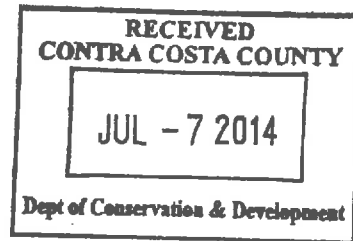


EXHIBIT 6



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July 7, 2014

VIA FACSIMILE 925-674-7258 AND PERSONAL DELIVERY

Zoning Administrator
County of Contra Costa
Department of Conservation and Development
30 Muir Road
Martinez, CA 94553

Re: Zoning Administrator Hearing of July 7, 2014: Subdivision and Development
Applications for 3189 Danville Blvd., Alamo

Dear Zoning Administrator:

As you know, this office represents TRH Holdings, LLC (TRH), owner of the property located at 3236 Stone Valley Road in Alamo. Our client's property is adjacent to the proposed project site for Mr. Rubey's development, which is the subject of the pending development applications (file nos. MS11-0006 and DP12-3029) (Project).

We appreciate the opportunity to review and provide comments on the Initial Study/Negative Declaration (IS/ND) that has been prepared in connection with the Project. As discussed more fully below, the IS/ND fails to adequately evaluate the Project's potential environmental impacts in numerous respects as required under the California Environmental Quality Act, Public Resources Code section 21000 et seq. and its guidelines at title 14 of the California Code of Regulations, section 15000 et seq. Accordingly, TRH hereby respectfully requests that the Zoning Administrator either disapprove the Project or continue the matter until a legally adequate CEQA review has been conducted.

I. The Threshold for Requiring Preparation of an Environmental Impact Report Is Relatively Low.

A negative declaration is inappropriate where a "fair argument" exists that a project may have a significant effect on the environment. *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74-75; Guidelines, § 15064(f)(1). The "fair argument" standard provides a "low threshold" for requiring an environmental impact report. *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 207. "A strong presumption in favor of requiring preparation of an EIR is built into CEQA.

This presumption is reflected in what is known as the 'fair argument' standard, under which an agency must prepare an EIR whenever substantial evidence in the record supports a fair argument that a project may have a significant effect on the environment." 1 Practice Under the California Environmental Quality Act (Cont.Ed.Bar 2d ed. 2014) § 6.37, pp. 6-38-39, citations omitted.

"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." CEQA Guidelines, § 15384(a). California courts have routinely recognized public comments as rising to this level. *Taxpayers for Accountable Sch. Bond Spending v. San Diego Unified School Dist.* (2013) 215 Cal.App.4th 1013, 1035; *The Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928; *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 583; *Ocean View Estates Homeowners Assn., Inc. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 402.

The "significance" of an environmental impact under CEQA is evaluated under the statutory and regulatory definitions. The Guidelines define a "significant effect" as "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic and aesthetic importance." CEQA Guidelines, § 15382. See also Pub. Res. Code, § 21068. It is clear that "significance" does not imply some dramatic change in the environment. "An effect on the environment need not be 'momentous' or 'important' to meet the CEQA test for significance. The term 'significant' covers a spectrum ranging from 'not trivial' through 'appreciable' to 'important' and even 'momentous.'" 1 Practice Under the California Environmental Quality Act (Cont.Ed.Bar 2d ed. 2014) § 6.44, p. 6-51, citation omitted.

Under these standards and as described more fully below, it is abundantly clear that more than substantial evidence supporting a fair argument exists that the Project may have a significant effect on the environment.

II. There Is Evidence in the Record that a Significant Environmental Impact May Occur as a Result of the Project.

The analysis set forth in the IS/ND fails to account for a number of potentially significant impacts that the Project may have on the existing environment, including effects on aesthetics, air quality, biological resources, geology and soils, greenhouse gas emissions, hydrology and water quality, noise, and transportation and traffic.

A. Fundamental Flaws Impair the IS/ND's Ability to Serve Its Disclosure Purpose.

CEQA is intended to inform decisionmakers and the public about the potentially significant environmental effects of a project before harm is done to the

environment, and the EIR is at the heart of that requirement. CEQA Guidelines, § 15002(a)(1); see also *No Oil, Inc. v. City of Los Angeles*, *supra*, 13 Cal.3d at 84. To fulfill this function, an environmental document's discussion of impacts must be detailed, complete, and "reflect a good faith effort at full disclosure." CEQA Guidelines, § 15151. An adequate environmental document must include facts and analysis and not just an agency's conclusions. See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568. The environmental document must disclose all direct and indirect, potentially significant environmental impacts of a project. Pub. Res. Code, § 21100(b)(1); CEQA Guidelines, § 15126.2(a). If an environmental document identifies such impacts, then an EIR is required and it must propose and evaluate mitigation measures to minimize those impacts. Pub. Res. Code, §§ 21002.1(a), 21100(b)(3); CEQA Guidelines, § 15002(a)(2) & (3).

Here, the IS/ND fails to serve this fundamental purpose. Rather than actually describing the proposed project and evaluating its impacts, the IS/ND defers all substantive analysis, either on the basis that it will be studied later (e.g., at the time of architectural review by an advisory body, preparation of the required geotechnical report) or by simply concluding without support or evaluation that a standard of significance will not be exceeded (e.g., no aesthetic impacts because project's design will be consistent with surrounding neighborhood).

The IS/ND is also deficient insofar as it repeatedly mischaracterizes mitigation as conditions and then improperly defers mitigation in numerous instances. Under the plain language of CEQA Guidelines section 15065(b), the timing for mitigation is critical. According to the authors of the leading CEQA treatise, "[t]his commitment to mitigation must be made before commencement of preliminary review of the CEQA document," not after. 1 Practice Under the California Environmental Quality Act (Cont.Ed.Bar 2d ed. 2014) § 6.50, p. 6-55. Moreover, "A negative declaration requiring formulation of mitigation measures at a future time violates the rule that members of the public and other agencies must be given an opportunity to review mitigation measures before a negative declaration is approved." *Id.* at § 6.74, p. 6-71, citing Pub. Res. Code, § 21080(c)(2), CEQA Guidelines § 15070(b)(1). In addition, it is well established under CEQA that deferring study of environmental impacts or handing them off to another agency is improper. *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296.

B. The Project Description Lacks Sufficient Detail in Order to Evaluate the Project's Environmental Impacts.

The project description included in the IS/ND is cursory and lacking in detail. Properly identifying and describing the whole of the project is the crucial first step of the CEQA process. "An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 730. Courts have held that a "truncated project concept" itself violates CEQA. *Id.* at 729-30. "An accurate project description is necessary for an intelligent evaluation of the

potential environmental effects of a proposed activity." *Id.* at 730. If an environmental document "does not 'adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project,' informed decisionmaking cannot occur under CEQA and the final EIR is inadequate as a matter of law." *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82–83.

The project description here identifies the building to be constructed as part of the Project as "[a] new approximately 3,000-square-foot, two-story commercial building for mixed professional office and retail use." (IS/ND, p. 1.) No other details are provided; and no reference is made to any conditions or other restrictions that will constrain development to the parameters evaluated in the IS/ND. Furthermore, while it could be appropriate in certain circumstances to evaluate a proposed development at a more conceptual level, this is only the case if there will be further CEQA review once the project is more fully designed and if the lead agency makes a meaningful attempt to evaluate the project's impacts based on reasonable assumptions. For example, the Staff Report reveals even the generic description provided in the IS/ND is supported only by a "a conceptual building design of **possible** future development" without any commitment by, or condition on, the applicant. (Staff Report, p. 3.) In fact, as the Staff Report demonstrates, the project does not specify **any** particular building or use, providing absolutely no basis for a substantive evaluation of its potential environmental impacts. "[N]ew development on Parcel B will **most likely** consist of approximately 26-foot, two-story professional building with a floor area of about 3,000 square feet." (Staff Report, p. 6.) The uncertainty inherent in "possible" and "most likely" undermines the conclusions reached in the IS/ND, rendering it fatally flawed under CEQA.

Even crediting the "conceptual building design" as a concrete element of the project, it does not provide enough detail to adequately assess the project's potential environmental impacts. "Approximately 3,000 square feet" is insufficiently specific to evaluate the project's intensity of use. Moreover, it leaves open any number of questions that should be answered prior to any finding of sufficiency of the IS/ND. At what level of intensity will the building actually be developed? How many employees and customers are anticipated to use it? What percentage of the building will be dedicated to professional offices and what percentage will be dedicated to retail? What will the physical footprint of the building be? What is the anticipated height, massing and scale in context with the adjacent uses? Without this basic information, the potential impacts of the project cannot be fully or fairly evaluated.

C. The Project's Aesthetic Impacts Have Not Been Adequately Evaluated.

The IS/ND's assessment of the project's aesthetic impacts is deficient insofar as it is based on the inadequate project description. Without an actual project to evaluate, there is no means to analyze its aesthetic impacts. Yet the IS/ND asserts that "the

proposed office building will be consistent with the character of the surrounding area" and "will be architecturally consistent with the existing building on the site." (IS/ND, p. 3.) These conclusions are unsupportable on the current record; without a definite "project" to evaluate, the aesthetic impacts are unknown.

Similarly, and as addressed above, it is improper under CEQA to defer analysis and mitigation of project impacts. The IS/ND concludes that the Project will be consistent with the surrounding area without any attempt to analyze the conceptual plans or identifying any performance standards that will ensure consistency and compatibility with the surrounding area. Rather, the conclusion that the Project will be consistent with surrounding uses appears to be based simply on the type of use which is, as noted, purely hypothetical at this point, while at the same time deferring analysis of and responsibility for this compatibility determination to some future process in front of an advisory body.

The IS/ND also gives short shrift of the impact on trees within the Project site. The importance of tree coverage cannot be underestimated, particularly in an already-urbanized setting. Here, it is unclear whether the Project will damage highly protected tree canopies. At the very least, this needs to be evaluated and mitigation needs to be imposed to ensure that any significant impacts that occur as a result of damage to the trees and therefore loss of the important tree canopies is fully mitigated. Simply imposing a condition to bond and replant damaged trees does not explain what the impact will be from an aesthetic perspective or confirm that such mitigation will be adequate.

Regarding the impact of the Project on the existing visual character, the IS/ND merely references the general description of a 3,000 square foot, two-story office building, and then makes a number of unsupported assumptions in an attempt to justify its conclusion that it will not in significantly degrade the visual character of the area. For example, it assumes without providing any basis that it will be architecturally consistent; and it does not even attempt to address massing and scale (except for referencing a nearby 2-story building); it does not address the potential loss of mature, highly protected trees to the greater area, nor any impacts on landscaping.

Regarding light and glare, the IS/ND concludes with no support that exterior lighting will be "minimal," with no reference to applicable development standards to ensure that no substantial light interference will occur. The document also fails to address glare impacts entirely; e.g., no discussion of building materials, glare from additional car windshields, etc.

D. The Project's Impacts on Air Quality Have Not Been Adequately Evaluated.

Among other flaws, the IS/ND's discussion of air quality impacts suffers from an internal inconsistency. It states that the loss of parking spaces from the project will

reduce automobile traffic and thus air pollutants while acknowledging in the next sentence that a new commercial/retail building will actually attract visitors and thus **increase** traffic and pollutants. "[T]here will be a corresponding decrease in criteria air pollutants by the reduction of the number of automobiles able to park on the parcel. Nonetheless, with the addition of a new building, there will understandably be an expected increase in visitors or patrons to the site whom will be likely coming by automobile." (IS/ND, p. 6.) The IS/ND cannot state that the project will both increase and decrease traffic; such an analysis is incoherent. Moreover, the document does not analyze the issue that the loss of parking and increase in traffic will create – i.e., the increased emissions resulting from the additional time project patrons and employees may spend in their cars searching for parking. Common sense dictates that an increase in traffic with a decrease in parking will lead to more time drivers spend hunting for a parking space. While the lack of parking alone is not sufficient to constitute an impact under CEQA, when there is evidence that the lack of parking will result in secondary physical impacts – i.e., cars circling for long periods of time looking for parking, which results in increased emissions – then such impacts must be evaluated. This becomes even more problematic given that the parking shortage is much more dire than originally evaluated given the inaccurate assumption related to the availability of an additional 30 spaces, as more fully explained in our correspondence to the County dated July 2, 2014. Accordingly, it is clear that between increased traffic and greater time searching for parking the Project will result in additional emissions.

Moreover, the IS/ND fails to analyze the actual effects of the project on air quality, instead comparing it to the current development in place at Alamo Plaza.

"Compared to Alamo Plaza, the proposed improvements on the subject site are minor, and any additional traffic generated by the proposed project is dwarfed in comparison. Thus the project is expected to have a negligible to minimal impact in terms of ambient air quality, so impact will be **Less Than Significant**." (IS/ND, p. 6.) Such a conclusory comparative analysis is inadequate under CEQA. As discussed below, the IS/ND's traffic analysis is deficient and cannot provide the basis for any assessment of air quality impacts. Likewise, the document does not include any summary or analysis of the air quality impacts of Alamo Plaza, making any purported comparative analysis completely baseless.

Given its location, attraction of new users, and reduction in parking, it is indisputable that the project will have air quality impacts. This is particularly the case given the flawed assumption in the IS/ND which assumes the existence of 30 additional parking spaces for which the applicant does not have exclusive right to utilize. The IS/ND's failure to try to quantify those impacts renders the document inadequate under CEQA.

The IS/ND's analysis of particular thresholds of significance drives the point home. With respect to whether the Project will conflict with or obstruct the implementation of an air quality plan, the IS/ND makes no attempt to evaluate this threshold. Rather, it merely provides a brief summary of the status of the AQP, and then simply

concludes that the Project will not conflict with or obstruct the plan. Such a tautological approach does not comply with CEQA.

Similarly, with respect to whether the Project will violate any air quality standards or contribute to an existing or projected air quality violation, the IS/ND fails to even acknowledge the threshold, let alone actually evaluate whether the project would violate or contribute to any violations of air quality standards – instead, it simply proclaims that the Project will have no impact. This is wholly inadequate.

Finally, the IS/ND also fails to even attempt to quantify the potential impacts from the Project in terms of whether there will be a cumulatively considerable net increase of any criteria pollutant. This is particularly problematic given the non-attainment status of several criteria pollutants. Accordingly, the IS/ND's failure to account for the Project's impacts on air quality renders it defective under CEQA.

E. The Project's Impacts on Biological Resources Have Not Been Adequately Evaluated.

The IS/ND states in conclusory fashion that "the proposed project cannot impact any biological resources, riparian habitats, natural communities, marshes, wetlands, vernal pools, etc." (IS/ND, p. 7.) However, it fails to acknowledge that the project site is less than 500 feet from San Ramon Creek, a water body listed as impaired by the Environmental Protection Agency. The IS/ND does not address how the project will or will not contribute to the impairment of San Ramon Creek by, for instance, construction activities or additional traffic and other use-related impacts.

Also, it fails to acknowledge there are trees on and adjacent to the Project site, which could serve as nesting habitat for migratory birds. The fact that it is an already-developed site does not obviate the need for at least a cursory evaluation of whether there are any species that could utilize the area for habitat purposes or serve as an important wildlife corridor, particularly given the relatively close location of expansive amounts of open space. The bottom line is that while the conclusion may ultimately be that there is no such habitat or corridors to be protected, CEQA does not allow an agency to come to this conclusion without any reference to facts or an attempt at analysis.

The brief discussion on the impacts to the highly protected trees is disingenuous at best. Here, with respect to the 58-inch tree, there are no facts included in the IS/ND to support the conclusion that it will not be affected by construction or development activities; the mere proclamation in the IS/ND does not make it so. Regarding the remaining four highly protected trees, there is an implicit acknowledgment that damage may in fact occur and thus conditions are imposed. And yet rather than call this out as an impact which then requires mitigation, the IS/ND disingenuously fails to identify the impact in the first place and then mischaracterizes the recommended mitigation as conditions, which are not even clearly defined much less evaluated to ensure these will be sufficient to reduce impacts to a less than significant level.

F. The Project's Impacts on Geology and Soils Have Not Been Adequately Evaluated.

The IS/ND's analysis of geology and soil impacts is legally insufficient as it improperly defers analysis to a yet-to-be-produced geotechnical report. "Additionally, the project will be conditioned to require a satisfactory geotechnical report prepared by a qualified individual or firm for the review of the County Planning Geologist and the review and approval of the Department of Conservation and Development." (IS/ND, p. 9.) CEQA does not countenance such an approach. Moreover, the impropriety of this analysis is particularly apparent given the IS/ND's notation that the project site has "generally high" potential for liquefaction in a seismic event. (IS/ND, p. 10.)

While it is typical to impose as a condition the completion of a design-level geotechnical analysis, that is not what is happening here. Instead, the IS/ND defers **all** analysis to this later report, which is supposed to include an evaluation, at minimum, of liquefaction, slope stability, expansive soils, erosion, differential settlement, lateral spreading, subsidence and corrosive soils" and is supposed to include "recommendations appropriate for addressing any adverse soil conditions." (IS/ND, p. 9.) How can the IS/ND come to a conclusion that the Project will have "less than significant impacts" on these issues when it expressly defers any study of these issues until **after** project approval? This is contrary to the letter and spirit of CEQA.

Along with deferring the underlying analysis, the IS/MND proposes to improperly defer mitigation of several potentially significant environmental impacts regarding geology and soils. However, CEQA requires mitigation measures to describe the actions that will be taken to reduce or avoid an impact, and deferral of such measures is typically inappropriate. CEQA Guidelines section 15126.4 requires that mitigation either be presented as specific, feasible, enforceable obligations, or presented as formulas containing performance standards that would mitigate the significant effect of the Project and that may be accomplished in more than one specified way. It is impermissible for a CEQA document to require mitigation where the formulation of the mitigation strategy does not identify steps that might be taken to mitigate the impact once the study is complete. See, e.g., *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 280.

In short, a geotechnical report analyzing all of the geotechnical and soils related risks for the Project must be prepared as part of the CEQA process and may not be improperly deferred.

G. The Project's Impacts on Greenhouse Gas Emissions Have Not Been Adequately Evaluated.

The IS/ND includes a page and half of boilerplate language relating to GHG emissions, and contains **exactly one sentence of purported "analysis,"** which

consists entirely of a nonsensical statement – i.e., because a comprehensive traffic study is not required for the project, it will not result in any significant GHG emissions. This analysis is fundamentally flawed, for several reasons.

One, as previously discussed, because the project description is inadequate and because the IS/ND fails to even attempt to analyze project impacts based on reasonable assumptions, there is no way to evaluate the intensity of use at the project and how much GHG emissions it will actually create. Two, the IS/ND fails to establish a link between a traffic study and the threshold of significance for GHG emissions. Just because a project will not generate sufficient traffic to merit a comprehensive study does not obviate the need to evaluate potential GHG impacts. Again, the fact that the result of such an analysis may show that such impacts are less than significant does not obviate the need to conduct such an evaluation in the first place. Third, as discussed below, the traffic “study” provided by the applicant is not included in the IS/ND and there is no indication it was peer reviewed by the County, making it an insufficient basis to reach any conclusions as to traffic impacts. Ergo, it cannot provide the basis for a finding as to the Project’s potential impacts on GHG emissions.

It is undisputed that the Project will attract users and reduce parking, creating more time spent in vehicles emitting greenhouse gases. CEQA requires that these impacts be evaluated, not dismissed in a conclusory fashion.

H. The Project’s Impacts on Hydrology and Water Quality Have Not Been Adequately Evaluated.

This portion of the IS/ND fails to actually compare the Project with the thresholds of significance. For instance, as to whether the Project would violate any water quality standards or waste discharge standards, the IS/ND simply reiterates the threshold and concludes that no water quality standards will be violated. It does not provide any evidence to support that conclusion and fails to acknowledge construction-related impacts that can affect water quality, for example.

Similarly, with respect to the Project’s effect on the local drainage pattern, the IS/ND does not address how stormwater during construction and operation will be handled and whether the currently developed nature of the site will impede the handling of that stormwater, particularly in light of new storm water regulations. While the Utilities portion of the IS/ND mentions C-3 requirements, there is nothing more than a bald reference without any further analysis. There is no effort to determine whether these requirements will apply and if so, whether the Project can be designed to meet the more rigorous standards.

Finally, the IS/ND mistakenly asserts that no bodies of water lie within the project’s vicinity. “There are no rivers, creeks or streams on the property within the project vicinity.” (IS/ND, p. 14.) As noted above, San Ramon Creek is located less than

500 feet from the project site. The IS/ND fails to account for the project's potential effect on this watershed and its already impaired status.

I. The Project's Impacts on Noise Have Not Been Adequately Evaluated.

The IS/ND fails to identify even generally the anticipated length of construction time, and yet it consistently relies on the notion that because construction is, by its nature, temporary, that no significant impacts will result. There is no excuse for not making a good faith based attempt to evaluate noise impacts based on reasonable assumptions.

Specifically with respect to noise, the IS/ND does not even attempt to walk through the thresholds, and provides no attempt to measure existing ambient noise or quantify the impacts of constructing and operating the proposed Project.

J. The Project's Impacts on Transportation and Traffic Have Not Been Adequately Evaluated.

The IS/ND cites a dated "mini" traffic impact analysis provided by the applicant as grounds for concluding that there will be no significant traffic impacts arising from the project. This is insufficient. In the first instance, the cited analysis is not included in the IS/ND, making it impossible to evaluate its assumptions, analysis, and conclusions. Moreover, there is no documentation that this analysis was peer reviewed by the County to ensure an independent analysis from the County and meaningful review.

Putting these fundamental defects aside, no true analysis of the Project's traffic impacts can be completed given the uncertainty inherent in the project description as discussed above. More to the point, the County has failed to even attempt to quantify potential impacts by making a reasonable estimate of the anticipated uses and then determining potential impacts based on that estimate. The lack of any quantifiable analysis renders the IS/ND defective.

In addition, there are a number of factors demonstrating that the Project may, in fact, give rise to significant traffic impacts. First, as discussed above, the reduction in parking with the addition of project-related uses has the potential to create additional traffic impacts. Less parking plus more trips equals more time drivers spend in their cars. Second, the traffic analysis fails to take into account the fact that the project site is in a heavily traveled area of the County. In the words of the IS/ND itself, the project site lies in the "highly developed commercial town center of Alamo," which is "the commercial hub of the unincorporated Alamo community." (IS/ND, pp. 1, 22.) Danville Boulevard is already subject to heavy traffic loads as it is the main thoroughfare connecting Danville, Alamo, and Walnut Creek. Indeed, according to the draft Tri-Valley Transportation Plan and Action Plan for Routes of Regional Significance dated February 21, 2014, the Danville Boulevard corridor is a route of regional significance. It is also particularly susceptible to traffic impacts as it

is used as an alternate to I-680 during the morning and evening commute periods. The addition of a mixed use commercial/retail project in the commercial heart of Alamo right on Danville Boulevard will undeniably have traffic impacts that must be adequately analyzed under CEQA.

K. The IS/ND Fails to Analyze the Project's Potential Cumulative Impacts.

Given the foregoing, it is clear that the Project has the potential to create cumulative impacts in the areas of air quality, greenhouse gas emissions, and traffic. The IS/ND's failure to treat with these issues renders it inadequate under CEQA.

In summary, the IS/ND as drafted fails to account for a number of impacts the Project will have on the environment. CEQA requires a more thorough and defensible analysis of these impacts. TRH therefore urges the County to either deny the Project or to defer action on the applications at hand until such time as the impacts can be appropriately evaluated and discussed as required under the law.

Very truly yours,

MILLER STARR REGALIA



Matthew C. Henderson

MCH:klw

cc: Gary Kupp (via email)
Rob Hirt (via email)
Mitch Hertz (via email)