a groundwater basin, while *return flow from native water limits the depletion of the supply to the*
5 *extent part of the produced groundwater returns to the basin.* This is precisely why a “water
6 balance” evaluates *imported and native water* sources, which explains, at least in part, why a return
7 flow right from native water is recognized by the United State Supreme Court, with Phelan Piñon
8 Hills having a legitimate basis for establishing such a right for itself, *particularly when uniquely*
9 *situated in this case such as being subjected to inverse condemnation claims.*

10 **C. Phelan Piñon Hills' Place of Use.**

11 The circumstance of significance here is that part of the Antelope Valley Groundwater
12 Basin overlaps and lies eastward of the southeast boundary of the Antelope Valley Adjudication
13 Area.

14 The Court stated as part of its Order After Hearing On Jurisdictional Boundaries, dated
15 November 3, 2006 (“Phase One Order”), that: “ ... the alluvial basin as described in California
16 Department of Water Resources [DWR] Bulletin 118-223 should be the basic jurisdictional
17 boundary for purposes of this litigation.”¹²

18 In addition, the Court’s March 12, 2007 Order entitled, “Revised Order After Hearing on
19 Jurisdictional Boundaries” (“Revised Order”) states: “The court concludes that the alluvial basin as
20 described in California Department of Water Resources Bulletin 118-2003 should be the basic
21 jurisdictional boundary for purposes of this litigation.”¹³ However, this same Order also states that
22 “[t]he eastern boundary will be the jurisdictional line on the east which was established as the
23 westernmost boundary in the Mojave litigation.” (*Ibid.* at p. 4:17-18.)

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26 ¹² See, Phase One Order, p. 4:6-8.

27 ¹³ See, Revised Order, p. 4:7-9.

1 *Ultimately, the Court recognizes that DWR Bulletin 118 (2003 update) illustrates that the*
2 *hydrogeologic Antelope Valley Groundwater Basin extends east of the Los Angeles/San Bernardino*
3 *County line, into San Bernardino County.* Anticipating the present circumstance, the Court,
4 through its February 19, 2010 "Order Transferring and Consolidating Actions for All Purposes"
5 ("Consolidation Order"), stated:

6 Any claim to declaratory relief regarding basin boundaries has been determined by
7 the Court by Order dated November 6, 2008. To the extent any current party was
8 not a party at the time of the determination of this issue, that party may seek to
9 reopen or, consistent with the order, move to amend the basin boundary.

10 *The foregoing Orders demonstrate two critical points: (i) the hydrogeological basin cannot*
11 *be ignored (nor should such technical and scientific issues be ignored in a groundwater*
12 *adjudication seeking to understand sub-surface characteristics and conditions in order to establish*
13 *water rights and a physical solution); and, (ii) a party, such as Phelan Piñon Hills, must be*
14 *afforded due process (i.e., notice and opportunity to be heard) to address this issue.*

15 *Thus, the hydrogeologic reality of the Antelope Valley Groundwater Basin extending*
16 *eastward and partially underlying Phelan Piñon Hills' service area cannot be ignored. Phelan*
17 *Piñon Hills should be afforded the right to use Well 14 water within its service area, without being*
18 *subject to an anti-export prohibition, as well as the right to recapture its return flows.*

19 Ultimately, certain parties insist on excluding Phelan Piñon Hills from settlement.
20 Accordingly, Phelan Piñon Hills requests adequate time to prepare for trial on each its causes of
21 action, claims, and issues as well as those of its adversaries.

22 Respectfully submitted,

23 Dated: July 8, 2014

ALESHIRE & WYNDER, LLP

24
25 By: 

26 Wesley A. Miliband
27 Attorneys for Cross-Defendant and
28 Cross-Complainant,
Phelan Piñon Hills Community
Services District

PROOF OF SERVICE

I, Linda Yarvis,

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 18881 Von Karman Avenue, Suite 1700, Irvine, CA 92612.

On July 8, 2014, I served the within document(s) described as **CASE MANAGEMENT STATEMENT BY PHELAN PIÑON HILLS COMMUNITY SERVICES DISTRICT FOR CASE MANAGEMENT CONFERENCE SET FOR JULY 11, 2014** as follows:

☒ (ELECTRONIC SERVICE) By posting the document(s) listed above to the Santa Clara County Superior Court website in regard to Antelope Valley Groundwater matter pursuant to the Court's Clarification Order. Electronic service and electronic posting completed through www.scefiling.org.

☐ (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth above. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Irvine, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ (BY OVERNIGHT DELIVERY) I deposited in a box or other facility regularly maintained by Overnight Express, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document(s) in a sealed envelope or package designated by the express service carrier, addressed as set forth above, with fees for overnight delivery paid or provided for.

Executed on July 8, 2014, at Irvine, California.

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

Linda Yarvis
(Type or print name)

(Signature)