IN THE SUPREME COURT OF CALIFORNIA
Case No. S212800

ORANGE CITIZENS FOR PARKS AND RECREATION, et al.
Petitioners,
v.
THE SUPERIOR COURT OF ORANGE COUNTY
Respondent;

MILAN REI IV LLC, et al.
Real Parties in Interest.

ORANGE CITIZENS FOR PARKS AND RECREATION, et al.
Plaintiffs and Appellants,
v.
MILAN REI IV LLC, et al.
Defendants and Respondents.

After a Decision by the Court of Appeal
Fourth Appellate District, Division Three
Case No. G047013 (consolidated with Case No. G047219)

Appeal from the Orange County Superior Court,
Case No. 30-2011-00494437
The Honorable Robert J. Moss, Judge Presiding

REPLY TO MILAN REI, IV'S ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

In its Answer to the Petition for Review, Milan claims that the case before this Court is unremarkable.

Orange Citizens agrees, up to a point. It was unremarkable for Milan, in its application for a residential subdivision on its 51-acre Property, to request that the City of Orange change the Property's land use designation from Open Space to residential in both the City's General Plan and in the Orange Park Acres Plan ("OPA Plan"). It was also unremarkable for the City to approve the requested General Plan Amendment ("GPA") prior to approving Milan's Development Agreement and residential Zone Change ("Project"). These are the types of typical, though sometimes controversial, land use applications and approvals that happen every day.

What is extraordinary in this case is what happened *after* the City Council approved the GPA and City voters exercised their constitutional right to challenge that approval by referendum. Rather than await the results of the Referendum election, Milan filed suit, arguing that its Project could proceed, *regardless* of the outcome of the Referendum. The City sided with Milan.

When the voters, in November 2012, rejected the Referendum by a 56% vote, Milan and the City maintained that the Project could still go forward, despite the failure of the GPA to take effect and the Project's

blatant inconsistency with the pre-existing General Plan Open Space designation. The Fourth District concurred.

Milan's Answer adds little of substance to the arguments put forth by the City in support of the Opinion, except perhaps to underscore their unprecedented, and even nonsensical, nature. Milan asserts, for example, that the unambiguous term "Open Space"—which the General Plan defines as areas "that should *not* be developed"—can reasonably be interpreted to permit residential development.

In a desperate gambit to escape its earlier concession that its Property *is* governed by the General Plan's Open Space designation, Milan also asserts that the City's adoption of the 2010 General Plan was, somehow, not a binding legislative act. This argument, too, is unavailing given that it directly conflicts with the holdings of this Court.

Finally, Milan misleadingly argues that it has not attempted to "thwart the 'will of the voters,'" because the City's approval of the Project occurred prior to the Referendum election. Answer at 19. In reality, however, Milan has attempted to thwart the Referendum at every turn. Among other things, Milan unsuccessfully sought a TRO to keep the Referendum off the ballot, later obtained a trial court writ removing the Referendum from the ballot (which was stayed only in response to Orange Citizens filing a petition for an extraordinary writ in the Court of Appeal), and, after the voters elected to retain the long-standing Open Space

designation, argued that the Referendum was meaningless. Indeed, all of Milan's legal claims have only one purpose: to circumvent the will of the voters who expressly rejected the GPA adopted by the City Council.

The Fourth District's Opinion rewards Milan's efforts. However, in doing so, it conflicts with numerous appellate and Supreme Court cases establishing the fundamental principles of modern California planning law. The Opinion also ignores this Court's directive that it is "the duty of the courts to jealously guard" the voters' rights of initiative and referendum and to ensure that these "precious rights of our democratic process" are not "improperly annulled." *Rossi v. Brown,* 9 Cal.4th 688, 695 (1995) (citations omitted).

Review by this Court is therefore necessary to determine whether the Fourth District improperly annulled the voters' actions here and to restore order and consistency to State planning law. Unless this Court grants review, the tactics pursued by Milan and the City, and upheld by the Fourth District, will serve as a road map for future parties seeking to avoid the plain language of a city or county general plan, or to circumvent the results of a successful referendum.

ARGUMENT

I. THE PROJECT CANNOT GO FORWARD BECAUSE IT IS INCONSISTENT WITH THE CURRENT GENERAL PLAN.

A. The General Plan's Open Space Designation Precludes Residential Development.

The City's 2010 General Plan expressly designates Milan's Property "Open Space" in both its Land Use and Open Space maps. Petition for Review ("Petition"), Ex. B at 7-8. The General Plan also expressly defines "Open Space" to mean areas "that should not be developed" and to include "privately held open spaces." *Id.* at 5; *accord* Gov. Code § 65560 (defining "open-space land" as any "area of land . . . that is essentially unimproved and devoted to an open-space use").

Orange Citizens submits that this plain language of the General Plan is controlling and prohibits residential development on any property, such as Milan's, which is designated "Open Space" in the General Plan.

1. The Open Space Designation in the General Plan Is Not Ambiguous.

Milan, however, repeatedly refers to this Open Space designation as "ambiguous" and claims that the City's asserted findings properly resolved the "apparent ambiguity in the wording within the General Plan." Answer at 2; *see also id.* at 7, 9. According to Milan, "'[g]eneral plans or policy statements are often semantical exercises.'" Answer at 13-14 (quoting *Bownds v. City of Glendale,* 113 Cal.App.3d 875,

883 (1980)). Milan seeks to engage in such "semantical exercises" here by arguing that the unambiguous and clearly defined term "Open Space" can be "interpreted" to allow residential development.

To hold that the City Council adopting the 2010 General Plan intended "Open Space" to actually mean "Open Space *and Residential*" would violate the most fundamental principles of statutory construction. Neither the City nor a court can "rewrite" the 2010 General Plan to "conform to an assumed intent" that was not expressed in the plan itself. *Lesher Communications, Inc. v. City of Walnut Creek,* 52 Cal.3d 531, 543 (1990). Rather, the City Council is "presumed to have meant what it said" in adopting the 2010 General Plan, and that document's "plain meaning . . . governs." *Stephens v. County of Tulare,* 38 Cal.4th 793, 802 (2006) (citation omitted).

Milan's claim—that Orange Citizens must prove that the City Council also "intended" to apply an Open Space designation to Milan's Property when it adopted legislation doing precisely that (*see* Answer at 9-10)—reverses this clear presumption and finds no support in the case law.

2. The 1973 Residential Designation Is Inconsistent with the Open Space Designation in the 2010 General Plan.

Milan's real argument seems to be that the current General Plan designation is somehow "ambiguous" because the 2010 General

Plan's Open Space designation conflicts with the residential designation set forth in the 1973 Planning Commission resolution. Answer at 6-7.

The conflict between the Open Space and residential designations in these two separate documents, however, is not an "ambiguity." Rather, it is an irreconcilable inconsistency. Because the Open Space designation is set forth in the current General Plan, at the top of the City's land use hierarchy, Orange Citizens contends that the conflicting and subordinate 1973 residential designation is legally invalid.

An unbroken line of case law (prior to the Opinion) supports this contention. *See, e.g., City of Poway v. City of San Diego,* 229 Cal.App.3d 847, 862-63 (1991); *City of Irvine v. Irvine Citizens Against Overdevelopment,* 25 Cal.App.4th 868, 879 (1994) (holding that "a zoning designation that categorizes property as not suitable for immediate development" is "clearly . . . not compatible with" general plan commercial and residential designations); Petition at 19. Moreover, to the extent that the 1973 designation was ever a valid general plan designation, it was superseded by the City's subsequent adoption of the 1989 and 2010 General Plans designating the Property solely for Open Space. *See id.* at 24-26.

Even assuming, however, as Milan insists and as the Fourth District held, that the 1973 designation is part of the City's *current* General Plan today, this would not support Milan. Rather, it would simply establish

that the General Plan—as "interpreted" to include the 1973 designation—contains conflicting land use designations for Milan's Property and is therefore *internally* inconsistent. *See Sierra Club v. Kern County,* 126 Cal.App.3d 698, 701-04 (1981) (general plan internally inconsistent where its land use and open space maps have conflicting designations for the same parcel).

Sierra Club holds that where a property has inconsistent designations in the general plan, no development can be approved on the property until this inconsistency is resolved by the local legislative body (or the voters). *Id.* Recognizing this bedrock principle of modern planning law, the City Council here adopted the GPA to "make the General Plan land use designations for the subject property consistent throughout the General Plan." AR-4:1948.

With the voters' rejection of the GPA, however, the inconsistency between the 1973 residential designation and the Open Space designation in the 2010 General Plan Land Use and Open Space maps remains. Thus, assuming, *arguendo,* that the 1973 residential designation is part of the General Plan today, Milan's Property currently has two conflicting designations in the "General Plan" (as defined by Milan), and the City's approval of Milan's Project is therefore invalid as a matter of law. *Sierra Club,* 126 Cal.App.3d at 701-04. Milan's attempt to avoid the inescapable legal consequence of its own theory—by claiming that "Open

Space" can be interpreted to mean "Open Space and Residential"—ignores the plain meaning "on the face" of the General Plan and must be rejected. *See Lesher,* 52 Cal.3d at 543 (holding that "[a]bsent ambiguity . . . the meaning apparent on the face" of a legislative act controls).

3. *Las Virgenes* Does Not Hold that the 2010 Land Use Policy Map Can Be Ignored, But Instead Reaffirms that Courts Must Apply a General Plan's Plain Language.

Milan suggests that, under its theory, the "General Plan" is not internally inconsistent because the Open Space designation in the 2010 General Plan Land Use and Open Space maps can be ignored. It asserts that *Las Virgenes Homeowners Federation, Inc. v. County of Los Angeles,* 177 Cal.App.3d 300 (1986), "stands for the proposition that a land use policy map that is inconsistent with the actual contents of a city's general plan does not . . . supersede the actual general plan." Answer at 16.

In fact, *Las Virgenes* holds no such thing. Rather, as detailed in the Petition, *Las Virgenes* simply reaffirms that, in interpreting a general plan, a court must look to the plain language of the particular general plan before it. *See* Petition at 18-19. Thus, the *Las Virgenes* court cited again and again to specific pages in the general plan "stat[ing] repeatedly that [its] policy maps are *general* in character and are *not* to be interpreted literally." *Las Virgenes,* 177 Cal.App.3d at 310 (emphasis added). The Los Angeles County general plan in that case also expressly provided that

"specific residential density ranges" for the subject property were set forth in an "area plan" map that was expressly incorporated as part of the general plan. *Id.* at 310-11.

Here, by contrast, the City's 2010 General Plan mandates that all City land use decisions must be "consistent with . . . the land uses shown on the Land Use Policy Map," and it defines the OPA Plan as a subordinate document that must "be consistent with" General Plan policies. Petition, Ex. B at 6, 9.

By accepting Milan's argument, the Fourth District essentially superimposed on the City of Orange General Plan the policy language from the Los Angeles County General Plan that was construed in *Las Virgenes*. In doing so, it not only rewrote the plain text of the City's 2010 General Plan, but also ignored California's *General Plan Guidelines*, which state: "The general plan's text and its accompanying diagrams are integral parts of the plan. They must be in agreement." Governor's Office of Planning and Research, *General Plan Guidelines* at 13 (2003); *see also id.* at 12 ("The concept of internal consistency holds that no policy conflicts can exist, either textual or diagrammatic, between the components of an otherwise complete and adequate general plan.").

B. The General Plan Amendment Was Absolutely Necessary for the Project to Go Forward.

1. Prior to Filing the Instant Litigation Milan Repeatedly Insisted that the GPA Was Critical for Project Approval.

At the core of Milan's argument is its astonishing claim that "[i]t is undisputed that a general plan amendment was *not* necessary for the development of the Property." Answer at 18 (emphasis added). Of course, this is the central point that Orange Citizens has disputed from the outset.

What makes Milan's assertion particularly disingenuous, however, is that Milan itself agreed with Orange Citizens throughout the entire administrative approval process. From the time that Milan applied for a general plan amendment in 2007 through the Council's adoption of the GPA in 2011, Milan repeatedly and consistently acknowledged that: (1) its Property was designated "Open Space" in the City's General plan, and (2) a general plan amendment was necessary for the City to be able to approve its Project. Indeed, as Milan emphasized to the City Council at the public hearing on the GPA, "the one point we agree with" Orange Citizens on is that *"you need to do a General Plan amendment."* AR-13:5434, lines 24-25 (emphasis added).[1]

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[1] *See also, e.g.,* AR-9:4001 (Milan's Project application certifying as "true and correct" its statement that the Property's "existing" land use designation is "Open

It was only *after* the GPA was challenged that Milan and the City Attorney changed their tune, claiming that the GPA was never necessary in the first place. AR-9:3982 (8/18/11 letter from Milan's lawyers proposing an "elegant solution" to the filing of the Referendum: "that the City re-evaluate the requirement for [the] Ridgeline General Plan amendment" it had adopted two months earlier); Petitioners' Appendix, Vol. I at 7:APP284 (filed 06/08/12). This post-hoc litigation position is legally untenable and certainly not entitled to judicial deference.

2. The City's Approval of the Project Was Contingent on the General Plan Amendment.

Milan also repeatedly asserts that "[t]he City clearly stated that its approval of the Project was not dependent on the amendment to the General Plan." Answer at 5; *id.* at 18 (same). Again, the record proves otherwise. In fact, the City Council did not find that the Development Agreement or the Zone Change were consistent with the existing General Plan, but only that these approvals were consistent with the "General Plan, *as amended by General Plan Amendment 2007-0001*." AR-4:1834 § III(A)

Space"); AR-14:6068 (Milan's "initial study" submitted with its application certifying that the "General Plan Land Use Element Map designates the project site as . . . Recreation Open Space); AR-6:2177-82 (Project summary from the City's draft environmental impact report ("EIR") confirming same).

(emphasis added); *see generally* Orange Citizens' Reply to City of Orange's Answer ("Reply to City") at 11-16.

Moreover, Milan's record cites in no way support its claims. Milan's first two citations are to staff reports or minutes which merely restate the title of the referended (and thus legally ineffective) GPA. Answer at 5 (citing AR-4:1455-58 and AR-4:1713-16). The cited City Attorney letter certainly cannot be construed as a finding *of the City Council* and, in any case, does not state that a GPA was unnecessary for Project approval. To the contrary, this letter acknowledges that the General Plan's land use maps "show only an Open Space designation on the Property" and that "the Project is proposing general plan amendments that . . . *if approved* would resolve any ambiguity surrounding the General Plan designation on the Property." AR-9:3978 n.1, 3975 (emphasis added).

Likewise, the cited EIR findings, which the Fourth District panel found "particularly relevant" (Opinion at 21), do *not* say that Milan's Project could be approved without a GPA. Rather, while the findings incorporate elements of Milan's theory, they conclude:

> *In approving GPA 2007-0001*, it is the intent of the City Council . . . *to honor the intent* of the original adoption of the OPA, remove any uncertainty pertaining to the permitted uses of the Property, and allow uses on the Property which the City Council believes to be appropriate. . . .

> *Changing the zoning of the Project Site* from [open space to residential] *is consistent with* the 1973 OPA Plan Land Use designations and *the land use designations adopted by the City Council's approval of GPA 2007-001. Therefore,* the [residential] zoning is consistent with the City's General Plan.

AR-4:1895 (emphasis added; cited in Opinion at 22). In other words, the City Council found: (1) the General Plan *amendments* would make the General Plan consistent with what it believed the City Council intended to do in 1973; and (2) the residential zoning would "therefore" be consistent with "the land use designations adopted by the [GPA]."

In short, the City Council's findings do not show that the GPA was unnecessary. Rather, they show just the opposite, acknowledging that the Project was consistent *only* with the General Plan *as amended by the GPA* to designate Milan's Property for residential use.

II. THE CITY'S ADOPTION OF THE 1989 AND 2010 GENERAL PLANS CONSTITUTED FORMAL LEGISLATIVE ACTION.

Milan's argument rests on its assertion that the 1973 residential designation not only remains effective today, but also trumps the plain language of the 2010 General Plan.

To make this argument, Milan all but ignores the Open Space designation in the 2010 General Plan, acting as if this designation were never even adopted. Milan asserts, for example, that "Appellants cannot point to a single resolution, determination, or final, binding legislative act

on the part of the City that designated the Property solely as open space." Answer at 9. It likewise accuses Orange Citizens of making the "blatantly false and deceptive" statement that Milan's Property "has been designated 'Open Space' in the City's General Plan 'for decades.'" *Id.* at 8

Milan's claims are absurd. As noted above, Milan itself certified that this allegedly "false and deceptive" statement was in fact "true and correct" in its own application for the GPA. AR-9:4001; *see also supra,* n. 1. More importantly, as a matter of law, the City Council's official adoption in 1989 and 2010 of comprehensive new General Plans indisputably constituted "final, binding legislative acts" by the City. *See Yost v. Thomas,* 36 Cal.3d 561, 570 (1984) ("The adoption of a general plan is a legislative act," as is its amendment.). In each of these General Plans, the adopted Land Use Policy Map—which was identified as a central feature of the General Plan (Petition, Ex. B, at 4)—designated Milan's Property solely as Open Space. Petition, Ex. B at 7-8; AR-14:5919 (1989 General Plan Land Use Map).

Moreover, the City itself conceded below "that the 1989 and 2010 City-wide General Plan land use map shows the Property as solely Open Space." City Respondents' Brief at 26 (filed 11/30/12). Likewise, the City Attorney's "Impartial Analysis" in the official "Voter Information Pamphlet" informed the voters that, *if they approved the GPA*, the "General Plan land use map, which shows solely an 'Open Space' land use

designation on the [Property]," would be revised. Appellants' Supplemental RJN ("SRJN") 006 (filed 01/30/13). But last November, the voters *rejected* the GPA. Therefore, in the words of the City Attorney's Impartial Analysis, the land use map *continues* to "show[ ] solely an 'Open Space' land use designation" on Milan's Property.

Milan also implies that the City's adoption of the land use designations in the 1989 and 2010 General Plans somehow occurred "in secret, without notice." Answer at 10. This claim, too, is wholly insupportable, both factually and legally. In adopting the 2010 General Plan, the City took great pains to ensure extensive public input. It issued a notice of intent to adopt the "Comprehensive General Plan Update," stating that it "represents a complete updating of the City's 1989 General Plan" and applies to property "citywide." AR-14:6170. The City held at least eight public hearings on the new General Plan, and members of the public could review the draft plan online. AR-14:6277, 6494. The City went through a similar process in adopting its comprehensive General Plan revision in 1989. *See* AR-9:3918-19; 11:4628.

In any event, Milan itself was fully on notice that both the 1989 and 2010 General Plans designated its Property solely as Open Space, as evidenced by its submittal of an application *to change* that designation to residential (AR-9:4000-01) and its insistence to the Council that "you need

to do a General Plan amendment" to designate its Property for residential use. AR-13:5434, lines 24-25.

Finally, Milan's wholly unsupported suggestion that the 1989 and 2010 General Plans did not "automatically" supersede all land use designations in earlier general plans, *see* Answer at 11, is directly contradicted by the uniform case law cited in the Petition. *See* Petition at 24-26. This Court's decision in *Lesher* does not remotely support Milan's argument that a comprehensive *general plan* revision does not supersede a previous general plan policy. Rather, *Lesher* held that a *zoning ordinance*, which by law is subordinate to the general plan, cannot result in a "pro tanto repeal or implied amendment of the general plan." 52 Cal.3d at 541. Here, the policies in the City's pre-1989 general plan were not amended "by implication," as Milan contends, but were *expressly* modified through the City's adoption of comprehensive General Plan updates in 1989 and 2010.

III. THE OPINION CONFLICTS WITH EXTENSIVE PRECEDENT ESTABLISHING THE BASIC TENETS OF MODERN LAND USE LAW.

Milan attempts to downplay the unprecedented nature of the Fourth District's Opinion, asserting that it merely applied "established land use and planning law" to the facts of this case. Answer at 5. In fact, as the four amicus letters underscore, the Opinion conflicts with appellate case law in multiple districts establishing the most basic principles of general

plan law. Milan makes little effort to distinguish these decisions. Nor is there is any basis for doing so.

First, Milan makes almost no mention of *Poway,* which is directly on point and holds that where, as here, a plan amendment is never implemented, never appears on the face of the publicly-available version of the general plan, and conflicts with the current general plan, it is legally invalid. 229 Cal.App.3d at 862-63; *see* Petition at 20-24.

Milan also fails to distinguish the First District's decision in *Harroman Co. v. Town of Tiburon,* 235 Cal.App.3d 388 (1991), which makes clear that any residential designation in effect in 1973 was necessarily superseded by the City's subsequent adoption of an Open Space designation for the Property in the 1989 and 2010 General Plans. *Id.* at 396; *see also* Petition at 24-26. In particular, Milan cites nothing to overcome the presumption that, in adopting the Open Space designations, the City Council "meant what it said" and that the "plain meaning" of the 2010 General Plan should govern. *See Stephens,* 38 Cal.4th at 802 (citation omitted).

Milan likewise fails to distinguish *Sierra Club,* in which the Fifth District held that a local government cannot approve *any* development on property with conflicting general plan designations. 126 Cal.App.3d at 703-04. While Milan attempts to invoke principles of judicial deference, the fact that "cities retain jurisdiction and authority to interpret and apply

their own general plans" (Answer at 17) is irrelevant where, as here, the alleged general plan designations are inconsistent and irreconcilable on their face. *Sierra Club,* 126 Cal.App.3d at 703-04 (agricultural and residential designations inconsistent on their face).

Finally, Milan ignores the Third District's decision in *Concerned Citizens of Calaveras County v. Calaveras County,* 166 Cal.App.3d 90, 104 (1985), which holds that where a general plan is internally inconsistent, the inconsistency must be resolved by the legislative body. The Fourth District's Opinion directly conflicts with this holding. Indeed, rather than affirming the legislative action of the voters, the Opinion effectively overturns it, putting in place by "judicial fiat" the very GPA that the voters rejected. *See Lesher,* 52 Cal.3d at 541.

The Fourth District's Opinion also flies in the face of this Court's mandate that, in exercising their constitutional right of initiative and referendum, the voters have "the final legislative word." *Rossi,* 9 Cal.4th at 704. Here, the referendum proponents' argument against the GPA in the official Voter Information Pamphlet urged City voters:

> Vote No on the City Council's decision to replace the long-time "Open Space" label on the General Plan land use map for the Ridgeline property with a designation that allows for expensive residential "estates."

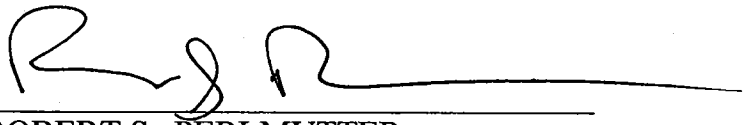
SRJN006. By rejecting the GPA, the voters expressly rejected the Council's attempt to change the Open Space designation for Milan's

Property in the 2010 General Plan. Rather than giving the people "the final legislative word," as mandated by this Court, the Opinion renders their "no" votes meaningless.

CONCLUSION

The petition for review should be granted.

DATED: September 20, 2013 SHUTE, MIHALY & WEINBERGER LLP

By: 

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CERTIFICATE OF WORD COUNT

I certify that this petition contains 4,095, exclusive of this certificate and the tables of contents and authorities, according to the word count function of the word processing program used to produce the petition. The number of words in this petition complies with the requirements of Rule 8.504(d)(1) of the California Rules of Court.

DATED: September 20, 2013 SHUTE, MIHALY & WEINBERGER LLP

By: 
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PROOF OF SERVICE

Orange Citizens for Parks and Recreation, et al.
v. Milan Rei IV LLC, et al.
California Court of Appeal, Fourth Appellate District, Division 3,
Case No. G047219
Orange County Superior Court, Central Judicial District,
Case No. 30-2011-00494437

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, CA 94102.

On September 20, 2013, I served true copies of the following document(s) described as:

REPLY TO MILAN REI, IV'S ANSWER TO PETITION FOR REVIEW

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on September 20, 2013, at San Francisco, California.

David Weibel

SERVICE LIST

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