Gina M. Austin (SBN 246833)
E-mail: *gaustin@austinlegalgroup.com*
Tamara M. Leetham (SBN 234419)
E-mail: *tamara@austinlegalgroup.com*
AUSTIN LEGAL GROUP, APC
3990 Old Town Ave, Ste A-101
San Diego, CA 92110
Phone: (619) 924-9600
Facsimile: (619) 881-0045

Attorneys for Proposed Intervenor
KIM Investments, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO- CENTRAL DIVISION

CITRUS ST PARTNERS, LLC;

Petitioner,

vs.

CITY OF LEMON GROVE; CITY COUNCIL OF THE CITY OF LEMON GROVE; AND DOES 1-10,

Respondents.

DOES 11-20

Real Parties in Interest and Defendants.

KIM INVESTMENTS, LLC,

Real Party In Interest and Intervenor.

CASE NO. 37-2019-00064690-CU-MC-CTL

PROPOSED INTERVENOR KIM INVESTMENTS, LLC'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO CITRUS STREET PARTNERS LLC'S FEBRUARY 13, 2020 EX PARTE APPLICATION TO REASSIGN CASE

[Imaged File]

Judge: Hon. Richard S. Whitney
Dept: C-68
Date: February 13, 2020
Time: 8:45 a.m.

Petition Filed: December 5, 2019

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3990 Old Town Ave, Ste A-101
San Diego, CA 92110

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San Diego, CA 92110

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3990 Old Town Ave, Ste A-101
San Diego, CA 92110

I. INTRODUCTION

Citrus Street refuses to acknowledge KIM's right to participate in this litigation and defend its interests. Citrus Street's conduct in this litigation, not KIM's, exemplifies gamesmanship and misuse of the Court process in violation of KIM's due process rights and to its severe detriment. KIM has already been severely harmed in this lawsuit by Citrus Street's unsupportable refusal to name KIM as a party while requesting injunctive relief from the Court that directly and immediately impacted, and continues to impact, KIM. Citrus Street's continued refusal to acknowledge KIM's necessary participation will only exacerbate this harm.

KIM's actions are proper and supported under the law unlike Citrus Street's improper and unsupportable actions to include this current ex parte application which has caused further harm to KIM by forcing it to spend more time and money defending its position in a litigation where Citrus Street should have named it as a party. As discussed below, this improper request should be denied and Citrus Street should be directed to engage in the proper procedure for challenging an order granting a Code of Civil Procedure section 170.6 challenge

II. STATEMENT OF FACTS

In 2016, City voters passed Measure V, an initiative removing the City's prohibition on medical marijuana dispensaries. Measure V was codified in Chapter 17.32 of the Lemon Grove Municipal Code ("LGMC"). (Austin Decl. ¶ 3.)

On January 28, 2019, KIM began the City's zoning clearance process as part of its conditional use permit application to legally operate a medical marijuana dispensary ("MMD") pursuant to Measure V at 3515 Harris Street, Lemon Grove, CA 91945 ("Harris Street")("CUP Application"). (Austin Decl. ¶¶ 1-4.)

On April 3, 2019, Citrus Street submitted its own application to operate a medical marijuana dispensary in the City. (Austin Decl. ¶ 5.) LGMC section 17.32.090(B) prohibits the establishment of a MMD within 1,000 feet of a "regulated use" which includes other MMD's and licensed daycare facilities. (Austin Decl. ¶ 6.) Citrus Street's application for 7309 Broadway and KIM's CUP Application for Harris Street are within 1,000 feet of one another and thus approval of one CUP application necessarily precludes approval of the competing application. (Austin

Decl. ¶ 7.)

On May 8, 2019 the City deemed KIM's application complete which made KIM eligible to proceed to City's CUP phase and on May 9, 2019, KIM submitted its Harris St. CUP Application to the City. (Austin Decl. ¶¶ 8-9.)

On October 22, 2019, the City Planning Commission approved a day care facility at 3468 Citrus Street, Lemon Grove, California 91945. (Austin Decl. ¶ 10.) Upon the satisfaction of the conditions enumerated in the day care's conditional use permit, the day care will be deemed a "protected use" that will disqualify KIM's CUP Application under LGMC section 17.32.090(B). (Id.)

On November 14, 2019, KIM received a notification letter from the City stating that its CUP Application was complete and would be set for City Council hearing on Tuesday, January 21, 2020 at 6:00pm. (Austin Decl. ¶ 11.)

On November 19, 2019, the City Council voted to deny Citrus Street's CUP application to operate a MMD at 7309 Broadway. (Austin Decl. ¶ 12.)

On November 21, 2019 and November 26, 2019, KIM's counsel formally objected to KIM's January 21, 2020 hearing date because it was more than 80 days after the City deemed KIM's project complete in violation of LGMC section17.28.02(G) which requires public hearings to be held no later than 60 days following a deemed complete application, or in KIM's case November 7, 2019. (Austin Decl. ¶ 13.)

On December 5, 2019, Citrus filed this action against the City of Lemon Grove ("City") alleging two causes of action: (1) Mandamus pursuant to Code of Civil Procedure section 1094.5 ("Administrative Mandamus"); and (2) Declaratory and Injunctive Relief (although injunctive relief is an equitable remedy, not a cause of action). Citrus Street did not name KIM as a real party in interest or defendant.

On January 9, 2020, KIM's counsel received an e-mail from Citrus Street attorney Grant Olsson. (Austin Decl. ¶ 14.) Mr. Olsson asked KIM's counsel if she was authorized to accept service of paperwork filed in this action to include the January 13, 2020 restraining order hearing in Department 66 of this Court. (Id.) Prior to this e-mail, neither KIM nor its counsel had any

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3990 Old Town Ave, Ste A-101
San Diego, CA 92110

knowledge of this proceeding. (Id.) On receiving Mr. Olsson's e-mail, KIM's counsel looked this case up on the San Diego Superior Court's register of actions and saw that KIM was not a party. (Austin Decl. ¶ 15.) She then responded to Mr. Olsson's e-mail by asking him why he had included KIM in the ex parte notice as KIM was not a party. (Id.) Mr. Olsson responded that Citrus Street was filing a temporary restraining order and preliminary injunction to request an order enjoining the City from holding the January 21, 2020 hearing on KIM's conditional use permit application and acknowledged that KIM, may have an interest in opposing the January 14, 2020 ex parte application given the fact that the requested relief would impact KIM. (Id.)

On January 14, 2020, KIM's counsel appeared at the ex parte hearing. (Austin Decl. ¶ 16.) During this hearing, Judge Medel allowed KIM's attorneys to argue against the temporary restraining order to include due process objections, and harm to KIM. (Id.) As evidence of harm, the Court was informed the Court that any interference with KIM's January 21, 2020 hearing could cause its CUP Application to be denied because of the pending day care application within 1,000 feet. (Austin Decl. ¶ 17.) Judge Medel considered this harm and at KIM's request, included a provision in the temporary restraining order enjoining the City from further processing the daycare's conditional use permit application. (Id; RJN Ex. 1, pg. 2, ¶ 2.) During the January 14, 2020 TRO hearing, Judge Medel asked Citrus Street if it would agree to allow KIM to intervene during the hearing to which Citrus Street said no. (Austin Decl. ¶ 18.) Thus, when the January 14, 2020 hearing concluded, KIM's counsel had been permitted to appear and argue and the Court had allowed language proposed by KIM's counsel to become part of the temporary restraining order. (Austin Decl. ¶ 19.) The City did not object to KIM's appearance and has filed papers indicating its position that KIM is a necessary and indispensable party. (Id.)

After the hearing, KIM's counsel and Citrus Street's counsel conferred in the hallway outside of Department 66. (Austin Decl. ¶ 20.) KIM's attorney asked Citrus Street's attorney if she would agree to KIM's intervention since Citrus Street refused to name KIM as party. (Id.) Citrus Street's attorney said she would ask her client but doubted the client would agree and thereafter KIM was informed me that Citrus Street would not agree to allow KIM to intervene and KIM was forced to file its motion to intervene. (Id.)

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3990 Old Town Ave, Ste A-101
San Diego, CA 92110

On January 21, 2020, in response to the TRO, the City continued KIM's CUP Application hearing to February 18, 2020. (Austin Decl. ¶ 21.)

On January 28, 2020, KIM filed its motion to intervene and that same day, KIM filed a Code of Civil Procedure section 170.6 challenge. (Austin Decl. ¶ 22.)

On January 29, 2020, Judge Medel signed an order granting the 170.6 challenge ("170.6 Order") finding that the challenge was timely filed and the party's/attorney's statement meets the requirements of Code of Civil Procedure section 170.6(a)(4) ("170.6 Order"). (Austin Decl. ¶ 23; RJN Ex. 2.) The 170.6 Order further states that the case would be reassigned and a notice mailed to the parties and/or counsel. (Id.) Thereafter, the case was immediately reassigned pursuant to the 170.6 Order to Department 68 for all purposes, the honorable Richard S. Whitney, presiding, and the dates in Department 66 were vacated. (Id.)

On reassignment, KIM's counsel contacted the department 68 calendar clerk about KIM's motion to intervene and the calendar clerk asked KIM to refile it with a new hearing date of May 1, 2020, which KIM thereafter filed. (Austin Decl. ¶ 24.) Because the hearing date is three months away, and given the time sensitive issues, KIM scheduled an ex parte on its motion to intervene to either request the Court grant it on an ex parte basis or shorten time on the May 1, 2020 hearing date. (Austin Decl. ¶ 25.) The ex parte is scheduled for February 18, 2020. (Id.)

III. CITRUS STREET'S APPLICATION IS PROCEDURALLY IMPROPER PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 170.3(D) AND SHOULD BE DENIED

On January 29, 2020, Judge Medel signed the 170.6 Order, which is an order of the Court. Code of Civil Procedure section 170.3(d) (Section 170.3) states "[t]he determination of the question of the disqualification of a judge is not an appealable order and ***may be reviewed only by a writ of mandate*** from the appropriate court of appeal sought only by the parties to the proceeding." (emphasis added.) Section 170.3(d) goes on to state that the petition for the writ shall be filed and served within 10 days after service of written notice of entry of the court's order determining the question of disqualification. If the notice of entry is served by mail, that time shall be extended as provided Code of Civil Procedure section 1013(a). (Code Civ. Proc. §

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3990 Old Town Ave, Ste A-101
San Diego, CA 92110

170.3(d).)

Ironically, Citrus Street's cases cited in support of this ex parte application further demonstrate that a petition for writ of mandate is the sole remedy for challenging a 170.6 Order. (*See e.g. Sears Roebuck & Co. v. National Union Fire Ins. Co.* (2005) 131 Cal.App.4th 1342; *Avelar v. Superior Court* (1992) 7 Cal.App.4th 1270; *Frisk v. Superior Court* (2011) 200 Cal.App.4th 402; *Hospital Council of Northern Cal.* (1973) 30 Cal.App.3d 331 (where each cited case demonstrates the challenge to a peremptory challenge was made by writ of mandate).)

The Legislature's enactment of section 170.6 granted litigants the right to disqualify judges for "prejudice" without proof. Prejudice is deemed to be established if a party or an attorney declares, under penalty of perjury, a good faith belief the judge is prejudiced. The affidavit of prejudice is incontestable, both regarding the alleged prejudice and the declarant's sincerity. (*Frisk, supra*, 200 Cal.App.4th at 408 citing *Solberg v. Superior Court* (1977) 19 Cal.3d 182, 192-193, 196-198.) Peremptory challenges are creatures of statute. (*Id*.) They are presented in the form of a motion, but they fall outside the usual law and motion procedural rules, and are not subject to a judicial hearing. (*Frisk, supra,* 200 Cal.App.4th at 408 citing *Truck Ins. Exchange v. Superior Court* (1998) 67 Cal.App.4th 142, 147.) A duly presented peremptory challenge is effective "without any further act or proof" upon acceptance by the trial court. (Code Civ. Proc. § 170.6(a)(4).) Trial courts must act upon peremptory challenges at the first available opportunity, lest this important right be lost or diminished through procedural tactics or maneuvers. (*Frisk, supra,* 200 Cal.App.4th at 408 citing *Hemingway v. Superior Court* (2004) 122 Cal.App.4th 1148, 1157.) Once the court promptly determines the motion is properly made, "the disqualification takes effect instantaneously and requires the court to transfer the cause immediately for reassignment." (*Id.*)

In *People v. Hull* (1991) 1 Cal.4th 266, the California Supreme Court stressed that the determination whether to accept or reject a peremptory challenge is a significant judicial event, with important consequences for the lawsuit and the litigants. Most notably, this judicial determination is reviewable only by immediate writ of mandate, not by appeal from a subsequent judgment. "***The Legislature, through section 170.3(d), has specifically determined that a writ of***

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3990 Old Town Ave, Ste A-101
San Diego, CA 92110

mandate shall be the exclusive means of challenging a denial of a motion to disqualify a judge." (emphasis added) (*Hull, supra,* 1 Cal.4th at p. 275; see also *D.C. v. Harvard-Westlake School* (2009) 176 Cal.App.4th 836, 849-850.)

On January 29, 2020, Judge Medel promptly determined KIM's 170.6 challenge when he granted the challenge and signed the 170.6 Order. On signing the 170.6 Order, Judge Medel found "that the challenge was timely filed and the party's/attorney's statement meets the requirements of Code of Civil Procedure section 170.6(a)(4)." (See 170.6 Order, RJN Ex. 2.) On signing the 170.6 Order, the disqualification was immediate, instantaneous, and subject to Section 170.3(d), reviewable only by a writ of mandate. Citrus Street brings this application in disregard of the sole and exclusive remedy to challenge a 170.6 order by filing a writ of mandate. Citrus Street has taken the position that the 170.6 Order simply does not exist because Citrus Street believes KIM lacked standing to file the 170.6 challenge. Citrus Street cites no supporting authority for its position that an order of the Court can simply be ignored, including the 170.6 Order. Citrus Street should be precluded from bypassing this exclusive statutory remedy by denying this ex parte request.

While no further analysis should be necessary given the unequivocal language in both Section 170.3(d) and its supporting case law that the only allowable procedural mechanism to challenge a 170.6 order is writ of mandate, contrary to Citrus Street's contention, KIM's 170.6 challenge was timely and properly filed.

IV. KIM'S 170.6 CHALLENGE WAS PROCEDURALLY PROPER

Citrus Street claims KIM lacked standing to file the 170.6 challenge. Citrus Street's position unsupportable as case law demonstrates that 170.6 are to be liberally construed, the motion to intervene conferred KIM standing to file its 170.6 and KIM's 170.6 was timely filed.

A. Code Of Civil Procedure Section 170.6 Should Be Liberally Construed

Code of Civil Procedure section 170.6 ("Section 170.6), subdivision (a)(2) permits "[a] party … appearing in … an action or proceeding" to disqualify the judge based on a sworn statement of the party's belief that the judge is prejudiced against that party or the party's attorneys. (See *Pickett v. Superior Court* (2012) 203 Cal.App.4th 887, 892.) The judge has no

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3990 Old Town Ave, Ste A-101
San Diego, CA 92110

discretion to refuse the challenge unless the statement is untimely or does not otherwise comply with the statutory procedural requirements. (*Id.*; see *Cybermedia, Inc. v. Superior Court* (1999) 72 Cal.App.4th 910, 914.) "The right to disqualify a judge under section 170.6 '"is 'automatic' in the sense that a good faith belief in prejudice is alone sufficient, proof of facts showing actual prejudice not being required."'" (*Pickett*, *supra,* 203 Cal.App.4th at 892.)

"Peremptory challenges are creatures of statute." (*Frisk v. Superior Court* (2011) 200 Cal.App.4th 402, 408.) The court examines "the statute's words, giving them their ordinary and usual meaning and viewing them in their statutory context, because the statutory language is usually the most reliable indicator of legislative intent." (*Gattuso v. Harte-Hanks Shoppers, Inc*. (2007) 42 Cal.4th 554, 567.) To the extent the statutory language is ambiguous, the court considers the consequences of the possible constructions and the public policies sought to be achieved. (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190.) '"'"As a remedial statute, section 170.6 is to be liberally construed in favor of allowing a peremptory challenge, and a challenge should be denied only if the statute absolutely forbids it."'" (*Pickett*, *supra*, 203 Cal.App.4th at 892.)

Section 170.6 and California case law to not absolutely forbit KIM from filing the 170.6 challenge and it should be liberally construed in favor of KIM's challenge.

B. KIM's Peremptory Challenge Was Properly Filed Under California Case Law

Petitioner argues that KIM is a non-party and thus lacked standing to bring its 170.6 challenge. California case law supports KIM's its 170.6 challenge was properly filed after KIM filed its motion to intervene.

In *Cuneo v. Superior Court*, a petition for writ of prohibition directed to the Superior Court of Merced County sought to restrain and prohibit the assigned judge from "hearing any matter and making any order in the aforesaid action and from enforcing any temporary restraining order and preliminary injunction issued in said action and for all other proper relief." (*Cuneo v. Superior Court of Merced County* (1963) 213 Cal.App.2d 452.) The underlying case in *Cuneo* was between the Heins, executors of two deeds of trust, and the Merced County Title Company,

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3990 Old Town Ave, Ste A-101
San Diego, CA 92110

the trustee named in the aforementioned deeds of trust. Petitioners were the beneficiaries under the deeds of trust and filed a notice of motion to bring in new parties – themselves – citing Code of Civil Procedure section 389. On the same date that the petitioner in *Cuneo* filed their motion, they filed a motion to disqualify the trial judge under Code of Civil Procedure section 170.6.

The question before the court of appeal in *Cuneo* was "whether or not the motion to disqualify under Code of Civil Procedure section 170.6 was premature in that at the time of the filing of the motion to disqualify, the petitioners were not parties under subdivision 2 of section 170.6 of the Code of Civil Procedure." (*Id.* at 454.)

The *Cuneo* Court subscribed to the view that "a litigant who believes the judge prejudiced should be able to avail himself of the statute for the purpose of a hearing on his right to intervene and should have the right to disqualify a judge [...]; that a person using intervention should not be expected to waive his right to remove a judge thus disqualified in fact from hearing his petition in intervention." (*Id.* at 456.) The court went further to say "[t]he rights of the litigant to avail himself of the purposes set forth in section 170.6 of the Code of Civil Procedure are well outlined in *Johnson v. Superior Court*, 50 Cal.2d 693, 697, where the court said "[i]t is important, of course, not only that the integrity and fairness of the judiciary be maintained, but also that the business of the court be conducted in such a manner as will avoid suspicion of unfairness."" (*Id.*) The court concluded "that the filing of the motion for disqualification was within a proceeding pending before the court." (*Id.*)

The facts in *Cuneo* are almost identical to the facts here. After making a general appearance in the temporary restraining order hearing, and on Citrus Street's refusal to agree to intervention, KIM filed its motion to intervene. After it filed its motion to intervene, and as the petitioner did in *Cuneo*, KIM filed its 170.6 challenge, which became an order of the Court on January 29, 2020. Following the holding in *Cuneo*, KIM was afforded the right to challenge Judge Medel on filing its motion to intervene, which it did. Because KIM's challenge was permissible on filing its motion to intervene, the court should deny Citrus Street's ex parte application.

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3990 Old Town Ave, Ste A-101
San Diego, CA 92110

C. KIM's Peremptory Challenge Was Timely Filed

On timeliness requirements, Section 170.6 states that a challenge is permitted any time before the trial or hearing begins, but then sets forth three exceptions, each of which mandates an earlier filing. (See *People v. Superior Court* (Lavi) (1993) 4 Cal.4th 1164, 1171–1172; *Entente Design, Inc. v. Superior Court* (2013) 214 Cal.App.4th 385, 389– 390.) The "all purpose assignment" statutory exception applies here. (Code Civ. Proc. § 170.6(a)(2).) This rule states "[i]f directed to the trial of a civil cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 15 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 15 days after the appearance." (*Id.*)

Judge Medel was assigned to this case for all purposes. On January 28, 2020, KIM filed its motion to intervene, which triggered the 15-day filing period. KIM filed its 170.6 challenge the same day and the challenge is timely.

V. CITRUS STREET'S CASE LAW IS DISTINGUISHABLE AND INAPPLICABLE

Although Petitioner's cases may appear superficially helpful, upon closer examination they are inapplicable in this case and do not refute the holdings in *Cuneo* or *Johnson*.

In *Sears Roebuck & Co. v. National Union Fire Insurance Company* (2005) 131 Cal.App.4th 1342 (*Sears*) plaintiff *Sears* directed a subpoena for deposition and documents to a non-party. The non-party did not appear for deposition or produce documents and Sears filed a motion to compel and request for sanctions with a court appointed discovery referee. The non-party deponent responded by filing peremptory challenge to the discovery referee and made a substantive opposition to the motion to compel. Ultimately, the discovery referee recommended to the trial court that the non-party's peremptory challenge was untimely and was not party and could not challenge the discovery referee, granted the motion to compel, and did not address sanctions. The trial court thereafter adopted the discovery referee's recommendations. The non-party deponent appealed. The court of appeal dismissed the peremptory challenge portion of the appeal on procedural grounds (the exclusive remedy to denying a 170.6 challenge is a writ). Thus, the issue on appeal was never litigated, the facts are distinguishable, and this case is inapplicable

AUSTIN LEGAL GROUP, APC
3990 Old Town Ave, Ste A-101
San Diego, CA 92110

in ruling on the facts currently before the court.

In *Avelar v. Superior Court (People)* (1992) 7 Cal.App.4th 1270, Avelar was charged with battery on a peace officer and as part of his defense, he requested discovery from the Ontario Police Department and filed a discovery motion to disclose the peace officers personal or confidential records. The trial court granted the motion in part and denied the motion in part. Avelar thereafter filed a challenge for cause which was granted. Avelar then filed a supplemental declaration regarding discovery with the new judge. The police department thereafter filed a peremptory challenge under 170.6 and the trial court ruled the disqualification effective. Avelar filed a writ petition where the issue was whether the police department may exercise a peremptory challenger under 170.6 to disqualify the judge hearing a motion to disclose the peace officers personal or confidential records under Evidence Code section 1043. The court of appeal held that the police department lacked standing to exercise the peremptory challenge because the police department is not a party to a criminal action and the evidence code section 1043 motion is not a special proceeding in the context of the pending criminal action.

In *Frisk v. Superior Court* (2011) 200 Cal.App.4th 402, a named defendant filed a 170.6 challenge. The plaintiff immediately dismissed the defendant and the dismissal was processed prior to the 170.6 challenge. Because the defendant had been dismissed when the 170.6 challenge was reviewed, the 170.6 challenge on appeal was denied on the grounds the defendant was no longer a party.

Deutshmann v. Sears, Roebuck & Co. (1982) 132 Cal.App.3d is not a peremptory challenge case.

VI. CALIFORNIA RULES OF COURT CITED BY CITRUS STREET AS SUPPORT FOR THIS EX PARTE APPLICATION ARE ALSO INAPPLICABLE

Citrus Street cites California Rules of Court, Rules 10.603(c)(1)(D) and 10.608(1)(B). Neither citation offers support for Citrus Street's improper ex parte application. Rule 10.603(c)(1) discusses the reassigning case power of the presiding judge. Rule 10.608(1)(b) discusses a judge's ability to state in writing the reasons for refusing to hear a cause.

These rules are inapplicable to an order granting or denying a 170.6 motion. California

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3990 Old Town Ave, Ste A-101
San Diego, CA 92110

law is clear that the exclusive remedy is explicitly defined in Section 170.3(d). Citrus Street should not be permitted to circumvent Section 170.3(d) by citing inapplicable California Rules of Court.

VII. CONCLUSION

For the foregoing reasons, KIM respectfully requests the Court deny Citrus Street's application.

Dated: February 12, 2020

Respectfully Submitted,

AUSTIN LEGAL GROUP, APC

By: _____

Gina M. Austin/Tamara Leetham,
Attorneys for KIM Investments, LLC

AUSTIN LEGAL GROUP, APC
3990 Old Town Ave, Ste A-101
San Diego, CA 92110