Court of Appeal No. H031658

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

COUNTY OF SANTA CLARA and PETER KUTRAS, JR., as the County Executive of the County of Santa Clara,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA,

Respondent.

CALIFORNIA FIRST AMENDMENT COALITION

Real Party in Interest.

Superior Court of the State of California,
County of Santa Clara Court Case No. 1-06-CV-072630
The Honorable James P. Kleinberg

PRELIMINARY OPPOSITION OF REAL PARTY IN INTEREST CALIFORNIA FIRST AMENDMENT COALITION TO PETITION FOR EXTRAORDINARY WRIT

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State of California
Court of Appeal
Sixth Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Caption: COUNTY OF SANTA CLARA et al., Petitioners, v. SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent; CALIFORNIA FIRST AMENDMENT COALITION, Real Party in Interest.

Court of Appeal Case Number: H0 031658

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with Entity or Person Information if necessary.

Please check here if applicable:

☒ There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208(d).

Signature of Attorney/Party Submitting Form

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INTRODUCTION

The exhaustive 27-page opinion and order that is the basis of the petition for extraordinary writ filed by Petitioners County of Santa Clara and its County Executive was issued by the respondent court a full four months after Real Party in Interest California First Amendment Coalition ("CFAC") filed its motion for judgment, and only after the respondent court held three hearings and received multiple rounds of briefing and evidentiary submissions from both parties. At the conclusion of that process, the respondent court found that the County's GIS basemap must be released for the direct cost of duplication as mandated by the California Public Records Act, Cal. Gov't Code § 6250 *et seq.* ("PRA"), and that none of the arguments cited by Petitioners justified their position that they should be able to continue their past practice of selling the basemap data for fees that often exceeded $100,000.

This is not the kind of case that warrants appellate scrutiny. In reaching its conclusions as to many of the County's arguments, the respondent court was required to review multiple declarations, determine the weight that should be given to conflicting evidence, and make the type of credibility determinations that are reserved for the finder of fact. *See, e.g., Shamblin v. Brattain*, 44 Cal. 3d 474, 479 (1988) ("The trial court, with declarations and supporting affidavits, was able to assess credibility and resolve any conflicts in the evidence. Its findings ... are entitled to great weight."); *Estate of Larson*, 106 Cal. App. 3d 560, 567 (1980) ("the trier of fact is in the best position to determine the value and weight to be attributed to evidence"). The respondent court's decision is supported not only by these factual determinations, but also by the applicable law, both for the reasons specified in its 27-page order and the additional reasons set forth in CFAC's three principal legal briefs filed in the court below, which are in the record submitted to this Court as part of Petitioner's Appendix

("PA"). *See* PA Tab 10 pp. 504-25; Tab 33 pp. 1430-40; Tab 50 pp. 1699-1715.[1]

Contrary to Petitioners' mischaracterization of the respondent court's order, that court did not have "grave doubts" about its decision ordering the release of the basemap. As a review of the respondent court's order shows, its real doubts centered on the County's purported arguments about security, given the County's past practice of providing the basemap data to those able to afford the hefty fees the County has been charging. Indeed, the record of this case reflects that the security issues so prominently featured in Petitioner's writ petition were simply not a concern to the County until it was confronted with the prospect of losing its ability to continue to use the basemap as a source of revenue.

In enacting the PRA, it was the Legislature's purpose to further the "fundamental right" of the public to have "prompt access to information in the possession of public agencies." *Filarsky v. Superior Court*, 28 Cal. 4th 419, 423 (2002). In light of the considerable attention and analysis devoted to this matter by the respondent court – to say nothing of the time and effort

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[1] While the respondent court's legal conclusions are subject to *de novo* review, its findings of fact, including its implied findings of fact, are reviewed according to the deferential "substantial evidence" standard. *E.g., Michaelis, Montanari & Johnson v. Superior Court*, 38 Cal. 4th 1065, 1072 (2006) (reviewing court should "accept as true the trial court's findings of the 'facts of the particular case' (Gov. Code, § 6255, subd. (a)), assuming those findings are supported by substantial evidence"); *Bolkiah v. Superior Court*, 74 Cal. App. 4th 984, 1000 (1999) ("An appellate court will not disturb the implied findings of fact made by a trial court in support of an order, any more than it will interfere with express findings upon which a final judgment is predicated." ... When an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed.") (internal quotations omitted).

already expended by CFAC, a non-profit public interest organization, to enforce the public's right under the PRA to obtain information about the operation of the government without paying exorbitant fees – this Court should summarily deny the County's petition.

FACTUAL BACKGROUND

In its petition and supporting memorandum, the County repeatedly misstates the respondent court's characterization of its own order. Over and over, the County asserts that respondent court said it had "grave concerns" and "grave doubts" about the wisdom of its decision. The order says no such thing. The County is apparently referring to the last section of the order, which states, in relevant part:

> As is apparent from the length of this opinion, the Court has reservations about granting the requested relief. ... The Court has an ongoing concern that, for security reasons as in the Hetch Hetchy example, granting this writ may prove to be unwise. On the other hand, it does not appear this has been an overriding concern to the County, as shown by the dissemination of the GIS basemap to others, albeit relying on a form of non-disclosure agreement. If the security issue were of greater importance, one would think there would be no dissemination of the GIS basemap whatever. The Court is further concerned that County will have difficulty recouping the expense incurred in creating the GIS basemap, although there was a dearth of evidence that this was County's initial plan. However, taking all of these issues into account, the straightforward statutory language, as underscored by the Attorney General's Opinion, contrasted with the County's inability to show an "overriding interest" to deny disclosure, compels the Court to grant the writ.

PA, Tab 59, pp. 1893-94.

In addition to this mischaracterization of the respondent Court's order, the County's description of the facts and procedural history underlying the instant writ petition is inaccurate and incomplete in many respects. As noted above, the respondent court has already resolved these

factual issues, and for the purposes of this preliminary opposition, it is necessary to note only a few major points:

First, the GIS basemap data at issue in this case is limited and straightforward. It consists of electronic data reflecting boundary lines of individual parcels of property, together with other basic information such as the address of each parcel and the Assessor's Parcel number. *See* PA Tab 1, pp. 6-7 & 185-87; Tab 10, pp. 509-11; Tab 13, pp. 1052-75; Tab 14, pp. 1058-63. The underlying data itself is available from other sources, including but not limited to the Assessor's parcel maps available on the County's own website. *See, e.g.*, PA Tab 50, p. 1704 (n.5) & pp. 1710-13. However, unlike the Assessor's parcel map, the GIS basemap is searchable and, because it is georeferenced, it can be used as a foundation, together with other publicly available data, to evaluate and monitor a wide variety of government activities. For example, it can be used to analyze government decisions on matters such as property tax assessments, issuance of permits, equitable deployment of public services, or issuance of zoning variances. Specific illustrations of the ways in which the basemap can be used to monitor government activities are described in the declaration of CFAC's expert included in Petitioner's Appendix at Tab 38, pp. 1495-99.

Second, the County suggests that CFAC is seeking orthophotographs and street center line data, but neither of these items were part of CFAC's PRA request. PA Tab 1, pp. 6-7 & 185-87; Tab 13, pp. 1052-58. In that request, CFAC noted its understanding that the County's basemap "reflects integrated countywide coverage that has been geographically registered with the county's orthophotography," but it did not request the

orthophotographs themselves, which GIS professionals normally consider to be separate from the GIS basemap itself. PA Tab 13, p.1056. [2]

Third, the County erroneously states that the basemap would show the precise location of the Hetch Hetchy water lines and other "critical components" such as valves, and pump stations. This is a misstatement. None of the basemap data elements and descriptive attribute data requested by CFAC would show such detail. To the extent the County contends such detail can be seen from the orthophotographs, this is also a misstatement, but in any event, orthophotographs are available for purchase on the open market, and as noted, CFAC has not requested the orthophotographs.[3]

Fourth, the so-called "Point Address Layer" map developed by the County after the respondent court issued its order would ***not***, as the County contends, meet CFAC's "informational desires." County's MPA, at 12 n.1. The parcel boundary lines (which, as noted above, are publicly available, albeit in other less sophisticated formats) are a key element of the basemap, and without those boundary lines, it would not be possible for CFAC and other members of the public to achieve the public benefits that motivated CFAC's request for the basemap data in the first place.

Fifth, the assertion by Deputy County Counsel Robert Nakamae in his declaration in support of the County's petition for an extraordinary writ

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[2] Because CFAC did not request the orthophotographs and street center line data, and has never contended that those items are among the data commonly understood to constitute a GIS basemap, it is CFAC's position that the County can comply with the respondent court's order by providing an electronic copy of the basemap that does not include either orthophotography or street center lines.

[3] Many sources of orthophotographs are available on the open market. The size of the smallest picture element ("pixel") can range from one meter, to one foot, and in some products, six inches. None of these pixel resolutions are sufficient to discern valves and pump stations. None show pipelines, which are buried underground.

that the transcripts of the April 13 and 27 hearings are "unavailable" is misleading. CFAC's counsel has conferred with the court reporter for those hearings, who has indicated that she has not yet ***prepared*** the transcripts. Upon request and payment of the requisite fees to the court reporter, those transcripts could be made available to this Court. CFAC also disputes the County's contention that the content of the April 13 and 27 hearings are not relevant to the facts at issue in this petition. The subject matter covered during the April 13 hearing was not nearly so narrow as the County suggests. In addition, the transcripts would serve to illustrate the respondent court's careful attention to this case, the probing questions asked by that court, and the discussion that led to CFAC's submission of amicus letters as part of the record below. While this Court need not review those transcripts in order to determine that a summary denial of the County's petition is warranted, it should not take any other action without first directing Petitioners to request the missing transcripts and submit them to the Court. *See* Cal. Rule Ct. 8.490(c)(1)(D) (a "petition that seeks review of a trial court ruling must be accompanied by an adequate record, including copies of ... (D) a reporter's transcript of the oral proceedings that resulted in the ruling under review").

I.

WHERE, AS HERE, THE RESPONDENT COURT'S ORDER IS WELL SUPPORTED BY BOTH THAT COURT'S FACTUAL FINDINGS AND THE UNDERLYING LAW, SUMMARY DENIAL IS APPROPRIATE

As the respondent court correctly noted in its detailed order, the PRA provides that "access to information concerning the conduct of people's business is a fundamental and necessary right of every person in this state." Gov't Code § 6250. The PRA "embodies a strong policy in favor of disclosure of public records," *Lorig v. Medical Board*, 78 Cal. App. 4th 462, 467 (2000); *accord Braun v. City of Taft*, 154 Cal. App. 3d

332, 342 (1984), and consistent with that policy, members of the public are entitled to obtain copies of documents maintained by government agencies for a charge that in most cases cannot exceed the direct cost of duplication.

"[S]upport for its claim [of nondisclosure] must be found, if at all, among the specific exceptions to the general policy that are enumerated in the Act." *State of California ex rel. Division of Industrial Safety v. Superior Court*, 43 Cal. App. 3d 778, 783 (1974). Where, as here, a local agency seeks to withhold a public record, "[t]he burden of demonstrating a need for nondisclosure is upon the agency claiming the right to withhold the information." *Braun*, 154 Cal. App. 3d at 345; *accord County of Los Angeles v. Superior Court*, 82 Cal. App. 4th 819, 825 (2000).

CFAC brought the instant PRA action not because Petitioners were refusing to release the GIS basemap, but because they were refusing to release it for the cost of duplication as required by the PRA, and were instead charging excessive fees for its release -- fees that, depending on the amount of data requested, often exceeded $100,000. PA Tab 4 pp. 180-82, 196-200; Tab 12 pp. 765-69 & 774-76. In an all-out effort to protect its ability to continue to sell the basemap data, the County raised at least seven different arguments in the proceeding below as to why that data was purportedly exempt from disclosure under the PRA. The respondent court considered each of those arguments in turn, and rejected all of them.

In its writ petition to this Court, the County only relies on three of those arguments, having apparently abandoned the other four. The County took every opportunity to submit evidence and argument to the respondent court in support of the three arguments on which it now relies. After giving careful consideration to the County's submissions, as well as those of CFAC, the respondent court concluded that none of those arguments entitled the County to avoid its obligation to disclose the basemap under the PRA for a fee that does not exceed the cost of duplication, and without

requiring CFAC to submit to the County's non-disclosure requirements and restrictions on use. It is evident, from a review of the record, that the respondent court reached the correct result.

A. **Critical Infrastructure Information Act** – The County asserts that the federal regulations promulgated as a result of the Critical Infrastructure Information Act "expressly preempt" the PRA. Even a cursory review of the Act itself (codified at 6 U.S.C. §§ 131-134) and regulations promulgated pursuant to that enabling law confirms that this is not the case.[4] As the respondent court correctly recognized, the issue was not whether 6 C.F.R. § 29.8(g) "preempts" the PRA, but whether it provides an exemption to disclosure that would be incorporated into the PRA through the exemption, in Government Code § 6254(k), for records "the disclosure of which is exempted or prohibited pursuant to federal or state law."

The trial court was also correct in concluding that, as the County's

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[4] Petitioners' preemption argument ignores black letter law. "[F]ederal regulation should not be deemed preemptive of state regulatory power absent 'persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" *Haberbush v. Charles & Dorothy Cummins Family Limited Partnership*, 139 Cal. App. 4th 1630, 1640 (2006) (citations omitted). The Critical Infrastructure Information Act and the regulations promulgated pursuant to that Act can clearly coexist with the PRA, since the PRA specifically provides an exemption for records "the disclosure of which is exempted or prohibited pursuant to state or federal law." Gov't Code § 6254(k). In this case, as the respondent court found, the County has waived this exemption by its prior sales of the basemap to non-governmental parties. Application of the PRA's waiver provisions are themselves consistent with the federal Act. As CFAC noted in its brief addressing the County's argument in the proceedings below, nothing in that Act ***prohibits*** a local agency from disclosing CII where it chooses to do so. *See* PA Tab 50 p. 1707. Here, the County has, in the past, chosen to provide the basemap to non-governmental parties who were able to pay the County's hefty fee.

own past practice illustrates, the Act does not prohibit the County from disclosing the basemap. As CFAC explained in a March 12, 2007 brief filed in the court below – a copy of which is included in Petitioner's Appendix at Tab 50 (pp. 1699-1715) – when the rule relied on by the County is examined and construed in connection with the enabling legislation, it is clear that § 29.8(g) only applies in those cases where a state or local government may have received data from another government entity that has been designated as CII, and is presented with a PRA request for that information. Moreover, even if § 29.8(g) provided an exemption for the County's own data, it is incorporated into the PRA, if at all, through Government Code § 6254(k), and the respondent court correctly concluded that the County waived § 6254(k) by virtue of its prior sales of the basemap to three non-governmental entities. PA Tab 60, pp. 1915-16. As such, § 29.8 has no application in this case.

B. **Government Code § 6255** – The PRA's so-called "catchall" provision authorizes a government entity such as the County to withhold public records if "on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." Gov't Code § 6255(a). "The burden of proof is on the proponent of nondisclosure, who must demonstrate a 'clear overbalance' on the side of confidentiality." *City of San Jose v. Superior Court*, 74 Cal. App. 4th 1008, 1018 (1999). Speculative assertions of harm by the government body are "inadequate to demonstrate any significant public interest in nondisclosure." *California State University, Fresno Ass'n v. Superior Court*, 90 Cal. App. 4th 810, 834-35 (2001); *accord CBS, Inc. v. Block*, 42 Cal. 3d 646, 652 (1986). In assessing the public interest served by disclosure, the focus is not how the particular requestor would use the information, but on the general public interest that will be served by disclosure. *Connell v. Superior Court*, 56 Cal. App. 4th 601, 617-18 (1997);

State Board of Equalization v. Superior Court, 10 Cal. App. 4th 1177, 1191 (1992). As the *Connell* court observed, "[i]f the records sought pertain to the conduct of the people's business there ***is*** a public interest in disclosure. The ***weight*** of that interest is proportionate to the gravity of the governmental tasks sought to be illuminated and the directness with which the disclosure will serve to illuminate." *Id.* at 616 (emph. in original).

For several years, the County sold its GIS basemap to government and non-government third parties alike, without any apparent concern for the purported security issues it now insists are so serious. See PA Tab 4, pp. 179-84, 188, 196-210; Tab 12 p. 765-79, Tab 13 p.1058. The County did not conduct any security checks; obtaining a copy of the basemap appears to have been contingent only on an ability to pay. It was only ***after*** CFAC challenged the County's practice of charging excessive fees that the County thought to object on security grounds. After consideration of the extensive arguments by both parties, together with the numerous declarations submitted by both sides, the respondent court concluded that in light of the County's prior disclosures of the basemap to third parties, its purported security concerns were not entitled to great weight. PA, Tab 59, p. 1893.[5] As to the County's assertions that the loss of funding from sales of the basemap would cause it to shut down the GIS program, the respondent court concluded that such assertions were "somewhat hypothetical," and did not give them great weight, either. In making these

[5] The County complains that the respondent court did not examine the GIS basemap *in camera*, but contrary to its contentions to this Court, the County never offered the respondent court an opportunity to inspect the electronic basemap data itself. The only material offered by the County for *in camera* review were printouts it said were derived from the basemap, together with printouts from Google Earth. As CFAC's expert explained in his February 21, 2007 declaration filed with the respondent court, nothing in these printouts purportedly from the basemap revealed sensitive information not already available to the public. PA, Tab 42, pp. 1602-1604.

assessments, the respondent court engaged in the type of weighing process and credibility determinations typically reserved for the finder of fact. *Shamblin v. Brattain*, 44 Cal. 3d 474, 479 (1988); *Estate of Larson*, 106 Cal. App. 3d 560, 567 (1980). Applying these factual findings to the weighing process mandated by Gov't Code § 6255 and the decisional law interpreting that section, the respondent court found that the County had not satisfied its burden to show the public interest served by not disclosing the basemap "clearly outweighed" the public interest in its disclosure. As the California Supreme Court has observed, "although a reviewing court should weigh the competing public interest factors de novo, it should accept as true the trial court's findings of the 'facts of the particular case.'" *Michaelis, Montanari & Johnson*, 38 Cal. 4th at 1072. As a review of the record of this case will confirm, the respondent court's factual determinations were supported by substantial evidence, and it properly applied the § 6255 balancing test. Under such circumstances, there is simply no basis for the County's challenge to the result reached by the respondent court.

C. **Copyright** – No doubt recognizing the weakness of its claim for withholding the basemap on the basis of the first two arguments addressed above, the County nonetheless asserts that it should be permitted to impose restrictions on the manner in which a requesting party can use the basemap data by requiring them to sign an "end user agreement." The County contends that the respondent court made no findings on this subject, but it overlooks footnote 19 of that court's opinion, which rejected the County's copyright claims. CFAC addressed the County's copyright claims at length in its submissions to the court below. PA Tab 10 pp. 515-19; Tab 33 pp. 1434-35. As that analysis demonstrates, the PRA precludes the County from imposing conditions on the use of the basemap.

D. **Costs** – As a final matter, the County argues that if it is required to make the basemap available in accordance with the PRA, it

should not be limited to charging the cost of reproduction, as directed in the respondent court's order, but should instead be allowed to charge "the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record," as permitted in certain instances specified by Gov't Code § 6253.9(b). In such a case, the fee "may not include expenses associated with the county's initial gathering of the information, or with initial conversion of the information into an electronic format, or with maintaining the information." 88 Ops. Cal. Atty. Gen. 153, 164 (2005).

Although the County made a similar request in the proceedings below, it failed to provide any information as to the amount of cost claimed, nor did it indicate how it proposes to calculate that cost, an omission that no doubt led to the respondent court's order to produce the basemap for the direct cost of duplication. In any event, since the County sends copies of the basemap data to its paid subscribers on a regular basis, it does not appear that any additional programming would be necessary to fulfill CFAC's request for the data under the PRA.

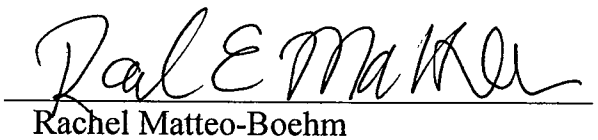
CONCLUSION

After four months and 27 pages of analysis, the respondent court found that the County was not justified in treating otherwise public records as a profit center, and rejected the County's argument that, if it could not continue to profit from the sale of the records, it should nonetheless be able to withhold for security reasons the same records that it was previously willing to sell for a hefty fee. Mindful of this Court's invitation to file a ***preliminary*** opposition, CFAC has limited this submission to only that which it thought would be helpful at this stage of the proceedings. Should this Court decide that, notwithstanding the respondent court's substantial attention to this case and the extensive arguments and evidence already made a part of the record, the County's petition should not be summarily

denied, CFAC respectfully requests that it be allowed an opportunity to demonstrate, in a more detailed submission, why the County's petition for an extraordinary writ must be denied and the respondent court's order affirmed.

DATED: June 25, 2007

HOLME ROBERTS & OWEN LLP
ROGER MYERS
RACHEL MATTEO-BOEHM
KYLE SCHRINER

By: 
Rachel Matteo-Boehm

Attorneys For Real Party in Interest
California First Amendment Coalition

VERIFICATION

I, Rachel Matteo-Boehm, am a partner with the law firm of Holme Roberts & Owen LLP, counsel of record for Real Party in Interest California First Amendment Coalition ("CFAC"). I have read the foregoing Preliminary Opposition, and the facts alleged in the Preliminary Opposition are within my own knowledge and I know those facts to be true. Because of my familiarity with the relevant facts relating to the proceedings before the respondent court, I, rather than CFAC, verify this Preliminary Opposition.

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

DATED: June 25, 2007.

Rachel Matteo-Boehm

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, counsel for Real Party in Interest California First Amendment Coalition certifies that the text of this preliminary opposition consists of 3,514 words, as counted by the Microsoft Word 2002 word-processing program used to generate the brief.

Dated: June 25, 2007

By: 

Rachel Matteo-Boehm

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 560 Mission Street, 25th Floor, San Francisco, California 94105.

On June 25, 2007, I served the foregoing document(s) described as:

PRELIMINARY OPPOSITION OF REAL PARTY IN INTEREST CALIFORNIA FIRST AMENDMENT COALITION TO PETITION FOR EXTRAORDINARY WRIT

on the interested party/parties in this action as follows:

Via Email & U.S. Mail: Robert A. Nakamae, Esq. Deputy County Counsel Office of the Santa Clara County Counsel 70 West Hedding Street 9th Floor, East Wing San Jose, CA 95110-1770 Tel: (408) 299-5900 Fax: (408) 292-7240 Email:robert.nakamae@cco.sccgov.org *Attorneys for County of Santa Clara and Peter Kutras, Jr.*	**Via U.S. Mail:** Clerk of the Court Santa Clara Superior Court 191 N. First Street San Jose, CA 95113-1090

☐ BY PERSONAL SERVICE: I caused the above-mentioned document(s) to be personally served to the offices of the addressee as indicated above.

☐ BY FACSIMILE: I communicated the above-mentioned document(s) via facsimile transmittal to the addressee as indicated above. The transmission was reported complete and without error by a transmission report issued by the facsimile transmission machine as

defined in California Rule of Court 2003 upon which the said transmission was made immediately following the transmission. A true and correct copy of the transmittal report bearing the date, time and sending facsimile machine telephone number shall be attached to the original proof of service.

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☒ BY MAIL: By placing a true and correct copy of such document(s) enclosed in a sealed envelope addressed to the offices indicated above. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on June 25, 2007, at San Francisco, California.

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

Nancy Burnett

Nancy Burnett