

No. S172199

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FORD GREENE,
Plaintiff and Appellant,

vs.

**MARIN COUNTY FLOOD CONTROL AND
WATER CONSERVATION DISTRICT,**
Defendant and Respondent,

**FRIENDS OF CORTE MADERA CREEK WATERSHED AND FLOOD
MITIGATION LEAGUE OF ROSS VALLEY,**

Respondents and Intervenors.

**Review of Decision by the Court of Appeal for the First Appellate District
(Case No. A120228)**

**Superior Court for the County of Marin
The Honorable M. Lynn Duryee, Judge Presiding
(Marin County Superior Court Case No. CV 073767)**

RESPONDENTS'/INTEVENORS' OPENING BRIEF

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INTRODUCTION

On June 24, 2009, this Court granted Respondent Marin County Flood Control and Water Conservation District's ("Respondent" or "District") Petition for Review of an Opinion filed March 11, 2009 by the First District Court of Appeal, Division Five, Presiding Justice Jones, Justice Needham and San Francisco Superior Court Judge Robert Dondero, sitting by designation.

This Court granted review on the issues raised in the Petition for Review; no issues were stated in the Answer to the Petition.

Respondents/Intervenors Friends of Corte Madera Creek Watershed and Flood Mitigation League of Ross Valley (jointly referred to herein as "Respondents/Intervenors") hereby join in the legal arguments offered by the District. Friends of Corte Madera Creek Watershed is a Marin County based all-volunteer, nonprofit organization, founded in 1995 to protect the remaining natural ecosystems of the Corte Madera Creek watershed, the primary drainage channel that runs through much of central Marin County. Flood Mitigation League of Ross Valley is also an all-volunteer nonprofit organization formed by flood victims and other interested citizens after the December 31, 2005 floods that devastated the Ross Valley, with its primary objective to work for the development of effective flood control systems.

Because Respondents/Intervenors agree with the statutory and legal arguments offered by the District, it will not offer redundant legal arguments. This brief is offered to provide the Court further factual context for this case in order to underscore the wide-

ranging ramifications for the residents of Marin County's Ross Valley if the Court were to overturn the decision of the Superior Court and invalidate the storm drainage fee at issue in this case.

Friends of Corte Madera Creek Watershed and Flood Mitigation League of Ross Valley strongly support the decision by the Marin County Superior Court. Indeed, both of these nonprofit organizations believed so strongly in the importance of the issues presented in this case that they sought, and were granted, intervention in the action in support of the District's efforts to uphold the flood fee at issue here.

STATEMENT OF FACTS

A. All of the Residents of the Ross Valley, Including the Respondents/Intervenors, have a Direct Interest in the Outcome of this Litigation.

Friends of Corte Madera Creek Watershed is an all-volunteer, nonprofit organization founded in 1995 to protect the remaining ecosystems of Corte Madera Creek watershed, especially those relating to urbanized creeks and wetlands, and where possible to increase the diversity of these ecosystems.¹ The principal goals of Friends of Corte Madera Creek Watershed include increasing public awareness and knowledge of the watershed's ecosystems; increasing scientific understanding of the creeks and using this knowledge to improve creek conditions; improving water quality; ensuring an adequate freshwater flow to restore and maintain clean, healthy creeks; restoring the wetlands;

¹ See <http://www.friendsofcortemaderacreek.org>) Pursuant to section 452(g) and (h) of the California Evidence Code, Respondents/Intervenors request the Court take judicial notice of this purposes behind Friends of Corte Madera Creek, as described at its website.

restoring diverse and self-sustaining populations of indigenous fish and wildlife; and promotion diverse and self-sustaining native wetlands, riparian, and upland vegetation.

Flood Mitigation League of Ross Valley is also an all-volunteer nonprofit organization formed by flood victims and other interested citizens after the December 31, 2005 flood that devastated the Ross Valley in Marin County, with its primary objective to work for the development of effective flood control systems.² Its members include residents of the towns of Fairfax, San Anselmo, Ross, and Kentfield, many of whom suffered substantial damage in the flood. The objectives of Flood Mitigation League of Ross Valley include working for the development of effective flood control systems and infrastructure by ensuring that cities, county, state, and federal agencies take steps to mitigate flooding in the Ross Valley; educating and informing the public regarding the prevention, mitigation, and hazards of flooding, as well as its environmental and infrastructural causes; and keeping residents and business informed of the progress that governmental and elected officials make toward mitigating and solving the chronic flooding in the Ross Valley.

B. The December 31, 2005 Flood Devastated Large Portions of the Ross Valley.

In support of the District's position in this case, Friends of Corte Madera Creek Watershed and Flood Mitigation League of Ross Valley offer background in order to

² See <http://fmlofrv.com>) Pursuant to section 452(g) and (h) of the California Evidence Code, Respondents/Intervenors request the Court take judicial notice of this purposes behind Flood Mitigation League of Ross Valley, as described at its website.

provide this Court with the proper context so that it understands the critical importance of this case.

The Ross Valley is an area of Marin County, California that runs from the San Francisco Bay near the foot of Sir Francis Drake Boulevard to White's Hill in Fairfax. Located within the Ross Valley are the communities of Greenbrae, Larkspur, Corte Madera, Kentfield, Ross, San Anselmo, and Fairfax. The Corte Madera/San Anselmo Creek is the primary drainage channel for the 28 square miles comprising the Ross Valley watershed. In addition, many tributaries to that primary stream flow through the various communities within the Ross Valley. The Ross Valley watershed, located beside Mt. Tamalpais, receives some of the highest annual rainfall amounts in the San Francisco Bay Area.³

The Ross Valley has been subject to chronic flooding for over 50 years. The watershed experienced floods causing major damage in 1951, 1955, 1958, 1960, 1962, 1963, 1967, 1969, 1982-1983, and 1986. Although no major flooding occurred between 1987 and 2004, during this period the creeks rose to or exceeded flood stage on several occasions and at several locations, such as at the Nokomis Bridge in San Anselmo.

³ See, generally, Ross Valley Flood Protection and Watershed Program, <http://www.rossvalleywatershed.org>). Pursuant to section 452(g) and (h) of the California Evidence Code, Respondents/Intervenors request the Court take judicial notice of the contents of this publicly available information.

While efforts were made to control these floods, for a variety of reasons no watershed-wide solution has ever been implemented in the Ross Valley watershed.⁴

The most recent major flood occurred in the early morning hours of December 31, 2005.⁵ In the weeks leading up to the 2005 flood, the watershed received up to nine inches of rainfall, causing extreme saturation of the soil, leaving little or no capacity to absorb additional rainfall. In the Ross Valley, creeks rise very quickly even during ordinary storms. With such a heavy storm in December 2005, the creeks rose quickly and dramatically. By 2 a.m. on December 31, the Corte Madera/San Anselmo Creek was already at flood stage, and the strongest part of the storm occurred from approximately 3 a.m. to 6 a.m. A flow estimated at 763,000 gallons per minute broke creek beds and flooded streets.⁶

The floods devastated the Ross Valley. Estimates of property damage exceeded \$200 million. Residents and families were displaced from their homes, causing incalculable emotional and financial distress. Merchants were forced to close their businesses, many temporarily, and some permanently. Government buildings, including schools and the town halls in San Anselmo and Fairfax, suffered substantial damage and

⁴ See, e.g., "Inaction Made Marin Flood Damage Inevitable," *Marin Independent Journal*, 1/15/06, attached at Exhibit A to Intervenor's brief filed in the Court of Appeal; "Doomed from the First Drop," *Marin Independent Journal*, 1/8/06, attached at Exhibit B to Intervenor's brief filed in the Court of Appeal.

⁵ Petitioner's petition stated that the flood occurred on January 1, 2006. It actually occurred during the early morning hours of the day before, on December 31, 2005.

⁶ See, e.g., "Damage Mounts in California as Fierce Storms Rush South," *New York Times*, 1/2/06, attached at Exhibit C to Intervenor's brief filed in the Court of Appeal; "Storm's Surreal Mess Shocks Ross Valley," *Marin Independent Journal*, 1/1/06, attached at Exhibit D to Intervenor's brief filed in the Court of Appeal.

were closed. Severe erosion, and loss of riparian habitat added to the damage. Tens of thousands of gallons of raw sewage were spilled and the contents of scores of garages and garden sheds, including pesticides and fertilizers, washed into the creeks, contributing to a substantial degradation of water quality and damage to riparian and aquatic habitat in the Corte Madera Creek system and the San Francisco Bay. As a result, potentially millions of Bay Area residents were impacted by the flood waters that surged through the Ross Valley communities.⁷

C. In the Wake of the 2005 Flood, Community Leaders and Organizations Joined Together to Address the Devastating Impact of the Floods.

Since the 2005 New Year's Eve flood, the creeks in the Ross Valley watershed have threatened to overflow their banks nearly every winter. As the Legislature has found, it is anticipated that climate change will increase flooding to communities like the Ross Valley.⁸ For the Ross Valley, that means a severe, existing problem may well get worse. Plainly, a meaningful flood control effort is needed for the Ross Valley.

⁷ *Id.*; see also "Storm Damage Extensive Throughout Marin," Marin Independent Journal, 12/31/05, , attached at Exhibit E to Intervenor's brief filed in the Court of Appeal; "San Anselmo, Ross, Fairfax Continue Storm Cleanup," <http://cbs5.com/local/San.Anselmo.Ross.2.438376.html> 1/2/06, , attached at Exhibit F to Intervenor's brief filed in the Court of Appeal; "Marin Merchants Unsure Where to Start," San Francisco Chronicle, 1/1/06, attached at Exhibit G to Intervenor's brief filed in the Court of Appeal; "Waiting for a Bailout/Owners Without Flood Insurance Suffering," San Francisco Chronicle, 1/3/06, , attached at Exhibit H to Intervenor's brief filed in the Court of Appeal; "Ross: Survivor Ready to Start All Over Again," Marin Independent Journal, 7/3/06, , attached at Exhibit I to Intervenor's brief filed in the Court of Appeal.

⁸ See, e.g., The Global Warming Solutions Act of 2005, Health & Safety Code §§ 38500, et seq., which declares that global warming threatens "a rise in sea levels resulting in the displacement of thousands of coastal businesses and residences (Health & Saf. Code § 38501(a)) and mandates adoption of a "scoping plan" to mitigate these impacts (Health & Saf. Code § 38561(a)). Section 65080 *et seq.* also recognizes the growing impact of global warming as it requires metropolitan

In January 2006, the Ross Valley Watershed Flood Protection and Creek Restoration Program was initiated by Marin County Supervisor Hal Brown. The program was intended to create a comprehensive flood control strategy for the entire Ross Valley watershed. Led by the County of Marin Department of Public Works, this program is a collaborative effort of private and public partners who have joined together to devise solutions to the chronic flooding that has affected the communities in the Ross Valley, with the goals to reduce flood and enhance the natural creek environments valued by many of its residents.

Partners in this bipartisan effort include the County of Marin (Board of Supervisors, Department of Public Works, Flood Zone 9, Marin County Stormwater Prevention Program), the City of Larkspur, the towns of Ross, San Anselmo, and Fairfax, the San Anselmo Flood Protection Technical Advisory Committee, Kentfield Planning Advisory Board, Coalition for Corte Madera Creek, California State Coastal Conservancy, Congresswoman Lynn Woolsey, National Oceanic and Atmospheric Administration, National Weather Service, State of California Office of Emergency Services, and the U.S. Army Corps of Engineers.⁹

Also joining as partners in this collaborative effort were Respondents/Intervenors Friends of the Corte Madera Creek and the Flood Mitigation League of Ross Valley.

planning agencies to prepare “sustainable communities strategies” to curb the impacts of global warming.

⁹ See <http://www.rossvalleywatershed.org/Content/10000/aboutus.html>.

Following the 2005 flood, and in conjunction with the Ross Valley Watershed Flood Protection and Creek Restoration Program, engineers began identifying locations where flood protection solutions will be most effective. Such projects include removing constrictions that block creeks, additional detention basins upstream to hold water during large storms and to release it slowly afterwards, increasing carrying capacity of sections of the creek, and reducing impervious surfaces so that infiltration of storm water can be increased and runoff reduced.

Specific projects have been identified, and they would involve removing bottlenecks that impede water flow; reducing damage due to flooding; conforming to the FEMA Community Rating System, which could reduce flood insurance premiums over time for affected property owners; improving fish passage; maintaining natural creek functions; reducing pollutants entering the San Francisco Bay; and incorporating habitat enhancements. All projects will go through a required public review process and will comply with all environmental requirements.¹⁰

D. The Storm Drainage Fee is the Lynchpin Funding Mechanism for these Flood Control Projects.

Because these government entities, most of which are cash-starved in these dire economic times, do not have funding for these potentially large flood control projects, a storm drainage fee adopted pursuant to Proposition 218, Article XII D, Section 6, was proposed as a funding mechanism. It was anticipated that the revenue generated from the storm drainage fee would be leveraged with other potential funding sources, including

¹⁰ See <http://www.rossvalleywatershed.org/docManager/1000000067/SolutionsFramework5-18-06.pdf>

state and federal resources (such as, perhaps, the recently adopted federal stimulus program under the American Recovery and Reinvestment Act), to fund flood mitigation projects that could provide a permanent solution to the chronic flooding in the Ross Valley.

Accordingly, in early 2007, the District called an election for Zone 9, which includes the Ross Valley, on an annual storm drainage fee. The storm drainage fee was adopted pursuant to the strict terms of the "property related fee" provisions in Proposition 218, which are incorporated in the California Constitution, Article XII D, Section 6. The storm drainage fee would be paid by developed properties that contribute runoff to the storm drainage system. The storm drainage fee for each property is related to the estimated amount of stormwater runoff it generates. Land that is developed (e.g., with a house, commercial building, or parking lot) includes "impervious areas" such as land covered by paving and buildings where water cannot soak into land, resulting in stormwater runoff that exceeds natural runoff from an undeveloped site. Each property owner's fee is based both on the size of the property and how intensively it is developed.

The vast majority of single-family residential properties in the Ross Valley would pay \$125 or less per year. Virtually all condominium owners would pay about \$33 a year. The fee was capped at \$180 a year for all residential properties. Adjustments for inflation are limited to no more than 3 percent a year as determined by the Board of Supervisors. The storm drainage fee will end in 20 years unless it is extended by a vote of property owners.

The District followed procedures set forth in the California Constitution and the Government Code to establish this fee. Specifically, the District conducted a noticed protest hearing on May 1, 2007. The District received less than 1% protest and set the matter for a property owner consistent with constitutional requirements. AA 65.

The District adopted election procedures. The adopted election procedures provide that “in order to be counted, a ballot must be signed . . . by the record owner as attested to pursuant to the declaration under penalty of perjury.” The procedures also provided that, “The Clerk shall not accept a ballot: . . . (ii) that does not contain an original signature.” AA 73.

These procedures requiring a signature are consistent with section 53753 of the California Government Code, which is part of the “Proposition 218 Omnibus Implementation Act.” Section 53753(c) provides, among other things, that each “ballot shall be in a form that conceals its contents once it is sealed by the person submitting the assessment ballot. Each assessment ballot *shall be signed* and either mailed or otherwise delivered to the address indicated on the assessment ballot.” (Emphasis added)

Consistent with these legal requirements, in three distinct places the ballot mailed to property owners by the District in May 2007 plainly and clearly noted the signature requirement. The instruction section of the ballot stated, “*Sign your name* and write in the date in ink.” AA 77. (Emphasis in original). Below the instruction section was typed in plain, readable language, “Ballots received without a signature will not be counted.” *Id.* Finally, below the voting box is a line providing for the “date,” “printed name,” and

for a signature next to the word, "Signed," with a blank underline for the voter's signature. AA 78. Underscoring the fact that a signature was to be placed in the space provided, directly under the date and signature lines was the phrase, "I hereby declare, under penalty of the laws of California, that I am authorized to submit a ballot on behalf of the parcel identified above." *Id.*

Recipients of the ballots had 45 days to review the material, including the language requiring a signature. Anyone, including the Appellant in this case, had an opportunity to raise an objection or bring a legal challenge before the vote. No such objection was raised. The mail-in vote was conducted pursuant to the strict terms of Proposition 218. A narrow majority of lawful votes returned by the deadline approved passage of the storm drainage fee. AA 87-88.

E. The 2007 Storm Drainage Balloting Received Considerable Publicity Throughout the Ross Valley

The 2007 storm drainage balloting received considerable publicity throughout the Ross Valley, particularly in light of the fact that the Ross Valley communities had suffered considerable damage only 15 months earlier. The front and inside pages of the various local newspapers, including the daily **Marin Independent Journal** and the weekly **Ross Valley Reporter**, prominently featured editorials and news stories regarding the storm drainage ballot in the days leading up to the May 1, 2007 public hearing providing notification to property owners and the June 2007 balloting by property

owners.¹¹ Indeed, it is doubtful that anyone living in the Ross Valley paying any attention at all to civic affairs could be unaware of the mail-in balloting process.

Despite receiving considerable public support from the agencies, organizations, and individuals identified above, the anti-tax organization Marin United Taxpayers Association (MUTA) and a local lawyer, Appellant Ford Greene, publicly opposed the passage of the storm drainage fee prior to the balloting.

Following the certification of the election, Greene published an opinion piece in **Marin Independent Journal** in which he laid out his reasons for seeking to set aside the property owners' vote to approve the fee. Greene argued that the signature requirement was in "very small print" and "not even in bold," and therefore it was a "cynical

¹¹ See http://www.mariniij.com/marinnews/ci_5177154?IADID, "Drainage user fee would pay to eliminate bottlenecks," Marin Independent Journal, February 7, 2007; http://www.mariniij.com/marinnews/ci_5182371?IADID, "Study finds flood trouble spots in Ross Valley," Marin Independent Journal, February 8, 2007; http://www.mariniij.com/marinnews/ci_5191431?IADID, "Hal Brown: Time for progress, not excuses," February 9, 2007; http://www.mariniij.com/marinnews/ci_5620799?IADID, "Ross Valley flood control measure criticized as unfair, illegal," Marin Independent Journal, April 7, 2007; http://www.mariniij.com/marinnews/ci_5656731?IADID, "Vote 'yes' on the Ross Valley flood fee," Marin Independent Journal Editorial, April 12, 2007; http://www.mariniij.com/marinnews/ci_5657398?IADID, "Taxpayer group opposes Ross Valley flood fee," Marin Independent Journal, April 13, 2007; http://www.mariniij.com/marinnews/ci_5761730?IADID, "Supervisor to discuss flood fee at luncheon," Marin Independent Journal, April 26, 2007; http://www.mariniij.com/marinnews/ci_5798508?IADID, "Ross Valley taxpayers face mail-in ballot on flood control charge," Marin Independent Journal, May 2, 2007; http://www.mariniij.com/marinnews/ci_5897701?IADID, "Lise Stampfli Torme: Countering flood misinformation," Marin Independent Journal, May 14, 2007;

manipulation of the elderly and infirm” that were apparently too old or blind to know of this requirement.¹²

Greene’s verified Complaint filed in the Marin County Superior Court on August 9, 2007, was similarly premised solely on whether the font size of the signature requirement warning on his ballot was legally deficient. Specifically, his verified complaint alleged that the signature requirement was supposedly “hidden” by alleged “9 point” font on the ballot, and that his “hidden” notice created impermissibly disparate classes between those who actually had notice of the signature requirement and those who did not.¹³

To support these arguments, Greene offered as evidence his own ballot—which he had no difficulty signing—and citations to various irrelevant consumer statutes dealing with notice requirements in commercial agreements. The signature requirement did not deter Greene from casting his ballot, discussing it in the press, and ultimately attaching a copy of it as a public record in this case. Indeed, 8,059 votes were cast in this election, of which 6,351 were valid. AA 78-79.

In the trial court, Greene offered a shifting set of legal theories (Equal Protection, “expressio unius est exclusion alterius”) in support of his effort to block the imposition of any fees or property taxes to fund effective flood mitigation efforts in the Ross Valley.

¹² See http://www.marinij.com/marinnews/ci_6456557?IADID, “Ford Greene: Ross Valley voters deserve an apology,” Marin Independent Journal, July 24, 2007.

¹³ AA 3:10-22

After lengthy briefing and detailed arguments, Presiding Judge Duryee of the Marin Superior Court issued a carefully reasoned order rejecting Greene's arguments. In rejecting his Equal Protection argument, Judge Duryee noted that the signature requirement applied to all property owners equally, the statutory scheme did not impair property owners' ability to vote, and invalidating unsigned ballots advanced a compelling interest in preventing fraud. Judge Duryee also concluded that the election was not governed by the Elections Code and, therefore, the ballot form was not required to conform to the provisions of that code for absentee ballots cast in registered-voter elections.¹⁴

Unhappy with these results, Greene publicly criticized Judge Duryee for, in his view, basing her decision on personal prejudices and biases due to her being "embedded in Marin County."¹⁵

ARGUMENT

Respondents/Intervenors join in the legal arguments offered by the District. They submit this brief to add further factual context relating this case, as well as to offer a few additional points.

First, as reflected above, the balloting that led to the passage of the storm drainage fee received widespread and substantial publicity throughout the Ross Valley. This balloting followed devastating floods that received national attention and resulted in tens

¹⁴ AA 284-285.

¹⁵ See http://www.marinij.com/marinnews/ci_7185872?IADID, "Greene will appeal decision on flood fee election," Marin Independent Journal, October 15, 2007.

of millions of dollars in property loss. Because of the widespread publicity surrounding this balloting by property owners, the results were as well-informed as any electoral decision and therefore are entitled to deference and respect by the courts of a democratic society. Respondents/Intervenors submit that these results should only be invalidated if substantial evidence is adduced of a clear legal violation that actually affected the outcome of the vote, which is certainly not the case here.

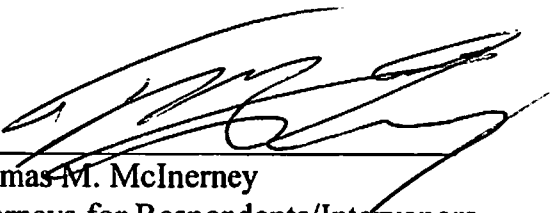
Second, invalidating the storm drainage fee will have a significantly deleterious affect on the residents and property owners in Ross Valley. For generations, the Ross Valley has suffered from chronic flooding. There is an equally long history of political and other impediments to effective flood mitigation in the Ross Valley. If this Court invalidates the storm drainage program and its funding source, efforts at implementing flood mitigation will be set back for years, if not decades, putting lives at risk. It is not an exaggeration to state that this Court's decision will have a direct impact on generations of Ross Valley residents, and will save lives and potentially hundreds of millions of dollars in future property damage. Accordingly, Respondents/Intervenors urge this Court to affirm the trial court's ruling rejecting the challenge to the decision of the Ross Valley property owners to impose a fee on themselves to fund a program of flood protection measures to enhance the safety of their homes and businesses.

Third, Appellant's arguments to set aside the storm drainage fee have shifted throughout this case. Initially, he argued that voters were somehow duped into approving the storm drainage fee because the type font on the ballot was too small. He later argued

that the voting violated principles of Equal Protection by treating those who signed the ballots disparately from those who did not. It was only on appeal that that the argument was made that the District somehow failed to afford ballot secrecy and that the failure to communicate the existence of that secrecy affected the outcome of the election. In light of the important policy reasons for upholding the storm drainage fee, this Court should not invalidate an Article XII D, § 6 election based on shifting and unsubstantiated legal arguments.

DATED: July 24, 2009

Respectfully submitted,
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CERTIFICATION OF WORD COUNT
(Cal. Rules of Court, Rule 14(c)(1))

The text of this brief consists of 3,620 words, as counted by the Word version word-processing software program used to generate the brief.

DATED: July 24, 2009

Respectfully submitted,
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Ford Green v. Marin County Flood Control District, et al.
Court of Appeal Case No. A120228

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California; I am over the age of 18 years and not a party to this action. My business address is Steuart Tower, Suite 1300, One Market Plaza, San Francisco, California 94105.

On July 24, 2009, I served the following document(s) described as:

RESPONDENTS'/INTERVENERS' OPENING BRIEF

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I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses as indicated above and:

- deposited the sealed envelope or package with the United States Postal Service, with the postage fully prepaid.*
- placed the envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United State Postal Service, in a sealed envelope or package with postage fully prepaid.

I am employed in the county where the mailing occurred. The envelope or package was placed in the mail at San Francisco, California.

I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on July 24, 2009, at San Francisco, California.

KATHLEEN A. SOVJAK

Type Name

Kathleen Sovjak

Signature