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9
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11 OUR CHILDREN'S EARTH FOUNDATION, and
12 COMMUNITIES FOR A BETTER ENVIRONMENT

13 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **IN AND FOR THE COUNTY OF SAN FRANCISCO**

15 ENVIRONMENTAL LAW FOUNDATION; OUR
16 CHILDREN'S EARTH FOUNDATION; and
17 COMMUNITIES FOR A BETTER
18 ENVIRONMENT, On Behalf of the General Public

19 Plaintiffs,

20 v.

21 LAIDLAW TRANSIT INC. dba LAIDLAW
22 EDUCATION SERVICES; LAIDLAW TRANSIT
23 SERVICES, INC.; DURHAM SCHOOL
24 SERVICES; DURHAM SCHOOL SERVICES,
25 L.P.; NATIONAL EXPRESS CORPORATION; and
26 DOES 1 through 100, inclusive,

27 Respondents.

CASE NO.: CGC-06-451832

**FIRST AMENDED COMPLAINT
FOR CIVIL PENALTIES,
STATUTORY, EQUITABLE AND
INJUNCTIVE RELIEF BASED
UPON:**

(1) Violation of Cal. Health & Safety
Code § 25249.6 *et seq.*

Complaint filed: May 2, 2006

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1 (Continuation of listing of additional counsel)

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1 Plaintiffs, by and through their attorneys, bring this action on behalf of the general public
2 on information and belief, except those allegations that pertain to the named plaintiffs or to their
3 attorneys (which are alleged on personal knowledge), and hereby allege as follows:

4 **INTRODUCTION**

5 **(The Hazards of Diesel Engine Exhaust)**

6 1. This action seeks, among other remedies, civil penalties and injunctive relief to
7 redress the actions of defendants that cause widespread exposure of children to diesel engine
8 exhaust, a chemical known to the State of California to cause cancer in humans. Specifically,
9 plaintiffs challenge defendants' operation of school buses for public and private schools and
10 school districts throughout the State of California that emit diesel engine exhaust, in the process
11 exposing passengers to diesel engine exhaust from the buses without prior warning. Defendants'
12 actions, including but not limited to their failure to provide warnings, violate California Health &
13 Safety Code §§ 25249.6 *et seq.*

14 2. Diesel engine exhaust poses a significant health threat, particularly to children.
15 Diesel exhaust and the many chemicals, gases and particulates that it contains have been linked
16 to decreases in lung function, cancer, asthma exacerbations, and premature death. The scientific
17 evidence associating diesel exhaust and human health problems is quite extensive. In fact, the
18 excess cancer risk in California from diesel particles is higher than any other Toxic Air
19 Contaminant identified by California's Office of Environmental Health Hazard Assessment
20 ("OEHHA").

21 3. Proposition 65 requires that consumers be warned before they are exposed to
22 substances that cause cancer. (The Safe Drinking Water and Toxic Enforcement Act, California
23 Health and Safety Code § 25249.6, *et seq.*, also known as "Proposition 65"). On October 1,
24 1990, diesel engine exhaust was declared to be a carcinogen subject to Proposition 65. On
25 October 1, 1991, the warning requirements under Proposition 65 became effective for diesel
26 engine exhaust. *See* Health and Safety Code § 25249.10(b).

27 4. By exposing school children to diesel engine exhaust without providing any warning,
28 defendants have violated and will continue to violate Proposition 65. Plaintiffs are therefore

1 entitled to civil penalties. Additionally, by committing the acts set forth herein, defendants have
2 violated, and unless enjoined will continue to violate, Proposition 65. Therefore, plaintiffs are
3 entitled to injunctive relief to compel defendants to comply with Proposition 65 in the operation
4 of their diesel buses, including its requirement that the passengers of defendants' buses be
5 provided with a clear and reasonable warning that defendants' diesel buses emit a chemical
6 known to the State of California to cause cancer.

7 **PARTIES**

8 5. Plaintiff ENVIRONMENTAL LAW FOUNDATION ("ELF") is a California
9 nonprofit organization founded on Earth Day in 1991. ELF has a longstanding interest in
10 reducing health hazards to the public posed by diesel engine exhaust, and particularly to protect
11 those with the least choice and greatest vulnerability to toxic risks: children and inner city
12 dwellers. ELF is dedicated to the preservation and enhancement of human health and the
13 environment. ELF brings this action pursuant to California Health and Safety Code § 25249.7(d)
14 in the interest of the general public.

15 6. Plaintiff OUR CHILDREN'S EARTH FOUNDATION ("OCE") is a California
16 nonprofit organization dedicated to protecting the public, especially children, from the harmful
17 effects of air and water pollution. OCE has an interest in reducing the harmful effects of toxic
18 air pollution. OCE brings this action pursuant to California Health and Safety Code
19 § 25249.7(d) in the interest of the general public.

20 7. Plaintiff COMMUNITIES FOR A BETTER ENVIRONMENT ("CBE") is an
21 environmental health and justice non-profit organization dedicated to promoting clean air, clean
22 water and the development of toxin-free communities. CBE has a long-standing interest in
23 reducing health hazards to the public posed by toxic chemicals. Founded in 1978, CBE
24 combines grassroots organizing and education with scientific research and legal action in the
25 service of environmental health and justice. CBE brings this action pursuant to California Health
26 and Safety Code § 25249.7(d) in the interest of the general public.

27 8. ELF, OCE and CBE (collectively, "Plaintiffs") bring this action in the public interest
28 as allowed under California law, as approved by the voters, in Health and Safety Code section

1 25249.7(d). Plaintiffs do not allege, nor have they suffered, an injury cognizable under Article
2 III of the United States Constitution.

3 9. Defendant LAIDLAW TRANSIT INC., doing business as LAIDLAW EDUCATION
4 SERVICES (“Laidlaw”), is a Delaware corporation and a “person in the course of doing
5 business” within the meaning of Health and Safety 25249.11 with its principal place of business
6 located at 55 Shuman Boulevard, #400, Naperville, Illinois 60563. Laidlaw operates diesel
7 school buses for schools throughout the State of California that expose riders to diesel engine
8 exhaust.

9 10. Defendant LAIDLAW TRANSIT SERVICES, INC. (“Laidlaw Transit Services”) is a
10 “person in the course of doing business” within the meaning of Health and Safety 25249.11 with
11 its principal place of business located at 55 Shuman Boulevard, #400, Naperville, Illinois 60563.
12 Laidlaw Transit Services operates diesel school buses for schools throughout the State of
13 California that expose riders to diesel engine exhaust.

14 11. Defendant DURHAM SCHOOL SERVICES (“Durham Services”) is a “person in the
15 course of doing business” within the meaning of Health and Safety 25249.11 with its principal
16 place of business at Executive Towers West, 1431 Opus Place, Suite 200, Downers Grove,
17 Illinois 60515. Durham Services operates diesel school buses throughout the State of California
18 that expose riders to diesel engine exhaust.

19 12. Defendant DURHAM SCHOOL SERVICES, L.P. (“Durham Services, L.P.”) is a
20 “person in the course of doing business” within the meaning of Health and Safety 25249.11 with
21 its principal place of business at 1431 Opus Place #200, Downers Grove, IL 60515 and 9011
22 Mountain Ridge Drive, Suite 200, Austin, Texas 78759. Durham Services, L.P. operates diesel
23 school buses for schools throughout the State of California that expose riders to diesel engine
24 exhaust.

25 13. Defendant NATIONAL EXPRESS CORPORATION (“National Express”) is a
26 “person in the course of doing business” within the meaning of Health and Safety 25249.11 with
27 its principal place of business at 9011 Mountain Ridge Drive, Suite 200, Austin, Texas 78759
28 and 3901 Watersedge Drive, Austin, TX 78731. National Express operates diesel school buses

1 for schools throughout the State of California that expose riders to diesel engine exhaust.
2 DURHAM SCHOOL SERVICES, DURHAM SCHOOL SERVICES, L.P., and NATIONAL
3 EXPRESS CORPORATION are collectively referred to as “Durham”.

4 14. The true names and capacities of defendants sued herein under California Code of
5 Civil Procedure § 474 as DOE defendants 1 through 100, inclusive, are presently unknown to
6 Plaintiffs, who therefore sue these defendants by such fictitious names. Plaintiffs will seek to
7 amend this Complaint and include these Doe defendants’ true names and capacities when they
8 are ascertained. Each of the fictitiously named defendants is responsible in some manner for the
9 conduct alleged herein and for the injuries suffered by the general public.

10 15. Laidlaw, Durham and defendants DOES 1 through 100 (collectively, “Defendants”)
11 each have employed ten (10) or more persons at all times relevant to this action.

12 16. In doing the things alleged in the cause of action into which this paragraph is
13 incorporated by reference, each and every Laidlaw Defendant was acting within the course and
14 scope of this agency or employment, and was acting with the consent, permission, and
15 authorization of each of the remaining Laidlaw Defendants. All actions of each Laidlaw
16 Defendant alleged in the causes of action into which this paragraph is incorporated by reference
17 were ratified and approved by every other Laidlaw Defendant or their officers or managing
18 agents, and by agreeing to actively conceal the true facts as alleged herein. Alternatively,
19 Laidlaw Defendants aided, conspired with and/or facilitated the wrongful conduct of other
20 Laidlaw Defendants.

21 17. In doing the things alleged in the cause of action into which this paragraph is
22 incorporated by reference, each and every Durham Defendant was acting within the course and
23 scope of this agency or employment, and was acting with the consent, permission, and
24 authorization of each of the remaining Durham Defendants. All actions of each Durham
25 Defendant alleged in the causes of action into which this paragraph is incorporated by reference
26 were ratified and approved by every other Durham Defendant or their officers or managing
27 agents, and by agreeing to actively conceal the true facts as alleged herein. Alternatively,
28

1 Durham Defendants aided, conspired with and/or facilitated the wrongful conduct of other
2 Durham Defendants.

3 **JURISDICTION AND VENUE**

4 18. This Court has jurisdiction over all causes of action asserted herein pursuant to the
5 California Constitution, Article VI, Section 10, because this case is a cause not given by statute
6 to other trial courts.

7 19. This Court has jurisdiction over Defendants named herein because Defendants either
8 are located in this State or are foreign corporations authorized to do business in California and
9 registered with the California Secretary of State, or who do sufficient business in California,
10 have sufficient minimum contacts with California, or otherwise intentionally avail themselves of
11 the markets within California through the operation of their diesel buses and the promotion, sale
12 and marketing of their diesel buses for use in California to render the exercise of jurisdiction by
13 the California courts permissible under traditional notions of fair play and substantial justice.

14 20. Venue is proper in this Court because the exposure occurred in this County, a
15 substantial portion of the activities complained of herein occurred here, contracts relating to the
16 operation of vehicles causing the exposure were entered into, made and were to be performed in
17 this County, and Defendants have received substantial compensation from the operation of the
18 vehicles causing the exposure at issue in this County by doing business here and exposing San
19 Francisco school children to a known carcinogen which had an effect in this County.

20 21. With respect to violations of Health and Safety Code § 25249.6, *et seq.*, on May 16,
21 2005, pursuant to Health and Safety Code § 25249.7, Plaintiffs ELF and OCE mailed notices of
22 Laidlaw's violations of section 25249.6 of Proposition 65, as alleged herein.

23 22. On June 30, 2006 Plaintiff CBE mailed notices of violations of section 25249.6 of
24 Proposition 65 by each of the Defendants, as alleged herein.

25 23. On June 30, 2006 Plaintiffs ELF, OCE and CBE mailed notices of Durham's
26 violations of section 25249.6 of Proposition 65, as alleged herein.

27 24. All of the "Notices of Violation of Proposition 65" were mailed to each of the
28 Defendants, as well as to the California Attorney General, the District Attorney of every county

1 in California, and the City Attorneys of any cities with populations according to the most recent
2 decennial census of over 750,000. Each notice included a certificate of merit executed by
3 Plaintiffs' attorneys stating that the person executing the certificate had consulted with one or
4 more persons with relevant and appropriate experience or expertise who has reviewed the facts,
5 studies or other data regarding exposure to the listed chemical that is the subject of the notice,
6 and that, based on that information, the person executing the certificate believes there is a
7 reasonable and meritorious case for this private action. Factual information sufficient to
8 establish the bases of the certificates of merit has been attached to the certificates of merit served
9 on the California Attorney General.

10 25. None of these public prosecutors has commenced and is diligently prosecuting an
11 action against the violations at issue herein, although the notice period provided in § 25249.7 has
12 elapsed since such notice was provided.

13 **STATUTORY AND REGULATORY BACKGROUND**

14 26. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative statute
15 passed as Proposition 65 by a vote of the People in 1986.

16 27. Proposition 65 provides the circumstances under which persons must be warned
17 before they are exposed to chemicals that cause cancer, birth defects, or other reproductive harm.
18 Health and Safety Code § 25249.6 states the warning requirement:

19 No person in the course of doing business shall knowingly and intentionally
20 expose any individual to a chemical known to the state to cause cancer or
21 reproductive toxicity without first giving clear and reasonable warning to such
22 individual, except as provided in section 25249.10.

23 28. Proposition 65 establishes a procedure by which the Governor lists chemicals known
24 to the state to cause cancer. Health and Safety Code § 25249.8. Pursuant to this authority, on
25 October 1, 1990 diesel engine exhaust was placed on the list of carcinogens.

26 29. The warning requirements under Proposition 65 for a given chemical go into effect
27 one year after the Governor places that chemical on the list. Health and Safety Code
28

1 § 25249.10(b). Therefore, diesel engine exhaust became subject to a Proposition 65 warning on
2 October 1, 1991.

3 FACTS

4 **What is Diesel Engine Exhaust?**

5 30. Diesel engine exhaust is a complex mixture of gases and fine particles formed by the
6 combustion of diesel fuel. Many known and potential cancer-causing substances such as arsenic,
7 benzene, formaldehyde, nickel and polycyclic aromatic hydrocarbons are present in the exhaust
8 gases, some of which are bound to the surfaces of the diesel-exhaust particles. The exhaust
9 contains more than 40 substances that California Air Resources Board (“ARB”) has identified as
10 Toxic Air Contaminants.

11 31. Diesel exhaust particles are small enough (less than 10 microns in diameter, about
12 one-seventh of the width of a human hair) to be inhaled deep into the lungs, where they can
13 affect lung performance and cause damage over time.

14 32. The small size of the particles in diesel exhaust and the large number of toxic
15 chemicals it contains make diesel exhaust a particularly potent threat to the human body.

16 33. Up to 85% of fine particles remain in the lungs 24 hours after initial exposure. This
17 means that diesel exhaust has easy, long-lasting access to the most sensitive parts of the lungs.

18 **What are the Health Effects of Diesel Engine Exhaust?**

19 34. Numerous human epidemiological studies have demonstrated that diesel exhaust
20 increases cancer risk. In fact, long-term exposure to diesel exhaust particles poses the highest
21 cancer risk of any toxic air contaminant evaluated by OEHHA.

22 35. The ARB estimates that about seventy percent (70%) of the cancer risk that the
23 average Californian faces from breathing toxic air pollutants stems from diesel exhaust particles.

24 36. Diesel exhaust is associated with a wide range of health effects beyond cancer,
25 including neurological effects, a weakened immune system, respiratory disease and
26 cardiovascular disease.

27 37. Short-term exposure to diesel exhaust causes inflammation in the bloodstream and
28 thickening of the blood, symptoms which are associated with cardiovascular disease and heart

1 attacks. Short-term exposure can even have immediate effects like dizziness, headaches, light-
2 headedness, and nausea. People who inhale diesel exhaust can experience nasal irritation,
3 breathing difficulties, coughing and chest tightness.

4 38. Long-term exposure to diesel exhaust has been associated with other respiratory
5 effects including chronic inflammation of lung tissue. Several studies have also linked diesel
6 exhaust particles to asthma, suggesting that these particles can increase the severity of respiratory
7 symptoms in individuals with pre-existing conditions like asthma.

8 39. Children, the elderly, individuals with asthma, cardiopulmonary disease and other
9 lung diseases, and individuals with chronic heart diseases are particularly susceptible to the
10 effects of diesel exhaust. Evidence continues to mount that children, especially those with
11 asthma, are exceptionally sensitive to the effects of fine particle pollution, such as diesel exhaust.

12 40. Diesel exhaust affects children more than adults because children inhale more
13 pollutants per pound of body weight than adults and children have faster rate of respiration,
14 narrower airways, and a less mature ability to metabolize, detoxify, and excrete toxins.
15 Exposures that occur in childhood are of special concern because children's developmental
16 processes can easily be disrupted and the resulting dysfunctions may be irreversible. In addition,
17 exposures that occur earlier in life appear more likely to lead to disease than do exposures later
18 in life.

19 41. There is no known safe level of exposure to diesel exhaust for children, especially
20 those with respiratory illness.

21 **How are Children Exposed to Diesel Engine Exhaust?**

22 42. Out of the six million school children in California, approximately one million are
23 transported by school buses.

24 43. A recent study concluded that the average school bus is nine years old and emits
25 nearly two times more pollution per mile than a big rig truck.

26 44. Studies by the ARB and others have established that much of a bus' own diesel
27 exhaust enters the cabin and exposes passengers through a phenomenon called "self-pollution."
28

1 45. A child riding in a diesel school bus may be exposed to as much as four times the
2 level of toxic diesel exhaust as someone riding in a car traveling the same route immediately
3 ahead of it.

4 46. A recent study conducted in the Los Angeles area found that children riding on diesel
5 school buses inhale roughly one million times more school bus exhaust (by mass) than non-riders
6 in the general population.

7 47. Children on school buses are exposed to levels of diesel exhaust that are five to ten
8 times higher than background levels.

9 48. Closing the bus' windows simply makes the situation worse. Concentrations of diesel
10 vehicle-related pollutants are significantly higher on board a conventional diesel bus when the
11 windows are closed due to the intrusion of the bus' own exhaust.

12 **Additional Facts**

13 49. Defendants operate their diesel buses across the State of California and promote, sell
14 and market their diesel buses for the transportation in California of school-age children.

15 50. The diesel buses at issue in this Complaint release diesel engine exhaust into the
16 interior passenger area of the buses, which results in human exposure to the diesel engine
17 exhaust without prior warning.

18 51. Defendants have not warned or informed the public that their buses expose
19 passengers to diesel engine exhaust, a chemical known to the State of California to cause cancer.
20 Defendants have also promoted and marketed their diesel buses for use without any warning
21 regarding the exposure to diesel engine exhaust. Thus, Defendants have, in the course of doing
22 business, knowingly and intentionally exposed individuals to a chemical known to the State of
23 California to cause cancer without providing a clear and reasonable warning, as required by
24 California Health and Safety Code §§ 25249.6 and 25249.11(f). As a direct result of
25 Defendants' acts and omissions, the general public in California is being regularly, unlawfully,
26 and involuntarily exposed to diesel engine exhaust, a known carcinogen, without a clear and
27 reasonable warning.

1 **FIRST CAUSE OF ACTION**

2 (California Health and Safety Code §§ 25249.6 *et seq.*)

3 (By All Plaintiffs Against All Defendants)

4 52. Plaintiffs incorporate by reference all of the above paragraphs as if fully set forth
5 herein.

6 53. The people of the State of California have declared in Proposition 65 their right “[t]o
7 be informed about exposure to chemicals that cause cancer, birth defects or other reproductive
8 harm.” Cal. Health & Saf. Code §25249.5, (Proposition 65), Note § 1(b).

9 54. To carry out those statutory purposes, Proposition 65 requires that a clear and
10 reasonable warning be given by persons who, in the course of doing business, knowingly and
11 intentionally expose any individual to a chemical known to the State of California to cause
12 cancer.

13 55. On October 1, 1990, diesel engine exhaust was listed as a chemical known to the
14 State of California to cause cancer. No warning needs to be given concerning a chemical so
15 listed until one year after the chemical first appears on the list. Cal. Health & Saf. Code
16 § 25249.10(b). Therefore, on October 1, 1991, diesel engine exhaust became subject to the
17 warning requirements of Proposition 65.

18 56. Proposition 65 provides that any person “violating or threatening to violate” the
19 statute may be enjoined in any court of competent jurisdiction. *Id.*, § 25249.7. In addition,
20 violators are liable for civil penalties of up to \$2,500 per day per violation, recoverable in a civil
21 action. *Id.*, § 25249.7(b).

22 57. Defendants have engaged and continue to engage in conduct that violates Health and
23 Safety Code § 25249.6. This conduct includes the operation of their diesel buses and the
24 promotion, sale and marketing of their diesel buses for use in California, the foreseeable use of
25 which results in exposing the riding public to diesel engine exhaust, known to the State of
26 California to cause cancer, without first providing a clear and reasonable warning pursuant to
27 Health and Safety Code §§ 25249.6 and 25249.11(f). Defendants have, therefore, in the course
28

1 of doing business, knowingly and intentionally exposed individuals to a chemical known to the
2 State of California to cause cancer without first providing a clear and reasonable warning.

3 58. By the above-described acts, Defendants are liable for a civil penalty of up to \$2,500
4 per day per individual exposure to diesel engine exhaust through the use of Defendants' school
5 buses, pursuant to Health and Safety Code § 25249.7(b).

6 **THE NEED FOR INJUNCTIVE RELIEF**

7 59. By committing the acts alleged herein, Defendants have caused irreparable harm for
8 which there is no plain, speedy, or adequate remedy at law. In the absence of equitable relief, the
9 general public will continue to be unwarned and involuntarily exposed to diesel engine exhaust
10 by riding Defendants' diesel school buses, which creates a substantial risk of irreparable physical
11 injury.

12 WHEREFORE, Plaintiffs pray for judgment against Defendants as set forth below.

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1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiffs pray for the following relief:

3 A. A temporary restraining order, preliminary and permanent injunction enjoining
4 Defendants, their agents, employees, assigns, and all persons acting in concert or participating
5 with them from:

6 (1) operating their diesel school buses that expose passengers to diesel engine
7 exhaust in California, without first providing a clear and reasonable warning that the
8 operation of these buses results in exposure to diesel engine exhaust, a chemical known
9 to the State of California to be a carcinogen;

10 B. An award of statutory penalties of \$2,500 for each violation of Proposition 65
11 throughout the State of California;

12 C. Reasonable attorneys' fees and costs;

13 D. Such other and further relief as this court may deem necessary and proper.

14 Respectfully submitted,

15 ADAMS BROADWELL JOSEPH & CARDOZO
16 MARC D. JOSEPH
17 RICHARD T. DRURY

18 ENVIRONMENTAL LAW FOUNDATION
19 JAMES R. WHEATON
20 LYNNE R. SAXTON

21 OUR CHILDREN'S EARTH FOUNDATION
22 MICHAEL COSTA

23 COMMUNITIES FOR A BETTER ENVIRONMENT
24 SHANA LAZEROW
25 ADRIENNE BLOCH

26 DATED: _____, 2006

27 **RICHARD TOSHIYUKI DRURY**
28 Attorneys for Plaintiffs
Environmental Law Foundation,
Our Children's Earth Foundation and
Communities for a Better Environment

1 Proof of Service

2 I am employed in the County of San Mateo, California. I am over the age of 18
3 and not a party to this action. My business address is 601 Gateway Blvd., Suite 1000,
4 South San Francisco, California, 94080.

5 On _____, 2007, I served the foregoing document described as:

6 **FIRST AMENDED COMPLAINT FOR CIVIL PENALTIES, STATUTORY,
7 **EQUITABLE AND INJUNCTIVE RELIEF BASED UPON: (1) Violation of Cal. Health
8 **& Safety Code § 25249.6 et seq.******

9 on the parties listed below by placing a true and correct copy thereof in a sealed envelope and by
10 causing the envelope to be sent, by **U.S. MAIL** addressed to:

11 Todd O. Maiden
12 ReedSmith LLP
13 Two Embarcadero Center, Suite 2000
14 San Francisco, CA 94111-3922
15 FAX: 415-391-8269

16 James Wheaton
17 Lynne Saxton
18 Environmental Law Foundation
19 1736 Franklin, 9th floor
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21 FAX: 510-208-4562

22 Mike Costa
23 Our Children's Earth Foundation
24 100 First Street, Suite 100-367
25 San Francisco, CA 94105
26 FAX: 815-642-9181

27 I declare under penalty of perjury of the laws of the California that the foregoing is true and
28 correct and that this was executed on _____, 2007 in South San Francisco,
California.
