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10 Attorneys for Plaintiff and Intervenor, National Credit Union Administration Board
11 As Conservator For Western Corporate Federal Credit Union

12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14 NATIONAL CREDIT UNION
15 ADMINISTRATION BOARD AS
16 CONSERVATOR FOR WESTERN
17 CORPORATE FEDERAL CREDIT
18 UNION,

19 Plaintiff,

20 v.

21 ROBERT A. SIRAVO, TODD M. LANE,
22 ROBERT J. BURRELL, THOMAS E.
23 SWEDBERG, TIMOTHY T. SIDLEY,
24 ROBERT H. HARVEY, JR., WILLIAM
25 CHENEY, GORDON DAMES, JAMES
26 P. JORDAN, TIMOTHY KRAMER,
27 ROBIN J. LENTZ, JOHN M. MERLO,
28 WARREN NAKAMURA, BRIAN
OSBERG, DAVID RHAMY and
SHARON UPDIKE,

Defendants.

Case No.: CV10-01597 GW (MANx)

**FIRST AMENDED COMPLAINT
FOR DAMAGES FOR BREACH
OF FIDUCIARY DUTIES, GROSS
NEGLIGENCE, FRAUD AND
UNJUST ENRICHMENT**

DEMAND FOR JURY TRIAL

Plaintiff, the National Credit Union Administration Board as Conservator of
Western Corporate Federal Credit Union (the "Conservator") alleges:

JURISDICTION AND VENUE

1. Western Corporate Federal Credit Union ("WesCorp") is a credit union
chartered under the Federal Credit Union Act, 12 U.S.C. § 1751, et seq., with its

1 relevant time period, Lane functioned as the second in command at WesCorp, after
2 Siravo.

3 8. Defendant Robert J. Burrell (“Burrell”) was an Executive Vice
4 President from January 31, 2003 to March 20, 2009, and the Chief Investment
5 Officer for WesCorp from 2000 to March 20, 2009, when he was terminated. The
6 Conservator is informed and believes and on that basis alleges that Burrell is a
7 resident of California.

8 9. Defendant Timothy T. Sidley (“Sidley”) was the Vice President for
9 Risk Assessment for WesCorp and the Chief Risk Officer in charge of investment
10 credit services from June 18, 1998 to April 2, 2010. The Conservator is informed
11 and believes and on that basis alleges that Sidley is a resident of California. Siravo,
12 Lane, Burrell, and Sidley are referred to collectively as the “Officer Defendants.”

13 10. Defendant Thomas E. Swedberg (“Swedberg”) was Vice President of
14 Human Resources for WesCorp from April 6, 1999 to July 24, 2006, at which time
15 he became Vice President of Strategic Planning and Organizational Development.
16 He served in that capacity until approximately December 31, 2008. He retired from
17 his formal position and worked with WesCorp on a consulting basis until July 22,
18 2009. The Conservator is informed and believes and on that basis alleges that
19 Swedberg is a resident of California.

20 11. Defendant Robert H. Harvey, Jr. (“Harvey”) was the former Chairman
21 of the WesCorp board of directors and was a director from May 2001 to March 20,
22 2009. Harvey was also the CEO of Seattle Metropolitan Credit Union, a WesCorp
23 member. The Conservator is informed and believes and on that basis alleges that
24 Harvey is a resident of Washington State.

25 12. Defendant James P. Jordan (“Jordan”) was a member of the WesCorp
26 board of directors from May 2002 to March 20, 2009 and was the Vice Chairman of
27 the WesCorp board from May 21, 2007 to March 20, 2009. He was a member of the
28 WesCorp board’s Asset and Liability Committee (“ALCO”) from October 2004 to

1 June 2007. Jordan was also the President and CEO of Schools Financial Credit
2 Union, a WesCorp member. The Conservator is informed and believes and on that
3 basis alleges that Jordan is a resident of California.

4 13. Defendant Timothy Kramer (“Kramer”) was a member of the WesCorp
5 board of directors from April 2004 to March 20, 2009 and was the former Secretary
6 and Treasurer of the WesCorp board from May 21, 2007 to March 20, 2009. He
7 was a member of the ALCO from December 2005 to June 2007. Kramer was also
8 the President and CEO of Keypoint Credit Union, a WesCorp member. The
9 Conservator is informed and believes and on that basis alleges that Kramer is a
10 resident of California.

11 14. Defendant Robin J. Lentz (“Lentz”) was a member of the WesCorp
12 board of directors from April 2000 to March 2009. She was a member of the ALCO
13 from December 2005 to May 2006. Lentz was also the President and CEO of
14 Cabrillo Credit Union, a WesCorp member. The Conservator is informed and
15 believes and on that basis alleges that Lentz is a resident of California.

16 15. Defendant John M. Merlo (“Merlo”) was a member of the WesCorp
17 board of directors from April 2002 to March 2009, served as Chairman of the
18 board’s Compensation Committee and was a member of the ALCO from June 2002
19 to September 2004. Merlo was also the President and CEO of Premier America
20 Credit Union, a WesCorp member. The Conservator is informed and believes and
21 on that basis alleges that Merlo is a resident of California.

22 16. Defendant Gordon Dames (“Dames”) was a member of the WesCorp
23 board of directors from May 1999 to May 2008. Dames was also the President and
24 CEO of Mountain America Credit Union, a WesCorp member. The Conservator is
25 informed and believes and on that basis alleges that Dames is a resident of Utah.

26 17. Defendant William Cheney (“Cheney”) was a member of the WesCorp
27 board of directors from May 2002 to February 2006. He was a member of the
28 ALCO from June 2002 to November 2005. Cheney was also the President and CEO

1 of Xerox Federal Credit Union, a WesCorp member. The Conservator is informed
2 and believes and on that basis alleges that Cheney resides in the Washington D.C.
3 area.

4 18. Defendant Warren Nakamura (“Nakamura”) was a member of the
5 WesCorp board of directors from November 2003 to March 2009. He was a
6 member of the ALCO from May 2004 to March 2009. Nakamura was also the
7 President and CEO of Honolulu Federal Credit Union, a WesCorp member. The
8 Conservator is informed and believes and on that basis alleges that Nakamura is a
9 resident of Hawaii.

10 19. Defendant Brian Osberg (“Osberg”) was a member of the WesCorp
11 board of directors from May 2005 to March 2009. He was a member of the ALCO
12 from June 2006 to March 2009. Osberg was also the President and CEO of Potelco
13 United Credit Union, a WesCorp member. The Conservator is informed and
14 believes and on that basis alleges that Osberg is a resident of Idaho.

15 20. Defendant David Rhamy (“Rhamy”) was a member of the WesCorp
16 board of directors from April 1995 to April 2006. He was a member of the ALCO
17 from January 2002 to April 2004. Rhamy was also the President and CEO of Silver
18 State Schools Credit Union, a WesCorp member. The Conservator is informed and
19 believes and on that basis alleges that Rhamy is a resident of Nevada.

20 21. Defendant Sharon Updike (“Updike”) was a member of the Wescorp
21 board of directors from April 2004 to April 2006. Updike was also the President
22 and CEO of Eagle Community Credit Union, a WesCorp member. The Conservator
23 is informed and believes and on that basis alleges that Updike is a resident of
24 California. Defendants Harvey, Merlo, Dames, Jordan, Kramer, Cheney, Lentz,
25 Nakamura, Osberg, Rhamy and Updike are referred to collectively as the “Director
26 Defendants”.

27 22. The Conservator is informed and believes and based thereon alleges
28 that defendants were at all relevant times acting as actual agents, conspirators,

1 27. By the end of 2007, WesCorp's assets had grown by more than 50% to
2 over \$32.5 billion from their 2002 levels and its borrowings had increased by more
3 than 2000% to more than \$10 billion – over 30% of its total assets.

4 28. WesCorp used the income from its investments to expand its
5 operations, subsidize the other banking services it provided and increase the
6 compensation paid to its top executives. By 2008, WesCorp's operating expenses
7 had grown by more than 110% from 2002 levels. The compensation paid to its top
8 executives had increased on average by about 88%, and Siravo's compensation had
9 increased by about 325%.

10 29. WesCorp's strategy of growing through borrowed funds made it
11 increasingly dependent on income from its investment portfolio. To maintain that
12 income, it was necessary for WesCorp to obtain a relatively large investment spread
13 – the difference between what it earned on its investments and its cost of funds.

14 30. To generate the investment income it needed, WesCorp increased the
15 concentration of relatively higher yielding private label MBS. These included
16 private label MBS based on Option ARM loans.

17 31. Neither the Officer Defendants nor the Director Defendants imposed
18 meaningful concentration limits on most of WesCorp's MBS, including its Option
19 ARM MBS. Consequently, by the end of 2007, the concentration of private label
20 MBS in WesCorp's portfolio increased to more than \$22 billion, or about 95% of
21 WesCorp's total investment portfolio. The Option ARM MBS in WesCorp's
22 portfolio increased to \$8.9 billion, or about 37% of the total portfolio.

23 32. Although the private MBS that WesCorp purchased for investment
24 were rated AAA or at least AA by Moody's and S&P, or both, and were
25 underwritten by the world's leading investment banks, the overwhelming
26 concentration of private label MBS in WesCorp's investment portfolio was not
27 prudent.

28 ///

1 during the relevant time period, between 28 and 31 retail corporate credit unions;
2 and (3) nearly 8,000 “natural person” credit unions. The wholesale corporate credit
3 union, “U.S. Central,” provides services to the retail corporate credit unions, while
4 the retail corporate credit unions provide services to both federally-chartered and
5 state-chartered natural person credit unions. The natural person credit unions, in
6 turn, serve the financial needs of more than 87 million members.

7 37. For a number of years, WesCorp had been the largest of the retail
8 corporate credit unions. At the end of 2002, more than 30% of all of the assets held
9 by retail corporate credit unions were held by WesCorp.

10 38. Like natural person credit unions, the corporate credit unions are not-
11 for-profit institutions owned by their members. In the case of the retail corporate
12 credit union, the members are primarily natural person credit unions.

13 39. Retail corporate credit unions provide essential support to their natural
14 person credit union members by offering services that would be largely unavailable
15 or more expensive for natural person credit unions to obtain on their own because of
16 their smaller size. First, they offer a variety of banking products and services to
17 their members – primarily settlement of transactions such as checks, ATM and
18 credit card transactions and wire transfers. Second, they provide a ready source of
19 liquidity to their members, allowing them to borrow as necessary. Finally, retail
20 corporate credit unions such as WesCorp provide an avenue for their members to
21 prudently invest their excess funds.

22 40. Profit maximization is not the mission of a corporate credit union.
23 Rather, the credit union structure is designed to maximize member service over the
24 profit motive. “Profits” are relatively small and are either returned to members in
25 the form of benefits (either lower costs or higher returns) or they are invested
26 upstream to provide a source of liquidity and risk management should the financial
27 markets suffer a decline. According to WesCorp:

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1 Profit is not the driving force at credit unions; rather, they
2 exist solely for the benefit of their member/owners – a
3 pivotal difference from other financial service providers . . .

4 The corporate credit union network was organized to provide
5 liquidity resources for credit unions as part of the credit
6 union system. The idea was to have within the credit union
7 movement a mechanism enabling credit unions to function
8 independently of the banking system and to provide credit
9 unions with a full range of financial, investment and back
10 offices services.

11 http://www.wescorp.org/about_us/aboutus_faq.asp?catid=60, downloaded August
12 31, 2010.

13 41. WesCorp’s bylaws provide that WesCorp’s purpose is to “foster and
14 promote the economic well-being, growth and development of its members through
15 effective funds management, and services which may be of benefit to its members
16 and are authorized by the Federal Credit Union Act and/or rules and regulations.”

17 42. Corporate credit unions have traditionally been conservative financial
18 institutions pooling the assets of their natural person credit union members to
19 provide banking services, safeguard their members’ investments, provide a source of
20 liquidity and pay moderate returns for invested funds.

21 43. Over the years, most credit unions in California became members of
22 WesCorp. WesCorp provided a vital service to its many small credit union
23 members which depended on it for services, liquidity and investment of excess
24 funds.

25 WesCorp’s Era of Growth

26 44. From the early 1990’s until about 2002, WesCorp strove to ensure that
27 its operating expenses were less than its income on capital plus fee income.
28 WesCorp considered this “self-sufficiency ratio” to be a hallmark of its strength and
ability to endure adverse economic and business conditions.

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1 45. Notwithstanding its size, WesCorp embarked on an aggressive plan to
 2 increase its size at about the time Siravo became President and CEO in 2002.
 3 WesCorp abandoned the self-sufficiency ratio, and its budgets for 2003 to 2008
 4 projected substantial increases in assets, net interest income and operating expenses:

Budget Year	Budgeted Net Interest Income	Budgeted Operating Expense	Budgeted Average Earning Assets (in millions)
2002	\$69,460,191	\$55,024,622	\$17,354
2003	\$79,934,973	\$56,587,747	\$20,754
2004	\$75,672,982	\$60,552,896	\$23,468
2005	\$86,116,515	\$67,351,993	\$23,824
2006	\$97,715,355	\$72,041,978	\$24,681
2007	\$100,621,962	\$76,924,300	\$27,274
2008	\$108,419,718	\$85,400,509	\$33,573

13 46. From 2002 through 2007, WesCorp grew significantly in terms of total
 14 assets, net interest income and operating expenses:

Year	Net Interest Income	Operating Expense	Total Assets (in millions)
2002	\$68,234,458	\$53,373,634	\$21,117
2003	\$60,478,556	\$57,033,281	\$24,995
2004	\$90,286,905	\$67,864,155	\$25,629
2005	\$102,682,904	\$68,631,486	\$26,501
2006	\$89,958,173	\$71,978,632	\$30,046
2007	\$137,201,776	\$81,901,701	\$32,517

21 47. WesCorp's membership and deposit base grew only moderately
 22 between January 2002 and November 2008. The total number of WesCorp
 23 members increased about 11% from 1040 to 1156. The average of WesCorp's total
 24 shares and deposits increased 17% between 2002 to 2008 from \$17.3 billion to \$20
 25 billion.

26 48. The disparity between institution growth and membership and deposit
 27 growth was particularly pronounced between 2004 and 2007. During that time,
 28 WesCorp's total assets grew 30%, its net interest income grew 52% and its total

1 operating expenses grew 21%. During the same period, the number of WesCorp
2 members increased by only 17 and the average of WesCorp's total shares and
3 deposits increased about 12%.

4 49. Without a significant increase in its deposit base, WesCorp funded its
5 growth by borrowing money to invest in its portfolio. Between January 2002 and
6 January 2004, WesCorp's borrowings increased from \$420 million to \$1.28 billion.
7 From January 2004 to November 2008, WesCorp's borrowings increased 472% to
8 \$7.3 billion.

9 50. In addition to borrowing more money to invest, WesCorp sought to
10 increase the yield on its portfolio by investing an ever larger proportion in private
11 label MBS, which were typically higher-yielding than MBS issued by government
12 agencies. The increase in borrowed funds and in the yield (and risk) in WesCorp's
13 investment portfolio dramatically increased WesCorp's investment income.
14 WesCorp's net interest income nearly doubled between 2002 and 2007, from \$68
15 million to \$137 million, before declining in 2008 to \$110 million. Between 2004
16 and 2007, WesCorp's annual gross investment income nearly tripled from \$563
17 million to \$1.64 billion.

18 51. WesCorp did not increase its capital base to compensate for the
19 increase in risk in its investment portfolio. Between 2002 and 2007, WesCorp's
20 retained earnings ratio – the ratio of retained earnings to assets – declined. By 2007,
21 all but two retail corporate credit unions had higher retained earnings ratios than
22 WesCorp and all but four had higher total capital ratios.

23 52. WesCorp used the money it earned from its portfolio to increase both
24 its operating expenses and its subsidy of its member services business. Between
25 2002 and 2008, operating expenses increased 62%, from \$53.4 million in 2002 to
26 \$86.6 million in 2008. Between 2002 and 2007, the subsidy of member services
27 expenses increased from about 35% to about 45%, and the amount of investment

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1 income used to subsidize member services almost doubled, from about \$14 million
2 to about \$27 million.

3 53. The growth of WesCorp as an institution and the growth of its net
4 interest income was used to justify increased compensation for WesCorp's top
5 executives. Siravo's salary and bonus compensation increased from \$350,000
6 (annualized) in 2002 to almost \$992,000 in 2008. Lane's salary and bonus
7 increased 121%, from \$176,000 in 2002 to almost \$390,000 in 2007, his last full
8 year. Other top WesCorp executives also received significant compensation
9 increases. The average salary and bonus WesCorp paid to its "leadership team"
10 increased by an average of approximately 88% between 2002 and 2008, an average
11 annual increase of approximately 14%.

12 **WesCorp's Increasing Concentration of Private Label MBS Investments**

13 54. WesCorp's business model made WesCorp increasingly dependent on
14 growth in its investment income. Because deposit balances were increasing
15 modestly, if at all, growth in investment income required both increased borrowing
16 and the maximum yield possible on WesCorp's investment portfolio.

17 55. At the same time that the Officer Defendants and the Director
18 Defendants were requiring increasing yield from WesCorp's investments, the
19 investment spreads for the types of securities WesCorp invested in were shrinking,
20 and the available yields were therefore decreasing. To increase the yield on its
21 investments, WesCorp lowered the concentration of U.S. government agency MBS
22 in its portfolio. Such MBS were relatively less risky because they were guaranteed
23 by the agency issuing them. From December 2002 to December 2007, the
24 concentration of U.S. agency MBS in WesCorp's investment portfolio dropped from
25 17% to 4%. During the same period, the concentration of higher-yielding private
26 label MBS increased from 72% to almost 95%.

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1 56. Between 2004 and 2007, WesCorp invested increasing amounts in new
2 forms of MBS, including Collateralized Debt Obligations (“CDOs”) and Option
3 ARM MBS.

4 57. CDOs are “second level” MBS. Typically, MBS are shares in a pool of
5 mortgages. CDOs are shares in a pool of MBS. They can be risky because the
6 MBS in the pools were themselves more risky than the single family home loans
7 that made up the pools in most MBS.

8 58. WesCorp began purchasing CDOs in 2004. By the end of 2007, CDOs
9 comprised just under 2.5% of WesCorp’s investment portfolio.

10 59. Option ARM MBS are shares in pools of Option ARM mortgages.
11 Option ARM loans allow the borrower to make substantially below-market monthly
12 payments for the first years of the loan. Thereafter, the monthly payments “reset”
13 and increase drastically, frequently more than doubling. Many Option ARM loans
14 were made without verifying the borrower’s income or ability to make the monthly
15 payments. Option ARM loans were made to borrowers who could afford the initial
16 below-market monthly payments but not the regular monthly payment due after the
17 loan reset.

18 60. WesCorp began purchasing Option ARM MBS in 2005. In 2006, 47%
19 of its investment portfolio purchases were Option ARM MBS. By 2007, that
20 number had risen to 57% and Option ARM MBS made up 37% of WesCorp’s
21 investment portfolio.

22 61. WesCorp also increased the yield and risk in its investment portfolio by
23 purchasing MBS from lower tranches. Typically, a particular MBS was sold in
24 several tranches, or levels. Lower tranches would absorb any losses in the mortgage
25 pools before the higher tranches. Lower tranches therefore had a higher risk and
26 paid a higher yield.

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1 62. The lowest tranche MBS WesCorp purchased were rated AA rather
2 than AAA. The concentration of AA rated MBS in WesCorp’s portfolio increased
3 from less than .5% in 2002 to over 22% in 2005, after which it declined.

4 63. Conversely, in 2002 more than 95% of the MBS WesCorp purchased
5 were from a “senior” or higher tranche. By 2007, the percentage had dropped to
6 less than 50%.

7 64. WesCorp stopped purchasing MBS in the summer of 2007. At the end
8 of 2007, WesCorp’s investment portfolio held the following concentrations of
9 relatively risky MBS securities.

MBS Type	% of Portfolio
Option ARM	37.1%
AA rated Subprime	14.5%
CDO	2.4%

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14 **WesCorp’s Failure to Control MBS Concentration Risk**

15 65. Near the end of each year, the Officer Defendants proposed and the
16 Director Defendants adopted a budget for WesCorp for the following year. The
17 budget contained detailed information about the proposed projected expenses and
18 projected fee income, but very little information about the proposed projected
19 investment income, investment expense and net income interest, except the monthly
20 projected totals. The Director Defendants were not provided any information about
21 how the composition of WesCorp’s investment portfolio would need to change to
22 achieve the net interest income projected in the budgets. The executive summary
23 narrative for the budgets was also silent on that subject.

24 66. Nonetheless, WesCorp’s budgets reflect that WesCorp actively planned
25 both to increase its borrowings to fund investments and to increase the spread
26 required in its investment portfolio. In the following table, the investment spread is
27 expressed in basis points above the one-month LIBOR rate.

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Year	Projected Average Borrowings (\$ billions)	Projected Spread (bp)
2004	1.17	27
2005	2.41	28
2006	2.54	31
2007	7.72	18
2008	7.81	23

67. Burrell and WesCorp's Investment Department were responsible for ensuring that WesCorp's investments earned the returns required to meet WesCorp's budget for investment income and net interest income.

68. WesCorp's Risk Management Department, headed by Sidley, was responsible for proposing and the Director Defendants were responsible for adopting prudent concentration limits for its investment portfolio to ensure that the portfolio was properly diversified.

69. WesCorp's board adopted policies specifying concentration limits for its investment securities and from time to time amended the policies to change limits or impose new limits. In 2002, these policies allowed WesCorp to invest 950% of WesCorp's capital in private label (non-government agency) MBS. The limit was raised to 1700% of capital in 2003 and to 2150% of capital in 2005. It eventually reached 2300% in December 2007. During the period from 2004 on, WesCorp's entire investment portfolio was less than these investment limits. WesCorp's concentration limit policy therefore allowed WesCorp to invest its entire portfolio in private label MBS.

70. The Officer Defendants never proposed and the Director Defendants never adopted any concentration limits for Option ARM MBS. By contrast, WesCorp's board adopted meaningful concentration limits for other private label MBS based on different collateral types. The concentration limit for CDOs was 100% of capital. The limit for commercial real estate MBS (CMBS) was 100% of

1 capital until November 2005 after which it was raised, eventually to 350% of capital
2 in November 2006.

3 71. For reporting purposes, WesCorp classified its MBS (other than CMBS
4 and CDOs) in only two ways: by rating (AAA and AA) and by FICO score (prime,
5 alt-A, and subprime). The Officer Defendants never proposed and the Director
6 Defendants never adopted policies requiring tracking or reporting of the
7 concentration of Option ARM MBS in WesCorp's portfolio. Without such tracking
8 and reporting, WesCorp was unable to control the risks posed by the concentration
9 of these MBS in WesCorp's portfolio.

10 72. The Officer Defendants never proposed and the Director Defendants
11 never adopted policies limiting or requiring reporting of concentration by tranche
12 position, other than bond rating. Therefore, the board was not provided any
13 comprehensive information about the increasing concentration of lower tranche
14 MBS in WesCorp's investment portfolio.

15 73. The Officer Defendants proposed and the Director Defendants adopted
16 amendments raising the concentration limits for the MBS in WesCorp's portfolio so
17 that WesCorp could achieve the portfolio yields required by WesCorp's budget. For
18 example, in 2004 WesCorp more than doubled the concentration limit for AA rated
19 MBS from 100% of capital to 250% of capital. In November 2005, it raised the
20 limit again to 350% of capital. At the end of 2005, the largest concentration of
21 securities in the portfolio was in AA rated subprime securities, which comprised
22 22% of the total portfolio, or 245% of WesCorp's capital.

23 **The Warnings of Risks in WesCorp's Portfolio**

24 74. The Officer Defendants and the Director Defendants generally attended
25 the ALCO meetings. At those meetings, the attendees received presentations about
26 the state of the economy generally and, from the Investment Department, about the
27 investment climate and WesCorp's investment strategy specifically.

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The Improper SERP Payments

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2 81. WesCorp's board authorized a SERP for certain high-level WesCorp
3 executives in November 2001 (the "Executive SERP"). Swedberg was a participant
4 in the Executive SERP program.

5 82. The purpose of the Executive SERP was to encourage its participants to
6 remain employed at WesCorp. Among other benefits, the Executive SERP provided
7 its participants a lump sum payment at their expected retirement dates, provided that
8 (1) they remained employees of WesCorp at the time, (2) had been WesCorp
9 employees for ten years, and (3) had been a participant in the SERP for five years.

10 83. When Siravo became President and CEO of WesCorp in March 2002,
11 he negotiated a SERP plan for himself (the "Siravo SERP") that provided a similar
12 lump sum payment at his expected retirement date, which was May 1, 2008.

13 84. In both SERPs, the amount of the lump sum benefit was determined by
14 a formula based on "Final Compensation." Final Compensation was defined as the
15 "monthly base-period salary paid most recently while a person was a participant in
16 the program, multiplied by twelve (12)." The lump sum payment formula for both
17 SERPs also included a 40% gross-up for taxes.

18 85. In the fall of 2007, Siravo and Swedberg decided to increase the
19 amount of the SERP retirement lump sum payment that they and the other
20 participants in the Executive SERP and Siravo SERP would receive at their
21 expected retirement dates. They decided to propose amendments to the SERP plans
22 that would (1) change the definition of "Final Compensation" to include all
23 compensation, not just monthly base salary; and (2) increase the gross-up for taxes
24 from 40% to 67%.

25 86. Siravo decided that the Siravo SERP should be amended by the board
26 first. Siravo told Swedberg that he would propose identical amendments for the
27 Executive SERP after the Siravo SERP was amended. Because Swedberg appeared
28 "disinterested" with respect to the proposed amendments to the Siravo SERP, Siravo

1 told Swedberg that he should make the presentation to the board requesting
2 amendments of the Siravo SERP. Although Swedberg was no longer responsible
3 for WesCorp's human resources function, he prepared the materials requesting the
4 amendments to the SERPs and communicated with the board regarding the proposed
5 amendment to the Siravo SERP.

6 87. Rather than disclosing to the board that the amendments to the Siravo
7 SERP were simply intended to increase the size of the lump sum payment to Siravo,
8 Swedberg, with Siravo's knowledge and acquiescence, concealed this fact and
9 instead represented to the board that the amendments were necessary to correct
10 errors in the Siravo SERP.

11 88. Swedberg developed the proposal to amend the Siravo SERP in
12 conjunction with Siravo, Merlo (the Chairman of the board's compensation
13 committee), and Harvey (the Chairman of the board).

14 89. Swedberg initially prepared a PowerPoint presentation for WesCorp's
15 board, which he sent to Siravo on October 19, 2007. The presentation stated that the
16 Siravo SERP required modification because (1) its formula currently produces a
17 28% shortfall and (2) new plans provide for a 67% gross-up, which "produces a
18 more equitable result."

19 90. Both of these statements were false and misleading. The formula in the
20 Siravo SERP in fact produced a lump sum payment significantly higher than the
21 payment contemplated by the parties at the time the SERP was negotiated, and the
22 amount of the gross-up had been set at that time in arms-length negotiations.

23 91. On October 22, 2007, Swedberg showed the PowerPoint presentation
24 to Merlo, who suggested replacing it with a short memo. Swedberg then prepared a
25 one page memo for Merlo's review that "recommended" an "administrative change"
26 to "increase benefits sufficiently to achieve 48 percent of earnings inclusive of off-
27 sets" and requested consideration of a change in the tax multiplier to 1.67 percent.

28 ///

1 Subsequent drafts of the memo stated that “the SERP currently produces 37% of
2 ending earnings versus the agreed-to 48%.”

3 92. The representations that the proposed change was “administrative” and
4 that there had been an “agreed-to 48%” of ending earnings were false. The change
5 was substantive, and Siravo and WesCorp had never agreed that his lump sum SERP
6 payment would be based on 48% of “ending earnings.”

7 93. On October 28, 2007, Swedberg met with Merlo and Harvey. After
8 that meeting, Swedberg wrote a revised memorandum dated November 2, 2007,
9 which he sent to Harvey on November 5, 2007, with Siravo’s concurrence. The
10 memorandum, provided to the board’s executive committee (and possibly the board
11 as a whole), was entitled “Administrative Change” to the CEO’s SERP. A true and
12 correct copy of the November 2, 2007 memorandum is attached hereto as Exhibit 1.

13 94. The characterization of the proposed amendments as “administrative”
14 was false and misleading. The proposed changes to the Siravo SERP were not
15 “administrative” at all. They were substantive changes intended to nearly double
16 the SERP benefit. In addition, the memorandum falsely stated:

17 a. that there were two “administrative errors in the current 457(f) [SERP]
18 plan document that are not consistent with the intent of the program when it
19 was initially developed.”

20 b. that “[o]ur CEO’s current 457(f) Plan utilized an old template that
21 dated back to Dick Johnson’s tenure as President when no bonuses or
22 incentive pay plans existed at WesCorp and the concept of tax gross-up was
23 not broadly utilized in 457(f) Plans.”

24 c. that the changes are necessary to provide the “agreed upon 48 percent
25 of compensation rate” and that the tax gross-up change is required to provide
26 the “correct tax gross-up amount.”

27 95. Each of these statements was false and misleading, and the Conservator
28 is informed and believes and on that basis alleges that Swedberg and Siravo knew

1 the statements were false at the time they were made or had no reasonable ground to
2 believe that they were true.

3 96. The true facts were that the Siravo SERP was fully consistent with the
4 intent of the parties at the time the plan was negotiated. Siravo's employment
5 agreement provided for an incentive bonus, and the concept of gross-up rates was
6 broadly utilized in SERP plans at the time, a fact Swedberg knew or should have
7 known. At the time the terms of the Siravo SERP were being negotiated, Siravo and
8 WesCorp never agreed or contemplated that the amount of the lump sum payment
9 would be 48% of total compensation. Rather, the parties contemplated and agreed
10 that the amount of Siravo's lump sum payment was to be calculated as a percentage
11 of base salary, not total compensation. Finally, the gross-up percentage in the
12 Siravo SERP formula was the same as the percentage in the Executive SERP, and
13 the Conservator is informed and believes and on that basis alleges that neither party
14 intended to change it at the time the Siravo SERP was negotiated.

15 97. After Harvey approved the proposal outlined in the November 2
16 memorandum, he submitted it to Kramer and Jordan, the other members of the
17 WesCorp board's executive committee, each of whom approved the proposal prior
18 to the board meeting.

19 98. At the November 27, 2007 meeting of the WesCorp board, Harvey
20 requested that the board approve the executive committee's approval of the changes
21 to the Siravo SERP and adopt a resolution to that effect. The board did so.

22 99. The resolution adopted by the WesCorp board authorized the following
23 changes to the Siravo SERP:

24 1. "Include salary *plus* bonus and incentive pay in the SERP
25 benefit calculation to make it consistent with the compensation
26 used in WesCorp's Defined Benefit plan benefits calculation."
(Emphasis in original).

27 2. "Calculate the tax gross-up using the divisor (.60) *versus*
28 the multiplier (1.4)." (Emphasis in original).

1 100. On January 24, 2008, Harvey, as chairman of WesCorp's board,
2 executed an amended Siravo SERP document that the Conservator is informed and
3 believes and on that basis alleges had been prepared by Swedberg and approved by
4 Siravo. The amended Siravo SERP provided Siravo a larger lump sum payment
5 than the board's resolution authorized.

6 101. The Conservator is informed and believes and on that basis alleges that
7 as senior officers of WesCorp, both Siravo and Swedberg had a duty to ensure that
8 the amendments to the Siravo SERP conformed to the board resolution and that they
9 had a duty to inform the board of any variance, or otherwise take action to correct
10 any mistake once it was recognized. The Conservator is informed and believes and
11 on that basis alleges that both Siravo and Swedberg knew or should have known of
12 the variance, but neither of them informed either Harvey or other members of
13 WesCorp's board that the amended Siravo SERP document provided for a larger
14 lump sum payment than the board had approved.

15 102. Although Siravo extended his employment at WesCorp to April 30,
16 2009, his expected retirement date remained May 1, 2008. On May 13, 2008,
17 WesCorp paid Siravo a lump sum SERP payment of \$6,881,401. Under the original
18 Siravo SERP, Siravo's lump sum payment would have been \$4,494,351.62.

19 103. After the Siravo SERP changes were approved, Swedberg began work
20 on amendments to the Executive SERP, in which he was a participant. These
21 amendments were identical to the amendments to the Siravo SERP proposed by
22 Swedberg and approved by WesCorp's board.

23 104. WesCorp's board approved the amendments to the Executive SERP at
24 its June 24, 2008 meeting. The only WesCorp employee present was Siravo. The
25 board resolution adopting the amendments to the Executive SERP is identical to the
26 resolution adopting the amendments to the Siravo SERP, except for the
27 identification of the SERP program involved.

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1 105. Swedberg retired at the end of 2008. On January 6, 2009, he was paid
2 a lump sum SERP payment of \$1,223,962. Under the original Executive SERP, his
3 lump sum SERP payment would have been \$534,971.35.

4 106. Lane was a participant in the Executive SERP. His SERP expected
5 retirement date was in 2015. The Conservator is informed and believes and on that
6 basis alleges that by late 2005, Lane had decided to leave WesCorp in the next few
7 years, well prior to his expected retirement date.

8 107. In a December 7, 2005 memo to Lane, Siravo proposed an alternative
9 to the Executive SERP for Lane under which Lane would exchange his
10 participation in the Executive SERP for a payment of \$1,325,000 by February 28,
11 2006 and a further payment of \$75,000 on January 15 of each year thereafter that he
12 was employed at WesCorp. Lane accepted the proposal by executing an Early
13 Payout Agreement with Siravo containing those terms.

14 108. The Conservator is informed and believes and based thereon alleges
15 that the board was either unaware of the Early Payout Agreement and never
16 approved it or that the board's approval, if any was given, was given without an
17 informed decision making process. The early payout in lieu of a lump sum payment
18 upon expected retirement date is inconsistent with the SERP rationale of retaining
19 key executives until their retirement date. The Conservator is informed and believes
20 and based thereon alleges that the payment to Lane served no *bona fide* business
21 purpose and therefore constituted a wasting of corporate assets.

22 109. Pursuant to the Early Payout Agreement, Lane received a payment of
23 \$1.325 million in 2006 and of \$75,000 in each of 2007 and 2008. For all three years
24 he also received base compensation and a substantial "regular" bonus. On April 8,
25 2008, Lane left his employment with WesCorp.

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1 **FIRST CLAIM FOR RELIEF**

2 **(Breach of Fiduciary Duties – Against All Defendants, Except Swedberg)**

3 110. The Conservator incorporates by reference paragraphs 1 through 80,
4 inclusive, of this complaint as though fully set forth.

5 111. A director or officer in performing his or her duties must act in good
6 faith, in the best interests of the corporation and of its shareholders, and with such
7 care, including a duty of reasonable inquiry, as an ordinarily prudent person in a like
8 position would use under similar circumstances. As directors and senior officers of
9 WesCorp, the Director Defendants and the Officer Defendants had a duty to ensure
10 the safe and sound operation of the credit union. At a bare minimum, they had a
11 duty to understand the relative risks of their strategy of borrowing and investing
12 heavily in private label MBS and to establish effective policies and procedures and
13 meaningful concentration limits to minimize those risks.

14 112. As directors and senior officers of a corporate credit union, the Director
15 Defendants and the Officer Defendants occupied a position of trust with respect to
16 WesCorp as defined under California law. As such, they owed WesCorp duties of
17 loyalty and were required to perform their duties in a manner each of them believed
18 to be in the best interests of WesCorp, at the expense of each of their own personal
19 interests or the interests of, in the case of the Director Defendants, the natural person
20 credit unions they ran. The Officer Defendants and the Director Defendants had a
21 duty to keep themselves informed, and they were not allowed to engage in acts or
22 omissions amounting to an unexcused pattern of inattention or to abdicate their
23 duties as officers and directors. Nor were they to engage in acts from which they
24 derived an improper personal benefit.

25 113. The Director Defendants and the Officer Defendants breached these duties
26 of care by, among other things, departing from the traditional corporate credit union
27 business model and following a strategy of maximizing investment income by
28 leveraging WesCorp's balance sheet and developing a large portfolio concentration of

1 private label MBS, particularly Option ARM MBS. In doing so, they failed to
2 adequately inform themselves of the additional credit risk created and failed to take
3 steps to mitigate that credit risk.

4 114. In particular, the Director Defendants and the Officer Defendants
5 breached their duties of care and were negligent by, among other things:

- 6 a. Embarking on a reckless growth and investment strategy
7 dependent on massive borrowing;
- 8 b. Providing excessive subsidies for member services that required
9 investment in higher yielding securities;
- 10 c. Failing to impose a meaningful concentration limit on
11 WesCorp's investments in private label MBS;
- 12 d. Failing to impose any concentration limits on WesCorp's
13 investments in particular forms of MBS, including Option ARM
14 MBS;
- 15 e. Failing to monitor or impose concentration limits on WesCorp's
16 investments in lower tranche position, AAA rated, private label
17 MBS;
- 18 f. Raising concentration limits and setting and approving budgets
19 based on desired yield without appropriate consideration of the
20 attendant risks;
- 21 g. Failing to reevaluate WesCorp's high return strategy in light of
22 changing economic conditions;
- 23 h. Allowing WesCorp to develop a large concentration of Option
24 ARM MBS in its investment portfolio.

25 115. In addition, the Conservator is informed and believes, and based
26 thereon alleges, that Siravo breached his duty of care by not devoting sufficient time
27 and effort to his duties as President and CEO of WesCorp.

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1 116. As a result of the foregoing breaches of the duty of care, among others,
2 WesCorp suffered massive losses in its securities portfolio, which losses were a
3 substantial factor in WesCorp's failure.

4 117. As a result of the Director Defendants and the Officer Defendants'
5 breaches of the duty of care, the Conservator has suffered damages not fully
6 ascertained but in excess of \$1 billion.

7 **SECOND CLAIM FOR RELIEF**

8 **(Gross Negligence – Against All Defendants, Except Swedberg)**

9 118. The Conservator incorporates by reference paragraphs 1 through 80 and
10 111 through 117, inclusive, of this complaint as though fully set forth.

11 119. As directors and senior officers of a federally insured credit union, the
12 Director Defendants and the Officer Defendants may be held personally liable for
13 gross negligence pursuant to 12 U.S.C. §1787(h).

14 120. Each of the Director Defendants and the Officer Defendants was
15 grossly negligent in performing his or her duties in allowing WesCorp to pursue a
16 highly leveraged strategy of investing in private label MBS without understanding
17 the risks of a high concentration of such securities in its portfolio and without taking
18 steps to mitigate those risks through appropriate concentration limits and investment
19 policies, and as more fully described in paragraph 114, a-h, above.

20 121. Each of the Director Defendants and the Officer Defendants was
21 grossly negligent by essentially ignoring the prospect that real estate values could
22 decline. Their allowing and, in fact, encouraging WesCorp to borrow huge sums of
23 money to invest in private label MBS, and particularly in Option ARM securities,
24 was a departure from what a reasonably careful credit union director or officer
25 would do in the same situation to prevent harm to the credit union.

26 122. As a result of the foregoing breaches of the duty of care, among others,
27 WesCorp suffered massive losses in its Option ARM MBS portfolio, which losses
28 were a substantial factor in WesCorp's failure.

1 SERP payments to Siravo and Swedberg without full knowledge of the facts.

2 129. As a result of the SERP Defendants' conduct in this regard, the
3 Conservator has incurred damages in the form of overpayment to Siravo and
4 Swedberg in the approximate sum of \$3,076,039.80.

5 **FOURTH CLAIM FOR RELIEF**

6 **(Fraud – Against Siravo and Swedberg)**

7 130. The Conservator incorporates by reference paragraphs 1 through 23, 81
8 through 105 and 125 through 129, inclusive, of this complaint as though fully set
9 forth.

10 131. As officers of WesCorp, the SERP Defendants had a duty to provide
11 candid and truthful information to the board of directors in matters affecting
12 compensation and employment issues and had a further duty not to conceal material
13 facts related to compensation and employment issues.

14 132. On or about November 2, 2007, the SERP Defendants made the
15 representations described above with regard to the changes to the Siravo SERP, and
16 on or about June 24, 2008, they made similar representations with regard to the
17 Executive SERP. The SERP Defendants also incorrectly calculated and failed to
18 correct errors that they were aware of in the amendments to the SERPs.

19 133. The representations alleged above made with regard to the Siravo
20 SERP and the Executive SERP were false when made, and the Conservator is
21 informed and believes, and on that basis alleges that the SERP Defendants knew
22 them to be false or had no reasonable basis for believing that they were true and that
23 they made these representations and concealed material facts with the intent to
24 defraud and to induce the WesCorp board of directors to approve the amendments to
25 the SERP plans and to have WesCorp make the increased payments to them as
26 described above.

27 134. In reliance on the aforesaid false representations and the failure of the
28 SERP Defendants to disclose material facts, the WesCorp board of directors

1 approved the amendments to the SERPs and permitted the increased SERP
2 payments to Siravo and Swedberg.

3 135. The board of directors' reliance on the representations was justified
4 given the positions of trust occupied by the SERP Defendants.

5 136. As a result of the SERP Defendants' conduct in this regard, the
6 Conservator has incurred damages in excess of \$3,076,039.80.

7 137. The conduct of the SERP Defendants was willful, malicious and
8 fraudulent and the Conservator is entitled to recover punitive and exemplary
9 damages.

10 **FIFTH CLAIM FOR RELIEF**

11 **(Breach of Fiduciary Duty – Against Siravo)**

12 138. The Conservator incorporates by reference paragraphs 1 through 23 and
13 81 through 109, inclusive, of this complaint as though fully set forth.

14 139. As the President and Chief Executive Officer of WesCorp, Siravo
15 occupied a position of trust with respect to WesCorp as defined under California
16 law. As such, he owed WesCorp a duty of loyalty and was required to perform his
17 job responsibilities in good faith and in a manner he believed to be in the best
18 interests of WesCorp, at the expense of his own personal interests and to provide
19 candid and truthful information to the board of directors in matters affecting
20 compensation and employment issues.

21 140. Siravo had a further duty to preserve WesCorp assets and not to
22 commit waste.

23 141. The Conservator is informed and believes and on that basis alleges that
24 Siravo breached his fiduciary duties by causing WesCorp to pay defendant Lane in
25 excess of \$1.4 million in compensation to which he was not entitled under the
26 Executive SERP, failing to disclose to the board the nature of the payment, and
27 failing to obtain appropriate board approval.

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1 142. As a result of Siravo's breach of fiduciary duties, the Conservator has
2 been damaged in an amount in excess of \$1.4 million, according to proof.

3 **SIXTH CLAIM FOR RELIEF**

4 **(Unjust Enrichment – Against Lane)**

5 143. The Conservator incorporates by reference paragraphs 1 through 23, 81
6 through 109 and 139 through 142, inclusive, of this complaint as though fully set
7 forth.

8 144. As an executive of WesCorp, Lane was entitled to participate in the
9 Executive SERP but only if he fulfilled the terms of the SERP, which required him
10 to remain employed at WesCorp until his expected retirement date.

11 145. The Conservator is informed and believes and on that basis alleges that
12 the Early Payout Agreement under which Lane received in excess of \$1.4 million
13 was not authorized by the WesCorp board of directors and was beyond Siravo's
14 authority to offer, and Lane knew or should have known, as Chief Financial Officer,
15 that the transaction was unauthorized and improper.

16 146. Pursuant to the Early Payout Agreement, Lane received a payment of
17 \$1.325 million in 2006 and of \$75,000 in each of 2007 and 2008. For all three years
18 he also received base compensation and a substantial "regular" bonus. On April 8,
19 2008, Lane left his employment with WesCorp before reaching his retirement age.

20 147. Lane was not entitled to the payments he received and was unjustly
21 enriched and the Conservator has been damaged in an amount according to proof.

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PRAYER FOR RELIEF

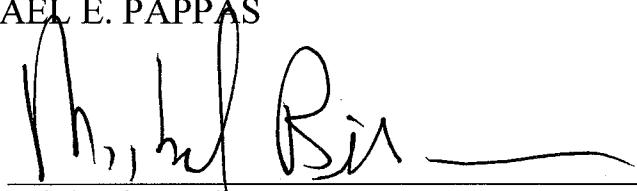
Wherefore the Conservator prays for damages as follows:

1. Compensatory damages according to proof;
2. Exemplary and punitive damages;
3. Costs of suit; and
4. Such other and further relief as this Court deems appropriate.

DATED: August 31, 2010

LUCE, FORWARD, HAMILTON & SCRIPPS LLP
MICHAEL H. BIERMAN
MICHAEL E. PAPPAS

By:



Michael H. Bierman
Attorneys For The National Credit Union
Administration Board As Conservator For
Western Corporate Federal Union

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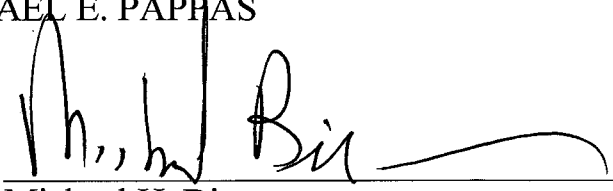
DEMAND FOR JURY TRIAL

The Conservator demands a jury trial.

DATED: August 31, 2010

LUCE, FORWARD, HAMILTON & SCRIPPS LLP
MICHAEL H. BIERMAN
MICHAEL E. PAPPAS

By:



Michael H. Bierman
Attorneys For The National Credit Union
Administration Board As Conservator For
Western Corporate Federal Union

201062694.12

EXHIBIT 1

Date: November 2, 2007
To: Robert Harvey, Board Chairman
From: Tom Swedberg, Vice President
Subject: Administrative Changes to CEO's Supplemental Executive Retirement Plan - 457(f)

Attachment: President/CEO Retention Program Agreement for your review.

Per our discussions in Nashville, Tennessee, attached is the information you requested regarding two suggested changes to the CEO Supplemental Executive Retirement Program.

In preparing for the May 2008 SERP distribution to Bob Siravo, we noticed there were two administrative errors in the current 457(f) plan document that are not consistent with the intent of the program when it was initially developed.

Our CEO's current 457(f) Plan utilized an old template that dated back to Dick Johnson's tenure as President when no bonuses or incentive pay plans existed at WesCorp and the concept of tax gross-up was not broadly utilized in 457(f) Plans.

As a result we recommend that the Board approve the following administrative changes:

- 1) The CEO's bonus and incentive pay be included in the benefit calculation. Without this change the benefit payments under the SERP Program effectively provide for only a 37 percent replacement rate instead of the agreed upon 48 percent of compensation rate.
- 2) Change the tax gross-up calculation to utilize the divisor of (.60%) versus the current multiplier of (1.40%). This change results in the correct tax gross-up amount.

Without these two changes, the existing plan will pay the CEO \$4.863 million which represents a replacement rate of 37 percent and is not properly grossed-up. With the inclusion of the two changes the CEO would receive the intended 48 percent of replacement rate payment that is properly grossed-up and receive an amount of \$7.412 million.

Attached is a copy of the current SERP plan document. The suggested changes are highlighted. Also attached is the appropriate Board Resolution.

Respectfully,

Tom Swedberg

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PROOF OF SERVICE

National Credit Union Administration, et al. v. Donna Bland, et al.

Case No. CV10-01597 GW (MANx)

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 601 S. Figueroa, Suite 3900, Los Angeles, California 90017.

On August 31, 2010, I served true copies of the following document described as:

FIRST AMENDED COMPLAINT FOR DAMAGES FOR BREACH OF FIDUCIARY DUTIES, GROSS NEGLIGENCE, FRAUD AND UNJUST ENRICHMENT - DEMAND FOR JURY TRIAL

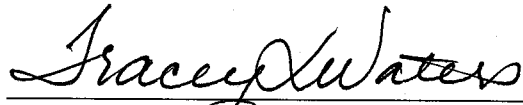
on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Luce, Forward, Hamilton & Scripps LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on August 31, 2010, at Los Angeles, California.



Tracey L. Waters

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