**IN THE SUPREME COURT OF CALIFORNIA**
**Case No. S177823**

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**AMERICAN COATINGS ASSOCIATION**
Plaintiff and Appellant,
*v.*
**SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,**
Defendant and Respondent.

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After a Decision by the Court of Appeal
Fourth Appellate District, Division Three
Case No. G040122

Appeal from the Orange County Superior Court,
Case No. 03CC00007
The Honorable Ronald L. Bauer, Judge Presiding

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# DEFENDANT'S REPLY BRIEF ON THE MERITS

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## INTRODUCTION

The principal response of Appellant American Coating Association on the first issue before the Court, the meaning of "best available retrofit control technology" ("BARCT"), is to borrow and apply language from a separate statute, one defining "best available control technology" ("BACT"). Only such misdirection can secure the Association's objective: to transform the key word in the statutory definition of BARCT, "achievable," into the past tense, "achieved." But that attempt fails because BACT serves a different regulatory function and is governed by a different set of statutes. Aside from this effort, the Association refuses to confront the most pertinent law, the statutory definition of BARCT. Nor does it explain why, in the courts below, it repeatedly conceded the correctness of Respondent South Coast Air Quality Management District's interpretation.

This pattern of studied evasion continues with the Association's response on the second major issue, whether BARCT establishes a statutory minimum or maximum standard. The Association does not address the pertinent statutes cited by the District. For example, the Association never explains why BARCT should be exempt from the Legislature's repeated and

explicit authorizations to air districts to adopt standards more stringent than those required by state law.

Finally, the Association asks the Court, without so much as a single supporting citation, to discard long-established law and adopt a new standard of review for the District's quasi-legislative rulemakings. The Court should reject that radical change. When the long-settled standard of review is accepted, it becomes clear that District Rule 1113 ("Rule") must be upheld in full. Indeed, the Association offers virtually no argument otherwise.

## ARGUMENT

### I. The BARCT Definition, Its Statutory Context, and Its Legislative History Demonstrate that a BARCT Standard May Anticipate Foreseeable Technological Innovation and Yet Be "Achievable."

The plain meaning of the definition of BARCT, and every other indicator of legislative intent, show that a BARCT standard need not be already achieved, but rather need only be "achiev*able*"—that is, "capable of being achieved." A standard that can be achieved by the deadline for compliance is a BARCT standard. (Defendant's Opening Brief on the Merits ("Opening Brief") at 26-39.)

In the court of appeal, the Association clearly and repeatedly agreed. (See *id.* at 35-36.) Nonetheless, the court of appeal ignored this concession and held that a BARCT standard must be capable of being achieved at the time the standard is adopted. (Slip Op. at 21-22.)

The Association now argues that the court of appeal was correct. (Appellant's Answer Brief on the Merits ("Answer Brief") at 2.) However, the Association bases its ex post rationalization of the court of appeal's unprompted holding on two fundamental errors. First, the Association virtually ignores the *statutory* definition of BARCT. Second, the Association collapses the Legislature's intentional distinctions between BARCT and BACT, which applies only to new and modified pollution sources. However, the very real differences between those regulatory concepts demonstrate that the District's position is correct.

### A. The Association Does Not Explain Its Jarring Reversal of Position on the Meaning of "Achievable."

In stark contrast to its position below, the Association now aggressively argues that a BARCT standard must be already achieved when adopted. (Answer Brief at 2.) Below, the Association stated repeatedly that BARCT is a "technology

forcing" standard that need only be achieved by the date on which compliance is required. (Opening Brief at 35-36.) For example, it wrote that "BARCT may be considered 'technology-forcing' in the sense that [the District] may force companies to implement technology if there is a showing that implementation is achievable *by the effective date*." (Appellant's Opening Brief ("AOB Below") at 25 [emphasis added].)

The Association has not acknowledged or responded to the litany of instances in which it conceded the very position it now attacks. It offers no explanation for its remarkable turnabout.

### B. The Association Virtually Ignores the Statutory Definition of BARCT, Which Demonstrates that a BARCT Standard Need Not Be Immediately Achievable.

In setting out its new theory of BARCT, the Association says almost nothing about the Legislature's definition of that phrase in Health and Safety Code Section 40406.[1] Yet that definition unquestionably governs the issue before the Court, and it demonstrates that regulated sources need not be able to

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[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

achieve a BARCT standard at the time it is adopted. (See Opening Brief at 26-31.) Ignoring that definition, the Association, like the court of appeal, chooses to focus on a single component word of the defined phrase BARCT, to consult a dictionary definition of that word, and then to conclude that "achievable" means "achieved." (Answer Brief at 13-15.) But even that definition supports the District's interpretation of BARCT.

To begin with, the Association cannot ignore the Legislature's chosen definition of BARCT: *that* definition must be the touchstone of a court's interpretation. (See Opening Brief at 30; see also *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1065 [declining to interpret a term as it is "ordinarily understood" because the statute "sets forth controlling definitions"].) If the Legislature had intended the component words of BARCT to have their ordinary meaning, it would not have defined the phrase. (See *In re Monrovia Evening Post* (1926) 199 Cal. 263, 266 [rejecting the usual meaning of a term because the statutory definition expressed "the clear intent of the legislature" to provide a different meaning].) Accordingly, this Court must focus on the *Legislature's* definition.

That definition decides this issue. It specifies "an emission limitation that is based on the maximum degree of reduction achievable, taking into account environmental, energy, and economic impacts by each class or category of source." (§ 40406.) The relevant word in this definition is "achiev*able*," and that word denotes something "*capable* of being achieved," not something already "achieved." (Opening Brief at 28-29.)

The Association does concede in passing the plain meaning of "achievable" as "capable of being achieved," but it assigns predominant weight to the word "achieved" in that definition.[2] (Answer Brief at 14.) The Legislature, however, defined BARCT as "the maximum degree of reduction achiev*able,*" not the maximum achiev*ed*.

The Association also cites a dictionary definition of "available" to support its interpretation of BARCT (Answer Brief at 14): "[c]apable of being employed with advantage or turned to

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[2] Also, oddly, the Association at one point states that "[a] 'retrofit' must also be achievable *when it must be employed.*" (Answer Brief at 15 [emphasis added].) This is precisely the District's position.

account; hence, capable of being made use of, at one's disposal, within one's reach." (Answer Brief at 14.) But even this definition supports the District. Like the plain meaning of "achievable," it entails "capability" of employing or using something, not that the thing has already been employed or used. As described in the Opening Brief and ignored in the Answer, "capability" does not denote immediacy. (Opening Brief at 27-29.)

### C. The Association Conflates BARCT and BACT, but Their Differences Demonstrate that BARCT Need Not Be Immediately Achievable.

The central premise of the Association's argument is that BARCT and BACT must be read together rather than independently, and indeed, it lumps the two together as "best available technologies." (See, e.g., Answer Brief at 1, fn. 2, 13, 19-21, 24-25.) The Association simply observes that both standards include those three words and chides the District for reading the standards differently. (*Id.* at 15.) Then, the Association reasons: because (1) BARCT and BACT must be read together, and (2) BACT must be "achieved" at the time it is imposed, thus BARCT is also limited to a standard that has already been achieved.

The manifest and fatal flaw in the Association's logic is that the Legislature used—and defined—*two* regulatory standards, not one. And the differences between BARCT and BACT demonstrate that BARCT need not be already achieved when the District adopts it. The Legislature intended that BACT be immediately achievable, for the simple reason that BACT must be immediately implemented by new sources poised for construction. Compliance with a BARCT standard, on the other hand, can be staggered or delayed for years, as it was in this case. (Opening Brief at 48.)

### 1. BARCT and BACT Are Different Standards that Serve Different Functions.

The obvious problem with the Association's amalgamation is that the Legislature chose to create two standards, not a single "best available technology" standard. "When the Legislature uses materially different language . . . the normal inference is that the Legislature intended a difference in meaning." (*People ex rel. Lockyer v. R.J. Reynolds Tobacco* (2005) 37 Cal.4th 707, 717.)

But the Legislature did not just use different terms; it separately defined them in ways that support the District's interpretation of BARCT. Section 40405 defines BACT as "an

emission limitation that will achieve the lowest achievable emission rate for the source to which it is applied." (§ 40405(a).) "Lowest achievable emission rate," in turn, is defined in part as, "[t]he most stringent emission limitation that is *achieved* in practice by that class or category or source." (§ 40405(a)(2) [emphasis added].) In contrast, the BARCT definition refers not to an emission reduction *achieved*, but rather to "the maximum degree of reduction *achievable*." (§ 40406 [emphasis added].)

The Association ignores this distinction. Plainly, however, the definition of BACT demonstrates that the Legislature knew how to formulate a standard where reductions have already been "achieved." If it meant to limit BARCT in that same way, it would have done so.

Moreover, as the District has explained, the Legislature distinguished the two standards because districts impose BACT on a source-by-source basis when issuing construction permits for pollution sources to be built or modified immediately.[3] By

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[3] New and modified sources must obtain a "permit to construct" from the District. (See District Rule 201, *available at* <http://www.aqmd.gov/rules/reg/reg02/r201.pdf>.) Those permits

contrast, BARCT is adopted by quasi-legislative rules that can allow long lead times for compliance. (Opening Brief at 48.)

The Association argues the District's explanation "has no logical basis." (Answer Brief at 15-16.) However, the Association's own interpretive authorities—the Legislature's enactment of several statutes after the 1987 legislation that enacted the BARCT provisions in section 40440 and 40406 (see *infra* Section I.C.2)—demonstrates that the District's explanation is correct.

First, the statutes defining BACT and establishing procedural requirements for it refer explicitly to the new-source permitting process. (See § 40405(b) [BACT definition referring to "the permitting of a proposed new source or a modified source"]; § 40440.11(e) [statute establishing BACT procedures referring to "an application for authority to construct"].)

Second, these statutes indicate that BACT is applied in on a source-by-source basis—as in a permitting process—whereas

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must incorporate BACT. (See District Rule 1303, *available at* <http://www.aqmd.gov/rules/reg/reg13/r1303.pdf>.)

BARCT is developed by generally applicable regulation. (See § 40405(a) [referring to "an emission limitation that will achieve the lowest achievable emission rate for *the source* to which it is applied" (emphasis added)]; § 40440.11(a) [BACT procedures referring to "establishing" BACT "for a proposed new or modified source"]; § 40440.11(b) [referring to "determining the [BACT] for a particular new or modified source"]; § 40440.11(e) ["[a]fter the south coast district determines what is the [BACT] for a source ..."]; 40723(c)(1) [allowing a source to contest a district's BACT determination for the source because that source is unable to meet it in practice].)

Moreover, *Security Environmental Systems, Inc. v. South Coast Air Quality Management Dist.* (1991) 229 Cal.App.3d 110, provides an example of the BACT process in action. The District had approved permits to construct a hazardous waste incinerator, but during a lengthy delay before construction, the state of the art in the relevant pollution control technology had improved. The court upheld the District's decision to demand that the incinerator incorporate that new technology as BACT, as a condition of extending the validity of the permits to construct. *Id.* at 131-32.

### 2. Rather than Suggesting BARCT and BACT Are Equivalent, the Subsequent Legislation Cited by the Association Emphasizes Their Differences.

The heart of the Association's argument conflating BARCT and BACT and converting "achievable" to "achieved" is not the statutory, or even dictionary, definitions. Rather, it is three statutes adopted *after* the 1987 BARCT legislation: sections 40440.11, 40723, and 40920.6. (Answer Brief at 14-15, 19-20.) However, that legislation consistently recognizes the Legislature's explicit *differentiation* of BARCT and BACT, and its intention that BARCT standards need not be already achieved.

#### a. Sections 40440.11 and 40920.6

In a 1995 statute, the Legislature enacted sections 40440.11 and 40920.6, which establish procedures for adopting BACT and BARCT, respectively. (Stats. 1995, ch. 837 [codified at §§ 40440.10, 40440.11, 40920.6].) As the Association notes, the procedures provided in those sections are similar to each other in numerous respects. (Compare § 40440.11(c)(1), (3)-(4) [BACT] with § 40920.6(a)(1)-(3) [BARCT].)

However, they also include a crucial *difference*—a difference that the Association ignores, but that confirms the

error of its conflation of BACT and BARCT. Only for BACT must the District "[d]etermine that the proposed emission limitation *has been met*" by a "commercially available" control technology for at least one year. (§ 40440.11(c)(2) [emphasis added].) The Association cites this provision as supposedly showing that the Legislature intended to require that BARCT standards be already achieved. (Answer Brief at 19.) However, the otherwise parallel BARCT procedures in section 40920.6 *omit* this requirement.[4] (See § 40920.6(a).) That significant lacuna confirms the Legislature's intent that districts may establish BARCT standards not yet met by existing technology. (See *People v. Licas* (2007) 41 Cal.4th 362, 367.)

**b. Section 40723**

Section 40723 demonstrates even more clearly that the Legislature intended BACT, but not BARCT, to be already achieved when adopted. The Legislature enacted section 40723

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[4] Section 40920.6(a)(1) does refer to "one or more potential control options which *achieves* the emission reduction objectives for the regulation" (emphasis added). But "achieves" does not mean "has achieved" and does not dictate that the "emission reduction objectives" be achieved immediately.

in 2000 to allow sources to challenge applicable BACT requirements. (Stats. 2000, ch. 501 [codified at § 40723].) However, it did not adopt, either then or since, any parallel statute for BARCT. As the Association emphasizes (Answer Brief at 14), section 40723 directs the District to "review whether the applicable [BACT] requirements *have been achieved*." (§ 40723(b) [emphasis added].) The Legislature's refusal to adopt a similar requirement for BARCT strongly indicates that it did not mean to require that BARCT standards "have been achieved." (See Opening Brief at 29-30, 47 [citing *Nat. Paint & Coatings Assn. v. South Coast Air Quality Management Dist.* (C.D. Cal. 2007) 485 F.Supp.2d 1153, 1160, fn. 21, which found section 40723 to be inapplicable to BARCT].)

Moreover, the legislative history of section 40723 reveals that lawmakers *deliberately* limited the statute's reach to BACT. Early versions of the bill applied to any "emission limitation or standard." (See, e.g., Sen. Amend. to Assem. Bill No. 1877 (1999-2000 Reg. Sess.) June 29, 2000, *reproduced in* Defendant's Request for Judicial Notice ("RJN"), Ex. A.) But lawmakers heeded a committee report's recommendation that they limit the bill to BACT. (*Id.*; Sen. Comm. on Environmental Quality,

Analysis of Assem. Bill 1877 (1999-2000 Reg. Sess.) as amended June 29, 2000, p. 2, *reproduced in* RJN, Ex. B.)

In light of the Legislature's clear intent that sections 40723 and 40440.11 *not* apply to BARCT, those statutes do not support the Association's argument. On the contrary, they demonstrate that a BARCT standard need not be already achieved when it is adopted.

### D. The Legislature Did Not Intend BARCT to Be Less Stringent than BACT.

Next, the Association argues that the Legislature differentiated between BACT and BARCT only because it intended BARCT to "minimiz[e] the burden that could be imposed by the District on existing sources, while allowing for more stringent [BACT] emissions controls on new and modified sources." (Answer Brief at 17.) This argument misconstrues the legislative history of SB 151, the 1987 legislation that amended section 40440 and adopted the definitions of BACT and BARCT.[5]

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[5] The Association relies on unpublished legislative history materials beyond those noticed by the court of appeal in response to the District's motion. (See Answer Brief 17-18, 20; see also Slip. Op. at 29, fn. 24.) But the Association has not brought a

That history actually shows—without exception—that the Legislature intended the 1987 legislation to prompt the District to take bolder action to control emissions, not to ease the burden of District regulation on industry. (Opening Brief at 11-16, 32-35, 50-51.)

The Association traces the bills that led to the final version of section 40440(b). The history starts with the preexisting, unenforceable requirement that the District "promote" BACT, proceeds to a mandate to "require" BACT alone, and ends with the current formulation, "[r]equire the use of [BACT] for new and modified sources and the use of [BARCT] for existing sources." (See Answer Brief at 17-18; § 40440(b)(1).)

Nothing in this history suggests that the Legislature meant BARCT to be less stringent than BACT. At most, it indicates that the Legislature intended to differentiate between BACT and

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motion for judicial notice of those materials, as required by the California Rules of Court, nor has it submitted copies of the materials. (See Cal. Rules of Court, Rules 8.252(a), 8.520(g).) California courts have declined to notice documents in these circumstances. (See, e.g., *Ortega v. Contra Costa Community College Dist.* (2007) 156 Cal.App.4th 1073, 1086, fn. 9; *Canal Insurance Co. v. Tackett* (2004) 117 Cal.App.4th 239, 243.)

BARCT, and meant the District to "require" and not merely "promote" stringent standards. The bill's evolution is fully consistent with the evidence *supra* that BACT, but not BARCT, must be immediately achievable because it must be applied in permits for new sources.

Moreover, the Association's conclusion drawn from the bill's evolution contradicts the Legislature's clear purpose in enacting the bill: to demand *more aggressive* emission controls, not to ease the burden of those controls on industry. (Opening Brief at 32-34.) The Association cites no statement of intent that would call into question this clear legislative purpose.

Finally, the Association also attempts to bolster its argument that BARCT must be less stringent than BACT by analogizing to the federal Clean Air Act (42 U.S.C. § 7401 *et seq.*). It argues that the Act establishes strict national standards for new sources while "exempt[ing] existing sources." (Answer Brief at 18.)

The federal Act does not support this false dichotomy. The Act establishes minimum national standards for new sources to prevent states from engaging in a "race to the bottom" by setting lower standards to attract new businesses. (42 U.S.C. § 7411;

H.R.Rep. No. 95-294, at 184 (1977), *reprinted in* 1977 U.S. Code Cong. & Admin. News, 1077, 1263.) It does not follow, however, that Congress intended to "exempt" existing sources or even that they be regulated less stringently. The Act leaves regulation of existing sources almost entirely to the states. (42 U.S.C. § 7410(a)(2)(A).) In doing so, Congress recognized that, in areas with poor air quality, states would need to stringently regulate existing sources to attain the ambient standards. (H.R.Rep. No. 95-294, at 184, fn. 3 (1977), *reprinted in* 1977 U.S. Code Cong. & Admin. News, 1077, 1263, fn. 3.)

Indeed, regulation of new sources can only reduce their *additional* pollution. Accordingly, in the Basin, stringent regulation of existing sources is the only way to reduce existing pollution levels as necessary to attain the air quality standards. This is exactly what the federal Act contemplates.

### E. The Requirement that the District Must Evaluate Cost-effectiveness Does Not Demonstrate that the District May Adopt Only Immediately Achievable Standards.

The Association cites statutes requiring the District to evaluate the potential costs of its regulations. (Answer Brief at 21-22.) These procedural requirements do not suggest that the

Legislature intended to substantively limit the regulatory standards that the District may adopt. (See Opening Brief at 48-49.) Moreover, as the record demonstrates, the District seriously evaluates the economic impacts of its regulations.

### 1. The District Carefully Considers the Costs of Its Proposed Regulations.

The District diligently evaluates the potential costs and socioeconomic impacts of its rules. (See, e.g., *Western States Petroleum Assn. v. South Coast Air Quality Management Dist.* (2006) 136 Cal.App.4th 1012, 1022-23; *Sherwin-Williams Co. v. South Coast Air Quality Management Dist.* (2001) 86 Cal.App.4th 1258, 1269-71; *Alliance of Small Emitters/Metal Industry v. South Coast Air Quality Management Dist.* (1997) 60 Cal.App.4th 55, 61-65 ["*Small Emitters*"]).)

Indeed, in this case, the District sought to estimate the costs of the Rule. (AR 3:793-95; 22:6150 *et seq.*) Although the refusal of coating manufacturers to share cost data hampered that analysis (AR 3:793), the District estimated compliance costs for the regulated categories, including costs to end users. (AR 3:794-95.)

The Association never challenged the District's cost analysis for the Rule. That failure is odd, given the Association's claim that the Rule is not achievable. If, as the Association contends, the Rule is not achievable and the District cannot evaluate the cost of an unachievable standard, then, by the Association's logic, the District's cost analysis must have been inadequate.

The Association also has not demonstrated that the District is unable to estimate the costs of an emission standard merely because the standard cannot be achieved until a future date. For example, where a rule cannot be achieved at the date of adoption, it may be achievable by the compliance deadline based on technology transfer from another industry or technology application.

Where the District relies on technology transfer, it can estimate the cost based on the setting from which the technology may be transferred. Likewise, where new technology must be developed to attain a standard, the District may estimate the cost of developing that technology. The mere requirement of cost-effectiveness analysis, therefore, cannot demonstrate that the District may adopt only immediately achievable rules.

### 2. The District Must Estimate the Costs of Its Rules Only to the Extent There Is an Evidentiary Basis for Doing So.

Two courts have sensibly held that the District need estimate the costs of proposed regulations only if the cost data necessary to do so is available. (Opening Brief at 48-49 (citing *Sherwin-Williams, supra,* 86 Cal.App.4th at 1274-75, and *Small Emitters, supra,* 60 Cal.App.4th at 64.) The Association responds that these cases did not expressly apply sections 40440.11 or 40920.6, and that these two statutes require the evaluation of actual costs. (Answer Brief at 22.)

As an initial matter, section 40440.11 applies only to BACT and is therefore inapplicable. (See *supra* Section I.C.2.a.) Both cases also suggest that section 40920.6, which does apply to BARCT, do not require cost estimates where supporting data is unavailable. Thus, *Small Emitters* concluded that "[n]either [section 40728.5] *nor any other* precludes issuance of antipollution rules until data exist allowing a precise analysis of the socioeconomic impacts of those proposed rules." (60 Cal.App.4th at 64 [emphasis added].) Furthermore, *Sherwin-Williams* applied a rule of reason like that of *Small Emitters* to the District's cost analysis under section 40922, a statute

requiring a cost-effectiveness analysis similar to that in section 40920.6. (86 Cal.App.4th at 1270-71 [citing *Small Emitters*].)

Moreover, section 40922 requires the District to evaluate the cost-effectiveness of control measures included in the District's air quality management plan. (§ 40922(a).) Those measures need not be achievable, immediately or otherwise. Indeed, the plan includes "long term measures" contemplating future regulation over a 10- to 20-year period. (See Opening Brief at 56-57.) The District nonetheless evaluates the cost-effectiveness of those measures to the extent data is available.

## II. The Legislature Required BARCT as a Regulatory Floor, Not a Ceiling.

The Association has little response to the District's broader argument: the Legislature commanded the District to adopt standards at least as stringent as BARCT, but did not prohibit the District from adopting standards more stringent than BARCT. (Opening Brief at 39-53.) Indeed, the Association expressly acknowledged its failure to confront most of the District's evidence of legislative intent. (Answer Brief at 24.)

### A. The Association Scarcely Mentions the Abundant Evidence of the Legislature's Intent to Mandate BARCT as a Minimum Standard.

#### 1. The Association Largely Ignores the Most Important Statutory Provision in this Case: Section 40440.

Section 40440(b) is the source of the supposed cap on the District's regulatory authority. The language of that section reads most naturally not as a prohibition on adopting standards more stringent than BARCT, but rather as a mandate that those standards constitute *at least* BARCT. (Opening Brief at 40-42.)

The Association offers no rejoinder based on the language of section 40440. Instead, it contends that BARCT must be a ceiling because the definition requires the "'maximum' achievable reduction." (Answer Brief at 26 [paraphrasing § 40406].) However, this argument ignores the remainder of the statutory definition. That definition refers not to an absolute maximum, but rather to the "the maximum degree of reduction *achievable, taking into account environmental, energy, and economic impacts by each class or category of source*." (§ 40406 [emphasis added].) That is, the BARCT definition refers to the maximum emission reduction given certain considerations and conditions, not the

*absolute* maximum reduction, which would presumably be a 100 percent reduction.

### 2. The Association Largely Ignores the Statutory Provisions that Expressly Allow the District to Adopt Standards More Stringent than Those Required by State Law.

The Association also mostly refuses to confront the several statutory provisions that expressly allow districts to adopt standards more stringent than those dictated by state law. (See Opening Brief at 42-45.) The Association does briefly recognize the Legislature's statement of intent, in adopting BARCT requirements for districts with major air pollution problems, that (1) it "intended to establish minimum requirements for air pollution control districts and air quality management districts," and that (2) "[n]othing in this act is intended to limit or otherwise discourage those districts from adopting rules and regulations which exceed these requirements." (Stats. 1992, ch. 945, § 18, pp. 4512-13, *quoted in* Opening Brief at 43.) But the Association dismisses this clear language as "a non-specific and uncodified savings clause tacked on at the end of the amendments." (Answer Brief at 24.) That characterization does nothing to refute its plain meaning and in fact "renders a part of a statute

meaningless or inoperative," an interpretive offense the Association itself condemns in the subsequent paragraph. (*Id.* at 25 [quoting *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274].)

The Association does assert that the District's (unrebutted) interpretation of this provision makes the BARCT requirement superfluous. (Answer Brief at 25.) On the contrary, section 40440(b)'s BARCT requirement performs a crucial function: setting a regulatory floor by prohibiting the District from adopting a standard less stringent than BARCT. Consequently, if the District were to adopt a lax standard for a category of existing sources, an environmental group could sue the District for violating section 40440(b)'s BARCT mandate. This interpretation is also consistent with the legislative history of section 40440(b), which the Legislature amended to prompt the District to more aggressive action. (See *supra* Section I.D.)

The Association also never confronts sections 39002 and 41508. Yet those sections dictate that districts "may establish additional, stricter standards than those set forth by law," unless the Legislature has *specifically* provided otherwise. (Opening Brief at 44 [quoting § 39002].) The Association cannot reasonably

contend that section 40440(b) specifically limits the stringency of District standards. (*Id.* at 44-45.)

Finally, the Association cites section 40916, which directs the state Air Resources Board to adopt a "feasible" model coatings rule. (Answer Brief at 20-21.) But the Association neglects to mention the statute's express savings clause, which states that "[n]othing in this subdivision shall limit or affect the ability of a district to adopt or enforce rules related to architectural paint or coatings." (§ 40916(d)(2); see Opening Brief at 49.) Here too, the Legislature preserved districts' authority to adopt standards more stringent than the state standards, while explicitly requiring that those statewide standards be "feasible."

### 3. Section 40920.6 Does Not Support the Association's Position.

The Association leans most heavily on section 40920.6 in arguing that the District cannot adopt standards more stringent than BARCT (Answer Brief at 25-26), but the section cannot bear the Association's weight. It imposes only procedural requirements. Nothing in it limits the stringency of District rules or requires that the District demonstrate that its rules are achievable. Indeed, as demonstrated above, the Legislature

consciously did *not* adopt such a requirement in section 40920.6. In the same 1995 statute that enacted section 40920.6, the Legislature enacted section 40440.11, which, *for BACT*, demands that the District "[d]etermine that the proposed emission limitation *has been met*." (See *supra* Section I.C.2.a.)

Nor can the requirement that a district "[i]dentify one or more potential control options which achieves the emission reduction objectives for the regulation" be read to substantively limit the stringency of the underlying regulation. (§ 40920.6(a)(1).) This requirement does not restrict the scope or timing of "the emission reduction objectives for the regulation." It directs districts to "*[i]dentify* . . . potential control options" to reach those objectives, but it does not demand that districts *demonstrate*—upon penalty of invalidation of the rule—that the rule's "emission reduction objectives" can be met by any particular "potential control option."

Finally, section 40920.6(b) states that "[a] district may establish its own [BARCT] requirement *based upon consideration of the factors* specified in subdivision (a) and section 40406." (§ 40920.6(b) [emphasis added].) This provision hardly suggests that the Legislature intended those "factors" to function as

absolute limits on the stringency of the standard. (*Cf. Western Oil & Gas Assn. v. Air Resources Bd.* (1984) 37 Cal.3d 502, 506-507 ("*Western Oil v. State Bd.*") [in setting state air quality standards, Air Resources Board was not obligated to adopt Department of Health Services' recommendation of a standard based on the health impact of pollution; it was only one of several "factors" that the Board had to consider in setting standards].)

### B. The Association Never Explains Why the Legislature Would Impose Unique Limitations on Air Districts with the Most Polluted Air.

The Association's position would subject the District—the jurisdiction with the most polluted air in the country—to regulatory limitations not imposed on other air districts, cities, or counties. (Opening Brief at 36-37.) But not all air districts must require BARCT–only those districts with the most compromised air quality. Moreover, the Legislature has expressly allowed cities and counties to adopt standards more stringent than the District's. (*Id.* at 37.)

The Association first responds that a district with "clean air" could not require standards more stringent than BARCT because such districts would need to show "authority" and "necessity" for regulations to address their nonexistent air

pollution. (Answer Brief at 26 [citing § 40727].) However, the District did not argue that districts with no air pollution—if they exist—could or would adopt aggressive, technology-forcing regulation. Rather, districts that confront air pollution problems, though less severe than those faced by the District, can adopt any standard needed to respond to those problems. They would have ample "authority" to do so in sections 40001 and 40702, neither of which is subject to the BARCT "limitation." (Opening Brief at 37.)

The Association then speculates that a district with less severe air pollution would not need to exceed BARCT. Such a district, however, might adopt a stringent regulation to address a pollution problem caused by a single industry or source, rather than by an array of sources that can each be regulated less stringently. Or it may need to adopt such a standard to prevent its air quality from deteriorating further.

Regardless, the District's point is that, under the Association's interpretation, districts with air pollution, but not severe pollution, would have broad discretion to respond to their pollution problems, but districts with more serious problems, such as the South Coast District, would lack that authority. This

anomaly undercuts the argument that the Legislature intended BARCT to cap the stringency of District rules.

The Association also asserts that the authority of cities and counties is irrelevant because they exercise plenary police power under the California Constitution. (Answer Brief at 27.) But the Association never explains why that fact is relevant. Nor does it explain why the Legislature would carefully limit the stringency of District regulations while *explicitly* allowing any local government in the Basin to exceed those limits. (§ 40449(a) [authorizing "any city or county . . . to adopt any ordinance with respect to air pollution control which is stricter than the rules and regulations adopted by the south coast district board"]; see Opening Brief at 13, 36-37.)

### C. Although BARCT Does Not Cap the Stringency of District Rules, Other Constraining Principles Do So.

That the District may adopt regulations more stringent than BARCT certainly does not mean its discretion is boundless. Several significant legal and practical limits constrain the application of this regulatory authority.

First, a District rule must be reasonably necessary. (§ 40727(a), (b)(1).) Indeed, in arguing that districts with cleaner

air could not adopt technology-forcing standards, the Association acknowledges that this necessity requirement serves an important function in limiting a district's emission regulations. (Answer Brief at 26; see also *supra* Section II.B.) The District also could not adopt standards more stringent than BARCT unless they were reasonably necessary to combat the District's severe pollution problems.

Second, a regulation cannot be arbitrary and capricious. (*Cal. Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 212.) For example, the District could not regulate a firm or industry that does not contribute to the Basin's air pollution problems. Nor could it adopt a regulation without substantial evidence in the record that it would in fact reduce emissions.

Third, the Code provides for granting variances to individual firms that cannot comply with the District's generally applicable standards. (See §§ 42350-42372.) Any regulated entity may apply to the District's Hearing Board for a variance. (§ 42350(a).) The Board *must* grant a variance if the applicant satisfies six statutory criteria, such as demonstrating that compliance would jeopardize its business or property rights. (§

42352(a); see also Manaster, *Fairness in the Air: California's Air Pollution Hearing Boards* (2006) 24 UCLA J. of Envtl. L. & Pol'y 1, 19-20 ["If the statutory criteria are satisfied, the applicant is entitled to a variance."].) The Code also affords special "product variances" for manufacturers on behalf of their customers and distributors. (§§ 42365-42372; see also Manaster, *supra*, at p. 55 [noting the "most common" product variances are for paints and coatings].) Some product variances may even trigger mandatory reconsideration of District rules and regulations. (§ 42372(c).)

Fourth, in a democracy, the political process is the primary line of defense against burdensome restrictions on liberty. (See *San Remo Hotel L.P. v. City & County of San Francisco* (2002) 27 Cal.4th 643, 671; *Santa Monica Beach v. Superior Court* (1999) 19 Cal.4th 952, 973-74.) That process has proved capable of constraining the District's regulatory initiatives.

The District's Governing Board is composed primarily of elected officials from throughout the Basin. (§ 40420; see also § 40402(h) [providing that the District is "largely to be governed by representatives of county and city governments"].) These officials are necessarily interested in avoiding severe regulatory impositions on their constituents.

Furthermore, the Legislature can veto or modify any District rule that it finds objectionable, and it has used this power. For example, section 40458 provides that "Rules 1501 and 1501.1 adopted by the south coast district are void" (§ 40458(a)) and modifies a specified provision of District Rule 2202. (§ 40458(b).) Those rules established employee vehicle trip reduction (e.g., carpool) planning requirements for employers in the Basin. (Stats. 1996, ch. 993, § 1 [enacting § 40458]). Similarly, sections 40456, 40717.6, and 40717.8 prohibit the District from adopting proposed traffic reduction rules.[6]

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[6] See Sen. Transportation Com., Analysis of Sen. Bill No. 1403 (1993-94 Reg. Sess.) as introduced Feb. 7, 1994 [bill codified at section 40456; explaining that the bill would prohibit the District from adopting a proposed rule requiring local governments to impose trip reduction requirements on small employers], *reproduced in* RJN, Ex. C; Assem. Floor, Third Reading Analysis of Sen. Bill No. 382 (1995-96 Reg. Sess.) as amended July 5, 1995, p. 2 [bill codified at section 40717.6; noting that an industry group sponsored the bill to preempt a proposed rule imposing traffic reduction requirements on shopping centers], *reproduced in* RJN, Ex. D; Sen. Floor Analysis of Assem. Bill No. 2581 (1993-94 Reg. Sess.) as amended June 27, 1994 [bill codified at section 40717.8; indicating that an industry group sponsored the bill to preempt a potential rule to impose trip reduction requirements on large event facilities such as Disneyland ], *reproduced in* RJN, Ex. E.

Finally, the District is subject to state and federal constitutional limitations. The District cannot adopt a regulation that is "functionally equivalent" to the exercise of eminent domain, and therefore constitutes a taking of private property, without payment of just compensation. (See *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 539.) It cannot treat similarly situated entities differently without a rational basis for that treatment. (See *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 480.) And it cannot adopt regulations that are so arbitrary as to violate due process. (See *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 857.) While these standards defer to the agency's quasi-legislative judgments, they provide a backstop if the political process fails to control that judgment.

## III. The Association's Proposed Standard of Review Is Meritless.

The Association argues that BARCT requires the District to show that its coating rules are "achievable" for every coating use or application. This argument is both baseless and unprecedented. This Court should therefore join (1) the superior court, (2) the court of appeal, and (3) the federal district court in the *National Paint* case in roundly rejecting such a revolutionary

standard. (See Opening Brief at 59 [citing *Nat. Paint, supra,* 485 F.Supp.2d at 1157-58].)

### A. The Association's Proposed Standard Is Inconsistent with Core Principles of Administrative Law.

The Association clearly states the rule of law it seeks:

> [W]hen a district proposes a rule that requires the use of technology across a broad and heterogeneous category of products *and substantial evidence shows that the technology is not available* for discrete classes or categories within the regulatory category, the district needs to adjust the technology requirement for those subcategories in which the technology is [not] available and the standard is [not] achievable.

(Answer Brief at 37-38 [emphasis added]; *id.* at 39 ["the district must ensure that technology is available for discrete subcategories of products identified by interested parties during the rulemaking process"].) This standard is not just unprecedented; it is revolutionary. It would invalidate a quasi-legislative regulation if it is *contradicted* by any substantial evidence submitted by the regulated industry.

The law applicable to quasi-legislative enactments is longstanding and well-settled. They must be upheld unless "arbitrary, capricious, or lacking in evidentiary support." (*Cal. Hotel & Motel Assn, supra,* 25 Cal.3d at 212.) An enactment

must be upheld if *supported* by substantial evidence in the record, regardless of whether the evidence could also support a different result. (See, e.g., *ibid.*) The agency, not the reviewing court, resolves evidentiary conflicts, particularly those involving technical questions. (See, e.g., *Western Oil v. State Bd., supra,* 37 Cal.3d at 515; *Pitts v. Perluss* (1962) 58 Cal.2d 824, 832-33.)

The Association cites *no* authority for its proposal to upend decades of administrative law. It merely offers a footnote—without citation—that analogizes its standard to the "fair argument" test applied under the California Environmental Quality Act ("CEQA"), Pub. Res. Code § 21000 *et seq.* (Answer Brief at 38, fn. 9.)

The Association does not explain why the fair argument test should apply here, and it manifestly should not. The test is rooted in CEQA's statutory language, which directs that an environmental impact report ("EIR") be prepared "[i]f there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment." (Pub. Res. Code § 21080(d)) No comparable language appears in any of the statutes relevant here. The test also reflects the EIR's role as the linchpin of the environmental

review process. It ensures that the agency does not cut short the environmental review *process*, but it has no immediate effect on the substance of the agency's action. (*Laurel Heights Improvement Assn. v. Regents of the University of Cal.* (1993) 6 Cal.4th 1112, 1123-35.)

By contrast, the Association's proposed standard would dictate the *results* of the District's rulemaking process. It would mandate relaxation of an emission standard if any substantial evidence indicated the standard was unachievable for any coating application.

The Legislature has not specified how the District should categorize sources in setting a BARCT standard. (Opening Brief at 64-65.) Accordingly, the District's choice of categories, including a decision not to create a "discrete subcategory" for an individual use (Answer Brief at 38), is subject not to a "fair argument" test, but rather to the traditional arbitrary and capricious standard. (See *supra*; see also Opening Brief at 64-65.) The Association must show that the District's categorization is arbitrary. (*Pitts, supra,* 58 Cal.2d at 833, 844.)

### B. The Association's Proposed Standard Would Paralyze the Regulatory Process.

At various times the Association has demanded that the Rule be achievable for "all uses," for "all applications," and for "all sources." (See Appellant's Appendix ("AA") 1:173 [Petitioner's Phase I Trial Brief]; AOB Below at 25; Appellant's Reply Brief at 22.) The court of appeal correctly determined that this standard would paralyze the District's rulemaking efforts. (Opening Brief at 61-63; Slip Op. at 17.) The Association nevertheless contends that its "fair argument" test would merely require the District to respond to complaints raised by industry during the rulemaking process. (Answer Brief at 38.) In fact, it goes much further than that.

Under the Association's test, once industry submitted *any* substantial evidence that the proposed emission standard was unachievable for any coating application, the District could do nothing to counter that evidence. (See *Architectural Heritage Assn. v. County of Monterey* (2004) 122 Cal.App.4th 1095, 1110 ["If [substantial] evidence is found, it cannot be overcome by substantial evidence to the contrary."].) Rather, the District would have to create a new subcategory for that application and

relax the emission standard for that subcategory. (Answer Brief at 37-38.) This approach would effectively place the regulated industry in firm control of the regulatory process.

The Association also reframes its argument another way, as demanding that District rules be achievable for each "discrete subcategory" of coatings rather than for each "application" or "use." (E.g., Answer Brief at 32, 35, 38.) But the Association continues to assert that the Rule must be achievable for all applications, describing the "key issue" as "whether [low-VOC] coatings 'are adequate to meet *all* the performance needs for *all* of the coatings in their category." (*Id.* at 39 [emphases added].) Indeed, the Association would require the creation of separate subcategories for every coating application that a manufacturer claimed could not be served with a low-VOC coating.

Additionally, this "discrete subcategory" theory does not resolve the problem that delineating categories (or subcategories) of coatings is fundamentally a technical question within the agency's expertise, the paradigmatic situation for application of the traditional, deferential arbitrary and capricious standard. (See *Western Oil v. State Bd., supra,* 37 Cal.3d at 515; *Pitts, supra,* 58 Cal.2d at 834-35.) The Association's example

demonstrates as much. It complains that the District's "industrial maintenance category" improperly includes both "chemical storage tank coatings" and "bridge coatings." (Answer Brief at 34.) "Clearly," the Association informs the Court, "chemical storage tank coatings and bridge coatings are not the same 'class or category of source.'" (*Ibid.*) But that conclusion is hardly self-evident. Although bridges and chemical storage tanks differ in many respects, one cannot decide, *a priori*, that a regulation cannot reasonably aggregate the paints applied to them. Conversely, the Association's proposed "discrete subcategories" might not be sufficiently specific. For example, one can imagine significant differences among chemical storage tanks.

In sum, there can be no objectively correct categorization of coatings. Given the technical nature of the problem, deference to the District's resolution of it is appropriate. (See *Western Oil v. State Bd., supra,* 37 Cal.3d at 515.)

### C. The Association's Cited Cases Are Not Analogous and Undermine the Association's Own Interpretation of "Achievable."

The Association relies on decisions construing other regulatory programs that are not analogous to the program

established for the District by the California Legislature. (Answer Brief at 35-37.) Beyond being inapt, these decisions fail to support the Association's proposed test. Moreover, to the extent they are relevant, the decisions support the District's interpretation of an "achievable" emission standard. (Opening Brief at 67-69.)

The Association first cites an Illinois case requiring for pollution control regulations a showing that "needed systems are beyond the conceptually workable state of development" for "a substantial number" of the emissions sources. (Answer Brief at 35 [citing *Commonwealth Edison Co. v. Pollution Control Bd.* (Ill.App.Ct. 1974) 323 N.E.2d 84, 95, *aff'd in part and rev'd in part on other grounds*, (Ill. 1976) 343 N.E.2d 459].) But that case has since been implicitly overruled. The Illinois court later held that the agency "need not conclude that compliance with a proposed regulation is 'technologically feasible and economically reasonable' before it can adopt such a regulation," but rather "may adopt technology-forcing standards which are *beyond the reach of existing technology*." (*Granite City Division of Nat. Steel Co. v. Pollution Control Bd.* (Ill. 1993) 613 N.E.2d 719, 734 [emphasis added].).

The Association next cites cases reviewing standards set under the federal Occupational Safety and Health Act ("OSH Act") (29 U.S.C. § 651 *et seq.*) and new source performance standards set under the federal Clean Air Act. From them, it argues that the District cannot make achievability determinations for a "heterogeneous category" but must evaluate "discrete" coating applications. (Answer Brief at 35-36.) But the Opening Brief demonstrated that these cases are inapt. (Open. Br. at 67-69.)

Moreover, importing feasibility requirements from these cases would be improper because the statutes construed in them impose weightier evidentiary burdens on OSHA and EPA. For instance, "OSHA must follow a procedure that is even more stringent than that in the federal Administrative Procedure Act, 5 U.S.C. § 553." (*AFL-CIO v. OSHA* (11th Cir. 1992) 965 F.2d 962, 968-69.) Under the OSH Act, "the burden is on OSHA to show by substantial evidence that the standard is feasible." (*Id.* at 980.) Under this standard, courts "take a harder look at OSHA's action than [they] would if [they] were reviewing the action under the more deferential arbitrary and capricious standard . . . ." (*Id.* at 970.) Similarly, courts apply a "rigorous

standard of review" to new source performance standard decisions under the Clean Air Act. (*Nat. Lime Assn. v. EPA* (D.C. Cir. 1980) 627 F.2d 416, 451-52, 451, fn. 126.)

Finally, the Association's cases *support* the District's construction of "achievable" as allowing standards not capable of being achieved immediately. (See Opening Brief at 68, fn. 23.) For example, as the Association argued to the court of appeal, the OSH Act's technological feasibility standard "does not restrict OSHA 'to the state of the art in the regulated industry,' but requires it to develop 'evidence that companies acting vigorously and in good faith can develop the technology,' before requiring that industry comply with standards 'never attained anywhere.'" (AOB Below at 26 [quoting *Asarco, Inc. v. OSHA* (9th Cir. 1984) 746 F.2d 483, 495]; see also *United Steelworkers of America, AFL-CIO-CLC v. Marshall* (D.C. Cir. 1980) 647 F.2d 1189, 1264 ["Congress meant the [OSH Act] to be 'technology forcing'...OSHA can also force industry to develop and diffuse new technology...."].) Because the Association continues to insist on the relevance of these cases, it must also accept that they undercut its argument that a standard must be achieved in practice to be considered "achievable."

## IV. The Rule's Categorization of Coatings Is Rational and Supported by Substantial Evidence.

Under the correct and longstanding standard of review, the Rule is rational and reflects substantial evidence of achievability. (Opening Brief at 69-78.) The Association devotes virtually its entire argument about the Rule's evidentiary basis to its claim that the Rule is not achievable for every coating application in the Basin. (Answer Brief at 38-41, 43.)

The Association, however, has not shown that the District's categorization of coatings is arbitrary. Tellingly, it never contests the definitions of the District's categories. It offers only the conclusion that "chemical storage tank coatings" and "bridge coatings" are "clearly" different and therefore require separate categories. (Answer Brief at 34; see *supra* Section III.B.)

The Association does complain about the weight of the evidence relied on by the District, but such arguments have no merit under the proper standard of review. For example, the Association complains that manufacturers' product data sheets are mere "marketing materials." (Answer Brief at 40-41.) Apart from the irony of the Association's maligning its own members' data sheets, they have already been found to constitute

substantial evidence. (See *Sherwin-Williams, supra,* 86 Cal.App.4th at 1279; *Nat. Paint*, *supra,* 485 F.Supp.2d at 1166.) The Association also complains that the District's testing was too "limited" (Answer Brief at 41), a mere disagreement with the District about the weight of the evidence that presents no basis for overturning the Rule. (*Pitts, supra,* 58 Cal.2d at 832-33.)

The Association also characterizes the flexibility measures built into the Rule (see Opening Brief at 72-74) as "not a relevant factor." (Answer Brief at 42-43.) But it never confronts the illogic of its assertion that measures easing compliance with the Rule have no bearing on whether it is "achievable." Regardless, the Association's objections again go only to the weight accorded those measures in assessing achievability.

Finally, in defending the court of appeal's conclusion that the Rule was unachievable for the rust preventative and quick-dry enamel categories, the Association reiterates that the District did not "evaluate the achievability of the proposed limits *for the discrete applications* in these coating categories." (Answer Brief at 43 [emphasis added].) But it identifies no substantial evidence that the Rule would be unachievable for any such "discrete applications" in those categories. Therefore, even applying the

Association's unsupportable fair argument test, the Rule must be upheld for those categories.

## CONCLUSION

This Court should reverse the court of appeal and direct that judgment be entered for the District.

DATED: June 22, 2010

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## CERTIFICATE OF WORD COUNT

I certify that this brief contains 8,361 words, 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 brief. The number of words in this brief therefore complies with the requirements of Rule 8.520(c)(1) of the California Rules of Court.

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## PROOF OF SERVICE

*American Coatings Association v. South Coast Air Quality Management District*
Supreme Court of California, Case No. S177823

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, California 94102.

On June 22, 2010, I served true copies of the following document(s) described as:

**DEFENDANT'S REPLY BRIEF ON THE MERITS**

**DEFENDANT'S REQUEST FOR JUDICIAL NOTICE**

**[PROPOSED] ORDER GRANTING DEFENDANT'S REQUEST FOR JUDICIAL NOTICE**

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 June 22, 2010, at San Francisco, California.

Natalia Thurston

**SERVICE LIST**

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