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Attorney for Defendants

5 STAR K-9 ACADEMY, Inc

dba MASTER DOG TRAINING,

Ekaterina Korotun an individual

**THE SUPERIOR COURT OF CALIFORNIA**

**COUNTY OF LOS ANGELES**

**STANLEY MOSK COURTHOUSE**

|  |  |  |
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| DYLAN YEISER-FODNESS,  an individual  Plaintiff,  vs.  MASTER DOG TRAINING ET AL.  Defendants. | )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  ) | Case No.: 22STCV21852  Defendants’ 5 Star K-9 Academy, Inc dba Master Dog Training, and Ekaterina Korotun, NOTICE OF MOTION AND MOTION TO SET ASIDE DEFAULT by clerk per Code Civ. Proc. § 473(b); Memorandum of Points and Authorities, Supporting Declaration by attorney Natalia Foley, ORDER [PROPOSED]  Date of Hearing: 01/26/2023  Time of Hearing: 9:00 AM  Reservation ID: 914231669114  Confirmation Code: CR-BTSNDFMPT73SMVQLQ  Department: 52, Room 510  Judge: Hon. Armen Tamzarian  Date Action Filed: 07/06/2022  Trial Date: not set |

**TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORDS:**

NOTICE IS HEREBY GIVEN that on 01/26/2023 at 9:00 AM, or as soon thereafter as the matter may be heard, in Department 52 of the Stanly Mosk Courthouse located at 111 N Hill St, Los Angeles, CA 90012, DEFENDANTS 5 STAR K-9 ACADEMY, Inc dba MASTER DOG TRAINING and Ekaterina Korotun, will and hereby do, by and through his attorney of record, move the Court for an order setting aside the default entered against Defendants on the grounds of mistake and excusable neglect pursuant to California Code of Civil Procedure § 473(b).

This Motion is based upon this Notice, the supporting MEMORANDUM OF POINTS AND AUTHORITIES set forth below, the accompanying declaration by Attorney Natalia Foley, and exhibits filed herewith, the pleadings on file in this case, the oral argument of counsel and such other and further evidence as the Court might deem proper. And on the reservation for hearing served and filed herewith.

Respectfully Submitted

Dated: 12/30/2022

LAW OFFICES OF NATALIA FOLEY

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By Natalia Foley, Esq ( SBN 295923)

Attorney for Defendants

5 STAR K-9 ACADEMY, Inc

dba MASTER DOG TRAINING,

Ekaterina Korotun an individual

**MEMORANDUM OF POINTS AND AUTHORITIES**

Come here Defendants 5 STAR K-9 ACADEMY, Inc dba MASTER DOG TRAINING, erroneously sued as 5 STAR K-9 ACADEMY, Inc and MASTER DOG TRAINING, Inc, and Ekaterina Korotun an individual (hereinafter – collectively “Defendants”) via their attorney of records and allege as follow:

**I. STATEMENT OF FACTS:**

1) This action was filed by the Plaintiff Dylan Yeiser-Fodness (Hereinafter - Plaintiff) on 07/06/2022 against defendants Master Dog Training, A California Corporation, 5 Star K-9 Academy, and Ekaterina Korotun an individual.

2) Plaintiff failed to file proof of service of Summons of all of the above defendants, and on or about 07/12/2022 the honorable court issued Order to Show Cause Failure to File Proof of Service.

3) Eventually, on 07/29/2022 Plaintiff filed two documents with the court – **one is entitled** “Proof of Service by Substituted Service; Filed by: Dylan Yeiser-Fodness (Plaintiff); As to: Ekaterina Korotun (Defendant); Proof of Mailing Date: 07/27/2022” and the **second document** that is entitled Proof of Service by Substituted Service; Filed by: Dylan Yeiser-Fodness (Plaintiff); As to: 5 Star K-9 Academy, Inc., a California corporation (Defendant); Proof of Mailing Date: 07/27/2022 **( see exhibit 01 – copy of the Documents file provided by the Case Access on 12/29/2022).**

4) According to the Case Document Images on the Court Website, these two documents are assigned number 25 and number 24 correspondingly **(see exhibit 02 – copy of the Case Document Images provided by the court website on 12/29/2022),** under the numbers 24 and 25 there is the same document that is a copy of the proof of substitute service of defendant Ekaterina Korotun performed by substitute service by delivering the copy of summons and complaint to a person identified as John Doe.

5) If the court record is the same as the online record on the court’ website, then the defendant 5 Star K-9 Academy was never served, and thus the default of 10/3/2022 against this defendant was entered in error, however Defendant cannot know that for sure and can only rely on the records of court available online.

6) On or about 9/ 14/ 2022, Defendants’ Attorney Natalia Foley contacted Plaintiff’ counsel Young Ryu via email asking for extension to review the file and to file an answer, and offering preliminary negotiation of a potential settlement. Plaintiff’ counsel responded the same day by asking to add the following emails to the server list: young.ryu@loywr.com, harley.phleger@loywr.com, marlin.gramajo@loywr.com, martha.gutierrez@loywr.com **( see exhibit 3 – copy of the Defendant’ attorney email from 9/14/2022).**

7) This communication was misunderstood by the Defendants’ counsel as consent to provide an extension for filing the answer. It was a complete surprise for the defendants’ counsel to receive another email from the plaintiff’ counsel on 9/21/2022 of the following content “Following up on the E-service list email inquiry sent to you on 9/14/22. Also, it is unclear what extension you wanted -Answer to the complaint? which is overdue and I believe the entry of default was already filed with. Responses to the Discovery? I think it is overdue also, meaning all objections are waived” **(Exhibit 04 – copy of the email by the Plaintiff’ attorney).**

8) It appears that prior to the above email Plaintiff’ counsel already secretly, without notifying defendants’ counsel, filed a request to enter default against the defendants, however this request was rejected. Plaintiff attorney never served Defendant with the copy of the request to enter default, nor with the copy of the notice of rejection.

9) Being unable to find any common ground for potential settlement, and being unaware of the default entered against defendant by clerk due to the failure of the Plaintiff to serve notice of the default entered, Defendants’ counsel filed an answer on 10/11/2022.

10) On or about 10/14/2022 Defendants filed Motion to Compel Arbitration.

11) On 11/30/2022, during the hearing on Motion to compel arbitration, Defendants’ attorney first time learned about entry of the default.

12) Defendants are seeking to set aside default pursuant to California Code of Civil Procedure Section 473(b) because the default was taken against defendants through the mistake and/or inadvertence and/or surprise and/or neglect of Defendants’ attorney, and the court has a mandatory duty to grant relief when the motion is accompanied by an attorney’s sworn affidavit, and is timely and in proper form.

**II. ARGUMENT**

**A. This Motion Is Timely**

A motion under Code Civ. Proc. § 473(b), for relief from a judgment, dismissal, order, or other proceeding on the ground of mistake, inadvertence, surprise, or excusable neglect must be filed within a reasonable time not exceeding six months after the judgment, order, or proceeding was taken, or, if relief is sought from a default judgment based on an attorney’s affidavit (declaration) of fault, within six months from the date the judgment was entered (without the reasonable time limitation) [[Code Civ. Proc. § 473(b)](https://advance.lexis.com/document/documentslider/?pdmfid=1000516&crid=835ec1d4-73f2-41f4-9b76-2a30967f731d&pdistocdocslideraccess=true&config=&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A51R0-GRX0-R03N-83H9-00000-00&pdcomponentid=237188&pdtocnodeidentifier=N108F8E&ecomp=zssyk&prid=d6fd64d3-3b11-4ff1-bfa7-1a97b85dc30f)].

In this case Motion to set aside default is filed within 30 days from the moment of actual notice of default received by the Defendants’ attorney during the hearing on 11/30/2022, and therefore is timely.

**B. The Court Also Should Set Aside The Default Because Defendants Had No Actual Notice Of This Action.**

Even if the Court were to conclude that the default here is not void on its face, the Court should vacate the default because Defendants had no actual notice of the action. Code of Civil Procedure § 473.5 “provides relief from default or default judgment to those defendants who, despite proper service, never received ‘actual notice’ of the lawsuit in time to defend against it.” Luxury Asset Lending, LLC v. Philadelphia Television Network (2020) 56 Cal.App.5th 894, 908. “[S]ection 473.5 reflects the understanding that if any form of service of summons does not result in actual knowledge, fundamental fairness may require that a subsequent default be set aside.” Olvera v. Olvera (1991) 232 Cal.App.3d 32, 40.

The California Court of Appeal has held that “the reference in Code of Civil Procedure section 473.5 to ‘actual notice’” of an action “means genuine knowledge of the party litigant…” Rosenthal v. Garner (1983) 142 Cal.App.3d 891, 895. “[A]ctual knowledge has been strictly construed, with the aim of implementing the policy of liberally granting relief so that cases may be resolved on their merits.” Olvera, 232 Cal.App.3d at 39; see also Goya v. P.E.R.U. Enterprises

(1978) 87 Cal.App.3d 886, 892 (upholding vacation of default judgment where one defendant was served with summons and complaint but did not speak English or understand the nature of the documents). It is “well established that it is the policy of the law to bring about a trial on the merits whenever possible, so that any doubts which may exist should be resolved in favor of the application, to the end of securing to a litigant his day in court and a trial upon the merits.” Rosenthal, 142 Cal.App.3d at 898. “Even in a case where the showing under section 473 is not strong, or where there is any doubt as to setting aside of a default, such doubt should be resolved in favor of the application.” Id.

In this particular case Defendant Ekaterina Korotun does not speak fluid English and is not capable of complete understanding of written English and thus she could not recognize the nature of the documents. She lacked an actual notice of action and her delay to defend the action was not caused by her avoidance of service or inexcusable neglect ( Tunis, 184 Cal.App.3d at 1077).

**C. The Court May Also Set Aside the Default and Default Judgment on Equitable Grounds.**

Even if this Court were to conclude that it did not have statutory authority to vacate the default (which it clearly does), this case absolutely warrants the Court’s exercise of its equitable powers. “A trial court may vacate a default on equitable grounds even if statutory relief is unavailable.” Luxury Assets, 56 Cal.App.5th at 910; see also Mechling v. Asbestos Defendants (2018) 29 Cal.App.5th 1241, 1245 (“A trial court has inherent power to vacate a default judgment on equitable grounds.”) “One ground for equitable relief is extrinsic mistake—a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits.” Mechling, 29 Cal.App.5th at 1246.

“Extrinsic mistake exists when the ground of relief is not so much the fraud or other misconduct of one of the parties as it is the excusable neglect of the defaulting party to appear and present his claim or defense.” Id. “If that neglect results in an unjust judgment, without a fair adversary hearing, the basis for equitable relief on the ground of extrinsic mistake is present.” Id. “To set aside a judgment based upon extrinsic mistake one must satisfy three elements.” Rappleya

v. Campbell (1994) 8 Cal.4th 975, 982. “First, the defaulted party must demonstrate that it has a

meritorious case. Second, the party seeking to set aside the default must articulate a satisfactory excuse for not presenting a defense to the original action. Last, the moving party must demonstrate diligence in seeking to set aside the default once discovered.” Id. at 982; see also Luxury Assets, 56 Cal.App.5th at 910 (same). As explained below, this case absolutely warrants the Court’s exercise of its equitable powers.

In connection with this motion, Defendants indeed filed their answer prior to learning of the entry of default **(see attached exhibit 05 – Copy of the answer filed**), which indicated Defendants’ intent to participate in this litigation in good faith. In fact, Defendants submitted the answer with multiple valid and meritorious affirmative defenses, which is sufficient to establish the “meritorious case” prong for equitable relief. See Mechling, 29 Cal.App.5th at 1247-48. “The moving party does not have to guarantee success, or demonstrate with certainty that a different result would obtain. Rather, it must show facts indicating a sufficiently meritorious claim to entitle it to a fair adversary hearing.” Id.

**D. The Policy of The Law Is That Controversies Should Be Heard and Disposed Of On Their Merits**

The evidence presented by Defendants demonstrates that Defendants have a meritorious

defense, and, if the default is not set aside, Defendants will be denied the opportunity for a

hearing on the merits, and the Court has broad discretion to grant relief pursuant to Defendant’s

Motion. (Shamblin v. Brattain (1988) 44 Cal. 3d 474, 478, 243 Cal. Rptr. 902, 749 P.2d 339)

**E. The Court Should Order the Default Entered Against Defendants Set Aside Because Of Surprise, Inadvertence, Or Excusable Neglect.**

Code of Civil Procedure section 473, subdivision (b) provides as follows:

“The court may, upon any terms as may be just, relieve a party or his or her legal

representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief ... shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.”

A motion under this section must be brought within a reasonable time, but not more than six months after the judgment. Here, the motion to set aside the default was filed within a

reasonable time, as it is less than three (3) months after entry of the default judgment.

The motion was brought as soon as possible in light of the investigation of the Defendants counsel necessary to understand the circumstances that resulted in default entry.

The fact that Defendants’ attorney was in communication with the Plaintiff’ counsel prior to Plaintiff filing for default, and yet, Plaintiff failed to serve Defendants with the notice of the entry of default was a surprise to the Defendants’ Attorney, Defendants’ attorney was mistaken by believing that the extension to file an answer was granted because of the ongoing potential settlement communication. Although a plaintiff’s attorney is not legally required to warn a defendant’s attorney before taking a default, if plaintiff’s counsel knows the identity of the lawyer representing a defendant, such warning is at the least an ethical obligation of counsel. Fasuyi v. Permatex, Inc. (2008) 167 Cal. App. 4th 681, 701, 84 Cal. Rptr. 3d 351.

Furthermore, in California, the entry of default is not automatic. To get the entry of default, the plaintiff must file an application for default judgment with the court clerk. Under certain circumstances, a Code of Civil Procedure section 425.11 statement of damages and a proof of service attached. The Plaintiff’ initial request for default was rejected. There was a possibility that the second request might be also rejected, thus notifying Defendants of the filing of the request is not the same as notifying Defendant of the actual entry of default.

Here, Plaintiff’ counsel knew the identity of the Defendants’ attorney, but failed to provide a notice of actual entry of default, that is a manifestation of bad faith litigation tactics.

Due to the luck of notice of entry of default, Defendants’ attorney made an excusable neglect by filing an answer prior to asking court for relief from default. Due to inadvertence error on the court website Defendants’ counsel was under impression that defendant 5 STAR K-9 ACADEMY, Inc dba MASTER DOG TRAINING was not in default.

All of the above should be sufficient to show surprise, inadvertence, or excusable neglect to warrant setting aside the default. (Code Civ. Proc., § 473(b).

**F. Plaintiff Will Not Suffer Prejudice if Entry of Default is Set Aside.**

Prejudice is determined by whether a party will be hindered in pursuing its claim. [See Knoebber, 244 F.3d at 701]. The fact that a party may be denied a quick victory is not sufficient to deny relief from default judgment. [ Bateman v. United States Postal Service, 231 F.3d 1220, 1225 (9th Cir. 2000). ]“The delay must result in tangible harm such as loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion.” Audio Toys, 2007 U.S.

Here, Plaintiff is unable to request the default judgement because Plaintiff failed to state the amount of damages in his Complaint. When the complaint did not specify the amount of damages plaintiff sought from the defendant, the default judgement against that defendant was void. Where no amount of damages is demanded, any amount awarded is by definition greater than the amount demanded. Falahati v. Kondo (2005) 127 Cal. App. 4th 823, 830–831, 26 Cal. Rptr. 3d 104

Thus Plaintiff will not be prejudiced in any way should Defendant be presented an opportunity to defend her position on the merit.

Defendants are ready and willing to litigate this lawsuit. Defendants’ delay in responding was due to excusable neglect and mistake of fact.

Defendants have meritorious defenses, and Plaintiff will not suffer any prejudice in pursuing its claims if default is set aside. Therefore, Defendant should be allowed to proceed on the merit and relief from default should be granted.

**G. The Court Has Broad Discretion and a Robust Legal Basis to Grant The Requested Relief**

The entry of default cuts off a defendant’s right to answer or otherwise respond to the complaint. Once the default is entered, the defendant is “out of court” and cannot take further steps in the cause affecting plaintiff’s right of action, until the default is set aside in a proper proceeding. (Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. (1984) 155 Cal. App. 3d 381, 385-

386, 202 Cal. Rptr. 204).

Second, a default proceeding is a device designed to enable the courts to clear their calendars of cases lacking adversarial quality. (Jones v. Interstate Recovery Service (1984) 160 Cal. App. 3d 925, 928, 206 Cal. Rptr. 924).

In considering the motion to set aside entry of default the trial court generally has wide discretion to grant the requested relief and set aside the default judgment under Cal. Code of Civ. Proc. § 473. (Berman v. Klassman (1971) 17 Cal.App.3d 900, 909.)

Furthermore, as we stated above, California has a long- and well-established public policy favoring the setting aside of a default on proper application so that every matter may be heard and disposed of on its merits. (Id., supra at 909), thus any doubts in applying the statute allowing relief from default must be resolved in favor of the party seeking relief from default. (Prage v. Couedel (App. 2 Dist. 1997) 70 Cal. Rptr. 2d 671, 60 Cal. App. 4th 1037.)

Also, a trial court’s power to set aside a default should be freely and liberally exercised so that cases shall be disposed of according to their substantial merits, rather than on mere technical matters of procedure. (Consolidated Mortgage Company v. Roberts (1950) 212 P 2d 28, 94 Cal. App. 2d 895.)

These are robust grounds for the setting aside of any default, but especially that which was entered against Defendant in this case.

**III. CONCLUSION**

Based on the foregoing, Defendants request that the Court set aside the default entered against it, allow to defend against this action, and to have its proposed Answer (attached as exhibit 05) filed or in the alternative allow the Answer that was already filed, to stay. Defendants further pray for such other and further relief as the court may deem proper.

Respectfully Submitted

Dated: 12/30/2022

Law Offices of Natalia Foley

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By Natalia Foley, Esq ( SBN 295923)

Natalia Foley, Esq (SBN 295923)

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Attorney for Defendants

5 STAR K-9 ACADEMY, Inc

dba MASTER DOG TRAINING,

Ekaterina Korotun an individual

**THE SUPERIOR COURT OF CALIFORNIA**

**COUNTY OF LOS ANGELES**

**STANLEY MOSK COURTHOUSE**

|  |  |  |
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| DYLAN YEISER-FODNESS,  an individual  Plaintiff,  vs.  MASTER DOG TRAINING ET AL.  Defendants. | )  )  )  )  )  )  )  )  )  )  )  )  ) | Case No.: 22STCV21852  SUPPORTING DECLARATION BY ATTORNEY NATALIA FOLEY  Date of Hearing: 01/26/2023  Time of Hearing: 9:00 AM  Reservation ID: 914231669114  Confirmation Code: CR-BTSNDFMPT73SMVQLQ  Department: 52, Room 510  Judge: Hon. Armen Tamzarian  Date Action Filed: 07/06/2022  Trial Date: not set |

1. I am Natalia Foley, an attorney at law duly admitted to practice in the State of California and attorney of record for the defendants 5 STAR K-9 ACADEMY, Inc dba MASTER DOG TRAINING, and Ekaterina Korotun an individual (hereinafter collectively – “Defendants”) and make this declaration in support of Defendants’ motion for an order setting aside and vacating the default taken against them by clerk on 10/3/2022.

2. The default were entered through my mistake or inadvertence or surprise or neglect or all or any combination of these in that:

- I mistakenly believed that my request for extension to file an answer was granted by the Plaintiff’ counsel because I was in communication with the plaintiff ‘counsel prior to Plaintiff’ filing for default;

- I was surprised to learn that the default against defendants was entered because I never received any notice of entry of default against my clients;

- I inadvertently filed an answer on behalf of defendants prior to asking court to set aside default because I was unaware of the fact of entry of default by clerk due to Plaintiff’ failure to serve a notice of entry of default by clerk;

- I did not review the image of the Plaintiff’ default filing from 10/3/2022 on the court website that constitutes an excusable neglect.

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

Date: 12/30/2022

Law Offices of Natalia Foley

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

By Natalia Foley, Esq ( SBN 295923)

Attorney for Defendants

5 STAR K-9 ACADEMY, Inc

dba MASTER DOG TRAINING,

Ekaterina Korotun an individual

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Attorney for Defendants

5 STAR K-9 ACADEMY, Inc

dba MASTER DOG TRAINING,

Ekaterina Korotun an individual

**THE SUPERIOR COURT OF CALIFORNIA**

**COUNTY OF LOS ANGELES**

**STANLEY MOSK COURTHOUSE**

|  |  |  |
| --- | --- | --- |
| DYLAN YEISER-FODNESS, an individual  Plaintiff,  vs.  MASTER DOG TRAINING ET AL.  Defendants. | )  )  )  )  )  )  )  ) | Case No.: 22STCV21852  ORDER [proposed] |

The motion of defendants 5 STAR K-9 ACADEMY, Inc dba MASTER DOG TRAINING, and Ekaterina Korotun, an individual, came on regularly for hearing on \_\_\_\_\_\_\_\_\_\_\_.

All parties were represented by their counsel of record.

This Court, having considered the Parties' moving and opposing papers and oral arguments, and good cause appearing therefrom, hereby ORDERS:

- that the default heretofore entered in this action against the defendants 5 STAR K-9 ACADEMY, Inc dba MASTER DOG TRAINING, Ekaterina Korotun an individual be hereby set aside and vacated;

- that the Answer, previously filed by the defendants 5 STAR K-9 ACADEMY, Inc dba MASTER DOG TRAINING, and Ekaterina Korotun, an individual, stays.

Dated:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Judge of the Superior Court

PROOF OF SERVICE

|  |  |
| --- | --- |
| DYLAN YEISER-FODNESS vs. MASTER DOG TRAINING ET AL. | Case No.: 22STCV21852 |

1. I, Irina Palees, am over the age of 18 and not a party of this cause. I am a resident of or employed in the county where the mailing occurred. My residence or business address is

***751 S Weir Canyon Rd Ste 157-455***

***Anaheim CA 92808***

2. I served the following document:

|  |
| --- |
| Defendants’ 5 Star K-9 Academy, Inc dba Master Dog Training, and Ekaterina Korotun, NOTICE OF MOTION AND MOTION TO SET ASIDE DEFAULT by clerk per Code Civ. Proc. § 473(b); Memorandum of Points and Authorities, Supporting Declaration by attorney Natalia Foley, ORDER [PROPOSED] |

by enclosing a true copy in a sealed envelope addressed to each person whose name and address is shown below and depositing the envelope in the US mail with the postage fully prepaid.

* Date of Mailing: 12/30/2022
* Place of Mailing: Los Angeles, CA

Name and Address of Person Served:

|  |  |
| --- | --- |
| Attorney for Plaintiff: | Attorney for Defendants: |
| Young W Ryu, Esq  LOYR, APC  1055 West 7th Street, Suite 2290  Los Angeles CA 90017 | Natalia Foley, Esq  Law Offices of Natalia Foley  751 S Weir Canyon Rd Ste 157-455  Anaheim CA 92808 |
|  |  |

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

Date: 12/30/2022

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

By Irina Palees,

Legal assistant to attorney Natalia Foley

**EXHIBIT 01**

**EXHIBIT 02**

**EXHIBIT 03**

**EXHIBIT 04**

**EXHIBIT 05**