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<b>State Bar Court of California</b> <b>Hearing Department</b> <b>San Francisco</b> <b>ACTUAL SUSPENSION</b>		
<b>Counsel For The State Bar</b>  <b>Manuel Jimenez</b> <b>Senior Trial Counsel</b> <b>180 Howard Street</b> <b>San Francisco, CA 94105</b> <b>(415) 538-2288</b>  <b>Bar # 218234</b>	<b>Case Number(s):</b> <b>15-O-12310 - MLA</b> <b>15-O-12780</b> <b>16-O-11277</b> <b>16-O-11345</b> <b>16-O-12319</b>	<b>For Court use only</b>  <b>PUBLIC MATTER</b>  <b>FILED</b>  <b>APR 10 2017</b> <i>WV</i>  <b>STATE BAR COURT CLERK'S OFFICE</b> <b>SAN FRANCISCO</b>
<b>In Pro Per Respondent</b>  <b>Donald Thomas Bergerson</b> <b>1140 N. 192<sup>nd</sup> Street, Apt. 612</b> <b>Shoreline, WA 98133</b> <b>(415) 505-7116</b>  <b>Bar # 91263</b>	<b>Submitted to: Settlement Judge</b>  <b>STIPULATION RE FACTS, CONCLUSIONS OF LAW AND</b> <b>DISPOSITION AND ORDER APPROVING</b>  <b>ACTUAL SUSPENSION</b>  <input type="checkbox"/> <b>PREVIOUS STIPULATION REJECTED</b>	
<b>In the Matter of:</b> <b>DONALD THOMAS BERGERSON</b>  <b>Bar # 91263</b>  <b>A Member of the State Bar of California</b> <b>(Respondent)</b>		

**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 **November 29, 1979**.
- (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 **20** 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."
- (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):
- Until costs are paid in full, Respondent will remain actually suspended from the practice of law unless relief is obtained per rule 5.130, Rules of Procedure.
  - 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.

**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 **96-O-08276**
  - (b)  Date prior discipline effective **October 31, 1999**
  - (c)  Rules of Professional Conduct/ State Bar Act violations: **Business and Professions Code, section 6068(b)**
  - (d)  Degree of prior discipline **Private Reproval**
  - (e)  If Respondent has two or more incidents of prior discipline, use space provided below.
- (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.

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- (8)  **Harm:** Respondent's misconduct harmed significantly a client, the public, or the administration of justice. See Attachment at page 16-17.
- (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. See Attachment at page 17.
- (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. See Attachment at page 17.
- (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 investigations 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.
- (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.

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- (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 convincing proof of subsequent rehabilitation.
- (13)  **No mitigating circumstances** are involved.

**Additional mitigating circumstances:**

**Pretrial Stipulation. See Attachment at page 17.**  
**Physical Difficulties. See Attachment at page 17.**

**D. Discipline:**

- (1)  **Stayed Suspension:**
- (a)  Respondent must be suspended from the practice of law for a period of **three (3) years**.
- i.  and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and fitness to practice and present learning and ability in the general law pursuant to standard 1.2(c)(1) Standards for Attorney Sanctions for Professional Misconduct.
- ii.  and until Respondent pays restitution as set forth in the Financial Conditions form attached to this stipulation.
- iii.  and until Respondent does the following:
- (b)  The above-referenced suspension is stayed.
- (2)  **Probation:**
- Respondent must be placed on probation for a period of **three (3) years**, which will commence upon the effective date of the Supreme Court order in this matter. (See rule 9.18, California Rules of Court)
- (3)  **Actual Suspension:**
- (a)  Respondent must be actually suspended from the practice of law in the State of California for a period of **two (2) years**.
- i.  and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and fitness to practice and present learning and ability in the general law pursuant to standard 1.2(c)(1), Standards for Attorney Sanctions for Professional Misconduct
- ii.  and until Respondent pays restitution as set forth in the Financial Conditions form attached to this stipulation.

iii.  and until Respondent does the following:

**E. Additional Conditions of Probation:**

- (1)  If Respondent is actually suspended for two years or more, he/she must remain actually suspended until he/she proves to the State Bar Court his/her rehabilitation, fitness to practice, and present learning and ability in the general law, pursuant to standard 1.2(c)(1), Standards for Attorney Sanctions for Professional Misconduct.
- (2)  During the probation period, Respondent must comply with the provisions of the State Bar Act and Rules of Professional Conduct.
- (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 probation. Upon the direction of the Office of Probation, Respondent must meet with the probation deputy either in-person or by telephone. During the period of probation, 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 period of probation. 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 probation during the preceding calendar quarter. Respondent must also state 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 days, that report must be submitted on the next 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 period of probation and no later than the last day of probation.

- (6)  Respondent must be assigned a probation monitor. Respondent must promptly review the terms and conditions of probation with the probation monitor to establish a manner and schedule of compliance. During the period of probation, Respondent must furnish to the monitor 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 probation 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 probation conditions.
- (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.

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- (10)  The following conditions are attached hereto and incorporated:
- |   |   |
|---|---|
| <input type="checkbox"/> Substance Abuse Conditions | <input type="checkbox"/> Law Office Management Conditions |
| <input type="checkbox"/> Medical Conditions         | <input checked="" type="checkbox"/> Financial Conditions  |

**F. Other Conditions Negotiated by the Parties:**

- (1)  **Multistate Professional Responsibility Examination:** 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 during the period of actual suspension or within one year, whichever period is longer. **Failure to pass the MPRE results in actual suspension without further hearing until passage. But see rule 9.10(b), California Rules of Court, and rule 5.162(A) & (E), Rules of Procedure.**
- No MPRE recommended. Reason:
- (2)  **Rule 9.20, California Rules of Court:** Respondent must comply with the requirements of rule 9.20, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court's Order in this matter.
- (3)  **Conditional Rule 9.20, California Rules of Court:** If Respondent remains actually suspended for 90 days or more, he/she must comply with the requirements of rule 9.20, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 120 and 130 calendar days, respectively, after the effective date of the Supreme Court's Order in this matter.
- (4)  **Credit for Interim Suspension [conviction referral cases only]:** Respondent will be credited for the period of his/her interim suspension toward the stipulated period of actual suspension. Date of commencement of interim suspension:
- (5)  **Other Conditions:**

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In the Matter of: <b>Donald Thomas Bergerson</b>	Case Number(s): <b>15-O-12310 [15-O-12780, 16-O-11277, 16-O-11345, 16-O-12319]</b>
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### Financial Conditions

#### a. Restitution

- Respondent must pay restitution (including the principal amount, plus interest of 10% per annum) to the payee(s) listed below. If the Client Security Fund ("CSF") has reimbursed one or more of the payee(s) for all or any portion of the principal amount(s) listed below, Respondent must also pay restitution to CSF in the amount(s) paid, plus applicable interest and costs.

Payee	Principal Amount	Interest Accrues From
<b>Adrienne Scott</b>	<b>\$15,000</b>	<b>June 15, 2014</b>
<b>Myra Holmes</b>	<b>\$7,500</b>	<b>January 6, 2014</b>
<b>Briannah Wilright</b>	<b>\$3,200</b>	<b>February 21, 2014</b>
<b>Anita Minter</b>	<b>\$5,000</b>	<b>January 30, 2014</b>

- Respondent must pay above-referenced restitution and provide satisfactory proof of payment to the Office of Probation not later than

#### b. Installment Restitution Payments

- Respondent must pay the above-referenced restitution on the payment schedule set forth below. Respondent must provide satisfactory proof of payment to the Office of Probation with each quarterly probation report, or as otherwise directed by the Office of Probation. No later than 30 days prior to the expiration of the period of probation (or period of revocation), Respondent must make any necessary final payment(s) in order to complete the payment of restitution, including interest, in full.

Payee/CSF (as applicable)	Minimum Payment Amount	Payment Frequency

- 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.

#### c. Client Funds Certificate

1. If Respondent possesses client funds at any time during the period covered by a required quarterly report, Respondent must file with each required report a certificate from Respondent and/or a certified public accountant or other financial professional approved by the Office of Probation, certifying that:
- Respondent has maintained a bank account in a bank authorized to do business in the State of California, at a branch located within the State of California, and that such account is designated as a "Trust Account" or "Clients' Funds Account";

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In the Matter of: <b>Donald Thomas Bergerson</b>	Case Number(s): <b>15-O-12310 [15-O-12780, 16-O-11277, 16-O-11345, 16-O-12319]</b>
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## Financial Conditions

### a. Restitution

- Respondent must pay restitution (including the principal amount, plus interest of 10% per annum) to the payee(s) listed below. If the Client Security Fund ("CSF") has reimbursed one or more of the payee(s) for all or any portion of the principal amount(s) listed below, Respondent must also pay restitution to CSF in the amount(s) paid, plus applicable interest and costs.

Payee	Principal Amount	Interest Accrues From
Elizabeth Dougherty	\$5,600	January 7, 2013
Tracy Nero	\$10,000	February 3, 2014

- Respondent must pay above-referenced restitution and provide satisfactory proof of payment to the Office of Probation not later than

### b. Installment Restitution Payments

- Respondent must pay the above-referenced restitution on the payment schedule set forth below. Respondent must provide satisfactory proof of payment to the Office of Probation with each quarterly probation report, or as otherwise directed by the Office of Probation. No later than 30 days prior to the expiration of the period of probation (or period of reprobation), Respondent must make any necessary final payment(s) in order to complete the payment of restitution, including interest, in full.

Payee/CSF (as applicable)	Minimum Payment Amount	Payment Frequency

- 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.

### c. Client Funds Certificate

1. If Respondent possesses client funds at any time during the period covered by a required quarterly report, Respondent must file with each required report a certificate from Respondent and/or a certified public accountant or other financial professional approved by the Office of Probation, certifying that:
- Respondent has maintained a bank account in a bank authorized to do business in the State of California, at a branch located within the State of California, and that such account is designated as a "Trust Account" or "Clients' Funds Account";



**ATTACHMENT TO**  
**STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION**

IN THE MATTER OF:        DONALD T. BERGERSON

CASE NUMBERS:            15-O-12310 [15-O-12780, 16-O-11277, 16-O-11345, 16-O-12319]

**FACTS AND CONCLUSIONS OF LAW.**

Respondent admits that the following facts are true and that he is culpable of violations of the specified statutes and/or Rules of Professional Conduct.

Case No. 15-O-12310 (Complainant: Phillip Pitney)

**FACTS:**

1. In April 2010, Phillip Pitney was convicted of attempted murder and various related counts and enhancements relating to his August 12, 2009 shooting of Ladarius Greer, in a case entitled *People v. Pitney*, case no. 209488, Superior Court for the County of San Francisco. The court sentenced Pitney to consecutive indeterminate terms of 15 to life for the attempted murder, and 25 to life for discharging a firearm causing great bodily injury during the commission of a felony. The court also sentenced, but stayed, Pitney to a determinate sentence of 29 years. The matter was appealed (*People v. Pitney*, case no. A128126, First Appellate District). On March 6, 2013, the Court of Appeal upheld the judgment, with minor changes not germane to the ultimate sentence.

2. On June 10, 2013, Pitney, through counsel Matthew Alexander Siroka, filed with the California Supreme Court a writ of habeas corpus, subsequently denied on November 20, 2013.

3. On March 18, 2014, Adrienne Scott (Phillip Pitney's mother) hired respondent to "research, investigate, write, file and litigate," a state petition for habeas corpus, and "if required," a federal petition for habeas corpus. Scott made two payments to respondent, the first on March 19, 2014 for \$10,000, and a second payment of \$5,000 June 15, 2014. Respondent did not have Pitney execute a waiver pursuant to California Rules of Professional Conduct, rule 3-310(F)(3). Respondent never filed either a state or federal petition for writ of habeas corpus. Respondent has not refunded any unearned fees.

4. Because of respondent's failure to perform, the time period for client to file for a federal writ of habeas corpus expired.

**CONCLUSIONS OF LAW:**

5. By failing to file either a state or federal writ of habeas corpus, or do any other work on the matter, respondent intentionally and repeatedly failed to perform legal services with competence in willful violation of Rules of Professional Conduct, rule 3-110(A).

6. By accepting \$15,000 from Adrienne Scott, as compensation for representing Pitney, without obtaining his client's informed written consent to receive such compensation, respondent accepted compensation for representing a client from one other than the client without obtaining the client's informed written consent, in willful violation of the Rules of Professional Conduct, rule 3-310(F).

7. By failing to refund \$15,000 in advanced fees to Scott, respondent failed to refund promptly any part of a fee paid in advance that has not been earned, in willful violation of Rules of Professional Conduct, rule 3-700(D)(2).

Case No. 15-O-12780 (Complainant: Myra Holmes)

FACTS:

8. On March 19, 2013, a jury found Myra Holmes guilty of five counts of bankruptcy fraud, bank fraud, and related charges, in a case entitled, *United States v. Holmes*, case no. 5:09-cr-00930-EJD-1, in the United States District Court for the Northern District of California. She was subsequently sentenced to 27 months imprisonment.

9. Holmes appealed, in a case entitled *United States v. Holmes*, case no. 13-10537, before the Ninth Circuit Court of Appeals. Respondent substituted into the matter on October 7, 2013, replacing appointed counsel from the Federal Defender's office, after Holmes hired him and paid \$7,500 for respondent to handle the appeal.

10. On October 18, 2013, respondent filed a timely notice of appeal.

11. On October 28, 2013, the Ninth Circuit issued an order to show cause ("OSC") why Holmes' *forma pauperis* status should not be revoked. Respondent timely received the order, and all of the subsequent orders described herein. Respondent failed to respond to the OSC.

12. On December 12, 2013, the Ninth Circuit revoked Holmes' *forma pauperis status*, and ordered her to pay \$455 in filing fees. Respondent did not inform Holmes of the fee, or otherwise have the filing fee paid.

13. On January 6, 2014, respondent filed with the district court a motion for a stay of Holmes' surrender, in which he stated that he needed a month of additional time to make a merits-based argument for release of Ms. Holmes on appeal. The court granted a one-month stay, to February 6, 2014.

14. On January 7, 2014, the Ninth Circuit issued an order requiring respondent to file a motion for release on appeal by February 6, 2014.

15. On January 8, 2014, the Ninth Circuit issued an order, which stated:

On December 12, 2013, this court revoked appellant's *pauperis status* and ordered retained counsel Donald Thomas Bergerson, Esq., within 14 days, to pay to the district court the \$455.00 filing and docketing fees for this appeal and file in this court proof of such payment. To date, counsel has not complied with the court's order.

Counsel shall have one final opportunity to prosecute this appeal. Within 14 days after the date of this order, appellant shall pay to the district court the \$455.00 filing and docketing fees for this appeal and file in the court proof of such payment. Alternatively, if counsel is unable to prosecute this appeal, counsel shall file, within 14 days, a motion under Ninth Circuit Rule 4-1(c) to withdraw as counsel.

16. On February 4, 2014, respondent filed motion to stay sanctions, in which he stated he had been unable to respond, or work on the case, due to disabling health issues, but indicated he had improved and it was in Holmes' best interest that he remain as counsel.

17. On February 5, 2014, respondent asked for a further stay and extension to file a motion for release on appeal. The district court denied the motion, and thus, no substantive motion for Holmes' release on appeal was filed. Holmes was incarcerated on February 9, 2014.

18. Beginning on February 6, 2014 and continuing through November 5, 2014, the Ninth Circuit issued seven orders, on the following dates, requiring respondent to file an opening brief: February 6, 2014; April 2, 2014; April 21, 2014; May 28, 2014; July 1, 2014; August 7, 2014 and November 5, 2014. Respondent repeatedly failed to file an opening brief as ordered.

19. On February 9, 2015, the Ninth Circuit entered a default notice, instructing respondent to file an opening brief within 14 days of the notice. Respondent did not file an opening brief.

20. On March 7, 2015, Holmes wrote a letter to the Ninth Circuit in which she stated that since her incarceration she has had trouble contacting respondent, and requesting appointed counsel. On March 11, 2015, the court rejected the letter because she was represented by counsel.

21. On March 19, 2015, the Ninth Circuit issued an order, which stated, in part, "The court *sua sponte* grants appellant's retained counsel, Donald T. Bergerson, Esq., leave to withdraw from this appeal."

22. Respondent has not refunded any part of the unearned fees.

#### CONCLUSIONS OF LAW:

23. By failing to timely respond to an October 28, 2013, court issued order to show cause on why his client's *forma pauperis* status should not be revoked; failing to obey a December 12, 2013, court order to pay a \$455 filing and docketing fee; by failing to obey seven court orders on and between February 6, 2014 and November 5, 2014, to file an opening brief; and failing to obey a February 9, 2015, court order to file a response to the court's default order, by February 23, 2015, respondent intentionally and repeatedly failed to perform legal services with competence, in willful violation of Rules of Professional Conduct, rule 3-110(A).

24. By failing file an opening brief, or take any other action on behalf of Holmes after September 19, 2014, constructively withdrawing from employment without obtaining the permission of the court to withdraw, respondent withdrew from employment in a proceeding before a tribunal without its permission, in willful violation of the Rules of Professional Conduct, rule 3-700(A)(1).

24. By failing to file an opening brief, or take any other action on behalf of Holmes after September 19, 2014, respondent constructively terminated his employment with Holmes, and upon termination of employment, failed to take reasonable steps to avoid reasonably foreseeable prejudice to his client, in willful violation of the Rules of Professional Conduct, rule 3-700(A)(2).

25. By failing to refund \$7,500 in advanced fees to Holmes, respondent failed to refund promptly any part of a fee paid in advance that has not been earned, in willful violation of Rules of Professional Conduct, rule 3-700(D)(2).

26. By failing to timely respond to an October 28, 2013, court issued order to show cause on why his client's *forma pauperis* status should not be revoked; failing to obey a December 12, 2013, court order to pay a \$455 filing and docketing fee; by failing to obey seven court orders on and between February 6, 2014 and November 5, 2014, to file an opening brief; and failing to obey a February 9, 2015, court order to file a response to the court's default order, by February 23, 2015, respondent disobeyed or violated orders of the court requiring respondent to do or forbear an act connected with or in the course of respondent's profession which respondent ought in good faith to do or forbear, in willful violation of Business and Professions Code, section 6103.

Case No. 16-O-11277 (Complainant: Kevin Duarte)

FACTS:

27. On December 6, 2011, Kevin Duarte was convicted of first degree murder during the commission of an attempted robbery, and other offenses, and sentenced to life without parole. Duarte appealed the conviction, which was affirmed on December 18, 2013.

28. On or about January 30, 2014, Briannah Wilright hired respondent to represent her fiancée, Kevin Duarte, and file a writ of habeas corpus "and other necessary ancillary proceedings related to *People v. Kevin Duarte*, Alameda Superior Court case no. C159175, Appellate case number A134634." The contract called for representation before both state and federal courts.

29. The respondent presented Wilright with a fee agreement, signed by respondent, but not signed by Wilright or Duarte. The fee agreement called for a flat fee of \$10,750 (\$750 had already been paid to review the case). The contract called for a payment of \$5,000 at the time of the execution of the fee agreement. The contract also called for monthly payments of at least \$300 toward the unpaid balance.

30. Anita Minter, Duarte's aunt, paid respondent \$5,000 on January 30, 2014. Between January 18, 2014 and February 21, 2015, Wilright paid respondent \$3,210. Respondent did not get Duarte to execute a waiver pursuant to Rules of Professional Conduct, rule 3-310(F)(3). Wilright repeatedly emailed respondent, but he failed to respond. Respondent did not file a writ in either state or federal court. Wilright demanded a refund from respondent. Respondent has not refunded any of the unearned fees.

31. Because of respondent's failure to perform, the time period for client to file for a federal writ of habeas corpus expired.

## CONCLUSIONS OF LAW:

32. By failing to file a writ of habeas corpus, and failing to perform any legal services of value for Kevin Duarte, respondent intentionally failed to perform legal services with competence, in willful violation of Rules of Professional Conduct, rule 3-110(A).

33. 6. By accepting \$5,000 from Anita Minter, and accepting \$3,210 from Briannah Wilright, as compensation for representing Duarte, without obtaining his client's informed written consent to receive such compensation, respondent accepted compensation for representing a client from one other than the client without obtaining the client's informed written consent, in willful violation of the Rules of Professional Conduct, rule 3-310(F).

### Case No. 16-O-11345 (Complainant: Patrick Cavanaugh)

## FACTS:

34. On January 7, 2013, Elizabeth Dougherty hired respondent to extinguish a mentally disordered offender ("MDO") status of her son, Patrick James Cavanaugh. MDO is a process that allows the detention and treatment of severely mentally ill prisoners who reach the end of a determinate prison term and are dangerous to others as a result of a severe mental disorder.

35. Prior to Dougherty hiring respondent, on August 05, 2009, Cavanaugh had been found not guilty by reason of insanity of battery by a prisoner, while he was at Wasco correctional facility.

36. Respondent did not provide Dougherty or Cavanaugh with a fee agreement. Respondent did not get a written waiver pursuant to Rules of Professional Conduct, rule 3-310(F) to allow a third party to pay legal fees. Dougherty made payments to respondent as follows: (1) January 2, 2013, \$3,000, (2) January 7, 2013, \$1,000, (3) February 1, 2013, \$500, (4) April 9, 2013, \$1,000, and (5) May 11, 2013, \$100, for a total of \$5,600.

37. Between January 7, 2013 to November 5, 2013, respondent failed to perform any substantive work on the matter.

38. On November 5, 2013, Dougherty sent respondent a correspondence, terminating respondent's employment, requesting an accounting, requesting a return of unearned fees, and requesting the client file. Respondent failed to do any of those things requested.

## CONCLUSIONS OF LAW:

39. By failing to do any substantive work to extinguish Patrick James Cavanaugh's mentally disordered offender status, or perform any other legal services of value, respondent intentionally, recklessly, and repeatedly failed to perform with competence, in willful violation of Rules of Professional Conduct, rule 3-110(A).

40. By accepting \$5,600 from Elizabeth Dougherty, as compensation for representing Cavanaugh, without obtaining his client's informed written consent to receive such compensation,

respondent accepted compensation for representing a client from one other than the client without obtaining the client's informed written consent, in willful violation of the Rules of Professional Conduct, rule 3-310(F).

41. By failing to release the client file after Dougherty terminated respondent and requested the client file, respondent failed to release promptly papers and property to his client, after termination of respondent's employment, in willful violation of Rules of Professional Conduct, rule 3-700(D)(1).

42. By failing to refund \$5,600 in unearned advanced fees to Elizabeth Dougherty upon his termination, respondent failed to refund promptly any part of a fee paid in advance that has not been earned, in willful violation of Rules of Professional Conduct, rule 3-700(D)(2).

43. By failing to provide an accounting for \$5,600 in fees Dougherty advanced, respondent failed to render appropriate accounts to a client regarding all funds coming into respondent's possession, in willful violation of Rules of Professional Conduct, rule 4-100(B)(3).

Case No. 16-O-12319 (Complainant: Keith Stamps)

FACTS:

44. In June 2009, nineteen year old Keith Stamps was convicted of first-degree murder. He was subsequently sentenced to 50 years to life. Stamps appealed, and the conviction was affirmed on April 27, 2011, in the case of *People v. Keith Stamps*, case number A126440, First Appellate District. Stamps sought review before the California Supreme Court, which was denied on August 10, 2011.

45. In 2012, Tracy Nero, Stamps' mother, hired respondent to handle a writ of habeas corpus. There was no written fee agreement. On and between the date of hire, and May 13, 2014, Nero paid respondent at least \$10,000. Respondent did not have Stamps execute a waiver pursuant to California Rules of Professional Conduct, rule 3-310(F)(3).

46. On November 8, 2012, respondent filed on behalf of Stamps a federal writ of habeas corpus, in a case entitled *Stamps v. Grounds*, case no. 5:12-cv-05753, United States District Court for the Northern District of California, before all state remedies had been exhausted. The court ordered respondent to show cause why the petition should not be dismissed for failing to exhaust state remedies. The OSC response was due December 17, 2012. Respondent filed a late response on December 19, 2012, in which respondent acknowledged that the state remedies had not been exhausted. On that same date, he filed a motion to "stay and abate" the federal matter.

47. On December 20, 2012, respondent filed on behalf of Stamps a state writ of habeas corpus, in the matter of *Keith Stamps on Habeas Corpus*, case number S207482, in the Supreme Court of California.

48. On March 12, 2013, the court granted respondent's motion to stay and abate, and ordered respondent to submit a report on the status of the state writ of habeas corpus by October 2, 2013. Respondent timely received the order, and all of the subsequent orders described herein.

49. On October 15, 2013, respondent filed a status report late. On that same date, the court ordered respondent to file a status report by January 19, 2014. Respondent failed to file a report.

50. On January 27, 2014, the court ordered respondent to file a status report by January 30, 2014 at noon. Respondent filed the status update late, on January 31, 2014.

51. On February 3, 2014, the court ordered respondent to file a status report by April 3, 2014. Respondent timely filed the report.

52. On August 28, 2014, a Clerk's notice directed respondent to file a status update by October 14, 2014. Respondent failed to do so.

53. On June 2, 2015, the court ordered respondent to file a status update by June 19, 2015 and notified respondent that failure to do so could result in dismissal. Respondent failed to do so.

54. On December 29, 2015, the court issued an order to show cause why the matter should not be dismissed with prejudice for failure to comply with court orders and for failure to prosecute. Respondent was ordered to reply by January 21, 2016. Respondent failed to file a reply.

55. On January 29, 2016, the court issued an order of dismissal for respondent's "unjustified failure to respond to six consecutive Court orders, including two that provided notice that dismissal could be a consequence..." On that same date, the court entered judgment, dismissing the action without prejudice.

56. On March 11, 2016, Stamps filed with the district court a handwritten appeal of the dismissal and for the appointment of counsel, which the district court forwarded to the Ninth Circuit, in which he wrote, in sum and substance, that he had been abandoned by respondent.

57. On April 6, 2016, the Ninth Circuit denied the appointment of counsel.

58. On June 2, 2016, the District Court issued an indicative ruling pursuant to Federal Rule of Civil Procedure 62.1(a)(3) that it would likely grant petitioner-appellant's motion to reopen.

59. On June 24, 2016, the Ninth Circuit filed an order, remanding the matter to the District Court.

60. On August 1, 2016, respondent filed a Memorandum Supporting Motion to Reopen Case. In this filing, respondent admitted, "During the nearly three-year period between issuance of the stay order in March of 2013 and the end of January of 2016, this Court issued a number of orders commanding the undersigned to provide ongoing status updates. Undersigned disregarded a number of these directives, and was justly reprimanded in this Court's 2016 dismissal order."

61. On August 8, 2016, the court granted the motion to reopen the matter.

#### CONCLUSIONS OF LAW:

62. By failing to timely respond to a December 3, 2012, court issued order to show cause; failing to obey a March 12, 2013, court order to file a status report by October 2, 2013; failing to obey a

January 27, 2014, court order to file a status report by January 30, 2014; failing to obey June 2, 2015, court order to file a status update by June 19, 2015; and failing to respond to a December 29, 2015, court issued order to show cause, respondent intentionally and repeatedly failed to perform legal services with competence, in willful violation of Rules of Professional Conduct, rule 3-110(A).

63. By accepting \$10,000 from Tracy Nero, as compensation for representing Stamps, without obtaining his client's informed written consent to receive such compensation, respondent accepted compensation for representing a client from one other than the client without obtaining the client's informed written consent, in willful violation of the Rules of Professional Conduct, rule 3-310(F).

64. By failing to refund \$10,000 in unearned advanced fees to Tracy Nero, respondent failed to refund promptly any part of a fee paid in advance that have not been earned, in willful violation of Rules of Professional Conduct, rule 3-700(D)(2).

65. By failing to timely respond to a December 3, 2012, court issued order to show cause; failing to obey a March 12, 2013, court order to file a status report by October 2, 2013; failing to obey a January 27, 2014, court order to file a status report by January 30, 2014; failing to obey June 2, 2015, court order to file a status update by June 19, 2015; and failing to respond to a December 29, 2015, court issued order to show cause, respondent disobeyed or violated an order of the court requiring respondent to do or forbear an act connected with or in the course of respondent's profession which respondent ought in good faith to do or forebear, in willful violation of Business and Professions Code, section 6103.

Case Nos. 115-O-12310, 15-O-12780, 16-O-11277, 16-O-11345, and 16-O-12319

66. By repeatedly accepting fees from persons other than his clients without written and signed authorization, repeatedly failing to perform legal services with competence, repeatedly failing to refund unearned fees, repeatedly failing to obey court orders, repeatedly failing to provide accountings, respondent committed misconduct involving moral turpitude, dishonesty and corruption in willful violation of Business and Professions Code, section 6106.

### **AGGRAVATING CIRCUMSTANCES.**

**Prior Record of Discipline (Std. 1.5(a)):** Respondent has a prior record of discipline. On October 1, 1999, respondent was privately reprovved in State Bar case number 96-O-08276, for violating Business and Professions Code, section 6068(b), not maintaining respect for the court as a result of failing to inform a judge until the afternoon on the day of trial, that he was not prepared to go to trial in a criminal matter, after motions in limine had already been argued during the morning session.

**Significant Harm (Std. 1.5(j)):** Respondent's failures to perform, abandonment, and return unearned fees resulted in clients Phillip Pitney and Kevin Duarte losing their opportunity to file for a federal writ of habeas corpus. Respondent's failures to perform also result in (1) Myra Holmes being incarcerated during the pendency of her appeal, and (2) Keith Stamps' matter being dismissed in federal court and Stamps having to handwrite an appeal to have case reopened. Furthermore, respondent's repeated failure to obey court orders delayed proceedings for which he was hired, thereby harming the



failure to obey court orders delayed proceedings for which he was hired, thereby harming the administration of justice. Respondent's misconduct resulted in his clients paying him for work that was not accomplished, and depriving them of those funds.

**Multiple Acts of Wrongdoing (Std. 1.5(b)):** Respondent committed 20 acts of misconduct, involving five clients, over a time period of at least three years, bordering on a pattern of misconduct. Respondent's multiple acts of misconduct constitute an aggravating circumstance pursuant to Standard 1.5(b).

**Vulnerable Victim (Std. 1.5(n)):** All of the clients in the underlying matters were incarcerated, and therefore reliant on respondent. Respondent's misconduct took advantage of clients who were highly vulnerable because of their incarceration. Because incarcerated clients are limited in their ability to assist their attorney or to stay apprised of their attorney representation, abandonment of incarcerated clients is especially egregious conduct. (See *Borré v. State Bar* (1991) 52 Cal.3d 1047, 1053; *In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Ct. Bar Rptr. 459, 465.)

## MITIGATING CIRCUMSTANCES.

### Additional Mitigating Circumstances:

**Pretrial Stipulation:** Respondent is entitled to mitigation for entering into this stipulation prior to trial, thereby preserving State Bar time and resources, as well as acknowledging and accepting responsibility for his misconduct (*Silva-Vidor v. State Bar* (1989) 39 Cal.3d 1071, 1079 [where mitigative credit was given for entering into a stipulation to facts and culpability].)

**Extreme Physical Disabilities:** Contemporaneous with the misconduct beginning in 2012, respondent aggravated injuries he suffered in a 1985. In 1985 respondent suffered multiple cervical spine compression fractures in an automobile accident. Residual pain from the accident was well controlled until 2012, when he was involved in a second automobile accident. Respondent suffered increasing back pain, including the intermittent inability to stand, tremors, and excruciating pain. Respondent has engaged in various medical interventions and is making progress, but they have not produced consistent improvement in his condition. Respondent believed that he could finish the matters for which he had been hired, and that it was in his clients' interests for he to continue representing them. Although respondent must be established by clear and convincing evidence that no longer suffers from the disability to receive mitigation pursuant to standard 1.6(d), respondent is entitled to some mitigation. (See *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 150; *In the Matter of Deierling* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr 552, 560-561.)

## 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 high professional standards; and preservation of public confidence in the legal profession. (*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 Silvertan* (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 discipline 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).) Where a member commits two or more acts of misconduct and the Standards specify different sanctions for each act, the most severe sanction must be imposed. (Std. 1.7(a).)

In the instant matter, two standards share the same severity of sanction. Standard 2.11 applies the allegations of moral turpitude, in violation of Business and Professions Code, section 6106. Standard 2.12(a), is applicable for the allegations of disobedience of a court order, and violation of an attorney’s oath or duties, in violation of Business and Profession Code, section 6103 and 6068, respectively. Both standards state that disbarment or actual suspension is the presumed sanction. Standard 2.11 gives more guidance, stating that the degree of sanction depends on the magnitude of the misconduct; the extent to which the misconduct harmed or misled the victim, which may include the adjudicator; the impact on the administration of justice, if any; and the extent to which the misconduct related to the member’s practice of law.

Here, respondent’s misconduct is directly related to the practice of law. All of the victims of his misconduct were incarcerated criminal clients, where respondent assumed responsibility for filing post-conviction applications. The aggravation is serious, and mitigation *de minimis*. The magnitude of respondent’s misconduct is demonstrated by the number of victims and allegations of professional misconduct, over a period of approximately four years. A disciplinary range from a two-year actual suspension, three-years stayed, three-years probation to disbarment is appropriate.

Case law is instructive. In *Borre v. State Bar* (1991) 52 Cal.3d 1047, the Supreme Court adopted the Review Department’s recommendation that respondent be suspended for two-years, actual, five-years stayed, and be placed on five-years probation, for violations of Business and Professions Code, sections 6068(a), 6068(m), 6103, 6106, 6128(a), and various rules of professional conduct for misconduct surrounding a single client matter in which respondent failed to file an appeal on behalf of a criminal defendant, and misrepresented the disposition of the appeal to his client. When the State Bar became involved, respondent submitted a fabricated letter, in an attempt to mislead the State Bar. The court in *Borre* found that respondent’s approximate 15 years of discipline free practice did not preclude substantial discipline.

In *Kent v. State Bar* (1987) 43 Cal.3d 729, the Supreme Court found that an attorney engaged in moral turpitude warranting disbarment for his habitual disregard of the interests of his client and failure to communicate. The attorney in *Kent* had a record of three prior disciplines, including two public

reprovals and an actual one-years suspension. The court found that respondent had wronged six clients in the underlying case and his prior disciplinary matters. All his priors involved failure to perform and making misrepresentations about the status or progress of the matter for which he was hired.

The misconduct in the instant matter is exponentially more egregious than *Borre*. Conversely, the aggravation in the instant case is much less than that present in *Kent*. In light of the serious and repetitive nature of respondent's misconduct, either a substantial actual suspension or disbarment is warranted under the standards.

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

Respondent acknowledges that the Office of Chief Trial Counsel has informed respondent that as of date the discipline costs in this matter are \$7,496. 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 MCLE CREDIT**

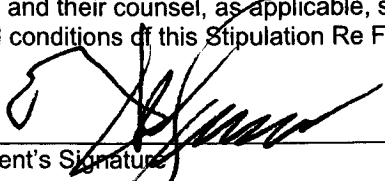
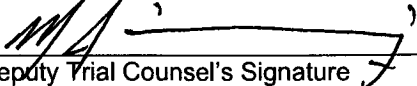
Pursuant to rule 3201, respondent may not receive MCLE credit for completion of State Bar Ethics School (Rules Proc. of State Bar, rule 3201.)

(Do not write above this line.)

In the Matter of: <b>DONALD THOMAS BERGERSON</b>	Case number(s): <b>15-O-10007 [15-O-12780, 16-O-11277, 16-O-11345, 16-O-12319]</b> 12310
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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.

March <u>14</u> , 2017 Date	 Respondent's Signature	Donald Thomas Bergerson Print Name
_____ Date	_____ Respondent's Counsel Signature	_____ Print Name
March <u>23</u> , 2017 Date	 Deputy Trial Counsel's Signature	Manuel Jimenez Print Name

(Do not write above this line.)

In the Matter of: DONALD THOMAS BERGERSON	Case Number(s): 15-O-12310 [15-O-12780, 16-O-11277, 16-O-11345, 16-O-12319]
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### STAYED SUSPENSION ORDER

Finding the stipulation to be fair to the parties and that it adequately protects the public, 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 DISCIPLINE RECOMMENDED to the Supreme Court.
- The stipulated facts and disposition are APPROVED AS MODIFIED as set forth below, and the DISCIPLINE IS RECOMMENDED to the Supreme Court.
- All Hearing dates are vacated.

1. On p. 1, the heading, case number "15-O-12310-MLA" is corrected to read "15-O-12310-LMA."
2. On p. 5, (1), the check in the box is deleted, as the standard 1.2(c)(1) requirement has been provided on page 4, under actual suspension.
3. On p. 12, par. 30, delete "February 21, 2015" and insert in its place: "February 21, 2014."

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.) **The effective date of this disposition is the effective date of the Supreme Court order herein, normally 30 days after file date. (See rule 9.18(a), California Rules of Court.)**

Date April 10, 2017   
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 San Francisco, on April 10, 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:

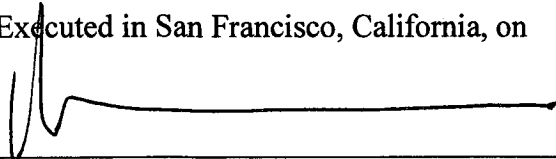
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

DONALD THOMAS BERGERSON  
LAW OFC DONALD BERGERSON  
1140 N 192ND ST  
APT 612  
SHORELINE, WA 98133 - 2951

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

Manuel Jimenez, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on April 10, 2017.

  
\_\_\_\_\_  
Vincent Au  
Case Administrator  
State Bar Court