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Services, a California nonprofit public benefit corporation;  
11 and Saddleback Memorial Medical Center, a California  
nonprofit public benefit corporation  
12

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
14 **FOR THE COUNTY OF ORANGE**  
15 **CENTRAL JUSTICE CENTER**

16 MEMORIAL HEALTH SERVICES, a	)	Case No.
California nonprofit public benefit	)	
corporation; SADDLEBACK	)	VERIFIED PETITION AND COMPLAINT
17 MEMORIAL MEDICAL CENTER, a	)	FOR:
California nonprofit public benefit	)	
corporation,	)	1) WRIT OF ADMINISTRATIVE
19 Petitioners and Plaintiffs,	)	MANDATE (California Code of Civil
	)	Procedure Section 1094.5 or, alternatively,
20 v.	)	Section 1085);
	)	2) DAMAGES FOR VIOLATIONS OF CIVIL
21 CITY OF SAN CLEMENTE, a municipal	)	RIGHTS (California Civil Code Section
corporation; ROBERT BAKER, an	)	52.1(b) and 42 United States Code Section
individual; KATHERINE WARD, an	)	1983);
23 individual; TIMOTHY BROWN, an	)	3) INJUNCTION AGAINST VIOLATIONS
individual; LORI DONCHAK, an	)	OF CIVIL RIGHTS (California Civil Code
24 individual; CHRISTOPHER HAMM, an	)	Section 52.1(b) and 42 United States Code
individual; and DOES 1 through 20,	)	Section 1983);
25 inclusive,	)	4) INVERSE CONDEMNATION;
26 Respondents and Defendants.	)	5) DECLARATORY RELIEF;
	)	6) INTENTIONAL MISREPRESENTATION;
	)	and
	)	7) NEGLIGENT MISREPRESENTATION.



1           3.     After SMMC had operated an acute-care hospital campus and emergency department  
2 on the property for nearly a decade, MemorialCare determined that, because of a steadily-  
3 declining patient census and fast-escalating medical costs, the hospital campus had become  
4 unviable and that its costs could interfere with MemorialCare's mission of providing healthcare  
5 services to the community. MemorialCare, relying on its long experience in understanding  
6 southern California's changing healthcare needs, concluded that other medical uses for the  
7 property would benefit the community. SMMC proposed to the City that SMMC remove the  
8 hospital services and build in their place a new, multi-story, state-of-the-art outpatient medical  
9 services facility, featuring an advanced urgent care center and a broad range of market-leading  
10 medical, health, and wellness services.

11           4.     When SMMC approached the City with the newly-proposed medical uses, the City  
12 objected for reasons not entirely known to MemorialCare. The City insisted that SMMC operate,  
13 at its sole cost, the hospital campus, but that, in all events, SMMC preserve an emergency  
14 department on the property. Having reached out to the community and come to understand the  
15 strong desire to retain emergency services at the property, MemorialCare considered operating an  
16 emergency service, without an acute care hospital, among the newly-proposed medical uses. At  
17 present, however, California law prohibits an emergency medical facility not operated with an  
18 adjacent acute-care hospital. MemorialCare agreed to work with state legislators and the City to  
19 propose legislation that would allow a standalone emergency facility on the property along with  
20 MemorialCare's newly-proposed medical uses. Although MemorialCare urged the legislature to  
21 adopt such a rule, to date, the legislature has not done so, and it is unlikely to do so in the  
22 foreseeable future. Yet, even while MemorialCare was participating in hearings in Sacramento,  
23 the City launched its planning process to force SMMC to maintain the hospital campus and its  
24 emergency service.

25           5.     Despite MemorialCare's good faith attempt to change California law to allow  
26 SMMC to operate a standalone emergency facility at the property, and without concern for the  
27 consequences to SMMC or MHS, by the fall of 2015, the City had begun moving aggressively to  
28 down-zone the property and, in effect, force MHS to bear the expense of continuing to operate the

1 hospital campus as a licensed acute care hospital facility. The City adopted an ordinance requiring  
2 on the property “a general acute care hospital, as defined by [California] Health and Safety Code  
3 Section 1250(a), that provides a wide range of emergency, clinical, and medical services to the  
4 general public,” or, if permitted by law, “a ‘standalone emergency department...,’” in spite of  
5 California law’s prohibition of any such standalone emergency department.

6         6. The ordinance did not expressly prohibit other medical uses on the property. Because  
7 it required the operation of an unviable acute care hospital there, however, it made other, more  
8 practical, medical uses impossible.

9         7. In fact, the City’s ordinance imposes a heavy burden on the owner. Its reference to  
10 California Health and Safety Code section 1250(a) would require the owner of the property to not  
11 only operate a hospital, but to offer the services mandated by that code section and the regulations  
12 associated with it, Title 22 of the California Code of Regulations, including, commonly, medical,  
13 nursing, surgical, anesthesia, laboratory, radiology, pharmacy, and dietary services. SMMC and  
14 any buyer of the property would have to satisfy these exacting operational requirements at its own  
15 expense.

16         8. In forcing the re-zoning, the City effectively deprived MemorialCare of the new  
17 state-of-the-art outpatient medical services facility, advanced urgent care center, and other  
18 medical, health, and wellness services that it had proposed, each of which had been allowed under  
19 the zoning in place when SMMC purchased the property in 2005, and through the date SMMC  
20 proposed its new use.

21         9. Moreover, the City’s downzoning contradicted its commitment to SMMC in 2004.  
22 Then, the City said it would consider *broadening the property’s use*, even to include professional  
23 offices, shopping centers, hotels, and other general commercial uses. By December 9, 2015,  
24 however, the City publicly proclaimed a new intention in an official press release: “[T]o ensure  
25 that the current hospital property is zoned only for the essential hospital purpose it was designed  
26 for when purchased by Saddleback Memorial Care...” When it had wanted SMMC to purchase  
27 the property, the City promised to consider wider, more flexible uses; a decade later, it delivered  
28 narrower, economically unviable uses.



1 MHS has its principal place of business within the Orange County, California. MHS is currently  
2 authorized to conduct business in California. Plaintiff SMMC has been and is a nonprofit public  
3 benefit corporation organized, existing and in good standing under the laws of the State of  
4 California. SMMC has its principal place of business within Orange County, California. SMMC  
5 is currently authorized to conduct business in California. MHS is the sole member (as that term is  
6 defined in California Corporations Code 5056) of SMMC. (MHS and SMMC are sometimes  
7 referred to below together as either "Plaintiff" or "MemorialCare.")

8       16. At all relevant times, Defendant City of San Clemente (the "City" or "San  
9 Clemente") is and has been a municipal corporation organized and existing under the laws of the  
10 State of California. The City is located within Orange County, California, has had its principal  
11 place of business within the geographic limits of San Clemente, California.

12       17. Defendant Robert Baker (separately, "Baker") is, and at all relevant times has been,  
13 an individual residing in San Clemente, California. Defendant Baker is now, and at certain times  
14 relevant hereto has been, a member of the City Council of the City of San Clemente, and has thus  
15 maintained substantial contacts with the State of California. All of the statements, conduct and  
16 omissions committed by Baker as alleged herein were undertaken within the course and scope of  
17 his position as a member of the City Council of the City of San Clemente.

18       18. Defendant Katherine Ward ("Ward") is, and at all relevant times has been, an  
19 individual residing in San Clemente, California. Defendant Ward is now, and at certain times  
20 relevant hereto has been, a member of the City Council of the City of San Clemente, and has thus  
21 maintained substantial contacts with the State of California. All of the statements, conduct and  
22 omissions committed by Ward as alleged herein were undertaken within the course and scope of  
23 her position as a member of the City Council of the City of San Clemente.

24       19. Defendant Timothy Brown ("Brown") is, and at all relevant times has been, an  
25 individual residing in San Clemente, California. Defendant Brown is now, and at certain times  
26 relevant hereto has been, a member of the City Council of the City of San Clemente, and has thus  
27 maintained substantial contacts with the State of California. All of the statements, conduct and  
28

1 omissions committed by Brown as alleged herein were undertaken within the course and scope of  
2 his position as a member of the City Council of the City of San Clemente.

3         20. Defendant Lori Donchak (“Donchak”) is, and at all relevant times has been, an  
4 individual residing in San Clemente, California. Defendant Donchak is now, and at certain times  
5 relevant hereto has been, a member of the City Council of the City of San Clemente, and has thus  
6 maintained substantial contacts with the State of California. All of the statements, conduct and  
7 omissions committed by Donchak as alleged herein were undertaken within the course and scope  
8 of her position as a member of the City Council of the City of San Clemente.

9         21. Defendant Christopher Hamm (“Hamm”) is, and at all relevant times has been, an  
10 individual residing in San Clemente, California. Defendant Hamm is now, and at certain times  
11 relevant hereto has been, a member of the City Council of the City of San Clemente, and has thus  
12 maintained substantial contacts with the State of California. All of the statements, conduct and  
13 omissions committed by Hamm as alleged herein were undertaken within the course and scope of  
14 his position as a member of the City Council of the City of San Clemente.

15         22. Plaintiff does not know the true names or capacities of Defendants Does 1 through  
16 20, inclusive, and therefore sues these persons or entities by their fictitious names. Plaintiff will  
17 amend this complaint to allege the true names and capacities of such Defendants when they have  
18 been ascertained. Plaintiff is informed and believes, and based thereon alleges, that each fictitious  
19 Defendant is in some manner responsible for the acts or omissions alleged, and the damages  
20 claimed, in this complaint.

21         23. The City, its City Council and the individual members of the City Council are  
22 collectively included in the references below by the term “City.” However, the individual City  
23 Council members named as Defendants in this case have been named for purposes of binding  
24 them to compliance with any injunctive, declaratory or other appropriate relief awarded on this  
25 complaint, but not for the purpose of seeking any monetary damages from them. Accordingly,  
26 none of the claims, causes of action or allegations set forth below shall be construed to seek  
27 monetary damages from the individual Defendants named herein.

28



1 Land Use Map, and Zoning Map, imposed on the Property a zoning classification of “RC 2.” That  
2 classification permitted the following uses:

- 3 a. hospitals;
- 4 b. ambulance services;
- 5 c. laboratory, florists, parking and other ancillary uses;
- 6 d. medical offices (a broad designation, including medical administrative offices,  
7 health clinics, dentists’, optometrists’, surgeons’, and physicians’ offices, and other uses of a  
8 medical nature);
- 9 e. congregate care facilities;
- 10 f. convalescent homes;
- 11 g. daycare;
- 12 h. parks;
- 13 i. city projects;
- 14 j. utilities; and
- 15 k. ancillary buildings.

16 29. At the time SMMC purchased the Property, and from that time through the date of  
17 the filing of this complaint, the City, by, among other things, its General Plan, General Plan Land  
18 Use Map, and Zoning Map, imposed on all parcels surrounding the Property a zoning  
19 classification of “CC 2” [Community Commercial 2]. That classification has, at all relevant times,  
20 allowed a broad range of uses, including general commercial, retail, shopping, hotel, office, and  
21 professional uses.

22 **THE CITY’S REPRESENTATIONS CONCERNING USE OF THE PROPERTY IN**  
23 **LIGHT OF THE POSSIBILITY OF CLOSING THE HOSPITAL CAMPUS**

24 30. Before SMMC purchased the Property, it had been owned by a series of persons and  
25 entities; the owner at the time that SMMC acquired the Property, and thus the seller to SMMC,  
26 was an entity by the name of San Clemente Medical Center, LLC (the “Old Owner”).  
27 MemorialCare is informed and believes that prior owners, including the Old Owner, had  
28 experienced financial difficulties and had not been able to operate the hospital at a reasonable and

1 desirable level of profitability. At the time SMMC purchased the Property, it intended to operate  
2 the Hospital Campus for five years and as long thereafter as might be financially viable and  
3 appropriate to serve the needs of the community. Under the terms of its agreements with the  
4 Property's sellers, SMMC committed to operating the Hospital Campus for five years after its  
5 acquisition, or through early 2010.

6 31. SMMC had purchased the Property fully aware of the possibility that, at some point  
7 in the future, it could find the operation of the hospital campus unviable and the services offered  
8 there poorly suited to the community's healthcare needs. As a responsible steward of its nonprofit  
9 assets, MemorialCare performed due diligence that evaluated other possible non-hospital medical  
10 uses under the then-applicable RC 2 zone, including medical administrative offices, health clinics,  
11 dentists', optometrists', and physicians' offices and treatment centers, surgery centers, and other  
12 medical uses. It also considered the broad range of possible uses under the CC 2 zoning  
13 classification, including general commercial uses.

14 32. Because of the financial difficulties of the prior owners and the City's desire to avoid  
15 the near-term closure of the hospital, the City wanted SMMC to purchase the Property. It sought  
16 to assure MemorialCare that if the financial difficulties with the Hospital Campus's operation  
17 were to continue, the City would cooperate with MemorialCare to help establish alternative uses at  
18 the site. To obtain assurances regarding those alternative uses before it purchased the Property,  
19 MemorialCare and its representatives discussed in depth its concerns about the long-term viability  
20 of the Hospital Campus use with representatives of the City, including, without limitation,  
21 planning staff and officials of its Planning Commission. The City's officials acknowledged the  
22 possibility that the Hospital Campus could be closed, but represented to MemorialCare's agents  
23 that, if the Hospital Campus were closed, the Property would be considered for a change in its  
24 zoning classification to CC 2 to allow a full range of commercial uses. In fact, the City advised  
25 MemorialCare's representatives that an amendment to the General Plan allowing those uses could  
26 be effectuated in approximately 120 days from the date of initial submission and would cost  
27 approximately \$30,000 in various City fees, together with additional miscellaneous legal and  
28 consulting fees (collectively, the "City's Use Representations"). In acquiring the Property and

1 committing to operate the Hospital Campus for at least five years, MemorialCare relied on, among  
2 other things, the City's Use Representations.

3 33. SMMC has continuously operated the Hospital Campus for approximately eleven  
4 years. However, over those years, as the patient census of the Hospital Campus declined and costs  
5 continued to rise dramatically, the operation of the Hospital Campus began to approach a point  
6 where it would no longer be viable. In addition, as medical technology has changed, SMMC  
7 determined that the acute-care hospital services available at the Hospital Campus no longer serve  
8 the community's healthcare needs. In or about 2014, as a nonprofit institution charged with the  
9 responsibility to husband its resources, SMMC proposed to change the use of the Property from  
10 that of an acute care hospital campus to a multi-story, state-of-the-art outpatient medical services  
11 facility, featuring an advanced urgent care center and a broad range of market-leading medical,  
12 health, and wellness services, all of which were allowed under the then-effective RC 2 zone.

13 34. While SMMC's proposed new uses would have brought to San Clemente quality  
14 advanced medical services of many types, the City was hostile to the change in use. It insisted that  
15 SMMC operate, at its sole cost, the Hospital Campus.

16 35. Having learned of the community's desire to retain emergency services at the  
17 property, MemorialCare considered operating an emergency service, without an acute care  
18 hospital, among its newly-proposed medical uses. Beginning in approximately late 2014,  
19 MemorialCare worked with state legislators and the City to obtain an exception to the California  
20 law prohibiting emergency service facilities not connected to an adjacent acute-care hospital and  
21 to allow for a standalone emergency service facility on the Property. Assembly Bill 911 (Brough)  
22 and Senate Bill 787 (Bates) were thereafter introduced and referred to committees in their  
23 respective houses. MHS worked hard for the success of these efforts and provided testimony to  
24 legislative committees with jurisdiction over the legislation. Notwithstanding MemorialCare's  
25 efforts, these bills expired in the legislature without any action to adopt them, thereby rendering an  
26 emergency service facility among MemorialCare's newly-proposed medical uses impossible.

27 36. Despite MemorialCare's attempts to work in good faith to seek legislation allowing  
28 the standalone emergency service use, and despite the City's understanding that the Hospital

1 Campus was no longer economically viable, the City initiated – even while MemorialCare was  
2 still attempting to secure the legislative changes – a series of unlawful actions designed to force  
3 MemorialCare to maintain an acute care hospital on the property. MemorialCare is informed and  
4 believes that the City sought to create, through its planning and zoning processes, restrictions  
5 compelling MemorialCare to either operate, at its sole expense, an acute care hospital campus with  
6 an emergency service as a public benefit or sell the Property to another, even at a substantial loss.

7 37. To implement the City’s plans described above, the City undertook and  
8 accomplished, among other things, the amendments to its General Plan, General Plan Land Use  
9 Map, and Zoning Map described below (the “Zoning Changes”). The effect of the Zoning  
10 Changes was, through illegal spot zoning, to effectively eliminate the use of the Property other  
11 than as an acute-care hospital facility with an emergency service, even though all parcels  
12 surrounding the Property enjoy a full and broad range of commercial uses.

### 13 THE ZONING CHANGES

14 38. Without consideration for the financial consequences to MemorialCare, by late-  
15 2015, the City began taking steps to enact the Zoning Changes. At its public meeting on  
16 November 3, 2015, the City Council directed its “staff to prepare a re-zone and General Plan  
17 amendment,” in the City’s words, “to ensure that the current hospital property is zoned *only* for  
18 the essential hospital purpose it was designated for... [emphasis added]” when purchased by  
19 SMMC. The ordinance did not expressly prohibit other medical uses, but, because it required the  
20 operation of an unviable acute care hospital, it made impossible the very healthcare uses that  
21 MemorialCare proposed for the Property in 2014. The City Council further ordered its staff to  
22 pursue information from, and initiate a meeting with, SMMC meant to ensure that the operation of  
23 the Property would, in the words of the City, “benefit the citizens of San Clemente.”

24 39. At the same meeting, and, in spite of the fact that SMMC, not the City, owned the  
25 Property, the City directed its staff to “review the opportunity of seeking potential hospital suitors  
26 that may be interested in coming to San Clemente to provide hospital and emergency department  
27 services....” In a Press Release dated December 9, 2015, the City further declared that it would be  
28 meeting with other “potential suitors in early December of 2015.” MemorialCare alleges on

1 information and belief that the City's purposes were to create inappropriate and unlawful leverage  
2 on MemorialCare to absorb the costs of an acute care hospital campus or force SMMC to sell the  
3 Property to another, even at a loss.

4 40. In response to the command of the City Council, the City's staff drafted the reports  
5 and ordinances necessary to effectuate the Zoning Changes. The Planning Commission approved  
6 General Plan Amendments 15-427 and 15-428 and Special Plan Amendments 15-449 through 15-  
7 452 to create the new "RMF 1" classification and, at the same time, another classification of "CC  
8 4," which would permit all of the broad general commercial uses allowed in the old CC 2 zone  
9 described above, plus an additional use for counseling centers.

10 41. Specifically, under the proposed new RMF 1 zone, only the following uses would be  
11 permitted for the Property:

12 a. "a general acute care hospital, as defined by Health and Safety Code section  
13 1250(a), that provides a wide range of emergency, clinical, and temporary medical services to the  
14 general public, or, to the extent permitted by law, a 'standalone emergency department'" as  
15 defined in the Health and Safety Code, and no other health facility or specialty hospital;

16 b. ambulance services;

17 c. laboratory, medical offices, florists, parking and other hospital-ancillary uses;

18 and

19 d. group counseling facilities.

20 42. The RMF 1 zone would prohibit, however, the following uses for the Property,  
21 which were allowed in the Property's pre-existing RC 2 zone:

22 a. any hospital or health facility other than an acute care hospital or emergency  
23 service, as described above;

24 b. medial offices not ancillary to a hospital use;

25 c. congregate care facilities;

26 d. convalescent homes;

27 e. daycare facility; or

28 f. parks.

1 The RMF 1 zone would bar the re-purposing of the Property that SMMC proposed to the City in  
2 2014: a new multi-story, state-of-the-art outpatient medical services facility with an advanced  
3 urgent care center and wide range of medical, health, and wellness services. Because RMF 1  
4 would eliminate the use of medical offices, clinics, and treatment and surgery centers not ancillary  
5 to the operation of an acute care hospital, none of SMMC's newly-proposed medical uses could  
6 proceed economically along with the unviable hospital campus use. MemorialCare is thus  
7 informed and believes that, by the adoption of the RMF 1 zone, the City wrongfully intended to  
8 eliminate the reuse of the Property that MemorialCare believes would benefit the community.

9 43. As noted above, the uses and developmental standards for CC 2 and the proposed CC  
10 4 categories are nearly identical, other than group counseling facilities, which would be allowed  
11 under CC 4. Both the CC 2 and CC 4 designations would allow broad general commercial, retail,  
12 shopping, hotel, office, and professional uses. In particular, the following uses were to be allowed  
13 by both the CC 2 and CC 4 designations, though none of such uses were to be permitted by the RMF  
14 1 designation:

- 15 a. a broad array of commercial uses, including retail sales of all description;
- 16 b. professional offices and financial institutions;
- 17 c. standalone medical offices;
- 18 d. restaurants; and
- 19 e. hotels and other hospitality facilities.

20 44. On January 19, 2016, the City Council held a public hearing to consider items  
21 necessary to effectuate the Zoning Changes, including without limitation the following:

- 22 1. Adoption of Resolution No. 16-03 entitled A RESOLUTION OF THE CITY  
23 COUNCIL OF THE CITY OF SAN CLEMENTE, CALIFORNIA, TO ADOPT  
24 GENERAL PLAN AMENDMENT 15-427, CAMINO DE LOS MARES  
25 MEDICAL ZONES, A CITY-INITIATED REQUEST TO AMEND THE  
26 GENERAL PLAN TO CREATE A REGIONAL MEDICAL FACILITIES  
27 LAND USE DESIGNATION APPLIED TO THE 6.6 ACRE PROPERTY  
28 LOCATED AT 654 CAMINO DE LOS MARES, AMEND THE

1 COMMUNITY COMMERCIAL LAND USE DESIGNATIONS USE AND  
2 DEVELOPMENT STANDARDS, AND CREATE A COMMUNITY  
3 COMMERCIAL 4 LAND USE DESIGNATION APPLIED TO A PORTION  
4 OF THE PROPERTY ALONG CAMINO DE LOS MARES (“Ordinance 16-  
5 03”); and

6 2. Introduction of Ordinance No. 1616 entitled AN ORDINANCE OF THE CITY  
7 COUNCIL OF THE CITY OF SAN CLEMENTE, CALIFORNIA, TO ADOPT  
8 ZONING AMENDMENT 15-428, AND SPECIFIC PLAN AMENDMENTS  
9 15-449 TO 15-452, CAMINO DE LOS MARES MEDICAL ZONES, A CITY  
10 INITIATED REQUEST TO AMEND THE ZONING ORDINANCE AND  
11 ZONING MAP TO CREATE A REGIONAL MEDICAL FACILITIES ZONE  
12 APPLIED TO THE 6.6 ACRE PROPERTY LOCATED AT 654 CAMINO DE  
13 LOS MARES, AMEND THE COMMUNITY COMMERCIAL ZONES USE  
14 AND DEVELOPMENT STANDARDS, CREATE A COMMUNITY  
15 COMMERCIAL 4 ZONE APPLIED TO A PORTION OF THE PROPERTIES  
16 ALONG CAMINO DE LOS MARES, AND ADD AND REVISE MULTIPLE  
17 MEDICAL-RELATED USES AND DEFINITIONS OF THE ZONING  
18 ORDINANCE AND THE FORSTER RANCH, RANCHO SAN CLEMENTE,  
19 TALEGA AND WEST PICO CORRIDOR SPECIFIC PLANS (together with  
20 the Motion approving it at the meeting of February 2, 2016, described below,  
21 “Ordinance 1616”).

22 45. SMMC protested the City’s plan. SMMC submitted written objections and, through  
23 its representatives, appeared at the January 19, 2016 hearing of the City Council to voice its  
24 objections to the re-zoning contemplated by Resolution 16-03 and proposed Ordinance 1616,  
25 which objections included that:

- 26 (a) the Property and the Hospital Campus are privately owned, and the City  
27 cannot usurp the decision concerning whether the Hospital Campus is to remain open;
- 28 (b) the Property cannot support an acute care hospital;

1 (c) the proposed Zoning Amendment would leave no other option than to close  
2 the Hospital Campus;

3 (d) the proposed Zoning Amendment would only limit the medical alternatives  
4 available to meet the needs of the citizens of San Clemente;

5 (e) the proposed Zoning Amendment would render the Property unusable and  
6 could result in a significant cost to the taxpayers, as well as the loss of a number of jobs  
7 and the reduction of medical services available to the citizens of San Clemente;

8 (f) the proposed Zoning Amendment would constitute spot zoning;

9 (g) the proposed Zoning Amendment would be discriminatory; and

10 (h) the proposed Zoning Amendment would constitute an illegal taking of  
11 Property without compensation.

12 In response, the City Attorney made certain comments regarding the applicability of spot zoning  
13 theories and other related matters. The measures were nonetheless adopted by unanimous vote of  
14 the City Council. Ordinance 1616 was adopted at the public meeting of the City Council on  
15 February 2, 2016. Resolution 16-03, and Ordinance 1616, are deemed to be specifically included  
16 within the term "Zoning Changes."

17 46. The claims and issues encompassed by this complaint are ripe for adjudication by  
18 this Superior Court. MemorialCare has pursued and exhausted administrative remedies, if any,  
19 available to it in attempting to obtain relief from the City's actions and omissions. There is no  
20 provision for further appeal from the City's adoption of the Zoning Changes, and by reason  
21 thereof, MemorialCare has no plain, speedy and adequate remedy in the ordinary course of law.  
22 Moreover, because the Property is the sole parcel on which the City has imposed the RMF 1  
23 zoning characterization, and because the re-zoning effectuated by the City described herein was  
24 directed exclusively towards a single property (the Property) and adopted for the sole purpose of  
25 precluding the development plan proposed by SMMC, it would be futile for SMMC to pursue any  
26 further action, including, without limitation, a request for a change in the zoning characterization.

27 47. The City's downzoning places serious burdens on MemorialCare and the public  
28 alike. By downzoning the Property, the City has attempted to force SMMC to bear alone the ever-

1 escalating costs of providing acute care medical services at the Hospital Campus. By reducing the  
2 scope of permissible uses on the Property, the City, though not the owner of the property,  
3 aggressively attempted to compel its sale. MemorialCare, a nonprofit institution with a  
4 distinguished history of assessing – and meeting – Southern California’s healthcare needs, made a  
5 carefully-considered judgment that an acute care hospital campus could no longer serve those  
6 needs and that those resources would be better used to provide other advanced medical services to  
7 San Clemente. Ultimately, however, the City alone, without experience or background in medicine  
8 or healthcare, determined which specific type of healthcare facility should be maintained on the  
9 property.

10 **PRECLUDING MHS’S PLANS FOR ALTERNATIVE DEVELOPMENT**

11 48. Under zoning characterizations applicable to the Property prior to the adoption of the  
12 Zoning Changes, as well the zoning characterizations applicable to the surrounding parcels at all  
13 times, the permitted uses would have allowed for the development of a new multi-story outpatient  
14 and urgent care facility, as well as numerous other economically feasible uses. As a proximate  
15 result of the City’s adoption of the Zoning Changes, however, the City converted the Property into  
16 an island, stripped of all feasible and economically viable uses, though surrounded by parcels  
17 enjoying an extensively broad range of profitable general commercial uses.

18 49. In the wake of the foregoing developments, on March 2, 2016, SMMC announced  
19 that the Hospital Campus would close by the end of May, 2016.

20 50. The adoption of the Zoning Changes was illegally and irrationally discriminatory, as  
21 well as arbitrary and capricious. MemorialCare is informed and believes they were meant to  
22 improperly force MemorialCare to either (a) to continue to operate the Hospital Campus,  
23 notwithstanding its lack of economic viability, as a public benefit, at the sole and exclusive cost of  
24 MemorialCare, or (b) to sell the Property, even at a loss; the City specifically sought to preclude  
25 SMMC from devoting it to a feasible and viable alternative medical or other use. In each case, the  
26 City callously disregarded the financial effect of its policies on the Property and MemorialCare  
27 and substituted its own judgment about the community’s healthcare needs for MemorialCare’s  
28

1 own responsible and experienced assessment. The City's acts have denied MemorialCare all  
2 economically viable use of the Property, and left no alternative other than closure.

3 51. Moreover, the designation of the Property as RMF 1 constitutes illegal and  
4 unconstitutional spot zoning because no other parcel in the City, including those surrounding the  
5 Property, is zoned RMF 1. That designation imposes severe restrictions on the use of the  
6 Property, and the City has failed to provide any justification for restricting the use of the Property  
7 in the manner effectuated by the Zoning Changes. The use of the Property has been unreasonably,  
8 arbitrarily and capriciously re-zoned to limit its use in a manner that is not consistent with the  
9 allowed uses on all of the surrounding parcels.

10 52. The City's actions have been in affirmative bad faith, in that in undertaking the acts  
11 described herein, the City has imposed directly on the Property and MemorialCare alone, a public  
12 burden that, in all fairness and justice, should be borne by the public as a whole, and forced the  
13 Property's owner to operate it for an uneconomic use. The City's scheme of classification has not  
14 been, and cannot be, applied fairly or impartially to the Property or to MemorialCare. The City's  
15 Zoning Changes go too far, and the ultimate consequence of the City's actions is that the Zoning  
16 Changes have had, and continue to have, an unduly harsh impact upon the use of the Property, one  
17 that deprives MemorialCare of all, or substantially all, rights for economically viable development  
18 and use of the Property, and thus constitute a taking of the Property without compensation.

19 53. As set forth below, as a proximate result of the actions and omissions of the City,  
20 MemorialCare has suffered damages, the greatly diminished fair market value of the Property, and  
21 the effective prohibition of all uses of the Property other than the operation of an acute-care  
22 hospital campus. As a further proximate result of the City's downzoning of the Property,  
23 MemorialCare has incurred and will incur incidental damages in the form of legally compensable  
24 fees and costs for the services of appraisers, civil engineers and other professionals and  
25 consultants, in amounts which cannot now be ascertained but which are within the jurisdiction of  
26 this Court and shall be determined according to proof at trial.

27 54. The City's actions and omissions were undertaken in affirmative bad faith, with  
28 express or implied malice, and with the intent to deprive MemorialCare of rights that are protected

1 by the constitutions and laws of the United States and of the State of California, or with reckless,  
2 conscious and/or callous disregard of and indifference to the probability that MemorialCare would  
3 be deprived of rights that are protected by the constitutions and laws of the United States and of  
4 the State of California.

5 **FIRST CAUSE OF ACTION**

6 (Writ of Administrative Mandate [Code Civ. Pro. §1094.5] or, in the Alternative, Ordinary  
7 Mandamus [Code Civ. Pro. §1085])

8 55. MemorialCare re-alleges all of the allegations above as though set forth in full in this  
9 Cause of Action.

10 56. The City's adoption of Resolution 16-03 and Ordinance 1616 is invalid, and a  
11 judgment should be entered directing that a writ issue to command that the adoption of Ordinance  
12 1616 be rescinded and/or set aside. The adoption of the foregoing is void and of no effect, for the  
13 reasons set forth above, and in addition because their adoption, and the Zoning Changes  
14 implemented thereby, among other things (a) constituted acts in excess of the jurisdiction of the  
15 City, and/or (b) constituted an abuse of discretion prejudicial to MHS, and/or (c) deprived  
16 MemorialCare of a fair hearing and/or trial, and/or (d) constituted illegal spot zoning and  
17 downzoning, due to, among other things, the unconstitutional and/or unlawful nature thereof, in  
18 particular as applicable or pertinent to MemorialCare. The City was aware that its re-zoning  
19 would likely force the closure of the Hospital Campus, and that closure will deny viable  
20 alternative uses of the Property and will result in the loss of a substantial number of jobs – all of  
21 which deprive the citizens of San Clemente, rather provide them with benefit, as the City's  
22 findings state irrationally and without support. As a result of the foregoing and all of the other  
23 facts set forth above, the City's actions were irrational, arbitrary, capricious and not supported by  
24 any findings made in connection therewith, and/or any findings made in connection therewith  
25 were irrational, arbitrary, capricious and not supported by the weight of the evidence, or even by  
26 substantial evidence. The City's adoption and enforcement against MemorialCare of the Zoning  
27 Changes effectuated by Ordinance 1616 have caused, continue to cause, and will cause great and  
28 irreparable injury to MemorialCare.



1 Property without just compensation in violation of the Fifth Amendment to the U.S. Constitution,  
2 as applicable to the states and their political subdivisions pursuant to the Fourteenth Amendment  
3 to the U.S. Constitution, and Article I, Section 19 of the California Constitution. In addition, the  
4 City has deprived MemorialCare of property without due process of law, and has further deprived  
5 MemorialCare of the equal protection of law, all in violation of Article I, Section 7(a) of the  
6 California Constitution and the United States Constitution.

7 62. The City's actions and omissions were undertaken under the color of the statutes,  
8 ordinances, regulations, customs and/or usages of the State of California.

9 63. As a direct and proximate result of the City's actions and omissions as described  
10 herein, MemorialCare has suffered injury and damages, and is continuing to suffer injury and  
11 damages, including but not limited to that which has been described above, which are  
12 compensable pursuant to California Civil Code section 52.1(b) and/or 42 United States Code  
13 Section 1983, believed to be in an amount of \$42.5 million, but which cannot now be ascertained  
14 with certainty and must be determined according to proof at trial, such amount being within the  
15 jurisdiction of this Court. Due to the extraordinary measures taken by the City as described above,  
16 MemorialCare is informed and believes that the filing of a claim regarding such matters is and  
17 would be a futile act. Nonetheless, as a precaution, a claim reflecting the foregoing damages  
18 pursuant California Civil Code section 52.1(b) is being contemporaneously filed with the City or  
19 will be filed with the City shortly hereafter.

20 64. As a further proximate result of the City's actions and omissions, MemorialCare has  
21 incurred and will incur fees and costs for attorneys and experts, said fees and costs being legally  
22 compensable pursuant to California law, in the course of enforcing MemorialCare's rights under  
23 California Civil Code § 52.1(b), and the above-mentioned provisions of the California and U.S.  
24 constitutions.

25 **THIRD CAUSE OF ACTION**

26 (Injunction Against Violations of Civil Rights)

27 65. MemorialCare re-alleges all of the allegations of paragraphs 1 through 54 above as  
28 though set forth in full in this Cause of Action.

1           66. In adopting the Zoning Changes, the City subjected MemorialCare, or caused  
2 MemorialCare to be subjected, through coercion, to the deprivation of and interference with rights,  
3 privileges, or immunities secured by the constitutions and laws of the United States and of the  
4 State of California. More specifically, the City has taken and/or damaged MemorialCare's  
5 Property without just compensation in violation of the Fifth Amendment to the U.S. Constitution,  
6 as applicable to the states and their political subdivisions pursuant to the Fourteenth Amendment  
7 to the U.S. Constitution, and Article I, Section 19 of the California Constitution. In addition, the  
8 City has deprived MemorialCare of property without due process of law, and has further deprived  
9 MemorialCare of the equal protection of law, all in violation of Article I, Section 7(a) of the  
10 California Constitution and the United States Constitution.

11           67. The City's actions and omissions were undertaken under the color of the statutes,  
12 ordinances, regulations, customs or usages of the State of California.

13           68. The City's enforcement of Zoning Changes against MemorialCare, unless and until  
14 enjoined and restrained by order of this Court, will cause great and irreparable injury to  
15 MemorialCare, in that:

16                 a. MemorialCare will not be allowed to develop the Property in a manner  
17 conforming to the development of the surrounding parcels and lots, thus relegating the Property to  
18 existence as a small island of limited land use in the middle of a larger surrounding area devoted  
19 to less restricted uses;

20                 b. MemorialCare alone will be required to directly, substantially and peculiarly  
21 bear a public burden which, in all fairness and justice, should be borne by the public as a whole;  
22 and

23                 c. The economic value of the Property will remain unjustly and substantially  
24 reduced by the arbitrary and capricious, as well as discriminatory, acts of the City.

25           69. The threat of irreparable harm described in the preceding paragraph and its subparts  
26 is imminent in that the recent adoption of Ordinance 1616 now applies the new zoning  
27 classification, together with its restrictions on use, to the Property in such a manner as to limit its  
28 use as described above.





1 and of no effect because of their unconstitutional and/or unlawful nature as they pertain to  
2 MemorialCare.

3 83. A judicial declaration is necessary and appropriate at this time under the  
4 circumstances, and should be issued so that MemorialCare may ascertain its rights and duties, and  
5 so that MemorialCare shall not alone be required to bear the financial burden, risk and expense of  
6 the City's adoption of the Zoning Changes and that the City was, and should be adjudicated to be,  
7 estopped from making the uses applicable to the Property more restrictive, rather than less  
8 restrictive.

9 84. As a further proximate result of Defendants' actions and omissions, MemorialCare  
10 has incurred and will incur fees and costs for attorneys and experts, said fees and costs being  
11 legally compensable pursuant to California law, in the course of enforcing MemorialCare's rights  
12 under California law.

13 **SIXTH CAUSE OF ACTION**

14 (Intentional Misrepresentation)

15 85. MemorialCare re-alleges all of the allegations of paragraphs 1 through 54 above as  
16 though set forth in full in this Cause of Action.

17 86. As set forth above, prior to consummating the purchase of the Property in 2005,  
18 agents of MemorialCare discussed with City staff and officials of the City's Planning Department  
19 the possibility that the Hospital Campus might, at some point in the future, have to be closed. In  
20 response, these officials made the City's Use Representations to MemorialCare's agents. These  
21 officials were authorized by the City to make representations such as the City's Use  
22 Representations and to bring them into fruition. The City's Use Representations were within the  
23 scope of their privileges, authority, duties and responsibilities. Accordingly, the officials had the  
24 authority to make the City's Use Representations.

25 87. MemorialCare alleges on information and belief that at the time the City's staff and  
26 officials of the Planning Commission made the City's Use Representations, such representations  
27 were not true. Further, on information and belief, these officials either knew at the time they  
28

1 uttered them that such representations were not true, or made such statements with conscious  
2 disregard for the fact that such representations might not be true.

3 88. MemorialCare relied on the truth of the representations made in connection with the  
4 City's Use Representations and did not know such representations were false, and SMMC would  
5 not have purchased the Property or made the expenditures related thereto if it had known that the  
6 City's Use Representations were not true.

7 89. As a proximate result of the City's actions and omissions as described herein,  
8 MemorialCare has recently learned of the City's misrepresentations only after making significant  
9 expenditures and is therefore entitled to obtain an order estopping and precluding the City from  
10 further effectuating, or refusing to rescind, the Zoning Changes, including without limitation the  
11 restrictions of Ordinance 1616. In addition, if there is any other relief allowed by law for which  
12 the City and/or its representatives are not immune, then MemorialCare reserves the right to seek  
13 such relief according to proof at trial.

14 **SEVENTH CAUSE OF ACTION**

15 (Negligent Misrepresentation)

16 90. MemorialCare re-alleges all of the allegations of paragraphs 1 through 54 above as  
17 though set forth in full in this Cause of Action.

18 91. As set forth above, prior to consummating the acquisition of the Property, agents of  
19 SMMC discussed with City staff and officials of the City's Planning Department the possibility  
20 that the Hospital Campus would, at some point in the future, have to be closed. In response, these  
21 officials made the City's Use Representations to SMMC's agents. These officials were authorized  
22 by the City to make representations such as the City's Use Representations and to bring them into  
23 fruition. The City's Use Representations were within the scope of their privileges, authority, duties  
24 and responsibilities. Accordingly, the officials had the authority to make the City's Use  
25 Representations.

26 92. MemorialCare alleges on information and belief that at the time the City's staff and  
27 officials of the Planning Commission made the City's Use Representations, such representations  
28 were not true. In the event that it is determined that, at the time the City's Use Representations

1 were made, the officials making such representations did not know at the time they uttered them  
2 that such representations were false, MemorialCare alleges in the alternative that the officials  
3 should have known that such representations might not be true, and were negligent in uttering  
4 such representations as if they were true.

5 93. MemorialCare relied on the truth of the representations made in connection with the  
6 City's Use Representations and did not know such representations were false, and SMMC would  
7 not have purchased the Property or made the expenditures related thereto if it had known that the  
8 City's Use Representations were not true.

9 94. As a proximate result of the City's actions and omissions as described herein, has  
10 recently learned of the City's misrepresentations only after making significant expenditures and is  
11 therefore entitled to obtain an order estopping or precluding the City from further effectuating, or  
12 refusing to rescind, the Zoning Changes, including without limitation the restrictions of Ordinance  
13 1616. In addition, if there is any other relief allowed by law for which the City and/or its  
14 representatives are not immune, then MemorialCare reserves the right to seek such relief  
15 according to proof at trial.

16 **PRAYER**

17 Wherefore, MemorialCare prays for judgment as follows:

18 1. On the First Cause of Action for Writ of Administrative Mandate (CCP §§ 1094.5)  
19 against each of the named Defendants:

20 a. For a peremptory writ of administrative mandate setting aside Ordinance  
21 1616 and directing Defendants to (a) vacate their adoption of the Zoning Changes and/or (b) enter  
22 a new decision in place thereof approving use restrictions consistent with the prior zoning  
23 characterization and/or that of the surrounding properties consistent with the opinion and  
24 judgment herein; and

25 b. For attorneys' fees, as may be allowed by law.

26 2. On the Second Cause of Action for Damages for Violations of Civil Rights (Cal.  
27 Civil Code § 52.1(b)) against the Defendants (excluding the individual Defendants):

1 a. For damages in an amount not less than \$42.5 million, plus interest  
2 accruing, or such other amount as shall be proven at the time of trial;

3 b. For prejudgment interest thereon; and

4 c. For attorneys' fees as provided by law.

5 3. On the Third Cause of Action for Injunction Against Violation of Civil Rights (Cal.  
6 Civil Code § 52.1(b)) against all Defendants:

7 a. For a permanent injunction against all Defendants, and all of their successors,  
8 assigns, agents, servants, employees, and all persons acting in concert therewith (a) enjoining and  
9 prohibiting them from enforcing the Zoning Changes, or any further amended general plan and  
10 ordinance similar thereto, and (b) commanding and mandating them to vacate the Zoning Changes  
11 and to enter a new enactment in place thereof approving use restrictions no more restrictive than  
12 the prior zoning classification and/or that of the surrounding parcels; and

13 b. For attorneys' fees as may be allowed by law.

14 4. On the Fourth Cause of Action for Inverse Condemnation against all Defendants  
15 (excluding the individual defendants):

16 a. For damages in an amount not less than \$42.5 million, plus interest accruing, or  
17 in such other amount as shall be proven at the time of trial;

18 b. For prejudgment interest thereon;

19 c. For punitive damages in such sum as shall be determined at trial; and

20 d. For attorneys' fees as may be allowed by law.

21 5. On the Fifth Cause of Action for Declaratory Relief against all Defendants:

22 a. For a judicial declaration that the Zoning Changes are void and of no effect  
23 because of their unconstitutional and/or unlawful nature and that the City must be estopped from  
24 further effectuating or refusing to rescind the Zoning Changes; and

25 b. For attorneys' fees as may be allowed by law.

26 6. On the Sixth Cause of Action Intentional Misrepresentation against all Defendants  
27 (with the exception of the Individuals):

28

1 a. For an order estopping the City from further effectuating, or refusing to  
2 rescind, the Zoning Changes, including without limitation Ordinance 1616; and

3 b. Such further relief as may be allowed by law and according to proof at trial.

4 7. On the Seventh Cause of Action for Negligent Misrepresentation against all  
5 Defendants (with the exception of the Individuals):

6 a. For an order estopping the City from further effectuating, or refusing to  
7 rescind, the Zoning Changes, including without limitation Ordinance 1616; and

8 b. Such further relief as may be allowed by law and according to proof at trial.

9 8. On all causes of action:

10 a. For costs of suit incurred herein; and

11 b. For such other and further relief as the Court deems just and proper.

12 Dated: April 8, 2016

13 SPACH, CAPALDI & WAGGAMAN, LLP  
14 MORGAN, LEWIS & BOCKIUS, LLP

15 By: 

16 Madison S. Spach, Jr.

17 Attorneys for Petitioners and Plaintiffs Memorial  
18 Health Services, a California nonprofit public  
19 benefit corporation; and Saddleback Memorial  
20 Medical Center, a California nonprofit public  
21 benefit corporation

22 [verification follows on next page]  
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VERIFICATION

I, Stephen B. Geidt, declare:

I am the Executive Vice President of Plaintiff Memorial Health Services, a California nonprofit public benefit corporation ("MHS"), and the Chief Executive Officer of Plaintiff Saddleback Memorial Medical Center, a California nonprofit public benefit corporation ("SMMC"). I am authorized by each of MHS and SMMC to sign on its behalf and to carry out the acts required to file and serve, or cause to be filed and served this Petition and Complaint. I have read the foregoing Petition and Complaint and know the contents thereof of my own personal knowledge to be true, except with respect to those matters stated on information and belief and, as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration has been executed in Laguna Hills, California, on April 5, 2016.

  
\_\_\_\_\_  
Stephen B. Geidt

# **Exhibit 1**

**Exhibit 1**

Recorded in Official Records, Orange County  
Tom Daly, Clerk-Recorder

RECORDING REQUESTED BY,  
WHEN RECORDED MAIL TO:

McDermott, Will & Emery LLP  
18191 Von Karman Avenue, Suite 400  
Irvine, California 92612-7107  
Attention: Anne Duncan, Esq.

AND MAIL TAX STATEMENTS TO:

Memorial Health Services  
2801 Atlantic Avenue, PO Box 22694  
Long Beach, California 90801-5694



35.00

2005000078048 08:00am 02/01/05

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SPACE ABOVE THIS LINE RESERVED FOR  
RECORDER'S USE

GRANT DEED

THE DOCUMENTARY TRANSFER TAX IS NOT FOR PUBLIC RECORD.

FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, SAN CLEMENTE MEDICAL CENTER, LLC, a California limited liability company ("Grantor"), hereby grants to SADDLEBACK MEMORIAL MEDICAL CENTER, a California non-profit public benefit corporation ("Grantee"), effective as of 12:01 a.m. (Los Angeles time), February 1, 2005, that certain real property located in the County of Orange, State of California, more particularly described in Exhibit A attached hereto ("Land"), together with all right, title and interest of in and to all buildings and improvements now located or hereafter constructed on the Land.

Grantor hereby further grants to Grantee all of Grantor's right, title and interest in and to all easements, privileges and rights appurtenant to the Land and pertaining or held and enjoyed in connection therewith and all of Grantor's right, title and interest, if any, in and to any land lying in the bed of any street, alley, road or avenue to the centerline thereof in front of, or adjoining the Land.

IN WITNESS WHEREOF, Grantor has executed this Grant Deed as of FEB 1, 2005.

GRANTOR:

SAN CLEMENTE MEDICAL CENTER, LLC,  
a California limited liability company

By: Ronald K. McGee MD

Name: Ronald K. McGee, MD

Title: President

675 072-19

mail Tax Statement To: Same as above

**EXHIBIT A**

LEGAL DESCRIPTION

That certain real property located in the County of Orange, State of California, and legally described as follows:

Parcel 1A:

PARCEL NO. 1 OF LOT LINE ADJUSTMENT NO. 98-76, IN THE CITY OF SAN CLEMENTE, COUNTY OF ORANGE, STATE OF CALIFORNIA, RECORDED DECEMBER 15, 1999 AS INSTRUMENT NO. 19990852746, OFFICIAL RECORDS.

Parcel 1B:

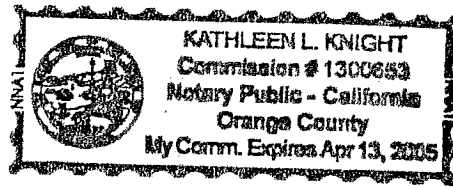
NON-EXCLUSIVE EASEMENTS FOR PARKING AND DRAINAGE FACILITIES AS MORE PARTICULARLY DEFINED IN AN INSTRUMENT ENTITLED "PARKING AND ACCESS EASEMENT", RECORDED APRIL 10, 2000 AS INSTRUMENT NO. 20000182632, OF OFFICIAL RECORDS.

STATE OF California )  
 ) ss.  
COUNTY OF Orange )

On Jan 29, 2005, before me, the undersigned, personally appeared Ronald K. Masee MD, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Kathy L. Knight  
Notary Public in and for said  
County and State



(SEAL)

GOVERNMENT CODE 27361.7

I certify under penalty of perjury that the Notary Seal on the document to which this Statement is attached reads as follows:

NAME OF THE NOTARY: Kathleen L. Knight  
DATE COMMISSION EXPIRES: 4-13-2005  
COUNTY WHERE BOND IS FILED: Orange  
COMMISSION NUMBER: 1300653 VENDOR#: NWA 1

I certify under penalty of perjury and the laws of the State of California that the illegible portion of this document to which this statement is attached reads as follows:

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PLACE OF EXECUTION: LOS ANGELES DATE: 1/24/05  
SIGNATURE: [Signature]

\* Personally know to me (or proved to me on the basis of satisfactory evidence) to be the person(s) is /are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or entity upon behalf of which the person(s) acted, executed the instrument.