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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

AMERICAN HOTEL & LODGING ASSOCIATION and ASIAN AMERICAN HOTEL OWNERS ASSOCIATION

Plaintiffs,

vs.

CITY OF LOS ANGELES,

Defendant.

CASE NO. 2:14-cv-09603-AB-SS
Assigned to Hon. Andre Birotte Jr.

REPLY MEMORANDUM TO LOCAL 11'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Date: April 6, 2015
Time: 10:00 am
Courtroom: 4-Spring Street

Complaint Filed: December 16, 2015

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PLAINTIFFS' INTERVENTION REPLY MEMORANDUM

Plaintiffs respectfully submit this memorandum in reply to the opposition of the Intervenor UNITE HERE Local 11 (the "*Union*" or "*Local 11*"), and in further support of their application for an order enjoining Defendant City of Los Angeles ("the "*City*") from implementing Ordinance No. 183241, entitled "Citywide Hotel Worker Minimum Wage Ordinance" (the "*Hotel Workers Act*" or the "*Act*").

I. THE UNION'S OPPOSITION MISCONSTRUES CONTROLLING SUPREME COURT AND NINTH CIRCUIT PRECEDENT.

A. Substantive Labor Standards Are Subject to *Machinists* Preemption Under Controlling Ninth Circuit Precedent.

Distilled to its essence, Local 11's position can be stated as follows: All is fair in love and labor standards. The Union would have this Court believe that irrespective of its purpose or actual effect on labor-management relations, labor standards adopted by state or local governments cannot be subject to *Machinists* preemption – ever, come what may, no matter what. (*See* Union Mem. at 7: "State and local laws that establish substantive, minimum labor standards [. . .] are not preempted by the NLRA.") This is not supported by a fair reading of the relevant Supreme Court precedent. (*See* Pl. Mem. at 20-23; Pl. R. Mem. at 11-13.) It contradicts the actual holding of *Fort Halifax Pkg. Co. v. Coyne*, 482 U.S. 1, 6-7 (1987) ("We ***hold*** further that the Maine law is not preempted by the NLRA, ***since*** it establishes a minimum labor standard ***that*** does not intrude upon the collective-bargaining process") (emphasis added). [1]

[1] The Union insinuates that *Machinists* preemption is limited to state regulation of economic weapons of self-help (Union Mem. at 6-7), but that has not been the law for 30 years. *See Metro. Life Ins. Co. v. Mass.* ("*MetLife*"), 471 U.S. 724, 749 n. 27 (1985) (*Machinists* preemption "initially has been used to determine whether certain weapons of bargaining [. . .] could be subject to state regulation [. . . . It] has been used more recently to determine the validity of state rules of general application that affect the right to bargain or to self-organization.") (internal citation omitted). Note, too, that in *N.Y. Tel. Co. v. N.Y.S. Dept. of Labor*, 440 U.S. 519 (1979), the employer "contended that [certain state benefit] payments were inconsistent with the federal labor policy" and the Supreme Court "rejected the argument, *not because* [it] disagreed with its premises, but rather because [it had concluded]

Nor is it the law in the Ninth Circuit. In *Chamber of Commerce of U.S. v. Bragdon*, 64 F.3d 497 (9th Cir. 1995), the Ninth Circuit considered a county ordinance that established (what the Union calls) a "substantive, minimum labor standard[]" and, applying *Machinists*, held the ordinance to be preempted by the NLRA.[2] While the Union disparages *Bragdon*, it has never been overruled.

The Union misleads by saying that "*Bragdon* involved a local *prevailing* wage" and urging the Court not "to extend *Bragdon* [. . .] to minimum-wage standards" (Union Mem. at 9 [emphasis by Union]), as if the prevailing wage in *Bragdon* were not a mandated minimum wage. But, it was. Typically, the term "prevailing wage" refers to the wage-rates required of, *inter alia*, contractors working on ***government*** construction projects, which are not generally subject to *Machinists* preemption because the government is acting as a market participant. (*See* Pl. R. Mem at 8 n. 3). In contrast, the county in *Bragdon* was acting as a market regulator, using a "prevailing-wage concept [. . .] to *regulate* the wages paid on *private* construction projects." *See* 64 F.3d at 501 (emphasis added). Indeed, the County itself had asserted that its prevailing wage requirement was a "'minimum labor standard.'" *Id.* at 499. Thus, *Bragdon* did, in fact, rule that a "minimum labor standard" was preempted in the NLRA.

The Union also misleads by saying that "*Bragdon's* broader statements on *Machinists* preemption" have been "disavowed" by "[t]he Ninth Circuit." (Union Mem. at 9.) The only Ninth Circuit case cited for that assertion is *Assoc. Bldrs & Contractors of S. Cal. v. Nunn*, 356 F.3d 979 (9th Cir. 2004). But, all *Nunn* said was that minimum wage laws "are not invalid *simply because*" they affect only one industry, *id.* at 990 (emphasis added), which in no way "disavow[s]" *Bragdon.*

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that Congress had intended to tolerate the conflict with federal labor policy." *Baker v. Gen. Motors Corp.*, 478 U.S. 621, 634 (1986) (emphasis added).

[2] *See* 64 F.3d at 504 ("We conclude that the Contra Costa County Ordinance is pre-empted by the NLRA because it is an undue governmental interference with the collective bargaining processes protected by that Act."). *See also id.* at 501 ("The essential question in this case is whether the Ordinance is incompatible with the goals of the NLRA.").

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Moreover, that the preempted ordinance applied only to construction companies was not critical to *Bragdon's* analysis. Rather, *Bragdon* applied *Machinists* preemption because "this Ordinance affects the bargaining process in a much more invasive and detailed fashion than the isolated statutory provisions of general application approved in *Metropolitan Life* and *Fort Halifax*." 64 F.3d at 502. In fact, *Nunn* actually endorsed *Bragdon* when it said:

> *Bragdon* held that state substantive labor standards *can be preempted* in certain extreme situations, when they are "so restrictive as to virtually dictate the results" of collective bargaining.

356 F.3d at 990 (emphasis added). Plaintiffs agree, understanding, of course, that *Machinists* preemption applies to union organizing as well as to collective bargaining and that economic inducements and disincentives that alter the balance of economic power between labor and management are as subject to *Machinists* preemption as is "virtually dictat[ing] the result" (*see* pp. 9-10, *infra*). [3]

The stakes here could not be higher. In *Bragdon*, the county helped local construction unions to ward off lower priced non-union contractors under the innocuous-sounding guise of a "prevailing wage." Today, organized labor, including UNITE HERE, has embarked on a campaign to obtain legislation from local governments that "puts a thumb on the scale" in favor of labor in union organizing and collective bargaining to counter what they view to be the "ossification" of labor law at the federal level.[4]

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[3] The Union also cites a California Supreme Court decision that, in a footnote, opines that the "Ninth Circuit Court of Appeals has effectively repudiated *Bragdon.*" *Cal. Grocers Ass'n. v. City of Los Angeles*, 52 Cal. 4th 177, 200 n. 8 (2011). That criticism, too, also had to do with *Bragdon's* having (purportedly) found preemption only because the disputed ordinance was applied only to one industry, which, as noted, was not critical to *Bragdon's* – nor is it to Plaintiffs' – preemption analysis. Nor is this Court free to disregard *Bragdon* based on some other judicial body's observation as to its being "effectively repudiated", whatever that may mean.

[4] These developments are also documented in scholarly articles and other studies. *See* Arch Y. Stokes et al., "*How Unions Organize Hotels Without an Employee Ballot*," 42 CORNELL HOTEL & REST. ADMIN. Q., 86-96 (2001) (cited at Eigen Decl. ¶40); U.S. Chamber of Commerce, *Labor's Minimum Wage Exemptions: Unions as the "Low-Cost" Option*

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If this Court were to rule, contrary to *Bragdon*, that every minimum labor standard is, by that fact alone, exempt from *Machinists* preemption, then politically powerful unions could "run the table," inducing municipal legislatures to impose the most onerous economic burdens needed to induce employers to bend their will towards union-favored actions – all under the guise of being an "unexceptional exercise of the [state's] police power" to set substantive labor standards, *MetLife* 471 U.S. at 758. That surely would impermissibly "substitute[ ] the free-play of political forces for the free-play of economic forces that was intended by the NRLA." *Bragdon*, 64 F.3d at 504. And, that part of *Bragdon* has never been "disavowed."

B. The Unilateral-Implementation Provision Disrupts Labor Relations And Bargaining To A Degree That Independently Compels Preemption.

1. An Employer Who Secures a Waiver Under The Act Will Face Inordinate Pressure to Reach a Successor CBA Prior to Its Expiration.

Attempting to minimize the insidious effect of the unilateral-implementation provision, the Union advances an argument that misapprehends the collective-bargaining process at contract expiration. (*See* Eigen Decl. ¶¶28, 30-32; Pl. Mem. at 17-20.) Specifically, it is common for parties to negotiate a temporary extension to the expired CBA while they are negotiating a successor agreement. (*See* Gleason Decl. ¶16.) The extension maintains the status quo , continuing all terms of the otherwise expired CBA and (until recently) served at least one purpose beneficial to the union: it allowed for the continuation of "dues checkoff," which was not (until recently) permitted without a contract extension.[5] Under recent case law, however, a dues checkoff provision continues in effect at expiration, even without a contract

(2014), available at http://bit.ly/1Evb112; Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV., 1154, 1169-97 (2011).

[5] The dues checkoff provision of a CBA authorizes and requires the employer to withhold union dues from union members' pay and remit the dues to the union. *See* 2 DEVELOPING LABOR LAW 2289 (John E. Higgins, Jr., ed., 6th ed. 2012). Under *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), the dues checkoff provision of a CBA was not automatically extended with the other contract terms at expiration. *See id.* at 2298.

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extension. *See In re WKYC-TV, Inc.*, 359 NLRB No. 30 (Dec. 12, 2012). As a consequence, unions no longer need a temporary agreement extending the contract, and may choose to negotiate without one. (*See* Gleason Decl. ¶16.)

Under the Hotel Workers Act, however, if a hotel employer is party to a CBA that contains a waiver and maintains the terms of the CBA after its expiration but does not have a written extension, as is perfectly proper under federal labor law (*see* Pl. Mem. at 18; Eigen Decl. ¶28), it risks being sued for violating the Act if, for example, it continues to pay banquet servers a base hourly rate of $9, rather than the $15.37. Against this threat of liability, employers may feel constrained at the end of a contract term to accede to union demands so as to secure renewal of the previously granted waiver because, under the Act, hotel employers may believe that they need a contract extension (*see, e.g.,* Czarcinski Decl. ¶¶37-38), even though unions no longer do. That imbalance gives unions an economic lever they would not otherwise have had.

This externally imposed economic pressure to reach a deal with the Union by the contract expiration date is no different from a mandate to end a strike by a certain date or lose a government franchise, which is precisely what the Supreme Court ruled to be preempted in *Golden State Transit Corp v. City of Los Angeles*, 475 U.S. 608 (1986). (*See generally,* Chamber Mem., Dkt No. 78, at 6-7.[6])

2. Under Ninth Circuit Authority, Such Government-Created Pressure on Post-Expiration Bargaining Warrants Preemption.

In *Barnes v. Stone Container Corp.*, 942 F.2d 689 (9th Cir. 1991), the Ninth Circuit recognized the impropriety of a state law's "interference in the collective bargaining process" occurring after expiration of a CBA, even where such interference is "not intentional." *Id*. at 693 (preempting a state-law wrongful

[6] "Chamber Mem." refers to the "Chamber of Commerce of the United States of American and Coalition for a Democratic Workplace Memorandum of Law as Amici Curiae" submitted in this action at Docket No. 78 by amici curiae on Mar. 30, 2015.

discharge action brought as to post-expiration termination of employment). As the *Barnes* court aptly explained, such "actions during this period would have the untoward effect of imposing a contract term on the parties and thus *altering incentives to negotiate*" prior to bargaining impasse. *Id.* at 693 (emphasis added). (*See* Pl. Mem. at pp. 19-20 [citing cases to similar effect].)[7]

The Union's insinuation that *Barnes* was somehow displaced by *National Broadcasting Co. v. Bradshaw* ("*NBC*"), 70 F.3d 69, 73 (9th Cir. 1995), is just not so. In *NBC*, the Ninth Circuit actually acknowledged the continuing validity of *Barnes*, holding only that state overtime regulations could apply during the "gap period" between bargaining impasse and the new CBA, but only because the new CBA was not given retroactive effect. *Id.* at 70. Distinguishing itself from *Barnes*, the *NBC* court explained, "in this case the state statutory remedy was not invoked until after impasse was reached, and therefore, the type of interference with negotiations frowned upon in *Barnes* did not occur here." *Id.* at 73.

The specter of incurring post-expiration/pre-impasse obligations merely as a consequence of continuing to apply employment terms previously exempted by a waiver would "have the untoward effect of [. . .] altering incentives to negotiate," *Barnes*, 942 F.2d at 693 and, to that extent, the Act is preempted under *Barnes*. While Plaintiffs contend that *NBC's* narrow holding that a different rule applies after bargaining impasse is inconsistent with *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) ("*Pro Football*"), that is not essential to Plaintiffs' preemption claim here.[8]

[7] *Cf. Concerned Home Care Provds., Inc. v. Cuomo*, No. 13-3790-cv, 2015 WL 1381380 at *6 n. 8 (2d Cir. Mar. 27, 2015) (explaining that preemption in *520 S. Mich. Ave. Assocs. v. Shannon*, 549 F. 3d 1119 (7th Cir. 2008) was predicated, in part, on a provision of the statute that "arguably interfered with the collective-bargaining process").

[8] In *Pro Football*, the Court ruled that the exemption from federal antitrust law afforded to collective bargaining continues after expiration of a CBA, after impasse and even after unilateral implementation, not because of some peculiarity of antitrust law, but because the alternative interferes with an employer's choice of "collective bargaining response." *Id*. at 243-44. Similarly, here, immunity from a state labor standard (whether by operation of a statutory "opt out" clause or by a previously granted union waiver) continues to apply post-contract expiration, post-impasse and even post-unilateral implementation because any other rule would frustrate collective bargaining as it is intended to operate under the NLRA.

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C. "Opt-Out" Clauses Are Not *Per Se* Immune From Labor Law Preemption.

The Union misstates the law when it say (Union Mem. at 2) that "federal preemption doctrine 'cast[s] no shadow on the validity of these familiar and narrowly drawn opt-out provisions,'" purporting to quote *Livadas v. Bradshaw*, 512 U.S. 107. 132 (1994). In fact, *Livadas* there refers only to its own holding, not to the "federal preemption doctrine" as a whole.[9] The *Livadas* rule is only that "narrowly drawn" opt-out provisions do not, in and of themselves, compel a finding of *Machinists* preemption. The Court's metaphor about "cast[ing] shadow[s]" cannot reasonably be construed as establishing a categorical exemption for anything called an "opt out" clause in any and all circumstances—especially not as to such provisions, like here, that are clearly not "narrowly drawn".

The cases that the Union relies are not to the contrary. In *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 490 (9th Cir. 1996), the "opt-out" clause provided only that a rule prohibiting miners from working more than 8 hours a day did not prohibit a 12-hour workday when the employees are subject to "a valid collective-bargaining agreement." 75 F.3d at 486. That, though, is nothing like the union-waiver provision at issue here if for no other reason than that the employer must obtain from the union an explicit, clear and unambiguous waiver even when a "valid collective-bargaining agreement" is already in place. The Union's reliance on *Fortuna Enter., L.P. v. City of Los Angeles*, 673 F. Supp. 2d 1000 (C.D. Cal. 2008) is also misplaced because, *inter alia*, the Court there did not have the benefit of a record demonstrating the practical effects of the ordinance, which was, compared to the instant ordinance, less

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Nevertheless, that the preemption would, under *NBC*, lapse in the anomalous circumstance of a successor CBA not having retroactive effect, does not mean the Act is valid in all other post-expiration circumstances.

[9] The exact unedited quote from *Livadas* is as follows: "Hence, our holding that the Commissioner's unusual policy is irreconcilable with the structure and purposes of the Act should cast no shadow on the validity of these familiar and narrowly drawn opt-out provisions." 512 U.S. at 132.

intrusive on collective bargaining. (*See* Pl. Reply Mem. at pp. 13-15.) The Union's reference to *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137 (9th Cir. 2004), is also a misdirection because the claims there related to equal protection and the improper delegation of legislative power, not to labor-law preemption. And, in *St. Thomas-St. John Hotel & Tourism Assoc. v. U.S.V.I.*, 218 F.3d 232, 236 (3d Cir. 2000), the opt-out clause said merely that a certain rule applied "[u]nless modified by union contract."

The Union's comparison to the "opt-out" provision of 29 U.S.C. §203(*o*) – a provision of the Fair Labor Standards Act (FLSA) – actually proves Plaintiffs' point. That provision excludes from "hours worked" time spent on certain preparatory activities *if* that time is excluded by the terms – or even "custom and practice" under – a CBA. It does not require an express, clear and unambiguous written waiver. This FLSA provision was identified specifically by *Livadas* as an example of "familiar and narrowly drawn opt-out provision[ ]." 512 U.S. at 131-32. Section 186.08 of the Hotel Workers Act is neither.

Nor are the insidious effects of the Act's union-waiver provision abated by the Union's (apparently) tactical decision to recede from its prior waiver conditions, which would have required hotel employers to assist in the Union's organizing efforts (*see* Czarcinski Decl. ¶¶24-25) or to waive the right to challenge the legality of the Act itself (*see* Czarcinski Decl. ¶42). That Local 11 was able to make such a demand in the first place and that it remains free to do so in the future, shows that the Act gives the Union a cudgel to use in collective bargaining that the City has no authority to grant.

That certain benign opt-out clauses are legitimate does not immunize all provisions exempting unionized employee that are dubbed an "opt out." The touchstone (with apologies for repetition) is actual content and real effect, not verbal labels. (*See* Pl. R. Mem. at 1-2.) Because the Act "put[s] considerable pressure on an employer either to forgo his [federal labor law rights] or else to [suffer an economic

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loss]," *see Chamber of Commerce v. Brown* ("*Brown*"). 554 U.S. 60, 73 (2008), it is preempted by *Machinists*.

D. *Machinists* Preemption Applies to Indirect Regulation Through Economic Incentives and Disincentives.

Contrary to the Union's contention (Union Mem. at 13), *Machinists* preemption applies not only to instances of direct regulation, but also when government "'predicat[es] benefits on refraining from conduct protected by federal labor law'" or otherwise "frustrates the comprehensive federal scheme established by [the NLRA]." *Brown*, 554 U.S. at 73-74 (*quoting Livadas*, 512 U.S. at 116). As to this, the Supreme Court in *Brown* could not have been more clear:

> California plainly could not directly regulate noncoercive speech about unionization by means of an express prohibition. It is equally clear that California may not *indirectly regulate* such conduct by *imposing spending restrictions* on the use of state funds.

Id. at 69 (emphasis added). Here, as in *Brown*, the Act imposes burdensome "compliance costs and litigation risk that are calculated to make [. . .] prohibitively expensive" conduct favored or permitted by federal labor policy, *id.* at 72, such as, *inter alia*, requiring an election to establish a union's majority status. Like the statute invalidated in *Brown*, the cumulative and interrelated effects of the provisions of the Hotel Workers Act generate disincentives on employer conduct that interfere with federal labor policy. That the Act leads only indirectly to the proscribed result is no defense. [10]

Particularly instructive on this point is *New England Health Care Employees Union v. Rowland*, 221 F. Supp. 2d 297, 328 (D. Conn. 2002) ("*Rowland"*). There,

[10] Contrary to what the Union's insinuates, *Viceroy Gold*, *supra*, nowhere holds that *Machinists* preemption is inapplicable in every circumstance where a party is subject to indirect pressure to unionize because of a challenged statute. Its ruling was only that a "potential" economic disincentive does not, in and of itself, "invalidate [. . .] a narrowly tailored opt-out provision." 75 F.2d at 490.

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the court found that a state's making "anticipatory Medicaid payments" during a strike (*i.e.*, reimbursing properly reimbursable costs *sooner* that it would otherwise have done) was preempted under *Machinists* because it "altered the economic balance" between nursing home employers and unionized health care workers who were on strike. 221 F. Supp. 2d at 329. The *Rowland* court was fully aware that the "anticipatory" reimbursements "did not regulate [the union's] conduct in any direct sense," but recognized that "NLRA preemption cannot focus solely on the conduct regulated, but must also consider 'the scope, purport, and *impact* of the state program.'" 221 F. Supp. 2d at 328 (*quoting N.Y. Tel. Co. v. N.Y. S. Dep't of Labor*, 440 U.S. 519, 532 n. 21 (1979)) (emphasis added). Because the effect of providing early reimbursements to employers resisting a strike would intrude on the balance struck by Congress, the state's action was preempted, even absent any direct regulation on strike activity. *Cf. Rum Creek Coal Sales, Inc. v. Caperton*, 971 F.2d 1148 (4th Cir. 1992) (finding preempted a state law preventing police from acting to prevent illegal activity connected with a strike).

If expediting payments due under Medicaid – payments that the employers were entitled to receive, simply at a later time – constituted interference in labor-management relations sufficient to require preemption, then the combination of disincentives and economic pressure created by the Hotel Workers Act (whether by design or consequence) surely does so well.

E. Ability to Pay Is No Justification For Intrusion on Federal Labor Policy.

The Union doubles down on the issue of the affordability when it argues that the $15.37 hourly rate mandated by the Act is permissible because it applies to large hotels that are "typically owned by 'large, well-capitalized companies' with 'diversified holdings.'" (Union Mem. at 17, internal citations omitted), as if "setting this wage level for businesses that can afford it" (*Id.* at 18) were relevant for labor-law preemption. There is, however, nothing to suggest that the minimal labor

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standards approved by the Supreme Court in *MetLife* and *Fort Halifax (see* Pl. Mem. at 22*)* were in any way related to an employers' ability to pay. Legislating profit sharing is nothing like "establish[ing] a minimal employment standard[s] [that are] not inconsistent with the general legislative goals of the NLRA", and are far from "valid and unexceptional exercise of the [the City's] police power," *MetLife*, 471 U.S. at 757, 758.

II. CONCLUSION.

For all of the foregoing reasons and those previously stated, this Court should grant Plaintiffs' motion for a preliminary injunction in its entirety.

DATED: March 30, 2015

Respectfully submitted,

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 400 S. Hope St., 8th Floor, Los Angeles, California 90071. On March 30, 2015, I served the document described as **REPLY MEMORANDUM TO LOCAL 11'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** on the interested parties in this action as follows:

> **[X]** (**BY Electronic Transfer to the CM/ECF System**) In accordance with Federal Rules of Civil Procedure 5(d) (3), Local Rule 5-4, and the U.S. District Court of the Central District's General Order governing electronic filing, I uploaded via electronic transfer a true and correct copy scanned into an electronic file in Adobe "pdf" format of the above-listed documents to the United States District Court Central District of California' Case Management and Electronic Case Filing (CM/ECF) system on this date. It is my understanding that by transmitting these documents to the CM/ECF system, they will be served on all parties of record according to the preferences chosen by those parties within the CM/ECF system. The transmission was reported as complete and without error.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Dated: March 30, 2015, Los Angeles, California.

By: //S//
John A. Canale