

UNITED STATES DISTRICT COURT
Northern District of California
450 Golden Gate Avenue
San Francisco, California 94102

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Richard W. Wieking
Clerk

General Court Number
415.522.2000

October 10, 2007

CASE NUMBER: CV 07-05107 JCS

CASE TITLE: JOSHUA HILD-v-CALIFORNIA SUPREME COURT

REASSIGNMENT ORDER

GOOD CAUSE APPEARING THEREFOR,

IT IS ORDERED that this case is reassigned to the **San Francisco** division.

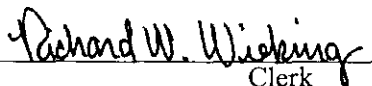
Honorable THELTON E. HENDERSON for all further proceedings.

Counsel are instructed that all future filings shall bear the initials **TEH** immediately after the case number.

ALL MATTERS PRESENTLY SCHEDULED FOR HEARING ARE VACATED AND SHOULD BE RENOTICED FOR HEARING BEFORE THE JUDGE TO WHOM THE CASE HAS BEEN REASSIGNED.

Date: 10/10/07

FOR THE EXECUTIVE COMMITTEE:


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RICHARD W. HARRIS
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

JCS

11 JOSHUA HILD,

12 Plaintiff,

13 vs.

14 CALIFORNIA SUPREME COURT;
15 CALIFORNIA COURT OF APPEAL,
16 SECOND APPELLATE DISTRICT,

16 Defendants.

CASE NO. 07 5107

COMPLAINT FOR DECLARATORY
JUDGMENT FOR VIOLATION OF
FEDERAL CONSTITUTIONAL
RIGHTS AND FOR INJUNCTIVE
RELIEF.

18 COMES NOW, Plaintiff JOSHUA HILD, and hereby complains of the Defendants and
19 each of them as follows.

20 PARTIES

21 1. At all times relevant herein, Plaintiff JOSHUA HILD, was and is a citizen and
22 resident of the County of Fresno, State of California.

23 2. At all times herein mentioned, Defendant CALIFORNIA SUPREME COURT
24 was and is the superior appellate judicial branch of the government of the State of California
25 duly created and existing pursuant to Article VI of the California Constitution.

26 3. At all times herein mentioned, Defendant CALIFORNIA COURT OF APPEAL,
27 SECOND APPELLATE DISTRICT, was and is an intermediate appellate judicial branch of
28 the government of the State of California duly created and existing pursuant to Article VI of

1 the California Constitution.

2 **JURISDICTION AND VENUE**

3 4. Jurisdiction of this Court over the subject matter of this action is predicated on
4 28 U.S.C. § 1331, in that the Plaintiff's claims herein of denial of due process and equal
5 protection arise under the 14th Amendment of the U.S. Constitution.

6 5. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b), in that
7 Defendant CALIFORNIA SUPREME COURT has its principal place of official business in
8 the City and County of San Francisco, State of California.

9 **GENERAL ALLEGATIONS**

10 6. On March 22, 2003, Plaintiff and a minor child at the time, Joshua Hild, (a
11 resident of the small company town of Big Creek located 90 miles northeast of Fresno,
12 California), was seriously injured by Katherine Magdaleno, while she was on duty as an
13 employee of the Southern California Edison Company ("SCE"), when a paint ball gun being
14 held by Ms. Magdaleno accidentally discharged, permanently blinding Plaintiff in his right
15 eye.

16 7. On April 28, 2003, acting by and through his guardian ad litem, Plaintiff filed
17 a civil action for personal injuries against SCE in the Los Angeles Superior Court, Case No.
18 BC294734 ("Underlying Civil Action").

19 8. During pretrial discovery in the Underlying Civil Action, it was discovered that
20 immediately following the accident, Ms. Magdaleno's immediate supervisor at SCE, Andrew
21 McMillan, had admittedly spoliated, contrary to SCE document retention policies, a
22 handwritten statement contemporaneously prepared by Ms. Magdaleno at Mr. McMillan's
23 direction, reciting the facts of the accident. Ms. McMillan replaced the handwritten statement
24 with a self serving typewritten account which admittedly embellished the incident by adding
25 legal terms of art intended to defend against prospective SCE tort liability, euphemizing the
26 accident as "horseplay," words Mr. McMillan admitted never appeared in the original account,
27 the contents of which will never truly be known.

28 9. SCE thereafter further willfully concealed and suppressed in sworn discovery

1 responses the fact of the one-time existence and subsequent destruction of that original, fresh,
2 contemporaneously-prepared handwritten evidence, leading to a motion by Plaintiff for issue,
3 evidence and terminating sanctions, based on upon that spoliation, brought pursuant to the
4 California doctrine of *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1.
5 The motion was granted by the trial court in part, and the trial court ultimately approved the
6 giving of CACI 204 (willful suppression of evidence) at the trial of the action.

7 10. The case was tried to a Los Angeles County Superior Court jury on April 22,
8 2005, solely on the issues of whether Ms. Magdaleno had been acting within the scope of her
9 employment at the time of the accident, and on Plaintiff's damages (as SCE stipulated that
10 Magdaleno had been negligent and had been within the course of her employment at the time
11 of the accident).

12 11. Based upon the substantial evidence presented at trial, the jury found as an issue
13 of fact, that Ms. Magdaleno had been acting within the scope of her employment, rendering
14 SCE liable for her conduct and Plaintiff's damages in the sum of \$704,633. Judgement for
15 Plaintiff in said sum was subsequently entered for Plaintiff and against SCE on May 24, 2005.

16 12. On August 23, 2005, SCE appealed the judgment to Defendant CALIFORNIA
17 COURT OF APPEAL, SECOND APPELLATE DISTRICT, seeking to overturn the jury's
18 verdict (and judgment based thereon) finding, as a question of fact, that Ms. Magdaleno had
19 been acting within the scope of her employment at the time of the accident.

20 13. During oral argument before on May 21, 2007 before the three-judge panel of
21 Defendant CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, after
22 extensive briefing, the panel posed no questions to Plaintiff's counsel.

23 14. On June 25, 2007, the Defendant CALIFORNIA COURT OF APPEAL,
24 SECOND APPELLATE DISTRICT issued an unpublished opinion, rejecting the jury's (and
25 the trial court's) evaluation of the evidence and the jury's determination of the issues of fact,
26 the Court held that, *as a matter of law*, SCE could not be liable for the damages resulting from
27 the injury Plaintiff suffered as a result of that accident. (A copy of that unpublished Opinion
28 is attached hereto as Exhibit "1.") The Court of Appeal subsequently modified its Opinion on

1 July 24, 2007 at SCE's request specifically to enable SCE to recover its costs below again
2 Plaintiff, which are expected to exceed tens of thousands of dollars.

3 **FIRST COUNT - DECLARATORY JUDGMENT - 28 U.S.C. § 2201**

4 (Against Defendant CALIFORNIA COURT OF APPEAL, SECOND APPELLATE
5 DISTRICT)

6 15. Plaintiff realleges and incorporates by reference each of the allegations of
7 paragraphs 1 through 14, inclusive, above, as though fully set forth herein.

8 16. In summarily issuing its June 24, 2007 opinion as "unpublished," Defendant
9 CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, engaged in
10 prohibited "selective prospectivity," as enunciated by the U.S. Supreme Court's decision in
11 *James S. Beam Distilling Co. v. Georgia* 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481
12 (1991) violating Plaintiff's 14th Amendment rights to due process and equal protection, in the
13 following particulars:

14 A. On April 1, 2007, well prior to issuance of the aforementioned June 25, 2007
15 opinion, Defendant SUPREME COURT OF CALIFORNIA adopted amended California
16 Rules of Court ("C.R.C.") Rule 8.1105(c) governing the standards for certification of
17 published opinions, adopting a November, 2006 Report and Recommendations of Defendant
18 SUPREME COURT OF CALIFORNIA's Advisory Committee on Rules for Publication of
19 Court of Appeal Opinions. (A copy of that Report is attached hereto as Exhibit "2.") Pursuant
20 to amended Rule 8.1105(c), Defendant CALIFORNIA COURT OF APPEAL, SECOND
21 APPELLATE DISTRICT, was obligated after April 1, 2007, to publish opinions under both
22 the former criteria of Rule 8.1105(c), as well as based on and additional new criteria set forth
23 in said Rule, **including "(4) Advances a new interpretation, clarification, criticism, or**
24 **construction of a provision of a constitution, statute, ordinance, or court rule."** Moreover,
25 the Court of Appeal was precluded from considering workload, potential embarrassment of
26 litigants, counsel or judges in deciding whether to certify for publication. Rule 8.1105(d).

27 B. As a result of these new criteria, Defendant CALIFORNIA COURT OF
28 APPEAL, SECOND APPELLATE DISTRICT, was obligated to have published the June 25,

1 2007 opinion under Rule 8.1105(c), because that Opinion clearly deviated dramatically from
2 the controlling and longstanding, well-settled law and *stare decisis* of the State of California
3 in the following numerous and dramatic particulars:

4 1. Defendant CALIFORNIA COURT OF APPEAL, SECOND
5 APPELLATE DISTRICT admittedly violated the very standard of review it cited as the
6 proper standard enunciated in *Perez v. Van Groningen, etc.* (1986) 41 Cal.3d 962,
7 admitting factual issues existed precluding adjudication of scope of employment as a
8 question of law --- yet then did impermissibly so anyway, contrary to *Perez, supra*;

9 2. Defendant CALIFORNIA COURT OF APPEAL, SECOND
10 APPELLATE DISTRICT repudiated the jury's actual fact-finding in Mr. Hild's favor,
11 disregarded substantial evidence the jury relied upon supporting the verdict, and instead
12 selectively chose and reweighed the evidence in SCE's favor in order to reverse the
13 judgment for Mr. Hild, contrary to law prohibiting California Courts of Appeal from
14 "substitut[ing] [their] own inferences or deductions" for those of the jury. *People v.*
15 *Barnes* (1986) 42 Cal.3d 284, 303; *People v. Thornton* (1974) 11 Cal.3d 738, 754; *In*
16 *re Estate of Beard* (1999) 71 Cal.App.4th 753, 779.

17 3. Defendant CALIFORNIA COURT OF APPEAL, SECOND
18 APPELLATE DISTRICT totally repudiated Defendant CALIFORNIA SUPREME
19 COURT's seminal ruling in *Cedars-Sinai Medical Center v. Superior Court* (1998) 18
20 Cal.4th 1, 12, authorizing trial courts to adapt and impose jury instructions on willful
21 suppression of evidence to remedy parties' acts of spoliation of important evidence
22 prejudicial to their opponents (as merely one alternative to recognizing an independent
23 tort cause of action for intentional spoliation of evidence).

24 4. Defendant CALIFORNIA COURT OF APPEAL, SECOND
25 APPELLATE DISTRICT disregarded inferences the jury obviously properly drew
26 against SCE under CACI 204 following SCE's spoliation of the very first handwritten
27 and most critical handwritten account of the incident personally drafted by Ms.
28 Magdaleno, SCE's coverup of that fact in false discovery responses, and the repeated

1 impeachment of Mr. McMillan at trial on the issue. In superimposing its personal
2 belief in SCE's witnesses' credibility over these conflicting adverse inferences arising
3 from the spoliation, Defendant CALIFORNIA COURT OF APPEAL, SECOND
4 APPELLATE DISTRICT repudiated the primary remedy Defendant CALIFORNIA
5 SUPREME COURT expressly intended be available to Plaintiff in lieu of a cause of
6 action for intentional spoliation of evidence in *Cedars-Sinai Medical Center v.*
7 *Superior Court* (1998) 18 Cal.4th 1.

8 5. By totally disregarding all conflicting factual evidence and inferences
9 adverse to SCE subscribed to by the jury, and instead reversing the jury's determination
10 based on its own selection of other evidence favorable to SCE, Defendant
11 CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT usurped
12 the jury's function and nullified altogether the jury's factfinding on these disputed
13 factual questions, violating Plaintiff's constitutionally-guaranteed right to a jury trial
14 on these factual issues. Cal.Const. Art. I, § 16; U.S. Const. 7th Am.; C.C.P. § 592;
15 Evid.C. § 312; *Cavinin v. Pac. Southwest Airlines* (1983) 148 Cal.App.3d 512, 531;
16 *Olivia N. v. NBC* (1977) 74 Cal.App.3d 383, 389.

17 6. Defendant CALIFORNIA COURT OF APPEAL, SECOND
18 APPELLATE DISTRICT'S "unpublished" opinion also dramatically broke new ground
19 holding that, regardless of the admittedly conflicting evidence, the factually disputed
20 admittedly unintentional accident was indistinguishable as a matter of law from
21 rape/sexual battery-intentional tort cases in that no amount of disputed facts will ever
22 bring the case within an employer's scope of employment, *citing Mary M. v. City of Los*
23 *Angeles* (1991) 54 Cal.3d 202, 219.

24 7. Defendant CALIFORNIA COURT OF APPEAL, SECOND
25 APPELLATE DISTRICT asserted that the scores of well-settled cases cited by Plaintiff
26 holding the issue of scope of employment to be a question of fact in a myriad of
27 factually comparable employer-employee accident cases, quipping "[a]ll of the cases
28 are distinguishable." However, Defendant CALIFORNIA COURT OF APPEAL,

1 SECOND APPELLATE DISTRICT thereafter only addressed a single case cited by
2 Plaintiff, and conspicuously offered no explanation whatsoever as to how or why the
3 scores of other cases cited by Plaintiff which plainly conflicted with its decision, were
4 or are “distinguishable.”

5 8. In never stating, nor apprising Plaintiff of, the revolutionary and
6 controversial new legal grounds relied upon by Defendant CALIFORNIA COURT
7 OF APPEAL, SECOND APPELLATE DISTRICT, for its unpublished June 25, 2007
8 Opinion until issuing that Opinion for the very first time, Defendant CALIFORNIA
9 COURT OF APPEAL, SECOND APPELLATE DISTRICT further denied Plaintiff any
10 opportunity to address in writing and/or orally, the new and revolutionary grounds it
11 intended to apply, and did so apply in issuing said opinion, and thus denied Plaintiff his
12 due process rights.

13 C. In purposefully electing to issue the June 25, 2007 opinion as “unpublished,”
14 Defendant CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT further
15 ensured denial to Plaintiff any right to judicial review by the Defendant CALIFORNIA
16 SUPREME COURT of its June 25, 2007 opinion, as a result of the following:

17 1. Under C.R.C. Rule 8.1115, the “unpublished” opinion may not be cited
18 or relied upon for any purpose by any other California appellate or trial court in any
19 other case. Consequently, by deeming the June 25, 2007 Opinion “unpublished,” the
20 decision simply does not exist for the purposes of *stare decisis*, cannot “create” new
21 law, does not present an important question of law, and axiomatically does not and
22 cannot conflict with the law enunciated by any other published opinion issued by any
23 other California Court of Appeal or Supreme Court, again because the opinion may not
24 be cited or published for any reason;

25 2. Under C.R.C. Rule 8.500(b), review of that unpublished opinion by
26 Defendant CALIFORNIA SUPREME COURT is authorized (other than when based
27 on procedural deficiencies) only when necessary to secure uniformity of decision or to
28 settle an important question of law;

1 3. Plaintiff is informed and believes, based in part upon the November, 2006
2 Report and Recommendations of Defendant SUPREME COURT OF CALIFORNIA's
3 Advisory Committee on Rules for Publication of Court of Appeal Opinions, and in part
4 because C.R.C. Rule 8.1115 axiomatically forecloses an "unpublished" opinion from
5 meeting the *de minimus* review criteria of Rule 8.500(b), that during the last 10 years,
6 Defendant CALIFORNIA SUPREME COURT has routinely applied Rule 8.500(b) in
7 such a manner as routinely to decline review of any unpublished decisions issued in
8 civil cases, except in those extremely rare cases where Defendant CALIFORNIA
9 SUPREME COURT has already previously granted review from a published decision
10 presenting the same legal issues presented in the unpublished decision as to which
11 review was later sought, and thus has implemented a *de facto* policy of refusing review
12 of unpublished decisions in civil cases inclusive of the subject June 25, 2007 Opinion.

13 4. As a result of the foregoing, and in particular the interplay of C.R.C.
14 Rules 8.1115 (preventing any citation or reliance whatsoever on unpublished
15 decisions), coupled with Rule 8.500(b)'s review criteria (which review qualification
16 are axiomatically extinguished by the application of Rule 8.1115 once an opinion is
17 deemed "unpublished"), by electing to issue the June 25, 2007 Opinion as
18 "unpublished," Defendant CALIFORNIA COURT OF APPEAL, SECOND
19 APPELLATE DISTRICT deprived Plaintiff of his 14th Amendment right to any due
20 process and/or judicial review of said Opinion.

21 D. In engaging in the foregoing actions with respect to Plaintiff herein, including
22 deliberately deeming the June 25, 2007 Opinion "unpublished" (contrary to the directive of
23 C.r.C. Rule 8.1105(c)), knowing the operation of C.R.C. Rules 8.1115 and 8.500(b) would
24 preclude and deprive Plaintiff of any judicial review whatsoever of its Opinion, Defendant
25 CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, expressly
26 overrode well-settled California judicial stare decisis in numerous particulars, and created a
27 system of "selective prospectivity" by adopting dramatically new rules of law (which
28 profoundly conflicted with established constitutional, statutory and common law of California)

1 which it purposefully applied only to Plaintiff's case for a single one-time, result-oriented
2 purpose, returning to standing California precedent for every other case arising on the same
3 facts predating the pronouncement of the unpublished June 25, 2007 Opinion, thus denying
4 Plaintiff his federal constitutional rights guaranteed under the 14th Amendment to due process
5 and further denying Plaintiff equal protection of the law by applying such new rules of law
6 arbitrarily, differently, and exclusively to Plaintiff, than were or are applied to all other
7 similarly-situated litigants.

8 E. Plaintiff further is informed and believes and thereon alleges that despite
9 awareness of its publication obligation under C.R.C. Rule 8.1105(c) amended effective April
10 1, 2007, Defendant CALIFORNIA COURT OF APPEAL, SECOND APPELLATE
11 DISTRICT nonetheless purposefully disregarded that Rule, and deliberately employed the
12 "unpublished" mantra of the June 25, 2007 opinion solely to enable it to engage in "selective
13 prospectivity" and to reach an unassailable, unreviewable, result-oriented decision and
14 outcome in Plaintiff's case, which could neither be reversed nor even reviewed under the
15 criteria of C.R.C. Rule 8.500(b), nor ever subjected to judicial or public scrutiny and/or
16 criticism in the future, as a result of the operation of C.R.C. Rule 8.1115, and thus its violation
17 of Plaintiff's aforementioned constitutional rights was intentional.

18 F. Had Defendant CALIFORNIA COURT OF APPEAL, SECOND APPELLATE
19 DISTRICT, known it was obligated to publish said Opinion and such Opinion had been legally
20 citable and usable, and thus: (1) further subject to scrutiny and harsh criticism by other justices
21 and courts a result-oriented one-time novel and irregular application of law; and (2) further
22 subject to potentially embarrassing review, criticism, and reversal by Defendant
23 CALIFORNIA SUPREME COURT, said Defendant would have either issued an opinion
24 consistent with and in conformity with the settled-rules of law and *stare decisis*, mandating
25 upholding Plaintiff's jury verdict and judgment against SCE properly respecting to jury's role
26 as the sole finder of disputed fact, or the fact of citability to such opinion, even if ordered
27 unpublished, would have granted Plaintiff a right to judicial review by Defendant
28 CALIFORNIA SUPREME COURT, as such a citable opinion would have amply met the

1 criteria of C.R.C. Rule 8.500(b)(1), because it clearly deviated profoundly in so many
2 numerous ways from existing law, and created a dramatic conflict among the districts, as a
3 result of which Plaintiff would not have been deprived of his right to judicial review.

4 17. There is presently a dispute and controversy as between the parties wherein
5 Plaintiff contends that the June 25, 2007 unpublished Opinion is null and void as it is the
6 unconstitutional product of an unconstitutional system of "selective prospectivity," whereas
7 Defendant asserts that the Opinion was not unconstitutional and/or unconstitutionally derived,
8 and accordingly, a declaration from this Court as to the constitutionality of that June 25, 2007
9 Opinion is necessary and proper so as to ascertain the rights and obligations of the parties.

10 18. Pursuant to 28 U.S.C. § 2201, Plaintiff seeks a declaratory judgment that the
11 unpublished June 25, 2007 Opinion of Defendant CALIFORNIA COURT OF APPEAL,
12 SECOND APPELLATE DISTRICT, was and is the product of an unconstitutional system of
13 "selective prospectivity," and deprived Plaintiff of his 14th Amendment rights to due process
14 and equal protection, and is therefore null and void, and that, pursuant to 28 U.S.C. § 2202,
15 that the cause ordered remanded to a new and different panel of Defendant CALIFORNIA
16 COURT OF APPEAL, SECOND APPELLATE DISTRICT, for consideration *de novo* based
17 upon the findings and judgment of this Court.

18 **SECOND COUNT - DECLARATORY JUDGMENT - 28 U.S.C. § 2201**

19 (Against Defendant CALIFORNIA SUPREME COURT)

20 19. Plaintiff realleges and incorporates by reference each of the allegations of
21 paragraphs 15 through 17, inclusive, of the First Count, as though fully set forth herein.

22 20. Pursuant to California Constitution, Art. VI, Defendant CALIFORNIA
23 SUPREME COURT is charged with authority over establishing publication criteria of the
24 appellate courts of the state, and supervisory power over its lower courts, including Defendant
25 CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, and is therefore
26 the exclusively constitutionally-ordained branch of California Government constitutionally
27 charged with, and having exclusive power over, with the enactment, modification, and/or
28 repeal of C.R.C. Rule 8.1115, and is therefore the proper party-defendant and with standing

1 to respond to and answer Plaintiff's Second Count herein alleging the unconstitutionality of
2 said Rule 8.1115.

3 21. Plaintiff alleges that non-citation rule of C.R.C. Rule 8.1115 is violative of the
4 14th Amendment of the U.S. Constitution, in that it has violated Plaintiff's rights to due
5 process and equal protection of the laws in the case below, for the following reasons:

6 A. The mandatory non-citation rule of C.R.C. Rule 8.1115, enables and fosters a
7 system of unconstitutional "selective prospectivity" among the Courts of Appeal, because it
8 facilitates the rendering of unassailable, unreviewable, result-oriented decisions and outcomes
9 in isolated cases, and has in fact done so in Plaintiff's individual case, which can neither be
10 reversed nor even reviewed under the criteria of C.R.C. Rule 8.500(b), nor ever subjected to
11 judicial or public scrutiny and/or criticism in the future, after which said Appellate Courts
12 return to standing California precedent for every other case arising on the same facts predating
13 the pronouncement of such unpublished decisions, thus denying citizens and residents of the
14 State of California, and Plaintiff in this case, of their federal constitutional rights guaranteed
15 under the 14th Amendment to due process and further denying such California citizens and
16 residents, including Plaintiff herein, equal protection under the law by applying such new
17 result-oriented rules of law arbitrarily, differently, and exclusively to such litigants, including
18 Plaintiff, than they are applied to all other similarly-situated litigants.

19 B. The mandatory non-citation rule of C.R.C. Rule 8.1115 axiomatically deprives
20 litigants in civil cases resulting in unpublished Opinions of their right to judicial review under
21 C.R.C. Rule 8.500(b) (for other than procedural reasons) as a result of the operation of C.R.C.
22 Rule 8.1115, because such litigants cannot meet the review criteria under Rule 8.500(b) once
23 an Opinion is unpublished, and Defendant SUPREME COURT OF CALIFORNIA, as a matter
24 of both policy and empirical fact, does not grant and has not granted review of such
25 unpublished decisions in civil cases not presenting an issue already before the Defendant
26 SUPREME COURT OF CALIFORNIA arising from a previously published Opinion.

27 C. Plaintiff is informed and believes that California is one of the only jurisdictions,
28 if not the only jurisdiction in the United States currently, which still imposes a non-citation

1 rule as to unpublished opinions, as even the Federal Courts have adopted Federal Rules of
2 Appellate Procedure, Rule 32.1, which prohibits rules such as C.R.C. Rule 8.1115, which
3 restrict any citation and/or reliance upon, unpublished and/or uncertified opinions.

4 D. In a November, 2006 Report and Recommendations of Defendant SUPREME
5 COURT OF CALIFORNIA's Advisory Committee on Rules for Publication of Court of
6 Appeal Opinions, found that California's Appellate Courts frequently based their decisions *not*
7 to publish opinions on many factors unrelated and irrelevant to the merits of the issues
8 including, but not limited to, insufficient time to prepare a published opinion, potential
9 embarrassment of judges or attorneys, yet 72 percent of the appellate justices surveyed were
10 against permitting litigants to draw Defendant CALIFORNIA SUPREME COURT's Court's
11 attention to unpublished opinions within the appellate district that arguably conflicted with the
12 decisions in their cases, whereas 67 percent of attorneys surveyed asserted that such attention
13 of the Defendant CALIFORNIA SUPREME COURT should be so drawn, further supporting
14 Plaintiff's contentions that the non-citation rule C.R.C. Rule 8.1105 has been employed to
15 create and facilitate a system of unconstitutional "selective prospectivity" among the Courts
16 of Appeal for the reasons and as alleged hereinabove.

17 22. As a direct and legal result of the foregoing, the June 25, 2007 Unpublished
18 Opinion by Defendant CALIFORNIA COURT OF APPEAL, SECOND APPELLATE
19 DISTRICT, was and is the product of an unconstitutional system of unconstitutional "selective
20 prospectivity" among the Courts of Appeal, and was promulgated in violation of Plaintiffs'
21 14th Amendment rights to due process and equal protection of the laws.

22 23. There is presently a dispute and controversy as between the parties wherein
23 Plaintiff contends that C.R.C. Rule 8.1115 prohibiting the citation or use of unpublished
24 opinions is null and as violative of the Plaintiff's 14th Amendment rights, and facilitates an
25 unconstitutional system of "selective prospectivity," whereas Defendant asserts that said Rule
26 is not unconstitutional, and accordingly, a declaration from this Court as to the
27 constitutionality of C.R.C. Rule 8.1115 is necessary and proper so as to ascertain the rights and
28 obligations of the parties.

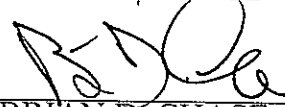
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6. For such other and further relief as this Court may deem proper and/or just.

DATED: September 25, 2007

BISNAR | CHASE

By:



BRIAN D. CHASE
Attorneys for Plaintiff