WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

TITO TORRES, ***Applicant,*** **vs.** **AJC SANDBLASTING; and ZURICH NORTH AMERICA,** ***Defendants,*** **UNITECH DIAGNOSTICS, LLC,** ***Lien Claimant.***	**Case Nos. ADJ909554 (LAO 0824849)** **ADJ1856854 (LAO 0837910)** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

We granted the petition for reconsideration filed by Green Lien Collections on behalf of lien claimant, Unitech Diagnostics, LLC (Unitech). Thereafter, to secure uniformity of decision in the future, the Chairwoman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision.[1] While this decision does not annunciate any new legal principles, we deem it necessary to act en banc because of a number of lien claimants who persist in disregarding existing law as to their burden of proof and repeatedly proceed to trial on lien claims that are so lacking in evidentiary support and/or presented with such a total disregard of existing law as to be frivolous. These lien claimants overburden the system, waste the limited resources of the Workers' Compensation Appeals Board (WCAB) and squander valuable calendar time, which otherwise could be

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[1] En banc decisions of the Appeals Board (Lab. Code, § 115) are binding precedent on all Appeals Board panels and workers' compensation judges. (Cal. Code Regs., tit. 8, § 10341; *Signature Fruit Co. v. Workers' Comp. Appeals Bd.* (*Ochoa*) (2006) 142 Cal.App.4th 790, 796, fn. 2 [71 Cal.Comp.Cases 1044]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6].) In addition to being adopted as a precedent decision in accordance with Labor Code section 115 and Appeals Board Rule 10341, this en banc decision is also being adopted as a precedent decision in accordance with Government Code section 11425.60(b).

used to address the claims of injured workers. Therefore, we hold that:

(1) Labor Code sections 3202.5 and 5705[2] mandate that a lien claimant must prove by a preponderance of the evidence *all* elements necessary to establish the validity of their lien before the burden of proof shifts to the defendant. *Keifer* and *Garcia*,[3] insofar as they held that a lien claimant can establish a prima facie right to recovery simply by introducing a billing statement showing that services were provided to a worker in connection with a claimed injury, have been nullified by sections 3202.5 and 5705 and subsequent case law.

(2) Proceeding to trial without any evidence or with evidence that is utterly incapable of meeting its burden of proof is frivolous and constitutes bad faith within the meaning of section 5813 justifying an award of sanctions, attorney's fees and costs against the party or lien claimant, its attorney(s) or hearing representative(s), individually or jointly and severally.

In light of these holdings, we affirm the decision of the workers' compensation administrative law judge (WCJ) disallowing Unitech's lien claim because it failed to introduce any evidence that the employee sustained a compensable injury and that it rendered medical treatment that was reasonable and necessary.

We also affirm the finding of the WCJ that by proceeding to trial without any evidence capable of establishing its lien claim, Unitech acted frivolously and in bad faith in violation of section 5813, meriting an award of sanctions, attorney's fees and costs. However, we rescind and defer the award of sanctions pending further proceedings before the WCJ to determine the amount of sanctions and whether they should be imposed against Unitech, Green Lien Collections and/or its hearing representative, Suzi Gonzalez, individually or jointly and severally.

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[2] All further statutory references are to the Labor Code.

[3] *Kaiser Foundation Hospitals v. Workmen's Comp. Appeals Bd.* (*Keifer*) (1974) 13 Cal.3d 20, [39 Cal.Comp.Cases 857] (*Keifer*) and *Garcia v. Industrial Acc. Com.* (1953) 41 Cal.2d 689 [18 Cal.Comp.Cases 290] (*Garcia*).

BACKGROUND

Applicant claimed that he sustained industrial injuries to his spine and bilateral lower extremities on October 22, 2002 and February 20, 2003. Defendant Zurich denied applicant's claims and on March 2, 2005, the cases were settled by compromise and release (C&R). The C&R listed outstanding liens and provided for their disposition. Neither Unitech nor its lien was listed.

On November 16, 2009, Green Lien Collections filed a notice of appearance on behalf of Unitech.

On September 15, 2010, Green Lien Collections filed an original lien claim on behalf of Unitech together with a copy of an unsigned "Health Insurance Claim Form" from Unitech to Zurich North America (Zurich) dated July 15, 2003.

At the August 19, 2011 lien conference, the parties prepared a pre-trial conference statement (PTCS) in which Unitech listed its trial exhibits, which included the health insurance claim form and two MRI reports.

At the October 6, 2011 lien trial, the parties stipulated that applicant "*claims to have sustained* injury arising out of and in the course of employment" (italics added) and that Zurich was the employer's workers' compensation insurance carrier. The issues presented were:

> "1. Liens [sic] of Unitech Diagnostics in the amount of $5,150, less amounts paid.
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> "2. Defendant is disputing the reasonableness and necessity of the services offered.
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> "3. Defense contends that the billing from Unitech exceeds the Official Medical Fee Schedule."

No witnesses testified and, despite having identified several exhibits in the PTCS, the only evidence offered by Unitech was a copy of an unsigned insurance form from Unitech addressed to Zurich, dated July 15, 2003.[4] This insurance form lists dates of service, procedure codes and treatment charges totaling $5,150.00 in addition to penalties of $704.03 and interest of $3,018.01 in a total amount

[4] Although unsigned, the signature lines for the patient/representative, the insured and the physician/supplier include the notation, "SIGNATURE ON FILE."

of $8,904.04. (Lien Claimant Exhibit 1.) No written description of goods or services was included. At all proceedings, Suzi Gonzalez appeared as the hearing representative for Green Lien Collections.

No evidence was offered by Zurich.

In the October 6, 2011 Minutes of Hearing, the WCJ found that "there is no factual or legal basis for proceeding to trial" and issued a notice of intent (NIT) to impose $2,500 sanctions against Unitech, allowing 15 days to respond as to why sanctions should not be imposed. No response was submitted by or on behalf of Unitech.

On November 3, 2011, the WCJ found that Unitech failed to carry its burden of proof and ordered that it take nothing on its lien. In addition, the WCJ found that proceeding to trial with only an insurance form was frivolous and a waste of Court time in violation of section 5813 and ordered Unitech to pay a $750.00 sanction, plus attorney's fees to defendant.

Unitech filed a timely petition for reconsideration contending that: (1) putting its bill into evidence established its prima facie case and that the burden of proof then shifted to defendant; (2) defendant failed to submit any evidence to rebut the reasonableness and necessity of lien claimant's services; and (3) therefore, it is entitled to have its lien awarded and the award of sanctions should be rescinded. The petition further alleges that applicant's treating physician referred him to Unitech for an MRI of the lumbar spine and right hip and that there is a medical report detailing the results of the MRIs.

Defendant did not file an answer.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that reconsideration be denied, but asking that the Appeals Board review the amount of the sanctions and to increase them if deemed just and proper.

In his Report, the WCJ explained:

> "At time of trial, it was determined that lien claimant had no medical or documentary evidence available to present into evidence [other than the unsigned insurance form].
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> "The Court advised Petitioner that should it choose to proceed to trial without benefit of evidence or testimony that the Court would sanction Petitioner for frivolous waste of Court time and assess costs against it.

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> "Petitioner's cavalier use of the limited Court time and resources was met with sanctions per California Labor Code, section 5813 as the Court warned petitioner that proceeding to trial [under these circumstances] was and is, in this Court's opinion, a frivolous act …"

DISCUSSION

I. After an Applicant's Underlying Claim Is Settled, a Lien Claimant Becomes a Party and Stands in the Shoes of the Applicant. Like Any Other Party, a Lien Claimant Bears the Burden of Proving All Elements Necessary to Establish Its Claim.

A. Historical Analysis

1. The *Keifer* and *Garcia* Decisions

In 1973, the Supreme Court held that a lien holder could establish a prima facie case of entitlement to reimbursement merely by showing "that the treatment rendered was for an injury allegedly received in the course and scope of employment."[5] (*Keifer,* 13 Cal.3d at p. 23.) In *Keifer,* lien claimant provided hospital services to applicant for a cardiac condition. Applicant claimed the condition was industrial. Defendant denied the claim. After applicant's death, his widow settled her claim for death benefits by way of a C&R, which included the proviso that, "[t]he question of death arising in the course and scope of employment is in issue."

Despite the fact that injury had never been admitted by defendant nor proved by applicant or lien claimant, the Court found that lien claimant was entitled to reimbursement. The Court reasoned that payment of the C&R constituted "compensation", and that by showing the treatment rendered was for a condition *claimed* to be industrial, lien claimant had met its burden and was entitled to reimbursement in full.

In a footnote, the Court cited *Garcia*, an earlier decision addressing a lien claimant's burden of proof, and said:

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[5] In workers' compensation cases, the correct standard is "arising out of and in the course of the employment." (Lab. Code, § 3600(a).) As stated in *Saala v. McFarland* (1965) 63 Cal.2d 124, 129, fn. 1 [29 Cal.Comp.Cases 306]: "[O]n occasion the phrase 'scope of employment' has been used interchangeably with 'arising out of and in the course of the employment.' [Citation omitted.] However, this court recognized in a leading case involving workmen's compensation coverage, *Pacific Emp. Ins. Co. v. Industrial Acc. Com.* [(*Carmel*) (1945)], 26 Cal.2d 286, 293 [10 Cal.Comp.Cases 89], that scope of employment defines a more restricted area of employee conduct than the customary phrase 'arising out of and in the course of the employment.' "

> "As explained in *Garcia, supra* (41 Cal.2d at p. 694), there exists 'great practical difficulty' in requiring a lien claimant to produce evidence of an industrial injury, 'where the employe[6] who has first hand knowledge of those matters and the insurance carrier who has immediate opportunity to investigate them decline to produce such evidence and instead elect to compromise.' Accordingly, it is sufficient that the lien claimant establish a 'prima facie' case by submitting evidence that the lien arose by reason of services rendered the employee in connection with an injury or event for which the employee claimed and is awarded compensation under a compromise agreement. (*Id*., p. 695.)"
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> (*Keifer,* 13 Cal.3d at p. 28, fn. 8.)[7]

2. The Post-*Keifer/Garcia* Amendments to Sections 3202.5 and 5705

In 1993, the Legislature amended section 3202.5 to provide that "[n]othing contained in Section 3202 shall be construed as relieving a party or *a lien claimant from meeting the evidentiary burden of proof* by a preponderance of the evidence." (Stats. 1993, ch. 4, § 1.5 (SB 31) [effective 4/3/93] (italics added).) It concurrently amended section 5705 to provide that "*[t]he burden of proof rests upon the* party or *lien claimant* holding the affirmative of the issue." (Stats. 1993, ch. 4, § 9 (SB 31) [effective 4/3/93] (italics added).) In 2004, the Legislature again amended section 3202.5 to provide that "all parties *and lien claimants shall meet the evidentiary burden of proof on all issues* by a preponderance of the evidence." (Stats. 2004, ch. 34, § 9 (SB 899) [effective 4/19/04] (italics added).)

It is presumed that the Legislature, in enacting a statute, does not intend to overturn long-established principles of law unless clearly expressed or necessarily implied. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1325 [72 Cal.Comp.Cases 565]; *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [41 Cal.Comp.Cases 42].) There can be no question that by expressly imposing on lien claimants the evidentiary burden of proof on all issues, the necessary implication of the

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[6] For many years, the appellate courts used the term "employe," not "employee." Therefore, this and the other references to "employe" in *Keifer*'s quotations from *Garcia* are correct and are not typographical errors.

[7] In *Garcia*, the employee's claim was settled by a compromise and release without any direct evidence of whether there was an industrial injury and, if so, whether the injury caused disability during the period for which the Department of Employment (Department) paid unemployment compensation disability benefits (state disability). At a subsequent hearing on the Department's state disability lien claim, no evidence was presented on the issue of industrial injury and, therefore, the Industrial Accident Commission (IAC) denied the lien. The Supreme Court held that because the employee filed an application claiming industrial injury, because this claim was compromised for a substantial sum, and because the IAC had approved the settlement, this constituted prima facie evidence that the state disability payments were made for a period of industrial disability. The *Garcia* court then recited the language from which *Keifer* quoted.

language of sections 3202.5 and 5705 is that *Keifer* and *Garcia* are no longer applicable to a lien claimant's burden of proof. This is confirmed in a series of appellate opinions addressing the burden of proof for lien claimants subsequent to the legislative amendments of sections 3202.5 and 5705.

In *Zenith Insurance Company v. Workers' Comp. Appeals Bd.* (*Capi*) (2006) 138 Cal.App.4th 373 [71 Cal.Comp.Cases 374] (*Capi*), the Court of Appeal held that lien claimants hold the burden of proof in order to establish entitlement to reimbursement for medical treatment liens. Citing sections 3202.5 and 5705, the Court declared:

> "In workers' compensation matters, the burden of proof rests on the party or lien claimant 'holding the affirmative of the issue.' (Lab. Code, § 5705; see § 3202.5.) Where the injured employee does not prosecute his or her claim, the lien claimant bears the burden of establishing the injury, entitlement to benefits and the reasonable value of the services." (*Capi*, 138 Cal.App.4th at p. 376.)

In *Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd.* (*Pinkney*) (1994) 26 Cal.App.4th 789 [59 Cal.Comp.Cases 461], the Court of Appeal said:

> "In 1982, the Legislature enacted Labor Code section 3202.5, which provides that nothing contained in Labor Code section 3202 shall be construed as relieving a party from meeting the party's evidentiary burden of proof by a preponderance of the evidence. [Fn. omitted.] Effective April 3, 1993, Labor Code section 3202.5 was amended to provide that *a lien claimant* also must meet its evidentiary burden of proof by a preponderance of the evidence and that the statutory rule of liberal construction does not assist the lien claimant in meeting its burden. Labor Code section 3202.5, as recently amended, provides additional support that a medical lien claimant may litigate the threshold issue of industrial injury to establish its entitlement to recover on its lien claim."
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> (*Pinkney*, 26 Cal.App.4th at p. 801 (italics added).)

The *Capi* and *Pinkney* statements that a lien claimant has the affirmative burden of proving all issues relevant to its lien are echoed in other appellate cases. (E.g., *Boehm & Associates v. Workers' Comp. Appeals Bd.* (*Brower*) (2003) 108 Cal.App.4th 137, 150 [68 Cal.Comp.Cases 548] ["The burden of proof of a lien is upon the lien claimant who must establish his or her claim by a preponderance of the evidence."]; *PM & R Assocs. v. Workers' Comp. Appeals Bd.* (*Zavala*) (2000) 80 Cal.App.4th 357, 370 [65 Cal.Comp.Cases 347] ["PM & R has the burden to prove its liens were for properly provided services. (… Lab. Code, § 3202.5.)"]; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd.*

(*Obernier*) (1995) 34 Cal.App.4th 1204, 1212-1213 [60 Cal. Comp. Cases 289] ["A lien claimant … has the burden of proving by a preponderance of the evidence that the claim is industrial (§ 3202.5)."].)

In *Kunz v. Patterson Floor Coverings, Inc.* (2002) 67 Cal.Comp.Cases 1588, 1592 (Appeals Board en banc) (*Kunz*), we stated:

> "Where a lien claimant (rather than the injured employee) is litigating the issue of entitlement to payment for industrially-related medical treatment, the lien claimant stands in the shoes of the injured employee and the lien claimant must prove by preponderance of the evidence all of the elements necessary to the establishment of its lien. (Lab. Code, §§ 3202.5, 5705 …)."

Later, in *Tapia v. Skill Masters Staffing* (2008) 73 Cal.Comp.Cases 1338, 1342-1343 (Appeals Board en banc) (*Tapia*), we declared:

> "It is *not* a defendant's burden to prove that an outpatient surgery center's claimed fee is *not* reasonable. To the contrary, the outpatient surgery center has the affirmative burden of proving that its lien *is* reasonable, and it must carry this burden by a preponderance of the evidence. (Lab. Code, § 5705 ('[t]he burden of proof rests upon the party *or lien claimant* holding the affirmative of the issue' (emphasis added); Lab. Code, § 3202.5 ('[a]ll parties *and lien claimants* shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence' (emphasis added)." (Italics in original.)

Repeatedly, the Court of Appeals and WCAB have declared that the holdings in *Keifer* and *Garcia*, which allowed a lien claimant to establish a prima facie case of entitlement to reimbursement and shift the burden of proof to a defendant merely by offering evidence that it furnished treatment for a condition, which an employee claimed to be industrial and was settled by a C&R, have been abrogated by sections 3202.5 and 5705.

B. The Application of Sections 3202.5 and 5705 to this Case

At the lien trial, the parties stipulated that applicant "*claims to have sustained* injury arising out of and in the course of employment" (italics added). Defendant did not stipulate to industrial injury nor did Unitech offer any evidence to prove that applicant's alleged injury was industrially-caused. Unitech did not meet its affirmative burden of proving the threshold element of a compensable injury as required by sections 3202.5 and 5705.

Even if Unitech had proved industrial causation, sections 3202.5 and 5705 also require that lien claimant prove that the treatment rendered was reasonable and necessary to cure or relieve the effects of

the injury. The only piece of evidence introduced by Unitech was a copy of an insurance claim form of unknown authorship that lists various code numbers without any additional explanation. The mere introduction of this bill is wholly inadequate to carry lien claimant's burden in this regard. Furthermore, lien claimant must show that the charges for the treatment or services rendered is reasonable. (See, *Tapia*, 73 Cal.Comp.Cases at p. 1343; *Kunz*, 67 Cal.Comp.Cases at pp. 1598-1599.)

For the first time, in its petition for reconsideration Unitech claims that applicant's primary treating physician referred applicant to lien claimant for MRIs. Since Unitech has offered no explanation why these assertions were not or could not have been raised at trial, and failed to introduce any evidence supporting them, they will not be considered. The fact that lien claimant listed exhibits on the PTCS, which it chose not to introduce at trial, is of no value. All parties are charged with exercising reasonable diligence in presenting their case. (Lab. Code, § 5903(d); Cal. Code Regs., tit. 8, § 10856(e)).

For the above reasons, we affirm the WCJ's disallowance of Unitech's lien.

II. Labor Code Section 5813 Sanctions, Attorney's Fees, and Costs for "Bad Faith Actions or Tactics that Are Frivolous" May Be Imposed Where a Party or Lien Claimant Proceeds to Trial with Evidence that Is Indisputably Incapable of Establishing Its Claim or Affirmative Defense. Sanctions, Attorney's Fees and Costs May Be Imposed against the Lien Claimant, Its Attorney(s) and/or Hearing Representative(s), Individually or Jointly and Severally.

Section 5813 permits the award of sanctions, attorney's fees and costs against a party who engages in "bad faith actions or tactics that are frivolous or solely intended to cause delay."[8] WCAB Rule 10561(b) provides that "bad faith actions or tactics that are frivolous" include: "(6) Bringing a claim, conducting a defense, or asserting a position: (A) that is: (i) indisputably without merit, … ; and (B) where a reasonable excuse is not offered … ." (Cal. Code Regs., tit. 8, § 10561.)

Unitech bore the burden of proving that applicant sustained an industrial injury, that it rendered medical treatment in connection with that injury and that the treatment was reasonable and necessary to cure or relieve the effects of the industrial injury. Prior to trial, Unitech was warned that the evidence it proposed to introduce was utterly incapable of proving its claim. By electing to proceed anyway with only an unauthenticated billing statement, Unitech acted in bad faith, and wasted valuable court time on a claim that was "indisputably without merit" and frivolous.

[8] WCAB Rule 10561(e)(1) provides that, for purposes of section 5813, a "party" includes a lien claimant and an "attorney" includes a lay representative of a party or lien claimant. (Cal. Code Regs., tit. 8, § 10561(e)(1).)

Unitech failed and continues to fail to offer a reasonable excuse for its conduct as allowed by Rule 10561(b)(6)(B). Its assertion that the introduction of its bill established a prima facie case thereby shifting the burden to defendant to refute the validity of its claim is utterly without merit and flagrantly disregards 20 years of statutory developments and case law. This conduct is inexcusable and the imposition of sanctions and attorney's fees under section 5813 and WCAB Rule 10561 are absolutely warranted in this case.

However, we will defer sanctions and return the case to the WCJ for further proceedings and a new decision on this issue. The WCJ imposed sanctions only against Unitech. However, it appears that Green Lien Collections and hearing representative Suzi Gonzalez bear significant responsibility for the handling of this claim. In addition, in his Report the WCJ asked that we consider increasing the sanctions. For these reasons, we will rescind and defer the award of sanctions so that the WCJ can reconsider the amount of the sanctions and against whom they should be imposed, whether individually or jointly and severally.

The WCJ should issue an NIT regarding the above, giving those responsible an opportunity to show good cause why sanctions should not be imposed. In his order, the WCJ should specify the reason(s) for his decision. Simply stating that "there is no factual or legal basis for proceeding to trial" as the basis for assessing sanctions is not sufficient. While the evidence introduced is wholly inadequate to prove its claim, lien claimant may have had a factual and/or legal basis to proceed to trial. Hence, the sanctionable conduct arises not from lacking a legal or factual basis for its claim, but from lien claimant's utter failure to produce the evidence necessary to prove it.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Appeals Board (En Banc) that the November 3, 2011 Findings and Order of the workers' compensation administrative law judge is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Tito Torres claims to have sustained injury arising out of and in the course of employment on October 22, 2002 and February 20, 2003 while employed by AGC Sandblasting, the insured of Zurich North America.

2. The case-in-chief was resolved by a March 2, 2005, Order Approving Compromise and Release.

3. Lien claimant, Unitech Diagnostics, LLC, failed to carry its burden of proof as to injury arising out of and in the course of employment and as to all other issues necessary to the establishment of its lien claim.

4. Sanctions, attorney's fees, and costs under Labor Code section 5813 and WCAB Rule 10561 are deferred, with jurisdiction reserved. The workers' compensation administrative law judge (WCJ) shall address these issues in the first instance, subject to the right of any person aggrieved by a final order, decision, or award to file a timely petition for reconsideration.

ORDER

IT IS ORDERED THAT that the lien claim of Unitech Diagnostics, LLC, is **DISALLOWED** and that it shall take nothing on its lien claim.

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IT IS FURTHER ORDERED as the Decision After Reconsideration of the Appeals Board (En Banc) that the case is **RETURNED** to the workers' compensation administrative law judge for further proceedings and decision in accordance with this decision.

WORKERS' COMPENSATION APPEALS BOARD

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RONNIE G. CAPLANE, Chairwoman

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FRANK M. BRASS, Commissioner

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ALFONSO J. MORESI, Commissioner

_____
DEIDRA E. LOWE, Commissioner

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MARGUERITE SWEENEY, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

GRAY PROUTY
GREEN LIEN COLLECTIONS
UNITECH DIAGNOSTICS, LLC
POLLARD, MAVREDAKIS ET. AL.

/bgr