

1 DAVID J. COHEN, ESQ.
California Bar No. 145748
2 MICHAEL J. PELLEGRINI, ESQ.
California Bar No. 285175
3 **BAY AREA CRIMINAL LAWYERS, PC**
300 Montgomery Street, Suite 660
4 San Francisco, CA 94104
Telephone: (415) 398-3900

5 Attorneys for Defendant **Darrell A. Souza**

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8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF STANISLAUS

10 THE PEOPLE OF THE STATE)
OF CALIFORNIA,)

Case No. 1439847

11 Plaintiff,)

12 v.)

13 DARRELL A. SOUZA,)

14 Defendant.)
15)
16)
17)
18)

**MR. SOUZA'S MOTION TO
DISQUALIFY AND RECUSE DOWNEY
BRAND, LLP, AND WILLIAM WARNE
FROM ANY FURTHER
REPRESENTATION OF RONALD
MALIK, EDNA MALIK, DUMAS
INTERNATIONAL, LLC, VAN DER
MEER, LLP AND MEDCAL, LLC**

Date: March 18, 2016

Time: 1:30 p.m.

Dept: 3

19 **I.**

20 **INTRODUCTION**

21 The situation necessitating disqualification in this case arises from the egregious misconduct
22 and subsequent conflict of interest pertaining to the already questionable representation of one
23 witness in this case, Ronald Malik ("Malik"), by another witnesses in this case, William Warne
24 ("Warne"). Malik is currently being represented by the law firm of Downey Brand, LLP ("Downey
25 Brand"). Warne, a partner at Downey Brand, testified in front of the grand jury as a percipient
26 witness to the events that form the bases of the criminal allegations against Darrell Souza in this
27 case. In late 2014, despite the fact that both Warne and Malik are both witnesses in this case, Warne
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of Ronald Malik, Edna Malik, Dumas International, LLC, Van Der Meer, LLC and MedCal, LLC

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1 appeared as counsel for Malik in moving to quash a subpoena issued by Mr. Souza and directed at
2 the disclosure of relevant financial documents. At that time, in order to avoid unnecessary litigation
3 over documents that do not exist or documents that Malik would be willing to turn over, the parties
4 agreed that the People would attempt to negotiate the disclosure of relevant financial documents with
5 Warne.

6 On April 7, 2015, after approximately six months of not receiving all of the necessary
7 documents responsive to the subpoena, the People and the defense met to discuss what items
8 subpoenaed by the defense the parties could agree are relevant and should be produced, in order to
9 further narrow the discussion to only the items that are unquestionably relevant. Since that time, the
10 People have made repeated unsuccessful attempts to meet and confer with Warne to discuss only the
11 documents that the defense and People both agree are relevant documents that should be produced.
12 For over ten months, Warne has demonstrated a continued unwillingness to meet with the People
13 even to represent whether these documents exist and whether Malik will agree to produce these
14 documents. During the entire 2015 calendar year, and continuing into 2016, Warne and Malik have
15 not produced a single document responsive to the defense's subpoenas, and the People have been
16 unable to secure enough of Warne's time to even obtain a simple representation from Warne as to
17 whether these documents exist.

18 Evidence has come to light that shows that Warne committed serious misconduct during his
19 grand jury testimony, creating an ongoing conflict of interest in which Warne is able to use his
20 position as Malik's counsel to advocate against the disclosure of documents which would further
21 establish Warne's misconduct. The combined misconduct and conflict of interest creates a
22 substantial judicial interest in protecting Mr. Souza's right to due process, the integrity of these
23 proceedings, and the integrity of the bar, by disqualifying Warne from continued representation of
24 Malik in this matter. Warne's testimony during the grand jury proceedings can only be described as
25 perjury, as Warne's testimony is in direct conflict with a sworn declaration Warne filed in the Solano
26 County Superior Court in another case. In front of the grand jury, in pursuit of claimed losses
27 exceeding \$200,000,000, Warne testified that Mr. Souza's alleged act of placing deeds of trust on
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1 Malik's properties prevented all of Malik's efforts to refinance the loans on those properties,
2 resulting in foreclosure. In a separate case, Warne, on behalf of Malik, and under penalty of perjury,
3 strenuously argued that Mr. Souza's actions did not hinder Malik's ability to obtain refinancing on
4 his properties. Instead, Warne insisted, it was bank's misconduct, including the bank's failure to
5 provide a necessary arm's-length appraisal, that prevented Malik from obtaining refinancing.
6 Warne's declaration clearly stated that "Souza was not an issue regarding refinancing." Warne's
7 sworn statement during the civil suit between Malik and his lender cannot be reconciled with his
8 testimony during the grand jury proceeding, and both statements came after Mr. Souza removed the
9 deeds of trust which were allegedly the cause of Malik's difficulty in obtaining refinancing.

10 In an effort to secure an advantage in litigations where Warne has a professional or financial
11 interest, Warne has a recent history of violate the Rules of Professional Conduct to secure an
12 advantage, including contacting represented parties without authorization, obtaining and using the
13 opposition's confidential attorney-client communications and work product, and, in the present case,
14 perjury and ongoing efforts to obstruct the defense's access to relevant documents. Having made
15 false statements to the grand jury in this case, Warne has an ongoing interest in preventing this
16 misconduct from being further exposed. Where there is evidence that an attorney has committed
17 misconduct or suffers from a conflict of interest that undermines the appearance of propriety in the
18 proceedings, disqualification of counsel is warranted.

19 Under the circumstances, it is untenable for Warne to continue his role as Malik's counsel.
20 Warne is both a witness and Malik's representation in connection with Malik's obligation to turn
21 over documents responsive to lawfully issued subpoenas. Such a situation presents significant
22 concerns that would warrant disqualification simply because it places one witness in a position to
23 advise another witness not to produce documents which might challenge the first witness's
24 testimony. This conflict is exacerbated and transformed into a much more serious conflict by virtue
25 of the fact that these financial records may further illuminate the circumstances surrounding Warne's
26 conflicting sworn statements, and might further establish that Warne's testimony constituted perjury.
27 In light of the evidence of misconduct, coupled with Warne's conflicting dual role as a witness and
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1 advocate, Warne must not be permitted to continue to represent Malik with respect to Malik's
2 obligation to disclose records in this case. Warne has a personal, professional, and potentially
3 financial interest in advising and advocating against Malik's disclosure of records which might shed
4 light on Warne's misconduct, or otherwise challenge Warne's testimony. Therefore, in consideration
5 of the totality of the circumstances, Warne must be disqualified as Malik's counsel in connection
6 with the production of documents in this case.

7 II.

8 STATEMENT OF FACTS

9 a. Malik and Warne Falsely Testify Before the Grand Jury That Mr. Souza Prevented 10 Malik from Refinancing the Loans on His Property.

11 On or about July 15, 2010, in the County of Stanislaus, the People filed a criminal complaint
12 against Mr. Souza, alleging multiple counts of criminal conduct. After two amendments to the
13 complaint, the People dismissed the complaint in favor of a Grand Jury indictment.¹ The indictment
14 alleged several counts of criminal conduct, as well as several enhancements and special allegations.
15 (See Exhibit A, March 29, 2012, Indictment of Darrell and Christine Souza.)

16 Counts II, and III, both allege that, on or about October 2, 2008, Mr. Souza offered a false
17 instrument for recording, under Penal code section 115(a). (See Exhibit A.) These counts relate to
18 allegations that Mr. Souza recorded deeds of trust, for \$4,000,000, without authority to do so, on
19 property owned by two of Malik's companies, Van Der Meer, LLC ("Van Der Meer"), and Medcal,
20 LLC ("Medcal"). (See Grand Jury Transcript ("GJT"), pp. 632-635; see also Grand Jury Exhibit
21 ("GJE"), #60-E.) These allegations are premised on the separate allegation, charged in Count VI, that
22 Mr. Souza forged a May 9, 2007 letter giving him authority to record these documents. (*Id.*)

23 Count IV alleges that, between October 22, 2008, and August 11, 2009, Mr. Souza,
24 personally and through his attorney, sent threatening letters in an attempt to extort money out of
25

26 ¹ The Grand Jury Transcript states that the Grand Jury hearing was conducted on April 26th, and 27th, of
27 2012. However, the indictment was filed on March 29, 2012. Defense counsel believes that the date listed
28 on the Grand Jury Transcript is incorrect. The date of the Grand Jury hearing was most likely in March of
2012.

1 Malik, in violation of Penal Code section 519. (*See Exhibit A.*) Specifically, the People argued to
2 the grand jury that because Mr. Souza recorded the deeds of trust on Malik's property without the
3 legal authority to do so, hindering Malik's ability to refinance the loans on those properties, the
4 demands made by Mr. Souza and his attorney became illegal threats. (*See GJT*, pp. 46-50, 128; *see*
5 *also GJE*, #60.) Based upon Counts I through VI, the prosecution made a special allegation that, in
6 the commission of the offenses, the defendant intentionally took or damaged in excess of three
7 million two hundred thousand dollars, in violation of section 12022.6(a)(4) of the California Penal
8 Code. (*See Exhibit A.*) The People premised this special allegation on the assertion that Mr. Souza,
9 without authorization, placed deeds of trust on properties owned by Medcal and Van Der Meer,
10 thereby preventing Malik from refinancing these properties, ultimately resulting in foreclosure. (*See*
11 *GJT*, pp. 883-887.)

12 Warne was a central witness during the grand jury hearing, testifying extensively in front of
13 the grand jury as witnesses with personal knowledge of what transpired in this case. (*See GJT* pp.
14 494-585.) During the grand jury proceedings, the People alleged, through the testimony of Warne²,
15 Steven Stwora-Hail³, and Malik⁴, that Mr. Souza's deeds of trusts created a cloud on the title,

17 ² A few relevant excerpts from Warne's testimony include the following statements: "... those deeds of trust
18 were in the way of everything he was trying to do to refinance those properties, and the situation was
19 precarious financially. He was going to lose those properties. Q. Lose them because? A. Because the bottom
20 had fell out in the raw land real estate market and he had to refinance those properties, and he couldn't
21 refinance the properties with these deeds of trust on them." (*See GJT*, p. 507:9-18.) "Q. How were the
22 holding companies affected? Specifically, I'm referring to the deeds of trust. A. Yes, the deeds of trust were
23 a block in the way of any efforts on the part of those LLC's to refinancing the property through the banks.
The deeds of trust were there, and the banks were not going to give us any refinancing in light of Mr. Souza's
assertions." (*See GJT*, p. 511:14-20.) "We were trying to get refinancing, and the deeds of trust sat there and
stopped us at every turn. The bank was not willing to refinance the property with an individual out there
saying he owed \$4 million with deeds of trust securing the property. They were not going to do it." (*See GJT*,
pp. 532-533.)

24 ³ A few relevant excerpts from Mr. Stwora-Hail's testimony include the following statements: "[Ronald
25 Malik] wanted to refinance those loans, and in order to do so, he would have to give the bank clear title. He
26 had to get rid of now the clouds, the notes that Mr. Souza had recorded against the property which we
27 sometimes call clouds on the title. We needed to get those removed in order for Mr. Malik to get legitimate
28 loans and refinance the first that he already had." (*See GJT*, p. 180:14-21.) "Q. Had the loans with County
Bank and Premier Bank been refinanced as of that date? A. No, not possible once we already had the deeds
of trust and knew they were encumbering the property." (*See GJT*, p. 196:13-16.) "Q. What happened to the
loans that came from these two banks that were on the MedCal and Van der Meer properties? Were they paid

1 preventing any bank from considering refinancing the approximately \$17 million dollars in loans that
2 were outstanding on the Van Der Meer properties, and that the properties were ultimately lost in
3 foreclosure due to Malik's inability to acquire refinancing.⁵ Malik also testified that the Van Der
4 Meer properties financed by County Bank were worth \$200 million dollars, and specifically based
5 this valuation on the fact that he had bank appraisals justifying this valuation, but no appraisals were
6 ever turned over to the grand jury.⁶

7 b. Malik and Warne Previously Sued WestAmerica/County Bank, Presenting
8 Substantial Evidence That the Bank Was Responsible for Malik's Inability to Obtain
9 Refinancing and Warne Signed a Declaration under Penalty of Perjury Specifically
10 Stating That Mr. Souza Was Not an Issue Regarding Refinancing.

11 In November of 2008, Malik, represented by Warne, filed a lawsuit against Mr. Souza. (See

12 off? Did they get foreclosed? What happened? A. Ultimately, the Orange County bank loans, County Bank,
13 the FDIC closed them down, and they were transferred to West America who ultimately foreclosed on the
14 properties last year and took all of the Van der Meer -- all of the Van der Meer properties. Q. And MedCal?
15 A. MedCal, they are, I believe, still -- I know Ron still has control over two of the parcels, the corner parcel,
16 and one of the -- one of the parcels above. I think it's Parcel 1 that we showed on the map before, but I think
17 he -- I think he has extensions on those with Premier Bank. I can't recall what the maturity date is right now.
18 Q. Okay. We'll talk to Mr. Malik about that." (See GJT, pp. 208-209.)

19 ⁴ A few relevant excerpts from Malik's testimony include the following statements: "Q. Did you have
20 concerns about trying to get a temporary release on the deeds of trust so you could refinance? A. I was -- I
21 didn't have concern. I was mortified. I mean, I've got this gorilla of a threat there that's going to tie my hands,
22 and banks were just beginning to really tighten up, and then to our shock, there's these \$8 million in liens on
23 it. For what? We don't know, and -- but the loan-to-value ratios went way out of kilter. So there was just
24 simply no chance. Q. What do you mean by 'the loan-to-value ratios went way out of kilter'? A. The banks
25 were requiring a -- they would only make a 30 percent loan to value. If the properties worth a hundred
26 million, they'll loan thirty million. Used to be, on a hundred million, they'd loan 75, 80 million, but now, it
27 was down to 30." (See GJT, p. 664:5-22.)

28 ⁵ Steven Stwora-Hail is a former Downey Brand attorney that also represented Malik in connection with
his litigation with Mr. Souza.

⁶ During his testimony, Malik claimed that the Van Der Meer properties encumbered by the County Bank
loan were worth a couple of hundred million dollars. (See GJT, pp. 645-649.) To justify this valuation, Malik
specifically claimed that the banks had provided him with appraisals justifying this assessment. (See GJT,
p. 646:1-10) ("Q. Let's stop a second. You said a couple hundred million in value of property. How do you
pull a number like that out? A. It ain't out of thin air. Q. Tell us. A. There were several appraisals by banks,
bank appraisals, not mine, appraisers that I had nothing to do with, and those appraisals were given to other
appraisal firms for their review.") When discussing why Malik valued the property in the \$200 million range,
Malik repeated the claim that he had bank appraisals justifying the value of the property, stating "[t]here's
also three appraisals, not my appraisers, bank appraisers." (See GJT, pp. 647-648.)

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1 GJE, #64.) On August 11, 2009, the civil suit reached a settlement that required Mr. Souza to
2 immediately remove the deeds of trust on Malik's property. (See GJE, #67, 68.) On August 5, 2009,
3 just prior to reaching a settlement with Mr. Souza, Malik sued County Bank and WestAmerica
4 Bank.⁷ (See Exhibit B, August 3, 2015, Complaint re Malik v. WestAmerica.) The allegations made
5 by Malik and Warne in this suit are directly contrary to the allegation that Mr. Souza was responsible
6 for Malik's inability to obtain refinancing, and none of this material was presented to the grand jury
7 for consideration. (*Id.*)

8 In the complaint, filed less than a week before Mr. Souza removed the deeds of trust
9 encumbering Malik's property, Malik's alleges six causes of action against County Bank directly
10 related to Malik's refinancing efforts, including, *inter alia*, breach of contract, breach of implied
11 covenant of good faith and fair dealing, intentional misrepresentation, and negligent
12 misrepresentation. (See Exhibit B.) The complaint sets forth a longstanding series of events in which
13 Malik alleges that County Bank misrepresented their willingness to issue new financing on the Van
14 Der Meer properties, failed to cooperate with his refinancing efforts, and breached the terms of the
15 a loan extension set to expire in September of 2009, an expiration which occurred after Mr. Souza's
16 deeds of trust were removed from Malik's property. (See Exhibit B, pp. 2-11.) Malik specifically
17 alleged that County Bank failed to provide a promised appraisal for the properties, and, contrary to
18 Malik and Warne's testimony to the grand jury, that Malik had a lender waiting to finance the
19 properties, that the lender required County Bank's appraisal, and that without this appraisal Malik
20 could not obtain financing. (See Exhibit B, pp. 8-9.) In support of these assertions, Malik filed a
21 declaration under penalty of perjury stating that County Bank frustrated all of his efforts to obtain
22 refinancing from another lending institution by, among other things, failing to provide an arm's-
23 length appraisal necessary to obtain refinancing. (See Exhibit C, Declaration of Ronald J. Malik,

24
25
26 ⁷ While Malik's loans originated with County Bank, in February of 2009, County Bank was taken over by
27 the FDIC. WestAmerica Bank is the successor in interest to County Bank, and continued to service Malik's
28 loans after the FDIC takeover. It is interesting to note that the FDIC takeover of County Bank was premised,
in part, specifically upon the fact that the bank issued the loans to Malik in the first place, as the FDIC
alleged this violated sound lending practice due to Malik's limited tertiary income.

1 Filed August 5, 2009.)

2 On August 5, 2015, Malik also filed an application for a temporary restraining order to
3 prevent WestAmerica Bank from recording notices of default on Malik's loans. (See Exhibit D,
4 August 5, 2015, Memo of Points & Authorities in Support of OSC and TRO, 1:26-27.) The
5 application for a TRO is based upon the same allegations contained in the complaint, including the
6 allegation that "[i]n late 2007 and into early 2008, County Bank repeatedly represented to Malik that
7 the loans would be renewed though County Bank had internally known that it did not intend to do
8 so." (See Exhibit D, 1:20-22.) Malik's allegations against County Bank consists of conduct that
9 precedes the date that Mr. Souza is alleged to have recorded deeds of trust on Malik's property,
10 including the following:

11 Throughout early 2008, Malik continued to rely upon County Bank's representations.
12 In specific reliance upon County Bank's representations and assurances that a
13 renewal of the First Note and Second Note would not be a problem, Malik did not
14 seek and obtain refinancing of the First Note or Second Note, even though Malik had
the ability and opportunity to obtain such refinancing if it was necessary. Malik
forwent these refinancing opportunities simply because County Bank, by its words
and actions, led him to believe that there was no need to do so.

15 (See Exhibit D, 4:18-24) (internal citations omitted.)

16 Malik also stated that:

17 Moreover, in early 2008, the economic downturn was rapidly impacting real estate
18 values and the availability of financing was becoming significantly worse than just
19 months earlier. As an example, Malik had obtained a substantial loan upwards of
20 approximately \$8,000,000.00 (unrelated to the First Note and Second Note) as late
21 as December 2007. However, lenders and loans that were available to Malik in mid-
to-late 2007, were becoming less and less viable options by early 2008. Thus, County
Bank's delay in notifying Malik of its true intentions caused substantial detriment
and harm to Malik's financial circumstances as they related to the First Note and
Second Note.

22 (See Exhibit D, 5:21-28) (internal citations omitted.)

23 Malik further alleged that County Bank refused to cooperate or assist Malik's efforts to
24 obtain refinancing, stating:

25 For instance, Malik was in contact with one financial institution that attempted, on
26 several occasions, to obtain information from County Bank regarding refinancing.
27 County Bank, however, did not return calls from the financial institution. County
Bank's failure to cooperate in this regard negatively impacted Malik's options and
hindered his ability to obtain refinancing.

1 (See Exhibit D, 6:5-9) (internal citations omitted.)

2 Malik alleged that in September of 2008, before Mr. Souza's alleged deeds of trust were filed
3 on Malik's properties, Malik reached an extension agreement with County Bank, but that County
4 Bank "materially breached the agreement by failing to provide an appraisal of all properties." (See
5 Exhibit D, 1:25-27.) According to Malik, "[t]he appraisal was critical to [his] refinancing efforts."
6 (See Exhibit D, 1:27-28.) Malik even stated that he "had one lender that was specifically waiting for
7 the appraisal ..." (See Exhibit D, 8:1-2.) "This appraisal was obviously crucial to Malik's efforts in
8 that it would be required either in connection with refinancing or a sale of any properties." (See
9 Exhibit D, 7:10-11) (internal citations omitted.) Malik filed a declaration under penalty of perjury
10 attesting to the facts that formed the basis of the complaint and TRO application. (See Exhibit C.)

11 In opposition, WestAmerica Bank disputed Malik's factual assertions and otherwise asserted
12 defenses to the allegations. (See Exhibit E, August 14, 2009, Memorandum of Points and Authorities
13 in Opposition to Order to Show Cause Re: Preliminary Injunction.) WestAmerica stated that County
14 Bank offered an extension to Malik in the spring of 2008, but that Malik refused the extension
15 because he did not like the terms of the loan. (See Exhibit E, p. 4:1-9.) According to WestAmerica,
16 prior to Mr. Souza placing deeds of trust on these properties, Malik submitted loan applications to
17 other institutions, which were turned down in July of 2008, at which time Malik's payments to
18 County Bank were already four months past due, and County Bank already sent a default letter to
19 Malik. (*Id.* at 4:14-16.) At that time, County Bank granted Malik an extension until December of
20 2008 to give him an opportunity to refinance his loans. (*Ibid.*) Malik did not make any of the
21 payments agreed to in the extension agreement, which required a principal down payment of
22 \$1,000,000, but Malik's threats to sue County Bank afforded him a further extension until March
23 of 2009. (*Ibid.*) WestAmerica alleged that Malik changed the terms of the agreement without
24 WestAmerica's approval, a change that WestAmerica referred to as "tantamount to fraud," and
25 alleged that Malik ultimately refused to make any payments owed to WestAmerica, even alleging
26 that Malik went as far as to withdraw money from escrow after being informed that the amount was
27 insufficient. (See Exhibit E, pp. 8-11.) According to WestAmerica, Malik's failure to live up to his

1 obligations under the terms of his loan and extension agreements was the real reason the bank filed
2 the notice of default that eventually resulting in a foreclosure action. In their own words:

3 It is clear that Mr. Malik is either unable or unwilling to live up to his contracts and
4 commitments to [WestAmerica Bank]. It is equally clear from the many prior
5 statements and threats by Mr. Malik over the past 18 months and the specious
allegations and mischaracterizations contained in this action that he will do or say
anything to delay the inevitable foreclosure.

6 (See Exhibit E, p. 11:7-11.)

7 In response to WestAmerica Bank's opposition, at a time after Mr. Souza's deeds of trust
8 were removed, Warne, Malik's chief litigator, filed a deceleration under penalty of perjury laying
9 the blame for Malik's inability to obtain refinancing solely on County Bank, and specifically refuted
10 any claim that Mr. Souza had any impact on Malik's ability to obtain refinancing. (See Exhibit F,
11 Declaration of William Warne, Filed August 24, 2009.) In this sworn declaration, Warne specifically
12 addressed why it was the bank, and not Mr. Souza, that prevented Malik from obtaining the
13 refinancing he needed, unequivocally stating that "Souza was not an issue regarding refinancing."

14 (See Exhibit F, p. 3:7.)

15 Unequivocally contrary to the testimony Warne provided to the grand jury, Warne declared as
16 follows:

17 Ms. Wineman is not correct when she states that I told her that the fraudulent deeds
18 of trust were the 'real reason' that Mr. Malik was unable to obtain financing on his
19 property. My discussions with her were carefully focused on the consequences to
20 WestAmerica in the event that it aided Mr. Souza after being fully apprised of his
21 criminal actions. Mr. Souza's scheme was so blatant, the forged signatures so
22 obvious, and his claims for payment so absurd, that Mr. Malik was able to minimize
23 the negative impact of Mr. Souza's criminal actions to prospective lenders. For
24 instance, he was able to share with these lenders certain documents which clearly
25 showed that Mr. Souza had cut and pasted Mr. Malik's actual signature from the
26 2007 document to a fabricated 2003 letter. Indeed, I shared the same information
27 with Ms. Wineman and her own notes therefore reflect that she also viewed the deeds
28 as forgeries. **Souza was not an issue regarding refinancing.** Money from a new
loan would be set aside in escrow or with the court until litigation was completed or
settled. The new funding source would get clear titled. Thankfully, these deeds of
trust were removed by defendant Souza and the case was settled on the first day of
trial.

In any event, while Mr. Malik was successful in minimizing the importance of Mr.
Souza's deeds of trust, he lacked what he needed -- a bank directed, arms length
appraisal, as promised by County Bank. Any appraisal commissioned by him would
not have the strength and effectiveness as the Bank's appraisal, which was precisely
why County Bank's promise of a bank directed appraisal was so critical to his

1 refinancing efforts.

2 ...

3 Indeed, in addition to the Extension Agreement's own recitals, the record
4 demonstrates that Ms. Wineman interacted with Mr. Malik and his agents by e-mail
5 and phone in a manner which confirms that she understood the importance of the
6 appraisal to Mr. Malik, as she promised time and time again that the Bank would
7 provide the appraisal to Mr. Malik within a certain amount of time, only to repeatedly
8 fail to follow through on those representations.

9 ...

10 Finally, the fact that Mr. Malik was on the verge of obtaining a commitment letter
11 from one lender, as discussed in Ms. Wineman's declaration, does nothing to
12 diminish the fact, as revealed by the declarations of Irwin Schier and Michael
13 Dunbar, that there were a number of lenders who were unwilling to move forward
14 with refinancing without the promised bank directed appraisal. Indeed, Mr. Schier
15 expressed confidence that he would have obtained financing had the Bank followed
16 through on delivering its promised appraisals.

17 (See Exhibit F, pp. 3-4) (emphasis added.)

18 Malik produced declarations from additional individuals, including Irwin Schier ("Schier"),
19 to establish the necessity of obtaining an appraisal from County Bank in order to secure refinancing.
20 Schier stated that he arranged financing for Malik, but that the appraisal was essential to any new
21 loan. (See Exhibit G, August 17, 2009, Declaration of Irwin Schier, pp. 2-3.) Schier declared as
22 follows:

23 I initially met Ronald Malik through a financial consultant named Michael Dunbar,
24 who introduced me to Mr. Malik in or about February 2008. . . . After discussing my
25 background, Mr. Malik asked me to help him obtain funding for his project.

26 ...

27 Receiving from County Bank its promise appraisal was absolutely critical to my
28 efforts to secure new financing for Mr. Malik during the time period we had under
County Bank's extension. An independent, bank directed, arms length appraisals was
essential to any prospective lenders, as it serves as the basis for any potential loan.

On a variety of occasions, I discussed with Ms. Wineman the status of County Bank's
appraisal During these conversations, I made it clear that we had parties
interested in providing funding to Mr. Malik's project but that the appraisal was
essential to any new loan.

...

The Bank's promised appraisal was critical to any refinancing.

...

During this same period, I had a number of interested lenders lined up to refinance
Mr. Malik's properties, including the Owens Finance, Providence Capital, and
Pinnacle Realty. These entities were extremely interested in Mr. Malik's project, and
my efforts to secure financing from one of the entities hinged upon the provision of

1 a fresh, arms length appraisal from County Bank. I am confident that if County Bank
2 had followed through on its promise to provide an appraisal, Mr. Malik would have
ultimately obtained financing.

3 (See Exhibit G, pp. 2-3.)

4 Malik also produced a declaration from Michael Dunbar ("Dunbar"), in which Dunbar also
5 stated that he obtained financing for Malik, but similarly claimed that any financing required County
6 Bank's arm's-length appraisal. (See Exhibit H, August 18, 2009, Declaration of Michael Dunbar.)
7 In that declaration, Dunbar stated the following:

8 I was introduced to Ron Malik in January 2008 by Bill Martin, an employee of
9 County Bank, who thought I might be able to help with some of his financial and
construction projects. After speaking with Mr. Malik, I learned that there was some
10 tension with County Bank, as Ron explained that County Bank was refusing to
extend his loans as previously promised. We immediately began looking for
11 replacement financing, and I introduced Mr. Malik to Irwin Schier, a commercial
loan agent, to assist with that effort. I also agreed to help Mr. Malik with this task,
and searched for lenders.

12 In the context of this effort, I was working with a company called FCI Commercial
13 Capital, which was connected with JHR Group, Inc, a company with funds to loan
for commercial purposes. FCI Commercial Capital was interested in Mr. Malik's
14 project and had funds available through JHR Group, Inc., but were insisting on
receiving an updated appraisal.

15 (See Exhibit H, p. 2:1-11.)

16 On August 31, 2009, the Court heard argument from the parties regarding the preliminary
17 injunction requested by Malik. (See Exhibit I, August 31, 2009, Reporter's Transcript of
18 Proceedings, Malik v. WestAmerica, Hearing on Motion for a Preliminary Injunction.) During this
19 hearing, the defendant, WestAmerica, made it clear that Malik simply wasn't making any of the
20 payments he'd agreed to with respect to the extensions he had received or the interest owed on the
21 debt. (*Id.* at pp. 6-8.) Specifically, WestAmerica, represented by attorney Joshua Daniels, stated the
22 following:

23 We dispute their allegations that Mr. Jordan committed a misrepresentation. It was
24 simply, as stated in his declaration, a realization that there were still several months
of interest owing that had not been paid, and there's been several months that have
25 gone by with no payments. There was never an agreement to – you know, that Mr.
26 Malik can forgo paying his additional monthly payments to the Bank when the
extension was agreed upon, and that was brought to their attention, and he chose to
remove the check from escrow and not provide any additional money.

27 ...
28 What we're dealing with is simply a failure to make payments to the Bank, that is

1 costing them.

2 ...
3 The Bank is willing to amend its notices, send those out this week. That will, in
4 effect, give another three months of nothing happening before the Bank can even
5 move forward. And if Mr. Malik is unable to continue making payments or be in
6 arrears, then we'll be looking at moving on the foreclosure, right, but there is simply
7 no reason for an injunction, especially when there's no likelihood of success on the
8 merits.

9 ...
10 The – the issue of whether an injunction should be granted I find interesting, because
11 today is the last day of when the extension would have run. I mean, today is it. He
12 would have had a full benefit of the bargain through the end of this month, nothing
13 beyond it. And to come into court now and say, Well, I negotiated an extension
14 through the end of this month, and I'm having trouble getting the financing, and I
15 think the Bank did a lot of bad things, and now I want an unlimited extension – that
16 was never negotiated, never been paid for and, frankly, is a windfall if the Court
17 allows them to do this.

18 ...
19 Frankly, we're not going to do anything but amend the notices, as we suggested, and
20 he'll get three additional months, and he'll have time to either work out another
21 agreement with the Bank or obtain additional lending.

22 And if – I'll close on this. If the Court is inclined to give him the additional time that
23 he never bargained for, never paid for, we request that he bring up the interest
24 payments that are in arrears, going back to December of last year. He did make a
25 \$250,000 payment, I believe, in February, but that still leaves over \$600,000 in
26 interest that is owed. We request that he be ordered to come current and make the
27 monthly payments going forward. That's all the Bank wants.

28 (*Id.* at pp. 6-15.)

29 The court requested to know why WestAmerica considered the loan to be a high-risk loan,
30 and WestAmerica informed the court that Malik's \$17 million loans had been in default for over
31 seven months, the total amount of payments outstanding was \$628,366.37. (*Id.* at 8:13-23, 16:17-22.)
32 In light of WestAmerica's representations, and the argument presented by Warne, the court made
33 the following comments;

34 I mean, your client hasn't been making any payments. That's not a good thing, and
35 he shouldn't get a free ride.

36 ...
37 And I hate to see – I mean, if the Bank can be made whole, kept current, and your
38 client gets some time to do whatever arrangements he needs to get the financing, he
39 can avoid a catastrophe. But from my point of view, I'm fully prepared to deny this
40 preliminary injunction. I would be tickled pink if he can meet this financial
41 obligation of the six hundred and twenty-eight thousand three hundred and
42 something, and keep the payments current; and then we'll get you a trial date, get you
43 your injunction, and we can go forward.

44 (*Id.* at 16-19.)

1 Ultimately, the court asked if Malik was prepared to pay the make the payments on his loan
2 obligations, and make his accounts current, but Malik simply wasn't able to make the payments on
3 his loan obligations, and the court denied the requested injunction.⁸ (*Id.* at 26-27.)

4 c. For over a Year, Warne Refuses to Allow Malik to Disclose Documents Responsive
5 to a Lawfully Issued Subpoena, Even after the Defense and People Agree to Limit the
6 Request to Items That Both the Defense and the People Agree Are Relevant and
7 Should Be Produced.

8 On July 30, 2014, Mr. Souza, in preparing his defense to the charges, prepared and served
9 several subpoenas duces tecum on Malik and his entities, Dumas International, Medcal, and Van Der
10 Meer. (*See* Declaration of Counsel, ¶ 11.) Many of the requested documents address the questions
11 of causation and valuation aspects of Malik's claim that Mr. Souza caused the loss of his properties.
12 (*Id.*) The subpoenas requested documents such as appraisals, foreclosure documents, applications
13 for refinancing, and other documents which would establish the truth of Malik's credit situation and
14 the circumstances of the foreclosure of his properties. (*Id.*) Since issuing these subpoenas in the
15 summer of 2014, Mr. Souza, and the People, have been unsuccessfully attempting to work with
16 Warne to obtain disclosure of documents relevant to the allegations made in this case. (*Id.*)

17 On or about August 8, 2014, Warne, on behalf of Malik, filed a motion to quash these
18 subpoenas, arguing that the subpoenas are overbroad and abusive, and that there is insufficient
19 support for the requested documents. (*See* August 8, 2014, Motion to Quash.) Warne also argued that
20 there was a procedural defect in service of the subpoena. (*Id.*) On August 25, 2014, Mr. Souza filed

21 ⁸ In addition to the perjury committed by Warne with respect to the losses suffered by Malik, and Mr.
22 Souza's responsibility for those losses, Warne also misled the grand jury in a discussion of the civil suit
23 between Malik and Mr. Souza. Warne described in detail how Mr. Souza opposed Malik's motion for a
24 preliminary injunction, but that Mr. Souza's declaration in opposition to Malik's motion caused the judge
25 to rule against Malik. (*See* RT pp. 519-523.) Warne describes the hearing as a close call, and that the judge
26 put Malik on the fast track to trial, but that Mr. Souza's declaration was the reason the injunction was not
27 granted. (*Ibid.*) The truth, however, is simply that no such hearing took place. Warne, on behalf of Malik,
28 requested that the matter be withdrawn from the court's calendar, rather than proceed with the hearing. (*See*
Exhibit J, December 8, 2008 Letter to Judge Mayhew.) In this letter, Warne informs the judge that Malik
could not secure the appropriate bond required to proceed with the hearing, and that Malik was withdrawing
his request. (*Ibid.*) Warne's testimony provided a false emphasis on Mr. Souza's responsibility for being
unable to seek legal intervention, and Warne again testified falsely to the grand jury about Mr. Souza's
responsibility for events that transpired in this case.

1 a motion to recuse Downey Brand, and Warne, on the basis that Warne, a witness, representing
2 Malik, another witness, in connection with the production of documents entails a conflict of interest,
3 as the documents might challenge Warne's testimony.⁹ (See August 25, 2014, Motion to Disqualify
4 and Recuse Downey Brand.)

5 On August 25, 2014, the parties appeared before this Court to discuss issues related to the
6 subpoenas. At that time, Warne, the People, and the defense agreed that the defense would meet at
7 confer with the People, and the People would meet and confer with Warne, in order to facilitate an
8 ongoing dialogue to attempt to resolve any area of dispute as to what materials should be produced.
9 (See Reporter's Transcript of Proceeding, August 25, 2014, p. 5:21-28.) Based upon Warne's
10 arguments, Mr. Souza filed a lengthy explanation under seal addressing the bases for each requested
11 item in the subpoenas, as well as later filing an abridged version for the Court's convenience. On
12 October 6, 2014, the People and the defense stated that there were ongoing efforts to meet and confer
13 in order to eliminate any disputes, but that there had been delays due to the schedule of Warne and
14 the People. (See Reporter's Transcript of Proceeding, October 6, 2014, pp. 4-5.) On October 23,
15 2014, the parties reiterated their continuing efforts to meet and confer to limit the areas of dispute,
16 and the parties indicated that they expected Malik to provide responsive documents by November
17 25, 2014. (See Reporter's Transcript of Proceeding, October 23, 2014, pp. 2-3.)

18 Prior to November 25, 2014, Malik produced some documentation in response to Mr.
19 Souza's subpoenas, but this incomplete production did not address a substantial amount of the
20 material requested in the subpoenas. (See Reporter's Transcript of Proceeding, November 25, 2014,
21 pp. 4:8-13.) On November 25, 2014, the defense issued new subpoenas to cure any defect related to
22 service, as well as to modify the items requested to avoid several of Warne's objections. (See
23 Declaration of Counsel, ¶ 17.) At that time, the parties agreed to continue Malik's subpoena
24 compliance date to January 13, 2015, in order to provide additional time to narrow areas of dispute
25 and limit the issues requiring litigation. (See Reporter's Transcript of Proceeding, November 25,

26
27 ⁹ Mr. Souza's motion to disqualify Downey Brand has not been heard by this Court. This motion has been
28 continued along with Malik's compliance date to provide documents responsive to the subpoenas. Mr. Souza
intends this motion to disqualify to supplement and replace his previously filed motion to disqualify.

1 2014, pp. 1:12-16, 3:6-9, 4:14-18.) On December 11, 2014, the compliance date was continued from
2 January 13, 2015 to January 28, 2015, in order to give the People more time to work with Warne on
3 these discovery matters. (*See* Reporter's Transcript of Proceeding, December 11, 2014, pp. 2:27-3:2.)

4 Over the next five months, the People attempted to meet and confer with Warne to obtain
5 additional relevant documents responsive to Mr. Souza's subpoenas, and the People and the defense
6 repeatedly continued the date for Malik to comply with the subpoenas or hold a hearing. (*See*
7 Declaration of Counsel, ¶¶ 17-19.) On April 7, 2015, after not receiving material responsive to the
8 vast majority of Mr. Souza's subpoenas, defense counsel met with the People to further narrow the
9 discussion to only items subpoenaed that both the defense and the People agreed were relevant and
10 should be produced. (*Id.* at ¶ 20.) During this meeting, the People and defense agreed that a number
11 of specific items requested were relevant and should be produced, and that the first step was to
12 obtain a representation from Malik and Warne whether the documents exist. (*Ibid.*)

13 During the over year long period of time that the People have been attempting to acquire
14 additional documentation from Warne, the People provided the defense with reasons why it was
15 difficult to get Warne to comply with the simple request to review the items that the parties have
16 agreed should be produced. (*See* Declaration of Counsel ¶¶ 22-33.) The People stated, among other
17 things, that Warne was difficult to get in touch with because of his busy schedule, that every time
18 that a meeting occurred Warne needed to be re-briefed on the issues, and that Warne was treating
19 any meeting with Nix to discuss the subpoenas as a low priority. (*See* Declaration of Counsel ¶¶ 25,
20 32.) Ultimately, after an initial incomplete disclosure in 2014, Warne has essentially refused to meet
21 with the People to even discuss the documents that both the People and the defense agree are
22 relevant and should be produced. (*See* Declaration of Counsel ¶¶ 14-33.)

23 d. Warne has a history of misconduct and alleged misconduct in apparent efforts to
24 obtain an advantage in litigations he is conducting.

25 Warne and Downey Brand have a history of misconduct in related and unrelated cases. In
26 September of 2009, during the lawsuit filed by Malik against his lenders, the same lawsuit discussed
27 above, WestAmerica accused Warne of violating Rule 2-100 of the Rules of Professional Conduct.
28 (*See* Exhibit K, September 17, 2009, Letter from WestAmerica to William Warne.) The letter

Mr. Souza's Motion to Disqualify and Recuse Downey Brand, LLP and William Warne from Any Further Representation
of Ronald Malik, Edna Malik, Dumas International, LLC, Van Der Meer, LLC and MedCal, LLC

1 accuses Warne of contacting Nancy Wineman, an employee of WestAmerica, and a witness in the
2 present case, without consent. (*Id.*) WestAmerica requested that Warne either voluntarily withdraw
3 from the matter, and stated that this prohibited conduct would be grounds for disqualification
4 motion. (*Id.*) This is not the only time that Warne and Downey Brand have violated their ethical
5 obligations.

6 In November of 2014, in a completely unrelated matter, the United States of America moved
7 to disqualify Downey Brand, specifically naming Warne, a partner and one of the primary litigators,
8 in the matter of *United States v. Sierra Pacific Industries, Inc., et. al.* (See Exhibit L, Eastern District
9 of California Case No. 2:09-CV-2445, Dkt. 613.) In that matter, the United States accused Warne
10 of engaging in a series of “egregious professional misconduct.” (*Id.* at 1:3.) According to the United
11 States, Warne and Downey Brand, for the third time in the same case, “engaged in professional
12 misconduct in their dealings with United States’ agents.” (*Id.* at 1:20-21.)

13 In the first instance, the district court found that Downey Brand attorneys “violated Rule 2-
14 100 of the California Rules of Professional Conduct when a Downey Brand attorney misrepresented
15 himself as only an interested member of the public in order to obtain evidence *ex parte* from line
16 employees” of the plaintiff, “and that both that attorney and lead counsel, who instructed him ‘to stay
17 confidential,’ engaged in conduct degrading and impugning the integrity of the Court and interfering
18 with the administration of justice” (*Id.* at 2:28-3:2.) The district court believed that it was
19 “important to make clear that it is troubled by [Downey Brand’s] behavior and decision with respect
20 to this particular incident.” (See Exhibit M, Eastern District of California Case No. 2:09-CV-2445,
21 Dkt. 124, p. 6:12-14.) The district court believed that Downey Brand’s conduct was attributable to
22 the fact that “[z]ealous advocacy overcame professional responsibility in this particular instance. It
23 should not, and the Court is certain, will not happen again.” (*Id.* at 7:14-17.)

24 But, as the Government stated in it’s motion to disqualify Warne and Downey Brand, “it did
25 happen again.” (See Exhibit L, p. 3:11.) In November of 2011, Judge Brennan of the Eastern District
26 again found that Downey Brand violated Rule 2-100 by “engaging in forbidden *ex parte*
27 communications through a retained expert.” (*Id.* at 3:11-13.) Warne, among other attorneys, met with
28

1 the expert in advance and specifically approved of the expert contacting federal agents to gather
2 evidence in that case. (*Id.* at 3:11-15.) The “Court found they had intentionally frustrated the intent
3 of a protective order entered by the Court after the first improper contact.” (*Id.* at 3:15-17.) In order
4 to address Downey Brand’s argument that they did not violate the court’s order when they again
5 violated rule 2-100, the district court stated:

6 It is true that this court’s order, while finding that [Downey Brand] had violated Rule
7 2-100 by the prior ex parte contacts, did not contain language explicitly prohibiting
8 counsel from violating the rule again in the future. Such a directive should hardly be
9 necessary. The undersigned trusted that counsel would conform their conduct to the
10 analysis set out in the opinion and the opinion issued by Judge Mendez. It appears,
11 regrettably, that such trust may have been misplaced.

12 ...

13 Now, the court amends its previous order to clearly and unmistakably include the
14 following directive: [Downey Brand] shall comply with all applicable ethical rules,
15 including, but not limited to, Rule 2-100; and shall ensure that their experts or anyone
16 else acting on behalf of [Downey Brand] do not engage in conduct that, if done by
17 an attorney, would violate Rule 2-100.

18 (*See* Exhibit N, Eastern District of California Case No. 2:09-CV-2445, Dkt. 326, p. 11:11-
19 12:7.)

20 Apparently, this order did not deter Warne and his associates. According to the United States,
21 after the case settled in 2012, an unnamed member of Downey Brand contacted former counsel for
22 the government, Robert Wright, Esq. (*See* Exhibit L, p. 4:13-21.) Wright prepared a declaration on
23 Downey Brand pleading paper, with Warne’s name at the top, detailing his work as counsel for the
24 United States in this matter. (*Ibid.*) This declaration disclosed “(1) confidential work performed by
25 counsel for the United States and other members of its litigation team ... (2) confidential thoughts
26 and legal strategies of counsel for the United States ... and (3) confidential requests for legal advice
27 by the U.S. Attorney’s Office and its Civil Division Chief and legal advice they received in
28 response.” (*Id.* at 5:15-19.) The United States asserted that Wright breached his duty of
confidentiality, loyalty, and engaged in unethical conduct with the assistance and encouragement of
Downey Brand, stating:

Wright was counsel for the United States in this very case. His duties to his client
should have been obvious to anyone. But he secretly met with defense counsel and
gave them information and a declaration about his work for the Government on this
case and even others. Wright obviously breached his duty to preserve his client’s

1 confidences and secrets “at every peril” and to do nothing injurious to his former
2 client or use information acquired by virtue of his previous relationship as counsel
3 in this case. *See* Cal. Bus. & Prof. Code. § 6068(e); *Wutchumna Water Co. v. Bailey*,
4 216 Cal. 564, 572-74 (1932).

5 By meeting with Wright, accepting his information, preparing his declaration, and
6 filing it in the public record, defense counsel breached their ethical obligation not to
7 “knowingly assist in, solicit, or induce” Wright’s violation of the State Bar Act. Cal.
8 R. Prof. Conduct 1-120. They also knowingly invaded privilege. This is actually the
9 third time in this very case that these same attorneys have engaged in professional
10 misconduct in their dealings with United States’ agents. The Court has already found
11 two previous violations. (Dkt. 92, 124, 326.) The last time this occurred, defense
12 counsel narrowly avoided a contempt finding and were specifically ordered “to
13 comply with all applicable ethical rules.” (Dkt. 326.)

14 The United States wants to forcefully address defendants’ allegations as soon as the
15 Court sets a briefing schedule.

16 (*Id.* at 1:10-26.)

17 The United States asserted that Downey Brand violated the ethical rule that specifically
18 forbids counsel from “assisting, soliciting, and inducing Wright’s breach of confidentiality and
19 loyalty.” (*Id.* at 10:19-20.) The United States stated that:

20 The care taken in [Downey Brand’s] papers to avoid naming the lawyers who dealt
21 with Wright is striking. But *someone* definitely solicited and induced a violation
22 when ‘defense counsel’ contacted Wright - knowing that he previously represented
23 the United States - to talk to him about his work on this fire case and others Over the
24 course of an unknown number of meetings, nameless ‘counsel’ elicited fifteen pages
25 of improper disclosures that any first year law student would know were forbidden
26 by the most fundamental duties of our profession. Since the declaration is on Downey
27 Brand pleading paper bearing the names William Warne ... and is notarized by an
28 employee of Downey Brand, it appears that at least these four attorney’s solicited,
induced, and assisted Wright in disclosing the United States’ secrets and confidences
and testifying against his former client. Then they wrote a brief citing Wright’s
improper disclosures fifty times, released the declaration to the press two days before
filing it, and filed the declaration and their brief on the public record.

Counsel’s violation was so obviously wrong and egregious that one cannot find a
precedent for this kind of misconduct. The defendant’s moving papers clearly show
attorneys Warne ... knowingly ‘solicited’ and ‘assisted in’ Wright’s violation of the
duties of loyalty and confidentiality.

(*Id.* at 10:21-11:15.) (Internal citations omitted.)

Ultimately, the district court did not rule on the disqualification motion. Instead, the district
court denied the Downey Brand’s motion to set aside the judgment and reopen the case, and, as such,
denied the motion to disqualify as moot. (*See* Exhibit O, Eastern District of California Case No.
2:09-CV-2445, Dkt. 640, p. 1:17-25.)

1 III.

2 **WILLIAM WARNE AND DOWNEY BRAND LLP MUST BE DISQUALIFIED FROM**
3 **REPRESENTING MR. AND MRS. MALIK, AND THEIR ENTITIES, IN CONNECTION**
4 **WITH THE CRIMINAL ACTION AGAINST MR. SOUZA**

5 a. Relevant Statutes and Case Law

6 This Court maintains the inherent authority to disqualify an attorney in order to “control in
7 furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner
8 connected with a judicial proceeding before it, in every matter pertaining thereto.” (California Code
9 of Civil Procedure §128(a)(5); *see also Kirk v. First American Title Ins. Co.* (2010) 183 Cal. App.
10 4th 776, 791-792 (*quoting People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.*
11 (1999) 20 Cal.4th 1135, 1145) (internal quotations omitted).) Motions to disqualify may “implicate
12 several important interests,” requiring judges to “examine the motions carefully to ensure that
13 literalism does not deny the parties substantial justice.” (*Kirk*, 183 Cal. App. 4th at 792.) Courts
14 maintain the power and duty to disqualify an attorney from participation in a case when the broader
15 societal interests in the effective administration of justice and maintenance of the public’s
16 confidence in the integrity of the legal system are implicated. (*See, e.g., In re Paradyne Corp.* (CA11
17 1986) 803 F.2d 604, 611, n. 16; *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238,
250-251 (CA2), cert. denied sub nom, *Roe v. United States* (1986) 475 U. S. 1108.)

18 There are two broad categories of cases in which courts have routinely held disqualification
19 of an attorney to be appropriate; those include cases involving a conflict of interest or attorney
20 misconduct. (*See, e.g., Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 (attorney
21 disqualified due to conflict of interest); *Clark v. Superior Court* (2011) 196 Cal.App.4th 37
22 (disqualification due to violation of rules of professional conduct); *see also Wheat v. United States*
23 (1988) 486 U.S. 153, 158, fn 2.¹⁰) When ruling on a disqualification motion “[t]he paramount
24 concern must be to preserve public trust in the scrupulous administration of justice and the integrity
25 of the bar.” (*Speedee, supra*, 20 Cal.4th at 1145; *see also County of Los Angeles v. Superior Court*
26

27 ¹⁰ *Wheat* upheld a district court’s denial of a defendant’s waiver of his attorney’s conflict of interest in order
28 to maintain the integrity of the legal process.

1 (1990) 222 Cal.App.3d 647, 658.) The right to counsel of choice “must yield to ethical
2 considerations that affect the fundamental principles of our judicial process.” (*Ibid.*) “Where the
3 ‘asserted course of conduct by counsel threatens to affect the integrity of the adversarial process, [the
4 court] should take appropriate measures, including disqualification, to eliminate such taint.”
5 (*Richards v. Jain* (2001) 168 F.Supp.2d 1195, 1200 (*quoting MMR/Wallace Power & Indus., Inc.*
6 *V. Thames Assoc.* (D. Conn. 1991) 764 F. Supp. 712, 718).) There is “a common theme in the cases
7 related to disqualification of attorneys by trial courts. If the status or misconduct which is urged as
8 a ground for disqualification will have a continuing effect on the judicial proceedings before the
9 court, it is justified in refusing to permit the lawyer to participate in such proceedings.”
10 (*Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597, 607.)

11 The California State Bar’s Rules of Professional Conduct govern attorney discipline, and they
12 do not create standards for disqualification, but the rules can provide guidance to courts in analyzing
13 questions of disqualification of attorneys. (*Kirk*, 183 Cal. App. 4th at 792 (citing *Hetos Investments,*
14 *Ltd. v. Kurtin* (2003) 110 Cal.App.4th 36, 47).) While the circumstances of the present conflict of
15 interest are somewhat unique, there are several Rules that provide guidance to this Court in
16 addressing these issues.

17 Rule 5-200 is particularly important under the present circumstances, as it specifically
18 prohibits an attorney from misleading a judge, judicial officer, or jury, in any matter. Rule 5-200
19 states: “In presenting a matter to a tribunal, a member (A) Shall employ, for the purpose of
20 maintaining the causes confided to the member such means only as are consistent with truth; (B)
21 Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact
22 or law ...” (*See California Rules of Professional Conduct, Rule 5-200(A)-(B).*) The California
23 Business and Professions Code similarly prohibits conduct which would be considered either
24 dishonest or an act of moral turpitude, stating:

25 The commission of any act involving moral turpitude, dishonesty or corruption,
26 whether the act is committed in the course of his relations as an attorney or
27 otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause
28 for disbarment or suspension. If the act constitutes a felony or misdemeanor,
conviction thereof in a criminal proceeding is not a condition precedent to disbarment
or suspension from practice therefor.

1 (Cal. Bus. & Prof. Code §6106.)

2 In this case, the conduct consists of an act that qualifies as perjury under California Penal
3 Code section 118, which states, in pertinent part:

4 Every person who, having taken an oath that he or she will testify, declare, depose,
5 or certify truly before any competent tribunal, officer, or person, in any of the cases
6 in which the oath may by law of the State of California be administered, willfully and
7 contrary to the oath, states as true any material matter which he or she knows to be
8 false, and every person who testifies, declares, deposes, or certifies under penalty of
perjury in any of the cases in which the testimony, declarations, depositions, or
certification is permitted by law of the State of California under penalty of perjury
and willfully states as true any material matter which he or she knows to be false, is
guilty of perjury. ...

9 (California Penal Code §118.)

10 Many of the rules of professional conduct are in place to protect the public confidence in the
11 legal system, and to promote the administration of justice, by restricting an attorney's ability to
12 undertake a representation in which they have an interest, *see, e.g.*, Rule 3-310(B)(4), act in a manner
13 which improperly affects the fact-finding process, *see, e.g.* Rules 5-220 and 5-310, or use the court
14 processes, or their position as an attorney, improperly, *see, e.g.* Rules 5-210 and 5-100. Importantly,
15 Rule 5-220 states that "[a] member shall not suppress any evidence that the member or the member's
16 client has a legal obligation to reveal or to produce." (California Rules of Professional Conduct,
17 Rule 5-220.)

18 Due process considerations also play a role in this Court's determination, as these
19 considerations take into account the complex and various factual circumstances which would
20 improperly influence the fact-finding process, improperly deny a defendant's ability to obtain
21 information relevant to the preparation of their defense, or undermine a defendant's ability to
22 confront witnesses, present a complete defense, or otherwise have a fair trial. (*See, e.g., U.S. v. Leal-*
23 *Del Carmen* (9th Cir. 2012) 697 F.3d 964 (deportation of illegal alien who is exculpatory witness in
24 a criminal case denied defendant due process); *U.S. v. Ramirez-Lopez* (9th Cir. 2003) 315 F.3d 1143,
25 withdrawn by *U.S. v. Ramirez-Lopez* (9th Cir. 2003) 327 F.3d 829 (government moved to vacate
26 conviction after it deported witness whose testimony would have exculpated defendant, in violation
27 of due process and right to present complete defense); *Maxwell v. Roe* (9th Cir. 2010) 628 F.3d 486
28

(false testimony from informant required reversal of defendant's conviction); *Lunbery v. Hornbeak* (9th Cir. 2010) 605 F.3d 754 (exclusion of hearsay evidence that other person committed crime denied defendant right to present a meaningful defense); *Commonwealth of the Northern Mariana Islands v. Bowie* (9th Cir. 2001) 236 F.3d 1083, *amended*, (9th Cir. 2001) 243 F.3d 1109 (prosecutor's failure to investigate letter indicating cooperating perpetrators would commit perjury denied defendant due process); *Franklin v. Duncan* (9th Cir. 1995) 70 F.3d 75, *affirming and adopting Franklin v. Duncan* (N.D. Cal. 1995) 884 F. Supp. 1435; *Brady v. Maryland* (1963) 373 U.S. 83 (prosecution withholding material exculpatory evidence violated due process).

b. Warne's Misconduct and Conflict of Interest Require Disqualification

In the present case, Warne committed serious misconduct in connection with his testimony before the grand jury.¹¹ The continued representation of Malik, and his LLCs, as it relates to litigation surrounding the criminal charges filed against Mr. Souza, constitutes a conflict of interest, presents the appearance of impropriety, denies Mr. Souza due process of law, denies him the right to effectively cross-examine witnesses against him, and may deny him a fair trial. A conflict of interest can occur in any situation in which an attorney's loyalty to, or efforts on behalf of, a client are at odds with his other responsibilities and interests, including his own personal interests. (*People v. Doolin* (2009) 45 Cal. 4th 390, 417 (citing *People v. Cox* (1991) 53 Cal.3d 618, 653).) "Conflicts spring into existence in various factual settings." (*People v. Bonin* (1989) 47 Cal. 3d 808, 835.) It is a truism that a person cannot serve two masters simultaneously, and Warne has a serious conflict of interest as it relates to the representation of Ronald and Edna Malik, and their entities, in this matter.

Of critical importance is the fact that Warne testified falsely to the grand jury about Mr. Souza's affect on Malik's ability to obtain refinancing on his properties. This claim is made in

¹¹ The misconduct committed by Warne had a drastic effect on the presentation of evidence to the grand jury. If the grand jury had reason to believe that the testimony of Warne and Malik was false, the grand jury would have investigated and learned of additional exculpatory evidence. Mr. Souza filed a motion pursuant to California Penal Code §§939.7 and 939.71 addressing in greater detail the effects of the false testimony. Mr. Souza hereby incorporates his motion pursuant to California Penal Code §§939.7 and 939.71 into this motion to provide this Court with additional information.

1 pursuit of over \$200,000,000 in alleged losses. While Warne testified in front of the grand jury that
2 Mr. Souza's actions were directly responsible for Malik's inability to obtain financing, Warne also
3 prepared and signed a declaration under penalty of perjury in another proceeding in which he
4 dismissed any claim that Mr. Souza affected Malik's ability to obtain refinancing. When Warne
5 prepared and signed this declaration, the offending deeds of trust had already been removed from
6 Malik's properties. After the deeds of trust were removed, they could no longer affect Malik's ability
7 to obtain refinancing, and Warne declared in no uncertain terms that the deeds of trust did not affect
8 Malik's ability to obtain refinancing. Therefore, Warne's testimony before the grand jury can only
9 be described as a willful statement contrary to his oath on a material matter, knowing his testimony
10 to be false. In other words, Warne committed perjury.

11 Warne's past conduct in other cases shows that he is willing to violate the Rules of
12 Professional Conduct to advance the cause of the litigation he is pursuing. In the related suit against
13 Malik's lenders, Warne was accused by WestAmerica Bank of violating Rule 2-100 when he
14 contacted a member of the bank despite the fact that the Bank was represented by counsel. In the
15 Sierra Pacific case, the district court twice found that Downey Brand violated Rule 2-100, when
16 Warne's associates and experts, on separate occasions, contacted government employees despite the
17 fact that there was an ongoing litigation in which the government was represented by counsel.

18 On a third occasion in the same litigation, after the matter had settled, Warne attempted to
19 reopen the case using information he obtained by way of a gross violation of the Rules of Professional
20 Conduct. At that time, Downey Brand encouraged and assisted a former attorney for the United
21 States to reveal attorney-client privileged information and work product in an effort to undermine
22 the settlement agreement reached in that case. Due to this egregious misconduct, the United States
23 sought the disqualification of Downey Brand, and specifically named Warne, a partner, as one of the
24 participants in this violation. It appears that Warne and Downey Brand escaped the need to explain
25 the allegation that they had violated the Rules of Professional Conduct for the third time in the same
26 matter, but the history of Warne's conduct in all of these various cases shows Warne's continuing
27 disregard for the professional and ethical obligations of counsel when it otherwise suits his purpose.

1 Whether these acts of misconduct are motivated by professional or financial considerations is known
2 only to Warne, but Warne's history of misconduct gives this Court reason to question his ability to
3 confine himself to the requirements of the Rules of Professional Conduct, particularly given the trust
4 placed in counsel to turn over all responsive documents. In the matter presently before this Court,
5 Warne's professional, personal, and financial interest in this case presents an even greater ongoing
6 temptation to misuse his position as Malik's counsel for his own benefit.

7 Financial considerations may have served as the primary motivating factor for the dishonest
8 testimony of both Warne and Malik. Malik initially filed a lawsuit against Mr. Souza, resolving that
9 matter for the removal of the deeds of trust and a settlement of \$500,000. As this matter resolved,
10 Malik filed a lawsuit against his lender, WestAmerica, alleging that WestAmerica's actions
11 prevented Malik from obtaining refinancing. In that suit, WestAmerica acknowledged that Mr.
12 Souza's actions did not prevent Malik from obtaining refinancing. When this lawsuit did not end
13 favorably, Malik and Warne had an incentive to attempt to shift the blame from WestAmerica, or
14 even Malik himself, to Mr. Souza. Despite the specific claims made in the lawsuit against
15 WestAmerica, Malik and Warne are now claiming that Malik lost his property, over a year after Mr.
16 Souza removed the deeds of trust, due to Mr. Souza's actions, and that this caused \$200,000,000 in
17 losses. If successful, Malik could obtain a court order for restitution in this amount. Even if it would
18 be completely impossible to recover this amount from Mr. Souza, who, like most people, does not
19 possess \$200,000,000, Warne and Malik have already set their sights on deeper pockets.

20 Warne, on behalf of Malik, already filed a lawsuit against Mr. Souza's brokerage, Sperry Van
21 Ness, alleging their responsibility for the losses allegedly caused by Mr. Souza. (*See* Exhibit P,
22 October 22, 2010, Complaint in Malik v. Sperry Van Ness Commercial Real Estate.) In this lawsuit,
23 Malik's lender, Premier Valley Bank, filed a notice of lien against the proceeds of this suit, but
24 acknowledged that this lien would be subject to any prior attorney lien by Malik's counsel. (*See*
25 Exhibit Q, July 20, 2011, Notice of Lien.) In 2011, when Van Der Meer filed for bankruptcy, Malik
26 owed Downey Brand, LLC at \$659,554.00, and Warne is a partner at Downey Brand. (*See* Exhibit

1 R, May 11, 2011, List of Creditors.)¹² This figure is likely higher now after several years oWhile
2 defense counsel believes that this lawsuit has been dismissed, without prejudice, it appears that this
3 dismissal is only to wait for the resolution of the criminal action against Mr. Souza. (See Declaration
4 of Counsel ¶ 19.) During settlement discussions with the People, the People informed defense
5 counsel that the only settlement that would work would require a guilty plea to many, if not all, of
6 the charges. (*Ibid.*) The People explained that such a settlement would assist Malik in his lawsuit
7 against Mr. Souza's brokerage, and the People stated that this would be the only likely way that
8 Warne would be paid for his work for Malik. (*Ibid.*)

9 Therefore, it appears that Malik and Warne both have a substantial financial interest in the
10 outcome of this criminal proceeding. There is an interest in obtaining money directly from Mr.
11 Souza, in the form of restitution, and from deeper pockets in the form of a renewed lawsuit against
12 Sperry Van Ness. Malik appears to owe Downey Brand a substantial sum of money, and blaming Mr.
13 Souza for Malik's financial troubles provides Warne with an opportunity to collect this money. The
14 potential to continue the lawsuit against Sperry Van Ness and to recoup money owed to Downey
15 Brand may have provided Warne with the initial motivation to mislead the grand jury into believing
16 that Mr. Souza's actions caused losses to Malik.

17 Once Warne provided this false testimony to the grand jury, it became in his personal,
18 professional, and financial interest to prevent his misconduct from being discovered. An attorney's
19 credibility and reputation is unquestionably a necessary aspect of any successful law practice, and
20 it has been held "beyond peradventure that one's professional reputation is a lawyer's most important
21 and valuable asset." *Walker v. City of Mesquite* (1997) 129 F.3d 831, 832 (citing *Cooter & Gell v.*
22 *Hartmarx Corp.* (1990) 496 U.S. 384, 412 (Stevens, J., concurring)); see also *Akers v. County of San*
23 *Diego* (2002) 95 Cal. App. 4th 1441, 1456; *Younger v. Solomon* (1974) 38 Cal. App. 3d 289, 298;
24 *In re Williams* (1st Cir. 1998) 156 F.3d 86, 90; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133,
25 1138.) In this case, the conflict of interest stems from conduct that is so serious that it could

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27 ¹² This figure is likely much higher now as Downey Brand has continued to represent Malik for several
28 years after 2011. (See Declaration of Counsel ¶ 19.)

1 potentially result in criminal actions or threaten Warne's standing with the California State Bar.
2 Allowing the representation to continue threatens Mr. Souza's right to due process, and undermines
3 the integrity of the judicial system.

4 Warne's position as both a witness, and counsel for Malik, places him in an untenable
5 position, and he must be disqualified. Warne has a personal, professional, and potentially financial
6 conflict of interest in this case. As stated above, the existence of a conflict or the presence of
7 misconduct is grounds for disqualification, especially when it may have a continuing effect on the
8 judicial proceedings before the court. This standard is clearly met in the present case, as Warne has
9 an incentive to use his position as Malik's counsel to prevent his misconduct from being exposed
10 further.¹³ Warne is a witnesses to the events in this matter, and will undoubtedly be called as a
11 witness by the People at trial, but he has engaged in extremely unethical conduct by providing false
12 testimony to the grand jury. Pursuant to California Penal Code §118, Warne's false testimony can
13 be prosecuted as perjury, and pursuant to California Business and Profession's Code §6106, Warne
14 can be suspended or disbarred for his misconduct.

15 As Malik's counsel, Warne is in a position to affect the disclosure of documents that might
16 challenge his version of events, and stymie the production of any documents that further establish that
17 his testimony has been less than truthful. It is intolerable to allow an attorney, who is a witness to
18 the events of a criminal case, to be able to use his position as an attorney to influence another witness
19 regarding that witness's production of documents that may be used to attack the testimony of the
20 attorney. This conflict creates the specter of impropriety, particularly given the demonstrably false
21 testimony Warne provided to the grand jury. Mr. Souza is seeking records to defend himself against
22 the allegations contained in the Second Amended Indictment, and this includes records that would
23 assist him confront Warne at trial. Warne has a professional obligation not to attempt to suppress the
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25 ¹³ Rule 3-310(E) specifically prohibits an attorney from accepting employment adverse to the client or
26 former client where, by reason of the representation of the client or former client, the member has obtained
27 confidential information material to the employment. *See also Leversen v. Superior Court* (1983) 34 C3d
28 530, 538; Bus. & Prof. Code §6068. Separate and apart from the conflict of interest related to Warne's
misconduct, the Court should order disqualification of Downey Brand due to Downey Brand's prior
representation of Dumas International, LLC. This organization was formed and owned by Mr. Souza.

1 disclosure of documents that his client has an obligation to turn over, but this obligation is at odds
2 with his personal and professional interests. This conflict of interest exists by virtue of the
3 representation of one witness by another, but it is amplified by the misconduct at issue in the present
4 case, as evidence of perjury would carry serious personal and professional repercussions. This
5 conflict gives Warne a reason to use his position as counsel for Malik to affect his own cross-
6 examination by limiting the production of documents relevant to his testimony.

7 Further, the history of this case shows that Warne has exercised his position as Malik's
8 counsel in an unreasonable way, demonstrating extreme resistance to turning over relevant
9 documents in response to a lawfully issued subpoena. Documentary evidence which would shed light
10 on the truth or falsity of the allegations made against Mr. Souza is currently in Malik's possession.
11 These documents have not been produced to the defense or the People because of Warne's
12 unwavering objection to the production of documentation responsive to Mr. Souza's subpoena and
13 his unwillingness to meet with the People to discuss the production of documents. This is true even
14 after April 7, 2015, when the defense and the People met and agreed to limit the initial discussion
15 only to areas subpoenaed which both the defense and the People agree are relevant and should be
16 produced. After the People and the defense met, the People have repeatedly sought only the most
17 basic of information from Warne: an initial representation whether these documents exist and
18 whether Malik is willing to produce them. For nearly a year, the People have been unable to obtain
19 even this simple representation from Warne, to the frustration of both the defense and the
20 prosecution. Warne's actions demonstrate an ongoing unwillingness to engage in even a reasonable
21 dialogue to secure disclosure of relevant documents in this matter.

22 In addition to exercising this Court's inherent authority to disqualify witnesses to protect the
23 integrity of the legal process, this Court should recognize the constitutional issues raised by the
24 continued representation. It is a violation of Mr. Souza's procedural and substantive due process
25 rights to allow this relationship to continue with respect to his criminal prosecution. Warne, who,
26 his capacity as a witness, should have no ability to challenge the production of documents
27 subpoenaed from Malik, is able to use his position as Malik's attorney to move to quash, or
28

1 otherwise challenge, the production of documents subpoenaed under California Penal Code 1326,
2 *et. seq.* Such a unique position affords Warne the opportunity to use his attorney-client relationship
3 with Malik to avoid the production of records that reflect upon his own credibility as a witness. Mr.
4 Souza is denied procedural due process in this respect, because were it not for this relationship,
5 Warne would not have the ability to challenge the production of another witness's documents. In any
6 other situation, such a challenge would be completely improper, and otherwise not entertained by
7 this Court. Despite having intimate knowledge of the present case, Warne continues to refuse to
8 produce any of the documents that the People and the defense agree are undisputedly relevant to the
9 allegations against Mr. Souza.

10 Further, Warne, as a witness to these events, is able to advise another witness as to what
11 records to produce or challenge. Other than through his position as Mr. Malik's attorney with respect
12 to Mr. Malik's motion to quash, any such communications between witnesses to a criminal action
13 would not only be improper, but would also not be afforded the protection of the attorney-client
14 privilege, and could be inquired about during any future examination. This ongoing representation
15 denies Mr. Souza his ability to fully confront these witnesses, and denies Mr. Souza substantive due
16 process by hindering the fact-finding process. For these reasons, this Court should exercise its
17 inherent authority to protect the integrity of the legal process in this case, and disqualify the Warne
18 and Downey Brand from representing Malik in all matters pertaining to this criminal action.

19 Allowing a witness, who has committed misconduct and suffers from a conflict of interest,
20 to remain in a position that would allow them to shape the contours of their own cross-examination,
21 constitutes an unjust detriment to Mr. Souza, and is injurious to the integrity of the judicial process.
22 Where misconduct or a conflict of interest may have an ongoing effect on the integrity of the
23 proceedings, disqualification of counsel is justified. In the present case, Warne has committed
24 misconduct, and his personal, professional, and financial interests in this case are ongoing.¹⁴ Given
25

26 ¹⁴ In addition to these considerations, the People have recently produced *Brady* information indicating that
27 Malik has committed short sale fraud in connection with the sale of his home. (*See* Exhibit S, Investigation
28 Report of Malik Short Sale Fraud.) Malik is currently living in the home that he was obligated to move out
of after a supposed arm's-length sale to a third party. (*Id.*) However, the People's investigation indicates that

1 that the misconduct is directly related to at least one of the allegations against Mr. Souza, his due
2 process rights are directly affected by the continued representation. Warne's conflict of interest goes
3 directly to the very heart of his position as Malik's counsel, turning over documents which might
4 further expose his own testimony as less than truthful. Under the totality of the circumstances, the
5 only reasonable course of action is to disqualify Warne and Downey Brand from any further
6 representation of Malik in connection with this matter.

7 **IV.**

8 **CONCLUSION**

9 For all the aforementioned reasons, Mr. Souza's motion to disqualify Downey Brand, LLP
10 and William Warne should be granted.

11 Respectfully submitted,

12 Dated: February 11, 2016

BAY AREA CRIMINAL LAWYERS, PC

13 By: 
14 **DAVID J. COHEN, ESQ.**

15 Attorneys for Defendant **Darrell A. Souza**

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26 the third party is merely a strawman purchaser for Malik, and the investigator was able to trace payments
27 made by Malik back to this purchaser. (*Id.*) Downey Brand has represented Malik's interests for over a
28 decade, and it is not yet clear what part Downey Brand played in Malik's apparently fraudulent conduct. (*Id.*)
So far, none of the documentary evidence substantiating the People's investigation has been turned over to
the defense.

1 **CERTIFICATE OF SERVICE**

2 I, Tonia M. Sanchez, declare that I am employed in the County of San Francisco, State of
3 California. I am over the age of 18 years and not a party to the within action. My business address
4 is Bay Area Criminal Lawyers, PC, 300 Montgomery Street, Suite 660, San Francisco, CA 94104.

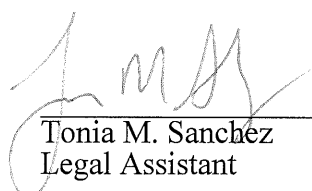
5 On February 12, 2016, a copy of **MR. SOUZA'S MOTION TO DISQUALIFY AND**
6 **RECUSE DOWNEY BRAND, LLP, WILLIAM WARNE, AND STEVEN STWORA-HAIL**
7 **FROM ANY FURTHER REPRESENTATION OF RONALD MALIK, EDNA MALIK,**
8 **DUMAS INTERNATIONAL, LLC, VAN DER MEER, LLC AND MEDCAL, LLC and**
9 **DECLARATION OF DAVID J. COHEN, ESQ., IN SUPPORT OF MR. SOUZA'S MOTION**
10 **TO DISQUALIFY AND RECUSE DOWNEY BRAND, LLP, WILLIAM WARNE, AND**
11 **STEVEN STWORA-HAIL FROM ANY FURTHER REPRESENTATION OF RONALD**
12 **MALIK, EDNA MALIK, DUMAS INTERNATIONAL, LLC, VAN DER MEER, LLC AND**
13 **MEDCAL, LLC, [PROPOSED] ORDER THREON and EXHIBITS A THROUGH S** in the
14 case of *People v. Souza*, Case No. 1439847, was served by e-mail and by United States mail to:

15 Brad Nix, Esq.
16 Deputy District Attorney
17 District Attorney's Office
18 County of Stanislaus
832 12th Street, Room 300
Modesto, CA 95354

and by United States mail to:

19 William R. Warne, Esq.
20 Downey Brand LLP
21 621 Capitol Mall, 18th Floor
Sacramento, CA 95814-4731

22 I certify under penalty of perjury that the foregoing is true and correct. Executed on February
23 12, 2016, at San Francisco, California.

24
25 
26 Tonia M. Sanchez
27 Legal Assistant
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