IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Case No. S242799

JULIA C. MEZA,

Plaintiff -Petitioner,

v.

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

Defendants-Respondents.

RESPONDENTS' ANSWER TO BRIEF OF *AMICI CURIAE*

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

Respondent Portfolio Recovery Associates, LLC is a Delaware limited liability company and is a wholly-owned subsidiary of PRA Group, Inc., a publicly-traded Delaware corporation. PRA Group, Inc. is listed on the NASDAQ stock exchange under the symbol PRAA. Respondent Hunt & Henriques is a law firm. The remaining Respondents, Michael Scott Hunt, Janalie Ann Henriques, and Anthony DiPiero, are individual persons.

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I. INTRODUCTION

Amici curiae urge the Court to adopt their interpretation of section 98 of the California Code of Civil Procedure, in order to avoid insurmountable financial burdens on their clients – whom they describe as "low income Californians" – that would effectively deprive them of their constitutional right to cross-examine the witnesses against them. For a number of reasons, the arguments advanced by *amici* are simply wrong.

Amici assume that, under section 98, the party who wants a declarant to appear at trial must first offer to pay the declarant's mileage and witness fees. This is not true. Nothing in section 98 requires any such payment. The statute is completely silent on payment of mileage and witness fees.

In fact, if Respondents'[1] interpretation of section 98 is adopted, then no litigant – be they poor or wealthy – would incur any additional costs to seek the attendance of section 98 declarants at trial (other, perhaps, than the cost of a stamp). Under Respondents' reading, no subpoena is required, nor are any fees incurred for serving any subpoena, and there are no mileage or witness fees. The goal of section 98 – minimizing the costs of prosecuting or defending low-stakes

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[1] Portfolio Recovery Associates, LLC ("PRA"), Hunt & Henriques, Michael Scott Hunt, Janalie Ann Henriques and Anthony DiPiero (collectively, "Respondents").

cases – is best served under Respondents' reading of the statute.

Ironically, if the Court adopts *amici's* position, then all litigants, including all low income Californians, will be responsible for paying – in advance – the cost of personally serving a subpoena on the declarant, as well as mileage and witness fees. It is unclear why *amici* would push for this result, given their claim that such payments "would generally be impossible" for their clients to shoulder.[2] *Amici's* approach would be contrary to section 98's cost-savings goal, and would harm consumers. Respondents' approach is consumer-friendly.

Amici's due process argument is also wrong. One of two things will happen when a declarant's presence at trial is requested: the declarant will or will not appear. If the declarant appears, the declaration will be admitted or the declarant will testify and can be cross-examined. If the declarant does not appear, the declaration will be excluded, there will be no direct examination of the declarant, and there will be no need for cross-examination. Either way, the party against whom the section 98 declaration was offered is not stripped of the right to cross-examine the witness. Thus, Respondents' interpretation of section 98 does not implicate any due process concerns, as *amici* wrongly contend.

Amici posit, as Meza did, that section 98 must be interpreted to require

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[2] Brief of *Amici Curiae* ("Brief"), at 23.

personal service of a subpoena, because this is the only way to "compel" the declarant to attend trial. Like Meza, however, *amici* ignore this Court's controlling precedent that prohibits an interpretation of the statute that would require the Court to re-insert language that the Legislature rejected. *Amici* also ignore, as Meza did, the self-effectuating penalty imposed when a declarant fails to comply with a request to attend trial: the declaration is not admitted into evidence (in which case, the proponent of the declaration almost certainly loses).

Section 98 is a statute of general application. It is available to all litigants in limited-civil cases alike, plaintiffs and defendants, individuals and entities, poor and rich. *Amici* ask this Court to re-write section 98 in order to conform with their policy-based arguments. Respectfully, under this Court's own precedent, it has no power to do so. *Amici's* arguments are better directed at the California Legislature and must be rejected here.

II. ARGUMENT

A. Section 98 Does Not Require The Declarant To Reside, Live, Work, or To Otherwise Be Physically Present Within 150 Miles of The Place of Trial

Amici and Respondents agree about one thing: this Court must ascertain the plain meaning of section 98 of the California Code of Civil Procedure. Curiously, *amici* contend the "[t]he *plain language* of section 98 requires that non-party

declarants be physically present at the place designated for service," and then argue that the "most natural reading of the phrase 'a current address of the affiant' is a *fixed residence* identifiable at the time of designation." Brief at 13-14 (italics added). The plain language of section 98, of course, says no such thing.[3]

First, the words "physically present" appear nowhere in the statute. Had the Legislature wanted to require declarants to be "physically present" at the designated address, it would have said so. Second, the statute does not refer to any particular type of address, let alone a "fixed residence" address.[4] It is not for this Court to second-guess the Legislature and insert such terms or phrases into the

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[3] Again, section 98 permits a party to offer written testimony of a declarant "in lieu of presenting direct testimony," so long as "the contents of the prepared testimony would have been admissible were the witness to testify orally thereto," and a copy of the declaration "has been served on the party against whom it is offered at least 30 days prior to the trial, together with a current address of the affiant that is within 150 miles of the place of trial, and 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." Cal. Code Civ. P. § 98(a).

[4] The term "address" is modified only temporally. By referring to a "current" address, the statute distinguishes from past and future addresses. *Amici* do not explain why the cost-savings goals of the statute would be met by restricting the use of section 98 declarations to declarants who are "residents" of the state and who happen to reside within 150 miles of the courthouse. Further, it would make little sense to require declarants to identify their residential addresses, given that they would likely be at work and not available at home to accept service during normal business hours. There are also significant privacy and safety concerns with requiring a declarant to disclose his or her residential address.

statute. There is absolutely no support for *amici's* alleged "plain language" reading of section 98.

B. Nothing In Section 98 Requires The Party Against Whom The Declaration Is Offered To Advance The Mileage or Witness Fees To The Declarant

Respondents agree with *amici* that section 98 was designed to reduce the costs associated with litigating small-stakes cases and to improve access to the courts for **all** litigants. This is accomplished by affording parties the option to present trial testimony by way of declaration or affidavit, thereby avoiding the cost of bringing a live witness to trial. Respondents also agree that section 98 was "not intended to financially favor any particular party." Brief at 20.

Amici are wrong, however, when they argue that section 98's purpose will be served only "if section 98 is read to require the physical presence of the declarant" within 150 miles of the courthouse. *Id.* at 16. Contrary to *amici's* suggestion, their reading of section 98 would impose a subpoena requirement that would increase the financial burden on any party against whom the declarations are offered, including their financially-struggling clients.

Amici acknowledge that travel and lodging are the "primary costs" associated with bringing witnesses to trial, and claim that a party who wishes to compel a witness's attendance (by subpoena or a section 1987 notice) must "offer

to pay for the costs of the witness's travel and accommodations near the place of trial." *Id.* at 21. In their view, section 98 would achieve savings by avoiding "some or all the costs with traditional witness production – travel, lodging and witness compensation" – (by requiring the witness to be a resident of California who lives within 150 miles of the courthouse, thus, presumably, eliminating travel and lodging costs). *Id.* at 21-22. They reason that if the declarant is required to be present "at the place of service," this "will reduce the overall cost of declarant's travel and lodging" and thereby "allocate[] those costs to the party best able to control and limit them." *Id.* at 22. *Amici* argue that if declarants are not required to "be physically present at the designated place of service," this could make "defending against small-dollar claims cost prohibitive." *Id.* at 22-23.

Amici offer a hypothetical involving a litigant in Redwood City who wants to compel a declarant in San Diego to attend trial. Under their hypothetical, and using their incorrect assumption that witness fees and mileage must be tendered pursuant to section 98, the litigant would "be required to make an upfront payment of at least $209.80," which *amici* say would be "generally . . . impossible" for their clients. *Id.* at 23.[5]

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[5] *Amici* also observe that they "frequently represent defendants in suits brought by . . . debt buyers" where the amount sought "is less than $2,000–sometimes less than $1,000," and that some defendants might decide it is not worth paying

But this alleged cost burden is not solved if *amici's* interpretation of the statute is adopted. Under their proposed reading of section 98, a litigant could still be required to come up with at least $95.00 to obtain the attendance of a declarant who resides 150 miles from the courthouse.[6] *Amici* do not explain why a litigant who is unable to advance $209.80 would necessarily be able to advance $95.00.[7]

More to the point, *amici* ignore the impact their interpretation would have on an indigent party who wished to rely on the declaration of a witness who resided hundreds or thousands of miles from the place of trial.[8] *Amici's* clients would have to arrange for their witnesses to travel to, and be *physically present at a fixed residence* address located within 150 miles of the courthouse for a

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$209.80, given the amount in controversy in such cases. *Id.* at 24-25. But even under *amici's* approach, a litigant might have to pay as much as $95.00, or more, to obtain a declarant's presence at trial. Specifically: 2(150 x $0.20) + $35 = $95.00. In addition, if personal service of a subpoena were required, there would be not-insubstantial fees associated with hiring a process server. The litigant might similarly conclude it not worth paying these amounts, depending on the amount in controversy.

[6] *See* n. 5, *supra*.

[7] Respondents note the lack of evidence supporting the various assertions of *amici* regarding their clients' means, but for purposes of argument, will take them at their word regarding their clients' ability to bear the amounts being discussed.

[8] *See* Respondents' Answer Brief at 46 n.36. (explaining how Meza's interpretation would affect all litigants, as both plaintiffs and defendants are entitled to benefits of § 98).

reasonable time during the twenty days prior to trial. *Amici* do not explain how their clients will accomplish this.

None of these cost issues can be explained by *amici*, and the Court need not wrestle with them here. Section 98 says nothing about witness fees or costs. The statute, on its face, does not require payment of any amount to secure the declarant's presence at trial. Under Respondents' approach, the service of a simple request at the designated address is all that is required, and the record shows this could have been accomplished by mail, email, fax, or in-person, *see* ER 193 ¶ 6). Beyond, perhaps, the cost of a stamp ($0.50), there is no financial risk involved to the requesting party. Under *amici's* approach, however, it could cost the requesting party at least $95.00, or almost two hundred times more than Respondents' approach ($0.50 vs. $95.00).

Amici suggest that "a party who frequently initiates litigation in California" can choose its witnesses so as to avoid unnecessary expenses, for example, by "identifying a local expert witness who resides within 150 miles of the courthouses in which it often appears, rather than bringing in out-of-state witnesses." Brief at 25-26. In other words, this cost-savings statute should be read to require a party to employ a small cadre of professional witnesses who live near all the courthouses of the state. This reading is not plausible.

First, section 98 is available to all litigants in limited-civil cases, whether they have "initiated" or are defending the lawsuit, and whether they litigate "frequently" or infrequently in California. Second, *amici* do not explain why a party should be forced to hire and bear the expense of local employees, when it may already have employees who reside elsewhere and are available and willing to appear at trial, upon request. And what of the individual California resident who wishes to utilize section 98 either offensively or defensively, but whose declarant is not located in the state? *Amici* answer none of these questions. Their approach does not eliminate or avoid costs, it simply shifts them to the other party.

Throughout their brief, *amici* deplore the unfairness of "shifting the burden of declarant's [sic] travel costs to section 98 opponents." Brief at 25; *see id.* at 12-13, 22-23. There are multiple problems with this argument. First, section 98 says nothing about payment of costs, so there are no costs "shifted" by the statute. Second, as discussed above, *amici's* interpretation would impose costs relating to witness fees, milage, and the costs of service, while Respondents' interpretation is cost-free. Finally, *amici's* approach would impose enormous costs on any litigant who wishes to utilize section 98 declarations of out-of-state witnesses, requiring them to physically locate those witnesses at residences within 150 miles of the courthouse for twenty days before trial. This would cost far more than the

amounts described above.[9]

Amici say that the statute was designed to reduce costs for "small litigants," and to help ensure access to the courts for "low- and middle-income people." Brief at 28. There is nothing in the statute or legislative history to support this. Assuming this is true, Respondents' interpretation of section 98 accomplishes those goals, as it imposes no up-front costs on the party requesting the declarant appear at trial, other than the negligible cost associated with mailing a request to appear to the designated address. *Amici's* interpretation, in contrast, would require the party to hire someone to serve a subpoena on the declarant, and to pay the declarant's mileage and witness fees. Clearly, Respondents' approach would benefit all litigants, including *amici's* clients, while *amici's* approach would impose burdens that "low-to-middle income people" may not be able to afford.

Lastly, *amici* contend that section 98 was not enacted with the debt buying industry in mind, and suggest that the statute "is ill-suited to the kinds of suits" typically brought by debt buyers. Brief at 29-31. This argument is wholly irrelevant. By definition, section 98 applies to all "small stakes" cases, regardless

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[9] Like Meza, *amici* ignore the far-greater savings the Legislature sought to achieve by eliminating the costs associated with requiring a witness to travel hundreds or thousands of miles to attend a low-stakes trial, while preserving the opposing party's right to cross-examine the declarant. *See* Respondents' Answer Brief on the Merits at 34 n.22.

of the identity of the parties. Nothing in the statute dictates who may, or may not, invoke it. *Amici* suggest, ironically, it is for the Legislature, not the Court "to rewrite the statute to better fit [their] needs." Brief. at 31. Respondents agree that this Court cannot and should not rewrite the statute.

C. *Amici's* Due Process Argument Fails Because The Party Against Whom The Section 98 Declaration Is Offered Will Never Be Deprived of The Right To Cross-Examine The Declarant

Amici argue that section 98 must be interpreted to require the declarant's physical presence near the courthouse. Otherwise, *amici* contend, it will be impossible to serve a subpoena on the declarant, and thus impossible to cross-examine the declarant, in violation of the other party's constitutional due process rights. This argument hinges on two false premises: one, that section 98 requires service of a subpoena, and two, that the section 98 declaration will be admitted into evidence if the declarant does not appear at trial. They are wrong on both fronts. There are no constitutional deprivations here.[10]

Again, for the reasons stated above and in Respondents' Answer Brief on the Merits, there is no basis for concluding that a "plain reading of section 98 requires a declarant to be available for personal service of a *subpoena*," as *amici*

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[10] For the reasons discussed at pages 42 through 50 of Respondents' Answer Brief on the Merits, however, the interpretation proffered by Meza and supported by *amici* could lead to serious constitutional issues, if adopted.

maintain. Brief at 33. This ignores this Court's binding authority that prohibits the Court from putting words back into a statute that the Legislature has rejected.

Contrary to *amici's* assumption, the party that proffers the section 98 declaration has every incentive to comply with the opposing party's request to bring the declarant to trial, and nothing to gain by failing to do so. If the party fails to bring its witness to trial, it suffers the most severe of penalties: the declaration is excluded. The declaration would be hearsay and not within any exception.[11]

Respondents do not dispute that "[a] litigant in a civil trial has the right to cross-examine any adverse witness on whose testimony an opposing party relies," Brief at 35.[12] But the right of cross-examination presupposes the existence of direct testimony. If there is no direct testimony in the first place, there is no need for cross-examination. If the declarant appears and testifies, then cross-examination will follow. Thus, the argument that section 98 would somehow deprive litigants in limited-civil cases of protections afforded litigants in

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[11] This is a far better outcome for the party against whom it was offered, and certainly more favorable than being able to cross-examine the declarant *but having the testimony and exhibits admitted into evidence nonetheless*.

[12] This assumes for purposes of argument the existence of a property interest protected by the United States Constitution, or a liberty interest protected by the California Constitution. *See* Brief at 34-35.

unlimited-civil and small claims cases is a false dichotomy.

Similarly, the supposition that "a witness could decline to respond to a non-subpoena notice and neither the court nor the consumer could do anything about it," Brief at 39, is also false. In that case, the Court would exclude the declaration.

Simply put, one of two things will happen when a party who is served with a section 98 declaration requests the declarant appear at trial: the declarant will appear, in which case the declarant can be cross-examined, or the declarant will not appear, in which case the declaration will be excluded and there will be no need for cross-examination. Although it was wrongly decided,[13] even the decision in *Target v. Rocha*, 216 Cal. App. 4th Supp. 1, 9 (2013), correctly recognized that a party may introduce a section 98 declaration "only" if the opposing party had the chance to cross-examine the declarant at deposition or trial. Either way, the due process right to cross-examination is vindicated. *Amici's* argument fails.

III. CONCLUSION

Respondents respectfully submit that this Court should reject the arguments raised by *amici curiae*, and should instead follow the plain language and legislative history of section 98. Respondents respectfully request that the question certified by the United States Court of Appeals for the Ninth Circuit to

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[13] *See* Respondents' Answer Brief on The Merits at 38-43.

this Court be answered in the negative.

SIMMONDS & NARITA LLP

Dated: March 13, 2018

By: _____
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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.520(c)(1), I certify that the text of this brief consists of 3,236 words, exclusive of the certificates, tables , cover, and signature blocks, according to the word count of WordPerfect, the computer program used to prepare this brief.

SIMMONDS & NARITA LLP

Dated: March13, 2018

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PROOF OF SERVICE

I, Rosana M. Klingerman, declare that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to this action. My business address is 44 Montgomery Street, Suite 3010, San Francisco, California 94104-4816.

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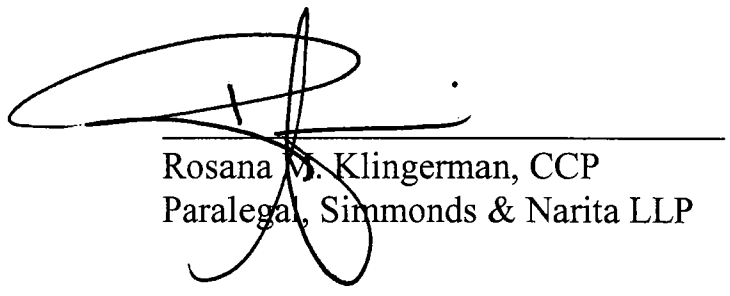
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California on this 16th day of March, 2018.



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