S202037

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

JOHN W. McWILLIAMS, on behalf of himself and all others similarly situated,
Plaintiff and Appellant,

vs.

CITY OF LONG BEACH
Defendant and Respondent.

After A Decision By The Court Of Appeal
Second Appellate District, Division Three
Case No. B200831

Superior Court for the County of Los Angeles
Hon. Anthony J. Mohr, Judge
Trial Court Case No. BC361469

NOTICE OF MOTION AND MOTION TO CONSIDER ADDITIONAL EVIDENCE

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To the Honorable Chief Justice and Associate Justices of the Supreme Court:

Please take notice that, pursuant to California Code of Civil Procedure section 909 and California Rules of Court, rule 8.252(c), Plaintiff/Appellant John W. McWilliams hereby submits this Notice of Motion and Motion to Consider Additional Evidence. Plaintiff moves this Court to consider, for the purposes of the Answer Brief on the Merits filed concurrently herewith, the following statement made by the City of Long Beach City Attorney, Robert E. Shannon, as reported in a Daily Journal article entitled, "Tax refund claims seen as major risk: Cities and counties face new taxpayer class actions," and dated April 13, 2012: "If people were left to the task of filing individual claims, they by and large wouldn't bother." A true and correct copy of the article is Exhibit A to the Declaration of Rachele R. Rickert attached hereto. The statement qualifies as an exception to the hearsay rule, and this Court may admit it into evidence.

This motion is based upon the attached Memorandum of Points and Authorities, the Declaration of Rachele R. Rickert, and the proposed order granting this motion, which fulfills the requirements of California Rules of Court, rule 8.252(c).

DATED: October 26, 2012

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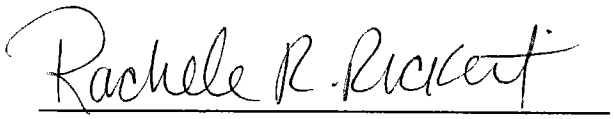
RACHELE R. RICKERT



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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On April 13, 2012, the Daily Journal published an article entitled, "Tax refund claims seen as major risk: Cities and counties face new taxpayer class actions." In that article, City of Long Beach (the "City") City Attorney Robert E. Shannon is reported as making the following statement:

> "If people were left to the task of filing individual claims, they by and large wouldn't bother."

(Declaration of Rachele R. Rickert, Exhibit A.) Plaintiff quotes this statement in his Answer Brief on the Merits at p. 34. This statement constitutes an admission of a party opponent, and the Daily Journal reported the statement after the Court of Appeal issued its opinion on March 28, 2012. (See Second Appellate District, Division Three, unpublished opinion filed on March 28, 2012 [Case No. B200831] ("Opinion").)

As further set forth below, Mr. Shannon's statement qualifies as an exception to the hearsay rule, and this Court may admit it into evidence pursuant to California Rules of Court, rule 8.252(c) and California Code of Civil Procedure section 909. This motion is timely made, the evidence is a discrete factual statement that supports affirmance of the Court of Appeal Opinion, and the statement is relevant to the City's motivation for opposing the filing of class claims and the potential impact of a bar on class claims as advocated by the City in its appeal before this Court.

II. CONSIDERATION OF ADDITIONAL EVIDENCE IS APPROPRIATE

A. General Principles For Consideration Of Additional Evidence On Appeal

California Rules of Court, rule 8.252(c) provides that "[a] party may

move that the reviewing court take evidence." Pursuant to California Code of Civil Procedure, section 909, this Court "may for the purpose of making the factual determinations or for any other purpose in the interests of justice, take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal...." (Cal. Code Civ. Proc. § 909. See also *Hasso v. Hasso* (2007) 148 Cal.App.4th 329, 333 fn. 3 [55 Cal.Rptr.3d 667]; *California Packing Corp. v. Transport Indemnity Co.* (1969) 275 Cal.App.2d 363, 370 [80 Cal.Rptr. 150].) Moreover, "[t]his section shall be liberally construed...." (Cal. Code Civ. Proc. § 909.) While historically, appellate courts have been reluctant to take evidence because they are not equipped for it, "where the proffered evidence is wholly documentary, this objection is not so great." (*Crofoot Lumber, Inc. v. Lewis* (1962) 210 Cal.App.2d 678, 681 [27 Cal.Rptr. 443] (*Crofoot*).) Moreover, the ability to consider additional evidence is favored where it supplies factual information supporting affirmance of the lower court's opinion. (See *Guardianship of Marino* (1973) 30 Cal.App.3d 952, 961 [106 Cal.Rptr. 655]; *Golden West Baseball Co. v. City of Anaheim*, 25 Cal.App.4th 11, 42 [31 Cal.Rptr.2d 378].)

B. The Statement In The Daily Journal Article Constitutes An Admission Of A Party And Therefore Is Excepted From The Hearsay Rule

While ordinarily statements contained within a news article would be considered inadmissible hearsay, here the proffered statement falls into the exception provided by California Evidence Code section 1220:

> Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

(Cal. Evid. Code § 1220; see also *Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1150 [119 Cal.Rptr.2d 131].) In addition, "it is well settled that no foundation as to time, place or persons present need be laid before admissions may be introduced." (*Borror v. Dept. of Investment, Div. of Real Estate* (1971) 15 Cal.App.3d 531, 547 [92 Cal.Rptr. 525].)

C. The Court Should Consider The Statement In The Daily Journal Article As Additional Evidence On This Appeal

Similar to the facts in *Crofoot, supra*, 210 Cal.App.2d at p. 681, Plaintiff is requesting the Court admit a single document into evidence that contains one statement by a party, specifically a one sentence statement by the City of Long Beach City Attorney, Robert E. Shannon, admitting that the City understands that if class claims are barred in these telephone tax refund actions, people would fail to pursue their claims, however valid. (See Exhibit A.) Admitting such evidence does not require this Court to resolve factual issues in dispute, which would more properly be determined by the trial court. (Compare *De Angeles v. Roos Bros., Inc.* (1966) 244 Cal.App.2d 434, 443 [52 Cal.Rptr. 783].) Moreover, the statement is relevant as a party admission regarding the City's motivation for opposing the filing of class claims and the impact of a class action bar in this tax refund case. The statement therefore provides factual information that supports affirmance of the Court of Appeal's decision upholding the ability of taxpayers to file class claims in tax refund actions. (See Opinion at pp. 2, 12.)

Finally, given the fact that the date of publication, April 13, 2012, was after both the trial and appellate court rulings in this case, this is not a matter that should have been, but was not, presented to the trial court for its consideration in the first instance. (Compare *In re L.B.* (2003) 110 Cal.App.4th 1420, 1423, fn. 1 [3 Cal.Rptr.3d 16] [denying request for

consideration of evidence that existed but was not presented at time of the lower court hearing]; *Replogle v. Ray* (1941) 48 Cal.App.2d 291, 311 [119 P.2d 980] [denying request for consideration of evidence based on undue delay].)

III. CONCLUSION

For the reasons set forth above, Mr. Shannon's statement is discrete additional evidence that is timely presented and relevant to the arguments on appeal, and such evidence falls within an exception to the hearsay rule. Therefore, Plaintiff respectfully submits that this Court should, after expiration of opposing counsel's opportunity to respond under California Rules of Court, rule 8.54(a)(3), grant Plaintiff's motion for consideration of the above-referenced statement contained in the Daily Journal article, attached to the Declaration of Rachele R. Rickert as Exhibit A.

DATED: October 26, 2012

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DECLARATION OF COUNSEL
[CRC 8.54(a)(2)]

I, Rachele R. Rickert, declare as follows:

1. I am an attorney in good standing and licensed to practice before the Courts of this state. I am counsel of record for Plaintiff John W. McWilliams.

2. Attached hereto as Exhibit A is a true and correct copy of the article entitled, "Tax refund claims seen as major risk: Cities and counties face new taxpayer class actions," by Ben Adlin, as published in the Daily Journal on April 13, 2012.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed on this 26th day of October 2012.

Rachele R. Rickert

RACHELE R. RICKERT

[PROPOSED] ORDER GRANTING MOTION FOR CONSIDERATION OF ADDITIONAL EVIDENCE

For the reasons provided in Plaintiff's Motion for Consideration of Additional Evidence (the "Motion"), this Court hereby grants the Motion, specifically the following statement made by the City of Long Beach City Attorney, Robert E. Shannon, as reported in the Daily Journal article dated April 13, 2012, attached as Exhibit A to the Declaration of Rachele R. Rickert:

> "If people were left to the task of filing individual claims, they by and large wouldn't bother."

As of the date of signing this Order, the Court will take this evidence into consideration pursuant to California Evidence Code section 1220 and California Code of Civil Procedure section 909 and in compliance with California Rules of Court, rule 8.252(c)(2). The Court hereby admits this statement into evidence without a hearing.

DATED:

_____

CHIEF JUSTICE

EXHIBIT A

Tax refund claims seen as major risk

Cities and counties face new taxpayer class actions.

By Ben Adlin

A relatively obscure class standing decision out of the state Supreme Court last summer could wreak havoc on local government finances and the services they fund.

The high court opinion in *Ardon v. City of Los Angeles* established that under state law, taxpayers can seek tax refunds from municipalities on behalf of an entire class. Previously, most read the Government Code to allow only individual claims.

Claims against local governments are an administrative remedy that taxpayers must complete before filing suit.

> **'To permit a class claim in this area has a tremendous financial impact.' - Robert E. Shannon**

The decision now threatens cities and counties with expensive class actions at a time when municipalities are already dealing with weak bottom lines. By allowing individuals to file class claims on behalf of others, thousands of taxpayers can now clear that procedural hurdle with the filing of a single claim.

Costs to cities and counties could be huge. Los Angeles City Administrative Officer Miguel A. Santana said damages in the Ardon case could be as high as $750 million - more than three times the city's $220 million projected shortfall for the coming fiscal year.

"We can't even borrow our way out of it without having a huge financial burden that takes out of other public services," Santana said. "We're talking about an annual payment as high as $100 million a year."

Despite potentially dizzying liabilities, many municipal lawyers initially read the July decision as a narrow one. They pointed to a footnote that suggested local governments might be able to shield themselves through local ordinances expressly barring class claims.

But last month, an appellate court decision cast doubt on whether such prohibitions offer any protection. The 2nd District Court of Appeal, Division 3, ruled invalid the city of Long Beach's provision against class claims. The unpublished decision isn't binding precedent, but it nevertheless has city attorneys worried. *McWilliams v. City of Long Beach*, B200831.

"To permit a class claim in this area has a tremendous financial impact," said City Attorney Robert E. Shannon. "If people were left to the task of filing individual claims, they by and large wouldn't bother."

Long Beach on Wednesday asked the appellate court to hear the case again. But courts usually decline such requests, observers said. Shannon said he intends to keep fighting the decision, pledging to petition the state Supreme Court if necessary.

Friday, April 13, 2012

Labor/Employment
Employer liability for rest breaks clarified by high court
The state Supreme Court issued a ruling Thursday providing long-sought clarity to employers on how they should structure breaks for hourly workers in California.

Energy Law
BrightSource calls off its IPO
In the midst of a struggling market for solar companies, Oakland-based solar project developer BrightSource abruptly reversed course on its long-awaited IPO, announcing it would not go forward as planned.

Solo and Small Firms
The Busch Firm
The Busch Firm's practice includes representing religious organizations, many of which its founder created.

U.S. Court of Appeals for the 9th Circuit
9th circuit says ban on political ads for public broadcast is unconstitutional
A longstanding federal ban on political ads on public radio and TV stations is an unconstitutional restriction of free speech, a divided 9th U.S. Circuit Court of Appeals panel held Thursday.

Large Firms
Another Dewey departure
Dewey & LeBoeuf sustained another defection from its Los Angeles office Thursday, this time a corporate mid-level partner jumping to the regional California shop Stradling Yocca Carlson & Rauth, P.C.

Alternative Dispute Resolution
Jeffrey M. Mandell
ADR neutral brings more than two decades of experience in negotiating thousands of deals for high-flying entertainment and media clients.

Entertainment & Sports
MPAA reorganizes legal staff
Six months after taking the reins, new entertainment trade group VP Henry Hoberman has restructured his legal team in Los Angeles and Washington, D.C.

"If we don't get review on this case, then someone else will be the pinata on that issue," said attorney Michael G. Colantuono, who represents Long Beach in the case.

Shannon said the city hasn't yet been able to quantify its liability in the case, but he said the suit targets roughly $48 million in telephone users tax collected between 2005 and 2008. Plaintiffs allege the some of that tax was levied on Internet service, which under federal law is supposed to be tax-free.

Class-action lawyers have filed similar suits against Los Angeles County and the city of Chula Vista.

Jon A. Tostrud, one of the attorneys representing plaintiffs in Long Beach and Los Angeles city and county, declined to comment about the cases. He referred questions to the cases' lead counsel at Wolf Haldenstein Adler Freeman & Herz LLP, where attorneys didn't respond to requests for comment.

Some municipal lawyers said tracking down information about class claims can be onerous - or worse.

"It's not possible," said San Francisco Deputy City Attorney Peter J. Keith. "If someone comes in and [files a claim on behalf of] every person who stayed in a hotel in San Francisco during these dates, we just don't have that information."

Certain local taxes, such as those on telephone service, hotel visits and public parking lots, are collected by businesses and then remitted to municipalities. Keith said it's difficult to impossible to obtain and process a class claim, which can include numerous unidentified taxpayers, within the 45-day deadline set out by state law.

Colantuono, who also represents the city and county of Los Angeles, said he worries the availability of a new tool for class actions will "attract a consortium of the most talented, smart [plaintiffs'] class-action lawyers" around.

"This is totally new," he said, "and we're brushing up our Rolodexes to identify competent class defense counsel to assist us."

RELATED ARTICLES

Path cleared for class tax claims August 8, 2011
The state Supreme Court makes it easier for taxpayers to challenge local tax impositions. By **Stanley S. Taylor** of Nossaman LLP

Do ordinances shield cities from class claims? August 4, 2011
A lawsuit pending against the city of Chula Vista hinges on whether municipalities can shield themselves from class claims by expressly barring them in local statutes.

RELATED RULINGS

Ardon v. City of Los Angeles September 11, 2009

Previous **Next**

Corporate
Former Apple IP counsel joins startup
The mystery over what Apple Inc.'s longtime intellectual property counsel was up to when he left the company last summer is solved.

Tax
Stars need tax help, too
For Hollywood's biggest stars, tax and estate planning is a year-round responsibility - one that many of them simply couldn't handle without the help of specialized lawyers.

Investments
Oaktree IPO off to a weak start
Oaktree Capital Group LLC , the largest private equity firm in California, dropped in its first day of trading after raising $380.2 million in a downsized initial public offering.

Tax
Amazon.com readies for online sales tax
By cutting a deal, Amazon and lawmakers left the broader tax law question unresolved and made the already convoluted tax system that much more complex.

Increased tax burdens on small businesses on the horizon
The IRS is increasing its scrutiny of S Corps while new regulations are looming. By **Alexander Lee** of Paul Hastings

Drop it: the remnants of the geographically-based restriction on property tax exemptions for nonprofits
Geographic restrictions on property tax exemptions don't make sense as a policy and create needless administrative burdens. By **Ofer Lion** of Hunton & Williams LLP

Intellectual Property
With passage of America Invents Act, it's a whole new ballgame for inventors. Pt. 2
The act turns our patent system into a "first inventor to file" system instead of a "first to invent" system. By **Hani Z. Sayed** of Rutan & Tucker LLP

Alternative Dispute Resolution
The "Harding Effect" in mediation
Two things happen in mediation: the mediator influences the parties, and the parties influence the mediator. By **Robert S. Mann** of ADR Services

Perspective
Do women 'opt-out' of work, or are they 'forced out'?
A collection of essays exploring the choices that women face when trying to balance the demands of

work and family. By **Bernie D. Jones**

Tax
Tax refund claims seen as major risk
A relatively obscure class standing decision out of the state Supreme Court last summer could wreak havoc on local government finances and the services they fund.

Estate tax March Madness: taxpayers 3, IRS 0
Recent decesions provide hope for taxpayers' ability to prevail in U.S. Tax Court. By **Bruce Givner** and **Owen Kaye** of Givner & Kaye PC

Letter to the Editor
Unsinking Mr. Kingsley's Titanic
Rebutting the claim that class action lawsuits are the lifeboats of society. By **Jeff Scott** of Greenberg Traurig

Judicial Profile
Cory J. Woodward
Superior Court Judge Kern County (Bakersfield)

Tax
Tax planners say uncertainty abounds in 2012
Tax attorneys in California who advise upper middle-class and wealthy clientele generally are professionals who prize certainty - something they say is in short supply this year with federal tax cuts set to expire in January.

DECLARATION OF SERVICE

I, Maureen Longdo, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 750 B Street, Suite 2770, San Diego, California 92101.

2. That on October 26, 2012, declarant served the NOTICE OF MOTION AND MOTION TO CONSIDER ADDITIONAL EVIDENCE via Federal Express Overnight Delivery in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List and the Supreme Court of the State of California.

3. That there is regular communication between the parties.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 26th day of October 2012, at San Diego, California.

Maureen Longdo

MAUREEN LONGDO

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