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6  
7 UNITED STATES DISTRICT COURT  
8 EASTERN DISTRICT OF CALIFORNIA  
9

11 UNITED STATES OF AMERICA,	)	Case No. 2:09-cr-00094-MCE
12	)	
13 Plaintiff,	)	MEMORANDUM OF POINTS AND
14	)	AUTHORITIES IN OPPOSITION TO
15 vs.	)	SHASTA COUNTY'S MOTION FOR
16 FRANCISCO JAVIER VELASCO,	)	A PROTECTIVE ORDER
17	)	
18 Defendant.	)	DATE: March 11, 2010
	)	TIME: 9:00 AM
	)	DEPT: Hon. Morrison C. England, Jr.

18 COMES NOW defendant Francisco Javier Velasco, through is attorney, Daniel A. Bacon,  
19 requesting this honorable court to deny the protective order requested by the County of Shasta.

20 I

21 **FACTUAL BACKGROUND**

22 The defendants in this matter are charged in a two-count indictment with conspiracy to  
23 possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846  
24 and 841(a), and possession with intent to distribute five kilograms or more of cocaine in violation  
25 of 21 U.S.C. § 841(a)(1).

26 The charges in the indictment stem from a traffic stop which occurred on February 12, 2009,  
27 on Interstate 5 in Shasta County just north of Redding, California. The defendants were stopped  
28 by Officer Pat Kropholler and Officer Chris McQuillan of the Shasta County Sheriff's Department.

Memorandum of Points and Authorities in Opposition  
to Shasta County's Motion for a Protective Order

1 Both of these officers are assigned to the California Multi-Jurisdictional Methamphetamine Task  
2 Force (CAL-MET).

3       Thereafter, the attorney for defendant Jose Salvador Sanchez-Palomino filed a motion to  
4 suppress which was joined by defendant Francisco Javier Velasco. The original motion alleged  
5 various grounds, including lack of consent to search the vehicle, lack of reasonable suspicion to  
6 stop the vehicle, an unlawfully prolonged initial traffic stop, and a lack of probable cause to search  
7 the car.

8       Thereafter, in late July and early August of 2009, defendant Francisco Javier Velasco,  
9 through his attorney, Daniel A. Bacon, issued subpoenas to Officer Pat Kropholler, Officer Chris  
10 McQuillan, and the Custodian of Records for the Shasta County Sheriff's office requesting  
11 numerous items, including information concerning various stops made by the officers over a two-  
12 year period from January 1, 2007 through February 12, 2009, including all records of said stops,  
13 requests for CLETS information, and any and all electronic or radio communications. The  
14 subpoenas were issued, and originally directed the officers and Custodian of Records to appear in  
15 person, or in lieu thereof to provide the records to counsel for defendant Francisco Javier Velasco.

16       Thereafter, the United States Attorney's office, through Assistant United States Attorney  
17 Todd D. Leras, filed a motion for an order to quash the subpoenas and set the hearing date for  
18 September 24, 2009.

19       The thrust of the government's motion to quash was that Rule 17 of the Federal Rules of  
20 Criminal Procedure had not been properly complied with, and was also made on the basis of  
21 relevance, as the subpoenaed documents did not appear relevant to the suppression motion that had  
22 been filed.

23       Thereafter, all parties agreed to continue the motion to quash, and an attempt to resolve the  
24 matter was made.

25       Initially, Francisco Javier Velasco filed a notice of motion to suppress evidence and a  
26 request for an evidentiary hearing, not only joining in those issues raised on behalf of his co-  
27 defendant, but additionally raising the issues that the officers in question did not stop the  
28 defendants' vehicle for speeding (as set forth in their reports), but rather that they were detained

1 due to their race, and further, that the CAL-MET officers involved had a long history of detaining  
2 Hispanic drivers for non-verifiable traffic offenses for the sole purpose of searching the vehicles  
3 for narcotics.

4 In addition to the new motion to suppress, counsel for defendants agreed with Assistant  
5 United States Attorney Todd D. Leras that the subpoena should provide that the officers and  
6 custodian of records either appear in court, or in lieu thereof, provide the records directly to the  
7 court, as opposed to providing those records to defendants' counsel.

8 In order to resolve any conflicts with Shasta County, the defendants agreed to modify the  
9 subpoenas, shortening and limiting their scope, and this modification was agreed to by Senior  
10 Deputy County Counsel David M. Yorton. On November 16, 2009, the new subpoenas were  
11 mailed directly to Mr. Yorton, who agreed to accept service. In addition, by letter dated  
12 November 16, counsel for defendant Velasco noted that the changes in the subpoenas were what  
13 had been agreed to by the parties, and if for any reason there was any misunderstanding, Mr. Yorton  
14 was requested to contact counsel's office so that they could resolve any differences. (See  
15 Declaration of Daniel A. Bacon attached hereto.)

16 Thereafter, on or about December 10, 2009, the attorney for defendant Velasco received an  
17 e-mail from Senior Deputy County Counsel David M. Yorton informing counsel of some changes,  
18 including redactions, that were necessary to avoid compromising any ongoing investigations. No  
19 other complaints or changes were requested. (See Declaration of Daniel A. Bacon.)

20 The subpoenaed records were provided to the court, and on January 7, 2010, Senior Deputy  
21 County Counsel David M. Yorton, who appeared telephonically, informed the court that an exact  
22 duplicate copy of the records had been provided to United States Attorney Todd D. Leras.  
23 Mr. Leras informed the court that he would review the records and provide them to counsel by  
24 reserving his right to object to any specific records should he deem it necessary.

25 Counsel for defendant Velasco has been informed by Assistant United States Attorney  
26 Leras that he has reviewed the documents and that the documents have previously been redacted  
27 by Shasta County. It was his intent to provide all of the subpoenaed documents to counsel and he  
28 was not joining in any request for protective order which had been filed on behalf of Shasta County.

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II  
ARGUMENT

**A. GOVERNMENT’S PROFFERED REASONS FOR PROTECTIVE ORDER**

In essence, Shasta County asserts that the protective order is needed to “protect witnesses and preserve the efficacy of the criminal investigations and prevent unnecessary disclosure of materials which might harm third parties.” (Gov’t Motion at 4). The County makes no effort to elaborate on these concerns and only makes oblique reference to them through statements such as:

- The order is a “necessary way to protect government files or witnesses from threats, bribery, and other corrupt influences.” (*Id.* at 3) (citing lower courts recognizing these concerns).
- The order prevents an “adverse effect on any future criminal cases. . . Witnesses may feel pressure from those designated as targets and other putative defendants and may decline to cooperate. Evidence may be destroyed or otherwise disappear.” (*Id.*)
- “[T]he defendants and other defendants of criminal investigations have entered into a joint defense agreement to share information.” (*Id.*)

In short, the government is concerned about (1) harm to witnesses and third parties, and (2) adverse effect on future criminal cases. The first government concern is entirely speculative and without merit. The second concern is not grounds for a protective order, and moreover, the government is without standing to raise it.

**B. DISCUSSION OF APPLICABLE LAW**

The burden of justifying a protective order under Rule 16(d)(1), “of course, is on the party requesting such an order.” *United States v. Nelson*, 486 F. Supp. 464, 480 (W.D. Mich. 1980) (citing *United States v. Leighton*, 265 F. Supp. 27 (S.D.N.Y.1967), *aff’d*, 386 F.2d 822, *cert. denied*, 390 U.S. 1025 (1968)). The norm is to deny a request for restricted discovery. *Id.* (citing *United States v. Hughes*, 413 F.2d 1244 (5th Cir. 1969), *vacated on other grounds*, 397 U.S. 93 (1970)).

**1. Concerns About Harm to Witnesses or Third Parties is Not Legally Sufficient for a Protective Order**

Although the Rule 16(d)(1) does not specify when a protective order should be entered, it is obvious that one would be appropriate where there is reason to believe that a witness would be

1 subject to physical or economic harm if their identity is revealed. *See Will v. United States*, 389  
2 U.S. 90, 101, 88 S.Ct. 269, 277. 19 L.Ed.2d 305, 314 (1967). A demonstrated need to protect  
3 witnesses is an appropriate basis for issuing a protective order. *See, e.g., United States v. Makekau*,  
4 429 F.2d 1403, 1404 (9th Cir. 1970) (per curium), *cert. denied* 400 U.S. 904 (1970). However, an  
5 order will not be made available where there are no facts to support an assertion that such an order  
6 is necessary to prevent harm to a witness or third party. *State v. Pettit*, 66 Or. App. 575, 675 P.2d  
7 183 (1984) (citing *Makekau*, 429 F.2d at 1404). The *Pettit* case is highly instructive.

8 *Pettit* involved a sodomy prosecution where the state moved for a protective order against  
9 disclosing the new address of the victim daughter and her mother. *Id.* at 577. The applicable state  
10 rule was modeled on, and indistinguishable from Rule 16(d)(1).<sup>1</sup> The motion for protective order  
11 was supported by a prosecutor's affidavit, explaining that "Ms. Pettit . . . does not wish the  
12 disclosure of her new location to the defense as she and her daughter are attempting to start their  
13 lives anew . . . She is fearful that any contact with the [defendant or his counsel] will be upsetting  
14 and disruptive to her and to her daughter. She is also apprehensive about the possible abduction of  
15 her children." *Id.* The court found this unpersuasive. Conceding that the mother's fears "*might*  
16 justify a protective order," the Court noted that there were "no facts in the affidavit showing  
17 circumstances or occurrences that support those conclusions" *Id.* at 578 (emphasis added). The  
18 court observed that "'[s]howing good cause' is not an idle phrase. In the context of the discovery  
19 statutes, good cause means a substantial reason -- one that affords a legal excuse. An assumed or  
20 imaginary pretense is insufficient." *Id.* (quoting Black's Law Dictionary (4th ed. 1951)).

21 In *Nelson*, the government moved under Rule 16(d)(1), asserting that "interests in public  
22 security and the privacy of its files outweighs what interest the defendants have in preparing their  
23 defense." 486 F. Supp at 480. After observing that the burden of justifying a protective order under  
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26 *See id.* (observing that "ORS 135.873 is derived in part from [present Rule 16(d)(1)] of the  
27 Federal Rules of Criminal Procedure."); *compare* ORS 135.815(1), ("Upon a showing of good  
28 cause, the court may at any time order that specified disclosures be denied, restricted or  
deferred, or make such other order as is appropriate.") *with* Fed. R. Crim. P. 16(d)(1), ("At any  
time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant  
other appropriate relief.")

1 Rule 16(d)(1) is on the moving party, and that the norm is to deny a request for restricted discovery,  
 2 the court concluded that “the government's bald statements fall far short of the requisite showing  
 3 of need.” *Id.* (internal citations omitted).

4 Cases where a concern for the witnesses was sufficient to justify a protective order have  
 5 consistently involved more serious and well-founded circumstances. *See, e.g., United States v.*  
 6 *Lee*, 374 F.3d 637, 652 (8th Cir. 2004) (limiting access to witness names was appropriate where  
 7 district court determined that disclosure would endanger their lives); *United States v. Aref*, 533 F.3d  
 8 72, 80 (2d Cir. 2008) (carefully reviewing classified information and agreeing with the district court  
 9 “that the Government has established a reasonable danger that disclosure would jeopardize national  
 10 security”).

11 The County argues that witnesses involved in the requested and subpoenaed material “may  
 12 feel pressure from those designated as targets and other putative defendants and may decline to  
 13 cooperate.” (Gov’t Motion at 3), and that a protective order may be issued “as the necessary way  
 14 to protect . . . files or . . . witnesses from threats, bribery, and other corrupt influences.” (*Id.*) To  
 15 back this legal assertion, the County cites three cases, none of which support the County’s  
 16 argument.<sup>2</sup> There is not a sliver of evidence that bribes, threats, or any corrupt influence will  
 17 result, or that witnesses may be “designated as targets” and “decline to cooperate.” The County’s  
 18 concerns are pure conjecture, “bald statements [that] fall far short of the requisite showing of need.”  
 19 *Nelson*, 486 F. Supp at 480. They amount to nothing more than “[a]n assumed or imaginary  
 20 pretense[, which] is insufficient” to demonstrate the required cause. *Pettit*, 66 Or. App. at 578.  
 21 The County’s concerns are so generic and commonplace, that if taken seriously, would justify  
 22 protective orders for any and all garden variety discovery requests.

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 24 <sup>2</sup>

25 *United States v. Anderson* 509, F.2d 724, 730 (9th Cir. 1975) observed that because of the unique  
 26 position of *confidential informants*, if probable cause for a search is disputed, the district court  
 27 should *in camera* balance whether the identity of the informant is relevant to the inquiry. *United*  
 28 *States v. Dellinger*, 472 F.2d 340, 392 (7th Cir. 1972), although mentions “protective order,” cannot  
 by any non-frivolous stretch be construed to infer support for the cited assertion. *United States v.*  
*Salsedo*, 477 F. Supp. 1235, 1244 (E.D. Cal. 1979) restates the concern of protecting files and  
 witnesses “from threats, bribery and perjury,” but fails to provide any guidance for making such a  
 determination; indeed, the *Salsedo* court sided with the defendant’s right to get the necessary  
 discovery.

1           **2. Shasta County Lacks Standing To Raise Concerns Over an “Adverse Effect” on**  
2           **Future Criminal Prosecutions.**

3           The County also asserts that disclosure beyond the proposed protective order “will have an  
4           adverse effect on any future criminal cases and possibly compromise them entirely.” (Gov’t Motion  
5           at 3) As a threshold matter, this allegation suffers from the same fatal flaws as the County’s concern  
6           about witnesses, as discussed in *supra* III-A. Namely, it is a bald assertion, devoid of factual  
7           foundation, and accordingly does not meet the weighty threshold needed to compel a court to issue  
8           a protective order.

9           Initially, defendant Francisco Javier Velasco points out that the documents in question are  
10          not discovery received pursuant to Federal Rules of Criminal Procedure 16, but rather items which  
11          were secured pursuant to Rule 17, i.e., subpoena. Therefore, counsel’s reliance on Rule 16(d) is  
12          inapplicable. Further, Shasta County Counsel’s memorandum of law on page 2 misstates the facts  
13          by alleging that the motion for protective order is being filed by the United States. Clearly, the  
14          United States is a party to this action, but the County of Shasta is not, and therefore the County has  
15          no standing in this case to request a protective order pursuant to Federal Rule of Criminal  
16          Procedure 16(d).

17          The Supreme Court has established an “irreducible constitutional minimum of standing”,  
18          which contains three elements: an “injury in fact”, that is causally connected to the conduct for  
19          which relief is requested, where it is likely that the injury will be redressed favorably. *See Lujan*  
20          *v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

21                 **a. Shasta County’s Claim Is Not an “Injury In Fact.”**

22          In order to have standing to raise an issue, Shasta County must have suffered an “injury in  
23          fact”-- “an invasion of a legally protected interest which is concrete and particularized..” *Id.*  
24          (internal citations omitted).

25          Shasta’s County does not have a legally protected interest in keeping out evidence of  
26          corrupt police practices where such evidence is relevant to resolving a legal issue – e.g. when other  
27          defendants seek to suppress evidence due to the incredibility of the same police officers or  
28          procedures. Accordingly, cases that involve the same officers, situated in similar circumstances,

1 conducting stops based on similarly subjective traffic violations, may be “adversely affected.”  
2 Different defendants will use the same discovered information to undermine the credibility  
3 judgments in their particular cases. Since any “adverse effect” would not be based on erroneous  
4 foundation, but on legitimate evidentiary inferences made in pre-trial hearings, the what the County  
5 seeks protection for is not a legally protected interest.

6 To the extent that the County’s motion appears to imply concerns about unfair prejudice,  
7 the County no less lacks standing. The County’s interest must be “actual or imminent, not  
8 ‘conjectural’ or ‘hypothetical’”. *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S.  
9 149, 155 (1990)). Accordingly, the County cannot hypothesize of, for example, the possibility that  
10 sharing of relevant impeaching evidence may, at some point, unfairly characterize the credibility  
11 of some officer in a Shasta County prosecution. To the extent that Shasta County has a legally  
12 cognizable interest in unfair characterization of their officers in future prosecution, such interest  
13 is not actual or imminent, it is purely hypothetical and conjectural, and does not give the County  
14 standing for this motion.

15 **b. There Is No Connection Between the Harm and The Defendant’s**  
16 **Conduct, Nor is there a likelihood of redress.**

17 The second “irreducible minimum for standing” is a causal connection between the harm  
18 and the challenged action: “the injury has to be ‘fairly . . . trace[able] to the challenged action. . .  
19 and not . . . the result [of] the independent action of some third party not before the court.’” *Lujan*,  
20 504 U.S. at 560 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

21 Shasta County fails this requirement because the protective order will not prevent  
22 “independent action of some third party not before the court” that will also result in the alleged  
23 harm. Parties who are involved in actions arising out of practices by the same police officers and/or  
24 departments, are not prevented from independently subpoenaing and/or making discovery requests  
25 for all of the evidence that the County seeks to “protect”. Indeed, because of the sheer number of  
26 similar traffic stops, other parties have probably already made such requests, causing the same  
27 alleged injury that the County seeks to redress with this order.

28 Shasta County also fails to meet the third standing requirement: “it must be ‘likely,’ as



1 opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Lujan*,  
2 504 U.S. at 560 (quoting *Simon*, 426 U.S. at 38, 43). Even if the protective order is granted, there  
3 is no likelihood that the “harm” will be redressed. As established earlier, any party for whom such  
4 evidence is relevant, can independently subpoena and/or make discovery requests for all of the  
5 evidence at issue here.

6 **III**

7 **CONCLUSION**

8 As set forth above, the County of Shasta has set forth no specific facts from which this court  
9 can make a finding of good cause that any witness would be threatened, bribed or subject to perjury  
10 should the information be disclosed to others. Further, the only reason set forth by the County of  
11 Shasta is that it believes other counsel in the area are working with the attorneys in the case at bar,  
12 reviewing the validity of the stops made by the subject narcotics officers in this case. Certainly if  
13 the actions of the officers are indeed found to be unconstitutional, and their stops not based on  
14 legitimate violations of law, but rather based upon race for the specific purpose of searching  
15 vehicles without probable cause, then it would seem that it would be in the best interests of the  
16 County of Shasta that those people harmed by the illegality be so informed, and that the illegality  
17 be terminated.

18 For the reasons set forth, and those to be offered at the hearing of this matter, defendant  
19 Francisco Javier Velasco respectfully requests that this honorable court deny the requested  
20 protective order.

21 Dated: March 9, 2010

22 Respectfully submitted,

23  
24 /s/ Daniel A. Bacon  
25 DANIEL A. BACON, Attorney for  
26 FRANCISCO JAVIER VELASCO

27 Defendant Jose Salvador Sanchez-Palomino, through his attorneys, Federal Defender Daniel  
28 J. Broderick, and Lauren Cusick, Assistant Federal Defender, joins in the Memorandum of Points

1 and Authorities in Opposition to Shasta County’s Motion for a Protective Order, and adopts the  
2 arguments and reasoning set forth therein.

3 DANIEL J. BRODERICK, Federal Defender

4  
5 /s/ Lauren Cusick  
6 LAUREN CUSICK, Assistant Federal Defender  
7 Attorneys for Defendant  
8 JOSE SALVADOR SANCHEZ PALOMINO  
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5  
6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF CALIFORNIA  
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9 UNITED STATES OF AMERICA,  
10 Plaintiff,  
11 vs.  
12 FRANCISCO JAVIER VELASCO,  
13 Defendant.

Case No. 2:09-cr-00094-MCE  
DECLARATION OF DANIEL A. BACON  
IN SUPPORT OF OPPOSITION TO  
SHASTA COUNTY'S MOTION FOR  
A PROTECTIVE ORDER  
DATE: March 11, 2010  
TIME: 9:00 AM  
DEPT: Hon. Morrison C. England, Jr.

14  
15 I, Daniel A. Bacon, declare and state as follows:

16 That I am an attorney licensed to practice before the United States District Court for the  
17 Eastern District of California, and represent defendant Francisco Javier Velasco.

18 That as the attorney for Mr. Velasco, I have attempted to investigate information received  
19 from various sources that the officers that detained Mr. Velasco on February 12, 2009, specifically  
20 Pat Kropholler and Chris McQuillan of the Shasta County Sheriff's Department and the CAL-MET  
21 task force, were involved in an ongoing practice of detaining drivers based upon their race for the  
22 sole purpose of searching their vehicles for illicit drugs. The information received from various  
23 sources indicated that the two agents would follow a vehicle with out-of-county license plates being  
24 driven by a Hispanic individual, drive alongside the vehicle, and inspect the interior of the vehicle,  
25 and thereafter stop the vehicle for an unverifiable traffic offense, i.e., speeding.

26 In an effort to investigate the matter further, this declarant issued subpoenas in late July and  
27 early August, 2009, to the Custodian of Records of the Shasta County Sheriff's Department, as well  
28 as to the two officers, seeking a multitude of records concerning the officers' stops for a two-year

1 period prior to the stop in question on February 12, 2009, including, but not limited to, requests for  
2 CLETS information, records of all stops, records of citations, and records of computer entries. The  
3 subpoena requested the presence of the Custodian of Records and the two officers on a specific date  
4 in the court of the Hon. Morrison C. England, Jr., or in lieu thereof to provide the records to this  
5 attorney's office.

6       Thereafter, Assistant United States Attorney Todd D. Leras filed a motion to quash the  
7 subpoena, and set the hearing date for September 24, 2009. Senior Deputy County Counsel David  
8 Yorton joined in the motion.

9       The hearing on the motion to quash was continued so that the parties could attempt to work  
10 out an agreement. Initially, this declarant and Assistant U.S. Attorney Leras resolved the relevancy  
11 objection by filing an additional motion to suppress, which included the defendants' position that  
12 the stop was based upon race, and not speeding, and therefore the actions of the officers in similar  
13 situations would become relevant.

14       Secondly, this declarant agreed to reissue subpoenas which provided (correctly) that the  
15 information subpoenaed should be provided directly to the court as opposed to this declarant's  
16 office.

17       Discussions were had with Senior Deputy County Counsel David M Yorton, and the  
18 subpoenas were revised to limit the time periods and reduce the amount of information requested.  
19 The new subpoenas were issued and served upon David M. Yorton on behalf of the Custodian of  
20 Records of the Shasta County Sheriff and the two named officers by letter dated November 16,  
21 2009, a copy of which is attached hereto as Exhibit A.

22       No objection was made to the subpoenas, and, indeed, by e-mail dated Thursday,  
23 December 10, 2009, Senior Deputy County Counsel Yorton informed this declarant that the  
24 information was being compiled and would be sent by FedEx directly to the court. Mr. Yorton did  
25 state, however, that certain amendments would be made and redactions accomplished, which might  
26 compromise ongoing investigations. He further agreed that after reviewing the documents, if I felt  
27 I needed more of the redacted information, we would meet and confer on that issue. (See Exhibit B  
28 attached hereto.)

1 The records were in fact produced to the court on January 7, 2010 at 9:00 AM. Mr. Yorton,  
2 via telephone conference, informed the court that an exact duplicate copy had been provided to  
3 Assistant U.S. Attorney Todd Leras. Mr. Leras informed this declarant that he would review the  
4 documents to make sure that there were no additional objections to providing the information.  
5 Mr. Leras has contacted this declarant and informed me that he is willing to provide all of the  
6 documents, although he noted that a substantial portion had previously been redacted by the County  
7 of Shasta. Further, Mr. Leras indicated that he would not be joining in the County of Shasta's  
8 motion for a protective order.

9 I declare under penalty of perjury that the foregoing is true and correct. Executed this 9<sup>th</sup>  
10 day of March, 2010, at Fresno, California.

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/s/ Daniel A. Bacon  
DANIEL A. BACON, Attorney for  
FRANCISCO JAVIER VELASCO