S178320
2nd Civil No. **B204943**

IN THE
SUPREME COURT
STATE OF CALIFORNIA

IN RE BAYCOL CASES I AND II

AFTER ORDER BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT,
ON APPEAL FROM THE SUPERIOR COURT FOR LOS ANGELES COUNTY
HONORABLE WENDELL MORTIMER, JR., JUDGE
LASC Case Nos. JCCP 4217 and JCCP 4223

REPLY BRIEF ON THE MERITS

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INTRODUCTION

For over a century, this Court has expressly, repeatedly and consistently held that the grant of a demurrer to a complaint without leave to amend commences the time to appeal only upon the final entry of judgment. *See* Petitioner's Opening Brief at 9-10 (citing cases). Bayer's opposition brief tellingly does not discuss even a single one of these authorities. Bayer instead simply asserts that this Court overruled this century of precedent, *sub silentio*, in *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695 (1967), and hence that the grant of a demurrer to an entire class action complaint results in two different appellate deadlines.

Daar did no such thing. *Daar* held only that the denial of class certification may be subject to an immediate appeal when individual claims persist – claims that would otherwise prevent appellate review and serve as the "death knell" of the litigation. This Court has never, and should not now, interpret *Daar* to overrule the century-old and statutory-backed rule that the grant of a demurrer to an entire complaint results in a single appeal. When an entire action is dismissed, there is properly but a single appeal. One dismissal, one order, one judgment, and one appeal.

Bayer's sole argument for requiring multiple appeals is that any contrary rule would allegedly be "unclear" and uncertain. But this is manifestly not the case, as the last century of consistent jurisprudence makes clear. The rule is simple: When a demurrer is granted to the entirety of a complaint, there is one appeal, and its deadline commences upon entry of a final judgment. This easily-applied rule has worked for the duration of California's existence. It is a bright-line rule. It avoids duplicative and unnecessary appeals, preserves jurisdiction in the trial court, and enhances the fair and just adjudication of claims on the merits.

For these reasons, this Court should reject Bayer's attempt to introduce unnecessary and pernicious complexity into the straightforward one final judgment rule that this Court has consistently articulated over the past century. It is true that a party may appeal the denial of class certification when individual claims persist. But when, as here, individual claims do *not* persist, and a trial court dismisses the *entirety* of an action, there is but one appeal. That is the essence of the one final judgment rule, and it is dispositive herein.

This Court should accordingly reverse the judgment below and remand the matter for a determination on the merits.

ARGUMENT

A. The Court of Appeal's Holding Is Inconsistent With Nearly One Hundred And Fifty Years Of Precedent Under The One Final Judgment Rule

As early as 1870, this Court expressly declared that "it is only from the judgment, and not from the order sustaining a demurrer, that the plaintiff could appeal. We have repeatedly held that an order sustaining or overruling a demurrer is not an appealable order." *Agard v. Valencia* (1870) 39 Cal. 292, 297. This has always been the law in California and continues to be the law today. *See, e.g., Harmon v. De Turk* (1917) 176 Cal. 758, 761 ("The only appeal that can be considered is that from the judgment, since our law does not authorize an appeal from an order overruling or sustaining a demurrer."); *Berri v. Superior Court* (1955) 43 Cal. 2d 856, 860 (same); *Lavine v. Jessup* (1957) 48 Cal. 2d 611, 614 (same); *Youngblood v. Board of Supervisors* (1978) 22 Cal. 3d 644, 651 (same).

Bayer does not address the significance of this unbroken chain of precedent, but instead asserts that this Court overruled a century of precedent, *sub silentio*, in *Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695. However, *Daar*, nowhere overruled the one final judgment rule in class actions nor created a separate "class action one final judgment

rule" as argued by Bayer. *See, e.g.,* Resp. Br. at 5, 16, 19, 21. Instead, *Daar* simply allowed an appeal of orders that are "tantamount to a dismissal of the action as to all members of the class *other than plaintiff*,"[1] *Daar,* 67 Cal. 2d at 699 (emphasis added), on the theory that any other rule would be the "death knell" of the litigation. The *Daar* rule expressly applies only when the "legal effect" of an order acts to "virtually demolish the action as a class action" because "[i]f the propriety of such disposition could not now be reviewed, it can never be reviewed." *Id.* This is "what has become known as the 'death knell' effect *of making further proceedings in the action impractical because of denial of class action status.*" *General Motors Corp. v. Sup. Ct.* (1988) 199 Cal. App. 3d 247, 251 (emphasis added). This principle simply does not apply when the *entire* lawsuit is dismissed and the *entire* action may be appealed upon the subsequent entry of final judgment. In such circumstances, pursuant

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[1] Bayer asserts that the Superior Court in *Daar* "sustained the demurrer as to *both* the individual *and* class claims;"(Resp. Br. at 16) however, the plaintiff's individual case in Daar was not dismissed, and was merely *transferred* to Municipal Court for lack of subject matter jurisdiction. *Daar*, 67 Cal. 2d at 698, n.1, and n.2. Subsequent to the holding in *Daar*, the Superior and Municipal Courts merged. If the underlying ruling in *Daar* occurred in today's merged court system, the Superior Court would retain jurisdiction. The fact that the case was transferred is of no moment to the *Daar* decision. The fact that the individual claims persisted, however, was critical to the formulation of the death knell doctrine.

to a century and a half of consistent precedent, the one final judgment rule flatly applies.

B. The Death Knell Doctrine Applies Only When A Plaintiff's Class Claims Are Dismissed With Prejudice But The Plaintiff's Individual Claims Persist

Critical to the death knell doctrine articulated in *Daar* and its progeny is that the doctrine applies only where all class claims have been terminated with prejudice, but the individual claims persist. This nuance was recognized by the United States Supreme Court in *Coopers & Lybrand v. Livesay* (1978) 437 U.S. 463, when the Court stated: "The 'death knell' doctrine assumes that without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination." *Coopers & Lybrand*, 436 U.S. at 469-70. The court in *General Motors* agreed, citing to *Coopers & Lybrand* and stating that the California "Supreme Court . . . [in *Daar*] has held that where an order has the 'death knell' effect of making further proceedings in the action impractical, the order is appealable." *General Motors Corp.,* 199 Cal. App. 3d at 251; *see also Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal. App. 4th 799, 807; *and Stephen v. Enterprise Rent-a-Car* (1991) 235 Cal. App. 3d 806, 811. The fact that individual claims

persist is the essential ingredient of the of the "death knell" doctrine, and does not apply when a demurrer is granted to the *entire* action.

Neither the Court of Appeal in its opinion, nor Bayer in its brief, acknowledge this limitation of the death knell doctrine, despite the complete lack of authority applying the death knell where, as here, a court dismisses the individual plaintiff's claims in addition to all class claims, thus dismissing the entire action and precipitating one final judgment. Indeed, all of the cases on which the Court of Appeal or Bayer rely involve an appeal from either (a) a partial demurrer order dismissing solely the class claims while preserving the plaintiff's individual claims, or (b) an order denying class certification, and not impacting the individual claims. *See In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 306 (appeal from order decertifying class, individual claims remained); *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 435 (immediate appeal appropriate from order denying class certification with no ruling as to individual claims); *Richmond v. Dart Indus., Inc.* (1981) 29 Cal. 3d 462, 470 (same); *Farwell v. Sunset Mesa Property Owners Assn., Inc.* (2008) 163 Cal. App. 4th 1545, 1547 (case involved a defendant class, and death knell found not to apply, but in discussing the death knell in relation to plaintiff class action, court noted that "since, in theory, *the*

individual plaintiff's action can go forward, the death knell doctrine fits comfortably into the exception to the 'one final judgment rule' . . .) (emphasis added); *Alvarez v. May Dept. Stores Co., Inc.* (2006) 143 Cal. App. 4th 1223, 1230 (appeal appropriate where lower court decided the issue of class certification on demurrer, but did not dismiss plaintiff's individual claims); *Alch v. Super. Ct.* (2004) 122 Cal. App. 4th 339, 359-60 (class claims eliminated while individual and representative claims persisted after demurrer); *Kennedy,* 43 Cal. App. 4th at 806-07 (citing *Daar* and rejecting, pursuant to the death knell exception, appellees' argument that the appeal was premature because the lawsuit was still viable as to the individual plaintiffs); *Stephen*, 235 Cal. App. 3d at 811 (determining that orders denying class certification must be immediately appealed); *Guenter v. Lomas & Nettleton Co.* (1983) 140 Cal. App. 3d 460, 465 (same); *Morrisey v. San Francisco* (1977) Cal. App. 3d 903, 906 (denial of class certification must be immediately appealed; appeal taken nearly a year after denial order and after judgment on individual claims at trial, was denied as untimely). Because individual claims remained, each of these cases is consistent with *Daar* and the one final judgment rule. Conversely, none of these cases provide a basis to expand *Daar* or to overrule this Court's *consistent* holdings that the time to appeal the

grant of a demurrer without leave to amend a complaint commences only upon the entry of a final judgment.

C. Petitioner Seeks To Enforce The Existing Bright Line, One Final Judgment Rule

Bayer strategically labels Petitioner's position as one about "divergence," asserting that such a theory "would inject uncertainty and shades of grey into what should be, and has been since *Daar*, a black-and-white, bright line rule." Resp. Br. at 26. This is not true. First, the test Petitioner seeks to enforce is the one final judgment rule. There can be no brighter line than this rule, which has existed in California jurisprudence since the inception of the state. Second, Bayer's argument relies upon an unfounded mythology of subjectivity. A court need not judge the *degree* of "divergence" between the interests of the individual plaintiff versus absent class members, but rather simply asks---after granting a demurrer with prejudice to class claims---whether individual claims persist. If individual claims do persist, an immediate appeal from the demurrer is permissible under *Daar*. By contrast, if individual claims do not persist, there are no persisting claims that preclude appellate review

and constitute the "death knell" of the litigation, and the time to appeal commences upon entry of the forthcoming final judgment.[2]

Bayer proposes three circumstances in which it claims the proper application of the one final judgment rule "would be difficult to assess." The first is when a demurrer is sustained to both class and individual claims but with leave to amend only the individual claims. Resp. Br. at 27. However, the answer under the one final judgment rule is simple: an immediate appeal from the class claims is proper because individual claims may still be litigated whereas the class claims may not. The decision to amend the individual claims remains in the control of the plaintiff, and the court need not concern itself with how that option will eventually be exercised. It need only determine whether class claims have been terminated with prejudice while individual claims have not.[3] The answer to Bayer's first

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[2] It bears mention that in *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal. App. 4th 471---the first published opinion by the Court of Appeal using the rule newly formulated in the present case---appellate jurisdiction was found over an appeal contesting the dismissal of class claims despite the fact that the notice of appeal was filed more than 60 after entry of the demurrer order. *See id.*, at 481. There, the demurrer order was entered on January 29, 2009 and 84 days later "[o]n April 23, 2009, [the plaintiff] filed a timely notice of appeal." *Id.* at 481. The Court of Appeal's application of its new rule thus appears to provide anything but a bright-line.

[3] In the event the plaintiff decides not to amend the individual claims, but instead stands on the complaint and challenges the demurrer decision, the plaintiff may either promptly refuse to amend (and file one appeal) or, if necessary, file an early appeal of the class claim and, as Bayer notes, attempt to consolidate the class and individual appeals in the event they are filed separately. Requiring consolidation

hypothetical is thus clear, and even clearer when – as here – the *entire* complaint is dismissed with *no* leave to amend as to *any* claims.

The second scenario posited by Bayer is one in which an order is entered sustaining a demurrer to class claims without leave to amend but the court takes the demurrer to the individual claims under submission and does not rule for 60 days. Resp. Br. at 27. While again an exceptionally infrequent occurrence, the answer remains simple: an immediate appeal from the class claims is appropriate because individual claims remain to be litigated. If an order is issued terminating all class claims while individual claims remain, the death knell rule is triggered, and once triggered, an immediate appeal from that order is appropriate regardless of what happens with the individual claims afterward. Once again, there is a single, easily applied bright line rule to follow.

The third scenario imagined by Bayer entails a demurrer sustained without leave to amend as to class and individual claims, but with the named plaintiff subsequently filing a motion for

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of appeals is not ideal; however, the hypothetical scenario described by Bayer is exceptionally infrequent, especially when compared to Bayer's proposed rule, under which multiple appeals will be required in the much more common situation of a demurrer sustained as to an entire complaint. Under Bayer's rule, every class action subject to a demurrer would trigger two appellate deadlines regardless of the status of the individual claims. By contrast, the hypothetical imagined by Bayer will occur only in those instances when all claims are subject to a demurrer *and* leave to amend is granted only for the individual claims *and* the individual plaintiff decides not to amend.

reconsideration as to the individual claims alone. *Id.* Not only can Bayer not find a single example of its hypothetical in actual practice, but the abandonment of valuable class claims in favor of an attempt to resurrect an individual claim seems exceptionally unlikely. But even were such an event to actually transpire, once again, the one final judgment rule finds an easy application. The entire action has been dismissed, so the longstanding one final judgment rule commences the time to appeal upon entry of final judgment (extended, if applicable, by Rule 8.108(e)). Only in the unlikely event that the Court revived the individual claims would there be a divergence between the class and individual claims that created a "death knell" for the litigation, at which point an appeal of the class claims could commence. Bayer's final hypothetical thus again fails to demonstrate the invalidity of the rule---consistently applied by this Court for over a century---that the time to appeal the dismissal of an entire complaint without leave to amend runs from the date of entry of the final judgment.

In each of these circumstances, the one final judgment rule finds easy, objective application without resorting to the subjective hand wringing suggested by Bayer. There is no need to divine any alleged *degree* of divergence of interests between the individual and class claims. Instead, a court need only determine whether individual

claims persist where all class claims have been terminated with prejudice. If both class claims and individual claims are terminated with prejudice, as in the present case, the persistence of individual claims does not create the "death knell" of the litigation and the longstanding one final judgment rule applies.

D. The Court Of Appeal's Expansion Of The Death Knell Doctrine Will Result In Undesirable Consequences

1. Duplicative Appeals

Bayer admits that multiple appeals in a single action will result if the Court of Appeal's reformulation of the death knell doctrine is allowed to stand, but argues the issue is of no concern because "there is a well established procedural framework of consolidating appeals." Resp. Br. at 30. The existence of a potential mechanism to partially manage such duplicative appeals, however, does not mean they should be invited---much less compelled---which is precisely what the rule advanced by Bayer accomplishes. Duplicative and protective appeals in cases such as the present one are unnecessary, inefficient, and waste both judicial and social resources. Even the consolidation of such appeals would result in multiple notices of appeal, multiple records, multiple case files, extraneous motions to consolidate, and delay in the proceedings while these mechanisms play out. Following

the one final judgment rule, by contrast, is manifestly efficient, and this Court has consistently applied this principle for precisely that reason. *See e.g., Morehart v. County of Santa Barbara* (1994) 7 Cal. 4th, 725, 741 n.9; *and Griset v. Fair Political Practices Comm'n* (2001) 25 Cal. 4th 688, 697; *see also Kinoshita v. Horio* (2001) 186 Cal. App. 3d 959, 966-967. When a demurrer is sustained to both class and individual claims without leave to amend, there will be one single appeal taken from the forthcoming judgment. When a demurrer is sustained to the class claims but denied as to the individual claims, there will be a single appeal as to the terminated class claims taken from the order. Under this rule, there is no need to break a case into multiple pieces on appeal, nor is it necessary to needlessly expend social resources simply to properly present the Court of Appeal with the entire case before it. Bayer does not, and cannot, meaningfully dispute the superiority of the one final judgment rule on this critical metric.

2. Representative Litigation Improperly Burdened

Bayer concedes that its reformulation of the death knell doctrine places a burden on representative and class litigation, but responds by arguing that the same burden exists in any multi-party

action. This assertion, however, yet again relies upon a conceptual contortion of the death knell doctrine.

First, in a class action, by definition, the claims and issues of the named plaintiff and the class necessarily overlap significantly, for only then may the plaintiff represent the class. It is that overlap which, under Bayer's proposed theory, would require protective and duplicative appeals. By contrast, in non-class multi-party litigation, one party does not represent another, nor is representative litigation on behalf of absent parties at issue. A judgment taken against one party in such a setting does not, as in the class context, automatically implicate the issues of the others. Nor is the pendency of an action involving one party the "death knell" of the claims of another. Bayer's purported analogy to non-class litigation is thus inappropriate. Bayer cannot defend the burden on class litigation that necessarily results from its purported rule by the assertion that a similar burden exists in non-class litigation, as this is simply not the case.

Second, Bayer's analogy of class cases to multi-party actions is incomplete. Bayer acknowledges that an appeal in a multi-party action follows the one final judgment rule wherein an appeal of a demurrer is appropriately taken from a judgment. Resp. Br. at 32. Bayer also argues that for "the purposes of finality," class

representatives and potential class members should be "treat[ed] as of they are separate 'parties' in a multi-party case." Resp. Br. at 33. If courts adhered to Bayer's analogy, however, the result would not be the ability to appeal from an *order* sustaining a demurrer to class allegations. Instead, "for the purposes of finality," the court would be required to enter a judgment on the class claims, just as it is required to do for a party in non-representative, multi-party action. But this is simply not the law. Moreover, nothing in *Daar*, nor any case interpreting *Daar*, suggests that a court treat a named plaintiff and a potential class as entirely separate, unrelated parties. They are not. The death knell doctrine "assumes that without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination." *General Motors Corp.,* 199 Cal. App. 3d at 251 (*quoting Coopers & Lybrand*, 436 U.S. at 469-70). Similar concepts of "group recovery" and resulting incentive effects do not necessarily adhere in non-class litigation, which is precisely why the death knell doctrine exists

In the end, Bayer does not meaningfully dispute that its new, expansive version of the death knell doctrine transforms *Daar*, a holding designed to ensure appellate review of class action dismissals,

into a doctrine which operates to prevent review. Bayer admits that when this Court has on occasion departed from the one final judgment rule, it has done so to *permit* adjudication on the merits and to avoid a jurisdictional dismissal. *See e.g., Daar, 67* Cal. 2d at 699*;* and *Tenhet v. Boswell* (1976) 18 Cal. 3d 150, 153 (found trial court had, by inadvertence or mistake, failed to enter judgment as to one cause of action among several, and decided to itself enter judgment in order to preserve an appeal on the merits); *cf. Clark v. Beyrle* (1918) 160 Cal. 306, 311 (preferring adjudication on the merits "rather than to have the case go off upon hypertechnical considerations affecting the right to maintain the appeal"); *see also Arce*, 181 Cal. App. 4th at 481 (allowing appeal of class claims, despite that it was filed more than 60 days after entry of order dismissing class claims). By contrast, the holding by the Court of Appeal below accomplishes a directly contrary result.

Bayer perhaps indirectly addresses the issue with its assertion that a lack of legislative efforts to "codify[] the rule proposed by petitioner." Resp. Br. at 34. This, however, is a flawed syllogism. Bayer assumes that its expansion of *Daar* is correct, and from that infers the lack of legislative action to support its theory. But a stronger argument is that there has been no statutory attempt to repeal

the one final judgment rule, which has existed for far longer than the rule recently articulated by the Court of Appeal below. This is particularly the case given that Bayer's reformulation of the death knell exception is inconsistent with the express language of this Court's ruling in *Daar* ruling and seeks to supplant the one final judgment rule for an entire category of cases. That there has been no demonstrated desire by the Legislature to supplant the one final judgment rule as applied to demurrers in class action lawsuits by codifying a new "class action one final judgment rule" is telling of the error of Bayer's interpretation.

3. The Court of Appeal's Erroneous Holding Reaches Beyond Class Action Lawsuits

Bayer's response to the expansive reach of the Court of Appeal's erroneous ruling beyond class litigation is limited to a footnote at the end of its brief. Resp. Br. at 34, n.8. Bayer's asserts therein that "the rule of *Daar* was developed for class action litigation, and the application of the rule is appropriately limited to that context." *Id.* That statement is true, however, only if the death knell doctrine is treated as originally crafted---a limited exception that arises out of the unique relationship between the named plaintiff and the class that is adversely impacted when individual claims persist that would

otherwise, in most cases, preclude appellate review of either the class's claims or those of the individual. Once that limitation is read out of *Daar*, however, and is applied without regard to the special nature of that relationship, the exception no longer exists as a stand-alone concept designed to address a unique issue arising in class cases, and thus becomes a general rule about rights to interlocutory appeals. Accordingly, such a rule must necessarily also apply to non-class claims immediately appealable per statute. *See e.g.* Cal. Code Civ. Proc. § 904.1 *et al.* (listing such claims as requests for an attachment (§ 904.1(a)(5), an injunction (§ 904.1(a)(6), appointment of receiver (§ 904.1(a)(7), etc.). The result would be multiple appellate deadlines for virtually every demurrer---one based on the order-triggered deadline for the interlocutory relief and another based on the judgment triggered deadline for everything else.

The breadth of such a ruling is truly astonishing when the number of lawsuits containing some form of request for interlocutory relief, such as injunctive relief, is considered. The potential is a tsunami of duplicative appeals requiring consolidation. This Court should not countenance, much less compel, such a result.

CONCLUSION

The death knell doctrine permits an appeal when class claims are terminated (either by denial of class certification, demurrer, or otherwise) but the named plaintiff's individual claims persist. This principle simply does not apply when the individual claims do *not* persist. When a demurrer is granted to an entire complaint, pursuant to the longstanding one final judgment rule, a single appeal is required, and the deadline for this appeal commences upon the entry of final judgment. A contrary rule would substantially harm not only class action litigation, as well as the named and unnamed parties thereto, but also the fairness, efficiency and the conscientious administration of justice in non-class action litigation as well. The Court of Appeal's holding is pernicious, unnecessary, and ignores the luminous line already provided by the one final judgment rule.

Following the one final judgment rule herein would lead to nothing other than an objective determination of appellate rights. Here, there was a single order sustaining a demurrer as to all claims with prejudice. There was one judgment entered. Pursuant to the one final judgment rule, there should be one appellate deadline and one appeal. The Court of Appeal's holding to the contrary is erroneous, and its dismissal of the appeal as untimely should be reversed.

DATED: August 6, 2010

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CERTIFICATION OF WORD COUNT

Pursuant to Rules 8.204(c)(1) and 8.504(d)(1) of the California Rules of Court, I certify that the attached Reply Brief on the Merits was produced on a computer. According to the computer program's word count function, the Reply Brief on the Merits has 5,483 words.

DATED: August 6, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Cynthia Thomas, hereby declare as follows:

I am employed by Green Welling, A Professional Corporation, 595 Market Street, Suite 2750, San Francisco, California 94105. I am over the age of eighteen years and am not a party to this action. On August 6, 2010, I served the within document(s):

REPLY BRIEF ON THE MERITS

_____ by placing the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at San Francisco, California addressed as set forth below.

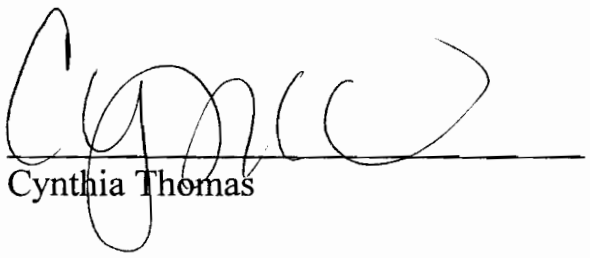
_____ by causing personal delivery by _____ of the document(s) listed above to the person(s) at the address(es) set forth below.

__XX__ by depositing the document(s) listed above in a sealed envelope with delivery fees provided for a FedEx pick up box or office designated for overnight delivery, and addressed as set forth below.

_____ by transmitting via facsimile the above listed document(s) to the fax number(s) set forth below on this date.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the above is true and correct, executed August 6, 2010, at San Francisco, California.



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