LIU, J.

SUPREME COURT
FILED

MAY 31 2012

Frederick K. Ohlrich Clerk

Deputy

S202037

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

JOHN W. MCWILLIAMS
Plaintiff and Appellant,

v.

CITY OF LONG BEACH,
Defendant and Respondent.

CITY OF LONG BEACH'S REPLY IN SUPPORT OF PETITION FOR REVIEW

Of an Unpublished Decision of the Second Appellate District of the Court of Appeal
Case No. B200831

Reversing a Judgment of the Superior Court of the State of California for the County of Los Angeles, Case No. BC361469
Honorable Anthony J. Mohr, Presiding

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Plaintiff John W. McWilliams ("Plaintiff" or "McWilliams") argues this case is moot and unworthy of review by assuming victory on all the contested points. There can be no doubt the parties here **do** contest whether the Defendant City of Long Beach (the "City") is empowered to preclude class claims. That question arises here and is vitally important to many others. Accordingly, this case merits review.

LEGAL DISCUSSION

I. Long Beach's Ordinances Preclude Class Claims

The City has consistently maintained throughout this litigation that Long Beach Municipal Code ("LBMC") § 3.68.160 authorizes refunds of overpaid telephone taxes to either consumers or carriers:

> A. Whenever the amount of **any tax** has been overpaid or paid more than once or has been erroneously or illegally collected or received by the city clerk or city treasurer-city tax collector under this chapter, it **may be refunded as provided in this section**.
>
> B. A service supplier may claim a refund or take as credit against taxes collected and remitted the amount overpaid, paid more than once, or erroneously or illegally collected or received, when it is established in a manner prescribed by the city treasurer-city tax collector that the service user from whom the tax has been collected did not owe the tax; provided, however, that neither a refund nor a credit shall be allowed unless the amount of the tax so collected has either been refunded to the service user or

credited to charges subsequently payable by the service user to the person required to collect and remit.

C. No refund shall be paid under the provisions of this section unless **the claimant** established his or her right thereto by written records showing entitlement thereto.

D. No refund shall be paid under the provisions of this section unless **the claimant** has submitted a claim pursuant to this section.

The Court of Appeal construed this ordinance, as would Plaintiff, to allow a remedy only to carriers. (Opinion of the Second District Court of Appeal, Division Three, filed March 28, 2012 [hereinafter, "Opinion"], p. 4.) The Opinion failed to construe the second ordinance litigated here — § 3.48.060 – which provides rules applicable generally to claims against the City,[1] even after the omission was noted by the Petition for Rehearing.[2] The Opinion apparently ignored this ordinance because the Court understood its primary holding to be the question of which this Petition seeks review: that no local claiming ordinance could apply to McWilliams'

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[1] LBMC § 3.48.060 provides: "Any refund made pursuant to this chapter must be authorized by the department head with the approval of the city attorney or the city attorney and the city council, provided the refund is made within one year after payment of the money to the city, or if an application for a refund is filed by the person entitled to the money, the application therefor must be filed within such one-year period."

[2] *See* Petition For Rehearing, filed April 11, 2012, pp. 2-4.

claim, because § 905[3] preempts local tax refund claiming ordinances. (Opinion, p. 2.)

Plaintiff wishes away § 3.48.060 by arguing that § 3.68.160 controls and allows only carriers to seek refunds. Plaintiff also asserts this lack of a remedy violates due process. (*See* Respondent's Brief filed April 30, 2008 at p. 7; *see also* Complaint, Count V, CT at 20-21.) However, courts must construe legislation to preserve its constitutionality where possible. An approach more consistent with the separation of powers would give these ordinances the usual deference accorded to legislation, find they provide a remedy but not to class claimants, and resolve whether ordinances may bar class claims.

Plaintiff's contention that the City does not challenge this argument here (Plaintiff's Answer to Petition for Review [hereinafter, "Answer"] at pp. 6, 7, 8, 10) is wishful thinking. The Petition unmistakably notes the City's contrary arguments. (Petition for Review, pp. 4, 11.) If there were any doubt, let us dispel it now: Long Beach contends the Opinion erred in overruling the trial court's grant of demurrer in reliance on §§ 3.68.160 and 3.48.060, whether it did so because those ordinances were preempted or because they did not apply.

II. Review Is Necessary to Resolve a Division Among the Courts of Appeal

Plaintiff asks this Court to find no conflict in the law despite the plain intent of the Second District to create one. Plaintiff does so by

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[3] Unspecified section references are to the Government Code.

arguing that only the cases which support his position — those that rely on a simplistic reading of Government Code § 811.8's belated definition of "statute" — are truly on point. (Answer, p. 3.) If ignoring the cases which undermine one's position could eliminate a conflict, this Court would never need grant review under Rule 8.500(b)(1).

A. Many Cases Apply Local Claiming Ordinances to Tax Refund Claims

Batt v. City & County of San Francisco (2007) 155 Cal.App.4th 65 is merely the latest and most cogently stated of a line of cases, including this Court's own decision in *Volkswagen Pacific, Inc. v. City of Los Angeles* (1972) 7 Cal.3d 48, and *Pasadena Hotel Development Venture v. City of Pasadena* (1981) 119 Cal.App.3d 412, that apply local claiming ordinances to tax and fee refund claims. Indeed, in suggesting that there is no conflict in the case law, Plaintiff ignores, for example, *Howard Jarvis Taxpayers Association v. City of Los Angeles* (2000) 79 Cal.App.4th 242, 249 n.5, which relied upon a Los Angeles ordinance to preclude a tax refund claim. Likewise, *Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129, 1139, held San Francisco's Municipal Code governed such suits.

Moreover, *County of Los Angeles v. Superior Court (Oronoz)* (2008) 159 Cal.App.4th 353, 365 construed *Batt*'s holding as dicta and declined to follow it. (*Id.* at n. 9.) Yet, the same division of the Court of Appeal recognized *Batt*'s language as a holding in this case, but summarily rejected it and *Pasadena Hotel*. (Opinion at 11.)

There is plainly a conflict between the *Batt* line of cases and the

opinions here and in *Oronoz* (the sole published opinion to find local claiming ordinances preempted by § 905(a)).

B. *Ardon* Did Not Overrule *Batt*

Nor has this Court impliedly overruled the *Batt* line, as Plaintiff claims. (Answer, p. 11.) Rather, this Court **distinguished** those cases and expressly reserved the question whether § 905(a) permits local tax and fee claiming requirements. (*Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241, 246 n. 2 ["... [W]e do not address any issues involving preemption of the municipal code provisions in this case."].)

III. This Case Warrants Review to Resolve This Conflict

Whether local charters and ordinances may bar class tax and fee refund claims requires decision by this Court. Indeed, Plaintiff's request for publication of the Opinion here demonstrates the continuing vitality of these issues.

A. Similar Pending Cases Cannot be Distinguished

Plaintiff fails to explain away the many lower cases which demonstrate the urgency of the question this Petition presents.

First, Plaintiff cannot question the relevance of *City of Chula Vista v. Superior Court*, 4th Court of Appeal Case No. D06156 (hereinafter, "*Chula Vista*"). He cited the case in his request for publication of the Opinion (Exhibit A to Letter from Plaintiff / Appellant's Counsel, Jon Tostrud, Requesting Publication, dated April 17, 2012 ["Plaintiff's Publication Request"].) Nor does Plaintiff meaningfully distinguish *Sipple v. Alameda,*

et al., Los Angeles Superior Court Case No. BC462270 (MJN,[4] Exh. C.). He notes only that *Chula Vista* and *Sipple* are factually distinguishable from this case in some unstated way. (Answer, p. 10.)

Second, Plaintiff's quibbles with the remaining cases cannot obscure that each represents a pending or recent class claim for refund of a tax or fee defended on the basis of local claiming ordinances, the applicability of which cannot be known until the question *Ardon* reserved is resolved.

I. The Cases Presented for Notice Demonstrate the Need to Resolve the Issue Raised by the Petition

While *Borst v. City of El Paso De Robles*, San Luis Obispo Superior Court No. CV 09-8117 (hereinafter, "*Borst*") (MJN, Exh. G) involves a petition that does not allege compliance with the City's local claiming ordinance, that fact makes it demurrable. Filed concurrently with this Reply is the City's Second Motion for Judicial Notice ("Second MJN"), Exhibit A to which is the *Borst* demurrer asserting a claiming ordinance.

Similarly, *Hanns v. City of Chico*, Butte County Superior Court No. 149292 (hereinafter, "*Hanns*") (MJN, Exh. I) is a class challenge to a fee. Many local claiming ordinances apply alike to tax and fee refund claims (as does § 905, subd. (a)),[5] like the Chula Vista ordinance involved in the

---

[4] "MJN" refers to the City's Motion for Judicial Notice filed May 1, 2012.

[5] Section 905(a) exempts from the Government Claims Act and authorizes local claiming procedures for "Claims under the Revenue and

recently denied Petition for Review in Case No. S201440.[6] Indeed, the question presented here involves the constitutional power of municipalities to impose claiming requirements on **both** tax and fee refund cases. Thus, *Hanns* further demonstrates the urgent need for review of these issues.

Finally, *Shames v. City of San Diego*, San Diego Superior Court No. GIC831539 (hereinafter, "*Shames*")(MJN, Exh. H) did settle several years ago as to residents' claims for refund of sewer charges, as Plaintiff notes. However, the restaurant industry's class challenge to those same fees was resolved only in 2011. (*California Restaurant Management Systems v. City of San Diego* (2011) 195 Cal.App.4th 1581.) Again, both cases demonstrate that class challenges to local utility fees are of pressing current concern to lower courts, local governments and would-be class claimants.

Taxation Code or other statute prescribing procedures for the refund, rebate, exemption, cancellation, amendment, modification, or adjustment of any **tax, assessment, fee, or charge** or any portion thereof, or of any penalties, costs, or charges related thereto."

[6] The City seeks notice of Paso Robles Municipal Code §§ 3.04.550 – 3.04.561 (Second MJN, Exh. C). This ordinance, like Chula Vista's, expressly forbids class claims for refunds of taxes and fees.

2. Recent Case Law Underscores the Urgency of This Issue

The City seeks notice of a recent order of the Los Angeles Superior Court granting the demurrers without leave to amend in *Sipple*, because the plaintiffs failed to comply with claiming ordinances. (Second MJN, Exh. B.) The court concluded the *Batt* line of cases was not displaced by *Ardon* and declined to follow *Oronoz*. (*Id.* at p. 6.) By contrast, in *Chula Vista*, the San Diego Superior Court denied this same defense, citing *Oronoz* and declining to follow *Batt*. (*See* Exhibit A to Plaintiff's Publication Request.) *Sipple* will soon be appealed to the Second District and *Chula Vista* may well find its way to the Fourth District in due course.

Plainly, these issues are live and much public money is being spent litigating and re-litigating them in various trial and appellate courts. Consistent application of the law cannot be had until this Court speaks.

IV. The Legislature Did Not Intend to Preempt Claiming Ordinances

The legislative history of the 1959 and 1963 statutes that enacted the Government Claims Act[7] demonstrates the Legislature did not intend to preempt claiming ordinances. The City will not belabor the point, as it is addressed in the Petition at pp. 15–25 and is more properly briefed on the merits if this Court grants review. However, a few points in the Answer bear rebuttal.

---

[7] Government Code § 810, *et seq.*

A. The Difference Between §§ 905(a) and 905(b) Does Not Demonstrate Intent to Preempt Local Ordinances

The Legislature's decision to exclude the phrase "other provisions of law" from what is now § 905, subdivision (a), while retaining that term in § 905, subdivision (b) was not intended to exclude local legislation from subdivision (a). Rather, the difference between "any provision of law" and "or other statute" (and between subdivisions (b) and (a)) is that the first includes judge-made law, and the second excludes it.

In 1959, mechanics liens and stop notice claims were governed both by judge-made "equitable lien" remedies and by statutes. Mechanics' liens cannot attach to public property. (*E.g., J.W. Theisen v. County of Los Angeles* (1960) 54 Cal.2d 170, 176.) Thus, a subcontractor on a public works project has a different remedy when a primary contractor fails to pay: a claim against public funds due the primary contractor. This Court surveyed the history of these remedies in *Connolly Development, Inc. v. Superior Court* (1976) 17 Cal.3d 803, and explained that because mechanics liens were not available, "the courts and the Legislature evolved alternative remedies — the equitable lien and the stop notice — which attach directly to the [construction] loan fund." (*Id.* at p. 827; see also *Smith v. Anglo-California Trust Co.* (1928) 205 Cal. 496, 502; *Doud Lumber Co. v. Guaranty Sav. & Loan Assn.* (1967) 254 Cal.App.2d 585, 588-590 [listing elements of judicially created equitable lien].) The statutory stop-notice remedy entitled a subcontractor to public funds due the prime contractor. (*J.W. Theisen, supra*, 54 Cal.2d at p. 177 [discussing stop notice procedure against public entities under former CCP § 1192.1].) The judge-made equitable lien

remedy was also available against public entities. (*Stansbury v. Frazier* (1920) 46 Cal.App. 485, 488; *Goldtree v. City of San Diego* (1908) 8 Cal.App. 505, 508-510 [constitution required judicial remedy for mechanics and materialmen on public works projects until Legislature acted].)

While Civil Code § 3264 abolished the judge-made equitable lien remedy in 1969, that remedy remained in 1959 when § 703, subd. (b) — the predecessor to the present §905, subd. (b) — was enacted. (*Connolly Development, Inc., supra,* 17 Cal.3d at p. 826 n.24; see also *Boyd & Lovesee Lumber Co. v. Western Pac. Fin. Corp.* (1975) 44 Cal.App.3d 460, 464-465 [discussing Civil Code § 3264's abolition of equitable lien remedy].) Thus, the Legislature used "any provision of law" in subdivision (b) of former § 703 to include both judge-made and statutory remedies. It is unlikely the Legislature used "any provision of law" to include municipal charters and ordinances, given that the sources of law governing this subject were common law and state — not local — statutes. Accordingly, the Legislature's use of the terms "statute" and "any provisions of law" in former § 703, subds. (a) and (b) (and present § 905, subds. (a) and (b)) undermines Plaintiff's argument.

I. Section 905(e) Is Not to the Contrary

Nor does the use of "other provisions of law" in what is now § 905, subdivision (e)[8] dilute this point. By that reference, the Legislature

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[8] Section 905, subdivision (e) exempts from claims presentation requirements "Applications or claims for any form of public assistance

intended to allow exceptions to the Government Claims Act to derive from a variety of legal sources as to mechanics liens and welfare claims (which are heavily regulated by federal, state and County regulations and policies), and simultaneously implemented the Law Revision Commission's advice to leave undisturbed local claiming requirements for tax and fee refunds.

B. Professor Van Alstyne's Study is Legislative History of the Government Claims Act

Plaintiff cannot evade the Government Claims Act's unambiguous legislative history. (Answer at pp. 14–15.) First, Plaintiff argues Professor Van Alstyne's "Study" was neither a part of the Law Revision Commission's Recommendation, "nor did it have anything to do with the Law Revision Commission's draft statutory language." (Answer at p. 14.) Wrong. The Study was prepared at the Commission's express direction and provided the factual underpinning for the Commission's recommendations:

> The Law Revision Commission was, therefore, authorized and directed to study and analyze the various provisions of law relating to the filing of claims... The Commission has made an exhausting study of existing claims statutes and judicial decisions interpreting and applying them.

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under the Welfare and Institutions Code or other provisions of law relating to public assistance programs ...."

> On the basis of this study the Commission has concluded that the law of this State governing the presentation of claims against governmental entities is unduly complex, inconsistent, ambiguous and difficult to find ... This conclusion is supported by the following facts among others disclosed by the Commission's study..."

(Recommendation and Study (Jan. 1959) 2 Cal. Law Revision Com. Rep. ["Report"] at A-7.)[9]

Second, Plaintiff claims "Van Alstyne's short-hand terminology, 'claims statutes' and 'claims provisions,' was never adopted by the Commission in its Recommendation . . ." (Answer at p. 15.) Wrong, again. The very first paragraph of the Recommendation provides:

> The law of this State contains many statutes and county and city charters and ordinances which bar suit against a governmental entity for money or damages unless a written statement or 'claim' ... is communicated to the entity ... . Such provisions are referred to in this Recommendation and Study as 'claims statutes.'"

(Report at A-7.)

Third, Plaintiff errs in claiming the Recommendation did not exclude all tax refunds from the proposed Claims Act:

> The proposed new statute does not govern the presentation of all claims against all governmental entities in this State.... Even as to local public entities, however, the coverage of the new general claims statute is not universal. Like nearly all

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[9] *See* City's Motion for Judicial Notice below, filed on April 11, 2012, Exh. A, page A-1.

> existing claims statutes, it applies only to claims for money or damages. Moreover, certain types of claims for money or damages are expressly excluded from the statute — for example, **claims for tax exemptions and refunds**.
>
> ....
>
> (b) All local public entities are authorized to prescribe by charter, ordinance or regulation claims procedures applicable to claims not governed by the general claims statute or by other statutes specifically applicable thereto.

(Report at A-9 and A-10.)

The Study directly informed the Commission's positions, and the Commission attached the study to the draft statute it recommended to the Legislature.[10] Indeed, the courts have ruled that the Study is legislative history of the Act:

> [T]he Law Revision Commission has stated that it excluded from the scope of the unified claims statute then proposed by the Commission all 'claims for tax exemption, cancellation or refund.' (See 2 Cal. Law Revision Com. Rep. (1959) p. A-117.) ... the intent of the commission in regard to [the meaning of 905(a) and former 703(a)] may be deemed to be the intent of the Legislature.

See Pasadena Hotel, supra, 119 Cal.App.3d at 415, n.3.

Plaintiff's effort to evade the legislative history of the Act is bootless.

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[10] *See* MJN below, Exhibit A, unmarked title page stating "California Law Revision Commission **Recommendation and Study** relating to The Presentation of Claims Against Public Entities." This report appears at http://clrc.ca.gov/pub/Printed-Reports/Pub019.pdf.

C. The Government Claims Act Uses Defined Terms Inconsistently

That § 935 references "statute or regulations" in cross-referencing § 905 and "charter, ordinance or regulation" in authorizing local claiming requirements sheds little light on the meaning of "statute" as used in § 905, subdivision (a). The Government Claims Act does not use these terms consistently. Rather, because these definitions were added to a complex statute in 1963 with another purpose in mind, they must be applied with care, as § 810 directs ("Unless the provision or context otherwise requires, the definitions contained in this part govern the construction of this division.").

Careful review of the Act demonstrates its use of the defined terms "statute" (§ 811.8), "enactment" (§ 810.6) and "regulation" (§ 811.6) are contradictory and haphazard, yielding anomalous results if these definitions are consistently applied.

For example, § 935(a) authorizes municipalities to enact claim procedures under certain circumstances. It refers to such procedures "prescribed in any charter, ordinance or regulation adopted by the local public entity." But § 811.6 defines a "regulation" as a rule, regulation, or standard adopted by the United States or an agency of the State under the respective federal and state Administrative Procedure Acts. Thus, local public entities cannot enact "regulations." (§ 811.6; see also § 11342.600 [defining "regulation" under Administrative Procedure Act as adopted by a "state agency"].) Therefore, § 935(a)'s authorization for local claiming requirements by "regulation" is meaningless unless the stated definition is

ignored, as § 810 invites (definitions apply "unless the provision or context otherwise requires"). This use of the term "regulation" in § 935, inconsistent with that term's definition in § 811.6, undermines Plaintiff's claim that § 811.8's definition of "statute" was intended to govern § 935 and § 905. Why assume precision as to the choice of one term when imprecision is obvious in the use of another in the very same code section?

A similar example appears in provisions governing conflicts of interest between public entities and their employees. Section 995.2, subd. (a) authorizes a public entity to refuse to defend an employee if there is a specific conflict of interest between their positions in litigation. Section 995.2 defines such a "specific conflict of interest" as "a conflict of interest or an adverse or pecuniary interest, as specified by **statute or by a rule or regulation** of the public entity."[11] Section 911.2 defines "public entity" to include local governments. Thus, a "public entity" — including a local government — has three means to identify conflicts of interest which entitle it to refuse to defend an employee: a statute, a regulation or a rule. However, the Act's definitions of "statute" (§ 811.8) and "regulation" (§ 811.6) exclude local legislation.

Here again, the Act authorizes local governments to do what its definitions prohibit. As before, the plain intent of the Legislature can be accomplished only by disregarding the Act's definitions of "statute" and "regulation" because "the provision or context otherwise requires."

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[11] All emphases are supplied.

Given the goal of statutory interpretation to "ascertain the intent of the Legislature so as to effectuate the purpose of the law," (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977), it is inappropriate to apply § 811.8's definition of "statute" and § 811.6's definition of "regulation" to § 935(a) and § 995.2. It is equally inappropriate to apply § 811.8's definition of "statute" to § 905, subd. (a)'s preservation of local rules for tax and fee refund claims.

V. Construing § 905(a) to Preempt Long Beach's Ordinances Raises Constitutional Questions

The City does not ignore Article XI, § 12, which empowers the Legislature to impose claiming procedures on charter cities. However, that power coexists with the taxing power of charter cities under Article XI, § 5 and the police power of counties and all cities under Article XI, § 7. If § 905, subdivision (a) reflects an intent to preempt local claiming ordinances as applied to tax refund claims, a new constitutional question arises — where does the City's power to tax end and the Legislature's power to regulate claims begin? That question can be avoided if § 905, subdivision (a) is given the sweep originally intended in 1959 and is not misconstrued due to the 1963 addition of § 811.8's definition of "statute."

Plaintiff argues *Ardon* resolved whether Article XIII, § 32 applies to Long Beach's ordinances. (Answer, p. 18.) He assumes this case is controlled by *Ardon*, a position Plaintiff can take only by ignoring the Petition. City ordinances apply here, notwithstanding the Opinion's erroneous conclusion that § 3.68.160 does not apply, and its failure to

construe § 3.48.060. Accordingly, this case squarely raises the question reserved in *Ardon* whether 905(a) does, and can, preempt local tax and fee refund claiming ordinances. That question is informed by the scope of Article XIII, § 32's second sentence, which requires legislative authorization for tax refund claims.

CONCLUSION

The Petition before this Court, unlike the straw man Plaintiff would prefer to oppose, poses a question reserved by *Ardon* that is roiling the lower courts. The question urgently warrants this Court's attention and this case provides a complete record and able counsel on both sides of the dispute to aid the Court in its resolution. This Court should grant this Petition to resolve an important question for the benefit of tax and fee refund claimants, local governments and the Californians they serve.

DATED: May 30, 2012

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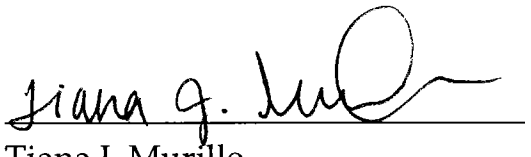

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CERTIFICATION OF COMPLIANCE WITH CAL. R. CT. 8.504(d)

Pursuant to California Rules of Court, Rule 8.504(d), the foregoing **Reply in Support of Petition for Review** by Defendant the City of Long Beach contains 3,977 words (including footnotes, but excluding the tables and this Certificate) and is within the 4,200 word limit set by Rule 8.504, subd. (d), California Rules of Court. In preparing this certificate, I relied on the word count generated by Word version 14, included in Microsoft Office Professional Plus 2010.

Executed on May 30, 2012, at Los Angeles, California.

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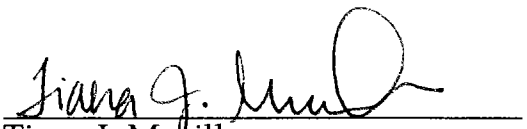

Tiana J. Murillo

CERTIFICATE OF SERVICE

I, Kimberly Nielsen, 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 Los Angeles, over the age of 18 years, and not a part to or interested in the within action; that declarant's business address is 300 South Grand Avenue, Suite 2700, Los Angeles, California 90071.

2. That on May 30, 2012, declarant served the **CITY OF LONG BEACH'S REPLY IN SUPPORT OF PETITION FOR REVIEW** via U.S. Mail in a sealed envelope fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is regular communication between the parties.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of May, 2012, at Los Angeles, California.

COLANTUONO & LEVIN, P.C.

By: _____
Kimberly Nielsen

McWilliams v. City of Long Beach, et al.
Case No. B200831
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Case No. B200831
Service List

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