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Camarillo Health Care District

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF VENTURA

JANE ROZANSKI, an individual

Petitioner,

v.

CAMARILLO HEALTH CARE DISTRICT, a California Special Health Care District,

Respondent

CAMARILLO ACORN,

Real Party In Interest

Case No. 56-2016-00489673-CU-WM-VTA_

RESPONDENT CAMARILLO HEALTH CARE DISTRICT'S BRIEF IN OPPOSITION TO WRIT OF MANDATE; DECLARATION OF MICHAEL VELTHOEN

Hearing Date: March 16, 2017
Hearing Time: 10:00 a.m.
Dept. No.: 20

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I. INTRODUCTION

Transparency is critical to the legitimacy of public institutions. When the public perceives – whether correctly or not – that those charged with responsibility for the public's business are abusing their positions, trust in those institutions wanes. For this reason, California enshrines in its constitution the right of the public to access certain records maintained by governmental entities. While petitioner Jane Rozanski ("Rozanski") may dismiss these principles as "bromides," the Legislature has declared that such "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Government Code §6250.

Acknowledging its responsibilities under the California Public Records Acts ("CPRA"), respondent Camarillo Health Care District ("the District") has concluded that certain emails and voicemails between Rozanski, the former Chief Executive Officer of the District, and Ralph Ferguson ("Ferguson") are subject to disclosure pursuant to requests made by the Camarillo Acorn ("the Acorn") and the Ventura County Star ("the Star"). Those emails and voicemails reflect that Rozanski and Ferguson – the District's outside counsel from 2012 to 2015 – were engaged in a secret, longstanding romantic relationship. During this relationship, Rozanski was responsible for reviewing and approving Ferguson's bills. The legal fees paid by the District increased **approximately fivefold** while Ferguson was its attorney, even though the District was not involved in any litigation or other unusual legal activity.

Rozanski argues that her relationship with Ferguson is none of the public's business. She claims that the Acorn and the Star are pursuing these records for prurient or exploitive purposes. Rozanski also impugns the District's motivations, suggesting that the District unnecessarily publicized its allegations against Rozanski and Ferguson. Such arguments are meritless – and completely beside the point. When Rozanski decided to hire her secret boyfriend as the District's general counsel, she made her relationship with Ferguson the public's business. Rozanski blames everybody but herself for the predicament she finds herself in.

In any event, Rozanski's arguments prove that disclosure of the emails and voicemails is mandated under the CPRA. In her declaration, Rozanski asserts under penalty of perjury: "The

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District claims my voicemails evidence a personal, intimate relationship between myself and Ferguson, and that because of that relationship Ferguson conspired together to charge excessive legal fees to the District, to the benefit of Ferguson. These allegations are absolutely false." In other words, Rozanski denies that she had a romantic relationship with Ferguson. Rozanski has repeated this denial to other members of the public. As the Court will quickly conclude upon review of the emails and voicemails, this denial is a lie. Unless the Court denies this writ, the public will not know whether it is a lie.

To answer this writ, this Court must therefore answer only one question: does the public have the right to know whether a Chief Executive Officer of a public agency was engaged in a secret affair with the agency's general counsel to whom the agency paid hundreds of thousands of dollars over a period of three years? The question answers itself.

II. RELEVANT FACTS

The District is a California healthcare district organized pursuant to Health & Safety Code § 3200 et seq. Declaration of Kara Ralston ("Ralston Decl."), ¶2. This District, which is supported by taxpayer funds, provides community-based healthcare services, such as an Adult Day Care Center, health screenings, immunizations, nutrition and meal programs, transportation services, caregiver resources, and related classes and programs. *Id.* The District has 33 employees and an annual budget of approximately $3.4 million. *Id.*

Rozanski was hired as the Chief Executive Officer of the District in 1993. Declaration of Jane Rozanski ("Rozanski Decl."), ¶ 3. Ralph Ferguson ("Ferguson") served as Chief Executive Officer of the Association of California Healthcare District ("ACHD"), an association formed to serve healthcare districts in California. Ralston Decl., ¶ 3. ACHD provides, among other things, advocacy and training services for its member districts. *Id.* The District regularly interacted with Ferguson on a variety of issues related to the District's business. *Id.*

ACHD terminated Ferguson's employment in 2011. *Id.*, ¶ 4. In 2012, Rozanski hired Ferguson to provide legislative services on behalf of the District. *Id.*, ¶ 5. Ferguson shortly thereafter began to serve as the District's outside general counsel. *Id.* The District's Board of

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Directors never formally approved the retention of Ferguson; there is no written fee agreement between Ferguson and the District. *Id.*

Rozanski worked closely with Ferguson. *Id.*, ¶ 6. After the District hired Ferguson, the amount of attorneys' fees paid by the District increased significantly. *Id.*, ¶ 14. Before the District hired Ferguson, the District's legal fees were very modest. *Id.* In the 2010-11 fiscal year, for example, the District paid $19,922 in legal fees. *Id.* From January 2012 to February 2015, the District paid Ferguson over $400,000 in legal fees. *Id.* The District was not involved in any litigation or other unusual circumstances that would have justified such an increase in attorney fees. *Id.*

In 2014, the District remodeled its Adult Day Care Center to add a commercial-grade kitchen. *Id.*, ¶ 7. When the remodel was completed, the Board of Directors reviewed the budget and expenses for the project. *Id.* At a meeting of the Board of Directors in December 2014, the Board was informed that the fees paid to Ferguson on the project were over $120,000, even though the total cost of the project, including Ferguson's fees, was only approximately $560,000. *Id.* In other words, Ferguson's fees on the project were more than twenty percent of the total cost, including construction, project management, and architects. *Id.*

Against Rozanski's advice, the Board of Directors authorized an investigation into Ferguson's fees for the Adult Day Care Center project. *Id.*, ¶ 8. The District also terminated Ferguson's services in February 2015. *Id.* After a preliminary investigation, the Board of Directors decided to pursue a claim against Ferguson for refund of fees already paid to him. *Id.* In March 2015, the Board of Directors approved hiring Michael Velthoen of the law firm of Ferguson Case Orr Paterson LLP to represent the District in connection with the claim. *Id.*

In April 2015, Rozanski elected to step down as Chief Executive Officer of the District. *Id.*, ¶9. When her employment with the District ended at the end of June 2015, Rozanski turned in her district-owned cell phone and laptop. *Id.* The cell phone and laptop were issued to Rozanski by the District for District-business. *Id.* The District paid for the cell phone and the laptop, as well as all related charges. *Id.*

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The District maintains a policy set forth in its Employee Handbook stating that the District reserves the right to inspect District-issued devices:

> Desks, offices, computers, cellular phones, District-owned vehicles and safety gear are the property of the District. These items must be kept clean and in working condition. The District reserves the right to inspect the contents of all District property, including, but not limited to, desks, vehicles and computers, without notice to the employee and/or in the employee's absence and/or upon separation. Voicemail, email and the internet are intended for business purposes only. The District reserves the right to listen to voicemail messages and to access email and internet contacts to ensure compliance with this rule, without notice to the employee and/or in the employee's absence.

Ralston Decl., Exh. A. In addition, District personnel are advised during orientation that their emails, voicemails, and other files may be subject to requests for public records. *Id.*, ¶10. While Rozanski was Chief Executive Officer, the District received numerous public records requests. *Id.* Rozanski worked on responding to these requests. *Id.*

After Rozanski's employment ended, the District's new Chief Executive Officer, Kara Ralston, examined her cell phone and discovered numerous voicemails from Ferguson. *Id.*, ¶ 11. These voicemails clearly reflected a romantic relationship between Ferguson and Rozanski. *Id.* In addition, there were many voicemails from Ferguson to Rozanski after Ferguson had stopped working for the District. *Id.* These emails reflected collaboration between Rozanski and Ferguson in responding to the District's investigation into Ferguson's fees. *Id.*

Ralston – who had previously served as the District's Chief Operating Officer since 2009 – was shocked to hear these voicemails as she did not know that Rozanski was having a romantic relationship with Ferguson. *Id.* Rozanski never told Ralston about the relationship. *Id.* Rozanski had not disclosed any personal relationship with Ferguson to the Board of Directors. *Id.*

After discovering the voicemails– and as part of pursuing the claim against Ferguson – the District searched Rozanski's emails for communications with Ferguson. *Id.*, ¶12. The District searched its email server, as well as Rozanski's District-owned laptop. *Id.* The server produced numerous emails between Rozanski and Ferguson going back to 2011. *Id.* Most of the emails from the server related to Ferguson's work with the District. *Id.* Other emails dealt with personal

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matters between Rozanski and Ferguson. *Id.* Still other emails reflected coordination between Ferguson and Rozanski in responding the District's investigation and claim into Ferguson's fees. The search of the laptop revealed numerous deleted emails between Rozanski and Ferguson. *Id.* Many of the deleted emails reflected a romantic relationship between Rozanski and Ferguson dating back to 2007, when Ferguson was the Chief Executive Officer of ACHD. *Id.*

The District pursued a claim for refund of fees previously paid to Ferguson. *Id.*, ¶13. The District subsequently obtained an arbitration award against Ferguson in the amount of $172,410 pursuant to the Mandatory Attorney Fee Arbitration Act. *Id.* The arbitration award was confirmed by this Court on July 5, 2016 and judgment against Ferguson was thereafter entered against him. *Id.* On October 7, 2016, the District filed a Complaint in Ventura County Superior Court against Rozanski (the "Complaint"). Verified Amended Petition, Exh. B. The District filed the Complaint after Rozanski failed to agree to submit the District's claim to arbitration pursuant to her Employment Agreement. Declaration of Michael Velthoen ("Velthoen Decl."), ¶ 4.

The Complaint contained allegations that the voicemails and emails evidenced a secret romantic relationship between Rozanski and Ferguson, that this romantic relationship compromised Rozanski's loyalty to the District, and that as a result, Rozanski caused and directed to pay Ferguson's patently false and exorbitant legal bills. *See generally* Plaintiff's Amended Verified Petition, Exhibit B.

On November 11, 2016, the District received a public records request from the Camarillo Acorn for the voicemails from Ferguson discovered on Rozanski's District-owned cell phone. Ralston Decl, ¶14, Exh. B. On December 13, 2016, the Ventura County Star also made a public records request for the voicemails. *Id.*, ¶ 14, Exh. C.

On December 22, 2016, the Camarillo Acorn made a public records request for "the emails sent between Jane Rozanski and Ralph Ferguson from January 1, 2011 to July 1, 2015." *Id.*, ¶ 15. On January 13, 2017, the Acorn amended this request to ask instead for "the emails between Jane Rozanski and Ralph Ferguson between Jan., 2007 and Jan. 31, 2012." *Id.*, Exh, D. On January 12, 2017, the Ventura County Star made a public records request of the District for "copies of emails exchanged between Jane Rozanski and Ralph Ferguson from 2007 through 2015, the year Ms.

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Rozanski retired." *Id.*, Exh. E.

In response to these requests, the District conducted a search for and review of all emails exchanged between Rozanski and Ferguson between January 1, 2007 and June 2015. *Id.*, ¶ 16. The District has located and reviewed thousands of such emails. *Id.* The District determined which emails it considered were subject to production under the California Public Records Act pursuant to the Star's and the Acorn's requests. *Id.* The District determined that many of the emails reflected communications made for the purpose of providing legal advice to the District and, therefore, concluded that such privileged communications were not subject to disclosure. *Id.* The District has concluded that none of the emails it has identified for disclosure are covered by the attorney client privilege. *Id.*

The District provided copies of the emails identified for disclosure to counsel for Rozanski in advance of production to enable her to assert any claims she may have concerning their disclosure. *Id.* Counsel for Rozanski identified those emails to which she objects to production. *Id.* The District is producing the remaining emails to the Acorn and the Star. *Id.* The voicemails and the emails to which Rozanski objects to disclosure are the subject of this Petition for Writ of Mandate.

III. **DISCUSSION**

"Openness in government is essential to the functioning of a democracy. Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal. 4th 319, 328-29. To that end, the California Legislature enacted the California Public Records Act ("CPRA"), which is modeled on the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The CPRA is enshrined in the California Constitution. Cal. Constitution, Article 1, § 3.

The purpose of the CPRA "is to require that public business be conducted under the hard light of full public scrutiny, and thereby to permit the public to decide *for itself* whether

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government action is proper. [D]isclosure, not secrecy, is the dominant objective." *Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3d 1325, 1350 (internal citations and quotations omitted) (emphasis added). In enacting the CPRA, the Legislature expressly declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Govt. Code § 6250. "Thus, the Act was passed to ensure public access to vital information about the government's conduct of its business." *City of San Jose v. Superior Court* (1999) 74 Cal. App. 4th 1008, 1016 (internal quotations and citations omitted).

Under the CPRA, "[p]ublic records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereinafter provided." Govt. Code § 6253(a). The general policy favors disclosure, and all public records are subject to disclosure unless the CPRA provides otherwise. *County of Santa Clara* (2009) 170 Cal. App. 4th 1301, 1320.

A. Under *Marken*, the Court May Grant The Writ Only If Disclosure Is Prohibited By Law.

Rozanski relies on *Marken v. Santa Monica-Malibu Unified School District* (2012) 202 Cal. App. 4th 1250 to support her claim that the Court may enjoin the District from disclosing the voicemails and emails. In *Marken*, the Court of Appeal recognized the right of an individual to bring a so-called "reverse CPRA action," in which the individual seeks to prevent a government agency from disclosing records pursuant to a CPRA request. The Court of Appeal held that "mandamus should be available to prevent a public agency from acting in an unlawful manner by releasing information the disclosure of which is prohibited by law." *Id.* at 1266 (emphasis added) (citing *County of Del Norte v. City of Crescent City* (1999) 71 Cal. App. 4th 965, 973 ["A permanent injunction is an equitable remedy, not a cause of action.... The remedy is available in a mandamus proceeding and is appropriate to restrain action which, if carried out, would be unlawful."]). It is therefore not sufficient for Rozanski to establish that the voicemails and emails are not subject to disclosure under the CPRA; she must prove that disclosure is "otherwise prohibited by law." *Id.* at 1270; *see also* Government Code § 6254(f) ("This section shall not

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prevent any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.").

B. The CPRA Requires The District To Disclose The Emails and Voicemails.

Under the CPRA, a public agency must produce, upon request, any public record that is not otherwise subject to an exemption. *Williams v. Superior Court* (1993) 5 Cal. 4th 337, 346. The first question, therefore, is whether the voicemails and emails are "public records" under the CPRA. If they are, the Court must then consider whether disclosure is otherwise prohibited by law.

There are three broad categories of emails and voicemails at issue in this Petition. The first category of voicemails and emails consists of communications between Rozanski and Ferguson that reflect the romantic nature of their relationship. Velthoen Decl., ¶¶ 2-3. In these communications, neither Rozanski nor Ferguson directly discuss the public's business. The second category consists of emails and voicemails where Rozanski and/or Ferguson discuss the District's investigation into Ferguson's fees.[1] *Id.* In the third category of emails, the communications expressly deal with the District's business, but are not covered by the attorney client privilege. *Id.*, ¶ 3. In these emails, Ferguson and Rozanski discuss issues such as Rozanski's employment agreement, ACHD (and Ferguson's termination therefrom), other healthcare districts, and Rozanski's appointment to other organizations. For the reasons set forth below, each category of emails and voicemails must be produced pursuant to the CPRA requests.

1. The Voicemails and Emails Are Public Records.

A "public record" is "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Govt. Code § 6252(e). In other words, a public record is (1) a writing; (2) containing information relating to the conduct of the public's business; and (3) retained by a public agency is a public record subject to disclosure.

[1] There are some emails that both reflect the romantic relationship between Rozanski and Ferguson, as well as discuss the investigation.

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Rozanski does not contest that the emails and voicemails satisfy two of these three prongs. The voicemails and emails are "writings." Under the CPRA, a "writing" is, among other things, "any form of communication or representation, including letters, words, pictures, **sounds**, or symbols, or combinations thereof, **and any record thereby created**, regardless of the manner in which the record has been stored." *Id.* (emphasis added). Both the emails and voicemails qualify as writings under the CPRA. The voicemails and emails are also "retained" by the District. The voicemails were left on a cell phone owned by the District. The emails were left on a laptop owned by the District. The cell phone and laptop remain in the possession of the District. The voicemails and emails, therefore, are retained by the District.[2]

The dispute centers on the third prong. Rozanski argues that the voicemails and emails are not related to the conduct of the public's business. She contends that the voicemails and emails are purely personal in nature, and therefore, not subject to disclosure. In making this argument, Rozanski relies on an unreasonably narrow construction of the CPRA. She contends that if a voicemail or email does not expressly discuss the public's business in the communication, the voicemail or email does not relate to the public's business.

Rozanski is wrong. First, she relies on a case – *People v. Olson* (1965) 232 Cal. App. 2d 480, 486 – that predates the passage of the CPRA in 1968. In *Olson*, the Court relied on a prior statute and defined a public record as a record "made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference." *Id.* This narrow definition of a public record did not survive the passage of the CPRA. *See, e.g., Cook v. Craig* (1976) 55 Cal. App. 3d 773, 781 (rejecting the contention that *Olson* definition controls the CPRA). As the California Supreme Court noted, the definition of a public record under the CPRA "is intended to cover every

[2] The District does not argue that ownership of the cell phone and laptop is dispositive of whether the voicemails or emails are public records. The District relies on *City of San Jose v. Superior Court* (2014) 225 Cal. App. 4th 75, *review granted*, 326 P.3d 976, to support the proposition that records on agency-owned electronic devices, such as cell phones and laptops, are "retained by" the agency.

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conceivable kind of record that is involved in the governmental process." *Sander v. State Bar of Cal.* (2013) 58 Cal. 4th 300, 322 (internal citations omitted).

Finding no success to identify a California case that supports her narrow interpretation of the CPRA, Rozanski goes outside the jurisdiction. Rozanski cites *Denver Publishing Company v. Board of County Commissioners of County of Araphoe* (Col. 2005) 121 P.3d. 190, to support her argument that the voicemails are not public records. *Denver Publishing*, however, deals with Colorado's public records act – not the CPRA. Moreover, the definition of "public records" under the Colorado Act is much narrower than the CPRA. The Colorado statute covers only records "held by [any government agency] **for use** in the exercise of functions required or authorized by law or administrative rule or involving the receipt of public funds." *Id.* at 195 (emphasis added). As such, the *Denver Publishing* opinion is of no use to the Court's analysis.

Second, the premise of Rozanski's argument is misplaced. She argues that the Court must only look to the content of the communication, and not its context, to determine whether a record "relates to the public's business." Opening Brief at 15 ("in order for the communications to be public records, they must actually discuss the public's business"). Rozanski startlingly argues that "the fact that one or more of the parties to a communication may be alleged to have engaged in wrongdoing, [sic] does not change the fundamental nature of the communication as either a public record within the meaning of the CPRA or not." *Id.* In other words, Rozanski contends that an email from the Administrator of a public agency to a vendor of the public agency thanking the vendor for his personal gift of $100,000 would not constitute a public record subject to disclosure because it did not "actually discuss the public's business." Such an argument is clearly contrary to the intent of the CPRA.

More importantly, such an interpretation is inconsistent with the actual words of the statute. The CPRA does not define a "public record" as a record that "actually discusses the public's business." Rather, a public record is one that simply "*relates to* the public's business." Govt. Code § 6252(e) (emphasis added). To ascertain whether a record relates to the public's business, it is therefore necessary to examine the context of the record in question.

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The voicemails and emails contain information "relating to the conduct of the public's business." These communications between Rozanski and Ferguson either (1) reflect the romantic relationship between Ferguson and Rozanski, (2) the collaboration between the two regarding the District's investigation into the fees paid to Ferguson, or (3) other District business. The first category relates to the public's business because such voicemails illuminate the relationship between Rozanski and Ferguson. This relationship was the impetus behind Rozanski's decision to hire Ferguson as the District's general counsel and to pay Ferguson's false and inflated legal bills and unreasonable fees.

The District acknowledges that the CPRA does not compel disclosure of "purely personal" materials in the possession of a public agency. Had Rozanski not decided to hire Ferguson as District counsel, the first category of emails and the voicemails would not qualify as public records. But Rozanski did hire Ferguson and paid him hundreds of thousands of dollars of public funds. A public official cannot reasonably complain of an invasion of privacy when the official is responsible for injecting her personal life into the public sphere.

The conclusion that the voicemails and emails are public records is bolstered by Rozanski's continued denial of any romantic relationship with Ferguson. One cannot credibly argue that a secret romantic relationship between the head of a public agency and a vendor of that agency who has received hundreds of thousands of dollars does not relate to the public's business. In light of Rozanski's continued denial of that relationship, the only means by which the public can verify her denial is to review the voicemails and emails. Without such disclosure, the public will remain in the dark and left to blindly assess the competing allegations of the District and Rozanski.[3]

The second and third category of emails and voicemails – those that reflect communications between Ferguson and Rozanski concerning the District's investigation into his fees and other District business – plainly relate to the public's business. In the second category, Rozanski and Ferguson communicate with each other regarding how to effectively respond to the

[3] As reflected in her complaints about the District's decision to file a public lawsuit against her, Rozanski clearly believes that the public has no right to know whether she was engaged in a secret affair with Ferguson.

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District's inquiries into Ferguson's fees. In other words, the Chief Executive Officer of a public agency was discussing an open investigation conducted by the agency with the very person who was the subject of the investigation. In the third category, Rozanski and Ferguson discuss items relating to the District, such as her employment agreement, ACHD, and other healthcare districts. If such records are not the "public's business," then those words have no real meaning.

Indeed, Rozanski does not even try to argue that the emails and voicemails reflecting the investigation into Ferguson's fees or other District business are not public records. In her Opening Brief, Rozanski acknowledges that numerous emails and voicemails are not "purely personal" in nature. *See* Opening Brief at 13 n. 5. At no point, however, does Rozanski explain why such voicemails or emails are not "public records" subject to disclosure.

The second category of emails and voicemails supports disclosure of the first category. Without the context provided by the emails and voicemails that reflect the relationship between Ferguson and Rozanski, it will be unclear as to why Rozanski and Ferguson are communicating so furtively regarding the District's investigation. Indeed, it is not just the fact of the relationship between Rozanski and Ferguson but its intensity that informs the circumstances.

The voicemails and emails are public records under the CPRA. They relate to the public's business. Unless their disclosure is otherwise precluded by law, the District must disclose them to the Acorn and the Star.

2. **Disclosure of the Voicemails and Emails Is Not Prohibited By Law.**

The CPRA enumerates a "number of exemptions that permit government agencies to refuse to disclose certain public records." *County of Santa Clara,* 170 Cal. App. 4th at 1320. In general, however, all public records are subject to disclosure unless the Legislature has expressly provided to the contrary. *Williams v. Superior Court* (1993) 5 Cal.4th 337, 346. As disclosure is favored, the exemptions are narrowly construed. *Board of Trustees of California State University v. Superior Court* (2005) 132 Cal. App. 4th 889, 896. Indeed, the California Constitution itself states, "A statute, court rule, or other authority ... shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." Cal. Const., art. I, § 3, subd. (b)(2).

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Rozanski argues that voicemails and emails are exempt under (1) Government Code Section 6254(c), which applies to "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy" and (2) Government Code Section 6255, which exempts records from disclosure where "the public interested served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."

Government Code § 6254(c) does not apply as the voicemails and emails are not "personnel, medical, or similar files." Even if they were, disclosure is mandated. In assessing whether records constitute "an unwarranted invasion of privacy," a court must balance two competing interests: (1) prevention of secrecy in government; and (2) protection of individual privacy. *City of San Jose v. Superior Court (1999)* 74 Cal.App.4th 1008, 1017. Where the public interest in disclosure of the records is not outweighed by the privacy interest, courts will direct the government to disclose the requested information. *BRV, Inc. v. Superior Court* (2006) 143 Cal. App. 4th 742, 756-58. The proponent of nondisclosure – Rozanski, in this instance – must demonstrate a "clear overbalance" on the side of confidentiality to prevent disclosure. *Id.* at 756.

Rozanski, however, must prove that more than an exception to CPRA applies; she must demonstrate that disclosure is "otherwise prohibited by law." In her Opening Brief, Rozanski relies on her right of privacy under the California Constitution. Opening Brief at 17. To claim a right of privacy, an individual must establish among other things, a reasonable expectation of privacy, and a serious invasion of that privacy. *See, e.g., American Academy of Pediatrics v. Lungren* (1997) 16 Cal. 4th 307, 330.

Rozanski argues that she never intended to disclose her communications with Ferguson to the public. Such a belief is self-evident from many of the emails and voicemails. But the question is not whether Rozanski personally believed that her emails and voicemails were subject to disclosure, but whether she had an objectively reasonable expectation of privacy in the voicemails and emails. *See International Federation of Professional and Technical Engineers*, 42 Cal. 4th at 330-331.

The answer to that question is clearly no. The recordings were maintained on a cell phone that belongs to the District. The email is contained on the District's laptop and server. The District

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has an express policy allowing it to examine any electronic devices, including cell phones and laptops, at any time. Rozanski, as the Chief Executive Officer of the District, is presumed to know of this policy. The cell phone and laptop are no longer in her possession.

Moreover, Rozanski caused the voicemails to be present on the cell phone and the emails to be present on the server. Even though she was aware of the District policy, she decided to carry on her communications with Ferguson on her District-owned devices, to allow his voicemails and emails to be stored on them, and to neglect to delete the voicemails when she retired and turned in the phone. She cannot claim an *objectively* reasonable expectation of privacy in the face of her conduct. There is no privacy interest to balance against the public interest in disclosure.

Sunbelt Rentals, Inc. v. Victor, 43 F.Supp.3d 1026 (N.D. Cal. 2014) is instructive on this point. In *Sunbelt*, the plaintiff employer filed suit against terminated sales representative alleging various claim. *Id.* at 1029. The defendant employee counterclaimed alleging violation of his right to privacy based on employer's review of text messages contained on his employer-issued cellular telephone and content contained on his employer-issued electronic device after the employee's termination. *Id.* The *Sunbelt* court dismissed the privacy claim, reasoning that the employee could not "legitimately claim an expectation of privacy in a 'place,' i.e., the Sunbelt iPhone, which belongs to his former employer and to which he ha[d] no right to access," and further that the facts demonstrated "that he failed to comport himself in a manner consistent with an objectively reasonable expectation of privacy" because it was his conduct led to the text messages being stored on the company phone. *Id.* at 1035. The court concluded that "even if he ***subjectively*** harbored an expectation of privacy in his text messages, such expectation cannot be characterized as ***objectively*** reasonable, since it was ***[the employee's]*** conduct that directly caused the transmission of his text messages to [the employer] in the first instance." *Id.* (emphasis in original).

The opinion in *TBG Insurance Services Corp. v. Superior Court* (2002) 96 Cal. App. 4th 443 is also on point. In that case, the Court of Appeal held that an employee (Zieminski) had no reasonable expectation of privacy in personal materials he stored on a home computer provided to him by his employer (TBG). TBG had advised Zieminski of its policy allowing it to inspect the computer at any time. The Court of Appeal ruled:

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> As can be seen, Zieminski knew that TBG would monitor the files and messages stored on the computers he used at the office and at home. He had the opportunity to consent to TBG's policy or not, and had the opportunity to limit his use of his home computer to purely business matters. To state the obvious, no one compelled Zieminski or his wife or children to use the home computer for his personal use. With all the information he needed to make an intelligent decision, Zieminski agreed to TBG's policy *and* chose to use his computer for personal matters. By any reasonable standard, Zieminski fully and voluntarily relinquished his privacy rights in the information he stored on his home computer, and he will not now be heard to say that he nevertheless had a reasonable expectation of privacy.

Id. at 453. The Court further discounted Zieminski's claims that it was accepted and understood that employees could use their home computers for personal use. *Id.*

In *Holmes v. Petrovich Development Co.* (2011) 191 Cal. App. 1047, the Court of Appeal held that an employee did not have any reasonable expectation of privacy in emails she sent to her personal attorney on her workplace computer. As a result, the Court held that the emails were not privileged. *Id.* at 1069-72. Although the employee acknowledged that her employer had a written policy advising her that it could inspect her computer at any time, the employer never actually searched employee computers. *Id.* The employee therefore argued that she had a reasonable expectation that the employer would not read her personal email. *Id.* The Court of Appeal rejected this argument: "Just as it is unreasonable to say a person has a legitimate expectation that he or she can exceed with absolute impunity a posted speed limit on a lonely public roadway simply because the roadway is seldom patrolled, it was unreasonable for Holmes to believe that her personal e-mail sent by company computer was private simply because, to her knowledge, the company had never enforced its computer monitoring policy." *Id.* at 1071.

Rozanski tacitly acknowledges that she has no reasonable expectation of privacy vis-à-vis the District. Instead, she argues that – even if her emails and voicemails were properly reviewed by the District – she had a reasonable expectation that such communications would not be disclosed to the public. Rozanski argues that the District's policy "does not state that any communication sent or received on a Respondent-issued cell phone or laptop would automatically become a public record subject to disclosure under the CPRA, or that such communications would

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be turned over to the press as soon as the employee's relationship with Respondent soured." Opening Brief at 22.

This argument is – quite frankly – strange. Rozanski was well aware of the District's obligations under the CPRA. As set forth in detail above, a public agency is *required* to disclose public records on request. A CPRA request therefore mandates that the agency conduct a search for and review of records – including emails and voicemails – under its control. If a voicemail or email qualifies as a public record, the District has no choice but to disclose the record on request. District employees are instructed on the District's obligations under the CPRA. Rozanski, as Chief Executive Officer of the District, handled numerous public record requests. Rozanski cannot credibly argue that she was unaware of the risk that the District would review and produce her emails or voicemails in response to CPRA requests.

Rozanski's argument is also circular. She claims that the emails and voicemails should not be disclosed to the public because she did not have an expectation that they would be disclosed. Under this scenario, a public agency can hide evidence of wrongdoing simply by claiming that their officials never anticipated having to disclose such evidence. Indeed, the crux of Rozanski's argument is that *she* never intended the emails and voicemails to be disclosed to the public. A public official who forgets to delete an email evidencing bribery, therefore, can avoid public disclosure of the email by stating: "Ooops. I did not mean for you to see that." That is clearly not what the CPRA contemplates. Rozanski's subjective intentions are irrelevant to whether she had an objectively reasonable expectation of privacy in the voicemails and emails.

Recognizing that her own claims of privacy are weak, Rozanski next argues that *Ferguson* has a reasonable expectation of privacy in the emails and voicemails. First, Rozanski does not have standing to assert Ferguson's privacy rights. Second, Rozanski cites no authority to support her suggestion that a person has a reasonable expectation of privacy in voicemails he leaves on another's cell phone or emails he sends to third parties. The District did not surreptitiously record Ferguson; he knew that he was leaving a voicemail for Rozanski. He knew that he was sending emails to Rozanski's District email address. In any event, Ferguson was the District's attorney. As such, he had a fiduciary duty to the District to disclose information material to his representation.

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Rule of Professional Conduct 3-310(B)(3). Had Rozanski decided to come clean with the District and voluntarily disclose her communications with Ferguson, Ferguson would have no basis to argue that Rozanski had violated any of his privacy rights. *See United States v. Miller* (1976) 425 U.S. 435, 440-41 (person has no legitimate expectation of privacy in material he turns over to third party).[4]

Even if Rozanski or Ferguson had an objectively reasonable expectation of privacy in the voicemails and emails, the District must still disclose those records if the public interest outweighs Rozanski's privacy interest. California courts have recognized the inherent tension between the public's right to know and society's interest in protecting private citizens (including public servants) from unwarranted invasions of privacy. *See, e.g., Versaci v. Superior Court* (2005) 127 Cal. App. 4th 805, 822. One way to resolve this tension is to try to determine "the extent to which disclosure of the requested item of information will shed light on the public agency's performance of its duty." *Teamsters Local 856 v. Priceless, LLC* (2003) 112 Cal. App. 4th 1500, 1519.

Disclosure of the emails and voicemails will shed considerable light on the agency's performance of its duty. The District has an obligation of transparency to the taxpayers. Rozanski was not a mid-level employee of the District; she was its Chief Executive Officer. As a public official responsible for the expenditure of taxpayer funds, Rozanski must expect scrutiny into her private affairs to the extent those private affairs create a conflict of interest. Rozanski's undisclosed relationship with Ferguson created such a conflict of interest. As a result, her relationship with Ferguson becomes the District's business.

To the extent that Rozanski has any privacy interests in her relations with Ferguson, they are minimal. "It is well settled that persons who voluntarily seek public office or willingly become involved in public affairs waive their right to privacy of matters connected with their public conduct. The reason behind this rule is that the public should be afforded every opportunity of

[4] Rozanski's argument that Ferguson has a reasonable expectation of privacy in his communications with the Chief Executive Officer of the District regarding an investigation conducted by the Board of Directors of the District beggars belief. Neither Rozanski nor Ferguson had any reasonable expectation of privacy that their conspiratorial communications would not be disclosed.

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learning about any facet which may affect that person's fitness for office." *Diaz v. Oakland Tribune, Inc.* (1983) 139 Cal. App. 3d 118, 134 (internal citations omitted); *Kapellas v. Kofman* (1969) 1 Cal. 3d 20, 36 ("government officials and candidates for such office have almost always been considered the paradigm case of 'public figures' who should be subjected to the most thorough scrutiny."). From her declaration, it is clear that Rozanski basked in the good will created by serving as the District's Chief Executive Officer. But those who enjoy the accolades and laurels of public service must also be prepared to suffer its slings and arrows.

Rozanski argues that disclosure of the voicemails and emails would "discourage public service" and "create an arena of gossip and scandal." Opening Brief at 21. In making this argument, Rozanski again refuses to acknowledge the connection between her responsibilities as the District Chief Executive Officer and her undisclosed relationship with Ferguson. Public employees who have private communications on agency-owned computers and cellphones need not worry that those communications will be subject to disclosure to the public – so long as the employee does not mix his or her personal life with the public's business. If anything, disclosure of the voicemails and emails will have the salutary effect of discouraging public officials from engaging in secret relationships with vendors of the agency.

Rozanski does not cite to a single California case that supports her argument that she has any reasonable expectation of privacy in the voicemails and emails. In each of the California cases cited by Rozanski that address the balancing test of privacy versus disclosure, the Court of Appeal ordered disclosure of the records. *See, e.g., Braun v. City of Taft* (1984) 154 Cal. App. 3d 332 (holding that documents were subject to disclosure); *Caldecott v. Superior Court* (2015) 243 Cal. App. 4th 212 (holding that public interests outweighed privacy rights); *BRV, Inc. v. Superior Court* (2014) 143 Cal. App. 4th 742 (ordering disclosure of records; "[Californians] have a strong interest in knowing how government officials conduct public business, particularly when allegations of malfeasance by public officials are raised.").

Rozanski therefore again travels out-of-state case to find a case that supports her argument. Setting aside that *Kentucky Board of Examiners of Psychologists & Div. of Occupations & Professions v. Courier-Journal & Louisville Times Co.* (Ky. 1992) 826 S.W.2d 324, 328-29,

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interprets an entirely different statute, its facts could not be more different than those presented here. In that case, the request sought the investigative file relating to allegations that a psychologist had sexually abused several patients. The file contained substantial information concerning intimate details of the lives of *the alleged victims*, including excerpts from the patient files and deposition transcripts. The Court concluded: "We must conclude that the information contained in the complaint file is of a personal nature—indeed, of a *very* personal nature—and that disclosure of the remainder of the public record in this case would constitute a serious invasion of the personal privacy of those who complained against Tadajewski, as well as other former clients involved in the investigation." *Id.* at 328.

Rozanski's breach of the public trust was a product of her secret relationship with Ferguson. Accordingly, the public has a right to know about that relationship. The voicemail recordings and emails "shed light" on Rozanski's relationship with Ferguson, and provide significant context for Rozanski's unlawful actions in her public capacity which resulted in substantial taxpayer dollars being used for unwarranted legal fees. There is a strong public interest in disclosure of these voicemails and emails, and it outweighs any privacy interest Rozanski might claim.

No credible argument is presented as to why the emails and voicemails that discuss the investigation into Ferguson's fees or other District business should not be disclosed. Even if Rozanski finds these communications embarrassing for various reasons, embarrassment is not the test for determining whether she has a legitimate privacy interest in the material.

Rozanski spends several paragraphs impugning the motives of the Acorn and the Star. She claims that the newspapers are simply interested in the emails and voicemails for prurient reasons- "sex sells." But the Acorn and the Star do not care that Rozanski was having an extramarital affair – they care that she was having an undisclosed extramarital affair with the general counsel of the District, who was paid hundreds of thousands of taxpayer dollars. No matter how many times she says it, Rozanski cannot credibly argue that her romantic relationship with Ferguson does not relate to her duties as Chief Executive Officer of the District.

The Opening Brief also suggests that the District is motivated by some desire to tarnish

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Rozanski's reputation. Rozanski suggests that the District unnecessarily filed a complaint in Superior Court despite the arbitration provision in her employment agreement. Rozanski, however, fails to mention that the District demanded arbitration prior to filing the complaint, but Rozanski failed to agree to submit the dispute to arbitration. Velthoen Declaration, ¶ 4. I

In her telling, Rozanski – who hid her relationship with Ferguson for the District while paying him hundreds of thousands of dollars in unnecessary attorney fees – is the victim. The Opening Brief exposes Rozanski's misguided belief that the District – a public agency – had some obligation to keep its discovery that Rozanski was having a secret affair with Ferguson under wraps. That was not an option for the District. Unlike Rozanski, the District takes its obligations to the public seriously.

C. The Attorney-Client Privilege Does Not Bar Disclosure.

Rozanski argues that her communications with Ferguson are protected from disclosure by the attorney-client privilege. This claim can be dispatched with quickly. As Rozanski admits, Ferguson "acted as outside legal counsel to the [District] from 2011 to 2015." Rozanski's Verified Complaint, ¶ 21 (emphasis added). Thus, the District was the client – not Rozanski. Rozanski does not have standing to assert the attorney-client privilege on behalf of the District. The Opening Brief makes the remarkable claim that the District – the holder of the privilege – has the burden of proving that the emails and voicemails are not covered by the privilege. In other words, any public agency must affirmatively prove that records subject to a CPRA request are not privileged before disclosing those records. It is enough to say that such an argument makes no sense.

In any event, the District is confident that none of the emails or voicemails at issue is covered by the attorney-client privilege. The District has withheld from disclosure communications between Rozanski and Ferguson that were made for the purpose of providing legal advice to the District. Ralston Decl., ¶ 16. None of the emails that the District has identified for disclosure are considered privileged by the District. *Id.*

Rozanski suggests that her communications with Ferguson regarding his bills are somehow covered by the privilege. A cursory review of those emails, however, reveals that the purpose of

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those communications was not to provide advice from Ferguson to the District. Indeed, most of those communications occurred after Ferguson stopped serving as counsel to the District. The purpose of those communications was for Rozanski and Ferguson to coordinate their responses to the District's investigation into Ferguson's fees. That Rozanski argues that somehow she was acting on behalf of the District in those communicates only further confirms that the District is required to disclose those communications to the Acorn and the Star.

IV. CONCLUSION

The District acknowledges the intimate nature of many of the emails between Rozanski and Ferguson. The District understands why Rozanski does not want many of these emails to be disclosed. The District takes no pleasure in these circumstances.

But the District is obligated under the CPRA to produce public records on request. The District has concluded that the voicemails and emails are public records and that Rozanski does not have a substantial privacy interest in preventing disclosure. The public has a right to know of the nature of the relationship between Rozanski and Ferguson.

The District did not create these circumstances. Rozanski made the decision to have an affair with Ferguson. Rozanski made the decision not to disclose the relationship to the District. Rozanski made the decision to hire Ferguson as the District's counsel. Rozanski made the decision to approve Ferguson's bills. Rozanski made the decision to carry on her correspondence and communication with Ferguson on District devices and the District servers. Rozanski put the District in the unfortunate position of having to disclose these emails and voicemails. The Court should deny the Writ.

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Date: February 24, 2017

FERGUSON CASE ORR PATERSON LLP

By: _____

MICHAEL A. VELTHOEN
Attorneys for Respondent Camarillo Health Care District

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DECLARATION OF MICHAEL VELTHOEN

I, Michael Velthoen, declare as follows:

1. I am a partner with the law firm of Ferguson Case Orr Paterson LLP, counsel of record for Camarillo Health Care District. I have personal knowledge of the fact set forth below and, if called as a witness, I could and would testify competently thereto.

2. I have possession of a cell phone issued by the Camarillo Health Care District to Jane Rozanski. I have listened to certain voicemails maintained on the phone from a phone number known to be Ralph Ferguson's. I also recognize Mr. Ferguson's voice on the voicemails. There are approximately 180 voicemails from Mr. Ferguson on the cell phone. The dates of the voicemails range from December 9, 2014 and May 26, 2015. Some of the voicemails last several minutes in length. Others are brief. The voicemails fall into two general categories. Many of the voicemails discuss routine personal matters (e.g., events of the day). These communications disclose a romantic relationship between Mr. Ferguson and Ms. Rozanski. Other voicemails reflect communications between Mr. Ferguson and Ms. Rozanski regarding the District's investigation into the fees collected by Ferguson from the District.

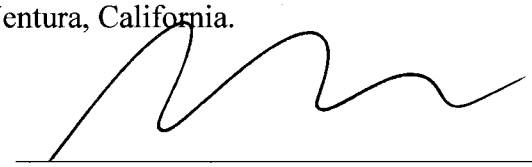
3. After the District completed its review of the emails between Rozanski and Ferguson, I sent the emails that the District concluded were subject to disclosure to Andrew Gilford, counsel for Ms. Rozanski. Mr. Gilford identified many emails that his client did not object to disclosure. The emails to which Ms. Rozanski objects also fall into three categories. First, there are emails that reflect the nature of the relationship between Ms. Rozanski and Mr. Ferguson. Second, there are emails that reflect communications between Ms. Rozanski and Mr. Ferguson regarding the District's investigation into Ferguson's fees. Third, there are emails between Mr. Ferguson and Ms. Rozanski that address the District's business (but are not privileged). Some of the emails include communications regarding Ms. Rozanski's employment agreement, the Association of California Healthcare Districts (and Mr. Ferguson's employment therewith), other healthcare districts, and Ms. Rozanski's appointments with other organizations.

4. In September 2016, I sent Ms. Rozanski a letter on behalf of the District demanding that she submit the District's claims against her to binding arbitration. The letter gave Ms.

Rozanski a deadline for affirmatively agreeing to submit the claim to arbitration. The letter further advised Ms. Rozanski that the District would pursue a claim in Superior Court in the event that she did not contact me to discuss the selection of an arbitrator by the deadline. While Ms. Rozanski responded to my letter, she did not agree to submit to arbitration or to discuss the selection of an arbitrator. The District thereafter filed its complaint against Rozanski in Superior Court.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 24, 2017 in Ventura, California.



Michael A. Velthoen

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF VENTURA:

I am employed in the County of Ventura, State of California. I am over the age of 18 and not a party to the within action. My business address is 1050 South Kimball Road, Ventura, California 93004.

On February 24, 2017, I served ☐ the original ☒ a true copy of the foregoing document described as **RESPONDENT CAMARILLO HEALTH CARE DISTRICT'S BRIEF IN OPPOSITION TO WRIT OF MANDATE; DECLARATION OF MICHAEL VELTHOEN**, which is related to the action styled *CHCD adv. Jane Rozanski*, Ventura Superior Court Case No. 56-2016-00489673-CU-WA-VTA, on the person or persons listed on the attached Service List as follows:

☒ **BY MAIL**: I enclosed the above-described document in (an) envelope(s) with postage thereon fully pre-paid and addressed as set forth on the attached Service List. I am readily familiar with FERGUSON CASE ORR PATERSON LLP's practice of collection and processing correspondence for mail with the U.S. Postal Service. Pursuant to that practice, I placed the above-described envelope into the Firm's designated receptacle, of which the contents are to be deposited with the U.S. Postal Service on that same day at Ventura, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date stated herein.

☐ **BY EXPRESS MAIL**: I enclosed the above-described document in (an) envelope(s) with Express Mail postage fully pre-paid and addressed as set forth on the attached Service List. I placed the above-described envelope into a post office, mailbox, subpost office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service for receipt of Express Mail.

☐ **BY OVERNIGHT DELIVERY**: I enclosed the above-described document in (an) envelope(s) of a type designated by the express service carrier for overnight delivery with delivery fees fully pre-paid or provided for and addressed as set forth on the attached Service List. I ☐ placed the above-described envelope into a box or other facility regularly maintained by the express service carrier/☐ delivered the above-described envelope to an authorized courier or driver authorized by the express service carrier to receive documents.

☐ **BY PERSONAL SERVICE**: I personally delivered the above-described document to _____, ☐ a party to this action; ☐ an attorney for _____, who is a party to this action, by leaving the document at the attorney's office in an envelope clearly labeled to identify the attorney being served with _____, a receptionist or a person having charge of the office; at _____ ☐ a.m. ☐ p.m. on _____, at _____, _____.

☐ **BY FACSIMILE TRANSMISSION**: I caused the above-described document to be transmitted via facsimile from (805) 659-6818 to each facsimile number listed on the attached Service List at _____ ☐ a.m. ☐ p.m. on the date set forth above. Each fax transmission was reported as complete and without error, and each transmission report attached hereto was properly issued by the sending fax machine.

☒ COURTESY COPY **BY ELECTRONIC TRANSMISSION**: I served a true copy of the document electronically in Portable Document Format (PDF) by transmitting it from bgutierrez@fcoplaw.com to the electronic service address(es) (emails), as indicated on the attached Service List at see below ☐ a.m. ☒ p.m. on the date set forth above.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare 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 February 24, 2017, at Ventura, California.

Barbara Gutierrez

In accordance with the California Code of Civil Procedure and Rules of Court regarding service, an executed copy of this Proof of Service is on file at Ferguson Case Orr Paterson LLP and will be made available for photocopying and inspection upon a request made pursuant to applicable statutory provisions.

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