

Case No. D052892

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE**

PROMOTE LA JOLLA, INC.,

Appellant,

vs.

NANCY WARWICK AND BOB COLLINS,

Respondents.

From the Superior Court of San Diego County
Honorable John S. Meyer, Dept. 61
CASE NO. 37-2007-00083383-CU-JR-CTL

APPELLANT PROMOTE LA JOLLA, INC.'S OPENING BRIEF

Christopher B. Cato, Esq. (SBN 155324)
Matthew G. Kleiner, Esq. (SBN 211842)
GORDON & REES LLP
101 W. Broadway, Suite 2000
San Diego, California 92101
(619) 696-6700
Attorneys for Appellant and Defendant
PROMOTE LA JOLLA, INC.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE	Court of Appeal Case Number: D052829
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): CHRISTOPHER B. CATO SBN:155324 GORDON & REES LLP 101 W. BROADWAY #2000 SAN DIEGO, CA 92101 TELEPHONE NO.: 619-696-6700 FAX NO. (Optional): 619-696-7124 E-MAIL ADDRESS (Optional): ccato@gordonrees.com ATTORNEY FOR (Name): PROMOTE LA JOLLA, INC.	Superior Court Case Number: 37-2007-00083383-CU-JR-CTL <p style="text-align: center;"><i>FOR COURT USE ONLY</i></p>
APPELLANT/PETITIONER: PROMOTE LA JOLLA, INC. RESPONDENT/REAL PARTY IN INTEREST: NANCY WARWICK, ET AL.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): <input type="checkbox"/> INITIAL CERTIFICATE <input checked="" type="checkbox"/> SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.490(i) before completing this form. You may use this form for the initial certificate in a civil appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ in a civil case. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

This form is being submitted on behalf of the following party (name): PROMOTE LA JOLLA, INC.

- a. There are no interested entities or persons that must be listed in this Certificate under rule 8.208.
- b. Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Party	Nonparty	Nature of interest (Explain):
(1) PROMOTE LA JOLLA, INC.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	APPELLANT
(2)	<input type="checkbox"/>	<input type="checkbox"/>	
(3)	<input type="checkbox"/>	<input type="checkbox"/>	
(4)	<input type="checkbox"/>	<input type="checkbox"/>	
(5)	<input type="checkbox"/>	<input type="checkbox"/>	

Continued on Attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: July 28, 2008

CHRISTOPHER B. CATO
 (TYPE OR PRINT NAME)

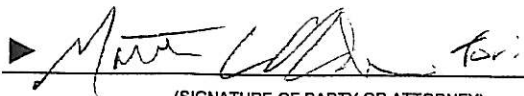

 (SIGNATURE OF PARTY OR ATTORNEY)

Table of Contents

	<u>Page</u>
INTRODUCTION	1
FACTUAL AND PROCEDURAL BACKGROUND	2
A. PLJ Is A Non-Profit Corporation Created to Beautify and Publicize La Jolla Village.....	2
B. Community Parking District.....	2
C. PLJ’s Bylaws.	3
1. Membership – Only Regular Members Can Be Directors.	3
2. PLJ Is Managed and Run by the Board.	4
3. The Bylaws Govern How Elections Are Held.....	4
4. Board Vacancies Are Filled by The Board or PLJ’s Members.	5
D. The 2007 Board Election.	5
E. Ms. Warrick and Mr. Collins Protest the Election Results.....	7
F. The Ineligible Elected Directors Resign.....	8
G. Ms. Warwick and Mr. Collins Sue the Board Seeking Appointment to the Board and Inspection of Records.	9
1. The Complaint	9
2. Ms. Warwick and Mr. Collins Move to be Appointed to the Board.....	9
3. The Trial Court Appoints Ms. Warwick and Mr. Collins to the Board.	10
4. PLJ Seeks Writ Review of the Order.....	11
H. PLJ Appeals.	11
THE ORDER IS DIRECTLY APPEALABLE.	11
STANDARD OF REVIEW	12
LEGAL DISCUSSION.....	13

Table of Contents
(continued)

	<u>Page</u>
I. THE TRIAL COURT EXCEEDED ITS AUTHORITY BY APPOINTING MS. WARWICK AND MR. COLLINS TO THE BOARD.....	13
II. THE TRIAL COURT’S ORDER APPOINTING MS. WARWICK AND MR. COLLINS IS INCONSISTENT WITH THE BYLAWS.	16
III. THE TRIAL COURT’S ORDER APPOINTING MS. WARWICK AND MR. COLLINS TO THE BOARD IS INCONSISTENT WITH RUDIMENTARY ELECTION PRINCIPLES.....	20
IV. THE BYLAWS, SECTION 7616 AND EQUITY ALL MANDATE A NEW ELECTION RATHER THAN APPOINTING MS. WARWICK AND MR. COLLINS TO THE BOARD.....	23
CONCLUSION.....	25

Table of Authorities

	<u>Page</u>
 <u>Cases</u>	
<i>Barton v. Ahmanson Devs.</i> (1993) 17 Cal.App.4th 1358.....	12
<i>Campbell v. Free</i> (1907) 7 Cal.App. 151.....	20, 21, 22, 23, 25
<i>Citizens for Responsible Environmental Development v. City of San Diego Redevelopment Agency</i> (2005) 134 Cal.App.4th 598.....	13
<i>Crawford v. Dunbar</i> (1877) 52 Cal. 36.....	20, 21, 23, 25
<i>Dominguez v. City of Alhambra</i> (1981) 118 Cal.App.3d 237.....	12
<i>Dyna-Med, Inc. v. Fair Employment & Housing Comm'n</i> (1987) 43 Cal.3d 1379.....	14
<i>Ellis v. McKinnon Broadcasting Co.</i> (1993) 18 Cal.App.4th 1796.....	13
<i>First Security Bank of Calif., N.A. v. Paquet</i> (2002) 98 Cal.App.4th 468.....	12
<i>Hard v. California State Employees Assn.</i> (2003) 112 Cal.App.4th 1343.....	12, 18
<i>Justus v. Atchison</i> (1977) 19 Cal.3d 564.....	11
<i>Los Banos Gravel Co. v. Freeman</i> (1976) 58 Cal.App.3d 785.....	13
<i>Nguyen v. Calhoun</i> (2003) 105 Cal.App.4th 428.....	13
<i>Ochoa v. Super. Ct. (Santa Clara County)</i> (1985) 39 Cal.3d 159.....	12

Table of Authorities
(continued)

	<u>Page</u>
<i>Tapanga & Victory Partners, LLP v. Toghia</i> (2002) 103 Cal.App.4th 775.....	13
 <u>Statutes</u>	
Code of Civil Procedure section 916	11
Corporations Code section 5003(a)(1).....	5
Corporations Code section 5075	5
Corporations Code section 7527	18, 23
Corporations Code section 7616	1, 9, 12, 13, 14, 16, 23, 25
Corporations Code section 7616(a)	2, 13, 14, 15, 16
Corporations Code section 7616(d)	1, 2, 14, 15, 16, 23, 24
Parking and Business Improvement Act.....	2
Public Records Act (Government Code section 6250	9
Street and Highways Code sections 36000, <i>et. seq.</i>	2
 <u>Other Authorities</u>	
Eisenberg, <i>California Practice Guide, Civil Appeals and Writs</i> , section 2:91	11, 12
 <u>Rules</u>	
California Rules of Court, Rule 8.204(c)(1)	26

INTRODUCTION

Appellant Promote La Jolla, Inc. (“PLJ”) seeks reversal of the trial court’s order appointing respondents Nancy Warwick and Bob Collins as directors on the PLJ Board of Directors (“Board”) pursuant to Corporations Code section 7616.¹ The order exceeds the trial court’s authority to determine the validity of an election and violated PLJ’s Bylaws, rudimentary election principles, and principles of equity.

This appeal arises from Ms. Warwick’s and Mr. Collins’ challenge to the PLJ’s members’ election of eight directors. (Appellant’s Appendix (“AA”) 2 – 8.) Two of the elected eight directors, unbeknownst to the Board or its members, were ineligible. (AA 139, ¶¶ 12 & 14.) Ms. Warwick and Mr. Collins, candidates in the election, finished ninth and tenth. (AA 109:16-17.) Ms. Warwick and Mr. Collins protested the election results and the two ineligible directors resigned creating two vacancies on the Board. (AA 109; AA 102, “President’s Report.”)

Ms. Warwick and Mr. Collins demanded that they be given the two vacant director seats pursuant to Section 7616, subdivision (d). (AA 106.) The Board, in accordance with the Bylaws, offered to fill the vacancies by director election and then later offered to fill the vacancies by member election. (AA 116, ¶ 12; AA 67, Article VIII, Sec. 4, subds. (c) & (d).) Ms. Warwick and Mr. Collins sued PLJ seeking an order pursuant to Section 7616, subdivision (d), appointing them onto the Board as the next highest vote recipients. (AA 2 – 8.)

The trial court appointed Ms. Warwick and Mr. Collins to the Board pursuant to Section 7616, subdivision (d). (AA 183:5-7.) The trial court erred by appointing Ms. Warwick and Mr. Collins to the Board simply because they were the next in line, as this act exceeded the trial court’s authority to determine a valid

¹ Unless otherwise stated all “Section” references are to the Corporations Code.

election under Section 7616, subdivision (a); was inconsistent with PLJ's Bylaws; and violated established principles of election law and equity. The trial court improperly ignored the votes and intent of PLJ's members and cast its vote for Ms. Warwick and Mr. Collins. The trial court should have ordered that another election take place, which is consistent with Section 7616, subdivision (d), the Bylaws, and principles of election law and equity.

FACTUAL AND PROCEDURAL BACKGROUND

A. PLJ Is A Non-Profit Corporation Created to Beautify and Publicize La Jolla Village.

PLJ was founded in 1987 as a non-profit mutual benefit corporation to administer the Business Improvement District for La Jolla Village and formed under the Parking and Business Improvement Act, which is codified in Street and Highways Code sections 36000, *et. seq.* (AA 137, ¶ 2:26-28.) The organization is subject to the Brown Act. (Government Code sections 54950, *et seq.*)

PLJ has performed, and continues to perform, numerous activities to beautify and publicize La Jolla Village, including economic revitalization and preservation, promotion throughout the state, physical maintenance of the business district (including street cleaning and holiday decorating), parking management, and hosting various events throughout the year. (AA 138, ¶ 2:1-4.)

B. Community Parking District.

In March 1997, the City of San Diego established the "Parking Meter District Program" as a mechanism to fund and implement solutions to parking problems in areas where parking meters are located. (AA 150, "Background," ¶ 1.) In November 2004, the policy was renamed the "Community Parking District" policy and amended to provide a mechanism whereby communities unable to meet existing parking demands may devise and implement parking management solutions to meet their specific needs. (*Ibid.*)

In June 2005, the City of San Diego approved the formation of a La Jolla Community Parking District to develop and institute solutions for parking management issues in La Jolla. (AA 138, ¶ 3:5-7.) The City authorized PLJ to serve as the advisory board and hold three of the nine seats on the Community Parking District board. (AA 138, ¶ 3:7-8.)

Over the next two years, the Community Parking District studied the growing problem with parking in La Jolla and began developing proposals to solve the issues. (AA 138, ¶ 4:11-12.) One proposal included a one-year pilot program to test parking meters in a limited area around La Jolla. (AA 138, ¶ 4:12-13.) Ms. Warwick and Mr. Collins adamantly oppose parking meters in La Jolla Village. (AA 138, ¶ 5:1.) Ms. Warwick is an active member of “Free La Jolla,” an organization whose mission is to thwart any paid parking in La Jolla Village. (AA 138, ¶ 5:14-16.)

C. PLJ’s Bylaws.

1. Membership – Only Regular Members Can Be Directors.

PLJ is comprised of two types of members: regular and associate members. (AA 52, Article V, Sec. 1, subds. (a) & (b).) Anyone owning a business in the La Jolla Village Business Improvement District and paying the District’s taxes and charges is a regular member. (AA 52, Article V, Sec. 1, subd. (a)(i).) Associate members are those not otherwise eligible to be regular members. (AA 52, Article V, Sec. 1, subd. (b)(i).) Only regular members can vote and serve as directors. (AA 61, Article V, Sec. 12, subds. (a), (b), & (c).) If a director ceases “to be a Regular Member during his/her term of office such may hold office until the following annual election and shall not be eligible for reelection until re-qualifying as a Regular Member.” (AA 65, Article VIII, Sec. 2.)

2. PLJ Is Managed and Run by the Board.

PLJ is managed by the Board. (AA 65, Article VIII, Sec. 1, subd. (a).) Generally, subject to limitations in nonprofit corporation law, the Articles of Incorporation and the Bylaws, “the business and affairs of [PLJ] shall be managed and all corporate powers shall be exercised, by or under the direction of the Board. . . .” (*Ibid.*) Specifically, the Board has the power to “prescribe any powers and duties for them that are consistent with law, with the Articles of Incorporation, and with these Bylaws. . . .” (*Id.* at subd. (b)(i).) Board meetings are held regularly. (AA 65, Article VII, Sec. 5.) The Board is comprised of fifteen directors. (AA 65, Article VIII, Sec. 2.) Each director serves a two-year term commencing in January of each year. (AA 66, Article VIII, Sec. 3.)

3. The Bylaws Govern How Elections Are Held.

PLJ has staggered director elections so that either seven or eight directors are elected each year. (AA 66, Article VIII, Sec. 3; AA 138, ¶ 6:25-26.) Candidates for directors are nominated by either: (1) the nominating committee or (2) a petition process. (AA 62, Article VII, Sec. 1, subds. (b)(i) & (iii).) At a Board meeting in September, the directors are expected to close the nominations and order the preparation of a written ballot. (AA 62, Article VII, Sec. 1, subd. (c).)

The Bylaws define the voting rights of members. “Those eligible to vote may cast as many votes by written ballot as there are vacancies to be filled; provided, however, no one may cast more than one . . . vote for any one . . . candidate.” (AA 63, Article VII, Sec. 1, subd. (c).) The candidates that receive the highest number of “affirmative weighted votes from eligible regular members” are elected. (*Id.*) Votes are weighted based on the assessed membership fees. (AA 61, Article VI, Sec. 12, subds. (a) & (b).)

The preliminary results of the election are posted on the business day following completion of ballot counting. (AA 63, Article VII, Sec. 1, subd. (c).) Any protest to the election results “must be filed with the [Board] before the corporation’s October Annual meeting” at which time the Board “shall hear the protest and confirm the election results.” (*Ibid.*)

4. Board Vacancies Are Filled by The Board or PLJ’s Members.

The Board may elect a director “at any time to fill any vacancy on the [Board].” (AA 67, Article VIII, Sec. 4, subd. (c).) A vacancy may occur for a variety of reasons, including a director’s resignation or removal.² (AA 66, Article VIII, Sec. 4, subd. (a)(i).) The president shall announce any vacancy and any person desiring to be a candidate to fill the vacancy “should submit a letter expressing an interest in serving to the president ten . . . days” before the next director meeting. (AA 67, Article VIII, Sec. 4, subd. (c).) The Board “may elect from the eligible candidates a person to fill the term of the Board member who caused the vacancy.” (*Ibid.*) Alternatively, the members may vote to elect a person to fill a vacancy by a majority vote. (*Id.* at subd. (d).)

D. The 2007 Board Election.

In 2007, PLJ sought to elect eight new directors. (AA 138, ¶ 7:27-28.) In August 2007, PLJ’s nominating committee nominated eight candidates for Board election. (*Ibid.*) All eight nominees were incumbents and supported the pilot program for parking meters. (AA 138, ¶ 7:28 – AA 139, ¶ 7:1.) Two of the nominees, Greg Rizzi and Izzy Tihanyi, had served the two previous terms on the

² “Vacancy” when used with respect to the Board means as “any authorized position of director which is then not filled, whether the vacancy is caused by death, resignation, removal, change in the number of directors authorized in the articles or bylaws) by the board or members or otherwise.” (Section 5075 [which applies to non-profit mutual benefit corporation by Section 5003, subdivision (a)(1)].)

Board. (AA 139, ¶ 8.) Unbeknownst to the nominating committee or the Board, these two nominees were not regular members and, thus, not eligible for the election. (AA 139, ¶¶ 13 & 14.)

Seven additional members qualified as candidates for a director position through the petition process. (AA 139, ¶ 9:4.) These seven individuals included Ms. Warwick and Mr. Collins, who opposed the parking program. (AA 139, ¶ 9:5-6.)

During the September 12, 2007, Board meeting, the Board closed the nomination period and ordered the secretary to mail election materials. (AA 87, "Action Item.") On September 24, 2007, the Board held a special meeting to address objections raised to the ballots by, among others, Ms. Warrick. (AA 89, "Action Item".) Neither Ms. Warwick nor any other individual objected to the placement of Greg Rizzi and Izzy Tihanyi on the ballot. (*Ibid.*) As a result of the objections, the Board delayed the election and moved the protest date from the October meeting to the November meeting. (*Ibid.*)

In October 2007, two hundred and fifty-two ballots were cast by eligible PLJ members, each with eight votes. (AA 139, ¶ 10:7-8.) The top eight candidates, all of whom were incumbents, each received more than seventy-five percent of the weighted vote.³ (AA 139, ¶ 10:8-10.) Ms. Warwick received only forty-nine percent of the weighted vote (119 votes), while Mr. Collins received only forty-five percent (104 votes). (AA 139, ¶ 11.) The next highest vote getters received approximately forty-two percent of the weighted vote (100 votes each). (AA 91.)

³ The top finisher earned 99 percent of the weighted vote and 178 votes. (AA 139, ¶ 10:9-10.)

As required by the Bylaws, the results of the elections were posted. (AA 109, ¶ 8:15; AA 63, Article VII, Sec. 1, subd. (c).) The eight incumbents (those that favored the parking program) received the highest number of votes. (AA 139, ¶ 12.)

E. Ms. Warrick and Mr. Collins Protest the Election Results.

On November 7, 2007, Ms. Warwick, Mr. Collins, and another person sent a letter claiming that two of the candidates reelected to the Board, Greg Rizzi and Izzy Tihanyi, were associate members, as defined in the Bylaws, and not eligible to serve as directors. (AA 109, ¶ 9:21-24.) The letter advised: “[i]t should be noted that any candidates not qualified for election may have siphoned off votes from the otherwise qualified candidates.” (AA 93, ¶ 2.) The letter further provided that the “next highest vote recipients willing to serve [Ms. Warwick and Mr. Collins] should be seated as Directors.” (AA 93, ¶ 2.)

Because both Mr. Rizzi and Ms. Tihanyi had served as directors for two previous two-year terms, and because the Small Business Administration had cleared their candidacy, PLJ was not aware that Mr. Rizzi and Ms. Tihanyi were not eligible to serve as directors. (AA 93, ¶ 3.) At no prior time had anyone questioned the eligibility of Mr. Rizzi or Ms. Tihanyi to serve as a PLJ director. (AA 140, ¶ 19.) Mr. Collins, however, had to have known or should have known of Mr. Rizzi’s ineligibility before the election because Mr. Rizzi worked for Mr. Collins for 15 years at his hotel located outside the Business Improvement District before leaving to go to a competing hotel in 2006. (AA 140 ¶¶ 19-20.) Despite this knowledge, Mr. Collins never raised any issue as to Mr. Rizzi’s eligibility before the election. (AA 140, ¶ 19.)

The Board confirmed the election results. (AA 102, "Action Item.")

F. The Ineligible Elected Directors Resign.

After the protest challenging their eligibility, pursuant to the Bylaws and due to their ineligibility, Mr. Rizzi and Ms. Tihanyi resigned from the remainder of their 2007 term, as well as their 2008/2009 term. (AA 66, Article VIII, Sec. 4, subd. (b); AA 139, ¶ 14.) The Board, authorized by the Bylaws to choose the members who would fill the vacancies created by the resignation of Mr. Rizzi and Ms. Tihanyi and as advised by PLJ's legal counsel, requested that eligible business owners who were interested in filling the vacant director positions submit a letter of interest by December 2, 2007. (AA 67, Article VIII, Sec. 4, subd. (c); AA 193, ¶ 16.)

During the November Board meeting, PLJ's President Deborah Marengo asked Mr. Collins if he would submit a letter of interest, to which he replied "yes." (AA 139, ¶ 17.) However, neither Ms. Warwick nor Mr. Collins submitted a letter of interest by the December 2 deadline. (AA 140, ¶ 18:1-2.) PLJ's President Marengo later contacted Mr. Collins to determine whether he would submit a letter of interest and to remind him of the deadline. (AA 140, ¶ 18:2-3.) Mr. Collins stated he had no intention of submitting a letter of interest for the director's position. (AA 140, ¶ 18:3-4.)

In a letter dated November 16, 2007, Ms. Warwick and Mr. Collins refused to apply for the vacancies claiming that, as the next highest vote getters, they were "legitimately elected to . . . the Board. . . ." (AA 106.) They claimed that applying for these positions would allow the Board to "have exclusive voting rights on our two seats, rather than recognizing the tallied vote of La Jolla's [Business Improvement District] members in the PLJ elections." (*Id.*)

G. Ms. Warwick and Mr. Collins Sue the Board Seeking Appointment to the Board and Inspection of Records.

1. The Complaint

On December 10, 2007, Ms. Warwick and Mr. Collins sued PLJ challenging the election under Section 7616. (AA 2 – AA 7.) The complaint alleged two separate and distinct causes of action: (1) Ms. Warwick and Mr. Collins, in their capacity as election candidates, sued for a determination of election results under Section 7616 and seeking placement on the Board as the next highest recipients of votes (AA 3, ¶ 4 – AA 5, ¶ 18); and (2) Ms. Warwick only, in her capacity as a member of the public, brought the second cause of action seeking inspection of public records pursuant to the Public Records Act (Government Code section 6250). (AA 5, ¶ 19 – AA 6, ¶ 27.)

2. Ms. Warwick and Mr. Collins Move to be Appointed to the Board.

On January 14, 2008, Ms. Warwick and Mr. Collins moved to be appointed to the Board (“Motion”). (AA 41 – 46.) They argued that the Bylaws do not allow Mr. Rizzi and Ms. Tihanyi, who ceased to be regular members, to be eligible for reelection. (AA 44 – 45.) Ms. Warwick and Mr. Collins concluded that the trial court should appoint them to the Board as the next highest eligible vote recipients. (AA 46.) Ms. Warwick and Mr. Collins did not cite a single case or Bylaw supporting their claim that the trial court could simply place them on the Board as the recipients of the ninth and tenth highest votes. (*Id.*) Finally, Ms. Warwick and Mr. Collins argued that the power to fill vacancies does not arise here because Mr. Rizzi and Ms. Tihanyi could not resign from positions for which they were ineligible. (AA 166.)

PLJ answered the complaint and opposed the Motion. (AA 118 – 125; AA 127 – 136.) PLJ argued that the Bylaws reserved the right for the Board to address director vacancy at any time. (AA 133 – 134.) PLJ also argued that even if the

trial court disagreed with the notion that the Board had the authority to address the situation, the trial court should order a new election. (AA 134 – 135.) To hold otherwise would be to ignore the voters’ will and disenfranchise the members who voted for the candidates who were later found to be ineligible. (AA 134:24-26.) PLJ stated that it was willing to undergo another election to replace the vacant positions despite the additional cost. (AA 136:6-8; AA 140, ¶ 21.)

Both parties objected to each other’s evidence. (AA 141 – AA 145; AA 161 – AA 163.)

3. The Trial Court Appoints Ms. Warwick and Mr. Collins to the Board.

On February 21, 2008, the trial court appointed Ms. Warwick and Mr. Collins to fill the vacant positions on the Board (“Order”). (AA 181 – 183.) The trial court stated that Mr. Rizzi and Ms. Tihanyi could not properly receive votes and, therefore, could not resign from positions they never had. (AA 182:15-17.) Specifically, the trial court found:

Inasmuch as Rizzi and Tihanyi were not eligible to serve as Directors and could not be qualified as properly elected, they could not properly receive votes. Hence the candidates who received the “highest number of affirmative weighted votes” in the October 2007 election includes Plaintiffs Warwick and Collins.

(AA 182:26 – 183:2.)

The trial court did not address the issue of a new election. (AA 181 – 183.) The Order left the second cause of action unresolved. (*Id.*) The Order sustained objections regarding evidence related to the parking issue stating that “the pros and cons of the parking issue were not relevant to the Court’s determination.” (AA 182:3-4.) The Order overruled the remainder of the objections. (AA 182:7.)

4. PLJ Seeks Writ Review of the Order.

PLJ, under the impression that the Order was not immediately appealable due to the unresolved second cause of action and to preserve its rights, applied ex parte to stay the enforcement of the Order and for a determination that the second cause of action was moot because Ms. Warwick, as a member of the Board, had access to the records she requested by the second cause of action. (AA 192:7-11.) On March 5, 2008, the trial court denied the ex parte application and the requested stay. (AA 199.)

Still under the impression that the Order was not be immediately appealable, PLJ file a petition for writ of mandate and requested an immediate stay. (AA 200 – 235.) On March 12, 2008, the court of appeal summarily denied the petition and request for stay. (AA 236.)

H. PLJ Appeals.

On April 18, 2008, PLJ appealed the Order appointing Ms. Warwick and Mr. Collins to the Board, after determining that the Order is directly appealable because it is final as to Mr. Collins and final as to Ms. Warrick in her capacity as an allegedly wronged candidate in the October 2007 Board election. (AA 238 – 241.) On May 13, 2008, PLJ filed a notice of automatic stay based on Code of Civil Procedure section 916. (AA 242 – 246.)

THE ORDER IS DIRECTLY APPEALABLE.

As to Mr. Collins, the Order appointing him to the Board is directly appealable because it disposes of the one and only cause of action that Mr. Collins asserted in this lawsuit. “In multiparty actions, a ‘piecemeal’ judgment or order that leaves no issue remaining to be determined as to one of the parties is considered final as to that party and thus appealable.” (Eisenberg, *California Practice Guide, Civil Appeals and Writs*, section 2:91, citing *Justus v. Atchison* (1977) 19 Cal.3d 564, 567–568 [disapproved on other grounds in *Ochoa v. Super.*

Ct. (Santa Clara County) (1985) 39 Cal.3d 159, 171]; see also *Barton v. Ahmanson Devs.* (1993) 17 Cal.App.4th 1358, 1361 [“It is hardly fair to hold appellant in some kind of judicial penalty box while the underlying case proceeds without him.”].) All issues as to Mr. Collins are now final and appealable.

As to Ms. Warwick, the Order appointing her to the Board is directly appealable because the Order disposes of all issues as to Ms. Warwick’s capacity as an allegedly wronged candidate in the October 2007 Board election. “An order finally determining the party’s rights in one of those capacities is separately appealable.” (Eisenberg, *supra*, at section 2.92 citing *Dominguez v. City of Alhambra* (1981) 118 Cal.App.3d 237, 241 [order denying a plaintiff leave to amend a complaint to include an additional cause of action in a new capacity (as administrator of decedent’s estate) was separately appealable] and *First Security Bank of Calif., N.A. v. Paquet* (2002) 98 Cal.App.4th 468, 474–475 [judgment on cross-complaint immediately appealable as to plaintiffs in their individual capacity despite pendency of complaint by plaintiffs in shareholder derivative capacity].) Ms. Warwick’s remaining cause of action relates only to her capacity as an alleged member of the public under the Public Records Act requesting production of documents. The Order as to Ms. Warwick is thus final and appealable.

STANDARD OF REVIEW

The trial court based its Order on its interpretation of the Bylaws and Section 7616 and its application of that interpretation to the largely undisputed facts. (AA 182:8-9.) The interpretation of the Bylaws is reviewed under a de novo standard. (*Hard v. California State Employees Assn.* (2003) 112 Cal.App.4th 1343, 1347 [“it is undisputed that we exercise de novo review of a trial court’s interpretation of a written instrument absent the need for extrinsic evidence of intent”].) Language in a contract is not ambiguous if its meaning can be

understood by fair inference from the remaining terms of the agreement. (*Ellis v. McKinnon Broadcasting Co.* (1993) 18 Cal.App.4th 1796, 1802.) Likewise, issues of statutory interpretation involve questions of law that are reviewed de novo. (See *Citizens for Responsible Environmental Development v. City of San Diego Redevelopment Agency* (2005) 134 Cal.App.4th 598, 605.)

With regard to the instant case, there were few, if any, disputed facts. Under these circumstances, when the question is one of law, the appellate court gives no deference to the trial court's ruling, or the reasons for its ruling, but decides the matter anew. (*Tapanga & Victory Partners, LLP v. Toghia* (2002) 103 Cal.App.4th 775, 780-781.) When there is no factual dispute as to the Bylaws at issue, appellate courts can interpret the writing de novo. (*Los Banos Gravel Co. v. Freeman* (1976) 58 Cal.App.3d 785, 791-792.) Finally, the application of law to undisputed facts is subject to the Court's independent review. (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 437.)

LEGAL DISCUSSION

I. **THE TRIAL COURT EXCEEDED ITS AUTHORITY BY APPOINTING MS. WARWICK AND MR. COLLINS TO THE BOARD.**

The trial court relied upon Section 7616 to appoint Ms. Warwick and Mr. Collins as directors on the Board. (AA 183:2-4.) That Section only allows the trial court to determine the validity of an election. (§ 7616, subd. (a).) Section 7616, subdivision (a), states in relevant part:

Upon the filing of an action therefore by any director or member or by any person who had the right to vote in the election at issue, the superior court of the proper county *shall determine the validity* of any election or appointment of any director of any corporation.

(Italics added.)

Section 7616, subdivision (d), establishes the various powers that the trial court has in determining the validity of an election. It provides that the powers set forth in subdivision (d) must be “consistent with” the other provisions of Section 7616. (§ 7616, subd. (d); See, e.g., *Dyna-Med, Inc. v. Fair Employment & Housing Comm’n* (1987) 43 Cal.3d 1379, 1387 [“The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.”].) In other words, any action the trial court may take under subdivision (d) must be “consistent with” the purpose of the statute described in subdivision (a) which is to “determine the validity of any election. . . .”

The four actions the trial court may take to “determine the validity of any election” are:

Option 1: “determine the person entitled to office of director;”

Option 2: “order a new election to be held;”

Option 3: “order a new appointment to be made;” or

Option 4: “direct such other relief as may be just and proper.”

(§ 7616, subd. (d).) Option 3 is highly instructive as to what the court does not have the power to do – appoint directors. Subdivision (d) provides the trial court no authority to, as it did here, “appoint” directors. The trial court can order that the Board make a new appointment, but it cannot appoint the directors itself. Such an appointment would be inconsistent with subdivision (a). Appointing a director exceeds the power to determine the validity of any election. “[D]etermin[ing] the validity of any election” is not the same as ordering a private corporation to “immediately seat” two new directors. (See AA 183:6.)

Ms. Warwick and Mr. Collins will argue that under Option 1 above, the trial court correctly exercised its power to “determine [that they are] the person[s] entitled to office of director.” Option 1, however, is only available if a court concludes there was a valid election, at which time it can appoint the director based upon the mandate of the voters. For example, in a case involving the basic miscounting of votes where the election, itself, is valid, a court could perform its own accounting and count the true votes for each candidate and “determine the person entitled to the office. . . .” (See § 7616, subd. (d).) Similarly, where ballots from ineligible voters exist, the court could determine the true totals after excluding those ineligible votes. In such cases, the court is merely identifying the true intent of the voters rather than substituting its judgment in their place.

In contrast, Option 1 cannot be available where a court concludes there was not a valid election, because there would then be no valid election results to dictate for the court who should be appointed. Here, Option 1 was not available to the trial court because the PLJ election as to the two PLJ directors at issue was invalid, once their eligibility was challenged. The trial court, therefore, could not determine who was entitled to the office of director without acting inconsistent with the narrow dictates of subdivision (a). The trial court’s appointment, on its own, of two directors was done without the guidance of valid election results determining whom the PLJ voters believed should be appointed. Indeed, the trial court ignored the interests of the voters by appointing two candidates who did not receive the highest number of votes and failing to consider the preferences of eligible voters that cast votes for the ineligible directors.

Option 4 also does not countenance the Order appointing Ms. Warwick and Mr. Collins to the Board. The equitable power referenced by subdivision (d) must be consistent with scope of subdivision (a), which allows the court to determine

the validity of an election. However, as previously stated, the trial court's appointment of directors was not consistent with its authority to determinate the validity of an election. Moreover, as discussed *infra*, the trial court's action was not just or proper in that it ignored a large number of votes and violated election principles. (See, *infra*, §§ III-IV.)

The trial court exceeded the scope of its power appointing Ms. Warwick and Mr. Collins to the Board because doing so was inconsistent with a determination of the validity of the election. The only option consistent with determining the validity of the election under subdivision (a) available to the trial court was Option 2 – “order a new election to be held.”

II. THE TRIAL COURT'S ORDER APPOINTING MS. WARWICK AND MR. COLLINS IS INCONSISTENT WITH THE BYLAWS.

The trial court failed to reach a decision in conformity with the Bylaws, despite its ability to do so. Section 7616 requires the trial court, to the extent possible, act in conformity with the Bylaws. (§ 7616, subd. (d).) Subdivision (d) states that a “court, consistent with the provisions of this part and in conformity with the articles and bylaws to the extent feasible, may determine the person entitled to the office of director or may order a new election to be held or appointment to be made.”

The trial court ignored the Bylaws and cast its own vote for Ms. Warwick and Mr. Collins. (AA 183:2-7.) Nowhere in the Bylaws is it contemplated that directors shall be chosen by the judiciary or that director candidates that did not receive the top eight votes could be appointed to the Board. The Bylaws do not state that when an election is challenged and candidates are deemed to be ineligible any votes cast for them should be ignored.

The Bylaws provide for the only two methods by which the vacancies on the Board can be filled: (1) by the directors or (2) by the members. (AA 66,

Article VIII, Sec. 4, subds. (c) & (d).) The Bylaws state that “the directors may elect a Director at any time to fill any vacancy on the Board of Directors.” (AA 67, Article VIII, Sec. 4, subd. (c).) This requires the following: (1) the president must announce the vacancy at a regular meeting; (2) any eligible member interested in filling the vacancy submits a letter of interest ten days before the next regular meeting; (3) the president forwards the letters of interest to the directors seven days before the next regular meeting; and (4) the Board then elects by written ballot the person to fill the vacancy. (*Id.*)

The only other option available for filling a director vacancy is by member election. (AA 67, Article VIII, Sec. 4, subd. (d).) The Bylaws state that “the members may elect a Director or Directors at any time to fill any vacancy or vacancies not filled by the Directors.” (*Id.*) The trial court, in order to be consistent with the Bylaws, should have followed one of these two methods for filling the vacancies. Under either scenario the will and intent of the members is represented either through the votes of Board members previously elected to represent their interests or through their own votes in a member election.

In response to Ms. Warwick’s and Mr. Collins’ election protests, the Board, with advise of counsel and consistent with the Board’s broad powers to manage the Board and to prescribe any powers and duties for them that are consistent with the law, the articles and the Bylaws, determined that it would fill the vacancies left by Mr. Rizzi and Ms. Tihanyi’s resignations by director election. (AA 65, Article VIII, Sec. 1, subd. (a) and (b)(i); AA 102, “President’s Report.”) The Board later, during the trial court proceedings, offered that it would fill the vacant positions by member election. (AA 134, fn. 5.) These approaches are consistent with the Bylaws and the trial court must defer to the Board’s interpretation of its own Bylaws.

A court may review a private organization's interpretation of straightforward bylaw language only where it is unreasonable, does not involve an arcane rule within the peculiar knowledge of the organization, and does not depend on the organization's rituals and customs. Even then, the judiciary may intercede in the private dispute only where the interests of the challenging party outweigh the burden on the judiciary and the autonomy interest of the private organization.

(*Hard v. California State Employees Assn.* (2003) 112 Cal.App.4th 1343, 1347 [emphasis added].) Nevertheless, the trial court rejected these approaches and summarily placed the next highest vote recipients on the Board – which is not provided for anywhere in the Bylaws. (AA 182:27 – 183:4.)

The trial court circumvented the Bylaws and its provisions regarding filling vacancies to determine the means of replacing the ineligible directors by incorrectly deciding that no vacancies existed because the two elected directors were ineligible and, therefore, could not have been elected in the first instance. (AA 182:26-27.) This analysis is incorrect because the fact of the matter is that Mr. Rizzi and Ms. Tihanyi were elected by the members. The trial court was not entitled to treat their election as if it did not happen. Their election was presumed valid until challenged. (See, e.g., Section 7527 [election results are conclusively presumed valid if no action challenging the validity of the election is filed within nine months of the election].)⁴ When Mr. Rizzi and Ms. Tihanyi resigned, they

⁴ Moreover, an event rendering a director ineligible after an election does not preclude that director from serving the remainder of his or her term. For example, the Bylaws state: "Should a Director cease to be a Regular Member during his/her term of office such may hold office until the following annual election and shall

created a vacancy under the Bylaws regarding their existing and future terms. (AA 66, Article VIII, Sec. 4, subd. (b).) The Bylaws have express provisions for filling vacancies. The trial court failed to act in conformity with the Bylaws, as required, when it failed to make a determination consistent with these provisions.

Moreover, assuming *arguendo* that Mr. Rizzi's and Ms. Tihanyi's resignations did not create vacancies within the express meaning of the Bylaws, the trial court's Order is still inconsistent with the Bylaws. Regarding an objection to an election, the Bylaws simply provide that the "Board . . . shall hear any protest and confirm the election results." (AA 63, Article VII, Sec. 1, subd. (c).) This language most certainly does not provide that, after a protest, a court can elect the directors, appoint directors who did not receive the highest number of votes, or ignore the votes of eligible voters.

Instead, in light of the silence in the above provision regarding the nature of the Board's response to a protest and the broad power of the Board to exercise its responsibilities, the Board appropriately applied the Bylaw provisions for filling vacancies to the circumstances, regardless of whether the empty director positions were technically vacancies. Such provisions set forth the only express mechanisms in the Bylaws for implementing the will of the members for filling an empty position on the Board. To similarly act consistent with the Bylaws, the Court should have granted a new election by the members for the empty positions, as proposed by the Board.

not be eligible for reelection until re-qualifying as a regular member." (AA 65, Article VIII, Section 2.)

III. THE TRIAL COURT'S ORDER APPOINTING MS. WARWICK AND MR. COLLINS TO THE BOARD IS INCONSISTENT WITH RUDIMENTARY ELECTION PRINCIPLES.

The trial court's Order is inconsistent with rudimentary election principles. It is improper to appoint the next highest vote-getter when one candidate is ineligible. (*Crawford v. Dunbar* (1877) 52 Cal. 36, 41; *Campbell v. Free* (1907) 7 Cal.App. 151, 153.) Instead, the trial court should have required a new election for the vacant spots.

Even though there is a dearth of case law regarding elections to non-profit corporate boards involving an ineligible candidate, or even corporate boards in general, case law from other types of elections provides guidance when dealing with a candidate who is elected but later found ineligible. The parallels between the present case and other public elections are especially instructive in light of the public role played by PLJ at the City of San Diego's behest. The organization is subject to the Brown Act, and voters in the Board elections have a direct impact on the city's civic affairs through their ballots. Because of this impact and involvement in public policy, elections to the Board closely resemble public elections and legal principles from such elections are instructive.

Where an ineligible candidate is discovered after an election takes place, it is improper to appoint the next available candidate because it carries the strong potential of ignoring the true intent of the voters. (*Crawford v. Dunbar, supra*, 52 Cal. 36.) In *Crawford*, a candidate (Dunbar) was elected to the office of School Superintendent, but later found ineligible because he already held the office of Inspector of Customs. (*Id.* at p. 39.) The recipient of the next highest number of votes (Crawford), claimed that he was summarily entitled to the office of Superintendent. (*Id.* at p. 41.) The court rejected Crawford's argument that the votes cast for Dunbar were "mere nullities." (*Ibid.*)

The court found that Crawford was not entitled to the vacated position once Dunbar had been declared ineligible. Such an action would not have been based upon the voters' intent.

An election is the deliberate choice of a majority or plurality of the electoral body. This is evidenced by the votes of the electors. But if a majority of those voting, by mistake of law or fact, happen to cast their votes upon an ineligible candidate, it by no means follows that the next to him on the poll should receive the office. If this be so, a candidate might be elected who received only a small portion of the votes, and who never could have been elected at all but for this mistake.

(*Crawford v. Dunbar*, *supra*, 52 Cal. at p. 41.)

The reviewing court went on to hold that, because Crawford could not simply take the place of Dunbar, the election position should be vacated and a new election held. (*Id.* at p. 42.)

In *Campbell v. Free* (1907) 7 Cal.App. 151, an election candidate was victorious, but subsequently declared ineligible, and the candidate receiving the next highest number of votes sought the position with judicial assistance. The reviewing court denied the challenger's contention that he was entitled to the office. To find that he was, the court said, would mean that votes given to the ineligible candidate (and the will of the voters that those ballots represented) would be ignored. (*Id.* at p. 153.) the court characterized the challenger's position as follows:

He contends that the votes cast for respondent should not be considered in any manner in the count, for the reason that the respondent was ineligible; that the case should be determined in the same manner as if the votes respondent received had been cast for the King of England or the man in the moon. To such doctrine we cannot accede.

(Ibid.)

Instead, the reviewing court in *Campbell* stated that the votes reflected the will of those participating in the election and could not merely be ignored by appointing the candidate with the next highest vote total:

If a majority of the voters, either by mistake of law or of fact, happen to cast their ballots for an ineligible candidate, it does not follow that the next highest on the list would receive the office. Otherwise, the intent of those voters would be ignored through no fault of their own.

(Id. at 153.)

The court thus concluded that the only fair remedy was to declare the election void. *(Id. at pp. 153-154.)* “In such case it is consistent with the theory of our institutions, and the right of the people to have officers of their own choosing, to consider the election void, because it is not an expression of the will of the people by a plurality of the votes cast.” *(Ibid.)*

Here, a new election will allow the voters who had previously chosen the ineligible candidates to instead cast their ballot for the next persons who most closely represent their interests. Those persons may not necessarily be the

candidates who had the next highest votes in the original election, and the only manner to discover the voters' true intent is to have another election. The trial court's Order appointing the next highest vote recipients to sit on the Board is, therefore, contrary to the law.

IV. THE BYLAWS, SECTION 7616 AND EQUITY ALL MANDATE A NEW ELECTION RATHER THAN APPOINTING MS. WARWICK AND MR. COLLINS TO THE BOARD.

This Court should order PLJ to hold a new election for the two vacant positions because that is consistent with the Bylaws, Section 7616, and equity.⁵ The Bylaws state that each member is entitled to his or her vote. (AA 58, Article VI, Sec. 7, subd. (a).) The Bylaws provide that the members can fill a vacancy on the Board and the Board has agreed to a new election. (AA 66, Article VIII, Sec. 4, subd. (d).) An election is consistent with the Bylaws because it gives effect to each member's vote and their right to vote.

Under Section 7616, subdivision (d), the trial court has the discretion to order a new election. It provides "[t]he court, consistent with the provisions of this part and in conformity with the articles and bylaws to the extent feasible, . . . may order a new election to be held. . . ." (§ 7616, subd. (d).) Thus, this Section is consistent with ordering a new election especially in light of the *Campbell* and *Crawford* decisions discussed above. As these cases make clear, in situations

⁵ The election should be for only the two vacant spots as opposed to an entirely new election. Ms. Warwick and Mr. Collins only protested the election as to Mr. Rizzi and Ms. Tihanyi. The remaining six Board members were confirmed and seated on the Board. Moreover, any action challenging the election of the six Board members must have been filed nine months after the election. (Section 7527.) No such action has been filed and, therefore, the validity of the election as to the six directors is presumed. Such presumption becomes conclusive nine months after the election.

involving victorious candidates who are later found to be ineligible, a new election is the preferred resolution.

Moreover, requiring another election, instead of appointing the runner up to the office by default, is also consistent with equitable principles. As emphasized in *Campbell*, it is “fairer, more just, and more consistent with the theory of our institutions, to hold the votes so cast as merely ineffectual for the purpose of an election, than to give them the effect of disappointing the popular will, and electing a man whose pretensions the people had designed to reject.” (*Campbell, supra*, at p. 41.) Section 7616, subdivision (d), recognizes the trial court’s power to fashion an equitable remedy: “[t]he court consistent with the provisions of this part and in conformity with the articles and bylaws to the extent feasible, . . . may direct such other relief as may be just and proper.”

Under equitable principles, a court cannot simply install another candidate because it risks rejecting the true intent of the voters. Appointing Ms. Warwick and Mr. Collins disenfranchises the members who voted for Mr. Rizzi and Ms. Tihanyi through no fault of their own. It cannot be assumed that Ms. Warwick and Mr. Collins (who received only a handful more votes than the next highest vote recipient) would have been elected had Mr. Rizzi and Ms. Tihanyi been absent from the ballot. If there is a new election, some voters may choose to vote for other candidates with similar views as Mr. Rizzi and Ms. Tihanyi.

The trial court’s Order states that Mr. Rizzi and Ms. Tihanyi were not duly elected because they were not eligible to be on the ballot. (AA 182:26-27.) However, the trial court’s focus solely on the eligibility of the candidates was misplaced, because it should have focused on the interests of the voters and their intent. The trial court’s Order does not address the equitable concern that the members who voted for Mr. Rizzi and Ms. Tihanyi will be stripped of their votes

and their rights to representation on the Board. The members who voted for Mr. Rizzi and Ms. Tihanyi did nothing wrong, and they are entitled to another opportunity to convey their preferences and secure representation on the Board.

In the present case, however, the trial court made its own improper determinations as to who the voters would have chosen had they known of the ineligibility of Mr. Rizzi and Ms. Tihanyi. (AA 183:5-7.) Under *Campbell* and *Crawford*, the trial court erred. Instead, a new election is the appropriate vehicle to determine voter intent.

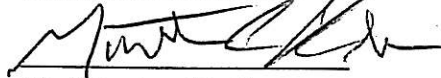
CONCLUSION

PLJ, in accordance with its Bylaws, properly sought to fill the vacancies resulting from Mr. Rizzi's and Ms. Tihanyi's resignations. (AA 67, Article VIII, Sec. 4, subds. (c) & (d).) The trial court, however, trumped PLJ's interpretation of the Bylaws, ignored the Bylaws, and appointed Ms. Warwick and Mr. Collins to the Board because they were the next highest vote recipients. (AA 183:2-4.)

PLJ requests that this Court, consistent with PLJ's Bylaws, Section 7616, and principles of election law and equity, order a new election for the two vacant seats to ensure that all proper votes of eligible voting PLJ members are counted in selecting the directors to represent their interests on the Board. Accordingly, PLJ requests that this Court reverse and remand.

Dated: July 28, 2008

Gordon & Rees LLP



Christopher B. Cato

Matthew G. Kleiner

Attorneys for Appellant and Defendant
Promote La Jolla, Inc.

CERTIFICATE OF WORD COUNT

(California Rules of Court, Rule 8.204(c)(1).)

The text of this brief consists of 7,311 words as counted by the Microsoft Word program used to generate the brief.

Date: July 28, 2008


Matthew G. Kleiner

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: 101 West Broadway, Suite 2000, San Diego, CA 92101. On **July 28, 2008**, I served the within documents:

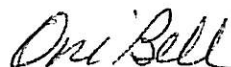
1. **APPELLANT PROMOTE LA JOLLA, INC.'S OPENING BRIEF;**
2. **APPELLANT PROMOTE LA JOLLA, INC.'S APPENDIX**

- BY FAX.** By transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- BY MAIL.** By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in United States mail in the State of California at state, addressed as set forth below.
- BY E-MAIL:** I hereby certify that the above listed documents were served via e-mail transmittal on July 28, 2008.
- BY PERSONAL SERVICE.** By personally delivering the document(s) listed above to the person(s) at the address(es) set forth below. **SEE SERVICE LIST**
- PERSONAL SERVICE BY CAUSE.** I caused said documents to be hand-delivered to the addressee on July 28, 2008, pursuant to Code of Civil Procedure § 1011.
- BY OVERNIGHT MAIL.** By placing a true copy thereof enclosed in a sealed envelope, at a station designated for collection and processing of envelopes and packages for overnight delivery by an overnight carrier, as part of the ordinary business practices of Gordon & Rees LLP described below, addressed as follows:

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

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

Executed on **July 28, 2008**, at San Diego, California.



Oni Bell

SERVICE LIST

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<p>Steven W. Haskins Margaret A. Pitchkolan HASKINS & ASSOCIATES APC 4045 Bonita Road, Suite 206 Bonita, CA 91902-1336 Tel: (619) 479-4351 Fax: (619) 479-0337 Attorneys for Plaintiffs/Respondents BOB COLLINS and NANCY WARWICK (1 Copy Brief and Appendix) Via Federal Express</p>	<p>San Diego Superior Court Central District Judge John S. Meyer, D-61 330 W. Broadway San Diego, CA 92101 Judge John S. Meyer, D-61 CASE NO. 37-2007-00083383-CU-JR-CTL (1 Copy Brief and Appendix)</p>
<p>California Supreme Court 300 S. Spring Street, 2nd Floor Los Angeles, CA 90013 (4 Copies Brief)</p>	