

Docket No. H030099
Santa Clara Co. Super. Court No. CV053609
Honorable Socrates P. Manoukian

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

JOHN DOE, aka "LASHWR45" on Yahoo!,

Appellant

v.

H.B. FULLER COMPANY

Respondent

APPELLANT'S REPLY BRIEF

(REDACTED VERSION FOR PUBLIC FILE)

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES.....	<i>ii</i>
ARGUMENT	1
I. Because this Case Implicates Doe's First Amendment Rights, the Correct Standard of Review is De Novo.....	1
II. The Doe Declaration Is Reliable Evidence That Doe Was Not an Employee at the Town Hall Meeting Because It Is Made With Personal Knowledge, Supported by the Taber Declaration and Subject to Penalty of Perjury.....	4
III. Even Absent the Doe Declaration, Fuller Has Not Provided Sufficient Evidence to Overcome Doe’s Qualified Immunity.....	7
IV. The Trial Court Erred By Placing the Burden of Persuasion on Doe and Failing to Examine the Text of the Postings	8
A. The Trial Court Wrongly Placed the Burden of Persuasion on John Doe.....	9
B. The Trial Court Issued Its Order Without the Benefit of Knowing What Doe Actually Said, a Critical Piece of Evidence in Fuller's Circumstantial Chain.....	10
V. The Balance of Harms Favors Protecting Doe’s Constitutional Right to Speak Anonymously Over Fuller’s Right to Pursue a Questionable Breach of Contract Claim.....	11
CONCLUSION	13
CERTIFICATE OF COMPLIANCE	

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Columbia v. Seescandy.com</i> , 185 F.R.D. 573 (N.D. Cal. 1999).....	7
<i>Bose Corp. v. Consumers Union</i> , 466 U.S. 485 (U.S. 1984).....	1
<i>Highfields Capital Management L.P. v. Doe</i> , 385 F. Supp. 2d 969 (N.D. Cal. 2004).....	7, 8, 9
<i>McIntyre v. Ohio Elections Commission</i> , 514 U.S. 334 (1995).....	12
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).....	1, 4
<i>Rankin v. McPherson</i> , 483 U.S. 378 (1987)	1

STATE CASES

<i>Cole v. Star Tribune</i> , 581 N.W.2d 364 (Minn. Ct. App. 1998)	5
<i>DVD Copy Control Association, Inc. v. Bunner</i> , 31 Cal. 4th 864 (2003)	1
<i>Davis v. Superior Court</i> , 7 Cal. App. 4th 1008 (5th App. Dist. 1992)	2, 3
<i>Fuller v. Goodyear Tire & Rubber Co.</i> , 7 Cal. App. 3d 690 (4th App. Dist.1970)	4, 5
<i>Hill v. National Collegiate Athletic Association</i> , 7 Cal. 4th 1 (1994)	2, 3
<i>Jensen v. Duluth Area YMCA</i> , 688 N.W.2d 574 (Minn.App. 2004)	11
<i>John B. v. Superior Court</i> , 38 Cal. 4th 1177 (2006).....	3
<i>Johnson v. Superior Court</i> , 80 Cal. App. 4th 1050 (2d App. Dist. 2000)	2, 3
<i>Mack v. Superior Court</i> , 259 Cal. App. 2d 7 (1st App. Dist. 1968)	5
<i>O'Grady v. Superior Court</i> , 139 Cal. App. 4th 1423 (6th App. Dist. 2006).....	1, 2, 4

Pioneer Electrics (USA), Inc. v. Superior Court,
40 Cal. 4th 360 (2007)2, 3

Planned Parenthood Golden Gate v. Superior Court,
83 Cal. App. 4th 347 (1st App. Dist. 2000)2, 3

Rancho Publications v. Superior Court, 68 Cal. App. 4th 1538
(1999).....2, 7, 8, 9

Save Open Space Santa Monica Mountains v. Superior Court,
84 Cal. App. 4th 235 (2d App. Dist. 2000).....4

RULES

Minn. R. Civ. P. 11.015

ARGUMENT

I. Because this Case Implicates Doe's First Amendment Rights, the Correct Standard of Review is *De Novo*.

Because the trial court's order infringes on Doe's Federal right to free speech, this court must review the trial court's order *de novo*. When determining whether the First Amendment protects speech, the Supreme Court has held that it is "compelled to examine for [itself] the statements in issue and the circumstances under which they were made to see whether or not they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Rankin v. McPherson*, 483 U.S. 378, 386 (1987). *See also Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (U.S. 1984) ("[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286 (1964).

This Court has followed the Supreme Court's mandate for *de novo* review. "Where a *Federal right* has been denied as the result of a factual finding or where a conclusion of law as to a *Federal right* and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts, the reviewing court must independently review these findings." *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1467 (6th App. Dist. 2006) (emphasis added); *See also DVD Copy Control Ass'n, Inc. v. Bunner*, 31 Cal. 4th 864, 889-90 (2003). *O'Grady* involved a challenge to Federal free press rights. In *O'Grady*, this court reviewed *de novo* the "[f]acts that are germane to the First

Amendment analysis” in deciding whether or not to grant discovery of the identities of confidential news sources.¹ *Id.* at 1466-67.

Without a doubt, this case is a free speech case. Doe seeks the protection of the qualified immunity from civil discovery “grounded in the free speech and privacy provisions of the United States and California Constitutions.” (CT. at 21-24, 317); *Rancho Publications v. Superior Court*, 68 Cal. App. 4th 1538, 1547 (1999). The free speech issue arises in the context of a discovery matter, but resolving the dispute requires a First Amendment analysis. Regardless of what one calls the case, the First Amendment analysis is fundamental, required, and reviewed *de novo*.

Fuller cites a number of cases for the proposition that courts must apply the traditional abuse of discretion standard for discovery orders that implicate California’s state constitutional right to privacy. (Resp’t Br. at 12-13.) However, those cases are inapposite because none of them involved the *Federal* right to free speech. Four of the cases involve the application of a balancing test like the one set forth in *Hill v. Nat’l Collegiate Athletic Ass’n*, 7 Cal. 4th 1 (1994), in which “the trial courts necessarily have broad discretion to weigh and balance the competing interests” where the California state right to privacy is the only constitutional right involved. *Pioneer Elecs. (USA), Inc. v. Superior Court*, 40 Cal. 4th 360, 371 (2007) (applying the *Hill* test); *Johnson v. Superior Court*, 80 Cal. App. 4th 1050, 1068 (2d App. Dist. 2000) (applying the *Hill* test); *Planned Parenthood Golden Gate v. Superior Court*, 83 Cal. App. 4th 347, 357-58 (1st App. Dist. 2000) (applying the *Hill* balancing test as applied in *Johnson*); *Davis v. Superior Court*, 7 Cal. App. 4th 1008, 1013-

¹ Fuller mistakenly argues that *O’Grady* involved the discovery of the *content* of communications rather than the identity of a speaker. (Resp’t Brief at 14.) However, the quote Fuller relies on in its brief was a part of the court’s discussion of whether the Stored Communications Act protected emails from discovery. *O’Grady*, 139 Cal App. 4th at 1449. This discussion is inapposite to the court’s application of *de novo* review to the discovery of the identity of confidential sources.

14 (5th App. Dist. 1992) (applying a *Hill*-like balancing test in a case pre-dating *Hill*).

In *Pioneer*, for example, the plaintiff sought discovery of the identities of consumers who had complained to defendant Pioneer about a certain DVD player. *Pioneer*, 40 Cal. 4th at 364. Pioneer objected to the discovery, arguing that the California state right to privacy prohibited the disclosure of this information without affirmative consent from its consumers. *Id.* The court applied the *Hill* balancing test in holding that permitting opt-in instead of opt-out of the information disclosure adequately protected the consumers' state right to privacy. *Id.* at 371. Because no Federal or First Amendment rights were involved in this case, which only discussed what rights consumers had under the California state right to privacy, the court was not compelled to review *de novo*. *Id.* at 366; *see also Davis*, 7 Cal. App. 4th at 1012-15 (applying the abuse of discretion standard where the California state right to privacy was involved but not any Federal or free speech rights); *Johnson*, 80 Cal. App. 4th at 1068 (same); *Planned Parenthood Golden Gate*, 83 Cal. App. 4th at 357-58 (same).

John B. v. Superior Court, 38 Cal. 4th 1177 (2006) the court applied *de novo* review to a state right to privacy case, not an abuse of discretion standard as Fuller claims. In *John B.*, the plaintiff wife sought discovery of her former husband's HIV status as part of her suit for infecting her with the disease. The California Supreme Court reviewed under an abuse of discretion standard the question of whether the plaintiff was **statutorily** entitled to the discovery. *Id.* at 1186. However, the court gave independent review to the constitutional question, performing the required balancing test itself, without any deference to the factual findings of the trial court. *Id.* at 1198-1202. Based on this independent, *de novo* review, the court reversed the trial court in part. *Id.* at 1200.

Save Open Space Santa Monica Mountains v. Superior Court, 84 Cal. App. 4th 235 (2d App. Dist. 2000) was an attorney's fee dispute where the defendants sought to learn whether the public interest environmental organization plaintiffs were litigating on behalf of the private interests of its association members, an important question in attorney's fee cases. This Second Appellate District writ dealt with the right to associational privacy, not the freedom of speech that the Supreme Court discussed in *Rankin*, *Bose*, and *Sullivan*. Unlike *Rankin*, *Bose*, and *Sullivan*, this court stated that it was applying an abuse of discretion standard, but it nevertheless reversed after weighing the interests of the litigants, holding that the trial court order was too broad. The case provides no reason to stray from this court's holding in *O'Grady*, or from established law in *Rankin*, *Bose*, and *Sullivan*.

This case implicates the Federal right to free speech, so this court must review the trial court's order *de novo*. This court must independently review the trial court findings in order to pass upon the question of whether Doe's Federal right to anonymous speech has been improperly infringed. This *de novo* review extends to the trial court's implied resolution of conflicting facts in the Doe and Volpi declarations as well, since the facts established in those declarations are crucial to the First Amendment analysis.

II. The Doe Declaration Is Reliable Evidence That Doe Was Not an Employee at the Town Hall Meeting Because It Is Made With Personal Knowledge, Supported by the Taber Declaration and Subject to Penalty of Perjury.

This Court can rely on Doe's anonymous declaration because the statements made in it are facts that are based on personal knowledge and both he and his attorney, Daniel Taber, can be held accountable for the declaration's truthfulness. The two cases cited by Fuller, *Fuller v.*

Goodyear Tire & Rubber Co., 7 Cal. App. 3d 690 (4th App. Dist. 1970) and *Mack v. Superior Court*, 259 Cal. App. 2d 7 (1st App. Dist. 1968), only hold that “declarations which set forth only conclusions, opinions or ultimate facts are insufficient” because those conclusions, opinions or ultimate facts cannot be tested for their truthfulness. *Goodyear Tire*, 7 Cal. App. 3d at 693; *Mack*, 259 Cal. App. 2d at 10. In *Goodyear Tire*, the court held that declarations by two employees of Goodyear conclusorily stating that certain tires involved in an accident did not contain defects were deficient because they “rely for their effect upon conclusions and opinions of the declarants.” *Id.* In *Mack*, the court first recognized that “an affidavit which sets forth only hearsay and conclusionary material is incompetent.” *Mack*, 259 Cal. App. 2d at 10. However, the court went on to hold the declaration at issue in the case competent because the declarant was “in a position to have personal knowledge of the facts asserted and the declaration, with the exception of one immaterial sentence, [took] the form of direct statements of fact.” *Id.* Unlike the declaration in *Goodyear Tire*, and like the declaration in *Mack*, Doe’s declaration sets forth provable facts that are based on personal knowledge, not opinions or conclusions that cannot be tested for truthfulness.

Doe knows he was not an employee of Fuller present at the November Town Hall Meeting. Taber supports Doe's assertion with direct and uncontradicted testimony that //REDACTED// (Taber Decl., App. Opening Br. Ex. E ¶¶ 4, 21.) Doe and Taber have personal knowledge of this fact; Fuller does not. Both aver under penalty of perjury, and Taber does so with the professional responsibility of first making an investigation and having a reasonable basis for his statements. *See* Minn. R. Civ. P. 11.01; *Cole v. Star Tribune*, 581 N.W.2d 364 (Minn. Ct. App. 1998) (holding that counsel has an affirmative duty to investigate the factual and

legal underpinnings of a pleading, and failure to do so results in the mandatory imposition of sanctions under Rule 11).

Neither Fuller, nor Fuller's counsel, knows who Doe is. They say they believe that Doe is an employee who was at the Town Hall Meeting. But this conclusion is unwarranted because Doe's two short postings do not contain facts that only someone at the Town Hall Meeting would have known. Instead, the postings are general in nature, and contain the type of information that Fuller has both previously and subsequently disclosed publicly. *See* Appellant's Opening Br. at 15-18.

Doe's anonymity does not shield him from perjury charges. The majority of the facts set forth in Doe's declaration can be proven without knowledge of Doe's identity, including paragraphs 10 through 16. Those facts that can be independently verified include:

- ♦ //REDACTED//

If Doe lied about any of those facts, then Doe would be subject to perjury charges, and the court could unmask his identity, either through Yahoo! or through counsel, to punish him. Those facts that do depend on Doe's identity, such as //REDACTED//, have sufficient indicia of reliability because both he and his attorney, Taber, have sworn to the statements. If these are lies, the penalty of perjury would not only reach Doe, but easily reach Taber, who is not only a known personage, but also a member of the Bar and an officer of the court.

Even the trial court recognized that the mere fact that the Doe declaration was anonymous did not rob it of its reliability. Despite the anonymous nature of Doe's postings, the trial court noted that "John Doe is competent to testify as to his own belief of status of employment, his personal conversations, and the content and timing of his postings at the Yahoo! message board because these statements are based on his personal knowledge." (CT. at 318.) The trial court recognized the impropriety of

forcing Doe to reveal his name “because whether Plaintiff will be able to obtain the identity of John Doe is the matter at issue.” (*Id.*) Indeed, disfavoring otherwise credible anonymous declarations would put individuals seeking to protect their First Amendment rights in a Catch-22; stay anonymous and lose the case, or reveal your identity and lose your rights while winning the case in theory only.

III. Even Absent the Doe Declaration, Fuller Has Not Provided Sufficient Evidence to Overcome Doe’s Qualified Immunity.

Regardless of the reliability of the Doe declaration, Fuller cannot meet its evidentiary burden because the Volpi, Hedberg, and Bohnen declarations fail to set forth competent evidence that Doe was present at the Town Hall Meeting and violated a confidentiality agreement. Plaintiffs seeking discovery of an anonymous defendant’s identity must “adduce competent evidence . . . address[ing] all of the inferences of fact that plaintiff would need to prove in order to prevail” and not “simply plead and pray.” *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969, 975 (N.D. Cal. 2004); *See* Appellant Opening Br. at 11-14. In *Columbia v. seescandy.com*, a plaintiff in a trademark dispute was able to satisfy this evidentiary burden only after putting forth 31 customer emails as evidence of actual confusion, coupled with evidence that the plaintiff’s mark was strong, that defendant used the same marketing channels and provided the same service, and that the defendant’s mark was identical to the plaintiff’s. 185 F.R.D. 573, 580 (N.D. Cal. 1999). In *Rancho Publications*, a plaintiff in a libel case failed to meet its evidentiary burden with conclusory allegations that the authors of nondefamatory advertorials were the same authors as other allegedly defamatory writings based on thematic and stylistic similarities. 68 Cal. App. 4th at 1550-51. The plaintiff deposed 11 people to see who had written the advertorials, but did not discover the author’s identity. *Id.* at 1551. It alleged that one of the deponents was the

author, the only question was which one. *Id.* The appellate court nevertheless denied discovery because to do so would be to “assume[] precisely the answer the challenged discovery seeks to procure.” *Id.*

None of Fuller’s evidence proves that Doe was present at the Town Hall Meeting or that he was employed by Fuller at the time of the meeting. Fuller would have met its burden if it had pointed to specific pieces of information in Doe’s postings that only those present at the Town Hall meeting could have known. None of Fuller’s declarations do this. The Volpi declaration is the only one that discusses what was said at the Town Hall Meeting and what was said in the postings. However, Volpi’s declaration does not identify the specific information in Doe’s postings that was only known by those present in the Town Hall meeting. Volpi’s general statements that //REDACTED// are no different than the plaintiff’s surmise in *Rancho Publications* that one of the 11 deponents was the author, had lied during deposition, and the only questions was which one. These are mere conclusory allegations which fall well short of the evidence the court in *Seescandy.com* found sufficient. The First Amendment requires more. *Highfields*, 385 F. Supp. 2d at 975.

Fuller does not identify a single assertion in Doe's postings that constitutes information known only by attendees of the November Town Hall Meeting at the time of the postings. Without this crucial evidence, Fuller leaves a gaping chasm in its theory of Doe’s liability, and the First Amendment does not allow this court to leap across that chasm without further evidence of Doe's liability, which the record utterly lacks.

IV. The Trial Court Erred By Placing the Burden of Persuasion on Doe and Failing to Examine the Text of the Postings.

In two instances, Fuller asks this court to ignore the plain language of the trial court’s order in order to excuse clear error on the part of the magistrate. The trial court plainly states, in clear and unambiguous

language, that (1) it believed the burden of persuasion belonged to Doe, and (2) it believed the postings were not provided to the trial court. Fuller attempts to sidestep these errors by playing semantic games with the former and calling the latter a mere typo.

A. The Trial Court Wrongly Placed the Burden of Persuasion on John Doe.

The court's statement was clear: "[T]his court believes that the burden of persuading the Court to quash the subpoena is on John Doe." (CT. at 316.) The court said this not once, but twice. (CT. at 318) ("As this Court stated above, it believes that John Doe has the burden of persuading this Court that Plaintiff is not entitled to take his deposition."). Fuller claims that, rather than shifting the burden of persuasion to Doe, the court merely placed the burden on Doe to prove that "H.B. Fuller is not entitled to take John Doe's deposition." (Resp't Br. at 31.) However, forcing Doe to prove that Fuller did not meet its burden is equivalent to shifting the burden to Doe. The law requires that the plaintiff provide a "real evidentiary basis for believing that the defendant has engaged in wrongful conduct" in order to discover the defendant's identity, not that defendants must persuade courts to the contrary. *Highfields*, 385 F. Supp. 2d at 975; *See also Rancho Publications*, 68 Cal. App. 4th at 1549 ("[T]he party seeking discovery must make a higher showing of relevance and materiality than otherwise would be required for less sensitive material."). The trial court conducted exactly the type of burden shifting rejected by the courts in *Highfields* and *Rancho Publications*.

B. The Trial Court Issued Its Order Without the Benefit of Knowing What Doe Actually Said, a Critical Piece of Evidence in Fuller's Circumstantial Chain.

The trial court made a clear and unambiguous statement that it believed that “[n]either the specific nature of the confidential material nor the postings themselves are provided to this Court.” (CT at 316.) Fuller asks this Court to find that this was “a typo” because Judge Manoukian interjected at one point during one of the hearings in this matter, “And they have copies of the postings in the papers.” (RT at 12:2-3.) The structure of the sentence and its context in the Order make it impossible that it was a typo. Perhaps Judge Manoukian knew that the postings were in the papers at the time of the oral arguments, but had not looked at them. Perhaps he had, and they were later lost. In any case, the Order is clear; the trial court did not consider the postings when issuing its order. Indeed, the Clerk’s inability to find the Volpi declaration (which contained the postings) when it was designated to be included in the appellate record is independent evidence that the trial court clerk had misplaced the postings and that they were, as Judge Manoukian said so clearly, not in the file for him to rely upon. (CT at 330.)

Fuller also points to instances where the parties referred to or discussed the nature of the postings to show that the trial court did examine the postings, but such instances are not relevant to whether or not the court *independently* examined the text of the postings *in their entirety*. The issue here is not whether the court was aware of the parties’ interpretations of the postings, but whether the court made an independent examination of the postings to decide for itself whether the information disclosed in them constituted confidential information. The court’s order makes clear that it did not conduct such an independent examination because it did not know

the postings were provided. Failure to make such an independent determination is error on the part of the trial court.

V. The Balance of Harms Favors Protecting Doe's Constitutional Right to Speak Anonymously Over Fuller's Right to Pursue a Questionable Breach of Contract Claim.

The balance between John Doe's constitutional right to anonymous speech and Fuller's right to proceed with its questionable breach of contract claim heavily favors John Doe. If Fuller is permitted to discover John Doe's identity, it will not be able to proceed with its breach of contract claim. Because John Doe was not an employee at the time of the meeting and was not present at the meeting, and because the information Doe posted was not confidential in the first place, Fuller's breach of contract claim has no merit. Even if Fuller could somehow show that there was a valid contract that was breached, years have passed since the postings were made and no harm has resulted, then or now. To the contrary, the same information Doe posted has been made public by Fuller in SEC filings and press releases. *See* Appellant Opening Br. at 22-23. Harm is an element of a breach of contract claim in Minnesota. *Jensen v. Duluth Area YMCA*, 688 N.W.2d 574, 578-79 (Minn.App. 2004) ("A breach of contract claim fails as a matter of law if the plaintiff cannot establish that he or she has been damaged by the alleged breach.") Fuller suffered no harm, therefore Fuller has no claim.

Fuller will gain nothing from its breach of contract claim. Its only satisfaction will be to discover the identity of a critic of its reorganization. Therefore, no harm will come about by preventing Fuller from proceeding with its claim.

On the other hand, the harm to John Doe's First Amendment rights will be severe and irreparable. If this court grants discovery of Doe's identity, he will be robbed of his right of anonymity and made vulnerable to

extra-legal punishment. Knowing Doe's identity, Fuller can use its power as a large, multinational corporation to harass and intimidate Doe in ways completely unrelated to its breach of contract claim. This sort of extra-legal punishment is exactly the type of harm from which the First Amendment was intended to protect anonymous speakers. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995) ("The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.").

Piercing Doe's veil of anonymity on such a minimal evidentiary showing will also chill future speech by anonymous individuals. If an anonymous speaker's identity can be discovered based solely on the broad allegations and conclusory claims of employee confidentiality that Fuller makes in this case, future speakers will not trust in the First Amendment to protect them. They will constantly fear that those against whom they speak anonymously might bring circumstantial breach of contract claims against them which they could not satisfactorily counter, even with sworn declarations made on personal knowledge. Allowing Fuller to discover Doe's identity would not only harm Doe's First Amendment rights, but also set a rule that would chill future speakers and harm the vitality of the marketplace of ideas that the First Amendment is meant to protect.

CONCLUSION

For the reasons stated above, this Court should reverse the trial court's order and grant Doe's Motion to Quash Fuller's subpoena.

Date: April 12, 2007

By: _____
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CERTIFICATE OF COMPLIANCE

I, Jennifer Granick, counsel for Appellant in the instant matter *H.B. Fuller Company v. John Doe, aka "LASHWR45" on Yahoo!*, Case No. H030099, hereby certify that the foregoing document was prepared pursuant to and in compliance with California Rule of Court Section 8.204(c)(1). The brief contains a total of 3,846 words and was formatted in Times Roman, 13-point typeface.

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

Dated: April 12, 2007

Respectfully submitted,

Jennifer Stisa Granick
Attorney for Appellant

PROOF OF SERVICE

I, the undersigned hereby declare:

I am over eighteen years of age and not a party to the above action. My business address is 559 Nathan Abbott Way, Stanford, CA 94305-8610.

On April 12, 2007, I caused to be served the following documents:

APPELLANT'S REPLY BRIEF

via Federal Express, by placing four (4) true and correct copies of the above-mentioned document in a properly addressed and sealed envelope in a pickup box routinely maintained by Federal Express, in conformity with the usual business practices of the Stanford Law School, on the following interested party:

Clerk of the Court
State of California
Supreme Court
350 McAllister Street
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and *via* Federal Express, by placing one (1) true copy of the above-mentioned document in a properly addressed and sealed envelope in a pickup box routinely maintained by Federal Express, in conformity with the usual business practices of the Stanford Law School, on the following interested parties:

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PROOF OF SERVICE

Clerk of the Court
Superior Court of California
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I declare, under the penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed this 12th day of April, 2007 at Stanford, California.

Amanda Smith