Andrew D. Skale, Esq. (SBN 211096)
askale@mintz.com
Nathan R. Hamler, Esq. (SBN 227765)
nhamler@mintz.com
MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO PC
3580 Carmel Mountain Road, Suite 300
San Diego, CA 92130
Telephone: (858) 314-1500
Facsimile: (858) 314-1501

Attorneys for Plaintiff/Counterclaim-Defendant
UPPER DECK INTERNATIONAL B.V.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UPPER DECK INTERNATIONAL B.V., a Netherlands corporation,

Plaintiff,

v.

THE UPPER DECK COMPANY, a California corporation; THE UPPER DECK COMPANY, a Nevada Corporation; RICHARD McWILLIAM, an Individual; and Does 1-10,

Defendants.

THE UPPER DECK COMPANY, a Nevada Corporation; RICHARD McWILLIAM, an Individual,

Counterclaimant,

v.

UPPER DECK INTERNATIONAL B.V., a Netherlands corporation; NICO BLAUW, an Individual; BLUE OCEAN ENTERTAINMENT B.V., a Netherlands limited liability company; LARISSA BLAUW, an Individual; and Roes 1-20,

Counterclaim-Defendants.

Case No. 11CV1741 LAB (RBB)

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UPPER DECK INTERNATIONAL B.V.'S AND NICO BLAUW'S SPECIAL MOTION TO STRIKE DEFAMATION COUNTER-CLAIM UNDER CALIFORNIA CIVIL PROCEDURE CODE SECTION 425.16

Date: March 12, 2012
Time: 11:30 a.m.
Hon. Larry Alan Burns
Courtroom 9

Complaint Filed: 08/04/2011

I. INTRODUCTION

In Richard McWilliam's first amended counterclaim (FACC) for defamation, he alleges the sky is blue. But, in his opposition to UDI's and Nico Blauw's motion to strike, everything changes. The target has moved, almost entirely, and now it's cloudy and raining; McWilliam abandons his allegations in the FACC and makes up entirely new ones—mostly through incompetent declarations replete with hearsay. His attempt to rewrite the allegations in this manner should be rejected.

Instead, the Court should focus on the allegations of the FACC. As demonstrated in UDI's and Mr. Blauw's opening papers, the FACC's allegations invoke protection under California's anti-SLAPP statute. And McWilliam has not meet—nor can he meet—his burden to prove he had a valid enough case to survive the anti-SLAPP statute's scrutiny.

Bootstrapping on his attempt to rewrite the FACC through his opposition, McWilliam then urges a very narrow interpretation of the anti-SLAPP statute. But the statute, itself, and pertinent case law are clear: the anti-SLAPP statute must be interpreted broadly. And, when the statute is interpreted correctly, it easily applies to the challenged statements (even to the nearly-new version of the alleged-defamatory statements that first surfaced in the opposition) because those alleged defamatory statements involve how a public figure (McWilliam) is running Upper Deck, a once-industry leader in a multi-billion dollar industry. Thus, the challenged statements directly implicate UDI's and Mr. Blauw's exercise of free speech in connection with an issue of public interest. Moreover, even McWilliam's rewritten version of the supposedly defamatory statements in his opposition papers fails to give enough detail to definitively determine whether the alleged defamatory statements were made in connection with then-ongoing legal proceedings.

Because the anti-SLAPP statute applies, McWilliam has the burden to establish, at this stage, a prima facie case. While not disputing this burden, McWilliam significantly understates what it entails. To establish he is likely to prevail, McWilliam was required to submit ***admissible***, ***competent*** evidence establishing a prima facie case. But all he submitted was incompetent evidence and inadmissible hearsay. And this hearsay and incompetent evidence is wholly contradicted by real evidence of what actually transpired.

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Because McWilliam failed to meet his burden to establish a prima facie case, his defamation counterclaim should be dismissed, without any further proceedings or discovery. While McWilliam half-heartedly claims a need for discovery if the Court is inclined to grant this motion, he does nothing to substantiate this need or establish the good cause necessary for any such discovery.

Finally, the anti-SLAPP statute mandates that UDI and Mr. Blauw be awarded their attorney's fees in having to defend against this counterclaim. McWilliam does not dispute UDI's and Mr. Blauw's entitlement to these fees if they prevail on this motion.

II. MCWILLIAM ABANDONS THE FACC (AKA: A COMPARISON OF THE FACC WITH MCWILLIAM'S OPPOSITION TO THIS MOTION)

The Court's principal focus in determining whether the anti-SLAPP "issue of public interest" prong is met should be on McWilliam's *allegations*, not his *arguments* recasting those allegations. *See Thomas v. Quintero*, 126 Cal. App. 4th 635, 646 (2005) (noting that § 425.16(b) allows for a motion to strike to be filed against "any cause of action" that challenges a party's exercise of First Amendment rights in connection with a public issue, and that "cause of action" is used interchangeably in the anti-SLAPP statute with "claim," "complaint," "action" and the phrase "the facts on which the liability … is based"). McWilliam's opposition, however, ignores the allegations actually made in the FACC.

Specifically, as noted in the opening brief, McWilliam's FACC alleged that "[t]hroughout 2010, Mr. and Mrs. Blauw, on several occasions, made false and defamatory statements regarding Mr. McWilliam to Mr. Brian Grey, various associates of Mr. McWilliam, and to other members of the relevant business community." FACC ¶ 116. And, McWilliam claimed, "[t]he statements falsely stated or implied that: a. Mr. McWilliam cannot be trusted and is dishonest; and b. Mr. McWilliam is a bad/incompetent, owner, executive, and member of the relevant business community." FACC ¶ 118. As also shown in the opening papers and in the separate motion to dismiss (Docket No. 33) (which has been fully briefed and which is awaiting decision by the Court), these allegations aren't sufficient to state a valid claim for defamation. But, even if they sufficed, they squarely implicate the protection of California's anti-SLAPP statute.

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McWilliam's opposition does not defend these allegations. He submits no declaration from Brian Grey substantiating the alleged defamatory statements supposedly made to Mr. Grey by Mr. Blauw. Instead, McWilliam abandons these allegations entirely. Now, he claims through his own declaration and the declaration of his handyman, that Mr. Blauw supposedly made a host of other statements. Paragraph 5 of the Vandoorn declaration reads in part:

> For example, Mr. Blauw ***falsely stated or implied to other people*** that Mr. McWilliam was the main problem with the company; that he cannot be trusted and is dishonest; that Mr. McWilliam was making a joke of the company; that Mr. McWilliam refused to come visit the company when requested by Mr. Blauw; that Mr. Blauw and not Mr. McWilliam was the one with the business ideas; that Mr. McWilliam is a bad/incompetent owner, executive and member of the business community in Amsterdam; that Mr. McWilliam would bankrupt and shut down the company and terminate all of the employees; that Mr. McWilliam was going to reduce all of the employee salaries, and that Mr. McWilliam was going to sell the company for liquidation. The false rumors hurt Mr. McWilliam's reputation at the company and in the community.

(emphasis added). Tellingly, while the allegations have multiplied in number, they suffer from the same defects as the original FACC allegations. Mr. Vandoorn does not say when these statements were supposedly made. Nor does he say to whom they were made. Indeed, Mr. Vandoorn doesn't even provide facts explaining how he has personal knowledge that any of these statements were actually made. He doesn't declare that he overheard or witnessed Mr. Blauw making them. Thus, these newly-written allegations suffer the same pleading defects as the original ones. Nor are they supported by competent evidence.

McWilliam's declaration is equally devoid of substance. It merely recites the same litany of supposed-defamatory statements, and then McWilliam declares "***I have been informed*** that Mr. Blauw has repeatedly stated or implied to business associates, vendors, and Upper Deck and UDI employee …" McWilliam Decl., ¶ 11. *See also* McWilliam Decl., ¶ 8 ("***Several people told me*** that McWilliam was treating me like his puppet…)' ¶ 7 ("In 2010, several business associates, friends, and co-workers ***approached me to tell me that they had very disturbing conversations*** with Mr. Nico Blauw about my capacity and competence ….") (emphasis added).

In sum, in deciding whether the defamation counterclaim should be stricken, the Court should examine what's actually been alleged. It should discount McWilliam's attempt to rewrite

the allegations in response to the anti-SLAPP motion. But, whether the Court focuses only on the FACC's allegations or also considers the newly-raised opposition allegations, the conclusion is the same: McWilliam's allegations don't even allege a cognizable claim for defamation.

III. THE CHALLENGED SPEECH IS PROTECTED UNDER THE ANTI-SLAPP STATUTE

A. McWilliam Urges a Narrow Reading of the Anti-SLAPP Statute, Contravening Both the Statute, Itself and Case Law Interpreting It

After trying to rewrite his allegations through his opposition, McWilliam then attempts to rewrite the anti-SLAPP statute, itself, and urges a narrow reading of that statute. In so arguing, McWilliam ignores all of the authority to the contrary discussed in the opening brief.

Specifically, as detailed in the opening brief, the California Legislature through the statute itself specifically mandated that it be construed ***broadly***. O.B. at 11-12, Cal. Civ. P. Code § 425.16(a); *Integrated Holdings, Inc. v. Fitzgibbons*, 140 Cal. App. 4th 515, 523 (Cal. App. 2006); *see also Hilton v. Hallmark Cards*, 580 F.3d 874, 886 (9th Cit. 2009) (recognizing that the Legislature's instruction that section 425.16 be broadly construed was added "to the statutory preamble as a correction of prior judicial decisions adopting narrowing constructions").

McWilliam ignores this mandate. And McWilliam's opposition fails to address or factually distinguish any of the cases cited in UDI's and Mr. Blauw's opening brief, which faithfully follow and apply this broad construction mandate in concluding that challenged conduct was protected under CCP § 425.16(e)(4). *See* O.B. at 16-17 (citing and discussing *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027 (Cal. App. 2008); *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 479 (Cal. App. 2000); *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 650-51 (Cal. App. 1996); *Rivera v. First Databank, Inc.*, 187 Cal. App. 4th 709 716 (Cal. App. 2010); *Integrated Healthcare Holdings, Inc. v. Fitzgibbons*, , 140 Cal. App. 4th 515, 522 (Cal. App. 2006); *Hilton* v. *Hallmark Cards*, 580 F.3d 874, 888 (9th Cir. 2009)).

As discussed below, when these cases are applied to the facts here, anti-SLAPP protection under at least section 425.16(e)(4) is triggered.

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B. The Challenged Speech Concerns a Matter of Public Interest, Namely, How a Public Figure is Running a Once-Industry Leader in the Highly Visible, Multi-Billion Trading Card Industry

When the statute is correctly interpreted and applied to the facts here, the alleged defamatory statements invoke anti-SLAPP protection because they directly concern how a public figure—Richard McWilliam—has run and continues to run Upper Deck, a once industry leader in what is a multi-billion trading card industry with thousands of collectors and thousands of members of the business community. *See* O.B., at 16-17. *See also* O.B., at 10-11 (citing and discussing evidence showing how both McWilliam and Upper Deck are in the public limelight and part of an industry followed by, and affecting, many people). In addition to ignoring the case law, McWilliam's opposition also ignores all of this evidence submitted with UDI's and Mr. Blauw's opening papers, demonstrating the vast public interest in McWilliam and the Upper Deck Company.

Instead, McWilliam argues (without any factual support), his companies are privately held, and how he runs his business is only of interest to "a few" or "a handful" of collectors. Incorrect. McWilliam's opposition does not dispute that the counterfeiting of Yu-Gi-Oh! trading cards, alone, involved The Upper Deck US entities putting over 600,000 counterfeit "rare" cards into circulation, affecting or potentially affecting thousands of collectors in that trading card community, alone. Nor does McWilliam dispute any of the evidence showing the high visibility of the Upper Deck U.S. entities and McWilliam's trustworthiness and competency to run those companies in the wake of this counterfeiting scandal and its enormous repercussions and reverberations, both through Upper Deck internationally as well as the trading card community.

Ignoring these facts and evidence, McWilliam instead tries to characterize the alleged defamatory comments about his trustworthiness and competency as a private or workplace dispute, and cites cases holding under specific facts that a private or workplace dispute did not arise to the level of a topic of widespread public interest. In essence, McWilliam tries to shoehorn a size 14 foot into a size 6 shoe.

McWilliam in particular relies heavily on *Weinberg v. Feisel*, 110 Cal.App.4th 1122 (2003). But *Weinberg* involved whether one rare coin collector defamed another by accusing him of being a thief by stealing a rare coin, which accusation defendant made in an industry collecting

publication with a low circulation. *Id*. at 1132. Thus, that case is very different from the facts here, where McWilliam's competency to run Upper Deck US and his trustworthiness in the wake of the Yu-Gi-Oh! counterfeiting scandal potentially is of interest and impacts thousands of collectors who buy or are considering buying Upper Deck products or trading cards.

Similarly, McWilliam relies on *Du Charme v. International Brotherhood of Electrical Workers*, 110 Cal.App.4th 107 (2003), and argues that to be protected under the anti-SLAPP statute, Mr. Blauw's alleged defamatory statements about McWilliam must have contributed to an ongoing controversy, discussion or dispute. (Opp at 11). But, accepting *Du Charme* as an accurate statement of the law, the threshold, factual predicate of this rule is that the alleged defamatory statement in issue does not otherwise concern a public figure or an issue of widespread public interest. Here, the alleged defamatory statements ***do*** involve a public figure (books have been written about McWilliam and Upper Deck, and he and the company have been and continue to be the subject of many blogs and public scrutiny) and ***are*** a topic of widespread public interest (the Yu-Gi-Oh! scandal, alone, involved over 600,000 counterfeit cards potentially impacting thousands of traders, and this product is only one of many that the Upper Deck companies distribute or have distributed). Thus, *Du Charme* is factually inapposite, and has been subsequently distinguished and limited by other courts. *See, e.g., Fleming v. City of Oceanside*, 2011 WL 197586, at * 3 (S.D. Cal. 2011) (holding that *Du Charme* rule applies only where alleged defamatory statement did not involve an issue of widespread public interest); *Integrated Healthcare*, 140 Cal.App.4th at 524 (same; concluding "[w]e have no difficulty placing the financial survival of four hospitals within the county into the category of '*widespread* public interest,' and thus not subject to the 'ongoing controversy' rule enunciated in *Du Charme*").

Finally, McWilliam cites—and misstates the holding in—*Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO*, 105 Cal.App.4th 913 (2003). McWilliam incorrectly argues that *Rivero* holds that disputes in the workplace, or internal workplace disputes or rumors, do not qualify as an issue of public interest. (Opp. At 11-12). But the court in *Rivero*, itself, specifically denounced such a broad holding. Instead, *Rivero* reviewed an internal dispute over plaintiff's management of eight custodians and merely stated that "unlawful workplace activity

below some threshold level of significance is not an issue of public interest." *Rivero* , 105 Cal.App.4th at 924. The court cautioned, however, that "**more significant waste or abuse of funds will rise to the level of public issue.**" *Id*. at 925 (emphasis added). Thus, *Rivero* is factually not even close to this dispute, and does not establish the rule advanced by McWilliam.

In sum, McWilliam's position that Mr. Blauw's alleged defamatory statements do not involve an issue of public interest under CCP § 425.16(e)(4) depends on ignoring facts and misapplying the case law.

C. McWilliam Continues to Hide the Ball through His Steadfast Refusal to Disclose Enough Detail About the Alleged Defamation to Truly Evaluate Whether Section 425.16(e)(1) or (2) Applies

Finally, as argued in UDI's and Mr. Blauw's opening brief, to the extent McWilliam challenges statements made during either the U.S. Konami/Upper Deck or the European Konami/UDI litigation, or statements made in connection with issues under review in one of those litigations, such statements would be protected under CCP § 425.16(e)(1), (e)(2), or both.

McWilliam does not dispute the legal premise, but instead criticizes the opening papers for "hedging" on whether sections 425.16(e)(1) or (2) applies. But this hedging was necessitated by the defects in McWilliam's allegations. Without identifying to whom the alleged defamatory statements were actually made, and when (other than generally saying 2010), it is impossible to know whether section 425.16(e)(1) or (e)(2)'s protections are invoked. (O.B. at 13 n.4).

Now, McWilliam argues that none of the alleged statements was made in the context of any litigation. But McWilliam cites no support (declaration or otherwise) for this statement. And, as discussed above, neither the Vandoorn nor the McWilliam declarations sheds any further light on the context in which any of the alleged statements was actually made. Thus, even after the opposition, UDI and Mr. Blauw are left to hedge as to whether, independent of section 425.16(e)(4)'s protections, any of the alleged defamatory statements are also protected under subsection (e)(1) or (2). This only serves to further underscore the defects in McWilliam's defamation counterclaim and why it should not survive scrutiny here.

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IV. MCWILLIAM FAILED TO MEET HIS BURDEN TO SHOW HE IS LIKELY TO PREVAIL ON THE MERITS OF HIS DEFAMATION COUNTERCLAIM

In any event, because the alleged defamatory statements (even as rewritten through the McWilliam and Vandoorn declarations) concern an issue of public interest, those statements, at a minimum, are protected under section 425.16(e)(4). The burden therefore shifts to McWilliam to demonstrate, at the outset, a prima facie case. This means he must "establish a probability that [he] will prevail on [his] claim." *Wilbanks,* 121 Cal. App. 4th at 894.

McWilliam does not dispute that, if the anti-SLAPP statute applies, he has this burden. Instead, he significantly understates and tries to minimize his burden. McWilliam has a burden to establish a prima facie case (meaning a probability that he will prevail on his claim). And he can only meet this burden with ***admissible, competent evidence***. O.B., at 20, citing *Paiva v. Nichols*, 168 Cal. App. 4th 1007, 1017 (Cal. App. 2008) (Anti-SLAPP opponent "may not rely solely on [his] complaint…; instead [his] proof must be made upon competent admissible evidence"); *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 26 (Cal. App. 2007) ("[D]eclarations that lack foundation or personal knowledge, or that are argumentative, speculative, impermissible opinion, hearsay, or conclusory are to be disregarded"); *HMS Capital, Inc. v. Lawyers Title, Co.*, 118 Cal. App. 4th 204, 212 (Cal. App. 2004) (same). McWilliam's opposition papers fall well short of satisfying this burden.

First, irrespective of the substance and content of the McWilliam and Vandoorn declarations submitted with the opposition, the fact remains that McWilliam has failed at a pleading level to even sufficiently plead a claim for defamation. Those pleading defects also infect McWlliam's attempts to redraft his allegations through declarations (as discussed above). Thus, McWilliam cannot prevail as a threshold matter because he hasn't even adequately pled defamation.

Second, if the Court disagrees and finds the allegations sufficient, the "evidence" submitted with McWilliam's opposition falls well short of what is required to meet McWilliam's burden because it is all inadmissible and incompetent evidence. McWilliam's declaration is infected with hearsay about what unidentified people supposedly told him Mr. Blauw said or had said about him. Similarly, the Vandoorn declaration does not establish any foundation or demonstrate that Mr.

Vandoorn in fact has personal knowledge about the alleged defamatory statements supposedly made by Mr. Blauw. All Mr. Vandoorn says is that Mr. Blauw "***falsely stated or implied to other people …***" a host of alleged defamatory statements about McWilliam. But again, Vandoorn doesn't even attest that he personally witnessed or overheard these alleged statements. Thus, no foundation is laid for Vandoorn having personal knowledge that any of these alleged statements was actually uttered by Mr. Blauw.

Third, many of the alleged defamatory statements are statements of opinion, even as recast through the opposition declarations. McWilliam's own opposition acknowledges that statements of opinion are inactionable. (Opp. at 13). And McWilliam does nothing to distinguish the cases cited in UDI's and Mr. Blauw's opening papers, holding various opinions inactionable. (O.B. at 19-20).

Finally, the incompetent declarations submitted with McWilliam's opposition are easily rebutted by the testimony of a host of individuals who ***do*** personal knowledge. Collectively, these declarations confirm that the Vandoorn declaration is highly questionable and incompetent. They also show that—contrary to McWilliam's portrayal that he was incapacitated in 2009 and 2010 because of medical issues he experienced in 2008—McWilliam's public drunkenness and shenanigans in 2009 and 2010 were merely an extension and continuance of a reckless, alcohol-infused life style that McWilliam had been living for many years preceding any medical issues in 2008. And they show that, throughout his various antics and public embarrassments, Mr. Blauw was often the one picking McWilliam up and defending him, not putting him down. *See* Declarations of Bruno van Speybroeck; Philippe van Wijnen; Gregory Benassar; Joeri Hoste; Serap Dag (submitted herewith). Thus, opinions or factual statements about McWilliam's competency, honesty, leadership, etc. are well-grounded in truth.

V. THE DEFAMATION CLAIM SHOULD BE DISMISSED WITHOUT DISCOVERY

McWilliam also requests that, if the Court is inclined to grant the anti-SLAPP motion, McWilliam first be allowed discovery on this claim. This request should be rejected.

McWilliam cites *Moser v. Triarc Companies, Inc.*, 2007 WL 3026425 (S.D. Cal. 2007) in support of his request for discovery. But *Moser* notes that discovery in response to an anti-SLAPP motion is inappropriate and unnecessary if, like here, the anti-SLAPP motion attacks the allegations

as defective on their face. Indeed, as discussed above, the allegations are so defective that one ***still*** cannot definitively determine whether they are also protected under sections 425.16(e)(1) or (2), and whether the substance of any such communications would therefore be absolutely shielded by the litigation privilege (making any discovery about them irrelevant).

Moreover, *Moser* also notes CCP § 425.16(g)'s stay of discovery when an anti-SLAPP motion is filed, "except that the court may allow ***specified*** discovery 'on notice motion and for good cause shown[.]'" *Moser*, 2007 WL 3026425, at *2 (quoting CCP § 425.16(g)). Here, while UDI and Mr. Blauw filed their anti-SLAPP motion on January 24, 2012, McWilliam waited over a month, until his opposition, to raise the supposed need for discovery. And even then, McWilliam fails to identify with any specificity or precision what discovery he supposedly needs and why he needs it. His vague, generalized plea for discovery does not establish the good cause required for such discovery to be allowed. *See, e.g., Lafayette Morehouse, Inc. v. Chronicle Publ. Co.*, 37 Cal.App.4th 855, 868 (1995) (to meet good cause standard for discovery under CCP § 425.16(g), proponent must show that evidence "is reasonably shown to be held or known by *defendant* or its agents or employees"); *Sipple v. Foundation for Nat'l Progress*, 71 Cal.App.4th 226, 247 (1999) (denying motion for discovery under 425.16(g) where party requesting discovery failed to show it was necessary to oppose the anti-SLAPP motion).

VI. UDI AND MR. BLAUW ARE ENTITLED TO AN AWARD OF ATTORNEY'S FEES IN HAVING TO DEFEND AGAINST IT

Finally, McWilliam does not dispute that, if UDI and Mr. Blauw prevail on this motion, the anti-SLAPP statute mandates they be awarded all of their fees in having to defend against the defamation counterclaim. (O.B., at 22). Thus, not only should the defamation counterclaim be stricken, but, if the Court grants the anti-SLAPP motion, UDI and Mr. Blauw request that they be allowed to submit proof of these recoverable fees and costs.

Dated: March 5, 2012

MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO PC

By s/Nathan R. Hamler
Nathan R. Hamler, Esq.

Attorneys for UPPER DECK INTERNATIONAL B.V. and NICO BLAUW

CERTIFICATE OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of San Diego, State of California, and am not a party to the above-entitled action.

On March 5, 2012, I filed a copy of the following document:

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UPPER DECK INTERNATIONAL B.V.'S AND NICO BLAUW'S SPECIAL MOTION TO STRIKE DEFAMATION COUNTER-CLAIM UNDER CALIFORNIA CIVIL PROCEDURE CODE SECTION 425.16

by electronically filing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

- **Alex M. Tomasevic** atomasevic@nblaw.org, kklinzman@nblaw.org, rshelton@nblaw.org
- **Andrew D. Skale** askale@mintz.com, bwagner@mintz.com, Docketing@mintz.com, kearle@mintz.com
- **Craig McKenzie Nicholas** cnicholas@nblaw.org, kklinzman@nblaw.org
- **Mei-Ying M. Imanaka** mimanaka@nblaw.org, kklinzman@nblaw.org
- **Nathan R. Hamler** nhamler@mintz.com, docketing@mintz.com, kjenckes@mintz.com

Executed on March 5, 2012, at San Diego, California. I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

s/Nathan R. Hamler
Andrew D. Skale, Esq.
Nathan R. Hamler, Esq.

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