UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SODEXO AMERICA LLC

and — Case 21-CA-39086

PATRICIA ORTEGA, an Individual

SODEXO AMERICA LLC; AND
USC UNIVERSITY HOSPITAL

and — Case 21-CA-39109

SERVICE WORKERS UNITED

USC UNIVERSITY HOSPITAL

and — Cases 21-CA-39328
21-CA-39403

NATIONAL UNION OF HEALTHCARE
WORKERS

SODEXO AMERICA, LLC'S ANSWERING BRIEF

Mark T. Bennett, Esq., SBN 89061
MARKS, GOLIA & FINCH, LLP
8620 Spectrum Center Blvd., Suite 900
San Diego, California 92123
Telephone: (858) 737-3100
Facsimile: (858) 737-3101
Attorneys for Sodexo America LLC

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF THE CASE 1

ARGUMENT 4

The ALJ Correctly Found That The Policy On Its Face Did Not Violate Section 8(a)(1) 4

The Hospital's Business Justification Issue 6

The Testimony of Julio Estrada. 7

The Proposed Remedy Is Too Broad 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Baptist Memorial Hosp.,
229 NLRB 45 (1997) 6, 9

C. E. Wylie Constr. Co.,
310 NLRB 721 (1993) 9

Castiglione v. United States Life Ins. Co.,
262 F.Supp.2d 1025 (D.Ariz.2003) 8

Citrus Valley Medical Center, Inc.,
2008 WL 4657784 (Oct. 17, 2008) 5

Communications Workers v. NLRB,
362 U.S. 479 (1960) 8

Dal-Tex Optical Co.,
137 NLRB 1782 (1962) 6

Hickmott Foods, Inc.,
242 NLRB 1357 (1979) 10

Holling Press, Inc.,
343 NLRB 301 (2004) 3

Intercommunity Hosp.,
255 NLRB 468 (1981) 6

J&R Flooring, Inc.,
356 NLRB No. 9 (Oct. 22, 2010) 9

Metro Managers, Inc.,
357 NLRB No. 150 (April 29, 2011) 10

NLRB v. C. E. Wylie Constr. Co.,
934 F.2d 234 (9th Cir. 1991) 8, 9

TABLE OF AUTHORITIES CONT'D

Page

Cases

NLRB v. Express Publishing Co.,
312 U.S. 426 (1941) 8

Perpetual Am. Sav. & Loan,
108 LRRM 1400 (1981) 5

Riberglass, Inc. v. Techni-Glass Indus., Inc.,
811 F.2d 565 (11th Cir.1987) 8

San Ramon Regional Medical Center,
2003 WL 22763700 (Nov. 12, 2003) 5

Southdown Care Center,
308 NLRB 225 (1992) 5

Standard Dry Wall Products,
91 NLRB 544 (1950) 6

Tenet Healthsystem Hospital,
2002 WL 31402769 (Oct. 16, 2002) 5

Tri-County Medical Center,
222 NLRB 1089 (1976) 4, 5, 6

Pessoa Constr. Co.,
356 NLRB No. 157 (May 19, 2011) 9

Statutes

29 U.S.C. § 158(a)(1) 1

National Labor Relations Act

§ 7 2
§ 8(a)(1) 1, 6, 8

SODEXO AMERICA, LLC'S ANSWERING BRIEF

Sodexo America, LLC ("Sodexo") submits this answering brief. Sodexo joins in the answering brief filed by Respondent USC University Hospital ("Hospital"). In this brief, Sodexo addresses the evidence and the arguments as it pertains to the allegations directed against Sodexo. The decision of Administrative Law Judge William G. Kocol ("ALJ") should be affirmed. The allegation that that Sodexo violated National Labor Relations Act ("NLRA") § 8(a)(1), 29 U.S.C. § 158(a)(1), should be dismissed.[1]

I

COUNTER-STATEMENT OF THE CASE

These cases involve a challenge to the factual validation of an off-duty access policy that was issued and maintained by the Hospital. The Hospital restricts off-duty access to protect employees and patients and their families from workplace violence, to prevent overtime claims and work-related inquiries, and to protect patient confidentiality. (T. 31-35, 42-43, 50-52; HOSP. EX. 1). Off-duty employees can access the interior of the Hospital but only under the same procedures as the general public. (DEC. AT 3; T. 37-38; 55-56, 68).

In this case, an individual, Patricia Ortega, and Service Workers United ("SWU") filed the pending separate charges against Sodexo. (GC. EX. 1(a), (d) AND (k)). The National Union of Healthcare Workers ("NUHW") did not file a charge against Sodexo.

[1] "T" refers to the hearing transcript. "GC. EX." refers to the General Counsel's exhibit. "HOSP. EX." refers to the exhibits introduced by Respondent USC University Hospital ("Hospital"). "GC. BRIEF" refers to the General Counsel's brief in support of exceptions.

In the consolidated complaint filed by the Acting General Counsel ("General Counsel"), Victor Perez is alleged to be a supervisor and agent of the Hospital. Sodexo denied that allegation. (GC. EX. 1(y) AT ¶ 8; GC. EX. 1(ax) AT ¶ 8). At the hearing, no testimony was presented as to the supervisory or agency status of Victor Perez. The ALJ apparently relied upon the Hospital's admission as to Perez's supervisory status. (T. 80-81).

It is conceded that USC acquired the Hospital on April 2009. (GC. BRIEF AT 2). The Hospital is an acute-care facility with over 1250 employees dispersed throughout several buildings. (DEC. AT 2; T. 30-31, 66).

Sodexo is a subcontractor to the Hospital. (DEC. AT 2). Sodexo operates the Hospital's cafeteria. The cafeteria is located inside the Hospital's facility. (GC. EX. 2 AT ¶ 5). The cafeteria is not open to the public. (DEC. AT 2; T. 44-45; HOSP. EX. AT 2). Sodexo's employees work in the cafeteria. (T. 52). Sodexo's employees also deliver food to patients throughout the Hospital. (T. 52). There is no evidence in the record that either Sodexo's employees or employees of the Hospital actually take breaks to eat meals in the cafeteria.

The sole allegation against Sodexo is that at some unspecified time after May 6, 2009, Sodexo announced to unidentified employees a 2008 version of an off-duty access Policy ("Policy") that was promulgated by the Hospital.[2] (GC. EX. 1(y) AT ¶ 11; GC. EX. 2 AT EX. A). The record does not describe the circumstances under which Sodexo made the announcement and, importantly, does not reflect that the announcement was made in connection with any employee exercising his or her rights under section 7 of the NLRA, 29 U.S.C. § 157.

[2] The allegations against the Hospital refer to a later version of the Policy. (GC. Ex. 3).

While the ALJ found that Sodexo posted the 2009 Policy for its employees, the ALJ's finding is not supported by the record. (DEC. AT 3). As part of the stipulation of facts, Sodexo admitted that a 2008 version of the Policy was posted on a bulletin board. The stipulation of facts does not state that Sodexo posted the Policy and does not state that the Policy was directed to Sodexo employees. (GC. EX. 2 AT ¶ 9).

The Policy in question begins by stating the general rule that "access to Hospital property by off-duty employees is permitted . . . ." (GC. EX. 2 AT EX. A). The Policy goes on to state that off-duty employees are not allowed to either enter or re-enter the interior of the Hospital or any work areas outside the Hospital except to visit a patient, receive medical treatment, or to conduct Hospital-related business. An "off-duty employee" is defined as an employee who has completed his or her assigned shift. "Hospital-related business" is defined as the pursuit of the employee's new normal duties or duties as specifically directed by management. Sodexo, as the Hospital's subcontractor, is required to follow the Policy. (DEC. AT 2; T. 48, 52; HOSP. EX. 2).

There is no evidence on the present record that Sodexo ever enforced the Policy against employees who were attempting to exercise section 7 rights.[3] Thus, there is no proof that Sodexo interfered with section 7 rights and the allegations against Sodexo must be dismissed. *Holling Press, Inc.,* 343 NLRB 301 (2004).

There is no evidence in the record that Sodexo allowed off-duty employees to return to the interior of the Hospital for any reason. Thus, there is no evidence on the present record that Sodexo's off-duty employees ever entered or re-entered the Hospital to pick up a paycheck.

Before the ALJ, and here, the General Counsel argues that the Policy is unlawful on its face because it did not prohibit off-duty access to the interior the Hospital <u>for any</u>

[3] The alleged discriminators in these cases are Hospital employees. (T. 20; GC. EX. 1(y) AT ¶¶ 12, 13, AND 14).

purpose. The General Counsel admits this Board has never adopted its view of *Tri-County.* (T. 21-22). At the hearing, when pressed by the ALJ, the General Counsel was unable to advance with a straight face this radical construction of the controlling law. The General Counsel readily conceded that the Policy could lawfully prohibit off-duty employees from returning to working areas that are inside the Hospital. Thus, the General Counsel conceded the following: "I would say that they are off-duty employees should not be allowed access to the interior of the Hospital's working areas." (T. 21). The General Counsel pointed only to the cafeteria as a potential interior non-working area of the Hospital. (T. 21). However, it is undisputed that the cafeteria is a working area for Sodexo employees.[4] The General Counsel thus has conceded that Sodexo did not violate section 8(a)(1) by announcing the Policy.

II

ARGUMENT

1. The ALJ Correctly Found That The Policy On Its Face Did Not Violate Section 8(a)(1).

The ALJ correctly applied the rule set forth in *Tri-County Medical Center*, 222 NLRB 1089 (1976). The ALJ correctly found that the parties had stipulated that the Policy applied only to off-duty employees and only to the interior of the Hospital. The ALJ also correctly concluded that there was no issue regarding dissemination of the Policy nor was there any issue relating to its selective enforcement. Thus, the ALJ correctly concluded that the first and second prongs of the *Tri-County* three-part test were not at issue in these cases. (DEC. AT 3).

[4] The General Counsel's statement that the places where employees may eat is not a work area is absurd. (GC. BRIEF AT 8). Sodexo operates the cafeteria and its employees work in the cafeteria. The cafeteria is a Sodexo work area. In any event, the General Counsel did not introduce evidence that either Sodexo or Hospital employees actually eat in the cafeteria.

ALJ also correctly concluded that the General Counsel's reading of *Tri-County*'s third prong is too literal and that the cases upon which the General Counsel relied are distinguishable. (DEC. AT 3-4). The Board in *Tri-County* held that an off-duty access policy was lawful under the third prong where the rule applied to off-duty employees who are seeking access for any purpose and not just to employees seeking to engage in union activity. In *Tri-County*, the off-duty access policy there applied to areas outside the Hospital and had not been disseminated to employees. The off-duty access policy in *Tri-County* was deemed unlawful for these reasons. *Tri-County,* 222 NLRB at 1089-90.

Subsequent interpretations of *Tri-County* by the Board, administrative law judges, and a previous General Counsel have concluded that an off-duty access policy is still lawful even though it grants off-duty access for some purposes. *Southdown Care Center,* 308 NLRB 225, 232 (1992) (allowed access to visit family or friends in the facility if visitor rules were followed); *Tenet Healthsystem Hospital,* 2002 WL 31402769 (Oct. 16, 2002) (virtually identical policy found lawful on its face); *San Ramon Regional Medical Center,* 2003 WL 22763700 (Nov. 12, 2003) (same); *Citrus Valley Medical Center, Inc.,* 2008 WL 4657784 (Oct. 17, 2008) (employees can return to pickup paychecks or to resolve benefit issues without offending *Tri-County*); *Perpetual Am. Sav. & Loan,* 108 LRRM 1400 (1981) (off-duty access permitted when employees were treated like the general public). The General Counsel in this case conceded as much when she acknowledged that an off-duty access Policy could be applied to working areas inside the Hospital. (T. 21). Further, interior cafeterias and break rooms are treated as being covered by the *Tri-County* three-pronged test. *Citrus Valley Medical Center,* 2008 WL 4657784 at *8; *San Ramon Medical Center,* 2003 WL 22763700 at 2-3 (same).

As the ALJ noted, the cases upon which the General Counsel relies are distinguishable. (DEC. AT 4). Thus, in *Baptist Memorial Hosp.*, 229 NLRB 45 (1997),

enf'd, 568 F.2d 1 (6th Cir 1977), the no-access rule in that case was not limited to the interior of the facility and was not clearly disseminated to employees.

In *Intercommunity Hosp.*, 255 NLRB 468 (1981), the Board did not find a violation of section 8(a)(1). The Board only found that the employees had engaged in conduct sufficient to overturn an election. The test of conduct that interferes with an election is considerably more restrictive than the test for conduct that violates section 8(a)(1). *Dal-Tex Optical Co.,* 137 NLRB 1782 (1962). Therefore, the finding of objectionable conduct in *Intercommunity* was not tantamount to finding a violation of section 8(a)(1). Further, in *Intercommunity,* there was evidence that employees were permitted to remain in the Hospital after work while waiting for rides or carpools. Here, unlike in *Intercommunity,* the Hospital's reference to "official business" is clarified and clearly defined to mean the pursuit of the employee's normal work duties or work duties that are directed by management. (DEC. AT 4). There is no evidence that Sodexo employers remain in the Hospital after work for rides or carpools.

2. The Hospital's Business Justification Issue.

The General Counsel devotes a substantial portion of her brief to whether the Hospital adequately supported the Policy with a business justification. The ALJ found that the Hospital's witness, Matthew F. McElrath, was credible and adequately explained the reasons and the need for the Policy. (DEC. AT 3; T. 28-69; HOSP. EXS. 1 AND 2). The General Counsel did not call a witness to rebut Mr. McElrath's testimony. The General Counsel has not shown that the ALJ's credibility resolutions were incorrect under the standards set forth in *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enf'd*, 188 F.2d 362 (3d Cir. 1951).

Moreover, under *Tri-County*, the employer need not offer a business justification for an off-duty access rule that is limited to the interior of the facility. A business

justification is required where the off-duty access rule is applied to "parking lots, gates, and other outside nonworking areas . . . ." 222 NLRB at 1089. Here, it was stipulated that the portion of the Policy challenged here applied only to the interior of the Hospital. While the Hospital adequately supported the need for the Policy by a business justification, no such justification was necessary under the *Tri-County* decision.

3. The Testimony of Julio Estrada.

ALJ also properly refused to consider the testimony of Hospital employee Julio Estrada (T. 70-84) relating to the picking up of his paycheck on days Estrada claimed he did not work. The General Counsel stipulated that selective enforcement was not an issue and both Sodexo and the Hospital objected to the testimony of Mr. Estrada. (GC. EX. 2 AT ¶ 8; GC. EX. 3 AT ¶ 13; T. 72-75). Further, the ALJ noted that that over "about a five-year period of about 10 occasions when Estrada's supervisor [Victor Perez] saw him in the facility while off-duty yet the supervisor allowed him to pick up his check." (DEC. AT 4, GC. BRIEF AT 4). The General Counsel does not except to this factual finding. The ALJ viewed as *de minimis* any deviation from the Policy. (DEC. AT 5).

The evidence relating to Mr. Estrada should not be considered with respect to Sodexo. First, it was stipulated by all parties that selective enforcement was not an issue and the ALJ correctly ruled General Counsel's evidence violated the narrow scope of the issues they raised in the Complaint. (DEC. AT 5; T. 72-75). Second, it is clear from the transcript that the Estrada testimony was offered only with respect to the Hospital and not with respect to Sodexo. (T. 75, 78-80). The General Counsel did not except to the ALJ's ruling on this point. Third, no testimony was presented as to the supervisory or

agency status of Perez, the so-called supervisor. (GC. BRIEF AT 4). Any admissions by the Hospital in that regard are not binding on Sodexo. *Riberglass, Inc. v. Techni-Glass Indus., Inc.,* 811 F.2d 565, 566 (11th Cir.1987*); Castiglione v. United States Life Ins. Co.*, 262 F.Supp.2d 1025, 1030 (D.Ariz.2003). Finally, the Estrada evidence is truly *de minimis*. As the ALJ found (DEC. AT 5), the size of the Hospital (over 500,000 square feet) and the number of employees (over 1200) are important on this point. Further, the Hospital was only acquired in April 2009 and there is no evidence in the record as to how many of the ten occasions occurred after that date.[5]

4. The Proposed Remedy Is Too Broad.

Without conceding that a violation occurred, the scope of the remedy proposed by the General Counsel is too broad. (GC. BRIEF AT 15-16, 19).

If a violation of is found, the remedial order must be limited to the following: the order should apply to SWU only as that is the only labor organization that filed a charge against Sodexo; the order should be limited to the Hospital facility; the order should be limited to ceasing to announce the 2008 version of the Policy as that is the only allegation against Sodexo; the order should be limited to like or related violations of section 8(a)(1); and posting or the remedial order should be by traditional means at the Hospital as there is no evidence in the record as to how Sodexo communicates with its employees.

The Board does not have the authority to restrain generally all unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct. *Communications Workers v. NLRB*, 362 U.S. 479 (1960); *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941); *NLRB v. C. E. Wylie Constr. Co.*, 934 F.2d 234, 236-37 (9th Cir. 1991), *further proceedings*, 310 NLRB 721 (1993).

---

[5] In her brief, the General Counsel states that all employees pick up their paychecks when off-duty. (GC. BRIEF AT 4). The ALJ sustained the Hospital's objection to that testimony. (GC. Brief at 4; T. 76). Like Estrada, Perez worked at the facility for many years prior to April 2009. (T. 70-82).

Here, any order should be limited to the announcement of the 2008 version of the Policy or any like or related violation. There is neither an allegation that Sodexo has announced any other access rule nor is there any allegation that it is likely to do so. The order requested by the General Counsel, which would apply to any rule, is simply too broad. In *Baptist Hosp.,* 229 NLRB at 53, the decision precisely described the policy that was subject to the remedial order.

The order should be limited to SWU as that is the only labor organization that has filed a charge against Sodexo. NUHW did not file a charge against Sodexo. A Board's order can include other labor organizations or entities only when there is a showing that the violation is likely to harm others. *C. E. Wylie Constr. Co.*, 310 NLRB 721, 712 (1993). The General Counsel does not argue that such evidence exists nor is there such evidence in the record.

The order should be limited to the Hospital location as that is the only location where any violation occurred. An order that extends beyond the specific location where the alleged violation occurred must be supported by evidence that the offending party is likely to commit similar violations at other sites. *Wylie*, 310 NLRB at 721; *Pessoa Constr. Co.,* 356 NLRB No. 157, * 1 n. 5 (May 19, 2011) (rejecting argument that notice should be posted at all jobsites). The General Counsel does not argue that such evidence exists and there is no such evidence in the record.

Any notice posting must be by traditional means. Electronic posting is justified only when the employer communicates with employees electronically. *J&R Flooring, Inc.,* 356 NLRB No. 9 at 4 (Oct. 22, 2010). No such evidence exists on the present record.

The notice proposed by the General Counsel would order Sodexo to cease and desist from any other violations of the NLRA. (GC. BRIEF AT 19). Such an order

smashes a broad order, which can only be imposed when there is a showing that the employer has a proclivity to violate the NLRA.[6] Thus, in *Express Publishing*, 312 U.S. at 430-39, the Supreme Court struck down a Board order that enjoined not only committing the unfair labor practice at issue in that case but enjoined the employer from committing any other violations of the NLRA. Under the Board's decision in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), an order enjoining any other violation of the NLRA is warranted only where there is a showing of a proclivity to violate the NLRA or the presence of such egregious or widespread misconduct as to demonstrate a general disregard of section 7 rights. The General Counsel does not claim that Sodexo has a proclivity to violate the NLRB or that any violation here (if there was one) is so egregious or widespread as to demonstrate a general disregard for section 7 rights.[7] *Accord, Metro Managers, Inc.,* 357 NLRB No. 150 at 2 n. 2 (April 29, 2011) (broad order not warranted as there is no showing of privilege to violate the NLRB and no showing egregious or widespread unfair labor practice). No such evidence is claimed to exist on the present record.

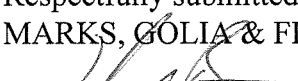
III

CONCLUSION

Based upon the foregoing, it is requested that the Board affirm the dismissal of the complaint against Sodexo.

DATED: June 20, 2011

Respectfully submitted,
MARKS, GOLIA & FINCH, LLP

By: 
MARK T. BENNETT
Attorneys for Sodexo America LLC

860.080/31N6411.axm

[6] The language that "WE WILL NOT DO ANYTHING THAT INTERFERES WITH THOSE [section 7] RIGHTS" does not appear in recent Board orders. *See, e.g., Landmark Family Foods, Inc.,* 356 NLRB No. 170 (May 31, 2011); *Kadouri Int'l Foods, Inc.,* 356 NLRB No. 148 (April 29, 2011).

[7] In fact, here the Regional Director dismissed several allegations raised in the charges. (GC. Ex. 1(am) at Exs. 10, 11, and 13).

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Region 21

SODEXO AMERICA LLC

and — Case 21-CA-39086

PATRICIA ORTEGA, an Individual

SODEXO AMERICA LLC; AND
USC UNIVERSITY HOSPITAL

and — Case 21-CA-39109

SERVICE WORKERS UNITED

USC UNIVERSITY HOSPITAL

and — Cases 21-CA-39328
21-CA-39403

NATIONAL UNION OF HEALTHCARE
WORKERS

PROOF OF SERVICE VIA
ELECTRONIC MAIL AND/OR OVERNIGHT EXPRESS

I, Ada Meraz declare that:

I am over the age of eighteen years and not a party to the action; I am employed in the County of San Diego, California; where the mailing occurs; and my business address is 8620 Spectrum Center Boulevard, Suite 900, San Diego, California 92123-1489. I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with overnight mail and/or electronic mail pursuant to which practice the correspondence will be deposited with overnight or electronic mail this same day in the ordinary course of business. I caused to be served the

following document(s): **SODEXO AMERICA, LLC'S ANSWERING BRIEF**, by placing either a copy thereof in a separate overnight envelope or by electronic mail for each addressee listed as follows:

VIA ELECTRONIC MAIL

Linda Van Winkle Deacon, Esq.
Bate, Peterson, Deacon, Zinn & Young
888 South Figueroa Street, Suite 1500
Los Angeles, California 90017
T: 213-362-1860
F: 213-362-1861
e-mail: ldeacon@bpdzylaw.com

VIA ELECTRONIC MAIL

Ms. Patricia Ortega
2107 Common Wealth Avenue,
Apt. D-369
Alhambra, CA 91803

e-mail: opatricia491@gmail.com

VIA ELECTRONIC MAIL

Alice Garfield, Region 21
National Labor Relations Board
888 South Figueroa Street, Ninth Floor
Los Angeles, CA 90017-5449
T: 213-894-3011
F: 213-894-2778
E-mail: alice.garfield@nlrb.gov

VIA ELECTRONIC MAIL

Florice O. Hoffman, Esq.
Law Offices of Florice Hoffman
8502 East Chapman Avenue, #353
Orange, California 92869
T: 714-282-1179
F: 714-282-7918
E-mail: fhoffman@socal.rr.com

VIA OVERNIGHT MAIL

SEIU-United Healthcare Workers-West
5480 Ferguson Drive
Los Angeles, CA 90022

VIA OVERNIGHT MAIL

Antonio Orea
National Union of Healthcare Workers
8502 East Chapman Avenue, Suite 353
Orange, CA 92869

VIA OVERNIGHT MAIL

Service Workers United
275 Seventh Avenue, 10th Floor
New York, NY 10001

VIA ELECTRONIC MAIL

Bruce A. Harland, Esq.
Weinberg, Roger, & Rosenfeld
1001 Marina Village Parkway,
Suite 200
Alameda, CA 94501
T: 510-337-1001
E-mail: bharland@unioncounsel.net

/ / / / /

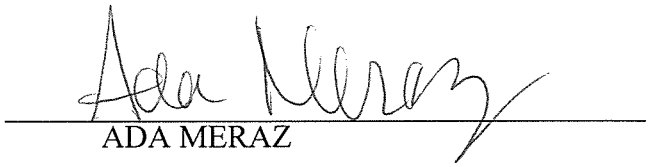
/ / / / /

/ / / / /

I then sealed the overnight envelope(s) and, either deposited it/each with overnight mail or electronically served it/each for collection and mailing on June 20, 2011 at San Diego, California, following ordinary business practices.

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

Executed on June 20, 2011.



ADA MERAZ

860.080/Proof.axm