Case No.
S168950

IN THE

SUPREME COURT OF CALIFORNIA

L. RICHARD RUNYON,
Plaintiff and Appellant,

v.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, *et al.*,
Defendants and Respondents

After a Decision By the Court of Appeal,
Second Appellate District, Division 1
Case No. B195213

REPLY BRIEF ON THE MERITS

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I.

INTRODUCTION

It is ironic that California State University (CSU) is using the "cash-strapped CSU system" as a justification for construing the Whistleblower Protection Act (WPA)(Govt. Code §§ 8547, *et seq.*[1/]) so as to deny whistleblowers like Professor Runyon (Runyon) the "procedural guarantees and independent fact-finding of a superior court damages action." (*State Board of Chiropractic Examiners v. Superior Court* (*Arbuckle*) (2009) 45 Cal.4th 963, 968.) After all, it was Runyon's complaints about Dean Luis Ma Calingo's (Calingo) blatant misuse of government resources, including kickbacks and improper overseas travel at public expense, which gave rise to the retaliation against Runyon.

It is also ironic that CSU argues that an interpretation of the WPA to require whistleblowers to challenge its decisions by way of writ review provides "tremendous incentive" to CSU to conduct its investigations in a thorough and good faith manner. In fact, the evidence in this case establishes exactly the opposite is true – all of which evidence CSU completely ignores. Indeed, in reading CSU's Answer to Brief on the Merits (hereafter, "RB" or

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[1/] All further references are to the Government Code unless otherwise indicated.

"Answer"), one is struck by the utter failure by CSU to address several critical issues and respond to numerous pivotal arguments made in Appellant's Opening Brief (hereafter, "AOB").

For example, CSU fails to explain why whistleblowers should be required to overturn CSU's administrative decisions in a writ proceeding when such decisions are not entitled to res judicata or collateral estoppel effect. Specifically, since whistleblowers are not provided with the opportunity to adequately litigate their claims during CSU's internal grievance process [since they are denied a hearing, an impartial decision maker, testimony under oath or affirmation as well as the right to subpoena, call, examine, and cross-examine witnesses], CSU's decisions cannot be binding. (See, *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 944.)

Moreover, CSU ignores the fact that giving res judicata effect to its administrative decisions would actually be "contrary to the intent" of the Legislature. More particularly, because section 8547.12(c) specifically authorizes the independent remedy of a damages action in the event CSU fails to satisfactorily address complaints in a timely manner, the Legislature did not intend CSU's findings to have preclusive effect against the complaining employee. (*Cf. Arbuckle, supra,* 45 Cal.4th at 976.)

Further, CSU claims that it is the reviewing court in a writ proceeding who determines whether CSU has "satisfactorily addressed" the retaliation complaint at the administrative level. Yet, CSU offers no clue whatsoever as to how any court could make this determination given the lack of any evidentiary record, hearing or discovery, and the limited review under the "arbitrary and capricious" standard in a writ proceeding. (*Cf. Arbuckle*, 45 Cal.4th at 977.) Unable to reconcile that limited review and the last sentence of section 8547.12(c), CSU concocts an entirely new mutant form of writ review which it creatively calls the "1085-Plus" standard. Not only does CSU's novel proposition lack any legal authority, it fails to solve the fundamental issue – given the lack of discovery, hearing or other adequate evidentiary record, how would a reviewing court in such writ proceeding determine whether CSU had acted in "good faith" and "satisfactorily addressed" the complaint?

Significantly, nowhere does CSU address that specific Legislative history which precipitated the addition of the qualifying language in the last sentence of section 8547.12(c) or explain *why* this particular language was added to the statute. Instead, CSU blithely contends that this Court should construe section 8547.12 in the same way this Court interpreted 8547.10 in *Miklosy v. Regents of the University of California* (2008) 44 Cal.4th 876 –

even though this pivotal language is missing from section 8547.10 and CSU admits the omission of this language makes 8547.10(c) "*profoundly different*" from section 8547.12(c). (RB pp.3-4) Furthermore, CSU has yet to address that, given that the Legislature permitted direct court access to whistleblowers under section 8547.8, why it would be "farfetched" to also conclude that the Legislature intended similar access to CSU employees by the addition of the last sentence of section 8547.12(c).

As CSU's misconduct in *Runyon* readily demonstrates, without the prospect of facing an immediate damages action, CSU cannot be trusted to act in "good faith." CSU's conduct in *Runyon* is exactly why a damages action is permitted by section 8547.12(c). Indeed, to construe the statute in the manner advocated by CSU would sanction abuse because it fails to provide any viable remedy to an employee challenging CSU's administrative decisions – but rather, insulates CSU's decisions [including those riddled with abuse] from ever being overturned and depriving whistleblowers of the very remedy guaranteed by the WPA.

II.

LEGAL ARGUMENT

A. CSU Fails to Address the Fact That Its Administrative Decisions Are Not Entitled To Res Judicata or Collateral Estoppel Effect

In his Petition for Review, Runyon asked this Court to address three specific issues, including the third issue, whether "*Under Government Code section 8547.12(c), does the collateral estoppel doctrine give binding effect to the findings issued by the California State University after an investigation and in the absence of a hearing?*" Conspicuously absent from CSU's Answer is any attempt to address this third pivotal issue.[2/]

Throughout its Answer, CSU continues to argue that its administrative decision was "binding" on Runyon because he did not get it reversed in a writ proceeding. In other words, conflating the distinct concepts of exhaustion of

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[2/] Without citing any authority, CSU claims that this Court has framed the issues for review differently than as set forth in the AOB. (RB p.14, fn. 2.) However, Runyon is unaware of the issues having ever been reframed by this Court. Indeed, it appears CSU erroneously believes the issues before the Court now are those issues which are summarized on the Court's website [since it states verbatim the summary from the website in its Answer]. However, the Court's website also has a disclaimer at the bottom of that page which makes clear, "The statement of the issues [summarized on the website] is intended simply to inform the public and the press of the general subject matter of the case. *The description set out above does not necessarily... define the specific issues that will be addressed by the court.*" (Italics added.)

administrative remedies and exhaustion of *judicial* remedies, CSU claims Runyon is collaterally estopped from attacking CSU's administrative decision. (*Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, 240-241 [discussing the differences between exhaustion of administrative remedies and exhaustion of judicial remedies, the former being only a condition precedent before resort to the courts, while the later, rooted in res judicata and collateral estoppel, prevents a party from revisiting an issue already litigated between the parties in a prior quasi-judicial proceeding].) However, CSU fails to treat with the fact that its administrative decision cannot have res judicata or collateral estoppel effect because: (1) Runyon was never given the opportunity to adequately litigate his claims; and (2) the Legislature expressly authorized a damages action for whistleblower retaliation as "a parallel remedy" in the last sentence of section 8547.12(c). (*Cf. Arbuckle*, *supra*, 45 Cal.4th at 976.)

(1) CSU's Administrative Decision Cannot Have Res Judicata Effect Since Runyon Had No Opportunity To Adequately Litigate His Claims

As this Court made abundantly clear in *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921 and more recently in *Arbuckle*, *supra*, 45 Cal.4th 963, 976, in order for an administrative decision to be binding in a later court action, the administrative proceeding must

possess "the requisite judicial character" to be worthy of judicial deference. (*Id.*) "Collateral estoppel may be applied to decisions made by administrative agencies '[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.'" (*People v. Sims* (1982) 32 Cal.3d 468, 479 (superceded by statute), quoting *United States v. Utah Constr. Co.* (1966) 384 U.S. 394, 422, italics omitted.) Thus, as this Court has explained:

> "For an administrative decision to have collateral estoppel effect, it and its prior proceedings must possess a judicial character...Indicia of proceedings undertaken in a judicial capacity include a hearing before an impartial decision maker; testimony given under oath or affirmation; a party's ability to subpoena, call, examine, and cross-examine witnesses, to introduce documentary evidence, and to make oral and written argument; the taking of a record of the proceeding; and a written statement of reasons for the decision." (*Pacific Lumber, supra,* 37 Cal.4th at 944 [citations omitted].)

Significantly, CSU does not deny that Runyon never got any hearing, much less a hearing before an impartial decision maker. (RT10-13, 23-29, 36; 5APP1096-98, 1116-17.) It does not deny that its proceedings were merely an investigation by a biased investigator, CSU Human Resources Manager Ellen Bui. (1APP0114-15; 2APP0385-89; 3APP0499-501, 0713-16; 5APP1096-98, 1100, 1121, 1126-27, 1131-41.) It does not deny that there was no testimony from witnesses taken under oath (except for Runyon). It does not deny that the

parties were not able to subpoena, call, examine, or cross-examine witnesses. (Slip Op. 5[3]; RT 10-13, 23-29, 26; 3APP0713, 0739; 4APP0896; 5APP1096-98, 1101-02, 1116-17.) It does not deny that Runyon had no access or knowledge as to what issues and evidence were being offered by witnesses other than himself, much less whether or not such issues and evidence were really being investigated by CSU. (3APP0713-14; 4APP0867-97; 5APP1097-1098, 1116-1118.) And, it does not deny that Runyon was not permitted to confront or cross-examine witnesses, much less know who was interviewed, and that he was not permitted any discovery. (3APP0713, 0739; 4APP0896; 5APP1096-98, 1101-02, 1116-18.)

In short, there was no procedure at CSU's administrative level at all resembling the "judicial character" required to justify the application of *res judicata* or collateral estoppel principles. Indeed, it is precisely because CSU's process fails to afford complainants adequate due process safeguards, *i.e.*, an adequate opportunity to actually litigate their whistleblower claims, that writ review of its administrative decisions is unwarranted. (*See e.g., Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 944.)

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[3] All references to the "Slip Op." are to the *Runyon* Court of Appeal decision, a copy of which is attached to Runyon's AOB.

Clearly, in the absence of that opportunity, *res judicata* deference to CSU's investigation and determination is wholly unwarranted and improper.

(2) CSU's Administrative Decision Cannot Have Res Judicata Effect Since Section 8547.12(c) Expressly Authorizes a Damages Action as "A Parallel Remedy"

The error in CSU's position is that it assumes that Runyon's failure to seek writ review elevated its findings to some sort of final judgment, precluding relitigation of the issues determined against him by CSU. However, as *Arbuckle* makes clear, "[A] court may not give preclusive effect to the decision in a prior proceeding if doing so is contrary to the intent of the legislative body that established the proceeding in which res judicata or collateral estoppel is urged." (*Arbuckle, supra,* 45 Cal.4th at 976; *Pacific Lumber, supra*, 38 Cal.4th at 945, quoting *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 326.) "[W]here [there is] specific statutory language suggesting that adverse [administrative] findings" *not* be binding in a later damages action, the principles of collateral estoppel with regard to such administrative proceedings simply do not apply. (45 Cal.4th at 976-977.)

Here, to give res judicata effect to CSU's administrative decision would clearly be "contrary to the intent" of the Legislature. By the addition of the last sentence of section 8547.12(c), the Legislature expressly authorized a

damages action in superior court for whistleblower retaliation and in doing so it expressly acknowledged the existence of that parallel remedy. It did not require that CSU's findings be set aside by way of a mandate action. Rather, it gave as the only precondition to the damages action authorized in section 8547.12(c), that a complaint be filed with CSU and that CSU fail to "s*atisfactorily address*" the complaint within 18 months. This statutory language clearly suggests that the Legislature did not intend CSU's findings to have preclusive effect against the complaining employee. (*Arbuckle*, 45 Cal.4th at 976.)

B. CSU Fails to Adequately Address How A Court In A Writ Proceeding Would Be Able To Determine Whether CSU "Satisfactorily Addressed" The Complaint

Completely ignoring the threshold issue as to whether its decisions are even entitled to res judicata or collateral estoppel effect, CSU jumps to the erroneous conclusion that employees are required to overturn its decisions in a writ proceeding by proving that CSU "*failed to satisfactorily address the employee's complaint because CSU's investigatory process was so slipshod that it failed to be conducted in good faith and respect due process, or that if a violation was found in the internal process, the CSU failed to properly rectify the matter.*" (RB p.18.) Significantly however, nowhere does CSU ever

explain how this analysis by a reviewing court would actually work in practice given the lack of any adequate record, the lack of any right to discovery and the limited review allowed in a writ proceeding – all of which issues CSU also fails to adequately address.[4/]

Indeed, in the AOB, Runyon goes to great lengths to explain why it would be virtually impossible for any employee in any writ proceeding to prove that CSU failed to conduct its administrative process in "good faith" given the lack of any hearing or evidentiary record available to the employee at the conclusion of the administrative process. (AOB pp.15-16, 50-52.) Among other things, there is no proper record for a reviewing court to scrutinize since the complainant is denied access to review any of the investigatory files and witness statements, is prohibited from calling or confronting witnesses, and is otherwise kept "in the dark" as to the adequacy or the real results of CSU's secret investigation of *itself*. (3APP0714-16; 5APP1096-98, 1100, 1109-11, 1116-19, 1121-41.) In other words, a complainant is deprived of any ability to "go behind" CSU's one-dimensional Summary and Final Determination in order to critique the investigation or its findings in order to determine whether CSU "satisfactorily addressed" the

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[4/] These issues were also completely ignored in *Ohton v. Board of Trustees of California State University* (2007) 148 Cal.App.4th 749.

complaint. (*Cf. Wellpoint Health Networks v. Superior Court* (1997) 59 Cal.App.4th 110, 126-29 [prohibiting reliance on an investigation where discovery was not permitted regarding its adequacy].)

Acknowledging this fatal flaw with its position, CSU mentions in passing that a reviewing court "may" order discovery relevant to the writ review process, citing to *Pomona Valley Hospital Medical Center v. Superior Court (Bressman)* (1977) 55 Cal.App.4th 93, 101–102. (RB p.50.) However, this argument lacks merit. First, the only authority cited by CSU for this proposition concerns writ proceedings brought under Code of Civil Procedure section 1094.5, which has no applicability here.[5/]

Second, while Code of Civil Procedure section 1094.5, subdivision (e) has been interpreted to allow limited posthearing discovery, it is *only* permitted where the party seeking the discovery first identifies the evidence it seeks to discover *and* shows that the evidence was improperly excluded at the administrative level *or* that it could not have been produced at the hearing with the exercise of reasonable diligence. (*Pomona Valley Hospital Medical Center*

[5/] While CSU moved for summary judgment in the trial court based upon Code of Civil Procedure section 1094.5, it has apparently abandoned that argument since it could not prove that Runyon ever got a hearing, a fundamental prerequisite of section 1094.5 writ review. (RT6-14, 52-57; 1APP0043-45, 0057–58; 2APP0483–484; 6APP1303–13.) Both the trial court and the Court of Appeal found that Code of Civil Procedure section 1094.5 writ review was inapplicable. (RT6; Slip Op. 16.)

v. Superior Court, 55 Cal.App. at 102.) "If the moving party fails to make the required showing, it is an abuse of the court's discretion to allow posthearing discovery." (*Id.*) In contrast to general discovery in a civil action, discovery cannot be used to look for unknown facts to support a complainant's theories. (*Id.*)

Since a complainant at the CSU administrative level has no access to or knowledge as to what issues and evidence were being considered [or excluded], much less what documentary evidence was gathered [or not gathered], which witnesses were interviewed by CSU's investigator [or not interviewed] and what those witnesses actually said (3APP0713-14; 4APP0867-97; 5APP1096-98, 1116-17), there would be no way that a CSU complainant could ever meet the threshold showing necessary to obtain discovery under the stringent requirements of Code of Civil Procedure section 1094.5(e). As explained in the AOB, CSU's entire investigation took place in some sort of "Star Chamber" which denied Runyon access or knowledge as to what issues and evidence were being offered by third party witnesses, much less whether or not such issues and evidence were really being considered by CSU during the administrative process. (*Id.*) In short, because of the secretness of CSU's administrative process, a complainant could not *in advance of actually obtaining discovery* articulate to a court in a writ

proceeding what CSU improperly excluded at the administrative level. Accordingly, CSU's "discovery" argument is a dead end.

Furthermore, as explained in *Arbuckle*, writ review under Code of Civil Procedure section 1094.5 is limited to the record compiled by the administrative agency, and the agency's findings must be upheld if supported by "substantial evidence." (C.C.P. §1094.5.) Writ review under Code of Civil Procedure 1085 is even more deferential; the agency's findings must be upheld unless arbitrary, capricious or entirely lacking in evidentiary support.[6/] (*Arbuckle*, 45 Cal.4th at 977.) Under either standard of review it would be virtually impossible for a complaining employee to prove that his complaint had not been "satisfactorily addressed." (*Id.*)

Thus, under CSU's argument, a court sitting in a writ proceeding would have to determine whether CSU's administrative proceeding "satisfactorily addressed" the employee's complaint (*i.e*, whether CSU's investigation was conducted in "good faith," was "slipshod" or lacked due process) – but such a court would be required to do so without an adequate record, without

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[6/] CSU's summary judgment motion was premised upon Code of Civil Procedure section 1094.5. (1APP0041-63; see fn. 5, *supra*.) It was only in its reply papers that it raised for the first time writ review under Code of Civil Procedure section 1085. (RT6-14, 52-57; 6APP1303-17.) Runyon objected based upon due process grounds, but the lower courts rejected Runyon's argument. (RT 8-9, 38-39, 48-49, 52-57; 6APP1370-1371, 1400-01, 1410-11, 1414; Slip. Op. 8, fn. 5.)

discovery to augment the record, and being limited to the "arbitrary and capricious" standard of review. In other words, complainants like Runyon would not only have no proper record to submit to the reviewing court and be deprived of any discovery, but they would be left with having to prove that CSU had not "*satisfactorily addressed*" [*i.e.*, did not conduct a thorough investigation in good faith] their administrative complaints under the "arbitrary and capricious" standard, effectively insulating CSU's decisions from attack, so long as they are not facially irrational. (Code Civ. Proc. §1085; *Arbuckle*, *supra*, 45 Cal.4th at 977; *see also*, *Miklosy v. Regents of the Univ. of Calif.*, *supra,* 44 Cal.4th 876, 904, fn. 2 [concurring opinion by Justice Werdegar].) CSU's position makes no sense.

Even CSU admits that the determination as to whether it "satisfactorily addressed" an employee's complaint "*is not objectively determinable.*"[7/] (RB p.25.) Thus, how does CSU expect a reviewing court in a writ proceeding to be able to decide whether CSU acted in "good faith" without an adequate

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7/ This is precisely why Runyon urges this Court to reject the *objective* standard born in *Ohton,* and adopted by the Court of Appeal in *Runyon,* and to instead adopt the subjective standard articulated by Runyon. (AOB pp.35–39.) Moreover, if whether CSU "satisfactorily addressed" Runyon's complaint is a qualitative factual question [as CSU argues], the trial court committed error when it granted summary judgment, given the abundance of evidence presented by Runyon of CSU's bad faith which at the very least revealed that a triable issue of fact existed. (See, *e.g.*, AOB pp.16-20.)

record, without any discovery and limited by the arbitrary and capricious standard?

In short, CSU's argument that a court sitting in a writ proceeding must decide whether the complaint was "satisfactorily addressed" offers no remedy at all. In nearly every case, an adverse decision from CSU would leave the employee without the benefit of the damages remedy set forth in section 8547.12(c). Indeed, petitioners who cannot overcome the deferential standard of review would be completely deprived of the remedy provided by the statute, *i.e.*, an action for damages. Nothing in Government Code section 8547.12(c) suggests that the Legislature intended the damages remedy created in that provision to be so narrowly circumscribed, and such a narrow interpretation would hardly serve the Legislature's purpose of protecting the right of state employees "to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution." (§ 8547.1.)

C. CSU's Concoction of An Entirely New Standard Of Writ Review Is Not Supported By Logic or The Law

Relying on a comment this Court made in *Miklosy*[8], CSU argues that only a court sitting in review in a mandate proceeding could determine whether CSU had "satisfactorily addressed" an employee's complaints. However, *Miklosy* never held that only a reviewing court *in a mandate proceeding* could make this determination. In fact, *Miklosy* clearly stated that it was *not* deciding what was meant by the "satisfactorily addressed" language contained in the last sentence of section 8547.12(c).[9] Furthermore, there is absolutely no reason why the "satisfactorily addressed" determination could not be made by a regular civil court in a damages action – an interpretation completely ignored by CSU.

In fact, as argued in Section B above, there is no logical way that a court sitting in review *in a mandate proceeding* could fairly and informatively make this "satisfactorily addressed" determination. After all, CSU's interpretation of section 8547.1(c) would, in effect, "put the cart before the

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[8] This Court commented "[t]he addition of the last sentence, and specifically the modifier 'satisfactorily,' raises the possibility that a court might find the state university's decision unsatisfactory (though timely) and on that basis permit a damages action." (*Miklosy*, *supra*, 44 Cal.4th at 886.)

[9] This Court stated, "we express no view on the substantive content, if any, of the term 'satisfactorily' in section 8547.12, subdivision (c)." (44 Cal.4th at 886.)

horse." Whistleblower complainants would be required to first prove that CSU failed to "satisfactorily address" their complaints, but they would have to do so before they could file a lawsuit to obtain any discovery on that *very* issue. Thus, without the benefit of discovery a plaintiff could never learn whether CSU conducted a sham investigation or concealed evidence since a complainant is precluded from any access to the relevant raw evidence.

Furthermore, even if a complainant could show that CSU acted in an "arbitrary and capricious" manner, CSU contends that the only relief that could be obtained in a writ proceeding under Code of Civil Procedure section 1085 is an order compelling CSU to fulfill its investigatory obligations – not the damages action permitted by section 8547.12(c). (RB p.50.) Accordingly, under CSU's view an employee would never have the right to a damages action even if the employee proved CSU failed to "satisfactorily address" the complaint. Thus, CSU is forced to concede that the "satisfactorily addressed" language of section 8547.12(c) imposes "an additional requirement" and "an additional level of scrutiny" *beyond* Code of Civil Procedure section 1085's "arbitrary and capricious" standard. (RB p.47.) CSU admits,

> "the University's satisfying this standard of review [C.C.P. §1085's arbitrary and capricious standard] does not end the inquiry. Rather, the reviewing court must also determine whether CSU satisfactorily addressed the complaint within 18 months." (RB pp.48-49.)

Rather than acknowledge that this inconsistency between the type of relief available under Code of Civil Procedure section 1085 and that provided in section 8547.12(c), bodes in favor of Runyon's interpretation of section 8547.12(c), CSU concocts an entirely new form of writ review. CSU calls this new mutant standard of review the "1085-Plus" standard. (RB p.48.) Under this "1085-Plus" standard of writ review [which CSU is asking this Court to create], the reviewing court in a writ proceeding would have the power not only to evaluate whether CSU acted in an "arbitrary and capricious" manner, but whether CSU "satisfactorily addressed" the complaint and permit a separate action for damages. (RB pp.50-51.)

Not only does CSU's proposition lack any legal authority, but it still fails to address the fundamental issue which would still confront a court using a "1085-Plus" standard of review – given the lack of discovery, hearing or other adequate evidentiary record, there would be no way for a reviewing court in such writ proceeding to determine whether CSU had acted in "good faith" and "satisfactorily addressed" the complaint. In short, even this mutant 1085-Plus standard places the whistleblower in the same "procedural minefield" so aptly described in *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1085-87, and later articulated in *Arbuckle*, *supra*, 45 Cal.4th at 977. Such a

result defeats the salutary purposes of the WPA – to encourage whistleblowers to come forward without fear of retribution.

D. CSU Fails to Explain Why *Arbuckle*'s Logic Should Not Also Apply to this Case

CSU erroneously contends that nothing in *Arbuckle* supports Runyon's position. In fact, CSU appears to be advocating for this Court to reject its own sound policy arguments so eloquently articulated in *Arbuckle*, and to instead, adopt the flawed reasoning and faulty analysis in *Ohton*. However, CSU fails to explain why *Arbuckle*'s logic should not also apply to this case, much less how *Ohton*'s reasoning can still be valid after *Arbuckle*.

Clearly, *Ohton*'s logic is at least suspect after *Arbuckle*. Mouthing *Ohton*, CSU argues that it would be "farfetched" for the Legislature to permit an unsatisfied whistleblower to file a damages action without first seeking writ review. *Ohton* premises its faulty reasoning on the mistaken notion that to hold otherwise would render the administrative process "meaningless." (*Ohton*, 148 Cal.App.4th 749, 765.) However, *Arbuckle* sanctions exactly what *Ohton* stated would be "farfetched" for the Legislature to have intended by the phrase "satisfactorily addressed," *i.e.*, direct court access by an unsatisfied complainant after complying with the internal grievance procedure. Furthermore, *Arbuckle* further undercuts *Ohton* by explaining why permitting

a *de novo* damages action does not render the administrative process "meaningless." (45 Cal.4th at 976-977.) Both of these issues are discussed in the AOB (pp. 43–45), and both are ignored by CSU.

Since the Legislature permitted direct court access to whistleblowers under section 8547.8(c), there is no logical reason to believe that it would not have permitted similar access to CSU employees by the addition of the last sentence of section 8547.12(c). Instead, CSU would have this Court believe that the Legislature intended by the addition of the last sentence of section 8547.12(c) to create CSU's proposed mutant standard, notwithstanding the fact that there is absolutely nothing in the Legislative history or any other place which supports its implausible proposition.

E. CSU Has Ignored Section 8547.12's Legislative History And Failed To Give Any Explanation For Why The Last Sentence Of Section 8547.12(c) Was Added To The Statute

Again, mouthing *Ohton*, CSU claims that writ review is required because "there is no indication from the statute or its legislative history that [sic] an exception to the requirements for a writ of mandate was contemplated when section 8547.12 was enacted." (RB p.30.) Not only is this assertion false, but CSU fails to address the particular Legislative history cited in the AOB, much less provide any explanation as to the reasons why the last

sentence of section 8547.12(c) was added to the statute [setting it apart from §8547.10(c)] when section 8547.12 was enacted.

As set forth in the AOB (pp.30-32), section 8547.12 was originally drafted to mirror section 8547.10. However, before it was enacted, members of the Assembly voiced concerns about it being inadequate to protect against retaliation. (See, Office of Child Development & Education, Enrolled Bill Report on SB 2097 (1994 Reg. Sess.), p. 2, a copy of which is attached to the AOB.) At the same time, "The University's Plaintiffs Co-op" (UPC) proposed "an amendment that would have authorized a damages action against the University of California whenever the University's resolution of a whistleblower retaliation complaint was *unsatisfactory to the injured party*." (*Id.*; *Miklosy*, *supra*, 44 Cal.4th at 896 [emphasis added].)

Apparently, to allay concerns from certain Assembly members and the UPC, the Legislature added to the draft of section 8547.12 the language in the last sentence of subdivision (c): "*Nothing in this section is intended to prohibit the injured party from seeking a remedy if the university has not satisfactorily addressed the complaint within 18 months.*" (§8547.12(c) [emphasis added].) Obviously, this language was added for a reason – and it was designed to mean something different than the language in section

8547.10. After all, if all it meant was what section 8547.10 already said, why was it added?

Significantly, nowhere does CSU address this Legislative history or explain *why* this language was added. Instead, CSU argues that this Court should construe section 8547.12 in the same way this Court interpreted section 8547.10 in *Miklosy* – even though CSU admits the language in section 8547.10(c) is "*profoundly different*" from that set forth in section 8547.12(c).[10/] (RB pp.3-4.)

In fact, in *Miklosy* the Court was constrained by the lack of express language in section 8547.10 permitting a damages action after a timely administrative decision.[11/] However, section 8547.10's linguistic encumbrance does not exist with regard to section 8547.12(c). Both the Legislative history and the plain language in the last sentence of section 8547.12(c) support the view that the Legislature in fact intended to provide whistleblower plaintiffs the direct right to file a damages action in the event CSU fails to resolve the retaliation complaint to the satisfaction of the injured party within 18

[10/] Ironically, in other places, CSU argues that 8547.10(c) is "nearly identical" to 8547.12(c). (*E.g.*, RB p.35.)

[11/] Moreover, the due process issues of collateral estoppel and res judicata were not raised in *Miklosy*. (44 Cal.4th at p.887, fn. 2 and p.890, fn. 4.)

months.[12/] Furthermore, Runyon's interpretation of section 8547.12(c) effectuates the WPA's remedial purpose and advances its core objectives.

F. CSU's Interpretation Of Section 8547.12(c) Has And Will Lead To Abuse Because It Fails To Provide Any Viable Remedy For The Employee To Challenge CSU's Administrative Decisions

In its Answer, CSU acknowledges the concerns raised in *Miklosy* regarding the potential for abuse by universities in the absence of adequate remedies to challenge their administrative decisions. This potential for abuse could not be more clearly demonstrated than by examining what occurred in *Runyon*.

[12/] Citing to AOB at page 53, CSU falsely claims it is Runyon's position that the only prerequisite to filing a civil action is the filing of an internal complaint and that Runyon discards the second part of the prerequisite, that CSU must also fail to satisfactorily address the complaint within 18 months. (RB p.19.) However, nothing on page 53 of the AOB even remotely supports CSU's argument. In fact, at page 53 of the AOB, Runyon states "there is only one prerequisite to the filing of a civil action for damages: *i.e.*, that the injured employee first file a complaint with CSU *which CSU has failed to "satisfactorily address" within 18 months*. CSU takes other liberties with its arguments. For example, at page 1 of the RB, CSU claims that in order to file a civil action, section 8547.12(c) (1) requires that the employee file an internal grievance, (2) that CSU failed to issue a timely decision; *and* (3) that CSU fail to "satisfactorily address" the complaint within 18 months. CSU's statement of the test is completely inaccurate, which CSU itself acknowledges at pages 19 and 20 of the RB. There, CSU necessarily admits that it *either* must fail to issue a timely decision *or* fail to "satisfactorily address" the complaint within 18 months.

During the administrative process in this case, the investigator was provided with an abundance of evidence of retaliation against Runyon [which even the trial court described as "DYNAMITE" (RT47)], yet all of this evidence was ignored by CSU, and conspicuously omitted from that part of the record to which Runyon was provided or entitled.[13/] It was only because Runyon was able to conduct discovery *in this damages action* that Runyon was able to learn that CSU concealed this "dynamite" evidence from him – which pivotal issue and evidence CSU again fails to refute or address.

Among other things, Runyon learned that CSU investigator Bui had omitted key evidence of Calingo's wrongful conduct from the Summary provided to Runyon. (RT20, 47-48; 3APP0499-506, 0508-09, 0523-26, 0529, 0538, 0559-60, 0581-82, 0600-04, 0607, 0708-09, 0713-14; 4APP0867-73, 0909; 5APP1075, 1109-11, 1118-19, 1121-22, 1124-29, 1131-35, 1137-40, 1143-44, 1196, 1204, 1206-07.) Runyon also learned that CSU omitted key

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13/ The only "record" available to a complainant in CSU's internal grievance procedure set forth in Executive Order No. 822 (EO822) are:

(1) the Complainant's written Grievance;
(2) the "Summary" of CSU's closed-door secret investigation (which CSU is allowed to sanitize) as opposed to the raw data or the investigator's full report upon which the "Summary" is supposedly based;
(3) Complainant's written response to CSU's sanitized "Summary"; and
(4) CSU's Final Decision. (2APP0384-89; 3APP0714-16; 5APP1096-98, 1100.)

evidence corroborating Calingo's retaliatory animus, which was neither mentioned in the Summary nor in the Final Letter of Determination – the only "record" provided to Runyon by CSU. (4APP0867-0873, 0897-0903; 5APP1075, 1118-20, 1121-22, 1131, 1134-35, 1137-39.)

Indeed, *through discovery in this subsequent damages action*, Runyon learned that absent from Bui's "Summary" was any mention that Runyon's complaint about Calingo's expenses actually triggered an internal audit of Calingo. This resulted in a finding by CSU that Calingo had regularly engaged in questionable and improper conduct in connection with his travel expenses, including charging to CSU his personal travel and that Calingo had submitted false travel expenses and altered his travel vouchers – thus, proving that Runyon's complaints were in fact justified. (3APP0603-04, 0616-18; 4APP0867-73, 0897-903, 0909-910; 5APP1075, 1109-1110, 1124-27, 1133, 1143-1144, 1146-47, 1159-62, 1196, 1204, 1206-1207.)

Significantly, although CSU had denied in its findings that Runyon's complaints had anything to do with his termination as Chair of his department, at her deposition, investigator Bui admitted that Runyon's March 2004 written complaints may have been a "*contributing factor*" in Calingo's decision to remove Runyon as Chair in April 2004. (3APP0499-0506, 0508-0509, 0523-526, 0529, 0535, 0538, 0557-0559, 0581-82, 0600-0604, 0607, 0708-0709;

5APP1128-29.) Yet, Bui failed to mention this critical evidence in her Summary. (4APP0867-73.)

In other words, had Runyon been permitted only to file a writ of mandate to challenge CSU's administrative decision, he never would have developed the evidence necessary to establish that CSU failed to "satisfactorily address" Runyon's complaint or overturn its administrative findings because he would have been forced to engage in this futile endeavor without an adequate record, without discovery to augment the record, and being subjected to the "arbitrary and capricious" standard of Code of Civil Procedure section 1085 writ review.

Clearly, as *Runyon* demonstrates, CSU cannot be trusted to act in "good faith"[14/] and, as such, it should not be permitted to hide behind the cloak of writ review to conceal its misconduct. CSU's conduct in Runyon is exactly why a damages action is permitted by section 8547.12(c). In short, CSU's conduct in *Runyon* exposes the very abuse which would occur if CSU whistleblowers are limited to writ review – insulating CSU's decisions [including those riddled with abuse] from ever being overturned and depriving whistleblowers of the very remedy guaranteed by the WPA.

[14/] CSU has engaged in similar abuse in other cases. (*Ohton, supra*, 148 Cal.App.4th at 762-63.)

G. Runyon's Interpretation Of Section 8547.12(c) Is Consistent With Its Language, the Intent of the WPA and the Policy Considerations Articulated in *Arbuckle*

CSU argues that Runyon's interpretation of section 8547.12(c) allows the exception to "swallow the rule" and renders the first part of subdivision (c) "meaningless." On the contrary, it is CSU's tortured construction of section 8547.12(c) which contravenes the black letter principles of statutory construction. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798-799 [a statute should be interpreted so as to effectuate its apparent purpose..."[s]ignificance should be given, if possible, to every word of an act" and "a construction that renders a word surplusage should be avoided."].)

In essence, CSU is asking this Court to interpret section 8547.12(c) in the same manner that it interpreted section 8547.10 in *Miklosy* [which does not include the qualifying language at issue in *Runyon*] – precluding whistleblowers from filing a damages action if CSU renders any decision within 18 months, and permitting limited writ review as the only challenge to its decisions.[15/] However, such a construction would render the last sentence of section 8547.12(c) meaningless surplusage. Clearly, the Legislative history and the timing of the addition of the last sentence of section 8547.12(c) – not

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[15/] Again, strangely, CSU attempts to treat sections 8547.10 and 8547.12 as if they were identical, when in fact, CSU admits their language is "*profoundly different.*" (RB pp.3-4.)

found in section 8547.10, but added to section 8547.12 *alone* – suggests that the Legislature believed that merely addressing a complaint within 18 months is not enough, but also must be addressed to the *satisfaction* of the injured employee. (See, Office of Child Development & Education, Enrolled Bill Report on SB 2097 (1994 Reg. Sess.); Assembly Committee on Public Employees, Retirement And Social Security Report on SB 2097 (1994 Reg. Sess.); *Cf. Miklosy*, *supra*, 44 Cal.4th at 896.)

Runyon's construction of section 8547.12 gives meaning to *all* parts of the statute. The first part of section 8547.12(c) requires whistleblowers to exhaust their administrative remedies by completing the internal grievance process. This process allows CSU the opportunity to correct its error and resolve the dispute internally, thus "promoting settlement" and "be[ing] an effective way of resolving minor disputes." (*Arbuckle*, *supra*, 45 Cal.4th at 976-77; *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 476 [administrative exhaustion "serves the salutary function of eliminating or mitigating damages," allowing an organization the first opportunity "to minimize, and sometimes eliminate, any monetary injury to the plaintiff"].) It is only where the employee is *dissatisfied* with CSU's decision that an action for damages is permitted – thus, giving meaning to the last sentence of section 8547.12(c).

Ignoring the "profound differences" between sections 8547.10 and 8547.12, CSU attempts to read the last sentence of section 8547.12(c) right out of the statute. In this regard, CSU argues out of both sides of its mouth. On the one hand, it claims that section 8547.12 must be construed to require writ review, because to hold otherwise would create an anomaly between sections 8547.10 and 8547.12 which are part of the same statutory scheme. Yet, CSU fails to treat with the fact that section 8547.8 is also a part of that same statutory scheme, and that section 8547.8 does not require writ review. (*Arbuckle, supra*, 45 Cal.4th at 974-979.) In fact, CSU repeatedly attacks Runyon's attempts to rely upon *Arbuckle* as support for his position as to how section 8547.12 should be interpreted.

While it may be true that "a statutory statement of the purpose does not override the express limits the Legislature has placed on the statutory text" (*Miklosy*, 44 Cal.4th at 897), section 8547.12 does *not* contain the express limits on the statutory text which are found in section 8547.10. Indeed, in contrast to section 8547.10, the modifying language added to section 8547.12 *alone* not only enables the construction proffered by Runyon, but also effects the remedial purpose of the WPA – "*protecting whistleblower employees by assuring them the procedural guarantees and independent fact-finding of a superior court damages action.*" (*Arbuckle*, 45 Cal.4th at 968.)

CSU's Legislative history arguments compel no different conclusion. First, CSU ignores the particular Legislative history cited in the AOB, including the concerns raised by the Assembly and the UPC about the then current state of the bill [which was at first identical to section 8547.10] being inadequate to protect against retaliation. (AOB pp.30-32.) Next, CSU fails to explain why, in light of these concerns, the last sentence of section 8547.12(c) was included in the statute enacted with regard to CSU whistleblowers. Instead of providing an explanation for the addition of the qualifying language found in the last sentence of section 8547.12(c) [which then distinguished it from section 8547.10(c)], CSU blithely mimics *Ohton*, claiming that section 8547.12 "should track" the University of California statute.

Indeed, CSU attempts to make much out of the fact that section 8547.12 was not amended when the Legislature amended section 8547.8 to include its current language, giving state employees the right to sue for damages regardless of whether the State Personnel Board issued, or failed to issue, a determination. However, it is clear that no similar amendment to section 8547.12(c) was necessary. More specifically, section 8547.12 already included the qualifying language in the last sentence of subdivision (c), which gave

CSU whistleblowers the right to a damages action where CSU's resolution of a retaliation complaint is unsatisfactory to the injured party.[16/]

Clearly, a construction of section 8547.12(c) consistent with the Court's rationale in *Arbuckle* and *Westlake* not only gives CSU a meaningful opportunity to quickly and thoroughly conduct an internal investigation into the alleged whistleblower retaliation and resolve it, but also, consistent with its Legislative history and the purpose of the WPA, it gives the whistleblower a real remedy [by way of a damages action] in the event that CSU fails to carry out its obligation to act in good faith to satisfactorily address the retaliation complaint – as was the case here.

[16/] Contrary to CSU's claims, Runyon is not arguing that when section 8547.8 was amended the Legislature also meant to amend section 8547.12. Rather, no amendment was necessary given the text of the statute which expressly provides for a damages action in the event CSU's internal process fails to "satisfactorily address" the grievance within 18 months.

III.

CONCLUSION

For the foregoing reasons and the reasons in the Opening Brief on the Merits, this Court should reverse the *Runyon* Court of Appeal decision, disapprove *Ohton*, and find that section 8547.12(c) provides a direct right of action for damages where CSU has failed to timely or satisfactorily address a whistleblower complaint.

DATED: September 1, 2009

Respectfully submitted,

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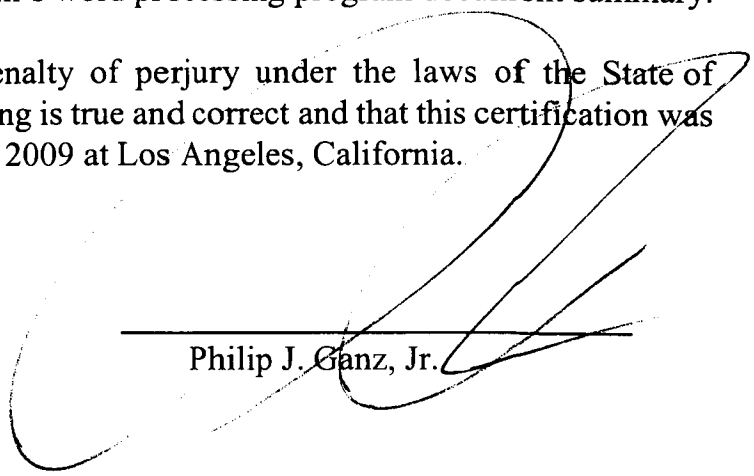
WORD CERTIFICATION AND RULE 8.520 DECLARATION

I, PHILIP J. GANZ, JR. certify that the foregoing Reply Brief On The Merits is less than 8,400 words based on our firm's computer's WordPerfect program.

I certify that the number of words in this Reply Brief On The Merits is 7,357 according to our firm's word processing program document summary.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this certification was executed on September 1, 2009 at Los Angeles, California.



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PROOF OF SERVICE VIA MAIL

I am employed in the County of Los Angeles, am over the age of 18 and not a party to the within action. My business address is 11620 Wilshire Blvd., Suite 340, Los Angeles, CA 90025.

On September 1, 2009, I served the foregoing **REPLY BRIEF ON THE MERITS** by placing true copies thereof enclosed in sealed envelopes and addressed as follows:

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Executed on September 1, 2009 at Los Angeles, California.

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