NO. S217763

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY, ET AL.,
Petitioners and Respondents,

v.

CALIFORNIA DEPARTMENT OF FISH AND GAME,
Respondent and Appellant.

THE NEWHALL LAND AND FARMING COMPANY
Real Party in Interest and Appellant

After a Decision by the Court of Appeal
Second District, Division Five, Case No. B245131

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

After reviewing 123,889 pages of administrative record, Division Five of the Second Appellate District issued a thorough, well-reasoned opinion applying established CEQA provisions, established rules of statutory interpretation and case law, basic principles requiring exhaustion of administrative remedies, and well-understood standards of review, including the substantial evidence rule.

Petitioners seek review of three issues, claiming the Court of Appeal (i) carved out an exception to the "take" prohibition found in section 5515 of the Fish and Game Code; (ii) imposed CEQA "exhaustion" requirements more stringent than those defined in Public Resources Code section 21177; and (iii) created a conflict in CEQA "baseline" case law with regard to the project's greenhouse gas emissions. Not so.

The Petition for Review should be denied because it does not satisfy the criteria for review set forth in rule 8.500(b)(1) of the California Rules of Court. Because the Court of Appeal's decision is not inconsistent in any way with established law, there is no need to secure uniformity of decision or to settle an important question of law.

As required by well-established canons of statutory interpretation, the Court of Appeal harmonized all relevant provisions of the Fish and Game Code in construing section 5515 consistent with the evident purpose of the overall statutory scheme, rather than the absurd construction urged by Petitioners.

As required by Public Resources Code section 21177, subdivision (a), and consistent with the well-established exhaustion of administrative remedies doctrine, the Court of Appeal correctly found that

comments submitted after the close of the CEQA public comment period were untimely, and that further opportunity to comment afforded by federal law does not reopen the CEQA public comment period.

And consistent with this Court's decision in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, the Court of Appeal upheld a method for determining the significance of a project's greenhouse gas emissions, a method consistent with CEQA Guidelines section 15064.4, and a method previously upheld by two other Courts of Appeal. (*Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327 (review den., Oct. 19, 2011); *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832.)[1] Thus, Petitioners are wrong to suggest that the Court of Appeal's decision creates a conflict in the law.

For the reasons stated above and discussed in more detail *post*, the Petition for Review should be denied.

BACKGROUND

Petitioners' lawsuit challenged the Department of Fish and Wildlife's (Department) approvals for the Newhall Ranch development — a residential, commercial, and mixed-use community in the Santa Clarita Valley, located in unincorporated Los Angeles County. (Slip Opn. 3-5.) In the trial court, Petitioners prevailed on six issues, and a writ of mandate issued to overturn the Department's certification of the EIR and its approval of two incidental take permits, a Master Streambed Alteration

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[1] Our references to "Guidelines" are to the CEQA Guidelines, California Code of Regulations, title 14, sections 15000 et seq.

Agreement, and a conservation plan for the state-endangered San Fernando Valley spineflower. (Slip Opn. 12-13.)

In response to appeals by the Department and Newhall, Division Five of the Second Appellate District reversed the judgment in its entirety, holding (as relevant to the issues raised by Petitioners) that:

(i) the statutory scheme and substantial evidence establish there will be no "take" of unarmored threespine stickleback within the meaning of Fish and Game Code sections 86 and 5515, subdivision (a)(1) (Slip Opn. 43-50);

(ii) Petitioners' failure to exhaust their administrative remedies regarding their cultural resources issues (Slip Opn. 59) and steelhead issues (Slip Opn. 71) bars them from raising the issues in court and, in any event, their issues fail on the merits (Slip Opn. 59-63, 71-74); and

(iii) the Department's greenhouse gas emissions analysis and related significance determination comply with CEQA and legal precedent, and are supported by substantial evidence (Slip Opn. 100-111).

REVIEW IS NOT WARRANTED

To satisfy rule 8.500(b)(1) of the California Rules of Court, Petitioners must show that the opinion disrupts the "uniformity of decision" or raises an important but unsettled question of law. Petitioners fail to make any such showing in this case.

I. THE OPINION'S HOLDING THAT THERE WILL BE NO TAKE OF UNARMORED THREESPINE STICKLEBACK DOES NOT CREATE A STATUTORY CONFLICT.

This issue is about the alleged "take" of unarmored threespine stickleback, a small fish that is both a state-listed endangered species under

the California Endangered Species Act (CESA, Fish and Game Code §§ 2050-2116) *and* a "fully-protected" species under section 5515 of the Fish and Game Code. Petitioners contend the opinion "creates a conflict" between CESA and Fish and Game Code section 5515, because it "carves out an unwarranted exception to the Fully Protected Fish Statute's prohibition on take when the take occurs as part of a mitigation program for a project under CEQA." (PFR 2.) According to Petitioners, the Court of Appeal held that Department mitigation measures to conserve stickleback will nonetheless cause prohibited take — but that such take is permissible as part of a CEQA mitigation program. (PFR 8, 11-12.) That is not what the Court of Appeal held.

The Court of Appeal held that the mitigation measures designed by stickleback expert Dr. Camm Swift and adopted by the Department would *prevent take* of stickleback, thereby avoiding any violation of section 5515:

> The department has expressly prohibited the developer from taking stickleback; i.e., killing any of them. Dr. Swift has explained in considerable detail how to relocate the stickleback or to build a temporary river channel to bypass the bridge construction site. Nothing in Dr. Swift's discussion indicates any stickleback will be killed. Plaintiffs argue there will be stickleback deaths. However, the extensive mitigation measures coupled with Dr. Swift's expertise constitute substantial evidence no deaths will result.

(Slip Opn. 43.)

The Court of Appeal plainly rejected Petitioners' contention that the mitigation measures themselves would cause take of stickleback. More specifically, Petitioners claimed that mitigation measure BIO-44 (which permits qualified biologists from the U.S. Fish and Wildlife Service, or those with related authority from the Service, to remove and relocate stranded stickleback to a safer place in the river) constitutes prohibited

"take" as that term is defined in Fish and Game Code section 86. The Court of Appeal disagreed, explaining that, viewed in context, BIO-44 is a conservation measure within the meaning of Fish and Game Code section 2061 and, therefore, does not constitute take or otherwise involve a prohibited Department authorization to take the species:

> Fish and Game Code section 2061 expressly permits the use of live trapping and transplantation if done for purposes of conservation; Fish and Game Code section 2055 requires the department use its authority to further the endangered species act's purposes which includes conservation; and all of this has occurred in the context of the imposition of mitigation measures. Hence, the live trapping and transplantation techniques used in this case do not constitute an unlawful take or possession.

(Slip Opn. 48.)

The Court of Appeal reached this holding by harmonizing the relevant provisions of the Fish and Game Code, including CESA:

> To begin with, we cannot read Fish and Game Code sections 86 and 5515, subdivision (a)(1), in isolation. Rather, as noted, we must construe them in light of the entire statutory scheme. The entire statutory scheme includes the use of live trapping and transplantation as a conservation measure. Plaintiffs' analysis treats Fish and Game Code section 2061 and its related provisions as surplusage. We cannot accept this line of analysis. [Citations omitted.] Further, we have a duty to harmonize conflicting statutes to the extent rationally possible. The 1984 enactment of the endangered species act grants the department the authority, when pursuing a strategy of conservation, to use live trapping and transplantation techniques. That is consistent with a prohibition on the possession or take of the stickleback when other non-legislatively approved conservation techniques are utilized.

(Slip Opn. 50.)

As can be seen, the Court of Appeal did not, as Petitioners contend, "carve out" an exception to the take prohibition in Fish and Game Code section 5515. The Court of Appeal simply held, based on substantial evidence in the record, that live trapping and transplantation, when conducted for conservation purposes authorized by section 2061 in the broader context of a Department-issued incidental take permit and Master Streambed Alteration Agreement, do not constitute take. (Slip Opn. 45-50.)

This is no statutory conflict for this Court to address.

II. THE OPINION'S HOLDINGS THAT PETITIONERS FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES ARE CONSISTENT WITH BOTH STATUTORY AND EXISTING CASE LAW.

Petitioners suggest that the Court of Appeal misinterpreted CEQA's "exhaustion" requirements, defined by Public Resources Code section 21177, "to require exhaustion before the close of an environmental review comment period rather than before project approval." (PFR 3.) According to Petitioners, the opinion "bars claims presented to and considered by a lead agency before the agency renders its decision, even where a final EIR is produced that substantively changes the draft EIR, and where the agency solicits, accepts, and responds to comments on the final EIR." (PFR 16.) Petitioners' argument is flawed for two reasons.

First, Petitioners misconstrue Public Resources section 21177. Second, they ignore the fact that federal law (NEPA) imposed *different* requirements on the U.S. Army Corps of Engineers (the lead agency for the EIS under NEPA), compared to CEQA and the Department (the lead agency for the EIR under CEQA).

Under NEPA, the Corps was obligated to accept and respond to comments on the *Final* EIS/EIR, but CEQA imposes no similar requirement on the Department. Unlike NEPA, CEQA does not provide a separate comment period for *final* EIRs. (Compare 40 C.F.R. § 1506.10 with Pub. Resources Code, § 21177.) As Public Resources section 21177, subdivision (a), explains:

> An action or proceeding shall not be brought pursuant to Section 21167 unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination.

This plainly means the alleged "grounds for noncompliance" with CEQA must be presented to the agency either (i) during the public comment period provided by CEQA *or* (ii) before the *close of the public hearing* on the project.

Petitioners concede that no one raised the cultural impact or steelhead smolt issues within the 120-day public comment period on the Draft EIS/EIR, which closed on August 25, 2009. In fact, no comments on these issues were submitted until August 3, *2010*, almost a year after the CEQA public comment period closed. Petitioners contend their 2010 comments were nevertheless "timely" because the Department "reviewed, considered, and responded" to comments that post-dated the public comment period, and did not certify the Final EIR and approve the project until December 3, 2010. (PFR 20, 26-27.) Petitioners are wrong.

First, the Department did not "invite" comments submitted after the close of the August 25, 2009 CEQA comment period on the Draft EIS/EIR. Nor did the Department indicate such comments would be considered in its

CEQA determinations or otherwise satisfy the exhaustion requirements of Public Resources Code section 21177, subdivision (a). It was the *Corps* — not the Department — that was required by federal law to accept comments after August 25, 2009. (40 C.F.R. §§ 1503.1(b), 1506.10.) Although the Department considered the Corps' responses to comments on the Final EIS, it did not thereby "re-open" the CEQA comment period.

Second, although the Department certified the EIR and approved the project on December 3, 2010, it did so without a public hearing, as it was entitled to do — because it had fully complied with CEQA by providing the opportunity for public comment during (i) the June 9, 2009 joint hearing held by the Corps and the Department on the Draft EIS/EIR, and (ii) the 120-day public comment period provided by CEQA, which closed on August 25, 2009. (Pub. Resources Code, § 21177, subd. (a).) Because the comments about cultural resources and steelhead smolt were submitted well *after* the June 9 hearing, and *after* the close of the 120-day public comment period provided under CEQA, Petitioners did not satisfy CEQA's exhaustion requirements.

To avoid this conclusion, Petitioners contend that because there was no *additional* public hearing on the EIR and project, they are relieved of their exhaustion duties. This is so, they say, because Public Resources Code section 21177, subdivision (e), provides that section 21177 "does not apply to any alleged grounds for noncompliance with this division for which there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing prior to the approval of the project, or if the public agency failed to five the notice required by law."

This argument ignores the fact that the Department *did* provide a June 9, 2009 hearing for comments on the EIR and the project, plus a further opportunity for the public to raise objections to both the EIR and the project during the 120-day period that ran from April 27 to August 29, 2009. Petitioners' failure to take advantage of those opportunities does not mean the opportunities were not provided. The Court of Appeal got it right (Slip Opn. 70-71), and it certainly did not create a conflict in the law governing the jurisdictional obligation to exhaust administrative remedies.[2]

III. THE OPINION'S HOLDING ON CEQA SIGNIFICANCE THRESHOLDS FOR GREENHOUSE GAS IMPACTS IS CONSISTENT WITH CEQA GUIDELINES AND CASE LAW.

Petitioners complain the Department used the wrong threshold to determine the significance of the project's greenhouse gas emissions (PFR 27-39), and insist the Court of Appeal erred in approving the Department's use of the metrics of Assembly Bill 32 (AB 32) for this purpose. (PFR 29-30.)[3] Petitioners conveniently ignore the fact that the only other CEQA cases addressing greenhouse gas emissions — *CREED*, *supra*, 197 Cal.App.4th 327, 336-337, and *Friends of Oroville*, *supra*, 219 Cal.App.4th 832, 841 — reached exactly the same conclusion that Division Five reached in this case — AB 32 provides adequate benchmarks for determining the significance of a project's greenhouse gas emissions. (Slip Opn. 106.)

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[2] Petitioners' notion that the federal NEPA regulations should be grafted onto CEQA (PFR 19, 25-27) is interesting but irrelevant. That is an argument to be made to the Legislature, not to this Court.

[3] AB 32 was codified at Health and Safety Code section 38550. For convenience, we use "AB 32" to refer to the California Global Warming Solutions Act of 2006, which includes section 38550.

To avoid this bump in their road to review, Petitioners contend Division Five should not have relied on *CREED* and *Friends of Oroville* because "[t]he broad language of both cases thus can be read as endorsing otherwise impermissible comparisons to a hypothetical 'business as usual' project baseline, although neither case explicitly so held." (PFR 30.) Petitioners are mistaken.

A. The Department's greenhouse gas emission analysis.

The CEQA lead agency is entitled to select the significance criterion that in its view best addresses a particular impact. (Guidelines, §§ 15064, subd. (b), 15064.4, subd. (a).) Here, the Department determined the project would have significant greenhouse gas impacts if project-related emissions would frustrate attainment of AB 32's greenhouse gas reduction mandate, which is to bring statewide carbon dioxide equivalents down to 1990 levels by 2020. (Slip Opn. 93.) The Department searched but found no ready-made greenhouse gas emission standard to address this issue. (Slip Opn. 103-104.) The Department did, however, find solid guidance in the Air Resources Board's 2008 Scoping Plan, which concluded that year 2020 "No Action Taken" conditions — also known as "Business-as-Usual" conditions — would have to be reduced by 29 percent to meet the AB 32 mandate. (Slip Opn. 93-94.) Accordingly, the Department selected the "29% reduction from 2020 BAU conditions" as the best available quantitative metric to assess the significance of the project's greenhouse gas emissions. (Slip Opn. 101.)

Before applying the 29 percent benchmark, the Department conducted a thorough analysis of existing and expected project greenhouse gas emissions, disclosed those emissions, explained the process it went through to identify an appropriate significance standard, described the

difficulties inherent in the process (given the absence of formal guidance from regulatory agencies with specified, related expertise), and provided a detailed account of the various mitigation measures the project will implement to reduce its own carbon footprint. (Slip Opn. 102-105.) Also, the Department, through the EIR's analysis of the project's greenhouse gas emissions, complied fully with Guidelines section 15064.4.

As the Court of Appeal recognized, the lead agency has substantial discretion in determining the significance of a project's greenhouse gas emissions. (Slip Opn. 105-106; Guidelines, § 15064.4, subd. (a).) Under the Guidelines, the lead agency has the discretion to determine significance through either quantitative or qualitative analysis, and its decision will be upheld if supported by substantial evidence. (Guidelines, § 15064.4, subd. (a)(1).)

Here, the Department performed a quantitative analysis of the project's greenhouse gas emissions. (Slip Opn. 102-105.) It disclosed the greenhouse gas emissions at the project site under *existing* baseline conditions, and then disclosed how much those greenhouse gas emissions would increase with project implementation. (Slip Opn. 102-104.) The Department then determined — and disclosed — that the simple "delta" (i.e., the difference) between existing conditions and project build-out conditions was not sufficient to make a significance determination. (Slip Opn. 103, 104-105, 108.) The Department explained that no regulatory agency had adopted any applicable numeric significance threshold for greenhouse gas emissions, and that, as a result, the EIR also considered and applied the 29 percent business-as-usual reduction metric set forth in the 2008 Scoping Plan. (Slip Opn. 103, 105-107.) These disclosures demonstrate compliance with Guidelines section 15064.4; and that is precisely what the Court of Appeal held. (Slip Opn. 108.)

Although Petitioners seem to believe that no lead agency should have this sort of discretion (PFR 37), there simply isn't any authority for their wish list — and there is no conflict in the law.

B. The opinion does not conflict with any statute, regulation, or case law.

Petitioners contend the Opinion "exacerbates" an alleged "conflict" arising from previously published cases addressing the proper baseline for environmental review and analyzing the significance of a project's greenhouse gas emissions. (PFR 4-5.) Not so.

The Court of Appeal correctly applied Guidelines sections 15125, 15064, and 15064.4 and relevant case law in deciding the Department properly exercised its discretion to determine both the existing environmental baseline and the significance threshold necessary to assess the project's greenhouse gas emissions. (Slip Opn. 98-100.) The Court of Appeal properly determined that the EIR's 150-page climate change assessment and the expert's analysis constituted substantial evidence supporting each of these distinct determinations. (Slip Opn. 100-107.)

According to Petitioners, the opinion holds that "business-as-usual" emissions may be used as a *baseline* to determine the significance of a project's greenhouse gas emission impacts. (PFR 28-31.) But the opinion does no such thing. In fact, consistent with Guidelines section 15125, subdivision (a), and published case law, the Court of Appeal held that the substantial evidence test applies and allows an agency discretion to decide how the existing physical conditions without the project can most realistically be measured. (Slip Opn. 99.)

The Court of Appeal also found substantial evidence supported the Department's baseline determination because the EIR "identified the

amount of greenhouse gas emissions currently emanating from the project site." (Slip Opn. 99.) The Department used existing conditions as the baseline, explained why the project's "delta" compared to that baseline was insufficient to make a significance determination, and then considered the Scoping Plan's business-as-usual methodology to determine the significance of the project's emissions. (Slip Opn. 99-107.)

There is no "conflict" created by the Court of Appeal's application of *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 650 (review den. Sept. 11, 2013), *CREED, supra*, 197 Cal.App.4th at page 336, and *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 841. (Slip Opn. 105.) All three cases are relevant, and Petitioners do not suggest Division Five misinterpreted or misapplied any of them. Petitioners do not show a conflict and none exists.

The fact that Petitioners disagree with the Department's use of the business-as-usual methodology derived from the Air Resources Board's Scoping Plan is interesting but legally irrelevant. The Scoping Plan was mandated by statute, subjected to "extensive and rigorous" public scrutiny, and later *affirmed* by Division Three of the First District Court of Appeal. (Health & Saf. Code, § 38561, subd. (h); *Association of Irritated Residents v. State Air Resources Bd.* (2012) 206 Cal.App.4th 1487, 1491, 1506.)

The use of the Scoping Plan's methodology to inform the Department's significance determination does not conflict with any statute or published case law.

C. Petitioners' challenge to the use of an allegedly "hypothetical" project is both wrong and irrelevant.

Petitioners contend the business-as-usual methodology resulted in the use of an impermissible "hypothetical" project. (PFR 32-38.) As the Court of Appeal explained, Petitioners are mistaken:

> The environmental impact report analyzed the project if no action was taken. The project as originally conceived was not hypothetical. It consisted of anticipated real construction on and development of presently open space. The Plaintiffs repeated characterizations some hypothetical project was analyzed has no merit.

(Slip Opn. 111.)

More specifically, Division Five concluded that the "environmental impact report does not discuss a mere *hypothetical project* but concretely identifies the number of greenhouse gas triggering facilities, activities and the anticipated emissions levels." (Slip Opn. 111.)

Petitioners' reliance on *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310 (*CBE*) is misplaced. (PFR 34.) In *Neighbors for Smart Rail, supra*, 57 Cal.4th at page 449, this Court clarified *CBE,* explaining that it did not decide the propriety of using a future conditions baseline to assess the significance of project-related effects under CEQA. Rather, in *Neighbors for Smart Rail*, this Court said that its earlier holding in *CBE* simply rejected the notion that hypothetical allowable/permitted conditions can serve as an appropriate *baseline* for purposes of CEQA. (*Neighbors for Smart Rail, supra*, 57 Cal.4th at p. 449.))

Here, the Court of Appeal appropriately relied on *Neighbors for Smart Rail* (Slip Opn. 99) for the proposition that CEQA does not mandate

an inflexible, uniform rule for the determination of existing conditions (the CEQA baseline). Instead, the "'agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence.'" (*Neighbors for Smart Rail*, *supra*, 57 Cal.4th at p. 449, quoting *CBE*, *supra*, 48 Cal.4th at p. 328.)

Petitioners also rely on *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683. (PFR 35.) But here again, *Neighbors for Smart Rail* essentially affirms the analysis in the Department's EIR by citing with approval the two-baseline approach referenced in both *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552 and *Woodward Park*, *supra*, 150 Cal.App.4th at page 707. (*Smart Rail*, *supra*, 57 Cal.4th at p. 454; Slip Opn. 99.)[4]

As can be seen, the Court of Appeal did not approve the use of a "hypothetical" project; this is a non-issue. Petitioners' "baseline" case law is of no assistance in light of the analysis performed in the EIR. (Slip Opn. 98-100, 103-104.)

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[4] *Pfeiffer* approved the use of a future baseline to assess significance where the EIR also assessed significance against existing conditions. (*Pfeiffer*, *supra*, 200 Cal.App.4th at p. 1573-1574.) *Woodward Park* held that a "two-baselines approach" accords with CEQA. (*Woodward Park*, *supra*, 150 Cal.App.4th at pp. 706-707.)

CONCLUSION

For all the reasons explained above and in the Answer filed by the Department, Newhall submits that no ground for review has been shown and that the petition for review should be denied.

Respectfully submitted,

May 19, 2014

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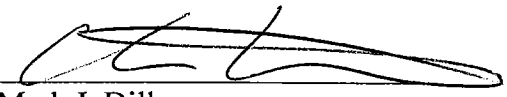
By 
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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c)(1) of the California Rules of Court, and in reliance on the word count of the computer program used to prepare this Answer, counsel certifies that this brief was produced using 13-point type and contains 3,974 words.

May 19, 2014

By
for Mark J. Dillon

CERTIFICATE OF SERVICE

I declare that I am employed with the law firm of Gatzke Dillon & Ballance LLP, whose address is 2762 Gateway Road, Carlsbad, California 92009. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on May 19, 2014, I served a copy of the following document(s):

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Clerk, Los Angeles County Superior Court 111 N. Hill Street Los Angeles, California 90012 (Los Angeles Superior Court No. BS131347)		Facsimile
	X	U.S. Mail
		Overnight Delivery
		Personal Service
		Electronic Service

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

Executed at Carlsbad, California on May 19, 2014.

/s/ Terri Kido
Terri Kido