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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

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Plaintiffs,

vs.

National Aeronautics and Space Administration, an Agency of the United States; Michael Griffin, Director of NASA, in his official capacity only; Department of Commerce; Carlos M. Gutierrez, Secretary of Commerce, in his official capacity only; California Institute of Technology; and Does 1-100,

Defendants.

Case No. CV-07-05669 ODW (VBKx)

CALTECH'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Complaint Filed: August 30, 2007

Date: January 7, 2008
Time: 10:00 a.m.
Courtroom: 11

United States District Court
Judge Otis D. Wright, II

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INTRODUCTION

Plaintiffs concede that their Administrative Procedure Act and California Constitution claims against Caltech should be dismissed. Accordingly, the Court should dismiss these claims with prejudice. The only remaining issue is whether Plaintiffs can maintain federal Constitutional claims against Caltech, a private entity. These claims must also be dismissed with prejudice for the following reasons.

First, the Ninth Circuit's decision in *Sutton v. Providence St. Joseph Medical Center,* 192 F.3d 826 (9th Cir. 1999) controls here and requires dismissal because Plaintiffs do not allege that Caltech acted "jointly" with the government, or handled any substantive part of the alleged unconstitutional conduct that Plaintiffs concede was mandated and implemented by the government. Plaintiffs attempt to avoid the binding impact of *Sutton* by pointing to three distinguishable opinions which pre-date *Sutton* by a decade or more: *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Mathis v. Pac. Gas & Elec. Co.*, 891 F.2d 1429 (9th Cir. 1989) (*Mathis I*); and *Carlin Commc'ns v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291 (9th Cir. 1987). But Plaintiffs did not cite the Ninth Circuit's second decision in *Mathis v. Pac. Gas & Elec. Co.*, 75 F.3d 498 (9th Cir. 1996) (*Mathis II*)—which supports dismissal here—and they failed to mention that *Sutton* explicitly considered and discussed all three of these cases.

Second, Plaintiffs' Opposition omits key parts of *Sutton*'s holding which set a high bar for plaintiffs who seek to have private entities deemed government actors subject to constitutional claims. *Sutton* begins with the "presumption that private conduct does not constitute governmental action." *Sutton*, 192 F.3d at 835. To overcome this presumption, Plaintiffs must demonstrate that Caltech has done "something more" in order to reflect Caltech's "willful participation in a joint activity" with the federal government. *Id.* at 843. Moreover, Plaintiffs must also demonstrate that Caltech took "the decisive step that caused the harm to" Plaintiffs. *Id.* at 838. Plaintiffs do not and cannot allege facts to overcome the presumption that

Caltech is not subject to suit for alleged constitutional violations by the federal government. Plaintiffs have not alleged that Caltech willfully participated in joint activity with the government, much less that Caltech took the decisive step in causing harm to Plaintiffs' constitutional rights.

Third, Plaintiffs make only one factual allegation of Caltech's involvement in the background investigation, namely, that "NASA's interim directive . . . states that if the Badge issuance process yields any 'derogatory or unfavorable information,' it will be forwarded to the Human Relations Officer for JPL who will determine 'employment suitability.'" *See* First Amended Complaint ("FAC") ¶ 52. But Caltech proved in its opening brief that this allegation is false; indeed, this allegation is contradicted by the NASA Interim Directive Plaintiffs cite and incorporate by reference in their Amended Complaint. *See* Caltech's Motion to Dismiss ("Opening Br.")12-13. The NASA Interim Directive states that the federal government, not JPL, determines "employment suitability." *See id.* In their Opposition, however, Plaintiffs do not even attempt to address that the Interim Directive on which they rely says the exact opposite of what they allege it says.

Fourth, Plaintiffs' remaining claims should also be dismissed because Plaintiffs have already made repeated judicial admissions that Caltech did not act jointly with the government or take any substantial part in the government's allegedly unconstitutional background investigation. As Caltech pointed out in its opening brief, Plaintiffs are bound by these admissions. *See* Opening Br. 8 n.7 (citing *Gospel Missions of Am. v. Los Angeles*, 328 F.3d 548, 557 (9th Cir. 2003)). But Plaintiffs ignore their prior admissions and ignore the binding precedent which prohibits them from contradicting or otherwise attempting to escape from these admissions to avoid dismissal of their complaint. Remarkably, Plaintiffs' Opposition to the federal government's motion to dismiss reiterates a number of the same admissions they now attempt to dodge in their Opposition to Caltech's motion. For example, Plaintiffs again argue that "the crux of this litigation is a dispute between scientists and

engineers employed by [Caltech] and the government." *See* Pls.' Opp'n to Fed. Defs.' Mot. to Dismiss ("Pls.' Gov't Opp'n") 1; *see also id.* at 2 (referencing a "***governmental*** policy that vests unfettered discretion in ***government officials***").[1]

Fifth, the Supreme Court recently raised the bar for plaintiffs seeking to defeat a motion to dismiss, stating that a complaint requires "more than labels and conclusions" and that factual allegations "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007). Even if the Plaintiffs are not bound by their multiple judicial admissions that the alleged unconstitutional conduct was "mandated and implemented" by the federal government, Plaintiffs allege conduct by Caltech that is, at best, ministerial and therefore inactionable. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52-55 (1999) (state involvement in multiple non-substantive aspects of program cannot be basis for a state actor determination).

This Amended Complaint represents Plaintiffs' second attempt to allege facts sufficient to overcome the presumption that Caltech cannot be liable for a claimed government intrusion on their constitutional rights. Plaintiffs have not overcome that presumption. Nor could they, as it is also undisputed that the background check requirement was unilaterally implemented by the government over Caltech's objection. Accordingly, their complaint should be dismissed with prejudice. *See Outdoor Sys. Inc. v. City of Mesa*, 997 F.2d 604, 613-14 (9th Cir. 1993) (trial court need not provide plaintiffs with more than one opportunity to file an amended pleading); *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend.")

ARGUMENT

Federal courts are reluctant to find private actors liable under constitutional theories. *See, e.g., Sullivan*, 526 U.S. at 985 (government action requirement "excludes from its reach merely private conduct, no matter how discriminatory or

[1] Any emphasis to quotations has been added by Caltech unless otherwise noted.

wrongful") (citations omitted); *Mathis II,* 75 F.3d at 501 ("While we sometimes treat acts of private parties as public, we do so sparingly."); *Sutton*, 192 F.3d at 835 ("When addressing whether a private party acted under color of law, we therefore start with the presumption that private conduct does not constitute governmental action.").

Plaintiffs allege only peripheral tasks by Caltech with respect to NASA's badge issuance program, such as gathering and processing forms, helping to determine risk levels associated with various positions at JPL, and verifying that forms are properly filled out. *See* FAC ¶¶ 44, 56; *see also* Pls.' Opp'n to Caltech's Mot. to Dismiss ("Pls.' Opp'n") 3-6 (identifying Caltech's role as relaying information to employees, and verifying that forms are completed prior to the government's substantive review). But in *Sullivan*, the Supreme Court found that allegations of non-substantive involvement were not sufficient to merit a finding of government action. 526 U.S. at 52-55.

In *Sullivan*, the challenged conduct involved a private insurer's decision to withhold payments for disputed medical treatment pending utilization review. *Sullivan*, 526 U.S. at 43. The *Sullivan* Court held that plaintiffs failed to establish that the government was sufficiently involved in the private insurers' dispute resolution scheme such that the government could fairly be held liable for the allegedly unconstitutional scheme. *Id.* at 50. The Supreme Court held that a sufficiently close nexus was not established because the decision to deny benefits was not made jointly, but was made by "concededly private parties and turn[ed] on judgments made by private parties without standards established by the State." *Id.* at 52 (internal quotations omitted). The *Sullivan* Court refused to find that the state was a government actor despite the fact that the state played a role in "creating, supervising, and setting standards" for the private review board that made the challenged decisions. *Id.* at 54. Moreover, in *Sullivan*, the Court refused to find that the significant administrative conduct by the state of Pennsylvania could be sufficient grounds to establish joint conduct. This conduct included processing requests for technical

compliance, forwarding the matter to a private decision-maker, and informing parties that the utilization review had been requested, and was insufficient to support a finding of joint participation between the government and the private entity. *Id.* at 55.[2]

Plaintiffs have not alleged anywhere near enough substantive conduct by Caltech to overcome the presumption that private conduct does not constitute governmental action. Caltech cannot be responsible for an alleged constitutional violation by the federal government because Caltech only plays an administrative role, does not engage in the challenged background check or suitability determination, and merely follows a government directive applicable to all NASA facilities.

I. *SUTTON*—NOT THE OLDER, DISTINGUISHABLE DECISIONS PLAINTIFFS CITE—IS THE CONTROLLING AUTHORITY HERE.

Plaintiffs' Opposition implicitly concedes that if this Court follows *Sutton*, their claims against Caltech must be dismissed. Plaintiffs therefore argue that *Sutton* is "at odds with other Ninth Circuit authority." *See* Pls.' Opp'n 10. Plaintiffs' argument is wrong. *Sutton* is the law of this circuit and it prevents Plaintiffs from proceeding against Caltech here.

After first arguing that *Sutton* is not binding, Plaintiffs then try to summarize *Sutton* without discussing three key parts of its holding. First, Plaintiffs omit *Sutton*'s holding that "[w]hen addressing whether a private party acted under color of law, we . . . start with the presumption that private conduct does not constitute governmental action." *See Sutton,* 192 F.3d at 835. Second, Plaintiffs ignore *Sutton*'s holding that, to overcome that presumption, Plaintiffs must show "something more" in order to reflect the private party's "***willful participation*** in a ***joint activity***" with the government. *Id.* at 843. Finally, Plaintiffs do not mention *Sutton*'s statement that, in the typical case where government action is found, the private actor takes "the

[2] *See also Village of Bensenville v. Fed. Aviation Admin.*, 457 F.3d 52, 65 (D.C. Cir. 2006) (no joint action between city and FAA where FAA played only a "peripheral role" and did not organize, design or plan the challenged conduct).

decisive step that caused the harm to the plaintiff." *Id.* at 838.

The *Sutton* court's holding that "only the state actor, and not the private party, should be held liable for the constitutional violation that resulted from the state compulsion," mandates dismissal of Plaintiffs' claims against Caltech. *See Sutton*, 192 F.3d at 838. Plaintiffs seek to avoid the fatal blow that *Sutton* deals to their case by relying on three earlier decisions, namely, *Adickes, Mathis I* and *Carlin*. But these cases do not save Plaintiffs' flawed complaint from dismissal. In fact, the *Sutton* court analyzed each of these cases and distinguished them from the facts in *Sutton*, and each is distinguishable here.

In *Adickes,* the plaintiffs alleged that the private party ***conspired*** with the government to jointly deprive the plaintiff of constitutional rights. *Adickes*, 398 U.S. at 152-53. Plaintiffs here are just like the plaintiff in *Sutton* in that "[t]he existence of a conspiracy between the private entity and state officials to pursue a joint and unconstitutional end distinguishes *Adickes* from this case." *Sutton*, 192 F.3d at 840. Plaintiffs do not and cannot allege any conspiracy between Caltech and the federal government. Moreover, Plaintiffs' concession that it is "undisputed that NASA has compelled Caltech to require all of its employees to submit to an allegedly unconstitutional background investigation," demonstrates that Caltech could not possibly have engaged in a willful conspiracy with NASA. *See* Pls.' Opp'n 11.

Plaintiffs also misstate the facts and holding of *Mathis I* in an attempt to avoid *Sutton*. Plaintiffs claim that, in *Mathis I,* the "NRC had encouraged PG&E to implement a particular" drug investigation program, and "***based on these facts alone***, the court held that PG&E could be deemed a 'state actor'. . . ." Pls.' Opp'n 9. This is not what the Ninth Circuit held in *Mathis I.*

In *Mathis I*, PG&E was the key actor implementing the alleged unconstitutional investigation against the plaintiff. *Mathis I*, 891 F.2d at 1432; *see also Sutton*, 192 F.3d at 842 (distinguishing *Mathis I* on grounds that it sufficiently alleged "willful" participation by private actor in a joint activity). And it was PG&E that devised and

operated the drug sting operation against Mathis. *Mathis I*, 891 F.2d at 1432. PG&E then confronted Mathis, interrogated him, and ultimately decided to terminate his employment. *Id.* The substantive and "decisive steps" in the investigation were taken by PG&E. *Mathis I* would be on point here only if: (1) Caltech created the SF-85, (2) Caltech required Plaintiffs to fill out the government's SF-85, (3) Caltech interviewed the employees' references, and (4) Caltech—not NASA—made the decision as to which employees would be permitted to obtain the badge required for them to work at JPL. But Caltech does not undertake any of these steps. Accordingly, *Mathis I* is off-point.[3]

In addition, Plaintiffs did not cite the Ninth Circuit's second decision involving the *Mathis I* litigants, which directly refutes Plaintiffs' mischaracterization of *Mathis I*. *See Mathis II*, 75 F.3d 498. In *Mathis II*, the Ninth Circuit reversed the district court's failure to grant judgment as a mater of law in favor of the private defendant, PG&E. *Id.* at 506. The court rejected the plaintiff's claim that he had demonstrated a joint "course of conduct" resulting in a loss of his job, and instead held that it was not enough to show the government "facilitated" the private actor's decision. *Id.* at 504. Not only are the *Mathis* cases distinguishable, but their ultimate holding supports dismissal of Plaintiffs' constitutional claims against Caltech.

While Plaintiffs attempt to rely on *Carlin,* the *Sutton* court also distinguished *Carlin* from facts like those present here. *See Sutton*, 192 F.3d. at 843. In *Carlin*, after a deputy district attorney threatened to prosecute a private telephone company, the telephone company took action allegedly in violation of the plaintiff's constitutional rights. *See Carlin*, 827 F.2d at 1295. The *Carlin* court held that the prosecutor's coercion of the telephone company converted the private conduct into

[3] The *Sutton* court also distinguished the facts in that case from the facts in *Mathis I* on the basis that *Mathis I* involved a public utility. *See Sutton*, 192 F.3d at 843 (hesitating to apply a "public-utility case as precedent in a private-employer case").

government action. *Id.*[4] *Carlin* was inapplicable in *Sutton*, as it is here, because in *Carlin* "the government directed a specific entity to take a specific (allegedly unconstitutional) action against a specific person." *Sutton*, 192 F.3d at 843 ("Action of a private defendant performed pursuant to such 'particularized state participation,' is fairly attributable to the state. We do not read *Carlin* as applying to cases such as this, which involve only generally applicable laws.") (internal citations omitted). Plaintiffs do not allege that the government directed Caltech to take specific, allegedly unconstitutional, actions against a specific person. Rather, Plaintiffs challenge a NASA-wide directive applicable to all NASA employees and contractors, including Caltech. Moreover, unlike the phone company in *Carlin*, Caltech is not undertaking the "action" of the background investigation.

As Caltech described in its opening brief, Plaintiffs challenge a background investigation program they claim was "mandated and implemented" by the federal government, which is fundamentally inconsistent with an allegation that Caltech willfully participated in a joint activity with the government. *See* Opening Br. 2-4, 9-13 (citing Request for Judicial Notice in Support of Motion to Dismiss ("Judicial Not.") Ex. 4 (Plaintiffs' Reply to Caltech's Opp'n to Mot. for Preliminary Injunction) ("[T]he motion…is is primarily addressed to the federal government, which is mandating and implementing the background investigation process.") and Ex. 3 (NPR 1600.1 § 4.7.1) ("Per FIPS 201, NASA is responsible for ensuring appropriate investigations are conducted and access suitability determined for all contractor personnel."). Plaintiffs' Opposition does not address their judicial admissions, which directly contradict any possible constitutional claim against Caltech. Nor did Plaintiffs discuss, much less challenge, the legal authorities Caltech presented which establish that Plaintiffs' admissions are binding. *See* Opening Br. 4-5, 8 n. 7 (citing *In re Calpine Corp. Secs. Litig.*, 288 F. Supp. 2d 1054, 1076 (N.D. Cal. 2003); *Gospel*

[4] Like it did with respect to *Mathis I*, the *Sutton* court distinguished *Carlin* on the basis that the private defendant was a public utility. *Sutton*, 192 F. 3d at 843.

Missions of Am., 328 F.3d at 557).

In fact, Plaintiffs made even more admissions that require dismissal of their claims against Caltech. On December 5, 2007, after Plaintiffs received Caltech's brief in support of its motion to dismiss, they conceded that the suitability investigation and determination is "being implemented by the ***government***." *See* Pls.' Gov't Opp'n 1. In the same brief, Plaintiffs again admitted that the allegedly unconstitutional conduct is a result of a "***governmental*** policy that vests unfettered discretion in ***government officials***" and the ***government*** is "conditioning [Plaintiffs'] ability to work for NASA on a suitability determination." *Id.* at 2, 6.

II. CALTECH'S NON-SUBSTANTIVE, ADMINISTRATIVE INVOLVEMENT DOES NOT ESTABLISH WILLFUL "JOINT PARTICIPATION" IN THE CHALLENGED GOVERNMENT PROGRAM.

Plaintiffs' allegations are on all fours with the holding in *Sutton*. Plaintiffs allege that a generally applicable government requirement violates their constitutional rights. Caltech is not unique in being subjected to this requirement; rather, all NASA employees and contractors must abide by the government-mandated badge issuance procedures. *See, e.g.*, Judicial Not. Ex. 2 (NASA Interim Directive § 6); Ex. 3 (NPR 1600.1 § 3.1.4). Like the private hospital in *Sutton* that was required to follow a generally applicable law, Caltech here is required to follow a NASA directive applicable to all NASA facilities.

Plaintiffs' amended pleading contains only one allegation of substantive involvement by Caltech. In paragraph 52 of the First Amended Complaint—which Plaintiffs repeat on page 11 of their Opposition—Plaintiffs allege that NASA's Interim Directive states that "derogatory or unfavorable information" yielded from the badge issuance process "will be forwarded to a Human Relations officer for JPL who

will determine 'employment suitability.'"[5]

Plaintiffs suggest that the referenced "Human Relations officer for JPL" is a Caltech employee, although the NASA Interim Directive does not so state. Caltech demonstrated in its opening brief, through matters subject to judicial notice, that this suggestion is directly contradicted by the text of the NASA Interim Directive itself, the purported source for this fact. *See* Opening Br. 12-13. The NASA Interim Directive makes clear that the ***government*** determines employment suitability and private contractors like Caltech are not notified of the basis for the government's determination that an applicant should be denied a badge. *See* Judicial Not. Ex. 2 §§ 11, 13.1.2. The NASA Interim Directive applies to all NASA facilities and does not even mention Caltech. *See id.* § 3. Notably, rather than trying to explain this false allegation, Plaintiffs ignored Caltech's argument altogether.

Finally, Plaintiffs argue here that they can meet *Sutton*'s "something more" requirement through their allegation that Caltech has "elected on its own, to summarily and immediately terminate any employee who does not have a badge to enter JPL." *See* Pls.' Opp'n 10. There is no question that any loss of employment would flow directly from the government's decision to deny access to JPL. Plaintiffs' Amended Complaint makes clear that Plaintiffs were hired to work at JPL and that they accepted employment with Caltech in order to work at JPL. FAC ¶¶ 1-30, 38, 57. If the government will not permit Plaintiffs to have access to JPL, they simply cannot perform the work they were hired to do. Thus, any loss of employment

[5] Plaintiffs also make specific allegations about the NASA Interim Directive in paragraph 43 of the Amended Complaint. As Caltech noted in its opening brief, the Court is therefore entitled to take judicial notice of the NASA Interim Directive in its entirety. *See* Opening Br. 2 n.2. Plaintiffs did not oppose Caltech's Request for Judicial Notice and this Court need not accept as true allegations that contradict matters subject to judicial notice. *See Sprewell v. Golden State Warriors*, 266 F. 3d 979, 988 (9th Cir. 2001).

naturally flows from the government action.[6] If the government does not require the badge, there is no risk to Plaintiffs' employment from Caltech.

More importantly, however, Plaintiffs' allegation is insufficient to establish Caltech as a government actor because *Sutton* recognized that, in order to be a government actor, the private actor typically must take the "decisive step" in causing the constitutional injury. *Sutton,* 192 F.3d at 838. Here, the alleged constitutional "injury" is not the loss of employment. Indeed, Plaintiffs do not allege that any employee has suffered any adverse employment effect from the government's badge issuance program. Rather, the constitutional harm Plaintiffs allege is the threatened privacy invasion as a result of the government-imposed procedures needed to obtain a federal identification badge. Caltech does not engage in any joint activity, nor does it take the "decisive step" which results in the alleged violation of Plaintiffs' constitutional rights.

Plaintiffs' suggestion that employees who refuse or fail to obtain a badge could work at other supposed Caltech facilities also does not support a finding of joint action. *See* Pls.' Opp'n 10.[7] The notion that Caltech should be required to find some new location and work for employees who do not wish to obtain an access badge or else Caltech would be deemed a joint actor in background investigation "mandated and implemented" by the government is not the law. Nor have Plaintiffs cited any legal precedent that would require such an extraordinary restructuring of Caltech's work force. Indeed, such a result would be inconsistent with the Ninth Circuit's decision in *Sutton*. If Plaintiffs' accommodation theory were the law, then the defendant hospital in *Sutton* would have been required to find an alternative job for

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[6] As set forth in the NASA directives, described in more detail in Caltech's opening brief, it is the government that requires a badge to have physical access to NASA facilities or logical access to NASA information systems. *See* Opening Br. 2-4, 9-13. No access is allowed without the badge. Thus, it is the government that might deny the employees without a badge access to JPL, a NASA-owned facility.

[7] The allegation is also inconsistent with other pleadings. Plaintiffs have not alleged that they have sought employment at other facilities and been denied. On the contrary, they insist that it is critical that they remain working at JPL. FAC ¶ 57.

the plaintiff that did not require him to provide a social security number. The Ninth Circuit, however, imposed no such requirement on the hospital, nor did the court suggest the hospital needed to make any other accommodations to avoid the impact of the generally applicable federal law.

CONCLUSION

Plaintiffs' First Amended Complaint should be dismissed in its entirety against Caltech. Plaintiffs concede their Administrative Procedure Act claim and California Constitution claim must be dismissed. Additionally, Plaintiffs' federal Constitution claims against Caltech should be dismissed because Plaintiffs have failed to make any allegations that could ever be sufficient to establish that Caltech is a government actor. Just the opposite is the case: Plaintiffs have made more than half a dozen binding admissions acknowledging that the government alone mandated and implemented the background investigation. Plaintiffs have also acknowledged that the government implemented the challenged background checks at JPL over Caltech's objections, further establishing that granting leave to amend would be futile. *See Allen v. Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990) ("[D]istrict court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint"). Because Plaintiffs have already made binding admissions which would prevent any amendments to avoid dismissal, the complaint should be dismissed with prejudice.

DATED: December 19, 2007

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PROOF OF SERVICE

I, Allison L. Mayo Andrews, 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 Kirkland & Ellis LLP, 777 S. Figueroa Street, Los Angeles, CA 90017.

On December 19, 2007, I served the foregoing document(s) described as:

1. **CALTECH'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT**

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

☒ **[E-mail]** By transmitting via electronic mail the document(s) listed above to the person at the electronic addresses set forth in the above-entitled action.

☒ **[Federal Express]** By placing the document(s) listed above in a sealed overnight courier envelope addressed as set forth below and routing the envelope for pick up within our offices by Federal Express. I am familiar with the firm's practice of collection for pick up and overnight delivery by Federal Express. It is routed for daily pick up in our offices by Federal Express on that same day with overnight courier charges thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the delivery date is more than one day after date of deposit with Federal Express in this affidavit.

☒ **(Federal)** I declare under penalty of perjury that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on December 19, 2007 at Los Angeles, California.

Allison L. Mayo Andrews

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