

Court of Appeal No. H031658

**COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT**

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

v.

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

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CALIFORNIA FIRST AMENDMENT COALITION  
Real Party in Interest.

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Superior Court of the State of California,  
County of Santa Clara Court Case No. 1-06-CV-072630  
The Honorable James P. Kleinberg  
Department 12 / (408) 882-2230  
May 18, 2007 Decision and Order After Hearing  
Requiring Petitioners to Disclose Records Pursuant to the  
California Public Records Act on June 25, 2007

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**PETITIONERS' REPLY TO REAL PARTY IN INTEREST'S  
PRELIMINARY OPPOSITION TO PETITION FOR  
EXTRAORDINARY WRIT**

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	APPELLATE REVIEW IS REQUIRED TO ADDRESS THIS CASE INVOLVING PUBLIC SAFETY AND MATTERS OF FIRST IMPRESSION .....	1
A.	FEDERAL LAW PREEMPTS THE CPRA, THEREBY RENDERING CPRA EXEMPTION ISSUES MOOT .....	1
1.	The Salient Issue is Preemption of, Not Exemption From, the CPRA .....	1
2.	CPRA Exemption Waiver Arguments Are Irrelevant to Analysis Under Federal Law .....	2
3.	CFAC’s Arguments Against Federal Preemption Are Without Merit .....	4
B.	SHOULD FEDERAL PREEMPTION NOT APPLY, THERE IS NO DISPUTE THAT THIS COURT CAN “RE-WEIGH” THE FACTS IN SUPPORT OF AND IN OPPOSITION TO DISCLOSURE .....	6
1.	The GIS Basemap is Exempt From Disclosure Under the CPRA’s Catchall Exemption .....	6
2.	The Standard of Review in Reviewing the Catchall Exemption to the CPRA is <i>De Novo</i> .....	7

3.	The GIS Basemap Requested by CFAC Presents a Security Threat Because it Contains Georeferenced Parcel Information . . . . .	8
C.	THE TRIAL COURT DID NOT REACH THE COUNTY’S END USER AGREEMENT ARGUMENT . . . . .	9
1.	Compilations are Copyrightable as Long as They Possess a Minimal Level of Creativity . . . . .	9
2.	The County Should Be Permitted to Require Users of the GIS Basemap to Execute an End User Agreement Respecting its Copyright in the GIS Basemap . . . . .	11
D.	THE TRIAL COURT DID NOT ADDRESS THE UNDERLYING FACTS OR LAW REGARDING ADDITIONAL COSTS FOR EXTRACTION, COMPILATION AND PROGRAMMING FUNCTIONS . . . . .	12
III.	CONCLUSION . . . . .	13
	DECLARATION OF ROBERT A. NAKAMAE IN SUPPORT OF PETITIONERS’ REPLY TO REAL PARTY IN INTEREST’S PRELIMINARY OPPOSITION TO PETITION FOR EXTRAORDINARY WRIT . . . . .	15
	CERTIFICATION OF WORD COUNT . . . . .	16

**TABLE OF AUTHORITIES**

**CASES**

*CBS Broadcasting, Inc. v. Sup. Ct.*  
(2001) 91 Cal.App.4th 892 ..... 7

*CBS, Inc. v. Block*  
(1986) 42 Cal.3d 646 ..... 7

*Cipollone v. Liggett Group, Inc.*  
(1992) 505 U.S. 504, 516 ..... 2

*County of Suffolk, New York v. First American Real Estate Solutions*  
(2001) 261 F.3d 179 ..... 12

*Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*  
(1991) 499 U.S. 360 ..... 10

*Michaelis, Montanari & Johnson v. Sup. Ct.*  
(2006) 38 Cal.4th 1065 ..... 7

*Microdecisions, Inc. v. Abe Skinner*  
(2004) 889 So. 2d 871 ..... 12

**STATUTES**

**STATE**

**Government Code**

section 6253.9(b) ..... 13

section 6254(bb) ..... 3

section 6254.5 .....	3
section 6254.9 .....	12
section 6254.9(d) .....	12
section 6254.9(e) .....	11
section 6255 .....	8
section 6255(a) .....	7

**FEDERAL**

**United States Code**

17 U.S.C. section 101. ....	10
6 U.S.C. section 131 <i>et seq.</i> ....	2
6 U.S.C. section 133 .....	3

**Code of Federal Regulations**

6 C.F.R. section 29 <i>et seq.</i> .....	2
6 C.F.R. section 29.2(d) (2006) .....	5
6 C.F.R. section 29.6(g) (2006) .....	6
6 C.F.R. section 29.8(g) (2006) .....	3, 4, 9

**MISCELLANEOUS**

**Nimmer, Copyright**

section 1.08[C][1] (1990) ..... 10

section 2.01[A] (1990) ..... 10

section 2.01[B] (1990) ..... 10

## I.

### INTRODUCTION

The trial court's order requiring disclosure of the GIS Basemap expressed the trial court's own reservations about the wisdom of its decision and stayed the effective date of the order so that these issues could be addressed by this Court.

Extraordinary writ relief is warranted because this case involves matters of first impression arising under federal laws that preempt the CPRA and because of the public safety concerns involved in the disclosure of key, sensitive, critical infrastructure information.

## II.

### APPELLATE REVIEW IS REQUIRED TO ADDRESS THIS CASE INVOLVING PUBLIC SAFETY AND MATTERS OF FIRST IMPRESSION

#### A. FEDERAL LAW PREEMPTS THE CPRA, THEREBY RENDERING CPRA EXEMPTION ISSUES MOOT

##### 1. The Salient Issue is Preemption of, Not Exemption From, the CPRA

CFAC focuses upon exemption from the California Public Records Act ("CPRA") rather than preemption of the CPRA. Yet, this ignores the supremacy clause of the United States Constitution – state law in conflict

with federal law is “without effect.” *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516.

The starting point in a preemption analysis is whether federal law preempts application of the CPRA with respect to information designated by the U.S. Department of Homeland Security as Protected Critical Infrastructure Information (“PCII”) pursuant to 6 U.S.C. section 131 *et seq.* and 6 C.F.R. section 29 *et seq.* [PA 01635-01637, and 01644-01645]. 6 C.F.R. section 29 *et seq.* expressly preempts state disclosure laws such as the CPRA. Therefore, in applying federal law, it is erroneous to consider application of CPRA exemptions.

The trial court mistakenly placed the CPRA exemption question ahead of the federal preemption question. Because 6 C.F.R. section 29 *et seq.* preempts the CPRA, the trial court erred in requiring production of the GIS Basemap.

## **2. CPRA Exemption Waiver Arguments Are Irrelevant to Analysis Under Federal Law**

The GIS Basemap is federally designated PCII. Federal PCII statutes preempt the CPRA. Therefore, alleged waiver of CPRA exemptions is not relevant to a preemption analysis.

Under federal law, PCII designated by the U.S. Department of



Homeland Security is protected from disclosure. 6 C.F.R. § 29.8(g) (2006). Under state law, Critical Infrastructure Information (“CII”) designated by the California Office of Homeland Security is protected from disclosure pursuant to 6 U.S.C. section 133, which is incorporated by Government Code section 6254 subdivision (bb). The County’s GIS Basemap has been designated PCII by the U.S. Department of Homeland Security and additionally as CII by the California Office of Homeland Security.

The trial court determined that petitioners’ prior licensing of the GIS Basemap constituted a waiver of the CPRA exemptions for state CII. That alleged waiver is limited, however, to a waiver of the CPRA’s exemption for state CII. See Gov. Code, § 6254.5.

This writ does not challenge the trial court’s determination that under California law petitioners’ prior licensing activities constitute a waiver of the CPRA exemptions set forth at Government Code section 6254 subdivision (bb).<sup>1</sup> Rather, the subject of this writ is the trial court’s erroneous

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<sup>1</sup> CFAC and the trial court also noted that Government Code section 6254 subdivision (bb) “shall not affect the status of information in the possession of any other state or local governmental agency.” [PA 01440 and 01886]. However, this subdivision is limited to state CII and is not relevant to this writ, which focuses on federal PCII preemption.

determination regarding the application of federal law.<sup>2</sup>

The trial court is without authority to change the PCII designation of the GIS Basemap. Unless and until the PCII Program Office deems the GIS Basemap to be customarily in the public domain and thereafter changes the designation of the GIS Basemap from PCII to non-PCII, the GIS Basemap remains PCII and is not subject to disclosure under state laws. 6 C.F.R. § 29.8(g) (2006). Accordingly, the CPRA analysis pertaining to the CPRA's state CII exemption is irrelevant.

### **3. CFAC's Arguments Against Federal Preemption Are Without Merit**

The Federal Regulations provide that information that has been validated as PCII by the U.S. Department of Homeland Security shall not be disclosed. 6 C.F.R. § 29.8(g) (2006). CFAC argues that because the U.S. Department of Homeland Security first validated the GIS Basemap as PCII after CFAC made its CPRA request but before the issuance of the trial court's order, this Court should ignore federal law in determining whether the trial court may properly order production of the GIS Basemap. CFAC

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<sup>2</sup> Besides the preemption issue, this writ petition also challenges the trial court's requirement that the County first prove each and every element in the GIS Basemap qualifies as PCII. Such a requirement is an incorrect application of the federal PCII laws. CFAC's preliminary opposition does not contest the point.

cites no authority in support of its argument. Nor can it. CFAC's argument is contradicted by the plain language of the applicable Federal Regulations. These regulations contain no exception that would allow the court to order disclosure under these circumstances. The strong public policy reasons favoring protection of information designated PCII by the U.S. Department of Homeland Security mandate rejection of CFAC's position.

CFAC further attempts to bolster its argument against federal preemption by contending that the County did not conduct background checks of those who licensed the GIS Basemap before the County submitted it to the U.S. Department of Homeland Security. Federal law contains no such limitation. Rather, the Federal Regulations require only that the information is not customarily in the public domain. 6 C.F.R. § 29.2(d) (2006).

Here, the GIS Basemap was never in the public domain. Rather, it was licensed to a limited group of licensees subject to confidentiality clauses and contractual non-disclosure agreements. Only two licenses exceeded \$100,000, the last one being December 2005. The last license for the entire GIS Basemap (\$4,800 to Midpeninsula) was executed July 2006. Many licenses – such as the Cities of San Jose, Cupertino and Palo Alto – were for no money. The County has not licensed the subject GIS Basemap since July

2006. All licenses included a confidentiality clause. [PA 00213-00482]. Contractual non-disclosure agreements were required of anyone purchasing the GIS Basemap. [PA 01302].

Nor can it be argued that prior licenses and enhancement updates to private entities such as Covad defeat federal preemption. Covad's GIS Basemap license expired December 15, 2006. [PA 00436]. As of December 15, 2006, the only remaining GIS Basemap licenses that have not expired or been cancelled are to other public agencies. [PA 00213-00482].

Even when an item that has been validated as PCII is later found to be customarily in the public domain, only the PCII Program Office can change the designation from PCII to non-PCII. 6 C.F.R. § 29.6(g) (2006). Here, there has been no such change in designation. The entire GIS Basemap has been validated as federal PCII and to this day remains federal PCII. As PCII, the GIS Basemap is protected by federal law against disclosure under the CPRA.

**B. SHOULD FEDERAL PREEMPTION NOT APPLY, THERE IS NO DISPUTE THAT THIS COURT CAN “RE-WEIGH” THE FACTS IN SUPPORT OF AND IN OPPOSITION TO DISCLOSURE**

**1. The GIS Basemap is Exempt From Disclosure Under the CPRA's Catchall Exemption**

The CPRA provides an exemption if “on the facts of the particular case

the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” Gov. Code, § 6255(a). This exemption is commonly referred to as the “catchall” exemption. The trial court balanced the interest served by not disclosing the GIS Basemap against the interests served by disclosure – and erred in concluding that disclosure was warranted.

**2. The Standard of Review in Reviewing the Catchall Exemption to the CPRA is *De Novo***

The County contends that a fresh examination and re-weighing of these interests would reveal that the trial court reached the wrong conclusion when it performed the balancing test. Interpretation and application of the CPRA presents a question of law subject to *de novo* appellate review. *CBS Broadcasting, Inc. v. Sup. Ct.* (2001) 91 Cal.App.4th 892, 906.

The parties agree that the standard of review this Court should apply in reviewing the trial court’s application of the balancing test analysis that applies under the catchall exemption of the CPRA is as follows: this Court should weigh the competing public interest factors *de novo*, accepting as true the trial court’s findings of fact assuming those findings are supported by substantial evidence. *Michaelis, Montanari & Johnson v. Sup. Ct.* (2006) 38 Cal.4th 1065, 1072; and *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 650-651.

The County is not asking this Court to re-examine the trial court's findings of fact with respect to the interests in favor of and against disclosure of the GIS Basemap. Instead, the County argues that a correct application of the balancing test to these same facts will conclusively demonstrate that the GIS Basemap is exempt from disclosure under the CPRA pursuant to Government Code section 6255. The County presented evidence from County first responders supporting non-disclosure of the GIS Basemap. CFAC demonstrated only a hypothetical and minimal interest in disclosure. For this Court to re-weigh the factors that are considered in the balancing test under Government Code section 6255 is both appropriate and warranted in this action.

**3. The GIS Basemap Requested by CFAC Presents a Security Threat Because it Contains Georeferenced Parcel Information**

CFAC argues that the basemap data is straightforward, that its request does not seek orthophotographs or street centerline data, and disputes that the GIS Basemap reveals critical infrastructure information about the Hetch Hetchy water system.<sup>3</sup> None of these contentions by CFAC change the fact

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<sup>3</sup> CFAC also takes issue with the fact that petitioners did not include the April 13 and 27 transcripts among their exhibits. As previously stated in the Nakamae Declaration submitted in support of the opening brief, the County requested a copy of these transcripts but learned that transcripts were unavailable. The trial court's reporter is currently on vacation and will not return until July 10. Although the County believes these hearings are

that the entire GIS Basemap has been designated PCII by the U.S. Department of Homeland Security and remains so to this day. Under the applicable Federal Regulations, because the entire GIS Basemap remains designated PCII, it is not subject to disclosure under state disclosure laws such as the CPRA. 6 C.F.R. § 29.8(g) (2006).

Moreover, CFAC's argument ignores the fact that placing a georeferenced parcel map (with accuracy within +/- 1 foot in the developed areas and +/- 5 feet in the hilly areas [PA 01124 and PA 01129]) in the public domain would allow anyone to locate the parcels overlaying the Hetch Hetchy water lines. Matching the GIS Basemap with orthophotographs, which are in the public domain, would allow anyone to pinpoint weak spots in the system and quickly and effectively plan a terrorist attack.

**C. THE TRIAL COURT DID NOT REACH THE COUNTY'S END USER AGREEMENT ARGUMENT**

**1. Compilations are Copyrightable as Long as They Possess a Minimal Level of Creativity**

The Copyright Act expressly states that compilations are copyrightable.

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not germane to the issues presented in this writ, the County will request copies of these transcripts from the court reporter once she returns from her vacation and supplement the exhibits with those transcripts once they are received. [Nakamae Declaration in Support of Reply ¶ 2].

The trial court should not have summarily dismissed the GIS Basemap's copyrightability on the grounds that it contained data [Order at PA 01914 fn.19], and should have thereafter considered the County's request for an end user agreement.

The Copyright Act defines a "compilation" as "work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101. Although comprised entirely of uncopyrightable facts, a compilation of these same facts may be copyrightable if it possesses a minimal degree of creativity. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.* (1991) 499 U.S. 360, 345. The required level of creativity is "extremely low" and even a slight amount will suffice. A compilation qualifies for copyright protection if it possess some creative spark, "no matter how crude, humble or obvious" it might be. *Id.*; and *Nimmer, Copyright* §§ 1.08[C][1] and 2.01[A], [B] (1990).

Even if the GIS Basemap is not copyrightable as a computer program, it is a copyrightable compilation. [PA 01124, 01129, and 01311-01312]. A correct application of the copyright laws to the GIS Basemap necessitates copyright protection because even if the GIS Basemap consists entirely of



facts, its unique arrangement is enough to satisfy the extremely low level of creativity required for copyright protection. Therefore, the trial court should not have summarily dismissed the County's request for an end user agreement, without first examining the creativity and compilation issues.

**2. The County Should Be Permitted to Require Users of the GIS Basemap to Execute an End User Agreement Respecting its Copyright in the GIS Basemap**

If the County is required to produce the GIS Basemap, then pursuant to Government Code section 6254.9 subdivision (e) the County should be allowed to require end users to execute an agreement respecting the County's copyright interest in the GIS Basemap. [PA 01135]. The trial court did not analyze the copyrightability of the GIS Basemap as a compilation, or the level of creativity contained in the GIS Basemap. Therefore, the issue of copyrightability and an end user agreement is ripe for adjudication by this Court.

CFAC argues that the trial court considered and rejected the County's copyright argument in footnote 19 of its Decision and Order After Hearing. However, footnote 19 arises in the context of whether the GIS Basemap is a computer program or data – it is silent with respect to the GIS Basemap's level of creativity or its qualification for copyright protection as a

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compilation. Footnote 19 states:

Subdivision (e) of § 6254.9 provides: “Nothing in this section is intended to limit any copyright protections.” CFAC is correct in its interpretation that, when read in conjunction with subdivision (d), copyright protection is not appropriate here. See also, CFAC’s Reply Memorandum at 4-5 and *Microdecisions, Inc. v. Abe Skinner*, (2004) 889 So. 2d 871, 874. Cf. *County of Suffolk, New York v. First American Real Estate Solutions*, (2001) 261 F.3d 179.”

[Order at PA 01914 fn.19.] Footnote 19 does not address the extremely low level of creativity required to protect a compilation such as the GIS Basemap. Thus, footnote 19 does not properly decide the issue of the GIS Basemap’s copyrightability as a compilation, or the issue of the County’s request for an end user agreement.

**D. THE TRIAL COURT DID NOT ADDRESS THE UNDERLYING FACTS OR LAW REGARDING ADDITIONAL COSTS FOR EXTRACTION, COMPILATION AND PROGRAMMING FUNCTIONS**

It is undisputed that in order to comply with CFAC’s request, the County would be required to produce a copy of the electronic GIS Basemap at an unscheduled interval. It is also undisputed that compliance requires data compilation, extraction, or programming to produce the GIS Basemap. The County raised this issue and the trial court did not address it in its order. [PA 01135-1137].

CFAC argues that the County did not outline the particular costs associated with its Government Code section 6253.9 subdivision (b) request. CFAC did not raise this argument in the underlying action, nor did the trial court cite this as a reason for not addressing or denying the request. CFAC's argument is untimely, and lacks both merit and legal support.

CFAC also argues that such costs are unnecessary because the County allegedly provided licensees with enhancement updates at regularly scheduled intervals. However, CFAC presented no evidence as to the timing of the updates, or that the updates even occurred at all. In fact, enhancements were to be provided only at the County's discretion [PA 00436] and no updates were ever provided.

### III.

### CONCLUSION

The trial court concluded its order with a *sua sponte* stay and an invitation to pursue this writ. This case involves a matter of public safety, and the issues tendered involve matters of first impression. The County respectfully requests that the Court grant its request and issue an extraordinary writ directing the trial court to vacate its May 18, 2007 order

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and issue a new order denying CFAC's motion for disclosure of the GIS  
Basemap.

Dated: July 5, 2007

Respectfully submitted,

ANN MILLER RAVEL  
County Counsel

By:   
\_\_\_\_\_  
ROBERT A. NAKAMAE  
Deputy County Counsel

Attorneys for Petitioners  
COUNTY OF SANTA CLARA  
and PETER KUTRAS, JR.

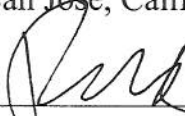
**DECLARATION OF ROBERT A. NAKAMAE IN SUPPORT OF  
PETITIONERS' REPLY TO REAL PARTY IN INTEREST'S  
PRELIMINARY OPPOSITION TO PETITION FOR  
EXTRAORDINARY WRIT**

I, Robert A. Nakamae, declare as follows:

1. I am a Deputy County Counsel in the Office of the County Counsel and one of the attorneys of record in this matter. I am a member in good standing duly admitted to practice before this Court and all Courts in the State of California. The following facts are true of my own personal knowledge, and if called upon to do so, I could and would testify competently thereto.
  
2. On June 29, 2007, I called Judge Kleinberg's court reporter to again request a copy of the transcripts for the hearings on April 13, 2007 and April 27, 2007. The court reporter's telephone message indicated that she is out of the office and will return on July 10, 2007. If I am able to obtain copies of these transcripts, I will promptly provide them to this Court.

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

Executed this 5<sup>th</sup> day of July, 2007 in San Jose, California.



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ROBERT A. NAKAMAE

## CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, counsel for Petitioners County of Santa Clara and County Executive Peter Kutras, Jr. certifies that the Petitioners' Reply to Real Party in Interest's Preliminary Opposition to Petition for Extraordinary Writ is proportionately spaced, has a typeface of 13 points or more contains 2,946 words as counted by the Corel WordPerfect version 12 word-processing program used to generate this brief.

Dated: July 5, 2007

  
\_\_\_\_\_  
ROBERT A. NAKAMAE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

**PROOF OF SERVICE BY MAIL**

COUNTY OF SANTA CLARA and PETER KUTRAS, JR., as the County Executive of the County of Santa Clara, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

Case No.: H031658

Santa Clara County Superior Court Case No. 1-06-CV-072630

I, Alexandra K. Weight, say:

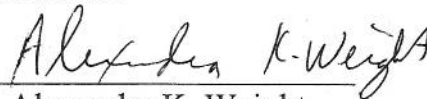
I am now and at all times herein mentioned have been over the age of eighteen years, employed in Santa Clara County, California, and not a party to the within action or cause; that my business address is 70 West Hedding Street, 9<sup>th</sup> Floor, East Wing, San Jose, California 95110-1770. I am readily familiar with the County's business practice for collection and processing of correspondence for mailing with the United States Postal Service. I served a copy of the attached **PETITIONERS' REPLY TO REAL PARTY IN INTEREST'S PRELIMINARY OPPOSITION TO PETITION FOR EXTRAORDINARY WRIT** by placing said copy in an envelope addressed to:

Honorable James P. Kleinberg  
Superior Court of the State of  
California, County of Santa Clara  
191 North First Street, D12  
San Jose, CA 95113

Rachel Matteo-Boehm, Esq.  
Holme Roberts & Owen LLP  
560 Mission Street, 25<sup>th</sup> Floor  
San Francisco, CA 94105

which envelopes were then sealed, with postage fully prepaid thereon, on **July 5, 2007**, and placed for collection and mailing at my place of business following ordinary business practices. Said correspondence will be deposited with the United States Postal Service at San Jose, California, on the above-referenced date in the ordinary course of business; there is delivery Service by United States mail at the place so addressed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on **July 5, 2007**, at San Jose, California.

  
Alexandra K. Weight