IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION THREE

CENTER FOR BIOLOGICAL DIVERSITY, INC., and PETER GALVIN, Plaintiffs and Appellants, vs. FPL GROUP, INC.; FPL ENERGY, LLC; ESI BAY AREA GP, INC.; ESI BAY AREA, INC.; GREP BAY AREA HOLDINGS, LLC; GREEN RIDGE POWER LLC; ALTAMONT POWER LLC; ENXCO, INC.; SEAWEST WINDPOWER, INC.; PACIFIC WINDS, INC.; WINDWORKS, INC.; and ALTAMONT WINDS, INC., Defendants and Respondents.	No. A116362 Alameda County Superior Court Case No. RG04-183113 The Hon. Bonnie L. Sabraw, Judge Department 512: (510) 670-6312

APPELLANTS CENTER FOR BIOLOGICAL DIVERSITY, INC. AND PETER GALVIN'S

SUPPLEMENTAL BRIEF IN RESPONSE TO THE INQUIRIES STATED IN THE COURT'S JANUARY 31, 2008 ORDER

ON APPEAL FROM A JUDGMENT OF DISMISSAL ON THE PLEADINGS

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INTRODUCTION

Plaintiffs hereby respond to the issues raised by the Court's supplement briefing order of January 31, 2008.

Neither primary jurisdiction nor abstention are a basis for affirming the judgment. The trial court twice properly exercised its discretion and denied defendants' motions to dismiss or stay the action on the basis of the primary jurisdiction and abstention doctrines. These determinations were correct and there was no abuse of discretion.

The primary jurisdiction doctrine has no application here because there is no " 'pervasive and self-contained system of administrative procedure' to deal with the precise questions involved" in the litigation. *Farmers Insurance Exchange v. Superior Court*, 2 Cal.4th 377, 396 (1992) (citation omitted). There are no factual issues in this litigation " 'which, under a regulatory scheme, have been placed within the special competence of an administrative body.' " *Id.* at 390. Nor are there any factual issues that are so technically complex that they are "beyond the usual competence of the judicial system," *id.* at 396, and create "a paramount need for specialized agency fact-finding expertise," *ibid*. Instead, the central issue in this litigation is whether defendants are legally liable for their undisputed destruction of public trust wildlife, a purely legal question that is within the core competence of the courts.

Abstention also has no place here, as the trial court concluded. The Supreme Court made clear in *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983), that cases brought by members of the general public for harms to public trust interests should go forward even in cases, unlike this one, in which the Legislature has established complex administrative schemes and charged an administrative agency with making an open-ended

balancing of interests to decide the very question presented by the litigation.

This action cannot be dismissed under Code of Civil Procedure section 389 for lack of joinder of Alameda and Contra Costa Counties because the counties are not necessary or indispensable parties to this action, nor are any other public subdivisions or agencies. In response to the trial court's inquiry, the State of California and Alameda County have expressly disclaimed on the record any interest in participating in this litigation. Alameda and Contra Costa Counties in any event have no protectible interest in the wildlife public trust property defendants are destroying that belongs to all Californians. Nor will a judgment restricting defendants' continuing destruction of public trust wildlife conflict with defendants' county land use permits, which do not purport to authorize or require that defendants destroy public trust wildlife. Moreover, the trial court has directed that, if it finds that defendants are liable, it will take into account the terms and conditions of defendants' land use permits in shaping whatever equitable relief, if any, it awards at the end of the case.

Finally, plaintiffs respectfully object to judicial notice by the Court of the documents identified in its January 31, 2008 order. Although a court may judicially notice documents contained in a court file or documents setting forth official acts, it may judicially notice only the existence of those documents and acts, and may not judicially notice the truth of facts asserted in those documents. *Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal.4th 1057, 1063-64 (1994). Because the fact of the existence of those documents and acts is not relevant to the issues on appeal, judicial notice is unnecessary and improper. *Ibid*. Independently, the documents are irrelevant because they have been mooted by subsequent events.

ISSUES ADDRESSED IN THE SUPPLEMENTAL BRIEFING

The Court's supplement briefing order of January 31, 2008, states as follows:

"1. On its own motion, the court will take judicial notice of those pleadings and other papers filed in Alameda County Superior Court actions Nos. RG04183113, RG05239552 and RG05239790 included in appellants' appendix or in respondents' appendix. The court will entertain requests to take judicial notice of other pleadings and papers filed in any of those actions which the parties may deem relevant.

"2. On its own motion, the court will take judicial notice of Alameda County Board of Supervisors Resolution No. R-2005-463, adopted September 22, 2005. The court will entertain requests to take judicial notice of any resolutions adopted by the Contra Costa County Board of Supervisors or other official body authorizing the operation of wind turbine electric generators in the Contra Costa County portion of the Altamont Pass Wind Resources Area.

"3. If this court should conclude that plaintiffs are entitled to maintain an action to enforce a public trust with respect to raptors and other birds found in the Altamont Pass Wind Resources Area, are the counties of Alameda and Contra Costa or any other public subdivisions or agencies necessary and indispensable parties to such an action? If so, may the judgment be affirmed based on the failure to join such parties?

"4. Do the doctrines of abstention or primary jurisdiction provide grounds on which the judgment may be affirmed?"

ARGUMENT

I. The Legislature Has Forbidden Alameda And Contra Costa Counties And Any Other Governmental Entity From Authorizing The Destruction Of The Raptors That Defendants Are Killing

The Court's inquiries in one way or another all touch upon the question of whether the Legislature has granted Alameda and Contra Costa Counties or some other public subdivision or agency the power to authorize defendants to destroy wildlife public trust property, whether any such governmental entity has so authorized defendants to destroy wildlife public trust property, and whether any such authorization might potentially conflict with whatever equitable relief the trial court might award if it were to find defendants liable. The short answer is that no state or local entity, including Alameda and Contra Costa Counties, has the power to authorize defendants to destroy the tens of thousands of raptors they have killed with their obsolete wind turbines, and none has purported to do so.

The Legislature has specifically forbidden any governmental entity, including Alameda and Contra Costa Counties, from issuing any permit authorizing defendants to kill Golden Eagles. The Legislature has designated the Golden Eagles that defendants are destroying as "fully protected birds." Fish & Game Code § 3511. Section 3511 of the Fish and Game Code forbids any governmental agency from issuing any permit to kill Golden Eagles: "(a) (1) Except as provided in Section 2081.7, fully protected birds or parts thereof may not be taken or possessed at any time. No provision of this code or any other law shall be construed to authorize the issuance of permits or licenses to take any fully protected bird, and no permits or licenses heretofore issued shall have any force or effect for that purpose. . . . [¶] (b) The following are fully protected birds: . . . (7) Golden eagle . . . ."

The Legislature has in addition prohibited the killing of other raptors. Section 3503.5 of the Fish and Game Code specifically prohibits the taking or destruction of eagles, hawks, falcons, and owls: "It is unlawful to take, possess, or destroy any birds in the orders Falconiformes [i.e., eagles, hawks, and falcons] or Strigiformes [i.e., owls] (birds-of-prey) or to take, possess, or destroy the nest or eggs of any such bird except as otherwise provided by this code or any regulation adopted pursuant thereto." The Legislature has crafted a number of exemptions to the prohibitions against killing wildlife for various agricultural and industrial activities. *See*, *e.g.*, Fish & Game Code §§ 3800, 3801.5. It has never created any similar exemption for wind turbines. Nothing in the Fish and Game Code or its regulations authorizes defendants to kill tens of thousands of eagles, hawks, falcons, and owls.

The Legislature has not given Alameda and Contra Costa Counties any authority to issue any permit authorizing defendants to kill eagles, hawks, falcons, owls, and other birds in violation of the Fish and Game Code and public trust law. Nor has the Legislature delegated any authority whatsoever over raptors and other wildlife public trust property to Alameda or Contra Costa Counties.

Thus, Alameda and Contra Costa Counties lack the power to authorize violations of California's wildlife protection laws or to authorize destruction of wildlife public trust property. In particular, Alameda and Contra Costa Counties cannot use their land use permitting proceedings to authorize or excuse violations of wildlife protection laws or the destruction of public trust wildlife. Any purported authorization by Alameda or Contra Costa Counties of defendants' conduct here would be utterly void. Under the California Constitution, a county has no power to override general state law, including wildlife protection laws and public trust law: "Under article

XI, section 7 of the California Constitution, '[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.' 'If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.' " *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal.4th 893, 897 (1993).

II. Because Judicial Notice Of Documents Filed In Other Litigation And Of The Superseded Alameda County Resolution Extends Only To Their Existence And Not To The Truth Of Their Contents, And Because The Existence Of Those Documents Is Not Relevant To The Issues On Appeal, Plaintiffs Respectfully Object To Judicial Notice Of Them

The Court sua sponte has taken "judicial notice of those pleadings and other papers filed in Alameda County Superior Court actions Nos. RG04183113, RG05239552 and RG05239790 included in appellants' appendix or in respondents' appendix" and "of Alameda County Board of Supervisors Resolution No. R-2005-463, adopted September 22, 2005."[1]

It is plaintiffs' understanding that, apart from documents first filed in this action (RG04-183113) that are part of the record on appeal in this appeal, the documents of which the Court is taking judicial notice are the documents attached to the Caplan declaration at tab 3 of respondent's appendix, RA 89-93, and the Caplan declaration at tab 6 of the respondents' appendix, RA 106-225, consisting of:

1. Alameda County Board of Supervisors Resolution No. R-2005-463, adopted September 22, 2005 (RA 107-166).

[1] Plaintiffs did not submit in their appellants' appendix any documents from Alameda County Superior Court actions nos. RG05-239552 and RG05-239790, nor did they submit Alameda County Board of Supervisors Resolution No. R-2005-463.

2. An email from the Alameda County Planning Department to various persons (RA 168-69).

3. The complaint in RG05-239552, an action brought by Californians for Renewable Energy (CARE) under the California Environmental Quality Act to which the defendants here were parties, alleging that Alameda County's decision not to prepare an Environmental Impact Report before adopting Resolution No. R-2005-463 violated CEQA (RA 171-185).

4. The complaint in RG05-239790, a similar CEQA action challenging Resolution No. R-2005-463 brought by Golden Gate Audubon Society (RA 187-222).

5. A letter from plaintiffs' counsel to Alameda County (RA 224-25).

6. A letter from the Attorney General to Alameda County (RA 89-93).

Although defendants included these documents in their respondents' appendix, they did not bother to inform the Court that in January 2007, nine months before they filed their briefs and appendix, they had entered into a settlement agreement with Alameda County, Golden Gate Audubon, and CARE that settled cases RG05-239552 and RG05-239790. *See* GREP Brief at 7-9; FPL Brief at 4-5.[2] Nor did defendants bother to inform the Court that, as a result of this settlement, the Alameda County Board of

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[2] The "GREP defendants" are GREP Bay Area Holdings, LLC; AES SeaWest, Inc. (formerly SeaWest WindPower, Inc.); and enXco, Inc. Defendants Pacific Winds, Inc.; Windworks, Inc.; and Altamont Winds, Inc. (the "Altamont Winds" defendants) have filed a joinder in the brief of the GREP defendants.

The "FPL defendants" are FPL Group, Inc.; FPL Energy, LLC; ESI Bay Area GP, Inc.; ESI Bay Area, Inc.; Altamont Power LLC; and Green Ridge Power LLC.

Supervisors in January 2007 enacted a new resolution superseding Resolution No. R-2005-463 and substantially changing the permit terms and conditions for all defendants except the Altamont Winds defendants.

Before a reviewing court takes judicial notice, the parties must be afforded an opportunity to address "the propriety of taking judicial notice of the matter" and "the tenor of the matter to be noticed." Evidence Code §§ 455, 459.

Plaintiffs respectfully object.

Although a court may judicially notice the fact of the existence of a document in a court file in a different action or the existence of a document memorializing an official act, it cannot judicially notice the truth of any factual assertions made in those documents. Because the mere fact that these documents exist is not relevant to this appeal, and because only relevant material may be judicially noticed, judicial notice of these documents is improper and unnecessary.

As the Supreme Court has said, "to the extent plaintiff asks us to notice the truth of matters asserted in those [government] documents, and not merely their existence, [defendant] has stated a valid objection. While courts may notice official acts and public records, 'we do not take judicial notice of the truth of all matters stated therein.' '[T]he taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom.' " *Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal.4th 1057, 1063-64 (1994).

"[W]hat is being noticed is the *existence* of the [official] act, not that what is asserted in the act is true. The truth of any factual matters that might be deduced from official records is not the proper subject of judicial notice." *Lockley v. Law Office of Cantrell*, 91 Cal.App.4th 875, 885 (2001) (emphasis original). "Although the *existence* of a document may be judicially noticeable, the truth of statements contained in the document and its proper interpretation are not subject to judicial notice if those matters are reasonably disputable." *Fremont Indemnity Co. v. Fremont General Corp.*, 148 Cal.App.4th 97, 113 (2007) (emphasis original); *Stormedia Inc. v. Superior Court*, 20 Cal.4th 449, 457 (1999) ("When judicial notice is taken of a document, however, the truthfulness and proper interpretation of the document are disputable.").

This principle applies equally to judicial records, filings, and decisions as does to other "official acts and public records," *Mangini*, 7 Cal.4th at 1063. It is improper to take judicial notice of facts asserted in court records when taking notice of the existence of the records: "[W]hile courts are free to take judicial notice of the *existence* of each document in a court file . . . they may not take judicial notice of the truth of hearsay statements in decisions and court files." *Lockley*, 91 Cal.App.4th at 882 (emphasis original); *accord*, *O'Neill v. Novartis Consumer Health, Inc.*, 147 Cal.App.4th 1388, 1405 (2007) (same); *Kilroy v. California*, 119 Cal.App.4th 140, 147-48 (2004) (same); *Sosinsky v. Grant*, 6 Cal.App.4th 1548, 1567 (1992) (same; improper to take judicial notice of the truth of allegations in a complaint).

Thus, none of the facts asserted in the complaints in cases RG05-239552 and RG05-239790 or in Alameda County Resolution No. R-2005-463 may be judicially noticed for their truth. (The contents of the email and the letters are hearsay not subject to judicial notice.)

Because the facts asserted within these documents cannot be judicially noticed, the documents themselves ultimately lack relevance to the issues on appeal. "Although a court may judicially notice a variety of matters, only relevant material may be noticed." *Mangini*, 7 Cal.4th at 1063 (citation omitted) (denying judicial notice of newspaper article because truth of matters asserted within article could not be judicially noticed and the mere fact of the article's existence divorced from its content was irrelevant); *see also* Evidence Code § 350 ("No evidence is admissible except relevant evidence.").

Moreover, these documents, all of which are from 2005, are independently irrelevant because they have long since been mooted by subsequent events. The plaintiffs in RG05-239552 and RG05-239790, Golden Gate Audubon Society and CARE, settled their CEQA lawsuits in January 2007. The settlement agreement actually *reduced* the mitigation requirements that defendants would otherwise have had to meet under the September 2005 land use permits. The settlement agreement also excludes plaintiffs, who were not parties to it and who were excluded from its negotiation, from any participation in selecting and implementing the mitigation procedures it adopts.

In addition, the County has admitted that, during the first two years after the September 2005 permits were issued, defendants failed to comply fully with either the original permit conditions or the conditions imposed later by the settlement agreement and has admitted that the County failed to enforce these conditions. Moreover, monitoring of the Altamont Pass wind turbines shows that there has been a substantial *increase* in raptor mortality during the period from October 2005 to October 2007, the two years after September 2005 when the new permits were first granted. Most recently, Alameda County rejected the repeated recommendations of its advisory

committee of scientists that the County shut down the Altamont Pass wind turbines for four months this past winter (2007-2008) as the minimum measure necessary to finally begin reducing avian mortality. Once again, defendants are destroying unimpeded the public trust wildlife that is the property of all Californians.

Plaintiffs are eager to prove each of these disputed facts, and many others, demonstrating Alameda County's utter and continuing failure over the past 20 years to take any effective measures to reduce avian mortality and its refusal for 20 years to take any enforcement actions against wind turbine permit violators, *if* and *when* those facts should ever become relevant during further proceedings below on remand. However, judicial notice is not the proper vehicle for, and an appellate court deciding whether the complaint states a cause of action is not the proper forum for, resolving these factual disputes. "The appropriate setting for resolving facts reasonably subject to dispute is the adversary hearing. It is therefore improper for courts to take judicial notice of any facts that are not the product of an adversary hearing which involved the question of their existence or nonexistence." *Lockley*, 91 Cal.App.4th at 882. "In short, a court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show." *Fremont Indemnity*, 148 Cal.App.4th at 115. (A judgment on the pleadings, the order on appeal here, presents, of course, the same question as a demurrer—whether the complaint states a cause of action—and is reviewed under the same standard. *Sanchez v. City of Modesto*, 145 Cal.App.4th 660, 671 (2006) ("the standard of review for an order granting judgment on the pleadings is the same as that for an order sustaining a general demurrer").)

Plaintiffs expect that defendants may treat the Court's order as an invitation to deluge the Court with additional documents from Alameda County, from Alameda County Superior Court actions nos. RG05-239552 and RG05-239790, or from other sources. For the reasons set forth above, it will be improper to judicially notice the truth of facts asserted in those documents, and it is extremely likely that the mere existence of these documents is irrelevant to the issues on appeal.

III. The Trial Court *Twice* Properly Exercised Its Discretion To Determine That There Was No Basis For A Stay On The Ground Of Primary Jurisdiction Or For Dismissal On The Ground Of Abstention

Defendants twice moved in the trial court to stay or dismiss the action based on the doctrines of primary jurisdiction and abstention. One motion was made by defendants before the Alameda County Board of Supervisors adopted Resolution No. R-2005-463 on September 22, 2005, and one was made by defendants after adoption of the resolution and the filing of two lawsuits challenging the procedural adequacy under CEQA of that resolution, Alameda County Superior Court Nos. RG05-239552 and RG05-239790. Plaintiffs were not parties to either of those lawsuits.

The trial court twice denied defendants' motions to stay or dismiss the action on the basis of the primary jurisdiction or abstention doctrines. RA 94-101; RA 228-31. The trial court's decisions are reviewed for an abuse of discretion. *Krumme v. Mercury Insurance Co.*, 123 Cal.App.4th 924, 938 (2004) (primary jurisdiction); *Shamsian v. Department of Conservation*, 136 Cal.App.4th 621, 641 (2006) (abstention). The trial court's exercise of its discretion in this regard was correct, and there is no basis in the record for finding an abuse of discretion or for reversing on appeal the trial court's decision on these issues. The reasons for this conclusion now follow.

A. Primary Jurisdiction Does Not Apply Because The Legislature Has Not Established A Formal Administrative Procedure For Adjudicating A Specific Factual Question That Is Both At Issue In The Litigation And Within The Special Technical Competence Of The Administrative Body

The Court has asked whether "the doctrine[] of . . . primary jurisdiction provide grounds on which the judgment may be affirmed?"

At the threshold, the answer is "no" because even where the prerequisites for applying the doctrine of primary jurisdiction exist, primary jurisdiction permits only a stay, and not the dismissal with prejudice, of an action. Thus, the trial court's dismissal with prejudice of this action cannot be affirmed on the basis of the primary jurisdiction doctrine.

More fundamentally, none of the prerequisites for applying the primary jurisdiction doctrine are present here. Thus, there is no basis in the record on which this Court could find that the trial court abused its discretion in twice rejecting primary jurisdiction as a ground for staying the action. RA 98; RA 230.

The primary jurisdiction doctrine is a narrow one with no application here. Before a court can exercise its discretion to apply the primary jurisdiction doctrine, three prerequisites must be satisfied. First, there must be a " 'pervasive and self-contained system of administrative procedure' to deal with the precise questions involved" in the litigation. *Farmers Insurance Exchange v. Superior Court*, 2 Cal.4th 377, 396 (1992) (citation omitted). Second, the questions that the court refers to the administrative body for decision must be factual ones " 'which, under a regulatory scheme, have been placed within the special competence of an administrative body.' " *Id.* at 390. Third, the factual issues must be ones that are so technically complex that they are "beyond the usual competence of the judicial system," *id.* at 396, and create "a paramount need for

specialized agency fact-finding expertise," *ibid*. The classic example is "insurance rate making[, which] pose[s] issues for which specialized agency fact-finding and expertise is needed in order to both resolve complex factual questions and provide a record for subsequent judicial review." *Id.* at 397.

Even where these three prerequisites exist, invocation of the primary jurisdiction doctrine by a court is not mandatory but discretionary. *Hewlett v. Squaw Valley Ski Corp.*, 54 Cal.App.4th 499, 529 (1997).

If these three prerequisites exist and if the court exercises its discretion and invokes the primary jurisdiction doctrine, the action is stayed (not dismissed) pending decision of the specific issues that are referred to the identified, statutorily-authorized administrative fact-finding proceeding. *Farmers Insurance*, 2 Cal.4th at 390, 401. Once the specific factual issue referred to the administrative proceeding is resolved and the agency issues factual findings, the court then proceeds with the litigation, having the "benefit of the views of the agency charged with regulating the . . . industry" and a formal administrative " 'record which the court may review.' " *Id.* at 398, 400.

Thus, under the primary jurisdiction doctrine, the Legislature must establish an all-embracing system of administrative regulation that it intends to be the mechanism for comprehensively resolving some specific and complex factual issue that is also an issue in the litigation, and the specific factual issue must be of such a technical complexity as to be outside the competence of the courts. Once the specific factual issue referred to the administrative proceeding is resolved, the court then proceeds with the litigation, having had the benefit of the agency's views without being bound by them.

Typically, primary jurisdiction is invoked where the Legislature has established an expert regulatory body (e.g., the Department of Insurance), where the Legislature has statutorily endowed the regulatory body with jurisdiction to decide the precise factual issue that is contested in the litigation, and where the factual issue is one where the Legislature has established an open-ended statutory standard of compliance (e.g., a requirement that insurance rates or common carrier shipping rates must be "reasonable") whose proper application requires analysis of a large body of complex data. Application of primary jurisdiction arises almost exclusively in the context of litigation challenging the reasonableness of prices in an industry like insurance or railroads whose prices are heavily regulated and subject to administrative review for reasonableness under complex and technical financial and economic standards by an agency charged with comprehensively regulating the industry.

Outside of the context of heavily regulated industries like insurance or railroads, courts routinely reject attempts by defendants to invoke the primary jurisdiction doctrine to escape liability, especially when, as here, the central issues in the litigation are not the facts of the defendant's conduct but determining what the governing legal standard is and how that standard applies to the defendant's conduct. *See, e.g., People ex rel. Kennedy v. Beaumont Investment, Ltd.*, 111 Cal.App.4th 102, 126 (2003); *Cundiff v. GTE California Inc.*, 101 Cal.App.4th 1395, 1413 (2002); *Aicco, Inc. v. Ins. Co. of North America*, 90 Cal.App.4th 579, 594-95 (2001); *Tenderloin Housing Clinic, Inc. v. Astoria Hotel*, 83 Cal.App.4th 139, 142 (2000); *Hewlett v. Squaw Valley Ski Corp.*, 54 Cal.App.4th 499, 528-29 (1997); *State Farm Fire & Casualty Co. v. Superior Court*, 45 Cal.App.4th 1093, 1112 (1996).

None of the prerequisites necessary for the invocation of primary jurisdiction is present here. First, there is no " 'pervasive and self-contained system of administrative procedure' to deal with the precise questions involved" in the litigation. *Farmers Insurance*, 2 Cal.4th at 396. There is no overarching administrative scheme comprehensively regulating the wind power industry, and no agency charged with that duty. Unlike other industrial facilities that generate electricity, no state agency has any regulatory authority over wind power generating facilities. No state permits are required to operate wind turbine generators, and there are no ongoing or potential state administrative proceedings relating to Altamont Pass wind turbine generators or the defendants' killing of raptors and other birds that are wildlife public trust property.

There is no ongoing or potential administrative proceeding established by the Legislature that will make factual findings regarding defendants' illegal killing of eagles, hawks, falcons, owls, and other birds and create a formal administrative " 'record which the court may review.' " *Farmers Insurance*, 2 Cal.4th at 400. In their repeated primary jurisdiction motions below, defendants could not identify any such comprehensive regulatory scheme, could not identify any specific statute or regulation authorizing formal administrative proceedings, could not identify any specific agency authorized by the Legislature to conduct such proceedings, and could not identify any specific factual issues to be decided by any such proceeding that are also factual issues in this action. Because there is no " 'pervasive and self-contained system of administrative procedure,' to deal with the precise questions involved herein," *id.* at 396, the primary jurisdiction doctrine cannot apply here.

Instructive on this point is *Hewlett v. Squaw Valley Ski Corp*. The ski resort Squaw Valley was sued under Business and Professions Code

section 17200 et seq. for illegally cutting trees in violation of the Forest Practices Act, which is administered by the California Department of Forestry. 54 Cal.App.4th at 521-23. The ski resort contended that the case should be referred to the Department of Forestry under the doctrine of primary jurisdiction to determine whether the tree-cutting was illegal. *Id.* at 528-29. The Department of Forestry regulates the logging industry, had issued a logging permit to Squaw Valley, had conducted meetings and negotiations with Squaw Valley regarding the tree-cutting at issue, and had ultimately decided not to prosecute Squaw Valley under the Forest Practices Act. *Id.* at 512-15, 527.

The Court of Appeal rejected Squaw Valley's primary jurisdiction argument because, notwithstanding its general expertise in forestry, the Department of Forestry had "no pervasive and self-contained system of administrative procedure to deal with the issues raised" by the litigation. 54 Cal.App.4th at 528-29 (internal quotation marks omitted); *accord*, *Cundiff v. GTE California Inc.*, 101 Cal.App.4th at 1413 (no primary jurisdiction where there was no pervasive and self-contained system of administrative procedure); *State Farm Fire & Casualty Co. v. Superior Court*, 45 Cal.App.4th at 1112 (same); *Aicco, Inc. v. Ins. Co. of North America*, 90 Cal.App.4th at 594-95 ("primary jurisdiction is not applicable" where there were no "pending or proposed administrative proceedings").

The other prerequisites for primary jurisdiction are also absent here. There are no factual issues in this litigation that, " 'under a regulatory scheme, have been placed within the special competence of an administrative body,' " *Farmers Insurance*, 2 Cal.4th at 390, much less issues that are so technically complex that they are "beyond the usual competence of the judicial system," *id.* at 396, and create "a paramount need for specialized agency fact-finding expertise," *ibid*.

Determining whether or not defendants are in fact killing public trust wildlife is not a complex determination requiring technical expertise. Death by dismemberment has always been well within the competence and expertise of the common law. No one at all familiar with defendants' operation of their obsolete wind turbines at Altamont Pass has the slightest doubt that defendants are killing raptors and other birds; defendants have never denied that they are. What is at issue instead in this case is the scope of their legal liability for those deaths. That is a purely legal question within the competence of the courts, not an administrative agency, and one that is not appropriate for a primary jurisdiction referral.

Hewlett v. Squaw Valley Ski Corp. is instructive on this point as well. The Court of Appeal in that case held that the primary jurisdiction doctrine was also inapplicable because "the basic issue in this appeal involves a question of statutory interpretation, a matter with which courts have considerable experience and which does not necessitate deferral to another agency." *Hewlett v. Squaw Valley Ski Corp.*, 54 Cal.App.4th at 529; *accord*, *People ex rel. Kennedy v. Beaumont Investment, Ltd.*, 111 Cal.App.4th at 126 (primary jurisdiction inapplicable where issue to be resolved was the proper construction of applicable law, an "inherently judicial function"); *Cundiff v. GTE California Inc.*, 101 Cal.App.4th at 1413 (primary jurisdiction inapplicable where issue was application of legal standard to the defendant's conduct: "The subject of this suit . . . is deception . . . . This is not a topic about which the [Public Utilities] commission would have more expertise than the trial court, or even as much expertise. Actions based on alleged deceit are not known to be within the technical expertise of the commission."); *Tenderloin Housing Clinic, Inc. v. Astoria Hotel*, 83 Cal.App.4th at 142-43 ("the trial court correctly observed that the matter before it involved no need for an

administrative agency's factfinding expertise, but rather concerned issues of statutory interpretation appropriate for judicial resolution") *cf*. *Marbury v. Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Thus, the trial court did not abuse its discretion in twice rejecting primary jurisdiction (RA 98; RA 230), and there is no basis for reversing the trial court's exercise of its discretion.

B. There Is No Basis For Abstention Here

Nor is there any basis on which the Court could conclude that the trial court abused its discretion in twice denying defendants' motion to dismiss the action on abstention grounds. RA 95; RA 229.

As plaintiffs have demonstrated in their opening and reply briefs, wildlife is a category of public trust property and plaintiffs and every other member of the public have standing to sue to remedy harms to public trust interests. The Supreme Court's statement of public trust standing under the common law is unqualified and unequivocal: "[A]ny member of the general public has standing to raise a claim of harm to the public trust. We conclude that plaintiffs have standing to sue to protect the public trust." *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 431 n. 11 (1983) (citations omitted).

The right of members of the general public to sue to protect the public trust would be eviscerated, however, were the Court to hold that courts should abstain from deciding such suits. The Supreme Court's decision in *National Audubon* rejected just such a course of action, and the Court should reject it here as well.

At issue in *National Audubon* was the impact of water diversions on public trust interests. The Legislature has established a complex statutory and administrative scheme regulating water rights in California, and has

provided extensive statutory remedies in the area of water rights. Under this scheme, the State Water Board has authority to comprehensively regulate the use of water, including authority to protect public trust interests. *National Audubon*, 33 Cal.3d at 446, 449 ("we have discerned a legislative intent to grant the Water Board a 'broad,' 'open-ended,' 'expansive' authority to undertake comprehensive planning and allocation of water resources").

In *National Audubon*, the State Water Board had improperly failed to take public trust interests into account in authorizing water diversions by the Department of Water and Power of Los Angeles. *National Audubon*, 33 Cal.3d at 428, 437, 440. The Supreme Court held in *National Audubon* that the National Audubon Society and other members of the general public could have initiated administrative proceedings before the State Water Board to challenge water uses that harm public trust interests. *National Audubon*, 33 Cal.3d at 449. Yet notwithstanding the comprehensive regulatory scheme governing water use, for which there is no parallel in the regulation of wildlife, and the availability to the plaintiffs of an administrative remedy, the Court refused to require even the exhaustion of administrative remedies before members of the public could bring public trust actions, much less hold that courts should abstain entirely from deciding claims of harm to the public trust. *Ibid.* (holding that "remedies before the Water Board are not exclusive, but that the courts have concurrent original jurisdiction" over actions to enforce public trust rights).

Here, there is even less basis for abstaining that there was in *National Audubon*, and thus all the more reason to reject abstention. The California water rights regime at issue in *National Audubon* is an elaborate and comprehensive administrative mechanism established by the Legislature that provided an administrative remedy to the *National*

Audubon plaintiffs by which they could have sought the same relief they sought in their lawsuit *and* that had the power to authorize the defendant's conduct and make it lawful. There is no administrative mechanism, comprehensive or otherwise, that provides an administrative remedy by which plaintiffs can seek any relief against defendants, and there is no administrative body that has the power to authorize defendants' destruction of public trust wildlife and make it lawful.

Thus, the trial court did not abuse its discretion in twice denying defendants' motion for abstention (RA 95; RA 229), and there is no basis for reversing the trial court's exercise of its discretion. There is nothing to abstain in favor of, for no administrative agency has any legal authority to engage in any ad hoc "balancing" of defendants' highly profitable operation of their obsolete wind turbines against the laws prohibiting the destruction of wildlife. The balance was struck long ago by the Legislature, when it criminalized the wildlife killings that defendants are committing on a daily basis with their obsolete wind turbines and did not create any exception that would legalize defendants' conduct. No administrative agency has any authority to upset the balance struck by the Legislature or to excuse defendants' killings.

IV. The Trial Court Properly Exercised Its Discretion To Continue This Litigation Without The Presence Of The State Or The Counties

A. The State Of California And Alameda County Have Disclaimed Any Interest In Joining This Litigation

Early on in this litigation, the trial court invited both the State of California and Alameda County to intervene in this litigation if they thought it necessary or appropriate to do so. 2/17/05 Order at 34:24 to 35:2 (RA 66:24 to 67:2). At the Court's direction, plaintiffs notified the Attorney General and the Alameda County District Attorney of the

pendency of the litigation and of the Court's invitation for them to intervene. After careful consideration, the State of California and Alameda County each expressly disclaimed on the record any interest in participating in this litigation. Supplemental Appellants' Appendix ("SAA") 1, 2. By disclaiming their interest in participating in this action, the State of California and Alameda County have expressed their determination that this action will not impair or adversely affect their interests.

B. There Is No Necessary Party Absent From This Litigation

The Court has asked whether "the counties of Alameda and Contra Costa or any other public subdivisions or agencies [are] necessary . . . parties" to plaintiffs' action. The answer is "no."

Subdivision (a) of section 389 of the Code of Civil Procedure defines necessary parties: "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party."

The first statutory requirement that a non-party must meet to be a necessary party is that "in his absence complete relief cannot be accorded among those already parties." Code Civ. Proc. § 389, subd. (a). Here, plaintiffs seek no relief directed at Alameda or Contra Costa Counties and do not seek to compel or prohibit any action by those counties. Nor do

plaintiffs seek relief directed at any other public subdivision or agency. Thus, the absence of Alameda and Contra Costa Counties provides no obstacle to complete relief against defendants.

The second requirement to be a necessary party under subdivision (a) is that the non-party must "claim[] an interest relating to the subject of the action and [be] so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." Code Civ. Proc. § 389, subd. (a). Clause (i) of this requirement asks whether the non-party claims "any interests at stake that could be 'directly and immediately' impacted by the outcome of the case." *Countrywide Home Loans v. Superior Court*, 69 Cal.App.4th 785, 795 (1999). Under clause (ii) of this requirement, a " ' "substantial risk" means more than a theoretical possibility of the absent party's asserting a claim that would result in multiple liability. The risk must be substantial as a practical matter.' " *Id*. at 796.

At the threshold, Alameda and Contra Costa County have no regulatory authority over or legally cognizable interest in the wildlife public trust property that defendants are destroying and thus cannot and do not claim an interest in the subject matter of this action. Nor, in any event, will this lawsuit, which is aimed at stopping the unlawful destruction of wildlife public trust property that belongs to all Californians, impair the interests that anyone has in that public trust property. To the contrary, it will protect and preserve that property for all who have an interest in it. Moreover, as explained above, the State of California and Alameda County have already determined that this litigation will not impair their interests, and have informed the trial court that they do not find it necessary to intervene in this

action to protect their interests. Thus, there is no non-party whose interests would be directly and immediately impaired by the outcome of this case.

Nor will this action leave defendants at "a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [a non-party's] claimed interest." Code Civ. Proc. § 389, subd. (a). Defendants' county land use permits do not authorize or mandate that they destroy wildlife public trust property. Neither county has purported to authorize defendants to kill raptors and other birds or to destroy wildlife public trust property, and neither county has any power to authorize defendants to kill raptors and other birds or to destroy public trust property. Nor has any other public subdivision or agency purported to authorize defendants' unlawful conduct, and no public subdivision or agency has the power to authorize defendants' unlawful conduct.

Because neither Alameda or Contra Costa County nor any other public agency or subdivision defendants have authorized or required defendants to kill raptors and other public trust wildlife, there is no possibility that any order by the trial court restricting or prohibiting defendants from killing protected public trust wildlife could possibly conflict with their county land use permits. Relief that requires defendants to reduce the number of birds they are killing will not conflict with anything the counties have or could authorize them to do. As a "practical matter," *Countrywide*, 69 Cal.App.4th at 796, there is no substantial risk that the trial court will require defendants to do anything that the counties have forbidden them from doing, or vice versa. Moreover, the trial court has explained that it will harmonize whatever equitable relief it may award with the terms and conditions of defendants' county land use permits. RA 230. Thus, there is no necessary party absent from this litigation.

C. There Is No Indispensable Party Absent From This Litigation

The Court has asked whether, if "the counties of Alameda and Contra Costa or any other public subdivisions or agencies [are] necessary . . . parties" under subdivision (a) of section 389, they are also "indispensable parties" to plaintiffs' action under subdivision (b) of section 389 whose absence requires dismissal of this action. The answer is "no."

Even if Alameda and Contra Costa Counties or some other public subdivisions or agencies were necessary parties under subdivision (a) of section 389, they would not be indispensable parties. If a party is found to be a necessary party under subdivision (a), but cannot be joined as a party to the action, subdivision (b) provides that "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder." Code Civ. Proc. § 389, subd. (b).

" '[F]ailure to join an "indispensable" party is not "a jurisdictional defect" in the fundamental sense; even in the absence of an "indispensable" party, the court still has the power to render a decision as to the parties before it which will stand. It is for reasons of equity and convenience, and not because it is without power to proceed, that the court should not proceed with a case where it determines that an "indispensable" party is

absent and cannot be joined.' " *Niederer v. Ferreira*, 189 Cal.App.3d 1485, 1494 (1987) (alterations and citations omitted).

The Supreme Court and the Courts of Appeal have cautioned strongly against the indiscriminate use of section 389 to dismiss litigation where doing so would cause injustice: "Bearing in mind the fundamental purpose of the doctrine, we should, in dealing with 'necessary' and 'indispensable' parties, be careful to avoid converting a discretionary power or a rule of fairness in procedure into an arbitrary and burdensome requirement which may thwart rather than accomplish justice." *Bank of California, Nat'l Assoc. v. Superior Court*, 16 Cal.2d 516, 521 (1940); *accord*, *Deltakeeper v. Oakdale Irrigation Dist.*, 94 Cal.App.4th 1092, 1105 (2001) (same); *Countrywide*, 69 Cal.App.4th at 793 (same).

The classic example of a necessary and indispensable party arises in the situation where there are many claimants with undetermined rights to a *res* (e.g., insurance proceeds, a decedent's estate, real estate with conflicting claims of title), but only some of the claimants are before the court. In that situation, an adjudication of the rights of the claimants who are parties may impair the interests of the non-parties in the *res*: "Typical are the situations where a number of persons have undetermined interests in the same property, or in a particular trust fund, and one of them seeks, in an action, to recover the whole, to fix his share, or to recover a portion claimed by him. The other persons with similar interests are indispensable parties. The reason is that a judgment in favor of one claimant for part of the property or fund would necessarily determine the amount or extent which remains available to the others. Hence, any judgment in the action would inevitably affect their rights." *Bank of California*, 16 Cal.2d at 522.

There is nothing similar here. Alameda and Contra Costa Counties have no property interest in and no regulatory authority over the public trust

wildlife that defendants are destroying. Any judgment in favor of plaintiffs, moreover, will protect and preserve the wildlife public trust property at issue here for the equal benefit of all Californians who have an interest in it.

Analysis of the four nonexclusive factors of subdivision (b) shows that Alameda and Contra Costa Counties are not indispensable parties. As the Court of Appeal in *Deltakeeper* noted, the first factor under subdivision (b)—"to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties"—is " 'essentially the same assessment that must be made under subdivision (a) in determining whether a party's absence would impair or impede that party's ability to protect his or her interests, and determining whether proceeding to judgment would subject existing parties to inconsistent obligations.' " 94 Cal.App.4th at 1107. For the reasons explained above in the discussion of subdivision (a), a judgment in this action requiring defendants to reduce their destruction of public trust property will not impair any cognizable interest of Alameda or Contra Costa County or any other public subdivision or agency, and will not subject defendants to inconsistent obligations.

The second factor asks "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided." As explained, not only do the counties lack any cognizable interest that could be prejudiced or impaired, but in addition the trial court has stated it will take the terms and conditions of the land use permits the counties have issued into account and harmonize any relief it imposes with the permits. RA 230.

The third factor is "whether a judgment rendered in the person's absence will be adequate." As explained above, the trial court will be able to render judgment adequately in the absence of Alameda and Contra Costa

Counties because plaintiffs seek relief directed only at defendants and because defendants have no authorization or mandate from the counties to destroy public trust wildlife with which any order of the trial court could conflict.

The fourth factor—"whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder"—weighs heavily against dismissal. No other remedy is available to plaintiffs to redress defendants' unlawful destruction of raptors and other public trust wildlife property. If this Court scuttles plaintiffs' lawsuit, defendants' unlawful killings will continue unremedied.

Ultimately, the inquiry under section 389 is an intensely practical and pragmatic one. "[W]e must ask what contribution [Alameda or Contra Costa County] could make to the proceeding before the trial court. In other words, what precisely are they foreclosed from doing by not being named as parties to the lawsuit?" *Deltakeeper*, 94 Cal.App.4th at 1107. The answer is "nothing," because they have no cognizable interest in the public trust wildlife that defendants are destroying and no power to authorize that destruction. "The only interests protected by section 389 are personal ones which may be prejudiced in a concrete way by a judgment rendered in the absence of joinder." *Van Atta v. Scott*, 27 Cal.3d 424, 451 (1980). Because the counties have no cognizable interest in the continuing destruction of wildlife public trust property that would be prejudiced by their nonjoinder, "their absence as parties will not harm anyone's protectible interests." *Countrywide*, 69 Cal.App.4th at 798. Instead, this is a case where "invocation of the doctrine of indispensability would 'thwart rather than accomplish justice.' " *Van Atta v. Scott*, 27 Cal.3d at 452.

V. The Proper Vehicle For The Court's Concern Lies In The Trial Court's Informed Exercise Of Its Equitable Discretion After A Full Trial On The Merits, And This Court's Review Of Any Equitable Relief The Trial Court Awards

The Court's inquiries may be motivated by a concern with the equitable relief, if any, that the trial court might award if, after trial, it determines that defendants are liable for their destruction of public trust wildlife property. The proper vehicle for addressing the Court's concerns lies in the careful and informed exercise by the trial court of its equitable discretion, exercised only after a full trial on the merits and a full examination of the evidence, and the availability of appellate review of any relief that the trial court awards.

The historic powers of equity are fully capable of taking account of whatever mitigation measures defendants have already undertaken at the time of judgment pursuant to their county land use permits and integrating those measures into whatever relief the court might order. Indeed, that weighing and measuring of the equities before awarding relief is an essential element of the exercise of equitable powers.

"Injunctive relief rests in the sound discretion of the court, to be exercised in accordance with well settled equitable principles and in light of all the facts and circumstances in the case. In an equity case the trial court has broad and flexible discretionary powers, and can, and undoubtedly would, deny injunctive relief where such relief would be inequitable." *Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist.*, 65 Cal.App.3d 121, 132 (1976) (citation and internal quotation marks omitted).

"A court cannot properly exercise an equitable power without consideration of the equities on both sides of a dispute. This principle of equity jurisprudence has been applied in a variety of contexts in which the

court is called upon to exercise equitable power. . . . '[I]n all such cases the court should weigh the competing equities which bear on the issue . . . and should then grant or deny injunctive relief depending on the overall balance of those equities.' . . . [¶]. . . '[E]quity is, peculiarly, a forum of conscience.' . . . [¶] . . . In short, consideration of the equities between the parties is necessary to ensure an equitable result." *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th 163, 180-81 (2000).

In deciding what, if any, equitable relief to award, the trial court will be fully able to inquire into whatever may be relevant to weighing the equities, including whatever remedial measures defendants may have already undertaken at the time of judgment and whatever permit requirements they are subject to. The trial court itself has already recognized the propriety and feasibility of this mode of proceeding and has adopted it. In its second order denying defendants' abstention and primary jurisdiction motion, the trial court noted that before ordering equitable relief it would take into account whatever mitigation measures were imposed on defendants by their land use permits: "The Court cannot determine at this juncture that it will be incapable of providing effective relief. If Plaintiffs prevail, the Court will at that time consider what relief is appropriate. At that time the Court can consider the restrictions imposed on Defendants by the Alameda County Planning Department/Board of Zoning Adjustment." RA 230. The trial court also bifurcated this action into a liability phase and a remedial phase, with a trial on liability to be held first before any proceedings on remedies, further demonstrating its sensitivity to this issue. SAA 4. The trial court's orders were well within its discretion and deserve to be respected by this Court.

The trial court's work of weighing the equities, however, lies far down the road at the end of the case, after liability has been established and

after the trial court has heard all of the evidence relevant not just to liability but to remedy. At issue in this appeal is only the threshold question of whether the complaint states a cause of action. It would be a gross and tragic miscarriage of justice if the Court were to foreclose at the outset any inquiry into the lawfulness of defendants' conduct simply because, if the trial court were to find that defendants are acting unlawfully, it would then have to proceed to consider what equitable remedy, if any, to impose on defendants for their unlawful conduct.

CONCLUSION

The trial court's judgment dismissing the action should be reversed.

Dated: March 26, 2008

Respectfully submitted,

Richard R. Wiebe
Attorney for Appellants
Center For Biological Diversity, Inc., and
Peter Galvin

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204, subdivision (c)(1), I certify that this brief contains 9,047 words.

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Richard R. Wiebe

CERTIFICATE OF SERVICE

I am over the age of 18 years, a member of the State Bar of California, and not a party to this action. My business address is 425 California Street, Suite 2025, San Francisco, California, 94104, which is located in the county where the service described below took place.

On the date stated below, I served true and correct copies of the following document(s):

APPELLANTS CENTER FOR BIOLOGICAL DIVERSITY, INC., AND PETER GALVIN'S SUPPLEMENTAL BRIEF

by placing copies in sealed envelopes, addressed as shown below, and tendering them to an employee of Federal Express Corporation (FedEx), with delivery fees provided for, for overnight delivery:

George T. Caplan Kaye Scholer LLP 1999 Avenue of the Stars, Suite 1700 Los Angeles, CA 90067	William S. Berland Ferguson & Berland 1816 Fifth Street Berkeley, CA 94710	John N. Zarian Zarian Midgley & Johnson 960 Broadway Suite 305 Boise, ID 83706
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Attorney for GREP Bay Area Holdings, Seawest Windpower, and Enxco	Attorney for FPL Group, Inc.; FPL Energy, LLC; Altamont Power, ESI Bay Area, ESI Bay Area GP, and Green Ridge Power	Attorney for Pacific Winds, Windworks, and Altamont Winds

In addition, I served the aforementioned document(s) on the following persons by placing copies in sealed envelopes, addressed as shown below, and providing for their delivery to the addressee by the method specified:

Via U.S. Mail **Alameda County Superior Court** 1225 Fallon Street Oakland, CA 94612	Electronically uploaded pursuant to Rule 8.212(c)(2) **Supreme Court** 350 McAllister St. San Francisco, CA 94102

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

Dated: March 26, 2008

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Richard R. Wiebe