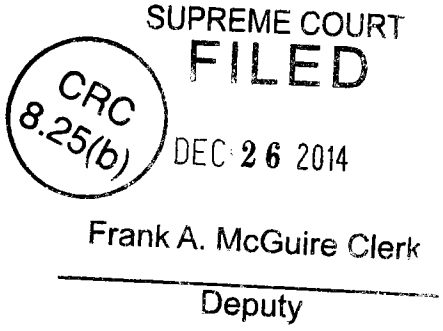
S220775

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA



NANCY F. LEE

Plaintiff and Appellant,

v.

WILLIAM B. HANLEY

Defendant and Respondent

On Review From The Court Of Appeal For the Fourth Appellate District,
Division Three, Case No. G048501

After An Appeal From the Superior Court For The State of California,
County of Orange, Case Number 30-2011-00532352, Hon. Robert J. Moss

REPLY BRIEF ON THE MERITS

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I.
INTRODUCTION

Appellant Nancy Lee's ("Lee") hostility toward any court that has interpreted California Code of Civil Procedure section 340.6[1] against her position is misguided. The trial court did not *deny* Lee her claims; it simply applied, as courts do daily, the applicable statute of limitations to the facts alleged in the complaint.

The gist of Lee's Answer Brief on the Merits ("Answer")[2] is that section 340.6 only applies to garden variety professional negligence or professional "tasks" where the attorney performs below the standard of care. Not only is this an unsupported and strained interpretation of the statute and legislative materials, it is contrary to the numerous appellate decisions that have weighed in on the issue.

The Legislature considered and rejected limiting the statute to "professional negligence," and instead wrote an expansive, broadly worded statute to cover the numerous acts and omissions arising in

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[1] All statutory references will be to the Code of Civil Procedure unless otherwise specifically stated.

[2] Lee's Answer is essentially a repackaged version of Lee's petition for review, which was denied on October 1, 2014. The Answer seeks to raise issues and theories which are beyond the scope of the issue presented in review, while also ignoring many of the arguments and authorities raised in the Opening Brief.

the legal practice. A "wrongful act or omission" includes *all* tort and contract claims (except actual fraud) "arising in performance of professional services."

Here, the funds were advanced per a written fee agreement for *legal services* in connection with a lawsuit.[3] Lee's causes of action are *all* based on Hanley's allege failure to return unearned fees after the lawsuit ended. An attorney's functions and duties to the client in this circumstance (e.g., what the attorney did in the lawsuit, how the funds were applied, whether credit is owed, etc.) are all intertwined, and an alleged breach of any one of these duties *arises in the performance of professional services*. Lee's claims are subject to section 340.6.

II.
THE LEGISLATURE INTENDED TO INCLUDE ANY "WRONGFUL ACT OR OMISSION" BY AN ATTORNEY "ARISING IN THE PERFORMANCE OF PROFESSIONAL SERVICES"

A. A "wrongful act or omission" is not limited to garden variety professional negligence or "professional tasks"

Lee references numerous snippets of the legislative history to conclude that the Legislature only intended to include "professional negligence" or "professional tasks" within the one-year period.

[3] This is not a case where a lawyer was in an unrelated dispute for *non-legal services* (e.g., concert promoter, pledgeholder.)

However, in Lee's lengthy discussion of the legislative history, she fails to address or even acknowledge that the words "professional negligence" or "legal malpractice" are nowhere to be found in section 340.6. These phrases were rejected by the Legislature.

In fact, the legislative progression of section 340.6 shows Lee's limiting phrases were purposely excluded. The bill, as originally drafted, proposed language that limited the statute to an action "based upon an attorney's *alleged professional negligence*" and, as originally proposed, used the language "[i]n an action for damages against an attorney based on the attorney's *alleged professional negligence*, ..." (Lee's Motion for Judicial Notice ("RJN") Exh. 1 p. 49 [italics added].) That language was *replaced* with the phrase "wrongful act or omission, other than for actual fraud, arising in the performance of professional services." (RJN, Exh. 1, p.48, 49, 51.) This is significant for several reasons.

First, and most obvious, the phrases "professional negligence and "legal malpractice" are not in the statute.

Second, the "fact that the Legislature chose to omit a provision from the final version of a statute which was included in an earlier version constitutes strong evidence that the act as adopted should not be construed to incorporate the original provision." (*Central Delta Water Agency v. State Water Resources Control Bd.*

(1993) 17 Cal.App.4th 621, 633-634; *Rich v. State Board of Optometry* (1965) 235 Cal.App.2d 591, 607 ["The rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision."])[4]

Third, section 340.5 is the statute of limitations for health care providers. Section 340.5 expressly applies to "alleged professional negligence," which is *the exact* phrase the Legislature *rejected* for section 340.6. (RJN, Exh. 1 p. 49.) Section 340.6 was enacted and amended *after* 340.5, and the Legislature clearly knew of its existence. (*See, also, Arthur Andersen v. Superior Court* (1998) 67 Cal.App.4th 1481, 1500-01 [legislature presumed to know the existing law when it enacts a statute]; *In re W.B.* (2012) 55 Cal.4th 30, 57; *Busse v. United Panam Financial Corp.* (2014) 222 Cal.App.4th 1028, 1038.)

Fourth, the Mallen article cited by Lee proposed to exclude "breach of contract" from the one-year period and suggested that a

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[4] *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal. 3d 176 ("*Neel*") and *Budd v. Nixen* (1971) 6 Cal.3d 195, on which Lee heavily relies, predate section 340.6. Both cases dealt with the application of the discovery rule in an action against an attorney and both were superseded by the enactment of section 340.6. (*Laird v. Blacker* (1992) 2 Cal.4th 606, 611.)

breach of written contract claim (also alleged by Lee) should be treated under the statute of limitations for breach of contract. However, the Legislature *rejected* an exception to the one-year period for breach of contract against an attorney. (*Southland Mechanical Constructors Corp. v. Nixen* (1981) 119 Cal.App.3d 417, 429 [superseded by statute on another point]) ("*Southland Mechanical Constructors*"). The only exception is for actual fraud.

The Legislature's rejection of limiting language and multiple exclusions is consistent with the intent to encompass all theories of liability against lawyers which arise in the professional relationship, except actual fraud.

The Enrolled Bill Report also reflects the problem the Legislature sought to address:

> Under the existing law the statute of limitations for a ***legal malpractice action depends on the nature of the specific action***: one year for most tort actions (CCP § 340), three years for actions based on fraud (see 337) and four years if the action is based on a contract (§337). . . .¶The statute of limitations on legal malpractice actions would now be one year from the time of discovery or four years from the date of the act itself. (RJN, Exh. 1, p. 27 [emphasis added].)

Thus, there are *multiple theories* used to support a "wrongful act or omission" of an attorney, not just garden variety "professional negligence" or "legal malpractice." The Legislature sought to include *all* claims a client has against her attorney relating to the

attorney's services except for actual fraud. As the court stated in *Southland Mechanical Constructors*, "[t]here is ***no single, settled legal meaning of 'wrongful' act*** for purposes of the statute." (*Southland Mechanical Constructors, supra*, 119 Cal.App.3d at p. 431 [emphasis added].)[5]

In *Cheong Yu Yee v. Cheung* (2013) 220 Cal.App.4th 184 ("*Yee*") the court stated: "The words of the statute are quite broad, but they are not ambiguous: '....the phrase 'a wrongful act or omission' in section 340.6 does not refer only to malpractice claims; the term malpractice does not appear anywhere in the statute." (*Id.* at pp. 194-196.)

The court in *Roger Cleveland Golf Company, Inc. v. Krane & Smith APC* (2014) 225 Cal.App.4th 660, 681 ("*Roger Cleveland*") discussed the legislative history at length and concluded:

> [T]he Legislature's use of 'wrongful act or omission' by an attorney arising in the performance of professional services was intended to include **any legal theory** related to a claim by a client or former client against his or her attorney. . . . (*Roger Cleveland, supra*, 225 Cal.App.4th at p. 680 [emphasis added].)

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[5] This observation by *Southland Mechanical Constructors* is consistent with Mallen's article which does not define legal malpractice, but instead proposes general guidance and suggests the statute will not apply where the attorney was not acting as an attorney. Here, Hanley was acting as an attorney at all times.

Lee's discussion of the legislative material and the cases ignores the legislative history and the evolution of the final statute. Indeed, Lee proposes a "three step analysis"[6] which is not only unsupported by any authority, but it adds a step which is not included in the statute or history (e.g., step number one: "identify those professional tasks necessary to the attorney's 'performance of professional services.'") The statute does not ask this question, and only asks whether the action against the attorney is (1) "for a wrongful act or omission, other than for actual fraud" (2) "arising in the performance of professional services."

Yet, based on this non-existent "step," Lee contends:

> If a potential . . . 340.6 plaintiff amends his/her pleading, removing all malpractice claims so that the only remaining claim(s) ***does not allege professional negligence***, then . . . section 340.6 should [not] apply. (Answer, p.17, fn. 2 [emphasis added].)

Not only is there no authority to support this interpretation, but such a pleading tactic[7] is contrary to the plain language of the statute and legislative materials. It is also a tactic soundly rejected by numerous courts which have addressed the issue. (*See, e.g., Levin v.*

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[6] Answer, p. 20.

[7] As argued in the Opening Brief, this is precisely what Lee did in this case. She realized her claims were subject to the one-year statute and then attempted to amend the complaint to exclude allegations that sounded in malpractice.

Graham & James (1995) 37 Cal.App.4th 798, 805 [alleging fee dispute without alleging malpractice]; *Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1366 [alleging breach of fiduciary duty], *Southland Mechanical Constructors*, *supra*, at p. 429 [alleging breach of contract].)

As part of Lee's argument that only professional tasks are included within section 340.6, she cites *Von Rott v. Johnson* (1983) 148 Cal.App.3d 608 ("*Von Rott*") and *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54 ("*Quintilliani*"). These cases addressed a situation where a person, who also happened to be an attorney, performed non-legal services, which is not the case here.

In *Von Rott*, a woman sued her attorney who drafted legal documents relating to the sale and purchase of her business. The attorney later became pledgeholder for stock involved in the transaction. The attorney moved for summary judgment on the grounds the action was barred by section 340.6. The plaintiff argued the statute was tolled under the continuous representation doctrine because the attorney volunteered to act as pledgeholder.

In affirming the trial court's grant of summary judgment, the appellate court found the attorney's status as pledgeholder was only tangentially related to the legal representation he provided (drafting legal documents) and did not operate to toll the statute of limitations.

The attorney's role as pledgeholder was separate and distinct from his role as attorney, and his status as pledgeholder did not constitute a continuation of the attorney-client relationship to toll the statute of limitations.

First, *Von Rott* is inapplicable because it addressed tolling under the continuous representation doctrine. It does not interpret the phrase "wrongful act or omission arising in the performance of professional service."

Second, although Lee states the court in *Von Rott* "inappropriately" applied the analysis,[8] *Von Rott* supports the argument that a fee dispute arises in the performance of professional services. It is only when an attorney undertakes a responsibility independent of performing professional legal services that the one-year statute does not apply. That situation is not present here.

In *Quintilliani*, the plaintiff sued a lawyer for failing to properly perform legal services *and* non-legal services relating to promoting a concert. The consulting contract "provides that [the attorney] is an independent contractor retained by the partnership 'for the purpose of providing legal representation and administrative

[8] The "analysis" being whether the attorney was acting in the capacity as an attorney such that the statute was tolled. (Answer, p. 7.)

consulting services for the production of the concert.'" The concert was a failure, and the client sued the attorney for several causes of action relating to both the attorney's non-legal consulting services and the attorney's legal advice.

As to breach of contract and breach of fiduciary duty relating to the legal services, the court found that section 340.6 applies. (*Id.*, 62 Cal.App.4th at p. 67-68 ["Since the fiduciary obligations arose solely from these attorney-client relationships, we agree with Mr. Mannerino that the statute of limitations for legal malpractice is applicable."]). Even as to misrepresentations made to the client before the lawyer was hired, the court found the cause of action for negligent misrepresentation was also covered by the one-year statute. (*Id.* at p. 69.)

Regarding *non-legal* consulting services (concert promoter), the court found the attorney cannot use section 340.6. In doing so, the court *distinguished* between legal services provided by an attorney *and* non-legal services provided by a person, who just happens to be an attorney.

Here, there is not a single allegation in the operative complaint that Hanley was hired to perform, or failed to perform, a non-legal service (e.g., pledgeholder, escrow officer, accountant, or any other non-legal activity).

Based on the legislative materials and cases interpreting them, it is unfeasible and contrary to the legislative intent to differentiate the functions Hanley performed in representing Lee in the litigation and those that naturally occurred as part of their business relationship. (*Quintiliani*, 62 Cal. App. 4th at p. 67.)

Section 340.6 is not limited to garden variety professional negligence. If the legislature wanted to limit the statute to professional negligence it could have done so, but it did not. (*Yee*, *supra*, 220 Cal.App.4th at p. 196.) It rejected the limiting language and used a "wrongful act or omission" "arising in the performance of professional services." This statutory evolution illustrates that the statute is an encompassing one designed to address the numerous acts and omissions arising in the attorney-client relationship.

B. A client's claim for the return of unearned fees advanced in connection with a lawsuit "*arises in the performance of professional services*" within the meaning and intent of the statute

The facts alleged in the operative pleading, which form the basis of Lee's claims, arise in the performance of professional services.

First, the phrase "arising in" is not discussed in the legislative history. But, as discussed in the Opening Brief, the phrase *arising in* should be interpreted broadly, which is consistent with not only the

legislative intent but the language of the statute. Rather than limit what the statute covered, the Legislature repeatedly expanded the language and limited the exceptions to the statute.[9]

That said, the word "arising" by definition means to originate; appear; spring-up; come into being. The professional relationship is the *genesis* of the Lee's claim, and without the professional relationship there would be no fees advanced *for legal services,*[10] no dispute as to how the funds were applied, and no obligation to return unearned fees. The right to relief depends on the existence of the professional relationship. (*See, e.g., Quintiliani,* 62 Cal.App.4th at p. 67 ["the fiduciary obligations arose solely from these attorney-client relationships."].)

Second, although Lee's proposed interpretation of "arising in" is another way to say "professional task," even if one were to use Lee's definition that the "wrongful act or omission must come into being 'in' the performance of professional services,"[11] then section 340.6 applies because the funds were advanced in connection with representing a client in a lawsuit, which then resulted in a fee

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[9] Opening Brief, pp. 12-13

[10] The funds were not advanced for any other purpose or service.

[11] Answer, p. 29.

dispute. Stated differently, the attorney's conduct in receiving and using the funds arises in the performance of professional services (the underlying lawsuit). The funds in possession of the attorney are related to the lawsuit and were advanced for the lawsuit. A claim that the fees were *unearned* is inextricably linked to the attorney's professional services.

Finally, Lee claims Hanley breached the retention agreement and breached fiduciary duties because he failed to return money she advanced for the lawsuit.[12] The retention agreement was entered into to secure Hanley's *legal services* and the fees were advanced for those services. The allegation that there was a breach of this agreement (failure to return advanced fees) can *only* arise in the performance of professional services. They are tethered to one another. The same is true regarding the breach of fiduciary duty claims, which arise from the creation of the attorney-client relationship. *(Quintiliani,* 62 Cal.App.4th at p. 67.)

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[12] As discussed above, this is a pleading tactic designed to avoid the one-year statute of limitations.

C. How an attorney handles fees advanced in connection with a lawsuit is an integral component of the attorney's professional services and duties to the client

As discussed in the Opening Brief, an alleged violation of ethical duties arising in the attorney-client relationship may form the basis of a legal malpractice action, even if the client does not allege the attorney's service was of poor quality.[13] Lee fails to address these authorities.

In that regard, there are essentially two types of disputes relating to representing a client in a lawsuit. The first relates to quality of the legal services in the lawsuit.[14] The second type of dispute does not involve the quality of legal services (e.g., disputes over client funds or ethical violations such as conflicts of interest.) (*Stoll, supra*, at p. 1365; *Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1621 ("*Schultz*"); *Knight v. Aqui* (2013) 966 F. Supp. 2d 989, 997; (*Bird, Marella, Boxer Wolpert v. Superior Court* (2003) 106 Cal.App.4th 419, 429-431 ("*Bird Marella*").

In both types of disputes, however, the one-year statute of limitations applies because both types of disputes involve a *wrongful act or omission* (e.g. breach of duty or contract) arising in the

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[13] Opening Brief, pp. 21-24

[14] Lee does not allege that the quality of Hanley's services fell below the standard of care.

performance of professional services. (*Levin*, 37 Cal.App.4th at pp. 803-805 [a claim for refund of legal fees is subject to the one-year statute]; *Stoll*, *supra*, at p.1368; *Bird, Marella*, *supra*, at p. 430.) This is this case regardless of whether the dispute is characterized as a breach of contract, breach of fiduciary duty, misappropriation of client funds, or conversion.

Even though there is no allegation that Hanley's work was of poor quality, there are numerous allegations that Hanley breached the retention agreement and violated ethical rules regarding Lee's advanced fees and costs. These alleged facts arise from the attorney's professional services and duties to the client, and an alleged violation of these duties (contractual or ethical) falls within the scope of section 340.6.

D. Lee's discussion of *Prakashpalan* ignores the *Prakashpalan* holding regarding the issue on review

Prakashpalan v. Engstrom, Lipscomb & Lack (2014) 223 Cal.App.4th 1105 ("*Prakashpalan*") held that a negligence and breach of fiduciary duty claim, based on the attorney's withholding of client funds, were time barred under section 340.6. *Prakashpalan* rejected the argument that holding of client funds, after the lawsuit ended, did not arise in the performance of professional services. (*Prakashpalan*, *supra*, p. 1122, fn. 4.)

Lee does not address this aspect of the decision. Instead, Lee uses *Prakashpalan* as a guide to pleading. Lee's counsel claims that until he read *Prakashpalan* he was unaware he could allege a breach of express trust theory and, had he known about the theory, he could have asserted breach of an express trust.[15]

The argument that Lee's counsel could not "make the 'connection'" that there was an express trust theory or that *Prakashpalan* created "newly enunciated law" is not only beyond the scope of the issue on review, it is mistaken and misleading.[16]

First, while seeing *Prakashpalan* may have been "eye opening" to Lee,[17] *Prakashpalan* did not create new law, a new legal theory, or a new statute of limitations. Rather, it apparently was the first reported opinion regarding a theory for delayed discovery under the Probate Code. Even though the theory is inapplicable, the theory *existed* when Lee filed her complaint.

Second, Lee was given several opportunities by the trial court to plead any species of fraud, but Lee chose not to pursue a fraud claim. This is true even though Lee acknowledged awareness all of

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[15] *See generally*, Answer, pp. 45-48.

[16] Answer, p. 46, 48.

[17] Answer, p. 46.

the facts regarding alleged misrepresentations relating to depositing money into the trust account. (CT 400-401)

Third, for the sake of argument, Probate Code section 16460 is inapplicable.[18] *Prakashpalan*, in a divided court, ultimately found that the plaintiffs' fraud based claims could proceed by applying Probate Code section 16460's delayed discovery rule (i.e., triggered by receipt of an accounting), but limited its holding to an accounting

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[18] Probate Code section 16460 provides a 3-year limitations period for proceedings by beneficiaries against trustees. It does not apply in this case. Probate Code Section 16460 provides in part:

> (1) If a beneficiary has received an interim or final account in writing, or other written report, that adequately discloses the existence of a claim against the trustee for breach of trust, the claim is barred as to that beneficiary unless a proceeding to assert the claim is commenced within three years after receipt of the account or report. . . . .
>
> (2) If an interim or final account in writing or other written report does not adequately disclose the existence of a claim against the trustee for breach of trust or if a beneficiary does not receive any written account or report, the claim is barred as to that beneficiary unless a proceeding to assert the claim is commenced within three years after the beneficiary discovered, or reasonably should have discovered, the subject of the claim.

for an aggregate settlement where the settling parties have limited information. These facts are not present here.

Fourth, section 340.6 is a specific statute of limitations enacted to apply to attorneys, whereas Probate Code section 16460 is a more general statute of limitations which applies to "claims" against a trustee. "A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates." (*Committee for a Progressive Gilroy v. State Water Resources Control Bd.* (1987) 192 Cal.App.3d 847, 859; *Hughes Electronics Corp. v. Citibank Delaware* (2004) 120 Cal.App.4th 251, 268; *E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1316-1317.)

E. Lee's attack on *Stoll* and other courts is unwarranted

Lee accuses the *Stoll* court of knowingly misrepresenting the legislative history behind section 340.6.[19] After discussing the

[19] Throughout her Answer, there are numerous instances where Lee attacks the judiciary. In addressing the decision in *Stoll*, Lee accuses the *Stoll* court of a "knowing misrepresentation" of the legislative history of section 340.6. Lee states "the *Stoll* court either didn't read the legislative records or specifically, knowingly continued a misrepresentation about the records (and from the

legislative intent, *Stoll* concluded that the phrase "wrongful act or omission . . . arising in the performance of professional services" more accurately conveyed the claims which the legislature intended to be covered by the statute than the phrase "legal malpractice." (*Stoll*, 9 Cal.App.4th at p. 1368.) "The Legislature intended to enact a comprehensive, more restrictive statute of limitations for practicing attorneys facing malpractice claims." (*Id.* at p. 1368.)

Stoll's analysis is consistent with the evolution of the statute. Moreover, several cases after *Stoll* agreed that in all cases other than actual fraud, whether the theory of liability is based on the breach of an oral or written contract, a tort, or a breach of a fiduciary duty, or any other theory, the one-year statute applies.[20]

Despite Lee's attack on *Stoll*, section 340.6 and case law interpreting the statute show that the phrase "arising in the performance of professional services" is to be interpreted broadly. It is a comprehensive statute covering the numerous acts and omissions arising in the practice of law. Anything connected to the professional services other than actual fraud falls within the one-year statute.

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phrasing (next) it appears the latter).... A knowing misrepresentation by the Court of Appeal." (*See, e.g.*, Answer, pp. 53-54.)

[20] *E.g., Levin* in 1995, *Quintilliani* in 1998, *Vafi* in 2011, *Yee* in 2013.

III.
CONCLUSION

Respondent requests that the Court reverse the Fourth District and affirm the judgment of the trial court. The facts which form the basis of Lee's claims are an integral part of the attorney's services to the client and arise in the performance of professional services. Lee claims were intended to be governed by section 340.6.

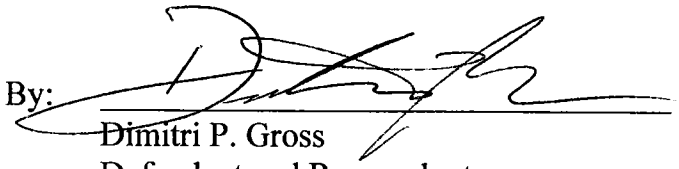
Dated: December 24, 2014 LAW OFFICE OF DIMITRI P. GROSS

By: _____
Dimitri P. Gross
Defendant and Respondent
William B. Hanley

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504 of California Rules of Court, the enclosed brief of Respondent was produced using 13-point type, including footnotes and contains approximately 4,071, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 24, 2014 LAW OFFICE OF DIMITRI P. GROSS

By: 

Dimitri P. Gross
Defendant and Respondent
William B. Hanley

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in Orange County, California. I am over the age of 18 and not a party to the within action; my business address is: 19200 Von Karman Avenue, Suite 900, Irvine, California 92612.

On December 24, 2014, I served the **REPLY BRIEF ON THE MERITS** on the interested parties in this action as follows:

Walter J. Wilson, Esq.
333 West Broadway, Ste. 200
Long Beach, California 90802
Attorney for Appellant Nancy F. Lee

Clerk of Court of Appeal
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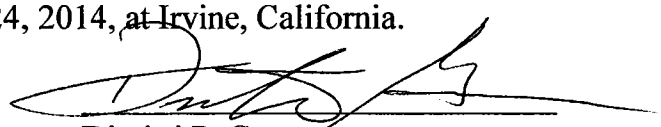
Santa Ana, CA 92702

Clerk of the Court
Orange County Superior Court
700 Civic Center Drive West
Santa Ana, CA 92701

I am readily familiar with Law Offices of Dimitri P. Gross' practice for collection and processing of correspondence for mailing with the United States Postal Service. Pursuant to such practice, all correspondence is deposited with the United States Postal Service in the ordinary course of business on the date it is generated. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices in the United States and mailed at Irvine, California.

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

Executed December 24, 2014, at Irvine, California.



Dimitri P. Gross