S 162313

IN THE

SUPREME COURT OF CALIFORNIA

ROBERT CHAVEZ
Plaintiff and Appellant
vs.
CITY OF LOS ANGELES, *et al.*
Defendants and Respondents

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION EIGHT, CASE NO. B192375
APPEAL FROM THE SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES, CASE NO. BC324514, THE HONORABLE ROLF M. TREU, JUDGE PRESIDING

REPLY BRIEF ON THE MERITS

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I. INTRODUCTION

In his Answering Brief on the Merits ("ABOM"), Plaintiff attempts to persuade this Court to judicially expand the scope of § 12965(b) by doggedly focusing on the Court of Appeal's straw-man argument that the trial court denied Plaintiff attorney's fees solely because he received an award less than the required jurisdictional amount. Not once does Plaintiff address the real issue of whether the cost-shifting provisions found in §1033 and §12965(b) are so irreconcilable that the public policy of deterring a plaintiff from exaggerating the value of his case should never apply to a case brought under FEHA. Indeed, Plaintiff provides no justification for ignoring the Legislature's inclusion of §12965(b) in the cost-shifting framework at Civil Procedure Code §1032 *et seq.* Nor does Plaintiff provide any justification for ignoring the public policies supporting the legislative checks placed on the extraordinary award of attorney's fees. Instead, Plaintiff makes an appeal for sympathy by touting the laudable goals of FEHA and misrepresenting the record in this case.[1]

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[1] For example, there are no facts in the record, and Plaintiff does not cite to any, as to the following assertions: (1) Defendants affirmatively treated Chavez' action as an unlimited matter, as they stipulated to submission of his state court action to a federal court with jurisdiction of damages of $75,000 or more. (ABOM at 6; 10); (2) At the time of re-filing his state complaint, which controlled the present case, Chavez's good faith estimate of economic and emotional distress damages well exceeded the jurisdictional limits of the Superior Court. (ABOM at 24); (3) Upon discussing the damage award with the two jurors who voted against the

Plaintiff also tries to persuade this Court to judicially expand §12965(b) to award attorney's fees against a party because of its failure to settle a case by splitting-hares and claiming that the Court of Appeal focused on Defendants' "litigation posture" (not it's "settlement posture") to find the denial of attorney's fees unjust. A plain reading of the Court of Appeal's Opinion, however, demonstrates that it was Defendants' settlement posture that the Court of Appeal took issue with. In point of fact, there is not a single citation or reference to the record by either Plaintiff or the Court of Appeal that shows that Defendants filed frivolous pre-trial or post-trial motions, obstructed Plaintiff's discovery efforts, ran to Court at every opportunity or otherwise over-litigated the case. Instead, the only "offense" committed by Defendants was being "recalcitrant" and not settling the case.

In short, Plaintiff provides this Court with no justification for judicially expanding the scope of §12965(b).

$11,500 award, Chavez's counsel learned that these two jurors wanted to give Chavez $100,000 for his emotional distress. (ABOM at 28); (4) On November 15, 2004, Plaintiff Robert Chavez re-filed his previous (May 12, 2000) complaint in Superior Court. (ABOM at 11). Plaintiff also misstates the contents of the record as to the following: (1) The jury received evidence regarding Chavez' worry about his family finances due to Defendants' actions, his fear and embarrassment caused by Defendants' actions, and how Chavez was demeaned by the actions of the defendants. (AA: Vol. III at 866-67). (ABOM at 16).

II. LEGAL ARGUMENT

A. The Judicial Expansion of §12965(b) at the Expense of §1033 is Contrary to Legislative Intent

As did the Court of Appeal, Plaintiff attempts to justify the expansion of §12965(b) at the expense of §1033 by focusing on the public policies supporting each statute. A public policy analysis, however, is not the first step in analyzing a statute. Rather, this Court has repeatedly stated that in determining Legislative intent the courts are to first look at the plain language of the statute. (Moyer v. Workmen's Comp. Appeals Bd., 10 Cal.3d 222, 230 (1973)). Furthermore, Plaintiff's public policy analysis is misguided in that it perpetuates the Court of Appeal's straw man by focusing on the false premise that the trial court denied Plaintiff fees solely because Plaintiff received a verdict less than the $25,000 jurisdictional amount.

1. Section 1033 and §12965(b) Can be Read in Harmony With Each Other, Thereby Giving Full Effect to Their Legislative Purposes

In conducting statutory analysis, the court first looks to the language of the statute attempting to give effect to the usual, ordinary import of that language and seeking to avoid making any language mere surplusage.

(Moyer, 10 Cal.3d at 230; see also Opening Brief on the Merits ("OBOM") at 16-17).

Plaintiff, however, tries to sidestep this rule and head straight to the public policy analysis by selectively choosing a fragment of case law and stating, "literal statutory construction should not prevail if it is contrary to the legislative intent, which is apparent in the statute." (ABOM at 34). The full context of this statement provides:

> "The 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose of whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citations]. Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations]. An interpretation that renders related provisions nugatory must be avoided [Citation]; each sentence must be read not in isolation but in the light of the statutory scheme [Citation]; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [Citation]."

(Lungren v. Deukmejian, 45 Cal.3d 727, 735 (1988)).

As set forth in the Opening Brief, §1033.5 was amended in 1990 to bring statutory attorney's fees into the cost-shifting framework. (See Civ. P. Code §1033.5, Annotated, Legislative History Notes). Consequently, the Legislature intended statutory attorney's fees to be regulated by the cost-

shifting framework of §1032 *et seq.* Furthermore, the plain language of §1033, as well as the cost-shifting framework of §1032 *et seq.*, applies to all civil actions. (See Civ. P. Code §§1032 and 1033 including the titles and chapters thereto). There is also no exception in either the plain language of §1033 or the cost-shifting framework of §1032 *et seq.* for FEHA actions. And, by excluding §1033 from FEHA actions, the language appearing in §1032(b) -- "in any action or proceeding," and the language appearing in §1033 – "in a case other than a limited civil case," is rendered mere surplusage. (OBOM at 17-20).

Plaintiff does not dispute this. Indeed, Plaintiff admits that §12965(b) can be read in harmony with the cost-shifting framework of §1032 *et seq.* (ABOM at 34). Plaintiff then, however, quickly denies that §1033 can be read in harmony with §12965(b), relying entirely on the straw man that denying fees solely because of a low damages award is contrary to FEHA. (ABOM at 34-35).

But again, this is not the public policy behind §1033. The public policy behind §1033 is to encourage the filing of actions in the appropriate forum by deterring plaintiffs from unduly puffing the value of their cases. (2 Witkin, Cal. Procedure (4th Ed. 1996) Jurisdiction, §30). Such a policy is not inimical to FEHA and Plaintiff provides this Court with no explanation as to why such a public policy would be. Instead, Plaintiff tries to misdirect

this Court from deciding the issue at hand by tirelessly arguing the Court of Appeal's straw man.

Plaintiff also argues for the expansion of §12965(b) at the expense of §1033 by citing the cannon of statutory construction that where two statutes conflict, the more specific statute controls over the more general one. (ABOM at 35). Section 1033, however, is the more specific statute in this situation, which is -- whether a trial court has discretion to award attorney's fees and costs when a plaintiff recovers a judgment that could have been rendered in a limited jurisdiction case.

While §12965(b) states that "the court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs, including expert witness fees..,"[2] as set forth above, §12965(b) is part of the cost-shifting

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[2] Plaintiff asserts that the Court of Appeal did not expand §12965(b), but rather refused to broaden §1033 as doing so would eliminate the well-established standard limiting a trial court's discretion to deny fees only where the existence of special circumstances would render an award unjust. (ABOM at 19-21). In Serrano v. Unruh, this Court cited an exaggerated fee request as an example of such a special circumstance. (Serrano v. Unruh, 32 Cal.3d 621, 635 (1982)). Plaintiff, however, offers no explanation as to why a plaintiff exaggerating the value of his case would not constitute a "special circumstance" justifying a similar denial of fees. And, this Court has repeatedly stated, "'the experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.' [Citations]." (Serrano v. Priest, 20 Cal.3d 25, 49 (1977); see also PLCM Group, Inc. v. Drexler, 22 Cal.4th 1084, 1096 (2000)). "However, 'discretion may not be exercised whimsically and, accordingly, reversal is appropriate 'where no reasonable basis for the action is shown.' [Citations]." (Baggett v. Gates, 32 Cal.3d

framework found at §1032 *et seq.* Moreover, the right to recover costs, including statutory attorney's fees, exists solely by statute. Indeed, §1032 states, "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding. (Civ. P. Code §1032(b)). Thus, §1033 is the more specific statute as to when fees should be awarded if a plaintiff has exaggerated the value of his case.

Reading §1033 and §12965(b) together works to encourage parties to rationally and realistically evaluate the merits and value of their cases by providing a disincentive to unduly inflating the value of cases. To be sure, it's hard to imagine that there would never be such an occasion where §1033 should be applied to deny a plaintiff attorney's fees under §12965(b). As such, these statutes do not conflict and they can be harmonized, without one taking precedence over the other.

2. The Public Policies Supporting §1033 and §12965(b) Are Not Inconsistent With Each Other

Plaintiff fallaciously claims that a FEHA plaintiff can never exaggerate the value of his claims. (ABOM at 21). Thus, it seems, there is never a need to apply §1033 to §12965(b). However, if Plaintiff were

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128, 143 (1982); see also Westside Community for Indep. Living Inc. v. Obledo, 33 Cal.3d 348, 355 (1983)). Here, applying the cost-shifting scheme at §1032 et seq., which encompasses §12965(b), is not an abuse of discretion.

correct in his assumption, then there would never be a need to award a prevailing defendant attorney's fees pursuant to §12965(b) for having defended against an action that was frivolous, unreasonable or brought in bad faith. (Linsley v. Twentieth Century Fox Film Corp., 75 Cal.App.4th 762, 766-767 (1999)). Nor would it be necessary to award a defendant attorney's fees in a FEHA action where the plaintiff fails to accept a reasonable §998 offer, continues to litigate the action and then fails to obtain a verdict more favorable than a §988 offer. (Steele v. Jensen Instrument Co., 59 Cal. App. 4th 326 (1997)). Nor would a court ever have to deny a FEHA plaintiff attorney's fees in response to an outrageously inflated fee request. (Serrano v. Unruh, 32 Cal.3d 621, 635 (1982)). But, such provisions do exist because such behavior does in fact occur. Indeed, it's the very reason the Legislature adopted §1033, to deter plaintiffs from exaggerating the value of their cases and causing considerable waste of the court's and defendants' time and money. And, such deterrence was directed at all plaintiffs, in all civil actions. (See Civ. P. Code §§1032 and 1033 including the titles and chapters thereto).

Plaintiff also claims that while the plain language of §12965(b) provides for a balance in awarding attorney's fees by allowing such fees to be awarded to either a prevailing plaintiff or a prevailing defendant, application of §1033 to FEHA actions does not comport with any such

balance. (ABOM at 35-36; OBOM at 22-23). Plaintiff's chief contention in this regard is that without expanding §12965(b) to exclude application of §1033, plaintiffs will be denied attorney's fees simply for receiving modest damages awards. (ABOM at 37). The consequence of which will be discouraging attorneys from taking FEHA cases unless a big price tag is associated with the plaintiff's claims and closing the door to plaintiffs with modest damages claims. (ABOM at 30, 8).

Plaintiff's contention, however, rests upon a false premise, which is that fees and costs are not denied under §1033 merely for recovering a damages award that could have been rendered in a limited jurisdiction court. Rather, as set forth in the Opening Brief, a denial of fees and costs under §1033 is not mandatory -- it's discretionary. (Civ. P. Code §1033(a)). Furthermore, §1033 does not apply to a party who reasonably and in good faith files an action as an unlimited civil case, but is surprised by an unexpectedly low verdict. (Valentino, 201 Cal.App.3d at 701-702). Indeed, in exercising its discretion, the court may consider: a plaintiff's assessment of his chances of recovery beyond the jurisdictional limit, his reasonable and good faith assessment of the recovery, and the amount of costs incurred. (Greenberg v. Pacific Tel. & Tel. Co., 97 Cal.App.3d 102,

108 (1979); Dorman v. DWLC Corp., 35 Cal.App.4th 1808, 1816 (1995)).[3] Accordingly, a FEHA plaintiff would not be denied fees simply for recovering a modest damages award. Instead, a FEHA plaintiff would be denied fees for exaggerating the value of his case, a practice not condoned by the Legislature. "When litigants bring cases in [unlimited jurisdiction courts] which properly belong in [limited jurisdiction courts] it wastes judicial resources and drain clients' wallets." (Valentino v. Elliott Sav-On Gas, Inc., 201 Cal.App.3d 692, 701 (1988)).

Since §1033 is designed to encourage a plaintiff to pursue litigation in the appropriate forum, attorneys will not be discouraged from taking FEHA cases as they will still be entitled to attorney's fees provided they did not exaggerate the value of their case. Further, an attorney's fee award for a limited jurisdiction case is not constrained by the jurisdictional limit.

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[3] Although Plaintiff claims that application of §1033 to FEHA cases would result in inconsistent rulings, Plaintiff's assertion is premised upon the misrepresentation that §1033 provides for a denial of fees simply for recovering a modest damages award. (ABOM at 38). As shown above, a denial of fees is not mandatory, but rather is based upon an analysis of the plaintiff's reasonable expectations at the time of filing the lawsuit. Accordingly, Plaintiff has no foundation for his claim and no evidence that the proper application of §1033 would result in inconsistent rulings. In fact, courts have already applied §1033 to other fee-shifting statutes without such a consequence. (See, e.g., Dorman, 35 Cal.App.4th at 1814-1815 (1995)(applying §1033 to Civ. Code §1717); see also Korech v. Roberta Hornwood, 58 Cal.App.4th 1412 (1997)(same); Haworth v. Lira, 232 Cal.App.3d 1362, 1371 (1991)(applying §1033 to Civ. P. Code §1021.9); see also Elton v. Anheuser-Busch Beverage Group, Inc., 50 Cal.App.4th 1301 (1996)(same); Dickens v. Lee, 230 Cal.App.3d 985, 988 (1991)(applying §1033 to Civ. Code §1942.4)).

(Cal. Civ. P. Code §85; Stokus v. Marsh, 217 Cal.App.3d 647, 652-653 (1990)(fee award under §1717 not limited to jurisdiction limit lest such judgments become valueless); *c.f.* Bakkebo v. Muncipal Court, 124 Cal.App.3d 229, (1981)(stating in *dicta* that a fee award should not exceed the jurisdictional amount)). And, contrary to Plaintiff's contention that a FEHA case cannot be properly litigated in a limited jurisdiction forum,[4] as set forth in the Opening Brief, Code of Civil Procedure at §86 *et seq.* sets forth the civil procedure rules for limited jurisdiction cases and provides no

[4] Mixed in with this unsubstantiated assertion is the often, overplayed statement that "attorneys generally have an obligation to pursue all available legal avenues for their client and it is impossible to know in advance which legal theory will ultimately prevail." (ABOM at 23). In citing this statement, Plaintiff ignores the fact that attorneys have responsibilities as officers of the court to not pursue claims that are without foundation, frivolous or brought in bad faith. Indeed, this responsibility requires attorneys to advise their clients of the same and to withdraw from representation of their clients rather than pursue such claims. (Kurokawa v. Blum, 199 Cal.App.3d 976, 995 (1988); see also Guthrey v. State of California, 63 Cal.App.4th 1108, 1126 (1998)(attorneys bear a responsibility to their clients to advise them when a case is frivolous); see also Finnie v. Town of Tiburon, 199 Cal.App.3d, 1, 17 (1988)(frivolous claim required defendant and court to expend considerable time and energy). In short, attorneys are not permitted to pursue any legal theory they can come up with, nor does the public policy underlying FEHA support such a practice. (See Flannery v. Prentice, 26 Cal.4th 572, 584-585 (2001)(vesting ownership of fees in the attorneys and not the litigants will encourage representation of legitimate FEHA claimants and discourage nonmeritorious suits); City of Sacramento v. Drew, 207 Cal.Ap.3d 1287, 1303 (1989)(unsuccessful forays should be compensated unless they are pursued in bad faith or incompetently, i.e., such that a reasonably competent lawyer would not have pursued them)).

discernable limitation for a FEHA type case. (OBOM at 21-22). Thus, the door will not be closed to plaintiffs with modest damages claims.

Plaintiff also asserts that without excluding the application of §1033 to FEHA actions, plaintiffs will be unfairly penalized for not having a "crystal ball" with which to predict how much a jury will award. (ABOM at 22). But again, §1033 does not require any such soothsaying. Section 1033 does not apply to those parties who reasonably and good faith filed their actions in an unlimited jurisdiction court and were then surprised by a low damages award. (Valentino, 201 Cal.App.3d at 701-702). Here, having litigated the case for over five years, Plaintiff should have been aware of the minimal damages that he was entitled to. Thus, §1033 denies the extraordinary boon of attorney's fees to those plaintiffs who exaggerate the value of their claims and file actions in an unlimited jurisdiction court.

The same is true of §998, which also rejects the "crystal ball" logic. Indeed, as Plaintiff correctly points out, §998 serves to penalize those plaintiffs who fail to accept reasonable settlement offers, thereby causing the needless continuation of the litigation. (ABOM at 36-37). Accordingly, the application of §1033 to FEHA, like §998, encourages parties to rationally and realistically evaluate the merits and value of their cases as litigation progresses by providing a disincentive to unduly inflating the value of cases. To be sure, it's hard to imagine that there would never

be such an occasion where §1033 should be applied to deny a plaintiff attorney's fees under §12965(b).

B. Section 12965(b) Should Not Be Judicially Expanded to Allow for Attorney's Fee Awards Because of a Party's Settlement Posture

As set forth in the Opening Brief, a party's settlement posture is not an appropriate factor to consider in determining whether to award attorney's fees. (OBOM at 27-29). Plaintiff's Answering Brief fails entirely to take on this issue, relying instead on the erroneous assertion that "Defendants misread the Court of Appeal's decision." (ABOM at 39). The Court of Appeal's decision speaks for itself:

> "The trial court should have analyzed Chavez' fee motion under Government Code §12965, the applicable statute under which the motion was brought, not section 1033. We conclude the trial court abused its discretion when it denied fees because the damages award was modest and, in hindsight, could have been made in a court of limited jurisdiction. *** The court also failed to consider whether an attorney could have competently filed this civil rights action as a limited jurisdiction case, and the parties' efforts to settle the action short of litigation. *** Moreover, according to Chavez, the parties participated in five mediation sessions, and he made numerous attempts to settle the case. The City flatly resisted all settlement discussions and never made a substantive offer. The City's litigation posture forced Chavez to engage in extensive discovery and litigate the action for five years through the state and federal trial and appellate courts, incurring substantial attorney fees. Under these circumstances, in which Chavez prevailed against some defendants on his FEHA retaliation claim, and in the face of a recalcitrant City, it was unjust to deny him any fees."

(Opinion at 9-10). There is no reference in this passage to Steele, nor any attempt by the Court of Appeal to distinguish the present case from Steele. (ABOM at 39). Nor does this passage reveal include any discussion by the Court of Appeal substantiating the size of Plaintiff's fee request. (ABOM at 39). Rather, the Court of Appeal's use of the term "recalcitrant" says it all – the City was "stubbornly disobedient," "obstinately defiant,"[5] towards settlement.

Plaintiff's claim that the Court of Appeal focused on Defendants' litigation posture and not their settlement posture is belied by the Opinion and the facts in the record. Not once is there a single cite to the record by either Plaintiff or the Court of Appeal to substantiate the allegation that Defendants "litigated tenaciously," thereby causing the substantial fees they now complain about. (ABOM at 41; Opinion at 10). There is no record of an "astonishing number of demurrers, motions to strike, applications for protective orders, requests for sanctions, discovery disputes, motions to quash, motions to reconsider and extensive additional postverdict maneuvers, all supported by extensive briefs." (Stokus, 217 Cal.App.3d at 654, n.3 (parties who litigate with no holds barred assume the risk they will have to reimburse the excessive expenses that they force upon their

[5] (See Merriam-Webster's Dictionary, http://www.merriam-webster.com/dictionary/recalcitrant)

adversaries)). Instead, the Court of Appeal cited: "the City flatly resisted all settlement discussions and never made a substantive offer," which "forced Chavez to engage in extensive discovery and litigate the action for five years..." (Opinion at 10). The Court of Appeal then stated, "Under these circumstances, ... it was unjust to deny him any fees." (Id.).

By expanding §12965(b) to include a party's settlement posture as a predominant factor in awarding attorney's fees, the Court of Appeal has placed a heavy burden on the attorney-client privilege. As set forth in the Opening Brief, the true reasons behind a party's settlement posture are oftentimes cloaked by the attorney-client privilege. Parties should not be forced to disclose such privileged communications in response to an opposing party's motion for attorney's fees. There is simply no sound public policy reason to support such an invasion and Plaintiff fails to provide this Court with any such justification.

Also not addressed by Plaintiff is the fact that admitting such a factor into the prevailing party analysis would convert the attorney fees motion from a relatively uncomplicated evaluation of the parties' comparative litigation success into a limitless attack on the ethics and character of the involved parties. (OBOM at 31-32).

And, similarly not addressed by Plaintiff are the practical effects of introducing such a factor into the attorney's fees analysis. For instance,

whose settlement offer is to be analyzed for reasonableness? And, from whose perspective? In the instant case, there was absolutely no discussion by the Court of Appeal regarding the Plaintiff's settlement demand and its implied reasonableness. Further, while the Court of Appeal viewed this case as a battle waged by Plaintiff for five years against a recalcitrant Defendant, its Defendants' contention that Plaintiff repeatedly lost at every turn, back and forth between the California and federal courts for over five years, until he finally prevailed on one claim in the instant action. So then, is the Defendants' offer to waive fees and costs a more accurate assessment of the validity and value of Plaintiff's claims since Plaintiff only recovered $11,500? Or, is Plaintiff's five-year war to recover $11,500 at a cost of $880,000 more accurate?

Such questions need not be entertained nor answered should this Court reject the Court of Appeal's expansion of §12965(b) to allow for an award of attorney's fees because of a party's settlement posture.

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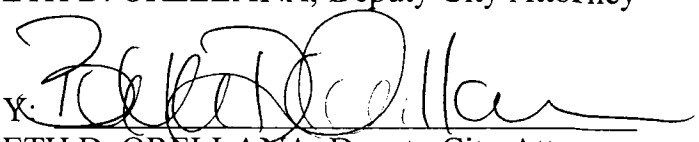
III. CONCLUSION

For all the foregoing reasons, this Court should reject the judicial expansion of §12965(b) by the Court of Appeal, answer in the negative each of the issues presented, reverse the decision of the Court of Appeal and reinstate the trial court's order denying Plaintiff's motion for attorney's fees.

DATED: October 16, 2008

RESPECTFULLY SUBMITTED:

ROCKARD J. DELGADILLO, City Attorney
PAUL L. WINNEMORE, Deputy City Attorney
BETH D. ORELLANA, Deputy City Attorney

BY: 
BETH D. ORELLANA, Deputy City Attorney

Attorneys for Petitioners CITY OF LOS ANGELES, GLENN KREJCI, PAUL VON LUTZOW and HARLAN WARD

CERTIFICATE OF WORD COUNT

Petitioners' counsel of record hereby certifies, pursuant to Rule 8.504(d)(1) of the California Rules of Court, that the text of the foregoing Reply Brief on the Merits was produced using 13-point Times New Roman font (including footnotes) and contains 4,175 words, as counted by the Microsoft Word word-processing system used to generate the brief.

DATED: October 16, 2008

RESPECTFULLY SUBMITTED:

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BY: 
BETH D. ORELLANA, Deputy City Attorney

Attorneys for Petitioners CITY OF LOS ANGELES, GLENN KREJCI, PAUL VON LUTZOW and HARLAN WARD

PROOF OF SERVICE
(VIA VARIOUS METHODS)

I, the undersigned, say: I am over the age of 18 years and not a party to the within action or proceeding. My business address is 700 City Hall East, 200 North Main Street, Los Angeles, California 90012.

On October 16, 2008, I served the foregoing documents described as **REPLY BRIEF ON THE MERITS** on all interested parties in this action by placing copies thereof enclosed in a sealed envelope addressed as follows:

[X] BY MAIL - I deposited such envelope in the mail at Los Angeles, California, with first class postage thereon fully prepaid. I am readily familiar with the business practice for collection and processing of correspondence for mailing. Under that practice, it is deposited with the United States Postal Service on that same day, at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing in affidavit; and/ or

[Attorneys for Plaintiff/Appellant]
Rochelle Evans Jackson, Esq.
LAW OFFICES OF ROCHELLE EVANS JACKSON
333 City Boulevard West, 17th Floor
Orange, California 92868

[X] BY PERSONAL SERVICE - I caused each envelope to be sent via messenger service, 200 North Main Street, 700 City Hall East, Los Angeles, California 90012-4131.

Clerk of the California Court of Appeal
Los Angeles Office
Ronald Regan Bldg., 2nd Floor
300 South Spring Street
Los Angeles, CA 90013

The Honorable Rolf M. Treu
Judge Presiding, Department 58
c/o Superior Court Clerk
111 North Hill Street
Los Angeles, CA 90012

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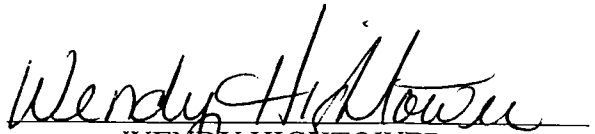
I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 16, 2008, at Los Angeles, California.



WENDY HIGHTOWER