ORIGINAL

Civil 9-9-09

S175204

S175204
4th Civil No. G040843

IN THE

Supreme Court
OF THE STATE OF CALIFORNIA

ALEJANDRA RUIZ, ALEJANDRO RUIZ, ANA RUIZ,
DIANA RUIZ, SAMUEL RUIZ,

Plaintiffs and Respondents,

SUPREME COURT
FILED

vs.

AUG 21 2009

ANATOL PODOLSKY, M.D.,

Frederick K. Ohlrich Clerk

Defendant and Appellant,

Deputy

Appeal From Orange County Superior Court
The Honorable James J. Di Cesare, Judge Presiding
[OCSC Case No. 07CC08001]

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TABLE OF CONTENTS **Page**

INTRODUCTION 1

STATEMENT OF THE CASE 1

REASONS WHY REVIEW SHOULD NOT BE GRANTED 4

I. THE *RUIZ V. PODOLOSKY* DECISION CLARIFIED A CONFLICT IN THE CASE LAW 4

A. The Court Of Appeal Did Not Change Existing Law 4

B. The *Ruiz* Opinion Resolved Conflicts In The Case Law 5

C. Justice George's Concurring Opinion In An Earlier Court Of Appeal Decision Was Referenced By The *Ruiz* Court And Considered In Its Analysis 6

D. The *Ruiz* Court Appropriately Distinguished The Cases In This Area 7

II. THE COURT OF APPEAL CORRECTLY FOUND THAT THE RUIZES WERE NOT BOUND TO ARBITRATE THEIR WRONGFUL DEATH CLAIMS 8

A. The Court of Appeal Followed The Cases Most Analogous With the Type of Arbitration Agreement In Issue 8

B. The Court of Appeal Did Indeed Consider The Intent of Rafael Ruiz And Code Of Civil Procedure Section 1295 In Reaching Its Decision 9

C. The Court of Appeal Addressed The Patient-Physician Relationship In The Context Of The Facts Of This Case 10

D. The Court Of Appeal Considered The One-Action Rule In Reaching Its Decision 11

E. The Court of Appeal's Analysis As To Why "Contract Principles" And "Right To A Jury Trial" Outweigh The Convenience Of Litigating In One Forum And The Public Policies Favoring Arbitration Was Sound And Legally Supported..12

F. The Import Given To The *Rhodes* Case By The Court of Appeal Was Proper..12

G. The Court of Appeal's Opining That Rafael's Wife Was Not Bound To Arbitrate Was Consistent With The Court's Analysis Of All Of The Case Law That Formed The Basis Of Its Opinion..................................13

CONCLUSION 14

CERTIFICATION 15

TABLE OF AUTHORITIES

Page

CASES

Baker v. Birnbaum, M.D.
(1988) 202 Cal.App.3d 288 ....*passim*

Bolanos v. v. Khalatian
(1991) 231 Cal.App.3d 1586..9

Bratt v. City and County of San Francisco
(1975) 50 Cal.App.3d 550..5, 6

Buckner v. Tamarin
(2002) 98 Cal.App.4th 140 ....*passim*

Clay v. Permanente Medical Group, Inc.
(N.D. Cal. Dec. 14, 2007) 540 F. Supp.2d 1101 7

County of Contra Costa v. Kaiser Foundation Health Plan, Inc.
(1996) 47 Cal.App.4th 237 ....7, 9, 10

Drissi v. Kaiser Foundation Hospitals, Inc.
(N.D. Cal. Jan. 3, 2008) 543 F. Supp.2d 1076 7

Gross v. Recabaren
(1988) 206 Cal.App.3d 771 ....6, 7, 9

Hall v. Pacific Tel. & Tel. Co.
(1971) 20 Cal.App.3d 953..6

Havstad v. Fidelity National Title Ins. Co.
(1997) 58 Cal.App.4th 654..14

Herbert v. Superior Court
(1985) 169 Cal.App.3d 718 ....*passim*

Kim v. Sumitomo Bank
(1993) 17 Cal.App.4th 974..14

Reyes v. Kosha
(1998) 65 Cal.App. 451..14

Rhodes v. California Hospital Medical Center
(1978) 76 Cal.App.3d 606..*passim*

Valdez v. Smith
(1985) 166 Cal.App.3d 723..11

Walker v. Superior Court
(1991) 53 Cal.3d. 257 3

STATUTES

California Code Civil Procedure:

Section 128(a)(8) 7
Section 1295..9, 10

California Constitution:

Art. VI, Section 1..3

INTRODUCTION

Plaintiffs and Respondents, Alejandra Ruiz, Alejandro Ruiz, Ana Ruiz, Diana Ruiz and Samuel Ruiz (collectively "Ruizes") respectfully submit that contrary to the opinions expressed in the Petition for Review, the decision in *Ruiz v. Podolosky* should not be reviewed nor reversed in that it soundly addresses a conflict in California law as to the scope of a patient's authority to bind his or her spouse and adult children to an arbitration agreement. The opinion does not exacerbate the split in appellate courts on this question nor does it unnecessarily produce confusion and instability in this area of the law. Rather, the decision following appropriate precedent resolves the issues with an extensive and methodical analysis of California and out of state authority. (Slip Opn. at 9-22.) It should not be disturbed.

STATEMENT OF THE CASE

The Ruizes are the wife and four adult children of decedent Rafael Ruiz (Rafael). The Defendant and Appellant Anatol Podolsky, M.D. (Podolsky) is an orthopedic surgeon who sought to enforce an arbitration agreement he had with Rafael against the surviving heirs. (Slip Opn. at 2.)

The genesis of the medical services arbitration agreement occurred at the time Rafael first presented to Podolosky's office on July 17, 2006 with a STAT referral from his primary care physician due to MRI findings that established bilateral hip fractures requiring immediate intervention. Rafael was offered the

agreement along with intake / pre-treatment paperwork, including a questionnaire concerning insurance information and a patient history requesting information pertaining to the cause of his injury. Although Rafael was not examined that day and was asked to return ten days later after clarifying the issue of whether his group insurance or Worker's compensation policy would pay for the treatment, he did sign the medical services arbitration agreement. (Slip Opn. at 5.) Tragically, Rafael died 8 days after his initial unsuccessful appointment with Podolsky and two days before his next scheduled appointment.

In July 2007, Ruizes filed a complaint against Podolsky and other health care providers alleging claims for wrongful death and medical malpractice maintaining that defendants failed to adequately identify and treat Rafael's hip fracture resulting in complications and eventually his death. Podolosky filed an answer to the complaint in January 2008 and attached a copy of the arbitration agreement with Rafael. (Slip Opn. at 4.) It should be noted that Podolosky initially denied any records, including the arbitration agreement and first disclosed the agreement when the answer was filed.

A few months after filing his answer, Podolosky filed a petition to compel arbitration. Ruizes opposed the petition, however relying on *Buckner v. Tamarin* (2002) 98 Cal.App.4th 140, 142-143 (*Buckner*), the opposition indicated that Rafael's wife was "potentially subject to the arbitration agreement" (AA at p. 41) as one of the minimal exceptions to the policy that arbitration agreements do not extend to those who are not parties to the agreement. The opposition

further argued that because only one plaintiff was subject to the arbitration agreement, pursuant to Code of Civil Procedure section 128(a)(8), California Constitution, Art. VI, section 1, and *Walker v. Superior Court* (1991) 53 Cal.3d 257, it was within the court's power to control the judicial proceedings before it and order all parties to proceed in the trial court to avoid inconsistent verdicts, unnecessary delay, multiple actions, and duplicative discovery. (AA at p. 41; Slip Opn. at 4.) Podolsky responded with the argument that the adult children were "swept up" into the arbitration agreement along with the wife due to the "one action rule" for wrongful death suits. (*Ibid.*)

The trial court denied the petition as to the adult children; granted it as to the wife; and stayed the superior court action pending resolution of the arbitration to avoid the possibility of inconsistent rulings. (AA at p. 81) Podolosky appealed but wife did not. (*Ibid)*

On appeal, Podolsky argued that Rafael had the broad authority to waive the adult children's right to a jury trial of their independent wrongful death claims simply because Rafael's spouse conceded she was bound to the agreement and the wrongful death statute requires litigation of the action in one forum. (Slip Opn. at 2.) Ruizes disagreed.

The Court of Appeal, Fourth Appellate District, Division Three, held that the trial court correctly concluded the adult children cannot be compelled to arbitrate their wrongful death claims. It further held that California's wrongful death statute does not create a derivative action and therefore Rafael lacked

authority (express or implied) to bind any heir, including the wife, to the physician – patient arbitration agreement he signed simply to receive treatment for himself from Podolosky. In so doing, the court concluded that "principles of equity and basic contract law outweigh the convenience of litigating in one forum and the public policies favoring arbitration". (Slip Opn. at 3.) Finally, because the wife in following *Buckner* indicated that her claim is potentially subject to the arbitration agreement and failed to appeal from the court's order compelling arbitration of that claim, she is bound by the arbitration agreement. *(Ibid.)*

REASONS WHY REVIEW SHOULD NOT BE GRANTED

I. THE *RUIZ V. PODOLOSKY* DECISION CLARIFIED A CONFLICT IN THE CASE LAW.

A. The Court Of Appeal Did Not Change Existing Law

Podolosky argues that review is appropriate because the decision fails to apply existing law since *Herbert v. Superior Court* (1985) 169 Cal.App.3d 718 (*Herbert*) was the "most applicable and factually analogous precedent". (Pet. at P. 10.)

After a thorough examination of *Herbert* and the cases pre and post that decision, the Court found that while there are divergent paths, the reasoning of the *Rhodes v. California Hospital Medical Center* (1978) 76 Cal.App.3d 606 (*Rhodes*) line of cases are most persuasive:

> "California law is clear that the cause of action created by the wrongful death statute is separate and distinct from the cause of action the deceased would have had for personal injuries had he survived. The heirs do not

stand in the shoes of the party who signed the arbitration agreement. We find the reasoning of the *Rhodes* line of cases and those of our sister jurisdictions employing a straightforward statutory analysis of the issue most persuasive. There is no compelling reason to create a new exception to bind nonsignatories to a contract. We find no contractual or statutory basis to confer on "medical patients" the special status of being able to waive the constitutional due process rights of family members (who are not third party beneficiaries or when there is no preexisting relationship). ¶Rafael was not securing a medical plan for the Adult Children when he agreed to arbitration; they received no benefit from the contract. The contract was not created by a person having protective powers, such as those inherent with minors and employees. This is not a case involving a fiduciary, agency, or other preexisting relationship. [Rafael] entered into the arbitration agreement simply to obtain his own medical care. We find no legal or rational basis to make the wrongful death statute's "one action rule" a new exception to bind nonsignatories to an arbitration contract. This court will not endorse or propagate a rule permitting courts to "sweep up" nonsignatory parties into arbitration for the sake of judicial convenience as that would require us to ignore basic contract law principles (arbitration dependant on a consensual written contract), ignore the fundamental right to have a jury trial, and ignore constitutional rights to due process." (Slip Opn. at 22.)

These findings did not change existing law but rather clarified the law applicable to the Ruizes' situation.

B. The *Ruiz* Opinion Resolved Conflicts In The Case Law

After its comprehensive analysis of the divergent case law on these issues, the Court of Appeal followed the precedents it believed were applicable to this case. (*Ibid.*) In so doing, it did not violate the basic principle that California courts should avoid creating conflicts nor did it "radically alter the landscape" (Pet. at p. 12.) On the contrary, the *Ruiz* decision added light to the legal landscape and resolved conflicts in the case law consistent with *Bratt v. City and*

County of San Francisco (1975) 50 Cal.App.3d 550, 555 and *Hall v. Pacific Tel. & Tel. Co.* (1971) 20 Cal.App.3d 953, 954-955.

C. Justice George's Concurring Opinion In An Earlier Court Of Appeal Decision Was Referenced By The *Ruiz* Court And Considered In Its Analysis

The *Ruiz* decision ultimately rested on the cases which determined a patient's authority to bind others to his or her arbitration contract is limited by traditional contract principles and equity. In so doing, the Court relied on, *inter alia, Baker v. Birnbaum* (1988) 202 Cal.App.3d 288 (*Baker*). The concurring opinion of then-Associate Court of Appeal Justice Ron George in *Baker* was addressed in the *Ruiz* opinion in its discussion of *Gross v. Recabaren* (1988) 206 Cal.App.3d 771, 781 (*Gross*). In that discussion, Justice George's opinion that *Baker* and *Herbert* were distinguishable on a number of points was acknowledged, including the finding that there was no reason to discuss or disapprove of the *Herbert* decision because it involved a different kind of arbitration provision and a different kind of lawsuit. (*Baker, supra*, 202 Cal.App.3d at p. 295.) (Slip Opn. at 12.)

Podolosky argues that the approach Justice George took in *Baker,* should have been taken by the *Ruiz* Court and *Herbert* should not have been disavowed. However, the analysis of *Herbert* undertaken by the *Ruiz* Court was indeed necessary in that unlike *Baker,* the issue of construction of an arbitration provision in the context of the statutory cause of action for wrongful death was at issue. *Id.*

The *Ruiz* Court again, painstakingly considered every aspect of the divergent case law and the facts associated therewith, including *Herbert* and *Baker,* before reaching its conclusion. (Slip Opn. at 9-22.) And that conclusion, consistent with *Baker,* was that a party's exercise of the right to a jury trial is paramount to the court's convenience in having all parties litigate in a single action. (*Baker, supra,* 202 Cal.App.3d at p. 293; Slip Opn. at 22.)

D. The *Ruiz* Court Appropriately Distinguished The Cases In This Area

The *Ruiz* Court took no shortcuts in discussing and distinguishing the cases in this area, including *Rhodes, Baker, Buckner v. Tamarin* (2002) 98 Cal.App.4th 140 (*Buckner*), *County of Contra Costa* v. *Kaiser Foundation Health Plan, Inc.* *(County of Contra Costa)* on the one hand, and *Herbert, Gross, Drissi v. Kaiser Foundation Hospitals, Inc.* (2008) 543 F. Supp.2d 1076, *Clay v. Permanente Med. Group, Inc.* (N.D.Cal. 2007) 540 F.Supp.2d 1101 on the other. Having done so, the court summarized as follows:

> "...the line of cases starting with the *Rhodes* decision approached the issue by looking to the statutory language creating the wrongful death action. Recognizing such claims are not derivative actions, those courts have determined a patient's authority to bind others to his or her arbitration contract are limited by traditional contract principles and exceptions regarding the binding of nonsignators. It must be equitable to compel a nonsignatory to waive his or her right to a jury trial of his or her independent wrongful death action. The second line of authority, originating with the *Herbert* case, approaches the issue focusing on the goal of enforcing medical malpractice arbitration agreements, especially in wrongful death cases. These cases have essentially broadened the authority of one particular class of claimants (medical patients), to bind others to arbitration without the benefit of an agency or other preexisting relationship. Simply stated, the public policy supporting arbitration of

> medical malpractice disputes, the Legislature's implicit approval of arbitration of wrongful death actions, and the concern patients will be denied treatment if he or she cannot bind all possible heirs to arbitration had been deemed to outweigh the constitutional and procedural rights of nonsignatory third parties." (Slip Opn. at 20-21)

The *Ruiz* Court thereafter correctly reached the conclusion that the "reasoning of the *Rhodes* line of cases and those of our sister jurisdictions employing a straightforward statutory analysis of the issue most persuasive". (Slip Opn. at 22.)

As to the plaintiffs' concession that Rafael's wife was bound by the arbitration clause, it too was considered, but did not play a role in the Court's reasoning other than finding that she was not in fact bound based on the myriad of cases considered by the *Ruiz* Court.

II. THE COURT OF APPEAL CORRECTLY FOUND THAT THE RUIZES WERE NOT BOUND TO ARBITRATE THEIR WRONGFUL DEATH CLAIMS

A. The Court of Appeal Followed The Cases Most Analogous With the Type of Arbitration Agreement In Issue

Podolosky asserts that the *Ruiz* Court improperly relied on *Rhodes, Baker* and *Buckner* in reaching its decision in that the facts in *Herbert* are the most analogous. (Pet. at p. 18.) While this has been addressed *supra,* a key component considered by the *Ruiz* Court was the type of arbitration agreement signed by Rafael which was dissimilar to the medical plan contract in *Herbert.*

In so doing, the court concluded:

> "Rafael was not securing a medical plan for the Adult Children when he agreed to arbitration; they received no benefit from the contract. The

> contract was not created by a person having protective powers, such as those inherent with minors and employees. This is not a case involving a fiduciary, agency, or other preexisting relationship. [Rafael] entered into the arbitration agreement simply to obtain his own medical care. We find no legal or rational basis to make the wrongful death statute's "one action rule" a new exception to bind nonsignatories to an arbitration contract. This court will not endorse or propagate a rule permitting courts to "sweep up" nonsignatory parties into arbitration for the sake of judicial convenience as that would require us to ignore basic contract law principles (arbitration dependant on a consensual written contract), ignore the fundamental right to have a jury trial, and ignore constitutional rights to due process." (Slip Opn. at 22.)

Based on these findings, Podolosky's position that the failure of the *Ruiz* Court to follow *Herbert* is "literally unprecedented" is without merit.

B. The Court of Appeal Did Indeed Consider The Intent of Rafael Ruiz And Code Of Civil Procedure Section 1295 In Reaching Its Decision

Podolosky relies on *Bolanos v. Khalatian* (1991) 231 Cal.App.3d 1586 (*Bolanos)* in support of his position that the *Ruiz* Court ignored the intent of the contracting parties and Code of Civil Procedure section 1295 in reaching its decision. Absent from that analysis is the later case of *County of Contra Costa, supra* 47 Cal.App.4th 237 which did not follow the *Bolanos* line of thinking.

In *County of Contra Costa,* after considering the *Bolanos* and *Gross* cases and their findings that a medical malpractice arbitration clause applies to any claim arising out of the contracted-for services regardless of whether they are asserted by the patient or a third party, the court discussed the limited circumstances in which nonsignatories can be bound by an arbitration agreement and opined that the *Bolanos* and *Gross* cases went too far and ignored the constitutional and procedural

rights of the nonsignatory third parties. It further definitively stated that the strong public policy in favor of arbitration does not extend to those who are not parties to the agreement or who have not authorized anyone to act for them in executing the agreement. (*County of Contra Costa, supra* 47 Cal.App.4th at p. 244-245; *see* also Slip Opn. at 8 and 17.)

The *Ruiz* Court, after consideration of Code of Civil Procedure section 1295 and the cases pertinent thereto, rightly found that a cause of action created by the wrongful death statute is separate and distinct from a cause of action the deceased would have had for personal injuries had he survived; heirs do not stand in the shoes of the party who signed the arbitration agreement; and there is no contractual or statutory basis to confer on "medical patients" the special status of being able to waive the constitutional due process rights of family members (who are not third party beneficiaries or when there is no preexisting relationship). (Slip Opn. at 22.)

These findings are not in error nor are they grounds for review or reversal of the *Ruiz* opinion.

C. The Court of Appeal Addressed The Patient-Physician Relationship In The Context Of The Facts Of This Case

Consistent with all of Podolosky's reasons for review, he cites *Herbert* for the position that the *Ruiz* court did not consider the patient-physician relationship in its decision. A full reading of the opinion in the context of the facts of the case proves otherwise.

As stated *supra*, the *Herbert* case involved a medical plan covering the Herbert family. It was not the independent physician-patient arbitration agreement Rafael signed simply to receive his treatment. There was no issue that decisions as to the terms of his medical treatment, including the arbitration provision, were his alone to make.

Under these circumstances, there is no contractual or statutory basis to confer on "medical patients" such as Rafael the special status of being able to waive his family members' constitutional due process rights. (Slip Opn. at 22.)

D. The Court Of Appeal Considered The One-Action Rule In Reaching Its Decision

There is no question that the one action rule and how it applied to the facts of this case were considered and thoroughly analyzed by the *Ruiz* court. In fact, it is discussed and dissected in 4 pages of the 23 page opinion commencing at page 5.

In reaching its opinion, the *Ruiz* court found that (1) the one action rule is not jurisdictional, its protections can be waived, and courts can infer waiver (*Smith v. Premier Alliance Ins. Co.* (1999) 77 Cal.App.4th 691, 698; Slip Opn. at 7); and (2) the one action rule was designed to provide a defendant protection from successive suits by heirs of whose existence the defendant had not known which is not the case here (*Valdez v. Smith* (1985) 166 Cal.App.3d 723, 727-728; Slip Opn. at 7-8).

Under the circumstances of this case, the *Ruiz* court accurately determined that Podolosky put himself in the position of waiving the one action rule (Slip Opn. at 3 and 8.) and the convenience of litigating in one forum for one party does not

trump another party's right to a jury trial of his or her independent action. (Slip Opn. at 3, 8 and 22.)

E. The Court of Appeal's Analysis As To Why "Contract Principles" And "Right To A Jury Trial" Outweigh The Convenience Of Litigating In One Forum And The Public Policies Favoring Arbitration Was Sound And Legally Supported

The *Ruiz* decision aptly analyzed why contract principles and the right to a jury trial in these circumstances outweigh the convenience of litigating in one forum and the public policies favoring arbitration. It did so in its analysis of the one action rule (Slip Opn. at 5 – 8); in its analysis of the rules regarding contractual arbitration and nonsignatory parties (Slip Opn. at 8- 10); and in its lengthy analysis of the evolving body of authority, including out of state authority, concerning the binding effect of arbitration agreements on nonsignatory spouses and adult children (Slip Opn. at 10-22). It did not err; it did not create entirely new law; and it did not throw into uncertainty the rules and policies governing enforcement of arbitration agreements. (Pet. at p. 31.) Its conclusions were sound and legally supported.

F. The Import Given To The *Rhodes* Case By The Court of Appeal Was Proper

In its analysis of the split of authority in California involving the binding effect of arbitration agreements on spouses and adult children, the Court of Appeal summarized that there were two lines of cases in this area and identified *Rhodes* as the beginning of the line of cases that found wrongful death is not a derivative cause of action and therefore a patient cannot bind nonsignatory heirs bringing a

wrongful death claim absent a preexisting agency-type relationship and *Herbert* as the basis for the line of cases that hold patients being treated have the broad authority to bind nonsignatory heirs to a medical arbitration agreement, especially in cases of wrongful death. (Slip Opn. at 2.)

It did not stop there. The Court went on to examine the general law regarding wrongful death and the one action rule and cases thereon, the rules and cases pertaining to contractual arbitration, and ultimately the numerous cases that followed *Rhodes* and those that followed *Herbert.* In other words, the Court did not read too much into *Rhodes* – it was just the first chapter in the long line of cases considered by the Court in reaching its decision.

As to Podolosky's position that the weakness of *Rhodes* is demonstrated by plaintiffs' failure to raise it in the trial court, this has no bearing on the import given to *Rhodes* by the Court of Appeal.

G. The Court of Appeal's Opining That Rafael's Wife Was Not Bound To Arbitrate Was Consistent With The Court's Analysis Of All Of The Case Law That Formed The Basis Of Its Opinion

The Court of Appeal methodically analyzed both California and out of state authority in reaching its decision and the opinion that Rafael's wife and his adult children were not bound by the arbitration agreement. This was not gratuitous. And while Plaintiffs were constrained by the position they took as to the wife based on *Buckner*, it does not change the conclusions reached by the Court, including its determination that equitable principles precluded disturbing the trial court's ruling

with respect to the wife. (Slip Opn. at 23.) It should also be noted that the Ruizes did indeed argue in the trial court that the entire matter should remain in superior court to prevent conflicting rulings and to avoid inconsistent verdicts, unnecessary delay, multiple actions, and duplicative discovery which was discussed in the respondent's brief and referenced in the decision. (Slip Opn. at 2 and 4.) The reliance on *Reyes v. Kosha* (1998) 65 Cal.App. 451,456 fn.1 (sic)[1], *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 and *Havstad v. Fidelity National Title Ins. Co.* (1997) 58 Cal.App.4th 654, 661 is therefore misplaced.

CONCLUSION

The Court of Appeal's decision in *Ruiz* does not warrant review. It is sound, resolves conflicts in the case law and should not be reversed.

DATED: August 20, 2009

Respectfully submitted,

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By:

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[1] The actual cite is 65 Cal.App.4th 451, 466, fn. 6.

CERTIFICATE OF WORD COUNT

(California Rules of Court, rule 8.504(d)(1))

Counsel of record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the within brief is produced using Microsoft Word 13-point Roman type, including footnotes, and contains approximately 3744 words, which is less than the 8,400 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: August 20, 2009

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(4TH Civil Case No. G040843)

STATE OF CALIFORNIA
COUNTY OF ORANGE

I am employed in the County of Orange, State of California; I am over the age of 18 and not a party to the within action; my business address is: 18200 Von Karman Avenue, Ste. 500, Irvine, CA 92612.

On this day, August 21, 2009, I served the foregoing document described as: **ANSWER TO PETITION FOR REVIEW** on all interested parties / entities in this action by placing the original where indicated as well as true copies thereof enclosed in sealed envelopes addressed as follows:

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