No. S246911

IN THE SUPREME COURT OF CALIFORNIA

JUSTIN KIM,
Plaintiff and Appellant,

v.

REINS INTERNATIONAL CALIFORNIA, INC.,
Defendant and Respondent.

APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF LOS ANGELES COUNTY
CASE NO. BC539194

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF DEFENDANT AND RESPONDENT REINS INTERNATIONAL CALIFORNIA, INC.

BLANK ROME LLP
LAURA REATHAFORD
(BAR NO. 254751)
NATALIE ALAMEDDINE
(BAR NO. 296423)
2029 CENTURY PARK EAST, 6TH FLOOR
LOS ANGELES, CALIFORNIA 90067
(424) 239-3400 • FAX: (424) 234-5454
lreathaford@blankrome.com
nalameddine@blankrome.com

ATTORNEYS FOR AMICUS CURIAE
ASSOCIATION OF SOUTHERN
CALIFORNIA DEFENSE COUNSEL

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2029 CENTURY PARK EAST, 6TH FLOOR
LOS ANGELES, CALIFORNIA 90067
(424) 239-3400 • FAX: (424) 234-5454
lreathaford@blankrome.com
nalameddine@blankrome.com

ATTORNEYS FOR AMICUS CURIAE
ASSOCIATION OF SOUTHERN
CALIFORNIA DEFENSE COUNSEL

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Under California Rules of Court, rule 8.200(c), the Association of Southern California Defense Counsel (ASCDC) requests permission to file the attached amicus curiae brief in support of Defendant and Respondent Reins International California, Inc.[1]

ASCDC is a preeminent regional organization of lawyers who specialize in defending civil actions. It has approximately 1,100 attorney members, among whom are some of the leading

[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than amici, its members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

trial and appellate lawyers of California's civil defense bar. ASCDC is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation practice. ASCDC is also actively engaged in assisting courts by appearing as amicus curiae.

As civil trial and appellate practitioners, ASCDC members are well versed in the Private Attorney General Act of 2004 ("PAGA") codified in Cal. Lab. Code § 2698, et seq. In addition, ASCDC members are vitally interested in the issue before this Court regarding the proper interpretation of Cal. Lab. Code § 2698. If appellant's interpretation is adopted, and the Court of Appeal's decision below reversed, a plaintiff will be allowed to pursue a representative PAGA claim despite not being an "aggrieved" employee as required by the code.

This case presents the Court with an opportunity to affirm that a plaintiff who has dismissed his underlying labor code violations *with prejudice* is no longer "aggrieved" as to step into the shoes of the State and bring a representative PAGA action. Accordingly, ASCDC requests that this Court accept and file the attached amicus curiae brief.

January 14, 2019

BLANK ROME LLP
LAURA REATHAFORD
NATALIE ALAMEDDINE

By: _____
Laura Reathaford

Attorneys for Amicus Curiae
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

AMICUS CURIAE BRIEF

INTRODUCTION

1. PAGA Is a Unique "Type" Of *Qui Tam* Action Allowing Aggrieved Employee Victims to Redress Labor Code Violations They Were Allegedly Subjected to

In *Iskanian v. CLS Transportation*, this Court held that PAGA is a "type of qui tam action... except that a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation." *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 382 (2014).

Appellant seeks to cling to the "qui tam" language to support his argument that he can pursue PAGA claims without any injury. However, respectively there are other differences between PAGA and a typical *qui tam* action. For instance, in most *qui tam* actions, a "relator" is suing to remedy a wrong committed against the government. Conversely, under PAGA, an "aggrieved employee" sues to recover a wrong committed against him and other aggrieved employees. As the California Court of Appeal in *People ex. rel. Allstate Ins. Co. v. Weitzman*, 107 Cal. App. 4th 534, 561 (2003) recognized:

> The goal of the [Federal False Claims Act] is to recoup *government* funds lost through the fraud of federal contractors. In other words, when a federal contractor fraudulently overcharges the government, public monies are lost. The federal government is the direct victim. The taxpayers are the indirect victims. The federal act encourages whistleblowers to report contractor fraud. An action may be brought by a person with knowledge of the fraud. But that individual is not a direct victim of the fraud. The only direct victim is the federal government. Money

> recovered through a Federal False Claims Act action is released to the national treasury. The relator recovers a bounty for bringing the fraud to light. If a federal contractor's fraud on the federal government were the subject of multiple Federal False Claims Act proceedings, the amount of money recovered by the government would be diminished. The Federal False Claims Act prevents this scenario from occurring by barring parasitic actions. A person cannot base a Federal False Claims Act lawsuit on information learned through public channels and as to which she or he made no contribution. (*United States ex rel. Doe v. John Doe Corp., supra,* 960 F.2d at pp. 319, 321.)

Not so under PAGA. Indeed, the statute's text and the legislative history both make clear that the aggrieved employee is seeking to remedy conduct committed against *employees* – not the government. See e.g. Lab. Code § 2699(a). As the Court of Appeal correctly recognized, in amending PAGA, the Legislature intended to circumvent the filing of frivolous lawsuits by anyone other than an individual who had experienced alleged Labor Code violations:

> The legislative history demonstrates that the term "aggrieved employee" was not initially defined in the original proposed language of section 2699. (Sen. Bill 796, introduced Feb. 21, 2003.) Employer groups opposing the bill expressed concerns that this type of statute could be abused by the filing of thousands of lawsuits against small businesses by members of the general public. (Judiciary Com., Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess. as amended Apr. 29, 2003, p. 6.) To address these concerns, the bill sponsors stated that "private suits for Labor Code violations could be brought only by an 'aggrieved employee'" and the bill "would not open private actions up to persons who suffered no harm from the alleged wrongful act." (Judiciary Com., Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) as amended Apr. 29, 2003, p. 7.) The bill was amended "[t]o clarify who would qualify as an 'aggrieved employee' entitled to bring a private action

> under this section," defining "aggrieved employee" to be "any person employed by the alleged violator ... against whom one or more of the violations alleged in the action was committed." (Judiciary Com., Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) as amended Apr. 29, 2003, p. 8.)

Iskanian also made it clear that PAGA is distinct from other *qui tam* actions because it requires injury to an employee, not just the government. *Iskanian* at p. 387. In crafting PAGA, the Legislature could have chosen to deputize citizens who were not employees of the defendant employer to prosecute *qui tam* actions. The Legislature instead chose to limit *qui tam* plaintiffs to willing employees who had been aggrieved by the employer in order to avoid "private plaintiff abuse." *Id.* (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 796 (Reg. Sess. 2003-2004) as amended Apr. 22, 2003, p. 7.).

Another important distinction between a typical *qui tam* action and a PAGA *qui tam* action arises in the procedural context. Under the False Claims Act, for instance, the "relator" must file his complaint (under seal) and serve the government with a copy. 31 U.S.C. §3730(b). The "relator" must also provide the government with substantially all of the information (including evidence) to support his or her claims. *Id.* The government then has a relatively short time frame (60 days under the FCA, for instance) to investigate the claims and decide whether it wants to intervene in the action. *Id.*[2]

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[2] Notably, the California False Claims Act and the California Insurance Code have similar structures. *See* California Government Code § 12651, *et seq.* and California Insurance Code §1871.7, *et seq.*

A different procedure exists under PAGA which requires the "aggrieved employee" to simply send a letter to the Labor Workforce Development Agency ("LWDA") setting forth the facts and theories to support the alleged Labor Code violation(s). Cal. Lab. Code §2699.3(a)(1)(A). No evidentiary support is required.

The employee must then wait until the LWDA determines *whether* it would like to investigate the allegations or whether it will allow the aggrieved employee to proceed and file suit. Cal. Lab. Code §2699.3(a)(2)(A). Unlike the False Claims Act procedure, the government does not have to investigate. Nor is the government given an opportunity to intervene in the PAGA civil action after the "aggrieved employee" has filed suit. Once it has delegated its authority to the "aggrieved employee," the government's involvement in the prosecution of the (now delegated) PAGA civil action ends.

Indeed, PAGA does not even permit the government to object to a proposed PAGA settlement relating to any Labor Code violation unrelated to health and safety laws.[3] Instead, PAGA simply requires that a copy of the settlement be sent to the LWDA at the same time it is filed with the Court for approval. Cal. Lab. Code §2699(*l*)(2) ("[t]he proposed settlement shall be submitted to the agency at the same time that it is submitted to the court.")

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[3] In PAGA settlements relating to health and safety violations, the government is allowed to comment on a settlement. *See* Cal. Lab. Code §2699.3(b)(4) ("The provisions of the settlement relating to health and safety laws shall be submitted to the division at the same timey they are submitted to the court. This requirement shall be construed to authorize and permit the division to comment on those settlement provisions, and the court shall grant the division's commentary the appropriate weight.")

This structure only makes sense when one considers that outside of PAGA, the California Labor Commissioner collects civil penalties for purported Labor Code violations committed *against employees*. Since an affected employee is the only one permitted to file a PAGA suit, PAGA effectively streamlines the recovery process by removing the proverbial "middle man." It thereby allows the employee to recover civil penalties on top of any other wages/statutory penalties he may already be seeking on his own behalf.

2. PAGA Permits Appellant to Settle His Underlying Claims and Abandon the PAGA Civil Penalties as a Result

Appellant settled all of his underlying Labor Code claims for $20,000.00 plus attorneys' fees in exchange for dismissing his underlying Labor Code claims with prejudice. Appellant was represented by counsel at the time of settlement. Nothing in the record indicates the Appellant was coerced into settling and the record does not indicate that the Appellant desires to challenge his acceptance of the settlement in any way.

Instead, it appears that the Appellant voluntarily accepted his settlement payment but he and his counsel seek to continue litigating *the same alleged Labor Code violations* he already settled,-this time with the goal of obtaining additional monies in the form of civil penalties under PAGA. Appellant suggests that he is enshrined with this "continued" persecutorial authority because he filed a PAGA letter (alleging Labor Code violations) and received permission from the government to file his civil action. In this way, Appellant appears to be imputing a continued and

perpetual standing "requirement" that was never contemplated nor ever written into PAGA.

As noted above, once the LWDA has permitted the aggrieved employee to file a civil action, it has no further authority to either prosecute or settle the civil case – presumably leaving it to the litigant and his counsel's discretion as to how he would like to proceed. Accordingly, should a litigant (like any other litigant) decide to settle all or part of his claims, he can do so. And, to the extent he declines to settle his PAGA representative claims, there is nothing in PAGA's text suggesting he cannot do so.

Importantly, PAGA does not preclude the dismissal of a PAGA action at any time. This is unlike class actions which require court approval when the named plaintiff wishes to dismiss the case. *See* California Rule of Court 3.770 ("[a] dismissal of an entire class action, or of any party or cause of action in a class action, requires court approval.")

Appellant argues that his claim "can (and must) be asserted 'independent of [his] own claim' for relief" because (according to him), a PAGA claim is not an individual one. Appellant's Reply Brief at 14.

Not so. PAGA's plain language allows an "aggrieved employee" to bring the action. Lab. Code § 2699(a). Therefore, while PAGA can in theory be brought as a stand-alone action or independently of individual claims, it still requires this underlying injury, which the Appellant lacks.

Accordingly, since an "aggrieved employee" must have been impacted by the Labor Code violation(s) at issue, the claims

remain his and they can be prosecuted, settled or abandoned at any time.

3. The *Huff* Decision Relied on by Appellant Misinterprets the Intent of PAGA and Even Then, Is Inapplicable to His Position On Standing

Appellant argues that since *Huff v. Securitas Sec. Svcs. USA, Inc.*, (2018) 23 Cal. App. 5th 745 (2018) permits him to sue for any Labor Code violation (irrespective of whether he suffered it), he has continued standing to litigate PAGA civil penalties after he already settled his underlying individual Labor Code claims. ASCDC contends that *Huff* was wrongly decided and should not be followed. Even so, Appellant misinterprets *Huff* and would have this Court extend it in a manner that reads out PAGA's injury requirement altogether.

First, the *Huff* court did not hold that an employee who has no alleged Labor Code violation can sue for other Labor Code violations. Instead, the *Huff* court confirmed that only employees who had allegedly suffered a Labor Code violation could maintain standing to pursue PAGA civil penalties. *See Huff* at pp. 753-754.

Unfortunately, the Court in *Huff* also held that although one Labor Code violation had been adjudicated against Huff, the fact he had alleged another Labor Code violation (which had not yet been tried) supported his prosecution of any and all Labor Code violations – even those which had not affected him. *Id.* The latter point does not help Appellant, who had released and dismissed his underlying Labor Code claims and had no outstanding allegations. But it is this latter point which the ASCDC believes the Court of Appeal in *Huff* misinterpreted the law.

The *Huff* court held that the definition of "aggrieved employee" (insofar as it is one who suffers "one or more" Labor Code violations) was unambiguous so if an employee suffered ***at least one*** Labor Code violation, then he could collect PAGA penalties for any and all Labor Code violations that affected other employees.[4] In so holding, the *Huff* court eroded the "injury" requirement from the definition of "aggrieved." This position is in direct contrast with the intent and legislative history behind PAGA.

As the Court below recognized, the revision to PAGA adding the definition of aggrieved employee to the law was intended to *limit* PAGA actions to those that employees personally suffered—not to open the floodgates and enable "headless" litigation by individuals who suffer only one type of Labor Code violation (and then sue for an unmeasurable number of others).

Moreover, a review of other excerpts of the legislative history confirms that PAGA's drafters envisioned that only employees affected by ***a specific*** Labor Code violation could collect PAGA penalties for ***that*** violation. For instance, one statement provided that "unlike the [Unfair Competition Law] this Bill would ***not*** open private actions up to persons who suffered no harm from ***the*** *alleged wrongful act* ... private suits for Labor Code violations could be brought only by an 'aggrieved employee -- an employee of the alleged violator against whom ***the*** alleged violation was committed." (Emphasis added.) Assem. Com. on Labor and

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[4] Under this logic, an employee who never worked overtime could bring a totally unrelated PAGA representative action for overtime because he allegedly was not provided a meal or a rest break.

Employment, Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) July 9, 2003, p. 7.

The reference and the comparison to California's Unfair Competition Law ("UCL") is significant. During the time period PAGA was proposed, any person could bring a representative action under the UCL regardless of whether they were injured by unfair competition. While the UCL was later amended to impose an "injury-in-fact" requirement, the opponents of PAGA knew that employers might suffer a similar fate at the hands of vigilante plaintiffs' lawyers seeking to cash in under PAGA if a similar requirement was not imposed:

> Opponents, on the other hand, argue that this measure, if enacted, will result in abuse similar to that alleged involving the UCL. For example, the Civil Justice Association of California (CJAC) argues that this bill will expose business to frivolous lawsuits and create a new litigation cottage industry for unelected private attorneys performing the duties of a public agency whose staffs are responsible to the general public. CJAC argues that similar private attorney general actions have resulted in an excessive amount of meritless, fee-motivated lawsuits. Allowing such 'bounty hunter' provisions will increase costs to businesses of all sizes, and add thousands of new cases to California's already over-burdened civil court system.

Id. Accordingly, the drafters incorporated the "aggrieved employee" requirement to ensure that PAGA would not succumb to the same pitfalls as the pre-amendment UCL.

Thus, while the definition of "aggrieved employee" could be interpreted to mean an employee suffering *at least one* Labor Code violation has standing to recover penalties for other Labor Code violations, it could also mean an employee who suffers "one or

more" specific Labor Code violations could collect PAGA penalties for those (one or more) Labor Code violations only he experienced.

Had the *Huff* court's decision considered the possibility that the statute was ambiguous, consideration of this legislative history should have resulted in a holding in which employees could only collect PAGA penalties for Labor Code violations *they* have experienced -- and not for Labor Code violations experienced purely by others.

Accordingly, the Appellant's reliance on *Huff* should be disregarded.

4. Appellant's "Parade of Horribles" Are Misleading

Appellant postures a number of "inconsistencies" that he believes will result within PAGA should the Court affirm the Court of Appeal's decision below. Appellant's concerns are overstated (at best) and misleading (at worst). See Appellant's Reply Brief at pp. 15-16.

First, Appellant argues PAGA measures civil penalties on a pay period basis. As a result, he claims that this measurement of penalties will be somehow circumvented if an employer offers to pay a litigant a lump sum to release his claims. However, there is no logical connection between PAGA's measurement of civil penalties by pay periods (with respect to some but not all Labor Code provisions) and an employer's offer to pay a litigant a lump sum to settle his claims.

More importantly, this concern is misleading since, an employer can always offer to settle any Labor Code claim with any litigant at any time – and for any amount. As noted above, the litigant need not accept the offer. He always has a choice. A litigant

who desires to maintain his standing as a PAGA representative, can easily reject the settlement offer.

Appellant argues next that a settlement of Labor Code violations would make PAGA's limited "cure" provisions nonsensical. Appellant misunderstands the law because settling a claim with a litigant is not the same as "curing" a PAGA violation. "Curing" a PAGA violation means that an employer can avoid PAGA litigation *before it is filed* for some (but not all) Labor Code violations within 33 days of receiving a PAGA letter. It also implies that it committed a Labor Code violation because if it did not, there would be nothing to cure.

Conversely, settling Labor Code claims for unpaid wages and/or meal periods, etc. pursuant to a statutory offer of compromise is done at any time and after a lawsuit has been filed. In that same vein (and as mentioned above), an employer could settle a Labor Code claim at any time (even in response to a demand letter sent before a PAGA letter is filed or pursuant to a severance agreement, for instance). Settling also does not imply that any Labor Code violation occurred. Indeed, the settlement offer in this case expressly stated that the Respondent "denied any liability in this action." *See* 2 AA 343-346.

Appellant's argument overstates this case. Since any employee can settle any claim at any time, PAGA's "cure" provisions are irrelevant to the analysis. And, if Appellant's argument were accepted, employers would never attempt to resolve any Labor Code claim for fear that the release would never cover a PAGA claim. This would erode California's strong public policy favoring the resolution and settlement of disputes.

Appellant also argues that if the Court of Appeal's decision is affirmed that employees could never bring PAGA-only actions and similarly could not recover civil penalties for which no private right of action exists. Appellant presents a false choice. As discussed at length above, every PAGA plaintiff must be an "aggrieved employee." Whether one has a private right of action or not, the ability to recover penalties is always based on an employee's injury under that section of the Labor Code. Accordingly, whether the plaintiff chooses to recover his unpaid wages plus civil penalties or chooses to simply seek only civil penalties always remains ***his choice***.

CONCLUSION

For the foregoing reasons, ASCDC respectfully urges this Court to affirm the Court of Appeal's decision.

January 14, 2019

BLANK ROME LLP
LAURA REATHAFORD
NATALIE ALAMEDDINE

By: _____
Laura Reathaford

Attorneys for Amicus Curiae
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rules 8.204(c)(1), 8.520(b)(1).)

The text of this brief consists of 3144 words as counted by the Microsoft Word version 2016 word processing program used to generate the brief.

Dated: January 14, 2019

Laura Reathaford

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is Business Arts Plaza, 3601 W. Olive Ave., 8th Fl., Burbank, California 91505-4681.

On Monday, January 14, 2019 I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF DEFENDANT AND RESPONDENT REINS INTERNATIONAL CALIFORNIA, INC.** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Blank Rome LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on Monday, January 14, 2019, at Los Angeles, California.

Sonia Gaeta

SERVICE LIST
Justin Kim v. Reins International California, Inc.
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Individual / Counsel Served	Party Represented
SPENCER C. SKEEN (182216) Ogletree, Deakins, Nash, Smoak & Steward, P.C. 4370 La Jolla Village Drive, Suite 990 San Diego, California 92122 (858) 652-3100 spencer.skeen@ogletreedeakins.com	Defendant and Respondent Reins International California, Inc. Served by U.S. Mail
ERIC B. KINGSLEY (185123) ARI J. STILLER (294676) Kingsley & Kingsley, APC 16133 Ventura Boulevard, Suite 1200 Encino, California 91436 (818) 990-8300 eric@kingsleykingsley.com ari@kingsleykinglsey.com	Plaintiff and Appellant Justin Kim Served by U.S. Mail
Office of the Clerk California Court of Appeal Second Appellate District, Division Four 300 South Spring Street Second Floor, North Tower Los Angeles, California 90013 (213) 830-7102	Appellate Court • B278642 Served by U.S. Mail
Hon. Kenneth R. Freeman Los Angeles County Superior Court Central District 312 N. Spring Street, Dept. 14 Los Angeles, California 90012 (213) 633-1061	Trial Court Judge • BC539194 Served by U.S. Mail
AARON KAUFMANN (148580) Leonard Carder, LLP 1330 Broadway, Suite 1450 Oakland, California 94612	Attorneys for Amicus Curiae California Employment Lawyers Association (CELA) Served by U.S. Mail

Individual / Counsel Served	Party Represented
CYNTHIA L. RICE (87630) STEPHANIE MIRANDA (297143) RONALD MELTON (317630) California Rural Legal Assistance, Inc. 1430 Franklin Street, Suite 103 Oakland, California 94612	Attorneys for Amicus Curiae Rural Legal Assistance, Inc. Served by U.S. Mail
GLENN A. DANAS (270317) JOHN E. STOBART (248741) Capstone Law 1875 Century Park East, Suite 1000 Los Angeles, California 90067	Attorneys for Amicus Curiae Bet Tzedek Legal Services, Inc. Served by U.S. Mail
KABATECK BROWN KELLNER LLP Historic Fire Engine Co. No. 28 Building 644 South Figueroa Street Los Angeles, CA 90017	Attorneys for Amicus Curiae Consumer Attorneys of California (CAOC) Served by U.S. Mail
California Department of Industrial Relations PAGA Administrator 1515 Clay Street, Ste. 801 Oakland, CA 94612	Served by U.S. Mail
Supreme Court of California 350 McAllister Street Room 1295 San Francisco, CA 94102-4797	Electronically Submitted 8 copies served via Federal Express