SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

DATE	: MAY 8, 2007	DEPT. NO	: 20
JUDGE	: HON. JACK SAPUNOR	CLERK	: TEMMERMAN

KAREN MATUS, individually and in various representative capacities as Trustee, Executor, and Personal Representative, ALEXANDER FAMILY TRUST, et al., Petitioners and Plaintiffs, VS. BOARD OF ADMINISTRATION OF CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM; CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM itself and as administrator of LEGISLATORS RETIREMENT SYSTEM, Respondents and Defendants.	Case No.: 06CS01759

Nature of Proceedings:	PETITION FOR WRIT OF MANDATE; RULING ON SUBMITTED MATTER

This action arises out of a dispute regarding the amount of retirement benefits payable by the Legislators' Retirement System (LRS) to Frances Alexander as the surviving spouse of Clarence Alexander. Clarence Alexander started working for the State of California in 1947. He retired in 1969 as the Secretary of the California Senate with 22.228 years of service credited under the LRS. Upon his retirement, Mr. Alexander received a monthly retirement allowance until his death in 1998, at which time, a monthly death benefit became payable to his then surviving spouse, Frances Alexander. Mrs. Alexander continued to receive a monthly survivor benefit until her death in late 2005.

In 2003, before her death, Mrs. Alexander learned of the possibility of a miscalculation in the amount of the Alexanders' retirement benefits. By letter dated October 14, 2003, Mrs. Alexander submitted a claim to CalPERS to correct the purported error. CalPERS denied the

claim, but Mrs. Alexander appealed. Since her death, Mrs. Alexander's appeal has been pursued by the Alexander Family Trust and Karen Matus, individually and in her representative capacities as trustee of the Alexander Family Trust, executor of the Estate of Mrs. Alexander, and personal representative of Mr. and Mrs. Alexander.

Mrs. Alexander's appeal initially was heard by an Administrative Law Judge (ALJ). On May 2, 2006, after an evidentiary hearing, ALJ Jonathan Lew issued a proposed decision in favor of Mrs. Alexander.[1] The ALJ's decision proposed to award Mrs. Alexander $3,579,578, plus six percent interest, the total of which would exceed $6 million.

On May 4, 2006, CalPERS received the ALJ's proposed decision. On June 21, 2006, the CalPERS Board voted to reject the ALJ's proposed decision and decide the case itself based upon the administrative record, including the transcript.[2] November 13, 2006, CalPERS received the transcript. On December 20, 2006, CalPERS issued an order delaying its decision for 30 days, and setting the matter for a February 22, 2007 hearing.

On December 12, 2006, Petitioners filed the instant petition for writ of mandamus, which is in the nature of a writ of prohibition to restrain administrative actions in excess of jurisdiction.[3] The issue presented in this petition is whether CalPERS has jurisdiction to conduct a hearing and issue a final decision on the merits. Petitioners contend that CalPERS lacks jurisdiction because the ALJ's proposed decision was "deemed adopted" by CalPERS under Government Code § 11517(c)(2)(E)(iv) because CalPERS failed to issue a final decision within 100 days of its rejection of the proposed decision. Petitioners contend that any decision issued after the 100-day deadline would be untimely and therefore void. Thus, Petitioners seek a writ of mandate to compel CalPERS to accept the proposed decision as its final decision in this case.

Respondents deny that CalPERS failed to comply with the "100-day" rule of Government Code section 11517(c)(2)(E)(iv). Respondents assert that when an agency orders a transcript of the proceedings before the ALJ, the "100-day" rule does not begin to run until the agency receives the transcript. Respondents also argue that due a loophole in the statute, there is no deadline for an agency to order a transcript, even if the transcript is ordered more than 100 days after rejection of the proposed decision. In this case, CalPERS alleges that it received the transcript on November 13, 2006. Thus, Respondents allege that the ALJ's proposed decision

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[1] The proposed decision concluded that under Government Code § 9359.10, Mr. Alexander was entitled to a base retirement allowance equal to two-thirds the higher of his salary when he retired or the salary of the current incumbent, plus increases for any cost-of-living increases cumulatively from the date of retirement. Because an incumbent officeholder's salary itself may be adjusted upward for cost-of-living increases, serial COLAs linked to an incumbent officeholder's salary are sometimes referred to as "double-barreled COLAs."

[2] CalPERS notified Petitioners' counsel of its decision to reject the proposed decision in a letter dated July 13, 2006.

[3] (*See Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 811 [determinations of state administrative agencies are not judicially reviewable by writ of certiorari or prohibition].)

had not been "deemed adopted" at the time this Court issued its temporary stay of the administrative proceedings before the Board.[4]

Respondents also contend that even if CalPERS violated Government Code section 11517(c)(2)(E)(iv) by failing to order a transcript or issue a final decision within 100 days of its rejection of the proposed decision, the "deemed adopted" penalty does not apply. According to Respondents, the "deemed adopted" penalty applies only if an agency fails to adopt or reject a proposed decision within 100 days of the agency's receipt of the proposed decision. Respondents assert that the other timelines provided in section 11517 subdivision (c)(2)(A) through (E), including the timelines contained in subdivision (c)(2)(E)(iv), are directory, not mandatory. Therefore, Respondents contend, those timelines do not carry a "deemed adopted" penalty.

Discussion

The issues presented in this case are whether CalPERS violated Government Code § 11517(c)(2)(E)(iv) by failing to issue a final decision within 100 days after rejection of the proposed decision and, if so, whether a violation of subdivision (c)(2)(E)(iv) carries a "deemed adopted" penalty.

In interpreting a statute, the Court's fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. (*Marshall v. Pasadena Unified School Dist.* (2004) 119 Cal.App.4th 1241, 1254.) The Court begins by examining the language of the statute, giving the words their usual and ordinary meaning, viewed in the context of the statute as a whole and the overall statutory scheme. (*Id.*) To determine intent, the court turns first to the language of the statute, viewed in the context of the statute as a whole and the overall statutory scheme words, attempting to give effect to the usual, ordinary import of the language and to avoid making any language mere surplusage. (*Id.*; *see also Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, 28-29.) If the terms of the statute are unambiguous, the Court presumes the lawmakers meant what they said, and the plain meaning of the language governs. (*Marshall, supra*, at p. 1254.) If the language is susceptible to more than one reasonable meaning, the Court may turn to standard rules of statutory construction and consider other indicia of legislative intent, including the statutory scheme, legislative history and purpose, and public policy. (*Id.*; *see also Mahon v. County of San Mateo* (2006) 139 Cal.App.4th 812, 821.)

The issue in this case is the meaning and effect of the first two sentences in Government Code § 11517(c)(2)(E)(iv). That section provides, in relevant part:

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[4] On February 2, 2007, this Court granted Petitioners' application for a temporary stay of the administrative proceeding to preserve the status quo.

> "If the agency elects to proceed under this subparagraph, the agency shall issue its final decision not later than 100 days after rejection of the proposed decision. If the agency elects to proceed under this subparagraph, and has ordered a transcript of the proceedings before the administrative law judge, the agency shall issue its final decision not later than 100 days after receipt of the transcript." (Gov. Code § 11517(c)(2)(E)(iv).)

According to Respondents, these two sentences must be read as alternatives, meaning that the agency must issue its final decision within 100 days after (i) the rejection of the proposed decision *or* (ii) receipt of the transcript, whichever occurs last. Petitioners contend, in contrast, the two sentences must be read together, meaning the agency must issue its final decision *both* within 100 days after the rejection of the proposed decision *and* within 100 days after the receipt of the transcript, i.e., within 100 days of whichever occurs first.

In the Court's view, the language of Government Code § 11517(c)(2)(E)(iv) is susceptible to only one reasonable interpretation: namely, that the second sentence is an alternative (or exception) to the first. Petitioners' interpretation is not reasonable because it either renders the second sentence surplusage, or leads to the absurd result that an agency is required to order and receive the transcript before rejecting the proposed decision or issue a decision before it receives the transcript.[5] (*See Poliak v. Bd. of Psychology* (1997) 55 Cal.App.4th 342, 349, 351 [finding no logical reason to require an agency to order a transcript *before* it has made the initial determination to reject the ALJ's proposed decision].)

This interpretation is supported by the legislative history of the statute. (*See* Exhibit "18" (Assembly Republican Bill Analysis of AB 1692) ["If the agency has ordered a transcript . . . then the 100-day clock begins ticking upon receipt of the transcript"]; Exhibit "19" (Senate Committee on Governmental Organization Bill Analysis of AB 1692) [AB 1692 "clarifies that if a decision is rejected, the agency has another 100 days from the date of rejection or the date it receives a transcript . . . to issue its final decision."]; Exhibit "22" (Senate Committee on Judiciary Bill Analysis of SB 10) ["The agency could, within the 100-day period, commence proceedings to decide the case upon the record, and could request a transcript. If so, the agency would itself have 100 days to issue its decision after the delivery the transcript . . . ."]; Exhibit "27" (Assembly Committee on the Judiciary Bill Analysis of SB 10) ["SB 10 contains a loophole enabling an agency to prolong the time for acting on a hearing officer's proposed decision. When a transcript of the hearing is ordered, the commencement of the 100-day period is forestalled until delivery of the transcript. An agency could at the last minute simply order a transcript to allow further delay of the case."].) Thus, the Court concludes that the first and

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[5] If a transcript were ordered and/or received after rejection of the proposed decision, the second sentence would have no meaning because the agency's deadline to issue its final decision always would be governed by the 100-day rule triggered by rejection of the proposed decision. Thus, in order to give effect to both the first and second sentences, the agency effectively would have to order and receive the transcript before it rejects the proposed decision.

second sentences in subdivision (c)(2)(E)(iv) are intended to be alternatives. The agency must issue its final decision either within 100 days after rejection of the proposed decision or, if the agency has ordered a transcript of the proceedings, within 100 days after receipt of the transcript.

Having concluded that the second sentence in subdivision (c)(2)(E)(iv) is an exception to the first is not the end of the matter. The Court still must determine when the exception applies. By its terms, the 100-day time limit described in the second sentence in subdivision (c)(2)(E)(iv) applies when the agency "has ordered" the transcript. The parties dispute, however, the date by which the agency must have ordered the transcript.

Petitioners assert that the transcript must be ordered at or before the date on which the agency elects to decide the case upon the record. There is some support for this interpretation in the language of the statute. The statute refers to the decision to elect to proceed under subparagraph (c)(2)(E) in the simple present tense, but refers to the act of ordering the transcript in the present perfect tense. (*See* Gov. Code § 11517(c)(2)(E)(iv) ["If the agency *elects* to proceed under this subparagraph, and *has ordered* a transcript . . . ."] [emphasis added].) This suggests a temporal relationship between the agency's election to decide the case on the record and the act of ordering the transcript.[6] In particular, this language suggests the agency is required to order the transcript before it elects to decide the case on the record.[7]

In *Poliak*, however, the Third District Court of Appeal rejected this interpretation. The Court concluded that the language of section 11517 (as it then existed) did not require an agency to order a transcript within the 100 days after receipt of the proposed decision. (*See Poliak*, *supra*, at p. 351 ["Had the Legislature intended to require that a transcript be ordered within the first 100-day period, the statute could easily have been drafted to reflect that fact. No such interpretation can be imputed to the language as it now exists."];[8] *see also Outdoor Resorts v.*

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[6] The present perfect tense is used to express an event that took place sometime in the past and that continues to influence the present.

[7] This interpretation also finds some support in the legislative history of section 11517. (*See* Exhibit "22" ["[t]he agency could, within the 100-day period, commence proceedings to decide the case upon the record, and could request a transcript. If so, the agency would itself have 100 days to issue its decision after delivery of the transcript . . . ."]; Exhibit "27" ["SB 10 contains a loophole enabling an agency to prolong the time for acting on a hearing officer's proposed decision. When a transcript of the hearing is ordered, the commencement of the 100-day period is forestalled until delivery of the transcript. An agency could at the last minute simply order a transcript to allow further delay of the case."].)

[8] The Court in *Poliak* construed the statute as setting forth not one, but two, 100-day time limitations. According to the Court, the first time limit is the 100-day period for the agency to commence proceedings to decide the case upon the record or refer the case to the ALJ. After an agency commences proceedings to decide a case upon the record, the Court concluded, there is a second 100-day time limit for the agency to issue its decision after submission of the case. According to the Court, when an agency orders a transcript, it is the second 100-day period that gets delayed until delivery of the transcript. (*Poliak, supra*, at p. 347.) At the time of its decision, section 11517 provided, in relevant part: "The proposed decision shall be deemed adopted by the agency 100 days after delivery to the agency by the Office of Administrative Hearings, unless within that time the agency commences proceedings to decide the case upon the record, including the transcript, or without the transcript where the parties have so stipulated, or the

Alcoholic Beverage Control Appeals Bd. (1990) 224 Cal.App.3d 696, 704 [construing former section 11517(d) as imposing 100-day period for agency to issue its decision on the record after submission of case].)

Moreover, Petitioners' interpretation seems to lead to the absurd result -- discussed above -- that the agency is required to order the transcript before the agency makes its initial determination to reject the proposed decision and decide the case upon the record.[9] Thus, for both of these reasons, the Court rejects Petitioners' interpretation that section 11517 requires CalPERS to order the transcript within the initial 100-day period after receipt of the proposed decision.

The Court next considers Respondents' interpretation of the statute. Respondents assert that there is no time limit for agencies to order a transcript of the proceedings before the ALJ. Respondents assert that an agency can order a transcript at any time and that, as soon as it is ordered, the agency shall have until 100 days after receipt of the transcript to issue its final decision.

The main problem with Respondents' interpretation is that it would permit the agency to indefinitely delay issuing a final decision on the record simply by not ordering the transcript. Since a transcript is required in the vast majority of cases where the agency elects to decide the case on the record,[10] this interpretation essentially would mean that there is no deadline for an agency to issue its final decision on the record. The other parties to the proceeding potentially would be stuck in administrative limbo until the agency orders the transcript and triggers the rule requiring the agency to issue its final decision within 100 days after receipt of the transcript.[11] Thus, Respondents' interpretation is inconsistent with the purposes of the statute. (*See Poliak, supra*, at p. 350 [purpose of timelines in statute is to improve administrative hearings by eliminating unnecessary delay and uncertainty]; *see also* Exhibit "22".) Respondents' interpretation also is inconsistent with the Legislature's use of the present perfect tense ("has

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agency refers the case to the administrative law judge to take additional evidence. In a case where the agency itself hears the case, the agency shall issue its decision within 100 days of submission of the case. In a case where the agency has ordered a transcript of the proceedings, the 100-day period shall begin upon delivery of the transcript." Effective July 1, 1997, section 11517 was amended so that the provision requiring the agency issue a decision within 100 days after submission of the case was deleted from subdivision (d) and added to subdivision (a). (*See* Stats 1995 ch 938 § 42; *see also* Exhibit "27" [discussing function of time limitations].) The Court was made aware of this amendment, and concluded that the amendments did not change its construction of the statute. (*Poliak, supra*, at p. 350 fn.4.) In 1999, former section 11517 was repealed and replaced with current section 11517. The legislative history of AB 1692 indicates the sponsor proposed the bill to remedy confusion as to how much time agencies have to issue revised decisions after rejecting a proposed decision and thereby "preserve the intended timing requirements" underlying the existing statute. (*See* Exhibit "19.")

[9] One might argue this is true only if the agency waits until the very last minute to reject the proposed decision.

[10] The statute suggests that an agency may decide a case upon the record without a transcript only by stipulation of the parties. (See Gov. Code § 11517(c)(2)(E).)

[11] In addition, there would be no means to remedy this delay because a court cannot compel an agency to perform a duty that it doesn't have.

ordered") instead of the simple present tense ("orders"). This suggests that the Legislature intended to impose a time limit for agencies to order the transcript. Therefore, the Court rejects Respondents' interpretation that there is no time limit for an agency to order a transcript.

In the Court's view, the Legislature intended agencies to order a transcript no later than 100 days after rejection of the proposed decision. This conclusion is based on the language and structure of the first two sentences in subdivision (c)(2)(E)(iv). The first sentence establishes the default rule: if the agency elects to decide the case upon the record, then the agency must issue its final decision not later than 100 days after rejection of the proposed decision. The very next sentence establishes an exception to the default rule, which applies only if the agency "has ordered" a transcript of the proceedings. This structure suggests the Legislature intended the conditional phrase -- if the agency "has ordered" a transcript -- to be judged with reference to the 100-day period described in the preceding sentence. Construed in this manner, if the agency elects to decide the case upon the record, and the agency has not ordered a transcript, the agency is required to issue its final decision not later than 100 days after rejection of the proposed decision. Alternatively, if at any time during this 100-day period the agency "has ordered" a transcript of the proceedings, then the second sentence in subdivision (c)(2)(E)(iv) applies and the agency shall have until 100 days after receipt of the transcript to issue its final decision on the record. Unlike Petitioners' and Respondents' proffered interpretations, this interpretation is consistent with the language and purposes of the statute, gives meaning to both the first and second sentences in subdivision (c)(2)(E)(iv), comports with existing precedent, and avoids absurd results. Thus, it is the most reasonable interpretation of the statute under the circumstances.

Applying this interpretation to the facts of this case, the Court concludes that CalPERS violated the time limitations of the statute. CalPERS rejected the ALJ's proposed decision on June 21, 2006, but did not order a transcript of the proceedings until November 6, 2006.[12] Because CalPERS did not timely order the transcript, CalPERS was required to issue its final decision on the record within 100 days after rejection of the proposed decision. CalPERS did not issue its final decision within this 100-day period after rejection of the proposed decision.[13] Thus, CalPERS violated the statute.[14]

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[12] CalPERS purportedly first tried to order the transcript from the Office of Administrative Hearings on October 6, 2006, even though the ALJ had notified the parties that they would need to contact the court reporting firm directly to order a transcript of the administrative hearing.

[13] As of February 2, 2007, the date on which the administrative proceedings were stayed by this Court, CalPERS' Board still had not issued its final decision on the record.

[14] In their Opposition, Respondents argue that, at most, the statute imposes a duty to act in a "reasonable" manner. For the reason discussed above, the Court rejects this argument. But even if the statute were construed under a reasonableness standard, the Court would find that CalPERS dilatory actions were not reasonable and violated the statute.

The only remaining issue is whether CalPERS' failure to comply with the time limits of the statute carries the "deemed adopted" penalty. This requires the Court to consider whether the statute's time requirements are directory or mandatory.

The directory or mandatory designation does not refer to whether a particular statutory requirement is obligatory or permissive. (*Morris v. County of Marin* (1977) 18 Cal.3d 901, 908.) It denotes whether noncompliance with that requirement will or will not have the effect of invalidating the governmental action to which the procedural requirement relates. (*Id.*) In order to determine whether a particular statutory requirement is mandatory or directory, the Court must ascertain the legislative intent. (*California Correctional Peace Officers Ass'n v. State Pers. Bd.* (1995) 10 Cal.4th 1133, 1145; *Chrysler Corp. v. New Motor Vehicle Bd.* (1993) 12 Cal.App.4th 621, 629-630.) In ascertaining legislative intent, some courts have looked at the likely consequences of holding a particular time limit mandatory and attempted to ascertain whether those consequences would promote or defeat the purpose of the legislation. Other courts have suggested that a requirement should be deemed directory unless a consequence or penalty is provided for failure to do the act within the time commanded. (*Id.*) The general rule is that an act is deemed directory unless the Legislature clearly expresses a contrary intent. (*Id.*)

Respondents argue that section 11517, subdivision (c)(2)(E)(iv)'s time requirements are directory and not mandatory. According to Respondents, the statute does not explicitly provide that a proposed decision shall be deemed adopted if the agency fails to issue a final decision within 100 days after rejection; it provides that a proposed decision shall be deemed adopted if the agency fails to act as prescribed in subparagraphs (A) to (E) within 100 days of receipt of the proposed decision. Respondents assert that CalPERS could not possibly be required to comply with "all" of the provisions in subparagraph (E) within 100 days of receipt of the proposed decision because this would render the 100-day time limits described in subdivision (c)(2)(E)(iv) meaningless. For example, to comply with the time limits in subdivision (c)(2) and (c)(2)(E)(iv), CalPERS would have to reject the proposed decision (and to have ordered and received the transcript) the same day the ALJ's proposed decision was received -- otherwise the time limitations in subdivision (c)(2)(E)(iv) would fall outside the agency's 100-day period to "act" and would be superfluous. Respondents argue, therefore, that the only "act" contemplated by subdivision (c)(2) is the agency's decision to (i) adopt the proposed decision with a reduced penalty[15]; (ii) reject the proposed decision and refer the case to an ALJ for additional evidence; or (iii) reject the proposed decision and elect to decide the case upon the record.

Respondents also argue that interpreting subdivision (c)(2)(E)(iv)'s time requirements as mandatory could have consequences inconsistent with the purposes of the statute. For example, if an agency were to reject an adverse proposed decision and elect to decide the case upon the record, but inadvertently fail to issue a final revised decision within 100 days after the date of

[15] The agency also may adopt the proposed decision in its entirety, but this is not really necessary because if the agency fails to act the proposed decision will be "deemed adopted" in its entirety as a matter of law.

rejection, the aggrieved party would, through no fault of his own, be deprived of a hearing and decision on his administrative appeal.

Respondents' arguments are valid, but Respondents ignore that this Court is not facing a clean slate. In *St. Francis Medical Center v. Shewry* (2005) 134 Cal.App.4th 1556, the Third District Court of Appeal considered whether an ALJ's proposed decision should have been deemed adopted based on an agency's failure to issue a final decision within 100 days of the rejection of the proposed decision. The Court held that because the agency issued its final decision beyond the 100-day limit of section 11517, subdivision (c)(2)(E)(iv), the ALJ's proposed decision should have been deemed the final decision of the agency. (*Id.* at pp. 1558-1559, 1561-1562, 1564.) This is the only published opinion to have addressed this specific issue and it is binding on this Court. (*See Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1168.)

Respondents argue that the Court is not bound by the holding in *St. Francis* because the agency in that case failed to raise the issue whether the second 100-day provision is directory or mandatory, and instead relied on a putative conflict between the Government Code and the Health & Safety Code. This may be true, but it is irrelevant. The Court in *St. Francis* considered the "deemed adoption" issue and expressly decided that a violation of subdivision (c)(2)(E)(iv) carries a "deemed adopted" penalty. Because this statement of law was necessary to the Court's decision, it is binding here.

For the foregoing reasons, the Court finds and concludes that CalPERS violated section 11517(c)(2)(E)(iv) by failing to issue a final decision within 100 days after rejection of the proposed decision and that, as a result, the ALJ's proposed decision was deemed adopted by the agency as a matter of law. The petition to compel Respondents to accept the ALJ's proposed decision as the final decision is granted on this basis. Petitioners' remaining claims -- including Petitioners' claim for attorneys' fees -- are denied.

Petitioners are directed to prepare a formal order and judgment, incorporating the Court's ruling herein verbatim or attaching it as an Exhibit, and a writ; submit them to opposing counsel for approval as to form; and thereafter submit them to the Court in accordance with Rule of Court 391.

Date: MAY - 8, 2007

JACK V. SAPUNOR

Jack Sapunor
Judge of the Superior Court of California
County of Sacramento

BOOK : 20
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CASE TITLE : ALEXANDER FAMILY TRUST v. CAL PERS

Superior Court of California, County of Sacramento

BY: F. TEMMERMAN, Deputy Clerk

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the Court's Ruling on Submitted Matter in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

JOHN JENSEN
ROBERTI JENSEN LLP
3600 WILSHIRE BLVD.
LOS ANGELES, CA 90010-2602

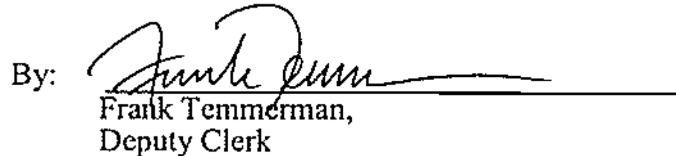
DAVID ROBERTI
ROBERTI JENSEN LLP
3600 WILSHIRE BLVD.
LOS ANGELES, CA 90010-2602

BENNETT EVAN COOPER
STEPTOE & JOHNSON, LLP
COLLIER CENTER
201 EAST WASHINGTON ST., STE. 1600
PHOENIX, AZ 85004-2382

MARGUERITE D. SEABOURN
CAL PERS LEGAL OFFICE
400 Q STREET, ROOM 3340
SACRAMENTO, CA 94229

Dated: May 8, 2007

Superior Court of California,
County of Sacramento

By: 
Frank Temmerman,
Deputy Clerk

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Deputy Clerk