

1 SCOTT W. DITFURTH, Bar No. 238127
scott.ditfurth@bbklaw.com
2 ANDREW G. SAGHIAN, Bar No. 316680
andrew.saghian@bbklaw.com
3 BEST BEST & KRIEGER LLP
3390 University Avenue
4 5th Floor
P.O. Box 1028
5 Riverside, California 92502
Telephone: (951) 686-1450
6 Facsimile: (951) 686-3083

7 Attorneys for Plaintiff
CITY OF ALBANY, a charter city

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11
12 CITY OF ALBANY, a charter city,
13 Plaintiff,
14 v.
15 ALBANY LIONS CLUB, LIONS
INTERNATIONAL, a California Non-Profit
16 Corporation; DOES 1-10, inclusive; and ALL
PERSONS UNKNOWN CLAIMING AN
17 INTEREST IN THE PROPERTY,
18 Defendant.

Case No. 22CV010822
Judge: Hon. Somnath Raj Chatterjee
**PLAINTIFF CITY OF ALBANY'S
REPLY BRIEF IN SUPPORT OF ITS
MOTION TO AFFIRM COURT'S
PREJUDGMENT POSSESSION
ORDER**
Date: January 12, 2023
Time: 2:30 p.m.
Dept.: 517
Reservation No. 347411201691
Action Filed: May 4, 2022
Trial Date: Not Set

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
3390 UNIVERSITY AVENUE, 5TH FLOOR
RIVERSIDE, CALIFORNIA 92502

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1 **I. INTRODUCTION**

2 The Lions Club of Albany, California’s (“Defendant”) opposition once again fail to raise
3 any new legal or factual matters that would otherwise warrant overturning this Court’s August 30,
4 2022 order granting the City of Albany (the “City”) prejudgment possession of an easement interest
5 in Albany Hill Park. Indeed, a review of Defendant’s brief confirms what this Court already
6 concluded: the City satisfied Code of Civil Procedure section 1255.410, subdivision (d)(2)’s
7 procedural and substantive requirements for obtaining prejudgment possession of the subject
8 property interests. Rather than accepting this ruling and litigating its right-to-take objection in this
9 case, as the Court noted it was entitled to do at trial under Code of Civil Procedure section 1245.255,
10 Plaintiff sought to undermine this Court’s authority by forum-shopping its claims in a “new” federal
11 lawsuit in the United States District Court, Northern District of California (“Northern District”).¹
12 As set forth in the City’s opening brief, however, *Lions Club III* has the same arguments, claims,
13 and allegations that are present in this lawsuit, and Defendant waited to file that lawsuit only after
14 this Court granted the City’s prejudgment possession motion. Defendant could have filed the
15 subsequent federal lawsuit much sooner, upon the City notifying it of the decision to appraise the
16 property, upon the City notifying it of the Resolution of Necessity hearing, after the City
17 unanimously adopted the Resolution of Necessity, or after the City filed this lawsuit and the Motion
18 for Prejudgment Possession. Defendant could have also sought a *writ of mandamus* in state court,
19 but it instead sought what it deemed to be a more favorable forum, the Northern District.

20 Defendant’s opposition brief does not change the fact that the City still satisfies the legal
21 requirements for obtaining prejudgment possession, which is what is to be adjudicated by way of
22 the City’s motion for prejudgment possession, and what this Court already found. While
23 Defendant’s opposition somewhat expands previous arguments that have already been ruled upon,
24 the underlying arguments against prejudgment possession remain the same.² Defendant has not

25
26 ¹ This federal lawsuit is styled as *Lions Club of Albany v. City of Albany*, and it bears Case Number
27 3:22-cv-05377-WHA (“*Lions Club III*”).

28 ² Defendant argues that Judge Alsup’s June 15, 2018 Order cannot be the basis for the City’s
“overriding need” and “substantial hardship” because he did not obligate the City to file an eminent
domain action. (*Lions Club of Albany, California v. City of Albany* (N.D. Cal. 2018) 323 F.Supp.3d

1 raised any new legal or significant factual positions that were not considered when this Court issued
2 its first prejudgment possession ruling. If, however, this Court chooses to entertain the Defendant’s
3 arguments, the City is still entitled to prejudgment possession because, as more fully set forth
4 below, the City has met each of the four prerequisites for obtaining prejudgment possession. (Code
5 Civ. Proc., § 1255.410, subd. (d)(2).) Accordingly, the City respectfully requests that its Motion
6 for Prejudgment Possession be affirmed.

7 **II. THIS COURT ALREADY MADE THE REQUIRED FINDINGS TO GRANT THE**
8 **CITY PREJUDGMENT POSSESSION OF THE SUBJECT PROPERTY**
9 **INTERESTS**

10 The Court’s August 30, 2022 Order granting the City prejudgment possession (“Order”)
11 made the following key findings: (1) the City is entitled to take the easement through its power of
12 eminent domain; (2) the City has deposited \$500,000 as probable just compensation; (3) the City
13 has an overriding need to manage the park’s open space for the benefit of public use and to
14 unencumber the public park to avoid potential claims of an Establishment Clause violation; and (4)
15 the hardships the City will suffer outweigh Defendant’s claimed hardships because Defendant
16 failed to establish hardships independent from acquisition of the easement as a whole. (Declaration
17 of Scott Ditfurth [“Ditfurth Decl.”], ¶ 9, Exhibit H, Prejudgment Possession Order, pp. 5-10.)

18 Defendant presents the same arguments in its current opposition brief that resulted in the
19 Court making these findings. To illustrate, Defendant’s initial opposition brief argues the City’s
20 overriding need to continue managing the open space, with all of its plant and animal life, for the
21 public, “makes no sense....[because] the cross never interfered with the City’s maintenance of the
22 Park.” (Defendant’s Initial Opposition, 4:20-24.) Defendant once again asserts the alleged lack of
23 evidence explaining how the cross interferes with the animal, plant and bird life at Albany Hill
24 Park. (Defendant’s Current Opposition, 4:9-22.) The Court presumably considered this argument
25 and concluded the City has an overriding need to manage the park without interference from the
26 cross. (Ditfurth Decl., ¶ 9, Exhibit H, Prejudgment Possession Order, p 8.)

27
28 1104.) The parties, however, already expressly acknowledged at oral argument on the prejudgment
possession motion that Judge Alsup’s 2018 Order was in *dictum*.

1 Similarly, Defendant argued in its initial opposition that it will suffer substantial hardship
2 by not being able to light the cross for the holidays and by having to spend time and money going
3 through the City’s permit process to restore the cross. (Defendant’s Initial Opposition, 6:7-13.)
4 Defendant once again reiterates this same position with the addition that members of the community
5 find “joy and comfort” from seeing the Cross on the hill and it is a “location and gathering place
6 for religious worship.” (Defendant’s Current Opposition, 11:7-13.) These additional “hardships”
7 do not suddenly outweigh the City’s hardships the Court identified. This Court has already
8 considered these arguments and facts, and ruled in the City’s favor. Thus, the City respectfully
9 requests that the Court affirm its prejudgment possession order.

10 Should the Court reconsider Defendant’s same arguments, the City is nevertheless entitled
11 to prejudgment possession because, as set forth below, it has satisfied the corresponding procedural
12 and substantive requirements.

13 **A. The City Has Satisfied All The Requirements For Prejudgment Possession**

14 It is important to remember what the City presently seeks. The City brought a motion for
15 prejudgment possession. The City is not attempting to litigate the Lions Club’s right-to-take
16 challenge. Accordingly, the requirements for prejudgment possession are the only matters at issue.
17 As this Court already ruled, the City satisfied all of those requirements. The court may make an
18 order for prejudgment possession of the property if it finds each of the following: (1) the plaintiff
19 is entitled to take the property by eminent domain; (2) the plaintiff has deposited, pursuant to Article
20 1 (commencing with Section 1255.010), an amount that satisfies the requirements of that article;
21 (3) there is an overriding need for the plaintiff to possess the property before the issuance of final
22 judgment in the case, and the plaintiff will suffer a substantial hardship if the application for
23 possession is denied or limited; and (4) the hardship that the plaintiff will suffer if possession is
24 denied or limited outweighs any hardship on the defendant or occupant that would be caused by
25 the granting of the order of possession. (Code Civ. Proc., § 1255.410, subd. (d)(2).) Here, the City
26 meets all these requirements.

27 **1. The City is Entitled to Take the Property**

28 On April 4, 2022, after a duly noticed hearing, the City Council adopted Resolution of

1 Necessity No. 2022-32 (the “RON”), declaring that the public interest and necessity require the
2 acquisition, by eminent domain proceedings, of the easement interest held by Defendants, as well
3 as removal of the cross. (Bond Declaration [Bond Decl.], ¶¶ 4, 7,8; Ex B.) The City is granted this
4 authority under Government Code section 37350 et seq. and Code of Civil Procedure sections
5 1240.110 and 1240.120.

6 The City Council adopted the RON, having made the requisite findings to do so. (Bond
7 Decl., ¶ 9.) Thus, there is a *conclusive presumption* that the City has the right to acquire the property
8 through eminent domain. (Code Civ. Proc. §§ 1240.030, 1245.250; see e.g., *People ex rel. Dep’t*
9 *of Transp. v. Cole* (1992) 7 Cal.App.4th 1281, 1284-85; *Council of San Benito County Governments*
10 *v. Hollister Inn, Inc.* (2012) 209 Cal.App.4th 473, 497.) The law is clear that any right-to-take
11 challenge does not overcome the conclusive presumption afforded the City related to a motion for
12 prejudgment possession.

13 **2. The City Has Deposited A Probable Amount of Just Compensation.**

14 The City has deposited an amount pursuant to Article 1 (commencing with Section
15 1255.010) that satisfies the requirements of that article. On or about April 28, 2022, the City
16 deposited in the condemnation trust account of the State Treasury the amount of \$500,000 as the
17 probable compensation for the acquisition of the easement (and cross removal) on the Property.
18 Defendant does not take issue with the City’s deposit.

19 **3. There Is An Overriding Need For Prejudgment Possession**

20 There is an overriding need for the City to possess the property before a final judgment is
21 issued in the case. Here, a resolution of necessity may be considered sufficient evidence of a public
22 entity’s urgent need to obtain possession. (*Israni v. Superior Court* (2001) 88 Cal.App.4th 621,
23 640.) Only in rare instances will courts disturb a legislative or administrative declaration, such as
24 a resolution of necessity, that the particular use is public or necessary. (See *People ex rel. Dep’t*
25 *Pub. Works v. Superior Court* (1968) 68 Cal.2d 206.)

26 The City owns the property that is the subject matter of this eminent domain action.
27 Defendant has a limited easement over the property for ingress and egress to maintain a cross
28 situated on the property. The City proposes a project required by public interest and necessity

1 because it seeks to acquire the easement to unencumber public land and avoid any potential
2 violation of the Establishment Clause arising from Defendant’s display of a cross in the park. (Bond
3 Decl., ¶¶ 2–4; see Code Civ. Proc., § 1240.680, subd. (a)(1) [“property is presumed to have been
4 appropriated for the best and most necessary public use if the property is appropriated to public use
5 as...a city park....”]; see also *Lions Club, supra*, 323 F. Supp.3d at p. 1117.) Here, the property is
6 already being utilized as public space. Accordingly, the City’s intended use is presumed to be the
7 best and most necessary use.

8 Additionally, the project is planned and located in the manner that will be most compatible
9 with the greatest public good and the least private injury because the easement to be acquired (with
10 the cross) is prominently located and highly visible. (Delahooke Decl., Ex. B at pp. 1–13; *Lions*
11 *Club, supra*, 323 F.Supp.3d at p. 1110.) Acquisition of the easement (and removal of the cross)
12 will, thus, have the greatest public good by creating unobstructed views and preserving the open
13 space character of the park from many vantage points. Additionally, acquiring the easement will
14 eliminate potential tax payer dollars to be spent regarding a potential Establishment Clause
15 violation. For those same reasons, and because of the location-specific nature of the public project,
16 acquisition of the Property is necessary; no other property could be acquired that would serve the
17 public purposes of the project.

18 **4. The City’s Hardship Outweighs Any Hardship That Defendant Claims**

19 The City will suffer hardship without prejudgment possession, as there will be an
20 unnecessary and ongoing risk of litigation due to the possibility that the cross raises concerns under
21 the Establishment Clause. (Bond Decl., ¶ 11 & Ex. C [*Lions Club, supra*, 323 F.Supp.3d at pp.
22 1115–17].) It is uncertain how long the eminent domain action will take. Accordingly, denying
23 this motion would simply be delaying the acquisition while simultaneously subjecting the City to
24 an unnecessary risk of litigation during the pendency of the eminent domain action. The property
25 is necessary for the City’s public use, as acquisition of the easement—and removal of the cross—
26 are required in order to unencumber the park, as well as avoid a potential Establish Clause issue.
27 (Bond Decl. ¶ 4.) The City’s legitimate and secular purpose in avoiding future Establishment
28 Clause litigation justifies the removal of the cross. (See *Vasquez v. Los Angeles County*, 487 F.3d

1 1246, 1257 (9th Cir. 2007).)

2 Additionally, the City is presently managing the property as a public park. The City has an
3 ongoing and overriding need to continue managing the open space, with all of its plant and animal
4 life, for the public, without interference of the maintenance of the cross. (Bond Decl., ¶ 11.) The
5 City has an overriding need for possession of the property to be able to appropriately manage this
6 open space. (*Ibid.*)

7 On the other side, Defendant’s stated hardships are nothing more than not being able to light
8 up the cross at Easter and Christmas, not be able to hold Easter morning services, or not be able to
9 be a gathering place for religious worship. None of these hardships outweigh the City’s hardships.
10 In support of its opposition, Defendant submits two declarations. The declaration of Kevin Pope,
11 the Lions Club President, provides that members of the community receive “joy and comfort” from
12 seeing the Cross on the hill each day and use the Cross as a “gathering place for religious worship.”
13 (Pope Declaration [Pope Decl. ¶¶ 5, 9.) In addition, because of the construction of the Cross,
14 removal may result in damage. (*Id.* at ¶ 13-14.) With respect to the declaration of Kenneth Berner,
15 the only hardships set forth are that removal of the Cross will prevent the Lions Club from
16 “illuminat[ing] the Christian Cross during the Christmas and Easter seasons,” “end[] a long-
17 standing tradition of hosting Easter Morning religious services at the Cross,” and reduce community
18 participation. (Berner Decl. ¶ 14-17.) There are a number of issues with these statements. First,
19 they do not provide a justification for substantial hardship. In evaluating prejudgment possession,
20 the balancing of hardships involves the granting of *immediate* possession, not hardships related to
21 the overall acquisition. (See Code Civ. Proc. § 1255.410(d)(2)(D).) There is no indication, or
22 factual statement, that Defendant will suffer any hardship as a specific result of *immediate*
23 possession. Rather, all of the alleged harms expressed by Defendant result from the acquisition of
24 the Property, *regardless of when it will be taken*. None of the hardships raised in the current
25 opposition relate to the timing of possession, which is required in opposing a motion for possession.
26 (*Israni v. Superior Court* (2001) 88 Cal.App.4th 621, 636 [the Court defined the term “substantial
27 hardship” to require a specific relationship to the particular interval between the application for the
28 order of immediate possession and its proposed effective date].)

1 Second, the easement that is the subject matter of this acquisition states as follows: “an
2 easement for ingress and egress to maintain the existing cross standing on a portion of the following
3 described premises...” (Bond Decl. & Ex. B.) The lighting of the cross at Easter and Christmas,
4 or the holding of Easter morning services, are not contemplated uses under the easement, and cannot
5 therefore be used as a basis to oppose the City’s right to prejudgment possession. At most, the
6 lighting of the cross, and Easter morning services, can be considered an ancillary benefit of the
7 easement. Deprivation of a benefit, even a substantial one, is not the equivalent of a substantial
8 hardship. (*Fairrington v. Dyke Water Co.* (1958) 50 Cal.2d 198.)

9 **B. Defendant’s Objections**

10 Under Code of Civil Procedure section 1255.410, once the City has demonstrated that it:
11 (1) adopted a RON; and (2) made the required deposit of probable just compensation, the burden
12 shifts to the defendant to demonstrate it would suffer hardship if the City was granted prejudgment
13 possession. The “overriding need” the City must demonstrate is considered in the context of the
14 plan of operation for execution of the project and the situation of the property with respect to such
15 plan. (*Israni v. Superior Court* (2001) 88 Cal.App.4th 621, 638, discussing “urgent need” standard
16 under previous section 1255.410, subd.(c).) Hardship to the defendant requires a specific
17 relationship to the interval between the application for the order of possession and its effective date.
18 (*Id.* at p. 642, addressing “substantial hardship” as defined under previous section 1255.420.)

19 **1. Defendant Does Not Own or Occupy The Property**

20 Code of Civil Procedure § 1255.410(c) states that only a defendant or an occupant of the
21 property can oppose a motion of prejudgment possession. The City owns fee title to the property.
22 Defendant simply has a non-exclusive easement interest for ingress and egress to maintain the cross
23 on the property. (Bond Decl. ¶ 3 & Ex A.) Defendant has no legal right to possession of the land
24 and is not the record owner of the property. (See *Marvin M. Brandt Revocable Tr. v. U.S.*, 572 U.S.
25 93 (2014).) Moreover, Defendant has no possessory interest in the land or the cross. The definition
26 of “occupant” requires actual possession of land, and as Defendant has none, Defendant is not an
27 occupant. (See *Dutcher v. Sanders* (1912) 20 Cal.App.549.) The purpose of notification for
28 prejudgment possession is to assure the occupants of the property being acquired are put on notice

1 in case the acquisition displaces any such occupant, requiring that they relocate. (*See e.g.*, Code
2 Civ. Proc. 1255.410(e)(1)(A) & B; Gov. Code 7260-7277 [providing that a public entity must
3 provide relocation assistance to any person or business displaced as a result of the acquisition]; *see*
4 *also Parking Auth. v. Nicovich* (1973) 32 Cal.App.3d 420). Defendant is neither an owner or an
5 occupant, and there is no relocation.

6 **2. Defendant Does Not Have a Sufficient Interest in the Property to be**
7 **Able to Assert Hardship**

8 Code of Civil Procedure section 1255.410, subdivision (c), provides that a written
9 opposition asserting hardship “shall be supported by a declaration signed under penalty of perjury
10 stating facts supporting the hardship.” Declarations usually are by an owner and/or occupant of the
11 property (Defendant is neither), but competent experts may also provide supporting declarations.
12 (Condemnation Practice in California 93d ed Cal CEB 2005), § 8.32.) Because the test is one of
13 balancing hardships between the parties, the opposition should provide a detailed description of
14 hardship to the owner and any occupant. (*Ibid.*)

15 As set forth above, Defendant is neither an owner or occupant of the property, but rather
16 has an easement interest. An easement is a nonpossessory interest in real property, thus the
17 easement owner does not have the right to actual possession. (*Marvin M. Brandt Revocable Tr. v.*
18 *U.S.*, 572 U.S. 93 (2014).) Any “hardship” Defendant suggests is mere conjecture. Indeed,
19 potential loss to a party not in possession of the property in question does not amount to a substantial
20 hardship. (*See Israni v. Superior Court* (2001) 88 Cal.App.4th 621, 640643). Because Defendant
21 does not actually own or possess the property, the “hardships” set forth by Defendant do not provide
22 a basis to deny the City’s motion for prejudgment possession.

23 Defendant also claims that the City’s acquisition constitutes a violation and loss of First
24 Amendment rights. Defendant offers no legal authority as to how Defendant’s First Amendment
25 rights have been violated by the City, nor any authority equating loss of First Amendment rights to
26 substantial hardship, as defined by Code of Civil Procedure section 1255.410. Even more,
27 Defendant’s own Constitution and Bylaw state that its purpose is: “To Provide a forum for the
28 open discussion of all matters of public interest; provided, however, that *partisan politics and*

1 *sectarian religion shall not be debated by club members.*”³ (Italics added). Defendant’s actions of
2 lighting the cross and holding Easter morning services are in direct contradiction to the
3 organization’s authorized purpose.

4 **III. THE ANTI-INJUNCTION ACT REQUIRES THE COURT TO CONSIDER**
5 **NOTIONS OF EQUITY AND PRINCIPLES OF FEDERALISM**

6 The Defendant argues that the Anti-Injunction Act (the “Act”) does not apply to this case
7 because Judge Alsup “did not grant an injunction staying proceedings in the Alameda County
8 condemnation action,” and “actions brought pursuant to 42 U.S.C § 1983 are an expressly
9 authorized exception” to the Act. (Opposition to Plaintiff’s Motion For Reassessment of Order of
10 Prejudgment Possession, 2:23-24, 3:3-4.) First, Defendant directly contradicts its argument that
11 Judge Alsup did not issue an injunction staying proceedings by characterizing the Federal District
12 Court’s order on November 17, 2022 as an “Order and Preliminary Injunction *staying* the City of
13 Albany from removing the Cross on Albany Hill...” (*Ibid.*, 1:4-5) (emphasis added).

14 Second, to the extent the Act does not apply to actions brought pursuant to 42 U.S.C. §
15 1983, federal courts are free to consider notions of equity and principles of federalism before
16 deciding to issue an injunction to stay state court proceedings. The court in *Mitchum v. Foster*,
17 simply found that the court is not “absolutely without power” in a § 1983 action to enjoin a state
18 court proceeding. (*Mitchum v. Foster* (1972) 407 U.S. 225, 243.) The *Mitchum* court further stated
19 that its decision does nothing to “question or qualify in any way the principles of equity, comity,
20 and federalism that must restrain a federal court when asked to enjoin a state court proceeding.”
21 (*Id.* at 243.) Notably, the *Mitchum* court did not reach or decide “exactly how great a restraint is
22 imposed by these principles on a federal court asked to enjoin state civil proceedings.” (*Id.* at 244
23 (conc. opn. of Berger, J.)) Here, Defendant’s federal court action does not serve as an absolute bar
24 to the Act and upon considering notions of equity and principles of federalism, it is imperative for
25 these state court proceedings to play out through the trial on the right to take challenge and an
26

27 ³ Language can be found on the Lions Club International Constitution and Bylaws at:
28 <https://clubrunner.blob.core.windows.net/00000101144/en-us/files/homepage/lions-club-international-constitution-by-laws/Lions%20Club%20International%20Constitution%20&%20By-Laws.pdf>

1 appeal before seeking relief in federal court.

2 **IV. CONCLUSION**

3 For the reasons set forth herein, as well as in the moving papers and the City’s motion for
4 prejudgment possession, the City requests that the Court affirm its previous ruling on the City’s
5 motion for prejudgment possession.

6 Dated: January 5, 2023

BEST BEST & KRIEGER LLP

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By: 

SCOTT W. DITFURTH
ANDREW G. SAGHIAN
Attorneys for Plaintiff
CITY OF ALBANY, a charter city

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
3390 UNIVERSITY AVENUE, 5TH FLOOR
RIVERSIDE, CALIFORNIA 92502

PROOF OF SERVICE

I, Ana Horta, declare:

I am a citizen of the United States and employed in Riverside County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 3390 University Avenue, 5th Floor, P.O. Box 1028, Riverside, California 92502. On January 5, 2023, I served a copy of the within document(s):

PLAINTIFF CITY OF ALBANY’S REPLY BRIEF IN SUPPORT OF ITS MOTION TO AFFIRM COURT’S PREJUDGMENT POSSESSION ORDER

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Riverside, California addressed as set forth below.
- by placing the document(s) listed above in a sealed FedEx envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a FedEx agent for delivery.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Robert E. Nichols
Richard W. Covert
713 Key Route Blvd.
Albany, CA 94706
Tel: (510) 710-7033
Email: renichols01@comcast.net

Attorneys for Defendant
LIONS CLUB OF ALBANY,
CALIFORNIA

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

Executed on January 5, 2023, at Riverside, California.



Ana Horta