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ORIGINAL

Case No. S172377

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 188,	)
Plaintiff and Appellant,	)
v.	)
PUBLIC EMPLOYMENT RELATIONS BOARD,	)
Defendant and Respondent,	)
CITY OF RICHMOND,	)
Real Party in Interest and Respondent.	)

REAL PARTY IN INTEREST AND RESPONDENT CITY OF RICHMOND'S CONSOLIDATED ANSWER BRIEF

After A Decision By The Court Of Appeal
First Appellate District, Division Three
[Case No. A114959]

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

Agency Decisions

Statutes

Other Authorities

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Real Party in Interest and Respondent City of Richmond ("City") respectfully submits this consolidated answer brief in response to the opening briefs submitted by Petitioner International Association of Fire Fighters, Local 188 ("Local 188") and Respondent California Public Employment Relations Board ("PERB").

INTRODUCTION

This Court has granted review of two different (albeit interrelated) issues encompassed by the First District Court of Appeal's decision below: (1) whether a decision by PERB not to issue an unfair practice complaint under the Meyers-Milias-Brown Act (Gov. Code § 3500 *et seq.*) (MMBA) may be subject to judicial review; and (2) whether a decision to lay off firefighters for fiscal reasons is a matter subject to collective bargaining under the Act.

Both PERB and Local 188 have already addressed these issues extensively in their respective briefs. The City agrees with the arguments presented by PERB but submits this consolidated answer brief to provide further argument on a few main points.

First, in enacting Government Code sections 3509, subdivision (b) and 3509.5, subdivision (a), the Legislature explicitly granted PERB the exclusive power to determine whether to issue unfair practice complaints,

and it chose to prohibit parties from challenging in court a PERB decision not to issue a complaint. Substantial judicial authority confirms that the Legislature was authorized to make this choice. Accordingly, the First District erred in concluding that a PERB refusal to issue a complaint may be subject to the limited grounds for review set forth in *Belridge Farms v. Agricultural Labor Relations Board* (1978) 21 Cal.3d 551.

Second, even assuming the grounds for review set forth in Belridge Farms applied to a PERB refusal to issue a complaint under the MMBA, the Court of Appeal misstated and misapplied those narrow grounds in its decision herein. Here, the Court conducted a full review of the administrative proceeding below, rather than assessing, e.g., whether PERB had refused to exercise jurisdiction (see *Cadiz v. Agricultural Labor Relations Bd.* (1979) 92 Cal.App.3d 365, 382) or obliterated a statutory guarantee (see *Southern Cal. Dist. of Council Laborers v. Ordman* (C.D. Cal. 1970) 318 F.Supp. 633, 635-636). If upheld by this Court, the Court of Appeal's holding would enable and indeed require trial and appellate courts to review fully the merits of virtually any refusal by PERB to issue a complaint – not just on scope of representation issues, but also in conjunction with the myriad of other legal and factual issues to which charges of unfair practice filed with PERB may give rise. This would significantly expand the scope of trial court and appellate review of PERB decisions and would commensurately burden the courts, PERB and the

parties appearing before them. Under a Belridge Farms approach, neither the trial court nor appellate court would have review PERB's refusal to issue a complaint, and would instead conduct a preliminary review only for the purposes of vetting clear constitutional error or failure to exercise jurisdiction.

Moreover, to the extent the Court believes necessary, it should affirm the portion of the appellate court's decision finding that the City's layoff decision did not constitute a mandatory subject of bargaining under the MMBA, reaffirming the principles articulated by this Court over 30 years ago in *Firefighters Union v. City of Vallejo* (1974) 12 Cal.3d 608 (*Vallejo*).) As we demonstrate below, under *Vallejo* and established federal precedent, an employer's decision to change the scope and level of services provided, including those decisions arising out of economic necessity, constitutes a managerial prerogative outside the scope of representation. Accordingly, while an employer may have a duty to meet and confer over the ***effects*** of its decision to lay off employees, it has no duty to meet and confer over the ***decision*** itself.

For all these reasons, discussed more fully below, the City joins in PERB's request and respectfully asks that the Court (1) correct the portion of the First District's decision finding that a PERB refusal to issue a complaint in an unfair practice case may be subject to judicial review; and (2) affirm the portion of appellant court's decision finding that the City's

layoff decision did not constitute a mandatory subject of bargaining under the MMBA.

STATEMENT OF THE CASE

The Court of Appeal's recital of the facts (set forth in the administrative record)[1] and procedural history is not in dispute. (Slip Opinion, pp. 2-7.) Accordingly, the City incorporates by reference that portion of the First District's Slip Opinion as if fully stated herein.

ARGUMENT

I. A PERB REFUSAL TO ISSUE A COMPLAINT UNDER THE MMBA IS NOT SUBJECT TO JUDICIAL REVIEW

The initial issue presented is whether a PERB refusal to issue an unfair practice complaint under the Meyers-Milias Brown Act (Gov. Code § 3500 *et seq.*) (MMBA) may be subject to judicial review. Because this issue constitutes a pure question of law, it is subject to de novo review. (See *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 740.)

A. The Legislature Has Expressly Exempted a PERB Refusal to Issue a Complaint Under the MMBA from Judicial Review

PERB is the state administrative agency charged with overseeing and enforcing California public sector labor relations statutes, including the MMBA. The MMBA provides that a complaint alleging a violation of any one of its provisions must be processed as an unfair practice charge with

[1] The administrative record is located at App. Vol. I, Tab 2 at pp. 000019-000254, and indexed at App. Vol. I, Tab 2 at pp. 000017-000018.

PERB. (Gov. Code § 3509, subd. (b) [stating further that "[t]he initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purpose of this chapter, shall be a matter within the exclusive jurisdiction of [PERB]"]; see also *Coachella Valley Mosquito & Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1077 ["the Legislature vested [PERB] with ***exclusive jurisdiction*** over alleged violations of the MMBA"], emphasis added.)

The MMBA prescribes in detail the circumstances under which PERB decisions may and may not be subject to judicial review.[2] Specifically, Government Code section 3509.5, subdivision (a) states: "Any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in an unfair practice case, ***except a decision of the board not to issue a complaint in such a case***, ... may petition for a writ of extraordinary relief from that decision or order." (Emphasis added.)

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[2] Before the MMBA came within PERB's exclusive jurisdiction, alleged violations of the MMBA were processed by superior courts through traditional mandamus actions under the Code of Civil Procedure. (See *Coachella Valley Mosquito & Vector Dist. v. Public Employment Relations Bd.*, *supra*, 35 Cal.4th at p.1084.) Following the Legislature's 2001amendments to the statute vesting PERB with exclusive initial jurisdiction over the MMBA, such allegations must now be filed as unfair practice charges with PERB. (*Ibid.*; see also Gov. Code § 3509, subd. (b).) When it vested PERB with exclusive jurisdiction over the MMBA, the Legislature instructed the agency to abide by prior judicial decision interpreting the statute. (Gov. Code §§ 3509, subd. (b) ["The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter."], 3510, subd. (b) [same].)

Under section 3509.5, subdivision (b), a petition for extraordinary relief must be filed "in the district court of appeal having jurisdiction over the county where the events giving rise to the decision or order occurred," and within 30 days after the board's final decision or order.

This statutory language is quite clear and specific: only final decisions and orders by PERB may be subject to judicial review. Critically, the Legislature has explicitly exempted from the judicial review process a PERB decision ***not to issue a complaint under the MMBA***. This fact alone forecloses Local 188's underlying challenge that PERB improperly refused to issue a complaint based on a misreading of *Vallejo*.

1. Applicable Rules of Construction and Legislative History Demonstrate That Government Code § 3509.5 Provides the Sole and Exclusive Means for Seeking Judicial Review of PERB Decisions Under the MMBA

To avoid the clear import of Government Code section 3509.5, Local 188 contends that the fact that the Legislature's prohibition against review through the extraordinary writ procedure under that statute does not preclude a party from seeking judicial review through other means, including actions for traditional mandamus. (Local 188's Answer Brief, p. 5-8.) The union is mistaken.

The extraordinary writ procedure under Government Code section 3509.5 is not simply one avenue by which parties may obtain judicial review of PERB decisions under the MMBA. Rather, it is the sole and

exclusive means by which review may be sought. (See 3 Witkin, Summary 10th (2005) *Agency and Employment*, § 586, p. 699 [section 3509.5 "establishes the following procedures for judicial review...."]; see also *Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 141 ["The issue of whether [a statute creates a private right of action] is primarily one of legislative intent.... If the Legislature intended there be no private right of action, that usually ends the inquiry."].)

As discussed above, section 3509.5 identifies those decisions which may and may not be subject to judicial review and further outlines the process by which review of such decisions may be sought. The fact that the Legislature has laid out, in detail, a process by which parties may obtain judicial review of PERB decisions under the MMBA necessarily precludes other avenues of review, including actions for traditional mandamus.[3] (See *Courtesy Ambulance Service v. Superior Court* (1992) 8 Cal.App.4th 1504, 1514 [holding that, under the maxim *inclusio unius est exclusio alterius*, "[w]e are not authorized to add exceptions where the Legislature has spoken clearly to prescribe a rule and narrowly limit the exceptions

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[3] The Legislative Counsel's Digest submitted in connection with the passage of Government Code section 3509.5 confirms that the extraordinary writ procedure established under the statute is the exclusive means by which parties may seek judicial review of PERB decisions under the MMBA. (Stats. 2002 c. 1137 (A.B. 2908), § 3 ["It is ... the intent of the Legislature by adding Section 3509.5 to the Government Code ***to establish procedures for judicial review of determinations by the Public Employment Relations Board***"], emphasis added.)

thereto"]; *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1391 [applying same rule].)

2. Government Code § 3509.5 Does Not Violate the California Constitution

Local 188 argues that Government Code section 3509.5 cannot preclude judicial review of a PERB refusal to issue a complaint because if it did, the statute would violate Article VI, section 10 of the California Constitution, which vests courts with jurisdiction over proceedings for extraordinary relief. (Local 188's Answer Brief, p. 17.) This argument fails.

The Legislature's decision to preclude judicial review of a PERB refusal to issue a complaint is not novel. The Legislature is authorized to establish the method of appellate review and may deny any means of appeal. (See *Modern Barber Colleges v. Cal. Emp. Stabilization Com.* (1948) 31 Cal.2d 720.) The power to state whether or not a right of appeal exists in a statute rests entirely with the Legislature in the first instance. (*Id.* at p. 733.) A litigant has no constitutional right to an appeal and may not appeal a judgment or order unless expressly permitted by statute because the right to appeal is purely statutory. (*Ibid.*; see also *Trede v. Superior Court* (1943) 21 Cal.2d 630, 634.) Indeed, it is well settled that non-final decisions of an administrative agency, including an administrative agency's decision not to issue an unfair practice complaint, are generally

immune from judicial review. (See *Belridge Farms*, *supra*, 21 Cal.3d at p. 556-557; *Leedom v. Kyne* (1958) 358 U.S. 184; *Panama Canal Co. v. Grace Lines, Inc.* (1957) 356 U.S. 309, 318.)

In *Modern Barber Colleges*, the state employment stabilization commission found that an employer owed contributions under the Unemployment Insurance Act. (31 Cal.2d at p. 722.) The statute provided that neither injunctive relief nor mandamus relief was available to prevent the collection of such contributions. Notwithstanding this provision, the employer sought a writ of mandate from the superior court, alleging that the commission had erroneously concluding that the petitioner was an employer within the meaning of the statute. (*Id.* at pp. 722-723.) The superior court denied the writ. (*Ibid.*)

In affirming the lower court's decision, this Court emphasized that "the Legislature has complete power over the rights involved in such actions and may either create or abolish particular causes of action." (*Id.* at p. 727.) This Court rejected the employer's argument – the same argument advanced by Local 188 here – that the "[state] Constitution gives the superior courts power to issue mandate and other extraordinary legal remedies and ... that the Legislature has no power to define, curtail or enlarge the circumstances under which they may be issued." (*Id.* at p. 726.) The Court reasoned that "[t]he mere statement in the Constitution that a court has the power to grant certain remedies ... does not mean that the

rights which those remedies were intended to protect have been fixed in the Constitution as of the time of its adoption and are thereafter immune from legislative change or regulation." (*Id.* at p. 727.)

Courts have followed *Modern Barber Colleges* in a variety of contexts and have consistently upheld legislative limitations on private rights of action. (See *Lowman v. Stafford* (1964) 226 Cal.App.2d 31,38-39; *First Aid Services of San Diego, Inc. v. Cal. Employment Dev. Dept.* (2006) 133 Cal.App.4th 1470, 1480-1482.) Most recently, the court in *City of Irvine v. Southern California Association of Governments* (2009) 175 Cal.App.4th 506 affirmed the dismissal of a city's mandamus action challenging a state association's allocation of regional housing funds. In affirming the dismissal, the court found that the administrative procedure established under Government Code section 65584 *et seq.* was the exclusive remedy for a municipality to challenge such determinations, thus "render[ing] this process ***immune*** from judicial intervention." (*Id.* at pp. 517, 521-522, emphasis added.)

Modern Barber Colleges and its progeny clearly hold that the Legislature has the authority to limit and regulate the rights of individuals. Here, in enacting Government Code section 3509.5, the Legislature explicitly granted PERB the exclusive power to determine whether to issue unfair practice complaints, and it chose to prohibit parties from judicially

challenging a PERB decision not to issue a complaint. Local 188's attempts to circumvent this legislative mandate must be rejected.

B. Express Statutory Language in the MMBA Precludes Application of the Narrow Grounds for Review Under *Belridge Farms*

In support of its argument that a decision by PERB to not issue an unfair practice complaint may be subject to judicial review, Local 188 cites to case law arising under the Agricultural Labor Relations Act (Lab. Code § 1140 *et seq.*) (ALRA), including this Court's decision in *Belridge Farms v. Agricultural Labor Relations Board, supra.* (Local 188's Answer Brief, p. 11.) *Belridge Farms* is inapt.

The issue in *Belridge Farms* was whether an employer could seek review of the ALRB general counsel's refusal to issue an unfair practice complaint on the grounds that the general counsel's decision was premised on an erroneous construction of a provision in the Labor Code. (21 Cal.3d at pp. 554-555.) In considering this issue, the Court recognized the general rule that non-final decisions of an administrative agency, including an agency's refusal to issue a complaint, are usually immune from judicial review. (*Id.* at p. 556.) Nevertheless, the Court construed pertinent language in the ALRA and concluded that the Legislature intended to incorporate the judicially-adopted rule under the National Labor Relations Act (29 U.S.C. § 151 *et seq.*) (NLRA) which authorizes review of agency determinations on three narrow grounds: where the challenged decision

violates a constitutional right; where it exceeds a specific grant of authority; or where it is based on an erroneous construction of an applicable statute.[4] (*Id.* at pp. 556-557

Because *Belridge Farms* dealt with entirely different statutory language, it does not control the issue of whether a PERB refusal to issue an unfair practice complaint may be subject to judicial review. In interpreting the MMBA, while it may be appropriate to take guidance in interpreting from cases interpreting the NLRA and other California labor relations statutes with parallel provisions (*Vallejo*, *supra*, 12 Cal.3d at p. 617), such precedent may not be used to interpret the MMBA with respect to matters on which the federal and state statutory schemes differ. (*Andrews v. Bd. of Supervisors of Contra Costa County* (1982) 134 Cal.App.3d 274, 283.)

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[4] Specifically, the Court relied upon Labor Code section 1160.8, which enumerated the circumstances under which courts may review final decisions and orders of the ALRB. (*Belridge*, *supra*, 21 Cal.3d at p. 556.) The Court found that section 1160.8 did not limit judicial review of a decision by the general counsel not to issue an unfair practice complaint because "[t]he general counsel's refusal to issue an unfair practice complaint does not constitute a final order of the board ...." (*Ibid.*) The Court then noted that section 1160.8 was "identical" to section 10(f) of the NLRA and concluded that, by using identical language in the NLRA, the Legislature intended to incorporate the judicially-adopted rule authorizing review of decisions by the NLRB general counsel not to issue an unfair practice complaint: "We are satisfied the Legislature intended to adopt the federal rule limiting review not only by use of its language identical to section 10(f) but also by other provisions of the ALRA," which provides that the general counsel has the sole authority to decision whether or not to issue an unfair practice complaint and that decision may not appealed to the ALRB. (*Id.* at pp. 557.)

The statutory schemes differ here. The MMBA – unlike the ALRA and the NLRA – expressly provides that a PERB refusal to issue a complaint is not subject to judicial review. Neither the ALRA nor the NLRA contain provisions that parallel to Government Code section 3509.5, which expressly states that only final decisions and orders by PERB are subject to judicial review and that Board decisions not to issue an unfair practice complaint are exempt from this process.[5] As such, neither statutory scheme can provide guidance on this issue. For this reason alone, Local 188's reliance on *Belridge Farms* and other cases arising under the ALRA and NLRA provides no support for its contention that any court may review a PERB decision not to issue a complaint.

II. EVEN IF THE NARROW GROUNDS FOR REVIEW UNDER *BELRIDGE FARMS* APPLIED TO A PERB REFUSAL TO ISSUE AN UNFAIR PRACTICE COMPLAINT, NONE OF THOSE GROUNDS ARE PRESENT HERE

Even if the Court of Appeal was correct in its determination that the narrow grounds for judicial review in *Belridge Farms v. Agricultural Labor Relations Board*, *supra*, applied to a PERB refusal to issue a complaint,

[5] In its decision below, the Court of Appeal declared that this was a "distinction without a difference" and observed that "the Legislature's authority to specify the mode of judicial review may not substantially impair the constitutional powers of the courts, or practically defeat their exercise.'" (Slip Opinion, p. 13 n. 5, quoting *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 110.) Nothing in the court's analysis, however, explains why sections 3509 and 3509.5, as interpreted by PERB, would derogate the jurisdiction of courts under the California Constitution. As demonstrated above, this interpretation is entirely consistent with substantial judicial authority holding that the Legislature has exclusive authority to create and limit private rights of action.

there was simply no basis for the court to conclude that any of those grounds were present here. Consequently, PERB's dismissal of Local 188's unfair practice charge should not have been subject to judicial review.

Courts have consistently recognized that the narrow grounds for review in *Belridge Farms* should be applied only in the rarest of circumstances. (*Cadiz v. Agricultural Labor Relations Bd.* (1979) 92 Cal.App.3d 365, 381-382; *Desert Seed Company, Inc. v. Brown* (1979) 96 Cal.App.3d 69, 72.) Indeed, courts have held that these limited grounds apply only "where the fact of a statutory violation cannot seriously be argued ... or where the agency transgression is the type of gross transgression for which we invoke the label jurisdictional or clear errors of law...." (*Desert Seed Company, Inc.*, *supra*, 96 Cal.App.3d at p. 72, internal citations and quotations omitted; see also *United Farm Workers of America v. Superior Court* (1977) 72 Cal.App.3d 268, 275 ["In the absence of arbitrary and clearly unreasonable actions tantamount to gross abuse, pursuant to the legislative mandate the courts should leave the matter in the first instance to the [administrative agency]...."].)

In its decision below, the Court of Appeal held that PERB's dismissal of Local 188's unfair practice charge was reviewable under the third ground for review discussed in *Belridge Farms* – whether the decision was based on an erroneous construction of an applicable statute. (Slip

Opinion, p., 16.) The court reasoned that because the union claimed that PERB's decision was based on erroneous interpretation of *Vallejo*, the relevant statute was Government Code section 3509, subdivision (b), which requires PERB to "apply and interpret unfair labor practices consistent with existing judicial interpretations of [the MMBA]." (*Ibid.*) The court then applied a de novo standard of review to determine whether PERB properly interpreted *Vallejo*.

Here, contrary to the Court of Appeals' finding, PERB's determination below did not arise from an erroneous construction of Government Code section 3509, subdivision (b). There is nothing in the record below that suggests that PERB deviated from or misconstrued its obligations under this statutory provision. Indeed, the record is clear that, in dismissing Local 188's unfair practice charge, PERB relied upon express language in *Vallejo* holding that a public employer's decision to lay off employees does not constitute a mandatory subject of bargaining under the MMBA.

Under the approach adopted by the Court of Appeals, a party may obtain judicial review of a PERB refusal to issue a complaint simply by asserting that the agency's decision was inconsistent with prior judicial interpretations of the MMBA. As PERB notes in its opening brief, the Court of Appeal's holding "arguably stand[s] for the proposition that every Board decision is subject to judicial review if it cites an existing judicial

interpretation of the MMBA." (PERB's Opening Brief, p. 19.) The First District's holding effectively eviscerates the general rule that such agency decisions are generally immune from the judicial review process. (See *Belridge Farms*, *supra*, 21 Cal.3d at p. 556; *Panama Canal Co. v. Grace Lines, Inc.* (1957) 356 U.S. 309, 318.) Indeed, the court's holding effectively requires trial and appellate courts to review fully the merits of virtually any refusal by PERB to issue a complaint – not just on scope of representation issues, but also in conjunction with the myriad of other legal and factual issues to which charges of unfair practice filed with PERB may give rise. This would significantly expand the scope of trial court and appellate review of PERB decisions and would commensurately burden the courts, PERB and the parties appearing before them.

But more importantly, the Court of Appeal's decision fails to afford PERB's determination any deference whatsoever. The Court of Appeal did not consider whether PERB's decision was arbitrary, capricious or otherwise tantamount to gross abuse. (*United Farm Workers of America v. Superior Court*, *supra*, 72 Cal.App.3d at p. 275; see also *Southern Cal. Dist. of Council Laborers v. Ordman* (C.D. Cal. 1970) 318 F.Supp. 633, 635-636 [review appropriate where agency's decision would result in "obliteration *ab initio* of rights created by Congress"].) Nor did the court apply the normal degree of deference afforded determinations by PERB by California courts. (See *Oakland Unified School Dist. v. Public Employment*

Relations Bd. (1981) 120 Cal.App.3d 1007, 1012 ["The relationship of a reviewing court to an agency such as PERB, whose primary responsibility is to determine the scope of the statutory duty to bargain and resolve the charges of unfair refusal to bargain, is generally one of deference"].) Rather, the Court of Appeal simply reviewed PERB's determination de novo.[6]

This approach stands in stark contrast with the balancing approach courts use in assessing whether the narrow grounds for review discussed in *Belridge Farms* apply. For example, in *Panama Canal Co. v. Grace Lines, Inc.*, *supra*, the United States Supreme Court refused to review an administrative agency's interpretation of a statute and resulting decision not to act, despite allegations that the agency's interpretation of the statute at issue was erroneous. The Court reasoned that situation before the Court was "quite unlike the situation where a statute creates a duty to act and an equity court is asked to compel the agency to take the prescribed action" but rather involved "matters on which experts may disagree" and which "require the exercise of informed discretion." (*Id.* at pp. 317-318.) Thus, the Court held that "the decision to act or not to act" should be left to the

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[6] The Court of Appeal's application of a de novo standard is particularly questionable in light of its statement that such a standard would not apply in reviewing a challenged PERB decision: "Moreover, ***a court necessarily may not undertake an even less deferential de novo review of the challenged PERB decision***. At most, the court's review is limited to considering whether the decision constitutes an abuse of discretion." (Slip Opinion, p. 14, emphasis added.)

"expertise of the agency burdened with the responsibility for decision." (*Id.* at p. 318.)

Similarly, in *Associated Builders, Inc. v. Irving* (4th Cir. 1979) 610 F.2d 1221, the federal court of appeal did not subject the NLRB general counsel's refusal to issue an unfair practice complaint to judicial review despite claims the decision was based on a purported mistake of law. The court concluded the general counsel acted within his delegated authority when interpreting the meaning of "employer" under the NLRA in deciding not to issue a complaint. (*Id.* at p. 1227.) In reaching this decision, the court applied the standard set forth in *Leedom v. Kyne*, *supra*, which held that only an NLRB violation of the "express command" of a statute was subject to judicial review. (*Ibid.)*

Here, PERB's decision to not issue a complaint was neither arbitrary, unreasonable nor in violation of an "express command" of a statute. As such, there was simply no basis for either the trial court or Court of Appeal to consider Local 188's challenge.

III. PERB PROPERLY CONCLUDED THAT THE CITY'S LAYOFF DECISION DID NOT CONSTITUTE A MANDATORY SUBJECT OF BARGAINING UNDER THE MMBA

As discussed above, there was simply no basis for either the trial court or the Court of Appeal to review PERB's decision herein. However, to the extent it deems necessary, this Court should affirm the portion of the

Court of Appeal's decision affirming PERB's decision that the City's layoff decision did not constitute a mandatory subject of bargaining under the MMBA. (See *Burch v. George* (1994) 7 Cal.4th 246, 253 [courts have inherent powers to issue a decision on a dispute not properly before it where the issues are of significant public importance and continuing interest].)

A. The City's Layoff Decision Constituted a Managerial Prerogative, Outside the Scope of Representation

Under the MMBA, a public agency's duty to meet and confer is "confined to matters within the 'scope of representation,'" that is, matters relating to "employment conditions and employer-employee relations including, but not limited to, wages, hours, and other terms and conditions of employment." (*Berkeley Police Assn. v. City of Berkley* (1977) 76 Cal.App.3d 931, 936; Gov. Code § 3504.) Critically, the MMBA provides that "the scope of representation shall not include considerations of the merits, necessity, or organization of any service or activity provided by law or executive order." (Gov. Code § 3504.)

This limiting language in the MMBA "forestall[s] any expansion of the language of 'wages, hours and working conditions' to include more general managerial policy decisions." (*Berkeley Police Assn.*, *supra*, 76 Cal.App.3d at p. 936; see *San Diego Adult Educators v. Public Employment Relations Bd.* (1990) 223 Cal.App.3d 1124, 1133-1134.) Thus, "decisions

which are plainly within the realm of managerial discretion are excluded from the scope of representation." (*Berkeley Police Assn.*, *supra*, 76 Cal.App.3d at p. 937; *San Jose Police Officers Assn. v. City of San Jose* (1978) 78 Cal.App.3d 935, 948-949 [city may unilaterally change policy concerning use of deadly force because it was a fundamental managerial decision].)

It is well established that a decision to eliminate or reduce services and lay off employees falls squarely within a public employer's managerial prerogative and is not subject to negotiation under the MMBA. In *Vallejo*, this Court held that a city's decision to lay off firefighters did not constitute a mandatory subject of bargaining, although the effects of that decision were negotiable. (12 Cal.3d at pp. 621-622 ["an employer has the right unilaterally to decide that a layoff is necessary, although it must bargain about such matters as the timing of layoffs and the number and identity of the employees affected"], citing *NLRB v. United Nuclear Corp.* (10th Cir. 1967) 381 F.2d 972.)

Subsequent California decisions have followed *Vallejo* and similarly recognized that a public employer's layoff decision does not constitute a mandatory subject of bargaining. (See *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 63-64 ["though an employer has the right unilaterally to decide that a layoff is necessary, he must bargain about such matters as the timing of layoffs and the number and

identity of employees affected"]; *State Assn. of Real Property Agents v. State Personnel Bd.* (1978) 83 Cal.App.3d 206, 213 ["an employer faced with economic necessity has the right unilaterally to decide that some reduction in work forces must be made"].)

Decisions interpreting the NLRA also support the conclusion that the MMBA exempts layoff decisions from the meet and confer requirement. In *First National Maintenance Corp. v. National Labor Relations Board* (1981) 452 U.S. 666 (*First National*), the United States Supreme Court considered whether an employer's economically motivated decision to close part of its business and layoff employees was a mandatory subject of bargaining under the NLRA. (*Id.* at p. 667.)

The *First National* Court concluded that the employer's decision to lay off employees was itself not subject to bargaining because it involved the scope and direction of an enterprise and therefore constituted a fundamental management right. (*Id.* at pp. 678-679, 683.) The Court explained that to require bargaining in such cases would obliterate managerial prerogative: "The union's practical purpose in participating [in a decision to close operations] however, will be largely uniform: it will seek to delay or halt the closing." (*Id.* at p. 681.) Requiring negotiation in such circumstances "could afford a union a powerful tool for achieving delay, a power that might thwart management's intentions in a manner unrelated to any feasible solution the union might propose." (*Id.* at p. 683.)

The Court went on to hold, however, that while an employer need not meet and confer over such managerial decisions, it does have a duty to negotiate over the effects of such decisions.[7] (*Id.* at p. 677, n.15.)

Applying these principles, PERB properly concluded that the City's layoff decision constituted a managerial prerogative and thus was not a mandatory subject of bargaining under the MMBA. This conclusion was consistent with PERB's own settled determination that the issue of whether there are insufficient funds or work to support maintenance of particular staffing levels "is a matter of fundamental managerial concern which requires that such decisions be left to the employer's prerogative." (*Newman-Crows Landing Unified School Dist.* (1992) PERB Decision No. 223 [6 PERC ¶ 13162; *State of California (Department of Forestry & Fire Protection)* (1993) PERB Decision No. 999-S [17 PERC ¶ 24112]; *San*

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[7] See also *NLRB v. Royal Plating & Polishing Co.* (3d Cir. 1965) 350 F.2d 191, 196 ("an employer faced with the economic necessity of either moving or consolidating the operations of the failing business has no duty to bargain with the union respecting its decision to shut down"); *Arrow Automotive Industries, Inc. v. NLRB* (4th Cir. 1988) 853 F.2d 223, 227 [noting that *First National* "established a ***per se rule*** that an employer has no duty to bargain over a decision to close part of its business"], emphasis added; *Int'l Brotherhood of Electric Workers, Local 21 v. NLRB* (9th Cir. 2009) 563 F.3d 418, 422-423 [under *First National*, corporation's decision to merge with joint venture was a core management decision not subject to mandatory collective bargaining].)

Mateo City School Dist. (1984) PERB Decision No. 383 [8 PERC ¶ 15081].)[8]

B. Local 188's Attempt to Manufacture a Conflict Between the Court of Appeal's Decision and Federal and State Precedent Is Entirely Without Support

1. The Court of Appeal's Decision Is Consistent with Federal Case Law Under the NLRA

Local 188 claims that the Court of Appeal's decision affirming PERB's dismissal conflicts with certain NLRB decisions and federal circuit court cases which purport to hold that an employer's decision to lay off employees for economic reasons constitutes a mandatory subject of bargaining under the NLRA. (Local 188's Opening Brief, pp. 24-25.) This argument is entirely without support.

As a threshold matter, it is important to note that neither PERB nor the Court of Appeal were under any obligation to interpret and apply the NLRB's interpretation of its statutes to the MMBA. Indeed, PERB's sole mandate here was to "apply and interpret unfair labor consistent with existing judicial interpretation [of the MMBA]." (Gov. Code §§ 3509,

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[8] Notably, PERB's determination that layoffs constitute a managerial prerogative outside the scope of bargaining has been cited with approval. (See *San Diego Adult Educators v. Public Employment Relations Bd.* (1990) 223 Cal.App.3d 1124, 1134 ["the decision to terminate employees, based on lack of sufficient funds to support their continued employment, has been described as a 'fundamental managerial concern which requires that such decisions be left to the employer's prerogative.'"], quoting *Newman-Crows Landing Unified School Dist.*, *supra*, PERB Decision No. 223.)

subd. (b), 3510, subd. (a).) And that is precisely what it did. In refusing to issue a complaint based on Local 188's unfair practice charge, PERB adhered to existing judicial interpretation of the MMBA, including this Court's decision in *Vallejo*, and concluded that the City's layoff decision constituted a fundamental managerial prerogative, outside the scope of bargaining.

Moreover, Local 188's attempt to create a conflict between the Court of Appeal and PERB's determination and federal precedent interpreting the NLRA fails under the very cases it cites. Although the cases relied upon by Local 188 did find violations of the NLRA due to an employer's failure to meet and confer over a decision to layoff employees, this was because the underlying layoff decisions were premised on "labor costs," "contracting out work," and other matters inherently suitable for the collective bargaining process. (See, e.g., *Pan America Grain Co., Inc. v. NLRB* (1st Cir. 2009) 558 F.3d 22, 27-28 ["Because labor costs [associated with strike] were a motivating factor for the layoffs, the Board explained that the company had a duty to bargain with the Union over the layoffs.... [W]e find its position reasonably defensible and affirm."]; *NLRB v. Carbonex Coal Co.* (10th Cir. 1982) 679 F.2d 200, 203 ["In our view, the record amply supports the Board's findings that after the representation election Carbonex laid off employees and subcontracted certain truck hauling work

not previously subcontracted as retaliation for its employee' unionization effort"].)

The employer decisions at issue in these cases stand in stark contrast with an employer's change in the scope or levels of services provided, which under *First National* and its progeny constitutes a fundamental managerial decision not subject to mandatory collective bargaining, ***even though the decision is motivated purely for economic reasons.*** (See *First National*, *supra*, 452 U.S. at p. 683 [an employer's decision "whether to shut down part of its business for purely economic reasons ... is ***not*** part of § 8(d)'s 'terms and conditions' over which Congress has mandated bargaining"], emphasis in original; *NLRB v. Litton Fin'l Printing Div.* (9th Cir. 1990) 893 F.2d 1128, 1133-1134 [employer not required to negotiate its "***economically motivated decision***" to layoff employees and close down its "cold-type" printing machinery in favor of "hot-type" process], emphasis added, rev'd in part on other grounds (1991) 501 U.S. 190; see also *Fibreboard Paper Products Corp. v. NLRB* (1964) 379 U.S. 203, 223 [Justice Stewart, in concurring opinion, explained that "managerial decisions, which lie at the core of entrepreneurial control [such as] [d]ecisions concerning ... the basic scope of the enterprise" are not a mandatory subject of bargaining, regardless of whether such decisions are economically motivated].)

Notably, virtually all of Local 188's cases distinguish the type of layoff decisions therein from those at issue in *First National* and its progeny. (See, e.g., *NLRB v. 199, Nat'l Union of Hospital & Health Care Employees* (4th Cir. 1987) 824 F.2d 318, 321-322 ["In this case, the employer failed to establish that the layoff represented a fundamental decision to close down any part of its business or to change its nature or scope. After the layoff, which involved but six of eighty-five unit employees, the employer continued to operate much as before, pursuing the same business, in the same manner, at the same locations."]; *Pan American Grain Co., Inc., supra*, 558 F.3d at pp. 27-28.)

Indeed, the employers in some of the cases cited by the union did not even contend that the underlying layoff decisions arose from an employer's change in the scope or level of services. (See, e.g., *Alpha Associates* (2005) 344 NLRB 782, 789 n. 12 ["The Respondent has failed to assert any other potential defenses to the allegation that it unilaterally laid off unit employees (e.g., that the layoffs were merely a consequence of a change in the scope or direction of the Respondent's business or other nonmandatory subject of bargaining...."]; *Tri-Tech Services, Inc.* (2003) 340 NLRB 894, 895 [affirming general counsel's decision that employer had obligation to bargain over layoff decision, where employer failed to present evidence

demonstrating that layoffs were consistent with past practice or that union waived right to bargain over layoffs].)[9]

Contrary to Local 188, the *First Maintenance* line of cases controls whether the layoff decision at issue here constitutes a mandatory subject of bargaining under the MMBA. The City's layoff decision was not intended to provide the same level of service but simply at a cheaper cost. Instead, it constituted a fundamental managerial decision concerning the scope and level of fire fighting services the City could provide members of the public in light of the economic climate at the time. As such, the City's decision constituted a managerial prerogative outside the scope of representation under the MMBA.

This conclusion is further compelled by the fundamental differences between public-sector and private-sector employers. Unlike private employers, public agencies are required by law to provide certain services

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[9] See also *Executive Cleaning Services, Inc.* (1994) 315 NLRB 227, 227 ("We agree with the judge's conclusion that the decision to lay off the employees ... and subcontract the work ... was a mandatory subject of bargaining.... There is no contention that this decision involved any capital investment or change in the scope or direction of the joint employer's business...."); *Holmes & Narver/Morrison-Knudson* (1992) 309 NLRB 146, 147 ["At the outset we note that our decision here does not purport to establish a rule as to all layoffs. We are dealing with layoffs that are made in connection with a decision to continue doing the same work with essentially the same technology, but to do it with fewer employees by virtue of giving some of the employees more work assignments. Even our concurring colleague agrees that such a decision does not fall within the category of decisions 'involving a change in the scope and direction of the enterprise ... akin to the decision whether to be in business at all...'"), internal citations omitted.

to members of the public, including fire protection services. They cannot simply decide to "go out of the business" of fire protection or cease providing other services in order to maintain certain staffing levels. Moreover, local governments must operate on a fixed and otherwise limited budget, subject to state and federal funding and tax collection. Unlike private employers, they cannot increase prices in services in order to generate additional revenue. Thus, the need for flexibility in instituting layoffs in order to address times of economic hardship is much greater in the public sector than it is in the private sector.

And, as the Court of Appeal below correctly noted, other states have recognized this principle and held that public employers have no obligation to meet and confer over layoffs resulting from a change in the scope and levels of service. (See Slip Opinion, p. 24, discussing *Int'l Assn. of Fire Fighters, Local Union 1052 v. Public Employment Relations Comm.* (Wash. 1989) 778 P.2d 32, 36-37 ["general staffing levels are fundamental prerogatives of management ...."]; see also *International Assn. of Fire Fighters Local 669 v. City of Scranton* (Pa. 1981) 429 A.2d 779, 781 [requiring city to negotiate police and firefighter layoffs "would give the [union] the right to have a major decision-making impact on government spending, budgeting, the level of police and fire protection that the municipality must provide, and even taxation, because salaries for the additional employees must come from public funds."]; *Philadelphia Fire*

Fighters' Union, Local 22 v. City of Philadelphia (Pa. 2006) 901 A.2d 560, 567 ["the City's decision to close certain fire companies was a matter of inherent managerial prerogative and not a mandatory subject of bargaining"]; *Int'l Assn. of Firefighters of City of Newburgh v. Helsby* (N.Y. 1977) 59 A.D.2d 342, 399 ["minimum number of men that must be on duty at all times per piece of firefighting equipment" is nonnegotiable management prerogative].)

2. The Court of Appeal's Analysis of *Building Material* Was Proper

Next, Local 188 suggests that the Court of Appeal erred by not applying the three-part balancing test established in *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651 (*Building Material*) in determining whether the City had an obligation to meet and confer over its layoff decision.[10] This argument also fails.

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[10] The balancing test discussed in *Building Material* was initially developed by the United States Supreme Court in *First National* and *Fireboard Paper Products Corp. v. NLRB*, supra. (*Building Material*, supra, 41 Cal.3d at pp. 659-660.) In the balancing test, the court must first consider whether the management action has a "significant and adverse effect on the wages, hours, or working conditions of the bargaining unit employees." (*Ibid.*.) If not, no duty to meet and confer applies. (*Ibid.*) If there is such an effect, the court must consider whether the "significant and adverse effect" arises from implementation of a fundamental managerial or policy decision. (*Id.* at p. 660.) "If an action is taken pursuant to a fundamental managerial or policy decision, it is within the scope of representation only if the employer's need for unencumbered decisionmaking [sic] in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question. (*Id.*, quoting *First National*, *supra*, 452 U.S. at p. 686.)

The Court of Appeal analyzed *Building Material* and decided that the case was distinguishable because it involved a transfer of work out of the bargaining unit – a mandatory subject of bargaining. The court correctly declined to apply a "balancing" test because, as discussed above, it is well-established by federal and state judicial and administrative case law that layoffs resulting from a basic change in the scope and levels of service constitute a managerial prerogative outside the scope of collective bargaining. (See *First National*, *supra*, 452 U.S. at p. 683 [an employer may exercise its managerial prerogative to eliminate or reduce services and lay off employees "free from the constraints of the bargaining process"].) Indeed, the *Building Material* Court expressly acknowledged that "***[d]ecisions to close a plant or reduce the size of an entire workforce*** … are of a different order from a plan to transfer work duties between various employees" and noted that "there was no violation of the meet and confer requirement when an employer unilaterally decided that layoffs would be necessary ***because of budget reductions***…."[11] (41 Cal.3d at p. 655, emphasis added, internal citations omitted.)

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[11] Moreover, in *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, this Court clarified that the balancing test established in *Building Material* "applies to determine whether management must meet and confer with a recognized employee organization … when the implementation of a fundamental managerial or policy decision significantly and adversely affects a bargaining unit's wages, hours, or working conditions." (*Id.* at p. 637, emphasis added.) The Court distinguished between actions taken to implement a fundamental

Local 188 also claims that the Court of Appeal's failure to apply the three-part *Building Material* test is inconsistent with the Fourth District Court of Appeal's decision in *Rialto Police Benefit Assn. v. City of Rialto* (2007) 155 Cal.App.4th 1295. *Rialto* is inapposite.

In *Rialto*, the city faced an intractable crime problem. (*Id.* at p. 1308 n. 5.) Conceding that its efforts to remedy Rialto's crime problem had failed, the city council voted to disband the city's police force and contract for law enforcement services with the much more effective and respected San Bernardino County Sheriff's Department. (*Id.* at p. 1305.) Although the city offered to meet and confer with the police unions on the effects of the decision to "go out of the business" of providing police services, it did not offer to meet and confer on the decision itself. (*Id.* at p. 1299.)

The *Rialto* court found that the decision was subject to collective bargaining because it was motivated by a desire to reduce costs, which along with matters concerning "employee morale, level of service, and management conflicts" were "eminently suitable for resolution through collective bargaining." (*Rialto*, *supra*, 155 Cal.App.4th at p. 1308.) Because, in the court's view, the city's motivation for disbanding its police force was to obtain less expensive law enforcement services from the

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managerial decision from a fundamental managerial decision itself, which is not subject to bargaining. (*Id.* at pp. 631-635.)

county sheriff, it was unnecessary to consider whether the decision implicated a fundamental managerial decision or policy. (*Ibid.*)

The *Rialto* decision is consistent with existing PERB and NLRB case law that differentiates subcontracting with an economic motive from layoffs. (See *Oakland Unified School District* (2005) PERB Decision No. 1770E [District unlawfully subcontract police work from District police force to city police department]; *Soule Glass and Glazing Co. v. NLRB* (1st Cir. 1981) 652 F.2d 1055, 1088 [employer is required to bargain both the decision and effects of a work transfer].) Unlike *Rialto*, the layoffs here were not premised on contracting out bargaining unit work to obtain firefighter services more cheaply from a third party. Rather, the Richmond layoffs of fire fighting personnel were part City-wide layoffs geared towards maintaining solvency and continuing to operate as a government entity.

3. *Vallejo* Did Not Create a Fire Fighters Exception to the General Rule that Layoffs Are a Managerial Prerogative

Finally, Local 188 contends that, even if, as a general rule, layoffs fall outside the scope of representation, *Vallejo* created an exception to the general rule applicable to firefighters and the Court of Appeal erred in failing to note this exception. Specifically, Local 188 argues: "the city's reduction in firefighter shift staffing levels had a significant and adverse effect on employee workload and safety and thus, under *Vallejo*, was a

mandatory subject of bargaining in and of itself." (Local 188's Opening Brief, p. 53.) The union's attempt to rewrite *Vallejo* fails.

Local 188 does not and cannot provide any authority for its belief that either the Legislature or the Supreme Court intended to create a "firefighters' exception" to the general rule that staffing decisions are outside the scope of bargaining. Indeed, the union's argument is belied by plain language in the *Vallejo* decision itself. The *Vallejo* Court squarely held that "[a] reduction of the entire fire fighting force based on the city's decision that as a matter of policy of fire prevention the force was too large would not be arbitrable in that ***it is an issue involving the organization of the service***." (12 Cal.3d at p. 621, emphasis added.)

In support of its proposed "firefighters' exception," Local 188 cites to the following passage in *Vallejo*: "On the other hand, because of the nature of fire fighting, a reduction of personnel may affect the firefighters' working conditions by increasing their workload and endangering their safety in the same way that general manning provisions affect workload and safety. To the extent, therefore, that the decision to lay off some employees affects the workload and safety of the remaining workers, it is subject to bargaining and arbitration for the same reasons indicated in the prior discussion of the manning proposal." (12 Cal.3d at p. 622.)

As the Court of Appeal below correctly noted, this passage in *Vallejo* merely reflects general rule that the effects of a layoff decision, but

not the layoff decision itself, are mandatory subjects of bargaining. (See *First National*, *supra*, 452 U.S. at p. 677, n. 15.) Indeed, the *Vallejo* Court noted this general principle and went on to state that while the city's decision to reduce fire fighter staffing levels did not constitute a mandatory subject of bargaining, the effects of that decision – such as workload or safety of the remaining employees – would be negotiable. (*Vallejo*, *supra*, 12 Cal.3d at pp. 621-622.) And, as noted above, subsequent California decisions correctly interpreted and followed this holding. (See *Los Angeles County Civil Service Com. v. Superior Court*, *supra*, 23 Cal.3d at pp. 63-64; *State Assn. of Real Property Agents v. State Personnel Bd.*, *supra*, 83 Cal.App.3d 206 at p. 213.)

CONCLUSION

Based on the foregoing, the City joins in PERB's request and respectfully asks that the Court (1) correct the portion of the First District's decision finding that a PERB refusal to issue a complaint in an unfair practice case may be subject to judicial review; and, to the extent the Court deems necessary, (2) affirm the portion of appellate court's decision finding

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that the City's layoff decision did not constitute a mandatory subject of bargaining under the MMBA.

DATED: November 9, 2009

Respectfully submitted,
Renne Sloan Holtzman Sakai LLP

By: _____

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California rules of court, Counsel for Real Party in Interest City of Richmond certifies that the text of its Consolidated Answer Brief consists of 8,413 words, excluding tables, as counted by the Word XP word-processing program used to generate the brief.

DATED: November 9, 2009

Respectfully submitted,
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PROOF OF SERVICE

CASE NAME: INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 188 v. PUBLIC EMPLOYMENT RELATIONS BOARD

SUPREME COURT CASE NUMBER: S172377
COUNT OF APPEAL CASE NUMBER: A114959

I, Rochelle Redmayne, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at Renne Sloan Holtzman Sakai, 350 Sansome Street, Suite 300, San Francisco, CA 94104.

On November 9, 2009, I served the following document(s):

REAL PARTY IN INTEREST AND RESPONDENT CITY OF RICHMOND'S CONSOLIDATED ANSWER BRIEF

☒ by placing the document(s) listed above in a sealed envelope(s) with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited in the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

on the following persons at the locations specified:

First District Court of Appeal
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San Francisco, CA 94102

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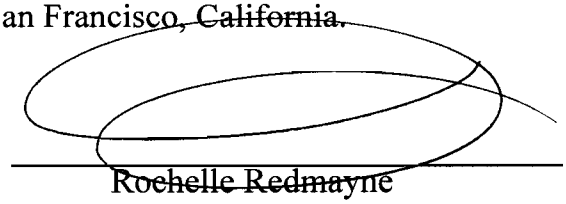
I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed November 9, 2009, at San Francisco, California.



Rochelle Redmayne