

Marc Van Der Hout  
Katherine M. Lewis  
Van Der Hout, Brigagliano & Nightingale, LLP  
180 Sutter Street, Suite 500  
San Francisco, California 94104  
Telephone: (415) 981-3000  
Facsimile: (415) 981-3003

Not Detained

Attorneys for Petitioner  
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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

|                            |   |              |
|----------------------------|---|--------------|
| **                         | ) | Case No. **  |
|                            | ) |              |
| Petitioner,                | ) | File No. A** |
|                            | ) |              |
|                            | ) |              |
| Jefferson B. SESSIONS III, | ) |              |
| Attorney General           | ) |              |
|                            | ) |              |
| Respondent.                | ) |              |
| _____                      | ) |              |

**PETITIONER'S MOTION TO STAY THE MANDATE**

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## I. INTRODUCTION

Petitioner \*\* (“Petitioner”) respectfully moves the Court to grant him a stay of the mandate for 90 days. As described below, Petitioner shows good cause for a stay of the mandate because he filed a Motion to Reopen (“MTR”) based on changed country conditions in Turkey in support of Form I-589 and an alternative Motion to Reopen *sua sponte* with the Board of Immigration Appeals (“BIA”) on \*, 2017. *See* Att. 1 (Declaration of Katherine M. Lewis); Att. 2 (MTR); Att. 3 (Fed Ex Proof of Delivery). Petitioner filed this MTR based on new and previously unavailable evidence, including country condition evidence and an expert report regarding the escalating persecution of ethnic Kurds and Kurdish political dissidents in Turkey, particularly in the wake of the attempted coup in July 2016, as well as evidence specific to Petitioner and his family, including a recently-issued politically-motivated arrest warrant, all of which demonstrates his *prima facie* eligibility for asylum, withholding of removal, and protection under the Convention Against Torture (“CAT”). *See id.* Petitioner’s MTR is currently in the process of being adjudicated. *See* Att. 1.

Should Petitioner be deported, he faces a high likelihood of persecution and torture as a result of his Kurdish ethnicity, pro-Kurdish beliefs, and his familial association, in light of the current country conditions that demonstrate widespread mistreatment and persecution of Kurds, and those who support Kurdish rights. *See*

Att. 2 at I; VIII.A-VIII.E. Moreover, Petitioner would likely be arrested and held in custody due to a pretextual warrant for his arrest related to pro-Kurdish political comments that were critical of the current Turkish regime posted on Facebook. *See* Att. 2 at I.B; IV. As reported by the U.S. State Department Report for Turkey 2016 and human rights organizations, the Turkish government is silencing critical voices, specifically ethnic Kurds and pro-Kurdish critics, through prosecution under Turkey’s “vague and sweeping” anti-terror laws in the aftermath of the attempted coup in July 2016. *See* Att. 2 at IA; VIII.A.i; VIII.A.ii; VIII.E.ii. Petitioner’s Turkish attorney reports that as a political dissident, Petitioner would be “subjected to severe torture during the 30 days he is under custody” waiting to appear before a judge and “will encounter treatment that range from solitary confinement to heavy torture” while in prison. *See* Att. 2 at I.B; *see e.g.*, Att. 2 at VIII.D.ii.

Additionally if removed, Petitioner would be forced to leave his U.S. citizen wife, U.S. citizen and permanent resident step-children, and his U.S. citizen sister and cousins living in the United States and whom would undergo hardship themselves as a result. *See* Att. 2 at II.A; II.C; II.D; II.E; VI.A; VI.C. Petitioner is the main provider for his family and is instrumental in providing financial assistance to his stepchildren. *See* Att. II.A; VI.A; VI.B; VI.C.

Based on the pending MTR and the fact that Petitioner’s U.S. citizen and

lawful permanent resident family rely on his guidance, support, and financial contribution, Petitioner respectfully requests a stay of the mandate. A stay would allow Petitioner the time necessary to pursue and secure the administrative remedies available to him.

## **II. BRIEF STATEMENT OF THE CASE**

On \*\*, 2001, Petitioner, a Kurdish native and citizen of Turkey, filed an affirmative application for asylum with the legacy Immigration and Naturalization Service (“INS”).<sup>1</sup> Certified Administrative Record (“A.R.”) 1209 (Application for Asylum and Withholding of Removal, dated \*\*, 2001). On \*\*, 2001, Petitioner’s case was referred to the San Francisco Immigration Court, and a Notice to Appear (“NTA”) was issued. A.R. 1306. The legacy INS charged Petitioner as being inadmissible under INA § 101(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i), as an alien who is present in the United States without inspection or admission. *Id.* Before the Immigration Judge (“IJ”), Petitioner renewed his application for asylum and presented testimony in support of his application on \*\*, 2002, \*\*, 2002, and \*\*, 2002. *See* A.R. 592-692 (Transcript of Hearing (“Tr.”)). On \*\*, 2002, Petitioner recanted portions of his prior testimony. *See* A.R. 677-79 (Tr.). Petitioner also submitted numerous exhibits in support of his asylum case. *See* A.R. 699-1022,

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<sup>1</sup> On March 1, 2003, the functions of the legacy INS were transferred to the Department of Homeland Security. To the extent that the INS performed the acts at issue in this case, Petitioner will refer to the legacy agency.

1029-1196, 1220-69 (Exhibits in Support of Asylum Case).

On \*\*, 2002, the IJ issued an oral decision finding that Petitioner was not credible and denying his applications for asylum, withholding of removal, and relief under the CAT. A.R. 547-555 (IJ Decision dated \*\*, 2002). The IJ ordered Petitioner removed to Turkey. *Id.* Petitioner timely filed a Notice of Appeal before the BIA and, on \*\*, 2004, the BIA issued a decision affirming without opinion the IJ's decision. A.R. 496 (BIA Decision dated \*\*, 2004).

Petitioner timely filed a petition for review with this Court and, on \*\*, 2009, this Court issued a Memorandum Opinion, finding that substantial evidence supported the IJ's adverse credibility determination, but granting Petitioner's and the government's separate requests<sup>2</sup> to remand the case to the agency for consideration of the documentary evidence. A.R. 461.

As a result of this Court's Order, on \*\*, 2009, the BIA issued a decision vacating its \*\*, 2004 decision and remanding the case to the IJ for further proceedings consistent with this Court's decision of \*\*, 2009. A.R. 450. On \*\*, 2010, Petitioner appeared at his Master Calendar hearing for the remanded proceedings before the San Francisco Immigration Court. A.R. 141 (Tr.). Petitioner

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<sup>2</sup> In Respondent's brief to this Court in that case, Respondent argued that the case should be remanded to the Board to determine whether the evidence submitted supported his applications for relief. A.R. 490. Respondent cited to *Al-Harbi v. INS*, 242 F.3d 882 (9th Cir. 2001), noting that "[d]ocumentary evidence alone can independently establish facts sufficient to prove a petitioner's claim." *Id.*

filed additional documentary evidence regarding the treatment of Kurds in Turkey, including a declaration from his cousin, \*\*. A.R. 258, 263-313 (Supporting Documentation). The IJ issued his decision on \*\*, 2010, again denying Petitioner's applications for relief. A.R. 134. On \*\*6, 2010, Petitioner timely filed with the BIA a notice of appeal of the IJ's decision. A.R. 115

On \*\*, 2013, the BIA dismissed Petitioner's appeal. A.R. 3-7. Reviewing Petitioner's asylum claim, the BIA held that Petitioner had failed to establish that there was a "pattern and practice" of persecution against Kurds in Turkey. A.R. 5. The BIA stated that mere discrimination does not amount to persecution, and cited to "positive developments" in Turkey regarding Kurdish freedom of expression. *Id.* The BIA concluded that "given the lack of objective, direct, and specific evidence to suggest that the Turkish authorities wish to harm ethnic Kurds, or that they cannot control those who wish to harm ethnic Kurds, the [Petitioner] has not demonstrated a well-founded fear of persecution on account of a protected ground." *Id.* The BIA also upheld the IJ's holding that Petitioner did not qualify for CAT relief. A.R. 6. Finally, the BIA held that the IJ had not violated Petitioner's due process rights. A.R. 7.

Petitioner timely filed a petition for review with this Court on \*\*, 2013. *See* Docket ("Dkt.") 1. On \*\*, 2013, Petitioner filed a motion for a stay of removal. Dkt. 5. The Court granted a temporary stay of removal on \*\*, 2013, pursuant to the

Ninth Circuit General Order 6.4(c). Dkt. 9. On February 21, 2014, Petitioner submitted his Opening Brief, on April 24, 2014, Respondent filed an Answering Brief, and on June 10, 2014, Petitioner filed his Reply Brief. *See* Dkt. 16; 21; 26. This Court heard oral argument on \*\*, 2016.

On \*\*, 2017, this Court denied Petitioner's Petition for Review. *See* \*\* (memorandum). This Court held that substantial evidence supported the BIA's conclusion that Petitioner did not show an individualized risk of persecution or a pattern or practice of persecution of ethnic Kurds in Turkey. *Id.* Furthermore, this Court found that the evidence "did not compel the conclusion that there is systemic persecution" of ethnic Kurds in Turkey nor that Petitioner is more likely than not to be tortured if removed to Turkey. *Id.* Lastly, this Court agreed with the BIA that Petitioner did not establish that he was denied a fair hearing. *Id.*

Petitioner moved for an extension of time in order to consider filing a Petition for Rehearing or Rehearing En Banc, which was granted. Dkt. 57-58. The mandate will issue on \*\*, 2017. On \*\*, 2017, Petitioner, through undersigned counsel, filed a MTR based on changed country conditions in Turkey that materially impact Petitioner's eligibility for asylum, withholding of removal and protection under the CAT and an alternative motion to reopen *sua sponte*. *See* Att. 1; 2; 3. Petitioner is now seeking a stay of the mandate in light of his pending MTR.

### **III. BRIEF STATEMENT OF THE FACTS**

Petitioner is a citizen and national of Turkey who has lived in the United States for over 17 years. A.R. 1306. Petitioner was born in \*\* region in Turkey. *See* Att. 2 at II.A. He is ethnically Kurdish. AR 137. Petitioner's family has a history of advocating for Kurdish rights. *See* Att. 2 at II.C; II.D; II.F. Petitioner first entered the United States on \*\*, 2000. AR 1306. He affirmatively filed an application for asylum and related relief within a year of his entry, and has continued to pursue asylum over the past 17 years because he is afraid to return to Turkey. *See* AR 1209-1216; Att. 2 at II.A. In 2004, Petitioner married \*\*, a U.S. citizen. *See* Att. 2 at VI.B. He has supported his wife and his three U.S. citizen and one lawful permanent stepchildren through his work as owner and operator of \*\*, a restaurant he opened in 2007 in \*\*. Att. 2 at II.A; VI.A; VI.C. Moreover, Petitioner participates in Kurdish community events and continues to advocate for Kurdish rights. *See* Att. 2 at II.A; II.D; III.B; VI.E; VI.F.

While Petitioner's Petition for Review was pending before this Court, he learned from family and friends and heard on the news that the situation had been deteriorating for Kurdish people in Turkey over the past couple of years, and has gotten particularly dangerous in the last several months. II.C-II.L. In July 2015, the two-and-a-half year ceasefire between the Kurdistan's Worker Party ("PKK"), an

armed insurgency fighting for greater Kurdish rights and political power, and the Turkish government ended and hostilities returned, resulting in a “spike of violence unprecedented since the 1990s.” *See* Att. 2 at I.A. (report by Professor Gunes Murat Tezcur).<sup>3</sup> In response to the end of the truce, the Turkish government began conducting security operations in a number of provinces in southeast Turkey, a predominately Kurdish area. *See e.g., id.*; Att. 2 at VIII.A.i.; VIII.B.vi (noting that Turkey imposed 24-hour curfews, sometimes for weeks and even months at a time, resulting in difficult living conditions including cuts to water, electricity and lack of access to food and medical services). Various human rights organizations have documented and reported on the “serious human rights violations” taking place in southeast Turkey since the reigniting of combat operations in the southeast. *See* Att. 2 at VIII.B.iv; VIII.A.iii (finding the authorities’ use of “extended round-the-clock curfews, a total ban on people leaving their homes, combined with the presence of heavy weaponry including tanks in populated areas, *was a disproportionate and abusive response to a serious security concern and may have amounted to collective punishment*”) (emphasis added).

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<sup>3</sup> Professor Tezcür is the Jalal Talabani Endowed Chair of Kurdish Political Studies, and an Associate Professor of Political Science at the University of Central Florida (“UCF”). Professor Tezcür also directs the Kurdish Political Studies Program at UCF, the only academic program dedicated to the study of Kurdish politics in the United States.

While Turkey continued to battle PKK in the southeast, members of the military attempted to carry out a coup d'état against President Recep Tayyip Erdogan on July 15, 2016. *See* Att. 2 at VIII.A.i. In the aftermath of the attempted coup, the Turkish government declared a three-month state of emergency, which has since been extended twice. *See* Att. 2 at I.A. The state of emergency suspended due process protections for those accused of ties to terrorist organizations. *See* Att. 2 at VIII.A.i. Furthermore, government decrees under the state of emergency restricted suspects' access to legal assistance, restrict suspects' rights to confidential conversations with their lawyers, allowed suspects to be held without a charge for at least 30 days, and in some cases, froze from the assets of suspended civil servants. *Id.*

In the wake of the coup, the Turkish government has tried to silence anyone seen as a political dissident in any way, and in particular have targeted Kurds. According to the State Department Report, "prosecutors continued to use a broad definition of terrorism and threats to national security to launch criminal charges against a broad range of defendants, *including more than 140 journalists and hundreds of mostly pro-Kurdish politicians, party officers, and supporters.*" *See* Att. 2 at VIII.A.i (emphasis added). Governmental decrees resulted in the closure of nearly all-Kurdish language media and Kurdish cultural institutions and previous Kurdish language reforms have been annulled in practice. *See* Att. 2 at

I.A; VIII.A.i. The Turkish government used “vague and sweeping anti-terrorism laws” to target pro-Kurdish politicians, Kurdish activists and Kurdish individuals voicing pro-Kurdish political speech. *See* Att. 2 at VIII.A.i (human rights organizations “alleged that many detainees have no substantial link to terrorism and were detained” to weaker pro-Kurdish political parties or to silence critical voices). Moreover, the aftermath of the coup resulted in increased reports of torture and ill treatment for suspects of the coup and Kurdish detainees in the southeast of the country. *See e.g.* Att. 2 at VIII.A.i; VIII.D.i.

In early November 2016, parliamentary members and officials from the pro-Kurdish political party Peoples’ Democratic Party (“HDP”) were arrested. *See* Att. 2 at I.A; VIII.C.i. In response to the jailing of HDP co-leaders and parliamentary members, Petitioner participated in a protest in \*\* 2016, in \*\*, organized by the Kurdish community in \*\*. *See* Att. 2 at II.D; III; Att. II.A (stating that he attended the protest because he “wanted to raise awareness of the arrest and detention of HDP parliamentary members. I protested to show the policy of discriminating against Kurds is not acceptable and that the Turkish government must accept that Kurds have the same rights as Turks.”). According to his cousin, \*\*:

We try to tell people that what Turkey is doing to Kurds is wrong. For example, \*\* and I attended a protest against the jailing of HDP parliamentary members in November 2016 in \*\*. We are not writers and journalists, but we are individuals and we do what individuals can do.

*See* Att. 2 at II.D.

In addition, these sweeping changes in Turkey have directly impacted Petitioner and his family. One of Petitioner's family members, who was studying at a Turkish university was attacked by Turkish students. *See* Att. 2 at II.C. Petitioner's sister-in-law was fired as a teacher as a result of her Kurdish ethnicity and one of Petitioner's brothers is having a hard time practicing as an attorney. Att. 2 at II.C-II.H. Another one of Petitioner's brothers has recently been arrested on multiple occasions due to his Kurdish ethnicity and membership in the \*\* family. *See* Att. 2 at II.A; II.D; II.G-II.H. Furthermore, two of Petitioner's friends who had traveled to Turkey after the attempted coup had been stopped and questioned about Petitioner by security forces at checkpoints in southeast Turkey. *See* Att. 2 at II.I; II.K. Moreover, Petitioner's cousin, \*\* was killed in an armed attack by Turkish forces in \*\*, Turkey on \*\*, 2016. *See* Att. 2 at V; II.D; Att. F. While the authorities reported that Mr. \*\* lost his life as a result of an armed conflict, villagers stated that "there was no mutual confrontation" and "that the victim was killed by one-sided shooting." *See* Att. 2 at V. The family's attorney, \*\*, reported that he was having difficulty in reaching the investigation file and \*\*, Petitioner's relative and mother of Mr. \*\*, reported that she was threatened by the police after the incident. *Id.*

In January 2017, Petitioner made a series of electronic posts that challenged Turkey's opinion of the Democratic Union Party ("PYD"), a Kurdish political

party in Syria, asked that all Kurds support PYD, and commented on Turkey's oppression of Kurdish citizens. *See* Att. 2 at I; II.A; IV. Later that week, he learned from his family that \*\* security forces and civilian police showed up at his family home in Turkey inquiring about him. *See* Att. 2 at II.B. Petitioner's family was informed that the \*\* Chief Public Prosecutor's Office was investigating Petitioner. *Id.* Petitioner's family contacted their family attorney who was able to obtain documents related to the investigation. *Id.* According to Petitioner's family attorney, \*\*, Petitioner's social media posts were being investigated pursuant to Article 7/2 of Anti-Terror Law No. 3713. *See* Att. 2 at I.B. As reported by 2016 State Department report, Turkey's anti-terror laws "were broadly used *against Kurds, suspected PKK sympathizers, and alleged members of the Gulen movement.* Human rights groups alleged that many detainees had no substantial link to terrorism and were detained to weaken the pro-Kurdish HDP and DBP or to silence critical voices." Att. 2 at VIII.A.i (emphasis added). According to attorney \*\*, Kurdish political dissidents waiting to be brought before the judge for the first time are subjected to "severe torture" and during their time in prison "will encounter treatments that range from solitary confinement to heavy torture. Today no political prisoner has security of life." *See* Att. 2 at I.B.

In light of these recently changed country conditions, Petitioner fears for his safety if he is forced to return to Turkey. Att. II.A.

#### **IV. ARGUMENT**

Petitioner hereby moves this Court to stay the mandate in his case because he is awaiting the adjudication of the MTR he filed with the BIA on \*\*, 2017, which would allow him to pursue relief from persecution and torture through asylum, withholding of removal, and protection under CAT. *See* Att. 2

The motion to reopen alleges that Petitioner is eligible for asylum, withholding of removal, and protection under CAT based on the deteriorating changed country conditions for ethnic Kurds and critics in Turkey and presented new and material evidence of the persecution and torture he would face if forced to return. As the basis for Petitioner's MTR is for asylum, withholding of removal, and protection under CAT and is based on changed country conditions in the country of nationality and he presented new evidence that was unavailable in 2010 at the time of his last hearing, he is exempted from the time and numerical limitations that generally apply when filing a MTR. *See* INA § 240(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii) (the time and numerical limitations on motions to reopen shall not apply if the basis of the motion is to apply for asylum and is "based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing."); *see also Malty v. Ashcroft*, 381 F.3d 942, 946 (9th Cir. 2004).

This Court has generally stayed the issuance of the mandate where a petitioner has filed, or plans to file, a meritorious MTR before the BIA, and should do so in this case as well. *See Myers v. Holder*, 661 F.3d 1178 (9th Cir. 2011) (granting petitioner’s motion to stay the mandate pending adjudication of his motion to reopen before the BIA). *See also Aguilar-Escobar v. INS*, 136 F.3d 140 (9th Cir. 1998); *Dhangu v. INS*, 812 F.3d 455 (9th Cir. 1987); *Alvarez-Ruiz v. INS*, 740 F.2d 1314 (9th Cir. 1984); *Khourassany v. I.N.S.*, 208 F.3d 1096, 1101 (9th Cir. 2000) (staying the mandate “to allow petitioners the opportunity to file a motion to reopen with the BIA”); *Roque-Carranza v. INS*, 778 F.2d 1372 (9th Cir. 1985).

In each of the above-mentioned cases, despite the fact that petitions for review were denied, this Court still found it appropriate to stay the issuance of the mandate because there were unresolved issues the Court felt that the BIA should address. Petitioner presents an even stronger case for issuance of a stay of the mandate because he is not asking this Court to issue such a stay so that he *may*, in the future, file a motion to reopen or application for relief to the agency, as was the case in *Alvarez-Ruiz*, *Khourassany*, *Roque-Carranza*, *Aguilar-Escobar* and *Ortiz*. Like the petitioner in *Myers*, Petitioner has *already* filed a motion to reopen to the BIA, here, based on changed country conditions in Turkey. *See* Atts. 1, 2, 3.

In his timely-filed motion, Petitioner presented objective and new evidence

that it is more likely than not that he would be persecuted or and subjected to torture if removed to Turkey. Att. I; III; IV; V; VIII. As stated by Professor Tezcür, “[u]nder the present circumstances, many Turkish citizens with Kurdish ethnicity have an insecure existence and subject to discrimination and mistreatment at the hands of governmental authorities.” Att. 2 at I.A. Similarly, Rod Nordland of the New York Times reported that “Turkey’s crackdown on Kurdish politicians, officials, news outlets, schools, municipalities, think tanks and even charities has been so thoroughgoing that it has left those who remain free expecting arrest at any moment.” Att. 2 at VIII.C.viii; *see also* Att. 2 at VIII.B.vi (noting that the in the “series of executive decrees issued under the state of emergency, the government, as part of a systematic attack on dissenting voices across the political spectrum, *has acted to eliminate all opposition Kurdish voices*”) (emphasis added).

Moreover, as explained by expert Professor Tezcur, “Kurdish citizens of Turkey with family histories and political views similar to Petitioner” are at a “great risk of being arrested for expressing political views, mistreated in detention including physical beatings, and waiting for indictments for months without taken to court. Petitioner is very likely to face similar mistreatment in his return to Turkey under the current circumstances.” Att. 2 at I.A. Moreover, Petitioner’s Turkish attorney, \*\* noted that, based on his experience as a practicing attorney in Turkey now, Petitioner would be subject to severe and heavy torture if he were to

return. Att. 2 at I.B. Attorney \*\* stated that:

Given the practices in Turkey today, the client will be subjected to severe torture during the 30 days he is under custody. Again, during the time he is in prison, he will encounter treatments that range from solitary confinement to heavy torture. [...] The situation is clearly stated by our clients who we visit in prison. We believe under such circumstances it is dangerous for our client to return to the Republic of Turkey.

*Id.*

As Petitioner's motion to reopen presents strong claims of changed country conditions and new and material evidence that he would be subject to persecution and torture if removed to Turkey, a stay of the mandate is warranted to allow those claims to be properly considered, in the first instance, by the BIA.

Moreover, to prevent extreme hardship to Petitioner's U.S. citizen wife and stepchildren, Petitioner requests that the mandate be stayed while his Motion to Reopen is pending. Petitioner has longstanding ties in the community, as he has lived in the U.S. for more than 17 years. *See* Att. 2 at II.A.; VI.A; VI.D. He has owned and operated a restaurant in \*\* for close to ten years and is active in the \*\* Community Center located in \*\*. *See id.*; Att. II.C; II.D; II.E.

Accordingly, Petitioner respectfully requests this Court stay the mandate for 90 days in light of his family ties, the serious persecution and torture he would face if returned to Turkey, and in order to allow time to pursue and secure his administrative remedies through his pending MTR.

**V. CONCLUSION**

Based on the aforementioned reasons, and the attached evidence, Petitioner respectfully requests the mandate be stayed until at least \*\*, 2017.

Dated: \*\*, 2017

Respectfully submitted,

/s Katherine M. Lewis

Katherine M. Lewis  
Marc Van Der Hout

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Katherine M. Lewis, the undersigned, say:

I am over the age of eighteen years and not a party to the within action or proceedings; my business address is Van Der Hout, Brigagliano & Nightingale, LLP, 180 Sutter Street, Suite 500, San Francisco, CA 94104.

On \*\*, 2017, I caused to be served the within:

PETITIONER'S MOTION TO STAY THE MANDATE

with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Katherine M. Lewis