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Apple-Samsung judge presses lawyers to settle

Observers think judge's efforts are not likely to gain traction with the dueling companies.

By Saul Sugarman
Daily Journal Staff Writer

SAN JOSE — U.S. District Judge Lucy H. Koh on Wednesday made a final plea for attorneys to settle a high-profile lawsuit between Apple Inc. and Samsung Electronics Co. Ltd., which are dueling in a trial over patent infringement and trade dress allegations.

"It's time for peace," Koh told attorneys for the two companies in the morning, outside the jury's presence. "I see risk here for both sides if we go to a verdict. I think it's worth one more chance [to try to settle]."

Lawyers for both companies agreed to a telephonic mediation with U.S. Magistrate Judge Joseph C. Spero of San Francisco, who tried unsuccessfully to negotiate a settlement before the trial started. But they did not indicate a resolution was likely.

Legal observers were not surprised by Koh's request, but do not expect the smartphone and tablet wars between Cupertino-based Apple and Mountain View-based Google Inc. and its allies, such as Samsung, to end before one side wins several major cases.

"Ultimately I think the parties have to settle the larger dispute. They both have too much to lose otherwise," Mark A. Lemley, a Stanford Law School professor who is not involved in the Apple-Samsung case, wrote in an email. "But it's not clear that will happen in the next week, before the verdict comes out."

Koh suggested that, even if the companies do not settle, they should consider streamlining their allegations by removing some "accused devices" from their claims. Neither side offered to do so.

"If you want to keep overreaching, that's up to you," Koh told attorneys. "If all you wanted was to raise awareness that you had [intellectual property rights] on these devices, message delivered."

Apple is represented by Wilmer Cutler Pickering Hale and Dorr LLP and Morrison & Foerster LLP, and Samsung is represented by Quinn Emanuel Urquhart & Sullivan LLP.

On occasion, Koh has been openly testy with the attorneys' conduct and docked their trial time. The San Jose judge demanded paper evidence on Tuesday and Wednesday to support attorney requests, saying she didn't want to base decisions solely on an attorney's arguments.

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DAILY APPELLATE REPORT

CIVIL LAW

Employment Law: Whistleblower doctor is not required to exhaust administrative remedies where such proceedings would provide means for retaliation. *Fahlen v. Sutter Central Valley Hospitals,* C.A. 5th, DAR p. 11289

Health Care: Resident in understaffed nursing home may sue facility despite absence of language in administrative regulations because patient's rights cannot be waived. *Shuts v. Covenant Holdco LLC,* C.A. 1st/4, DAR p. 11326

Immigration: Petitioner is not removable where his conviction for using government computer to access pornographic websites is not 'aggravated felony' under modified categorical approach. *Aguilar-Turcios v. Holder,* U.S.C.A. 9th, DAR p. 11309

CRIMINAL LAW

Criminal Law and Procedure: Defendant who threw rock at federal officer is not guilty of assault where officer was not aware of threat of harm until after it had passed. *U.S. v. Acosta-Sierra,* U.S.C.A. 9th, DAR p. 11301

Criminal Law and Procedure: Order authorizing involuntary medication for purpose of restoring defendant to competence is sufficiently specific by implicitly relying on prior treatment plan. *People v. Coleman,* C.A. 1st/3, DAR p. 11334

Full rulings and summaries are online by 4 p.m. the day they are issued. www.dailyjournal.com

BRIEFLY

A university professor who wrote emails outlining a plan to attack a California high school after his son committed suicide has pleaded not guilty to arson charges. Rainer Reinscheid entered his plea Wednesday in an Orange County courtroom. The 48-year-old has been charged with several counts of arson and one count of attempted arson. Prosecutors say Reinscheid, a professor at the University of California, Irvine, set a series of fires earlier this year. They believe Reinscheid was upset his son hanged himself shortly after he was disciplined for allegedly stealing from a school store. Police say emails written by Reinscheid describe a plan to buy weapons, shoot students and administrators, commit sexual assaults and burn down the school before killing himself. Prosecutors have not charged Reinscheid with making the threats.

A Los Angeles federal district court clerk and her husband are facing criminal charges for allegedly accessing sealed court documents and using the confidential information to alert defendants of their pending arrests. According to an FBI affidavit, Nune Gevorkyan, who was employed as a clerk in the U.S. District Court clerk's criminal intake area, allegedly offered a confidential informant access to sealed information in the federal court system in exchange for cash.Gevorkyan and her husband, Oganes Koshkaryan, were taken into custody Wednesday afternoon on charges of conspiracy to obstruct justice, according to an FBI press release. If convicted, the couple faces a maximum penalty of 20 years in prison.

JUDICIAL APPOINTMENTS

Associated Press

Gov. Jerry Brown's office and some observers say he's about on pace with his predecessors when it comes to filling judicial vacancies.

Brown on pace for judge selection

Despite vacancies, governor in line with predecessors

By Paul Jones
Daily Journal Staff Writer

Despite a perceived slow start to appointing judges, data shows Gov. Jerry Brown is within reach of his predecessors' records. And his appointment process — which some observers say involves greater deliberation and more personal involvement than past governors, and drew criticism for eschewing a judicial appointments secretary — has drawn praise in some quarters for its results, though many vacancies remain.

Brown appointed just one judge for the first 11 months of his term, but has since ramped up the volume of appointments, including 14 in December 2011, 17 this past May and six last week.

According to data provided by the state Administrative Office of the Courts, Govs. Gray Davis and Arnold Schwarzenegger appointed 25 and 34 judges, respectively, in their first 17 months in office. In Brown's latest term, he has appointed 31 in the same time frame.

Currently, there are approximately 68 positions are open on superior courts, with the potential for more to become vacant.

Brown's office has taken issue with characterizations in the press that his office has acted slowly.

"In his first year in office, Gov. Brown was at or above the pace of the past three administrations with respect to judicial appointments," said Evan Westrup, a spokesman for the Brown Administration. "If you look at the

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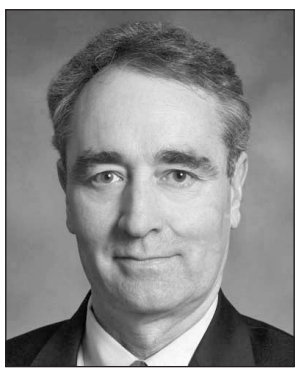
GUEST COLUMN



Martin Kenney *is a professor in the Department of Human and Community Development at UC Davis and a Senior Project Director at the Berkeley Roundtable of the International Economy at UC Berkeley.*

Crowdfunding: making sure it works

Crowdfunding uses dedicated Internet websites where promoters describe their projects to potential funders. These websites allow the promoters to reach a far larger audience and number of potentially interested parties than would otherwise be possible. Think of it as a way to pitch a project to the world and aggregate demand in ways previously unimaginable. For me, this is one of the most exciting ways of raising money for good projects that has ever emerged. The excitement is so great that it became an important component of the recently passed JOBS Act, which specifically loosened various SEC regulations to facilitate crowdfunding. The opportunities and likely risks are only now being explored.

Two rapidly growing websites, Kickstarter and AngelList, are intriguing examples of the innovation in this field. Both have business models uniquely adapted to the markets they were serving. Kickstarter offers individuals a platform for raising money to undertake a specific project. It is tailored to raise funding for creative projects that do not have ongoing maintenance costs. The site makes no warrantees about the project promoter and takes no responsibility for the promoter's fulfilling of the project commitment. It is based on caveat emptor and, in many respects, those pledging funding can see this as charity. While the risk of non-delivery is high, there is no financial "upside" being promised and there is no possibility of continuing funding calls. In this way, the "investment" by funders is inherently self-limiting.

AngelList is specifically geared toward fund-

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Effort to repeal death penalty is losing steam

By Henry Meier
Daily Journal Staff Writer

After a strong start in their campaign to abolish the death penalty in California, supporters of Proposition 34 have seen public support for their position decline as opponents have pounced on several high-profile events to bolster support for capital punishment.

If passed, the November ballot initiative would replace the death penalty with life without parole for the 724 inmates who currently sit on the state's death row.

A mid-July joint poll by the California Business Roundtable and the Pepperdine School of Public Policy showed that support for Prop. 34, the Saving, Accountability and Full Enforcement for California Act or SAFE, was polling just above the opposition with 47 percent for it and 45 percent against.

Several events have shaken up those numbers, according to opponents of the measure. In wake of the July 20 movie theater shooting in Aurora, Colorado and the high-profile run-up to the Jared Lee Loughner mass-murder plea deal in Arizona reached Aug. 7, voters appear to be turning against the measure, according to the group's latest numbers.

In a follow-up survey of 873 likely voters taken between July 31 and Aug. 1, approximately 55 percent said they would vote against the measure, while support for it had dropped to 35 percent.

Michael Rushford, the president of the Criminal Justice Legal Foundation, attributed the numbers to the faces put on extreme acts of violence, including the Arizona and Colorado murders.

"In the abstract, people are more philosophic about the death penalty," he said. "But when you put a face on it, their support for it surges."

Natasha Minsker, campaign manager for the SAFE California Campaign, said the California Business Roundtable and Pepperdine poll wasn't reliable and that data she had seen was far more favorable to the initiative.

"The method of polling that they're using is completely untested," she said.

"Our polling shows that 54 percent of people support the initiative and other polls, while they haven't cracked 50 percent, show it in the high 40s leading by a wide margin."

Minsker said opponents' assertions that the Loughner case had any effect on the numbers are misleading, adding that much of the recent media coverage of it came after the California Business Roundtable and Pepperdine poll.

"That's really just the opposition trying to spin this," she said.

Loughner pleaded guilty in exchange for a life sentence without the possibility of parole for killing six people in Jan. 2011, including Chief Justice John Roll of the U.S. District Court for the District of Arizona. The shooting also left U.S. Rep. Gabrielle Giffords severely injured.

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MORE NEWS

Confidentiality: red flags and the dangerous client

By Wendy L. Patrick

"And ... I just bought a gun." Your ears perk up when your client ends what you had thought was just a session of blowing off steam, describing his animosity towards the star witness testifying against him in trial, and expressing his exasperation in general at the legal mess he is in. "Why do you need a gun?" you ask your client, suddenly anxious about what you have just heard. Does your client intend to kill someone? Kill himself? Your client levels you with an icy stare and assures you: "Don't worry about it." Suddenly there is a pit in your stomach as your mind races to recall the ethical rules and regulations that may come into play when you worry your client may be dangerous. And as a preliminary matter, your client has not really *told* you he was planning on *doing* anything with the gun ... has he?

In the wake of recent national tragedies involving mass shootings in Oak Creek, Wis. and two weeks earlier in Aurora, Colo., we have all attempted to become more perceptive and aware of the behavior of other people in order to notice red flags that might signal potential danger. In the last month alone we have seen two examples of mass murders being committed by opening fire on a crowd of people by two people, one in Colorado and one in Wisconsin, who had recently purchased guns and ammunition. The hypothetical presented thus calls into play the California ethics rules, code sections and evidence code provisions that may apply when you fear you are representing a dangerous client.

Although client confidentiality is one of the hallmarks of the attorney-client relationship, in California there are circumstances under which you as a lawyer have the option of revealing confidential client information. There are legal and ethical rules that explain the circumstances under which attorneys may, but are not required to, reveal confidential information imparted to them by their clients.

> What if you believe the client bought the gun to kill himself? This is a difficult scenario ... because suicide is not a "criminal act" in any state.

For instance, California Evidence Code Section 956 explains that there is no attorney-client privilege if an attorney was sought or obtained to facilitate the commission or the planning of a crime or fraud. Section 956.5 states that: "[t]here is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." Section 956.5 is expressly mentioned as an analogous code section in the discussion section of California Rule of Professional Conduct (CRPC) 3-100. See CRPC 3-100 Discussion, Section [3].

The conduct of California lawyers is also governed by California Business and Professions Code Section 6068. Section 6068(e)(1) states that one of these duties is "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Section 6068(e)(2), however, states that "[n]otwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." This important exception is further developed in CRPC 3-100.

All California attorneys are ethically bound by the CRPC. Rule 3-100, Confidential Information of a Client, states that: "(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule." Paragraph (B) provides that "[a] member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual."

Before a lawyer decides to reveal confidential information, CRPC 3-100 gives a list of options the lawyer may decide to take. Paragraph (C) notes that "[b]efore revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances: (1) make a good faith effort to persuade the client not to commit or to continue the criminal act and/or to pursue a course of conduct that will prevent the threatened death or substantial bodily harm, and (2) inform the client at an appropriate time of the ability or decision to reveal confidential information per subsection (B)."

Regarding the extent of the disclosure, paragraph (D) states that when revealing information per (B), "the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure." Subdivision (E) provides that if an attorney decides not to reveal information that would have been permitted under (B), there is nonetheless no violation of this rule.

Discussion Section [11] recognizes that after disclosure has been made pursuant to this section, withdrawal will likely be required per CRPC 3-700(B), unless the lawyer can obtain consent to continued representation. The lawyer must tell the client about having disclosed confidential information "unless the member has a compelling interest in not informing the client, such as to protect the member, the member's family or a third person from the risk of death or substantial bodily harm."

CRPC 3-700(C), Permissive Withdrawal, states in pertinent part that an attorney may not request permission to withdraw from representation unless the client (b) "seeks to pursue an illegal course of conduct," or "(c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act."

The solution to other scenarios may depend on the interpretation of your client's language. The hypothetical at the beginning of this article was ambiguous. This is realistic, because in many cases, your client's language will not clearly establish a threat of any kind. Your client may not tell you he intends to shoot the star witness against him, he may merely inform you that you need not waste your time preparing the cross-examination of the star witness, because that witness would not be coming to court. Again, several things must factor into your threat analysis. In a domestic violence case, in making such a statement your client might be informing you that he and the victim have decided to reconcile. In a gang case, you may be justified in giving your client's revelation more weight.

What if you believe the client bought the gun to kill himself? This is a difficult scenario because while the result of his act is "likely to result in death of, or substantial bodily harm to, an individual," you still would not be able to disclose the information because suicide is not a "criminal act" in any state. *In re Joseph G.*, 34 Cal. 3d 429, 433 (1983); *Donaldson v. Lungren*, 2 Cal. App. 4th 1614, 1624 (1992). (Note that deliberately *aiding or encouraging* another person to commit suicide is a crime in California. California Penal Code Section 401; *In re Ryan N.*, 92 Cal. App. 4th 1359 (2003)). Many lawyers profess that they would attempt to save their client anyway and risk State Bar discipline, but knowing what the ethics rules say provide valuable guidance to practitioners that are thrust into this unfortunate situation.

The moral of the story is that if you practice law long enough, you may at some point in your career be faced with representing the dangerous client. A working knowledge of the ethical rules that apply in this situation is essential to allow you to weigh your options under your particular facts, and to make the right decision. Good luck!

This article does not constitute legal advice. Please shepardize all case law before using.

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Crowdfunding: making sure it works

Continued from page 1

ing entrepreneurs in the hopes of achieving a financial return, and as such it is organized quite differently. It is a venue for entrepreneurs and accredited investors to meet. But the investment *cannot be done online*; the potential investor must meet the entrepreneur prior to making the investment, thereby ensuring some degree of due diligence (for a discussion prior to the JOBS Act passage see http://www.youtube.com/watch?v=lWfGw7serN0).

AngelList was already growing rapidly prior to the JOBS Act. It has a number of community tools and has attracted an all-star roster of investors that have in turn attracted high-quality entrepreneurs. The model is based upon high levels of transparency and careful vetting of applicant investors. To be an investor, AngelList requires that one have already done at least two cash investments, be qualified as an accredited investor, and be referred. At this point, lawyers, headhunters, accountants, etc. are not allowed to use AngelList to search for customers. Currently, it is highly curated and the owners operate it as a non-profit. In this respect, it is more like Craigslist, but they are considering how it might be monetized.

> It is vitally important that the outcome of the JOBS Act not be the creation of a market that is so lax that fraudsters and charlatans enter, and in the process discredit crowdfunding.

New financial innovations, as we have learned repeatedly, always pose contradictions. How can we ensure the obvious benefits of crowdfunding offers without it being suborned by unscrupulous individuals preying upon the unsuspecting? The role of regulators and legislators should be to allow for experimentation, while being prepared to rein in criminal behavior. In the case of Kickstarter, which entirely operates on a funder-beware model with no promises of financial benefits to contributors, there would appear to be little need for regulatory oversight. Kickstarter itself is likely to have to implement some method of ensuring responsibility, otherwise non-performance may become endemic destroying the credibility of the site. For sites such as AngelList the key will be to ensure continuing curation so that neither too many bad deals nor inexperienced investors become part of the community. Both models appeared to be working well within the previous regulatory environment; removing most remaining regulation, as the JOBS Act has done, has some risks.

Crowdfunding is the most interesting development in entrepreneurial financing in the last 20 years. The SEC is in the process of writing the final rules to implement the JOBS Act crowdfunding provisions. This is a difficult task because markets can be destroyed by either too much or too little regulation. Both Kickstarter and AngelList are excellent models due to their transparency and being structured to avoid perverse incentives. They carefully outline the risks to investors and do not hype the opportunities. It is vitally important that the outcome of the JOBS Act not be the creation of a market that is so lax that fraudsters and charlatans enter, and in the process discredit crowdfunding. Of equal importance is that the SEC not over-regulate and thereby destroy the ability of the existing crowdfunding models to continue to provide services and new ones to emerge. With confidence in the SEC as a regulatory institution at all-time lows, for those interested in the long-term development of this funding mechanism it will be important to monitor the rule-making.

Skadden plays role in large Chinese buyout

By Kevin Lee
Daily Journal Staff Writer

A local Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates lawyer snatched a cut of the legal work in what could be the biggest private buyout for a Chinese company listed on a New York-based stock exchange.

Skadden is representing Focus Media Holding Ltd. Chairman and CEO Jason Nanchun Jiang, who teamed up with a consortium of private equity groups and investment firms in a proposed $3.5 billion management buyout.

The buying consortium sent a preliminary, non-binding proposal letter to Focus Media's board of directors on Aug. 12, according to a Focus Media company press release.

Jiang's team is led by Skadden corporate partners Peter X. Huang in Beijing and Michael V. Gisser in Los Angeles and Beijing. Beijing-based associate Andre Zhu also advised on the matter.

Huang and Gisser have previous experience with delisting Chinese companies from New York stock markets, including Harbin Electric Inc., which completed a $750 million management buyout in November.

"It gives us the opportunity to forge closer ties with our private equity clients, and to work closely with a range of excellent Chinese companies that we hope to serve for years to come," Gisser said. "It's also an excellent example of how a long-term commitment to a market can bear fruit."

Experts say Chinese companies have been delisting from U.S. stock markets partially as a result of increased scrutiny from the U.S. Securities and Exchange Commission and investment firms.

Focus Media, which displays advertising in Chinese office and commercial spaces, began publicly trading in 2005.

Fried, Frank, Harris, Shriver & Jacobson LLP and Sullivan & Cromwell LLP are representing the private equity groups and investment firms in the buyout consortium, which include Carlyle Group LP, CITIC Capital Holdings Ltd.,, CDH Investments, China Everbright International Ltd., and FountainVest Partners.

A Hong Kong-based team of corporate lawyers at Simpson Thacher & Bartlett LLP is representing Focus Media in the transaction.

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Tustin lawyer disbarred for 'flouting' courts

By Don J. DeBenedictis
Daily Journal Staff Writer

A suspended lawyer who led courts, partners, clients and opponents to think he could practice law should be disbarred, the State Bar Court review department has ruled.

John Mark Heurlin of Tustin "repeatedly and consciously flouted the authority of the courts ... by continuing to file pleadings misrepresenting himself as a licensed attorney in good standing and entitled to practice law when clearly he is not," the review panel held. *In re: Heurlin*, 09-O-10774 (St. Bar Ct., filed Aug. 7, 2012).

Heurlin, who represented himself at the bar, didn't immediately respond to a phone message about the ruling.

He was suspended for two years in 2005 in connection with a tangled fee dispute, but he never satisfied the conditions for readmission. Yet he didn't tell his partners in a new law firm about the suspension, and he continued to refer to himself as "attorney at law" and "Esq." in letters and bills.

When his two partners found out from opposing counsel, they sued to dissolve the partnership. Representing himself, Heurlin filed pleadings in the trial and appellate court using the same attorney titles.

At one point, he filed a sworn declaration with the 4th District Court of Appeal saying he was "an attorney licensed to practice before the courts of the State of California." That court referred Heurlin to the State Bar in 2007 and again in 2009.

In the bar court review department's unpublished opinion last week, it said Heurlin even used "these references to himself in his pleadings and briefs filed in this court," Judge Judith A. Epstein wrote for the three-judge panel.

The panel agreed with the trial judge that Heurlin had engaged in the unauthorized practice of law. It rejected his arguments that he had the right to use the titles because he was representing himself in most of the underlying litigation. It described as "unconvincing" his contention that "the word 'Esquire' has many meanings, including that of property owner and subscriber to the magazine Esquire."

While the trial court judge made some procedural errors, the appellate panel held they weren't prejudicial. And it found too vague his argument that the judge had "single-handedly violated every precept of due process."

Because he was disciplined three times before and because he presented no mitigation in his defense, Heurlin should be disbarred, the court ruled, in a recommendation to the state Supreme Court.

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REAL ESTATE
Movers And Dealmakers

MOVERS

Litigation firm inks $500,000 lease in Orange County

Long & Delis, a litigation firm that specializes in business, construction, product liability and medical and legal malpractice, inked a deal in Orange County to renew its lease for 4,600 square feet at 400 N. Tustin Ave. in Santa Ana.

The firm signed a five-year lease agreement for $500,000.

Andrew Herron of The Saywitz Company handled brokerage services for the law firm.

DEALMAKERS

Milbank advises on $300 million public offering for BRE Properties

Milbank, Tweed, Hadley & McCloy LLP advised underwriters in a $300 million offering of senior 10-year notes issued by BRE Properties Inc.

BRE focuses on ownership, operation, development and acquisitions of apartment communities located primarily in California and Seattle, Wash. The real estate investment trust has about $3.4 billion in real estate assets.

Milbank represented J.P. Morgan Securities LLC, RBS Securities Inc., Wells Fargo Securities LLC and a syndicate of 10 other underwriters in connection with the registered public offering.

J.P. Morgan, RBS, Wells Fargo, Deutsche Bank Securities Inc. and UBS Securities Inc. acted as joint "book-running managers" — underwriters with ultimate control of the offering.

The notes will mature on January 15, 2023.

BRE intends to use the net proceeds of the notes offering to repay outstanding amounts under its credit facility and for general corporate purposes.

This is the fifth transaction since 2010 in which Milbank has acted as underwriters counsel for a BRE financing. The firm has assisted the company in raising more than $1.5 billion through SEC-registered equity and debt offerings.

Milbank global securities partner Robert B. Williams led the firm's team on the deal. Associates Sam Badawi and Elizabeth Rosado also worked on the transaction. Partner Bruce E. Kayle and associate Joanna Grossman worked on tax elements of the deal.

— Connie Lopez

Submit your real estate moves and dealmakers to real_estate@dailyjournal.com