IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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MICHAEL ETCHEGOINBERRY, *et al*., Plaintiffs, v. THE UNITED STATES, Defendant.	)	No. 11-564 L Judge Marian Blank Horn

PLAINTIFFS' RESPONSE TO THE UNITED STATES' SUPPLEMENTAL BRIEF REGARDING ADDITIONAL AUTHORITY IN SUPPORT OF ITS MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. INTRODUCTION

Judge Hewitt's Opinion and Order dismissing the Westlands Water District's contract case is not the silver bullet the Government makes it out to be. To the contrary, it expressly finds that a number of the claims brought by the District would not be time-barred, and it certainly does not resolve the issue pending before this Court as to the timeliness of Plaintiffs' takings claim. The Government's contradictory arguments exaggerate the decision's reach. They also fail to appreciate the court's reasoning as to why some of the District's claims would have been timely and how that reasoning actually supports the timeliness of Plaintiffs' takings claim here.

Judge Hewitt dismissed the District's case because she found nothing in the contracts between the United States and the District that obligated the United States to provide the District drainage. In reaching this conclusion, Judge Hewitt confirmed the Government's *statutory* obligation to provide drainage, which establishes the predicate duty for Plaintiffs' takings claim. But nowhere in Judge Hewitt's decision does she consider the takings claim presented here, which presents an entirely different issue by entirely different parties, subject to an entirely distinct accrual analysis. In pushing this Court to embrace Judge Hewitt's decision to obtain a result that is in no way supported by that decision, the Government ignores these relevant differences between the two cases.

For instance, Judge Hewitt's Opinion and Order never holds that the Bureau of Reclamation's September 2010 letter to Senator Feinstein cannot accrue any claim, let alone a takings claim by farmers that was never considered by that court. Based on the substantial physical invasion to Plaintiffs' farmlands and Plaintiffs' reasonable foreseeability of the damage to their farmlands, Plaintiffs are entitled to proceed with their takings claim now.

Judge Hewitt's Opinion and Order also does not diminish Plaintiffs' justifiable uncertainty as to the permanence of their Constitutional claim. Plaintiffs' justifiable uncertainty was never based exclusively on the contracts between the United States and the District as the Government's supplemental motion appears to suggest. Numerous events and government actions since 1986, all grounded in the San Luis Act, contributed to Plaintiffs' uncertainty and delayed stabilization of their claim. This includes any Government expression of its intent to provide drainage, including those in the contracts.

Finally, Judge Hewitt's decision to time-bar two of the Water District's breach of contract claims does not mean Plaintiffs' takings claim is time-barred, since accrual of each claim is subject to a distinct accrual analysis. The stabilization doctrine, which applies to Plaintiffs' takings claim, but was never considered by Judge Hewitt in her analysis of the contract claims, leads to the exact opposite result.

Accordingly, nothing in Judge Hewitt's Opinion and Order or in the Government's supplemental brief interpreting that decision undercuts the timeliness of Plaintiffs' takings claim, and there is much in Judge Hewitt's decision that actually supports it.

II. ARGUMENT

A. The Bureau's September 2010 Letter to Senator Feinstein Can Accrue Plaintiffs' Takings Claim.

The Government's contention that the Bureau's September 2010 letter to Senator Feinstein cannot accrue Plaintiffs' takings claim is wrong, and cannot, in any event, be understood to support an argument that Plaintiffs' takings claim already accrued outside of the limitations period.

A takings claim caused by a continuous process, such as a flood, accrues when the situation becomes stabilized. *U.S. v. Dickinson*, 331 U.S. 745, 749 (1947). The Federal Circuit has defined this point to be "when it becomes clear that the gradual process set into motion by the government

has effected a permanent taking, not when the process has ceased or when the entire extent of the damage is determined." *Boling v. U.S.*, 220 F.3d 1365, 1370-1371 (Fed. Cir. 2000). "[O]nce it is clear that the process has resulted in a permanent taking and the extent of the damage is reasonably foreseeable, the claim accrues and the statute of limitations begins to run." *Id.* at 1371.[1] Principles of fairness underscore this accrual analysis and discourage "applying an excessively rigid rule when the government takes property through a gradual physical process." *Dickinson*, 331 U.S. at 749.

Under this framework, Plaintiffs' takings claim accrued recently, and the Bureau's September 2010 letter effected that accrual. There is no dispute that a substantial physical invasion of foul groundwater to Plaintiff's farmlands has occurred. *See* Compl. ¶¶ 106-108; U.S. Re-filed Reply Br., at 14 (filed Jan. 11, 2013 [Doc. 59]). And the extent of that harm to Plaintiffs' farmlands only became reasonably foreseeable to Plaintiffs by release of the Bureau's critical September 2010 letter. U.S. Dept. Interior, Letter to Sen. Dianne Feinstein (Sept. 1, 2010) (Stip. Fact UUU [App. 60 {JA01875-JA01879}]). In that letter – to be read in the light most favorable to Plaintiffs (*see Farmers Grain Co. v. U.S.*, 29 Fed. Cl. 684, 686 (1993)) – the Bureau openly rejected the agreed-upon drainage solution embodied in its own 2007 Record of Decision. *Id.* at

[1] The court in *Hansen v. United States*, 65 Fed. Cl. 76 (2005), marked the point of accrual as follows:

> [I]n a case involving a taking by a continuing physical process, a claim is ripe for adjudication if the government has caused a substantial invasion of the plaintiff's property and the extent of the harm caused by the invasion is foreseeable. Under this rule, a plaintiff may seek just compensation for harm to private property that has not occurred, so long as that harm is shown to be reasonably foreseeable.

Id. at 126. Using "common sense of legal pragmatism," the *Hansen* court concluded that "injustice would result if plaintiff were required either to file multiple takings claims to obtain just compensation – or risk having his claims become time-barred because the facts do not fit neatly within the limits of the stabilization doctrine." *Id.*

JA01876 ("[T]he alternative selected in the ROD cannot be implemented fully under existing law."). In a clear break from past actions and decisions, the Bureau also purported to then transfer responsibility for its drainage obligations under the San Luis Act to the local water districts. *Id.* ("We believe the best way to accomplish [our] goals is to transfer responsibility for irrigation drainage to local control."). And the Bureau even threatened to withhold water from Westlands if the local water districts in California did not get behind the Government's new plan. *Id.* ("Reclamation should be directed to stop delivery of CVP water that would go to parcels of land for which the districts fail to provide acceptable drainage service within a specified timeframe.").

Importantly, the Bureau's September 2010 letter trailed the Government's consistent failure to pursue the necessary legislation to implement the long-planned, long-term, district-wide drainage solution required to implement the full 2007 Record of Decision. Notwithstanding this commitment, the Government's Control Schedule for drainage implementation was limited to just a single subunit of the San Luis Unit. *See* Supplemental Status Report, *Firebaugh Canal,* No. CV-88-0634 (E.D. Cal. Nov. 18, 2009) (Stip. Fact RRR [App. 57 {JA01847}]). And the Bureau had made no effort to seek new authorizing legislation to increase the appropriations ceiling required for full Record of Decision implementation beyond this single subunit. *See* Federal Defendants' Status Report, *Firebaugh Canal,* No. CV-88-0634 (E.D. Cal. Apr. 1, 2010) (Stip. Fact TTT [App. 59 {JA01862-JA01870}]) (no action taken on legislative proposal for long-term drainage strategy that would increase amount of appropriations for ROD implementation). In this context, Interior's rejection of its own Record of Decision expressed in September 2010 marked the point where the extent of the harm to Plaintiffs' farmlands became reasonably foreseeable. It was then that Plaintiffs' takings claim became readily susceptible to adjudication, not in 1986.

The shortcomings the *Westlands* court identified with the Bureau's letter, and which the Government emphasizes here in an attempt to undermine Plaintiffs' proffered accrual date, are inapposite. Importantly, such deficiencies were not expressed in the context of a statute of limitations analysis. Rather, that discussion was part of the *Westlands* court's analysis of whether the District could state a claim for relief under an anticipatory breach of contract cause of action. *Westlands*, Case No. 12-12 C, slip op. at 36. It was the letter's silence on the existence of a contractual obligation that compelled the court to conclude that the letter was not a "distinct, unqualified refusal to perform a *contractual* duty." *Id.* (emphasis added). Whether the letter could amount to clear repudiation of a contractual duty is a far different inquiry than whether it could be a reasonable date of accrual for a takings claim.

In fact, when considered in the context of a *statute of limitations* analysis, Judge Hewitt found that the Bureau's letter *could indeed serve as the basis for accrual of several claims* – an aspect of Judge Hewitt's ruling the Government conveniently neglects to mention. The *Westlands* court found that the claim for anticipatory breach "would survive the statute of limitations" based on the District's position that the Government had made clear its intent to abandon its drainage obligation in September 2010. *Id.* at 48. The court also found that the total breach claim would have accrued in 2010 based on the District's assertion that it then "became clear that the Government would never provide the drainage facilities required." *Id.* at 47. Thus, the *Westlands* decision does not present any obstacle to a takings claim accrual in 2010, and in fact supports it.

Finally, the Government's unsurprising rejection of the Bureau's September 2010 letter as the proper accrual date certainly does not dictate that Plaintiffs' claim accrued before September 1, 2005 – outside of the limitations period – and the Government provides no support for such an assertion. *See* U.S. Supp. Br., at 2-3 (filed Feb. 6, 2013 [Doc. 72]). In fact, the position taken by

the Government that the "letter is simply not an event sufficient to accrue Plaintiffs' claim" – an apparent ripeness argument antithetical to its untimeliness defense – simply pinpoints the defects in its statute of limitations argument. On the one hand, the Government contends that the Bureau's September 2010 letter is inadequate to accrue Plaintiffs' claim because it purportedly expresses a commitment to provide some drainage, while on the other hand, it argues Plaintiffs' claim accrued much earlier notwithstanding similar expressions of the Government's intent to provide drainage. *See, e.g.,* U.S. Re-filed Reply Br., at 6-8 (filed Jan. 11, 2013 [Doc. 59]). The Government cannot have it both ways.

B. Under the Stabilization Doctrine – Which Provides the Proper Framework to Analyze Accrual Here – Plaintiffs' Takings Claim Did Not Accrue in 1986.

1. Plaintiffs' Justifiable Uncertainty Resulting from Numerous Events and Government Promises Since 1986 Has Delayed Stabilization of Their Takings Claim.

The Government's conclusion that Plaintiffs' takings claim accrued because Judge Hewitt found that "damage began due to the cessation of drainage in 1986" wrongly extends Judge Hewitt's breach of contract accrual analysis to Plaintiffs' takings claim. Even though the Government acknowledges "the claim accrual analysis for a breach of contract differs from that of a taking," its analysis neither explains the differences nor accounts for them. Thus, the result the Government urges this Court to reach is premised on a hastily drawn conclusion that ignores the important differences in analyzing accrual for very different claims.

The most fundamental of those differences is that the stabilization doctrine determines when a takings claim, based on a gradual and continuous process, accrues. *See Dickinson*, 331 U.S. at 749; *Applegate v. U.S.*, 25 F.3d 1579, 1583-84 (Fed. Cir. 1994); *Hansen v. U.S.*, 65 Fed. Cl. 76, 125 (2005) ("The *Dickinson* stabilization doctrine determines when the statute of limitation on continuous physical process takings claims begins to run.").

Here, because Plaintiffs assert a single claim for a taking premised on a gradual and continuous process – flooding as a result of the rising, saline groundwater beneath Plaintiffs' farmlands – the accrual analysis must be analyzed in terms of the stabilization doctrine, which is in stark contrast to Judge Hewitt's accrual analysis for breach of contract claims in *Westlands*. Judge Hewitt never considered when a takings claim accrued because the Water District never asserted such a claim. *See generally Westlands*, No. 12-12 C, slip op. at 1-56. Similarly, Judge Hewitt never examined how accrual of a breach of contract claim is distinct from accrual of a takings claim involving similar facts. *See id.* And critically, Judge Hewitt never analyzed the stabilization doctrine. *See id.* Given this, Judge Hewitt's decision related to the accrual of breach of contract claims has limited application to determining when Plaintiffs' takings claim accrued here.

Analyzed appropriately under the stabilization doctrine, the raw facts demonstrate that Plaintiffs' takings claim did not accrue in 1986, when Judge Hewitt found the Water District's breach claims accrued, because Plaintiffs were justifiably uncertain as to the permanence of their claim in the ensuing years. Since the 1986 closure of the Kesterson Reservoir and cessation of drainage to any farmlands in the San Luis Unit, that uncertainty has been forged by the following facts:

Dec. 1986	United States agrees to complete drainage plan by 1991 as part of *Barcellos* Judgment. (Stip. Fact BB [App. 21 {JA00591-JA00648}]).
Dec. 1988	*Firebaugh* litigation filed in order to address whether the United States was obligated to complete the San Luis Drain to provide drainage to San Luis Unit farmlands . (Stip. Fact CC [App. 22 {JA00649-JA00664}]).
Aug. 1989	Bureau forms San Luis Unit Drainage Program in order to "achieve a long-term solution to the drainage problem in the San Luis Unit." (Pl. Fact P-B [App. P02 {PA00021}]).

Mar. 1990	Bureau releases Plan of Study for the San Luis Unit Drainage Program "to identify and implement a long-term solution to the drainage problem of the [San Luis Unit]." (Pl. Fact P-C [App. P03 {PA00029}]).
Sept. 1990	San Joaquin Valley Drainage Program, a federal-state interagency program, issues Rainbow Report, which purports "to identify measures to help solve immediate drainage-related problems." (Stip. Fact. EE [App. 24 {JA00719-JA00782}]).
Jan. 1991	*Sumner Peck* litigation filed in order to address whether the United States was obligated to complete the San Luis Drain to provide drainage to San Luis Unit farmlands. (Stip. Fact FF [App. 25 {JA00783-JA00845}]).
Dec. 1991	Bureau releases NEPA Draft Environmental Impact Statement for San Luis Unit Drainage Program, which purports to "address drainage needs through the year 2007." (Stip. Fact GG [App. 23 {JA00667, JA00672-JA00679}]).
May 1993	U.S. District Court issues ruling in *Sumner Peck* that "the San Luis Act requires [Interior] to make provisions for drainage as specified in the Act" and that "the failure to do so violates the Act." (Stip. Fact J [App. 09 {JA00373-JA00395}]).
Dec. 1994	U.S. District Court issues Findings of Fact and Conclusions of Law in *Sumner Peck*, finding that the United States' obligation to provide drainage was not foreclosed or excused and that Interior "must be provided an opportunity to comply with the law to provide drainage to the San Luis Unit." (Stip. Fact NN [App. 32 {JA01076-JA01122}]).
Mar. 1995	U.S. District Court issues order, holding that the United States has a statutory duty to provide drainage and issuing a permanent injunction commanding the United States to apply for the permits necessary to complete the San Luis Drain. (Stip. Fact OO [App. 33 {JA01123-JA01136}]).
Feb. 2000	U.S. Court of Appeals for the Ninth Circuit affirms District Court Order that United States is obligated to provide drainage to San Luis Unit. (Stip. Fact QQ [App. 06 {JA000236-JA00245}]).
Apr. 2001	Bureau releases Plan of Action, providing an overview and timeline for providing drainage service within the San Luis Unit. (Stip. Fact SS [App. 36 {JA01144-JA01176}]).

Dec. 2001	Bureau releases Preliminary Alternatives Report, which expresses Government's objective to promptly implement a plan to provide drainage to the San Luis Unit and identifies range of options that could be utilized to satisfy court's order to provide drainage service. (Stip. Fact TT [App. 17 {JA00530-JA00573}]).
Dec. 2002	Bureau releases Plan Formulation Report, setting forth an analysis of the various alternatives for providing drainage to San Luis Unit and selecting alternative the Government intends to pursue. (Stip. Fact XX [App. 39 {JA01198-JA01250}]).
July 2004	Bureau releases Plan Formulation Report Addendum, adding another alternative plan for providing drainage to the San Luis Unit. (Stip. Fact EEE [App. 46 {JA01399-JA01420}]).
May 2005	Bureau releases Draft Environmental Impact Statement, analyzing environmental effects of proposed alternatives for providing drainage service to the San Luis Unit. (Stip. Fact III [App. 50 {JA01461-JA01541}]).
May 2006	Bureau releases Final Environmental Impact Statement in order to implement preferred drainage alternative for providing drainage service to San Luis Unit. (Stip. Fact KKK [App. 52 {JA01553-JA01745}]).
Mar. 2007	Bureau adopts Record of Decision, selecting alternative to fulfill drainage obligations and requirements of Court Order. (Stip. Fact LLL [App. 10 {JA00398-JA00438}]).
July 2008	Bureau submits Feasibility Report to U.S. Congress, determining feasibility of selected alternative to be implemented and noting selected alternative would require Congressional action to increase cost ceiling for the San Luis Unit. (Stip. Fact NNN [App. 07 {JA00246-JA00318}]; Stip. Fact OOO [App. 54 {JA01827-JA01829}]).
Nov. 2009	Bureau submits to court Control Schedule as part of Supplemental Status Report, outlining actions between 2010 and 2019 to implement limited drainage in only one subpart of San Luis Unit while reaffirming intention to finalize by the end of 2009 the elements of a legislative proposal for long-term drainage strategy. (Stip. Fact RRR [App. 57 {JA01845-JA01855}]).
Sept. 2010	Bureau sends letter to Senator Feinstein announcing rejection of Court and prior commitment to implement 2007 Record of Decision. (Stip. Fact UUU [App. 60 {JA01875-JA01876}]).

Under these overwhelming facts, the permanence of Plaintiffs' takings claim has been uncertain at least through the Government's promise to implement the drainage plan laid out in the Bureau's March 2007 Record of Decision. At no point in time since the cessation of drainage in 1986 and through September 2010 has a six-year period elapsed without an event that instilled in Plaintiffs the expectation that drainage would be provided to their farmlands. The contracts between the United States and Westlands do not undermine that expectation.

2. The Contracts Between the United States and the Water District Have Added To Plaintiffs' Justifiable Uncertainty But Have Not Been the Exclusive Or Even Primary Basis For Plaintiffs' Uncertainty.

In addition, the Government's suggestion that Plaintiffs' uncertainty as to their takings claim should be rejected as a result of Judge Hewitt's ruling that no *contractual* obligation to provide drainage exists between the United States and the District (as opposed to *statutory* obligation) misreads Judge Hewitt's decision and overstates Plaintiffs' reliance on the contracts as the grounds for their uncertainty.

The Government misreads the *Westlands* decision because even if the court found that nothing in the contracts established a binding contractual drainage obligation, Judge Hewitt never disavows the drainage representations made by the Government in the contracts. *See Westlands*, Case No. 12-12 C, slip op. at 20-28. In fact, Judge Hewitt's interpretation of the contracts provides added reasons as to why Plaintiffs' uncertainty is justified. *See id.* For instance, Judge Hewitt found certain provisions in the 1963 Contract reflected that the United States "intended to fulfill its statutory duty to provide drainage pursuant to the San Luis Act," or constituted "a statement of the government's prediction or intent that drainage service would be available in the future." *Id.* at 10, 22. Judge Hewitt found a recital in the 1965 Contract to "express[] a government intention to undertake construction of drainage," and that certain maps "reflect . . . the intent of the government

to complete the construction [of drainage facilities] in accordance with the maps." *Id.* at 25. The *Westlands* court also found that a provision in an interim contract "represents [the government's] prediction or intent that drainage services will be provided to Westlands in the future." *Id.* at 28. Given this interpretation, absolutely nothing in Judge Hewitt's Opinion and Order is antithetical to Plaintiffs' position that they were justifiably uncertain as to the permanence of their taking for years. Rather, Judge Hewitt's recognition of both the Government's statutory obligation as well as its expressions of intent to provide drainage in the contracts only reinforces the contracts as reasonable, additional grounds for Plaintiffs' uncertainty.

Further, just as Plaintiffs never predicated their takings claim on the contracts, they have not based justifiable uncertainty on specific contractual obligations by the Government to provide drainage, as the Government submits. Plaintiffs' briefs that the Government cites to make this clear: In the first brief cited by the Government, Plaintiffs invoked the "existing valid contracts between the United States and Westlands Water District involving drainage" and referred to contractual terms obligating Westlands landowners to pay drainage services fees in order to rebut the Government's purported claim to have made a "policy decision" to forego its drainage obligation. *See* Pls.' Surreply, at 5-6 (filed Mar. 30, 2012 and June 15, 2012 [Doc. 31-1 and 35]). In the other brief cited by the Government, Plaintiffs elaborate upon these drainage service fees as a further basis for establishing uncertainty among the farmers. Pls.' Resp. to U.S. Supp. Br., at 7-8 (filed June 15, 2012 [Doc. No. 36]). Contrary to the Government's assertion, nowhere do Plaintiffs assert that a contractual obligation by the Government to provide drainage is the basis for their uncertainty. *See id*.

Moreover, any suggestion by the Government that the contracts between the United States and the District were the sole basis, or even primary reason, for Plaintiffs' uncertainty is simply

inaccurate. The suggestion is contradicted by the facts in the extensive record enumerated above. *See* Section II.B.1, *supra*. It is also directly disputed by Plaintiffs' express arguments that even without the contracts, the facts "sufficiently establish justifiable uncertainty," and the contracts "contributed to the justifiable uncertainty" and "simply underscore" that uncertainty. *See* Pls.' Resp. to U.S. Supp. Br., at 7-8 (filed June 15, 2012 [Doc. No. 36]). In sum, even though provisions in the contracts, which Judge Hewitt found express the Government's intent to provide drainage did have the effect of compounding uncertainty already well-established by other Government conduct, the contracts have never been the only bases for Plaintiffs' justifiable uncertainty.

Finally and in any event, while the drainage service fees and Government representations in the contracts are relevant to contributing to Plaintiffs' uncertainty, the contracts are not dispositive in the accrual analysis. Before Judge Hewitt's decision was issued, the Government argued that the contracts should have little to do with when Plaintiffs' takings claim accrued:

> The contracts from the 1960s were not new commitments or new actions which could constitute mitigation promises by the United States in the 1990s. Plaintiffs also fail to provide any argument explaining how the interim renewal service contracts from 2007 and 2010 could have any effect whatsoever on events transpiring in the 1990s.

U.S. Supp. Br., at 7-8 (filed June 28, 2012 [Doc. 34]). The Government's newfound enthusiasm for the contracts simply marks a misguided and opportunistic shift in position rather than an accurate reflection of how Judge Hewitt's breach of contract accrual analysis should inform this Court's accrual analysis of Plaintiffs' takings claim.

C. Judge Hewitt's Decision Does Not Undermine This Court's Jurisdiction Over Plaintiffs' Takings Claim.

Ultimately, nothing in Judge Hewitt's Opinion and Order compromises this Court's jurisdiction over Plaintiffs' takings claim, especially given that Plaintiffs have more than satisfied their burden on a motion to dismiss to demonstrate that subject matter jurisdiction with this Court is

proper and that they are "entitled to offer evidence in support of the[ir] claims." *See Patton v. U.S.*, 64 Fed. Cl. 768, 773 (2005) (citations omitted). "[U]nless it is beyond doubt" Plaintiffs can "prove no set of facts which would entitle [them] to relief," Plaintiffs claim should not be dismissed. *Hamlet v. U.S.*, 873 F. 2d 1414, 1416 (Fed. Cir. 1986); *see also Juda v. U.S.*, 6 Cl. Ct. 441, 450 (1984) ("Denial of a taking claim on the basis of the defense of limitations is warranted only when the facts alleged demonstrate conclusively that such a decision is required as a matter of law."). Holding otherwise would penalize Plaintiffs for their reasonable belief that the Government would comply with its statutory duty, adhere to court orders, and make good on its years of representations that it would achieve a drainage solution for the San Luis Unit. Such a ruling would create the very "injustice" the Court of Federal Claims has warned against and would be incompatible with the Supreme Court's mandate in *Dickinson* that takings claims be enforced with an eye toward fairness. *See Hansen*, 65 Fed. Cl. at 126; *Dickinson*, 331 U.S. at 749.

III. CONCLUSION

For these reasons, this Court's jurisdiction over Plaintiffs' claim is entirely proper.

Respectfully submitted,

BEVERIDGE & DIAMOND, P.C.

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/s/ Lily N. Chinn

Lily N. Chinn
Ryan R. Tacorda
456 Montgomery Street, Suite 1800
San Francisco, CA 94104
Tel: (415) 262-4000 / Fax: (415) 262-4040
Email: lchinn@bdlaw.com
rtacorda@bdlaw.com

Gus B. Bauman
1350 I Street, N.W., Suite 700
Washington, DC 20005
Tel: (202) 789-6000 / Fax: (202) 789-6190
Email: gbauman@bdlaw.com

KERSHAW, CUTTER & RATINOFF

William A. Kershaw
Lyle W. Cook
401 Watt Avenue
Sacramento, CA 95864
Tel: (916) 448-9800 / Fax: (916) 669-4499
Email: wkershaw@kcrlegal.com
lcook@kcrlegal.com

Counsel for Plaintiffs