

1 STEPHENS FRIEDLAND LLP
John B. Stephens, Bar No. 142718
2 Todd G. Friedland, Bar No. 187022
J. Gregory Dyer, Bar No.
3 4695 MacArthur Court, Suite 1550
Newport Beach, CA 92660
4 Telephone: (949) 468-3200 / Fax: (949) 468-3201

5 THE FOLEY GROUP, PLC
Katrina Anne Foley, Bar No. 184921
6 1600 Dove Street, Suite 101
Newport Beach, CA 92660
7 Telephone: (949) 502-8800 / Fax: (949) 502-8801

8 Attorneys for [Proposed] Intervenors
9 JOHN B. STEPHENS and KATRINA ANNE FOLEY

10
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF ORANGE, CENTRAL JUSTICE CENTER**

13 JULIE FOLCIK,

14 Petitioner,

15 vs.

16 ORANGE COUNTY REGISTRAR OF
17 VOTERS, and NEAL KELLEY, Registrar of
18 Voters,

19 Respondents.

20 JOHN B. STEPHENS and KATRINA ANNE
21 FOLEY,

22 Intervenors.
23

CASE NO. 30-2012-00553905

Assigned to: Hon. Franz Miller
Department C14

**JOHN B. STEPHENS AND KATRINA
ANNE FOLEY'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF
MANDAMUS**

DATE: March 27, 2012
TIME: 1:30 P.M.
DEPT: C-14

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1 **I. SUMMARY OF OPPOSITION.¹**

2 The City of Costa Mesa’s City Council blew a mandatory statutory election law deadline.
3 There is no legal basis for using the Writ of Mandamus to force the Registrar of Voters (“ROV”)
4 to accept resolutions that were filed three days late. In fact, such an order would conflict with
5 established case law and would be reversible error. Indeed, the Petition asks the Court to force the
6 ROV to *violate* a ministerial duty, not to comply with such a duty.

7 The concept of substantial compliance is not applicable. Rather, strict compliance with
8 mandatory statutory election law deadlines is required. Inadvertence is no excuse. The deadline is
9 clearly stated in election law statutes, Election Code § 10403. The specific deadline was published
10 on the ROV website. And, ROV personnel specifically advised the City of Costa Mesa of the
11 deadline. Five other cities were able to make the deadline. There is no excuse for Costa Mesa’s
12 failure to do so, and no legal basis for this Court to cram the proposed Charter on to the June ballot
13 instead of the November ballot, a mere five months later.

14 There would be no harm to the citizens or the political process if the Court properly denies
15 this errant Petition. The result of denial will be to put the proposed Charter on the ballot five
16 months later in November when more citizens will come to the polls. This will enhance the
17 political process, not detract from it. Dozens of citizens have advocated for a November vote
18 since the proposed Charter was first raised on December 6, 2011.

19 The Petitioner is asking the Court to stick its neck out and make a bad decision because the
20 City Council made a mistake. The Court should kindly decline the invitation.

21 **II. THE PETITIONER DOES NOT HAVE STANDING.**

22 In addition to the many substantive reasons the Petition should be denied, it suffers from a
23 fatal procedural defect: the Petitioner, Julie Folcik, lacks standing. Reading the Petition one
24 wonders: Why is Julie Folcik the Petitioner in this matter and not the City of Costa Mesa or its
25 City Council? This awkward tactical decision is not explained anywhere in the moving papers.
26 There is no allegation that Ms. Folcik is a resident, taxpayer or registered voter in the City of Costa

27 ¹ Intervenors incorporate by reference their previously filed documents: *Amicus Brief In*
28 *Opposition to Ex Parte Application for Writ of Mandate; Declarations of Stephens and Foley;*
Exhibits.

1 Mesa. “Every action must be prosecuted in the name of the real party in interest”
2 Cal.Civ.Proc.Code § 367. Here the “City Council of the City of Costa Mesa,” not Julie Folcik,
3 issued the Charter resolutions that were presented to the ROV for filing three days late. Moreover,
4 Elections Code Section 10403 requires “the district, city or political subdivision” (*i.e.*, Costa
5 Mesa, not the City Clerk) to file the resolutions by the mandatory, statutory deadline. The only
6 reference in the Charter resolutions to Julie Folcik is to “attest” and to certify that the copies of the
7 Charter resolutions are true and correct. The city attorney, Thomas Duarte, not Julie Folcik,
8 approved the Charter resolutions as to form. Moreover, filing a mandamus petition on behalf of
9 the City of Costa Mesa is not one of the powers of a city clerk enumerated in Government Code
10 Sections 40801 through 40813. None of the cases cited in the moving papers are brought by a City
11 Clerk. Then why is Julie Folcik our Petitioner? Perhaps naming Julie Folcik as the Petitioner is a
12 way of creating an expedient political scapegoat for the City Council’s blunder. Perhaps the City
13 Council is trying to support its “clerical error” theme with the infantile logic that every “error” of a
14 “clerk” is a “clerical error.” Whatever the reason, because Julie Folcik lacks standing to seek
15 mandamus, the Petition should be denied as a foundational procedural matter.

16 **III. THERE IS NO BASIS TO ISSUE A WRIT OF MANDAMUS AND DOING SO**
17 **WOULD BE REVERSIBLE ERROR.**

18 The Petitioner argues that the Writ of Mandamus should be granted because she made an
19 “inadvertent mistake” (as opposed to an intentional mistake, apparently), that she was confused,
20 and that even though the City blew the deadline for filing the Charter with the Registrar of Voters,
21 Costa Mesa “substantially complied” with the filing requirements. *See* Petition at 1:13-17. None
22 of these contentions constitutes a legal basis for casting aside established statutory election law
23 and decisional authority related to the consequences of missing a mandatory, statutory election law
24 deadline. Petitioner also argues that there will be “no prejudice to the [ROV],” but Petitioner does
25 not make any argument regarding lack of prejudice to the citizens of Costa Mesa. *Id.* at 1:19.
26 Petitioner does not argue that there will be any harm, much less irreparable harm, to the Petitioner,
27 the ROV, Costa Mesa or its citizens if the proposed Charter is placed on the November 2012 ballot
28 as opposed to the June 2012 ballot.

1 *Barnes v. Wong* (1995) 33 Cal.App.4th 390 is dispositive. Under *Barnes*, it would be
2 reversible error to grant a Writ of Mandamus in this circumstance. In *Barnes*, the trial court
3 granted a Writ of Mandamus to allow the filing of a ballot argument even though it was submitted
4 five hours late. The Court of Appeal held that granting a Writ of Mandamus in that circumstance
5 was judicial error. As the *Barnes* court stated:

6 The two requirements for mandamus thus are (1) a clear, present and usually
7 ministerial duty on the part of the respondent and (2) a clear, present and beneficial
8 right in the petitioner to performance of that duty. (*Hutchinson v. City of*
Sacramento (1993) 17 Cal.App.4th 791, 796, 21 Cal.Rptr.2d 779.)

9 *Barnes v. Wong*, 33 Cal.App.4th at 394-95. Neither of these requirements is present was present
10 in *Barnes*, and neither of these elements is present in the instant case. As in *Barnes*, the ROV had
11 no ministerial duty to accept the untimely-filed Charter resolution. In fact, the ROV's position is
12 that he had no discretion to do so. See Kelly Decl. at ¶ 11. Likewise, there is no beneficial right
13 for the City of Costa Mesa to be allowed to file untimely resolutions. Indeed, all case law cited
14 herein holds there is no such right.

15 Importantly, the *Barnes* court also noted that mandamus is intended to correct an abuse of
16 discretion, not to substitute the discretion of the Court for the discretion of the ROV:

17 And, while mandamus is not available to control the discretion exercised by a
18 public official or board, it is available to correct an abuse of discretion by such
19 party. (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d
328, 344, 124 Cal.Rptr. 513, 540 P.2d 609.)

20 *Barnes v. Wong*, 33 Cal.App.4th at 395. Here, there is no credible argument that the ROV abused
21 its discretion when he rejected the admittedly-late filing of the Petitioner. The ROV testified that
22 he had no discretion to accept the late filing. See Kelley Decl. at ¶ 11 (“I do not believe that I
23 have discretion as the County's top elections official to accept the City of Costa Mesa's late
24 filing.”) Therefore, there is no basis to grant a Writ of Mandamus.

25 Likewise, in *Sonoma County Nuclear Free Zone '86 v. Superior Court* (1987) 189
26 Cal.App.3d 167, the court held that a court has no power to force an election official to accept late
27 filed documents:

1 Once the clerk reasonably exercises discretion and sets the deadlines, a trial court
2 generally has no power to order the clerk to accept a late argument for filing.
3 Section 3784 clearly provides that “no arguments for or against an initiative may be
4 filed” after expiration of the deadline. ***The provision is mandatory and allows for
5 no discretion, and the county clerk has a ministerial duty to enforce it.*** A court
6 has no power to order a public official to commit an act in violation of a valid
7 statute. The writ may only issue against a respondent with a clear duty to perform a
8 ministerial act and with a legal authority to discharge that duty. [citation omitted]. . .
9 ***The Clerk had a legal duty to enforce the statutory ban and could not ignore the
10 clear mandate of the prohibition against acceptance of late filing.*** There was thus
11 no basis for issuance of a writ on a theory of compelling performance of a
12 ministerial act. (Emphasis added)

13 *Id.* at 179 (emphasis added).

14 Two California Superior Court cases stand for the same proposition. *See Steele v. Bartlett*
15 (1941) 18 Cal.2d 573, 574 (city clerk was required to omit six candidates from ballot because they
16 filed their nomination papers one day late); *Griffin v. Dingley* (1896) 114 Cal.481, 483 (to allow
17 nomination certificate “to be filed twenty-eight days before the day of the election would be in
18 manifest disregard of the statute”); *see also Daniels vs. Tregerson* (1982) 211 Cal.App.3d 1204
19 (invalidating election due to missed filing deadlines). Not only do these authorities show that the
20 Court has no discretion to order the ROV to accept the late-filed Charter resolutions, they support
21 the ROV’s testimony that his “ministerial duty” was two enforce Elections Code Section 10403 by
22 rejecting Costa Mesa’s tardy Charter resolutions. The Petitioner’s reasoning, therefore, is exactly
23 backwards: the ROV was duty bound to reject, not to accept, the untimely-filed Charter
24 resolutions for inclusion on the June 5, ballot. Thus, the Petition must be denied.

25 The Petitioner’s substantial compliance” arguments are irrelevant. *Barnes* rejected the
26 argument that “substantial compliance” is permitted in connection with election deadlines:

27 Nevertheless *Barnes* argued below that the writ should issue because he had
28 substantially complied with the deadline rules. ***The doctrine of substantial
compliance does not apply. Cases specifically dealing with statutory deadlines for
election filings*** that are couched in language requiring documents to be filed “not
less” than or “not later” than a given number of days before a designated time ***have
insisted on strict compliance with the deadlines.***

Barnes v. Wong, 33 Cal.App.4th at 396 (emphasis added). Elections Code Section 10403 contains
such language of mandatory deadlines, providing that the city “***shall*** at least 88 days prior to the
election, file with the board of supervisors, and a copy with the elections official, a resolution of its

1 governing board requesting the consolidation, and setting forth the exact form of any question,
2 proposition, or office to be voted upon at the election, as it is to appear on the ballot. . . .”

3 (Emphasis added) The *Barnes* court concluded:

4 Substantial compliance . . . is not an appropriate consideration in mandamus where
5 the predicate inquiry is whether there is (1) a present ministerial duty on the part of
6 the officer in question that must be exercised or (2) an official abuse of discretion
7 ripe for correction. Neither predicate existed and thus the extraordinary remedy
8 should not have been granted.

9 *Barnes v. Wong*, 33 Cal.App.4th at 397.

10 Substantial compliance is not sufficient where there is a blown statutory election deadline;
11 instead, strict compliance with mandatory statutory election deadlines is required. For instance, if
12 a citizen registers to vote one day after the voter registration deadline, then he or she is not able to
13 vote in the upcoming election. Likewise, in this case, there is no question that the Costa Mesa
14 City Council blew the mandatory statutory election deadline. It does not matter whether they did
15 so due to an “inadvertent mistake” or confusion. The Costa Mesa City Council operated on the
16 thinnest of margins when starting the charter process on December 6, 2011. The City Council,
17 City Attorney, and Costa Mesa well knew the election deadlines and they engineered the process
18 to provide the least possible public participation in the debate regarding the proposed Charter.
19 They should not be relieved of a mistake that was brought about by their poor planning and
20 procrastination. To do so, would be contrary to established case law and therefore would be
21 reversible error.

22 In addition, failure to comply with mandatory statute deadlines can vitiate an election.
23 Therefore, if the proposed Charter is voted upon in June, the Charter election will be subject to
24 collateral attack notwithstanding any mandamus ordered by this Court. This was the result in
25 *Daniels v. Tregerson* (1989) 211 Cal App.3d 1204. In *Daniels*, after a candidate won an election,
26 the election was challenged because the candidate was a registered voter for only 28 days before
27 the deadline for filing nomination papers instead of the required 30 days. *Id.* at 1207. The trial
28 court ruled that the election was valid because there was substantial compliance with the Election
Code. The appellate court reversed, holding that strict compliance with mandatory deadlines is
required, and a “violation of a mandatory provision vitiates an election,” *Id.* at 1208.

1 The language at issue in *Daniels* (Government Code § 25401) had similar mandatory
2 language to the statute at issue here (Elections Code Section 10403). Government Code Section
3 25041 provides that, “each member *shall* have been a registered voter for *at least 30 days*
4 immediately preceding the deadline for filing nomination documents” (Emphasis added.)
5 Elections Code §10403 similarly provides that a city “*shall at least 88 days* prior to the date of the
6 election file . . . a resolution of its governing board requesting the consolidation.” (Emphasis
7 added.) Both statutes are mandatory, not permissive. And neither statute empowers the Court to
8 relieve a party from non-compliance through mandamus. Obviously, it would be a disastrous
9 consequence for Costa Mesa if the Charter election went forward in June despite the blown filing
10 deadline only to be invalidated thereafter as happened in *Daniels*. If the proposed Charter were to
11 pass in June, a collateral attack on the Charter election would create confusion as to whether Costa
12 Mesa is a Charter city or a general law city. This result could paralyze the City.

13 Not that it matters legally, but there is no good excuse for the City of Costa Mesa missing
14 the mandatory statute deadline of Elections Code Section 10403. As set forth in the Declaration of
15 Neal Kelley, the Registrar of Voters for the County of Orange, the ROV website set forth the clear
16 mandatory deadline, “Resolutions continuing a measure must be to Registrar of Voters by
17 5:00 p.m. on March 9, 2012.” Kelley Decl. at ¶ 7. In addition, “on at least two occasions” the
18 ROV office “specifically advised the City of Costa Mesa personnel of the applicable 5:00 p.m.
19 March 9, 2012, deadline.” *Id.* at ¶ 9. Five other cities in Orange County filed their resolutions on
20 time. *Id.* at ¶ 8. In addition, the City of Costa Mesa was at all times represented by competent
21 counsel, Costa Mesa Attorney Thomas Duarte of Jones & Meyer, who approved the resolutions as
22 to form. There is no excuse for the City Council to miss the deadline.

23 There is another public policy reason why the Court should deny the petition—granting the
24 petition would open the proverbial “floodgates of litigation.” If Courts were permitted to relieve
25 parties of their failure to comply with mandatory election law deadlines, then the Courts would be
26 inundated with requests by citizens and governmental bodies to adjudicate the adequacy of their
27 excuse for missing election deadlines. Our courts are burdened enough. The bad law advocated
28 by the Petition would exacerbate the State’s fiscal crisis.

1 **IV. THE PETITIONER’S ARGUMENTS AND AUTHORITIES ARE INAPPLICABLE**
2 **IN THE FACE OF MANDATORY, STATUTORY DEADLINES.**

3 The cases cited by the Petitioner on pages seven through nine of her brief are inapplicable.
4 Those cases each involve initiatives and petitions initiated by citizens that the public official failed
5 or refused to place on the ballot. Here, the proposed Charter emanated from the governmental
6 body, the Costa Mesa City Council, not the initiative of the citizenry. Also, neither the Petitioner
7 nor the ROV are refusing to place the proposed Charter on the ballot. Instead, the ROV rejected
8 the proposed Charter resolution because it was filed three days after the mandatory statutory
9 deadline, Elections Code Section 10403. This was consistent with his statutory duty. The remedy
10 in this circumstance is to place the proposed Charter on the November ballot, not to grant
11 mandamus.

12 The Petitioner’s arguments are convoluted in that she awkwardly attempts to distance
13 herself from the governmental body she serves, *i.e.*, the City of Costa Mesa. The Petitioner is an
14 agent of the City of Costa Mesa. If the city clerk misses a filing date, the City of Costa Mesa is
15 bound by the consequences under basic principles of agency law and *respondeat superior*. The
16 Petitioner’s implication that her employer, the City of Costa Mesa, should not bear the
17 consequences of her acts or omissions strains credulity.

18 Oddly, the arguments and authorities in the Petitioner’s moving papers attempt to convert
19 this proceeding into a question of whether *the Petitioner* failed to do a ministerial act. *See*
20 Petitioner’s Brief at ¶ 3 and case law cited therein. Here, the Petitioner is not asking the Court to
21 order *her* to do anything. Instead, the Petitioner is asking the Court to order *the ROV* to accept the
22 Charter resolutions even though they were presented for filing three days after the mandatory
23 deadline set forth in Elections Code Section 10403. *See* [Proposed] Order. The Court has no
24 power to issue such a Writ of Mandamus because the ROV had no right (much less a ministerial
25 duty) to accept Costa Mesa’s late filing, and the city had no right to file the Charter resolutions
26 after the March 9, 2012 deadline. *See* Cal.Civ.Proc.Code §1085, *Steele v. Bartlett*, 18 Cal. 3d at
27 574; *Griffin v. Dingley*, 114 Cal. at 481. In fact, the ROV has testified, “[b]ecause the deadline for
28 a city to request consolidation of an election with the Presidential Primary Election is fixed by

1 statute, I do not believe that I have discretion as the County's top elections official to accept the
2 City of Costa Mesa's late filing." Kelley Decl. at ¶ 11. This Court is not empowered to bestow
3 discretion on the ROV that is not provided by the legislature.

4 **V. THERE IS NO PREJUDICE IF THE CHARTER IS PLACED ON THE**
5 **NOVEMBER 2012 BALLOT.**

6 The issue of prejudice is not a valid consideration. Strict compliance with mandatory
7 deadlines is required. If the Court considers the issue, however, it will be apparent that the
8 Petitioner will suffer no prejudice if the Petition is denied.

9 Costa Mesa has been a general law city for 59 years since it was incorporated in 1953.
10 Now, the City Council wants the citizens of Costa Mesa to vote to convert Costa Mesa to a Charter
11 city. The proposed Charter would empower the Costa Mesa City Council to circumvent the
12 general laws of the State of California on many issues relating to municipal affairs by adopting
13 ordinances and resolutions that conflict with the laws of the State of California. Whether the
14 proposed Charter should be adopted has been hotly debated within Costa Mesa. There is no reason
15 why the vote on the proposed Charter cannot take place in November 2012. In fact, the Court can
16 take judicial notice that a vote in November 2012 would likely result in a greater percentage of
17 registered voters participating in the Charter decision inasmuch as November 2012 is a general
18 presidential election.

19 During hearings on the proposed Charter, several citizens requested that the vote take place
20 in November so that more citizens will participate in this election that so profoundly impacts the
21 governmental structure of Costa Mesa. Citizens also requested more time to consider the merits of
22 the proposed Charter. The citizens' sentiment in favor of November election was widely reported
23 in the press through various articles and commentaries.²

24 ² See e.g., *Costa Mesa Sues County Over Ballot Measure*, by Joseph Serna, Daily Pilot (3/16/12)
25 ("Many have argued that the charter initiative should be voted on in November, when voter
26 turnout will be higher because of the presidential election. They also want to give voters more
27 time to review the proposed city constitution."); *Costa Mesa Charter Plan Goes to Voters in June*,
28 by Sean Greene, Orange County Register (3/7/12) ("Residents have lined up meeting after meeting
to ask the Council to instead put the charter on the November ballot, where there will be a higher
and more diverse voter turnout. . . ."); *Costa Mesa Charter Heads to June Ballot*, by Joseph Serna,
Daily Pilot (3/7/12) ("Still, others maintained that the community won't have enough time to

1 **VI. THE CITIZENS OF COSTA MESA WILL SUFFER EXTREME PREJUDICE IF**
2 **THE WRIT OF MANDAMUS IS GRANTED.**

3 The City Council engineered the Charter so that there would be the minimum amount of
4 time required by law to conduct an election. The Petition creates more confusion as to whether the
5 proposed Charter will even be on the ballot. The Court's ruling on this issue will not occur until
6 March 27, 2012 at the earliest—69 days before the June 5, 2012 election. The distraction
7 occasioned by this Writ of Mandamus proceeding has irrevocably infected the political process
8 surrounding a June 5 vote on the proposed Charter. This confusion has distracted the citizenry
9 from debating the relative pros and cons of the proposed Charter. The time lost by this late-filing
10 debacle cannot be recovered.

11 Dated: March 23, 2012

STEPHENS FRIEDLAND LLP
THE FOLEY GROUP, PLC

12
13
14 By: _____
15 John B. Stephens
16 Katrina Foley
17 Attorneys for [Proposed] Interveners JOHN B.
STEPHENS and KATRINA FOLEY

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25 understand the implications before they're asked to vote."); *Comments Flood In for Proposed*
26 *Charter*, by Joseph Serna, Daily Pilot (1/11/12) ("The City Council on Tuesday rejected pleas
27 have it redrafted by a citizens commission."); *Community Commentary: No need to rush a city*
28 *charter*, by Sandra Genis, Daily Pilot (1/7/12) ("Before moving forward with any charter, it is
imperative that we take the time to become accurately informed as to the city's existing rights and
obligations, citizens' rights protected by existing law, and what a charter would change.") These
and other articles and commentaries are attached as Exhibit A for the Court's consideration.

**PROOF OF SERVICE
(CCP § 1013A(3))**

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 4695 MacArthur Court, Suite 1550, Newport Beach, California 92660.

On **March 23, 2012**, I served the foregoing document(s) described as **JOHN B. STEPHENS AND KATRINA ANNE FOLEY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as set forth below:

SEE ATTACHED SERVICE LIST

- VIA U.S. MAIL:** I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice and such envelope(s) would be deposited with the U.S. Postal service on that same date with postage thereon fully prepaid, at Newport Beach, California. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- VIA E-MAIL/ELECTRONIC TRANSMISSION:** I caused the documents to be sent to the person(s) at the e-mail address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
- VIA FACSIMILE:** A true copy thereof by facsimile, conforming copy by mail.
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Executed on **March 23, 2012**, at Newport Beach, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Carolyn McHardy Peca

SERVICE LIST

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Richard J. Grabowski, Esq.
James L. Poth, Esq.
John A. Vogt, Esq.
JONES DAY
3161 Michelson Drive, Suite 800
Irvine, CA 92612-4408
Telephone: 949-851-3939
Facsimile: 949-553-7539
Email: rgrabowski@JonesDay.com;
jlpoth@JonesDay.com; javogt@JonesDay.com

Thomas P. Duarte, Esq.
JONES & MEYER
3777 North Harbor Blvd.
Fullerton, CA 92835
Telephone: 714-446-1400
Facsimile: 714-446-1408
Email: tpd@jones-mayer.com

Leon Page, Esq.
Deputy County Counsel
County of Orange, Office of County Counsel
333 W. Santa Ana Blvd., Suite 407
Santa Ana, CA 92701
Telephone: 714-834-6238
Facsimile: 714-834-2359
Email: Leon.Page@coco.ocgov.com

Fredric D. Woocher, Esq.
Strumwasser & Woocher LLP
10940 Wilshire Blvd., Suite 2000
Los Angeles, CA 90024
Telephone: 310-576-1233
Facsimile: 310-319-0156
Email: fwoocher@strumwooch.com

Katrina A. Foley, Esq.
THE FOLEY GROUP, PLC
Katrina Anne Foley, Bar No. 184921
1600 Dove Street, Suite 101
Newport Beach, CA 92660
Telephone: 949-502-8800
Facsimile: 949-502-8801
Email: Katrina@OCFoleylaw.com