Nxx Lopez
Street
City
Telephone 650-
In Pro Per

IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO
APPELLATE DIVISION

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. Nxxxxxx Lopez, Defendant and Appellant	Case No.: AD-□20 **Appellant's Response Brief**

APPEAL FROM SUPERIOR COURT, NORTHERN JUDICIAL DISTRICT

HONORABLE COMM. JOSEPH K. ALLEN SUPERIOR COURT CASE N6__089

TABLE OF AUTHORITIES

California Appellate Cases:

Firpo vs. Murphy (1925) 72 Cal App 249, 253

Pelkey v. Hodge (1931) 12 Cal App 424, 426 (Pelkey)

STATUTES:

California Civil Code §§ 1441 and 1667

California Vehicle Code §§ 21453(a), 21455.5(g)(1) and (g)(2), 21455.6

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

Plaintiff/Respondent has come forth with a "City of Daly City's Reply Brief" to the Superior Court of California, County of *Alameda* [emphasis added]. Although it seems likely that their intent was to have generated this for the County of San Mateo, I am unable to be sure, as Plaintiff/Respondent also neglected to indicate the court division or address. There is no provision in either California Rules of Court Rule 8.200(a) for a "Response Brief" from the Plaintiff/Respondent– it is arguably prohibited by 8.200(a)(4) as well as San Mateo County Court local Rules Division 1, 1.5(a)(2). The Plaintiff/Respondent's "Response Brief" is actually the Respondent's Opening Brief that should have been submitted by November 13, 2009 and is thus untimely. Additionally, this Plaintiff/Respondent 's "Reply Brief" is in the form of the delinquent "Respondent 's Opening Brief", including the format that asserts its own argument in this manner and in no way either maps to, specifically refutes nor cites Appellate's Opening Brief arguments. It is clearly a document that relies entirely upon the original trial record and Settled Statement – the entirety of which is the domain of the "Respondent's Brief" that they failed to file. The sanction for failure to file the "Respondent's Opening Brief" is clearly described in California Rules of Court Section 8.220, parts (a)(2) and (c) applied here. I anticipate that the Court will disallow Respondent's "Reply Brief" submission on its own motion. However since I am not an attorney and no judgment has been handed down, I have generated this Appellant's Reply Brief herein in case the court decides to allow Respondent's filing.

RESPONSE TO PETITIONER/RESPONDENT'S ARGUMENTS

Argument A1: "The City's Contract Complies with the Plain Language of CVC §21455.5(g)(1)"

Plaintiff/Respondent attempts to recharacterize this contract as a "Flat Fee" contract, then continues to slip in parenthetically that the other provisions are simply safeguards for the city. As the usual and ordinary meaning citations have already been offered, the simplest example will clarify this:

> Months 1, 2, 3, 4, 5, 6 receipts are $5000/month. Months 7, 8, 9, 10, 11, 12, receipts are $7000/month. Yearly variance (with Cost Neutrality) is zero, as the excess for Months 7-12 is applied to the shortfalls during Months 1-6. Excess during Months 7-12 is not kept by the city – it

is ultimately paid to supplier. Specifically, the Month 7 payment to RedFlex is ultimately $7000, not $6000. Payment in any given month is a variable dependent upon the number of citations issued. Income lost in low-ticket periods can be made up by submitting more violations later to catch up. Total due to RedFlex is now restored to $72,000 due to the Cost Neutrality clause. A $6,000 maximum per month (scenario claimed by Plaintiff/Respondent) would have resulted in $66,000 in fees, a loss of $6000 – a scenario that not supported by the contract. A fixed-fee result (no Cost Neutrality) would be $72,000.

This constitutes a variable fee structure based upon the number of citations, with RedFlex left wanting if not enough citations were issued. I had submitted two rulings as part of my original case – they are presently in evidence. An extraction from a 2007 Fullerton reversal based upon CVC§21455.5(g)(1) cites that that if insufficient revenue is generated, the fee goes down. As such, NTS has an incentive to ensure sufficient revenues are generated to cover the monthly fee.

In a separate reversal of a RedFlex system ticket that adds perspective to the illusion of Fixed Fee equivalence, the opinion notes, ”Indeed, by the contract’s express language, compensation can be 100% of the [all] revenue[even that over the monthly fee] generated for one or more months while the [overall yearly] deficit gets reduced or eliminated” [parentheses are my editorial clarifications]. The opinion continues, “Such a payment method would, as a matter of common sense, embolden the supplier to store more data and develop broader criteria for Los Alamitos’ consideration; especially if, over time, any deficits continue or increase. Yet withstanding any facts to the contrary, this is a revenue-driven pricing system, in direct violation of CVC§21455.5(g)(1).”

As part of the contract in question (Exhibit “D” of the contract, Compensation and Pricing, already in evidence), Daly City pays Redflex what is stated as a “fixed fee” of $6000 per month for each designated intersection approach. Each month the parties compare the fixed fee against the amount of money received from the citations. If the money received is less than the fixed fee, Daly City is only obligated to pay the money received. However the difference carries over to the next month as a deficit. If the situation is reversed in the next month and money received from the citations exceeds the fixed fee,

then Daly City is obligated not only the fixed fee, but to make up any of the deficit it can from the excess money. There is a provision to forgive any deficit remaining after twelve months.

In any given month under the contract payment to RedFlex can be based, not on a flat fee of $6000, but instead on a percentage of the revenue generated. Indeed, by the contract's express language, compensation can be 100% of the revenue (even more than $6000) generated for one or more months while the deficit gets reduced or eliminated. Such a payment method would, as a matter of common sense, embolden the supplier to store more data and develop broader criteria for Daly City's consideration; especially if, over time, any deficits continue or increase. Yet withstanding any facts to the contrary, this is a revenue driven pricing system, in direct violation of CVC§21455.5(g)(1)

If there was to be a Flat Fee intent, the contract would simply say "Flat Fee". After a successful appeal against the City of Los Alamitos, the July 2005 RedFlex contract was amended in June 2007 from Cost Neutral (in the same format as the Daly City contract) to Flat Fee, payable after 90 days. (see Exhibit A and B, with the actual case already noted as filed with the original trial). It is not reasonable to assert that a "Flat Fee" contract and a "Flat Fee with Cost Neutrality" contract are effectively identical; otherwise, the Cost Neutrality verbiage would never need to be added.

Additionally, the change to the RedFlex contract with the City of Los Alamitos was done two years before the citation was issued in Daly City – plenty of time to issue a similar contract amendment. It is certain that RedFlex was aware of this issue, as the contracts are nearly identical – even to having the fee structure on Exhibit B [of the contract] in both cases. This is but one example of how such enforcement systems can reasonably contract with a city to provide services that meet CVC§21455.5(g)(1), as well as RedFlex has demonstrated an awareness and responsive reaction in some, but not all, cities.

Daly City city's contract with RedFlex could have easily been written to comply with CVC§21455.5(g)(1) and avoid the legal shortcoming of which RedFlex was previously aware.

Argument A2: "The City's Contract Satisfies the Statutory Intent"

Plaintiff/Respondent first asserts that RedFlex has no ability to influence the number of citations issued (ignoring possible factors as elapsed timer calibration tampering, e.g.). However, this statement has no basis in evidence and must be ignored. However, the main issue is that the Statutory Intent, which has clearly been stated to address trust issues, not to address any actual tampering. Speculation from the Plaintiff/Respondent regarding incentives is misplaced in this context.

On September 23, 2003, AB1022 was signed into law that created CVC §21455.5(g). Quoting the author (via Business Wire), Assembly Member Jenny Oropeza, "This measure will ensure that traffic camera programs are not manipulated for profit." The bill was in response to a 2002 state auditor's report recommendations to the red light camera program to eliminate perceived conflicts of interest and restore public trust in the system. This quote was also submitted to this court in a separate traffic appeal filing (People v. Bullock).

Plaintiff/Respondent states that "the purpose of CVC§21455.5(g) is to ensure that camera operators do not have an incentive to increase the number of citations issued and paid through the use of their equipment." This is a mischaracterization of the actual quote – cited in both my Opening Brief and even cited in their own statement –"…undermines the public trust and raises concerns….". Having an actual incentive, or having the means or motive to make any changes is not within the scope of the Bill Analysis; the management of the perception is the reason cited for the generation of the CVC§21455.5(g) amendment. Although it is unusual, we fortunately need not delve into "reasonable interpretation of legislative intent" or "plain meaning" because the actual legislative statements are a matter of record, have been cited by the Plaintiff/Respondent and are not a point of contention.

In *Pelkey v. Hodge* (1931) 12 Cal App 424, 426 (Pelkey), the court explained that when a contingency fee contract for testimony invites perjury, it will be declared void, although in a particular instance no injury to the public may have resulted. In other words its validity is determined by its general tendency at the time it is made and if this is opposed to the interests of the public it will be invalid, even through the intent of the parties was good and no injury to the public would result in a particular case. "The test is the evil tendency of the contract and not its actual injury to the public in a particular instance

Argument B: "The Contract's Severability Clause Requires Enforcement Even If the Cost Neutrality Clause is Stricken"

Plaintiff/Respondent asserts that the "severability clause" requires enforcement against the Defendant/Appellate, even if the cost neutrality is stricken. This logic has several non-interdependent faults. First, California Civil Code §1441 states "A condition in a contract, the fulfillment of which is impossible or unlawful, within the meaning of the Article on the Object of Contracts, or which is repugnant to the nature created by the contract, is void." Nothing has been presented to show how the assertion of the severability clause would override California Civil Codes. Second, exercising the severability clause attacks the very existence of the exchange of consideration, and thus, a valid contract. The Cost Neutrality is a key factor for determining the reimbursement to RedFlex. There is no mechanism to remove the offending clause without a resulting (possibly large) change in reimbursement. In the extreme case, if the sever is made to the entire Exhibit B, this removes all provision for consideration to RedFlex for services, thus cancelling the existence of the contract per California Civil Code §1441 which states, "It is essential to the existence of a contract that there should be: 1) Parties capable of contracting, 2) Their consent, 3) A lawful object, and 4) A *sufficient* [italicized for emphasis] cause or consideration. " Thirdly, the Defendant/Appellate entire objection to this case is in regards to the Cost Neutrality clause – there is nothing in the balance of the contract that is being challenged nor is germane as to the contact being compliant with CVC§21455.5(g). Whether the contract is valid and enforceable applies to my objection regarding CVC§21455.6, but is moot to the CVC§21455.5(g) aspect. Lastly, whenever a statute is made for the protection of the public, a contract in violation of its provisions is void (*Firpo vs. Murphy* (1925) 72 Cal App 249, 253). Here, CVC§21455.5 et. seq. was enacted to allow automated enforcement of CVC 21453 violations; which are punishable by a statutorily designated fine. A contract contrary to the terms of law designed for the protection of the public and prescribing a penalty for violation is illegal and void and no action may be brought to enforce it. A court should, on its own motion, refuse to entertain an action when its illegality appears as a matter of law from the whole case before the court. (Civil Code §1667; *Industrial Indemnity Company vs. Golden State Company* (1953) 117 Cal App. 2nd 519, 527).

Additionally, since the contract was defective and void, the requirements of CVC§21455.6 were not met, as there was actually no legal contract.

CONCLUSION:

Since the Daly City PD issued my citation during a period of time that the contract between RedFlex and the City of Daly City was not compliant with CVC§21455.5(g)(1) as mandated in CVC §21455.5(g)(2), and that compliance to this section is compulsory, the trial court should have sustained my foundational objection to evidence should have been ruled inadmissible and that it was not the jurisdiction of the Daly City PD to use such a device to issue my citation. Notwithstanding this camera evidence, there is no other specific evidence offered to support the citation. The prejudice is absolute.

I declare under penalty of perjury under the laws of the State of California that the forgoing is true and correct.

Dated: December 4th, 2009

Respectfully Submitted

Nxxxxxx Lopez