Civil No. S158965

In the Supreme Court of the State of California

Brian Reid,
Plaintiff and Appellant,

vs.

Google, Inc.,
Defendant and Respondent.

SUPPLEMENTAL BRIEF OF BRIAN REID

After a Decision by the Court of Appeal
Sixth Appellate District, Case No. H029602
Superior Court for the County of Santa Clara
Case No. CV023646

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I. The Court's Request for Supplemental Briefing

In its April 9, 2010 order, this Court directed the parties to respond to the following issues:

> The waiver provisions of Code of Civil Procedure section 437c, subdivisions (b)(5) and (d) require the evidentiary objections to be made at the hearing. Would written objections filed before the summary judgment hearing be sufficient to preserve evidentiary objections? If not, when and how must the evidentiary objections be made to be deemed made at the hearing?

Plaintiff and Appellant Brian Reid responds to these issues as follows.

II. Discussion

A. Are Written Objections Filed Before The Summary Judgment Hearing Sufficient to Preserve Evidentiary Objections?

1. Evidentiary Objections Must Be Raised At The Hearing Or They Are Waived.

The short answer to the Court's question is no. Under Code of Civil Procedure section 437c ("Section 437c"), subdivisions (b)(5) and (d), objections not "made at the hearing" are "deemed waived." Written objections filed before the hearing are not enough. Specifically, Section 437c, subdivision (b)(5) states: "Evidentiary objections not made at the hearing shall be deemed waived." Similarly, Section 437c, subdivision (d) states: "Any objections based on the failure to comply with the requirements of this subdivision [addressing the competency of declarants] shall be made at the hearing or shall be deemed waived."

Despite the apparent clarity in the code, the courts of appeal have reached very different conclusions as to whether written objections alone are sufficient to preserve evidentiary objections under Section 437c. While many courts have held that a litigant must raise written objections orally at

the hearing to preserve them,[1] some courts have reached the opposite conclusion and held that evidentiary objections relating to a summary judgment motion may be raised *either* in writing before the hearing *or* orally at the hearing.[2] Faced with this split, a leading California practice guide cautions attorneys to both raise objections in writing and also bring the written objections to the trial court's attention orally at the hearing.[3]

At the heart of the dispute is the failure of rule 3.1352 of the California Rules of Court ("Rule 3.1352") to correctly track the code. Rule

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[1] See, e.g., *Jones v. P.S. Development Company, Inc.* (2008) 166 Cal.App.4th 707, 711 fn.4 ("To the extent [appellant] failed to request decisions on [his evidentiary] objections at the hearing on the motions, they are forfeited;" citing Section 437c, subd. (d)); *Swat-Fame, Inc. v. Goldstein*

[2] See, e.g., *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 784 (holding that Section 437c subds. (b)-(d) and rules 343 and 345 of the Rules of Court "presuppose that evidentiary objections are to be filed in writing or orally."); *Vineyard Springs Estates v. Superior Court* (2004) 120 Cal.App.4th 633, 638, fn.3 (finding oral objections at hearing sufficient); *Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 193 ("A party objecting to evidence presented on a summary judgment motion must either object orally at the hearing or timely file separate, written evidentiary objections. (Cal. Rules of Court, rules 3.1352, 3.1354.)"); *Tilley v. CZ Master Assn.* (2005) 131 Cal.App.4th 464, 479 ("Code of Civil Procedure section 437c, subdivision (b)(5) requires the objections to be made 'at the hearing' but not orally. A written objection submitted for the court's consideration in connection with the hearing would be considered made 'at the hearing.'").

[3] Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) ¶ 10:210.1a and 10:210.3 ("It is *strongly recommended* that you serve and file written objections .... If evidentiary objections have previously been filed in writing, it is your job (tactfully) to *remind the Court* at the hearing of the necessity to rule on them;" original emphasis); see also Cal. Civ. Proc. Before Trial (Cont.Ed.Bar 4th ed. 2009) §36.92 ("practice tip" states party may either file written objections or raise objections orally at the hearing).

3.1352 (formerly rule 343) states: "A party desiring to make objections to evidence in the papers on a motion for summary judgment must either: (1) Submit objections in writing under rule 3.1354; or (2) Make arrangements for a court reporter to be present at the hearing." The rule was first adopted in 1984. (See Cal. Rules of Court, [former] rule 343, adopted eff. Jan. 1, 1984, renumbered rule 3.1352 and amended, eff. Jan. 1, 2007.) At that time, Section 437c, subdivision (b), included the following provision: "Evidentiary objections, not raised here *in writing or orally* at the hearing, shall be deemed waived." (Former Code Civ. Proc. §437c, subd. (b), as amended by Stats. 1980, ch. 57 (Sen. Bill No. 1200) [emphasis added].)[4] Thus, at the time it was adopted, rule 343 correctly tracked the code.

In 1990, however, "either in writing or orally" was deleted from Section 437c, subdivision (b)(5).[5] Since 1990, Section 437c, subdivision (b)(5) has simply read: "Evidentiary objections not made at the hearing shall be deemed waived." (Code Civ. Proc. §437c, subd. (b)(5), as amended by Stats. 1990, ch. 1561 (Sen. Bill No. 2594).) This is how the statute read when Google's summary judgment motion was filed in 2005.

Those courts that conclude that objections may be raised *either* in writing *or* orally at the hearing invariably rely on Rule 3.1352. (See cases cited in footnote 2 above.) But if "made at the hearing" in Section 437c was intended to mean "made in writing or orally at the hearing," as Rule 3.1352 indicates, it cannot have that meaning after the modifying phrase

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[4] A 1984 amendment to the statute substituted "made either" for "raised here" so that the statute read: "Evidentiary objections not made either in writing or orally at the hearing shall be deemed waived." (Former Code Civ. Proc. §437c, subd. (b), as amended by Stats. 1984, ch. 171, § 1.)

[5] Section 437c, subdivision (b) was separated into numbered subsections in 1982 without change to the wording under discussion. (*Haskell v. Carli* (1987) 195 Cal.App.3d 124, 131, citing Stats. 1982, ch. 1510, § 1, p. 5855.)

was deleted from Section 437c in 1990. The unmodified phrase "made at the hearing" must reference the actual summary judgment hearing itself. Rule 3.1352 appears to be incorrect. The legislative history bears this out.

2. The Legislative History Behind Section 437c Indicates That Rule 3.1352 of the California Rules of Court, Adopted in 1984, Does Not Correctly Track Section 437c, As Amended in 1990.

By way of background, prior to the 1980 amendments to Section 437c, litigants were not held to waive evidentiary objections at summary judgment proceedings for failure to object. (See *Haskell, supra,* 195 Cal.App.3d at 129-30, citing *Dugar v. Happy Tiger Records, Inc.* (1974) 41 Cal.App.3d 811, 817.) Instead, the courts interpreted Section 437c as prohibiting the grant of summary judgment based on inadmissible evidence, and therefore permitted litigants to attack a summary judgment by challenging the admissibility of evidence for the first time on appeal. (See, e.g., *Happy Tiger Records*, *supra*, 41 Cal.App.3d at 817 ["the general [waiver] rule is inapplicable in summary judgment proceedings since there can be no waiver of the right to object to inadmissible evidence in such proceedings."] [citing *Southern Pacific Co. v. Fish* (1958) 166 Cal.App.2d 353, 365].)

In reaction to this line of cases, the Legislature amended Section 437c in 1980 in two important respects. First, as to the text of what would become Section 437c, subdivision (c), the word "admissible" was deleted from the phrase "the court shall consider all of the *admissible* evidence," and the additional phrase "except that to which objections have been made and sustained by the court" was added, so that new sentence read: "the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court." (*Haskell*, *supra*, 195 Cal.App.3d at 129-30; see also *Howell*, *supra*, 218 Cal.App.3d at 1459 fn. 9 [explaining that the 1980 amendments "eliminated a previous

requirement that a court ruling on a summary judgment consider admissible evidence only."]) Second, a provision was added stating that "[e]videntiary objections, not raised here *in writing or orally at the hearing*, shall be deemed waived."[6] (Stats. 1980, ch. 57, § 1, p. 151 [emphasis added]; *Haskell*, *supra*, 195 Cal.App.3d at 130 ["In 1980 the statute was amended to provide evidentiary objections were waived if not made *at or before* the time of the hearing on the motion."] [emphasis added]; see generally *Review of Selected 1980 California Legislation* (1980-81) 12 Pacific L.J. 291-92 [analyzing legislative intent behind the 1980 amendments].)

Section 437c was further amended in 1990. This round of amendments was prompted by a further line of cases that held—despite the 1980 amendments—that litigants still could raise evidentiary objections at least as to the *competency* of declarations for the first time on appeal, because Section 437c, subdivision (d), continued to contain an unqualified requirement that summary judgment be based on competent declarations. (See, e.g., *Witchell v. De Korne* (1986) 179 Cal.App.3d 965, 974 ["While it is arguable that the 1980 amendment to section 437c, which added a provision for waiver of objections not asserted in a timely manner, undercut these earlier decisions [holding no waiver of right to object to competency of declarants], we believe such a conclusion to be inappropriate" in light of "the *mandatory* language regarding the manner in which the motion was to be supported" set forth in (former) Section 437c, subd. (d)] [original emphasis]; *Zuckerman v. Pacific Savings Bank* (1986) 187 Cal.App.3d 1394, 1404 [following *Witchell*].)

Reacting to these cases, the Legislature amended Section 437c in 1990 to add the following sentence to subdivision (d): "Any objections

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[6] The words "raised here" were subsequently deleted and replaced with "made either" in 1984. (Stats. 1984, ch. 171, § 1)

based on the failure to comply with the requirements of this subdivision [i.e. addressing the competency of declarants] shall be made at the hearing or shall be deemed waived." (See 6 Witkin, Cal. Proc. (5th ed. 2008) *Summary Judgment*, §233 [discussing change in law]; see also *Review of Selected 1990 Legislation* (1990-91) 22 Pacific L.J. 446, fn. 5 [analyzing legislative intent behind 1990 amendments]; *Coy v. County of Los Angeles* (1991) 235 Cal.App.3d 1077, 1084 fn. 4 [same].) At the same time, the Legislature also deleted the phrase "either in writing or orally" from Section 437c, subdivision (b)(5), so that it now read: "Evidentiary objections not made at the hearing shall be deemed waived." This is how the statute reads today.

Deletion of the phrase "either in writing or orally" from Section 437c, subdivision (b)(5) in 1990 is significant. It indicates an intent to require that objections not made at the court hearing be deemed waived, whether or not the objections were previously made in writing. The Legislative Counsel's Digest presented with Senate Bill No. 2594, that effectuated the 1990 amendments, clearly indicates the change was intended to *revise* the existing law:

> Existing law, among other things, provides evidentiary objections not made either in writing or orally at the hearing shall be deemed waived.
>
> This bill would *revise* existing law and provide all of the following: (1) evidentiary objections to a motion for summary judgment not made at the hearing shall be deemed waived; . . . (3) any objections based on the failure to comply with provisions governing supporting and opposing affidavits or declarations shall be made at the hearing or shall be deemed waived; . . . .

(Legis. Counsel's Dig., Sen. Bill No. 2594, ch. 1561, 1990 Cal. Legis. Serv. 1561 (1989-1990 Reg. Sess.) [emphasis added]; see also *Review of Selected 1990 Legislation* (1990-91) 22 Pacific L.J. 446 ["Under Chapter 1561,

evidentiary objections and objections regarding the sufficiency of affidavits or declarations are deemed waived *unless made at the court hearing* on the motion for summary judgment." (emphasis added)].)

While it is correct that the word "hearing" does not always mean an oral hearing, the context is key. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1247 ["California courts have concluded that use of the terms 'heard' or 'hearing' does not require an opportunity for an oral presentation, *unless the context or other language indicates a contrary intent.*"] [emphasis added].) Here, the phrase "made at the hearing" cannot mean "made in writing or orally at the hearing" when the modifying phrase "in writing or orally" was deliberately deleted by the Legislature. (See *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 576 ["When the Legislature 'has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded'"] [internal citation omitted]; see also *Elsner v. Uveges* (2004) 34 Cal.4th 915, 935 ["When the Legislature amends a statute, we will not presume lightly that it 'engaged in an idle act.'"] [internal citation omitted].)[7]

Despite the 1990 change to Section 437c, Rule 343 (now rule 3.1352) was never amended to track the revised statute, and continues to incorrectly state that litigants may raise objections to summary judgment motions *either* in writing *or* orally at the hearing.[8] But the rule of court

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[7] A purely textual analysis also suggests "hearing" refers to the oral hearing under Section 437c. (See *Mediterranean Constr. Co. v. State Farm Fire & Casualty Co.* (1998) 66 Cal.App.4th 257, 263-64 [in holding that litigants have a right to oral argument on summary judgment, court examined the use of the word "hearing" in Section 437c, subds. (b)(5) and (d) and concluded "[t]he Legislature plainly intended to distinguish between written and oral argument."])

[8] Since its adoption in 1984, Rule of Court 343 has been changed only twice, once in 2002 to replace "shall" with "must" (Cal. Rules of Court,

must give way to the statute. (See *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 532 ["If a rule is inconsistent with a statute, the statute controls."]) Accordingly, the correct interpretation of Section 437c, subdivisions (b)(5) and (d), is that adopted by those many courts holding that the failure to raise objections at the hearing constitutes waiver. (See cases cited in footnote 1 above.)

B. If Written Objections Filed Before The Hearing Are Not Sufficient To Preserve Objections, When and How Must The Evidentiary Objections Be Made At The Hearing?

1. Raising Specific Objections At The Hearing Appears To Be What The Legislature Intended In The 1990 Amendments To Section 437c.

Most courts hold that it is sufficient to preserve evidentiary objections at a summary judgment hearing if the party simply requests that the trial judge rule on previously filed written objections, rather than restate the individual objections. (See, e.g., *Gallant*, *supra*, 128 Cal.App.4th at 713 ["[T]he obligation to request a ruling does not impose an undue burden on counsel. He or she need only be diligent, for example, by making an oral request for a ruling."]; *City of Long Beach*, *supra*, 81 Cal.App.4th at 784 [counsel satisfied the "made at the hearing" requirement by requesting at the hearing that court rule on the objections]; *Parkview Villas Assoc., Inc. v. State Farm Fire & Cas. Co.* (2005) 133 Cal.App.4th 1197, 1217 [objections held preserved where counsel "specifically reminded the court [at the hearing] of its objections and its desire for a ruling"].) As the Fourth District observed in *Tilley*, *supra*, "[r]equiring [evidentiary] objections to be repeated, out loud, for the court reporter's edification, serves no purpose whatsoever." (131 Cal.App.4th at 479.)

[former] rule 343 as amended, eff. Jan. 1, 2002), and again in 2007 when it was renumbered 3.1352 (*id.* as amended, eff. Jan. 1, 2007).

But the wording of Section 437c, subdivisions (b)(5) and (d) suggests that all objections must be made at the hearing or they are deemed waived. In *Howell*, *supra*, the First District concluded that the 1980 changes to Section 437c "brought evidence rules in summary judgment cases into conformity with principles of trial evidence, which require a party who opposes admission to raise an objection *and* to make an effort to have the court rule on it. If a party fails to seek a ruling, he is deemed to have waived the objection." (218 Cal.App.3d 1460 fn.9 [original emphasis].)

The 1990 changes appear to push the summary judgment statute even further towards trial-style objections, requiring that the objections be raised at the hearing.[9] Certainly as to the competency of affiants, Section 437c, subdivision (d) (added in 1990) appears to require that at least this category of objections must be expressly made at the hearing or deemed waived:

> Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations. Any objections based on the failure to comply with the requirements of this subdivision *shall be made at the hearing or shall be deemed waived.*

(Code Civ. Proc. §437c, subd. (d) [emphasis added].)

Interpreting the 1990 changes to require specific objections at the hearing is consistent with other changes to Section 437c in the same Senate Bill, including the addition to subdivision (b) that "[a]ny incorporation by reference of matter in the court's file shall set forth with specificity the exact matter to which reference is being made and shall not incorporate the

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[9] *Howell*, *supra*, was decided March 22, 1990, *before* the 1990 changes to Section 437c became effective on January 1, 1991. (218 Cal.App.3d 1446.)

entire file." (Stats. 1990, ch. 1561 (Sen. Bill No. 2594); Legis. Counsel's Dig., Sen. Bill No. 2594, ch. 1561, 1990 Cal. Legis. Serv. 1561 (1989-1990 Reg. Sess.).) Moreover, requiring that counsel raise specific objections at the hearing accords with an important purpose behind conducting an oral hearing in the first place, which the Court of Appeal identified in *Mediterranean, supra*:

> Any experienced lawyer who has doggedly waited through a tedious law-and-motion calendar understands the need, when his or her turn finally comes, to get to the point. There is no time for a leisurely exposition of the facts or the law; it is necessary to speak out about what is important and to be silent about what is not.

(66 Cal.App.4th at 264; see also *Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, 578 fn.6 [advising that litigants object "only to items of evidence that are legitimately in dispute and pertinent to the disposition of the [summary judgment] motion,...."] Compelling counsel to focus on the objections that really count also serves to reduce what some courts have criticized as the "all-out artillery exchange that summary judgment has become" (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 711-12), and counters the disturbing trend towards increasingly oppressive blunderbuss objections.[10]

2. If The Court Does Not Sustain The Objections Raised At The Hearing, The Evidence Must Be Considered Under Section 437c (c).

Section 437c, subdivision (c) states that "the court shall consider all of the evidence set forth in the papers, except that to which objections have

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[10] E.g., *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 248, 254 (defendant in retaliatory discharge and harassment action filed 764 objections spanning 324 pages, which the First District said "may well be the most oppressive motion ever presented to a superior court" and the "poster child" for abusive objections).

been made and sustained by the court." As explained in Reid's Answer Brief on the Merits ("AB") pp.39-40, this language provides the statutory basis for the Court of Appeal's decision in this case that all objections not sustained are effectively overruled. In *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670 fn.1, and *Sharon P. v. Arman, Ltd.* (1999) 2 Cal.4th 1181, 1186 fn.1, this Court held that counsel's failure to obtain a ruling on the objections results in waiver.

But whether the unresolved objections are deemed impliedly overruled or waived, the effect is the same: the evidence must be considered by the trial court under Section 437c, subdivision (c). (E.g., *Weil v. Federal Kemper Life Assur. Co.* (1994) 7 Cal.4th 125, 149 fn.9 [summary judgment evidence to which objections were never sustained by the trial court was considered on appeal in determining existence of triable issue of fact, based on Section 437c, subd. (c)]; see also *Ann M., supra,* 6 Cal.4th at 670 fn.1 ["Because counsel failed to obtain rulings, the objections are waived and are not preserved for appeal [citing Section 437c (b) and (c)]. . . [and] we must view the objectionable evidence as having been admitted in evidence"]; *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 736 ["*Ann M.* teaches that we must take [the trial court's statement that it had considered only admissible evidence] as an *implied overruling* of any objection not specifically sustained."] [emphasis added].)

3. Regardless Whether Google's Objections Were Waived In The Trial Court, Only Google's Objection To The Matloff Declaration Was Both Raised On Appeal And Material To A Triable Issue Identified By The Court Of Appeal—And The Court Of Appeal Resolved That Objection On The Merits.

Here, Google's blunderbuss written objections contained 175 separate objections. (11APP2774-2805; see AB p.34.) During the hearing on the motion for summary judgment, Google's counsel voiced a general,

unspecified objection to "the majority" of Reid's evidence and requested the court to rule on Google's written objections:

> Of the majority of the evidence that plaintiff cites in their opposition, almost the majority of it is also inadmissible. Rather than having all of this come at the motions in limine and having the trial judge go through all of this evidence and rule it inadmissible, we ask you to please review the evidence very carefully in this case and our objections to their evidence.

(Reporter's Transcript ("RT") (Sept. 16, 2005) pp.48:23-49:2.)

Google's counsel then went on to raise four specific objections. First, counsel objected to the admissibility of Rebecca LaBelle's declaration, arguing that LaBelle is "a woman that was never a Google employee and signed a declaration expressly full of her opinions and impressions...." (RT p.49:5-8.) Second, counsel objected to the declaration by Reid's counsel authenticating certain internet articles regarding Google, on the ground of speculation. (RT p.49:9-13.) Third, Google challenged Dr. Matloff's declaration by asserting that his statistical analysis did not take into account employees' positions or performance ratings. (RT p.52:21-27.) Fourth, counsel objected to the admissibility of the transcript of a garage.com interview with Google general counsel Eric Schmidt, on the basis of lack of authentication and competency. (RT p.85:20-27.)

On appeal, Google did not specifically raise all its written objections in its opening brief to the Court of Appeal, and instead simply incorporated by reference in a footnote its voluminous written objections from the trial court. (Google's Respondent's Brief, p.29, fn. 5; see also AB p.34.) As Reid explained, this incorporation by reference was impermissible and Google waived any objections not specifically raised in its opening brief. (AB p.34, citing *Soukup v. Law Offices of Hafif* (2006) 39 Cal.4th 260, 295 fn. 20.) In other words, regardless of the waiver rules in the trial court,

Google challenged Dr. Matloff's declaration by asserting that his statistical analysis did not take into account employees' positions or performance ratings. (RT p.52:21-27.) Fourth, counsel objected to the admissibility of the transcript of a garage.com interview with Google general counsel Eric Schmidt, on the basis of lack of authentication and competency. (RT p.85:20-27.)

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Moreover, of the four items of evidence Google specifically objected to at the summary judgment hearing, the Court of Appeal looked only to the Matloff expert declaration as a basis to find one of several triable fact issues identified in its decision; the other items specifically addressed by Google's counsel at the hearing are therefore immaterial. (AB pp.33-36.) And as to Google's objections to the Matloff declaration, the Court of Appeal expressly addressed Google's objections and rejected them on their merits. (See AB pp.36-39.)

In sum, regardless of the waiver rules in Section 437c, the Court of Appeal never applied a waiver rule to Google. Looking at all the evidence, as it was required to do under Section 437c (c), the Court of Appeal correctly identified numerous triable issues precluding summary judgment. The judgment of the Court of Appeal should be affirmed.

Dated: April 29, 2010

Respectfully submitted,

DUANE MORRIS LLP

By: _____
Paul J. Killion

Attorneys for Plaintiff and
Appellant, Brian Reid

CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, rule 14(c), I certify that this Supplemental Brief contains approximately 4,170 words, not including the Tables of Contents and Authorities, the caption page, signature blocks, attachments or this certification page.

Dated: April 29, 2010

Paul J. Killion

DECLARATION OF SERVICE

I declare that I am, and was at the time of service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. My business address is Spear Tower, One Market Plaza, Suite 2200, San Francisco, California 94105-1127. I am a citizen of the United States and am employed in the City and County of San Francisco. On April 29, 2010, I caused to be served the following documents:

SUPPLEMENTAL BRIEF OF BRIAN REID

Upon the parties as listed on the most recent service list in this action by placing true and correct copies thereof in sealed envelopes as follows:

FOR COLLECTION VIA HAND DELIVERY:

Clerk of the Court California Supreme Court 350 McAllister Street, Room 1295 San Francisco, CA 94102	Original + 14 Copies: Appellant's Supplemental Brief

FOR COLLECTION VIA U.S. MAIL:

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Supplemental Brief of Brian Reid

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on April 29, 2010, at San Francisco, California.

Vikki Domantay