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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CHULA VISTA CITIZENS FOR JOBS AND FAIR COMPETITION, LORI KNEEBONE, LARRY BREITFELDER, and ASSOCIATED BUILDERS AND CONTRACTORS OF SAN DIEGO, INC., **Plaintiffs,** **v.** **DONNA NORRIS,** in her capacity as City Clerk for the City of Chula Vista, **MAYOR CHERYL COX,** in her official capacity as Mayor and Member of the Chula Vista City Council, and **PAMELA BENSOUSSAN, STEVE CASTANEDA, JOHN McCANN,** and **RUDY RAMIREZ,** in their official capacity as Members of the Chula Vista City Council, **Defendants.**	**Case: 09CV0897-BEN-JMA** **The Honorable Roger T. Benitez** **Reply Memorandum of Points and Authorities in Support of Plaintiffs' Motion For Preliminary Injunction**

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Introduction

23,000 citizens of the City of Chula Vista ("**City**"). That is how many citizens of the City have signed a petition to have the Fair and Open Competition Initiative be put to a vote. However, the City refuses to process the petition, disregarding the wishes of these 23,000 citizens, and trampling upon not only the principles of fairness and justice, but upon the First Amendment as well. As set forth below and in the Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction (**"Plaintiffs' Memo"**), a preliminary injunction is necessary to ensure that the First Amendment speech and associational rights of the Plaintiffs are not unconstitutionally burdened.[1]

Argument

I. Plaintiffs Are Likely to Succeed on the Merits.

A. By requiring a petition proponent to be a natural person, the City infringes on the First Amendment rights of groups like ABC and Chula Vista Citizens, as well as individuals.

1. The First Amendment rights at stake in this case are those of groups like ABC and Chula Vista Citizens, as well as individuals.

With regard to the likelihood of success on the merits, Defendants make two preliminary arguments that are unrelated to the issues in this case.[2] First, Defendants argue that "Plaintiffs'

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[1]Plaintiffs are only arguing the Constitutionality of two petitions in this suit. Thus, although Defendants refer to three petitions, Plaintiffs will continue to refer to the two petitions at issue as the First and Second Petitions, as previously set forth in Plaintiffs' Memo. (Plaintiffs' Memo at 2-5.)

[2]The City also argues that "Plaintiffs probably will not fulfill the first requirement for a First Amendment challenge: the California Elections Code provisions incorporated in the Charter are not restrictions on protected speech or petitioning at all but rather govern California's process of direct citizen legislation." (Defendants' Opp. at 13.) In other words, the City argues that an organization cannot make a First Amendment challenge to the portions of the California Elections Code that govern the process of direct citizen legislation, because "the power of initiatives is one of natural persons." (*Id*. at 11-12.) However, organizations regularly bring suits implicating their First Amendment rights with regard to the process of direct citizen legislation. *See e.g.*, *Buckley v. Am. Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) ("*Buckley II*"). Moreover, in a situation such as this—where the language of a statute does not indicate if an organization may be a proponent of a ballot initiative—it is imperative that an organization be allowed to bring suit to determine that

petitions were properly rejected by the City Clerk under the applicable regulations." (Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction (**"Defendants' Opp."**) at 11.) However, whether the City Clerk followed the "applicable regulations" has no bearing on whether those "applicable regulations" are constitutional or violate Plaintiffs' First Amendment rights, which are the actual issues to be decided.

Defendants next argue that the City Clerk's actions do not raise a First Amendment issue because "[t]he City Clerk enforced both the Elections Code and fundamental California constitutional history by requiring natural persons to sign the Notice of Intent." (Defendants' Opp. at 11-12.) As with the rejection of the petitions, the real issue here is whether the application of those portions of the California Elections Code ("**Code**") by the Clerk, as well as the Code itself, violate the First Amendment rights of Plaintiffs.[3]

2. Groups like ABC and Chula Vista Citizens have a First Amendment right to be proponents of ballot initiatives.

Defendants argue that requiring proponents of an initiative to be individuals does not violate the First Amendment for two reasons: that the "Notice of Intent[4] conveys information beyond the text of the petition and the reasons supporting it," (Defendants' Opp. at 13.), and that "[i]f

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fact, even if the case is ultimately decided against the organization.

[3]Defendants also argue that this case does not implicate First Amendment rights of organizations because "the initiative [is] an inherent power of direct legislation that can only reside in, and has been reserved to, the electors." (Defendants' Opp. at 12.); *but cf.* Charter § 903 (actual Charter language). This language is not part of the California statutes. *See* Code §§ 9202, 9203, 9205, 9207. Thus, the California statutes do not require the signatures of individuals on statewide ballot petitions. *See* Code § 9001. Further, the names and signatures of Plaintiffs Kneebone and Breitfelder appear on the Clerk's Version and the Newspaper Version. Thus, electors have participated in the direct legislation process, even if their names are not on the Circulated Version. Moreover, a person interested in this information can obtain it at the Clerk's office.

[4]Defendants use the term "Notice of Intent" to refer to "Notice of Intent to Circulate a Petition" language from Code §9202(a) that is printed in three places: the Clerk's Version, the Newspaper Version, and the Circulated Version. Because the different requirements of the three Versions are subject to argument in this case, Plaintiffs will refer to each separately.

organizations were permitted to circulate Notices of Intent without a natural person's name, members of the organization would carefully select misleading or vague organization names to garner voter support for a proposition despite its content."[5] (Defendants' Opp. at 14.) Defendants quote *Myers* for the proposition that: "A voter may reasonably seek to judge the precise effect of a measure by knowledge of those who advocate or oppose its adoption, and he may gain such knowledge only through pre-election disclosure requirements . . . ." *Myers v. Patterson*, 196 Cal.App.3d 130, 138-39 (1987); *see also* Op.Cal.Atty.Gen. No. 00-410.

The requirement that an individual's name and signature appear on the Circulated Version, as the City requires, fails to give a voter the knowledge required by the Ninth Circuit: "[I]n the ballot issue context, the relevant informational goal is to inform voters as to 'who backs or opposes a given initiative' financially, so that the voters 'will have a pretty good idea of who stands to benefit from the legislation.'" *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1033 (2009) (*quoting Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1106 (9th Cir. 2003) ("*Cal. Pro-Life Council I*"); *see also id*. at 1036 (Noonan, J., *concurring*) ("How do the names of small contributors affect anyone else's vote? Does any voter exclaim, 'Hank Jones gave $76 to this cause. I must be against it!'"). In other words, if there is an informational interest in knowledge, it is to "follow the money"—not in the knowledge of two citizens of Chula Vista who have not even donated to the ballot measure petition in question.[6] (*See* Verified Complaint at ¶¶ 47 and 62.)

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[5]Defendants also argue that the requirement of an elector's signature on the Circulated Version is "nothing like" the regulations in *Buckley II*, because proponents are not exposed to heat of the moment harassment. (Defendants' Opp. at 14); *see also Buckley II*, 525 U.S. at 182. However, that individuals are not exposed to immediate harassment does not prevent harassment of individual proponents, whose names are viewed by the thousands of people who must view the petition to get it on the ballot. Moreover, *Buckley II* is applicable in this case to show that strict scrutiny applies to laws that burden petition initiative speech, and that there is no corruption risk present in the context of ballot measures. (Plaintiffs' Memo at 11.)

[6]If there is an informational interest in the financial supporters, it is fulfilled by the language appearing on the First Petition: "Paid for by the Chula Vista Citizens for Jobs and Fair Competition, major funding by Associated Builders & Contractors PAC and Associated General Contractors PAC to promote fair competition (#1303758)." (*See* Verified Complaint at Exhibit 1 - Page 4.)

As the City interprets the Code, more knowledge is given to voters by listing two non-donors on the petition than by listing the group actually funding the petition.[7] This leads to absurd results. For example, if a tobacco company wanted to bring a ballot initiative in Chula Vista regarding smoking, Chula Vista's interpretation of the Code would prevent the tobacco company from identifying themselves on the petition. Instead, the person who would appear on the petition would have to be a random Chula Vista citizen. Those signing the petition would not have knowledge of the true advocate of the petition.

California law already protects against Defendants' worry that "[i]f organizations were permitted to circulate Notices of Intent without a natural person's name, members of the organization would carefully select misleading or vague organization names to garner voter support for a proposition despite its content." (Defendants' Opp. at 14.) For instance, Chula Vista ballot measure campaigns cannot have misleading names. *See* Cal. Gov't Code § 84107; *see also* Cal. Gov't Code § 84504 (requiring disclosure of major donors "using a name or phrase that clearly identifies the economic or other special interest of its major donors").

3. Plaintiffs have a First Amendment right not to be forced to disclose their identities.

The only possible interest that the City can have in the context of a ballot initiative is an informational interest in combating voter ignorance by informing voters about who financially supports or opposes a ballot measure.[8] *See Canyon Ferry Road*, 556 F.3d at 1032-33; *Cal. Pro-Life Council I*, 328 F.3d at 1105 n.23 (*quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789-90 (1978)). Here, this means that the City only has an interest in informing the voters who financially supports or opposes a ballot measure. However, the City's position on this point is untenable: they require private individuals who may only have a fleeting interest in the ballot

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[7]Although the City requires the signature of an individual supporter of the ballot measure, California does not require a signature on ballot petitions for statewide initiatives. *See* Code § 9001.

[8]For the reasons set forth in Plaintiffs' Memo at 11-12, Defendants do not have an informational interest in this case.

measure to identify themselves to voters, while the voters remain ignorant of the true financial supporters of the ballot measure. In this case, this means that the City requires Plaintiffs Kneebone and Breitfelder to appear on the Circulated Version, even though they have not donated to the campaign, nor have they even circulated the petition. (*See* Verified Complaint, ¶¶ 47 and 62.) Put simply, the City is advocating that its interest in the statutes is satisfied by failing to identify the true proponent of the measure.

It is telling that Defendants are unable to cite even a single case supporting their position on this point, and they do not even attempt to make analogies to existing cases. The lack of support for Defendants' position is particularly troubling, as they, being the governmental entity, have the burden of showing that the law meets strict scrutiny. *See Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1178 (9th Cir. 2007); *F.E.C. v. Wisconsin Right to Life*, 551 U.S. 449, 127 S.Ct. 2562, 2664 (2007); *Buckley II*, 525 U.S. at 206. To counter Plaintiffs' arguments, Defendants state that the specific facts of the cases cited by Plaintiffs are inapplicable because they do not specifically deal with ballot petitions.[9] (Defendants' Opp. at 15-16.) However, the specific holdings in each of the cases cited by Plaintiffs are applicable to the broader election process and the First Amendment in general, and are not limited as Defendants state. (Plaintiffs' Memo at 12-19.)

B. The requirement that proponents of a ballot initiative be natural persons impermissibly forces groups like ABC and Chula Vista Citizens to choose between Constitutional rights and decreases the ability of such groups and individuals to exercise their First Amendment rights.

Defendants argue that Plaintiffs are not forced to choose between Constitutional rights, because "organizations have no right to the power of initiative" and "the proponents are not required

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[9]Defendants use the terms "voting process" and "election process" interchangeably when discussing the application of the cases cited by Plaintiffs. However, the terms are very different. "Voting" refers to "[t]he casting of votes for the purpose of deciding an issue," *Black's Law Dictionary* 1571 (7th ed. 1999), while "election" refers to "[t]he process of selecting a person to occupy a position or office. . . ." *Id*. at 536. A ballot petition is part of the election process, not part of the voting process. Thus, although a case like *McIntyre* may not be applicable to the voting process, its holding is applicable to the election process and situations like ballot petitions. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 344-45 (1995).

to reveal any group affiliations by [] placing their name on a Notice of Intent because the regulations do not require organizations to identify themselves as supporters in the petition"; thus, "[t]here is no choice to be made between privately associating and freely speaking in an initiative petition." (Defendants' Opp. at 12-13.)

This is a misunderstanding of Plaintiffs' arguments. Under Defendants' interpretation of the statutes, Plaintiffs ABC and Chula Vista Citizens may not be the proponent of a ballot initiative. (*See* Plaintiffs' Memo at 8-11.) If they want to engage in political speech, ABC and Chula Vista Citizens must find a member of their organization who will engage in political speech on their behalf. However, to do that, the member of ABC or Chula Vista Citizens must give up his or her right to remain an anonymous member of the group. ABC and Chula Vista Citizens must make the choice between engaging in political speech (by having a member of their group become the proponent of the ballot measure), or protecting the privacy of their members. Forcing such a choice is "intolerable." *Simmons v. U.S.*, 390 U.S. 377, 394 (1968).

C. The statutes at issue are unconstitutionally vague and overbroad.

Defendants present three arguments as to why certain portions of their statutes are not vague and overbroad: First, Defendants argue that by having an organization publish a notice, Plaintiffs have used a "cute trick" to create an ambiguity in the statute with regard to the terms "proponent" and "publish." (Defendants' Opp. at 17.) Whether or not this Court considers the actions of Plaintiffs a "cute trick," publication by an organization is a method of publication that is perfectly acceptable under the statute, and creates an ambiguity as to who actually is the "proponent." Defendants' argument that Code § 9205 "plainly requires the proponent of the initiative *to cause* publication as a condition of validity of the petition," (Defendants' Opp. at 17.), does not reflect the actual, plain language of Code §§ 9205 and 342. Neither Code section uses the term "cause;" instead, the statutes only say that publication "shall be" done.

As to the term "bear a copy," Defendants argue that "taken in context and in this modern era of copy machines, the expression 'bear a copy' presents no more than a remote possibility that

anyone of ordinary intelligence would not understand what is meant." (Defendants' Opp. at 18.) This unsupported statement is countered by an argument left entirely unaddressed by Defendants: That the Clerk interprets the Code § 9207 "bear a copy" requirements differently from what is required by Code § 9202—the Clerk requires a copy to be 100% exact, while Code § 9202 only requires that such copy be in "substantially" the same form. (Plaintiffs' Memo at 21.) Moreover, the City has not always interpreted "bear a copy" in the same way; for other initiatives, the Clerk has sometimes required an exact copy, and sometimes required something less. (*Id*. at 21-22.)

Finally, Defendants argue that "Plaintiffs offer no explanation for why the court should predict or assume that section 9202 would lead a prospective initiative proponent to refrain from commencing the process."[10] (Defendants' Opp. at 18.) However, one Plaintiff has already stated that he will not allow his name on a Circulated Version again, because of the problems inherent in the statutes. (*See* Verified Complaint at ¶70.) Thus, the Court need not "predict or assume" anything—there is concrete evidence that at least one prospective initiative proponent will not do so in the future.

II. Plaintiffs Will Suffer Irreparable Harm Without an Injunction.

Defendants argue that "Plaintiffs spend less than a page discussing irreparable harm. . . , cite only two cases, and summarily claim that they will be irreparably harmed if their requested injunction is denied." (Defendants' Opp. at 8-9.) However, a finding of irreparable harm is simple in this context: There is a presumption of irreparable injury where First Amendment rights are clearly being infringed. (Defendant's Opp. n. 3.; Plaintiffs' Memo at 23-24); *See also Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1234 (9th Cir. 2006) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Brown v. Cal. Dept. of Transp.*, 32 F.3d 1217, 1226 (9th Cir. 2003). As set forth here and in Plaintiffs' Memo, Plaintiffs have demonstrated Defendants' multiple

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[10]Defendants also state that Plaintiffs' arguments as to the vagueness and overbreadth of Code § 9202 are not applicable because "there is no constitutionally protected speech at issue here." (Defendants' Opp. at 18.) As set forth above, Plaintiffs do have a constitutionally protected right here. *See* Section I.A, *supra*.

violations of their First Amendment rights, and have thus suffered irreparable harm.

III. The Balance of Harms Favors the Plaintiffs.

Defendants' argue that "[i]f Plaintiffs were likely to prevail on the merits, their showing of irreparable harm remains limited to the abstraction of daily denial of intangible First Amendment rights." (Defendants' Opp. at 19.) However, the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Yahoo!, Inc*., 433 F.3d at 1234. Thus, Plaintiffs' ongoing loss of First Amendment freedoms is irreparable. Even taking the Fourth Circuit standard Defendants propose—that one consider the harm if the injunction is improperly granted—the balance of harms favors Plaintiffs. (Defendants' Opp. at 19 ("[T]he real issue in this regard is the degree of harm that will be suffered by the plaintiff or the defendant if the injunction is improperly granted or denied." *Scotts Co. v. United Ind. Corp.*, 315 F.3d 264, 284 (4th Cir. 2002)).) Plaintiffs' daily ongoing and compounding loss of First Amendment rights is "irreparable"—i.e., there is no remedy for the harm that they suffer. There is no comparable harm in forcing the special election 23,000 citizens want, and letting the voters speak.

Relatedly, Defendants argue that there is not enough time to hold a special election by December 7, 2009. (Defendants' Opp. at 6-7.) However, Defendants' argument is based upon numerous assumptions about timing that do not hold up to scrutiny.[11] First, Defendants argue that it will take thirty days to verify the petition signatures. (Defendants' Opp. at 6.); Code § 9114. However, the language of Code § 9114 only states that "within 30 days" the Registrar of Voters must "ascertain whether or not the petition is signed by the requisite number of voters"; nothing in the statute's language or in the evidence presented by Defendants suggests that it will take the full 30

[11]Defendants do recognize that it is possible to hold the special election by December 7, 2009, as the language of their timing argument is carefully phrased to avoid certainty about the dates they present. (Defendants' Opp. at 6 ("There is *probably* insufficient time to process the second petition and schedule a special election before December 7, 2009") (emphasis added).)

days to make a determination as to the validity of the signatures.[12]

Second, Defendants argue that a report may be needed "to determine the economic impact of the proposed ballot initiative." However, such a report is optional under California law. Code § 9212. Moreover, even if the City Council desires such a report, the Code allows such a report to be drafted as soon as the petition is being circulated; i.e., it can be drafted today. Code § 9212. Thus, a more reasonable timeline is as follows:

Date:	**Event:**
July 6, 2009	• City Clerk submits signed petition to San Diego County Registrar of Voters to verify signatures
	• Optional report on the economic impact of the proposed ballot initiative is ordered
August 17, 2009	• Last day for San Diego County Registrar of Voters to verify signatures[13]
September 1, 2009	• Next scheduled meeting of the City Council, at which the report is reviewed and a special election is ordered[14]
December 1, 2009	• First possible date for a special election[15]

IV. An Injunction Is in the Public Interest.

The Ninth Circuit has held that "it is always in the public interest to prevent violation of a

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[12]It is unlikely that it would take the full 30 days to complete the review of the petition signatures. Under Code § 9115(a), the Registrar of Voters may make a random sample of 3% of the signatures on the petition. Using the 23,285 signatures collected on the Second Petition, this would require a review of approximately 700 signatures; a 30 day review would mean fewer than 25 signatures were being verified per day.

[13]This date assumes that it takes the full 30 days to complete a review of the signatures, for an average pace of less than 25 signatures reviewed per day. *See* n. 12, *supra*.

[14]This date assumes that the City Council does not reschedule the currently canceled City Council meetings on August 18, 2009 and August 25, 2009.

[15]Though Defendants complain about the cost of holding a special election, (Defendants' Opp. at 7.), 23,000 citizens of the City have signed the petition, and have specifically asked for a special election. Defendants' argument suggests that Plaintiffs—as well as 23,000 citizens—should be punished and denied their First Amendment rights, solely because of the cost to the City resulting from its own failure to act.

party's constitutional rights." *Sammartano v. First Judicial District Court, in and for Carson City*, 303 F.3d 959, 974 (9th Cir. 2002) (*quoting G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). This can only be overcome by "a strong showing of other competing interest." *Id*. Defendants present three reasons they believe they have made such a "strong showing": to ensure "the integrity of the initiative process," to ensure "the quality of information presented to the voters," and because any First Amendment violation "would be limited to one document."[16] (Defendants' Opp. at 20.) As set forth above, Defendants' unconstitutional actions go against the integrity of the initiative process and prevent the highest quality information from being presented to the voters, thus defeating the first two arguments of Defendants. (*See* Sections I.A.1 and I.A.2, *supra*.) As to the argument that the public's First Amendment rights are limited to one document, at the very least, six documents are implicated: the three Versions, as found in each of the two petitions. Moreover, the Constitutional issues stretch to multiple sections of the Code, as interpreted and applied by the City. And even if the First Amendment rights at issue were limited to one document, it is not the specific document that is important, but the effects of those First Amendment limitations on the Plaintiffs and the 23,000 citizens who signed the petition. It is those effects, as set forth throughout Plaintiffs' Memo and this Reply Memorandum, that make it imperative for this Court to issue an injunction.[17]

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[16]Defendants also argue that this would be a bad use of the public's funds. For the reasons set forth in n. 15, *supra*, such an argument is without merit.

[17]Defendants argue that this Court should abstain from hearing this case under the *Pullman* abstention doctrine. (Defendants' Opp. at 19.); *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Defendants correctly set out the three general requirements for *Pullman* abstention, *U.S. v. Morros*, 268 F.3d 695, 703-04 (9th Cir. 2001), but do not note that *Pullman* abstention is inappropriate in cases that involve First Amendment issues. *See Porter v. Jones*, 319 F.3d 483, 486-87 (9th Cir. 2003) ("It is rarely appropriate for a federal court to abstain under *Pullman* in a First Amendment case, because there is a risk in First Amendment cases that the delay that results from abstention will itself chill the exercise of the rights that the plaintiffs seek to protect by suit"); *see also Sable Communications of Cal. v. Pacific Telephone and Telegraph Co.*, 890 F.2d 184, 191 (9th Cir. 1989).

Conclusion

For the foregoing reasons, as well as the reasons set forth in Plaintiffs' Memo, a preliminary injunction should issue, enjoining Code § 9202's requirement that proponents be natural born persons, and Code § 9207's requirement that the proponent's name and signature be on the Circulated Version, and grant any other appropriate relief. No security should be required because Defendants have no monetary stake.[18]

Respectfully Submitted,

/s/ Charles H. Bell, Jr.

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* *Pro hac vice application approved by the Court on June 16, 2009.*

[18]Defendants are not asking for any monetary renumeration in this suit; only the declaration that the application of certain statutes by the City is unconstitutional. As such, neither party has a monetary stake in the outcome of the injunction.

PROOF OF SERVICE

I, Charles H. Bell, Jr., am over the age of 18 years and am one of the attorneys for the plaintiffs in this action. My business address is 455 Capitol Mall, Suite 801, Sacramento, California 95814.

On June 29, 2009, I electronically filed the foregoing document described as *Reply Memorandum of Points and Law in Support of Plaintiffs Motion For Preliminary Injunction*, which will be served on all Defendants.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 29, 2009 at Sacramento, California.

/s/ Charles H. Bell, Jr.
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