**IN THE COURT OF APPEAL**
**OF THE STATE OF CALIFORNIA**
**THIRD APPELLATE DISTRICT**

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**Appeal Nos. C038339 and C038343**

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STATE OF CALIFORNIA, et al.,
*Petitioners, Respondents (on appeal) and Cross-Appellants,*

vs.

ARBITRATION PANEL, etc.,
*Respondent (below),*

ANNA JORDAN, et al.,
*Real Parties-In-Interest, Appellants and Cross-Respondents.*

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ANNA JORDAN, et al.,
*Plaintiffs/Petitioners/Appellants and Cross-Respondents,*

vs.

CALIFORNIA DEPARTMENT OF MOTOR VEHICLES, et al.,
*Respondents and Cross-Appellants.*

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Sacramento Superior Court Case Nos. 95AS05228 and O1CS00073
The Honorable Joe S. Gray

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# RESPONDENTS'/CROSS-APPELLANTS' BRIEF

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**ATTORNEYS FOR RESPONDENTS AND CROSS-APPELLANTS**

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal results from a *sui generis* proceeding -- a statutorily-mandated arbitration for a specific, statutorily-mandated purpose, namely, to determine "the appropriate level of court costs, fees, and expenses **in the settlement of the case of *Jordan v. Department of Motor Vehicles* (1999) 75 Cal.App.4th 449. . . .**"(Rev. & Tax Code § 6909(b) (emphasis added).) Because the panel's authority derived from this statute, the critical issue was, has been and always will be: **What does the statutory mandate "settlement of the case of *Jordan v. Department of Motor Vehicles* (1999) 75 Cal.App.4th 449" mean?**

As they have at every stage of the proceedings, the Attorneys:[1] (i) continue to ignore these important words -- indeed, ignore the enabling statute altogether; and (ii) pretend that this was a private contractual arbitration in which the panel was free to award the Attorneys any amount of fees on any theory at all. That tactic proved successful with the panel -- or, more accurately, with two of the three panel members -- who: (i) made no attempt to determine the limits of their statutory authority, even though the State opened its arbitration brief by proclaiming that "[t]here is nothing in the legislation authorizing this arbitration proceeding" to support the Attorneys' requested remedy [3 JA 555-556];[2] and (ii) entered an astounding $88.5

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1 Although the appellants in this proceeding nominally consist of the four individual plaintiffs in the *Jordan* case and all the law firms who represented them, in point of fact, only the attorneys have a stake in the outcome of this appeal. For this reason, appellants are referred to herein as the "Attorneys." Respondents/Cross-Appellants State of California, Department of Motor Vehicles and Board of Equalization are referred to collectively as the "State."

2 Citations to "__ JA ___" herein are to the volume and page number of the parties' Joint Appendix, which the Attorneys are filing.

million award based upon a common fund theory expressly foreclosed by the published *Jordan* decision, which is what the enabling statute ordered to be settled and which had resulted in a mere $1,200 judgment with no common fund.[3]

The Attorneys tried the same tactic with the lower court, with very different results. Unlike the majority of the arbitration panel (which made no meaningful effort to come to grips with the wording of the enabling statute), the lower court correctly recognized that the statute controlled and defined the limits of the panel's authority -- limits that foreclosed the relief argued for by the Attorneys and awarded by the panel. The lower court's analysis was both straightforward and unassailable.

**<u>The Panel Exceeded Its Authority</u>.** As the lower court correctly reasoned, the panel's $88.5 million award was based upon the Attorneys' theory that, under the common fund doctrine, they were entitled to a percentage of $665 million appropriated by the Legislature as a reserve for possible refunds to individuals who had paid a smog impact fee that this Court, in the published *Jordan* decision, ruled was unconstitutional. However, the statute nowhere authorized the panel to compensate the Attorneys for the Legislature's public policy decision (concurred in by Governor Davis) to provide refunds to all taxpayers -- relief the Attorneys did not and could not obtain through the concluded *Jordan* litigation.[4] Instead, the enabling statute

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[3] The third panel member, former Chief Justice Malcolm Lucas, ultimately concluded that the panel likely had exceeded its authority and had made an unconstitutional gift of public funds. Given Justice Lucas' pointed and cogent dissent, the Attorneys' suggestion that the panel rendered a "unanimous" decision is simply wrong.

[4] Every litigation effort to fashion relief along the lines later provided by (continued...)

expressly directed the panel to determine "the appropriate level of court costs, fees, and expenses in the settlement of the case of *Jordan v. Department of Motor Vehicles* (1999) 75 Cal.App.4th 449." And, as the trial court has observed, that published decision -- which was final and the law of this case -- unambiguously established that **there was no common fund.** [7 JA 1777-1778.] (See also *Jordan*, 75 Cal.App.4th at 466-468 (emphasis added).)[5]

Given the clear limitations of the authorizing statute, the trial court correctly ruled that the panel exceeded its authority. Simply, the panel was authorized only to determine the appropriate amount of fees **in settlement of the *Jordan* case -- a case with a mere $1,200 judgment and no common fund**. Rather than fulfill its statutory mandate, however, the panel based its award upon a common fund theory the *Jordan* court had just taken away -- and, then, upon a fund created by **the Legislature** seven months after the *Jordan* decision had become final and the law of the case. The jurisdictional

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[4] (...continued)
the Legislature was singularly **unsuccessful.** To begin with, class action treatment was sought and denied in *Ramos v. DMV,* C023619. Further, in *McCabe v. Snyder* (1999) 75 Cal.App.4th 337, the Court of Appeal ruled that the State could not even divulge to plaintiffs' counsel the confidential identities of the individuals who had paid the tax. Finally, the ultimate judgment in the *Jordan* litigation was reduced to four plaintiffs and an award of just $1,200, thereby eliminating any litigation-established "common fund." (*Jordan v. Dept. of Motor Vehicles* (1999) 75 Cal.App.4th 449.)

[5] Even the Attorneys recognized below that the *Jordan* case abolished any common fund:

> The State is correct that the October 1999 Court of Appeal merits decision eliminated the $363 million "common fund" that provided one of two bases for this Court's fee award.

[3 JA 668-669.]

flaw in this approach is obvious: As the trial court correctly reasoned, a statutory mandate to settle the attorneys' fees for a published case that conclusively had eliminated a common fund theory cannot possibly be read as giving the panel the authority to override the very "no common fund" holding of that case.

The Attorneys' opening brief never comes to grips with the facts that: (i) the enabling statute mandated that the panel determine the appropriate amount of fees in settlement of the published *Jordan* case, which eliminated a common fund; (ii) nothing in the wording of the enabling statute evinces an intent by the Legislature to have the panel ignore the published *Jordan* case or base an attorneys' fees award on something extraneous and contrary to that decision; and (iii) the panel ignored the published *Jordan* decision -- and, for that matter, the wording of section 6909(b) -- and instead, at the Attorneys' urging, exceeded its statutory authority **by deciding a different issue.** Indeed, to this day, the Attorneys continue to misdefine the issue the panel was supposed to resolve as "whether plaintiffs' successful prosecution of the *Jordan* litigation substantially contributed to the creation of the Refund Account," and proudly proclaim that "[t]his is exactly the question that the arbitrators decided." [Op. Br. at 25.] This, of course, is the entire problem. One need only contrast the wording of the statute with the Attorneys' articulation of the issue decided to see that, as the trial court concluded, "the panel decided a dispute other than that which it was empaneled to do . . . ." [7 JA 1780.]

When these undisputed facts are brought front and center where they belong, the lower court's ruling vacating the panel's $88.5 million award hardly expands the permissible scope of judicial review of arbitration awards or constitutes "quibbling over legal theory," as the Attorneys suggest. Instead,

it does nothing more than correctly follow an express statutory mandate that trial courts **must** vacate an arbitration award in excess of the arbitrators' authority:

> [T]he court **shall vacate** the award if the court determines . . . [t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

(Code Civ. Proc. § 1286.2(d) (emphasis added).) Moreover, not only did the panel exceed its authority for the reasons found by the trial court, but it also exceeded its authority for additional, independent reasons.

**Gift of Public Funds.** As described below, when the attorneys' fee dispute was ordered to arbitration, the State's maximum exposure was $18 million. That being the case, a directive to **"settle"** a maximum $18 million dispute can only be viewed as a directive to reach an award between $0 and $18 million. Indeed, any statutory authorization for the panel to render an award above the State's maximum $18 million exposure would be an unconstitutional gift of public funds. [*See* Section III(B), *infra*.][6]

Fundamental rules of statutory construction require that the statute be interpreted in a fashion that would render it constitutional, and the only way to do that here is to read the statute as placing an $18 million cap on the amount of any award. Regardless, because the State's maximum exposure was $18 million, any reading of the statute and implementing Arbitration Agreement that would permit a higher award would result in an

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6 Pushed to its logical extreme, the Attorneys' "no cap" interpretation is nonsensical. According to the Attorneys' interpretation, the panel was free to award them the entire State Treasury -- or at least the entire $665 million appropriation behind section 6909 -- and no Court could set the award aside. Plainly, the Legislature could not have intended such an absurd result.

unconstitutional gift of public funds. For these reasons, although the trial court properly vacated the excessive arbitration award on the alternate grounds urged by the State, it erred in its passing conclusion that there was no cap on the amount the panel could award if it adhered to a theory permitted by the published *Jordan* case. [7 JA 1780.] In affirming the trial court's order vacating the arbitration award, this Court should correct that error to avoid any further mischief upon re-arbitration.

**Violation of Public Policy.** Finally, it is well-settled that an award exceeds the arbitrator's powers if it is violative of public policy. (*Moncharsh v. Heiley & Blase* (1992) 3 Cal.4th 1, 32.) And, here, the panel's award violated at least two public policies. First, the award violated the express policies underlying the very statute by which the panel was constituted -- to **settle** a claim whose maximum value was $18 million, and to do so with reference to a published decision that eliminated a common fund and left a $1,200 judgment. Second, for the reasons noted above, any award above the State's maximum $18 million exposure would be an unconstitutional gift of public funds.

For all of these independent reasons, this Court should affirm the trial court's order vacating the panel's $88.5 million award.

## II. STATEMENT OF THE CASE

Regrettably, the Attorneys take significant liberties by: (i) misrepresenting the facts and procedural history; (ii) omitting key facts; and (iii) taking partial quotes out of context to create false impressions. To set the record straight, the State has provided below a brief recap of the actual record.

## A. The *Jordan* Plaintiffs Prevail In The Trial Court And Their Attorneys Receive An $18 Million Fee Award.

In 1995, plaintiffs initiated four actions in Sacramento County Superior Court to challenge the constitutionality of a $300 smog impact fee imposed on out-of-state used vehicles when they first were registered in California. Ultimately, the four actions were consolidated (the "*Jordan* action") and proceeded to a judgment entered by the trial court (the Hon. Joe S. Gray) on October 27, 1997. The trial court ruled that the tax was unconstitutional and ordered the State to pay refunds not just to the four named plaintiffs, but to all others who had paid the tax within three years of the commencement of the *Jordan* action -- a remedy valued at $363 million (the "*Jordan* Judgment"). Based upon that $363 million judgment, on July 27, 1998, the trial court awarded plaintiffs' counsel $18,194,319.92 in fees and costs (the "Attorney Fee Order"). [1 JA 38-46.][7] The State then pursued separate appeals of the

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[7] The trial court advanced two rationales for the fee award. First, under a "common fund" theory, this figure represented 5% of the $363 million quasi-class remedy ordered by the trial court. Second, plaintiffs' counsel submitted conclusory declarations and other "evidence" indicating an attorneys' fee "lodestar" in excess of $2.5 million and expenses of more than $200,000. [1 JA 40; see generally 11 JA 2860 to end of Joint Appendix for the record on the Attorney Fee Order.] The trial court then allocated the Attorneys another $1 million for appeals and other future proceedings to reach a total lodestar of slightly more than $3.5 million. It then applied a multiplier of five to that inflated number to reach a back-up justification for an $18 million fee award. [1 JA 40-41.] Inasmuch as the quasi-class remedy was reversed by this Court, the first rationale has evaporated and the second was undercut. Indeed, given the skeletal record advanced by the Attorneys concerning their hours and the work performed, any lodestar award was indefensible. And, tellingly, in their briefing to the trial court on the parties' competing petitions to vacate and confirm, the Attorneys conceded that reversal of the Attorney Fee Order was virtually a foregone conclusion. [3 JA 669 (characterizing prospect of

(continued...)

*Jordan* Judgment and the Attorney Fee Order.

## B. This Court Dramatically Scales Back The *Jordan* Judgment, And Its Published Decision Becomes Final And The Law Of The Case.

On October 1, 1999, this Court issued a published decision with respect to the *Jordan* Judgment, affirming that the smog impact fee was unconstitutional, but reversing the quasi-class remedy and reducing the trial court's judgment to four plaintiffs and $1,200. (*Jordan v. Department of Motor Vehicles* (1999) 75 Cal.App.4th 449.) In its decision, this Court made clear that the trial court lacked authority and jurisdiction to craft a class remedy and create a common fund for all affected taxpayers. (*Id.* at 466-468.)

On November 10, 1999 -- the last day to seek Supreme Court review -- Governor Davis issued a press release announcing that the State would not further appeal the decision. Notwithstanding the limited relief ordered in the *Jordan* case, Governor Davis further stated that, as a matter of equity and public policy, he was urging legislation that would permit all persons who had been charged a smog impact fee to apply for refunds. [1 JA 72 ("I believe everyone who paid the fee is entitled to a refund.").] As the Governor has made clear, he "was not influenced, or persuaded by any plaintiff or plaintiff's attorney in taking this action." [1 JA 74.] Of course, regardless of the Governor's motivation, the fact remains that such relief could not be, and was not, obtained in the *Jordan* case, which had eliminated the trial court's quasi-class remedy and had become final.

Meanwhile, the State's appeal of the Attorney Fee Order remained pending. **Plaintiffs' counsel did not cross-appeal the $18 million award**

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[7] (...continued)
affirmance of the award on the alternative private attorney general theory as a "remote possibility").]

**and, in fact, took the position with this Court that they "are not seeking to increase the $18 million fee award. . . ."** [1 JA 52, fn. 5.] **Thus, the State's maximum exposure was $18 million.**

C. Months After The *Jordan* Case Was Final, The Legislature Enacts Section 6909 And Sends The Fee Dispute To Arbitration.

During the pendency of the appeal on the Attorney Fee Order, and seven months after the published *Jordan* decision had issued and become final, the Legislature, at the urging of Governor Davis, enacted Revenue and Taxation Code section 6909. [1 JA 224-227.][8] The purpose of that statute was to appropriate funds sufficient to pay any possible refund claims, even though the *Jordan* litigation had been reduced to only four claims worth $1,200 and even though many potential claims otherwise would have been barred by the statute of limitations. The Legislature appropriated over $665 million for the payment of claims, **with any unused funds to revert to the State's General Fund.**

Well after this appropriation was settled upon, the proposed statute was amended to require arbitration to settle the only dispute remaining in the courts -- the amount of fees to be awarded plaintiffs' counsel in the *Jordan* litigation. [Compare 1 JA 216-222 with 1 JA 206-214.] The purpose of this last-minute amendment was not to allow plaintiffs' counsel to obtain a windfall percentage of a legislative appropriation that this Court had just ruled the *Jordan* trial court could not compel. Indeed, **given the Court's published *Jordan* decision, such a windfall would have constituted an unconstitutional gift**

[8] Section 6909 became effective June 8, 2000. At the time, oral argument on the appeal of the Attorney Fee Order was set for August 25, 2000 (having twice been continued from February 18, 2000 and May 15, 2000). Consistent with section 6909, the parties stipulated to dismiss the appeal on August 15, 2000, and an order of dismissal was entered five days later.

**of public funds** (Cal. Const., art. XVI, § 6) -- a conclusion validated by a pointed dissent authored by one of the members of the arbitration panel (former Chief Justice Malcolm Lucas). [1 JA 196 ("the State may have grounds for holding fast to its current view that any award over $18 million is in violation of section 6909, subdivision (b) and is an unconstitutional gift of public funds").] Instead, having determined to provide legislative relief for all individuals who had paid unconstitutional smog impact fees, the Legislature plainly wanted to **settle** quickly the only issue remaining after the Court's published decision in *Jordan* – whether plaintiffs' counsel were entitled to $18 million in fees for a $1,200 remedy (which is the most they could have received had they prevailed through all judicial appeal(s)) or something much less than that. Indeed, the unambiguous wording of the statute makes clear that any arbitration award must be based on the outcome of the published *Jordan* case, not on any subsequent acts of the Legislature.[9] It was pursuant to this specific statutory authorization in section 6909(b) that the arbitration panel was given unique authority to resolve this narrow issue -- a fact ignored throughout the Attorneys' Opening Brief.

**D. The Parties Execute An Agreement Setting Forth A Procedure To Implement Section 6909(b).**

To implement section 6909(b), the parties executed an "Agreement to Arbitrate Amount of Attorneys' Fees" in July of 2000 (the "Arbitration

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9 Specifically, the enabling statute nowhere says that the panel may treat the Legislature's $665 million appropriation as a common fund. Instead, it expressly provides that the arbitrators were to determine "the appropriate amount of court costs, fees, and expenses **in the settlement of the case of *Jordan v. Department of Motor Vehicles* (1999) 75 Cal.App.4th 449**" (Rev. & Tax. Code § 6909(b) (emphasis added)) -- which, as noted above, expressly eliminated a common fund and resulted in a mere $1,200 judgment.

Agreement"). [1 JA 80-84.][10] Although the Attorneys now attempt to read this agreement as a stand-alone contract that overrode the limitations in the enabling statute and gave the arbitration panel *carte blanche* to issue an award in any amount and on any theory, in fact: (i) in a Stipulation prepared by the Attorneys and previously filed with this Court, the Attorneys expressly recognized that the Arbitration Agreement merely **"provides a procedure"** by which the parties would comply with the statute [7 JA 1667]; (ii) the Arbitration Agreement -- also drafted by Attorneys -- expressly provides that "[The State's] authority to enter into this agreement is set forth in Revenue and Taxation Code section 6909, subdivision (b) . . ." [1 JA 80]; and (iii) the panel twice has identified the source of its authority as the statute [1 JA 137 (stating

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[10] The Attorneys strain to suggest that, prior to the enactment of this statute, the parties had agreed to submit the fee dispute to binding arbitration. [Op. Br. at 2, 8.] The sole support for this suggestion is in a May 9, 2000 letter to this Court signed by counsel for the Attorney General and counsel for plaintiffs in the *Jordan* case requesting a continuance of the hearing on the appeal of the Attorney Fee Order in light of possible arbitration. [2 JA 480-484.] On its face, this letter confirms that there was no definitive agreement on the terms of any possible arbitration [*id.* ("They are currently in the process of working out the detailed terms. . ." )], which, under California law, means that there was no enforceable arbitration agreement. (*Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics* (1998) 61 Cal.App.4th 672, 677 (recognizing courts only can enforce written agreements to arbitrate); *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 357-359 (applying California law regarding formation of contracts, arbitration agreement is not enforceable if there is a failure to reach a meeting of the minds on all material points *"even though the parties have orally agreed upon some of the terms, or have taken some action related to the contract"*).) In any event, as noted below, even the Attorneys have conceded that this statute was necessary for the arbitration of this dispute to pass constitutional muster. [See, *infra*, footnote 11.] Thus, no matter how much the Attorneys wish it were otherwise, the only thing obligating the State to arbitrate was the statute, with its plain limiting language.

Award made "[p]ursuant to California Revenue and Taxation Code section 6909"); 1 JA 191 ("Our authority to hear this matter is a matter of statutory mandate, granted us under Revenue and Taxation Code 6909, subdivision (b).")].[11] Thus, far from going beyond the enabling statute, the Arbitration Agreement expressly limits the State's authority to the statute.

## E. A Panel Is Selected And Issues An Award In Excess Of Its Authority.

Ultimately, a three-person panel was selected, and the arbitration proceeded on November 13 and 14, 2000. Both in their briefing to the panel and in their evidentiary presentation, **the Attorneys made no effort to establish their entitlement to fees based upon the outcome of the published *Jordan* decision, which, as noted above, had eliminated any common fund and resulted in a mere $1,200 judgment. Instead, they seized upon something entirely extrinsic to the published decision (the Legislature's later appropriation of $665 million)**, argued that the appropriation was a common fund, and requested that the panel award them a percentage of the

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[11] Tellingly, in their demurrer to a taxpayer suit challenging the constitutionality of the arbitration, the Attorneys have conceded that section 6909(b) was necessary and controls. Simply, "[i]t is well-established that all contracts entered into by the state, or its agencies, must be authorized by statute . . . and all such unauthorized agreements and contracts are null and void." (*Pacific Inter-Club Yacht Assn. v. Richards* (1961) 192 Cal.App.2d 616, 619 (citing *Miller & Lux v. Batz* (1901) 131 Cal. 402 and Cal. Const., art. IV, § 32 (now art. IV, § 17). See also *Air Quality Products, Inc. v. State of California* (1979) 96 Cal.App.3d 340, 349 (same).) Far from arguing that cases such as *Pacific Inter-Club* are inapplicable and that section 6909, or some other enabling statute, was unnecessary, the Attorneys conceded *Pacific Inter-Club's* applicability by citing that case and affirmatively asserting that: (i) an agreement "is not 'without authority of law' when it is authorized by statute" [7 JA at 1712:1-2]; and (ii) **section 6909 was the necessary enabling statute here** [*id.* at lines 3-4].

$665 million appropriation. [1 JA 50, 54-64.] Contrary to the Attorneys' repeated suggestion that the State somehow conceded by silence that the panel had the power to enter a common fund award based on a legislative appropriation extraneous to the final published *Jordan* decision, the State took the position up front that: (i) "[t]here is nothing in the legislation authorizing this arbitration proceeding" to support the common fund remedy sought by petitioners [3 JA 555-556];[12] and (ii) the Attorneys were limited to an award

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[12] This unequivocal statement readily belies the Attorneys' claim that the State never argued, until after an award had been entered, that the relief requested by the Attorneys exceeded the arbitration panel's authority. [Op. Br. at 3, 12, 22.] In any event, the Attorneys' suggestion that the State could waive this argument by not making it [*id.* at 22-23] is contrary to California law. To begin with, the State did not even have to respond to the Attorneys' unilateral attempt to expand the scope of the arbitration beyond the sole issue properly submitted. (*Pacific Crown Distributors v. Brotherhood of Teamsters* (1986) 183 Cal.App.3d 1138, 1143-1145 (party cannot unilaterally expand arbitration by going beyond the issues properly presented; no waiver by failure of other side to object to unilateral injection of issue; order vacating award as being in excess of arbitrator's power affirmed).) Moreover, whatever the rules of waiver and estoppel may be for private litigants, they are vastly different where, as here, the government and taxpayer dollars are involved. Indeed, in this public context, the Attorneys could not succeed in invoking equity to bar the State from asserting statutory and constitutional limitations even had the State affirmatively represented that there were no limits on the panel's authority. As our Supreme Court recently noted, "it is clear 'that neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public.'" (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 316 (citation omitted).) Further, "'estoppel will not be applied against the government if the result would be to nullify a strong rule of policy adopted for the benefit of the public or to contravene directly any statutory or constitutional limitations.'" (*Transamerica Occidental Life Ins. Co. v. State Bd. of Equalization* (1991) 232 Cal.App.3d 1048, 1054 (citations omitted) (BOE not barred from asserting higher tax rate against corporation even

(continued...)

under California's private attorney general statute. (Code Civ. Proc. § 1021.5.) [3 JA 577-580.]

The panel issued the Arbitration Award several weeks later. [1 JA 122-138.] The panel correctly found that the $665,261,000 appropriated by section 6909

> was **created by the Legislature and not by the court in the *Jordan* case.** It [the *Jordan* case] never was certified as a class action and Claimants attorneys did not represent the 1.7 million taxpayers who paid the Smog Impact Fee.

[1 JA 130 (emphasis added).] Nevertheless, rather than go on to settle a maximum $18 million dispute with reference to the $1,200, "no common fund" judgment of the published *Jordan* case, as section 6909 required, the panel proceeded to: (i) disregard its statutory mandate; (ii) apply a "common fund" contingent fee theory to a $665 million legislative appropriation made seven months after the published *Jordan* decision had become final; and (iii) award plaintiff's counsel 13.3% ($88,479,713) of the appropriation.

## F. Panel Member And Former Chief Justice Malcolm Lucas Issues A Pointed Dissent.

The State promptly urged the panel to reconsider its decision. [1 JA 140-148 and 150-164.] However, citing *Moncharsh v. Heily & Blase, supra,* 3 Cal. 4th 1, two members of the panel concluded that they could not do so. [1 JA 166-187.] The third – retired Chief Justice Malcolm Lucas, the author of *Moncharsh* – issued a sharp dissent, concluding that the panel could and should reconsider what likely was an erroneous decision. [1 JA 189-197.] Contrary to the Attorneys' suggestion [Op. Br. at 13], the nine-page dissent

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[12] (...continued)
though Insurance Department counsel had opined to corporation that lower tax rate applied).)

was the antithesis of equivocal. Instead, it offered a series of pointed criticisms of the Award and why it likely was erroneous, and even invited the State to pay no more than $18 million. [1 JA 196-97.]

Specifically, Justice Lucas made clear his disagreement with the majority, stating: "I am inclined to believe that we did err and that plaintiffs' counsel have been handed about $70 million for the political consequences of their $1200 judicial victory." [1 JA 196.] Justice Lucas explained in detail why the Majority erred:

> *First*, if the . . . Legislature's intent in enacting section 6909, subdivision (b) was to allow an award *of up to $18 million*, any award in excess of that amount is clearly contrary to public policy, *i.e.*, to the amount intended and prescribed by the Legislature. *Second*, and perhaps even more troublesome, is that . . . any award for legislative action prompted by plaintiffs' counsel might be deemed to be compensation for sponsoring favorable legislation. Any such award would violate, not just public policy, but also might be an unconstitutional gift of public funds.
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> * * *
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> I doubt the Legislature's intent in enacting section 6909, subdivision (b) was to have us determine lobbyists' fees. And, I doubt whether the Legislature could properly set aside public funds for that purpose, even if the Legislature had wanted to do so. I am not now prepared to make an award of more than $70 million for political lobbying, *i.e.*, the portion of the award in excess of the initially-claimed amount of $18 million.

[1 JA 192-194 (emphasis in original).] Needless to say, the fact that the author of the *Moncharsh* decision took these positions readily refutes the Attorneys' claim that *Moncharsh* foreclosed the trial court from vacating the Award.

## G. The Parties File Competing Petitions And The Trial Court Vacates The Panel's Award.

On January 17, 2001, the State filed with the Sacramento County Superior Court a petition for a writ of mandate compelling the panel to vacate its award or, in the alternative, for an order simply vacating the award under California's Arbitration Act (Code Civ. Proc. §§ 1280 et seq.) [1 JA 1-11.] Shortly thereafter, the Attorneys filed a separate petition to confirm the arbitration award in the long-closed *Jordan* case. [2 JA 232-307.] The cases were consolidated before Judge Gray -- the same superior court judge who presided over the *Jordan* case the first time around.

On April 4, 2001, Judge Gray, sustained, without leave to amend, the Attorneys' demurrer to the State's mandamus claim, concluding that the State had an adequate remedy under its alternative petition to vacate under the Arbitration Act. [3 JA 789-790.][13] Then, several weeks later, he turned to the parties' competing briefs on the issue of whether, under California's Arbitration Act, the award should be vacated or confirmed.

Contrary to the Attorneys' repeated suggestion [Op. Br. at 14, 16], the State's briefing on that issue was not limited to the argument that the enabling statute effectively placed an $18 million cap on the amount of any award. Instead, the State also consistently urged that, because the enabling statute expressly directed settlement of a published case that had expressly eliminated a common fund, the panel exceeded its authority by employing the very

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[13] That order is the subject of the State's pending cross-appeal. If this Court affirms vacation of the panel's award under the Arbitration Act, then it need not review the trial court's demurrer order. For the reasons noted in the State's demurrer opposition, however, mandamus relief would be appropriate given the *sui generis* nature of this proceeding. [3 JA 636-646.]

common fund theory this Court had taken away.[14]

On April 18, 2001, Judge Gray issued a tentative ruling in which he granted the State's petition to vacate the arbitration award and denied the Attorneys' petition to confirm the award. [7 JA 1777-1780A.] Echoing the dissent of former Chief Justice Lucas and the second line of reasoning advanced by the State, Judge Gray stated that:

> [i]t was at a minimum an error of law to find that the legislative appropriation of funds to pay those who would not otherwise have been entitled under law to receive refunds created a common fund in the amount of the appropriation or any other amount. The 665 million dollar "fund" was never a part of the judicial case of Jordan. It was achieved, to the extent the attorneys had influence on the Governor's decision, by lobbying, not "lawyering."

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[14] For example, in its initial brief in support of the petition to vacate, the State correctly identified the sole issue to be arbitrated as "settlement of attorneys' fees for counsel in the *Jordan* case as that case had been decided by the Court of Appeal" [1 JA at 23:2-3] and argued, as an independent ground for vacating the award, that:

> The panel's award treated a **legislative** appropriation of $665,261,000 driven by sound and fair public policy considerations, as a **litigation-generated** "common fund" from which plaintiffs' counsel could be reimbursed, even though that fund: (i) was not, and could not have been, created by the *Jordan* litigation; and (ii) instead, was the result of the fact "that the Legislature and the Governor made the *political* decision to grant relief."

[1 JA 18-19; see also *id.* at 19, fn.2 (chronicling history establishing that every litigation effort to establish a common fund was unsuccessful).] Likewise, in both its opposition to the Attorneys' petition to confirm and its reply in support of the petition to vacate, the State asserted that the panel exceeded its authority by basing its award "upon a legislative appropriation no Court ordered or could order." [3 JA at 781:6-7; see also 3 JA at 612:16-18.]

[7 JA 1779.] Judge Gray then determined that the arbitration award could not survive as it "was beyond [the panel's] jurisdiction," explaining that:

> [t]he dispute was and always should be, what are the fees which the attorneys should receive for the successful prosecution of the Jordan litigation [which was final and had resulted in a mere $1,200 judgment]. The panel had no jurisdiction to decide what fees should be allowed for the lobbying efforts which the attorneys expended in advocating for the enactment of section 6909.

[7 JA 1780.] Judge Gray further held that, regardless of the arbitrators' interpretation of the scope of their authority, they could not "grant [themselves] more authority than the legislature could give." [7 JA 1780A.][15]

On May 3, 2001, Judge Gray issued a final order affirming his tentative ruling. [11 JA 2789.] On May 10, 2001, Judge Gray issued an Amended Minute Order Re: Court's Ruling to reflect the caption for both the State's petition to vacate the arbitration award (Superior Court Case No. 01CS00073) and the Attorneys' petition to confirm the arbitration award (Superior Court Case No. 95AS05228). [11 JA 2806.]

### H. This Appeal And The State's Cross-Appeal Follow.

On or about May 8, 2001, the Attorneys filed a Notice of Appeal challenging the May 3 order. [11 JA 2800-2805.] On May 24, 2001, following Judge Gray's May 10, 2001 amended minute order, the Attorneys filed an Amended Notice of Appeal from each case. [11 JA 2814-2825.] On

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[15] In a line of reasoning unnecessary to his decision, Judge Gray suggested that, although it foreclosed use of a common fund theory, the statute did not place a limit on the amount of any award the panel could issue under a proper theory. [7 JA 1780.] This is the other reason for the State's cross-appeal. As explained below, the trial court's "no cap" conclusion is plainly erroneous and, indeed, could result in an unconstitutional gift of public funds. [See Section III(B).]

June 27, 2001, the State filed a Notice of Cross-Appeal from each case challenging: (i) the trial court's ruling on the issue of whether section 6909(b) expressly or impliedly imposed a cap on the amount of the fees the panel could award; and (ii) the April 4, 2001 order sustaining without leave to amend the Attorneys' demurrer to the State's alternative mandamus claim. [11 JA 2826-2842.]

Despite the various appeals currently pending before this Court, the Attorneys also filed a Petition for Writ of Mandate, which raises the exact issues as the appeals already pending before this Court. On July 12, 2001, the State filed a Preliminary Opposition to the Attorneys' writ petition. For the reasons explained in the Preliminary Opposition, the Attorneys' writ petition is procedurally improper and should be denied out of hand.

## III. THE TRIAL COURT'S DECISION VACATING THE AWARD MUST BE AFFIRMED FOR THREE INDEPENDENT REASONS.

### A. Section 6909 Granted The Arbitrators Only Limited Authority Expressly Related To The *Jordan* Decision.

The Attorneys' opening brief all but ignores the limits imposed by the enabling statute -- section 6909 -- that authorized this arbitration. Section 6909 provided only the legal authority for the arbitration panel to award "court costs, fees, and expenses **in the settlement of the case of *Jordan v. Department of Motor Vehicles* (1999) 75 Cal.App.4th 449.**" Nowhere in the Attorneys' 30 pages of briefing do they even try to explain what this statutory directive means. This is by design.

To elaborate, the statute nowhere authorized the panel to give the Attorneys a percentage of a $665 million appropriation resulting from the Legislature's **later** public policy decision to provide refunds to all taxpayers --

relief the Attorneys did not and could not obtain through the long-concluded *Jordan* litigation. Instead, the enabling statute expressly directed the panel to determine **only** "the appropriate level of court costs, fees and expenses in the settlement of the case of *Jordan v. Department of Motor Vehicles* (1999) 75 Cal.App.4th 449." And, as Judge Gray recognized, the published *Jordan* decision -- which was final and the law of this case -- unambiguously established that **there was no available common fund**:

> The court of appeal . . . further held that the portion of the [trial court's] judgment that attempted to fashion a remedy for those persons who would not recover the fees paid unconstitutionally because they had not filed a timely claim, or might not thereafter file a timely claim, was beyond the issues in the lawsuit. The holding of the court of appeal was specifically that such relief was beyond the jurisdiction of the court to give. The appellate decision held that the remedy granted by statute (that requiring each person who paid the unlawful levy to file a timely claim or not be paid) was all the law required. Existing law required that persons who failed to file such a timely claim were entitled to no remedy. **The inescapable effect of this ruling is that there was no common fund created by the litigation.**

[7 JA 1777-1778 (emphasis added). See also *Jordan, supra*, 75 Cal.App.4th at 466-468.][16]

Given the clear limitations of the authorizing statute, the trial court correctly ruled that the panel exceeded its authority. Simply, rather than fulfill

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[16] Although the Attorneys still grudgingly concede that the published *Jordan* decision eliminated a common fund [Op. Br. at 15], they assert that "the arbitrators were asked to award an 'appropriate' fee in November 2000, not in October 1999 [when the *Jordan* decision was issued]." [*Id.* at 26.] This is a *non sequitur*. Section 6909(b) did not direct the panel to determine the appropriate amount of fees and costs considering events that transpired up to November of 2000 -- or, for that matter, at any time after the *Jordan* decision was issued. Instead, it chose a specific benchmark for measuring fees -- "the case of *Jordan v. Department of Motor Vehicles* (1999) 75 Cal.App.4th 449."

its statutory mandate to determine the appropriate amount of fees **in settlement of the published *Jordan* case -- a case with no common fund and a mere $1,200 remedy** -- the panel based its award upon a common fund theory the *Jordan* court had just taken away, and, then, upon a fund created by the Legislature, not the *Jordan* suit. Indeed, section 6909 was enacted almost seven months after the *Jordan* case had become final. As the trial court aptly summed it:

> The essence of the flaw in the award is that the panel decided a dispute other than that which it was empanelled to do; namely, to determine the attorneys fees for the litigation in the case of Jordan v. DMV. Instead, the panel decided the issue of attorneys' fees for the legislative advocacy in seeking passage of section 6909. That was beyond their jurisdiction.

[7 JA 1780.][17]

Put another way, given the clear limitations of the published *Jordan* decision, for the panel's award to have been authorized, the enabling statute would have had to evince an intent by the Legislature to overrule or supersede

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[17] In an effort to make the trial court's ruling seem like more "quibbling over legal theory" or "methodology," the Attorneys make much of a passing comment by the trial court to the effect that it would not have vacated a similar-sized award under a permitted theory (namely, the private attorney general doctrine). [Op. Br. at 4, 14.] The Attorneys miss the point. To begin with, for the reasons noted below, under any theory, an arbitration award in excess of the State's maximum $18 million exposure would constitute an unconstitutional gift of public funds. [See Section II (B), *supra*.] Moreover, one need only review the published decisions dealing with fees under the private attorney general doctrine to see that an $88.5 million private attorney general fee award for a $1200 judgment was not even in the realm of possibility. (See, e.g., *Ramos v. Countryside Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 627 (reversing fee order of $2.1 million, based on multiplier of 2.5; court notes that trial court must give detailed reasons for such a "greatly enhanced" award).)

the *Jordan* decision. But, far from doing so, the Legislature expressly cited that decision in the statute and directed the panel to determine the appropriate amount of fees in settlement of that published case. By definition, a statutory mandate to settle the attorneys' fees for a published case that conclusively had eliminated a common fund theory **cannot possibly be read as giving the panel the authority to override the very "no common fund" holding of that case.**[18] This is one of the principal reasons why the panel exceeded its authority, and Judge Gray properly so ruled.

**B. Fundamental Rules Of Statutory Construction Require That A Cap Be Read Into The Statute To Avoid Awarding An Improper Gift Of Public Funds.**

Although the trial court properly vacated the Award for the reasons noted in Section III(A) above, the panel also exceeded its authority for an independent reason: Any award above the State's maximum $18 million exposure -- be it authorized by section 6909(b) or by the Arbitration Agreement implementing the statute -- would be an unconstitutional gift of

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18 Predictably, the Attorneys' sole effort to find some statutory authorization for the panel's award is a diversion. To elaborate, section 6909(b) contains two clauses. The first clause specifies the issue to be arbitrated -- "the appropriate level of court costs, fees, and expenses in the settlement of the case of *Jordan v. Department of Motor Vehicles* (1999) 75 Cal.App.4th 449, shall be determined through binding arbitration." The second clause specifies how the award must be paid -- "all of those fees, costs, or expenses shall be paid with funds from the [refund] account." The Attorneys make a passing reference to the second clause and imply that it somehow provides a legislative "seal of approval" for treating the Legislature's entire $665 million appropriation as a common fund. [Op. Br. at 2, 11.] Obviously, the Attorneys are focusing upon the wrong language -- it is the first clause quoted above that specifies the issue to be arbitrated. And, as noted above, the relevant statutory language unquestionably foreclosed the remedy argued for by the Attorneys and awarded by the panel.

public funds. In that regard, the California Constitution prohibits the Legislature from "mak[ing] any gift or authoriz[ing] the making of any gift, of any public money or thing of value to an individual, municipal or other corporation whatever." (Cal. Const., art. XVI, § 6.) To survive constitutional muster, a public appropriation "must not only be used by the recipient entity for a *public* purpose, but must be used in furtherance of the *particular* public purpose of the transferring governmental entity." (*Golden Gate Bridge and Highway Dist. v. Luehring* (1970) 4 Cal.App.3d 204, 208.) In other words, "there must be some real benefit to the State which constitutes the 'public purpose' justifying the expenditure." (*Orange County Foundation for Preservation of Public Property v. Irvine Co.* (1983) 139 Cal.App.3d 195, 200.)

Here, there was no benefit to the State, real or otherwise, to embarking upon an arbitration that could generate an award in excess of its maximum $18 million exposure on a fully-briefed appeal of the Attorney Fee Order.[19] Instead, if the statute is read as permitting an award above the State's maximum exposure, there only could be a windfall to plaintiffs' counsel, which is precisely what our Constitution forbids. (*Orange County Foundation, supra,* 139 Cal.App.3d 195 (payment to settle frivolous title claim asserted by developer was gift of public funds because release of a specious claim is inadequate consideration).)

Put another way, fundamental rules of statutory construction require

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[19] The State could not even save litigation costs by arbitrating. In contrast to the arbitration, which resulted in additional briefing and a two-day hearing, all that remained on the fully-briefed appeal was a short oral argument. Indeed, the arbitration actually was more expensive for the State because the Arbitration Agreement required the State to pay the arbitrators' fees as part of any settlement. [1 JA 81.]

that section 6909(b) be interpreted in a fashion that places an $18 million limit on the amount of any award. First, it is well-settled that, wherever possible, every word of a statute is to be given meaning:

> A cardinal rule of construction is that every word in a statute is presumably intended to have some meaning and that a construction making some words surplusage is to be avoided.

(*Watkins v. Real Estate Comr.* (1960) 182 Cal.App.2d 397, 400 (citing 45 Cal. Jur.2d 627); *see also Valley Circle Estates v. VTN Consolidated, Inc.* (1983) 33 Cal.3d 604, 610 (same, citing *Watkins*). Here, if the term "settlement" does not place a limit on the panel's power, it adds nothing to the statute not already encompassed in the remaining statutory directive that "the appropriate level of court costs, fees, and expenses . . . shall be determined through binding arbitration." (Rev. & Tax Code § 6909(b).) Because the law forbids relegating a statutory term to the "useless" heap, "settlement" must be given meaning. The State's interpretation does so; the Attorneys' does not.

Second, even if the Court were to conclude that the statute is susceptible of either of the proposed constructions, statutes must be construed, consistent with their objectives, in a "sensible," "practical" manner, "mindful of 'the consequences that will flow from a particular interpretation.'" (*Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 686 (citation omitted).) As one court has summed it:

> **[T]he provision must be given a reasonable and common sense interpretation** consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, **which upon application will result in wise policy rather than mischief or absurdity . . . "'The court should take into account matters such as context**, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction.'"

(*DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 18 *disapproved on other grounds by Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1 (citations omitted; emphasis added).) As discussed above, the context of the dispute, in which the State had a maximum $18 million exposure, plainly supports the State's interpretation that the Legislature intended a limit on the panel's powers.[20] Moreover, the Attorneys' interpretation would lead to "mischief and absurdity" in the form of an unchecked panel's ability to multiply the liability of the State (and thus the taxpayers) to levels not possible had the Legislature left the fully-briefed dispute in the courts for final resolution. Clearly, it would not be "wise policy" for the Legislature to remove a dispute from the courts, where the State's liability was confined, to a limitless liability forum, and the statute should not be construed in such an absurd manner.

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[20] In an effort to suggest that the Legislature passed an open-ended statute knowing that the attorneys would argue a common fund entitlement to the entire legislative appropriation, the Attorneys claim that "counsel for the *Jordan* plaintiffs took the position in communications with both the Legislature and the Attorney General that they were entitled to a common-fund fee award calculated as a percentage of the entire $665 million fund." [Op. Br. at 8.] In point of fact, the Attorneys liberally misread the evidence they cite. The first piece of evidence to which the Attorneys cite [3 JA 595] is a hearsay recount of a **confidential** mediation brief from the Attorneys. There is a complete absence of any evidence that the Legislature had any knowledge regarding the Attorneys' confidential mediation position before it enacted the statute. Moreover, even assuming, *arguendo*, that the Legislature knew of the Attorneys' exorbitant mediation demand, then that "fact" would further support the argument that the Legislature intentionally limited the Panel to "settlement" of a $0 - $18 million dispute. The second piece of evidence cited by the Attorneys -- 4 JA 898-899 -- is a letter to certain legislators in which the Attorneys expressly offered to cap their recovery at $18 million. Given this offer, it defies credulity to suggest, as the Attorneys do, that the Legislature drafted a statute that gratuitously opened the door for the Attorneys to get more than they were happy to accept.

Finally, it is well-settled that, wherever possible, a statute must be construed in a manner that renders it lawful and enforceable:

> **If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional** in whole or in part, **or raise serious and doubtful constitutional questions, the court will adopt the construction which**, without doing violence to the reasonable meaning of the language used, **will render it valid in its entirety, or free from doubt as to its constitutionality**, even though the other construction is equally reasonable.

(*Miller v. Municipal Court* (1943) 22 Cal.2d 818, 828 (emphasis added).) Even if the Attorneys' interpretation were "equally reasonable" -- and it most decidedly is not -- because any award of funds above the State's maximum $18 million exposure would be an unconstitutional gift of public funds, the Attorneys' "no limits" interpretation would render the statute unconstitutional. Conversely, the State's interpretation eliminates the "gift of public funds" issue.

In sum, whether the Court stops with the plain meaning of the statute and the word "settlement" or goes on to apply canons of statutory construction, the end result inevitably must be a conclusion that the statute limited the panel's authority to an award between $0 and $18 million. Because the panel's $88.5 million award exceeded that limit, it must be vacated. Regardless, because the State's maximum exposure was $18 million, any reading of the statute and the Arbitration Agreement implementing it as permitting a higher award would result in an unconstitutional gift of public funds.[21]

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[21] For these reasons, although the trial court properly vacated the excessive arbitration award for the reasons noted above, it erred by going on to note that there was no cap on the amount the panel could award if it stuck to theories permitted by the published *Jordan* case. [7 JA 1780.] In affirming (continued...)

## C. The Panel's Award Violates Public Policy.

Additionally, the courts uniformly have held that arbitration awards violating public policy must be vacated. (See, e.g., *Board of Education of Round Valley Unified School Dist. v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 277 (vacating arbitrator's award that gave effect to collective bargaining procedures contrary to "'explicit legislative expression of public policy'"); *City of Palo Alto v. Service Employees Internat. Union, Local 715* (1999) 77 Cal.App.4th 327, 339 (award was invalid because giving it in effect would require violating an injunction).) And, needless to say, the violation of public policy here is even stronger than the violations found in cases such as *Round Valley* and *Palo Alto*. This is not just a case where an arbitration award violates policies expressed in another statute or a court order (such as the California Constitution's prohibition on gifts of public funds). Instead, this is a case where the panel's award also violates the policy underlying the very statute by which this panel was constituted – to **settle** a claim whose **maximum value** was $18 million and to do so with reference to this Court's published decision leaving a $1,200, "no common fund" judgment. As former Chief Justice Lucas summed it in his Dissent:

> *First*, if the . . . Legislature's intent in enacting section 6909, subdivision (b) was to allow an award *of up to $18 million*, any award in excess of that amount is clearly contrary to public policy, *i.e.*, to the amount intended and prescribed by the Legislature. *Second*, and perhaps even more troublesome, is that . . . any award for legislative action prompted by plaintiffs' counsel might be deemed to be compensation for sponsoring favorable legislation. Any such award would violate, not just

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[21] (...continued)
the trial court's order vacating the arbitration award, this Court should correct that error to avoid any further mischief upon re-arbitration.

public policy, but also might be an unconstitutional gift of public funds.

[1 JA 192-193 (emphasis in original).]

Given the Legislative mandate to settle a maximum $18 million dispute, the first point articulated by former Chief Justice Lucas cannot be genuinely disputed. And, as concerns the second point, any award above the State's maximum $18 million exposure -- be it authorized by statute or allowed by the arbitration agreement -- undeniably would be an unconstitutional gift of public funds for the reasons noted above.

## IV. THE ATTORNEYS' DIVERSIONS ARE UNAVAILING.

The Attorneys have no meaningful response to these arguments. Consequently, they throw up a series of diversions designed to obscure the obvious. Each diversion can be summarily dismissed.

### A. <u>This Was More Than An Error Of Law -- The Panel Exceeded Its Authority</u>.

Having successfully invited the panel to ignore its statutory mandate and decide the wrong issue, the Attorneys argue that, at most, the panel committed an error of law that the trial court and this Court are powerless to correct. [Op. Br. at 24-25.] As the trial court already has found, the Attorneys are wrong.

No elaborate discussion is necessary. The only issue the panel was authorized to resolve was the appropriate amount of fees to be awarded in settlement of the published *Jordan* case, which eliminated any common fund and left a $1,200 judgment. Instead of doing this, the panel looked to an event outside of and subsequent to the *Jordan* case -- the Legislature's policy decision to pay refunds to all -- that the Attorneys could not, and did not, achieve in *Jordan*. The panel thus decided an issue argued for by the

Attorneys but not authorized by the enabling statute -- namely, whether the *Jordan* case had a sufficient influence on the Legislature such that it would be fair to treat the $665 million reserve as a common fund and give a percentage of the reserve to the Attorneys.

It is well-settled that an arbitration award is in excess of an arbitrator's authority if the arbitrator decides issues beyond the ones properly submitted. (E.g., *Pacific Crown Distributors v. Brotherhood of Teamsters, supra,* 183 Cal.App.3d 1138.) Further, the panel undeniably constructed a remedy on a legislative appropriation extraneous to, and occurring months after, the *Jordan* decision. As even the Attorneys concede, an arbitrator would exceed its powers if he constructed a remedy based on sources extraneous to the contract (here, a statute). [Op. Br. at 23; see also *Advanced Micro Devices, Inc. v. Intel Corp.,* (1994) 9 Cal.4th 362, 381 (relied on by Attorneys; court notes award should be vacated if it "was based on an extrinsic source").][22]

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22 This is not, as the Attorneys suggest, a case of quibbling over methodology that would constitute at most an unreviewable error of law, and neither of the Attorneys' cases holds otherwise. [Op. Br. at 24-25.] *In re Thirteen Appeals Arising Out of San Juan DuPont Plaza Hotel Fire Litigation* (1st Cir. 1995) 56 F.3d 295 is not even an arbitration case; instead, it simply involved the review of a fee award by the trial court. Further, although the First Circuit held that the trial court utilized a permissible legal theory, it went on to reverse the award because the trial court abused its discretion in applying that permissible theory. In *Paramount Unified School Dist. v. Teachers Assn. of Paramount* (1994) 26 Cal.App.4th 1371, the Court of Appeal held that: (i) the arbitrator did not exceed its power in awarding damages, which the arbitration agreement expressly permitted (*id.* at 1382 (agreement provided "arbitrator is empowered to include in any award such financial reimbursement or other remedies as he/she judges to be proper"); and (ii) at bottom, the appellant's complaints were nothing more than a challenge to the sufficiency of the evidence supporting the award, which was not a reviewable issue. (*Id.* at 1384.) This case is decidedly different. Here, as noted above, the statute (continued...)

## B. Section 6909, Not The Arbitration Agreement, Authorizes The Arbitration.

Throughout their opening brief, the Attorneys focus myopically on one portion of one sentence of the Arbitration Agreement, which was signed **well after** the enactment of section 6909 and which was executed specifically to implement section 6909(b). Specifically, the Attorneys' entire brief relies upon the first half of a sentence in the Arbitration Agreement providing that "Attorneys may argue entitlement to any amount of Fees on any theory they believe is supported by the facts and circumstances of the case." [1 JA 81.][23] Based upon the first twelve words of this sentence, which they repeat over and over again, the Attorneys argue that there were no limits on the panel's authority. [Op. Br. at 3, 4, 9, 21, 24.] For a variety of reasons, however, this language simply does not support the Attorneys' position.

To begin with, as former Chief Justice Lucas aptly noted in his dissent:

> [A]n agreement that an attorney may *argue* for any amount or any theory is not the same as an agreement that a party is entitled to that amount.

[1 JA 196 (emphasis in original).] The Attorneys still have not pointed to --

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22 (...continued)
requiring arbitration spelled out a very specific purpose for the panel -- to determine the appropriate award of fees in settlement of the published *Jordan* decision eliminating a common fund -- that the panel did not even try to fulfill. Indeed, the panel did precisely what the statute forbade -- it overrode the limits imposed by the published *Jordan* decision. **Even the Attorneys concede that actions by the Arbitration Panel contrary to the statute would exceed the panel's authority.** [Op. Br. at 25, fn. 20.]

23 Predictably, the Attorneys omit the last 12 words of this quoted sentence -- doubtless because one of "the facts and circumstances of the case" was that this Court had eliminated a common fund as a basis for recovery of attorneys' fees.

and never will find -- any agreement by the State that the panel could exceed its authority. **In fact, as noted above, the State expressly took the position to the panel that section 6909 did not authorize the common fund relief requested by the Attorneys.** [2 JA 411-412.]

Further, the Attorneys do not quote the full Agreement. The very sentence preceding the partial quote relied upon by the Attorneys provides:

> Defendants' authority to enter into this agreement is set forth in Revenue and Taxation Code section 6909, subdivision (b) . . . .

[1 JA 80.] Thus, far from going beyond the terms of the statute, **the Arbitration Agreement expressly limits the State's authority to the statute.** And tellingly: (i) the panel itself has recognized that its authority derives from the statute;[24] (ii) in a stipulation for dismissal of the fee appeal drafted by the Attorneys, the Attorneys stipulated that the Arbitration Agreement merely **"provides a procedure"** for complying with the statute [7 JA 1667]; and (iii) in briefing to the trial court below, the Attorneys **expressly conceded that this statute controls** -- indeed, was necessary for the arbitration to be constitutional [see note 11, *supra*].

In any event, the Attorneys cite no authority for the proposition that the parties could, by agreement, cut a different deal than that mandated by the Legislature. In fact, the law is to the contrary. (See *Lukens v. Nye* (1909) 156 Cal. 498, 503; *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1087-1088.)[25]

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[24] [See 1 JA 137 (arbitration award states that award was made "[p]ursuant to California Revenue and Taxation Code section 6909"), 1 JA 191 (Lucas dissent states "Our authority to hear this matter is a matter of statutory mandate, granted us under Revenue and Taxation Code 6909, subdivision (b).").]

[25] [See also 7 JA 1653-1660 (State's Supplemental Memorandum Re:
(continued...)

## C. Courts, Not Arbitrators, Make The Final Legal Determination Of An Arbitrator's Authority.

Predictably, the Attorneys also argue, as they did below, that the panel determined it had the authority to issue the award it did and that this determination is entitled to deference. [Op. Br. at 20-21.] Initially, the panel hardly was unanimous on this point. Indeed, as noted above, former Chief Justice Malcolm Lucas -- the author of the seminal *Moncharsh* decision upon which the Attorneys rely -- openly criticized the award as likely being in excess of the panel's statutory authority.

Further, one need only review the Award to see that the remaining panel members made no true effort to interpret the critical words in section 6909 -- "in the settlement of the case of *Jordan v. Department of Motor Vehicles* (1999) 75 Cal.App.4th 449." Thus, there is no substantive analysis -- reasoned or otherwise -- to which a court could defer.

Additionally, the Attorneys' cited "deference" cases [Op. Br. at 21] all deal with private contractual arbitrations in which the terms voluntarily are agreed to by the parties, **not a statute** directing the parties to arbitrate a specific issue. (See generally *Advanced Micro Devices, supra*, 9 Cal. 4th at 374-375 (noting that notion of deference stems from desire to honor expectations in private contractual arbitrations).) In this *sui generis* proceeding, the panel's authority derives from a specific statute that: (i) was enacted for a specific purpose; (ii) incorporates a specific case; and (iii) must be enforced in accordance with its terms. The Attorneys cite no case providing

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[25] (...continued)
Ability of State Agencies and Attorney General to Agree to Arbitration Absent an Enabling Statute) (establishing that statute is required for there to be a valid agreement).]

for deference to a panel's interpretation of specific statutory authority granted by the Legislature -- for good reason. Obviously, it is the Legislature's intent that controls and must be honored here.

In any event, the short and complete answer to the Attorneys' argument is that **arbitrators never have the final word on their authority.** Instead, as the Arbitration Act makes express, courts are independently bound to uphold restrictions on an arbitrator's authority, even if the arbitrator has concluded that the authority exists. (*California Faculty Assn. v. Superior Court* (1998) 63 Cal.App.4th 935, 944 ("'courts retain the ultimate authority to overturn awards as beyond the arbitrator's powers. . . .'") (quoting *Advanced Micro Devices, supra,* 9 Cal.4th at 375); Code Civ. Proc. § 1286.2(d) (award must be vacated where it exceeds arbitrator's authority).)

**D. The Attorneys' "Substantial Contribution" Theory Misses The Mark.**

Finally, as they did below, the Attorneys make a passing attempt at arguing that the panel's award was proper because they supposedly would be entitled to credit for the Legislature's $665 million appropriation, "even if that [appropriation] was legislative action that was not compelled by the court judgment" because the *Jordan* case supposedly contributed to the Legislature's later action. [Op. Br. at 22.] In support of that proposition, the Attorneys offer sound bites carefully excerpted from four cases -- *Californians for Responsible Toxics Management v. Kizer* (1989) 211 Cal.App.3d 961; *Wallace v. Consumers Cooperative of Berkeley, Inc.* (1985) 170 Cal.App.3d 836; *Paris v. United States Dept. of Housing and Urban Development* (1st Cir. 1993) 988 F.2d 236; and *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668 -- that the Attorneys never critically discuss.

Initially, the only relevant case here is the one the Attorneys continue to ignore -- *Jordan v. Department of Motor Vehicles* (1999) 75 Cal.App.4th 449, which the Legislature expressly incorporated into section 6909 as the benchmark for settlement. As this Court and both sides have recognized, the *Jordan* case eliminated any common fund and left four individual plaintiffs with a $1,200 judgment. Because the enabling statute incorporated that "no common fund" case and directed the panel to determine the appropriate amount of fees in settlement of that case, the panel plainly had no authority to disregard *Jordan* and apply a common fund theory based upon subsequent events extraneous to the decision. Given *Jordan*, citation to any other case is unnecessary and irrelevant.[26]

In any event, the lack of context in the Attorneys' abbreviated case discussion is no accident -- the Attorneys liberally misread the cases they cite. The remainder of this section sets the record straight. Again, however, the only case that matters is the published *Jordan* decision incorporated into the enabling statute authorizing this arbitration.

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[26] Put another way, for the Attorneys' arguments to have any vitality, the enabling statute directing this arbitration would have to provide in substance for the panel to "determine the appropriate level of court costs, fees and expenses for actions contributing to the enactment of Revenue & Taxation Code § 6909(b), using the $665 million appropriation as a common fund." But it didn't. Instead, it directed the panel to determine the "appropriate level of court costs, fees, and expenses in the settlement of the case of *Jordan v. Department of Motor Vehicles* (1999) 75 Cal.App.4th 449" -- a case which: (i) expressly eliminated a common fund; and (ii) was final and the law of the case months before the first iteration of section 6909 ever was drafted.

1. **The Attorneys Improperly Are Using Non-Common Fund Cases In An Attempt To Justify Their Claim That A Legislative Appropriation Is A Common Fund.**

None of the cases relied on by the Attorneys is a common fund case; instead, the California cases all involve Code of Civil Procedure section 1021.5, California's private attorney general statute, while the one federal case cited by the Attorneys (*Paris*) deals with the federal private attorney general doctrine.

**The issue that these cases resolved has absolutely nothing to do with common funds or the appropriateness of a percentage of common fund recovery.** Rather, the issue in each case was whether the plaintiffs could be "prevailing" parties when the result they achieved came from settlements and the like, rather than directly through a final litigated judgment. They stand for the unremarkable proposition that, in private attorney general cases, courts can use common sense to determine whether there was a prevailing party and that, in an appropriate case, the plaintiff can be a prevailing party entitled to private attorney general fees even without a trial judgment providing all the relief requested. (*Kizer, supra,* 211 Cal.App.3d at 966-967; *Folsom, supra*, 32 Cal.3d at 684-685; *Wallace, supra*, 170 Cal.App.3d at 844-845; *Paris, supra*, 988 F.2d at 240-241.) Predictably, although the Attorneys cite a dated federal circuit court case (*Paris*), they neglect to apprise the Court of the United States Supreme Court's later pronouncement on this subject, which: (i) makes clear that, even in the private attorney general context, to be a prevailing party, the results must be compelled by the litigation itself, such as through a judgment or a consent decree. (*Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources* (2001) 121 S.Ct. 1835, 1840 ("A defendant's voluntary change in conduct, although perhaps accomplishing

what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change.").)[27]

Needless to say, a private attorney general "prevailing party" analysis has nothing to do with common funds, and by citing these cases and suggesting that they do, the Attorneys are mixing apples and oranges. Ironically, although these cases are irrelevant, one of the cases the Attorneys cited below but conveniently omit here -- *Crawford v. Board of Education* (1988) 200 Cal.App.3d 1397 -- makes clear that, even under section 1021.5, the Attorneys are not entitled to private attorney general credit for the Legislature's enactment of section 6909. In *Crawford*, a desegregation case, certain intervenors sought section 1021.5 fees for their efforts in trying to shape the desegregation plan ultimately adopted by the Court. The intervenors were unsuccessful in Court, but one of them (Bustop) was highly successful in the political arena, being the "organizing force behind the passage" of a constitutional amendment that effectively dictated the desegregation plan ultimately adopted by the court. In concluding that intervenors were not entitled to prevailing party attorneys' fees, the *Crawford* court held:

> Each of these arguments ignore the essential fact that the plan ultimately adopted by the District and approved by the trial court resulted from the passage of Proposition 1 in November 1979. By amending the Constitution to prohibit mandatory busing in school desegregation cases (see *Crawford II*), the citizens of this state, not interveners, produced the practical

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[27] See also *Bennett v. Yoshina* (9th Cir. Aug. 7, 2001) 2001 U.S.App.LEXIS 17447 (following *Buckhannon*, court affirms order denying attorneys' fee request stemming from passage of legislation providing result that plaintiffs had unsuccessfully sought to obtain in court; Ninth Circuit rejects "catalyst" theory and holds "even if Hawai'i's political branches were motivated to enact Act 131 solely by this litigation, this result 'lack[ed] the necessary judicial imprimatur' to qualify plaintiffs as prevailing parties").

> result which obtained. Bustop, of course, was the organizing force behind the passage of the initiative and the most vocal of all groups opposed to mandatory busing. Its accomplishments in the political arena, however, do not entitle it to an award under section 1021.5. **As we see it, the private attorney general doctrine limits awards of fees to litigants who successfully utilize the *judicial process* to achieve their aims. The doctrine simply does not, nor should it, encompass successful lobbying efforts by those who seek to influence the Legislature or the electorate on any particular issue.**

(*Crawford, supra*, 200 Cal.App.3d at 1408 (emphasis added).)[28] The Attorneys' "no-lobbying" protestations notwithstanding,[29] this case is

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[28] Plaintiffs' remaining cases are readily distinguishable from *Crawford* and this case. (See, e.g., *Folsom, supra*, 32 Cal.3d 668 (suit prompted settlement by which plaintiffs promised to dismiss their action with prejudice upon substantial performance of defendants' promise to build transit systems; transit systems built); *Wallace, supra*, 170 Cal.App.3d 836 (suit to challenge validity of mandatory minimum prices resulted in settlement where plaintiffs agreed to dismiss suit as moot if government conducted hearings and suspended minimum prices by a certain date, which happened); *Kizer, supra*, 211 Cal.App.3d at 972 (holding that time spent in related administrative proceeding was properly included in fee requests "because it was both useful and necessary and directly contributed to the resolution of the action."); *Paris, supra*, 988 F.2d 236 (federal legislative change during pendency of suit).) Here, of course, no such circumstances exist. Indeed, *Jordan* had become final almost seven months before section 6909 was enacted. Moreover, as noted above, the United States Supreme Court has just made clear that, even in the private attorney general context, results for which plaintiffs seek attorneys' fees must be compelled by the lawsuit itself. (*Buckhannon*, 121 S.Ct. at 1840.)

[29] Although the Attorneys protest that they were not lobbying [Op. Br. at 4-5], undeniably lobbying was **all** they could do. Simply, the *Jordan* decision became final on November 10, 1999, almost seven months before section 6909 was enacted. After November 10, 1999, the established law was that there was no common fund and any aggrieved taxpayers would have to file individual refund claims within the statutory period. (*Jordan, supra*, 75 Cal.App.4th at 466-468.) Given this state of affairs, the only thing the Attorneys could do (continued...)

indistinguishable from *Crawford.*

2. **This Is Not A Common Fund Case.**

As the Attorneys' lack of discussion of common fund cases tacitly confirms, even had this Court not already made the point clear in the published *Jordan* decision, this is not a common fund case. To appreciate this, the Court need only review the California Supreme Court's seminal common fund decision in *Serrano v. Priest* (1977) 20 Cal.3d 25, which the Attorneys inexplicably chide the trial court for following. [Op. Br. at 15.] The common fund theory in California is:

> "[T]hat one who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear a fair share of the litigation costs."

(*Serrano, supra*, 20 Cal.3d at 35 (quoting *Quinn v. State of California* (1975) 15 Cal.3d 162).) The basis of the doctrine is equity:

> "Fees are awarded under this rationale out of a fund recovered or maintained by the plaintiff, on the theory that all who will participate in the fund should pay the cost of its creation or protection and that this is best achieved by taxing the fund itself for attorney's fees."

(*Id.* at fn. 5 (citation omitted).) And, perhaps most importantly, the doctrine does not extend to independent legislative appropriations in response to a judgment; instead, it would apply only if a judgment **required** an appropriation of a certain sum for an identifiable class. (*Id.* at 36.)

Applying these principles, it is clear that the common fund theory has no application here. Most notably, the final published *Jordan* decision

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[29] (...continued)
was lobby for a statute like section 6909. And, in fact, lobbying is precisely what they did. [4 JA 898-899.]

eliminated any common fund. Further, the theory behind the doctrine -- that all beneficiaries should pay for litigation costs -- is not satisfied here. Instead, the State is paying.[30] Additionally, there is not a scintilla of evidence to suggest that the Legislature intended to establish (or in fact established) a common fund -- as opposed to simply appropriating sufficient funds to implement a policy-driven statute providing for the possible payment of public monies, precisely as the trial court concluded. [11 JA 2806.][31] Finally, just as in *Serrano*, at best, funds were appropriated in response to a judgment; they did not flow "from the judgment itself." (20 Cal.3d at 36.)[32] Although the Attorneys now dismiss *Serrano* out of hand, they plainly know better. In a treatise on attorneys' fee awards, one of the *Jordan* attorneys observed that, for the common fund doctrine to come into play, "[t]he fund must be created or

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[30] That the statute provides for fees to be paid by the State (a section 1021.5 result), rather than by the beneficiaries (a common fund result), further buttresses the notion that the Legislature did not intend for the common fund theory to apply.

[31] In point of fact, the statutory scheme forecloses the notion. To begin with, Vehicle Code section 1673.2 -- the statute detailing how the smog impact fee will be refunded -- provides for individual claims by individual taxpayers. More importantly, section 6909 expressly contemplates that, after a specified period, any funds not claimed by taxpayers would revert to the State's general fund. That the Legislature expressly contemplated the return of appropriated funds and that substantial funds will in fact be returned is antithetical to the notion that the Legislature intended to create a $665 million common fund.

[32] In fact, this case fits well within *Serrano*. In *Serrano*, the judgment in question absolutely required that the Legislature take corrective action. Here, as the published *Jordan* decision establishes, the Legislature was free to do nothing.

preserved by the judgment itself rather than from legislative implementation of the judgment." (R.M. Pearl, California Attorney Fee Awards (C.E.B. 2d ed. 2000), § 7.4 at p. 185.)

* * *

In sum, the **only** case relevant to the instant dispute is the published *Jordan* decision: (i) which all sides concede eliminated any common fund; (ii) which is expressly incorporated into Revenue and Taxation Code section 6909(b); and (iii) which established limits on the panel's authority that were exceeded by the panel. In any event, none of the Attorneys' cases establishes that a legislative appropriation subject to reversion to the general treasury and not mandated by judgment can constitute a "common fund" for the payment of attorneys' fees, and one of them makes clear that fees are not even available under the private attorney general statute for any lobbying efforts resulting in the passage of section 6909.

## V. CONCLUSION

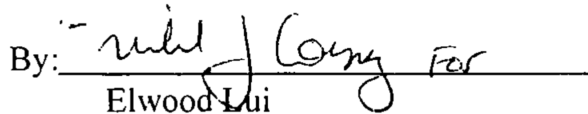
For each of these reasons, the Court should: (i) affirm the trial court's order vacating the arbitration award; (ii) reverse that part of the trial court's order refusing to find a cap on the amount of attorney's fees to be awarded; and (iii) direct that the re-arbitration occur before a new panel. In that regard, the Attorneys concede that rearbitration can be ordered before the same panel only if all parties consent and that the State does not now consent to rearbitration

rearbitration before the same panel. [Op. Br. at 28-29 (citing Cal. Code Civ. Proc. § 1287).] The Attorneys cite no case for the proposition that rearbitration can be ordered before the same panel under these circumstances.

DATED: August 24, 2001

Respectfully submitted,

JONES, DAY, REAVIS & POGUE



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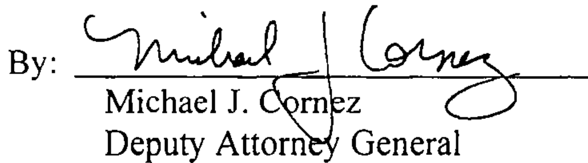

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