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**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

CITY OF ALHAMBRA, et al.,

*Plaintiffs/Petitioners Below*

v.

COUNTY OF LOS ANGELES, et al.,

*Defendants/Respondents Below*

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# PETITION FOR REHEARING

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GREENBERG TRAURIG, LLP
Scott D. Bertzyk (116449)
Karin L. Bohmholdt (234929)
1840 Century Park East
Suite 1900
Los Angeles, CA 90067
Telephone: (310) 586-7700
Facsimile: (310) 586-7800

OFFICE OF LOS ANGELES COUNTY COUNSEL
John F. Krattli (82149)
County Counsel
Thomas M. Tyrrell (72985)
Principal Deputy County Counsel
500 West Temple Street
Los Angeles, CA 90012
Telephone: (213) 974-1833
Facsimile: (213) 617-7182

*Attorneys for Defendants/Respondents Below*
COUNTY OF LOS ANGELES, ET AL.

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## INTRODUCTION

Justice Kennard's observation that this is a "rather complex tax case" has proven to be a decorous understatement. This case is so intricate that it has generated three distinct judicial analyses, the last of which (i) actually agrees with the County on the precise issue presented in the underlying mandamus petition;[1] but (ii) nonetheless rules against the County on different statutes, which, as the Court has recognized, also support the County "at first glance."

Unmistakably, the Court's November 19, 2012, Decision ("Decision") is driven by concerns that: (i) if recoupment were allowed, the replacement revenue streams the Legislature intended for cities could be "reduced or [even] eliminated" altogether (Dec. at 21); and (ii) at a minimum, the goal of "revenue neutrality" this Court finds to be embodied in the Triple Flip and VLF Swap would be undermined (Dec. at 28). Out of concern for revenue neutrality, moreover, the Court further finds no evidence that a revenue-neutral minded Legislature intended to take away immunity that would have attached to the cities' new property tax shares had they gone to schools or ERAFs.

All of these points are based on material misapprehensions of fact and law, most of which were not the focus of the parties' briefing and each of which provides a ground for rehearing.[2] Because they are at the heart of

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[1] Whether Revenue & Taxation Code section 97.75 forbade the County from recouping PTAF in the fashion challenged.

[2] See, e.g., Cal. R. Ct., rule 8.536 [power to order rehearing]; *In re Jessup's Estate* (1889) 81 Cal. 408, 471 [rehearing appropriate to correct omission or misstatement of material facts or issue, or mistakes of law]; Gov. Code, § 68081 [in any appellate court, where decision is "based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that

the Court's interpretational errors, we address the Court's factual misapprehensions first. On the undisputed record, all of the following facts are true, and belie the Court's concerns:

- Total property tax administrative fees ("PTAF") are a tiny fraction of total property tax revenues collected. By way of example, in FY 2007-08, total PTAF to be recouped amounted to just **1.4%** of total revenues (approximately $140 million in PTAF versus over $10 billion in revenues). (2 AA 286 [total PTAF], 290 [gross PTR].)

- Likewise, the PTAF associated with the Flip and Swap revenues allocated to cities is a tiny fraction of the Flip and Swap revenues themselves. By way of example, over FY 2006-07 and 2007-08, the City of Alhambra alone received additional Flip and Swap revenues of more than $14 million; it complains of additional PTAF of less than $130,000 per year. (2 AA 273 & 291 [column 4]; 1 AA 36 [¶ 64.a].)

- The picture is precisely the same on a macro level. For example, in FY 2007-08, more than $2 billion in property tax revenues that previously would have gone to schools/ERAFs were allocated to cities and counties instead, with all cities in Los Angeles County receiving approximately 50% (i.e., ***over $1 billion***) of that amount. Considering total revenues and total PTAF for FY 2007-08, cities were allocated over $2.5 billion, and were responsible for just $35 million in PTAF (1.4% of total revenues) — i.e., precisely their pro rata share.

- The County, in contrast, still bears a disproportionate burden of PTAF. In FY 2007-08, including Flip and Swap revenue allocations (as to which the County bears its own PTAF), the County received approximately 34% of the total property tax revenues collected but, even with the benefit of additional PTAF recoupment from cities, shouldered the

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opportunity, a rehearing shall be ordered upon timely petition of any party."].)

responsibility for almost 55% of the PTAF (due to immunity associated with dollars still allocated to schools). (2 AA 290.) If this Court's Decision stands, the disproportion would grow even further and counties across the State would be in the unprecedented position of having to bear a portion of the cost of collecting property tax revenues allocated to cities. Cities, since 1990, always have been required to bear their full pro rata share because:

> It is the intent of the Legislature in enacting this section to recognize that since the adoption of Article XIII A of the California Constitution by the voters, county governments have borne an unfair and disproportionate part of the financial burden of assessing, collecting, and allocating property tax revenues for other jurisdictions and for redevelopment agencies. The Legislature finds and declares that this section is intended to fairly apportion the burden of collecting property tax revenues and is not a reallocation of property tax revenue shares or a transfer of any financial or program responsibility.

(Section 95.3, subd. (e).)

- Finally, as for revenue neutrality, the Legislature could not possibly have intended revenue neutrality as to the VLF Swap since its measure of growth is different than the former VLF revenues. Additionally, as a factual matter, the Triple Flip and VLF Swap necessarily include supplemental property tax revenues. (Revenue and Taxation Code, Section 75 and following.) In just the two fiscal years preceding the filing of this lawsuit (FY 2006-07 and 2007-08), the 47 petitioner cities alone came out more than $85 million ahead, even after accounting for the modest additional PTAF associated with the additional property tax revenues allocated to them. (2 JA 452-457 [¶ 19 & Exs. 1-2].) Today, with the benefit of four more years of revenues tied to an income stream (property tax growth) far more stable than the one being replaced (vehicle license fees), that windfall will have increased substantially.

In short, the Cities are not threatened with a loss of revenue neutrality in the slightest, and the "threats" this Court is concerned with do not exist. With the actual facts and equities corrected, the balance of this Petition corrects the further oversights in the Court's Decision. With that, a very different outcome is compelled. Rehearing should be granted.

## ARGUMENT

Each of the misapprehensions and errors discussed below provides a ground for rehearing. (*In re Jessup's Estate* (1889) 81 Cal. 408, 471.)

### A. The Court's Decision Misapprehends The True Economics And Equities.

This point has been fully explored in the Introduction, and we will not repeat it here. The Court's misapprehension of these central facts and equities, in and of itself, warrants rehearing.

### B. The Decision Fundamentally Misapprehends How The Recoupment Process Actually Works.

Legally, the Decision turns on the Court's assumption that, the immunity from PTAF recoupment provided for in section 95.3(b)(1) extends to dollars that, but for operation of the Triple Flip and VLF Swap, would have gone to schools or ERAFs. In other words, the Court assumes that section 95.3(b)(1) immunity is something that attaches to ***particular dollars***, rather than the embodiment of a specific legislative policy crafted to protect ***particular recipients*** of property tax revenues (ERAFs and schools). Thus, the Court reasons that there is nothing in the legislative history for the Triple Flip or VLF Swap reflecting an intent to remove an immunity the Court assumes exists. (See, e.g., Dec. at 12 [finding absence of evidence to suggest that Legislature "intend[ed] to change the effect of the ERAF exemption from the property tax administration fee"]; see also Dec. at 15 ["The issue here is whether the Legislature intended to alter section 95.3's property tax administration fee calculations by eliminating

the ERAF exemption from the property tax administration fee for those monies designated for an ERAF but diverted by the Triple Flip and VLF Swap."].)[3]

If the Court's assumption as to immunity and how it works were correct, the Court's conclusion would follow. But, the Court's assumption is simply wrong.

County auditors are not directed to calculate recoupment responsibility before all property tax revenues have been allocated; nor are they directed to apply fee immunity midstream, before the ultimate allocation end results are known. Instead, recoupment calculations are made, and immunities applied, only after all revenues, including property tax revenues allocated under the Triple Flip and VLF Swap, have been allocated.

At that point, and only at that point, auditors are instructed to apply a three-step process for purposes of recoupment. **Step 1** is to determine the "administrative cost apportionment factor" for each recipient of property tax revenues. The denominator is, as the Court is aware, the sum of all dollars allocated to all recipients. The numerator is the total amount of property tax dollars allocated to an individual recipient, with the same calculation being performed for all recipients of property tax revenues

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[3] Over and over again, the Court makes similar pronouncements in purporting to describe and address "the County's position." For example, at page 2, the Court frames the County's position as being that the *funds lost their exempt status* by being allocated to cities rather than the ERAF. On pages 10-11, the Decision notes that "Beginning in fiscal year 2006-2007, County ... no longer treated the property tax revenues diverted by the Triple Flip and VLF Swap as *ERAF funds exempt from the property tax administration fee*." And, at pages 15-16, the Court says the County "reasons that in enacting the 2004 budgetary measures, the Legislature *intended to eliminate the exemption* for the funds diverted by the Triple Flip and VLF Swap — thereby increasing administrative fees paid by cities." But this is not the County's position at all.

(including schools and ERAFs). The formula is such that all the individual apportionment factors necessarily must equal 100%. (Section 95.3, subd. (a).) It is undisputed, of course, that the dollars allocated under the Flip and swap are "property tax revenues" since that is how they are characterized — repeatedly — in sections 97.68 and 97.70.[4]

**Step 2** is to multiply each recipient's apportionment factor by the total amount of PTAF incurred by a county in the preceding fiscal year to arrive at the administrative costs to be charged to each tax recipient. In this way, each recipient is allocated its pro rata share of PTAF for the property tax revenues collected by a county on the recipient's behalf. Again, this process is performed for all recipients of property tax revenues (including schools and ERAFs), such that the sum of all PTAF allocated equals 100% of the PTAF for the prior fiscal year. (Section 95.3, subd. (a).) By definition, the process is proportional, such that the more property tax revenues a recipient has been allocated, the greater the share of PTAF will

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[4] See, e.g., §§ 97.68, subd. (a)(1) ["Notwithstanding any other provision of law, in allocating ad valorem *property tax revenue allocations* for each fiscal year during the fiscal adjustment period, all of the following apply: (1) The total amount of ad valorem *property tax revenue* otherwise required to be allocated to a county's Educational Revenue Augmentation Fund shall be reduced by the countywide adjustment amount."], 97.68, subd. (c)(5) [". . .[T]he county auditor shall . . . reduce the total amount of ad valorem *property tax revenue* otherwise allocated to that city or county from the Sales and Use Tax Compensation Fund [etc.]"]; 97.68, subd. (e), (f) and (g) [similar usage]; 97.70, subd. (a)(1)(A) ["The auditor shall reduce the total amount of ad valorem *property tax revenue* that is otherwise required to be allocated to a county's Educational Revenue Augmentation Fund by the countywide vehicle license fee adjustment amount."]; 97.70, subd. (g)(2)(A) ["Tax exchange or revenue sharing agreements. . . are deemed to be modified . . . .[I]n that these reduced revenues are, in kind and in lieu thereof, replaced with ad valorem *property tax revenue* from a Vehicle License Fee Property Tax Compensation Fund or an Educational Revenue Augmentation Fund."]. (emphasis added.)

be, and vice-versa. For example, once the allocation process has been completed, if an ERAF is to receive no property tax revenues, it will be assigned no responsibility for PTAF because the formula would work like this: **$0/Sum of revenues allocated = 0% apportionment factor. 0% X last year's PTAF = $0.**

**Step 3** is the step that instructs county auditors what to do with the PTAF responsibility calculated in Step 2. **It also is the step that the Decision misapprehends.** Step 3 actually is codified in two subdivisions of section 95.3. The first is subdivision (b)(1), which provides in pertinent part:

> *Each proportionate share of property tax administrative costs determined pursuant to subdivision (a), except for those proportionate shares determined with respect to a school entity or ERAF, shall be deducted* from the property tax revenue allocation of the relevant jurisdiction or community redevelopment agency, and shall be added to the property tax revenue allocation of the county.

The second subdivision is subdivision (d), and it is this subdivision that explains why allowing recoupment as to these revenues does not pad the County's budget, and instead benefits cities. Subdivision (d) provides:

> Any additional amounts of property tax revenue allocated to the county pursuant to this section *shall be used only to fund costs incurred by the county in assessing, equalizing, and collecting property taxes, and in allocating property tax revenues, and shall constitute charges for those services*, not exceeding the actual and reasonable costs incurred by the county in performing those services."

Thus, counties may not use PTAF except for property tax administration (i.e., into collecting more property tax revenues). (See also Section 95.35(a) [recognizing the positive impact on collections of an adequately funded property tax administration].)

With the background, the flaw in the Decision's reasoning becomes manifest. Under section 95.3, subd. (b)(1), immunity is not tied to any

particular set of dollars, divorced from the actual recipient. Instead, it is extended only to two recipients (schools and ERAFs), and more particularly ***only to the charges actually allocated to those two recipients under section 95.3, subd. (a).*** Thus, if an ERAF is to receive no revenues, the ERAF apportionment factor will be zero; the ERAF's responsibility for PTAF will be zero; and immunity will not even come into play.

In other words, accounting for how section 95.3 actually works, the issue becomes this: "Is there clear evidence the Legislature intended to expand immunity from PTAF recoupment, previously enjoyed only by schools and ERAFs, to extend to PTAF charges associated with revenues allocated to cities under the Triple Flip and VLF Swap?" The answer to that question is "No." Three more points:

First, because all PTAF has to be allocated to someone (even if immunity later applies), to rule for the cities, one would have to rewrite either (i) section 95.3, subd. (a), to direct county auditors, in calculating apportionment factors, to give ERAFs credit for all Flip and Swap dollars allocated to cities and counties, rather than to them, or (ii) section 95.3, subd. (b)(1), to extend immunity not just to schools and ERAFs (as they do not receive these dollars), but also to cities (but not counties) to the extent the cities receive additional tax shares through the Triple Flip and the VLF Swap. But, whether deliberately or by failure to even consider the matter, our Legislature has done neither of these things, and fundamental rules of statutory interpretation preclude this Court from doing so.

Second, the one shard of legislative history relevant here does show that the Legislature was aware of section 95.3 and its impact, and made a conscious choice to allow recoupment. Specifically, the Legislative history for SB 1096 (which dealt with Sections 97.68, 97.70 and 97.75) begins:

> Existing law authorizes a county to retain a portion of the ad valorem property tax revenue that would otherwise be

> allocated to specified entities in a county to reimburse the county for costs in collecting and administering the ad valorem property tax.

(See Legis. Counsel's Dig., Sen. Bill No. 1096 (2003-2004 Reg. Sess.) pp. 4-5.)[5] What could this reference to "existing law" authorizing recoupment be but a reference to section 95.3? Unmistakably, then, the Legislature was aware of section 95.3 and the impact additional property tax revenue allocations to cities would have on PTAF recoupment, and yet, chose not to amend section 95.3 to preclude that inevitable outcome.

Third, even if one were to assume that the Legislature gave no thought to the larger recoupment issues raised by section 95.3, then this Court still may not rewrite statutes or strain against existing language to support an outcome it feels the Legislature should have provided for. Instead, the Court still must enforce the statutes as written, direct a judgment for the County and end its opinion with the same sentence already there: "Should the Legislature disagree with our conclusion, it of course remains free to expressly authorize a different result." (Dec. at 28.) The point, of course, is that, as things now stand, the Legislature has expressly authorized the result advocated by the County, and has not expressly authorized the different result advocated by the cities.

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[5] For good measure, that same Legislative history goes on to make clear that whatever recoupment the Legislature intended to foreclose it intended to foreclose "for the 2004-05 and 2005-06 fiscal years ***only***." If the counties and the SB 1096 Guidelines are to be faulted for anything, it is that they erroneously assumed the Legislature intended for those two years to foreclose recoupment of everything, rather than simply the cost of the incremental new accounting services necessary to perform Triple Flip and VLF Swap calculations. That hardly provides ground for accusing the County of inconsistency, however. (Dec. at 16, fn. 10.) Rather, it means only that the County has given the cities yet another windfall by recouping less than its due.

### C. The County's Interpretation Does Not Fundamentally Alter The Annual A.B. 8 Property Tax Revenue Allocation System.

The Court errs further in concluding that, to rule for the County would be to "fundamentally alter the annual A.B. 8 [property tax revenue] allocation system." (Dec. at 17.) Two points are in order.

First, as a threshold matter, the Court's expressed conclusion mixes apples (the revenue allocation process) with oranges (responsibility for the charges for collecting those revenues). Our Legislature, in section 95.3, subd. (d) itself, expressly calls PTAF recoupment a "charge." And, if that were not enough, in section 95.3, subd. (e). the Legislature ***expressly confirms that an allowance of PTAF recoupment is not, as this Court has concluded, a reallocation of tax revenues***:

> It is the intent of the Legislature in enacting this section to recognize that since the adoption of Article XIII A of the California Constitution by the voters, county governments have borne an unfair and disproportionate part of the financial burden of assessing, collecting, and allocating property tax revenues for other jurisdictions and for redevelopment agencies. The Legislature finds and declares that this section is intended to fairly apportion the burden of collecting property tax revenues and ***is not a reallocation of property tax revenue shares or a transfer of any financial or program responsibility.***

(Emphasis added; see also *Community Redevelopment Agency of City of Los Angeles v. County of Los Angeles* (2001) 89 Cal.App.4th 719, 726-727 [in rejecting claim by redevelopment agency that to allow PTAF was to reduce the agency's allocated share of revenues, court holds that agency was confusing revenues with charges].)

In short, cities are being allocated every penny of the revenues the Legislature intended them to receive. The issue here is whether the cities may be charged for the costs associated with collecting the revenues they

receive and, as the Decision recognizes, the answer to that question has, since 1990, been an unequivocal "yes." (Dec. at 23-25.)

Second, *the only true A.B. 8 allocations* are those that assign to each local taxing entity, out of the smaller pool of post-Proposition 13 revenues available: (i) its base (which, in the first year after the enactment of Prop 13, was the entity's proportionate share of dollars from the prior year); and (ii) its annual tax increment (which is the pure growth in tax revenues within the area governed by that taxing entity). *Any other revenue allocation (including ERAF allocations in the first instance) is, by definition, a deviation from the pure A.B. 8 system first crafted by our Legislature.* Far from fundamentally altering the outcome envisioned by a traditional A.B. 8 system, the Triple Flip and VLF Swap actually have moved things closer to their pure origin, by restoring to cities and counties dollars that since the early 1990s had been allocated to ERAFs instead.[6]

[6] To be clear, the County never has contended that "the 2004 budgetary measures reflected the Legislature's attempt to restore property tax administration fees to levels that existed before the creation of the exemptions applicable to property tax revenue directed to schools and the ERAF's" -- i.e., that the Legislature crafted the Triple Flip or VLF Swap for that purpose. (Dec. at 16.) Rather, the County's points always have been that: (i) as a practical matter, the Triple Flip and VLF Swap had the fiscal effect of moving cities and counties closer to the point where they started under the "traditional" A.B. 8 system in place before the Legislature began raiding local funds to patch holds in State budgets; (ii) whether or not the Legislature actually appreciated that increasing revenue allocations to cities and counties would increase their respective PTAF shares absent amendment of section 95.3, the conclusion would be the same -- by failing to amend section 95.3, the Legislature left that outcome in place; and (iii) as the Court has observed, if the Legislature desires a different outcome now, it remains free to authorize a different result.

## D. The Statutory Language Actually Dispels Any Notion That The Legislature Intended Revenue Neutrality.

The Decision spends considerable effort extolling a legislative intent that the VLF Swap and Triple Flip be revenue neutral, in order to reject the County's PTAF charges as threatening to deprive cities of revenue neutrality.[7] Indeed, the Decision concludes by expressing a concern that, "A contrary interpretation would permit the statewide multimillion-dollar annual shift of property tax revenues from the cities to the counties and would run afoul of the implementing statutes for the Triple Flip and VLF Swap" supposedly designed to ensure revenue neutrality. (Dec. at 28.)

Initially, as noted above, that reasoning confuses revenues with charges. Section 95.3, subd. (e), itself expressly instructs that PTAF recoupment "***is not a reallocation of property tax revenue shares*** or a transfer of any financial or program responsibility." Insofar as the VLF Swap is concerned, moreover, revenue neutrality could not possibly have been intended, as the replacement property tax revenues allocated to cities and counties are tied to the percentage change from year to year in the "gross taxable assessed valuation within the jurisdiction of the entity, as reflected in the equalized assessment roll" — as opposed to a truly revenue-neutral calculation tied to VLF fees lost or projected to have been lost. (See, e.g., Rev. & Tax. Code, § 97.70(c).) In other words, the wording chosen by the Legislature to provide a replacement stream for VLF license fees guaranteed that, if true revenue equality occurred, it would be by accident, rather than design. And, in fact, because the Legislature chose to tie growth in VLF Swap shares to a far more stable revenue stream (property taxes) than vehicle license fees, it virtually guaranteed that beneficiaries of the VLF Swap in particular would come out far ahead.

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[7] Dec. at 17-23.

### E. The County Only Is Recouping Actual Costs Of Assessing, Collecting And Allocating Flip And Swap Shares To Cities.

The Decision suggests that "the County withheld from Cities an additional $4.8 million, as property tax administration fees for fiscal year 2006-2007 and an additional $5.3 million as property tax administration fees for fiscal year 2007-2008. County's actual annual cost, however, in administering the Triple Flip and VLF Swap with regard to all 47 cities was approximately $35,000." (Dec. at 11.) This has been a favorite mantra of the cities throughout this litigation; without explanation, it appears unfair; and that perceived unfairness most surely has impacted this Court's Decision. The truth is different, and the Court's decision misunderstands the real facts.

To be clear, the $4.8 million and $5.3 million figures do not represent the cost of collecting property tax revenues for someone other than these cities. Instead, they reflect the true actual administrative cost of assessing and collecting the additional hundreds of millions of property tax dollars allocated to cities under the Triple Flip and VLF Swap, for the two fiscal years in question. The $35,000 per year figure simply represents the actual cost for the incremental new services required to perform the final accounting steps necessary to accurately allocate the Flip and Swap dollars. Both figures represent actual costs. To draw a finer point, both figures represent actual costs tied to the property tax shares allocated to cities.

## CONCLUSION

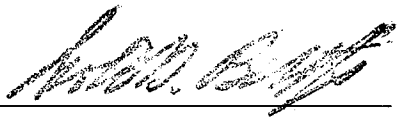
The Court's Decision is based upon material misunderstandings about central facts and legal issues; and, it seeks to correct a perceived inequity that does not exist. Rehearing should be granted to fully brief the

misunderstandings that drive the Decision, and to reach a correct outcome.

DATED: November 29, 2012

Respectfully submitted,

GREENBERG TRAURIG, LLP

By: 

Scott D. Bertzyk
Attorneys for
Defendants/Respondents Below
*County of Los Angeles, et al.*

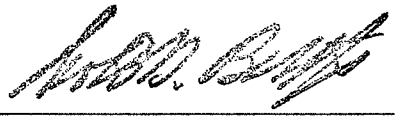
## CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that the enclosed brief was produced using 13-point type, including footnotes, and contains 4,186 words. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: November 29, 2012

Respectfully submitted,

GREENBERG TRAURIG, LLP

By: 

Scott D. Bertzyk
Attorneys for
Defendants/Respondents Below
*County of Los Angeles, et al.*

## PROOF OF SERVICE

## STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is 1840 Century Park East, Suite 1900, Los Angeles, CA 90067.

On November 29, 2012, I served the **PETITION FOR REHEARING** on the interested parties in this action by placing the true copy thereof, enclosed in a sealed envelope, postage prepaid, addressed as follows:

Benjamin P. Fay
Rick W. Jarvis
Jarvis, Fay, Doporto & Gibson, LLP
492 Ninth Street, Suite 310
Oakland, California 94607

Holly O. Whatley
Colantuono & Levin, PC
300 South Grand Avenue, Suite 2700
Los Angeles, CA 90071-3137

☒ (BY MAIL)

I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings and notices for mailing with United States Postal Service. The foregoing sealed envelope was placed for collection and mailing this date consistent with the ordinary business practice of my place of employment, so that it will be picked up this date with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of such business.

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

Executed on November 29, 2012, at Los Angeles, California.

JESSE RODRIGUEZ