

1 **SHARON NOONAN KRAMER, PRO PER**
2 **2031 Arborwood Place**
3 **Escondido, CA 92029**
4 **(760) 746-8026**
5 **(760) 746-7540 Fax**

6 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
7 **FOR THE COUNTY OF SAN DIEGO, NORTH DISTRICT**

8 **BRUCE J. KELMAN &**
9 **GLOBALTOX, INC.,**

10 **Plaintiffs,**

11 **v.**

12 **SHARON KRAMER, and DOES 1**
13 **through 20, inclusive,**
14 **Defendant.**

CASE NO. GIN044539

**Defendant's Notice of Motion For
Reconsideration Re: Motions for
JNOV and New Trial;
Memorandum of Points and
Authorities; Declaration of
Defendant.**

**[Assigned for All Purposes To
Presiding Judge Department 31]**

Trial Date: August 18, 2008

**JNOV/New Trial Hearing Date:
December 12, 2008**

**Motion Hearing Date To Be
Assigned.**

15 **TO EACH PARTY AND ITS ATTORNEY OF RECORD:**

16 PLEASE TAKE NOTICE THAT: Defendant Sharon Kramer ("Kramer")
17 shall and hereby does move the Court to reconsider its Rulings on
18 the Motion for Judgment Not Withstanding the Verdict and the
19 Motion for a New Trial dated December 12, 2008. This motion is
20 made based on CCP 1008; Business and Professions Code 6068(d)(g);
21 and new evidence in the form of:

- 22 1. The transcript from the oral arguments, December 12, 2008;
- 23 2. Declaration of Jury Foreman, Roy Litzenberg, December 20,
24 2008;
- 25 3. The deposition transcript of Bruce J. Kelman in the
26 Mercury vs. Kramer case, October 1, 2003; and
- 27 4. A change of assignment of the trial judge to Family Court
28 commencing immediately after oral arguments.

**Notice Of Motion For Reconsideration Of Motions For JNOV And New Trial;
Memorandum Of Points and Authorities.**

1 It is supported by the accompanying Memorandum of Points and
2 Authorities and the declarations of Sharon Kramer, John Richards,
3 Esq, and William J. Brown III, Esq. For all practical purposes
4 this case is now Kelman vs. Kramer. The jury verdict finding
5 Plaintiff GlobalTox did not prove defamation is disputed by no
6 one.

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 As evidenced by the transcript of oral arguments, December
9 12, 2008, and *attached hereto in its entirety as Exhibit 1*, there
10 were many judicial errors when ruling on Kramer's Motions for
11 JNOV and New Trial. When denying Kramer's motions for JNOV and
12 New Trial, the Honorable Judge Lisa C. Schall ("the Judge")
13 refused to evaluate the undisputable evidence that Plaintiff
14 Kelman ("Kelman") had repeatedly presented false declarations
15 under penalty of perjury on the issue of malice and Plaintiff
16 Counsel, Mr. Scheuer, {"Plaintiff Counsel"} repeatedly submitted
17 the perjurious declarations to the Courts. In oral argument, the
18 Judge stated, "I can't be drawn into that kind of petty behavior,
19 demanding Mr. Scheuer to explain himself on things..." (Oral
20 Argument 19:13-15). "Things" is the repeated suborning of perjury
21 on an issue key to defamation law, ie, malice. The Judge declined
22 to view the irrefutable evidence that this perjury and suborning
23 of perjury did in fact occur. (Oral Argument 14:5-7). The Judge
24 stated, "I am not going to be reading anything you have from
25 another case in this case." Her decision to decline to examine
26 the irrefutable evidence that Kelman committed perjury on the
27 issue of malice, seemed to be based on the fact that the false
28 evidence was entered into the case prior to trial in the form of
declarations when the Honorable Judge Michael P Orfield was the
presiding judge who made the anti-SLAPP and MSJ rulings, and
again when before the Appellate court on the anti-SLAPP
motion. (Oral Argument 17:18-28, 19,20:1-3)

1 However, this is not a valid reason for a judge to refuse
2 to examine evidence of perjury presented before her court when
3 deciding whether the verdict should be set aside or a new trial
4 granted. Kramer did not ask the Judge to rescind the MSJ and
5 anti-SLAPP rulings or weigh the merits of prior rulings by other
6 judges. She asked the Judge to review the irrefutable proof that
7 perjury had impacted the trial and verdict while on this Judge's
8 watch. The Judge responded, "It's irrelevant for my purposes on
9 this motion (sic Motion for JNOV) unless its' something that
10 happened in the trial."

11 Regardless of prior judges' rulings or what occurred on
12 whose watch, the final impact of the perjury occurred on this
13 Judge's watch with a verdict reached in favor of Kelman while the
14 jury was subjected to a trial based on false facts on the issue
15 of malice. These false facts helped to erroneously frame the
16 scope of the trial, exclude evidence and experts (which would
17 have proven the perjury) and thus cause the wrongful verdict.
18 This wrongful verdict occurred while under Judge Schall's
19 presiding. Therefore, the Judge was responsible to determine if
20 evidence supported that perjury did in fact occur in violation of
21 Business and Professions Code 6068(d)"To employ, for the purpose
22 of maintaining the causes confided to him or her those means only
23 as are consistent with truth, and never to seek to mislead the
24 judge or any judicial officer by an artifice or false statement
25 of fact or law." And 6068(g)"Not to encourage either the
26 commencement or the continuance of an action or proceeding from
27 any corrupt motive of passion or interest."

28 Attached hereto collectively as Exhibit 2, are Kelman's
false declaration statements that were submitted by Plaintiff
Counsel to the Courts on September 15, 2005, May 8, 2006, and
March 26, 2008. They are regarding a testimony Kelman never gave

1 in the case of Mercury vs Kramer. This was then used in this case
2 of Kelman vs. Kramer as false reason Kramer would have malice.
(Oral argument 17:17-28,18).

3 Attached hereto collectively as Exhibit 3 are the
4 declarations of Kramer's two attorneys in the Mercury case, John
5 Richards, Esq. and William Brown III, Esq. stating no such
6 testimony was ever given by Kelman, nor was there a reason for
7 the Superior Court or the Appellate Court to surmise Kelman had
8 meant a prima facie burden of proof of malice; and certainly no
9 reason to frame the scope of the trial around this false
10 testimony. Exhibits 2 and 3 have been provided to the Judge prior
11 in the noticed motions for JNOV, New Trial and Motion to Strike
12 Costs of Kelman. As evidenced from the oral argument transcript,
13 page 12:20-21 the Judge stated, "I can't give you and any of this
14 credence because I don't know what you're talking about." And
15 page 14:11-14, "Only this case is before me. I don't have other
16 proceedings or other matters unless they were part of a judicial
17 noticed record, and they were in this case.." No less than 22
18 exhibits in the form of Kelman's and Kramer's deposition
19 testimony, Kelman's and Kramer's declarations, affidavits of
20 attorneys, affidavits of an expert witness (who was not permitted
21 to testify at trial) and excerpts of Kelman's actual testimony in
22 the Mercury case had been provided to the Judge in judicial
23 records/motions after trial proving Kelman's perjury had impacted
24 the verdict that was favorable to Kelman.

25 Kramer provided exhibits and affidavits of this perjury in
26 her Supplemental Objection to Costs, September 15, 2008; Motion
27 for JNOV Memorandum of Points and Authorities, October 31, 2008;
28 Motion for New Trial Memorandum of Points and Authorities,
October 31, 2008; Motion to Strike Costs, October 31, 2008;
Response to Plaintiffs' Opposition to JNOV and New Trial,
November 26, 2008; Opposition to Plaintiff's Opposition To Strike
Costs, December 1, 2008; and even went in Ex Parte on December 9,

1 2008 to request the Judge to compel Plaintiff Counsel tell the
2 truth on the matter. The plea fell on deaf ears with the judge
3 stating this Ex Parte application was not proper protocol for the
4 courts. She declined to even ask Plaintiff Counsel about the
5 perjurious declarations in both the Ex Parte hearing and the oral
arguments of December 12, 2008.

6 If the Judge read Kramer's motions and attached exhibits, it
7 is not possible that the Judge could not give "credence" or did
8 not know what Kramer was talking about, ie. that perjury on the
9 key issue of malice had occurred in this case, prior to making
her rulings of December 12, 2008 and while declining to even hear
10 oral argument for a Motion for New Trial.

11 As evidence of such a nature that it cannot be disbelieved,
12 *attached hereto as Exhibit 4* is the entire deposition testimony
13 of Kelman in the Mercury case *proving* Kelman and Plaintiff
14 Counsel presented false declarations in this case of Kelman vs.
15 Kramer on the issue of malice. Kramer cannot cite for the Court
16 to a specific line and page in Kelman's Mercury deposition
17 transcript as one cannot cite to purported testimony that does
18 not exist. More discussion of the Judge refusing to consider
19 unrefutable evidence of Kelman's perjury may be read at pages
20 2:27-28,3,4:1-10,4:26-28,5:9-16,12:8-21,14:3-17,17:21-28,18
21 of the oral argument transcript. These pages clearly indicate the
Judge had not read Kramer's motions that, by law, should be
granted. Nor had she read the undisputable evidence attached as
exhibits. (Oral argument 20:5-28, 21:1-16)

22 Judge Michael P. Orfield presided over this case for three
23 and a half years and set the trial date. Days before trial, Judge
24 Schall was assigned to oversee the trial. Had Judge Orfield been
25 the presiding judge, he would have quickly realized that he had
26 previously been presented false declarations by Kelman on the
27 issue of malice when defeating the anti-SLAPP and MSJ motions. A
nonsuit would have been granted. But by Judge Schall not allowing

1 any discussion of Kelman's science during trial or an expert, Dr.
2 Harriet Ammann, Senior Toxicologist for the State of Washington
3 Health Department (retired), to testify that as a toxicologist it
4 is not possible Kelman gave the expert testimony claimed the
5 Mercury case as Kramer's reason for malice, Judge Schall did not
6 grasp the impact that the perjurious testimony falsely promoting
7 personal malice was having on the trial and her framing of the
8 scope of the trial.

9 In fairness to Judge Schall, this case was her first and
10 last defamation case. Kramer realizes that the Judge has had a
11 difficult time of late and a change of employment occurred
12 immediately after her oral argument rulings of the December 12
13 2008. Kramer, having experienced much stress in recent years
14 herself, bears no ill will toward the Judge for errors made
15 before, during and after trial. Nor does she believe the Judge
16 bears ill will for her.

17 However, the Judge's inability to focus on important
18 evidence that was contrary to her preconceived opinion caused by
19 relying too heavily on the anti-SLAPP ruling (that was made while
20 considering Kelman's false testimony); her inexperience as a
21 defamation judge; and her unwillingness in oral argument to
22 address errors of trial that were clearly documented and
23 supported by exhibits in Kramer's motions; are not valid reasons
24 for Kramer to be denied the right to a fair trial, fair judgment
25 or fair consideration of motions after the trial.

26 At 3:55 PM, December 12, 2008, the denial of Kramer's
27 motions were the last rulings made by the Honorable Judge Lisa C.
28 Schall in her capacity of a Superior Court Judge. The transcript
indicates the Judge was already halfway out the door, not wanting
to hear or discuss evidence or motions. The transcript shows the
Judge was not willing to discuss the Motion for New Trial at all.
Period. (Oral argument 28:23-28).

1 THE COURT: No. I'm done. So tentative is final.

2 MS. KRAMER: What about the new trial, all the information on
3 the new trial?

4 THE COURT: I'm not going to grant any of the requests you've
5 made on that.

6 No less than thirty eight times, the Judge interrupted
7 Kramer from presenting her arguments while lecturing Kramer on
8 the law. The facts show that many errors were made in trial and
9 afterwards by permitting "Plaintiffs Special Jury Instructions,
10 Proof of Actual Malice" to induce a verdict favorable to Kelman;
11 the wrongful exclusion of Kramer's evidence and experts that were
12 necessary for her defense; false hearsay evidence considered by
13 the jury that was never discussed in trial; new evidence not
14 available at trial showing what Kelman why trying to silence
15 Kramer through this lawsuit (a Federal Government Accountability
16 Report, issued September 30, 2008); and the erroneously framed
17 scope of the trial based on a two year old anti-SLAPP ruling
18 before discovery. The oral argument transcript clearly shows that
19 motions were obviously never read or evaluated by the Judge, just
20 simply denied. As such, a reconsideration of the motions is now
21 warranted.

22 *Attached hereto as Exhibit 5 is new evidence that the jury*
23 *was instructed they had to find Kramer's writing was incorrect.*
24 *It is the Declaration of Jury Foreman, Roy Litzenberg, December*
25 *20, 2008. Mr. Litzenberg indicates that the jury asked the Judge*
26 *late in the deliberations that if they found for actual malice*
27 *according to **Plaintiff's Special Instructions, Proof of Actual***
28 ***Malice**, did that mean they had to find that Kelman proved by*
29 *clear and convincing evidence that Kramer knew the statement was*
30 *false, or had serious doubts about the truth of the statement.*
31 *Question 5 on the Special Verdict Form reads*

32 "Did Kelman prove by clear and convincing evidence that
33 Kramer knew the statement was false, or had serious doubts
34 about the truth of the statement? __ yes __ no"

1 The Judge's reply to the jury was "yes". This means the Judge,
2 not the jury, made the final determination to the final question
3 causing a verdict favorable to Kelman. The Plaintiff Special
4 Instructions held statements that it was legally predetermined
5 for the jury that Kramer had "anger, hostility, ill will, spite,
6 hatred, animosity" and "failure to investigate". The exact
7 sentences within the special instructions are,

8 "Although personal ill will by itself is not sufficient
9 to prove actual malice, a combination of Kramer's anger,
10 hostility toward the Plaintiffs, failure to investigate
11 or subsequent conduct may all constitute circumstantial
12 evidence that actual malice existed. Evidence alone of
13 Kramer's animosity, hatred, spite or ill will toward
14 Kelman or Globaltox does not establish actual malice."

15 Nowhere do the special instructions say "If you, jury, find
16 Kramer held anger, hostility, animosity, hatred, spite or ill
17 will toward Plaintiffs". Nowhere do the instructions say, "If
18 you, jury, find Kramer failed to investigate." This means the
19 jury was instructed Kramer failed to investigate, and therefore
20 they had to find her writing was false. This is contrary to the
21 Judges statements made in oral argument in which she indicates
22 the jury themselves found failure to investigate, not that they
23 were induced to according to the plaintiff's special jury
24 instructions they were told they had to follow. And then told
25 "yes" by following these, they had to find Kelman met his burden
26 of proof of actual malice by clear and convincing evidence. (Oral
27 arguments 15:13-24)

28 **Amazingly, for a defamation case where actual malice must be
proven by a standard of clear and convincing proof, there was not
a single piece of evidence ever presented at trial that Kramer
has ever blogged, published, emailed, posted or made comment
calling Kelman anything other than Kelman or Dr. Kelman. Kramer
has never written statements such as "Kelman is killing babies"
as Plaintiff Counsel was permitted to infer throughout the trial**

1 with no supporting evidence. Kramer, not being able to discuss
2 the science, could not refute the inflammatory and unfounded
3 inferences by not being able to discuss the impact of conflicts
4 of interest in public policy over the mold issue. The entire
5 premise of personal malice was founded on inflammatory inference
6 with false reason provided under penalty of perjury as to why
7 Kramer would harbor personal malice. This means the Special Jury
8 Instructions, Proof of Actual Malice was founded on inflammatory
9 inference and false testimony with a directive to find for actual
10 malice and failure to investigate, culminating with the judicial
11 answer of "yes" you do have to find Kelman met his burden of
12 proof. This is reason alone for a reconsideration of the motions
13 for new trial and a judgment notwithstanding the verdict. By
14 law, actual malice cannot be proven by false inference of
15 personal malice, not supported by evidence but supported by
16 perjurious testimony and a jury directive to find actual malice.
17 However, as evidenced by the oral argument transcript, 15:13-
18 24,28:23-28, the Judge was not willing to discuss the reasons for
19 a New Trial. Period.

20 The primary error overshadowing the trial and verdict stems
21 from the fact that the Judge, not experienced in libel law, came
22 into the case at the last minute and framed the scope of the
23 trial based on Kramer's anti-SLAPP motion that was defeated by
24 Kelman in November of 2006. By relying heavily on the anti-SLAPP
25 ruling, she had a perception bias of what the case was about
26 causing a steering of the proceedings to a mistrial. This is a
27 wrongful interpretation of the law. Anti-SLAPP rulings are only
28 meant to determine that a case may go forward. They are not
intended to be used as a blueprint for reasons to limit a
defendant's defense while causing a predetermined outcome of
trial consistent with the anti-SLAPP ruling.

Even more egregious in this case, when defeating the anti-
SLAPP motions in the first place, Kelman provided false

1 declarations under penalty of perjury on the issue of malice.
2 Plaintiff Counsel then knowingly used these false declarations to
3 his and his client's advantage many times over by steering the
4 case to make it appear Kramer's writing was a personal vendetta,
5 not a whistleblowing of a deceit in science impacting public
6 policy. As a result, the scope of the trial was based on false
7 testimony that was then wrongfully used by the defamation law
8 inexperienced and distracted Judge to deny a defendant a fair
9 trial and fair verdict.

10 As is clearly evidenced by several statements of the Judge
11 during oral arguments, the Judge, while operating under a
12 perception bias caused by relying on the anti-SLAPP ruling,
13 unwittingly let Plaintiff Counsel lead her as to what evidence
14 and experts were relevant and not relevant for Kramer's defense
15 when in trial. (Oral argument 5:26-28, 6:1-7, 6:27-28, 7, 8, 9, 10, 11,
12 12:1-12)

14 What the Courts have not understood about this litigation
15 right from its inception is that it is one of national
16 significance, impacting public policy over the mold issue. As
17 merely one of a vast number of examples of this, *attached hereto*
18 *as Exhibit 6* is a letter from a Boston City Counselor, September
19 28, 2005 to the US Senate Majority Health Education, Labor and
20 Pension Committee (Senate HELP Committee). The Counselor is
21 discussing how grateful she is that Sharon Kramer has "taken the
22 bull by the horns" to remove a deceit in public policy science
23 and how she "must voice her outrage at the personal legal attacks
24 Sharon is suffering by exposing the relationship between big
25 business funneling money to influence medical papers that harm
26 the health of our fellow Americans."

25 It is not logical for the Courts to think Kelman, who was
26 outed on the front page of the Wall Street Journal (2007) for the
27 conflicts of interest surrounding the science of his expert

1 witness testimony, would be so incensed simply by the word
2 "altered" in a little internet press release (2005) that he would
3 be willing to spend hundreds of thousands of dollars to defend
4 the honor of his expert witnessing from this simple little word.
5 Kelman never filed a lawsuit against the Wall Street Journal
6 claiming they defamed the legitimacy of his expert witness
7 opinion in the four page article specifically about the science
8 behind his expert opinion. This article in a national and
9 respected newspaper was far more damning than the little word
10 "altered" on the internet could ever be. If Kramer had been
11 intimidated and silenced in 2005 by this strategic litigation
12 against public participation, there never would have been a Wall
13 Street Journal article in 2007. The Courts, not savvy to the
14 politics behind the mold issue, have not understood the national
15 significance of Kelman's obfuscating and altering testimony that
16 Kramer wrote about in the press release in question.

17 Kramer's diligent efforts have changed public policy with the
18 assistance of Senate HELP Committee and the Federal Government
19 Accountability Office (GAO) to the detriment of Kelman's expert
20 witness business. With the release of the GAO Report, *"Indoor
21 Mold: Better Coordination of Research on Health Effects and More
22 Consistent Guidance Would Improve Federal Efforts"*, September 30,
23 2008, no longer can Kelman and others stand before the courts as
24 expert witnesses while claiming it is current accepted science
25 that illnesses "could not be" caused by exposure to mycotoxins.
26 This is important new evidence for a jury to understand. This is
27 exactly what Kelman was trying to stop from happening by using
28 this litigation meant to silence.

29 Kelman vs. Kramer was never a case about an honorable,
30 incensed scientist. It was always a case about a man with a PhD,
31 whose expert defense witnessing career began in Big Tobacco,
32 trying to silence a whistleblower, Kramer. The transcript of the
33 oral arguments shows the Judge never grasped what this case was

1 really all about and as a result of her misdirectives, neither
2 did the jury.

3 The irony of this case is that had Kelman and his
4 corporation not sued Kramer in 2005 for the use of the word
5 "altered" in a hokey little internet press release, no one would
6 have even paid attention to the writing that was the first to out
7 the questionable relationship of the American College of
8 Occupational and Environmental Medicine, a think-tank, and the US
9 Chamber of Commerce. Instead, this case has been written about
10 many times and in many venues causing others to question Kelman's
11 science and how it was legitimized and mass marketed. So in
12 essence, Kelman filing and aggressively pursuing this lawsuit is
13 what ultimately caused his own demise, culminating with the
14 Federal Government deeming Kelman's science he presents before
15 many courts as an expert, to be not legitimate science.

16 It is a travesty of justice that the Courts would allow this
17 case to slip through the cracks and that Kramer, who has changed
18 policy for the betterment of the public, would be labeled a
19 malicious liar for the *exact writing* that was the first to out the
20 deceit in science driving bad public policy over the mold issue.
21 Kramer's public participation press release (and this lawsuit) was
22 the catalyst that caused change. The change has come at great
23 expense for Kramer and her family from the exorbitant costs of
24 having to defend in a case founded on clearly documented,
25 irrefutable perjury by Kelman.

26 The sole action of this case has been Kelman accusing Kramer
27 of being a malicious liar because the word "altered" was
28 purportedly a false accusation of perjury. Yet, the undisputable
facts of the case show that it is Kelman, while under penalty of
perjury, who has been the liar as to why Kramer would have malice.
(see Exhibits 2 and 4. They are false declaration statements of
Kelman and the Mercury trial transcript). Oral arguments show the

1 Judge did not feel it was her responsibility to address this
2 perjury before the courts, even though it wrongly impacted the
3 verdict in the trial over which she presided.

4 As such, Kramer respectfully requests that the Court grant a
5 reconsideration of the Motion for JNOV and the Motion for New
6 Trial. Kramer makes no motion but respectfully requests under CCP
7 170.1(a)(1), 170.1(6)(A)(i)(ii)(iii) and 170.1(6)(B) that the
8 Honorable Judge Lisa C. Schall recuse herself, (if she is still
9 indeed considered as the presiding judge over this matter), and
10 that this Motion for Reconsideration be heard by the Honorable
11 Judge William S. Dato, Superior Court Judge, Department 31, North
12 County Division, San Diego Superior Court. Judge Schall was not
13 the presiding Judge over this three and a half year case and only
14 stepped in at time of trial. The evidence of the oral argument
15 transcript, December 12, 2008, indicates an inability to
16 effectively decipher relevant facts and an unwillingness to hear
17 argument or even read the motions for JNOV and New Trial. Again,
18 Kramer recognizes Judge Schall has had a difficult of late; was
19 inexperienced in defamation law at the time of trial; and was
20 asked to preside over an eight volume case just days before trial.
21 Regardless of why, these facts added to cause a mistrial and
22 subsequent wrongful denial of motions. Judge Dato has already taken
23 at least partial jurisdiction over this case through his
24 assignment as the new presiding judge of Department 31. He will be
25 hearing a motion on this case regarding costs on March 6, 2009.

26 Kramer cautions the Court that Plaintiff Counsel has
27 exhibited extraordinary skill many times over as a master of
28 inflammatory inferences and hyperbole while providing no evidence
or false evidence in support of many statements. As such, she
requests that the Court do not take Plaintiff Counsel's writings
that are not supported by attached evidence or exhibit at face
value.

1 Dated: December 22, 2008

Respectfully submitted,

2
3 Sharon Kramer, Defendant Pro Per

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6
7 **Declaration of Sharon Kramer**

8
9 **My name is Sharon Kramer. I am the Defendant Pro Per in the case of Kelman vs.**
10 **Kramer. I have provided the Court undisputable evidence of such a nature that it cannot be**
11 **disbelieved that Kelman and his counsel have repeatedly submitted false declarations under**
12 **penalty of perjury on the issue of malice. These false declarations made under penalty of**
13 **perjury caused a wrongful framing of the trial and wrongful exclusion of evidence and**
14 **experts at trial. Thus, they caused a jury verdict favorable to Kelman that was reached by**
15 **means that are against the law. As such, I respectfully request the Courts to reconsider the**
16 **Honorable Judge Lisa C. Schall's rulings of December 12, 2008, on the Motion for**
17 **Judgment Notwithstanding the Verdict and the Motion for New Trial.**

18
19 **I declare under penalty of perjury of the laws of the State of California that the foregoing**
20 **is true and correct and that this Declaration was executed by me on this 22nd day of**
21 **December, 2008, in Escondido, California.**

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26
27 Sharon Kramer