

IN THE COURT OF APPEAL THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION P

YU CHUNG KOO, an individual,

Plaintiff and Respondent,

vs.

HUANG CHO HONG, an individual
a/k/a Zhao Huang Hong a/k/a Zhao Joe
Hong a/k/a Joe Hong; XI FAN HONG,
an individual a/k/a Fred Hong; SIU LING
LI, an individual a/k/a Salina Li; YAN
NAN HONG, an individual,

Defendants and Appellants.

Court of Appeal No. B 228431

(Los Angeles County
Super. Ct. No. BC 414375)

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Appeal from a Judgment
Of the Superior Court, County of Los Angeles
Hon. Mark V. Mooney, Judge

RESPONDENT'S REPLY BRIEF

Robin Mashal (Cal. Bar No. 205003)
Peter Y. Hong (Cal. Bar No. 213620)
Hong & Mashal, LLP
1875 Century Park East, Suite 600
Los Angeles, CA 90067-2507
Telephone: (310) 286-2000
Facsimile: (310) 286-2525
Counsel for Respondent, Yu Chung Koo

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Telephone: (310) 286-2000
Facsimile: (310) 286-2525
Counsel for Respondent, Yu Chung Koo

TABLE OF CONTENTS

I.	STATEMENT OF FACTS.....	1
II.	APPEALABILITY AND STANDING.....	1
III.	ISSUES PRESENTED AND STANDARD OF REVIEW.....	2
IV.	LEGAL ANALYSIS.....	2
	A. TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS' MOTION FOR NEW TRIAL BECAUSE NO JURY MISCONDUCT HAD OCCURRED.....	2
	1. <i>The Jury Followed Court's Instructions and Returned a General Verdict in Favor of Respondent, which General Verdict Implies a Finding in Favor of Respondent on Every Fact Essential to Establish His Causes of Action.</i>	3
	2. <i>By their Failure to Raise Timely Objections During the Progress of the Trial, Appellants Waived any Objections They May Have Had.</i>	5
	B. THE GENERAL VERDICT WAS SUPPORTED BY SUBSTANTIAL AND SUFFICIENT EVIDENCE, AND APPELLANTS FAIL TO PRESENT ANY EVIDENCE FOR THIS COURT TO REVIEW.....	7
	C. TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS' LAST MINUTE EX PARTE MOTION TO CONTINUE TRIAL AND RE-OPEN DISCOVERY.....	9
	1. <i>Denying Appellants' Last Minute Ex Parte Motion for Trial Continuance Was Not an Abuse of Discretion as the Next Available Trial Date was Nearly A Year Away, and Such Delay Would Have Gravely Prejudiced Respondent.</i>	9
	2. <i>Denying Appellants' Last Minute Ex Parte Motion to Extend Discovery Cutoff Was Not An Abuse of Discretion, as Appellants' Motion Lacked the Necessary Meet and Confer Declaration, and Appellants had Already Conducted Substantial Amounts of Discovery.</i>	10
V.	CONCLUSION.....	11

TABLE OF AUTHORITIES

Cases

<i>Abner Doble Co. v. Keystone Consol. Mining Co.</i> , 145 Cal. 190 (1904).....	5
<i>Behr v. County of Santa Cruz</i> , 172 Cal. App. 2d 697 (1 st Dist., 1959).....	3
<i>Blank v. Kirwan</i> , 39 Cal. 3d 311 (1985).....	6
<i>Bresnahan v. Chrysler Corp.</i> , 65 Cal. App. 4 th 1149 (2d Dist., 1998)	7
<i>County of San Bernardino v. Doria Mining & Eng'g Corp.</i> , 72 Cal. App. 3d 776 (4 th Dist., 1977).....	9
<i>Denham v. Superior Court (Marsh & Kidder)</i> , 2 Cal. 3d 557 (1970)	2, 6
<i>Estate of Hellier</i> , 169 Cal. 77 (1915).....	7
<i>Gay v. Torrance</i> , 145 Cal. 144 (1904).....	3
<i>Head v. Logan</i> , 39 Cal. App. 2d 243 (3d. Dist., 1940).....	5, 6
<i>Henderson v. Harnischfeger Corp.</i> , 12 Cal. 3d 663 (1974).....	7
<i>Hepner v. Franchise Tax Board</i> , 52 Cal. App. 4 th 1475 (1997)	6
<i>Hope v. Arrowhead & Puritas Waters, Inc.</i> , 174 Cal. App. 2d 222 (2d. Dist., 1959).....	3
<i>Horn v. Atchinson, Topeka & Santa Fe Ry. Co.</i> , 61 Cal. 2d 602 (1964).....	6
<i>Hudgins v. Standard Oil Co.</i> , 136 Cal. App. 44 (3d. Dist., 1933).....	3
<i>Jensen v. BMW of No. America Inc.</i> , 35 Cal. App. 4 th 112 (1995).....	8
<i>Kralyevich v. Magrini</i> , 172 Cal. App. 2d 784 (1959).....	8
<i>Lorraine v. McComb</i> , 220 Cal. 753 (1934).....	9
<i>Mann v. Pacific Greyhound Lines</i> , 92 Cal. App. 2d 439 (1949)	9
<i>Maria P. v. Riles</i> , 43 Cal. 3d 1281 (1987).....	3
<i>Mizel v. City of Santa Monica</i> , 93 Cal. App. 4 th 1059 (2001)	8
<i>Musgrove v. Perkins</i> , 9 Cal. 211 (1858).....	10
<i>Pilot Rock Creek Canal Co. v. Chapman</i> , 11 Cal. 161 (1858).....	10
<i>Posz v. Burchell</i> , 209 Cal. App. 2d 324 (1962)	8

<i>Price v. Bekins Van & Storage Co.</i> , 179 Cal. 326 (1918).....	3
<i>Sanches-Corea v. Bank of America</i> , 38 Cal. 3d 892 (1985).....	7
<i>Sommer v. Gabor</i> , 40 Cal. App. 4 th 1455 (2d Dist., 1995).....	6
<i>Sommer v. Martin</i> , 55 Cal. App. 603 (1 st Dist., 1921).....	6
<i>Tapia v. Barker</i> , 160 Cal. App. 3d 761 (1 st Dist., 1984).....	5
<i>Thomson v. Casaudoumecq</i> , 205 Cal. App. 2d 549 (4 th Dist., 1962).....	3
<i>Tremble v. Tuman</i> , 175 Cal. 696 (1917).....	3
<i>Woodcock v. Fontana Scaffolding & Equip. Co.</i> , 69 Cal. 2d 452 (1968).....	8

Statutes

<i>Cal. Code Civ. Proc.</i> § 2024.050.....	2, 10, 11
<i>Cal. Code Civ. Proc.</i> § 624.....	3
<i>Cal. Code Civ. Proc.</i> § 657.....	2, 5, 6
<i>Cal. Gov. Code</i> § 68607.....	9

Other Authorities

CAL. CONST. Art. VI, § 13.....	2
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Rules

<i>California Rules of Court</i> , Rule 3.1332.....	9, 10
.....	

I. STATEMENT OF FACTS.

Plaintiff/Respondent Yu Chung Koo was the owner of a wholesale stone and marble business in the City of El Monte, California. Defendants fraudulently inducing Respondent into signing a “shareholder agreement,” promising Respondent to invest in his business and become co-shareholders with him. Appellants breached their promises, yet Appellants proceeded to take over Respondent’s business and exclude Respondent from sharing in its management and profits.

Respondent commenced the action below on May 22, 2009. Throughout the litigation, Appellants were evasive in providing discovery responses and were otherwise uncooperative. Notwithstanding the fact that Appellants were financially chocking Respondent, and other challenges, Respondent properly prosecuted his case through the jury trial, obtained a general jury in his favor, upon which verdict the Trial Court entered a judgment in Respondent’s favor.

II. APPEALABILITY AND STANDING.

Respondent notes here that three of the Appellants (Huang Cho Hong, Xi Fan Hong and Siu Ling Li) had filed Bankruptcy petitions prior to the filing of their Opening Brief herein. Respondent assumes that these Appellants are intentionally commencing appeal, and have obtained the proper authority from the Bankruptcy Court and their respective Bankruptcy Trustee to do so. Also, please see discussion under heading IV.A.2, *infra*, concerning other potential issues with the appealability of issues presented herein.

Assuming those Appellants in bankruptcy have obtained proper authorization from their respective bankruptcy trustee to proceed with this appeal, they would have standing here.

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III. ISSUES PRESENTED AND STANDARD OF REVIEW.

The following are the issues presented by Appellants' brief for this Court's review, and the standards of review that apply to each:

First, Appellants urge that there were "irregularities in the proceedings" pursuant to Subdivision (1) of Section 657 of the *California Code of Civil Procedure*. See, Opening Brief, p. 5. The applicable standard of review is abuse of discretion.

Second, Appellants challenge the general verdict rendered as "against the law" pursuant to Subdivision (6) of Section 657 of the *California Code of Civil Procedure*. See, Opening Brief, p. 5. The applicable standard of review is the substantial evidence rule.

Third, Appellants urge the Trial Court erred in denying their last minute *ex parte* application to continue trial and re-open discovery, pursuant to Rule 3.1332 of the *California Rules of Court*, and Section 2024.050 of the *California Code of Civil Procedure*. See, Opening Brief, pp. 8-9. The applicable standard of review is abuse of discretion.

IV. LEGAL ANALYSIS.

A. TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS' MOTION FOR NEW TRIAL BECAUSE NO JURY MISCONDUCT HAD OCCURRED.

No new trial can be ordered in California, unless after review of the entire cause, the court is of the opinion that the matter complained resulted in a miscarriage of justice. CAL. CONST. Art. VI, § 13.

The most fundamental rule of appellate review is that an appealed judgment or order is presumed to be correct, and the appellant has the burden to affirmatively show an error. *Denham v. Superior Court (Marsh & Kidder)*, 2 Cal. 3d 557, 564 (1970). Failure to provide adequate record of an issue requires that the issue be

resolved against appellant. *Maria P. v. Riles*, 43 Cal. 3d 1281, 1295 (1987). Irregularities having no relation to or effect on the disposition of the cause are not proper subject of complaint. *Gay v. Torrance*, 145 Cal. 144 (1904).

1. ***The Jury Followed Court's Instructions and Returned a General Verdict in Favor of Respondent, which General Verdict Implies a Finding in Favor of Respondent on Every Fact Essential to Establish His Causes of Action.***

“A general verdict is that by which [jurors] pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant.” *Cal. Code Civ. Proc.* § 624. A general verdict implies a finding in favor of the prevailing party of every fact essential to the support of the party's action or defense. *Price v. Bekins Van & Storage Co.*, 179 Cal. 326, 328 (1918); *Tremble v. Tuman*, 175 Cal. 696, 698 (1917). If the evidence supports implied findings on any set of issues which will sustain the verdict it will be assumed that the jury so found. *Thomson v. Casaudoumecq*, 205 Cal. App. 2d 549, 555 (4th Dist., 1962) ; *Hope v. Arrowhead & Puritas Waters, Inc.*, 174 Cal. App. 2d 222 (2d. Dist., 1959). It is unnecessary to cite the cases holding that all intendments are in favor of the general verdicts, and that everything necessary to be found by the jury, not otherwise controverted, will be deemed found and included therein. *Behr v. County of Santa Cruz*, 172 Cal. App. 2d 697, 712 (1st Dist., 1959); *Hudgins v. Standard Oil Co.*, 136 Cal. App. 44, 50 (3d. Dist., 1933). The court on appeal does not have to speculate on what particular ground the jury may have found in favor of the prevailing party. *Thomson*, at 555; *Hope*, at 712.

During the trial, Trial Court prepared a general verdict form, CACI VF-5001, which form was presented to Appellants' counsel and Respondent's counsel for review and modifications. After review, modifications and agreement by the parties and their respective counsels, the CACI General Verdict Form was given by the Court to the jury. The Jury deliberated, reached their decision, and rendered their

verdict by filling out and signing the CACI General Verdict Form. On August 13, 2010, the Jury returned their verdict, were polled by the Court clerk, and the Court entered the verdict on the records. A true copy of General Verdict is can be found in the Clerk's Transcripts, Bates numbers 000164 through 000165. This general verdict implies a finding in favor of Respondent of every fact essential to support Respondent's causes of action against Appellants.

The jury instructions in the trial below made numerous references to "defendants" generally, which refer to all defendants in the action. *See*, Clerk's Transcripts 000121-000161. As well, the jury instructions made several specific references to the defendants by name, including specific mentions of defendant Siu Ling Li. *See*, *e.g.*, Clerk's Transcripts 000140, 000141, 000154 and 000155. As well, the General Verdict form CACI-5001 was reviewed and approved by Appellants' counsel and by Respondent's counsel before being presented to the Jury. *See*, Clerk's Transcripts 000164-000165. The General Verdict form was an integral part of the materials presented by the Trial Court to the Jury for their consideration and decision. The Jurors clearly marked the boxes indicating they found in favor of Respondent and against each of the Appellants on each cause of action presented to them. *See*, Clerk's Transcripts 000164-000165. Counsel for Appellants and counsel for Respondent were presented when the Jurors returned from their deliberations, the verdict was taken on the record, and the jurors were polled. Appellants never raised any questions or objections, and they certainly have not presented any evidence to this Court about their raising any objections before the Jurors were dismissed. Appellants have the burden to show there was an error below, that the error was prejudicial, and that Appellants acted diligently to remedy any such error before it was too late, but they fail to establish any of these elements. By failing to raise any objections prior to the General Verdict form being presented to the Jury, and failing to raise any objections after the Jury reached a verdict but before the Jurors were dismissed, Appellants waived any objections they may have

had. Furthermore, Appellants have failed to present the reporter's transcripts to this Court to consider.

Appellants cite to *Tapia v. Barker*, 160 Cal. App. 3d 761 (1st Dist., 1984), in support of their contention of "jury misconduct." *Tapia* is factually distinguishable. There, after the jury returned their special verdict and the jurors were dismissed, an affidavit was presented to the court showing juror bias against the Plaintiff's race and that the juror had discussions about high verdicts leading to high insurance premiums. Since defendant was not able to present a counter-affidavit, the *Tapia* court found jury misconduct and ordered new trial. By contrast, Appellants here have never mentioned—let alone provide an affidavit—showing juror bias against race or that jurors considered the impact of high verdict on insurance premiums. Since here Appellants and Respondent are all Chinese, race could not possibly have been a factor in the case outcome. As well, no insurance coverage applied to the claims in the case below. Unlike *Tapia*, the jurors here returned a general verdict. Therefore, *Tapia* is not controlling here.

2. *By their Failure to Raise Timely Objections During the Progress of the Trial, Appellants Waived any Objections They May Have Had.*

Appellants' cite to Subdivision (1) of Section 657 of the *California Code of Civil Procedure* to argue for "irregularity in proceedings." It is well settled that in order to invoke this Subdivision, an appellant needs to have raised proper objections during the trial proceeding. "The ground refers to matters which may not be fully presented by exception taken during the progress of the trial, and which therefore, must be shown by affidavit." *Head v. Logan*, 39 Cal. App. 2d 243 (3d. Dist., 1940) (quoting 20 CALIFORNIA JURISPRUDENCE, page 43, § 22).

A party will not be permitted to sit by and keep silent and then later urge the objection when it is too late to correct the defect. *Abner Doble Co. v. Keystone Consol. Mining Co.*, 145 Cal. 190 (1904). A party who fails to make timely

objections is deemed to have waived the objections. *Horn v. Atchinson, Topeka & Santa Fe Ry. Co.*, 61 Cal. 2d 602, 609-10 (1964). A litigant must preserve the right to present an issue on appeal. *Hepner v. Franchise Tax Board*, 52 Cal. App. 4th 1475, 1486 (1997). California courts have repeatedly imposed a duty on litigants to voice any concerns before it is too late to remedy them and they are deemed waived:

“The law casts upon the party the duty of looking after his legal rights and calling to the judge’s attention any infringements of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.”

Sommer v. Martin, 55 Cal. App. 603, 610 (1st Dist., 1921) (quoting 1 HAYNE ON TRIAL AND APPEAL §103). Accord, *Sommer v. Gabor*, 40 Cal. App. 4th 1455 (2d Dist., 1995).

The standard of review under Subdivision (1) of Section 657 of the *California Code of Civil Procedure* is abuse of discretion. *Head v. Logan*, 39 Cal. App. 2d 243, 246 (3d Dist., 1940). Under the “abuse of discretion” standard of review, appellate courts will disturb discretionary trial court rulings only upon a showing of “a clear case of abuse” and “a miscarriage of justice”. *Blank v. Kirwan*, 39 Cal. 3d 311, 331 (1985); *Denham v. Superior Court (Marsh & Kidder)*, 2 Cal. 3d 557, 566 (1970).

Appellants reviewed the General Verdict form before it was presented to the jury, but never raised any objections. Appellants and their counsel were present at the court when the Jury returned their verdict, and when the Jury was polled. At no point did Appellants raise any objections during the trial or up to the point when the Jury was dismissed. The first instance Appellants made any objections was on August 25, 2011 (*See*, Clerk’s Transcripts 000166-000168A)—twelve days after the Jury returned their general verdict and were dismissed by the Trial Court. By so

delaying, Appellants foreclosed any possibility for remedial action while the action was still pending, and hence waived any concerns Appellants may have had.

The Trial Court presided over the entire trial of this action and was familiar with all of its proceedings. Having knowledge of the trial proceedings and having considered Appellants' motion for new trial and Respondents' oppositions, the Trial Court denied Appellants' motion. Appellants have not made a showing that the Trial Court abused its discretion in so ruling. Furthermore, although the Appellants bear the burden of proof here, they have not provided the reporter's transcripts for this Court's consideration.

B. THE GENERAL VERDICT WAS SUPPORTED BY SUBSTANTIAL AND SUFFICIENT EVIDENCE, AND APPELLANTS FAIL TO PRESENT ANY EVIDENCE FOR THIS COURT TO REVIEW.

California courts recognize "the settled rule that a general verdict implies a finding in favor of the prevailing party of every fact essential to the support of his action or defense." *Henderson v. Harnischfeger Corp.*, 12 Cal. 3d 663, 673 (1974). Where the losing party does not ask for special findings from the jury, the jury is not required to provide them, and the verdict will be upheld if the evidence was sufficient to sustain it on any grounds. *Estate of Hellier*, 169 Cal. 77, 83 (1915). A general verdict will be upheld if any one of the prevailing party's claims or defenses is supported by the evidence and the law. *Henderson*, at 673; *Bresnahan v. Chrysler Corp.*, 65 Cal. App. 4th 1149, 1153 (2d Dist., 1998).

The standard of review applied to determine if a verdict is "against the law" is the substantial evidence rule, and the court considers the evidence in light most favorable to the prevailing party making all legitimate inferences to uphold the jury verdict if possible. *Sanches-Corea v. Bank of America*, 38 Cal. 3d 892, 907 (1985). A jury verdict is "against the law" if it is "unsupported by any substantial evidence, i.e. [if] the entire evidence [is] such as would justify a directed verdict against the

part[ies] in whose favor the verdict [is] returned.” *Kralyevich v. Magrini*, 172 Cal. App. 2d 784, 789 (1959). “Where several counts or issues are tried, a general verdict will not be disturbed by an appellate court if a single one of such counts or issues is supported by substantial evidence and is unaffected by error, although another is also submitted to the jury without any evidence to support it and with instructions inviting a verdict upon it.” *Posz v. Burchell*, 209 Cal. App. 2d 324, 335-36 (1962). It is immaterial that the court gave erroneous instructions on other claims or defenses: “The rule assumes that the jury found on the cause of action or theory which was supported by substantial evidence and as to which there was no error.” *McCloud v. Roy Riegels Chemicals*, 20 Cal. App. 3d 928, 935-36 (3d. Dist., 1971).

If the verdict as rendered is ambiguous or incomplete, the party adversely affected may ask the trial judge to obtain a more certain verdict *before* the jury is discharged. *Woodcock v. Fontana Scaffolding & Equip. Co.*, 69 Cal. 2d 452, 457 (1968); *Mizel v. City of Santa Monica*, 93 Cal. App. 4th 1059, 1070-71 (2001). Failure to object to the form of verdict before the jury is discharged may waive any ambiguity or insufficiency in the verdict. *Jensen v. BMW of No. America Inc.*, 35 Cal. App. 4th 112, 131 (1995).

As discussed above, the jury instructions were as to all defendants and the General Verdict form prepared with the approval of Appellants and Respondent allowed the jury to return verdict as to each cause of action against all defendants. After the jury returned the verdict, the jurors were polled in the open court in the presence of Appellants’ counsel and Respondent’s counsel and neither side raised any objections nor pointed to any ambiguity, at which point the verdict was entered on the Court’s records and the jury was excused by the Court. Therefore, assuming *arguendo* there were any ambiguities as to the verdict, Appellants have waived their objections to the same by failing to raise the objections before the jurors were discharged from their duties. Respondent presented substantial evidence at trial on

each of his causes of action, and Appellants had no grounds to seek a directed verdict on any of the causes of action. Appellants have the burden to prove a reversible error here, but Appellants have failed to present the reporter's transcripts to this Court for the Court's consideration. Hence, the judgment below should be affirmed.

C. TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS' LAST MINUTE *EX PARTE* MOTION TO CONTINUE TRIAL AND RE-OPEN DISCOVERY.

1. *Denying Appellants' Last Minute Ex Parte Motion for Trial Continuance Was Not an Abuse of Discretion as the Next Available Trial Date was Nearly A Year Away, and Such Delay Would Have Gravely Prejudiced Respondent.*

California law requires that to the maximum extent possible, the judges must set firm trial dates, commence trial as scheduled, and adopt firm, consistent policies against trial continuance. *Cal. Gov. Code* § 68607(e)-(g). The court has an interest in orderly and effectively dispatch of legal business, and to avoid congestion and confusion in its calendar may insist on cases being heard as promptly as circumstances will permit. *Lorraine v. McComb*, 220 Cal. 753, 755 (1934); *Mann v. Pacific Greyhound Lines*, 92 Cal. App. 2d 439, 446 (1949).

“[T]here is no policy in this state of indulgence or liberality in favor of parties seeking continuances.” *County of San Bernardino v. Doria Mining & Eng'g Corp.*, 72 Cal. App. 3d 776, 781 (4th Dist., 1977). Subdivision (c) of Rule 3.1332 of the *California Rules of Court*, while emphasizing that “continuances of trials are disfavored,” enumerates circumstances that may provide grounds for continuance. Subdivision (b) of Rule 3.1332 of the *California Rules of Court* requires that “[t]he party must make the motion or application as soon as reasonably practical once the necessity for the continuance is discovered.”

The California Supreme Court has clearly pronounced the standard of review for trial court rulings on continuance requests:

“The granting or refusal of a continuance rests in sound discretion of the Court below; and its rulings will not be revised except for *most cogent* reasons. The Court below is apprised of all the circumstances of the case, and the previous proceedings, and is, therefore, better able to decide upon the propriety of granting the application than an Appellate Court, and when it exercises a reasonable and not arbitrary discretion, its action will not be disturbed.”

Musgrove v. Perkins, 9 Cal. 211, 212 (1858)(emphasis supplied); Accord, *Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 161, 162 (1858).

Respondent filed his complaint in this action on May 22, 2009. At the trial setting conference on September 1, 2009, the Trial Court scheduled the case for Final Status Conference and Trial, on July 23 and August 2, 2010, respectively. Appellants brought an *ex parte* request at the Final Status Conference to continue the Trial. Appellants’ motion for trial continuance did not point to any of the grounds under Subdivision (c) of Rule 3.1332 of the *California Rules of Court*. The Trial Court properly found there was no good cause to continue the trial date. In denying the Appellants’ motion, the Trial Court noted that had this case not gone to trial on August 2, 2010, as scheduled, the next available trial date would have been nearly a year later; that would have violated the fast track rules and certainly would have prejudiced Respondent who was seeking a resolution of the case.

2. *Denying Appellants’ Last Minute Ex Parte Motion to Extend Discovery Cutoff Was Not An Abuse of Discretion, as Appellants’ Motion Lacked the Necessary Meet and Confer Declaration, and Appellants had Already Conducted Substantial Amounts of Discovery.*

California law provides courts the “discretion” to grant or deny a motion to extend discovery cutoff. *Cal. Code Civ. Proc.* § 2024.050(b). The motion “*shall be accompanied by a meet and confer declaration under Section 2016.040.*” *Cal. Code*

Civ. Proc. § 2024.050(a)(emphasis supplied).

Here, the Trial Court properly exercised its discretion to deny Appellants' last minute *ex parte* motion to extend discovery cutoff. First, as evidenced by Clerk's Transcripts Bates numbers 000182 through 000196, Appellants' motion lacked the requisite meet and confer declaration, which in itself was automatic grounds for denial. *Cal. Code Civ. Proc.* § 2024.050(a). Second, there was no necessity for discovery as Appellants had conducted substantial written discovery on Respondent, and as well, had conducted a full day of Respondent's deposition. *Cal. Code Civ. Proc.* § 2024.050(b)(1). Third, assuming *arguendo* Appellants had any grounds to seek an extension of discovery cutoff, Appellants should have acted promptly and diligently rather than bringing their motion at the final status conference of the case—one week before the commencement of trial. *Cal. Code Civ. Proc.* § 2024.050(b)(2). Finally, as discussed above, had the trial not commenced as scheduled, the next available date on the Trial Court's calendar was nearly a year away which delay would have caused substantial prejudice to Respondent. *Cal. Code Civ. Proc.* § 2024.050(b)(4).

V. CONCLUSION.

The judgment of the Superior Court of California for the County of Los Angeles should be affirmed.

Dated: April 15, 2011

Respectfully submitted,

HONG & MASHAL, LLP

By: 

Robin Mashal

Peter Y. Hong

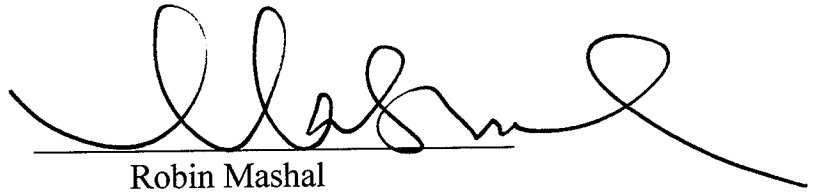
Attorneys for Plaintiff/Respondent

YU CHUNG KOO

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.360(b) of the *California Rules of Court*, I, hereby certify that the above Respondent's Reply Brief contains 3487 words, including footnotes. In making this certification, I have relied on the word count of Microsoft Word, the computer program used to prepare this brief.

Dated: April 15, 2011



Robin Mashal

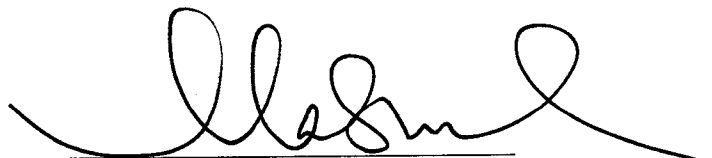
PROOF OF SERVICE

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 1875 Century Park East, Suite 600, Los Angeles, California 90067-2507.

On April 15, 2011, I served on the interested parties in this action true and correct copy (or copies) of the foregoing document described as:
RESPONDENT'S REPLY BRIEF.

- (BY MAIL)** By placing said documents in postage pre-paid envelope(s), sealed and addressed as shown on the attached service list, and depositing the same with the United States Postal Service the same day. I am readily familiar with this firm's business practice for collection and processing of correspondence by U.S. Mail. I am aware that on motion of party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date stated in this proof of service.
- (BY OVERNIGHT DELIVERY)** By placing said documents in Overnight Express™ envelope(s), sealed and addressed as shown on the attached service list, and depositing the same within the Overnight Express™ deposit box at Los Angeles, California, before the scheduled pickup time, to be delivered to the parties the next day.
- (BY PERSONAL SERVICE)** I hand delivered said documents to the address(es) indicated on the attached service list.
- (STATE)** I declare under penalty of perjury under the laws of the State of California, that the above is true and correct.
- (FEDERAL)** I declare that I am a member of the bar of this court OR I am employed in the office of a member of the bar of this court at whose direction this service was made, and that the above is true and correct.

Executed on April 15, 2011, at Los Angeles, California.



Robin Mashal

SERVICE LIST

Dale C. Frailey, Esq.
Lawrence Hoodack, Esq.
Law Offices of Frailey & Associates
8632 E. Valley Blvd., Suite "P"
P.O. Box 888
Rosemead, CA 91770

[one copy]

Phone: (626) 288-2545
Fax: (626) 288-1695

Carlos A. LLoreda, Jr.
LAW OFFICE OF CARLOS A. LLOREDA, JR.
4311 Wilshire Boulevard, Suite 403
Los Angeles, California 90010

[one copy]

Phone: (323) 965-0365
Fax: (323) 965-0483

Honorable Judge Mark V. Mooney
Los Angeles Superior Court
111 North Hill Street
Department 68
Los Angeles, CA 90012

[one copy]

Phone: (213) 974-5707

Supreme Court of California
350 McAllister Street,
Second Floor
San Francisco, CA 94102-4783

[four copies]

Phone: (415) 865-7000

Second Appellate Dist.: (213) 830-7000