In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **ZACHARY EDWARD DAVIS,** Defendant and Appellant.	Case No. S198434

Second Appellate District, Division Four, Case No. B229615
Los Angeles County Superior Court Case No. BA367204
The Honorable Barbara R. Johnson, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

In the absence of expert testimony or a stipulation that MDMA/Ecstasy was a controlled substance or an analog of a controlled substance, did the Court of Appeal correctly hold that substantial evidence supports defendant's convictions?

STATEMENT OF THE CASE

On December 31, 2009, members of the Los Angeles Police Department Gang Narcotics Buy Team conducted an undercover operation at a rave party at the Los Angeles Coliseum. (2RT 328-334.) One member of the team, Officer Romeo Rubalcava, attempted to purchase methylenedioxymethamphetamine (MDMA), commonly known as Ecstasy, from appellant. (2RT 332.) As appellant walked past, Officer Rubalcava loudly stated "E." (2RT 336, 338-339.) Appellant asked what Officer Rubalcava wanted. (2RT 341.) Officer Rubalcava said "E" again, and appellant asked how much he wanted. The officer replied "dub two," meaning $20 worth. (2RT 341-342.) Appellant then walked over to a man later identified as Jeffrey Kiralla. (2RT 342.) Appellant had a quick meeting with Kiralla, returned to Officer Rubalcava, grabbed two blue pills from a plastic bindle he pulled out of his rear waist area, and gave them to Officer Rubalcava in exchange for $20. (2RT 343-349.) Officer Rubalcava then walked away with the pills and arranged to have appellant and Kiralla arrested. (2RT 354-359.)

As officers approached, Kiralla dropped a clear plastic bag containing blue pills. (3RT 666-667.) An additional 19 blue pills were recovered from this dropped bag. (3RT 666-668.)

Wubayehu Tsega, a criminalist from the LAPD Crime Lab, tested the two blue pills appellant sold Officer Rubalcava and a representative sample

of the 19 pills recovered from the clear plastic bag. They were all found to contain "MDMA or ecstasy." (3RT 707-709.)

The jury found appellant guilty of one count of sale of methylenedioxymethamphetamine (§ 11379, subd. (a)) and one count of possession of methylenedioxymethamphetamine (§ 11377). (1CT 81-85.) The trial court sentenced appellant to 36 months of formal probation with the condition that he serve 90 days in county jail. (1CT 92-95.)

On appeal, appellant claimed that his convictions must be reversed because there was not substantial evidence that the substances he possessed and sold were controlled substances or controlled substance analogs. The Court of Appeal disagreed, finding that evidence adduced at trial showed that the pills appellant sold contained MDMA and that MDMA is the abbreviation for methylenedioxymethamphetamine. The appellate court then applied "common sense" in concluding that because the name of the substance, methylenedioxymethamphetamine, included the term "methamphetamine" without a suffix or term negating the inference, the evidence established that the pills sold by appellant contained "some quantity" of methamphetamine or amphetamine within the meaning of section 11055, subdivision (d). (Opinion at pp. 6-7.) The Court of Appeal therefore affirmed the conviction. (Opinion at p. 11.)

SUMMARY OF ARGUMENT

The Court of Appeal correctly held that substantial evidence supports appellant's convictions for possession and sale of MDMA or Ecstasy. Evidence was presented to the jury that appellant possessed and sold blue pills containing MDMA: methylenedioxymethamphetamine. Based on the name of the chemical compound, it was logical to infer that these pills contained amphetamine or methamphetamine. (See http://m.drugabuse.gov/publications/teaching-packets/neurobiology-

ecstasy/section-i/2-define-ecstasy; http://m.drugabuse.gov/sites/default/files /eslide2.gif.) Thus, despite the fact that MDMA is not an *enumerated* controlled substance in the California Uniform Controlled Substances Act (Health and Safety Code,[1] § 11000 et seq.), MDMA could be deemed a controlled substance within the meaning of section 11055, subdivision (d), which treats as a controlled substance "any material, compound, mixture, or preparation which contains *any* quantity of amphetamine or methamphetamine." Because MDMA contains amphetamine or methamphetamine for purposes of the Act, appellant's unlawful sale and possession of the MDMA pills violated section 11377 and section 11379, subdivision (a).

Expert testimony was not required in the trial court because such a determination could be made based upon the common knowledge that chemical compound names detail the composition of the compound. Accordingly, by introducing the chemical compound name of Ecstasy (methylenedioxymethamphetamine), the prosecution presented sufficient evidence that Ecstasy is a controlled substance pursuant to section 11055, subdivision (d). Expert testimony was not required on this topic because reasonable jurors could make such an inference drawing upon the jury's "common fund of information."

Furthermore, contrary to appellant's argument, the prosecution did not need to establish that methamphetamine maintains its "distinct chemical identity within MDMA" in order for MDMA to qualify as a controlled substance under section 11055, subdivision (d). Rather, the statute simply states that any material, compound, mixture, or preparation is a controlled substance if contains any quantity of certain substances, including

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[1] All further statutory references are to the Health and Safety Code, unless otherwise stated.

amphetamine and methamphetamine, which have a stimulant effect on the nervous system. Looking at the plain language of the statute, it is clear the Legislature intended to criminalize the possession and sale of all mixtures and preparations which contain *any quantity* of certain banned substances. Contrary to appellant's suggestions, there are no requirements on how to prove the mixture *contains* the banned substance (i.e., only through expert testimony) and no requirement that the banned substance maintain its "distinct chemical identity." For this reason, no testimony (expert or otherwise) was "needed to prove methamphetamine maintains its 'distinct chemical identity' within MDMA."

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS APPELLANT'S CONVICTIONS FOR SALE AND POSSESSION OF METHYLENEDIOXYMETHAMPHETAMINE

Appellant contends the Court of Appeal incorrectly determined that sufficient evidence supports his convictions in violation of his constitutional rights. Specifically, he claims that the prosecution "failed to produce 'a stipulation [] or expert testimony showing that MDMA meets the definition of a controlled substance or controlled substance analog." (Appellant's Opening Brief on the Merits "AOBM" 2.) According to appellant, "[i]n the absence of expert testimony or a stipulation establishing MDMA contained a listed controlled substance or was a controlled substance analog, the prosecution failed to prove an essential element of the charged crimes beyond a reasonable doubt." (AOBM 28.) Appellant's arguments are without merit. By introducing the chemical compound name of MDMA (methylenedioxymethamphetamine), the prosecution presented sufficient evidence that MDMA contains methamphetamine or

amphetamine and thus is a controlled substance pursuant to section 11055, subdivision (d).

A. Sufficient Evidence Was Presented That Methylenedioxymethamphetamine is a Controlled Substance Within the Meaning of Section 11055, Subdivision (d)

The standard of review governing sufficiency of the evidence claims is well settled.

> On appeal, the test of legal sufficiency is whether there is substantial evidence, i.e., evidence from which a reasonable trier of fact could conclude that the prosecution sustained its burden of proof beyond a reasonable doubt. Evidence meeting this standard satisfies constitutional due process and reliability concerns. [¶] While the appellate court must determine that the supporting evidence is reasonable, inherently credible, and of solid value, the court must review the evidence in the light most favorable to the prosecution, and must presume every fact the jury could reasonably have deduced from the evidence. Issues of witness credibility are for the jury.

(*People v. Boyer* (2006) 38 Cal.4th 412, 479-480, internal citations omitted.)

The California Uniform Controlled Substances Act (§ 11000 et seq.) regulates the use, possession, and sale of controlled substances in California. Five sections of the Act each contain a numbered schedule (I-V) listing a variety of controlled substances. (§§ 11054-11058.) For example, amphetamine and methamphetamine are listed in Schedule II as controlled stimulant substances. (§ 11055, subd. (d)(1), (2).) Methylenedioxyamphetamine (MDA) is listed in Schedule I as a hallucinogenic substance. (§ 11054, subd. (d)(6).)

Although MDMA is not an enumerated controlled substance under the California Uniform Controlled Substances Act,[2] section 11055, subdivision (d) treats as a controlled substance "any material, compound, mixture, or preparation which contains *any quantity* of [certain] substances having a stimulant effect on the central nervous system." (Emphasis added.) Included within this subdivision are mixtures containing "amphetamine" or "methamphetamine." (§ 11055, subd. (d)(1), (2).) In addition, an analog of a listed controlled substance is treated the same as the listed controlled substance. (§ 11401, subd. (a).) A "controlled substance analog" is defined as a substance that: (1) has a substantially similar chemical structure as the controlled substance, or (2) has, is represented as having, or is intended to have a substantially similar or greater stimulant, depressant, or hallucinogenic effect as the controlled substance. (§ 11401, subd. (b).) Thus, in order for MDMA to be treated as a controlled substance in the instant matter, MDMA must contain one of the enumerated prohibited substances or meet the definition of a controlled substance analog.

As instructed by the trial court in the instant matter, in order to convict a defendant of violating section 11377, the prosecution must prove: 1) the defendant unlawfully possessed a controlled substance; 2) the defendant knew of its presence; 3) the defendant knew of the substance's nature and character as a controlled substance; 4) the substance was Ecstasy; and 5) the controlled substance was in a usable amount. (See CALCRIM No. 2304; 1CT 75; 3RT 923-924.) For a violation of section 11379, subdivision (a), the prosecution must prove: 1) the defendant sold a controlled substance; 2) the defendant knew of its

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[2] As acknowledged by both parties and the Court of Appeal, methylenedioxymethamphetamine (MDMA) is not specifically listed as a controlled substance in these statutes. MDMA is listed as a controlled substance under federal law. (51 Fed.Reg. 36552 (Oct. 14, 1986).)

presence; 3) the defendant knew of the substance's nature or character as a controlled substance; and 4) the controlled substance was methylenedioxymethamphetamine commonly called Ecstasy. (See CALCRIM No. 2300; 1CT 73; 3RT 920-921.)

Here, sufficient evidence was presented that appellant unlawfully possessed and sold MDMA in violation of section 11377 and section 11379, subdivision (a). Indeed, contrary to appellant's contentions, the prosecution did demonstrate that MDMA contained a listed controlled substance, namely amphetamine or methamphetamine, and was, therefore, a controlled substance within the meaning of section 11055, subdivision (d). Specifically, evidence was offered to the jury that the pills possessed and sold by appellant contained MDMA or "Ecstasy." (3RT 707-709.) The jury was further instructed that "Ecstasy" is commonly known as methylenedioxymethamphetamine. (1CT 73-77; 3RT 920-922.) In addition, the lab report that identified the blue pills as 3, 4-methylenedioxymethamphetamine (MDMA) was admitted into evidence as People's Exhibit 12. (3RT 710.) Using common knowledge, it was proper to infer that methylenedioxymethamphetamine contains amphetamine or methamphetamine. (See http://m.drugabuse.gov/publications/teaching-packets/neurobiology-ecstasy/section-i/2-define-ecstasy; http://m.drugabuse.gov/sites/default/files/eslide2.gif.) Since amphetamine and methamphetamine are defined as controlled substances in section 11055, subdivision (d)(1) and (2), MDMA is necessarily included among the controlled substances subject to section 11377 and section 11379, subdivision (a). Accordingly, appellant's possession and sale of the MDMA pills violated sections 11377 and 11379, subdivision (a).[3]

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[3] Indeed, appellant effectively conceded at trial that MDMA constitutes a controlled substance. (See Opinion at p. 10.) When the trial (continued...)

For these reasons, sufficient evidence was presented that methylenedioxymethamphetamine is a controlled substance within the meaning of section 11055, subdivision (d).

B. Expert Testimony Was Not Necessary to Determine Whether Methylenedioxymethamphetamine Contains a Controlled Substance

Appellant argues at length that sufficient evidence does not support his convictions because expert testimony was needed to establish whether MDMA contains a controlled substance. According to appellant, such a determination cannot be a matter of "common sense." (AOBM 9-20.) Appellant's arguments are without merit because even matters related to chemistry or science can be matters of common knowledge.

It is a matter of common knowledge that chemical compound names detail the composition of the compound. (See Zumdahl, Chemical Principles (2nd ed. 1995) § 2.9, p. 39.) Thus, using common knowledge, one could readily infer, for example, that hydrogen peroxide contains hydrogen, and that sodium chloride contains sodium. It is likewise easy to infer that methylenedioxymethamphetamine contains amphetamine or methamphetamine. Contrary to appellant's assertions, the fact that the subject matter involves science or chemistry does not take the matter out of the realm of common knowledge. Indeed, facts are deemed common knowledge if they are matters of common human experience or well known laws of natural science. (*People v. Love* (1961) 56 Cal.2d 720, 732,

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(...continued)
court instructed the jury that MDMA was, in fact, a controlled substance, there was no objection from the defense. (3RT 901-902, 920-926.) Furthermore, appellant did not dispute that MDMA was a controlled substance and did not argue to the jury that the prosecution had failed to carry its burden in proving the element. In addition, defense counsel often referred to Ecstasy as a "drug" and a "narcotic." (See, e.g., 3RT 933-1067.)

overruled on other grounds by *People v. Morse* (1964) 60 Cal.2d 631; see also *People v. Thompson* (2006) 38 Cal.4th 811, 832, citing *In re Martin* (1962) 58 Cal.2d 509, 512 ["It is a matter of common knowledge that the intoxicating effect of alcohol diminishes with the passage of time"]; *People v. Clark* (1993) 5 Cal.4th 950, 1017-1019, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [it is common knowledge that inferences can be drawn from spatter patterns of blood expelled from the human body]; *Simmons v. Rhodes & Jamieson, Limited* (1956) 46 Cal.2d 190, 195 ["It is a matter of common knowledge that water activates the lime in cement"]; *People v. Mitchell* (2003) 110 Cal.App.4th 772, 789 [it is "common knowledge that scent travels through air and that vacuum devices pick up particles"]; *Barton v. Owen* (1977) 71 Cal.App.3d 484, 494, citing *Bardessono v. Michels* (1970) 3 Cal.3d 780, 789-790 [there are a "wide variety of cases in which courts have found sufficient common knowledge and observation among laymen, regardless of expert testimony, to indicate 'that the consequences of the professional treatment were not such as ordinarily would have followed if due care had been exercised'"]; *Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1075 ["it is a matter of common knowledge among laymen that the use of a catheter in an artery is not ordinarily harmful unless someone is negligent"]; *Brubaker v. Beneficial Standard Life Ins. Co.* (1955) 130 Cal.App.2d 340, 345 ["It is a matter of common knowledge that science is constantly increasing the life expectancy of everyone"].)

Moreover, expert testimony is not appropriate "when it would add nothing at all to the jury's common fund of information, i.e., when 'the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness.'" (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300.) Here, as explained above, that methylenedioxymethamphetamine contains amphetamine or

methamphetamine is a concept that can be readily inferred from "common knowledge" such that "men [or women] of ordinary education" could reach such a conclusion without the assistance of an expert. (See *id.*) For this reason, expert testimony is not necessary to prove that MDMA is a controlled substance. It was enough for the prosecution to introduce the full, chemical name of MDMA to know what its components are and whether it contains a controlled substance for purposes of section 11055, subdivision (d).

Appellant further contends that the Court of Appeal's "'mistaken assertion' regarding how MDMA is produced demonstrates the need for expert testimony to prove MDMA contains a controlled substance or is a controlled substance analog." (AOBM 14.) Not so. Indeed, how MDMA is actually produced is irrelevant to the determination that MDMA contains *any quantity* of amphetamine or methamphetamine for purposes of section 11055, subdivision (d). In the instant matter, it was enough for the jury to hear that the pills possessed and sold by appellant were found to be methylenedioxymethamphetamine in order to infer that they therefore contained amphetamine or methamphetamine and were controlled substances within the meaning of section 11055, subdivision (d).

Appellant's argument that *People v. Silver* (1991) 230 Cal.App.3d 389 (*Silver*), mandates the use of expert testimony in the instant matter is unpersuasive. (AOBM 15-16.) In *Silver*, the defendant was convicted of possession for sale and sale of MDMA in violation of sections 11378 and 11379. At trial, the parties presented competing expert testimony regarding whether MDMA is an *analog* of methamphetamine. (*Silver*, *supra*, 230 Cal.App.3d at pp. 392-393.) Among other things, the experts compared the molecular structure and physiological effect of the two drugs. (*Id.* at pp. 392-393, 396.) On appeal, the court concluded that testimony expressly comparing MDMA to an enumerated controlled substance was sufficient

evidence to support a jury conviction. (*Id.* at p. 396.) However, contrary to appellant's argument, *Silver* did not state, or even suggest, that testimony from an expert was *necessary* to uphold a conviction on appeal. There is also no language from the appellate court requiring any specific form of evidence in order to demonstrate sufficient evidence. Moreover, in *Silver*, the prosecution sought to classify MDMA as an *analog* of methamphetamine pursuant to section 11401—not to establish that MDMA was, in fact, a controlled substance because it *contained* an enumerated controlled substance pursuant to section 11055, subdivision (d).

In support of his position, appellant relies heavily on the Ninth Circuit Court of Appeals' opinion in *United States v. Lo* (9th Cir. 2006) 447 F.3d 1212, 1221 (*Lo*), which held that a chemical "commingled with other substances" can be considered a listed chemical for purposes of 21 U.S.C. § 841(c) if it "maintain[s] its distinct chemical identity within the combination rather than changing into a different chemical" and "maintain[s] its utility in the manufacture of a controlled substance." A jury convicted Lo of, among other things, possession of ephedrine and conspiracy to distribute ephedrine and to aid and abet the manufacture of methamphetamine. (*Id.* at p. 1219.) The district court granted Lo's motion for acquittal on the possession of ephedrine count, reasoning that Lo had possessed ma huang (ephedra) rather than ephedrine and, according to the defense expert, extracting ephedrine from ma huang is a laborious process. (*Id.* at p. 1221.) The Ninth Circuit reversed the acquittal, stating that there was sufficient evidence that the ephedrine maintained a separate identity within the ma huang extract and could be used to manufacture methamphetamine. (*Id.* at pp. 1221-1225.)

Citing *Lo*, appellant argues that "a jury is not equipped to determine whether methylenedioxymethamphetamine is a mere commingling of chemicals, wherein methamphetamine retains a separate existence, or

whether it becomes a different chemical." (AOBM at 17-18.) He further contends that "expert testimony therefore is necessary to determine what happens when chemicals are combined." (AOBM at 18.) He also states that as in *Lo*, "expert testimony is needed to prove methamphetamine maintains its 'distinct chemical identity' [citation] within MDMA." (AOBM at 19.) Appellant is mistaken, and his reliance on this federal opinion is misplaced.

First, federal cases are not controlling in state appeals such as this, especially federal cases concerning a federal statute not at issue in this case. (See *United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, 1115.) Indeed, *Lo* considered and analyzed 21 U.S.C. § 841(c)—not California's Health and Safety Code. Moreover, as noted in *Lo*, federal courts had previously held that in order for a chemical that is commingled with other substances to be considered a listed chemical for purposes of 21 U.S.C. § 841(c), the chemical must: "1) maintain its distinct chemical identity within the combination rather than changing into a different chemical; and 2) must maintain its utility in the manufacture of a controlled substance." (*Lo*, *supra*, 447 F.3d at p. 1221.) Section 11055, subdivision (d), on the other hand, does not contain these requirements. It deems something a controlled substance simply if it "contains" *any quantity* of an enumerated controlled substance.

Established maxims of statutory construction support the interpretation that section 11055, subdivision (d), does not have a "distinct chemical identity" or "utility" requirement. In this regard, this Court has explained that the plain meaning of a statute is ordinarily the starting and ending point to determine legislative intent:

> Where, as here, the issue presented is one of statutory construction, our fundamental task is "to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute."

> [Citations.] We begin by examining the statutory language because it generally is the most reliable indicator of legislative intent. [Citation.] We give the language its usual and ordinary meaning, and "[i]f there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs." [Citation.] If, however, the statutory language is ambiguous, "we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history." [Citation.] Ultimately we choose the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute. [Citations.] Any interpretation that would lead to absurd consequences is to be avoided. [Citation.]

(*Allen v. Sully-Miller Contracting Co.* (2002) 28 Cal.4th 222, 227.)

"The 'major consideration in interpreting a criminal statute is the legislative purpose,' and the court 'will usually inquire into the evils which prompted its enactment and the method of elimination or control which the Legislature chose.'" (*People v. Kelly* (2007) 154 Cal.App.4th 961, 967.) The California Uniform Controlled Substances Act unequivocally manifests a legislative intent to restrict the transportation, sale and possession of controlled substances so as to protect the health and safety of all persons within this state. (See, e.g., §§ 11350, 11351, 11352; see also *People v. Medina* (1972) 27 Cal.App.3d 473, 477-478; *People v. Clark* (1966) 241 Cal.App.2d 775, 780.) In addition, this Court has recognized that "'California, of course, has a weighty public interest in the suppression of traffic in and the abuse of controlled substances, by which term narcotics and dangerous drugs have come to be known.' [Citation.]" (*People v. Aston* (1985) 39 Cal.3d 481, 490.)

In looking at the plain language of the statute, it is clear the Legislature intended to criminalize the possession and sale of all mixtures and preparations which contain *any quantity* of certain banned substances. Contrary to appellant's suggestions, there are no requirements on how to

prove the mixture *contains* the banned substance (i.e., only through expert testimony) and no requirement that the banned substance maintain its "distinct chemical identity." For this reason, no testimony (expert or otherwise) was "needed to prove methamphetamine maintains its 'distinct chemical identity' within MDMA."

Accordingly, here, expert testimony was not required to prove that the MDMA possessed and sold by appellant was a controlled substance within the meaning of section 11055, subdivision (d).[4]

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[4] Appellant also argues that the Court of Appeal erred in taking judicial notice of certain learned treatises because, according to appellant, "since judicial notice is a substitute for proof, the reviewing court's resort to judicial notice establishes there was insufficient proof MDMA contained a controlled substance. (AOBM 20, 25.) Further, appellant contends his constitutional right to a jury determination of every element of the crime and due process was violated when the appellate court "develop[ed] a factual record to support an essential element of the crime." (AOBM 32.) Appellant's arguments are flawed. The Court of Appeal did not take judicial notice of the treatises as a "substitute for proof" or to develop an additional factual record. Rather, it referenced these journals to verify the facts it already deemed to be common knowledge. (See Opinion at pp. 6-7.) Regardless, judicial notice is not required in order to affirm the conviction.

CONCLUSION

Substantial evidence supports appellant's convictions. Evidence was presented that the blue pills possessed and sold by appellant contained methylenedioxymethamphetamine (MDMA). Using common knowledge, it was logical to infer that these pills therefore contained amphetamine or methamphetamine. As such, MDMA could be deemed a controlled substance within the meaning of section 11055, subdivision (d). Therefore, appellant's unlawful sale and possession of MDMA violated section 11377 and section 11379, subdivision (a).

Accordingly, respondent respectfully asks that the judgment be affirmed.

Dated: November 8, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Answer Brief on the Merits uses a 13 point Times New Roman font and contains 3,883 words.

Dated: November 8, 2012

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DECLARATION OF SERVICE BY U.S. MAIL

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I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. On November 13, 2012, I served the attached

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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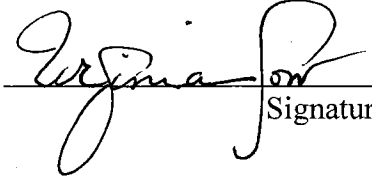
Virginia Gow
Declarant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