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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

PEOPLE OF THE STATE OF CALIFORNIA, Respondent/Plaintiff, vs. BLUMENTHAL, Appellant/Defendant.	Appellate Case Number: 30-2011-00457710 Case No. SA156171PE **RESPONDENT'S BRIEF**

TO DEFENDANT/APPELLANT, DEFENDANT'S/APPELLANT'S ATTORNEY AND THIS HONORABLE COURT:

PLEASE TAKE NOTICE that Plaintiff/Respondent, PEOPLE OF THE STATE OF CALIFORNIA (hereinafter referred to as "People") hereby submits the following Brief in response to Defendant's/Appellant's, BLUMENTHAL (hereinafter referred to as "Appellant"), Opening Brief, and in advance of any appellate hearing in the above-captioned matter.

I. INTRODUCTION

The Appellant in the above-captioned matter was issued a Notice of Traffic Violation and Notice to Appear pursuant to the City of Santa Ana's automated traffic enforcement system (hereinafter referred to as the "system"). The Appellant committed a violation of *Vehicle Code*

section 21453(a), failure to stop at a red light, on May 3, 2010, at the intersection of Bristol and Segerstrom in the City of Santa Ana. After being presented with evidence regarding the system and the incident, the trial court found the Appellant guilty of the alleged violation.

Appellant now makes several contentions regarding the sufficiency of the trial and the legitimacy of the evidence against him. Specifically, the Appellant argues that: (1) The photographs and video were inadmissible hearsay; (2) the contract between the City and Redflex violates *Vehicle Code* section 21455.5(g)(1); and (3) the City did not comply with the warning notice requirements of *Vehicle Code* section 21455.5(b).

As to (1), the photographs and video are not hearsay as they are not "testimonial". Accordingly, the photographs and video do not violate the Confrontation Clause. Further, such evidence is presumed accurate under *Evidence Code* sections 1552 and 1553. Moreover, even if such evidence were considered hearsay, they fall under the exception to the hearsay rule and are admissible as "business" or "official" records, pursuant to *Evidence Code* section 1271 and 1280, respectively.

As to (2), the plain language of the contract between the City and Redflex does not contain a citation or revenue-based compensation provision. Section 26(a) neither explicitly nor implicitly violates *Vehicle Code* section 21455.5(g)(1).

As to (3), the City is presumed to have regularly performed official duties. (*Evidence Code* sections 664, 606, 660) Appellant's mere assertions, without more, alleging that warning notices were not issued, does not rebut the statutory presumption.

Accordingly, the Appellate Division should uphold the reasonable and justified rulings of the underlying court and find the Appellant guilty of failing to stop at a red light.

II. FACTUAL AND PROCEDURAL BACKGROUND

On May 3, 2010, the City's system captured Appellant failing to stop at a red light at the intersection of Bristol and Segerstrom, in violation of *Vehicle Code* section 21453(a). Subsequently, on May 10, 2010, a Notice of Traffic Violation and Notice to Appear was issued to the Appellant and filed with the Orange County Superior Court. (Clerk's Transcript, Volume 1, Pages 1 & 12)

On September 9, 2010, a hearing was held by Commissioner Luege in Department C54 as a Trial by Declaration. The court found the Appellant guilty. A request for a Trial de Novo was filed on October 8, 2010 and a new trial was set for November 10, 2010 and then re-set for January 12, 2011 at the request of Appellant, appearing through counsel Jeffrey Ousley, and by finding of good cause by the court to re-set the trial. (Clerk's Transcript, Volume 1, Pages 1-3)

The matter proceeded to court trial in Department C54 of the Orange County Superior Court on January 12, 2011. At that court trial, the Appellant, through counsel Jeffrey Ousley, pled not guilty. On that date, the Santa Ana City Attorney's Office appeared as prosecutor in the matter on behalf of People of the State of California. (Clerk's Transcript, Volume 1, Page 3) The trial date was continued to January 26, 2011 so People may respond to a Discovery request that was incorrectly sent to the District Attorney rather than the City Attorney. (Clerk's Transcript, Volume 1, Page 3)

The matter was heard before Commissioner Luege on January 26, 2010. People introduced nine (9) exhibits and presented the testimony of two individuals, Officer Alan Berg of the Santa Ana Police Department and Mr. John Burnette, Co-Custodian of Records for Redflex. Appellant introduced three (3) exhibits, marked 12-14, consisting of the contract between the City and Redflex, an informal discovery request and a letter from the Appellant to the City Attorney's Office. (Clerk's Transcript, Volume 1, Pages 4-8)

At the conclusion of the presentation of evidence, the case was taken under submission. The trial court issued its Trial Ruling on February 9, 2011, finding the Appellant guilty of violating *Vehicle Code* section 21453(a).

III. PHOTOGRAPHS AND VIDEO ARE ADMISSIBLE

A. PHOTOGRAPHIC AND VIDEO EVIDENCEARE NOT HEARSAY

Hearsay is defined as "a statement that was made other than by a witness while testifying at the hearing..." (*Evidence Code* section 1200[a]) Photographs and video are not "statements," and therefore are not hearsay. Essentially, photographs and videos are "demonstrative evidence depicting what the camera sees. They are not testimonial and they are not hearsay." *People v. Cooper*, (2007) 148 Cal.App.4th 731, 746. See also, *People v. Bowley*, (1963) 59 Cal.2d 855,

860, and *People v. Doggett*, (1948) 83 Cal.App.2d 405.

The testimony at trial demonstrated that the information in the data bar on the photographs, including the date and time of the alleged violation, is automatically generated by a computer. No person inputs the information. (See Settled Statement on Appeal, 4:2-7, and 8:9-12). In *People v. Hawkins*, (2002) 98 Cal.App.4th 1428, the Court explained that a computer's internal time and date clock are records of its internal operations and not hearsay because "the Evidence Code does not contemplate that a machine can make a statement." Therefore, the information in the data bar is also not hearsay.

In addition, the law states that, "A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent." (*Evidence Code* section 1553) Similarly, *Evidence Code* section 1552 states that, "A printed representation of computer information or a computer program is presumed to be an accurate representation of the computer information or computer program that it purports to represent."

The information in the data bar on the photographs, including the date, time, and location of the alleged violation, is also presumed to be accurate. This information is automatically generated by a computer and the computer software runs an internal check to verify the accuracy of the time and date entry. The data bar is encrypted in the photograph by the computer at the time the cameras take the photographs. The software program on the computer maintains the information, runs internal tests to confirm the information is accurate, and automatically encrypts the photographs with the data bar. (See Settlement Statement, 10:11-14; See also, *People v. Hawkins*, (2002) 98 Cal.App.4th 1428 [the timing of a "computer's clock" is presumed accurate under *Evidence Code* section 1552])

The rule for admission of photographs into evidence was first stated by *People v. Bowley*, (1963) 59 Cal.2d 855. Noting that photographs are useful for different purposes, the California Supreme Court focused on the value of photographs and video as "probative evidence of what they depict. Used in this manner they take on the status of independent 'silent' witnesses." *Id.* at 860; see also, *United States v. Taylor*, 530 F.2d 639, 642 (5th Cir. 1976). In this regard, the

Bowley Court concurred with *People v. Doggett*, (1948) 83 Cal.App.2d 405, a case in which the only evidence of the crime was a photograph. The *Bowley* Court noted that the photograph in *Doggett* was admitted into evidence even though no human witness testified that it accurately depicted what it purported to show. *Bowley*, 59 Cal.2d at 860. The *Doggett* Court found that evidence as to when the photograph was taken, the place the photograph was taken, and that the defendants were the persons shown in the photograph was sufficient to establish a foundation for the photograph's admissibility. The *Bowley* Court agreed that the picture was allowed to "speak for itself" and that "this seems to be a sound rule." *Bowley*, 59 Cal.2d at 860-61. Specifically, the *Bowley* Court explained:

> "There is no reason why a photograph or file, like an X-ray, may not, in a proper case, be probative in itself. To hold otherwise would illogically limit the use of a device whose memory is without question more accurate and reliable than that of a human witness. It would exclude from evidence the chance picture of a crowd which on close examination shows the commission of a crime that was not seen by the photographer at the time. It would exclude from evidence pictures taken with a telescopic lens. It would exclude from evidence pictures taken by a camera set to go off when a building's door is opened at night. (citation omitted) We hold, therefore, that a photograph may, in a proper case, be admitted into evidence not merely as illustrated testimony of a human witness but as probative evidence in itself of what it shows." *Bowley*, 59 Cal.2d at 861.

As *Bowley* holds, photographs are admissible and may be the sole evidence used to convict a defendant notwithstanding the fact that a person cannot testify to the truth of the matter depicted in the photos.

However, when the silent witness approach is used to admit photographs and video into evidence, a witness must explain the reliability of the process by which the photograph or video was created. The testimony required to admit computer generated data enjoys a relatively low threshold. See, *People v. Lugashi*, (1988) 205 Cal.App.3d 632, 641-644 (discussing the national trend towards "less extensive foundational showings" required for computer generated records); *Aguimatang v. California State Lottery*, (1991) 234 Cal.App.3d 769, 797 (witness for the purpose of admitting computer records need not be a computer expert, but only needs to generally

understand the system's operation and possess sufficient skill to use the system and explain the resulting data). The photographs and video were supported by such testimony and are admissible.

Lastly, Appellant cites to *People v. Khaled* (2010) 186 Cal. App. 4th Supp. 1, but ignores the glaring differences between the lack of testimony documented in *Khaled*, and the exhaustive testimony provided in this case. Accordingly, *Khaled* is factually distinguishable from this case. Here, the People presented the testimony of Officer Berg, who has had personal training, experience, and knowledge pertaining to the City's system, and an employee of Redflex, John Burnette, who has expertise in maintenance, processing and storage of the photographic and video evidence. The Officer's testimony, in detail, discussed the following: how the Redflex automated enforcement system works, including how the cameras operate at the intersection, how the information on the data bar is automatically encrypted on the image by the computer at the intersection, how it is electronically transmitted from the computer at the intersection to Redflex via a secured internet server; how the data is digitally stored; the Police Department guidelines for screening evidence and determining whether to approve the issuance of a citation; as well as other information. (See Settlement Statement, 2-6:7-3)

The testimony of John Burnette also provided pertinent information regarding the red light camera system utilized by the City of Santa Ana, including confirmation that: Redflex receives the photographs and video from the intersection equipment; photographs and video are stored at the local computer and transmitted through a secure transmission line to the Redflex main server; Redflex employees engage in a three-step procedure when processing the incident; processors confirm the validity of the digital signature and review the data captured; the images captured by the red light camera equipment are made available to the Santa Ana Police Department for approval; security measures observed at Redflex; and the maintenance procedures established by Redflex in order to ensure proper operation of the system.

Therefore, the testimony here demonstrates that, based on their training and experience, Officer Berg and Mr. Burnette had sufficient knowledge and understanding of the Redflex automated enforcement system to testify, and accordingly did testify, as to the time of the violation, method of retrieval and that the photographs and video were "a reasonable

representation of that which it is alleged to portray.'" (*Khaled*, at 5, citing *People v. Gonzalez, supra, 38 Cal.4th at p. 952.*)

B. EVEN IF PHOTOGRAPHS AND VIDEO EVIDENCE WERE CONSIDERED HEARSAY, SUCH EVIDENCE WOULD QUALIFY FOR EXCEPTION PURSUANT TO EVIDENCE CODE SECTION 1271 AND 1280

Even if the photographic and video evidence were considered hearsay, such evidence would qualify for the business records exception to the hearsay rule pursuant to *Evidence Code* section 1271, as well as the official records exception under *Evidence Code* section 1280. Both the business records exception and the official records exception require that the evidence presented must have been made in the regular course of business, at or near the time of the event, and that there is an indication of trustworthiness. The business records exception also requires that a qualified witness testify to the identity and mode of preparation of the evidence. The official records exception does not require such testimony, so long as the evidence was made by and within the scope of duty of a "public employee." *Evidence Code* section 195 defines a "public employee" as "an officer, agent, or employee of a public entity."

Redflex is an agent of the City, as is permitted by *Vehicle Code* section 21455.5(d). The evidence demonstrated that Redflex operates the cameras pursuant to an agreement with the City. (See Exhibit 12) Indeed, by the statutory scheme set out in *Vehicle Code* section 21455.5, the law requires that cities who contract with manufacturers and suppliers maintain control and supervision of the automated enforcement system. (*Vehicle Code* section 21455.5[d]). Redflex could not and does not operate independently of the City. By statute and by contract, Redflex performs specified duties *for* the City. Therefore, so long as it is functioning as an agent of the governmental entity pursuant to *Vehicle Code* section 21455.5, it is an agent of the City for purposes of *Evidence Code* section 1280. Accordingly, documents prepared by Redflex may be imbued with the trustworthiness of a public police agency. See, *Imachi v. DMV* (1992) 2 Cal.App.4th 809, 816-817 (trustworthiness indicia supplied by fact that private lab technician, acting on behalf of law enforcement agency, was reporting first hand observations as well as

presumption of official duty regularly performed, citing *Evidence Code* section 664). The fact that Redflex serves as an agent for the City meets the chief foundation of the special reliability granted official and business records, which is that they are based on first hand observation of someone whose job it is to know the facts recorded.

Moreover, records prepared in the ordinary course of business are not inadmissible hearsay merely because they may be utilized in litigation. Appellant relies on two cases, *Palmer v. Hoffman,* 318 U.S. 109 (1943) and *Gee v. Timineri*, 248 Cal.App.2d 139 (1967), which are factually distinguishable. The *Palmer* case arose out of a grade crossing accident, where the engineer of the train, who died before trial had commenced, prepared a statement concerning the accident two days after the accident occurred. The petitioners argued that this statement was properly admitted under the "business records exception." The Court disagreed. Unlike records concerning the operation of a business, the Court held that the statement of the engineer was not "prepared in the regular course of business." It reasoned: "It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls." (Id. at 113) Because the record did not concern management or operation of the business as such, the Court determined it was not prepared in the "regular course of business" and was not admissible under that hearsay exception.

Gee v. Timineri, 248 Cal.App.2d 139 (1967) similarly fails to categorically exclude the photographs and video from the business records exception, merely because they may be used in litigation, when there is evidence that the documents were prepared in the regular course of business. In *Gee*, the court determined that there was no evidence to demonstrate that the document at issue (a "financial statement" prepared by the plaintiff's "bookkeeper and accountant") was prepared in the normal course of business. Indeed, the plaintiff's testimony demonstrated that he had asked his bookkeeper/accountant to prepare the statement for presentation to his attorneys, for purposes of a lawsuit.

Unlike *Palmer* and *Gee*, here the records were prepared in the regular course of Redflex's

business. The photographs and video are not singular documents prepared for the purpose of a legal proceeding, like a report prepared by an employee after an accident or a "financial statement" prepared for purposes of a lawsuit between former business partners. Although the photographs and video may eventually be used by the prosecution in those cases where individuals do not plead guilty to the violation, the records are part of Redflex's day to day operation—the processing of red light camera violations.

Indeed, case law is clear that where there is testimony demonstrating that the documents were prepared in the regular course of business and otherwise meet the requirements for the hearsay exception, the use of such records in litigation are appropriate and not excluded as hearsay. (See *Potamkin Cadillac Corp. v. B.R.I Coverage Corp.*, 38 F.3d 627 (2d. Cir. 1994); *U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040 (2009); *County of Sonoma v. Grant*, 187 Cal.App.3d 1439 (1986).) Accordingly, the court is not precluded from determining that the business records exception applies to the evidence presented in this case merely because, in some cases, the documentary evidence will be utilized in connection with a legal proceeding.

C. THE EVIDENCE PRESENTED BY THE PEOPLE DOES NOT VIOLATE THE CONFRONTATION CLAUSE

The Sixth Amendment of the *United States Constitution* provides a criminal defendant with "the right… to be confronted with the witnesses against him." However, the Confrontation Clause is not applicable to the red light camera photographs, video and data bar.

In *Crawford v. Washington*, (2004) 541 U.S. 36, the United States Supreme Court examined the history of the Confrontation Clause and stated that the "principle evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50. *Crawford* concluded that the Confrontation Clause "applies to 'witnesses' against the accused – in other words, those who 'bear testimony.'" *Id.* at 51 (citation omitted). "Testimony" in this regard, "is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 56 (citation omitted). As such, only "testimonial" statements are subject to the Confrontation Clause. *Id.* at 51; *United States v. Cervantes-Flores*, 421 F.3d 825, 831 (9th Cir. 2005); *United*

States v. Lopez-Moreno, 420 F.3d 420 (34) (5th Cir. 2005). Although *Crawford* declined to provide a comprehensive definition of a "testimonial" statement (*Crawford*, 541 U.S. at 68, fn.10), the Court did provide guidance as to what types of statements are and are not testimonial. *Crawford* stated that most hearsay statements admissible through established exceptions to the hearsay rules are not subject to the Confrontation Clause since "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records or statement in furtherance of a conspiracy." *Crawford*, 541 U.S. at 56. The Court also gave several examples of "testimonial" statements, including: prior testimony at a preliminary hearing, before a grand jury, or at a former trial and police interrogations. *Id.* at 57-58.

These issues were further analyzed in *Melendez-Diaz v. Massachusetts*, (2009) 129 S.Ct. 2527, where the defendant was charged with distributing cocaine and objected to three "certificates of analysis" showing the results of forensic analysis performed on the seized substance. *Id.* at 2531. The certificates were not generated by computers or machines, but were sworn statements prepared and signed by laboratory analysts reporting that the bags had been examined by the analysts and found to contain cocaine. *Id.* The Court held that admission of the certificates violated the defendant's Sixth Amendment right to confront the witnesses against him. *Id.* at 2542. The Court concluded that the certificates were testimonial statements within the ambit of the Confrontation Clause because they were sworn declarations made for the purpose of proving a fact. *Id.* at 2532. However, the *Melendez-Diaz* Court created an exception for declarations concerning the authenticity and accuracy of machines, stating "we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." *Id.* at 2542, fn. 1. Accordingly, it is not necessary for every Redflex employee to appear and testify at trial regarding evidence obtained by Redflex.

Similarly, numerous cases hold that information generated by machines, such as the photographs and video generated by the Redflex system, are non-testimonial statements outside the ambit of the Confrontation Clause of the Sixth Amendment. *United States v. Washington*, 498 F.3d 225, 230-231 (4th Cir. 2007) (raw data contained in the machine printout constituted

'statements' of the machines themselves, not their operators); *United States v. Moon*, 512 F.3d 359, 361-362 (7th Cir. 2008) (machines do not constitute "witnesses against" defendants); *United States v. Crockett*, 586 F.Supp.2d 877, 885 (E.D. Mich. 2008).

Here, the photographs and video constitute machine-generated raw data and thus are outside the reach of the Confrontation Clause. Similar to the test results in *Moon* and *Washington*, which were generated solely by machines, the photographs and video are produced solely by red light cameras without the assistance of a human operator. As such, they are not testimonial statements, but rather statements of machines that are not subject to the Confrontation Clause.

IV. THE AGREEMENT BETWEEN THE CITY OF SANTA ANA AND REDFLEX DOES NOT VIOLATE VEHICLE CODE SECTION 21455.5

Vehicle Code section 21455.5(g)(1) provides that a contract between a governmental entity and manufacturer or supplier of the automated enforcement equipment may not include a provision for the payment or compensation based on the number of citations generated, or as a percentage of the revenue generated. Appellant's characterization of Section 26(a) of the original contract between the City and Redflex is inaccurate. The plain language of the 26(a) makes clear that it does not include a provision for payment or compensation to Redflex based on the number of citations or percentage of the revenue generated. It is merely a provision allowing the City to renegotiate compensation if, after its own biannual review, it determines that it cannot recover the costs of operating the system.

Section 26(a) also does not implicitly address the number of citations generated or percentage of revenue generated. Appellant asks this court to infer that renegotiation of the contract in accordance with section 26(a) must be based on the number of citations issued or on a percentage of revenue. The inference Appellants asks this court to make is based on a faulty assumption—that Redflex can control the number of citations or revenue generated. Redflex has no authority to do so as it is not involved in those aspects of the program which can reasonably be inferred to result in additional citations or revenue. Redflex merely maintains the equipment, processes the incidents, and sends the citations that are approved by the Police Department.

Redflex cannot select intersections (See Section 3(c) of original contract) and cannot evaluate photographic evidence for citations (See Section 5(e) of the original contract). It only captures potential violations and processes those incidents. Moreover, by contract, it must capture all incidents of potential violations. (See Section 8[a] of the original contract) If Redflex must capture all incidents of potential violations, it cannot be said that Redflex, because of Section 26(a) "has considerable reason to issue as many citations as it can…" There is no additional incentive, nor ability, to issue more citations or increase revenue. Accordingly, Section 26(a) does not implicitly provide for compensation based on the number of citations or revenue generated and is not a violation of *Vehicle Code* section 21455.5(g)(1).

V. THE CITY OF SANTA ANA FULFILLED THE REQUIREMENTS OF VEHICLE CODE SECTION 21455.5, INCLUDING THOSE RELATED TO WARNING NOTICES; IN FACT, CITY IS PRESUMED TO HAVE COMPLIED WITH WARNING NOTICE REQUIREMENTS BY VIRTUE OF EVIDENCE CODE SECTION 664—APPELLANT PROVIDED NO EVIDENCE REBUTTING THAT PRESUMPTION

The testimony of Officer Berg indicated that the City of Santa Ana issued warning notices for every intersection in the City operating red light camera equipment, which includes the intersection of Bristol and Segerstrom. (See Settled Statement on Appeal, 3:4-9) In fact, Officer Berg was specific in describing the date and time of the warning notice phase, which he clearly indicated was implemented for all intersections where equipment is currently in operation. Accordingly, the City complied with *Vehicle Code* section 21455.5(b), consistent with the ruling in *People v. Park* (2010) 187 Cal.App.4th Supp.9.

Moreover, Evidence Code section 664 creates a presumption that an official duty has been regularly performed. See *Cosgrove v. Sacramento County* (Cal. Ct. App.1967) 252 Cal.App.2d 623; *Davenport v. Department of Motor Vehicles* (1992) 6 Cal.App.4th 133. By a statutory scheme specific to automated enforcement systems, the City, prior to issuing citations for *Vehicle Code* section 21453(a) by way of that system, was required to issue only warning notices for thirty (30) days. Because the statutory scheme contains official duties relative to operation of the

system and because the City is currently operating that system, it is presumed that the City has complied. See *Fisk v. Department of Motor Vehicles*, (Cal.Ct.App.1981) 127 Cal. App.3d 72; *Arthur v. Department of Motor Vehicles* (Cal.Ct.App.1999) 184 Cal.App.4th 1199.

Appellant's assertion that a failure to produce actual warning notices is "substantial evidence that notices were never sent out" is misplaced and not supported by law. First, actual warning notices could not be produced because, in order to protect the confidentiality of registered owners, State law limits the retention of automated red light camera records to six months from the date the information was first obtained or until final disposition of the citation, whichever is later. (*Vehicle Code* section 21455.5[e][3]) In compliance with *Vehicle Code* section 21455.5(e)(3), actual warning notices, which were issued in late 2009, have been destroyed. Indeed, the fact that actual warning notices were not produced, rather than demonstrating noncompliance with *Vehicle Code* section 21455.5(b), is actually consistent with compliance with *Vehicle Code* section 21455.5(e). Therefore, a lack of production does nothing to bolster Appellant's unsupported contention that the City failed to comply with *Vehicle Code* section 21455.5(b).

Indeed, a failure to produce actual warning notices, or a failure to produce evidence of any kind pertaining to the requirements in *Vehicle Code* section 21455.5, is immaterial. Evidence Code section 660 clearly indicates that the presumption in Section 664 is a presumption affecting the burden of proof. *Evidence Code* section 606 provides that "The effect of a presumption affecting the burden of proof is to impose upon the party *against whom it operates the burden of proof as to the nonexistence of the presumed fact.*" (Emphasis Added.) Appellant's mere claim that there was a lack of production as to warning notices is wholly insufficient to overcome the City's official duty presumption and to meet Appellant's burden of proof regarding nonexistence. Indeed, Appellant would perhaps need to provide evidence that during the warning notice phase which occurred late in 2009, an individual who should have received a warning notice from the City did not. Such evidence might reasonably prove nonexistence of the facts presumed and shift the burden. Since no such evidence was provided, Appellant cannot prove that the requirements of 21455.5 were not met.

VI. CONCLUSION

For the foregoing reasons, any objection or argument as to the sufficiency and admissibility of the evidence in this matter, should be OVERRULED or DENIED.

CITY OF SANTA ANA
OFFICE OF THE CITY ATTORNEY

Dated: June 30, 2011

By: _____
MELISSA M. CROSTHWAITE
Deputy City Attorney
Attorneys for PEOPLE OF THE STATE OF CALIFORNIA

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.883(b)(1))

The text of this Brief consists of 4,681 words as counted by the Microsoft Office Word 2007 word-processing program used to generate the brief.

DATED: June 30, 2011

MELISSA C. CROSTHWAITE
Deputy City Attorney
Counsel for Respondent/Plaintiff
People of the State of California

PROOF OF SERVICE
(C.C.P. SECTION 1013(a), 2015.5)

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the aforesaid county; I am over the age of eighteen and not a party to the within action; my business address is 20 Civic Center Plaza, Santa Ana, California 92702.

On June 30, 2011, I served the foregoing document described as: **RESPONDENT'S BRIEF** in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Jeffrey P. Ousley, Esq.
316 W. 4th St., Suite 221
Santa Ana, CA 92701

Tony Rackauckas, O.C. District Attorney
Attn.: Writs & Appeals
P.O. Box 808
Santa Ana, CA 92701

Clerk of the Court
ORANGE COUNTY SUPERIOR COURT
700 Civic Center Drive West
Santa Ana, CA 92701
Delivery to: Commissioner Daniel Ornelas

[] I caused to be delivered by courier, such envelope by hand to the office of the addressee(s).

[X] I am readily familiar with my employer's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Santa Ana, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on June 30, 2011 at Santa Ana, California.

Marcella Villaseñor