September 14, 2009

Honorable Ronald M. George, Chief Justice
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Brown, Winfield & Canzoneri, Inc. v. Superior Court*, No. S156598

Dear Chief Justice George and Associate Justices:

This letter brief by amicus curiae California Academy of Appellate Lawyers addresses the inquiry posed in this court's order of September 3, 2009: "whether a trial court must afford notice and an opportunity to be heard prior to reconsidering an interim ruling in response to a suggestive *Palma* notice. (See, e.g., *Le Francois v. Goel* (2005) 35 Cal.4th 1094.)"

In the Academy's view, this inquiry begs the question. Plainly, *if* the Court of Appeal issues a suggestive *Palma* notice to the superior court, effectively urging the superior court to change its order, the superior court should afford the parties notice and an opportunity to be heard before doing anything further. In *Le Francois v. Goel, supra,* 35 Cal.4th at page 1108, this court held that when the superior court decides on its own motion to reconsider an interim ruling, as a matter of fairness the superior court should give the parties notice and an opportunity to litigate the question on reconsideration via briefing and a hearing. The same notion of fairness would be implicated on reconsideration after a suggestive *Palma* notice.

An assurance of fair process in the superior court after a suggestive *Palma* notice, however, does not resolve the first question presented for review in this case: whether the Court of Appeal should be issuing suggestive *Palma* notices *at all*.

The Academy's amicus curiae brief points out two problems that suggestive *Palma* notices present. First, the mere threat of a suggestive *Palma* notice will tend to compel real parties in interest to immediately file full-scale opposition on the merits – where a preliminary opposition limited to the threshold requirements for writ review, or no opposition at all, would otherwise suffice – for fear that the Court of Appeal might effectively decide the merits without the real party ever having been heard on the merits. Second, suggestive *Palma* notices effectively amount to short-cut decision-making, where the Court of Appeal, without full consideration of opposing argument, decides that it "appears" the trial court erred, whereupon the trial court feels coerced to change its order.

Affording the real party notice and an opportunity to be heard in the superior court – but *only* in the superior court – would not address these problems. The fact remains that, if it is possible a suggestive *Palma* notice might issue, it will be risky for the real party to withhold full-scale opposition prior to issuance of an alternative writ or order to show cause. The tool of preliminary opposition, as well as the strategy of filing no preliminary opposition at all, will largely be lost to real party's counsel.

The prospect of an opportunity to address the merits in the superior court will not ameliorate the danger from electing not to file a full-scale opposition at the outset in the Court of Appeal, for once the Court of Appeal says it "appears" the superior court erred, the die will almost certainly be cast. It is a rare superior court judge who will defy a "suggestive" *Palma* notice. The so-called "opportunity to be heard" in the superior court is something of an empty gesture, for the appellate court's "suggestion" is more coercive than suggestive. Where real parties truly need the opportunity to be heard is in the Court of Appeal, where the real decision-making occurs. Indeed, that is the larger message of *Le Francois v. Goel* – that the parties should have a full and fair opportunity to be heard in the court making the decision.

Where suggestive *Palma* notices lurk, the real party's best strategy is to attempt to nip the "suggestion" in the bud and file full-scale opposition before it is effectively too late. And if suggestive *Palma* notices become entrenched in the landscape of California's appellate process, the immediate filing of full-scale opposition will become routine. That may fatten the wallets of attorneys as they increasingly file full-scale opposition where they formerly would not have, but it comes at a price to their clients, who must pay serious money – perhaps $10,000, or $20,000, or even more – for work that more often than not will ultimately prove to have been unnecessary.

Admittedly, a procedural short-cut can still produce the right result, which will likely be the outcome in many cases where a suggestive *Palma* notice issues. But that will not always be true. The risk of error is inevitably increased by appellate decision-making without full consideration. Moreover, the damage from proliferation of suggestive *Palma* notices would extend to *other* cases – even if a suggestive *Palma* notice never materializes – where the real party's counsel will likely feel compelled to file an immediate full-scale opposition that ought not to be necessary, for fear of a suggestive *Palma* notice. And that damage would be to the *client*, for whom the cost of litigation would become even more burdensome.

Certainly, if this court were to give its imprimatur to suggestive *Palma* notices, the real party should have notice and an opportunity to be heard in the superior court. But this court should not give that imprimatur. The cost to litigants in other cases, where the very threat of a suggestive *Palma* notice would compel immediate full-scale opposition, is too great.

Respectfully submitted,

JAY-ALLEN EISEN
JON B. EISENBERG
DENNIS A. FISCHER
JOSEPH R. GRODIN
STEVEN L. MAYER
ROBIN MEADOW
ROBERT A. OLSON
JONATHAN B. STEINER
DOUGLAS R. YOUNG

By _____
Jon B. Eisenberg

Attorneys for Amicus Curiae
CALIFORNIA ACADEMY OF APPELLATE LAWYERS

cc: See attached proof of service