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State Bar Court of California  
Hearing Department  
Los Angeles  
REPROVAL

<p>Counsel For The State Bar</p> <p><b>Caitlin M. Elen-Morin</b> Deputy Trial Counsel 845 S. Figueroa St. Los Angeles, CA 90017 (213) 765-1653</p> <p>Bar # 272163</p>	<p>Case Number(s): 15-C-12470</p> <p><b>PUBLIC MATTER</b></p>	<p>For Court use only</p> <p><b>FILED</b></p> <p>JUL 28 2017</p> <p>STATE BAR COURT CLERK'S OFFICE LOS ANGELES</p>
<p>In Pro Per Respondent</p> <p><b>Kevin Matthew Kirby</b> 3767 Central Ave. San Diego, CA 92105 (619) 602-2890</p> <p>Bar # 224835</p>	<p>Submitted to: <b>Assigned Judge</b></p> <p>STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING</p> <p><b>PUBLIC REPROVAL</b></p> <p><input type="checkbox"/> PREVIOUS STIPULATION REJECTED</p>	
<p>In the Matter of: <b>Kevin Matthew Kirby</b></p> <p>Bar # 224835</p> <p>A Member of the State Bar of California (Respondent)</p>		

**Note:** All information required by this form and any additional information which cannot be provided in the space provided, must be set forth in an attachment to this stipulation under specific headings, e.g., "Facts," "Dismissals," "Conclusions of Law," "Supporting Authority," etc.

**A. Parties' Acknowledgments:**

- (1) Respondent is a member of the State Bar of California, admitted **May 30, 2003**.
- (2) The parties agree to be bound by the factual stipulations contained herein even if conclusions of law or disposition are rejected or changed by the Supreme Court.
- (3) All investigations or proceedings listed by case number in the caption of this stipulation are entirely resolved by this stipulation and are deemed consolidated. Dismissed charge(s)/count(s) are listed under "Dismissals." The stipulation consists of **10** pages, not including the order.
- (4) A statement of acts or omissions acknowledged by Respondent as cause or causes for discipline is included under "Facts."



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- (5) Conclusions of law, drawn from and specifically referring to the facts are also included under "Conclusions of Law".
- (6) The parties must include supporting authority for the recommended level of discipline under the heading "Supporting Authority."
- (7) No more than 30 days prior to the filing of this stipulation, Respondent has been advised in writing of any pending investigation/proceeding not resolved by this stipulation, except for criminal investigations.
- (8) Payment of Disciplinary Costs—Respondent acknowledges the provisions of Bus. & Prof. Code §§6086.10 & 6140.7. (Check one option only):
- Costs are added to membership fee for calendar year following effective date of discipline (public reproof).
  - Case ineligible for costs (private reproof).
  - Costs are to be paid in equal amounts prior to February 1 for the following membership years: (Hardship, special circumstances or other good cause per rule 5.132, Rules of Procedure.) If Respondent fails to pay any installment as described above, or as may be modified by the State Bar Court, the remaining balance is due and payable immediately.
  - Costs are waived in part as set forth in a separate attachment entitled "Partial Waiver of Costs".
  - Costs are entirely waived.
- (9) The parties understand that:
- (a)  A private reproof imposed on a respondent as a result of a stipulation approved by the Court prior to initiation of a State Bar Court proceeding is part of the respondent's official State Bar membership records, but is not disclosed in response to public inquiries and is not reported on the State Bar's web page. The record of the proceeding in which such a private reproof was imposed is not available to the public except as part of the record of any subsequent proceeding in which it is introduced as evidence of a prior record of discipline under the Rules of Procedure of the State Bar.
  - (b)  A private reproof imposed on a respondent after initiation of a State Bar Court proceeding is part of the respondent's official State Bar membership records, is disclosed in response to public inquiries and is reported as a record of public discipline on the State Bar's web page.
  - (c)  A public reproof imposed on a respondent is publicly available as part of the respondent's official State Bar membership records, is disclosed in response to public inquiries and is reported as a record of public discipline on the State Bar's web page.

**B. Aggravating Circumstances [Standards for Attorney Sanctions for Professional Misconduct, standards 1.2(h) & 1.5]. Facts supporting aggravating circumstances are required.**

- (1)  **Prior record of discipline**
- (a)  State Bar Court case # of prior case
  - (b)  Date prior discipline effective
  - (c)  Rules of Professional Conduct/ State Bar Act violations:
  - (d)  Degree of prior discipline
  - (e)  If Respondent has two or more incidents of prior discipline, use space provided below or a separate attachment entitled "Prior Discipline."

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- (2)  **Intentional/Bad Faith/Dishonesty:** Respondent's misconduct was dishonest, intentional, or surrounded by, or followed by bad faith.
- (3)  **Misrepresentation:** Respondent's misconduct was surrounded by, or followed by misrepresentation.
- (4)  **Concealment:** Respondent's misconduct was surrounded by, or followed by concealment.
- (5)  **Overreaching:** Respondent's misconduct was surrounded by, or followed by overreaching.
- (6)  **Uncharged Violations:** Respondent's conduct involves uncharged violations of the Business and Professions Code or the Rules of Professional Conduct.
- (7)  **Trust Violation:** Trust funds or property were involved and Respondent refused or was unable to account to the client or person who was the object of the misconduct for improper conduct toward said funds or property.
- (8)  **Harm:** Respondent's misconduct harmed significantly a client, the public, or the administration of justice.
- (9)  **Indifference:** Respondent demonstrated indifference toward rectification of or atonement for the consequences of his or her misconduct.
- (10)  **Candor/Lack of Cooperation:** Respondent displayed a lack of candor and cooperation to victims of his/her misconduct, or to the State Bar during disciplinary investigations or proceedings.
- (11)  **Multiple Acts:** Respondent's current misconduct evidences multiple acts of wrongdoing.
- (12)  **Pattern:** Respondent's current misconduct demonstrates a pattern of misconduct.
- (13)  **Restitution:** Respondent failed to make restitution.
- (14)  **Vulnerable Victim:** The victim(s) of Respondent's misconduct was/were highly vulnerable.
- (15)  **No aggravating circumstances** are involved.

**Additional aggravating circumstances:**

**C. Mitigating Circumstances [see standards 1.2(i) & 1.6]. Facts supporting mitigating circumstances are required.**

- (1)  **No Prior Discipline:** Respondent has no prior record of discipline over many years of practice coupled with present misconduct which is not likely to recur.
- (2)  **No Harm:** Respondent did not harm the client, the public, or the administration of justice.
- (3)  **Candor/Cooperation:** Respondent displayed spontaneous candor and cooperation with the victims of his/her misconduct or to the State Bar during disciplinary investigation and proceedings.
- (4)  **Remorse:** Respondent promptly took objective steps demonstrating spontaneous remorse and recognition of the wrongdoing, which steps were designed to timely atone for any consequences of his/her misconduct.

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- (5)  **Restitution:** Respondent paid \$ \_\_\_\_\_ on \_\_\_\_\_ in restitution to \_\_\_\_\_ without the threat or force of disciplinary, civil or criminal proceedings.
- (6)  **Delay:** These disciplinary proceedings were excessively delayed. The delay is not attributable to Respondent and the delay prejudiced him/her.
- (7)  **Good Faith:** Respondent acted with a good faith belief that was honestly held and objectively reasonable.
- (8)  **Emotional/Physical Difficulties:** At the time of the stipulated act or acts of professional misconduct Respondent suffered extreme emotional difficulties or physical or mental disabilities which expert testimony would establish was directly responsible for the misconduct. The difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse, and the difficulties or disabilities no longer pose a risk that Respondent will commit misconduct.
- (9)  **Severe Financial Stress:** At the time of the misconduct, Respondent suffered from severe financial stress which resulted from circumstances not reasonably foreseeable or which were beyond his/her control and which were directly responsible for the misconduct.
- (10)  **Family Problems:** At the time of the misconduct, Respondent suffered extreme difficulties in his/her personal life which were other than emotional or physical in nature.
- (11)  **Good Character:** Respondent's extraordinarily good character is attested to by a wide range of references in the legal and general communities who are aware of the full extent of his/her misconduct.
- (12)  **Rehabilitation:** Considerable time has passed since the acts of professional misconduct occurred followed by subsequent rehabilitation.
- (13)  **No mitigating circumstances** are involved.

**Additional mitigating circumstances:**

**No prior discipline, see attachment, page 7.**  
**Pretrial Stipulation, see attachment, page 7.**

**D. Discipline:**

- (1)  **Private reproof (check applicable conditions, if any, below)**
- (a)  Approved by the Court prior to initiation of the State Bar Court proceedings (no public disclosure).
- (b)  Approved by the Court after initiation of the State Bar Court proceedings (public disclosure).

or

- (2)  **Public reproof (Check applicable conditions, if any, below)**

**E. Conditions Attached to Reproof:**

- (1)  Respondent must comply with the conditions attached to the reproof for a period of **one year**.
- (2)  During the condition period attached to the reproof, Respondent must comply with the provisions of the State Bar Act and Rules of Professional Conduct.

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- (3)  Within ten (10) days of any change, Respondent must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar of California ("Office of Probation"), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.
- (4)  Within thirty (30) days from the effective date of discipline, Respondent must contact the Office of Probation and schedule a meeting with Respondent's assigned probation deputy to discuss these terms and conditions of reprobation. Upon the direction of the Office of Probation, Respondent must meet with the probation deputy either in-person or by telephone. During the reprobation conditions period, Respondent must promptly meet with the probation deputy as directed and upon request.
- (5)  Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the condition period attached to the reprobation. Under penalty of perjury, Respondent must state whether Respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of the reprobation during the preceding calendar quarter. Respondent must also state in each report whether there are any proceedings pending against him or her in the State Bar Court and if so, the case number and current status of that proceeding. If the first report would cover less than 30 (thirty) days, that report must be submitted on the next following quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the condition period and no later than the last day of the condition period.

- (6)  Respondent must be assigned a probation monitor. Respondent must promptly review the terms and conditions of reprobation with the probation monitor to establish a manner and schedule of compliance. During the reprobation conditions period, Respondent must furnish such reports as may be requested, in addition to the quarterly reports required to be submitted to the Office of Probation. Respondent must cooperate fully with the monitor.
- (7)  Subject to assertion of applicable privileges, Respondent must answer fully, promptly and truthfully any inquiries of the Office of Probation and any probation monitor assigned under these conditions which are directed to Respondent personally or in writing relating to whether Respondent is complying or has complied with the conditions attached to the reprobation.
- (8)  Within one (1) year of the effective date of the discipline herein, Respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, and passage of the test given at the end of that session.
- No Ethics School recommended. Reason:
- (9)  Respondent must comply with all conditions of probation imposed in the underlying criminal matter and must so declare under penalty of perjury in conjunction with any quarterly report to be filed with the Office of Probation.
- (10)  Respondent must provide proof of passage of the Multistate Professional Responsibility Examination ("MPRE"), administered by the National Conference of Bar Examiners, to the Office of Probation within one year of the effective date of the reprobation.

No MPRE recommended. Reason:

- (11)  The following conditions are attached hereto and incorporated:

Substance Abuse Conditions

Law Office Management Conditions

Medical Conditions

Financial Conditions

(Effective April 1, 2016)



8. At this time, Mr. S was standing in the doorway of the RK Hostel when respondent approached Mr. S and stated, "You remember me, bitch!" Respondent then fired a taser at Mr. S. Mr. S, fortuitously, got behind the front door of the hostel which prevented the prongs of the taser from making contact with his person.

9. Shortly thereafter, the San Diego Police Department responded to a 9-1-1 call regarding a man who was attacked with a stun gun or taser at the RK Hostel.

10. Upon arriving at the hostel, Officer Rodriguez saw a spent cartridge from the taser on the floor near the entrance of the RK Hostel.

11. Officer Rodriguez interviewed a witness to the incident, Ms. L, who stated that Mr. S was attacked with a taser. Ms. L further reported that there was no argument or physical confrontation between Mr. S and respondent preceding the incident.

12. Officers Rogriduez and Vina then interviewed respondent on April 2, 2015 about the incident. Respondent was cooperative and stated that Mr. S, along with other individuals, had previously and repeatedly verbally harassed respondent, and had him attacked by dogs.

13. Respondent was arrested for assaulting Mr. S with a taser in violation of Penal Code section 244.5(b).

#### CONCLUSIONS OF LAW:

14. The facts and circumstances surrounding the above-described violation(s) did not involve moral turpitude but did involve other misconduct warranting discipline.

#### ADDITIONAL FACTS RE MITIGATING CIRCUMSTANCES.

**No Prior Discipline:** Respondent was admitted to practice law on May 30, 2003. At the time of the misconduct, he had nearly twelve (12) years of discipline free practice and is entitled to significant mitigation. While respondent's conduct is serious, he is entitled to substantial mitigation for a discipline free record after approximately 10 years of practicing law. (*Hawes v. State Bar*, (1990) 51 Cal.3d 587, 596 [significant mitigation to an attorney practicing for 10 years without discipline]; *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41 [mitigation credit for many years of discipline free practice given even when the misconduct is serious].)

**Pretrial Stipulation:** By entering into this stipulation, respondent has acknowledged his misconduct and is entitled to mitigation for saving the State Bar significant resources and time. (*Silva-Vidor v. State Bar* (1989) 49 Cal.3d 1071, 1079 [where mitigative credit was given for entering into a stipulation as to facts and culpability]; *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 521 [where the attorney's stipulation to facts and culpability was held to be a mitigating circumstance].)

#### AUTHORITIES SUPPORTING DISCIPLINE.

The Standards for Attorney Sanctions for Professional Misconduct "set forth a means for determining the appropriate disciplinary sanction in a particular case and to ensure consistency across cases dealing with similar misconduct and surrounding circumstances." (Rules Proc. of State Bar, tit. IV, Stds. for

Atty. Sanctions for Prof. Misconduct, std. 1.1. All further references to standards are to this source.) The standards help fulfill the primary purposes of discipline, which include: protection of the public, the courts and the legal profession; maintenance of the highest professional standards; and preservation of public confidence in the legal profession. (See std. 1.1; *In re Morse* (1995) 11 Cal.4th 184, 205.)

Although not binding, the standards are entitled to “great weight” and should be followed “whenever possible” in determining level of discipline. (*In re Silvertown* (2005) 36 Cal.4th 81, 92, quoting *In re Brown* (1995) 12 Cal.4th 205, 220 and *In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) Adherence to the standards in the great majority of cases serves the valuable purpose of eliminating disparity and assuring consistency, that is, the imposition of similar attorney discipline for instances of similar attorney misconduct. (*In re Naney* (1990) 51 Cal.3d 186, 190.) If a recommendation is at the high end or low end of a standard, an explanation must be given as to how the recommendation was reached. (Std. 1.1.) “Any disciplinary recommendation that deviates from the Standards must include clear reasons for the departure.” (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.)

In determining whether to impose a sanction greater or less than that specified in a given standard, in addition to the factors set forth in the specific standard, consideration is to be given to the primary purposes of discipline; the balancing of all aggravating and mitigating circumstances; the type of misconduct at issue; whether the client, public, legal system or profession was harmed; and the member’s willingness and ability to conform to ethical responsibilities in the future. (Stds. 1.7(b) and (c).)

Standard 2.16(b) provides that a suspension or reproof is appropriate discipline for a final conviction of a misdemeanor not involving moral turpitude but involving other misconduct warranting discipline. Moral turpitude has been defined as “a deficiency in any character trait necessary for the practice of law (such as trustworthiness, honesty, fairness, candor, and fidelity to fiduciary duties)” or conduct that “involves such a serious breach of a duty owed to another or to society, or such a flagrant disrespect for the law or for societal norms, that knowledge of the attorney’s conduct would be likely to undermine public confidence in and respect for the legal profession.” (*In re Lesansky* (2001) 25 Cal. 4<sup>th</sup> 11, 16.) A conviction for assault with a stun gun or taser does not involve moral turpitude per se and, even upon consideration of the facts and circumstances, has generally been held not to rise to the level of moral turpitude. (*In re Otto* (1989) 48 Cal.3d 970 [conviction for felony assault found not to involve moral turpitude].)

In this matter, respondent was convicted of a misdemeanor for assault with a stun gun or taser. Fortuitously, the taser barb respondent fired did not strike the victim. Respondent’s crime was serious, but did not involve the practice of law. Here, there is no aggravation and respondent is entitled to significant mitigation for nearly twelve (12) years of discipline free practice. Respondent is also entitled to some mitigation for entering into a pretrial stipulation. Because the mitigation outweighs the aggravation in this case, discipline on the lower end of Standard 2.16(b) is appropriate. Accordingly, a public reproof is appropriate to protect the public, courts and legal profession; maintain high professional standards by attorneys; and preserve public confidence in the legal profession. (Std. 1.1.)

Case law supports this level of discipline. In *In re Hickey* (1990) 50 Cal.3d 571, an attorney was convicted of violating Penal Code section 12025(b) [carrying a concealed weapon]. The facts and circumstances surrounding the conviction involved domestic violence. At a night club in Palm Springs, the attorney took out a loaded gun and hit his wife across the face with it. The wife left the night club and sought refuge at a neighbor’s house. Hickey approached the neighbor’s house and threatened his wife. Then, both the neighbor and Hickey’s wife heard a gunshot fired outside the neighbor’s home.



Hickey had a prior arrest for domestic violence, which was not referred for State Bar discipline, but heard by stipulation as part of the surrounding facts and circumstances. In the prior incident, Hickey had swung a punch at his wife, missed, and then pushed her. When a bystander told him to stop, Hickey verbally assaulted the bystander, ripped a metal sign up from the ground and swung it at the bystander's head, who shielded his face with his hands, suffering a cut and bruises to his arms. While Hickey was being arrested, he threatened to get a gun and shoot the bystander and other witnesses. During the disciplinary proceeding, Hickey was also prosecuted for failing to properly withdraw from a client matter, in addition to the conviction. The Court found that the attorney's criminal conduct did not involve moral turpitude, but did involve other misconduct warranting discipline and noted harm in aggravation. The court imposed discipline consisting of a three-year stayed suspension, three-years' probation with conditions, including 30-days' actual suspension.

Like *Hickey*, respondent committed an act of violence. However, respondent's conduct is less egregious than that in *Hickey* as the misconduct here did not result in harm and respondent did not engage in misconduct in the course of his representation of a client. This is also respondent's first incident of criminal violence, as opposed to the second in *Hickey*. Respondent's misconduct was, on the whole, much less severe than in *Hickey*, who pursued his victim from one location to the next. Therefore, the level of discipline in this matter should be less severe than that in *Hickey*.

Given the facts and circumstances surrounding the conviction, the lack of any aggravating circumstances, and the mitigating circumstances, consisting of respondent's approximately 12 years of discipline free practice and entering into this pretrial stipulation, discipline on the low end of the Standard 2.16(b) is warranted. A public reproof is appropriate to achieve the purposes of discipline and protect the public.

#### **COSTS OF DISCIPLINARY PROCEEDINGS.**

Respondent acknowledges that the Office of Chief Trial Counsel has informed respondent that as of June 26, 2017, the discipline costs in this matter are \$2,629. Respondent further acknowledges that should this stipulation be rejected or should relief from the stipulation be granted, the costs in this matter may increase due to the cost of further proceedings.

#### **EXCLUSION FROM MINIMUM CONTINUING LEGAL EDUCATION ("MCLE") CREDIT**

Respondent may not receive MCLE credit for completion of State Bar Ethics School, and/or any other educational course(s) to be ordered as a condition of reproof or suspension. (Rules Proc. of State Bar, rule 3201.)

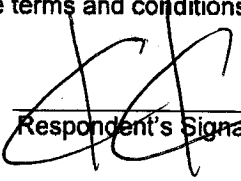
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In the Matter of: KEVIN MATTHEW KIRBY	Case number(s): 15-C-12470
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**SIGNATURE OF THE PARTIES**

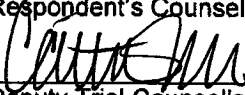
By their signatures below, the parties and their counsel, as applicable, signify their agreement with each of the recitations and each of the terms and conditions of this Stipulation Re Facts, Conclusions of Law, and Disposition.

July 14, 2017  
Date

  
Respondent's Signature

Kevin Matthew Kirby  
Print Name

July 19, 2017  
Date

  
Deputy Trial Counsel's Signature

Caitlin M. Elen-Morin  
Print Name

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In the Matter of: KEVIN MATTHEW KIRBY	Case Number(s): 15-C-12470
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### REPROVAL ORDER

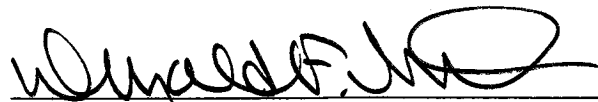
Finding that the stipulation protects the public and that the interests of Respondent will be served by any conditions attached to the reproof, IT IS ORDERED that the requested dismissal of counts/charges, if any, is GRANTED without prejudice, and:

- The stipulated facts and disposition are APPROVED AND THE REPROVAL IMPOSED.
- The stipulated facts and disposition are APPROVED AS MODIFIED as set forth below, and the REPROVAL IMPOSED.
- All court dates in the Hearing Department are vacated.

The parties are bound by the stipulation as approved unless: 1) a motion to withdraw or modify the stipulation, filed within 15 days after service of this order, is granted; or 2) this court modifies or further modifies the approved stipulation. (See rule 5.58(E) & (F), Rules of Procedure.) **Otherwise the stipulation shall be effective 15 days after service of this order.**

**Failure to comply with any conditions attached to this reproof may constitute cause for a separate proceeding for willful breach of rule 1-110, Rules of Professional Conduct.**

Date 7/27/17

  
DONALD F. MILES  
Judge of the State Bar Court

**CERTIFICATE OF SERVICE**

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on July 28, 2017, I deposited a true copy of the following document(s):

**STIPULATION RE FACTS, CONCLUSIONS OF LAW  
AND DISPOSITION AND ORDER APPROVING**

in a sealed envelope for collection and mailing on that date as follows:

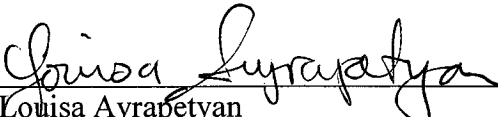
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

KEVIN M. KIRBY  
KEVIN KIRBY, ESQ.  
3767 CENTRAL AVE  
SAN DIEGO, CA 92105 - 2506

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

CAITLIN M. ELEN-MORIN, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on July 28, 2017.

  
\_\_\_\_\_  
Louisa Ayrapetyan  
Case Administrator  
State Bar Court