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September 1, 2016

VIA EMAIL

Dianne Martinez, Mayor
Council Members of City of Emeryville
Emeryville City Hall
1333 Park Avenue
Emeryville, CA 94608
mdesai@emeryville.org

Re: Additional Information Regarding the City of Emeryville's (City) Exhaustive and Legally Adequate Environmental Review Process for the Sherwin Williams Development Project (Project) and the City's Certification of the Final Environmental Impact Report for the Project (Project EIR)

Dear Mayor and Honorable Members of the City Council:

We are writing on behalf of our client, the Project applicant, and appreciate the opportunity to provide additional information on the following topics:

1. The City's careful and thorough assessment of the Project;
2. The City's role in certifying the Project EIR;
3. Legal standards applicable to the City's certification of the Project EIR; and
4. The four letters submitted to the City after the comment period closed.

We believe that this information will assist the members of the City Council (collectively, the Council) in considering the recommendation by City staff that the Council certify the Project EIR.

1. The City's careful and thorough assessment of the Project

More than a decade ago, Sherwin-Williams Company (Sherwin) embarked on a planning process in cooperation with the City to convert a defunct industrial property located at the corner

of Horton Street and Sherwin Avenue (the Sherwin site) into an environmentally conscious, high-quality commercial and residential space that would benefit the City and its residents.

Sherwin completed substantial site remediation so that the type of development contemplated in the Project now proposed—namely, a development with a mix of residential, commercial, park and open space uses—could be built. For more than five years, Sherwin worked with the agencies having jurisdiction over hazardous substances to remediate the Project site to the extent necessary to accommodate residential development. The level of remediation required to accommodate residential development is more extensive and costly than what would have been required of Sherwin had Sherwin elected to simply leave the land fallow and unoccupied. Sherwin received its remediation Certificate of Completion from the Department of Toxic Substances Control (DTSC) in 2012 and thus the Sherwin site has been ready for residential development for more than three years.

The City and Sherwin worked together to update the City's General Plan so that it accommodated precisely the type of development project now being proposed at the Sherwin site. This is significant from an environmental review standpoint. It means that the City has already studied the basic environmental effects of the Project under the California Environmental Quality Act (CEQA). When the City updated its General Plan, it prepared an environmental impact report (EIR) for that update, and that EIR studied the effects of a project of the same density and uses as the Project currently proposed. Per CEQA, the City could have relied upon the conclusions in the General Plan EIR that pertained to this Project's environmental impacts and confined subsequent environmental review to only those Project impacts not fully evaluated in the General Plan EIR.[1] Nevertheless, the City embarked on a full and complete review of the Project with preparation of a brand new EIR (the Project EIR) as discussed further below.

Finally, it is certainly worth noting that Sherwin actively and purposely sought to partner with local and experienced development groups having a proven track record in executing complex mixed-use urban infill projects. The chosen development group is well equipped and experienced in the type of project now proposed. As you are aware, Sherwin and its development partners have been working with community stakeholders for several years to ensure that the Project accommodates their needs and desires and is designed in a way that alleviates their concerns. Although such community outreach is unrelated to the adequacy of the Project EIR, it is important to understand that Sherwin and its development partners have expended a considerable amount of time and money ensuring that the Project will not only preserve the character of the surrounding neighborhood, but will also demonstrably improve

[1] CEQA authorizes lead agencies to "tier" environmental review such that, when an EIR has been certified for a program, plan or policy, subsequent environmental review for a proposed project within the program, plan or policy area can be streamlined. *See* Pub. Res. Code § 21094(a); CEQA Guidelines § 15152.

neighborhood character by providing much-needed amenities such as a public park and neighborhood retail.

The long entitlement processing timeline for this Project demonstrates that: (i) the Project is a product of City, community and developer collaboration; (ii) the Project has had the environmentally beneficial effect of prompting a residential occupancy level of site remediation; and (iii) completing the Project will help the City achieve its stated land use development goals.

Beginning in December, 2014, the Project was subjected to the most comprehensive form of environmental review available under CEQA—specifically, preparation of a completely new Project EIR. As discussed above, the basic form of development proposed by the Project was already evaluated in the EIR prepared for the City's General Plan update and the City could have tiered its review of the Project using the 2009 General Plan update EIR. However, the City conservatively elected to prepare an entirely new EIR for the Project itself. From the beginning, the City involved the public in the EIR process. Although it was not required to do so, the City held a formal public scoping meeting on the Project EIR so that members of the public could testify as to what they believed the Project EIR should cover. The City also accepted scoping comments on the Project EIR from the public from December 14, 2014 to February 27, 2015.[2]

The City retained highly qualified environmental experts, LSA Associates, Inc. (LSA), to prepare the Project EIR. Experts in particular environmental resource fields were also retained to prepare the comprehensive analyses for the Project EIR. For example, the City retained renowned transportation consultants Fehr & Peers to prepare a comprehensive traffic analysis for the Project. Key facts concerning the Project EIR preparation process are as follows:

- The Project EIR was prepared entirely by expert consultants under City staff direction. Neither Sherwin nor its development partners had any involvement whatsoever with EIR preparation. The City did not give Sherwin or Lennar access to administrative drafts of the EIR or any of the technical studies prepared for the EIR. Thus, EIR preparation was entirely an arms' length transaction with respect to the Project proponents. Such separation between the applicant and the EIR process is in no way legally mandated, but was a practice embraced by City staff to further emphasize the impartial nature of the EIR.

- The Project EIR employed thresholds of significance as directed by City staff and considered applicable City policies and regulations as authorized by law.

[2] The City provided gave the public more than the statutory 45-day review period to comment on the Project EIR. Pub. Res. Code § 21091(a).

- LSA prepared a complete and comprehensive Project EIR. LSA spent over one year preparing the EIR. The EIR evaluated thirteen of the sixteen CEQA resource topics in detail. Only three resource topics (agriculture/forestry resources, biological resources and mineral resources) were eliminated from further consideration because such resources do not exist on the Sherwin site due to the site's urban/industrial nature.

- Public participation in the Project EIR process was robust. As already discussed above, the City afforded members of the public more time than the law requires to comment on the scope of the EIR. Likewise, members of the public were given more time than the law requires to review and comment on the Draft EIR; that comment period spanned sixty-days from January 8, 2016 to March 8, 2016, even though the law only requires a forty-five day comment period. (*See* CEQA Guidelines § 15105(a).)

- The City's responses to comments received on the Project EIR were complete and comport with the law.[3] The City's technical experts spent more than three months (from March 8, 2016 to June 28, 2016) preparing responses to all written and oral comments received on the Draft EIR. The City response to comments document published on June 28, 2016 is 509 pages long and each comment is individually bracketed and a corresponding response has been provided.

Thus, the FEIR for the Project (comprising the Draft EIR, all comments received on the Draft EIR, responses to those comments and minor editorial changes to the text of the Draft EIR) represents nearly two years of work by the City and qualified experts to inform City decision makers, City residents and the public at large about the Project, the Project's environmental effects, and the ways in which those effects can be minimized or avoided completely.

2. <u>The City's role in certifying the Project EIR</u>

Under CEQA, lead agencies are responsible for preparing and certifying any EIR prepared for a project within one year. (*See Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 220 (citing Pub. Res. Code § 21151.5).) Unfortunately, this timeframe has not

[3] *See* CEQA Guidelines explaining that responses to comments need not be exhaustive; they need only demonstrate a good faith reasoned analysis. *See also Citizens for E. Shore Parks v. State Lands Commission,* (2011) 202 Cal.App.4th 549, explaining that a public agency need not respond to all comments on a draft EIR, but only those comments that present significant environmental issues. *See also, Environmental Protection Information Center v. California Department of Forestry & Fire Protection,* (2008) 44 Cal.4th 459, explaining that specific responses to comments that present significant environmental issues are not required when a specific response to that issue has already been provided elsewhere.

been met. However, City staff and the City's consultants have been striving to deliver the thorough and comprehensive Project EIR to the Council as quickly as feasible. As of July 28, 2016, all required steps in the EIR process have been accomplished. Specifically, City staff and the City's consultants have (i) prepared a comprehensive Draft EIR for the Project based on extensive input from the public; (ii) circulated that Draft EIR for two months to obtain further public input; (iii) responded in writing to all comments received from the public concerning the Draft EIR; and (iv) prepared a Final Project EIR. At this point, the law obligates the City to certify that the Project EIR is complete. *Sunset Drive Corp., surpa,* 73 Cal.App.4th at 222.[4] In certifying that the Project EIR is complete, the Council is not approving or disapproving the EIR. Approval of the Project EIR as a legally adequate document under CEQA is subject to a separate and distinct set of legal standards, as explained below.

3. Legal standards applicable to the City's approval of the Project EIR

As a preliminary matter, it is important to understand what the City is and is not being asked to approve at this time. The City is not being asked to approve the Project (Option A or Option B) or any of the Project alternatives studied in the Project EIR. All that the City is determining at this time is: (i) whether the Project EIR satisfies the legal requirements of CEQA; (ii) whether the EIR reflects the City's independent judgment. If the City finds that the EIR meets CEQA's requirements and reflects its independent judgment, it approves (certifies) the EIR as legally adequate. Such approval means that the information, mitigation measures and environmental conclusions contained in the EIR can and will be utilized when addressing the Project at a later date, but it does not commit the City to Project Option A, Option B or any Project alternative. On the other hand, if the City believes that the Project EIR has not met CEQA's requirements, the City can decline to certify the Project EIR at this time. However, in order to do so, the City must specifically state what changes to the Project EIR are required for the EIR to meet CEQA's mandates so that the EIR could be approved in a timely manner. (*See Sunset Drive Corp., supra,* 73 Cal.App.4th at 222-223.)

Several Project commenters have made inaccurate claims regarding the legal adequacy of the Project EIR. Therefore, it is important to have a clear understanding of what constitutes a legally adequate EIR as a matter of law. A legally adequate EIR is one that:

- Provides decision-makers and the public with information sufficient to inform them about the potential, significant environmental effects of proposed activities. (*See* CEQA Guidelines § 15002); and

[4] In other words, lead agencies cannot leave an applicant's proposal pending indefinitely by refusing to complete the EIR process. *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 222-223.

- Identifies ways that environmental damage can be avoided or significantly reduced through feasible mitigation measures. (*Id.*)

Absolute perfection in an EIR is not required. (*See Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 406.) Rather, a legally adequate EIR is one that provides readers with a reasonable, good faith disclosure and analysis of a proposed project's environmental impacts. (*See California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 269.)

Adequate mitigation measures are measures that reduce or minimize a project's significant impacts, but not necessarily eliminate them. (*See* Pub. Res. Code § 21100(b).) Moreover, the California courts defer to an agency's assessment of the effectiveness of mitigation measures proposed in an EIR. (*See Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1027.)

It is equally important to understand what does not render an EIR inadequate under CEQA. We provide a non-exhaustive list as follows:

- Disputes as to the thresholds of significance or the analytical methodologies used in an EIR; and

- Disagreement among experts as to a project's environmental impacts or the significance of a project's environmental impacts.

- Requests that additional reasearch, maps and diagrams be included in the EIR.

As matter of law, the City has discretion to formulate thresholds of significance for use in an EIR. (*See Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 243.) Furthermore, the City's determination that is or is not significant when compared to the threshold will be upheld by the courts if there is any substantial evidence[5] in the whole of the record of proceedings to support that determination. *Id.* There is ample evidence in the Project EIR, the studies prepared for the Project EIR and the whole of the record to support the significance thresholds that the City applied, as well as the impact conclusions that the City reached.

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[5] Substantial evidence means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 675 (quoting CEQA Guidelines § 15384.)

As a matter of law, the City may rely upon and adopt the environmental conclusions by the expert consultants that prepared the Project EIR even though other experts may disagree with the underlying data, analysis or conclusions of the City's experts. (*See Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 409.) Again, so long as the conclusions of the City's consultants are supported by substantial evidence contained in the whole of the record (as is amply the case here), the EIR is legally adequate. *Id.*

As a matter of law, an EIR need not include additional research and studies (*see Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1396; CEQA Guidelines § 15204(a)) and assertions that environmental issues should be analyzed in a different way or that other studies might shed additional light on a subject do not provide a basis for challenging an EIR.

4. <u>The four letters submitted to the City after the comment period closed.</u>

The City, its consultants and Sherwin have no obligation to respond to comments submitted on the Project after the comment period for the Project EIR closed. CEQA Guidelines §§ 15088(a), 15207. Nevertheless, this letter addresses the late-submitted comments from four individuals and/or organizations to demonstrate that none of the late-submitted comments supply cause not to certify the Project EIR.

a. *The July 22, 2016 letter of Richard Grassetti*

We first address the inaccurate legal conclusions drawn by Richard Grassetti (Mr. Grassetti) dated July 22, 2016 (Grassetti Letter), as well as follow up comments that Mr. Grassetti made at the City Planning Commission Hearing on July 28, 2018 (PC Hearing). As a preliminary matter, we note that Mr. Grassetti is not a licensed attorney at law. As such, his opinions on legal matters are those of an unqualified lay-person. In fact, Mr. Grassetti's assertion that the FEIR does not comport with certain California court decisions is based upon Mr. Grassetti's misinterpretation or misapplication of those court decisions.

Although outside counsel for the City briefly addressed the matter of Mr. Grassetti's misinterpretation and misapplication of case law for the benefit of the City Planning Commission at the PC Hearing, we now provide a detailed discussion of this matter below for the Council's benefit. For ease of review, we provide the complete name of the court decisions referenced by Mr. Grasetti, a summary of Mr. Grassetti's allegations regarding that decision vis-à-vis the FEIR, and an explanation of the actual determination made by the court, as well as the implication of that determination with respect to the FEIR.

City of Irvine v. County of Orange (2015) 238 Cal.App.4th 526

Remarks from Mr. Grassetti

Mr. Grasetti first takes issue with the response to comments on the Draft EIR section of the FEIR. Mr. Grasetti cites this case for the general proposition that the City has an obligation "to respond in good faith and in detail, to *significant* environmental issues raised in comments whenever the lead agency's position is at variance with the comment about the significant environmental issue." *City of Irvine, supra,* 238 Cal.App.4th at 549. Mr. Grassetti claims that "over 40" of the "99 comments" he submitted on the Draft EIR prepared for the Project did not elicit a "meaningful response" (July 22 Letter p. 11.)

Further Response and Analysis

As a preliminary matter, it is important to point out that Mr. Grassetti has construed this decision in an artificially narrow manner. Having noted that a good faith, detailed response is required to a comment that raises a significant environmental issue, the court went on to describe what may constitute a good faith detailed response as follows:

> Case law has provided a few oft-repeated principles by which courts may evaluate the sufficiency of a lead agency's responses to comments: A response can be sufficient if it refers to parts of the draft EIR that analyzes the environmental impacts raised by the comment. (Citations.) A general comment can be adequately met with a general response. (Citations.) And because, ultimately, responses to comments are part of the EIR itself, their sufficiency should be "viewed in light of what is reasonably feasible." (Citations.)

City of Irvine, supra, 238 Cal.App.4th at 550. After articulating the above framework for evaluating responses to comments, the court held that the public agency had adequately responded to all comments submitted on the subject project. *City of Irvine, supra,* 238 Cal.App.4th at 558.

Tellingly, Mr. Grasetti declines to provide any explanation as to why he believes the City did not adequately respond to over 40 of his 99 comments.[6] Instead, Mr. Grassetti offers the following uninformative and conclusory statement—"Response fails to address comment"—for each comment response he believes to be lacking. (July 22 Letter pp. 10-11, 13-14, 17-20.) Thus, Mr. Grassetti has presented no legal basis for his assertion that the responses were

[6] Mr. Grasetti inaccurately portrayed the number of written responses the City prepared. Mr. Grasetti's July 22 Letter contained three attachments and the City prepared responses to the July 22 Letter and the attachments for a total of 120 responses.

deficient in any way. To the contrary, the voluminous record of proceedings and the dense, lengthy and detailed Project EIR affirmatively demonstrate that the environmental review process for the Project was robust.

Oro Fino Gold Mining Corp. v. County of El Dorado (1990) 225 Cal.App.3d 872 and *Berkeley Keep Jets Over the Bay Committee v. Board of Port Com'rs* (2001) 91 Cal.App.4th 1344

Remarks from Mr. Grassetti

Mr. Grassetti claims that residents who have experienced unspecified air quality impacts and noise from remediation activities conducted at the Sherwin site in years past are now experts on these matters per the foregoing two court decisions.

Further Response and Analysis

The *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, decision is easily distinguishable from the situation at hand here. In that case, a mine operator had conducted drilling exploration activities under a prior permit for a number of years and then applied for a subsequent permit to conduct the same drilling exploration activities again. *Oro Fino Gold Mining Corp., supra,* 225 Cal.App.3d at 876. During the time that the operator conducted drilling activities under the first permit, nearby residents had submitted many noise complaints. *Oro Fino Gold Mining Corp., supra,* 225 Cal.App.3d at 882. When those residents raised complaints about noise during proceedings to approve the subsequent permit authorizing the same type of drilling activities, the court in that case concluded that the residents' complaints constituted evidence that there would be a noise impact. *Id.* The key fact was that the residents were opining about the noise arising from the exact same activities—drilling operations under the first permit and the exact same drilling operations to be undertaken under the subsequent permit.

There are no such circumstances here. Here, the residents allegedly experienced noise and air quality impacts associated with remediation activities, not construction of a mixed-use project. This apples-to-oranges comparison of DTSC remediation activities to construction and operation of the Project was not sanctioned by the *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872 court. As such, the residents are not experts on the noise or air quality impacts associated with this specific Project.

The holding of *Keep Jets Over the Bay Committee v. Board of Port Com'rs* (2001) 91 Cal.App.4th 1344, is also inapplicable here. In that case, the court expressly noted that the statements regarding plane over-fly noise submitted by residents was supported by the opinions of expert noise consultants. *Berkeley Keep Jets Over the Bay Committee, supra,* 91 Cal.App.4th

at 1376. In that case, it was not the opinion of the residents that mattered, but rather the option of the qualified consultants they hired to advocate on their behalf. *Id.*

Moreover, whether or not the residents are experts is irrelevant for purposes of the Project EIR's legal sufficiency. As already discussed above, the City may rely upon and adopt the environmental conclusions by the expert consultants that prepared the Project EIR even though other experts may disagree with the underlying data, analysis or conclusions of the City's experts. (*See Laurel Heights Improvement Assn., supra*, 47 Cal.3d at 409.)

Neighbors for Smart Rail v. Exposition Metro Line Const. Authority (2013) 57 Cal.4th 439 and *North County Advocates v. City of Carlsbad* (2015) 241 Cal.App.4th 94.

Remarks from Mr. Grassetti

Mr. Grassetti claims that the Project EIR's existing conditions baseline for assessing traffic impacts is "misleading" because it did not include trips to and from certain buildings on Horton Street that were vacant at the time the Notice of Preparation for the EIR was released.

Further Response and Analysis

Review of the 1,406-page Transportation Impact Analysis (TIA) discloses that accepted traffic impact quantification methodologies were employed. The TIA studied traffic flows during all weekday and weekend peak AM and PM traffic periods at thirty (30) intersections in the Project vicinity. (*See* TIA Chapter 1.0 and Figure 4.) From this robust sampling, the TIA properly characterized project roadway level of service (LOS) under current conditions, near term, and cumulative horizon term. Whenever traffic counts are taken, some buildings or spaces within them will be vacant; this is the norm in terms of environmental conditions, and thus cannot be viewed as misleading. Furthermore, although an analysis of vehicle miles traveled (VMT) is not legally required, the TIA nevertheless analyzes VMT to provide the public with an abundance of information about all possible traffic impacts of the Project. There is simply no evidence to suggest that the TIA is in any way misleading.

a. *The July 22, 2016 letter of Gary Grimm & Ann Holsberry*

This letter repeats the same claim made by Mr. Grassetti—that the City's responses to comments submitted on the Project Draft EIR were not adequate. Mr. Grimm and Ms. Holsberry state that they join the comments made by Mr. Grassetti in his July 22 Letter. Yet none of their statements explain how the City's responses to comments have fallen short of the applicable legal standard for responses described above. (*See City of Irvine v. County of Orange* (2015) 238 Cal.App.4th 526, 550. Thus, there is again no showing here that the Project EIR is legally defective in any way.

Mr. Grimm and Ms. Holsberry also renew their request for recirculation of the Project EIR. This is a request often made by commenters who are not aware of the specific legal standard for recirculation of an EIR. As a matter of law, only certain, very limited circumstances trigger the recirculation of an EIR and those circumstances are not presented here. Recirculation of an EIR is only required when significant, new information is added to an EIR after the public comment period has concluded, but before the final EIR is certified. Pub. Res. Code § 21092.1; CEQA Guidelines § 15088.5. The minor textual edit and textual clarifications made to the Project Final EIR do not qualify as significant new information.

b. *The July 25, 2016 letter of Richard Ambro*

Mr. Ambro claims that the Project EIR is deficient because it was not revised to include the "cultural resource maps." Mr. Ambro does not claim that the Project EIR failed to disclose reasonably foreseeable impacts to cultural resources. Mr. Ambro does not allege that the Project EIR failed to provide mitigation measures to lessen or avoid impacts to cultural resources. Mr. Ambro does not claim that the cultural resource mitigation measures provided in the EIR are inadequate or infeasible. Mr. Ambro's complaint is simply that the EIR did not include graphics that he believes would be nice to include.

As a matter of law, the Project EIR is not rendered legally inadequate for failing to include the requested cultural resource maps. As discussed in detail above, a legally adequate EIR is one that provides readers with a reasonable, good faith disclosure and analysis of a proposed project's environmental impacts. (*See California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 269.) The lengthy and comprehensive EIR prepared for this Project more than satisfies this legal requirement.

c. *The July 28, 2016 letter from Adams Broadwell Joseph & Cardozo*

This letter was submitted on behalf of the Emeryville Residents for Responsible Development (Residents) and discloses that the Residents are repeating the same comments they submitted on March 8, 2016 in connect with the Project Draft EIR. Residents state that they retained their own experts and those experts disagreed with the Project EIR's conclusions regarding air quality impacts, greenhouse gas impacts, soil contamination impacts, traffic impacts and water usage impacts.

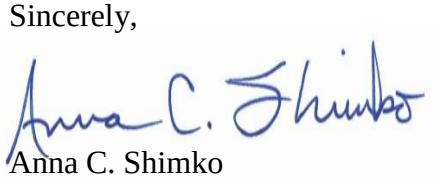
As discussed in detail above, the legal standard here is quite clear. As a matter of law, the City may embrace the thresholds and methodology employed by the expert consultants that prepared the Project EIR and adopt the environmental conclusions reached by them even though other experts may disagree with the data, analysis or conclusions of the City's experts. (*See*

Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 409.) The EIR is not deficient because Residents' experts and the City's experts reached different conclusions regarding these select impacts.

In conclusion, we remind the City of its obligation at this stage in the environmental review process. At present, the law obligates the City to certify that the Project EIR is complete. *Sunset Drive Corp., surpa,* 73 Cal.App.4th at 222. As to certifying that the Project EIR meets the requirements of CEQA, the City must either: (1) certify the Project EIR as legally adequate under CEQA; or (2) find that the Project EIR does not meet CEQA requirements, and, in so findings, specifically state what changes to the Project EIR are required for the EIR to meet CEQA's mandates. (*See Sunset Drive Corp., supra,* 73 Cal.App.4th at 222-223.)

Thank you for the chance to submit these comments. Please do not hesitate to contact me with any questions.

Sincerely,



Anna C. Shimko

cc:

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