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EXEMPT FROM FILING FEES UNDER
GOVERNMENT CODE § 6103

Attorneys for Cross-Complainant
Phelan Piñon Hills Community Services District

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES - CENTRAL DISTRICT

Coordination Proceeding
Special Title (Rule 1550(b))

Judicial Council Coordination Proceeding
No. 4408

**ANTELOPE VALLEY
GROUNDWATER CASES**

For Filing Purposes Only: Santa Clara
County Case No.: 1-05-CV-049053

Included Actions:

Assigned to the Honorable Jack Komar,
Department 17

*Los Angeles County Waterworks District
No. 40 v.
Diamond Farming Co., et al.,
Los Angeles County Superior Court, Case
No. BC 325 201*

**OPPOSITION TO PEREMPTORY
CHALLENGE (C.C.P. §170.6)**

Date: October 27, 2009
Time: 9:00 a.m.
Dept.: 17C

*Los Angeles County Waterworks District
No. 40 v.
Diamond Farming Co., et al.,
Kern County Superior Court, Case No.
S-1500-CV-254-348*

*Wm. Bolthouse Farms, Inc. v. City of
Lancaster
Diamond Farming Co. v. City of Lancaster
Diamond Farming Co. v. Palmdale Water
Dist.
Riverside County Superior Court,
Consolidated Action, Case Nos. RIC 353
840, RIC 344 436, RIC 344 668*

AND RELATED CROSS-ACTIONS

I.

INTRODUCTION

Phelan Piñon Hills Community Services District (“PPHCSD”) opposes the peremptory challenge to Judge Komar filed by attorneys for U. S. Borax, Inc., Bolthouse Properties, LLC, Diamond Farming Company, Crystal Organic Farms, Grimmway Enterprises, Inc., Lapis Land Company, LLC, Service Rock Products Corporation, Sheep Creek Water Company, Inc., A. V. United Mutual Group, and Antelope Valley Groundwater Agreement Association (“AGWA”). Defendants’ peremptory challenge is untimely and is filed after two trials involving determination of law and fact.

On October 13, 2009, Judge Komar granted Public Water Suppliers’ Motion to Transfer and Consolidate for All Purposes each of the actions pending as part of Judicial Council Coordination Proceeding 4408, also known as Antelope Valley Groundwater Cases. Defendants immediately filed their Peremptory Challenge to Judge Komar.

Consolidation of cases in coordinated proceedings does not create a new opportunity for a peremptory challenge. Judicial coordination rules do not allow for it. The defendants have already appeared before Judge Komar on all matters subject to consolidation, and have participated in trials of fact and law before Judge Komar, in which he made significant determinations of key factual issues. The time to peremptorily challenge this judge passed over four years ago.

II.

THE PEREMPTORY CHALLENGE IS UNTIMELY

A. Timing for a Peremptory Challenge in a Non-Coordinated Action is Different Than in a Coordinated Action

A challenge under California Code of Civil Procedure §170.6 must be filed within 10 days after a party has appeared in the action (Code of Civil Procedure § 170.6). In addition, the challenge must be made prior to any hearing of any contested issues of law and fact.

Pacific/Southwest Annual Conference of the United Methodist Church v. Superior Court (1978) 82 Cal.App3d 72, 79. Where the judge is known 10 days before the date of the trial or hearing,

the challenge must be made at least 5 days before that date.

Section 170.6(2) provides that, “in no event shall any judge entertain ... a motion [for peremptory challenge] ...” if it is made after commencement of trial. Since the parties who seek to challenge Judge Komar now have participated in two trials and numerous hearings, under the above criteria alone, the challenge is untimely.

B. Special Rule in Cases Coordinated for Trial

A peremptory challenge in coordinated actions is governed by California Rule of Court No. 3.516, which states, “A party making a peremptory challenge by motion or affidavit of prejudice regarding an assigned judge must submit it in writing to the assigned judge within 20 days after service of the order assigning the judge to the coordination proceeding.”

A Coordination Petition was filed on January 3, 2005. The case was ordered coordinated on June 17, 2005, and designated as Judicial Council Coordination Proceeding No. 4408. The Amended Order Assigning Coordination Trial Judge, assigning Judge Komar to sit as coordination trial judge, was signed by the Chief Justice of California and Chair of the Judicial Council on August 31, 2005 (*see* Exhibit “A”, attached hereto). Counsel for Los Angeles County Waterworks District No. 40 filed a Notice of Entry of the Amended Order Assigning Coordination Trial Judge on September 2, 2005 (*see* Exhibit “B”, attached hereto). Defendants failed to issue a peremptory challenge within the time permitted under the law.

Industrial Indemnity Co. v. Superior Court (1989) 214 Cal.App.3d 259, 263 applied and upheld the application of the requirement that peremptory challenges be made within twenty days after the coordinated judge is assigned. Whether defendants are the initial parties or add-on parties, their right to challenge Judge Komar is subject to Court Rule 3.516. Under this rule, defendants had twenty days to challenge Judge Komar. Defendants chose not to do so, and this challenge is untimely.

C. This Peremptory Challenge Must be Denied Because the Judge has Presided at Earlier Proceedings Which Involved Determinations of Contested Factual Issues Relating to the Merits

The case of *Swift v. Superior Court* (2009) 172 Cal.App.4th 878, holds that a Code of Civil Procedure §170.6 challenge must be denied if the judge has presided at an earlier hearing

which involved a determination of contested factual issues relating to the merits. The case states at page 883:

“At issue here is one of the limited exceptions to automatic disqualification. An otherwise timely peremptory challenge must be denied if the judge has presided at an earlier hearing which involved a determination of contested factual issues relating to the merits.” *Swift v. Superior Court* (2009) 172 Cal.App.4th 878, citing *Grant v. Superior Court* (2001) 90 Cal.App4th 518-525.

In these coordinated actions, Judge Komar has presided over trials of significant factual issues. Phase I of trial determined the significant factual issue of the scope of the court’s jurisdiction, including the identity of landowners who needed to be included in the action. All of the parties who now challenge Judge Komar were represented at this trial. Phase II of trial included a factual determination of the characteristics of the basin, including a determination that water in the basin commingled throughout the basin.

Allowing a challenge after the judge has ruled on contested fact issues relating to the merits would make it possible for defendants to gamble on obtaining a favorable decision and then disqualify the judge if confronted with an adverse ruling. The policy against judge-shopping precludes such a result. *Stevens v. Superior Court* (2002) 96 CA4th 54, 60.

III.

NISSAN MOTOR CORPORATION v. SUPERIOR COURT **IS NOT APPLICABLE TO THIS ISSUE**

Defendants argue that *Nissan Motor Corporation In U.S.A. v. Superior Court* (1992) 6 Cal.App.4th 150 allows them to exercise a peremptory challenge under Code of Civil Procedure § 170.6. However, *Nissan* was not a case that had been deemed coordinated pursuant to Code of Civil Procedure § 404, *et seq.*, and thus California Rule of Court No. 3.516 was not discussed. On this basis, *Nissan* is inapplicable to these coordinated actions.

Nissan is a case of three separate lawsuits in three courts before three separate judges. One of the judges ordered that all three actions be consolidated into his court. Some of the

litigants therefore never had the opportunity to challenge the judge that had ordered the cases be transferred to him. The appellate court ruled that as to the actions that were new to the challenged judge, the challenge was timely because it was made within ten days after the assignment of those cases.

Regardless of Rule 3.516, in *Nissan*, there was no dispute that the challenge in the consolidated actions was filed within ten days after notice of the assignment of those cases to the new judge. The appellate court's ruling in *Nissan* was thus compelled by the plain language of Code of Civil Procedure 170.6.

Nissan is distinguishable because in this case, all parties were before Judge Komar prior to consolidation, and the act of consolidation did not impose a new judge upon any of the defendants who now challenge Judge Komar. There is no dispute that defendants' challenge was filed more than twenty days after August 31, 2005, the date the actions were coordinated and assigned to Judge Komar. The plain language of California Rule of Court 3.516 compels the conclusion that the challenge is untimely by approximately four years.

V.

CONCLUSION

Defendants' motion has been brought several years too late. Judge Komar has already conducted two phases of trial and decided key factual issues applicable to the claims in each case. In addition, the timing of this motion is governed by Code of Civil Procedure § 170.6, and Rule 3.516, both of which specifically preclude a preemptory challenge by defendants.

Dated: October 19, 2009

SmithTrager LLP


By 
Susan M. Trager
Attorneys for Defendant and Cross-
Complainants Phelan Piñon Hills
Community Services District

EXHIBIT “A”

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 09/23/05

DEPT. 57

HONORABLE RALPH W. DAU

JUDGE

M. NISALL

DEPUTY CLERK

HONORABLE
13

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

R. INNIS, C.A.

Deputy Sheriff

NONE

Reporter

8:30 am

BC325201

Plaintiff

Counsel

LOS ANGELES COUNTY WATERWORKS
DISTRICT NO. 40

[No Appearances]

VS

Defendant

Counsel

DIAMOND FARMING COMPANY, A
CORPORATION, ET AL.

NATURE OF PROCEEDINGS:

NON-APPEARANCE CASE REVIEW;

The Amended Order Assigning Coordination Trial Judge in Judicial Council Coordination Proceeding No. 4408 was signed by the Chief Justice Of California and Chair of the Judicial Council on August 31, 2005.

The Honorable Jack Komar of the Superior Court of California, County of Santa Clara, has been assigned pursuant to Code of Civil Procedure Section 404.3 and Rule 1540 of the California Rules of Court to sit as coordination trial judge to hear and determine the coordinated actions and may exercise all the powers over each coordinated action of a judge of the court in which that action is pending.

Counsel for the Plaintiff shall give notice.

CLERK'S CERTIFICATE OF MAILING/ NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on 09-26-05 I served Notice of Entry of the above Minute Order of 09-23-05 upon counsel named below by depositing in the United States Mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a sealed envelope and addressed as show below with the postage thereon fully prepaid.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 09/23/05

DEPT. 57

HONORABLE RALPH W. DAU

JUDGE

M. NISALL

DEPUTY CLERK

HONORABLE
13

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

R. INNIS, C.A.

Deputy Sheriff

NONE

Reporter

8:30 am BC325201

Plaintiff

Counsel

LOS ANGELES COUNTY WATERWORKS
DISTRICT NO. 40

[No Appearances]

VS

Defendant

Counsel

DIAMOND FARMING COMPANY, A
CORPORATION, ET AL.

NATURE OF PROCEEDINGS:

Date: September 26, 2005

John A. Clarke, Executive Officer/Clerk

By: M. Nisall
M. Nisall, Judicial Assistant/Clerk

Best, Best & Krieger, LLP
Eric L. Garner, Esq.
5 Park Plaza, Suite 1500
Irvine, California 92614

EXHIBIT “B”

ERIC L. GARNER, Bar No. 130665
JEFFREY V. DUNN, Bar No. 131926
JILL N. WILLIS, Bar No. 200121
BEST BEST & KRIEGER LLP
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P.O. Box 1028
Riverside, California 92502
Telephone: (951) 686-1450
Telecopier: (951) 686-3083

Los Angeles County Waterworks District No. 40

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

Coordination Proceeding

**ANTELOPE VALLEY
GROUNDWATER CASES**

Judicial Council Coordination Proceeding No.
4408

Hon. David C. Velasquez, Dept. CX101

**NOTICE OF ENTRY OF AMENDED
ORDER ASSIGNING COORDINATION
TRIAL JUDGE**

Wm. Bolthouse Farms, Inc. v. City of
Lancaster

Diamond Farming Co. v. City of Lancaster

Diamond Farming Co. v. Palmdale Water
District

Los Angeles County Waterworks District
No. 40 v. Diamond Farming Co.

Los Angeles County Waterworks District
No. 40 v. Diamond Farming Co.

Riverside County Superior Court
Lead Case No. RIC 344436
Case No. RIC 344668
Case No. RIC 353840

Los Angeles Superior Court
Case No. BC 325201

Kern County Superior Court
Case No. S-1500-CV-254348

Coordination Petition Filed: January 3, 2005

LAW OFFICES OF
BEST BEST & KRIEGER LLP
3750 UNIVERSITY AVENUE
P.O. BOX 1028
RIVERSIDE, CALIFORNIA 92502

NOTICE OF ENTRY OF ORDER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that, on August 31, 2005, the Chief Justice of California and Chair of the Judicial Council duly entered an Amended Order Assigning Coordination Trial Judge. A true and correct copy of the Court's order is attached hereto as Exhibit "A."

Dated: September 2, 2005

BEST BEST & KRIEGER LLP

By: 

ERIC L. GARNER
JEFFREY V. DUNN
JILL N. WILLIS
Los Angeles County Waterworks District
No. 40

CHAIR, JUDICIAL COUNCIL OF CALIFORNIA
455 Golden Gate Avenue, San Francisco, CA 94102-3688

Coordination Proceeding
 Special Title (Rule 1550(b))

ANTELOPE VALLEY
GROUNDWATER CASES

)
)
)
)
) JUDICIAL COUNCIL
) COORDINATION PROCEEDING
) NO. 4408
)
)

**AMENDED ORDER ASSIGNING
 COORDINATION TRIAL JUDGE**

The order heretofore made authorizing the Presiding Judge of the Superior Court of California, County of Los Angeles to assign this matter to a judge of the court to sit as coordination trial judge is hereby terminated.

THE HONORABLE JACK KOMAR of the Superior Court of California, County of Santa Clara, is hereby assigned pursuant to Code of Civil Procedure section 404.3 and rule 1540 of the California Rules of Court to sit as coordination trial judge to hear and determine the coordinated actions listed below, at the site or sites he finds appropriate. Immediately upon assignment, the coordination trial judge may exercise all the powers over each coordinated action of a judge of the court in which that action is pending.

COORDINATED ACTIONS

<u>COURT</u>	<u>NUMBER</u>	<u>SHORT TITLE</u>
Superior Court of California County of Los Angeles	BC 325 201	Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.

<u>COURT</u>	<u>NUMBER</u>	<u>SHORT TITLE</u>
Superior Court of California County of Kern	S-1500-CV 254 348	Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.
Superior Court of California County of Riverside (Consolidated Actions)	(RIC 353 840 ((RIC 344 436 ((RIC 344 668 ((Wm. Bolthouse Farms, Inc. (v. City of Lancaster (Diamond Farming Co. v. (City of Lancaster (Diamond Farming Co. v. (Palmdale Water District

The coordination motion judge has designated the Court of Appeal, Fourth Appellate District, Division two as the reviewing court with appellate and writ jurisdiction. (Code of Civ. Proc., §404.2; rule 1505(a)).

Pursuant to rules 1501(17) and 1540, every paper filed in a coordinated action must be accompanied by proof of submission of a copy thereof to the coordination trial judge at the following address:

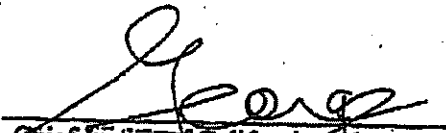
Hon. Jack Komar
Judge of the Superior Court
of California, County of Santa Clara
191 North First Street
San Jose, CA 95113

Pursuant to rule 1511, a copy of every paper required to be transmitted to the Chair of the Judicial Council must be sent to the following address:

Chair, Judicial Council of California
Administrative Office of the Courts
Attn: Appellate & Trial Court Judicial Services
(Civil Case Coordination)
455 Golden Gate Avenue
San Francisco, CA 94102-3688

Petitioner is directed to serve a copy of this order on (1) all parties to the included coordinated actions, and (2) the clerk of each court for filing in each included action, pursuant to rule 1540.

Dated: August 31, 2005


Chief Justice of California and
Chair of the Judicial Council

CHAIR, JUDICIAL COUNCIL OF CALIFORNIA

PROOF OF SERVICE BY MAIL

JUDICIAL COUNCIL COORDINATION NUMBER: 4408	CASE NUMBER:
--	--------------

1. I am over the age of 18 and not a party to this legal action.
2. I am employed in the City and County of San Francisco and my business address is

455 Golden Gate Avenue
San Francisco, CA 94102-3688

3. On August 31, 2005, I served a copy of the following documents:

- ☐ ORDER ASSIGNING COORDINATION MOTION JUDGE
- ☐ ORDER ASSIGNING COORDINATION TRIAL JUDGE
- ☐ ORDER ASSIGNING COORDINATION MOTION JUDGE
AND SETTING DATE FOR HEARING
- ☐ AMENDED ORDER ASSIGNING COORDINATION MOTION JUDGE
- ☒ AMENDED ORDER ASSIGNING COORDINATION TRIAL JUDGE
- ☐ OTHER

on the interested parties listed on the attached mailing list by placing a true copy enclosed in a sealed envelope with postage fully prepaid in the outgoing mailbox in my office, in accordance with ordinary business practices for deposit with the United States Postal Service in San Francisco, California. I am readily familiar with my office's business practice for collection of and processing of correspondence for mailing, and under that practice the above document is being deposited with the United States Postal Service this date in San Francisco, California, in the ordinary course of business.

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

Date: August 31, 2005


Carlotta Tillman

MAILING LIST

JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4408

Mr. Erick L. Garner
Mr. Jeffrey V. Dunn
Mr. Marc S. Ehrlich
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Raymond G. Fortner, Jr.
County Counsel
Frederick W. Pfaffle
Senior Deputy County Counsel
OFFICE OF COUNTY COUNSEL
COUNTY OF LOS ANGELES
500 West Temple Street
Los Angeles, CA 90012

PROOF OF SERVICE

I, Lynda Serwy, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Best Best & Krieger LLP, 3750 University Avenue, Riverside, California 92502. On September 2, 2005, I served the within document(s):

**NOTICE OF ENTRY OF AMENDED ORDER ASSIGNING
COORDINATION TRIAL JUDGE**

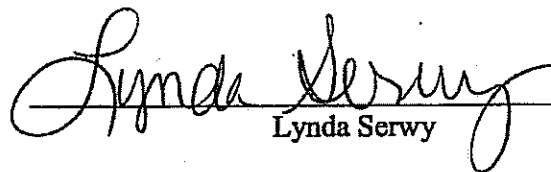
- ☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Riverside, California addressed as set forth below.
- ☐ by causing personal delivery by ASAP Corporate Services of the document(s) listed above to the person(s) at the address(es) set forth below.
- ☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- ☐ I caused such envelope to be delivered via overnight delivery addressed as indicated on the attached service list. Such envelope was deposited for delivery by Federal Express following the firm's ordinary business practices.

(SEE ATTACHED SERVICE LIST)

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on September 2, 2005 at Riverside, California.


Lynda Serwy

SERVICE LIST

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20 mfife@hatchparent.com and John Calandri on behalf of
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21 known as the Antelope Valley Ground
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Company

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Airports

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5 Managing Assist. City Attorney
6 Attention: James Spitsler, Esq.
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City of Los Angeles – Airport

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9 Ellison, Schneider & Harris LLP
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10 Sacramento, CA 95814-3109
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Attorneys for Los Angeles County
Sanitation Districts

11 Raymond G. Fortner, Jr.
12 County Counsel
13 Frederick W. Pfaeffle
14 Senior Deputy County Counsel
15 Office of County Counsel
County of Los Angeles
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Los Angeles, CA 90012

16 Chair, Judicial Council of California
17 Administrative Office of the Court
18 Attn: Appellate & Trial Court Judicial Services
(Civil Case Coordination)
455 Golden Gate Avenue
San Francisco, California 94102

Hon. Jack Komar
Judge of the Superior Court
of California, County of Santa Clara
191 North First Street
San Jose, CA 95113

19 Hon. Ralph W. Dau – Dept. 57
20 Los Angeles County Superior Court
111 North Hill Street
21 Los Angeles, CA 90012

Hon. Louis P. Etcheverry
Dept. 14
Kern County Superior Court
Metropolitan Division
1215 Truxtun Avenue
Bakersfield, CA 93301-4698

22 Hon. Joan F. Burgess – Department 6
23 Riverside Superior Court
4050 Main Street
24 Riverside, CA 92502-0431

PROOF OF SERVICE

I, Robin Steele, declare:

I am employed in the County of Orange, State of California. I am over the age of 18 and am not a party to the within action; my business address is 19712 MacArthur Blvd., Suite 120, Irvine, California 92612.

On October 19, 2009, I served the foregoing documents(s) described as **Opposition to Peremptory Challenge (C.C.P. 170.6)**, as follows:

X **(ELECTRONIC SERVICE)** By posting the document(s) listed above to the Santa Clara County Superior Court website in regard to the Antelope Valley Groundwater matter pursuant to the Court's Clarification Order. Electronic service and electronic posting completed through www.scefiling.org.

— **(REGULAR MAIL)** By enclosing the document(s) listed in sealed envelope(s), addressing as shown below, and placing the envelope for collection and mailing following our ordinary business practices. I am readily familiar with this firm's practice for collection 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 States Postal Service in a sealed envelope with postage fully prepaid. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

— **(FEDERAL EXPRESS)** By placing the document(s) listed above in a sealed overnight envelope, with delivery fees paid or provided for; addressed as shown below, and depositing it for overnight delivery at a facility regularly maintained by the express service carrier or delivered to a courier or driver authorized to receive documents on its behalf, for delivery on the next business day.

— **(FACSIMILE)** by transmitting the document(s) listed above via facsimile to the office of the addressee(s) shown below. A true and correct copy of the transmission report indicating transmission without error is attached hereto.

— **(PERSONAL SERVICE)** By delivering the document(s) listed above in a sealed envelope addressed to the parties as noted by hand to the offices of the addressee.

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

Executed this 19th day of October, 2009, in Irvine, California.

_____/s/
Robin Steele