

S202037



LIU, J.

SUPREME COURT
FILED

MAY 29 2012

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

Frederick K. Ohlrich Clerk

Deputy

JOHN W. MCWILLIAMS
Plaintiff and Appellant,

v.

CITY OF LONG BEACH,
Defendant and Respondent.

**DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR
JUDICIAL NOTICE**

After Decision of the Second Appellate District of the
Court of Appeal
Case No. B200831

Appeal from the Superior Court of
the State of California for the County of Los Angeles, Case No. BC361469
Honorable Anthony J. Mohr, Presiding

CITY ATTORNEY'S OFFICE
ROBERT E. SHANNON (43691)
J. CHARLES PARKIN (159162)
MONTE H. MACHIT (140692)
333 West Ocean Blvd., 11th Floor
Long Beach, CA 90802-4664
(562) 570-2200
(562) 436-1579 (fax)

COLANTUONO & LEVIN, P.C.
MICHAEL G. COLANTUONO (143551)
SANDRA J. LEVIN (130690)
TIANA J. MURILLO (255259)
300 S. Grand Ave., Suite 2700
Los Angeles, CA 90071-3137
(213) 542-5700
(213) 542-5710 (fax)

I. INTRODUCTION

Defendant/Respondent the City of Long Beach (the “City”) replies to Plaintiff John W. McWilliams’ (“McWilliams”) Opposition to the City’s Motion for Judicial Notice (“MJN”) to make two brief points: (i) the Petition for Review most assuredly **does** contest the Plaintiff’s contention that no local claiming ordinance applies to this case and (ii) to further explain the relevance of the materials of which notice is sought.

II. ARGUMENT

A. **This Case is Controlled By One or More of the Claiming Ordinances on Which the Trial Court Granted Relief to the City.**

This case comes to this Court on demurrer. Plaintiff brought a purported class action for a refund of allegedly miscalculated telephone taxes paid by telephone carriers to the City. The City demurred to that action because the asserted class included those who had not complied with the applicable claiming ordinances. The trial court sustained that demurrer on that basis and Plaintiff elected to dismiss his remaining claims to facilitate prompt appeal. The District Court of Appeal stayed the case pending this Court’s decision in *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241, and subsequently issued an unpublished opinion disagreeing with *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65. The Court of Appeal ruled that any local claiming ordinance would be preempted and *Ardon* required the case to go forward as a class under the

relevant provision of the Government Claims Act, Government Code § 910. In passing, the Court of Appeal also construed one of the two City ordinances in issue here as limited to refund claims by telephone carriers, not those filed by consumers like Plaintiff. The Court failed to address a second ordinance briefed in the trial and appellate courts by both parties. The City pointed out that omission in a Petition for Rehearing, which the Court of Appeal denied without comment.

In short, as the Petition states, the central question here is whether Long Beach is entitled under its home rule power as a charter city and its police power under Article XI, section 7 to impose claiming requirements on actions like this one which seek class relief against allegedly overpaid taxes and, by the same logic, fees. In asserting that “[t]he City does not dispute the Court of Appeal’s finding that the City has no applicable claiming ordinance,” Oppo. at 1., the Opposition opposes a Petition the City has not brought.

B. The Materials For Which Notice is Sought Are Relevant to This Court’s Consideration of the Petition.

Only in footnote 2 does the Opposition seek to assert that the materials of which notice is sought are not pertinent to the question the Petition actually presents. We briefly respond.

It is true that the Paso Robles case (Exhibit G to MJN) involves a petition that does not allege compliance with the City’s local claiming ordinance. That fact makes the complaint demurrable. We will not burden this Court with the City’s papers in the action to prove that a local claiming

ordinance is in issue, especially as the Court's docket indicates the case was stayed by the trial court pending decision in *Ardon*. It is enough to note that class action challenges to utility fees – like Paso Robles' water charges – are pending in the trial courts, demonstrating the need for guidance on the issues presented by this Petition.

Similarly, the Chico case (Exhibit I to MJN) is relevant because it involves a purported class action challenge to a fee. Many local claiming ordinances apply alike to refund claims for refunds of taxes and fees, like the Chula Vista ordinance involved in the Petition for Review by this Court in Case No. S201440. Indeed, the question presented by the Petition involves the constitutional power of local governments to impose claiming requirements on **both** tax refund cases like the instant case and fee refund cases. Though a factual distinction between tax and fee cases can be drawn, the legal authorities apply equally to both. Accordingly, the Chico case provides context for the current Petition and further demonstrates the urgent need for review of these issues and the requested notice is therefore appropriate.

It is true that the *Shames* action (Exhibit H to MJN) was settled several years ago as to the original residential claimants for refund of the City's sewer charges. The restaurant industry's attempt to bring a class challenge to those same fees, however, was resolved by the Court of Appeal only in 2011. *California Restaurant Management Systems v. City of San Diego* (2011) 195 Cal.App.4th 1581 (hereinafter, "*CRMS*"). Again, both *Shames* and *CRMS* are worthy of notice to demonstrate that class refund

challenges to local utility fees are of pressing current concern to the lower courts, local governments, and the millions of Californians they serve.

III. CONCLUSION

Therefore, the City respectfully submits that this Court should grant the City of Long Beach's motion to judicially notice the attached materials.

DATED: May 21, 2012

ROBERT E. SHANNON
J. CHARLES PARKIN
MONTE H. MACHIT
**LONG BEACH CITY ATTORNEY'S
OFFICE**

333 West Ocean Blvd., 11th Floor
Long Beach, CA 90802-4664
(562) 570-2200
(562) 436-1579 (fax)

MICHAEL G. COLANTUONO
SANDRA J. LEVIN
TIANA J. MURILLO
COLANTUONO & LEVIN, PC



Tiana J. Murillo
300 So. Grand Avenue, Ste. 2700
Los Angeles, CA 90071-3134
(213) 542-5700; (213) 542-5710 (fax)
ATTORNEYS FOR DEFENDANT/RESPONDENT

CERTIFICATE OF SERVICE

I, Martha Rodriguez, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a part to or interested in the within action; that declarant's business address is 300 South Grand Avenue, Suite 2700, Los Angeles, California 90071.

2. That on May 21, 2012, declarant served the **DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR JUDICIAL NOTICE** via U.S. Mail in a sealed envelope fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is regular communication between the parties.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of May, 2012, at Los Angeles, California.

COLANTUONO & LEVIN, P.C.

By: _____



Martha Rodriguez

McWilliams v. City of Long Beach, et al.

Court of Appeal Case No. B200831/Supreme Court Case No. S202037

Service List

**COUNSEL FOR RESPONDENTS IN THIS ACTION AND THE
RELATED ACTIONS OF ARDON V. CITY OF LOS ANGELES AND
GRANADOS V. COUNTY OF LOS ANGELES:**

Francis M. Gregorek
Rachele M. Rickert
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
750 B Street, Suite 2770
San Diego, CA 92101
(619) 239-4599
(619) 234-4599 (fax)

Nicholas E. Chimicles
Timothy N. Matthews
Benjamin F. Johns
CHIMICLES & TIKELLIS LLP
One Haverford Centre
361 West Lancaster Avenue
Haverford, PA 19041
(610) 641-8500
(610) 649-3633 (fax)
timothymathews@chimicles.com

Jon A. Tostrud
9254 Thrush Way
West Hollywood, CA 90069
(310) 276-9179

McWilliams v. City of Long Beach, et al.

Court of Appeal Case No. B200831/Supreme Court Case No. S20203731
Service List

Sandra W. Cuneo
CUNEO GILBERT & LADUCA
330 South Barrington Ave., #109
Los Angeles, CA 90049
(424) 832-3450
(424) 832-3452 (fax)

**COUNSEL FOR RESPONDENTS IN THE RELATED ACTION OF
ARDON V. CITY OF LOS ANGELES:**

Carmen A. Trutanich
Noreen S. Vincent
Brian I. Cheng
OFFICE OF THE CITY ATTORNEY
200 North Main Street, Suite 920
Los Angeles, CA 90012

**COUNSEL FOR RESPONDENTS IN THE RELATED ACTION OF
GRANADOS V. COUNTY OF LOS ANGELES:**

Albert Ramseyer
Office of the County Counsel
648 Hall of Administration
500 West Temple Street
Los Angeles, CA 90012-2713

Erica L. Reilley
Jones Day
555 South Flower Street, Fiftieth Floor
Los Angeles, California 90071-2300

McWilliams v. City of Long Beach, et al.

Court of Appeal Case No. B200831/Supreme Court Case No.
S202037Service List

COURTESY COPIES TO:

Honorable Anthony J. Mohr
Superior Court of California
County of Los Angeles
600 S. Commonwealth Ave.
Los Angeles, CA 90005

Clerk of the Court
California Court of Appeal
Second Appellate Division
300 S. Spring Street, 2nd Floor
Los Angeles, CA 90013