Case No. S242799

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JULIA C. MEZA,

Plaintiff/Petitioner,

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC, HUNT & HENRIQUES, MICHAEL SCOTT HUNT, JANALIE ANN HENRIQUES, and ANTHONY J. DIPIERO,

Defendants/Respondents.

On Certified Question from the
United States Court of Appeals for the Ninth Circuit
Pursuant to California Rule of Court 8.548
Ninth Circuit Case No. 15-16900

PETITIONER'S REPLY BRIEF ON THE MERITS

*Fred W. Schwinn (CA BN 225575)
fred.schwinn@sjconsumerlaw.com
Raeon R. Roulston (CA BN 255622)
raeon.roulston@sjconsumerlaw.com
Matthew C. Salmonsen (CA BN 302854)
matthew.salmonsen@sjconsumerlaw.com
CONSUMER LAW CENTER, INC.
12 South First Street, Suite 1014
San Jose, California 95113-2418
Tel: (408) 294-6100
Fax: (408) 294-6190

Attorneys for Plaintiff/Petitioner
Julia C. Meza

Case No. S242799

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JULIA C. MEZA,

Plaintiff/Petitioner,

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC, HUNT & HENRIQUES, MICHAEL SCOTT HUNT, JANALIE ANN HENRIQUES, and ANTHONY J. DIPIERO,

Defendants/Respondents.

On Certified Question from the
United States Court of Appeals for the Ninth Circuit
Pursuant to California Rule of Court 8.548
Ninth Circuit Case No. 15-16900

PETITIONER'S REPLY BRIEF ON THE MERITS

---

*Fred W. Schwinn (CA BN 225575)
fred.schwinn@sjconsumerlaw.com
Raeon R. Roulston (CA BN 255622)
raeon.roulston@sjconsumerlaw.com
Matthew C. Salmonsen (CA BN 302854)
matthew.salmonsen@sjconsumerlaw.com
CONSUMER LAW CENTER, INC.
12 South First Street, Suite 1014
San Jose, California 95113-2418
Tel: (408) 294-6100
Fax: (408) 294-6190

Attorneys for Plaintiff/Petitioner
Julia C. Meza

(Additional Attorneys for Petitioner listed below)

*O. Randolph Bragg (IL BN 6221983)
rand@horwitzlaw.com
HORWITZ, HORWITZ & ASSOCS., LTD.
25 East Washington Street, Suite 900
Chicago, Illinois 60602-1716
Tel: (312) 372-8822
Fax: (312) 372-1673

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

Because there is essentially no dispute about the underlying facts of this case, the Court is in the position to conduct a pure legal analysis. Similarly, because the issue to be decided has been briefed many times over by the parties as the case made its way to the Supreme Court, virtually all of the parties' arguments and authorities have been set forth in detail in the Opening and Answering briefs. Thus, rather than repeat any arguments made in her Opening Brief, Petitioner will limit this reply to addressing the distortions of Petitioner's arguments made by Respondents, as well as the misleading spin contained in Respondents' Answering Brief.

ARGUMENT

A. MR. EYRE COULD ONLY HAVE BEEN COMPELLED TO ATTEND TRIAL WITH A SUBPOENA

Many of the arguments in Respondent's brief make sense only if taken in a vacuum, as if no other laws existed. But legal analysis does not work that way. Section 98 is part of an existing framework of Civil Procedure statutes, and must be construed within that framework. For example, Respondent mischaracterizes Petitioner's position as built on "assumptions," when instead Petitioner's argument follows from simple logical reasoning, applied within the existing framework of the Code of Civil Procedure.

For example, Respondent states that Petitioner "assumes" that Section 98 must contemplate service of a subpoena on Mr. Eyre. However, this is no mere assumption. Petitioner, Respondent, and the District Court below all agree that the purpose of the "available for service of process . . . during the 20 days immediately prior to trial" clause of Section 98 is to enable the party against whom the Section 98 declaration is being offered to compel the declarant – in this case Mr. Eyre – to attend trial.[1] However, the parties diverge regarding *how* that should occur. Petitioner's interpretation of Section 98 fits into the existing statutory framework, and requires none of the assumptions Respondents make (*e.g.*, Respondents' authority-free assertion that the Legislature "effectively abrogated section 1200" in enacting Section 98).

Respondents' argument takes literalism to an absurd degree. While it is true that Section 98 does not contain the text "physically located," that is irrelevant under the facts of this case. It is undisputed that Mr. Eyre was not a party to the state court action, nor was he an officer, director or managing agent of such party, or a person for whose immediate benefit the action was maintained. Thus, Petitioner could not have compelled *Mr.*

1 This, notwithstanding the 4 pages Respondents spend in their Answering Brief exploring various other kinds of "service of process" unrelated to compelling attendance at trial, and which thus have no connection to the facts in the case at bar. See also, Petitioner's Opening Brief on the Merits, section A(3) at pgs. 24-29.

Eyre's presence at trial with a "Notice to Appear" pursuant to Cal. Civ. Proc. Code § 1987(b). Adopting Respondent's position would require this Court to ignore Section 1987(b), a conclusion with no support or authority.

Respondents similarly engage in sophistry regarding what an "address" is, asserting that Section 98 does not explicitly say that the "declarant must 'reside[],' 'maintain[] an office,' or 'work[]' within 150 miles of the court." This statement, while true, is irrelevant. Respondents' use of ellipses is particularly creative, when it states that:

> "the Legislature directed the proponent of the declaration to identify 'a current address ... within 150 miles of the place of trial' where the declarant 'is available for service of process' before trial. In other words, the declarant need only provide an address- any current address- where the declarant can be served with process."
> Respondents' Answer Brief on the Merits 23-24.

Section 98 does not require merely "a current address ... within 150 miles of the place of trial." Section 98 actually requires that affiants/declarants provide "a current address **of the affiant** that is within 150 miles of the place of trial" *and* that "the affiant is available for service of process **at that place** for a reasonable period of time, during the 20 days immediately prior to trial" (emphasis added). It seems apparent from these interconnected requirements that the Legislature intended that Section 98 declarants such as Mr. Eyre be available for personal "service of process" at an address within 150 miles of the place of trial during the short period of

time remaining before the case is called for trial. "A cardinal rule of construction is that every word in a statute is presumably intended to have some meaning and that a construction making some words surplusage is to be avoided." *Watkins v. Real Estate Comm'r*, 182 Cal. App. 2d 397, 400 (Cal. App. 1st Dist. 1960). Thus, while the statute does not explicitly use the words "reside," "maintain an office," or "work," it makes little sense for Respondents to maintain that the term "address of the affiant" where the affiant is available for service "at that place," should not be reasonably interpreted to be the home or business address of the affiant.

Respondents pontificate extensively in a footnote over the strawman argument that a subpoena cannot only be served at work or home. Petitioner never argues that service of a subpoena is limited to those two locations. Undoubtedly, Mr. Eyre could provide the address of a random parking lot in the Section 98 declaration, so long as Mr. Eyre was available for service, *i.e.*, physically available for service of a trial subpoena, in that parking lot ("at that place") during the twenty days prior to trial. The gravamen of Petitioner's argument, from which Respondents are trying to distract the Court, is that Mr. Eyre could only have been compelled to trial with a subpoena, which must be served upon Mr. Eyre personally. Thus, Respondents' use of a declaration, containing an address where Mr. Eyre admittedly could not have been personally served, does not comply with

Section 98.

B. THE LEGISLATURE'S REMOVAL OF "SUBPOENA" FROM THE FINAL VERSION OF THE STATUTE IS INCLUSIVE, NOT EXCLUSIVE

Respondents, in yet more misguided literalism, argue that the text of the statute does not contain the word "subpoena." Moreover, Respondents argue, the "Assembly thus rejected the language requiring the affiant be 'subject to subpoena' in favor of a requirement that the affiant simply be 'available for service of process.'" With just the barest of logical reasoning, the Court will arrive at the reason why Petitioner should prevail on the facts before the Court. Mr. Eyre was not a party to the state court action, nor was he an officer, director or managing agent of such party, or a person for whose immediate benefit the action was maintained. As such, Petitioner could not have compelled *Mr. Eyre's* presence at trial with a "Notice to Appear" pursuant to Cal. Civ. Proc. Code § 1987(b). Of course, had the declarant in this case been someone for whom a Section 1987 Notice to Appear would have been effective to compel their attendance at trial, instead of Mr. Eyre, then Petitioner might have proceeded by means of such a notice.[2] Thus, although Respondents urge the Court to conclude that

2 Perhaps the Legislature envisioned that the Section 98 declarations in these small-stakes cases would often be done by the parties (for whom a trial subpoena would be unnecessary), instead of an agent for a large national debt buyer.

the "removal" of the word "subpoena" from the current version of Section 98 means that the Legislature *does not* contemplate the service of a subpoena, a better reading is that the Legislature always contemplated compelling **any** declarant's attendance at trial, and – smartly – settled on a final wording which *also* covers those scenarios when the declarant belongs to the class of persons who could be compelled to attend trial with, for example, a Notice to Appear. This does not change the fact that Colby Eyre, the declarant in the case at bar, is not such a person.

The only way for the Court to find for Respondents under the instant facts is to hold that the Legislature, in drafting Section 98, deliberately intended to change the rules regarding compelling attendance of non-parties at trial. However, there is nothing in the statutory text, legislative history, or case law, to suggest that in these small stakes cases the Legislature intended to implicitly abolish Cal. Civ. Proc. Code § 1985. Instead, it is far more reasonable for the Court to view the development of the text of Section 98 as inclusive, rather than exclusive, and to simply ignore the irrelevant speculation on other methods of compelling trial attendance which do not jibe with the facts in this case. Despite this issue being addressed on pages 27-29 of Petitioner's Opening Brief, Respondents make the hyperbolic assertion that Petitioner "cannot answer" why the word "subpoena" was removed, or why the statute does not say "personal

service." Seemingly, Respondents would have produced legislation which was not as tightly drafted to cover various types of declarants.

Section 98 contemplates compelling attendance of the declarant at trial. In this case, Mr. Eyre could only be compelled to attend trial by service of a Civil Subpoena for Personal Appearance at Trial or Hearing upon his body. Because Mr. Eyre did not provide *his* address (that is, "a current address of the affiant") where he could be physically served, he was not "available for service of process" within the meaning of Section 98.

C. IT IS IRRELEVANT THAT PETITIONER NEVER ATTEMPTED TO PERSONALLY SERVE MR. EYRE

Respondents argue that neither *Rocha* nor *Rodgers* is applicable to this action because Petitioner never attempted to personally serve Mr. Eyre. However, any attempt to serve Mr. Eyre would have been fruitless, as Mr. Eyre does not reside within 150 miles of the place of the state court trial, and does not maintain an office at the location provided in his declaration. *See, e.g.*, Declaration of Plaintiff in Lieu of Personal Testimony at Trial [CCP §98] (Appellant Julia C. Meza's Excerpts of Record Volume 1 28 at ¶ 1)[3] ("I am an employee of Plaintiff, Portfolio Recovery Associates, LLC, ("Plaintiff") which is doing business at Riverside Commerce Center, 140 Corporate Boulevard, Norfolk, Virginia 23502. . . ."); *See also*, Motion for

3 References to the Excerpts of Record are hereinafter abbreviated as "ER."

Summary Judgment, ER Vol. 1 90:8-10 ("Even the least sophisticated debtor would understand Mr. Eyre was not suggesting he would be physically located near the courthouse."). Respondents do not contest this fact, or provide admissible evidence to the contrary, and merely raise this point as a strawman argument. The issue before this Court is whether, in spite of *Rocha* and *Rodgers*, Respondents' declarant may provide ***any*** address for service of process (*e.g.*, that of the debt collector's counsel) and be in compliance with Section 98. The Court should not be distracted.

D. PROPER INTERPRETATION OF SECTION 98 DOES NOT RAISE CONSTITUTIONAL ISSUES

Respondents argue that "constitutional issues" will be raised if they are not allowed to continue using declarations from distant or out of state affiants. Unsurprisingly, Respondents' "constitutional" arguments boil down to a series of complaints about money, and how Respondents should not have to spend more of it on litigation. Petitioner anticipated, and covered, this overarching argument in her Opening Brief, but will respond to some of Respondents' more spurious and disingenuous specific points here. First, any assertion that a proper interpretation of Section 98 would cause Respondents to lose the right to petition the Courts is false. Respondents would simply have to litigate within the bounds of the law, even if it sometimes cost them more money to do so.

1. Section 98 was not Designed for Distant Witnesses

Respondents argue that Petitioner's "interpretation of section 98 would effectively prohibit creditors whose witnesses reside more than 150 miles from the court, or outside California, from using section 98 declarations." This prohibition is exactly how Section 98 should work, as there is no indication that Respondents' interpretation of Section 98 is what was contemplated by the Legislature. The Court should not find it controversial that laws have the effect of regulating behavior in various ways. The default position is that declarations are inadmissible at trial. A narrow exception was carved out for low stakes cases. If Respondents cannot fit their bulk filing business model into this exception as cheaply as they would like, Respondents could perhaps take that issue up with the Legislature. There is no indication that the Legislature drafted Section 98 with the business model of large national debt buyers in mind. Respondents' arguments boil down to "this interpretation works for us, so this is how it should be."

2. Section 98 does not Favor Any Type of Litigant Above Another

In yet another lengthy footnote argument, Respondents claim that Petitioner's interpretation prevents all types of litigants from using Section 98 the way Respondents wish to. This argument unwittingly destroys Respondents' "constitutional issues" narrative. Section 98 does not

discriminate against creditors generally, or large national debt buyers specifically. It merely provides a limited exception to the general rules, which applies uniformly to all types of litigants. Respondents' hypothetical about Petitioner having some distant witness of her own is inapposite. Petitioner is not seeking to abuse a perceived loophole in the manner that Respondents have. Imagine a motorist who gets pulled over for speeding arguing that speed limits should not be enforced because other people who do not speed will be unable to choose to speed if such laws are enforced.

3. California Need not Cater Specially to Out-of-State Litigants

Respondents' arguments that proper interpretation limits the petitioning activities of out of state creditors and/or disadvantages out of state litigants versus in state litigants is without merit. First, the State of California is under no obligation to write its laws to specifically benefit out of state litigants versus the State's own residents. The State's only obligation is to write laws which pass Constitutional muster. Section 98 does. The reality is that different litigants will necessarily have different characteristics, be it geographically, financially, or otherwise. Thus, the State's various procedural rules may affect each litigant differently. Second, Respondents have produced no authority that the State may not set up and run its system of courts as it sees fit. This includes procedural rules that may benefit litigants with smaller cases, *i.e.*, poorer litigants. Under

Respondents' reasoning, a statute that provided for a court fee waiver for an indigent litigant would be prejudicial against a litigant of means. Any such position is absurd.

4. Respondents' Cost-Related Arguments Are Unavailing

The Court should not be swayed by Respondents' concern trolling and crocodile tears regarding potential court costs to consumers. The reality is that consumers who are defending collection lawsuits are at risk for money judgments and court costs in any event. Nor should the Court credulously believe that debt buyers, whose goal is to collect as much money as possible, are averse to obtaining bigger judgments, all out of some altruistic concern for the consumers they have chosen to sue. Respondents' misdirection is to pretend that their "trial by declaration" business model is actually better for consumers because there is no risk of the $500 summary judgment fee being added to the judgment against the consumer as a court cost. The opposite is true; trials by declaration are worse for consumers because they necessarily allow debt buyers to win easier, quicker judgments than a summary judgment motion and hearing. These trials by declaration often last between 5 and 10 minutes, or even less if the consumer does not appear. Moreover, debt buyers in such rapid-fire court trials can avoid the potentially higher scrutiny that a court would be able to give to a motion for summary judgment that was pending for the

statutorily mandated 75 days. *See*, Cal. Civ. Proc. Code § 437c(a)(2). The Court can decide whether it is more believable that debt buyers want to reduce the potential judgments against their litigation adversaries, or that debt buyers want to avoid having to advance a $500 filing fee in every case.

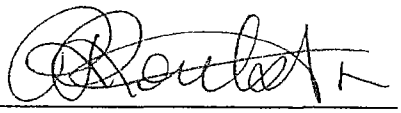
Respondents complain about how expensive it would be to exercise even a modicum of judgment about how and when to sue consumers. It should go without saying that there are many different ways to litigate a given case, some more expensive than others. What Respondents are seeking is permission to continue spending as little money as possible on their bulk litigation, while passing on the cost to the court system. Ultimately, Respondents seem to argue that Section 98 should not be applied properly because it may inconvenience certain parties, including of course, Respondents.

CONCLUSION

The purpose of the "available for service" clause in Section 98 is to enable the party against whom a Section 98 Declaration is offered to compel the attendance of the declarant at trial, for live testimony and cross-examination. If a trial subpoena is the document that Section 98 contemplates to be served on Respondents' non-party affiant, Mr. Eyre, and a trial subpoena could only be served on Mr. Eyre personally, then this Court must conclude that a Section 98 declarant such as Mr. Eyre must

provide an address that is within 150 miles of the place of trial, and where that declarant is available for *personal* service of process in the 20 days before trial.

Respectfully submitted,



Fred W. Schwinn (CA BN 225575)
Raeon R. Roulston (CA BN 255622)
Matthew C. Salmonsen (CA BN 302854)
Consumer Law Center, Inc.
12 South First Street, Suite 1014
San Jose, California 95113-2418
Tel: (408) 294-6100
Fax: (408) 294-6190

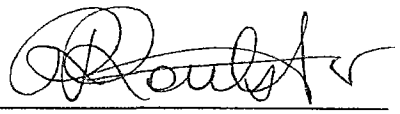
O. Randolph Bragg (IL BN 6221983)
Horwitz, Horwitz & Associates, Ltd.
25 East Washington Street, Suite 900
Chicago, Illinois 60602-1716
Tel: (312) 372-8822
Fax: (312) 372-1673

Counsel for Plaintiff/Petitioner

CERTIFICATE OF WORD COUNT

The text of this brief consists of 2,840 words as counted by LibreOffice 5.4.4.2, the word processing system used to prepare the motion, exclusive of the certificates, tables and cover.

Respectfully submitted,



Fred W. Schwinn (CA BN 225575)
Raeon R. Roulston (CA BN 255622)
Matthew C. Salmonsen (CA BN 302854)
Consumer Law Center, Inc.
12 South First Street, Suite 1014
San Jose, California 95113-2418
Tel: (408) 294-6100
Fax: (408) 294-6190

O. Randolph Bragg (IL BN 6221983)
Horwitz, Horwitz & Associates, Ltd.
25 East Washington Street, Suite 900
Chicago, Illinois 60602-1716
Tel: (312) 372-8822
Fax: (312) 372-1673

Counsel for Plaintiff/Petitioner

PROOF OF SERVICE

I, Raeon R. Roulston, declare that:

I am, and was at the time of the service hereinafter mentioned, at least 18 years of age and not a party to this action. My business address is 12 South First Street, Suite 1014, San Jose, California 95113-2418. I am employed in Santa Clara County, California.

On January 11, 2018, I served the following:

PETITIONER'S REPLY BRIEF ON THE MERITS

via overnight delivery, addressed as follows:

Original and one copy to:
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797
(415) 865-7000
Supreme Court

and via first-class mail, addressed as follows:

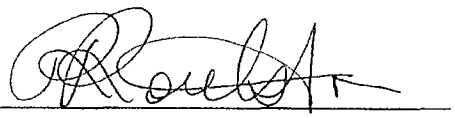
One copy to:
Office of the Clerk
U.S. Court of Appeals
95 Seventh Street
San Francisco, CA 94103-1526
Court of Appeals

One copy to:
The Honorable Lucy H. Koh
280 South 1st Street
Courtroom 8, 4th Floor
San Jose, CA 95113
District Court Judge

One copy to:
Tomio B. Narita
Simmonds & Narita, LLP
44 Montgomery St., Suite 3010
San Francisco, CA 94104
Attorney for Respondents

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

Executed January 11, 2018, at San Jose, California.



Raeon R. Roulston (CA BN 255622)