

EXHIBIT 2

INDEX FOR ATTACHMENT 2

	<u>Page(s)</u>
1) Supplemental Declaration of Christine Brody, M.D. in Support of Special Motion to Strike, dated November 9, 2001, page 2 and 4, RJN Exh. 2	1-2
2) Declaration of Defendant Christine Z. Brody M.D. in Support of Defendants' Motion for Summary Adjudication as to Plaintiff's Sixth, Seventh, Eighth, Ninth and Tenth Causes of Action, and Plaintiff's Claim for Punitive Damages, dated January 22, 2004, pages 3 and 5, RJN Exh. 7	3-4
3) Separate Statement of Undisputed Material Facts in Support of Defendants North Coast Women's Care Medical Group, Inc.'s, Christine Z. Brody, M.D.'s and Douglas K. Fenton, M.D.'s Motion for Summary Adjudication as to Plaintiff's Sixth, Seventh, Eighth, Ninth and Tenth Causes of Action, and Plaintiff's Claim for Punitive Damages, dated January 23, 2004, pages 2 and 3, RJN Exh. 6	5-6
4) Memorandum of Points and Authorities in Support of Defendants North Coast Women's Care Medical Group, Inc.'s, Christine Z. Brody, M.D.'s and Douglas K. Fenton, M.D.'s Motion for Summary Adjudication as to Plaintiff's Sixth, Seventh, Eighth, Ninth and Tenth Causes of Action, And Plaintiff's Claim for Punitive Damages, dated January 23, 2004, pages 3-4, RJN Exh. 5	7-8
5) Order of the Superior Court for San Diego County granting in part and denying in part defendants' motion for summary adjudication of plaintiff's sixth, seventh, eighth, ninth and tenth causes of action and claim for punitive damages, dated April 12, 2004, RJN Exh. 8	9-10

1 2. I have reviewed plaintiff Guadalupe Benitez' affidavit in opposition to this motion to
2 strike. There are some matters raised concerning my care and treatment rendered to my patient, Ms
3 Benitez, which I believe need further clarification to avoid confusion. I also want to respond to
4 some of the assertions Ms. Benitez has made.

5 3. I again want to emphasize that I never discriminated against Ms. Benitez, nor did I
6 refuse to provide her agreed upon treatment that I understood I would be providing because of her
7 sexual orientation. A patient's sexual orientation is generally irrelevant to me in my practice (except
8 where it could conflict with my beliefs), as I provide treatment to numerous patients with similar
9 orientation as Ms. Benitez without hesitation, or even fleeting thought. If any such conflict arose,
10 the specific issue presented would be immediately addressed by referral to others at NCWC or, if
11 necessary, to another physician such as Dr. Kettel. I have no "prejudice" toward these persons as
12 Mr. Benitez claims.

13 4. There are several treatment options and methods available for a patient to attempt to
14 successfully achieve pregnancy. These appear to all be generically lumped together in the
15 opposition as "artificial insemination" in connection with the treatment discussions and available
16 options. However, the distinctions are important. A patient can attempt intravaginal insemination
17 (IVI), which is something that can and normally is accomplished at home without actual physician
18 direct participation. With IVI, the patient uses a device to personally inject the sperm into the
19 vagina, with the hope that it will make its way to the uterus to fertilize the eggs. [I generally do not
20 favor or recommend this approach, especially with someone who has had failure in the past. This
21 method provides a far less chance of success.] Intrauterine insemination (IUI) is the other alternative
22 which requires physician participation. This involves the physician using a small syringe to place
23 the sperm directly in the cervix/uterus for better chance of success at fertilizing the eggs. The next
24 step in the process is in-vitro fertilization (IVF) which is a substantially more invasive procedure.

25 With respect to available donor sperm, there are also several options. One is frozen
26 donor sperm from a sperm bank which is obtained "pre-washed", pre-tested and ready for use after
27 thawing and requires no further processing or preparation. The other option is the use of live donor
28 sperm which would require appropriate testing and actual in-house preparation before use. With

1 it was against my religious beliefs to actually perform IUI for a gay couple. I did however inform
2 Ms. Benitez that I would continue to treat her up to that point and thereafter if she did conceive,
3 would be glad to provide further care for her and her pregnancy to term. Ms. Benitez was, therefore
4 informed that I would provide her with continuity of care from ovulation induction through term
5 delivery, with the sole exception of my inability to participate in IUI because of my religious beliefs.
6 I also informed Ms. Benitez that Dr. Fenton would feel the same as I felt since he attended the same
7 church as I and, therefore, would share the same religious convictions regarding this issue. Ms.
8 Benitez was also informed by me that there were two other physicians affiliated with NCWC, Drs.
9 Stoopack and Langley, who might be available to perform the IUI and to my knowledge they had
10 no religious convictions against such a procedure under these circumstances. However, at that time
11 I had not yet conferred with Dana Landsparger, R.N. regarding whether she had any religious or
12 moral convictions that would prevent her from preparing the sperm under these circumstances. Ms.
13 Benitez agreed to undertake treatment at NCWC with the clear understanding that neither Dr.
14 Fenton nor I could perform an IUI and remain compliant with our moral/religious convictions.

15 I recall that the Ms. Benitez and her partner stated they understood and respected my
16 religious convictions and felt comfortable in continuing care with our office. On a number of
17 occasions throughout the course of treatment, I reconfirmed my religious convictions and the fact
18 that if the treatment reached the need for an IUI, it would have to be performed by Drs. Stoopack
19 and Langley, or she would be referred to another infertility specialist for evaluation and treatment
20 and thereafter could return for obstetrical care following conception.

21 Ms. Benitez' infertility diagnostic evaluation and treatment progressed under my care, despite
22 questionable compliance with her glucophage. Seven cycles of Clomid resulted in four cycles
23 where she ovulated. The patient had a normal hysterosalpingogram (x-ray with dye confirms that
24 the fallopian tubes are patent). The patient also stated that she was using sperm from a sperm bank
25 and was using it at home intravaginally, that she was experiencing increasing pain with her
26 menstrual periods, and she underwent a diagnostic laparoscopy on April 7, 2000 for the diagnosis
27 of pelvic pain and infertility which was essentially normal.

28 ///

1 M.D. and Dana Landsperger, R.N. as those qualified to perform the preparation of live sperm.

2 5. Ms. Benitez initiated care with me on August 6, 1999 with the chief complaint of
3 primary infertility. During this initial visit, Ms. Benitez informed me of her sexual orientation. I
4 specifically informed Ms. Benitez on this initial visit that if her fertility treatment progressed to the
5 point where intrauterine insemination was the next recommended step, it was against my religious
6 beliefs to perform IUI for a homosexual couple. I did also inform Ms. Benitez that I would continue
7 to treat her up to that point and thereafter if she did conceive and would be glad to provide further
8 care for her and her pregnancy to term. Ms. Benitez was specifically informed that I would provide
9 her with continuity of care from ovulation induction through term delivery, with the sole exception
10 of my personal inability to participate in IUI because of my religious beliefs. In fact, in plaintiff's
11 complaint, Ms. Benitez asserts that I told her that my personal religious beliefs prevented me from
12 assisting a homosexual couple to conceive a child by IUI. I also informed Ms. Benitez that I was
13 certain that Dr. Fenton would feel the same as I felt since he attended the same church as I and,
14 therefore, would share the same religious convictions regarding this issue. However, Ms. Benitez
15 was also informed by me that there were two other physicians affiliated with NCWC, Drs. Stoopack
16 and Langley, available and willing to perform the IUI and to my knowledge they had no religious
17 convictions against such a procedure under these circumstances. I also confirmed their availability
18 to do such a procedure with them after Ms. Benitez' initial visit, and was informed that they indeed
19 had no objections. Ms. Benitez agreed to undertake treatment at NCWC with the clear
20 understanding that neither Dr. Fenton nor I could perform an IUI and remain compliant with our
21 moral/religious convictions.

22 6. On a number of occasions throughout the course of treatment, I reconfirmed
23 the fact that if the treatment reached the need for an IUI, it would have to be performed by Drs.
24 Stoopack and Langley, and thereafter I would continue her care following the IUI treatment. In
25 fact, in Ms. Benitez's chart, on April 18, 2000, I wrote, "The pt understands that Dr. Langley
26 and Dr. Stoopack will perform the IUI..."

27 7. During 1999 and 2000, while under my care, Ms. Benitez had attempted several
28 intravaginal inseminations using frozen sperm that she had obtained from a sperm bank. These did

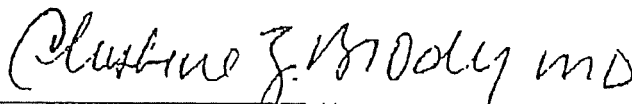
1 Medical Association) section E-10.05(3)(c) states, "it may be ethically permissible for physicians
2 to decline a potential patient when: A specific treatment sought by an individual is incompatible
3 with the physician's personal, religious, or moral beliefs." In Ms. Benitez's case, for me to perform
4 an IUI procedure involving a homosexual couple was incompatible with my moral and religious
5 beliefs.

6 11. I strongly deny any allegations of discrimination, breach of contract, breach of implied
7 contract, breach of the covenant of good faith and fair dealing, negligence, negligent infliction of
8 emotional distress, intentional infliction of emotional distress, deceit and fraud, tortious interference
9 with prospective advantage and invasion of privacy. I had no objections whatsoever to providing
10 all necessary medical care and treatment to Ms. Benitez, with the one exception of performing the
11 elective invasive IUI procedure. She was at all times fully aware of my beliefs and convictions.

12 12. It is my firm belief that my care of Ms. Benitez was proper throughout her course of
13 treatment and that my care complied with physician ethical guidelines.

14
15 I declare under penalty of perjury under the laws of the State of California that the foregoing
16 is true and correct.

17 Executed this ²² ___ day of January, 2004 at Carlsbad, California.

18
19 
20 CHRISTINE Z. BRODY, M.D.

1 **ADJUDICATION #1: PLAINTIFF'S CAUSE OF ACTION FOR NEGLIGENT**
2 **INFLICTION OF EMOTIONAL DISTRESS HAS NO MERIT**

3 **UNDISPUTED MATERIAL FACTS**

3 **EVIDENTIARY SUPORT**

- 4 1. Plaintiff asserts causes of action for
5 both negligence (5th cause of action)
6 and negligent infliction of emotional
7 distress (6th cause of action).
8
9 2. Plaintiff's negligent infliction of
10 emotional distress claim arises out
11 of the same facts as her negligence
12 claim. Plaintiff's negligent infliction
13 of emotional distress cause of action
14 is based on the same breach of duty
15 as that alleged in her negligence
16 cause of action.

1. First Amended Verified Complaint,
¶ 78-85, Exhibit A.
2. First Amended Verified Complaint,
¶ 83-85, Exhibit A.

12 **ADJUDICATION NO. 2: PLAINTIFF'S CAUSE OF ACTION FOR INTENTIONAL**
13 **INFLICTION OF EMOTIONAL DISTRESS HAS NO MERIT**

- 13 3. Defendant Christine Z. Brody, M.D.
14 is a physician licensed to practice
15 medicine in the State of California.
16 She is board-certified in obstetrics
17 and gynecology.
18
19 4. Defendant Douglas K. Fenton, M.D.
20 is a physician licensed to practice
21 medicine in the State of California.
22 He is board-certified in obstetrics and
23 gynecology.
24
25 5. Drs. Brody and Fenton were, at all
26 relevant times, employed by
27 Defendant North Coast Women's
28 Care Medical Group, Inc. ("NCWC"),
a medical group providing Ob/Gyn
services to patients.
6. Plaintiff Benitez began her treatment
for infertility at NCWC on August 6,
1999.
7. During the relevant time period, Dr.
Brody was plaintiff's physician for
the chief complaint of primary
infertility.
8. At the initial consultation on August
6, 1999, plaintiff informed Dr. Brody
of her homosexual orientation. At

- 3 First Amended Verified Complaint,
¶ 5, Exhibit A; Declaration of Dr.
Brody, ¶ 1, Exhibit B.
4. First Amended Verified Complaint,
¶ 6, Exhibit A; Declaration of Dr.
Fenton, ¶ 1, Exhibit C.
5. First Amended Verified Complaint,
¶'s 5-6, Exhibit A; Declaration of Dr.
Brody, ¶ 2, Exhibit B; Declaration of
Dr. Fenton, ¶ 2, Exhibit C.
6. First Amended Verified Complaint,
¶ 15, Exhibit A; Declaration of Dr.
Brody, ¶ 5, Exhibit B.
7. First Amended Verified Complaint,
¶'s 19-21, Exhibit A; Declaration of
Dr. Brody, ¶¶ 2, 5, Exhibit B.
8. First Amended Verified Complaint,
¶ 19, Exhibit A; Declaration of Dr.
Brody, ¶ 5, Exhibit B.

1 this initial consultation, Dr. Brody
2 specifically informed plaintiff that if
3 her fertility treatment progressed to
4 the point where intrauterine
5 insemination was the next
6 recommended step, it was against Dr.
7 Brody's religious beliefs to perform
8 intrauterine insemination for a
9 homosexual couple.

10 9. At the initial consultation, Dr. Brody
11 also informed plaintiff that she was
12 certain that Dr. Fenton could not
13 perform intrauterine insemination
14 because performance of this
15 procedure for a homosexual couple
16 was also against Dr. Fenton's
17 religious beliefs, as both Dr. Brody
18 and Dr. Fenton attended the same
19 church.

20 10. At the initial consultation, Dr. Brody
21 informed plaintiff that there were two
22 other physicians affiliated with
23 NCWC, Drs. Stoopack and Langley,
24 available to perform intrauterine
25 insemination, who to her knowledge
26 had no religious convictions against
27 performing intrauterine insemination
28 for a homosexual couple.

11 11. NCWC holds a tissue bank license
12 which is required in order to perform
13 intrauterine inseminations pursuant to
14 California Health and Safety Code.
15 An intrauterine insemination is
16 considered an invasive procedure
17 with accompanying risks which are
18 always explained to the patient. At
19 NCWC, only physicians are allowed
20 to actually insert the prepared sperm
21 into the uterus at the time of
22 ovulation.

23 12. If live donor sperm, rather than
24 frozen, pre-washed, IUI-ready sperm
25 from a sperm bank, is used, it must go
26 through a preparation process by
27 qualified personnel. At NCWC, only
28 Dr. Fenton and Dana Landsparger,
R.N. were qualified to perform the
referenced live sperm preparation.
Frozen, pre-washed, IUI-ready sperm
from a sperm bank needs no
additional preparation by personnel

9. Declaration of Dr. Brody, ¶ 5, Exhibit B.

10. Declaration of Dr. Brody, ¶ 5, Exhibit B.

11. Declaration of Dr. Brody, ¶ 4, Exhibit B; Declaration of Dr. Fenton, ¶ 3, Exhibit C.

12. Declaration of Dr. Brody, ¶ 4, Exhibit B; Declaration of Dr. Fenton, ¶ 3, Exhibit C.

1 Ms. Benitez informed Dr. Brody during her first office visit on August 6, 1999 of her lesbian
2 sexual orientation. Dr. Brody then informed Ms. Benitez during this initial visit that if her fertility
3 treatment progressed to the point where intrauterine insemination was the next recommended step,
4 it was against Dr. Brody's religious belief to perform IUI for a homosexual couple. Dr. Brody
5 informed Ms. Benitez that Dr. Brody would be glad to treat her up to that point and thereafter, if
6 there was a conception, including all further care for Ms. Benitez and for a pregnancy to term. Ms.
7 Benitez was informed that Dr. Brody would provide her with continuity of care from ovulation
8 induction through term delivery, with the sole exception of participating in IUI because of Dr.
9 Brody's religious beliefs.

10 Dr. Brody also informed Ms. Benitez that Dr. Fenton would feel the same way since he
11 shared her religious convictions. However, Dr. Brody informed Ms. Benitez that there were two
12 other obstetrician/gynecologists with NCWC, Drs. Stoopack and Langley, who were available to
13 perform the IUI and had no religious convictions against performing the procedure under these
14 circumstances. Ms. Benitez agreed to undertake treatment at NCWC with a clear understanding that
15 neither Dr. Brody nor Dr. Fenton could perform an IUI procedure for her and that she would be
16 referred to another doctor for this.

17 When arrangements were to be made for the intrauterine insemination, Ms. Benitez suggested
18 to use live donor sperm rather than frozen, pre-washed, IUI-ready sperm. This raised the issues of
19 the details and protocol of preparing the live donor sperm which took some time to work out.

20 When Ms. Benitez saw Dr. Brody on July 5, 2000, shortly before Dr. Brody went on vacation,
21 the issue as to the preparation of the live donor sperm had not yet been clarified. Therefore, Ms.
22 Benitez decided to use frozen, pre-washed, IUI-ready sperm for the intrauterine insemination during
23 the July cycle.

24 While Dr. Brody was on vacation, Ms. Benitez spoke to Dr. Fenton regarding arrangements
25 for the IUI. Dr. Fenton was under the impression that live donor sperm was to be used for the IUI.
26 While Dr. Brody had, consistent with her custom and practice, promptly dictated her chart note
27 following the July 5th office visit, the dictation had not yet been transcribed and placed in Ms.
28 Benitez' office chart at the time Ms. Benitez spoke on the telephone with Dr. Fenton. Since he and

1 Dana Landsparger, RN, were the only two individuals of NCWC licensed and qualified to perform
2 the preparation of live sperm, and since both of these individuals had moral/religious objections to
3 preparing live sperm for IUI for a homosexual couple, Dr. Fenton referred Ms. Benitez to Dr.
4 Michael Kettle, a fertility specialist/reproductive endocrinologist affiliated with the San Diego
5 Fertility Center, for performance of the IUI with live donor sperm.

6 Dr. Fenton explained the reasons for the referral to Ms. Benitez and also told her that she was
7 welcome to continue care at the NCWC office following the insemination, for any pregnancy or for
8 any other gynecologic concerns.

9 Ms. Benitez did not inform Dr. Fenton that she had agreed during her last office visit with
10 Dr. Brody before Dr. Brody's vacation, to proceed with frozen, pre-washed, IUI-ready sperm rather
11 than live sperm for the IUI. Had Ms. Benitez so informed Dr. Fenton, the IUI could have been
12 undertaken at NCWC by one of the other two ob/gyns, Dr. Stoopack or Dr. Langley, and no referral
13 would have been necessary. The use of frozen, pre-washed, IUI-ready sperm would not have
14 involved the need for either Dr. Fenton's or Nurse Landsparger's participation in the preparation
15 of the sperm.

16 Ms. Benitez subsequently consulted Dr. Kettle who performed several intrauterine
17 inseminations on her, none of which however resulted in pregnancy. Thereafter, Ms. Benitez
18 underwent in vitro (test tube) fertilization by Dr. Kettle and became pregnant by this method in June
19 2001. Ms. Benitez has subsequently delivered a healthy baby boy.

20 **Statement of the Case**

21 The operative complaint consists of eleven (11) causes of action, ten of which are directed
22 against defendants NCWC, Dr. Brody and Dr. Fenton. The first cause of action is for discrimination
23 under the Unruh Act and seems to be the gravaman of plaintiff's complaint. All causes of action
24 against Defendants pertain to the alleged "arbitrary refusal and failure of [Defendants] to carry out
25 their contractual and moral duties to provide medical services to a patient." (First Amended
26 Verified Complaint, Exhibit A.) Defendants move to dismiss the negligent infliction of emotional
27 distress (Sixth Cause of Action), intentional infliction of emotional distress (Seventh Cause of
28 Action), deceit and fraud (Eighth Cause of Action), tortious interference with prospective economic



Superior Court

San Diego County, State of California

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The following is a TELEPHONIC ruling for 4/12/2004,
Department 71, the Honorable RONALD S. PRAGER presiding.

Case Number GIC770165

TENTATIVE RULING: The Court rules on defendants North Coast Women's Care Medical Group, Inc., Christine Z. Brody, M.D. and Douglas K. Fenton, M.D.'s (collectively "Defendants") motion for summary adjudication as to plaintiff Guadalupe T. Benitez's ("Plaintiff") sixth through tenth causes of action and as to the punitive damages claim as follows:

As a preliminary matter, the Court finds that Plaintiff has provided sufficient proof to establish that its opposition was filed in accordance with CCP §437c(b). Furthermore, the Court declines to rule on specific evidentiary objections. The Court disregards all evidence which is found to be incompetent or inadmissible. See *Billjac Associates v. First Interstate Bank*, 218 Cal. App. 3d 1410, 1419 (1990).

Summary adjudication is granted with regard to the sixth cause of action for negligent infliction of emotional distress and the tenth cause of action for invasion of privacy, as Plaintiff does not oppose summary adjudication as to these causes of action. See Plaintiff's Opposition, page 1, fn. 1 and page 3, fn. 3.

The Court denies the motion as to the seventh cause of action for intentional infliction of emotional distress and the eighth cause of action for deceit and fraud, as there are triable issues of fact regarding whether the conduct alleged was outrageous, intentional, and/or willful with the intent to induce reliance.

[It is undisputed that Dr. Brody informed Plaintiff at the initial consultation that it was against her religious beliefs to perform intrauterine insemination ("IUI") for a homosexual couple. See Plaintiff's Separate Statement of Disputed and Undisputed Material Facts ("PSS"), pages 3-4, ¶8. See also verified First Amended Complaint ("FAC"), ¶19 and Defendant's Notice of Lodgment, Exhibit B, ¶5.]

Plaintiff states that Dr. Brody assured her that all the other physicians at North Coast would be available to perform the IUI. Id. at ¶9. Dr. Brody did not explain the risks associated with Clomid at the initial consultation. See Plaintiff's Declaration, ¶12. See also Hsiao Declaration, ¶4. Dr. Brody deviated from the treatment plan and recommended that Plaintiff stay with the Clomid/IVI treatment rather than progress to the Clomid/IUI treatment. Id. at ¶¶15, 17, and 26. See also Hsiao Declaration, ¶6. Laparoscopic surgery was performed before any attempt to achieve fertilization through IUI. Id. at ¶22. See also Hsiao Declaration, ¶11. Dr. Brody informed Plaintiff that the IUI would not proceed if she was the physician on call at the time her IUI was scheduled. Id. at ¶23. In May 2000, Dr. Brody

informed Plaintiff that Nor Coast the necessary tissue license order to inseminate using known donor sperm. Id. at ¶25. See also Hsiao Declaration, ¶¶3 and Carroll Declaration, ¶3-5 and Exhibit A. In July 2000, Dr. Fenton refused to refill Plaintiff's prescription for Clomid based upon her sexual orientation. Id. at ¶¶30, 32-34. As a result, Plaintiff sought psychological counseling and was unable to resume infertility treatment for almost five months. Id. at ¶¶35-36.

This evidence raises triable issues of fact as to whether Defendants' affirmative conduct and omissions were outrageous, intentional, and/or willful with the intent to induce reliance.

Summary adjudication is granted with respect to the ninth cause of action for tortious interference with prospective economic advantage. Plaintiff failed to establish facts that show that she had an economic relationship with Dr. Kettle for future economic gain that Defendants interfered with or that Defendants attempted to disrupt the doctor-patient relationship between Plaintiff and Dr. Kettle.

Summary adjudication is granted with respect to the punitive damages claims, as Plaintiff failed to comply with CCP §425.13. The fraud and intentional infliction of emotional distress claims are directly related to the manner in which Defendants provided professional services. The claims emanate from the manner in which they treated Plaintiff's fertility problem, which is an ordinary and usual part of the provision of medical services. Thus, CCP §425.13 is applicable to this case. See Central Pathology Serv. Medical Clinic v. Super. Ct. (1992) 3 Cal. 4th 181, 191-192.

IT IS SO ORDERED

If the moving party, or any party who has filed timely opposition, is dissatisfied with the telephonic ruling, that party may request oral argument by telephoning the calendar clerk at (619)685-6127 by 4:00 p.m. on the Tuesday following the telephonic hearing and specifying with particularity the issues sought to be orally argued. The requesting party may be asked to file a "Notice of Issues to be argued."

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PROOF OF SERVICE

I, TITO GOMEZ, declare:

That I am a resident of Los Angeles County, California; that I am over eighteen (18) years of age and not a party to this action; that I am employed in Los Angeles County, California; and that my business address is 3325 Wilshire Blvd., Suite 1300, Los Angeles, CA 90010.

On April 24, 2006 I served a copy of the attached document, described as **PETITION FOR REVIEW OF REAL PARTY IN INTEREST GUADALUPE T. BENITEZ**, on the parties of record by placing true copies thereof in sealed envelopes to the office of the persons at the addresses set forth below:

By Overnight Mail

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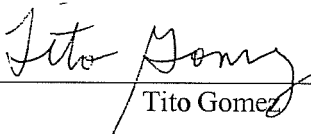
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I am readily familiar with the office's practice of collecting and processing correspondence for mailing. Under that practice, this correspondence would be deposited with the U.S. Postal Service on that same day. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing stated in this affidavit.

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

Dated: April 24, 2006



Tito Gomez

