S183372

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PORFIRIO SERRANO AND LOURDES SERRANO Plaintiffs - Appellants, STEFAN MERLI PLASTERING COMPANY, INC. DBA INLAND CONCRETE PUMPING Defendant, COAST COURT REPORTERS, Respondent.	No. S183372

APPELLANTS' REPLY BRIEF

Review After Decision of the Court of Appeal, Second Appellate District, Division Three, Case No. B215837

From an Order of the Superior Court, Los Angeles County
Case No. BC 324031, the Honorable Aurelio Munoz, Judge

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INTRODUCTION

The lessons Respondent wants this Court to teach are clear. When there is insufficient economic incentive to act, don't act. Forget high minded ideas about acting for the public good and justice for all. Don't accept encouragement to appeal a matter principally for the benefit of the public, and especially not to help a Court in matters of first impression know what it can or can't do to promote scrupulous conduct by its ministerial officers. If these seem wrong lessons in light of ***§1021.5's***[1] objectives, they are. Given COAST's inappropriate charges and conduct,[2] such lessons send the wrong

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[1] References are to the ***Code of Civil Procedure*** unless otherwise indicated.

[2]On remand, the Trial Court stated COAST was rearguing ***Serrano v. Stefan Merli Plastering Co. Inc.*** (2008) 162 C.A.4th 1014 ***("Serrano#1")*** (RTB 1:21-26), that COAST argued lack of Trial Court authority all along -"Butt out, Judge" (RTB 7:12-18), that in substance the expedition copy cost was fully covered by the standard copy cost because the noticing party's transcript expedition and first copy order left nothing but to make a second copy (RTB 3:25-27), and that COAST's arguments harked back two years to when the Court felt the entire expedite copy charge was unreasonable. (RTB 6:2-5 - see T8 AA 234-235 - unconscionable ***practice*** - a second copy is just a copy) COAST ***argued*** it worked the July 4th holiday on Serrano (T9 AA 473C:25-474A:2), but offered ***no evidence*** it was true, or that any identifiable extra cost was ever incurred for "expediting" a Serrano copy. Respondent's record citation that this evidence was ignored is false, because it was only ***argument***. The un-appealed ruling (T17 AA 579; T15 566) held the entire expedite copy fee unreasonable, so that under ***Serrano#1 at 1038,*** not one penny was incurred or could be justified. ***Serrano v. Stefan Merli Plastering Co. Inc.*** (2010) B 215837 ***("Serrano#2") Slip Op. Dissent at 5 (n.2)***; AOB 12 (fn. 18); Pet.Hrg.Rply. 4 (fn 4) (both with record references)

public message about the court system to actual or prospective litigants.[3] The "unfair to individuals" argument lying beneath the surface rings hollow here, specifically since rejected by the Legislature and ***In re Joshua S.*** (2008) 42 C. 4th 945 (***"Joshua S.")***.[4]

Serrano#2 claims this was a private business dispute determining only private rights over small money - $2,871.57 - with one court reporting service in one personal injury case. (***RB 25-27***) But the Trial Court recognized this case established "uniformity" among reporters (RTC 6:8-19) and was a "big case" with a "big question." (RTC 6:21-7:3). So did the industry. AOB 20 (fn 13 and transcript references cited) Even COAST's counsel said on remand: "***I think a ruling is going to address things that may or may not be reasonable or unreasonable for an agency to charge***. So, ***in that respect, [the amici] may want to be heard***." (RTC 6:21-7:3) [material in brackets added]

The $2,871.57 was merely the legally necessary vehicle providing standing (***Press v. Lucky Stores Inc***, (1983) 34 C.3d 311, 321 (fn. 11) to raise

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[3]Prior absence of ***Serrano#1's*** oversight remedy, in Serranos' opinion, is why the gap in reporter accountability and the consequent economic opportunity for high fees developed.

[4]RJN 39: 19-40:11- testimony of Thomas Hookano, attorney with Pacific Legal Foundation - ***§1021.5*** should not provide fees against individuals, and ***Joshua S. at 956; See AOB 37 (fn. 51 and cases cited)***

the first impression public issues the Trial Court wanted resolved and the public needed. When proceedings' costs far exceed the individual benefit to be derived from litigation, only the public can be the primary beneficiary of successful results. ***It is simply not reasonable to say this case, at least from the appeal on, was a private dispute.***[5]As noted in a similar situation between two individuals:

> "Agran's ***appeal was the quintessential undertaking of litigation in the public interest*** . . . " (emphasis added)

Hammond v. Agran (2002) 99 C.A.4th 115, 132, qualified disapproval on other grounds in ***Conservatorship of Whitley*** (2010) 50 C. 4th 1206, 1226 (fn. 4)("***Whitley***"), but cited on the point that discrete issues of public importance within a case can qualify under ***§1021.5. Whitley at 1226.***

Under ***Serrano#1*** and the dissent in ***Serrano#2 (Slip Op. Dissent at 1, 2, 6)***, COAST's reporters were acting in the capacity of ministerial court officers (***§2093***), subject to control under ***§128(a)(5)*** respecting a law ***(§2025.510(a)(b)(c)*** applying to all deposition reporter - ministerial court officers statewide. The dispute's subject matter was how such officers performed their duties respecting public litigation in the Court system. ***Serrano#1*** determined that Respondent participated in this case in a public, not

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[5]See ***Serrano#2 Dissent, p. 6 (fn.4)***

private, capacity, and was therefore required to respond under ***§128(a)(5)***. Since the Court Reporter's Board had no jurisdiction (***Hall v. Court Reporter's Board*** (2002) 98 C.A.4th 633, 638) and the dispute interfered with the Trial Court's own business, it was its own enforcement agency. Serranos could only turn to it under ***§128(a)(5)*** to determine its power to manage and control its ministerial officers, much as if proceedings were commenced against a public agency[6] for the same purpose.[7]

Were all this insufficient to remove ***Serrano#2's*** erroneous perception of a purely private dispute, by invoking industry standards as justification, COAST made this case about practices employed by all court reporters acting as ministerial court officers. ***AOB 24 (fn. 34), 12 (fn. 18) (and transcript references cited)*** The personal injury case was over and settled (***Serrano#1 at 1025, 1028***). ***This was about the public's right to have a forum to ensure the timely completion of court business by requiring delivery of the evidence in***

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[6]Serranos' writ of mandate from the order thereafter successfully appealed was summarily denied (***Serrano#1 at 1025***), although seeking the same relief in a legally separate stand alone proceeding in which the Court itself was Respondent. ***In re Head*** (1986) 42 C.3d 223, 226 and (n. 4), 227-229 (***§1021.5*** fees are not denied based on the form or procedure utilized to vindicate the important right)

[7]Courts themselves are subject to ***§1021.5*** fees when they do not enforce legal requirements for which they have primary public enforcement responsibility. See eg, ***Olney v. Municipal Court*** (1982) 133 C.A.3d 455, 463.

the form of transcript copies upon which its judgment might rest, and to contest the unconscionable monopolistic fees of ministerial court officers imposed in that capacity which they made a condition of delivery by COD or otherwise.

Yet ***Serrano#2 (Slip Op. at 10)*** erroneously determined under ***Joshua S.*** that the number of persons COAST's conduct directly affected was determinative of important right affecting the public interest, rather than the subject matter of the right, and the class of persons the law was intended to affect on its face statewide. This incorrectly substituted a vague factual test of Defendant's market share or degree of villainy for an established legal one requiring ***court judgment as to the importance of the law***. The effect, contrary to statutory purpose, was to restrict enforcement opportunities and completely eliminate them for important consumer and other laws violated at lower levels where ***individuals*** have no financial incentive to litigate. Absent ***Serrano#1***, fictitious expedite copy fees would continue today, and reasonableness limitations on standard copy fees would not exist.

COAST fails to concede other consequences of its interpretation of ***Joshua S. §1021.5*** never intended a free pass to wrongdoers who lose enforcement proceedings initiated by private persons.[8] The Trial Court lifted

[8]"Coast merely raised the argument that it, not the trial court, had the right to regulate the fees it charged." ***Serrano#2 (Slip Op. at 10)*** Not

out of context, and ***Serrano#2*** misconstrued, the ***Joshua S. at 949*** language about merely raising issues in private litigation (RTD 3:24-25; T36 AA 1002-1003, ***Serrano#2*** (***Slip Op. at 10***). This case involved enforcement. However, ***Joshua S.***' adoption context addressed one not being sued for doing anything wrong who simply raised an issue. ***Serrano#2*** allows any losing defendant who raises issues against enforcement to walk. See ***Serrano#2 Dissent (Slip Op. at 6***) Similarly, it removes all litigation between two parties like ***Bartling v. Glendale Adventist Medical Center*** (1986) 184 C.A.3d 97 and ***Hammond, supra***, from the ***§1021.5*** "radar screen" of private practitioners.

Unable to effectively counter these arguments, Respondent proffers a 77 page brief, replete with inaccurate and mis-characterized record citations and arguments. Respondent aims to re-litigate, re-define and expand the case it first lost and then did not appeal below, and to litigate what ***Joshua S.*** did not but which ***Serrano#2*** implied in unnecessary dicta -- ***§1021.5***'s traditional

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exactly - Coast charged the unconscionable industry standard fee, leveraged it with COD, and was impeding public litigation, thus acting adversely to the public until Appellants sought judicial relief. ***(Serrano#2 Dissent Slip Op. At 5 and (fn. 3) Serrano #1 at 1021-1022*** shows Serranos objected to the withholding and the fee, and initiated proceedings to determine its reasonableness and validity under ***§2025.510***. Respondent sought justification by cloaking itself in the mantle of industry standards and lost.(AOB 24 (fn. 34);Pet.Hrg. 18 (fn. 37) - record citations)

elements should be supplanted by a public interest litigation test.[9] This amorphous concept which renders statutory application less certain actually involves inserting revisionist and restrictive concepts, unnecessary to decide here, which this Court in over 30 years has declined to adopt. They include a purported requirement that an important right factually be of extreme current importance (RB 19) rather than the subject matter of the law test this Court has directed.[10] Also advocated is requiring for substantial benefit purposes that the judgment by its terms directly affect a large class of persons, rather than accepting the ***stare decisis***, doctrinal or conceptual benefits this state's court

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[9] Serranos concede no such superseding test. However, once they paid COAST, they could have simply done nothing, taken their settlement proceeds, gone home, and not incurred any risk. ***Where the reasonably anticipated cost of proceeding if paid to a private attorney would actually hurt Serranos by causing them to incur indebtedness approaching 30 to 50 times or more as much as the money at issue***, where the economic motivation to recover the $2,871.57 is thus virtually non-existent, and where the primary motivation to continue a matter with public interest implications, given the undisputed evidence, was to respond to the Trial Court's request for help, to prevent the continuation of the business practice, and to take the case up out of a sense of duty without regard to economics because the entire situation was a matter of principle and unfair (T21 AA 632:5-634:2; T8 251:4-13; 251:27-252:3), there is not only statutory compliance but public interest litigation as most understand it.

[10]This Court's wisdom in not letting short term headlines restrict or substitute for legislative judgment and judicial experience about long run importance, and in not foreclosing the flexibility to address important issues whenever they first arise, cannot seriously be questioned.

have consistently held to qualify. Lastly, there is the "1% test."[11] These revisionist characteristics are proffered to eliminate suits by individuals,[12] were not written into statute, and are inconsistent with its settled interpretations and policies.

SERRANO#2 SHOULD HAVE FOCUSED ON THIS CASE AS A WHOLE

Serrano#2's Dissent (Slip Op. p. 6 (fn. 4) and AOB 22 (fn. 31- see case citations requiring consideration of the case as a whole) show the Trial Court's order denying fees incorrectly isolated on the very first thing that happened in the case rather than considering the case as a whole. See also ***Whitley at 1226*** (jurisdictional issue raised later by court, fees should pertain to that issue from that point forward); AOB 22 (fn. 33 - see citations re cases with public issue injected by court or raised belatedly qualifying for fees from that point as to issue); ***Hammond, supra at 128-134*** (fees for public issue phases or appeals)

Despite a motion which principally focused on the appeal and remand

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[11]COAST claims legislative history envisioned less than 1% of state litigation would meet the requirements of ***§1021.5***. (RB 16, 18) What this has to do with a case that meets the requirements is not clear, especially given the specific policy goal of statutory breadth which the courts have consistently maintained.

[12] The Legislature was perfectly capable of limiting ***§1021.5*** to "worthy" persons but did not, as evidenced by the eliminated taxpayer-plaintiff requirement. (RJN 10-14)

proceedings for fees,[13] Respondent argued ***Joshua S.*** should be applied solely to the ex parte application because Serranos' initial reason was not to enforce a right[14] but to obtain copies without an expedite fee. (RT8 AA 879:23-27) However, the above cases and ***Whitley at 1226*** authorize fees for enforcement of public issues after they arise, evidencing a practicality consistent with established law that one need not raise the winning issue initially, pursue particular procedures, win all claims, or win in any particular way or at all, given that the requirement is that the litigation simply cause a successful result in terms of enforcing the important right - its impact. ***City of Sacramento v. Drew*** (1989) 207 C.A.3d 1287, 1303-1304; ***Lyons v. Chinese Hospital*** (2006) 136 C.A.4th 1331 1345-1347; ***River Watch v. County of San Diego etc.*** (2009) 175 C.A.4th 768, 782-783; ***Folsom v. Butte County Assn of Governments*** (1982) 32 C. 3d 668, 685-686; ***Maria P. v. Riles*** (1987) 43 C.3d 1290, 1291.

Even were the rule otherwise, the undisputed record shows that after Appellants' objection, and Respondents' refusal without payment (T8 AA 153, 160-161) made court necessary, the application was based on the very statute under which

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[13]Any award would arguably have been premature until judgment after remand. ***Liu v. Moore*** (1999) 69 C.A.4th 745, 754-755; ***Urbaniak v. Newton*** (1993) 19 C.A. 4th 1837, 1843-1844.

[14]Serranos went to court to enforce their right to receive copies without being held hostage by an unreasonable fee and COD.

relief was ultimately granted,[15] and the reasonableness and validity of the fee were attacked. Respondent agreed that "validity and reasonableness" were in issue, and the proceeding expanded to 13 depositions July 5 when the application was filed. (T8 AA 139, 146-150, 153, 154, 156-158; 160-161; 163-167, 175:1-20; 184:20-24; 212-221,253:8-22;250:2-17; 245:15-24) Respondent only ***thereafter*** (July 7 or 10) agreed to deliver without COD payment because the ruling would be applicable to all the depositions. (T8 AA 249:14-250:1; 367:28-368:7)

The record does not support COAST's claims (RB 28-31) it delivered the first copy before ex parte application without COD July 5 or of any permanent COD waiver. COAST's transcript citation (T8 AA 171) shows only the July 5 hearing minute order and nothing about delivery, there is no waiver in the July 5 notice of ruling (T8 AA 174-175), and the temporary COD waiver was not until July

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[15] ***§2025.510.*** Serranos initially looked to ***§§2025.510(b)(d)***, ***2025.570(a)*** and ***2025.320***, attacking the reasonableness and validity of the fee as an improper allocation and failure to make the copy reasonably available.(T8 AA 139-169; 202-222; 224-235) Respondent later disclaimed any allocation (T9 AA 473A:3-12; 20-23; 473B:18-474A:9; 474C:21-475A:2, 7-23), despite an amicus brief from her trade organization stating the contrary industry norm and that there was nothing unconscionable about allocating transcription costs under well the established business model. (T13 AA 506:6-508:3; T14 513:22-514:1-4; 520; 521; 526; 527; T10 486:24-487:7); and see AOB 12 (n.18 - and transcript references cited). Note ***Saunders v. Superior Court***, (1994) 27 C.A.4th 832, 839-841- reporter cost shifting favoring good clients violates ***Business and Professions Code §§ 8025 and 17200***. The Trial Court found no basis for any stand alone expedite fee, refunding its entirety, and thus establishing violation of ***§2025.510(c) (Serrano#2 Dissent Slip Op. at 5 (fn. 2)*** and the ***Business and Professions Code***. AOB 15 (n. 24) and case citations.

7 or 10 (T8 AA 249:14-250:1) so there was nothing effective until then. The record (T8 AA 153, 154, 156, and 160-161) shows any COD waiver was conditioned upon receipt of fax confirmation of check that had to be mailed that day including the expedite fee, there was objection to payment of the expedite fee, and COAST insisted on the fee with no waiver. The July 7 or 10 temporary and unilateral COD waiver was only pending the later merits hearing, because Respondent had a court remedy to compel payment without COD.[16] See also AOB 11 (fn. 17 - and see record references) Respondent's assertions of July 5 delivery and COD waiver (but obviously no waiver of the improper fee they charged Serranos [17] and not of COD with others per their policy) are completely unsupported. COAST's COD policy was reinstated after the second ex parte hearing. (T8 AA 283) ***Serrano#1*** and ***Serrano#2's***dissent correctly analyzed these facts. (***Serrano#2 Dissent Slip Op. at 1 (fn. 1),5, 6*** - transcript held hostage by abuse of reporter's authority conditioned upon unconscionable and unreasonable fee) The ***Serrano#2*** dissent points out the majority was incorrect about the record. ***(Serrano#2 Slip Op. At 1 (fn. 1)***

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[16]Respondent's counsel in substance volunteered on the record that the temporary waiver resulted from the Court's agreement to hear the matter. ***Serrano#1 at 1023.***

[17]As noted at AOB 11-12 (fn 17), there was a unilateral waiver of 3 of 13 expedite fees, resulting from a courtesy ***transcript expedite fee waiver accorded the noticing party***. (T8 AA 283) However, COAST threatened judicial process for payment of the rest. (T8 AA 290-291)

Respondent's assertion **(RB 29, 66)** that ***Serrano#2's*** Rehearing Petition never raised this is simply false. (Pet. Rhrg. 28-29, Pet. Rev. 21 (listing locations in Pet. Rhrg. where numerous facts were called to court's attention)

Thus, the record shows enforcement, and the important public issues, including the "free market - all the market will bear - no court regulation of price" issue, the "no violation of the Code of Civil Procedure issue," the "COD" issue, the fee justification by "moving to the head of the line" argument, the "industry standard"[18] and "what others charge or do" fee argument, the "80 to 100% surcharge for supposedly expedited copies" issue,[19] and the "power and ability of the Court to control its ministerial officers" issue, were all raised before or at the July 20 hearing. (T8 AA 161, 171, 179-200 and particularly 184-190, 192-194; 202-222; 225:26-228:15; 363:26-366:15, 367:18-21; 368: 5-7) Appellants' prompt stay application pending review of a claimed important issue of first impression(T8 AA 244:14-18),

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[18]COAST's representation the fee it charged Serranos was its standard fee meant its conduct adversely affected all non-parties who also sought expedited copies, thus adversely affecting the public interest. (***Serrano#2 Dissent Sip Op. 5, and (fn. 3***) The Trial Court initially found the "***practice*** employed by the court reporter in this case is unconscionable . . ."(emphasis added) Even Respondent's Counsel says COAST followed the "***common practice***." (RB 26 - emphasis added)

[19]Respondent claims Serranos agreed to pay a fee, citing T8 AA 144. That citation only shows that if the Trial Court felt any fee were warranted, it should be $37.26 using ***Government Code*** analogies. (T8 AA 144:20-22)

offering to pay the uncontested charges or to deposit full payment in court (T8 AA 243:27-244:10), was denied July 25. (T8 AA 303) There was no payment delay. [20]

COAST and the Trial Court did not focus on the obvious consequences of the pertinent above undisputed facts at the fee motion. However, when COD improper charges meant going before the Superior Court at all with the first invoice expedite fee of $261.56 or even the ten invoices - $2,871.57[21] - Serranos were losers, especially given what had to be done.[22] Serranos were in no better conceptual position then than when the appeal decisions had to be made, though the magnitude of the disproportion was not as great - $6,570 plus

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[20]Serranos paid in full 2 days later under protest to avoid waiving appeal (***Serrano#1 at 1025***; T8 AA 229:22-27; 298:16-299:22; 300:4-8 ; 303; 305-310; 252:6-10) before any of the invoices were late under their 30 day before late charge terms (T8 AA 269-281), and the settled personal injury action was dismissed with reservation of jurisdiction.(***Serrano#1 at 1025***; T8 AA 343-347).

[21] That was more than 50% of the total $5,614.55 paid for the 10 deposition standard copy fees.

[22] COAST claims $2,871.57 hardly amounts to the relatively large complicated litigation testified about in legislative hearings. Large complicated litigation is shorthand for the time and cost of litigation deterring private counsel, as discussed in ***Conservatorship of Whitley***, ***supra***. It is not a separate test. Who would not say that the smaller the amount, the more any litigation becomes ***relatively*** costly and complicated? Does that mean ***§1021.5*** should not apply to smaller cases when the burden of the litigation is disproportionate to the private benefit? The statute does not say so.

costs to try to get $2,871.57 (T21 AA 649:21)[23]

THE ISSUE SHOULD BE

THE CORRECT INTERPRETATION OF JOSHUA S.

The Trial Court (T36 AA 1002-1003) interpreted ***Joshua S. at 949*** [24] as rewriting ***§1021.5*** law, which Respondent argued. (RT "D" 3:17-23) The Trial Court concluded, and ***Serrano#2*** agreed, that ***Joshua S.*** narrowed ***§1021.5***'s application under a new "private litigation" test determinative of what was an important right affecting the public interest, excluding litigation between two parties over a dispute in which one did not purport to attack an industry or the other was not a surrogate for the public.[25] This in effect restricted the traditional three elements[26] and ***Joshua S.***' "enforcement" element to cases not "private litigation." ***Joshua S.*** did not purport to

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[23]Serranos could not have passed the unreasonable deposition costs along to Defendants (***Serrano#1 at 1039)***, an uncertain objection under ***§2025.320*** to COAST's further use provided no copy, money, or a new reporter, and a prolonged wait on eve of trial for the uncertain decision of a potentially unfunded and completely discretionary indigent's transcript fund maintained by the Court Reporters Board, not required by law to rule within the pre-trial time periods, were not reasonable options.

[24]See also pp. 956, 957, and 958.

[25] ***Serrano#2*** noted this "was a private business disagreement between plaintiffs and Coast only--not the entire deposition reporting industry . . ." and that "Coast was not purporting to represent the public."

[26] ***Joshua S.*** at 951-952

adjudicate what was an important right, or say private rights could never qualify, implying at p. 958 that private rights will qualify if important and enforced. ***Joshua S.*** looked first to the wording of ***§1021.5 (ibid at 956)*** to determine whether there was an implied enforcement criteria implicating violation or compromise of a public right, or initiation or maintenance of a policy or practice harmful to the public interest. (***ibid at 954, 955, 956-957, 958***)[27] Only after deciding that the statutory wording implied such a requirement did it look to the legislative history and prior holdings (***ibid* at 956-957**), and then only to make sure that history and prior precedent were consistent. ***Joshua S.*** simply confronted a circumstance in which a private plaintiff never maintained litigation ***to enforce*** the important right affecting the public interest, added the "enforcement" element, and reconfirmed the traditional elements. Its "private litigation" language was wholly in that context, was not intended to be ***ratio decidendi*** extended beyond that context, and was merely explanatory in a discussion of why enforcement and traditional elements must concur.[28] COAST implicitly agrees, suggesting that even if out of context, the ***Joshua S.*** discussion should be adapted to these facts.

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[27]How can Respondent maintain it did nothing wrong? The Court remarked it had wanted "the Court of Appeal to take it over because I didn't think what was going on was right." (RTA 2:20-22)

[28]***Joshua S.*** at 956, 958.

Joshua S. would have been decided completely differently were it about a couple maintaining litigation against a private adoption agency which prohibited adoption by domestic partner but otherwise qualified prospective parents - private litigation under ***Serrano#2***'s majority view. ***Joshua S.*** at 958 is nonetheless satisfied by such an example because all of the agency customers are subject to the same policy (***Serrano#2 Dissent Slip Op. At 5, and fn. 3***)[29] This case is far stronger than the example, because litigation was maintained to enforce rights under ***§2025.510*** and other statutes against a private person who was, however, acting in an official capacity as a ministerial officer of the Court, at the request of the Court to determine whether it had the right to regulate certain of the conduct of its ministerial officers, under a common industry standard apparently employed by all deposition reporters/ministerial court officers as to their copy purchasers (or at least by Respondent against its copy purchasers), and from which only the public could primarily benefit due to the small amount at issue individually.

This case is about what is an important right affecting the public

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[29] The legislative counsel's bill descriptions and bill versions make it clear ***§1021.5*** applies to cases between individuals as government parties were initially dealt with separately and then combined with private parties without distinction. Serrano Request for Judicial Notice (SRJN) 1-2 ("in any action not involving a public entity"); SRJN 3-4 (combined); SRJN 5-10 ("in any action not involving a public entity"). The final bill retained the "any" language but broke out public entities for particular considerations.

interest, the test for that, and the standard of review. Those are all legal issues about statutory construction ripe for de novo review dependent upon the interpretation of ***Joshua S. Whitley at 1213-1214.*** Moreover, the facts are materially undisputed authorizing de novo review (***Ghirardo v. Antonioli*** (1994) 8 C. 4th 791, 799) because Respondent's one declaration opposition in the Trial Court showed only the Trial Court's pre-motion statements it was disinclined to grant fees, and that its refund judgment was paid, accompanied by objections never ruled on and a separate legal memorandum raising some of the arguments now raised.[30] (T31 AA 890-956; T30 873-887; T32 959-971) Even were abuse of discretion review employed, failure to use the correct legal test abuses discretion. ***City of Sacramento v. Drew, supra*** at 1298 (***§1021.5***); ***Flannery v. California Highway Patrol*** (1998) 61 C.A.4th 629, 634 (***§1021.5***).

Therefore, the "important right" issues necessarily include the Court of Appeal's apparent confusion of that ***§1021.5*** element with its substantial benefit element by choosing language pertinent only to the latter from ***Joshua S.*** at 949 and 954 - almost a direct quote from the significant benefit language

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[30]Respondent also argued it ought not to be punished by fees because it did nothing wrong, that Petitioners' motivation was not proper, and that the public interest was not implicated by a reasonable fee dispute between two private parties. (T30 AA 877:3-18; 877:20-28; 878:1-23; 879:1-884:22; 885:10-886:16)

of ***§1021.5(a)*** - and erroneously relying on it as a test for important right determinations by creating (and then applying) a "private litigation" test. See **AOB**, pp. 34-35; ***Beasley v. Wells Fargo Bank*** (1991) 235 C.A.3d 1407, 1418-1419, disapproved on another point in ***Olson v. Automobile Club of Southern California*** (2008) 42 C.4th 1142, 1152-1153 (number of people affected by Defendant's conduct relevant only to substantial benefit, not to importance of right).[31]

An important right affecting the public interest also means that ***the law the Defendant is violating is an important law (taking into account the factors and kinds of evidence specified at AOB 4) which on its face governs or affects the conduct of the public or a large group of persons. The importance is inherent in the law, both in terms of its subject matter and the breadth of the group it purports to regulate on its face. Importance of a law cannot be dependent upon the number of persons the Defendant's conduct***

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[31]Respondent implies (RB 17) the testimony of Armando Menocal, Public Advocate (RJN102:25-103:1), a former associate of Justice Kline (RJN 95:1-17) supports the private litigation test. However, the comment was aimed at the requirement that ***the significant benefit portion of the bill remain***, because significant public benefit was in Mr. Menocal's opinion what prevented the statute "from covering many situations where a mere - - an individuals rights [sic] involved and that individual then has an option deciding whether or not to seek vindication." If anything, this comment, in substance repeated at RJN103:13-17, supports Serranos that the private litigation test created from significant benefit language conceptually has nothing to do with important right affecting the public interest.

alone violates, because that does not take into consideration the subject matter of the law, or the many others Defendant's direct conduct does not affect, but who may be affected by others doing the same thing the Defendant is doing. Serrano#2 was simply incorrect.

Respondent relies in part for the "private litigation" test, and in part to raise additional issues, on generalized comments about what constitutes public interest litigation in an incomplete legislative history.[32] The comments principally fail to distinguish between important right and significant benefit, but pertain mostly to significant benefit. Since ***Serrano#2*** applied the wrong legal test to important right affecting the public interest, perusing endless pages of conflicting legislative testimony and reports is unnecessary. ***Whitley at 1213-1214*** (plain language of statute controls unless ambiguous and then only look to extrinsic sources) Importance of the right affecting the public interest, and not what generally is public interest litigation, is the core of this case, because that is the element ***Serrano#2*** specifically held lacking. Moreover, as noted in ***Whitley at 1224***, the legislative history was not concerned with having the proper normative (ie altruistic or right-minded) motives to protect the public or the kind of subjective motivation that the Trial

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[32] The Department of Consumer Affairs Enrolled Bill Report quoted in ***Whitley at1218*** is absent from Respondent's ***§1021.5*** tendered history. Serranos will be submitting their additional history from the Legislative Intent Service via request for judicial notice.

Court (T36 AA1002-1003) and Court of Appeal relied upon. See also ***Whitley at 1219-1222.***

THERE IS NO ISSUE WHETHER PUBLICATION ALONE SUFFICIENTLY PROVES AN IMPORTANT RIGHT AFFECTING THE PUBLIC INTEREST

Serranos never claimed, as COAST asserts, that publication ***prima facie*** establishes an important right affecting the public interest. They contend only that, in accord with cited authorities, publication is some evidence of that[33] which was entitled to be considered along with other evidence. ***Joshua S. at 958***; ***Los Angeles Police Protective League v. City of Los Angeles*** (1986) 188 C.A.3d 1, 12; facts and factors referenced at ***AOB 13-17; 41-52.*** While it is intuitive that cases covered by ***§1021.5*** "are often of first impression in the courts and without established legal precedents" (***Conservatorship of Whitley*** (2010) 50 C. 4th 1206, 1218 quoting the Department of Consumer Affairs Enrolled Bill Report), the ultimate question is whether, if the case is one of first impression and without established legal precedents, the subject matter of the law addressed by the published opinion is a sufficiently important right affecting the public interest.

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[33] ***Protect Our Water v. County of Merced***, (2005) 130 Cal. App. 4th 488, 495 (fn. 8) and cases cited.

Respondent inaptly cites, as did ***Serrano#2***, language in ***Woodland Hills Residents Assn. v. City Council***, (1979) 23 C. 3d 917, 946, ostensibly supporting an argument at RB 22 that publication itself has never been sufficient for fees under ***§1021.5.*** The argument is irrelevant, correct, and Serranos never made it, contending only that where important right is present and other statutory elements are established, the ***significant benefit*** element can be satisfied by a published opinion. ***Whitley supra at 1224*** acknowledges ***§1021.5.*** authorizes the kind of non-pecuniary "abstract" benefits which flow from opinions. See also ***River Watch v. County of San Diego etc.*** (2009) 175 C.A.4th 768, 781 (benefit may be conceptual or doctrinal - extent of public benefit need not be great). ***Joshua S.*** even accepted the proposition that publication produced a significant benefit. The Trial Court attorney's fee grant was"the Supreme Court's decision conferred a significant nonpecuniary benefit on a large class of persons and resolved an important issue of law" (***Joshua S. at 951***), which conclusion the Court of Appeal did not dispute (***ibid.***), and which ***Joshua S.*** accepted at 952, noting there was no question the litigation yielded a benefit.

Woodland Hills, supra, carefully distinguished concrete benefits under the separate substantial benefit doctrine from ***stare decisis*** benefits qualifying under the private attorney general doctrine. The issue was whether fees could

be obtained under the substantial benefit doctrine "***from*** all those who may, in future cases, utilize a precedent he [the attorney] has helped to secure" rather than from concrete monetary benefits created by the attorney. ***ibid.*** [emphasis and material in brackets added] There was no specific monetary fund or costs saving created by that litigation, so substantial benefit did not apply - not the issue here which is important right affecting the public interest.[34] Respondent's argument presupposes without basis that the same concerns expressed in ***Woodland Hills*** are pertinent to the private attorney general doctrine, when ***Woodland Hills was quick to state they were not. Woodland Hills*** observed that fees for ***stare decisis*** which effectuates important public policies (available only in published opinions) should be sought under the private attorney general doctrine and not the substantial benefit doctrine. ***ibid at 947-948*** Benefits under the private attorney general doctrine need not be monetary given the statue specifies non-pecuniary benefits. eg ***Braude v. Automobile Club*** (1986) 178 C.A.3d 994, 1005-1009, 1011, 1013-1014. COAST only highlights ***Serrano#2's*** confusion between the separate elements of important

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[34]Appellants here are attempting to obtain reduced fees of $50,000 plus $7,500 on ***Serrano#2*** and another $7,500 here, only from one whose practice adversely affected the public interest (***Joshua S.*** at 954), not from all in the future who utilize the precedent. Respondent has falsely claimed ***Serranos*** want $185,000. Contrast RB 74 with AOB 25 and fn. 38; T21 AA 605:4; Pet. Rev. 14-16 and fn. 30.The accrued hours are now over $250,000 in time which will be limited in accord with the above.

right and significant benefit.

Respondent further argues, referring to language out of context from ***Joshua S. at 957***, that publication by itself is not sufficient because there must also be a Trial Court judgment in the case that directly affects many people - a restatement of the ***Joshua S.*** language argument.[35] Presumably, Respondent claims any published opinion not preceded by such a judgment does not qualify. A Trial Court judgment affecting many is but one way to ensure significant benefit, but has nothing to do with important right affecting the public interest. A judgment, trial or appellate, is at best ***a vehicle for implementing significant benefits in the form of pre-existing rights. It only declares what those preexisting rights are.*** Logically, ***the formality of adjudicating rights at any level that one party contends are important rights affecting the public interest does not make them so. It is the rights themselves, their subject matter, and breadth or coverage which do.***

Moreover, Respondent's position is wrong. The taking of an appeal in litigation between two private parties over a public issue qualifies under ***§1021.5. Hammond, supra at 132.*** An appellate court decision is a judgment.

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[35]Respondent cites to Justice Kline's then "public interest litigation" comments (RJN 67:17-19), which are literally consistent with both direct judgments of the Trial Court and appellate judgments based on ***stare decisis*** benefits. Since a portion of the law was derived from a freeway case (La Raza Unida v. Volpe - see RJN 68:18), his comments were more experiential than theoretical and appellate litigation was not mentioned.

§912; 9 Witkin, ***California Procedure***, Appeal §831, p. 898 (5th ed. 2008); ***Metropolitan Water District v. Adams (1942) 19 C.2d 463, 468.*** An appellate opinion is equally if not more efficacious as a vehicle for implementation of significant public benefits because it operates statewide whereas a Trial Court judgment directed at many people does not. Respondent cannot state why an appellate judgment cannot confer significant benefits affecting the public at large or a large class of persons, assuming important subject matter. Did the Legislature truly exclude appealed cases where the benefit comes from the published appellate judgment, more powerful in many ways than an injunction or large monetary award?

Indeed, Governor Brown's signing message (RB 19) is completely inconsistent with Respondent and consistent with Serranos. His message focuses on final judgments resulting in the "public at large" receiving significant benefits, which cannot generally happen without a statewide published opinion. See also RJN 170 (Legislation's Author's Letter to Governor Brown - "broad benefit on the public"); cf. RJN 168-169 (State Bar Representative Harold Bradford's letter to Governor Brown - bill fills gaps where class or representative actions are insufficient, where "great benefit has been conferred on the public," and "there may be no monetary recovery from which to reimburse the litigator")

Appellants find no case that a Trial Court judgment which directly benefits many people is the ***exclusive*** way, ***let alone a way at all***, of fulfilling statutory requirements ***for an important right affecting the public interest.*** Such a requirement is completely inconsistent with recognition that ***stare decisis*** benefits for important rights affecting the public interest qualify as benefits under ***§1021.5(a).Woodland Hills, supra at 946-948.***

Rather than broad construction consistent with the legislative and legal history, COAST's narrow formalistic arguments seek to impose restrictions not clearly required by the language of the statute itself and incompatible with its broad purpose to incentivize private counsel to enforce important rights benefitting the public. See eg. ***In re Head*** (1986) 42 C.3d 223, 227, 233; ***Estate of Trynin*** (1989) 49 C.3d 868, 875. The law's breadth permits the statute to "cure the vast amount of existing legislation that's on the books where there is no provision for attorney's fees" (RJN 28:8-10 - Harry Hathaway, Chairman of ABA Special Committee on Public Interest Practice), make it apply broadly across all types of civil cases and proceedings.(RJN 4, 7), allowing for "enforcement of the legislation that you as legislators enact - Frequently, some of the most high-minded legislation simply goes unenforced because there is no enforcement mechanism." (RJN 29:11-14 Carlyle Hall, Center for Law in the Public Interest). ***§2025.510(c)*** is a perfect example of a

statute without an enforcement mechanism.

THERE WAS NO MATERIAL FACTUAL FINDING

The Trial Court's order (T36 AA 1002-1003) simply recited ***Joshua S.*** language at 949 and said this case was the same, thereby misinterpreting and literally misapplying that language by asserting a private litigation test not the law when the ***Joshua S.*** language referred only to the absence of enforcement. Here, there was undisputed enforcement against one acting adversely to the public interest. This was legal error in misinterpreting and applying legal criteria reviewable de novo because conclusions of law are not binding on appellate courts. Moreover, the facts were undisputed.

The order does purport to state, after applying the ***Joshua S.*** language, that Serranos did not maintain this case to vindicate the pubic interest. Under ***Whitley at 1224, 1221***, whether they intended to vindicate the public interest is irrelevant in determining whether the case qualifies for fees, though the evidence in this case is undisputed that they principally did,[36] and wanted the $2,871.57 as well,[37] which is perfectly acceptable under ***Whitley***. Trying to vindicate the public interest under ***Whitley*** is simply not a required element.

The last sentence that Appellants were trying to protect their own

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[36](T21 AA 633:4-634:2)

[37] (T21 AA 632:5-6)

interest only shows appropriate conduct under ***Whitley*** and ***Press v. Lucky Stores Inc.***, ***supra*** (some interest is necessary to confer standing), even though it purports to be subjective motive. However, no matter what one reads into the ruling, that interest was indisputably never worth more than $2,871.57, and before the first court filing involved but $261.56. The Trial Court's language simply demonstrates on its face a failure to apply the ***Whitley*** burden-benefit test and the other cases above cited. The analysis in the ***Serrano#2 Dissent Slip Op.6 (fn. 4)*** is instructive. Protection of ones own economic interest as a matter of law is insufficient to defeat an award if the financial burden is out of proportion to the financial benefit, which is here established as a matter of law, and cannot, as COAST requests, be tortured into a finding this was not public interest litigation.

Whether viewed as a conclusion of law, or a mixed question of law and fact with predominating legal issues, or as the application of a statute or of a statute to undisputed material facts, de novo review applies. ***Harustak v. Wilkins***, (2000) 84 C.A.4th 208, 212-213.

RESPONDENT'S OBJECTIONS ARE IMMATERIAL AND/OR WITHOUT MERIT

Respondent complains (RB 23-25) about admissibility of certain declaration evidence. However, the rulings below were on issues of law that

the evidence complained of is only tangential to, the objections were improper to begin with, were never ruled on, were made in effect by a stranger to the case without standing, other evidence unobjected to is in the record, and Respondent has not shown that if all of the objections were sustained, regardless of the other evidence, it would eliminate a required element. Moreover, to the extent the objections can be identified, most have no merit.

First, given ***Serrano#1*** affects every deposition, every reporter, every attorney obtaining a copy, and every client who must pay for one, as to both standard and expedite copy fees into the future, the size of the population benefitted need not be quantified. ***Planned Parenthood v. Aakhus*** (1993) 14 C.A.4th 162, 171; ***MBNA v. Gorman***, (2006) 147 C.A.4th Supp. 1, 9-10.

Second, this Court needs no specific evidence of monetary amounts when non-pecuniary benefits are authorized under the statute, and it is clear that as here, the population benefitted is large now and in the future, the processes examined involve significant sums of money, so the money involved is inferentially large. See, eg. ***Saleeby v. State Bar***, (1985) 39 C.3d 547, 574. Moreover, when the industry in the form of three amici turned out to argue for Respondent against any power to control fees, the fees themselves under Respondents's own evidence were up to 100% of their standard fees, Respondent's justification was "everyone does it" acknowledged by

Respondent's counsel to have been the "common practice" (RB 26), and the fees were industry standard, the big money picture is clear.

Third, Respondent provided the fee schedule and consecutively numbered ***per job*** invoice system showing this happened at the end of June - beginning of July - mid year.(T6 AA 86:1-8; T8 193:1-9; T6 83:21-26; 93-105; T8 212-221; 252:6-9; 269-281; T8 129:22-130:1; T22 743:22-27, 746:12-13, 17-17) Thus, a low end conservative estimate can double the number of invoices to obtain an annual figure, assume one expedite copy fee per expedited transcript, assign a reasonably small percentage of expedited depositions based on the doubled number of invoices, and apply Respondent's own schedule. Therefore, Respondent's own and Serranos' other evidence is more than sufficient to show a conservative estimate for revenue from Respondent's unlawful practice.

Fourth, neither of the Courts below ruled on Respondent's objections. Each objection was to multiple paragraphs, with characterizations rather than specification of the objectionable language, beginning, for example, with the words like the referenced paragraph(s) "generally discusses." See eg. T32 AA 962:11-15; 963:22-26; 964:22-25. No one could tell what specific language was objectionable or how to respond. This alone merits ignoring or overruling the objections ***in toto***. ***People v. Harris*** (1978) 85 C.A.3d 954, 957 ("the

inadmissible portions must be specified"); ***Evidence Code***, §353; cf. ***California Rules of Court***, Rule 3.1354 (format of objections). Instead of guessing and responding, Appellants correctly opposed each objection (T35 AA 993-999) for lack of specificity, arguing admissibility, and noted that the matters were the subject in many instances of a separate request for judicial notice which had not been objected to, so the information was independently in the record. See, eg. T35 AA 995:25-996:3; 997:9-15, 16-22; 994 and the requests at T8 AA 129-471; T14 513-561; T22 743-747.

Moreover, the motion was addressed to Nancy Holly (T21 AA 604), but corporate COAST made the objections without substituting in as a party. See AOB 6 (fn 11). The motion sought no relief against COAST, and it had no standing to object.

Respondent did not cross-appeal, so it could not urge error (***Estate of Myrtle Louis Powell*** (2000) 83 C.A.4th 1434, 1439) and there was no review under ***§906*** because Respondent obtained no ruling and abandoned its objections. ***People v. Donald Ray Milwee*** (1998) 18 C. 4th 96, 126; ***People v. Braxton*** (2004) 34 C. 4th 798, 813. Even were this court to apply ***Reid v. Google Inc.*** (2010) 50 C. 4th 512, 527 (n. 5), its rule based exclusively on specific provisions of the summary judgment statute, as against the ***Evidence Code*** general rule in such cases as in ***Flatley v. Mauro*** (2006) 39 C. 4th 299,

306 (n. 4), ***Soukup v. Law Offices of Herbert Hafif*** (2006) 39 C. 4th 260, 291 (n. 17);and ***Dodge, Warren & Peters Insurance Service, Inc. v. Riley*** (2003) 105 C.A.4th 1414, 1421, Respondent **has not purported to show how a predicate erroneous ruling under *§906*, if decided properly, would have changed the result or meant Appellants would have no evidence or inference left on a critical element.**

It would avail nothing if all objections were sustained as the Trial Court principally ruled on an issue of statutory law - ***Joshua S.*** Moreover, the evidence not objected to - the request for judicial notice of the records of what had happened in the case to the point of the ruling, including the prior appellate opinion, matters on appeal, and in the Supreme Court (T22 AA 743-747), are in and of themselves sufficient to show that the ruling was reversible error because the Trial Court failed to apply the correct legal standard.

Respondent also complains that certain estimates of money were speculative, and that attorney declarations were inappropriate. Those estimates were based on Nancy Holly's own declaration and sequentially numbered invoices not objected to. Estimates of the fictitious fees were necessary because the facts were peculiarly within her knowledge, she declined to produce any evidence on the point, and the uncertainty she created was something which she was required to bear. ***Guntert v. City of Stockton***, (1976)

55 C.A.3d 131, 143; ***Speegle v. Board of Fire Examiners*** (1946) 29 C.2d 34, 46. As noted in ***Guntert, supra***, this Court could make the same estimates from matter appropriately in the record. While reasonable estimates may be admitted subject to evidence that there is no basis for the estimate, or that the bases for the estimate are otherwise incorrect (see, eg. ***Razzo v. Varni*** (1889) 81 Cal. 289, 292), Respondent submitted no countervailing evidence.

Respondent's complaint about attorney declarations fails on the first point - attorneys have personal knowledge of the cases they litigate, admissible on fee motions, and are perfectly entitled to explain what the issues were, whether they were complex or not and if so what made them so, why they were handled a certain way, why certain fees were necessary on certain issues or in response to tactics of the opposition and what those tactics were, what time was incurred, what the local market rates are, what is a reasonable rate, and so on. Most all of the complaints fall within these categories. Some have to do with the estimates, which were the only choice open to Appellant and are immaterial in light of the above.

Respondent claims the Trial Court is presumed to have rejected the declarations. When the record shows what was done, the rule has no application. ***Steuri v. Junkin*** (1938) 27 C.A.2d 758, 760. Here, the record shows a complete failure to rule on objections accompanied by a ruling solely

on issues of law which avoided, and never reached or encompassed, most of the claimed objectionable material, plus no standing to make the objections. That negates any reasonable claim that the Trial Court rejected the declarations, because it is clear it did not need to nor did it consider them due to its narrow legal ruling. Moreover, as a general rule, the unimpeached and uncontradicted testimony of a witness on a point, not inherently improbable, cannot be arbitrarily disregarded and should be accepted by the trier of fact as true. See ***Joseph v. Drew*** (1950) 36 C.2d 575, 579 (judgment reversed); ***County of Ventura v. Marcus*** (1983) 139 C.A. 3d 612, 617-618; ***Western Digital Corp. v. Superior Court*** (1998) 60 C.A.4th 1471, 1487; ***Hollywood Screentest of America, Inc. v. NBC Universal***, (2007) 151 C.A.4th 631, 648 (and fn. 9) Respondent submitted no evidence contradicting Appellants declarations.

CONCLUSION

The judgment of the Court of Appeal misconstrued ***Joshua S.***, and there are no countervailing factors meriting affirmance. Therefore, the

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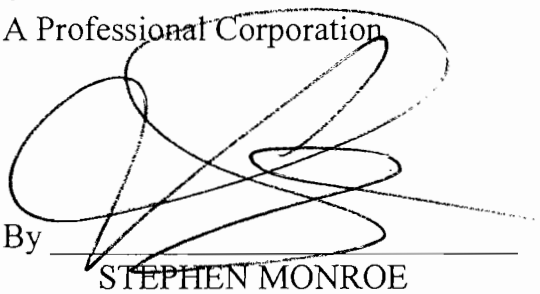
judgment should be reversed, and attorneys fees subject to the noted limitations be awarded on appeal.

Dated: January 25, 2011

Law Offices of David B. Bloom
A Professional Corporation



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CERTIFICATE OF WORD COUNT

The undersigned counsel for Petitioners/ Appellants certifies pursuant to California Rules of Court, Rule 8.204(c)(1) that the total word count of this Brief, as counted by the WordPerfect program used to prepare it, is 8, 301 words, excluding tables, the certificate and such other items as are permitted by Rule 8.204(c)(3).

Dated: January 25, 2011

Stephen Monroe

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is: 3699 Wilshire Boulevard, Tenth Floor, Los Angeles, California 90010.

On January 25, 2011 I served the foregoing document described as **APPELLANTS' REPLY BRIEF** on the interested parties to this action by placing **A TRUE COPY** thereof enclosed in a sealed envelope addressed as follows:

See attached Service List

X **BY MAIL** :

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, 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 the date of deposit for mailing in the Affidavit.

Executed on January 25, 2011 at Los Angeles, California.

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

ESTELA G. MENJIVAR

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