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14 **UNITED STATES DISTRICT COURT**  
15 **NORTHERN DISTRICT OF CALIFORNIA**

17 **EMIL ALPERIN, et al,**

18 **Plaintiffs,**

19 **v.**

20 **THE FRANCISCAN ORDER**  
**(ORDER OF FRIARS MINOR**  
21 **- OFM), et al,**

22 **Defendants.**

**NO. C99-4941 MMC (EDL)**

**PLAINTIFFS' SUR-REPLY AND**  
**RESPONSE TO ORDER TO SHOW**  
**CAUSE; POINTS AND AUTHORITIES**

Date: September 11, 2009  
Time: 9:00 a.m.  
Ctrm: 7, 19<sup>th</sup> floor  
Hon. Maxine M. Chesney

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1 Plaintiffs file this Sur-Reply, pursuant to the Court's Doc. 440 Order, (1) to respond to  
 2 OFM's argument raised for the first time in its Reply on whether CAFA is applicable or whether  
 3 the "regular" rules apply to diversity in this case, and (2) to answer the Court's question for why  
 4 this case should not be dismissed for lack of subject matter jurisdiction under the Alien Tort  
 5 Statute (ATS) for violations of treaties because, in general, treaties do not create a private right  
 6 of action. For all the reasons stated below and in Plaintiffs' Response, Doc. 438, this Court has  
 7 subject matter jurisdiction based on multiple grounds, including but not limited to:

- 8 1. A finding of Alien Tort Statute jurisdiction under 28 USC § 1350 and supplement  
 9 jurisdiction 28 USC § 1367 on any one of three grounds, for violation of 18<sup>th</sup>  
 10 Century *jus cogens* international law, modern *jus cogens* international law, or  
 private remedies under the London and Gold Declarations as interpreted by the  
 U.S. State Department Letter of 1949;
- 11 2. A finding of diversity of citizenship jurisdiction under 28 USC § 1332 along with  
 12 supplemental jurisdiction under 28 USC § 1367;
- 13 OR
- 14 3. Deferring finding diversity jurisdiction under 28 USC § 1332, and instead finding  
 15 federal question jurisdiction under 28 USC § 1331 and supplemental jurisdiction  
 16 under 28 USC § 1367 consistent with the ATS claims under 28 USC § 1350  
 jurisdiction. (Plaintiffs' pleadings support both federal question and diversity  
 jurisdiction.)

17 **I. THE FOREIGN PLAINTIFFS NEED NOT SATISFY BOTH ALIEN TORT  
 18 STATUTE AND CLASS ACTION DIVERSITY IN ORDER TO ESTABLISH  
 19 JURISDICTION.**

20 In this case, OFM is blatantly wrong to assert a meritless requirement for complete  
 21 diversity. (*See* OFM Reply, at 7 of 19). There is no such requirement that claims by the foreign  
 22 Plaintiffs in this Class Action must also satisfy the class action diversity of citizenship rules  
 23 under 28 U.S.C. § 1332. OFM has shown no authority to the contrary.

24 For example, in *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 121-22 (E.D.N.Y.  
 25 2000), the Court allowed the coexistence of U.S. citizen plaintiffs and foreign plaintiffs in the  
 26 same class action for conversion, unjust enrichment, and violations of international laws, against  
 27 French institutions for aiding, abetting, and conspiring with the Vichy and Nazi regimes to  
 28 plunder private property of plaintiffs. In *Bodner*, the court wholly bypassed the issue of  
 diversity jurisdiction by finding federal question and Alien Tort jurisdiction instead. (*Id.* at 127-

1 28).

2 Here, both the domestic and foreign Plaintiffs' claims squarely satisfy the federal question  
3 and ATS requirements, 28 U.S.C. §§ 1331 and 1350, respectively, as outlined below and in  
4 Plaintiffs' Response. The Court need not also find it has diversity of citizenship jurisdiction of  
5 this case, but, indeed, the U.S. Plaintiffs do satisfy the diversity requirements.

6 **II. RELIANCE UPON TREATIES IS ONLY ONE OF THREE WAYS**  
7 **PLAINTIFFS SHOW VIOLATION OF CUSTOMARY INTERNATIONAL**  
8 **LAW, THUS ENABLING THE COURT TO FIND ATS JURISDICTION.**

9 The Alien Tort Statute, 28 U.S.C. § 1350, states:

10 "The district courts shall have original jurisdiction of any civil action by an  
11 alien for a tort only, committed in violation of the law of nations or a treaty  
12 of the United States."

13 In their 6AC, Plaintiffs have well pleaded three grounds for ATS jurisdiction:

- 14 (1) Violation of modern *jus cogens*<sup>1</sup> norms of international law for dealing in looted  
15 property (Doc. 438, at 20-21 of 35);
- 16 (2) Violation of 18<sup>th</sup> Century *jus cogen* norms of international law based on  
17 brigandage the land based equivalent of piracy. (Doc. 438, at 18-20 of 35); and
- 18 (3) Treaty based causes of action. (Doc. 438, at 16-17 of 35).

19 Therefore the treaty-based causes of actions are not the exclusive ATS jurisdictional theory  
20 proposed by Plaintiffs.

21 "[An] AT[S] claim need not arise from a violation of a treaty. . . . An  
22 AT[S] claim may rest upon any "specific, universal, and obligatory" norm  
23 recognized by the international community. *Doe v. Reddy*, 2003 U.S. Dist.  
24 LEXIS 26120, 32 (ND CA 2003).

25 In order to dismiss the ATS claims, even if certain treaties were found not to support a private  
26 right of action, the Court must also find that Plaintiffs have not and cannot plead that any tort  
27 whatsoever was committed in violation of international law, either under an 18<sup>th</sup> or 21<sup>st</sup> Century  
28 analysis.

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<sup>1</sup><http://dictionary.lp.findlaw.com/scripts/results.pl?co=dictionary.lp.findlaw.com&topic=0a/0a00a0dfb2959e1404c8ab77415ac11c> (meaning literally, "constraining law"; a principle of international law that is based on values taken to be fundamental to the international community and that cannot be set aside (as by treaty)).

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**A. Treaties Are Evidence Of Norms Of International Law For Jus Cogens Claims Under Alien Tort Jurisdiction.**

Although treaties, in general, do not create a private right of action, it is well established that treaties are evidence of emerging norms of international law for *jus cogens* claims under the ATS. *Kadic v. Karadzic*, 70 F.3d 232, 238 n.1 (2<sup>nd</sup> Cir. 1995); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 252 (2<sup>nd</sup> Cir. 2003); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 127 (E.D.N.Y. 2000); *Iwanowa v. Ford*, 67 F. Supp. 2d 424, 439, n.14 (Dist. N.J. 1999).

Similarly, in *Siderman* the Ninth Circuit found that while the Universal Declaration of Human Rights (UDHR) did not create private rights of action, the UDHR did represent evidence of customary international law. *Siderman de Blake v. Argentina*, 965 F.2d 699, 719-720 (9<sup>th</sup> Cir. 1992).

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**B. To Find Whether A Treaty Confers A Private Right Of Action, That Treaty Must Be Interpreted In Light Of Its Purpose And Objective.**

In this District, Judge Ilston recently stated that even:

“...[T]reaties that are not self-executing may be used as evidence of customary law and do not undermine the viability of a claim under the ATS.” *Bowoto v. Chevron*, 557 F. Supp. 2d 1080, 1091 (N.D. CA 2008).

A self-executing treating is one that “does not require specific implementing legislation by Congress and that may create rights flowing directly to litigants without such implementing legislation.”<sup>2</sup> However, the U.S. Supreme Court has also found private rights even when a treaty is not specifically self-executing. See *Kolovrat v. Oregon*, 366 U.S. 187, 190-91, n.6 (1961); *Olympic Airways v. Husain*, 540 U.S. 644, 646 (2004).

The Ninth Circuit has found that the question of whether a treaty is self-executing and whether it creates a private right of action forms two distinct issues. For any treaty to be susceptible to judicial enforcement, it must both confer individual rights and be self-executing. “While a treaty must be self-executing for it to create a private right of action enforceable in court without implementing domestic legislation, all self-executing treaties do not necessarily

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<sup>2</sup><http://www.internationallawhelp.com/Forum/messages/552.html>;  
<http://www.britannica.com/EBchecked/topic/930484/self-executing-treaty>.

1 provide for the availability of such private actions.” *Corenejo v. United States*, 504 F.3d 853,  
 2 857 (9th Cir. 2007) (citing *Renkel v. United States*, 456 F.3d 640, 643 n.3 (6th Cir. 2006)). The  
 3 question here then is whether the Executive Branch intended the London and Gold declarations  
 4 to be more than mere policy statements and to also create a private cause of action. The  
 5 declarations terms should be interpreted in their context and in the light of the treaty’s object and  
 6 purpose. *Cornejo*, at 859 (citing Restatement (Third) of Foreign Relations Law of the U.S.)).

7 Therefore, Plaintiffs’ lawsuit should not be dismissed because at least one of the three  
 8 grounds stated for ATS jurisdiction apply: (1) violations of modern *jus cogens* law, (2) violations  
 9 of 18<sup>th</sup> Century *jus cogens* law, and (3) violation of self-executing treaties.

10 This third ground for ATS jurisdiction is what the Court has requested Plaintiffs to  
 11 discuss in this Sur-Reply. In their 6AC, Plaintiffs have asserted violations of the Forced  
 12 Transfers Agreement and the Multilateral Gold Policy Treaty. Both Treaties create private rights  
 13 of action. On this basis alone, Plaintiffs’ lawsuit should not be dismissed for lack of subject  
 14 matter jurisdiction.

15 **III. BOTH THE FORCED TRANSFERS AGREEMENT (LONDON**  
 16 **DECLARATION) AND MULTILATERAL GOLD POLICY TREATY**  
 17 **(GOLD DECLARATION) PROVIDE FOR A PRIVATE RIGHT OF ACTION.**

18 Plaintiffs are unable to find any case directly interpreting the Multilateral Declaration on  
 19 Forced Transfers of Property in Enemy Controlled Territory of 1943 (“London Declaration”),  
 20 3 Bevens 754, and the Multilateral Gold Policy of 1944 between the United States, United  
 21 Kingdom, and Soviet Union (“Gold Declaration”), 3 Bevens 889, 9 Fed. Reg. 2096.

22 Whether these treaties are self-executing would appear to be a matter of first impression  
 23 for this Court to decide. However, there is strong collateral evidence that these Declarations  
 24 were meant to provide guidance in private matters of international law.

25 **A. The London And Gold Declarations Address Private Transactions.**

26 On January 5, 1943, the United States and its Allies issued the London Declaration, also  
 27 known as The Multilateral Declaration on Forced Transfers of Property in Enemy Controlled  
 28 Territory, warning that all forced “transfers of, or dealings with property, rights and interests of

1 any description” in any of the Axis countries faced invalidation. *See* Appendix I.

2       However, the London Declaration did not just declare invalid Axis governmental looting,  
3 but rather stated it encompasses private dealings based on private contractual law:

4               “This warning applies whether such transfers or dealings have taken the  
5 form of open looting or plunder, or of transactions apparently legal in form,  
6 even when they purport to be voluntarily effected.” London Declaration,  
7 3 Bevens 754; 8 Dep't St. Bull. 21 (1943).

8       The London Declaration was later implemented by, *inter alia*, the United States’ Gold  
9 Declaration of 1944 and by the United Nations in its Bretton Woods Resolution. Fed. Reg. 2096  
10 (1944) (Appendix II); Proceedings and Documents of the United Nations Monetary and  
11 Financial Conference, Bretton Woods, New Hampshire, July 1-22, 1944, Vol. II, 939-40 (1948).

12       In the Tate-Bernstein Letter of 1949 (*See* Appendix III for text), the U.S. Executive  
13 Branch stated that U.S. courts were an appropriate forum to resolve claims to recover property  
14 wrongfully taken during World War II, even when faced with protests of interference with  
15 another nation’s sovereignty. Responding to an inquiry in a Second Circuit Holocaust restitution  
16 case, the State Department’s Acting Legal Adviser, Jack Tate, advised that the policy of the  
17 Executive Branch with respect to private claims asserted in the United States for restitution of  
18 property or compensation lost through force, coercion, or duress as a result of Nazi persecution  
19 was to “to relieve American courts from any restraint upon the exercise of their jurisdiction to  
20 pass upon the validity of the acts of the Nazi officials.” Tate listed nine prior declarations,  
21 agreements, directives and laws— including, first and second, the London Declaration and the  
22 aforementioned Gold Declaration of 1944, 9 Fed. Reg. 2096.

23       Thereafter, the Second Circuit, in *Bernstein v. N.V. Nederlandsche-Amerikaansche*  
24 *Stoomvaart- Maatschappij*, allowed a private remedy to proceed based on the Tate Letter to  
25 recover Axis looted property. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-*  
26 *Maatschappij*, 210 F.2d 375 (2d Cir. 1954).

27       In *Altman v. Commissioner of Internal Revenue*, 20 T.C. 236; 1953 U.S. Tax Ct. LEXIS  
28

1 171 (1953)<sup>3</sup>, the 1943 London Declaration was considered as potentially self-executing but the  
2 Declaration was found not to be applicable in Austria as Austria had initiated its own separate  
3 restitution scheme:

4 “On the record, we have found that the London Declaration was a political  
5 declaration of intent on the part of the Allied Powers, including the United  
6 States and Russia, which has not been carried out by the Government of  
7 Austria.” *Id.* at 20 T.C. 236, 251.

8 Nonetheless, since the London Declaration’s intent is to invalidate both public and private  
9 transfers of looted property, the Declaration must be interpreted so as to effectuate its purpose.  
10 Thus, it must provide for a private international law remedy to address private transfers of loot,  
11 as in the case of immediate post war money laundering of the Ustasha Treasury by OFM which  
12 went undetected until the Eizenstat Report of 1998. Pointedly, the Ninth Circuit has found that  
13 no existing government sanctioned restitution scheme deals with the Ustasha Treasury. *Alperin*  
14 *v. Vatican Bank*, 410 F.3d 532, 550 (9<sup>th</sup> Cir. 2005).

15 **B. The London and Gold Declarations Are Distinguishable From The Universal  
16 Declaration of Human Rights and the International Covenant on Civil and  
17 Political Rights Reviewed In *Sosa*.**

18 As evidenced above, the London Declaration and Gold Declaration created a private  
19 cause of action for invalidating dealings in Axis looted property by private individuals. This is  
20 based upon the Executive Branch’s 1949 exhortation to the Second Circuit, which removed any  
21 restraint upon the Courts in dealing with Axis loot and the lack of a recognized restitution  
22 scheme dealing with the Ustasha Treasury. These Second World War era declarations, as later  
23 interpreted by the Executive branch to the Second Circuit, therefore are distinguished from the  
24 Supreme Court’s finding in *Sosa*.

25 The *Sosa* Court found that violations of the Universal Declaration of Human Rights and  
26 the International Covenant on Civil and Political Rights were not actionable under the ATS  
27 because the Universal Declaration was non-binding and the International Covenant was  
28 specifically non-self-executing in the United States. *See Sosa v. Alvarez-Machain*, 542 U.S. 692,

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<sup>3</sup> Vacated and remanded on other grounds in an unpublished order 55-2 USTC 9599, 48  
AFTR 1867 (2<sup>nd</sup> Cir. 1955).

1 734-735, 124 S.Ct. 2739, 159 L.Ed.2d 718, 755 (2004). In contrast, the Tate Letter of 1949  
 2 suggests the Court may fashion a remedy based on the concepts embodied in the London  
 3 Declaration and Gold Declaration in this case.

4 **IV. THE U.S. PLAINTIFFS' LAWSUIT AGAINST FOREIGN DEFENDANT OFM**  
 5 **ALSO SATISFIES THE REQUIREMENTS FOR FEDERAL QUESTION AND**  
 6 **SUPPLEMENTAL JURISDICTION.**

7 As the Court has noted in its Doc. 440 Order, at fn. 1, the jurisdictional inquiry under both  
 8 the ATS and § 1331 "is the same." *See Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1201 n.5 (9th  
 9 Cir. 2007).<sup>4</sup>

10 "[A] case presenting claims arising under customary international law  
 11 arises under the laws of the United States for purposes of federal question  
 12 jurisdiction." *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1544 (N.D. CA  
 13 1987). *See* 28 U.S.C. § 1331.

14 Under federal question jurisdiction and, along with supplemental jurisdiction, 28 USC  
 15 § 1367, the Court can apply an alternative jurisdictional avenue for the domestic diversity of  
 16 Plaintiffs for their "state law claims" in conjunction with the ATS claims. *See Bodner v. Banque*  
 17 *Paribas*, 114 F. Supp. 2d 117, 127 (E.D.N.Y. 2000).

18 **V. THERE IS COMPLETE DIVERSITY IN THE U.S. PLAINTIFFS' CLASS**  
 19 **ACTION UNDER 28 USC § 1332 AND FED. R. CIV. P. 23.**

20 Nowhere have Plaintiffs abandoned their claim of diversity of citizenship under 28 U.S.C.  
 21 § 1332(a), as Defendant erroneously asserts. (OFM Reply, at 7 of 19). Under regular diversity  
 22 rules, a plaintiff must have a claim in excess of \$75,000 and all class representatives and all  
 23 defendants must be completely diverse. OFM admits it is a citizen of Italy and no diversity  
 24 Plaintiffs are from Italy.

25 The presence of ATS foreign Plaintiffs has no effect on the diversity analysis because  
 26 their presence in this lawsuit is based on separate ATS jurisdiction. *See Bodner v. Banque*  
 27 *Paribas*, 114 F. Supp. 2d 117, 126 (E.D.N.Y. 2000) (diversity claimants and ATS claimants

28 <sup>4</sup> Vacated by, Rehearing, en banc, granted by *Sarei v. Rio Tinto*, 499 F.3d 923, 2007 U.S.  
 App. LEXIS 19751 (9<sup>th</sup> Cir., 2007); Different results reached on rehearing at *Sarei v. Rio*  
*Tinto*, PLC, 2008 U.S. App. LEXIS 25279 (9<sup>th</sup> Cir. Cal., Dec. 16, 2008).

1 coexisting in the same action). In *Bodner*, one class action set, “Bodner was filed on behalf of  
 2 United States citizens,” and the other class action set, “the Benista plaintiffs [were] aliens who  
 3 assert[ed] their claims under the Alien Tort Claims Act.” *Id.* at 121. Further, it is well  
 4 established that foreign ATS plaintiffs can also be class representatives in cases involving  
 5 foreign defendants. *Sarei v. Rio Tinto*, 550 F.3d 822, 825-826 (9<sup>th</sup> Cir. 2008).

6 The jurisdictional amount is also satisfied. Here, diversity Plaintiff Herskovic has  
 7 asserted a claim in excess of \$75,000— property worth the equivalent of \$1.5 million in 1941  
 8 dollars. See 6AC at ¶ 72. Likewise ATS Plaintiff Bates alleges claims exceeding \$100,000. See  
 9 6AC at ¶ 87. As to the other Plaintiffs, the Court may then exercise supplemental jurisdiction  
 10 over them under 28 USC § 1367. See 6AC at ¶ 40. According to the U.S. Supreme Court, in  
 11 a multi-party class action case such as this:

12 “When a well-pleaded complaint has at least one claim satisfying the  
 13 amount-in-controversy requirement, and there are no other relevant  
 14 jurisdictional defects, the district court, beyond all question, has original  
 jurisdiction over that claim.” *Exxon Mobil Corp. v. Allapattah Servs.*, 545  
 U.S. 546; 125 S. Ct. 2611; 162 L. Ed. 2d 502, 513 (2005).

15 Thus as long as one single plaintiff satisfies either diversity, ATS, or federal question  
 16 jurisdiction, supplemental jurisdiction may be exercised over the remaining plaintiffs. Thus  
 17 diversity of citizenship exists in this case and is unaffected by the presence of the ATS Plaintiffs  
 18 as representatives of the worldwide class members.<sup>5</sup>

19 **VI. PLAINTIFFS NEED NOT RELY ON CAFA FOR THIS COURT TO HAVE**  
 20 **SUBJECT MATTER JURISDICTION.**

21 Plaintiffs appreciate the opportunity to clarify their position on the matter of subject  
 22 matter jurisdiction with respect to CAFA. In light of the Northern District cases of *Tiffany v.*  
 23 *Hometown Buffet*, 2006 U.S. Dist. LEXIS 45286 (Judge Armstrong) and *Morgan v. AIG*, 2005  
 24 U.S. Dist. LEXIS 20393 (Judge Chesney), Plaintiffs now believe they probably do not qualify  
 25 under CAFA and must rely instead upon the ordinary class action jurisdiction. See 6AC (Doc.  
 26 \_\_\_\_\_

27 <sup>5</sup> Even if the presence of ATS plaintiffs is relevant to diversity, bifurcation or creation of  
 28 subclasses of ATS and diversity claims would be the appropriate remedy, not dismissal. See  
*Thompson v. Clear Channel Communs., Inc. (In re Live Concert Antitrust Litig.)*, 247 F.R.D.  
 98, 149 (CD CA 2007).

1 413) at ¶¶ 145, 153.

2 **VII. CONCLUSION**

3 The Court may exert subject matter jurisdiction under any one of three grounds:

- 4
- 5 1. Diversity of citizenship jurisdiction under 28 USC § 1332 and supplemental  
jurisdiction under 28 USC § 1367;
- 6 2. ATS jurisdiction under 28 USC § 1350 and supplement jurisdiction 28 USC §  
7 1367 on any one of three grounds:
- 8 (a) Violation of 18<sup>th</sup> Century *jus cogens* international law in that OFM aided  
and abetted the Ustasha<sup>6</sup>, modern day equivalent of 18<sup>th</sup> Century brigands,  
9 the land based equivalents of pirates;
- 10 (b) Violation of modern *jus cogens* of international Law by OFM for dealing  
in looted Axis property as evidenced by norms of international law found  
11 in The Hague Convention of 1907, Articles 47-53, 55-56, 238 and the  
Versailles Treaty of 1919 (Article 232),<sup>7</sup> the Roerich Pact of 1935 (the  
12 Washington Pact of 15 April, 1935 for the Protection of Artistic and  
Scientific Institutions and of Historic Monuments), the Holocaust Victims  
13 Redress Act of 1998 (Pub.L. No. 105-158, 112 Stat. 15 1998), and the  
London Declaration of 1943 and The Gold Declaration of 1944;<sup>8</sup> or
- 14 (c) Violation of private remedies fashioned under the London and Gold  
15 Declarations as interpreted by the U.S. State Department Tate Letter of  
1949;

16 OR

- 17 3. The Court may also defer finding diversity jurisdiction under 28 USC § 1332 and  
18 instead find federal question jurisdiction under 28 USC § 1331 and supplemental  
jurisdiction under 28 USC § 1367 consistent with the ATS claims under 28 USC  
19 § 1350 jurisdiction. Plaintiffs' pleadings support both federal question and  
diversity jurisdiction. See 6AC, ¶¶ 36 and 38.

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25 <sup>6</sup> The Ustasha regime was not recognized by the United States. See *United States ex rel.*  
*Karadzole v. Artukovic*, 170 F.Supp. 383, 388 (S.D. Cal. 1959).

26 <sup>7</sup> The Versailles Treaty established the general principle that reparations could be had for war  
27 damages including looting.

28 <sup>8</sup> See the 6AC at ¶ 37: "Plaintiffs' claims involve violation of well known international  
treaties and **norms**..."

1 DATED: August 14, 2009.

Respectfully submitted,

2 /S/ Windle Turley  
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14 Attorneys for Plaintiffs Alperin *et al.*

15  
16  
17 **CERTIFICATE OF SERVICE**

18 I hereby certify that a true and correct copy of the foregoing document has been filed with the  
19 Court's CM/ECF filing system on this 14<sup>th</sup> day of August, 2009, which will provide service on all  
20 counsel of record.

21 /S/ Windle Turley  
Windle Turley