No. H028699

(Santa Clara County Super. Ct. No. 102-CV-813627)

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

BARBARY COAST CAPITAL MANAGEMENT,
STEPHEN N. WORTHINGTON,

Third Parties and Appellants,

vs.

MATRIXX INITIATIVES, INC., a Delaware corporation,

Plaintiff and Respondent.

Appeal From Order Of The Superior Court For The County Of Santa Clara
(Hon. James P. Kleinberg, Presiding)

APPELLANT'S OPENING BRIEF

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I.

INTRODUCTION

This appeal arises out of a motion to compel certain deposition testimony (the "Motion") that was filed in the Superior Court for Santa Clara County ("Superior Court") by Matrixx Initiatives, Inc. ("Appellee" or "Matrixx"), the plaintiff in an unrelated Arizona lawsuit entitled *Matrixx Initiatives, Inc. v. Steven Edward Dick, et al.*, No. CV2002-023934 (Maricopa County). (Appellants' Appendix, Vol. 1 at 28-41.) (hereinafter "AA, Vol. __ at __.") The Motion sought an order from the Superior Court that directed Barbary Coast Capital Management ("Barbary Coast") and Stephen Worthington ("Worthington") (collectively "Appellants"), two California residents and third parties, to disclose the identities of two anonymous Internet posters known as "Gunnallenlies" and "Veritasconari" in direct contravention of these Internet posters' First Amendment right to remain anonymous.

Appellants first became involved in the Arizona lawsuit on May 3, 2004, when Matrixx served Barbary Coast with a Subpoena Duces Tecum seeking documents directed to the identity of "Gunnallenlies" and "Veritasconari." (AA, Vol. 1 at 4-7.) After Barbary Coast advised Matrixx that it did not have any documents responsive to its subpoena, Matrixx served Barbary Coast and Worthington with Subpoenas Re Deposition. (AA, Vol. 1 at 10-21.) The Subpoenas Re Deposition were issued by the Superior Court pursuant to an Arizona Commission authorizing these California depositions in connection with the Arizona lawsuit. (AA, Vol. 1 at 8-9.) On November 29, 2004, Worthington sat for a deposition as the custodian of records for Barbary Coast, and as the person most knowledgeable about certain issues.

During the course of the deposition, counsel for Barbary Coast instructed Worthington not to answer certain questions that directly sought the identities of either Gunnallenlies or Veritasconari. (AA, Vol. 1 at 42-71.) Counsel for Barbary Coast made it clear on the record that the instruction was based upon these anonymous Internet posters' First Amendment rights and privacy grounds, and cited to supporting authorities. *Id.* Worthington abided by his counsel's instruction and refused to answer any questions concerning the identities of Gunallenlies or Veritasconari, although he did answer questions regarding a number of other subjects. *Id.*

On or about February 9, 2005, Matrixx filed its Motion in Superior Court. (AA, Vol. 1 at 28-41.) The Motion was argued by counsel on April 1, 2005, and Judge James P. Kleinberg issued an Order granting the Motion on April 4, 2005. (AA, Vol. 3 at 549-551.) The Order was limited to the word "Granted". A timely Notice of Appeal was filed on April 14, 2005. (AA, Vol. 3 at 552-555.)

The only basis for the Motion, and its request that the Superior Court disregard the First Amendment, was the assertion by Matrixx that it had asserted defamation claims against Veritasconari and Gunnallenlies in its Arizona lawsuit. Appellants opposed the Motion on the ground that a party seeking the disclosure of anonymous Internet posters must, as a factual predicate to any such motion, first have actually asserted defamation claims against the anonymous speakers it seeks to identify. (AA, Vol. 2 at 310-327.) In this regard, Appellants identified undisputed facts which demonstrated that Matrixx in fact had not asserted any defamation claims against either Gunallenlies or Veritsasconari in its Arizona lawsuit. Based upon these undisputed facts, the critical factual predicate to the Motion was

absent from the case. For this reason alone, the Motion should have been denied.

Notwithstanding this dispositive argument, Appellants further argued that merely asserting a defamation claim is not enough to justify the total disregard of these Internet posters' First Amendment rights. (AA, Vol. 2 at 310-327.) Every court that has considered the question has acknowledged that the right to speak anonymously is fundamental to the right of free speech, and an anonymous speaker's right of free speech may only be overcome by satisfying a heightened level of pleading and proof. In that situation, a party seeking the identity of an anonymous speaker must "make a prima facie" factual and evidentiary offer of proof showing that it "has a legitimate, good faith basis" to assert a defamation claim against the anonymous speaker. Mere conclusory pleadings are insufficient.

Moreover, in connection with the "totality of circumstances" test applied by all these courts to delineate non-defamatory statements of opinion from allegedly defamatory statements of fact, this *prima facie* evidentiary offer of proof must address and include: (1) the context in which each alleged defamatory statement was made; (2) whether the challenged statement is capable of being objectively characterized as true or false; and (3) whether the words used in each alleged defamatory statement can be understood in a factually defamatory sense. The Motion never attempted to satisfy, and thus totally failed to satisfy, and indeed on these facts is incapable of satisfying, this heightened level of pleading and proof. For this reason alone, the Motion should have been denied.

In the final analysis, the Motion should have been denied because (1) Matrixx had not asserted any defamation claims against these two anonymous speakers in the first place; and (2) even if it had done so,

Matrixx was totally incapable of making, and in fact made absolutely no effort to make, the prima facie offer of proof required by California courts under the "totality of circumstances" test. Accordingly, Appellant requests that this Court enter an Order directing the Superior Court to vacate its Order of April 4, 2005, and enter an Order DENYING the Motion.

II.

ISSUES TO BE DECIDED ON APPEAL

1. Should the Order of the Superior Court be vacated and should the Motion be denied on the ground that Appellee had not asserted a claim for libel against either "Gunallenlie" or "Veritasconari" in its out-of-state lawsuit and thus, as a matter of law, failed to establish an essential and critical predicate to the Motion;

2. Should the Order of the Superior Court be vacated and should the Motion be denied on the ground that the Appellee never attempted to satisfy, and thus totally failed to satisfy, the "totality of circumstances" test by failing to make a *prima facie* evidentiary offer of proof that included: (1) the context in which each allegedly defamatory statement was made; (2) whether the challenged statement is capable of being objectively characterized as true or false; and (3) whether the words used in each allegedly defamatory can be understood in a factually defamatory sense.

III.

STANDARD OF APPELLATE REVIEW

The First Amendment issues presented by this appeal, and this Court's determination of those issues, is subject to a *de novo* review on appeal. *New York Times v. Sullivan,* 376 U.S. 254, 284-285 (1964); *Frank McCoy v. Hearst Corporation,* (1986) 42 Cal. 3d 835, 841-843; *Annette F. v. Sharon S.,* 119 Cal. App. 4th 1146, 1159 (2004); *Bryan Franklin, et al. v. Dynamic Details, Inc., et al.*

116 Cal. App. 4th 375, 383 (2004); *Frank DuCharme v. International Brotherhood of Electrical Workers,* 110 Cal. App. 4th 107, 111-112 (2003); *Joanne Colt v. Freedom Communications, Inc.,* 109 Cal. App. 4th 1551, 1557 (2003); *David Rosenaur v. Walt Scherer,* 88 Cal. App. 4th 260, 279-280 (2001).

IV.

ARGUMENT

A. The Motion Failed To Satisfy The Burden It Must Meet To Justify Compelling The Disclosure Of Gunnallenlies' and Veritasconari's Identity.

1. Gunnallenlies and Veritasconari Have A Fundamental, First Amendment Right To Speak Anonymously On The Internet.

It is well settled that the First Amendment protects the right to engage in anonymous speech. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) ("anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent"); *Buckley v. American Constitutional Law Foundation, Inc.* 525 U.S. 182, 204 (1999) (striking down law requiring those who circulate political petitions to wear name tags); *Watchtower Bible & Tract Soc'y of N. Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166 (2002) (describing anonymity as more than just a form of protected speech, but rather as part of "our national heritage and constitutional tradition.")

It is further well settled that First Amendment protections, including the right to speak anonymously, extend to speech via the Internet. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (through the Internet "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox"; there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."); *Doe v. 2TheMart.com, Inc.* 140 F. Supp. 2d 1088, 1093 (W.D.

Wash. 2001) ("[t]he free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously."); *Dendrite Int'l., Inc. v. Does*, 342 N.J. Super. 134 (2001); *see also, Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) ("Seescandy.com") (acknowledging right of persons who have done nothing wrong to speak anonymously via the Internet).

2. Before A Motion To Compel Can Be Granted Which Would Abridge Free Speech and Protected Anonymous Speech, The Moving Party Must First Demonstrate That A Valid Cause of Action Exists

Although the right to speak anonymously is not absolute, it is well settled that before the right may be abridged through means of case-related discovery, a heightened standard of pleading and proof must be satisfied. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) (an order compelling production of individuals' identities in a situation that would threaten the exercise of fundamental rights is "subject to the closest scrutiny"); *see also McIntyre*, 514 U.S. at 347 ("exacting scrutiny" required). Courts that have considered anonymity issues related to Internet-related speech have consistently applied a higher level of scrutiny. *See 2TheMart.com*, 140 F. Supp. 2d at 1093 ("[D]iscovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts."); *Seescandy.com*, 185 F.R.D. at 578 ("[L]imiting principals should apply to the determination of whether discovery to uncover the identity of a defendant is warranted."); *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26, 36 (2000) ("AOL"), rev'd on other grounds sub nom. *America Online, Inc. v. Anonymous Publicly Traded Co.* 542 S.E.2d 377 (Va. 2001) ("[B]efore a court abridges the First Amendment right of a person to communicate anonymously on the Internet,

a showing, sufficient to enable that court to determine that a true, rather than perceived, cause of action may exist, must be made.")

Although the courts have articulated various factors to be considered when determining whether a party should be allowed to overcome a speaker's right to remain anonymous, all have required that the party seeking disclosure make a prima facie showing that it could prevail on its claims against the anonymous speaker. For instance, in *Seescandy.com*, the court stated that among other things, "plaintiff should establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss." 185 F.R.D at 579. Explaining this factor, the court made clear that "[a] conclusory pleading will never be sufficient to satisfy this element." *Id.* Rather "plaintiff must make some showing that an act giving rise to civil liability actually occurred and that the discovery is aimed at revealing specific identifying features of the person or entity who committed that act." *Id.* at 580.

Likewise in *AOL*, the court stated that before an anonymous speaker's identity may be disclosed, the court must first be satisfied by the pleadings and evidence that the party seeking the discovery "has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed" and that the information is centrally needed to advance that claim. 52 Va. Cir. at 37. In making its determination, the court did not simply rely on the plaintiff's pleadings, but rather, conducted a further examination of the claims and evidence to determine whether the plaintiff's subpoena was reasonable under the circumstances. *Id.; see also Dendrite*, 342 N.J. Super. at 154-158 (analyzing the *Seescandy.com* and *AOL* decisions and explaining that in those cases, the courts conducted a more probing inquiry of the plaintiff's

claims in order to determine whether discovery seeking an anonymous speaker's identity should be allowed.)[1]

In its Motion, Appellee argued that it is entitled to the subject deposition testimony because it had a pending defamation claim against Gunnallenlies and Veritasconari in its underlying Arizona lawsuit. Nothing more. Indeed, Appellee's Motion made absolutely no effort to address, much less meet or satisfy, the heightened pleading requirement established by the foregoing case law. On that basis alone, the Motion should have been denied.

Moreover, this singular basis in support of the Motion must fail since it is undisputed that the Arizona Complaint is facially deficient as regards Gunnallenlies and Veritasconari. The Complaint does not mention Gunnallenlies at all, much less charge her with any wrongdoing. Further, the Complaint fails to identify Veritasconari as a Doe defendant, and more importantly, it does not even allege that she published any libelous statements concerning Matrixx. The only allegation in the Complaint against Veritasconari is that she had used identity-obfuscation software to preserve her anonymity. (AA, Vol. 2 at 80.) Since the Complaint does not identify any allegedly libelous statements made by either Gunnallenlies or Veritasconari, it is impossible to discern if any, some or all of the 50 pages

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[1] These tests are closely akin to the test set forth in California Code of Civil Procedure section 425.16 concerning Strategic Lawsuits Against Public Policy ("SLAPP"). Section 425.16 allows a defendant who asserts that a lawsuit has been lodged solely in an effort to impinge his or her free speech rights to bring a special motion to strike the offending claims. To defeat a Section 425.16 motion to strike, the plaintiff must "[establish] that there is a probability that the plaintiff will prevail on the claim." C.C.P § 425.16(b)(1).

of Internet posts attached as Exhibit B to the Motion form the basis of any claim made by Matrixx in the Arizona action. (AA, Vol. 2 at 86-135.)

Therefore, Appellee's Arizona Complaint is fatally defective to the extent that it: (1) contains no allegations of defamatory conduct as far as Gunallenlies and Veritasconari are concerned, and (2) has totally failed to identify any specific Internet posts that it claims to be defamatory.

3. The Internet Postings Constitute Non-Actionable Statements of Opinion When Viewed In The "Totality Of The Circumstances."

Even if Matrixx had actually alleged specific defamation claims against Veritasconari, it still cannot demonstrate that it is likely to prevail on this claim.[2] Matrixx is incapable of making that showing because Veritasconari's postings consist only of her opinions. Opinions cannot form the basis for a cause of action for defamation. If Matrixx attempted to plead a cause of action it would fail as there are no false statements of fact at issue. At best the statements that would have to be relied upon are opinions, and therefore non-actionable. Moreover, even if Veritasconari's statements were actionable statements of fact, Matrixx has not made any attempt to prove that any were false or that they prejudiced Matrixx in the conduct of its business as required by Arizona law.[3]

In order to prevail in its Arizona defamation action, Matrixx must demonstrate (1) that it is a for-profit business; (2) that Veritasconari

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[2] Barbary Coast's and Worthington's arguments in this section equally apply to Gunnallenlies to the extent Matrixx now claims any of her postings contained libelous statements. Of course, Matrixx has not accused Gunnallenlies of any wrongdoing.

[3] Matrixx also brought a claim against Veritasconari and all other defendants for trade libel, claiming that the defendants had disparaged its products. However, Matrixx bases its present motion solely on its defamation claim against Veritasconari. (AA, Vol. 2 at 32.)

published defamatory matter concerning it; and (3) that the matter tends to prejudice it in the conduct of its business or deter others from dealing with it. *See Dombey v. Phoenix Newspapers*, 150 Ariz. 476, 490-491 (1986). Matrixx's failure to address the second and third elements precludes it from demonstrating a viable defamation claim. Matrixx did not even discuss, much less present evidence, concerning any prejudice it allegedly suffered due to Veritasconari's postings. Courts have denied subpoenas seeking the identity of anonymous speakers where the plaintiff failed to demonstrate that the speaker caused it any damages. *See Dendrite*, 342 N.J. Super. at 158 (finding that plaintiff had presented insufficient evidence to justify discovery seeking identity of an anonymous speaker). Further, it is undisputed that Matrixx has not, and cannot, make such a showing. Indeed, empirical data in the public domain demonstrates that during the relevant period, Matrixx's stock price and revenues increased, not decreased. Therefore, even if it had tried to, Matrixx cannot prove causation.

Matrixx also cannot demonstrate the second element -- that any defamatory statements were made -- because Veritasconari's Internet postings constituted opinions, not statements of fact. Only statements of fact are actionable as defamatory; Arizona recognizes that "[t]he expression of one's opinion is absolutely protected by the First and Fourteenth Amendments to the U.S. Constitution." *See Amcor Inv. Corp. v. Cox Ariz. Publications, Inc.*, 158 Ariz. 566 (1988); *see also*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.")

4. The "Totality Of The Circumstances" Test Mandates That The Subject Statements Are Not Actionable As Defamatory

To determine whether a statement is fact or opinion, Arizona, California and several other jurisdictions employ a flexible "totality of the circumstances" approach which recognizes that "[s]ensitivity to the values of free debate requires an analysis not only of the words used but also the context in which they appear, as well as the entire circumstances surrounding the publication." *Amcor*, 158 Ariz. at 569. Generally, in conducting a totality of the circumstances analysis courts consider (1) the context in which each allegedly defamatory statement was made; (2) whether the challenged statement is capable of being objectively characterized as true or false; and (3) whether the words used can be understood in a factually defamatory sense. *See id.*; *see also*, *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993 (2001) (stating that the court must put itself in place of the average reader and determine the natural and probable effect of the statement, considering both the language and the context); *SPX Corp. v. Doe*, 253 F. Supp 2d 974 (N.D. Ohio 2003) (using totality of the circumstances test in determining that allegedly defamatory statements posted on message board were not defamatory); *Global Telemedia Int'l., Inc. v. Doe 1*, 132 F. Supp. 2d 1261 (C.D. Cal. 2001) (totality of the circumstances includes the general tenor of the entire work, the subject of the statement, the setting, the format of the work, and whether it is susceptible of being proved true or false.)

A number of courts have considered whether postings on Internet message boards similar to those authored by Veritasconari constitute fact or opinion under the totality of the circumstances. For instance, in *SPX Corp.*, *supra*, the plaintiff corporation alleged that the anonymous Doe defendant

had defamed it by posting statements on the Yahoo! message board, and issued a subpoena seeking the defendant's identity. *Id.* at 977. The postings included statements such as "TIMBER!!!!! Account Fraud!!!!!!", "SPX = Massive SEC and FBI Investigation" and "Overleveraged, lots of insider selling, shit businesses, and cooking the books". *Id.* In granting the Doe defendant's motion to dismiss, the court found that although the language used favored the plaintiff, the other totality of the circumstances factors weighed against it. Regarding the context in which the statements were made, the court found that the tenor of the statements, including the fact they appeared in a piece characterized by subjective hyperbole rather than objective facts, weighed against liability. *Id.* Likewise, the court found that the broader social context in which the statements were made, namely the uncontrolled Yahoo! message board, did not support finding liability because "[a] reasonable reader would not view the blanket, unexplained statements at issue as 'facts' when placed on such an open and uncontrolled forum." *Id.* The court noted that the Yahoo! message board included a disclaimer at the bottom of every post (and which appears at the bottom of Veritasconari's messages) alerting readers that the statements made on the board are only the authors' opinions. The court also found that the statements were not verifiable because the defendant gave no indication that he possessed materials that could substantiate his statements. *Id.* at 981.

Likewise, in *Rocker Management LLC v. Does*, 2003 U.S. Dist. LEXIS 16277, the plaintiff company issued a subpoena seeking the identity of an anonymous defendant who had allegedly posted libelous messages about the plaintiff on the Yahoo! message board. The messages stated that plaintiff "threatens analyst[s] who are bullish on certain stocks" and that

plaintiff spread lies about those stocks, as well as claiming that plaintiff was the subject of a Securities and Exchange Commission investigation. *Id.* at *2. In granting the defendant's motion to quash the subpoena, the court found that on the whole, the defendant's messages were merely "free flowing diatribes" in which he did not use proper spelling, grammar or capitalization. *Id.* at *6. The court also found fatal to plaintiff's claim the plaintiff's failure to even attempt to show that the defendant's posts were sufficiently factual to be susceptible of being proved true or false. *Id.* at *7. *See also, ComputerXpress, Inc.* 93 Cal. App. 4th at 1013 (finding allegedly libelous Internet postings that accused plaintiff of being a stock scam and of illegally manipulating the company's value, were hyperbolic, informal opinions that "lacked the characteristics of typical fact-based documents"); *Global Telemedia Int'l., Inc.*, 132 F. Supp. 2d. at 1267 (finding allegedly libelous message board posts opinions in part because they were posted in the "general cacophony of an Internet chat-room in which about 1,000 messages a week are posted . . . . They were part of an on-going, free-wheeling and highly animated exchange about [plaintiff] and its turbulent history.")

5. Applying The Totality Of The Circumstances Analysis To Veritasconari's Posts Demonstrates That Her Statements Are Of The Same Character As Those Found To Be Non-Actionable In *SPX, Rocker, ComputerXpress* And *Global Telemedia*

Applying the totality of the circumstances analysis to Veritasconari's posts demonstrates that her statements are of the same character as those found to be non-actionable in *SPX, Rocker, ComputerXpress* and *Global Telemedia.* First, the context in which the statements are made is the same as in those cases, namely, on a public, uncontrolled Yahoo! message board where Veritasconari's posts were among tens of thousands of other posts

concerning Matrixx Initiatives. As the courts have recognized, the Yahoo! message board is a place where readers expect to see strongly worded opinions rather than objective facts. In addition, as noted above, each message posted on the board is accompanied by a disclaimer reminding the reader that the messages found there express the opinions of the poster, not objective facts. In this context, a reasonable reader of the message board would not believe that Veritasconari's posts constituted anything but her own opinions.

Moreover, not only has Matrixx failed to assert any defamation claims against Veritasconari in its Complaint that allege specific defamatory publications, but the Motion fails to identify any specific posts set forth in the 50 pages of Internet posts attached to its Motion. Further, Matrixx has also failed to deny that any statement made in those 50 pages of messages is untrue, including those concerning its accounting practices and press releases that formed the basis of many of Veritasconari's opinions.

A general review of the posts demonstrates that, like the posts in *SPX*, *Rocker, Computerxpress*, and *Global Telemedia*, they are informal, hyperbolic, filled with invective and criticisms against Matrixx that cannot be verified. Many of the posts consist entirely of articles written by third parties like the Securities and Exchange Commission (AA, Vol. 2 at 87-88.) Others state that it "looks like" something is going on, or that Veritasconari believes that something "may be" happening. (AA, Vol. 2 at 94-99.) Many are mere predictions of what Veritasconari believes Matrixx will face in the future.

Further, like the messages in *Global Telemedia*, many of the posts were written as part of a continuing, heated debate between Veritasconari

and other posters on the board, particularly a user named InvestorUSA. Although Matrixx provided none of the posts of other users, thus preventing the Court from seeing the full context in which Veritasconari's posts were made, it is clear that other posters had views different from those held by Veritasconari, and that Veritasconari devoted considerable time to presenting her "opinion" concerning this debate. Veritasconari's posts reflect that she believed there were serious issues concerning Matrixx's accounting practices, nothing more. Significantly, the posts do not purport to convey that Veritasconari had any basis for her opinions concerning Matrixx other than her own evaluation of neutral facts. Under these circumstances, a reasonable reader would not take a defamatory, factual meaning from Veritasconari's posts; rather they would perceive them to be the strongly held opinions of a single poster on the message board.

V.

CONCLUSION

For the foregoing reasons the Superior Court's Order of April 4, 2005 should be vacated and the Motion should be denied.

RESPECTFULLY SUBMITTED this 27th day of July, 2005.

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PROOF OF SERVICE

I, NICOLE A. BIGLEY, declare:

1. I am employed in the City and County of San Francisco, California by Shartsis Friese LLP at One Maritime Plaza, 18th Floor, San Francisco, California 94111.

2. I am over the age of eighteen years and am not a party to the within cause.

3. I am readily familiar with Shartsis Friese LLP's practice for collection and processing of correspondence and documents for mailing with the United States Postal Service, which in the normal course of business provides for the deposit of all correspondence and documents with the United States Postal Service on the same day they are collected and processed for mailing.

4. On July 27, 2005, at Shartsis Friese LLP located at the above-referenced address, I served the attached **APPELLANTS' OPENING BRIEF** on the interested parties in said cause by

___ Personal delivery by messenger service of the document(s) above to the person(s) at the address(es) set forth below:

_X_ Placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in accordance with the firm's practice of collection and processing correspondence for mailing to the person(s) at the address(es) set forth below:

___ Facsimile transmission pursuant to Rule 2008 of the California Rules of Court on this date before 5:00 p.m. (PST) of the document(s) listed above from sending facsimile machine main telephone number (415) 421-2922, and which transmission was reported as complete and without error (copy of which is attached), to facsimile number(s) set forth below:

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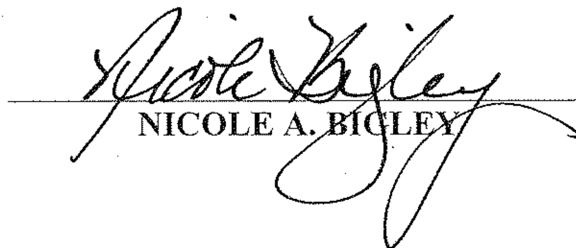
San Jose, CA 95113-1090

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

Executed on July 27, 2005 in San Francisco, California.



NICOLE A. BIGLEY

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