Case No. S_____

IN THE SUPREME COURT OF CALIFORNIA

Ensign United States Drilling (California), Inc.,

Petitioner,

vs.

Superior Court of California, County of Kern,

Respondent.

Louis Newell, Real Party in Interest

After an order of the Fifth District Court of Appeal summarily denying a petition for writ of mandate or other relief
Fifth District Court of Appeal No. F077817
Kern County Superior Court No. BCV-15-100367

Petition for Review

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Issues Presented for Review

1. Whether, under the federal Outer Continental Shelf Lands Act (43 U.S.C. § 1333 et seq.), state law is borrowed as the applicable federal law only when there is a gap in the coverage of federal law (as the United States Court of Appeals for the Fifth Circuit has held) or, instead, whenever state law pertains to the subject matter of a lawsuit and is not preempted by inconsistent federal law, as the United States Court of Appeals for the Ninth Circuit, and the trial court below, held.

2. Whether, in a case of first impression, a trial court's holding that California wage and hour law applies to work performed on platforms attached to the Outer Continental Shelf off the California coast should be applied retroactively upending established contracts and relationships in a significant industry.

Statement of Facts

The Outer Continental Shelf Lands Act creates exclusive federal jurisdiction over oil platforms in federal waters.

Along the coast of California, state control over all submerged lands extends three geographic (nautical) miles from the mean high tide line, seaward. (43 U.S.C. § 1301(a)(2).) Thereafter, the Outer Continental Shelf is exclusively under federal jurisdiction—outside the territorial jurisdiction of California—to the limit under international law (generally 200 nautical miles). (43 U.S.C. §1331(a); see *Amber Res. Co. v. United States* (Fed. Cir. 2008) 538 F.3d 1358, 1362.)

As described in *Shell Oil Co. v. Iowa Dep't of Revenue* (1988) 488 U.S. 19, 26 ("*Shell Oil*"), a dispute arose between various coastal states and the federal government over the ownership of off-shore lands, and more particularly the rich mineral reserves there. Ultimately, the dispute was resolved by a combination of Supreme Court decisions and Congressional action, resulting in the Outer Continental Shelf Lands Act, "emphatically implement[ing] [Congress's] view that the United States has paramount rights to the seabed beyond the three-mile limit." (*United States v. California* (1947) 332 U.S. 19, 38-39; *Shell Oil* at 27.)

The Lands Act's primary purpose was to "define a body of law applicable to the seabed, the subsoil, and the fixed structures such as [off-shore platforms] on the [Outer Continental Shelf]." (*Rodrigue v. Aetna Cas. & Sur. Co.* (1969) 395 U.S. 352, 355 ("*Rodrigue*").) While Congress considered simply applying maritime law or state law to the Outer Continental Shelf, it ultimately declared the Outer Continental Shelf federal territory governed exclusively by federal law. (43 U.S.C. §1333(a)(1); see *Rodrigue* at 357 ["[F]ederal law is 'exclusive' in its regulation of this area."].) In making that decision, Congress expressly rejected applying the law of each state. (*Continental Oil Co. v. London Steam-Ship Owners' Mut. Ins. Ass'n* (5th Cir. 1969) 417 F.2d 1030, 1036 ("*Continental Oil*").)

Congress also recognized that federal law might be inadequate for some issues, and so it borrowed state law to fill gaps in federal law. (*Rodrigue* at 357.) As such, the laws of the

adjacent state—California here—may be adopted as surrogate federal law on the Outer Continental Shelf, but only to the extent those laws "are applicable and not inconsistent with this subchapter or with other Federal laws and regulations." (*Ibid.;* 43 U.S.C. §1333(a)(2)(A).) But Congress did not want state law to be supreme, and so it clarified that the Lands Act's choice-of-law provisions "shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the [Outer Continental Shelf]." (43 U.S.C. §1333(a)(3).) The U.S. Supreme Court has described the resulting choice-of-law scheme as follows: "All law applicable to the Outer Continental Shelf is federal law, but to fill the substantial 'gaps' in the coverage of federal law, Lands Act borrows the 'applicable and not inconsistent' laws of the adjacent States as surrogate federal law." (*Gulf Offshore Co., Div. of Pool Co. v. Mobil Oil Corp.* (1981) 453 U.S. 473, 480.)

The FLSA addresses "hours worked" and off-duty time for employment arrangements subject to it.

The Fair Labor Standards Act of 1938 (29 U.S.C. § 201 et seq., "FLSA") is a "comprehensive legislative scheme" that protects a "all covered workers from substandard wages and oppressive working hours." (*United States v. Darby* (1941) 312 U.S. 100, 109, *Barrentine v. Arkansas-Best Freight Sys., Inc.* (1981) 450 U.S. 728, 739.) Among the topics the FLSA and its implementing regulations address is determining what constitutes "hours worked" and the circumstances under which employees should be compensated for time spent on the

employer's premises but off-duty, including time spent sleeping. For example, federal regulations provide that "[a]n employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises." (29 C.F.R. §785.23; see *id.* §§785.14-785.22.)

Newell files suit against Ensign; Ensign seeks summary adjudication of the choice of law issue; Ensign seeks writ review in the Fifth District Court of Appeal.

The petitioner is Ensign United States Drilling (California), Inc. Ensign is a defendant in a class action lawsuit filed in Kern County Superior Court, captioned Louis Newell v. Ensign United States Drilling (California), Inc., BCV-15-100367.[1] Newell, the real party in interest, was employed by Ensign on platforms in the Santa Barbara Channel,[2] some of which were in state waters but most of which were on platforms subject to the Lands Act.

Newell filed a class action complaint on behalf of himself and others "similarly situated" in which he alleged Ensign violated various California wage and hour laws (including those regarding minimum wages, overtime and double-time premium wages, final wages, meal periods, and pay stubs) and engaged in unfair competition based on Business and Professions Code section 17200.[3] He also made claims under the Private Attorneys

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[1] Exh. A, p. 6, exhibits filed in the 5th DCA
[2] Exh. A, p. 7
[3] Exh. A, p. 8

General Act of 2004 (Lab. Code, § 2699).[4] Newell did not allege violations under the FLSA.[5]

Ensign's operative answer alleges 18 affirmative defenses, among them that the state wage and hour claims were "preempted" by the Lands Act for those employees working on platforms in federal waters.[6]

Ensign and Newell stipulated to proceed under Code of Civil Procedure section 437c, subdivision (t), which allows for summary adjudication of a legal issue that does not dispose of a cause of action or an affirmative defense. Specifically, the parties stipulated that the court resolve a potentially dispositive legal issue: whether, under the Lands Act, federal wage and hour law applied, or California wage and hour law should be adopted as surrogate federal law.[7] Ensign's motion sought resolution of "two purely legal issues":

a. Whether the [Lands Act] applies to work performed by Defendant's employees on platforms in federal waters; and

b. If so, whether federal law applies exclusively, or if, instead, California law is adopted as surrogate federal law under the [Lands Act].[8]

In support, Ensign argued:

a. The Lands Act invokes state law as surrogate federal law "[i] only when necessary to fill a

[4] Exh. A, p. 8
[5] Exh. A, pp. 6 et seq.
[6] Exh. B, p. 27
[7] Exh. C, p. 34
[8] Exh. H, p. 88

significant void or gap in federal law and, [ii] even then, only when not otherwise inconsistent with federal law."[9]

b. The FLSA "fully occupies the field—as multiple federal district courts have found—leaving no significant void or gap for state law to fill. [And] state law is directly contrary to federal law in the way it treats time spent by employees who reside at the worksite. Accordingly, the Lands Act precludes state wage and hour claims arising from employment on platforms subject to its provisions...precluding approximately 80% of the putative class claims."[10]

Ensign cited multiple cases from federal jurisdictions, including six cases from the Central District of California in which each of the district court judges interpreted the Lands Act and dismissed similar California wage and hour claims arising out of work performed on off-shore platforms subject to the Lands Act.[11] One of those six Central District cases was *Newton v. Parker Drilling Mgmt. Srvs., Inc.*[12] Ensign noted that three of the six cases were pending appeal in the Ninth Circuit, including *Newton*. The trial court here delayed its decision on Ensign's motion until after the Ninth Circuit decided *Newton*.

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[9] Exh. I, p. 96
[10] Exh. I, p. 96
[11] Exh. I, generally, and specifically, p. 104, fn. 2
[12] Exh. I, p. 104, fn 2

Ultimately, the Ninth Circuit concluded California wage and hour law should be adopted as surrogate federal law under the Lands Act:

> We hold that the absence of federal law is not, as the district court concluded, a prerequisite to adopting state law as surrogate federal law under the Outer Continental Shelf Lands Act, []. We thus reject the proposition that "necessity to fill a significant void or gap," [] is required in order to assimilate "applicable and not inconsistent" [] state law into federal law governing drilling platforms affixed to the outer Continental Shelf.

(*Newton v. Parker Drilling Management Services, Ltd.* (9th Cir. 2018) 881 F.3d 1078, 1081–1082, citations omitted.) Noting the Fifth Circuit's reliance on legislative history in defining "applicable" as meaning "necessary," the Ninth Circuit rejected the Fifth Circuit's approach and relied instead on what it considered the ordinary meaning of "applicable":

> Reading the plain text of the [Lands Act] against the background of its inconclusive legislative history, we are not convinced that state law applies as surrogate federal law on the [Outer Continental Shelf] only if "necess[ary]," [] in the sense that there is no existing federal law on the subject.

(*Newton* at p. 1093, internal citation omitted.)

> As we see it, because there are California and federal statutory schemes that are "applicable," in the ordinary sense of that term, to the parties' conflict, the

> determinative question in Newton's case is not which law is "applicable," but whether California wage and hour laws are "inconsistent with" existing federal law.

(*Ibid.*) Regarding the "not inconsistent" prong of the Lands Act test, the Ninth Circuit concluded California wage and hour law was not inconsistent with federal law, interpreting "inconsistent" by reference to other statutes where Congress directed that state and federal law be evaluated for inconsistency. (*Id.* at p. 1093-1097.)

The Ninth Circuit acknowledged this legal issue was one of first impression:

> Newton's principal wage and hour objection is that he was not properly compensated for standby hours on the drilling platform. We know of no appellate case law examining whether, for the purposes of the [Lands Act], state wage and hour laws are inconsistent with the federal FLSA.

The defendant in *Newton* filed a petition for rehearing en banc,[13] and various amicus curia filed a brief in support of the petition,[14] advancing four arguments supporting en banc review:

- First, the Ninth Circuit had "expressly rejected a rule that is settled Fifth Circuit law," which is a significant problem because it creates a "square conflict" between the circuits responsible for the Gulf of Mexico and the

[13] Exh. DD, pp. 398, et seq.
[14] Exh. DD, pp. 465, et seq.; DCA RJN #6, request for judicial notice filed in the 5th DCA

West Coast where virtually all off-shore production and exploration occurs.[15]

- Second, the Ninth Circuit had potentially inflicted "hundreds of millions of dollars of retroactive damages, fines, and penalties" on West Coast off-shore employers despite "the already generous wages and benefits employees enjoy under longstanding arrangements" created because of the "unique circumstances of living and working offshore."[16]
- Third, the Ninth Circuit's decision had advanced state law supremacy over federal supremacy, when federal supremacy was the purpose of the Lands Act.[17]
- Finally, the Ninth Circuit's decision could allow states with different "policy preferences" to work mischief against the federal policies encouraging mineral production and exploration.[18]

In denying the petition for rehearing en banc, the Ninth Circuit amended the opinion, adding a footnote regarding retroactivity:

> The opinion, filed on February 5, 2018, is amended. On page 40, after the sentence, "We vacate the order dismissing Newton's claims and remand to the district court for further proceedings consistent with this opinion[,]" the following footnote is added: "*We reserve*

[15] Exh. DD, p. 477; DCA RJN #6
[16] Exh. DD, p. 477; DCA RJN #6
[17] Exh. DD, pp. 477-478; DCA RJN #6
[18] Exh. DD, p. 478; DCA RJN #6

> *for the district court's consideration on remand the question whether our holding should be applied retrospectively.* [*Chevron Oil Co. v. Huson* (1971) 404 U.S. 97, 105-109 ("*Huson*")]"[19]

The Ninth Circuit deferred or stayed oral argument or briefing in the three other cases pending finality of *Newton.*[20] On September 24, 2018, Parker Drilling filed a Petition for Writ of Certiorari with the U.S. Supreme Court.[21] That petition is pending.

Meanwhile, Ensign moved for, and the parties briefed, a stay of all further proceedings and tolling the five-year statutory requirement for prosecution. [22] (Code Civ. Proc., § 583.310.) And, given the trial court's tentative order denying the motion for summary adjudication, Ensign also moved for an order that the presumed order be given no retroactive effect.[23] Ensign cited *Huson*—a U.S. Supreme Court case that adopted state law under the Lands Act in the absence of federal law, but declined to apply its ruling retroactively—to support applying the respondent court's ruling on the legal issue prospectively because

> ...applying state wage and hour law to a federal platform subject to the Lands Act will constitute an entirely new principle of law and upend decades of industry practice established relying upon

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[19] Exh. FF, p. 534, emphasis added.
[20] DCA RJN #1, 2, & 3
[21] CASC RJN, request for judicial notice filed in this court
[22] Exh. BB, pp. 345, et seq.; Exh. CC, DD
[23] Exh. KK-MM & PP-RR

> decisions of both the Supreme Court and federal circuit courts.[24]

After its final hearing on the motion for summary adjudication, the trial court denied the stay,[25] denied the motion for summary adjudication,[26] and denied the request for nonretroactive (prospective) application. [27] In its final order, the respondent court made 14 enumerated findings, in which it concluded state law applied and was not inconsistent with federal law.[28]

On July 20, 2018 Ensign filed its Petition for Writ of Mandate, Prohibition, or Other Extraordinary Relief, accompanied by a request for immediate stay with the Fifth District Court of Appeal. On October 9, 2018, the Fifth District summarily denied Ensign's Petition.

I. Why review should be granted.

In the Outer Continental Shelf Lands Act, Congress declared federal law to be the exclusive source of law on the Outer Continental Shelf. To fill the gaps in the coverage of federal law, Congress provided that the law of the adjacent state would be borrowed as federal law, to the extent that such state law is "applicable" and "not inconsistent with" existing federal law. Consistent with U.S. Supreme Court decisions, the Fifth Circuit has long held that state law is not borrowed as surrogate

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[24] Exh. KK, p. 592
[25] Exh. VV, pp. 730, ¶ 13
[26] Exh. VV, pp. 726 et seq.
[27] Exh. VV. p. 729 ¶ 9
[28] Exh. VV, pp. 727 et seq.

federal law under Lands Act unless there is a gap in federal law (e.g., a garden-variety contract claim because federal law does not address common law contract claims).

But, in *Newton*, the Ninth Circuit expressly disagreed with the Fifth Circuit and held that state law should be borrowed as federal law governing the Outer Continental Shelf whenever state law pertains to the subject matter of a lawsuit and is not preempted by inconsistent federal law, regardless of whether there is a gap in federal law. The Ninth Circuit thus held that California's wage-and-hour laws apply to claims filed by workers on drilling platforms on the Outer Continental Shelf, even though the FLSA already provides a comprehensive set of federal rights and remedies. The result is wholly unanticipated and potentially creates massive liability for Outer Continental Shelf operators that complied with the FLSA.

The paradigm shift signaled by *Newton* and the respondent court's order will have enormous consequences on oil exploration and production on the Outer Continental Shelf—the singular activity the Lands Act controls. Until now, no court at any level has ever held state law might apply to activities on federal platforms without a corresponding gap in federal law. An entire industry has developed innumerable contracts and interlocking business activities relying on the federal precedents discussed here, which require a gap in federal law before state law is adopted as surrogate federal law governing activities on oil platforms on the Outer Continental Shelf.

A. *This Court should intervene because its decision in* Mendiola *is being used to upend the oil production industry and industry practices.*

Immediately following this Court's decision in *Mendiola v. CPS Sec. Solutions, Inc.* (2015) 60 Cal.4th 833 ("*Mendiola*"), multiple lawsuits were filed seeking to extend its reach to offshore platforms located in federal waters. This case was filed in Kern County Superior Court and several were filed in federal courts against various petroleum producing companies and service providers. The decision of the trial court here, and of the Ninth Circuit in *Newton,* have paralyzed the off-shore oil industry because it now lacks clear guidance on what law it should follow. This is because neither the Ninth Circuit nor the Fifth Circuit decisions are binding on state courts—those opinions constitute persuasive authority only. (*People v. Bradley* (1969) 1 Cal.3d 80, 86 [only U.S. Supreme Court opinions are binding on state courts].) But the U.S. Supreme Court has not addressed the specific question here. And as to California-based federal courts, *Newton* is stayed pending the petition to the U.S. Supreme Court;[29] the other cases pending in the Ninth Circuit and the Central District of California are stayed pending *Newton.*[30] Regardless, Fifth Circuit cases holding that only federal law applies under similar circumstances remain unchanged.

This case is in a unique procedural posture for this Court to resolve the issue, at least in the absence of a decision by the U.S.

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[29] Exh. OO, p. 627; see also CASC RJN
[30] DCA RJN #s 1-3, 5

Supreme Court. The parties have proceeded by stipulation to identify and isolate a single issue of law—whether state wage and hour laws apply to work performed on platforms affixed to the Outer Continental Shelf or whether, instead, the federal FLSA is the exclusive law to be applied.

Alternatively, given the significant federal issue posed and the uncertainty regarding the U.S. Supreme Court's intervention to resolve the conflict between the Ninth and Fifth Circuits, this Court should grant review and put this matter on hold pending a determination on Parker Drilling's Petition for Writ of Certiorari. This is consistent with the approach the federal courts in California have taken—both the Ninth Circuit and the Central District.[31]

It makes no sense at all for the parties here to proceed to litigate the myriad class issues posed by *Mendiola* and state law if, in fact, the U.S. Supreme Court determines that only the FLSA applies. And, if the U.S. Supreme Court does not grant review, the industry operating off the coast of California remains confronted with the two competing approaches of the Ninth and Fifth Circuits, which this Court can resolve for California courts.

Even if this Court—or the U.S. Supreme Court—might agree that state wage and hour law apply, this Court should intervene to assure that the effect is prospective only and that it does not disrupt relationships forged in long reliance on what, until now, was a clear mandate that, in the absence of significant gaps, only federal law applies on federal platforms.

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[31] Exh. OO, p. 627; DCA RJN #s 1-3, 5

B. *The issue is critical to the off-shore petroleum exploration and production industry.*

According to the U.S. Energy Information Association, petroleum is big business in California—and this does not surprise anybody who has lived here.[32] The importance is illustrated by the concerted effort the industry made in filing an amicus brief in *Newton* urging en banc review in the Ninth Circuit.[33] That brief, filed by five employers, six trade associations, and the Chamber of Commerce of the United States of America, argued—among other things—the Ninth Circuit's decision would dramatically disrupt existing contractual relationships founded on the Fifth Circuit's interpretation of the Lands Act. The Amici explained the *Newton* decision could inflict hundreds of millions of dollars of retroactive damages on the California petroleum industry, because the industry had followed the Fifth Circuit's jurisprudence nationwide,[34] consistent with the notion that the Lands Act was supposed to create consistency in law aboard off-shore platforms to protect the mineral development industries. (See *Rodrigue* at 358.)

Based on the unique nature of off-shore oil exploration—requiring travel to remote platforms—the oil industry has long established employment practices, including the provision of off-shore lodging. If California wage and hour law were to be adopted as surrogate federal law on the platforms, and the lower court's decision is given retroactive effect, employees will claim to be

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[32] https://www.eia.gov/state/analysis.php?sid=CA
[33] Exh. DD, p. 465 et seq.; DCA RJN #6
[34] Exh. DD, p. 489; DCA RJN #6

entitled to overtime wages (double time) for the approximately 12 hours they spend on platforms when they are otherwise off-duty. Typically, Ensign employees, like Newell, are paid wages of $25 per hour or more: double-time for 12 hours would amount to $600 or more for each employee, per off-duty shift.[35] The parties agree that the choice of law dispute here impacts approximately 19,000 employee-work shifts on platforms in federal waters through November 2015, alone.[36] The math is straightforward: at $600 or more for each twelve-hour period on-platform but off-duty, Newell and the putative class seek wage damages of $12 million or more plus associated penalties for the overtime claim, alone. Considering Newell's claims for wage damages, derivative penalties, and related claims, Ensign faces a threat of exposure of nearly $30 million in potential damages and penalties, most of which would not even arguably be owed if the FLSA applied.[37]

With such a consequential question facing a critical industry, and the employer here facing extraordinary risks, this Court should take the opportunity to review the choice of law question.

C. *The issue is novel—it is one of first impression in California.*

Although the U.S. Supreme Court has addressed the issue in other contexts, no U.S. Supreme Court case has addressed what the Lands Act means by "applicable" and "not inconsistent"

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[35] DCA Petition ¶ 43
[36] Ibid.
[37] Ibid.

when faced with both relevant state and federal law, much less state law that differs significantly from federal law, such as that occasioned by on-platform lodging arrangements. (*Rodrigue* at 355-356; *Huson* at 99-100; see also, *Gulf Offshore Co., Div. of Pool Co. v. Mobil Oil Corp., supra,* 453 U.S. at 480-481.)

The Fifth Circuit has addressed similar issues because Louisiana and its off-shore platforms are within that Circuit's jurisdiction. (*Continental Oil Co.* at 1035-1036 [considering maritime and admiralty law]; *Nations v. Morris* (5th Cir. 1973) 483 F.2d 577, 585 [considering Longshore and Harbor Workers' Compensation Act]; *LeSassier v. Chevron USA, Inc.* (5th Cir. 1985) 776 F.2d 506, 509 [considering Longshore and Harbor Workers' Compensation Act].) But until *Newton*, the Ninth Circuit had never addressed the issue and the respondent court is the first California court the parties have identified that has done so.

The only cases addressing the specific question here—the application of California wage and hour law to activities on platforms subject to the Lands Act—are federal cases from the Central District of California. In each case pre-dating the *Newton* decision, the district court judge relied on U.S. Supreme Court and Fifth Circuit precedent to conclude the FLSA should apply—California law was unnecessary as surrogate federal law because there was no "gap" in federal law. (*Williams v. Brinderson Constructors Inc.,* No. CV 15-2474-MWF (AGRX) (C.D. Cal. Aug. 11, 2015) 2015 WL 4747892); *Newton v. Parker Drilling Mgmt. Servs., Inc.*, No. 2:15-cv-02517 (C.D. Cal. Aug. 10, 2015); *Reyna v.*

Venoco, Inc., No. 2:15-cv-04525 (C.D. Cal. Oct. 23, 2015); *Espinoza v. Beta Operating Co., LLC*, No. 2:15-cv-04659 (C.D. Cal. Oct. 29, 2015); *Garcia v. Freeport-McMoran Oil & Gas LLC*, No. 2:16-cv-04320 (C.D. Cal. Sep. 16, 2016); *Jefferson v. Beta Operating Company, LLC*, No. 2:15-cv-04966 (C.D. Cal. Nov. 3, 2015).) Three district courts went further and addressed an issue of first impression—whether the FLSA and California wage and hour law are "inconsistent," as contemplated by the Lands Act and differentiating between applying state law under the Lands Act and traditional preemption analysis—and finding the two inconsistent. (*Garcia v. Freeport-McMoran Oil & Gas LLC*, No. 2:16-cv-04320 (C.D. Cal. Sep. 16, 2016); *Jefferson v. Beta Operating Company, LLC*, No. 2:15-cv-04966 (C.D. Cal. Nov. 3, 2015); *Williams v. Brinderson Constructors Inc.*, No. CV 15-2474-MWF (AGRX) (C.D. Cal. Aug. 11, 2015) 2015 WL 4747892.)

Of these, *Newton*, *Espinoza*, *Garcia*, and *Jefferson* were appealed to the Ninth Circuit. The Ninth Circuit has decided *Newton*, but has stayed mandate pending the *Newton* defendant's petition for writ of certiorari to the U.S. Supreme Court, filed on September 24, 2018.[38] Similarly, the Ninth Circuit has deferred or stayed oral argument or briefing in *Espinoza*, *Garcia*, and *Jefferson*, until *Newton* becomes final.[39] In the one Central District case post-*Newton*, the court applied *Newton*, but stayed the case pending mandate.[40]

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[38] Exh. OO, p. 629; CASC RJN
[39] DCA RJN #1, 2, & 3
[40] DCA RJN #5

II. The *Newton* court's approach to the Lands Act is fundamentally different from that of the Fifth Circuit, and it ignored Supreme Court precedent.

The *Newton* court acknowledged its approach might differ from that of the Fifth Circuit in its reading of the Lands Act, *Rodrigue,* and *Huson* and it distinguished *Rodrigue* and *Huson* because they did not resolve a claimed inconsistency between potentially applicable state and federal laws. (*Newton* at 1091,1087.) But, *Rodrigue* laid the foundation for every later case interpreting the Lands Act—it constitutes binding authority regarding the Congressional intent to make federal law exclusive on the Outer Continental Shelf. (See e.g., *Continental Oil* at 1035; *Union Texas Petroleum Corp. v. PLT Engineering, Inc.* (5th Cir. 1990) 895 F2d 1043, 1047 ("*PLT*").)

A. Rodrigue *is binding authority and should not be distinguished from* Newton *as the Ninth Circuit concluded.*

In *Rodrigue*, the U.S. Supreme Court scrutinized the legislative history behind the Lands Act, from which it articulated the standard under which state law would be adopted and enforced as federal law on the Outer Continental Shelf—that federal laws apply on the Outer Continental Shelf, but that "the Act supplements gaps in the federal law with state law..." (*Rodrigue* at 357.) It further identified the purpose of adopting state law in that area of exclusive federal jurisdiction—to address a federal system of laws that "might be inadequate to cope with the full range of potential legal problems." (*Id.* at 357.) The

Supreme Court relied on records of the Congressional debate that led to a central feature of the Lands Act:

- A problem addressed in Senate debate was the anticipation of many workers on the Outer Continental Shelf, which might present problems that required a body of law more comprehensive than the Federal Code. (*Id.* at 358 [Senator Cordon].)
- The solution was to draft an act that provided for federal laws and regulations to govern on the Outer Continental Shelf but might invoke state laws "where there is a void." (*Id.* at 358, [Senator Anderson].)
- Opponents of the Lands Act sought to make state laws applicable on the Outer Continental Shelf, which amendments were rejected. (*Id.* at 359 [referring to Senator Long's amendment that would have made "the laws of such State applicable" on the Outer Continental Shelf based on his belief it was even more important that State law should apply on the artificial islands than on natural land].)
- A federal solution was needed to address the absence of so-called social laws that might become necessary for protecting workers, one that admiralty law was unsuited to fill, but that the Lands Act addressed by treating the Outer Continental Shelf as an area of exclusive federal jurisdiction, like a federal enclave. (*Id.* at 361-365.)

Based on this dispositive recital of Congressional intent, the Court declared "[t]his language makes it clear that state law could be used to *fill* federal *voids*." (*Id.* at 358, emphasis added.)

Ultimately, the *Rodrigue* Court decided this legislative history would have supported the lower court's finding the federal Seas Act applied to the exclusion of Louisiana law based on inconsistencies between those bodies of laws. (*Rodrigue* at 359.) But, as the Court concluded—the Seas Act did not apply in that instance and, *considering the void in federal law*—Louisiana law should have been adopted as surrogate federal law under the Lands Act. (*Id.* at 359.) *Huson* affirmed *Rodrigue*'s interpretation of the Lands Act and application of state law within the framework developed there. (*Huson* at 101, 104-105 [declining to apply *Rodrigue* retroactively].)

The *Newton* decision incorrectly dismisses both *Rodrigue* and *Huson* as inapposite to situations in which there is applicable federal law. Every court faced with the issue of whether to apply state law under the Lands Act has relied on *Rodrigue's* legislative analysis, including cases forced to resolve the issue in the face of existing federal law—such as *Continental Oil.*

B. Continental Oil *is the leading case on applying the Lands Act and its approach is consistent with* Rodrigue *and other U.S. Supreme Court authority.*

Like *Newton, Continental Oil* distinguished itself factually from *Rodrigue.* Because in *Rodrigue* "there (i) was *no* federal law and (ii) there was a state law covering the precise situation," the *Continental Oil* court had to interpret "applicable" in a new

context—one involving federal law. (*Continental Oil* at 1035.) But, unlike *Newton*, *Continental Oil* emphatically rejected reading the term "applicable" that extended state law merely to afford a gain or benefit not available under federal law, noting this approach deprived the term "applicable" of any substantive meaning, put 100% emphasis on "not inconsistent," and accorded "a superiority to adjacent state law," contrary to legislative history. (*Id.* at 1035.) Instead, the court affirmed *Rodrigue*'s interpretation of the Lands Act that a "gap" in federal law was necessary before state law could be "applicable," observing this conclusion also made "something more out of the 'not inconsistent' element than a mere disjunctive for mechanical invocation and assessment." (*Id.* at 1036-1037.)

C. *The Ninth Circuit forged a different definition of "applicable" than had been used by other federal courts interpreting the Lands Act.*

Newton identified *Continental Oil* and *PLT* as "two strands" of Fifth Circuit jurisprudence that cite *Rodrigue*, each describing a "test" for applying state law under the Lands Act. The *Newton* court recognized *Continental Oil* and its progeny interpreted "applicable" as meaning it must "be read in terms of necessity—necessity to fill a significant void or gap." (*Newton* at 1091, citing *Continental Oil* at 1036 [damage to sea-going vessel; no gap; maritime and admiralty law applied], and recognizing *Nations v. Morris, supra,* 483 F.2d at 585-586 [on-the-job injury; no gap; Longshore and Harbor Workers' Compensation Act applied]; *LeSassier v. Chevron USA Inc., supra,* 776 F.2d at 509

[retaliatory discharge; no gap; Longshore and Harbor Workers' Compensation Act applied].)

PLT enumerates the prerequisites for applying state law on the Outer Continental Shelf, without mention of the requirement there be a significant gap in federal law, asking only whether (1) the controversy arose on a situs covered by the Lands Act; (2) federal maritime law applies; and (3) state law is inconsistent with federal law. (*Newton* at 1089, citing *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC* (5th Cir. 2009) 589 F.3d 778, 783, in turn, citing *PLT* at 1047.)

The *Newton* court conceded it is not clear whether the *PLT* test supersedes the *Continental Oil* test, or whether the *Continental Oil* test is a precursor to the *PLT* test. (*Newton* at 1089.) Faced with this apparent confusion, *Newton's* solution was to disregard the *Continental Oil* line of cases altogether, even though, of the two lines of cases, only *Continental Oil* and its progeny directly address the Lands Act in the context of *existing federal law* (contradicting the rationale for dismissing *Rodrigue*). (See *id.* at 1093.) Instead, *Newton* uses what it describes as the ordinary meaning of the term "applicable," asserting *for the first time* that legislative history was too ambiguous to control the meaning and citing *Knapp v. Chevron USA, Inc.* (5th Cir. 1986) 781 F.2d 1123, for the notion preemption analysis relates to applying state law under the Lands Act. (*Newton* at 1089, 1090-1093.)

This conclusion both contradicts decades of authority dating to *Rodrigue* and is logically incoherent. *Newton* rejected

Continental Oil, which interpreted "applicable" in the context of *existing federal law*, in favor of *PLT* and *Knapp,* both of which applied state law under the Lands Act *absent federal law.* Although *Knapp* considered the lack of congressional intent that the Longshore Act "preempt the field," this point was secondary to the conclusion the Longshore Act did not apply to the issue. (See *Knapp v. Chevron USA, Inc., supra,* 781 F.2d at 1131.) But *Newton* applied what it deemed to be the "ordinary meaning" of the term "applicable" and held the *PLT* test looks to congressional intent regarding preemption to determine whether state law is inconsistent with federal law—disregarding the unique meaning attributed to the term under the Lands Act by numerous courts through scrutinizing well-documented legislative history. (*Newton* at 1089.) Contrary to the *Continental Oil* decision nearly 50 years earlier, *Newton* adopts a meaning of "applicable" that makes it superfluous by putting 100% emphasis on the "not inconsistent" element and assumes the primacy of state law under the Lands Act—the very problem identified in *Continental Oil.*

Newton rejects the express requirement under the Lands Act that state law only be adopted when "applicable" and "not inconsistent" with federal law and, instead applies ordinary preemption analysis as though the Outer Continental Shelf were not a unique and statutorily defined area of exclusive federal jurisdiction. In doing so, *Newton*—for the first time—extends state law over territory subject to the Lands Act, such that all state laws apply on the Outer Continental Shelf unless

preempted by federal law—rejecting decades of case law that required a "significant void or gap" in federal law to exist and applying the plain meaning of "inconsistent," without considering traditional preemption standards, before adopting state law as surrogate federal law.

The only logical conclusion, considering Fifth Circuit case law, would have been to recognize the consistent theme woven through both the *Continental Oil* and *PLT* lines of cases, which result in consistent tests. Subsequent courts (including Fifth Circuit courts after *PLT)* have analyzed applying state law under the Lands Act in light of existing federal law *generally*—not just whether maritime law applies in its own force—and applied the *PLT* test consistent with *Continental Oil's* and *Rodrigue's* requirement that state law only apply to fill a "significant gap or void." *(See e.g., Moody v. Callon Petroleum Operating Co.* (E.D. La. 1999) 37 F.Supp.2d 805, 810, 813 [describing *PLT* as requiring: "(1) the controversy must arise on a situs covered by Lands Act; (2) **another federal law must not apply (Jones Act or LHWCA for example);** and (3) the state law must not be inconsistent with Federal law," emphasis added; citing *PLT* at 1047]; *Matter of Tidewater Inc.* (W.D. La. 1994) 883 F.Supp. 105, 106 [following *Continental Oil* in holding state law did not apply in the absence of significant gaps in federal law]; *Tennessee Gas Pipeline Co. v. Houston Cas. Co.* (W.D. La. 1995) 881 F.Supp. 245, 248-249, aff'd and remanded sub nom. *Tennessee Gas Pipeline v. Houston Cas. Ins. Co.* (5th Cir. 1996) 87 F.3d 150 [citing *Continental Oil* on whether state law applies as federal surrogate

law]; *Sekco Energy, Inc. v. MIV MARGARET CHOUEST* (E.D. La. 1993) 820 F.Supp. 1008, 1013 [citing *PLT, Rodrigue,* and *Continental Oil* together to find state law did not apply because maritime law applied "in its own force"].)

Even absent applicable federal law, the Fifth Circuit addressed the *"PLT* factors" and, nonetheless, reaffirmed the rule from *Rodrigue*—that state law is adopted as federal law only if there is a gap in federal law and only if the state law is not inconsistent with federal law—in *Tetra Technologies, Inc. v. Continental Ins. Co.* (5th Cir. 2016) 814 F.3d 733, 738.)

While *PLT* did not probe for gaps in federal law, it is only because it was unnecessary to do so, since *it was clear federal law did not apply.* (See *PLT* at 1050-1052.) *Continental Oil*'s interpretation of "applicable" remains operative where there is federal law. Relying on *PLT, Continental Oil,* and *Rodrigue,* the Fifth Circuit continued to apply state law only to fill significant gaps or voids in federal law and only when state law is not inconsistent. The Ninth, in *Newton,* became the first federal appellate court to take a contrary position and is, therefore, vulnerable on review.

Whether California wage laws should be adopted on the Outer Continental Shelf as federal law requires careful consideration of the legislative history exhaustively examined in *Rodrigue* and applied in *Continental Oil* where there is comprehensive existing federal law. In the absence of existing federal law in the field, the truncated *PLT* test would apply

without controversy. Neither *Newton* nor Ensign present that issue, so *Newton's* reliance on *PLT* is singularly misplaced.

D. *California wage and hour law is inconsistent with the FLSA in its treatment of on-site residency agreements.*

Even if this Court were to accept *Newton*'s definition of "applicable," state law should not be adopted under the Lands Act if it is "inconsistent" with existing federal law. *Newton* conceded whether California wage and hour law is "inconsistent" with the FLSA under the Lands Act is a question of first impression in appellate courts. (*Newton* at 1090.) But, since the "inconsistency" prong of the Lands Act was not addressed by the *Newton* district court—it held there were no "significant voids or gaps" in federal law (the FLSA) and declined to adopt California wage and hour law on that basis *alone*—the Ninth Circuit made findings without the benefit of the lower court's reasoning on this issue. (See *id.* at 1083; see also, *Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 498 [appellate court decisions are not law for matters not necessarily decided].)

The California Labor Code and FLSA are fundamentally different in how they view the relationship between employer and employee, which results in divergent approaches to analyzing "hours worked." California and federal courts have interpreted the same FLSA regulations regarding "hours worked" and reached starkly different conclusions under each jurisdiction's statutory scheme. (See *Mendiola* at 840-841[rejecting an agreement between employee and employer as a relevant factor

in evaluating compensability of on-call time]; compare to e.g., *Bringham v. Eugene Water & Elec. Bd.* (9th Cir. 2004) 357 F.3d 931, 938-941 [recognizing constructive employment agreements as a significant factor in analyzing hours worked under the FLSA].) This Court has acknowledged the FLSA regulations on hours worked as "fundamentally inconsistent" with California law. (*Mendiola* at 844.)

The *Newton* court refused to recognize these differences as "inconsistent," and applied traditional preemption analysis instead. In applying state law under a preemption analysis, *Newton* ignores the unique legislative history and paramount purpose of the Lands Act: to establish the primacy of federal law in an area of exclusive federal jurisdiction, adopting state law only where federal laws are inadequate. (*Rodrigue* at 355-356.) Instead, notwithstanding well-settled case law, *Newton* creates a system of simultaneous application of federal and state wage and hour law as though the Lands Act did not apply, and the claims arose in a California jurisdiction—something that no other court before *Newton* has sanctioned.

Ironically, the *Newton* court, which professed to use an "ordinary meaning" to interpret the term "applicable," refused to apply the same standard when interpreting the term "inconsistent." (See *Newton* at 1093 ["applicable"] & 1097 ["inconsistent"].) Instead, *Newton* applied what it considered the ordinary meaning of "applicable" that robs it of any significance in the context of the Lands Act and then went to great lengths to engineer a special meaning for the term "inconsistent" based on

how the term has been interpreted in unrelated statutes. (See *id.* at 1093-1097.) Yet again, *Newton* abandons decades of U.S. Supreme Court and Fifth Circuit cases relying on the same legislative history to give unique meanings to the terms "applicable" and "inconsistent" under the Lands Act—without authority. Had *Newton* applied the plain meaning of the term "inconsistent" using the same logic as it used to define "applicable," it would have found that California law dismissing the significance of onsite residency agreements between employers and workers was "inconsistent" with the FLSA as applied to work performed on platforms subject to the jurisdiction of the Lands Act. Those inconsistencies proscribe adopting California law as surrogate federal law under the Lands Act.

III. Any holding that California state wage and hour law should apply to work performed on platforms subject to the Lands Act should receive only prospective application.

Citing *Huson*, the *Newton* court raised the retroactivity issue sua sponte after it expressly disagreed with Fifth Circuit precedent on one issue and identified another as one of first impression. The *Newton* court likely recognized the decision was potentially both disruptive of existing contractual and other business relationships, and entirely unanticipated. It is striking that the *Newton* court cited *Huson* in deferring to the district court on the retroactivity issue because *Huson* not only identified the three-factor analysis for deciding whether to apply a decision retroactively, it decided not to apply *Rodrigue* retroactively and, in doing so, declined to adopt a state statute of limitations under

the Lands Act. (*Huson* at 106-107.) In its decision, the *Huson* court recognized *Rodrigue* represented a case of first impression under the Lands Act and overruled a long line of decisions by the Court of Appeals for the Fifth Circuit. (*Id.* at 107.) Ironically here, a new interpretation of the Lands Act, the first since *Rodrigue*, again raising an issue of first impression and breaking with Fifth Circuit cases, also prompted the *Newton* court to raise retroactivity. This type of decision has traditionally been afforded only prospective application.

Both the Ninth Circuit and the California Supreme Court have cited the *Huson* test for determining retroactivity: "Whether (1) the decision establishes a 'new principle of law' by overruling 'clear and past precedent'; (2) the history and purpose of the rule announced require retroactive application; and (3) retroactively applying the overruling decision would produce injustice or hardship." (*Casas v. Thompson* (1986) 42 Cal.3d 131, 140 [affirming the prospective application of the trial court's ruling based on a U.S. Supreme Court case interpreting a federal legislative scheme and the equities]; *Nunez-Reyes v. Holder* (9th Cir. 2011) 646 F.3d 684, 692 [applying *Huson* to conclude a decision should only be applied prospectively].)

California courts have also analyzed the issue in terms of public policy, fairness, foreseeability, reliance, and statutory purpose, which are—for all practical purposes—the same as the factors identified in *Huson*:

- The first *Huson* factor addresses whether a decision establishes a new principle of law by either overruling

past precedent ***or*** announcing a new rule of law. It encompasses the same issue as California's considerations of foreseeability of a change in the law, and reliance. (See e.g., *Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 988 [weighing considerations of public policy, fairness, and reliance in concluding there was no compelling reason to depart from the rule of retroactivity] ("*Emerson Radio*").) Both look at how foreseeable the change was and the extent parties relied on the past rule.

- The second *Huson* factor looks at the history and purpose of the rule announced. This factor addresses the public policy considerations implicated by examining the rule of law and the purpose to be served by changes to the law. (See e.g., *Claxton v. Waters* (2004) 34 Cal.4th 367, 378-379 [concluding that considerations of fairness, public policy, and reliance supported prospective application of the new rule].)
- The third *Huson* factor addresses the equities affected by the change—the effect of the change on the administration of justice, fairness, and reliance on a former rule of law. (See e.g., *id.* at 378.)

While Ensign does not dispute the general rule that judicial decisions are applied retroactively to cases pending at the time of the decision, both state and federal cases acknowledge well-settled authority for exceptions to the general rule. (*Huson* at 107, [declining to apply *Rodrigue* retroactively and refusing to

apply state law retroactively]; *Emerson Radio* at 982-992 [engaging in the retroactivity analysis process to determine whether considerations of fairness, public policy and reliance would support prospective application]; *Nunez-Reyes v. Holder, supra,* 646 F.3d 684, 692 [engaging in the retroactivity analysis under *Huson* and finding that the decision should only be applied prospectively].)

California has treated tort and contract cases differently, applying the general rule in tort cases and applying prospective application in some contract and procedure cases. (See, e.g., *Emerson Radio* at 981-989.) In *Emerson Radio*, the Court concluded its decision barring tort damages for breach of the implied covenant of fair dealing applied retroactively, noting there were no compelling reasons to depart from general retroactive application "in tort cases." (*Id.* at 975-976, 985.) The Court recognized tortfeasors and victims are unlikely to rely on vagaries of tort law:

> Neither the tortfeasor nor the victim normally takes account of expanding or contracting rules of tort liability except tangentially...

(*Id.* at 981.) But the Court acknowledged that contracting parties rely on the status of the law:

> [t]he most compelling example of such reliance occurs when a party has acquired a vested right or entered into a contract based on the former rule, and we are more reluctant to apply our decisions retroactively in those cases.

(*Id.* at 989, emphasis added; see also, *Woods v. Young* (1991) 53 Cal.3d 315, 330 [statutes of limitation applied prospectively only]; *Casas v. Thompson, supra,* 42 Cal.3d at 139-141 [applying a new federal law prospectively only as it affected the property interests of spouses in a military pension]; *Claxton v. Waters, supra,* 34 Cal. 4th at 378-879 [the reasonableness of the parties' reliance, the nature of the change, the effect on the administration of justice, and the purposes to be served by the new rule supported applying its decision prospectively only]; *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 372–373 [considerations of public policy favored the prospective application of the court's decision regarding attorney's fee and fee-shifting decision].)

Here, an employee does not forfeit all remedies or a day in court by applying the new rule prospectively. Rather, when pleading claims under the FLSA, employees have access to a statutory scheme providing comprehensive remedies for wage and hour claims. Applying the respondent court's ruling prospectively—that is, applying federal law exclusively until the date of its order—will provide adequate wage and hour remedies up to that date. The impact of retroactive application of the court's ruling will undermine all the contracts between Ensign and other mineral industry employers, and between third parties and their employees, formed in reliance on the well-settled interpretation of the Lands Act under *Rodrigue* and Fifth Circuit precedent.

Prospective application is appropriate here because of the *Newton* court's new and different path, adopted for the first time by the respondent court. The *Newton* court acknowledged its decision resulted in significant change: first, by rejecting the legislative history in *Rodrigue* and adopted by Fifth Circuit precedent on "applicability"; and, second, by acknowledging the question of "inconsistency" between state wage and hour law and FLSA as one of first impression. (*Newton* at 1090-1093.) The Ninth Circuit explained its new path:

- Contrary to Fifth Circuit cases, "[t]he legislative history indicates that Congress was solicitous to retain and indeed, assert, the federal government's civil and political jurisdiction over the [Outer Continental Shelf], but we are not persuaded that this consideration justifies judicial substitution of 'necessary' for the actual term, 'applicable.'" (*Id.* at 1091.)
- "Although the Fifth Circuit sometimes described 'necessity to fill a significant gap' as the 'recurring theme of *Rodrigue*,' [] ...the Supreme Court has not yet squarely confronted a situation where, as here, a state statutory scheme and an existing federal statutory scheme are both 'potentially applicable' to a civil suit arising on the [Outer Continental Shelf]." (*Id.* at 1093, internal citation omitted.)
- Calling the issue one of "first impression," and stating "[w]e know of no appellate case law examining whether, for the purposes of the [Lands Act], state wage and hour

laws are inconsistent with the federal FLSA." (*Id.* at 1090 [including a footnote citing the seven district court cases that have considered the issue and held there was "no gap" in federal law "for state law to fill."].)

Ensign is not singularly obtuse in failing to anticipate the sea change in law the *Newton* decision and the respondent court's order represent. As spelled out by amicus briefing in support of Parker Drilling's petition for en banc review in *Newton*, the entire industry has constructed and implemented business plans operating off shore platforms, in reliance upon the Lands Act choice of law provisions as interpreted by the Supreme Court and the Fifth Circuit.[41] The respondent court's decision is a textbook example of one that should have only prospective application.

Conclusion

For all the foregoing reasons, Ensign respectfully requests that this Court grant review.

Dated: October 19, 2018 Respectfully submitted,

By 
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[41] Exh. DD, pp. 465 et seq.; DCA RJN #6

Certificate of Word Count

I hereby certify that the Petition for Review contains 8,264 words as counted by the Microsoft Word word-processing software. This word count is exclusive of the Cover, Table of Contents, Table of Authorities, and this certificate, but inclusive of all footnotes.

This certificate is prepared in accordance with California Rules of Court, Rule 8.504(d).

Catherine E. Bennett

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIFTH APPELLATE DISTRICT

ENSIGN UNITED STATES DRILLING (CALIFORNIA), INC., Petitioner, v. THE SUPERIOR COURT OF KERN COUNTY, Respondent; LOUIS NEWELL, Real Party in Interest.	F077817 (Kern Super. Ct. No. BCV-15-100367) **ORDER**

BY THE COURT:*

The "Petition for Writ of Mandate, Prohibition, or Other Extraordinary Relief," filed on July 20, 2018, is denied.

Poochigian, A.P.J.

* Before Poochigian, A.P.J., Smith, J. and Snauffer, J.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF KERN

I am employed in the County of Kern, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 4550 California Ave., Second Floor, Bakersfield, CA 93309. My email address is syates@kleinlaw.com.

On October 19, 2018, I served the following documents described as:

PETITION FOR REVIEW

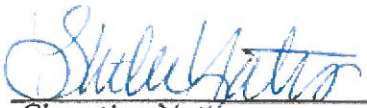
on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY OVERNIGHT MAIL SERVICE I am readily familiar with the business practice at my place of business for collection and processing of documents and correspondence for overnight delivery by GSO. Documents and correspondence so collected and processed is deposited with this overnight courier service on the same day in the ordinary course of business. On the below date, the said envelope was collected for this overnight courier service, following ordinary business practices and deposited at this overnight courier service drop/pickup location in Bakersfield, California by 7:00 P.M.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

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



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