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9 Michael Genest, Director of Finance, and State  
Controller John Chiang

10  
11 SUPERIOR COURT OF CALIFORNIA  
12 COUNTY OF SACRAMENTO

13  
14 **CALIFORNIA ASSOCIATION OF  
PROFESSIONAL SCIENTISTS**

15  
16 Petitioner,

17 v.

18 **STATE OF CALIFORNIA, DEPARTMENT OF  
PERSONNEL ADMINISTRATION; DAVID  
GILB, DIRECTOR OF DEPARTMENT OF  
19 PERSONNEL ADMINISTRATION; STATE OF  
CALIFORNIA DEPARTMENT OF FINANCE;  
20 MICHAEL GENEST, DIRECTOR OF  
FINANCE; STATE CONTROLLER JOHN  
21 CHIANG; and DOES 1 THROUGH 10,  
INCLUSIVE,**

22 Respondents.  
23

CASE NO:  
34-2008-00014476-CU-WM-GDS

**DEPARTMENT OF FINANCE,  
DIRECTOR OF FINANCE, AND  
STATE CONTROLLER'S  
MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF THEIR  
OPPOSITION TO PETITION FOR  
WRIT OF MANDATE**

Date: September 19, 2008  
Time: 1:30 p.m.  
Dept: 33  
Judge: The Honorable Lloyd  
G. Connelly  
Trial Date: Not Set  
Action Filed: June 27, 2008

1 I. INTRODUCTION

2 Once all of the immaterial allegations and extraneous information is set aside, this writ  
3 presents a very simple question for decision: Did Finance or its director (collectively Finance)<sup>1/</sup>  
4 fail to perform a ministerial duty or mandatory duty such that CAPS has a clear, present, and  
5 beneficial legal right to obtain relief by way of writ of mandate? The answer to this question is  
6 “no” for at least three reasons.

7 First, and foremost, CAPS has not identified any ministerial duty that Finance is  
8 obligated to perform. In fact, Finance does not have a ministerial duty to (1) make any  
9 determination whether there are funds in existing appropriations to pay for salary increases  
10 and/or (2) recommend that the Legislature make appropriations for the CAPS salary increases in  
11 the 2008-2009 budget. CAPS has not cited to a single statute that would obligate Finance to take  
12 the actions that the union is requesting.

13 Second, even assuming, *arguendo*, that there is a duty to make a determination of  
14 whether there are existing funds to pay for the salary increases, Finance has already performed  
15 this act; specifically, on May 7, 2008, Finance informed DPA that there were no monies available  
16 in the department budgets or in Budget Act Item 9800 for the salary increase.

17 Third, and finally, assuming, *arguendo*, that there is a duty to recommend that the  
18 Legislature make appropriations for the CAPS salary increases in the 2008-2009 budget, Finance  
19 is unable to do so because the deadline to make any such recommendations has already passed.  
20 Specifically, Government Code section 13308 states that “... Finance shall provide to the  
21 Legislature, on or before April 1 of each year, all proposed adjustments to the Governor’s Budget  
22 . . . .” (Gov. Code, § 13308, subd. (c); see also State Administrative Manual (SAM), Chapter  
23 6130 [“By statute, [Finance] is required to give the Legislature all proposed adjustments ... to the  
24 Governor’s Budget by April 1.”].)

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27 1. The State Controller does not take any position on the merits of CAPS’ petition and  
28 will comply with any and all orders of this Court with regard to any decision issued in this case.

1 While Finance understands CAPS' desire to obtain salary increases for its scientist  
2 supervisors, there is simply no ministerial act that Finance can perform in order to provide  
3 monies for such salary increases. Therefore, Finance respectfully requests that CAPS's petition  
4 for writ of mandate be denied.

## 5 II. FACTUAL BACKGROUND

### 6 A. The Department Of Finance And Its Role In State 7 Government.

8 The Department of Finance is in the Executive Branch of California State Government  
9 under the Governor's administration. (Gov. Code, § 13000; see also 58 Cal.Jur.3d. (2008) State  
10 of California, § 48.) Finance is under the control of an executive officer known as the Director  
11 of Finance, who is appointed by the Governor and acts as the Governor's chief fiscal policy  
12 advisor. (Gov. Code, §§ 13001, 13002; see also 48 Cal.Jur.3d (2008) State of California, § 48.)

13 In *Tirapelle v. Davis* (1993) 20 Cal. App.4th 1317 (*Tirapelle*), the California Court of  
14 Appeal, Third Appellate District, provided the following summary of Finance and its role in state  
15 government:

16 In our governmental scheme of things, the Department of Finance  
17 has general powers of supervision over all matters concerning the  
18 financial and business policies of the state. ([Govt. Code,]  
19 § 13070.) Every state agency or court for which an appropriation  
20 has been made must submit to the Department of Finance a  
21 complete and detailed budget setting forth all proposed  
22 expenditures and estimated revenues for the ensuing fiscal year.  
23 [footnote omitted] (§ 13320.) In the budget submitted to the  
24 Department of Finance, each agency must estimate and call  
25 attention to the sums necessary for employee compensation,  
26 including merit salary adjustments. (§ 19835.5.) Until enactment  
27 of the budget act containing appropriations for the fiscal year, the  
28 Department of Finance may revise, alter or amend the budget of  
any state agency. (§ 13322.) The Department of Finance then  
assists the Governor in preparing the budget which the state  
Constitution requires the Governor to submit to the Legislature.  
(§ 13337.)

(*Tirapelle, supra*, 20 Cal.App.4th at pp. 1320-21.)

Finance does not have the power to appropriate money; rather, "[t]he power of  
appropriation resides exclusively in the Legislature." (*Tirapelle, supra*, 20 Cal.App.4th at  
p. 1321 (citing *California State Employee's Assn v. State of California* (1973) 32 Cal.App.3d

1 103, 107-08.) In addition, Finance does not have the power to set employee compensation.  
2 Instead, "that is a legislative function which ... the Legislature has delegated to the [Department  
3 of Personnel Administration]." (*Tirapelle, supra*, 20 Cal.App.4th at p. 1322, fn. 8 (citing *Pacific*  
4 *Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 189, 193).) "In general, DPA has jurisdiction  
5 over the state's financial relationship with its employees, including matters of salary...."  
6 (*Tirapelle, supra*, 20 Cal.App.4th at p. 1322.)

7 **B. DPA's Recommendation For A Salary Increase And**  
8 **DOF's Response.**

9 On April 28, 2008, the Department of Personnel Administration (DPA) sent a letter to  
10 CAPS enclosing a copy of DPA's findings on the salary hearings conducted regarding the  
11 compensation of various supervising scientific classifications pursuant to Government Code  
12 Section 19826. (Petition, at ¶¶ 24-26; see also Declaration of Christopher J. Voight in support of  
13 Verified Petition for Writ of Mandate and Complaint for Declaratory Relief (Voight Dec.), at ¶ 5  
14 & ex. A.) The letter indicated that pursuant to that same code section, DPA was forwarding the  
15 information to Finance to make a determination on whether the recommended adjustments were  
16 within existing salary appropriations, and that a copy of DPA's findings would be sent to Finance  
17 for their determination. (Voight Dec., at ¶¶ 5, 16 & ex. A.)

18 On May 7, 2008, the Director of Finance sent a letter to DPA's Director stating the  
19 following:

20 Section 19826(a) of the Government Code prohibits the  
21 Department of Personnel Administration from making adjustments  
22 to salaries that require expenditures in excess of existing  
23 appropriations. Funds for the recommended salary increases for  
the 14 supervising scientific classifications have not been  
appropriated in either department budgets or Budget Act Item  
9800.

24 (Declaration of Timothy S. Lynn (Lynn Dec.), at ¶ 3 & ex. 1.)

25 On June 27, 2008, DPA sent a letter to CAPS' Staff Director, Christopher J. Voight,  
26 amending its findings and stating that although CAPS contends that there are appropriations  
27 contained in the 9800 Item of the State budget to pay for the salary increases, "DPA is not aware  
28 of any money the Department of Finance (DOF) has identified for this pay adjustment. As you

1 know, when funds are unavailable for salary adjustments, expenditures must be approved by the  
2 Legislature.” (Request for Judicial Notice (RJN), at ex. 1.)

3 On June 27, 2008, CAPS filed the instant petition for writ of mandate in Sacramento  
4 County Superior Court.

5 **C. Summary Of CAPS’ Allegations Against DOF, Its**  
6 **Director, And The State Controller.**

7 CAPS’ petition alleges that “Finance has a duty to determine whether the higher  
8 salaries can be paid within existing appropriations.” (Petition, at ¶ 51.) CAPS then alleges that  
9 “[u]pon a determination that payment of the salaries called for in the DPA Director’s Decision  
10 dated April 28, 2008 will not exceed appropriations, Respondent State Controller Chiang has a  
11 ministerial duty to pay the increased salaries called for in the DPA Director’s Decision.” (*Id.*, at  
12 ¶ 52.) CAPS also alleges that “[i]f DPA determines that it will increase the salaries for  
13 engineering supervisors ... Finance has a duty to include in the proposed budget for 2008-2009  
14 for the Legislature’s consideration an increase that would move the salaries of the fourteen  
15 classes from where they are to where the correlating supervising engineering classes will be  
16 effective July 1, 2008 or otherwise pay those increased salaries out of the 9800 Item, or any other  
17 provision for salary, of the 2008-2009 State Budget.” (*Id.*, at ¶¶ 40 & 53.) Lastly, CAPS alleges  
18 that Finance, its director, and the State Controller “have a clear, present and ministerial duty to  
19 conform to the laws of the State of California and to avoid violations of the law.” (*Id.*, at ¶ 54.)

20 In its points and authorities in support of its petition, CAPS makes a reference that “[if]  
21 Finance somehow determines that the salary increases cannot be paid in the 2007-2008 fiscal  
22 year as they would exceed existing appropriations, the increased salaries must be placed in the  
23 proposed budget for the Legislature’s consideration or must otherwise be paid out of the  
24 2008-2009 State Budget Act’ 9800 item or any other provision for the payment of salary.”  
25 (Points and Authorities in Support of Verified Petition for Writ of Mandate and Complaint for  
26 Declaratory Relief (CAPS’ P&As), at p. 11:13-16.) However, there is no mention of the state

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1 officer or department that would allegedly have a ministerial duty to perform this act, or a  
2 citation to any statutory authority.<sup>2f</sup>

### 3 III. STANDARDS FOR A TRADITIONAL WRIT OF MANDATE

4 Mandamus lies to compel the performance of a clear, present, and ministerial duty  
5 where the petitioner has a beneficial right to performance of that duty. (*Carrancho v. California*  
6 *Air Resources Board* (2003) 111 Cal.App.4th 1255, 1264-65.) To warrant relief by writ of  
7 mandate, a petitioner must demonstrate that the public entity had a ministerial duty to perform,  
8 that is, a duty that the entity is required to perform in a prescribed manner without any exercise of  
9 judgment or opinion concerning the propriety of the act. (*California Ass'n for Health Services at*  
10 *Home v. Department of Health Services* (2007) 148 Cal.App.4th 696, 704).<sup>3f</sup>

11 An action in ordinary mandamus is proper where the claim is that an agency has failed  
12 to act as required by law, and it will issue only to compel the performance of an act specially  
13 enjoined by law. (*Conlan v. Bonta* (2002) 102 Cal.App.4th 745, 752; *Wallace v. Board of*  
14 *Education of City of Los Angeles* (1944) 63 Cal.App.2d 611, 616.) Courts have held that if a  
15 statute that clearly defines the specific duties or course of conduct that a governing body must  
16 take, it creates a ministerial duty and eliminates any element of discretion. (*Rodriguez v. Solis*  
17 (1991) 1 Cal.App.4th 495, 504-05; *Great Western Sav. & Loan Assn. v. City of Los Angeles*  
18 (1973) 31 Cal.App.3d 403, 413.) "In short, where a statute requires an officer to do a prescribed  
19 act on a prescribed contingency, his functions are ministerial." (*People ex rel. Fund American*  
20 *Companies v. California Ins. Co.* (1974) 43 Cal.App.3d 423, 431-432.)

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21  
22 2. Finance, the Director, and the Controller respectfully object to the Court's  
23 consideration of this allegation. This allegation was not contained in the petition, and therefore  
24 was not verified by the party beneficially interested in the issuance of the writ. (Code Civ. Proc.,  
25 § 1086.) Consequently, this Court should not consider this allegation when deciding the merits  
26 of the writ petition. (*Krueger v. Superior Court* (1979) 89 Cal.App.3d 934, 939.)

27 3. Additionally, mandamus will lie to correct an abuse of discretion by an officer or a  
28 board. (*Inglin v. Hoppin* (1909) 156 Cal. 483, 491.) However, abuse of discretion is not an issue  
in this case; CAPS does not allege in its petition or its supporting brief that the Director of  
Finance or the State Controller have abused their discretion with regard to any actions, or lack  
thereof, in this case.

1 IV. LEGAL ARGUMENT

2 A. Finance Does Not Owe CAPS Any Ministerial Duties.

3 As stated above, CAPS has the burden to establish that Finance has a ministerial duty  
4 to perform the acts its is requesting; namely, determining whether there are existing funds to pay  
5 the recommended salary increases for CAPS' scientist supervisors and recommending that the  
6 Legislature make provisions for the salary increases in the 2008-2009 Budget. (Petition, at ¶¶ 40,  
7 51 & 53; CAPS' P&As), at p. 11:13-16.) CAPS, however, has not identified any statute that  
8 requires the Department of Finance to take the actions it demands. In fact, both the petition and  
9 its supporting brief are completely devoid of a reference to any statute that mandates Finance to  
10 take any such actions.

11 In reviewing the state laws applicable to Finance, nowhere is there any responsibility  
12 on Finance to perform the acts requested by CAPS. (Gov. Code., § 13000 et seq.) As discussed  
13 above, Finance's primary responsibility is to "supervis[e] over all matters concerning the  
14 financial and business policies of the state." (*Tirapelle, supra*, 20 Cal.App.4th at pp. 1320-21.)  
15 Finance does not decide how state monies are spent; rather, that duty resides exclusively with the  
16 Legislature. (*Humbert v. Dunn* (1890) 84 Cal. 57, 58 [noting that the California Constitution's  
17 provision "that no money shall be drawn from the treasury but in consequence of appropriations  
18 made by law is intended to secure to the legislative department of the government the exclusive  
19 power of deciding how, when, and for what purpose public funds shall be applied in carrying on  
20 the government."].)

21 Thus, it is with the Legislature, not Finance, that CAPS should seek financing for the  
22 salary increases it desires for its scientist supervisors. While Finance is sympathetic to the plight  
23 of the underpaid CAPS members, the remedy that CAPS seeks may only be obtained from the  
24 Legislature by way of an appropriation. (See *County of San Diego v. State of California*  
25 (2008)164 Cal.App.4th 580, 612-13 [stating the Civil Code section 3523, which states "for every  
26 wrong there is a remedy" "does not permit a remedy through the courts when the remedy is with  
27 the Legislature."].)

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1           **B. CAPS' Allegation That Finance Must Determine Whether**  
2           **Increased Salaries Can Be Paid From Existing Appropriations**  
3           **Is Without Legal Merit.**

4           CAPS has not provided a single reference to a statute or case law in its petition or legal  
5 opening brief that obligates Finance to determine whether the salary increases recommended by  
6 DPA can be paid from existing appropriations. For example, although CAPS repeatedly refers to  
7 Government Code section 19826, subdivision (a), in its petition and opening brief, no where does  
8 the statute reference any duty by Finance to perform a specific act requested by CAPS. To the  
9 contrary, the Government Code provision simply describes DPA's obligations to adjust salaries  
10 for public employees:

11           The [DPA] shall establish and adjust salary ranges for each class of  
12 position in the state civil service subject to any merit limits  
13 contained in Article VII of the California Constitution. The salary  
14 range shall be based on the principle that like salaries shall be paid  
15 for comparable duties and responsibilities. In establishing or  
16 changing these ranges, consideration shall be given to the  
17 prevailing rates for comparable service in other public employment  
18 and in private business. [DPA] shall make no adjustments that  
19 require expenditures in excess of existing appropriations that may  
20 be used for salary increase purposes. [DPA] may make a change in  
21 salary range retroactive to the date of application of this change.

22 (Gov. Code, § 19826, subd (a).) This statute expressly applies only to DPA and it makes no  
23 reference to Finance. Accordingly, section 19826, subdivision (a), does not create any ministerial  
24 duties that must be performed by Finance.

25           Even assuming, *arguendo*, that this Court determines that Finance has a ministerial  
26 duty to determine if existing funds are available to pay the DPA recommended salary increases,  
27 that "duty" has already been performed. In a letter dated May 7, 2008, the Director informed  
28 DPA's Director that DPA was not permitted to make any salary adjustments that would exceed  
existing appropriations, and that there were no monies in either the department budgets or the  
Budget Act Item 9800 to cover the recommended salary adjustments. (Lynn Dec, at ¶ 3 & ex.  
1.) Simply stated, Finance informed DPA that there were no monies in either the budgets of the  
departments employing the scientist supervisors or

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1 the Budget Act Item 9800 to pay for the recommended salary adjustments.<sup>4/</sup>

2 **C. CAPS' Suggestion That Finance Must Place Increased Salaries**  
3 **In The Proposed Budget For 2008-2009 Is Without Legal**  
4 **Merit.**

5 **1. CAPS Has Failed To Identify Any Duty On The Part Of Finance To**  
6 **Recommend Salary Increases For Scientist Supervisors In The 2008-**  
7 **2009 Budget**

8 CAPS contends in its petition and opening brief that Finance has the ministerial duty  
9 to recommend to the Legislature that the salary increases recommended by DPA for the scientist  
10 supervisors be included in the 2008-2009 Budget. But again, CAPS has not made a single  
11 reference to a statute or case law in its petition or legal opening brief that obligates Finance to  
12 do so.

13 Even assuming, *arguendo*, that there is a duty on Finance to recommend that the  
14 Legislature make appropriations for the salary increases in the 2008-2009 budget, Finance is  
15 unable to do so because the statutory scheme established by the Legislature to finalize the state  
16 budget does not allow Finance to submit any proposed changes to the budget after April 1, 2008.  
17 Specifically, Government Code section 13308 states that "... Finance shall provide to the  
18 Legislature, on or before April 1 of each year, all proposed adjustments to the Governor's Budget  
19 ...." (Gov. Code, § 13308, subd. (c).)<sup>5/</sup> The date of April 1, 2008, has already come and gone,  
20 and thus Finance is legally unable to present to the Legislature any recommendations for changes  
21 to the State Budget.

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23 4. CAPS' contention that it "has not been officially informed whether Finance has made  
24 a determination of whether the increased salaries are within existing appropriations[]" is false.  
(CAPS' P&As, at p. 9:18-19.) On June 27, 2008, DPA sent a letter to CAPS' Staff Director,  
Christopher J. Voight, informing him that "DPA is not aware of any money the Department of  
25 Finance (DOF) has identified for this pay adjustment." (RJN, at ex. 1.)

26 5. There are two additional instances where Finance may submit changes to the  
27 Legislature regarding the proposed budget: (1) proposed adjustments to the Governor's Budget in  
28 appropriations for capital outlay, which are due on or before May 1st; and (2) any proposals to  
reduce expenditures to reflect updated revenue estimates, known as the "May Revise," which is  
due on or before May 14th of each year. However, neither of these two instances are applicable  
in this case, and thus it is the April 1st deadline that applies here.

1                   **2. Section 13322 Does Not Create A Ministerial Duty Upon Finance To**  
2                   **Submit A Recommendation To The Legislature Regarding Salary**  
3                   **Increases.**

4                   Although not discussed in CAPS petition or points and authorities, Finance anticipates  
5 that CAPS may argue that Section 13322 of the Government Code creates a ministerial duty  
6 upon them to act in accordance with CAPS' demand that a recommendation to the Legislature be  
7 made to pay the salary increases out of the 2008-2009 Budget. Such an argument, however,  
8 would be misguided. Section 13322 provides that an alteration to a department's budget may  
9 only occur in certain circumstances:

10                   Until enactment of the budget act containing the appropriations  
11 funding the fiscal year budget; the department *may* revise, alter, or  
12 amend any fiscal year budget, if, in its opinion, revision, alteration  
13 or amendment is required in the interest of the State. The  
14 department shall notify the head of the State agency or court of any  
15 revision, alteration, or amendment of its fiscal year budget.

16 (Gov. Code, § 13322; emphasis added.) The use of the language "may" indicates a legislative  
17 intent that Finance has the *discretion* to revise, alter, or amend the budget – it is not a mandatory  
18 obligation. (See *Lara v. Board of Supervisors* (1976) 59 Cal.App.3d 399, 407 [finding that  
19 "[a]lthough 'may' may be construed to be mandatory where the object to be obtained compels  
20 such a construction, or where that construction is necessary to give effect to the legislative intent,  
21 in the absence of such special circumstances, it should be interpreted as permissive or conferring  
22 discretion."].) Because Finance has the discretion as to whether a revision, alteration or  
23 amendment to the budget is necessary, Finance cannot be compelled to exercise its discretion by  
24 a writ of mandate. (See *US Ecology, Inc. v. State of California* (2001) 92 Cal.App.4th 113, 138  
25 [holding that mandamus cannot be used to compel the exercise of discretion in a particular  
26 manner or to order a specific result when the underlying decision is purely discretionary].)

27                   Moreover, this section is limited to the altering of budgets of state agencies, not the  
28 overall state budget, and does not include any provision regarding an alteration due to changes in  
29 employee compensation.

30                   In sum, there is simply no legally required act that Finance can be ordered to take to  
31 ensure that there are funds to pay for the recommended salary increases.

1 IV. CONCLUSION

2 Based on the foregoing, there is no ministerial act that Finance, its Director, or the  
3 State Controller can be ordered to perform that will provide monies for the salary increases  
4 requested by the supervisor scientists. Such relief may only be obtained from the legislature by  
5 way of an appropriation for monies designated for such salary increases. Consequently,  
6 Finance, the Director, and the State Controller respectfully request that CAPS' petition for writ  
7 of mandate be dismissed without leave to amend.

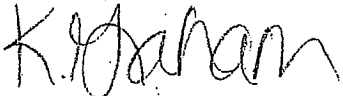
8 Dated: August 22, 2008

9 Respectfully submitted,

10 EDMUND G. BROWN JR.  
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Department of Finance, Michael Genest,  
Director of Finance, and State Controller John  
Chiang

18 10451595.wpd  
19 SA2008303513

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **California Association of Professional Scientists v. State of California, et al.**  
Sacramento County Superior Court No.: **34-2008-00014476-CU-WM-GDS**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 25, 2008, I served the attached **DEPARTMENT OF FINANCE, DIRECTOR OF FINANCE, AND STATE CONTROLLER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR OPPOSITION TO PETITION FOR WRIT OF MANDATE**; by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Gerald James  
Law Office of Gerald James  
660 J Street, Suite 480  
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 25, 2008, at Sacramento, California.

Christine A. McCartney  
\_\_\_\_\_  
Declarant

  
\_\_\_\_\_  
Signature