S147190

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**Raymond Edwards III,**

*Plaintiff and Appellant,*

*v.*

**Arthur Anderson LLP,**

*Defendant and Respondent*



Appeal from Court of Appeal, District No. 2, Div. No. 3
Case No. B178246
Los Angeles Superior Court Case No. BC255796
Hon. Andria K. Richey, Judge

# REQUEST BY CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION FOR PERMISSION TO FILE AMICUS BRIEF AND AMICUS BRIEF IN SUPPORT OF PLAINTIFF/APPELLANT

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Attorneys for Amicus Curiae
California Employment Lawyers Association

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REQUEST FOR PERMISSION TO FILE AMICUS BRIEF:

TO THE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

The California Employment Lawyers Association (CELA) requests permission to file a brief as amicus curiae in support of Plaintiff and Appellant. CELA is a statewide organization of attorneys primarily representing plaintiffs in employment termination and discrimination cases.

CELA, through its undersigned attorney, is familiar with the questions involved in this case and the scope of their presentation and believes that there is necessity for additional argument on the following points:

- Whether the proposed "narrow restraint" exception to Business and Professions Code Section 16600 would undermine worker mobility and societal interests?

- Whether form release agreements such as the one presented to Mr. Edwards should be viewed from the perspective of the reasonable worker when evaluated in the context of a "refusal to sign" case?

If this request is granted, the following brief in support of plaintiff and appellant is respectfully submitted.

Respectfully submitted,

Date: May 13, 2007 LAW OFFICES OF JEFFREY K. WINIKOW

By: Jeffrey K. Winikow
Attorney for Amicus Curiae
California Employment Lawyers Assoc.

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# CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION'S AMICUS BRIEF IN SUPPORT OF PLAINTIFF/APPELLANT

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## SUMMARY OF ARGUMENT:

The questions raised in this case affect legal rights and policy issues far broader than those simply arising from Business and Professions Code Section 16600. While CELA fully concurs with the points and authorities presented by Mr. Edwards in his Answering Brief, CELA submits this amicus brief to highlight the legal and practical impact that restrictive covenants may have on workers involuntarily displaced from their jobs.

In the wrongful termination context it is often difficult to reconcile a common law duty to mitigate damages with a covenant not to compete with one's former employer. Indeed, the duty to mitigate only extends to one's obligation to seek and accept "substantially similar" employment, yet employers who promulgate restrictive covenants seek to subject workers to suit if they do just that, i.e., accept employment too similar to their former jobs. To suggest that a "narrow restraint" only affects some portion of the array of potential employment opportunities is to ignore that the narrow universe of jobs affected by a restrictive covenant is often the very same narrow universe of jobs to which a mitigation duty attaches. Indeed, in this very case, Arthur Anderson has plead "failure to mitigate," while at the same time it has argued for an expansive right to prevent former employees from working for others.

Moreover, from a policy standpoint, recognizing a "narrow restraint" exception to Business and Professions Code Section 16600 impacts both the interests of the State and the interests of an aging workforce. The State should be concerned whenever there is an under-utilization of resources, especially in California's rural counties where the

market for skilled personnel like physicians may not be as plentiful as in other areas of the State. And individuals – especially older workers – need to be concerned about obtaining jobs should they become involuntarily displaced from their current ones. When older workers have to compete for jobs outside of the arena where their specialized skill and knowledge makes them most marketable, then the so-called "narrow restraint" becomes more like an untenable straight-jacket.

Finally, in cases where a company retaliates against an employee for not signing a so-called standard form agreement, liability is premised upon the conscious decision to retaliate and not upon the company's draftsmanship. When an employer compels its workforce to sign form agreements, then the employer better make sure that its agreements are lawful ***as written***. This is not a particularly onerous burden to bear, especially when Arthur Anderson carved out some, but not all, non-waivable claims from its otherwise comprehensive release. Companies which promulgate over-reaching agreements should act at their own peril when they exercise their considerable power over the worker because the worker refused to sign the over-reaching agreement. Whether or not Arthur Anderson intended to chill the exercise of statutory rights, such as the right to indemnification under Labor Code Section 2802, it has done just that. In "refusal to sign" cases, the court should construe agreements from the prospective of a reasonable worker reading it.

## THE NATURE OF CELA'S INTEREST IN THIS MATTER:

The California Employment Lawyers Association ("CELA") is an organization composed of attorneys who represent primarily plaintiffs in employment discrimination and related cases. Through its undersigned attorney, CELA is familiar with the questions involved in this case and the scope of their presentation. CELA has sought leave of Court to submit this brief.

## ARGUMENT

### A. Importing a "Narrow Restraint" Exception to Business & Professions Code Section 16600 Undermines, If Not Eviscerates, a Common Law Duty to Mitigate Damages

The Defendant in this case, like many wrongful termination defendants, has plead and pursued an affirmative defense regarding the Plaintiff's alleged "failure to mitigate" damages. 4 AA, pg. 441. But this defense, where it applies, does not require one to accept ***any job***. Instead, a mitigation duty merely requires one to seek and accept comparable work "substantially similar" to his or her former job.

The legal issues presented in this case will have a significant, practical impact on tens of thousands of individual workers. And there is a palpable tension between enforcing restrictive covenants and enforcing a duty to mitigate. It is simply not enough to suggest that narrow restraints on trade are permissible when the duty to mitigate itself is only a narrow doctrine.

1. The Duty to Mitigate Does Not Require One to Accept Work Which Creates "Undue Risk," Which Includes The Economic Risk of Getting Sued on a Restrictive Covenant

The Restatement of the Law of Contracts holds that the duty to mitigate only extends to harm which the plaintiff could have avoided by reasonable effort and without "***undue risk, burden or humiliation***". Restatement 2d Contracts, Section 350(1). The Restatement further clarifies the mitigation duty by noting that it is not reasonable to expect a plaintiff to "take steps to avoid the loss if those steps may cause other serious loss." Restatement 2d Contracts, Section 350 Comment (g). Specifically, a plaintiff "need not, for example, ***make other risky contracts***, incur other reasonable expenses or inconvenience or disrupt his business." Id. (emphasis added). See also CACI 358 ("You should consider the reasonableness of [Plaintiff's] efforts in light of the circumstances facing [him/her/it] at the time, including [his/her/its] ability to make the efforts or expenditures without undue risk or hardship.").

In other words, the mitigation duty does not compel one to accept a subsequent job when doing so carries a risk of getting sued based upon a restrictive covenant with one's prior employer.

2. Under California Law, The Duty to Mitigate Only Extends to a Narrow Range of Jobs That Are Within the Universe of the "Narrow Restraint" Doctrine

Proponents of the "narrow restraint" exception urge the Court to adopt so-called "reasonable" encroachments upon one's right to pursue

work, completely ignoring that the mitigation duty is similarly grounded in the very same type of reasonableness. Proponents of the "narrow restraint" exception seek to exclude workers from taking only a small subset of potential jobs, yet the mitigation duty only applies to a small subset of jobs. Parker v. Twentieth Century Fox Film Corp., 3 Cal.3d 176, 181-182 (1970) (duty to mitigate only extends to jobs that are truly comparable and substantially similar). See also Sellers v. Delgado College, 902 F.2d 1189. 1193 (5th Cir. 1990) (describing the concept of substantial similarity as jobs which are "***virtually identical***" to one another in terms of duties, responsibilities, compensation and working conditions) .

Proponents of the "narrow restraint" exception also seek to exclude workers from taking jobs only within a circumscribed geographical area, yet the mitigation duty only applies to jobs within that same circumscribed geographical area. See, e.g., Cunningham v. Retail Clerks Union, 149 Cal.App.3d 296, 307 (1983) (plaintiff need not accept a job in a different geographical area); California School Employees Association v. Personnel Commission, 30 Cal.App.3d 241, 250-255 (1993) (examining whether alternative employment was comparable based upon its "locality"). See also CACI 2407, which identifies several factors which are used to assess comparability for mitigation purposes.

It is difficult, if not to say impossible, to reconcile the "narrow restraint" exception with the mitigation duty while sitting in an academic ivory tower. Perhaps there is some small subset of jobs the exclusion from which could potentially constitute a "narrow restraint" while still being sufficiently comparable to withstand the mitigation doctrine. But what does this academic exercise say about the difficulty a worker will face

when he has to make a real life decision affecting real life interests in real time when a restrictive covenant is seemingly at odds with one's legal duty?

While not all cases involving restrictive covenants will arise in a wrongful termination context, the Court should nonetheless try to view the analytical issues presented here through the prism of a mitigation analysis. If it does so, the two doctrines simply cannot be harmonized with one another in any way that makes legal or logical sense.

B. The Narrow Restraint Exception Undermines The Public Interest and Disenfranchises Workers From The Communities

Restrictive covenants undoubtedly affect the public interest, as resources are taken from their highest and best use and are forced in other directions. How could this type of underutilization of human capital possibly benefit society as a whole?

As one example, imagine a situation involving a physician in one of California's many rural counties who is forced out of his or her practice group. How does enforcing a "narrow restraint" on that physician's right to practice medicine in one of those counties further the public's interest? It doesn't. It forces the public to subordinate its interests to that of the physician's former employer. Doctors will have to flee their communities; and patients will be left without healthcare.

As Mr. Edwards highlights, California's Silicon Valley has emerged as one of the most sophisticated and successful bastions of technology in the world, and many would argue that its success can be attributed in large part to the fact that highly skilled workers do not face the

same type of impairments to their mobility that may face workers in other communities. See, for example, Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete* ,74 N.Y.U.L. Rev. 575, 577-579 (1999) (contending that Silicon Valley has outperformed the equivalent region in Massachusetts because California's general refusal to enforce non-compete agreements).

While one may commonly think of restrictive covenants as only applying only to highly skilled workers like physicians, accountants or technology gurus, the practical reality is that restrictive covenants appear in a wide range of employment contracts and corporate policies. The following is just a short list of the types of moderately skilled jobs whose workers have been faced with restrictive covenants.

- ***Bartenders***: Daiquiri's III on Bourbon, Ltd. v. Wandfluh, 608 So. 2d 222 (La. Ct. App. 1992);
- ***Cosmetologists***: Carl Coiffure, Inc. v. Mourlot, 410 S.W.2d 209 (Tex. Civ. App. 1967);
- ***Pest Exterminators***: Orkin Exterminating Co. v. Etheridge, 582 So. 2d 1102 (Ala. 1991);
- ***Garbage Collectors***: Brewer v. Tracy, 253 N.W.2d 319 (Neb. 1977);
- ***Janitors***: Royal Servs., Inc. v. Williams, 334 So. 2d 154 (Fla. Dist. Ct. App. 1976)
- ***Night Watchmen***: Stein Steel & Supply Co. v. Tucker, 136 S.E.2d 355 (Ga. 1964)

- ***Undertakers***: Folsom Funeral Serv. v. Rodgers, 372 N.E.2d 532 (Mass. App. Ct. 1978).

Allowing a "narrow restraint" exception to Business and Professions Code Section 16600 will affect a whole host of California's workers and California's communities.

C. The Narrow Restraint Exception is Grossly Unfair to Workers Who Have Dedicated Their Careers to Developing Skills

A worker who has spent his or her career developing job skills needs to be able to use those skills to market themselves should they be faced with unemployment. The business community does not seem to be beating down doors to court workers in their forties, fifties, or sixties (not to mention workers even older than that) – and the prospect of expanding restrictive covenants in California will only make it that much more difficult for these workers to secure subsequent jobs.

To suggest that the "narrow restraint" exception only covers a "minor part of the market" is to ignore that it is this precise part of the market in which the worker has his or her greatest skill and marketability. To dismiss away an encroachment as being only "minor" or "narrow" is akin to saying, "...other than that Mrs. Lincoln, how was the play?" Well, other than being able to use one's job skills in the community in which one lives, what is the problem with a "narrow restraint" exception?

It is one thing to draw a line at protecting an employer's proprietary trade secret interests, but it is quite another to start moving that line when there is an aging population of Baby Boomers in this State. Adopting the "narrow restraint" exception could only lead to thousands of

workers being too scared or too intimidated into using their skills for someone else once their former employer tosses them to the sidewalk. At a minimum, these covenants force workers out of a competitive marketplace where their specialized skills and knowledge foster bona fide marketability, and into a different, and more generic, ultra-competitive marketplace for all job seekers. In youth-oriented sectors like Technology, the "narrow restraint" on mobility can easily be the difference between having an older worker remain as a vital part of the labor force – or having him sit on the couch watching "Oprah."

It is difficult to imagine a judicially created "narrow restraint" exception to Business and Professions Code Section 16600 which would itself contain an exception for workers who are involuntarily forced out of their existing jobs, but CELA requests that the Court do just that if it elects to adopt any portion of the "narrow restraint" exception. CELA's strong preference, however, is to reject the exception in its entirety, as employee mobility interests do not merely stand on par with employers' business interests, they rise far about them – at least when employees respect the proprietary nature of an employer's bona fide trade secrets.

D. The Legality of Arthur Anderson's Release Language Must Rise and Fall on the Four Corners of the Document When Evaluated in the Context of this Case

This case involves a worker who was retaliated against for refusing to sign a document releasing potential claims against his former

employer[1]. Here, the specific dispute focuses on whether or not the compelled release of "any and all" claims violates Labor Code Section 2802, but the case could have easily have been about one employer refusing to hire a worker unless that worker released civil rights claims against Arthur Anderson. See, for example, Skillsky v. Lucky Stores, Inc., 893 F.2d 1088, 1094 (9th Cir. 1990) (an employer may not retaliate against a worker because the worker had previously pursued claims against a prior employer). Indeed, substantial questions of retaliatory bias arise ***anytime*** one employer conditions employment on a worker releasing claims against their prior employer ***because workers who have the temerity to assert their rights will be systematically screened out of jobs.***

As a matter of policy, CELA asserts that there should be a presumption against an employer conditioning terms, privileges and benefits of employment on compelled releases. But even if one does not goes so far as to adopt a presumption one way or the other, where – as here – a worker refuses to sign a compelled release, then the release must be construed in accordance with its four corners, as it appears to a reasonable worker, and not with the 20-20 hindsight of how that agreement might later be construed by a court if and when a defendant asserts the release as a shield against claims.

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[1] CELA recognizes that the specific claim at issue is for interference with prospective economic advantage, and not for retaliation. The term "retaliation," however, best exemplifies the independent wrong used to support this claim.

1. Liability in "Refusal to Sign" Cases is Premised Upon the Conscious Decision to Retaliate, Not on Sloppy Draftsmanship.

Cases involving employees refusing to sign cram down agreements have three basic elements[2]: (1) an employer-promulgated form agreement; (2) a worker who refuses to sign that agreement; and (3) an employer that retaliates against the worker by either firing him, disciplining him or, as in this case, interfering with his ability to get a subsequent job. Oftentimes, these cases do not involve issues of causation, i.e., there is no dispute that the failure to sign the agreement prompted the action at issue.

In "refusal to sign" cases, liability is not premised upon the first element; it is premised upon the employer's conscious decision to tie rights and privileges to employee acquiescence. When an employer guesses incorrectly, and presumes that its cram-down agreement is lawfully drafted, then it should act at its peril when it decides to punish the worker for refusing to sign it.

This case presents the somewhat awkward situation of an employer having to attack the legality of its own release language by construing the waiver to reach only those claims which could lawfully be waived. This may be all well and good in a situation where a court must construe the release language in order to determine whether or not the

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[2] Examples of "refusal to sign" cases include D'Sa v. Playhut, Inc., 85 Cal.App.4th 927 (2000) and Thompson v. Impaxx, 113 Cal.App.4th 1425 (2003).

release reached a given set of claims[3], but those cases are not this case.

Courts and attorneys are well versed in tossing around maxims of construction to provide an analytical framework for examining contracts. Workers, however, are not. When a company elects to use broad and sweeping release language like "any and all claims" in its standard form agreements, the agreements need to be construed as potential waivers of "any and all claims" when a worker refuses to sign it[4].

Last year, the National Labor Relations Board invalidated a California employer's arbitration program because the employer's language was overly broad in subjecting ""all disputes" to arbitration. U-Haul Company of California, 347 NLRB No. 34 (2006). Specifically, the NLRB held that this type of broad language could reasonably deter workers from filing Unfair Labor Practice charges with the Board. Because the arbitration policy could be read by some workers as inhibiting them from

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[3] While the specific issue in this case involves Labor Code Section 2802, other types of potential claims would also survive the specific release language presented in this case. These claims include claims for workers' compensation benefits (Labor Code §§ 5001, 5003), claims for unemployment insurance (Unemp. Ins. Code § 1342), and claims for federal age discrimination (29 U.S.C. § 626). Yet, it is possible that workers having these sorts of potential claims have been deterred from asserting them given the comprehensive waiver at issue in this case.

[4] Arthur Anderson's suggestion that to be effective a release cannot imply terms that are not expressly written (Reply Brief, pg. 15) flies in the face of established precedent which affirms the validity of broad releases. Jefferson v. Dept. of Youth Authority, 28 Cal.4th 299 (2002) (workers compensation release bars discrimination claim); Bardin v. Lockheed Aero. Sys., 70 Cal.App.4th 494, 505-507 (1999)(release covering 'any and all liability" covers claims relating to a defendant's alleged false statements).

exercising statutory rights, the arbitration policy was deemed unlawful. The U-Haul of California decision did not reflect the actual scope of the arbitration provision as much it reflected how the specific language adopted by the employer could affect the reasonable worker reading it.

Whether the employer in U-Haul of California ever intended to apply its policy to claims raised with a government agency was not the issue. And, here, whether Arthur Anderson ever intended to apply its release agreement to claims under Labor Code Section 2802 is not the issue. The issue is how the agreement reads, and whether it could inhibit workers from exercising statutory rights. It is simply not enough for companies like Arthur Anderson to say that it would not attempt to enforce these waivers against claims arising under Labor Code Section 2802 when it is impossible to determine whether workers were deterred from ever asserting the claims in the first place.

2. Arthur Anderson Knew How to Carve-Out Unlawful Release Provisions.

In this case, Arthur Anderson expressly carved out certain types of non-waivable claims from the scope of the release. Specifically, the release contained an exception for wage and hour claims, thus saving it from legal challenge under Labor Code Sections 206.5 and 219[5]. Yet,

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[5] The pertinent part of the release carve out has two parts: claims arising out of the TONC agreement and claims arising from wage and hour law. 7 AA 1385, Exh. 42 . The release language is quoted in full at footnote 1 of Edwards' Answering Brief, pgs 5-6.

The carve out in the release agreement, therefore, would presumably

Arthur Anderson failed to carve out any other type of non-waivable claim, such as those arising under Labor Code Section 2802– despite the fact that Mr. Edwards specifically brought the 2802 issue to the Company's attention. Answering Brief, pg. 7. Because Arthur Anderson expressly chose to exclude some, but not all, non-waivable claims from its release, there should be an inference that it did not intend to exclude Section 2802.

This case doesn't present the hypothetical situation of a drafter that could have theoretically carved out certain types of claims from its release language; Arthur Anderson actually did so. Blackballing Mr. Edwards from working with HSBC due to Mr. Edwards' refusal to sign this specific release language is an independent wrong supporting Mr. Edwards' claim for intentional interference.

3. Compelling Releases of Claims Under Labor Code Section 2802 Would Be Unlawful

Because this Court granted review on the issue of the ultimate legality of Arthur Anderson's release language as applied to non-waivable statutory claims such as those arising under Labor Code Section 2802, CELA wishes to stress its belief that the release does not – and cannot – bar these types of claims. Private parties simply may not agree to alter statutory duties which embody minimum state labor standards. De Haviland v. Warner Bros. Pictures, 67 Cal.App.2d 225, 235-236 (1944); Imel v.

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allow former Arthur Anderson employees to bring claims for meal period violations (Labor Code Section 226.7), kick-back violations (Labor Code Section 221) and waiting time penalties (Labor Code Section 203) amongst other things.

Laborers Pension Trust Fund for No. Cal., 904 F.2d 1327 (9th Cir. 1990).

Civil Code Section 1668 provides that contracts "which have for their object, directly or indirectly, to exempt anyone from responsibility for his own...violation of law...are against the policy of the law." To the extent that the release language adopted by Arthur Anderson purports to do just that, it should be declared null and void.

This case does not present the issue of how one may settle claims involving a bona fide dispute, as the release language was adopted in a standard form agreement and not as part of a negotiation over a contested claim. While some release-related cases may give rise to policy arguments favoring the settlement of claims (e.g., Jefferson v. Dept. of Youth Authority, 28 Cal.4th 299 (2002) (language in a workers compensation release bars claim for sexual harassment)), this case does not present any of those policy concerns. The agreement was nothing more than an employer's demand that all workers waive their legal rights against Arthur Anderson – regardless of whether they were legally waivable rights – if they wanted a job with Arthur Anderson's de facto successor.

4. Courts Should Not Reform Unlawful Agreements

This case does not involve an agreement that would be deemed unconscionable according to its own terms; it involves an agreement which is ***unlawful*** according to its own terms. Arthur Anderson, in essence, is not only asking this court to sever out any unlawful, over-reaching terms of the release but to charge Mr. Edwards and other workers with the responsibility of doing so themselves when they review the document. Even if it were somehow appropriate to charge workers with

knowing the scope of a so-called standard form release, courts should not be severing out provisions of agreements which on their terms are unlawful (as opposed to agreements which are unconscionable). Civil Code Section 1670.5(A).

Whether it is a release agreement, or an arbitration provision, employers must be held accountable for drafting overly broad agreements seeking to restrict and limit the exercise of workers' statutory rights. As noted in Fitz v. NCR Corp., 118 Cal.App.4th 702, 728 (2004):

> An employer will not be deterred from routinely inserting such a deliberately illegal clause into the arbitration agreements it mandates for its employees if it knows that the worst penalty for such illegality is severance of the clause . . . In that sense, *the enforcement of a form arbitration agreement containing such a clause drafted in bad faith would be condoning, or at least not discouraging, an illegal scheme* . . .

Many employers would like nothing more than to compel employees to sign over-reaching, broad releases, knowing that the worst thing that can happen is that a court will only enforce the release to the extent that it may lawfully be enforced. Meanwhile, the employer might be able to dissuade and deter others from exercising statutory rights or otherwise asserting claims. In other words, through promulgating over-reaching agreements one could enjoy prophylactic benefits without incurring any costs by chilling the exercise of statutory rights. But here, Arthur Anderson takes this goal even further by seeking a rule of law which would allow employers to compel workers to sign over-reaching agreements under the threat of non-hire or discharge, leaving issues about

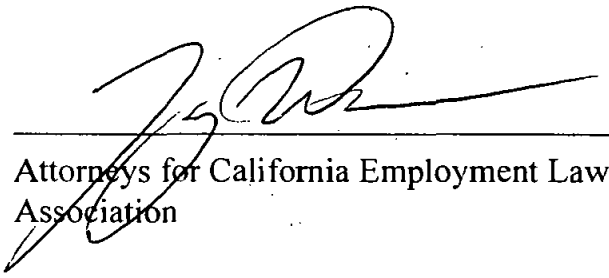
the actual legality of the release for another day. In an arena already tainted with grossly disproportionate bargaining power, this simply goes too far.

## CONCLUSION

For the foregoing reasons and authorities, CELA respectfully requests that this Court affirm the Court of Appeal's decision and remand this case for trial.

May 13, 2007

LAW OFFICES OF JEFFREY K. WINIKOW



Attorneys for California Employment Lawyers Association

## CERTIFICATE RE: WORD COUNT

I, Jeffrey K. Winikow, hereby certify that pursuant to Rule 14 of the California Rules of Court, that the Amicus Curiae brief submitted by the California Employment Lawyers Association contains 4526 words (including caption sheets and the request to file this brief). I make this representation in reliance upon the word count program accompanying the WordPerfect software that was used to create this brief.

May 13, 2007

Jeffrey K. Winikow
Attorney for Amicus Curiae
California Employment Lawyers Assoc.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1801 Century Park East, Suite 1520, Los Angeles, CA 90067.

On May 14, 2007, I served the following document described as:

REQUEST TO FILE AMICUS BRIEF; AMICUS BRIEF

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Executed on May 14, 2007 at Los Angeles, California.