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DAVID WALGREN
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. Roman Polanski, Defendant.	Case No: A334139 PEOPLE'S OPPOSITION TO DEFENDANT ROMAN POLANSKI'S MOTION TO DISMISS

The People hereby request that this Court dismiss defendant Roman Polanski's motion to dismiss. Since 1978, Roman Polanski has voluntarily remained a fugitive from justice and, as such, is not entitled to have this Court entertain his motion until such time that Mr. Polanski decides to submit to the Court's jurisdiction.

This motion is based upon this Memorandum of Points and Authorities, the Grand Jury proceedings, the Indictment, the entire pleadings, records and files in this case, the evidence attached hereto, and upon further argument and evidence as this Court accepts at the hearing on the motion.

January 6, 2009

Respectfully submitted,

By: _____
David Walgren
Deputy District Attorney

March 11, 1977, a search warrant was served at the Beverly Wilshire Hotel, where Mr. Polanski was staying, and at the home of Jack Nicholson, where the crime had occurred. (GJ at pp. 37, 50.) The police recovered the photographs that the defendant had taken of the victim. The police also recovered a Quaalude pill from the person of Roman Polanski. (GJ at pp. 39-40.) On that same day, the police placed Mr. Polanski under arrest. (GJ at p. 50.)

III. PROCEDURAL BACKGROUND

Based on the crimes committed on March 10, 1977, a grand jury issued an indictment against the defendant on March 24, 1977, alleging six felony counts. Count 1 alleged a violation of Health and Safety Code section 11380(a), Furnishing a Controlled Substance to a Minor, a felony; Count 2 alleged a violation of Penal Code section 288, Lewd or Lascivious Acts Upon a Child Under Fourteen, a felony; Count 3 alleged a violation of Penal Code section 261.5, Unlawful Sexual Intercourse, a felony; Count 4 alleged a violation of Penal Code section 261(3), Rape By Use of Drugs, a felony; Count 5 alleged a violation of Penal Code section 288a(a) and (c), Perversion, a felony; and Count 6 alleged a violation of Penal Code section 286(a) and (c), Sodomy on a Person, a felony.

In subsequent weeks, the victim, through her lawyer, expressed in no uncertain terms that she wished to maintain her anonymity and avoid the further trauma that would accompany a full-blown jury trial. (Lawrence Silver letter dated July 26, 1977, Exh. B; Plea Transcript at pp. 3-6, Exh. C.) Based on these expressed concerns, on August 8, 1977, the defendant was permitted to plead guilty to one felony count, Penal Code section 261.5, for having unlawful sexual intercourse with a minor. (Plea Transcript at p. 16.) This was an open plea to the court, meaning that at the time of the plea, there did not exist any agreement as to what sentence may or may not be imposed. Instead, the sentence was to be determined by the court based on the probation report and argument of counsel. (Plea Transcript at pp. 11-13.) The sentencing

hearing was then continued to the date of September 19, 1977. (Plea Transcript at p. 20.)

On September 19, 1977, the court acknowledged having read and considered the probation report. (Sentencing Transcript at p. 5, Exh. D.) The court then allowed counsel for the defendant, as well as the People, to argue their respective positions. Defense counsel argued for a grant of probation without any additional time in custody, while the prosecutor argued for a period of confinement. (Sentencing Transcript at pp. 9, 13.) Following argument, the judge indicated he was impressed by the arguments of counsel and then made multiple specific references which further evidenced his having read and considered the probation report.[4] (Sentencing Transcript at pp. 14-16.) The judge then ordered the defendant committed to the custody of the Department of Corrections, and confined for a period of 90 days for purposes of a diagnostic evaluation, pursuant to Penal Code section 1203.03. (Sentencing Transcript at pp. 16-17.)

At the request of the defendant, this sentence was stayed to accommodate his schedule. (Sentencing Transcript at pp. 17-18.) Eventually, on December 16, 1977, the defendant surrendered to the Department of Corrections. He was released 42 days later. At the time of his release, the Department of Corrections provided the court with a copy of its diagnostic evaluation. The court and counsel met in chambers on January 30, 1978. During that meeting, according to Judge Rittenband, the court expressed its disappointment with the documentation provided by the Department of Corrections and characterized the report as "superficial, replete with many inaccuracies and factually unsupported conclusions, and was conspicuous more for what it failed to report than what it did report." (Answer of Judge Rittenband to Statement of Disqualification, and Consent to Transfer at p. 3, Exh. E.) The judge further indicated that "an

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appropriate sentence would be for Mr. Polanski to serve out the remainder of the 90-day period…, provided Mr. Polanski were to be deported by the Immigration and Naturalization Bureau, by stipulation or otherwise, at the end of the 90 days." (Answer of Judge Rittenband to Statement of Disqualification, and Consent to Transfer at p. 4.) The matter was then set for February 1, 1978, for sentencing. (Answer of Judge Rittenband to Statement of Disqualification, and Consent to Transfer at p. 4.)

Prior to the February 1, 1978, sentencing hearing, the defendant's attorney, Douglas Dalton, informed the defendant of the judge's inclination regarding the sentence. (Dalton Declaration at p. 6.) In response, the defendant left the United States and has never returned. (Dalton Declaration at p. 6.) On February 1, 1978, the court issued a bench warrant for the defendant's arrest. That warrant remains in full force and effect and the defendant remains a fugitive from justice to this day.

On December 2, 2008, defendant filed his motion to dismiss.

IV. THE GUILTY PLEA WAS AN OPEN PLEA TO A FELONY AND WAS MADE FREELY AND VOLUNTARILY WITH THE ADVICE OF COUNSEL.

After being advised of his Constitutional rights, the defendant clearly and explicitly gave up each of those rights and his attorney "join[ed] in those waivers." (Plea Transcript at pp. 7-10.) The defendant, while under oath, then admitted that he was "in fact guilty" of having sexual intercourse with a minor, the victim in this case. (Plea Transcript at p. 10.) Additionally, the defendant specifically admitted he knew the victim was only 13-years-old. (Plea Transcript at p. 14.) The defendant further affirmed he knew he was pleading guilty to a felony. (Plea Transcript at p. 11.) The defendant also acknowledged that his sentence had not yet been determined and that the appropriate sentence would be decided by the judge after having read and considered the probation report and after having heard argument of both counsel. (Plea

Transcript at pp. 11-12.) In regard to the potential sentence, the defendant acknowledged that the sentence could include time in state prison, time in county jail, or a grant of straight probation. (Plea Transcript at p. 11.)

Lastly, the defendant acknowledged having had enough time to confer with his lawyers regarding the facts and circumstances of the case, his rights and possible defenses, and the consequences of his plea. (Plea Transcript at pp. 13-14.) The defendant denied being threatened in any way and admitted that there had been no promises made in regard to a lesser sentence or a grant of probation. (Plea Transcript at p. 14 -15.) When given an opportunity to ask any questions, the defendant declined. When asked if he was pleading freely and voluntarily, the defendant answered affirmatively. (Plea Transcript at p. 15.) The defendant's attorney, Mr. Dalton, additionally affirmed having discussed with Mr. Polanski his rights, his possible defenses, and the possible consequences of his plea of guilty. (Plea Transcript at p. 15.) Mr. Dalton also explicitly denied being aware of any promises made to his client other than what had been stated on the record in open court. (Plea Transcript at p. 15.)

At that point, after the court made a finding that the plea was made freely and voluntarily and that there was a factual basis for the plea, the defendant pleaded guilty to a violation of Penal Code Section 261.5, a felony, for the crime of unlawful sexual intercourse with a minor. (Plea Transcript at p. 16.)

V. THE FUGITIVE DISENTITLEMENT DOCTRINE BARS THE DEFENDANT, A FUGITIVE FROM JUSTICE, FROM SEEKING RELIEF FROM THIS COURT.

The defendant, as a fugitive from justice, must be denied the opportunity to seek relief from the very court whose jurisdiction the defendant refuses to recognize. This principle, long recognized as the fugitive disentitlement doctrine, has been repeatedly, consistently and appropriately applied in these situations and should be applied in the present case to bar any

hearing on the defendant's motion to dismiss.

In *MacPherson v. MacPherson* (1939) 13 Cal. 2d 271, 277 [89 P.2d 382], the California Supreme Court expressed the rule that "[a] party to an action cannot, with right or reason, ask the aid or assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state. [Citations.]" This general rule has been applied to cases involving defendants who are fugitives from justice. In denying the fugitives the relief they seek, the courts have premised their decisions on the fugitive disentitlement doctrine—the proposition that "a fugitive has no right to ask the courts to review the very judgment that the fugitive flouts." (*People v. Kubby* (2002) 97 Cal. App. 4th 619, 623 [118 Cal. Rptr. 2d 588], *citing, inter alia*, *Molinaro v. New Jersey* (1970) 396 U.S. 365, 366 [90 S.Ct. 498, 498-499, 24 L.Ed. 2d 586, 588]; *People v. Redinger* (1880) 55 Cal. 290, 298; *People v.* Buffalo (1975) 49 Cal. App. 3d 838, 839 [123 Cal. Rptr. 308].) Accordingly, the courts have "long found it proper to dismiss the criminal appeals of those who are fugitives from justice, often granting the defendants 30 days to return to the custody of the authorities before the dismissal becomes effective." (*People v. Kubby, supra,* 97 Cal. App. at 623, *citing, inter alia, People v. Redinger, supra*, 55 Cal. at pp. 298-299; *People v. Clark* (1927) 201 Cal. 474, 477 [259 P. 47]; *People v. Fuhr* (1926) 198 Cal. 593, 594 [246 P. 1116]*; People v. Buffalo, supra*, 49 Cal. App. 3d at p. 839; *People v. Sitz* (1913) 21 Cal. App. 54, 55 [130 P. 858].)

One of the principal considerations driving the fugitive disentitlement doctrine is the general principal that a fugitive should not be able to call upon the resources of the courts he avoids. In *Molinaro v. New Jersey, supra*, 396 U.S. 365*,* for example, the Court dismissed the defendant's appeal after defendant failed to surrender himself to state authorities. In dismissing defendant's motion, the court reasoned that "[n]o persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed on him pursuant to the conviction."

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In *MacPherson v. MacPherson* (1939) 13 Cal. 2d 271, 277 [89 P.2d 382], the California Supreme Court expressed the rule that "[a] party to an action cannot, with right or reason, ask the aid or assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state. [Citations.]" This general rule has been applied to cases involving defendants who are fugitives from justice. In denying the fugitives the relief they seek, the courts have premised their decisions on the fugitive disentitlement doctrine—the proposition that "a fugitive has no right to ask the courts to review the very judgment that the fugitive flouts." (*People v. Kubby* (2002) 97 Cal. App. 4th 619, 623 [118 Cal. Rptr. 2d 588], *citing, inter alia*, *Molinaro v. New Jersey* (1970) 396 U.S. 365, 366 [90 S.Ct. 498, 498-499, 24 L.Ed. 2d 586, 588]; *People v. Redinger* (1880) 55 Cal. 290, 298; *People v.* Buffalo (1975) 49 Cal. App. 3d 838, 839 [123 Cal. Rptr. 308].) Accordingly, the courts have "long found it proper to dismiss the criminal appeals of those who are fugitives from justice, often granting the defendants 30 days to return to the custody of the authorities before the dismissal becomes effective." (*People v. Kubby, supra,* 97 Cal. App. at 623, *citing, inter alia, People v. Redinger, supra*, 55 Cal. at pp. 298-299; *People v. Clark* (1927) 201 Cal. 474, 477 [259 P. 47]; *People v. Fuhr* (1926) 198 Cal. 593, 594 [246 P. 1116]*; People v. Buffalo, supra*, 49 Cal. App. 3d at p. 839; *People v. Sitz* (1913) 21 Cal. App. 54, 55 [130 P. 858].)

One of the principal considerations driving the fugitive disentitlement doctrine is the general principal that a fugitive should not be able to call upon the resources of the courts he avoids. In *Molinaro v. New Jersey, supra*, 396 U.S. 365*,* for example, the Court dismissed the defendant's appeal after defendant failed to surrender himself to state authorities. In dismissing defendant's motion, the court reasoned that "[n]o persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed on him pursuant to the conviction."

(*Molinaro v. New Jersey, supra*, 396 U.S. at p. 366.) The Court noted that "[w]hile such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims." (*Ibid.*)

Likewise, in *People v. Kubby, supra*, 97 Cal. App. 4th at page 629, the court ordered defendant's cross-appeal dismissed unless defendant, a fugitive, surrendered himself to the appropriate authorities within 30 days thereafter. The court saw "no reason why a fugitive from justice who seeks to prosecute a cross-appeal should be held to any different standard than a fugitive from justice who seeks to prosecute an appeal." (*People v. Kubby, supra*, 97 Cal. App. 4th at pp. 627-628.) The court noted that "[b]oth invoke the court's jurisdiction to seek affirmative relief while simultaneously absconding from the court's jurisdiction to avoid compliance with the judgment they attack." (*Id.* at p. 628.) Thus, the decision by both courts reflects the view that it "is contrary to the principles of justice to permit one who has flaunted the orders of the courts to seek judicial assistance." (*Estate of Scott* (1957) 150 Cal. App. 2d 590, 594 [310 P.2d 46].)

The other consideration driving the fugitive disentitlement doctrine is the enforceability of the court's determination. In the seminal case of *People v. Redinger*, where defendant appealed his conviction and subsequently fled to Canada, the court addressed the issue of enforceability. (*People v. Redinger, supra*, 55 Cal. at pp. 294-296.) The court noted that since "courts have no jurisdiction over persons charged with crime, unless in custody actual or constructive . . . . [i]t would be a farce to proceed in a criminal cause, unless the Court had control over the person charged, so that its judgment might be made effective." (*Id.* at p. 298.) In that case, the fact that defendant was represented by counsel was of no consequence since "defendant has no longer a right to appear by counsel, when he has escaped from custody, until he has returned into custody." (*Ibid.*) Similarly, in *Smith v. United States* (1876) 94 U.S. 97 [24

L. Ed. 32], the Court held that it was proper to refuse to hear a criminal case when the fugitive defendant cannot be made to respond to the judgment it may render. (See *Ortega-Rodriguez v. United States* (1993) 507 U.S. 234, 239-240 [122 L. Ed. 2d 581, 113 S. Ct. 1199] [noting that it is within a court's discretion to refuse to hear a criminal case when the defendant fugitive cannot be made to respond to any ruling].) The Court reasoned that "[i]f we affirm the judgment, [the fugitive defendant] is not likely to appear to submit to his sentence. If we reverse it, and order a new trial, he will appear or not, as he may consider most for his interest. (*Id.* at p. 97; see *United States v. Freelove* (9th Cir. 1987) 816 F.2d 479, 480 ["One may not invoke the power of judicial review only thereafter to obey or disobey the [district] court's mandate as he sees fit."].) Under such circumstances, [the *Smith* Court was] not inclined to hear and decide what may be a moot case." (*Ibid.*) Thus, in dismissing a fugitive's appeal, both the *Smith* and *Redinger* courts recognized that it would be senseless to review a case when its determination cannot be enforced.

Although the courts have generally applied the fugitive disentitlement doctrine to criminal appeals, the courts have extended this doctrine when appropriate. (See e.g., *Conforte v. C.I.R.* (9th Cir. 1982) 692 F.2d 587, 589, affd. 459 U.S. 1309, 1310 [103 S.Ct. 663, 74 L.Ed. 2d 588] [applying the fugitive disentitlement to civil cases].) In the present case, justice demands that this court deny defendant's motion unless defendant, in accordance with *Redinger* and its progeny, submits to the court's jurisdiction within the next 30 days.[5] Here, even though defendant technically is not appealing his case, he is calling upon the court to, on its motion, dismiss his case and sanction the District Attorney's Office. Such a request runs contrary to the considerations of the fugitive disentitlement doctrine.

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[5] Of course, to allow even 30 days is an exercise in futility considering the defendant has had 30 years to submit to the court's jurisdiction.

First, defendant is a fugitive from justice because he fled the court's jurisdiction and has continued to flout it for the past 30 years. (See *Estate of Scott* (1957) 150 Cal. App. 2d 590, 592 [310 P.2d 46] ["One who, with knowledge that he is being sought pursuant to court process in a criminal action, absents himself or flees is a fugitive from justice."].) Moreover, defendant seeks affirmative relief from the court—the dismissal of his case—while simultaneously absconding from its jurisdiction. As the courts have clearly held, **"**a fugitive from justice has *no right* to ask the courts to review the very judgment that the fugitive flouts." (*People v. Kubby, supra*, 97 Cal. App. 4th at 623 [emphasis added].)

Second, contrary to the defendant's motion, defendant *is* "flouting the processes of the law" and "attempting to bargain with or to obtain a tactical advantage over the court." In *Katz v. United States*, the court recognized that "[i]t is usually appropriate to refuse to exercise jurisdiction over the appeal of a person who is in fugitive status because that person is attempting to bargain with or to obtain a tactical advantage over the court: *that is, to wait the judicial result and return if it is favorable or to remain a fugitive if it is not*." (*Katz v. United States* (9th Cir. 1990) 920 F.2d 610, 612 [emphasis added]; see *People v. Kubby*, *supra*, 97 Cal. App. at p. 619 [noting that "[d]efendant's flight from the court's jurisdiction makes a mockery of the justice system because it places the [defendant], rather than the courts, in the position of determining whether to submit to the court's judgment"].) Here, defendant flouts the law by remaining a fugitive despite the outstanding bench warrant for his arrest. Further, defendant attempts to bargain with or to obtain a tactical advantage over the court by refusing to submit to its jurisdiction while at the same time requesting affirmative relief from the court. As the court held in *Katz v. United States, supra*, 920 F.2d at page 612, "[o]ne may not invoke the power of judicial review only thereafter to obey or disobey the court's mandate as one sees fit. [citations.]" Therefore, since defendant flouts the law and seeks a tactical advantage over the court, this court should deny defendant's motion.

Lastly, even though the court in *Doe v. Superior Court* (1990) 222 Cal. App. 3d 1406, 1409-1410 [272 Cal. Rptr. 474] (hereinafter referred to as *Polanski*, the real party in interest) held that defendant's fugitive status was not an impediment to *defending a civil action*, defendant's reliance on that case for his present criminal case is misplaced. In *Polanski*, the court "did not disagree with the cases that authorize dismissal of a fugitive's criminal appeal, but merely distinguished such cases from the right to *defend* against a lawsuit brought by another party." (*Kubby, supra*, 97 Cal. App. 4th at 627 [emphasis added].) The *Polanski* court held that the application of the fugitive disentitlement doctrine was improper in the civil case because "it was [the plaintiff] who initiated the lawsuit, bringing Polanski into the civil arena of the California court system. Having appeared to defend himself, Polanski d[id] not seek relief in his own right; rather, he merely s[ought] the opportunity to be heard and present any defenses he may have to [the plaintiff's] causes of action." (*Ibid.*, *quoting Polanski*, *supra*, 222 Cal. App. 3d at p. 1409.)

In the present case, however, defendant is not defending himself against a civil cause of action brought by a plaintiff. Rather, defendant is seeking affirmative relief from the court—namely, he requests that the court dismiss his case and sanction the District Attorney's Office for engaging in "prosecutorial misconduct." As the court held in *People v. Kubby,* however, when defendant is not merely defending himself in an action brought by a plaintiff, but rather seeking affirmative relief, the doctrine of fugitive disentitlement still applies. (*Id.* at pp. 627-628.) In *Kubby*, defendant argued that since he only filed a cross-appeal, and thus did not initiate the appellate process, the fugitive disentitlement doctrine did not apply. (*Id.* at p. 627.) The court noted, however, that because defendant sought affirmative relief—the reversal of his conviction and a vacatur of various terms of probation, defendant was not merely defending himself against a cause of action brought by plaintiff. (*Id.* at pp. 627-628.) Accordingly, the court held that the principles of the fugitive disentitlement doctrine still applied to defendant's cross-appeal. (*Ibid.*) Like the defendant in *Kubby*, the defendant in this case seeks affirmative relief from the

court while simultaneously remaining a fugitive from justice. In accordance with *Kubby*, therefore, this court should apply the fugitive disentitlement doctrine to this case and dismiss defendant's motion.[6]

VI. PENAL CODE SECTION 977 FURTHER REQUIRES THE PERSONAL APPEARANCE OF THE DEFENDANT

Defendant's attempt to seek relief from this court while remaining a fugitive from justice also violates Penal Code section 977(b)(1), which mandates:

> In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. **The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present.** [emphasis added.]

There exists no exception to the requirements of Penal Code section 977(b)(1) as it applies to the defendant. He must be personally present at any proceedings in this matter.

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[6] Defendant also cites the British civil case of *Polanski v. Conde Nast Publications Ltd.*, [2005] UKHL 10, in support of his argument that the fugitive disentitlement doctrine should not apply to his present criminal case. In that case, defendant claimed he had been libeled by a *Vanity Fair* article which had included an accusation that, while en route to his wife Sharon Tate's funeral, Mr. Polanski had visited a restaurant and proceeded to "charm" a "gorgeous Swedish girl" by sliding "his hand inside her thigh" while promising to "make another Sharon Tate out of" her. Although defendant brought that suit in London against Conde Nast publications, defendant was again merely *defending* his rights. Moreover, the British court specifically ruled that in the United Kingdom, unlike the United States, the "law knows no principle of fugitive disentitlement." Of course, this British ruling is not binding on this court.

VII. THE DEFENSE ALLEGATIONS OF JUDICIAL AND DISTRICT ATTORNEY MISCONDUCT ARE NOT RIPE FOR LITIGATION UNTIL SUCH TIME THAT DEFENDANT SURRENDERS TO THE JURISDICTION OF THIS COURT

The defense makes multiple allegations of misconduct directed at members of the Los Angeles Superior Court judicial bench and members of the District Attorney's Office. While not conceding any of these various allegations, the People simply note that the alleged misconduct occurred *after* the defendant pleaded freely and voluntarily to a felony, with the understanding that the judge would determine the appropriate sentence. Beyond that, this is not the time to litigate such allegations. Should Mr. Polanski feel that he was treated unfairly after he pleaded guilty to the statutory rape of a child, he should surrender to the court's jurisdiction so that the allegations may be properly litigated. Until such time, the matter is not ripe for litigation.

VIII. CONCLUSION

On March 10, 1977, Mr. Polanski provided a 13-year-old girl alcohol and drugs, and then proceeded to have oral, vaginal, and anal sex with this child. The defendant pleaded guilty to this unlawful sexual intercourse but, prior to being sentenced, fled the jurisdiction of the United States. He has remained outside this court's jurisdiction for the past 30 years and has remained a fugitive from justice. Until such time that Mr. Polanski surrenders to the jurisdiction of this court, the defense motion should be dismissed and the matter should be taken off calendar.

Dated: January 6, 2009

Respectfully submitted,

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David Walgren
Deputy District Attorney

DECLARTION OF SERVICE

The undersigned declares under the penalty of perjury that the following is true and correct:

I am over eighteen (18) years of age, not a party to the above cause and employed in the Office of the District Attorney of Los Angeles County with offices at 210 W. Temple Street, Los Angeles, California 90012. On the date of execution hereof, I served the attached documents by sending a true copy by mail and by facsimile to the following address:

Chad S. Hummel
Manatt, Phelps & Phillips, LLP
11355 West Olympic Boulevard
Los Angeles, California 90064-1614
Fax: (310) 312-4224

Executed on January 6, 2009, at Los Angeles, California.

_____
Adam Wong