

COPY

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FILED
Clerk of the Superior Court

JUL 06 2011

4 Attorney for Plaintiff and Petitioner
5 TAXPAYERS FOR ACCOUNTABLE
SCHOOL BOND SPENDING
6

By: Lisa Van Herkheim, Deputy

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF SAN DIEGO – CENTRAL DISTRICT
9

10 TAXPAYERS FOR ACCOUNTABLE
SCHOOL BOND SPENDING, a California
11 nonprofit fictitious business entity,

) Case No.: 37-2011-00085714-CU-WM-CTL
) [action filed: February 10, 2011]

12
13 Plaintiff and Petitioner,

) EX PARTE APPLICATION TO AMEND
) COMPLAINT AND CONSOLIDATE THE
) NEW CLAIM WITH THE CURRENT
) BRIEFING SCHEDULE; DECLARATION
) OF COUNSEL; [PROPOSED] ORDER

14 v.

15
16 SAN DIEGO UNIFIED SCHOOL DISTRICT;
and DOES ONE through TWENTY, inclusive,

) Date: July 7, 2011
) Time: 8:30 a.m.
) Dept. C-72
) I/C Judge: Hon. Timothy Taylor

17
18 Defendants and Respondents,
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21 I.
22 EX PARTE APPLICATION FOR AN ORDER GRANTING
23 THE PARTIES' STIPULATION ALLOWING AMENDMENT OF COMPLAINT
AND CONSOLIDATION WITH HEARING AND BRIEFING

24 A. Background Facts

25 Plaintiff TAXPAYERS FOR ACCOUNTABLE SCHOOL BOND SPENDING
26 ("Plaintiff") filed a lawsuit on February 10, 2011 claiming defendant San Diego Unified School
27 District ("Defendant") had no valid exemption of local zoning ordinances and local agency
28 general plans. (Complaint, ¶¶ 36-39)

1 Three months after Plaintiff's filing and fourth months after approving the project and
2 its CEQA decision, on May 10, 2011, without notice to Plaintiff, their attorney or any property
3 owner within "300" of feet of the subject school and project site (and other 11 other school
4 sites) nor any notice via newspaper publication, Defendant adopted a Resolution exempting
5 Hoover H.S. and 11 other schools' separate projects from compliance with local plans and
6 zoning ordinances. No CEQA review was conducted and no CEQA findings were made for
7 that May 10, 2011 action.

8 Plaintiff now intends to bring a new cause of action and claim to rescind that May 10,
9 2011 exemption action.

10 B. Appropriateness and Necessity of Ex Parte Order

11 The parties have reached an agreement to allow Plaintiff to amend its complaint to add
12 a Fourth Cause of Action to include the new related cause of action. (See attached *Stipulation*
13 *and Proposed Order*, Exhibit B hereto.) The proposed amendment is attached to that same
14 *Stipulation* as Exhibit A.

15 An additional lodged *Stipulation and Order* is being provided for signing. Plaintiff will
16 have the First Amended Complaint ready for filing at the July 7, 2011 ex parte hearing should
17 the Court approve the proposed amendment.

18 Because of a statute of limitations on the intended new cause of action, and for reasons
19 of judicial economy of a related claim between the same parties, the matter of the amended
20 pleading and consolidation with the pending briefing needs to be dealt with expediently.

21 With proper notice given (Sherman Decl. ¶ 3), this ex parte application is brought in
22 accordance with Cal. Rules of Court, Rule 3.1200 et seq. and Rule 3.1300, subd. (b), and Local
23 Rules for an important matter which needs immediate attention and scheduling.

24 Dated: July 6, 2011

LAW OFFICE OF CRAIG A. SHERMAN

25 
26 _____
27 Craig A. Sherman
28 Attorney for Plaintiff
TAXPAYERS FOR ACCOUNTABLE
SCHOOL BOND SPENDING

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II.

DECLARATION OF CRAIG A. SHERMAN

I, CRAIG A. SHERMAN declare:

1. I am counsel of record for Plaintiff in the above-captioned action. I am personally aware of all of the information contained herein, and if I was called to testify, I could and would do so as set forth herein.

2. Plaintiff has drafted and proposes to file a *First Amended Complaint* with a new Fourth Cause of Action, a true and correct copy of the substantial language of the proposed amendment is attached as Exhibit A to the attached *Stipulation and Proposed Order*.

3. On July 5, 2011, I both called and wrote called attorney Cameron C. Ward, wherein we discussed: (a) the proposed amendment and consolidation of briefing, and (b) that Plaintiff would be appearing *ex parte* July 7, 2011 at 8:30 a.m. in department 72 of this Court to present the proposed amendment for review, approval and order thereon.

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

Executed on July 6, 2011 in San Diego County.

By: 

Craig A. Sherman, Esq.

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III.

ORDER

With Good cause appearing, it is hereby ordered that:

1) Plaintiff's ex parte application on the parties' *Stipulation* to allow an amendment of the complaint to add a Fourth Cause of Action and consolidate the briefing and hearing on that new claim is granted. The Court's signature approving said *Stipulation* shall be the Order of the Court.

IT IS SO ORDERED.

Dated: 7/7/11

Timothy B. Taylor
Hon. Timothy Taylor
JUDGE OF THE SUPERIOR COURT

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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF SAN DIEGO – CENTRAL DISTRICT
9

10 TAXPAYERS FOR ACCOUNTABLE
SCHOOL BOND SPENDING, a California
nonprofit fictitious business entity,
11

12 Plaintiff and Petitioner,

13 v.
14

15 SAN DIEGO UNIFIED SCHOOL DISTRICT;
and DOES ONE through TWENTY, inclusive,
16

17 Defendants and Respondents,
18
19
20

) Case No.: 37-2011-00085714-CU-WM-CTL

) [action filed: February 10, 2011]
)

) STIPULATION AND [PROPOSED]
ORDER TO FILE AN AMENDED
COMPLAINT TO ADD A NEW CAUSE
OF ACTION: BRIEFING AND HEARING
SCHEDULE ON SAID NEW CAUSE OF
ACTION

) CEQA Hearing Date #1: August 26, 2011
Writ Hearing Date #2: September 30, 2011
Dept. C-72
I/C Judge: Hon. Timothy Taylor
)

21 WHEREAS, on February 10, 2011, plaintiff and petitioner TAXPAYERS FOR
22 ACCOUNTABLE SCHOOL BOND SPENDING (“Taxpayers” or “Plaintiff”) filed an initial
23 lawsuit for declaratory and injunctive relief, and petition for writ of mandate with three causes
24 of action;

25 WHEREAS, on May 10, 2011, Defendant adopted a resolution to exempt itself from the
26 City of San Diego zoning ordinance and adopted general plans, which action Plaintiff proposes
27 to challenge based on four currently proposed grounds, the substance of which is contained in
28 the proposed First Amended Complaint, underscored in the draft attached hereto as Exhibit A.

EXHIBIT B PAGE 1

1 **THEREFORE, without waiving any legal arguments, rights or defenses, the parties**
2 stipulate as follows:

3 1) **Plaintiff shall a *First Amended Complaint* substantially conforming to the**
4 proposed new allegation, claims, and cause of action attached to this Stipulation. Such
5 amendment shall be filed within five (5) calendar days of notice from this Court that this
6 Stipulation and Order has been signed;

7 2) **Defendant shall file a responsive pleading or *Answer* within fifteen (15)**
8 days of service of the *First Amended Complaint*;

9 3) **The new added claim in the proposed Fourth Cause of Action shall be**
10 heard and adjudicated on the current briefing and hearing schedule set forth as follows:

11 Hearing Date:	September 30, 2011
12 Opening Brief	September 2, 2011
13 Opposition Brief(s)	September 16, 2011
14 Reply Brief	September 23, 2011

15 4) **Except as otherwise inconsistent herein, all other terms and conditions set**
16 forth in this Court's prior May 10, 2011 Order for the September 30, 2011 hearing shall control.

17 **IT IS SO STIPULATED.**

18 Dated: July 6, 2011

LAW OFFICE OF CRAIG A. SHERMAN

Craig A. Sherman, Esq.
Attorney for Plaintiff and Petitioner
**TAXPAYERS FOR ACCOUNTABLE
SCHOOL BOND SPENDING**

23 Dated: July 6, 2011

DANNIS, WOLIVER, & KELLEY

Cameron Ward, Esq.
Attorney for Defendant and Respondent
SAN DIEGO UNIFIED SCHOOL DISTRICT

ORDER

With GOOD CAUSE appearing, the above agreement and stipulation of the parties are hereby accepted and ordered as follows:

1) Plaintiff shall a *First Amended Complaint* substantially conforming to the proposed new allegation, claims, and cause of action attached to this Stipulation. Such amendment shall be filed within five (5) calendar days of notice from this Court that this Stipulation and Order has been signed;

2) Defendant shall file a responsive pleading or *Answer* within fifteen (15) days of service of the *First Amended Complaint*;

3) The new added claim in the proposed Fourth Cause of Action shall be heard and adjudicated on the current briefing and hearing schedule set forth as follows:

Hearing Date:	September 30, 2011
Opening Brief	September 2, 2011
Opposition Brief(s)	September 16, 2011
Reply Brief	September 23, 2011

4) Except as otherwise inconsistent herein, all other terms and conditions set forth in this Court's prior May 10, 2011 Order for the September 30, 2011 hearing shall control.

IT IS SO ORDERED.

Dated: _____

By: _____
JUDGE OF THE SUPERIOR COURT

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7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 8 **COUNTY OF SAN DIEGO – CENTRAL DISTRICT**
 9

10 TAXPAYERS FOR ACCOUNTABLE
 SCHOOL BOND SPENDING, a California
 11 Nonprofit Fictitious Business Entity,
 12 Plaintiff and Petitioner,
 13
 14 v.
 15 SAN DIEGO UNIFIED SCHOOL DISTRICT;
 and DOES ONE through TWENTY, inclusive,
 16 Defendants and Respondents,
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 19

) Case No.: 37-2011-000885714-CU-WM-CTL
)
) **FIRST AMENDED VERIFIED**
) **COMPLAINT FOR DECLARATORY**
) **AND INJUNCTIVE RELIEF; PETITION**
) **FOR WRIT OF MANDATE ****
)
) **[** Including an action brought under the**
) **California Environmental Quality Act,**
) **Cal. Public Resource Code § 21000 et seq.]**
)
) Dept. C-72
) I/C Judge: Hon. Timothy Taylor

20 **I.**
 21 **INTRODUCTION**

22 1. This action challenges and seeks to overturn and set aside the January 11, 2011
 23 and the May 10, 2011 decisions of the San Diego Unified School District (“SDUSD” or
 24 “District”) to approve an expenditure of Proposition S school bond money for the construction
 25 of athletic field stadium lighting and other stadium improvements, along with certification of a
 26 completed CEQA environmental review and decision there can be no possible significant
 27 environmental effect arising from the construction and operation of the Project.
 28

EXHIBIT A PAGE 1

1 and elected representatives charged with the duties and obligations as alleged herein.
2 Respondent, through its respective officers, departments, elected officials, superintendent and
3 the final January 11, 2011 and May 10, 2011 actions of its Board of Education, has adopted the
4 resolution and findings, and is otherwise responsible for all actions and conduct which is the
5 subject of this litigation.

6 7. Plaintiff is ignorant of the true names and capacities of the defendants sued herein
7 as DOES ONE through TWENTY, inclusive, and therefore sues these defendants by such
8 fictitious names. Plaintiff will amend this complaint to allege their true names and capacities
9 when ascertained. Plaintiff also designates all persons unknown claiming any interests in the
10 Project as DOE Defendants.

11 8. This lawsuit has been commenced within the time limits imposed for actions
12 under the California Code of Civil Procedure and California Public Resources Code, as made
13 applicable to the District by its own policies, regulations, or by the general laws of this State.

14 9. Venue and jurisdiction in this Court are proper pursuant to the California Code
15 of Civil Procedure for a matter relating to subject property located within, and an
16 administrative action decided within, the Court's geographical venue jurisdiction.

17 10. Plaintiff, by and through its members, its residents, District staff, citizen and
18 planning group members (including residents and groups of persons living, residing or
19 operating in the Talmadge, Kensington and other local communities and greater San Diego
20 City and County areas), have made oral and written comments, and have been present,
21 participated in the public hearings or have otherwise raised the legal deficiencies asserted in
22 this complaint and petition for writ of mandate.

23 11. Plaintiff has performed all conditions precedent to filing this action by
24 complying with all requirements of the California Public Resources Code, including giving
25 written notice to Respondent by certified mail on February 9, 2011, and again on July , 2011,
26 prior to filing this action, and has no other remedy other than to bring this action. All other
27 requests of Respondent, having been previously made, would be futile.

28 **EXHIBIT A PAGE 2**

1 15. Under CEQA, where there is no reasonable probability (or “fair argument”) that
2 any adverse impacts *may* result from an agency action, the preparation of a Negative
3 Declaration or Mitigated Negative Declaration is appropriate. The California Supreme Court
4 and the Legislature have clearly spoken and ruled that where a project *may have* a significant
5 effect on the environment, an EIR *must be* completed before a project is approved. (Cal. Public
6 Res. Code §§ 21100, 21151; CEQA Guidelines § 15064, subs. (a)(1), (f)1)) When any
7 question, doubt or uncertainty is present about potential significant effects, there is a strong
8 presumption in favor of requiring preparation of an EIR.

9 15a. Under California Government Code § 53091 the District is required to comply
10 with city zoning ordinances and general and community plans. However, the District is
11 authorized to exempt itself from the purview of such local ordinances and adopted plans by a
12 two-thirds vote of their governing board. Relevant provisions of such allowable exemptions
13 are set forth in Government Code § 53094 which states that:

14 (b) Notwithstanding subdivision (a), the governing board of a school district, that
15 has complied with the requirements of Section 65352.2 of this code and Section
16 21151.2 of the Public Resources Code, by a vote of two-thirds of its members, may
17 render a city or county zoning ordinance inapplicable to a proposed use of property
18 by the school district. The governing board of the school district may not take this
19 action when the proposed use of the property by the school district is for
20 nonclassroom facilities, including, but not limited to, warehouses, administrative
21 buildings, and automotive storage and repair buildings.

22 (c) The governing board of the school district shall, within 10 days, notify the city
23 or county concerned of any action taken pursuant to subdivision (b). If the
24 governing board has taken such an action, the city or county may commence an
25 action in the superior court of the county whose zoning ordinance is involved or in
26 which is situated the city whose zoning ordinance is involved, seeking a review of
27 the action of the governing board of the school district to determine whether it was
28 arbitrary and capricious. The city or county shall cause a copy of the complaint to
be served on the board. If the court determines that the action was arbitrary and
capricious, it shall declare it to be of no force and effect, and the zoning ordinance
in question shall be applicable to the use of the property by the school district.

16. Proposition S, entitled and otherwise known as the “School Repair and Safety
Measure of 2008,” appeared as a bond proposal on the November 4, 2008 ballot for voters
within the boundaries of the San Diego Unified School District. The measure authorized a

EXHIBIT A PAGE 3

1 23. On or about January 12, 2011, the District prepared and caused to be filed with
2 the San Diego County Clerk, a Notice of Determination setting forth that a final CEQA
3 decision for the Project was made by the District on January 11, 2011.

4 23a. On May 10, 2011, at specially set Board of Education meeting of the District, a
5 matter was placed on its consent calendar, with no public hearing, staff testimony, explanation,
6 or otherwise being presented, the District made a decision and adopted a Resolution to render
7 inapplicable any zoning ordinance of the City of San Diego, including without limitation, the
8 City's Zoning Ordinances and General Plans, which would otherwise be applicable to twelve
9 (12) specific schools sites and each sites' associated named projects listed in "Exhibit A" to the
10 draft and official final adopted resolutions, a true and correct copy of said Resolution and its
11 Exhibit A is attached hereto, and incorporated by reference here, as Exhibit 1 and is hereafter
12 referred to as May 10, 2011 "Exemption Action." The May 10, 2011 Exemption Action is a
13 "project" under the given and legally interpreted definitions of CEQA such that compliance
14 with CEQA, its regulations, and case law thereunder, is required.

15 23b. Plaintiff is informed and believed that the District did not give actual written or
16 mailed notice to any of the affected property owners near any of the twelve (12) listed
17 exempted schools, did not give notice to the interested and litigating named party, Taxpayers,
18 nor did the District conduct any CEQA review or make any CEQA determinations or findings
19 related to or associated with the May 10, 2011 Exemption Action.

20 IV.

21 **FIRST CAUSE OF ACTION – COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**
22 **(Violation of Restricted Government Spending; Waste and Misuse of Public Money)**
23 **(Cal. Code Civ. Proc. §§ 526(a), 1060)**

24 24. Plaintiff hereby realleges and incorporates by reference ¶¶ 1-23 above, as
25 though fully set forth herein.

26 25. Plaintiff is beneficially interested in the issuance of a declaration of law and
27 injunction by virtue of the proposition of facts and law set forth herein.

28 **EXHIBIT A PAGE 4**

1 39. By approving the Project with direct conflicts with important laws, policies, goals
2 and directives of the City of San Diego's zoning and general plan, the District has failed to
3 proceed in a manner required by law. A peremptory writ of mandamus is requested to be issued
4 by this Court ordering the District to rescind and set aside its January 11, 2011 project approvals,
5 and remand the matter to the District to reconsider the Project consistent with requirements of
6 applicable state and local laws as alleged herein and proven by Plaintiff, or otherwise as directed
7 by the Court.

8 VII.

9 FOURTH CAUSE OF ACTION - PETITION FOR WRIT OF MANDATE

10 (Violations of the Exemption Provisions of Cal. Gov. Code § 53094, subd. (b) and CEQA)

11 40. Plaintiff hereby realleges and incorporates by reference ¶¶ 1-39 above, as though
12 fully set forth herein.

13 41. Plaintiff hereby challenges and seeks to set aside and render null and void the
14 Resolution adopted for the May 10, 2011 Exemption Action on the following bases:

15 a) No written notice was given to affected property owners in the direct
16 vicinity of any of the twelve (12) listed schools sites and projects, as required for
17 adjudicatory actions of government (and the District here) for decisions directly or
18 indirectly affecting property rights, according to the notice and due process
19 requirements as pronounced and explained in *Horn v. County of Ventura*, (1979) 24
20 Cal.3d 605; *Scott v. City of Indian Wells*, (1972) 6 Cal.3d 541;

21 b) The District's attempted exemption of multiple whole school site
22 projects violates the provisions of California Government Code § 53094 which only
23 allows exemption of "classroom facilities." Application of the purported
24 exemption to whole listed twelve (12) named projects, each of which contain one or
25 more "nonclassroom" project elements or features such as administrative buildings,
26 parking lots, storage facilities, and the like, makes the adoption and application of
27 the Exemption Action unlawfully overboard and not in compliance with said Code;

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c) The attempted *Post Hoc* and retroactive action of the District to one or more of the listed twelve (12) school sites, including but not limited to Hoover High School, is an unlawful application of the exemption provisions of California Government Code § 53094 in that it fails to provide appropriate and timely notification – regarding the relative impacts and adverse effects to persons, property, and communities – that local zoning and plans are or were contemplated to be abandoned; and/or

d) The District did not make, consider, or adopts any determination(s) or finding(s) with regards to compliance with CEQA for the May 10, 2011 Exemption Action. The District, nor its May 10, 2011 Exemption Action, qualify for any exemption under CEQA. Notwithstanding, assuming the District purports or contends that it did make a required CEQA finding, any determination that there can be no possible adverse environmental impact under CEQA, by the adoption or implementation of the May 10, 2011 Exemption Action, is not supported by the May 10, 2011 decisional record of the District.

42. By adoption of the Resolution for the May 10, 2011 Exemption Action, for the above foregoing reasons, the District has failed to proceed in a manner required by law, has not adopted required findings as required by law under CEQA, has failed to give requisite and actual due process notice regarding the consideration and adoption of said Exemption Action, the decision(s), and finding(s), and/or purpose relating to District’s Exemption Action are arbitrary and capricious and/or are not supported by the substantial evidence. A peremptory writ of mandamus is requested to be issued by this Court remanding and ordering the District to rescind the Resolution made for the May 10, 2011 Exemption Action, and proceed according to law as set forth herein or as otherwise proven and ordered after trial or hearing on this matter. The matter should also be remanded to the District for reconsideration of the Project consistent with requirements of CEQA.

VIII.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays for judgment as follows:

1. For Plaintiff's claims for declaratory and injunctive relief, that this Court order, describe, and declare the proper interpretation and application of law(s) which are the subject of this lawsuit, and grant an injunction or appropriate declaration of law to prevent repeated violations of law by the agencies named in this lawsuit;

2. That this Court find that by making the final approvals for the Project and the May 10, 2011 decision, Respondent has not proceeded in a manner required by law, has not adopted requisite findings, and/or its decisions or findings are not supported by the substantial evidence;

3. That this Court issue a peremptory writ of mandamus declaring that one or more of the decision(s) rendered by Respondent on January 11, 2011, and any additional resolution of Respondent relating to, or dependent upon the same, are null and void and have no legal force effect;

4. That this Court order Respondent to vacate and set aside each of the decisions made on or about January 11, 2011 and May 10, 2011, and each of the resolutions, administrative approvals, permits, quasi-judicial, and legislative decisions of Respondent with respect thereto;

5. That there be issued a writ of mandamus ordering Respondent to prepare an EIR for the January 11, 2011 and/or May 10, 2011 decisions within a reasonable date from the issuance of said writ of mandate, in the event the Real Parties wish to pursue the Project;

6. That until such time as Plaintiff's above claims can be adjudicated by this Court, Respondent and Real Parties be enjoined, restrained and/or Respondent's January 11, 2011 and May 10, 2011 decisions be stayed from taking effect to preserve the status quo and prevent frustration of Plaintiff's and the public's rightful claims and right to judicial review.

7. That Plaintiff be awarded its reasonable costs incurred in this action, including attorneys' fees under Cal. Code of Civil Procedure § 1021.5 for this matter brought in the public interest; and

EXHIBIT A PAGE 7

Proof of Service

Taxpayers for Accountable School Bond Spending v. San Diego Unified School District
Case No.: 37-2011-00085714-CU-WM-CTL
San Diego Superior Court, Central District

I, the undersigned, declare under the penalty of perjury that I am over the age of eighteen years, my place of business is in the County of San Diego, located at 1901 First Avenue, San Diego, CA; and I served the below-named person(s) the following document(s):

EX PARTE APPLICATION TO AMEND COMPLAINT AND CONSOLIDATE THE NEW CLAIM WITH THE CURRENT BRIEFING SCHEDULE; DECLARATION OF COUNSEL; [PROPOSED] ORDER

on June 6, 2011 on the following person(s) in a sealed envelope or package, addressed as follows:

Cameron C. Ward, Esq.
DANNIS, WOLIVER & KELLEY
71 Stevenson Street, 19th Floor
San Francisco, CA 94105
cward@DWKesq.com

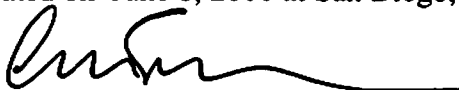
Counsel for Defendants and Respondents
SAN DIEGO UNIFIED SCHOOL DISTRICT

in the following manner:

- 1) By hand delivering or having delivered by courier, during usual business hours, copies to the office(s) of the above-named addressee(s), and leaving said package or envelope with the person who was apparently in charge. (on JUNE 7, 2011)
- 2) By placing a copy in a separate envelope, with postage fully pre-paid, for each person and address named above and depositing each in the U.S. Mails at San Diego, CA.
- 3) By faxing copies to the above person and printing confirmation of the success of said transmission and retaining a copy of said successful transmission
- 4) By sending to each person named above via electronic service at the above electronic notification address(es) on 7/6/11 @ 11 45 a.m.

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

Executed on June 6, 2011 at San Diego, California.



Craig A. Sherman