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VIA OVERNIGHT MAIL

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Clerk of the Napa Superior Court
By: _____ Deputy

Hon. Diane M. Price
Presiding Judge
Appellate Division
California Superior Court, County of Napa
825 Brown Street
Napa, California 94559

with copy to:

Peter Winkler
Attorney at Law
104-A Main Street
Tiburon, California 94920

with copy to:

David C. Jones
Deputy City Attorney
City of Napa
P.O. Box 660
Napa, California 94559

with copy to:

Napa Police Department
Attn: Officer John Brandt
1539 First Street
Napa, California 94559

Re: Opposition to Request for Publication of the Decision of the California Superior Court, County of Napa, Appellate Division, in People v. Daugherty, Case No. CR154602

Dear Judge Price:

On behalf of Redflex Traffic Systems, Inc. ("Redflex"), we are writing to oppose Appellan[redacted]Daugherty's ("Appellant") request that the Court publish its recent decision in People v. Daugherty, Case No. CR154602 (Napa Super. Ct., App. Div., filed May 26, 2011) ("Daugherty"), a copy of which is enclosed.

1. Redflex's Interest in Opposition to Publication

Redflex and the City of Napa (the "City") are parties to a contract providing for the City's automated red light camera enforcement system (the "Contract"). Redflex installed and maintains the digital cameras, computers and other components of the system.

Redflex is the largest traffic photo enforcement technology provider in the United States, with more than 1,200 fully operational systems in more than 240 communities in 21 states. Redflex's systems are deployed in 67 California municipalities and/or counties. Many other California municipalities contract with Redflex's competitors to provide other photo enforcement systems in California.

The Legislature has set forth a comprehensive statutory scheme governing automated traffic enforcement systems. See Vehicle Code § 21455.5. While Redflex obviously has an interest in continued municipal use of its red light camera systems, Redflex is not paid on a per citation basis. See Vehicle Code § 21455.5(g)(1). Therefore, Redflex, like any automated red light camera enforcement vendor, can only charge a flat fee regardless of how many citations the city generates or, for that matter, whether the system generates any revenue or citations.

Despite the Legislature's statutory framework for automated enforcement systems, red light violators caught by automated systems sometimes mount vocal campaigns, generally focusing on the revenue that cities generate. Such criticism is misguided because it is factually incorrect and it ignores the safety benefit that such systems provide.

Depending on the jurisdiction, a California red light citation can range between approximately $420 and $500. Of that, the State of California receives over $200, the county receives approximately one-third, and the city receives the remainder (but generally incurs almost all of the enforcement and related costs). Cities and law enforcement agencies lack the resources to hire more officers to further monitor and enforce red light violations. Meanwhile, the State can ill-afford to lose the millions of dollars a year it receives from automated red light enforcement systems, especially at this time of fiscal crisis.

The Daugherty court ignored the substantial public safety benefits that cost neutral fee arrangements provide to the State of California. Numerous studies and law enforcement agencies, including the California Police Chiefs Association, routinely validate the safety benefits that such systems provide. See www.stoperedlightrunning.com. In contrast, red light runners downplay or simply ignore the devastation caused by side-impact collisions when drivers run red lights.

Red light traffic cameras cause a decrease in red light running. These programs save lives.

2. Daugherty Should Not be Certified for Publication

As detailed below, contrary to Appellant's contentions, Daugherty does not advance the clarification of California Vehicle Code section 21455.5(g)(1). On the contrary, Daugherty was decided on an incomplete record containing only Appellant's briefing and argument, and as a result misinterpreted the facts and misapplied Section 21455.5(g)(1). Publishing such a case would lead to significant public and judicial confusion, and would not serve the ends of justice.

Courts have long recognized the policy of selectively determining those opinions which should be published, and those that should not, as stated in Schmier v. Supreme Court (2000) 78 Cal.App.4th 703, 709-710:

> "By specifically empowering the Supreme Court to determine which opinions of the Court of Appeal are appropriate for publication, the Legislature and the

electorate have clearly disclosed an intent that the decisional law of this state does not require publication of every opinion of the intermediate appellate courts. Rather, the Supreme Court appropriately determines by selective publication the evolution and scope of this state's decisional law."

Publication of Daugherty is not warranted not simply because Daugherty was wrongly decided, but also because it illustrates what happens when the adversary system is undermined.

3. There Was No Briefing, Argument or Appearance on Behalf of the People in Daugherty

The prosecution of traffic violations on behalf of the People is, in theory, the province of the District Attorney. However, in practice, the District Attorney rarely participates in any way, and had no participation in Daugherty, either at trial or on appeal.

Red light violations are adjudicated in traffic court. Prosecutors (such as city attorneys) rarely attend or participate at the trial level and there is rarely a court reporter. The testifying officer simply appears and, when the case is called, takes the stand. Daugherty was no different.

Neither the District Attorney nor the City Attorney participated at trial or in the appeal. The City Attorney did not even know about the case or the legal issues raised therein before the Court's May 26, 2011 decision. Though the Police Department was given notice of the appeal, it never received a copy of Appellant's opening brief and thus did not even know what issues were involved in the appeal. The Police Department did not notify the City Attorney of the appeal, and the City Attorney did not become aware of the appeal until after the Court issued its decision. As such, the City Attorney's failure to appear in Daugherty on behalf of the People was caused by the limited notice given to the Police Department, which itself was not even notified of the issues raised in the appeal.

Significantly, the California Supreme Court has recognized that a city police department is a Real Party in Interest in a case like Daugherty in which the city did not receive notice of an appeal of an automated red light enforcement citation. See People v. Fischetti; City of Santa Ana Police Department, Real Party in Interest, 2009 Cal. LEXIS 2544 (Cal., Mar. 10, 2009), amending People v. Fischetti, 2009 Cal. LEXIS 1589 (Cal., Feb. 25, 2009). In Fischetti, the California Supreme Court specifically amended its order granting the city's petition for depublication by changing the case title and adding the city police department as Real Party in interest. Id.

As a result of the lack of notice of the appeal to the City, the City was not given an opportunity to intervene on behalf of the People and show the Court why the cost neutral fee arrangement in the Contract complies with Section 21455.5(g)(1). Instead, the court decided the appeal solely on Appellant's appearance, argument and briefing without having before it any argument or briefing on behalf of the People. As such, the proceedings severely undermined the adversarial process which is the cornerstone of the California legal system.

The ends of justice would not be served by publishing a decision based solely on arguments made on one side of an issue, particularly given California's policy of selective publication of appellate decisions. A decision like Daugherty that is the result of a flawed procedural process should not be permitted to bind courts in the County of Napa, or serve as any type of authority in other California jurisdictions. While a published decision on this issue may at some point serve the ends of justice, this is simply not the appropriate case.

4. Daugherty Would Create Significant Confusion in the Courts and Elsewhere if Certified for Publication

If certified for publication, Daugherty would no doubt cause substantial confusion in the courts and in the public. The Appellate Division routinely rejects challenges to cost neutral fee arrangements in automated enforcement contracts. See People v. Travis, Case No. APP10000013 (Riverside Super. Ct., App. Div., filed Aug. 23, 2011); People v. Chew, Case No. AD-5178 (San Mateo Super. Ct., App. Div., filed Jan. 4, 2011) (rehearing granted); People v. McDonald, Case No. BR046561 (Los Angeles Super. Ct., App. Div., filed Feb. 23, 2009).

The Ninth Circuit has similarly held that the same Redflex cost neutral fee arrangement at issue in Daugherty complies with Washington's statutory analogue to Section 21455.5(g)(1). See Todd v. City of Auburn, Case No. 10-352222 (9th Cir. Mar. 31, 2011).

Moreover, in a pre-Section 21455.5(g)(1) case, the California Court of Appeal held that contingency fee and hybrid contingency-flat fee payment provisions in automated enforcement contracts do not violate California public policy. See In re Red Light Photo Enforcement Cases (2008) 163 Cal.App.4th 1314, 1341. Though the case predated Section 21455.5(g)(1), it was based on the same public policy considerations that drove the enactment of Section 21455.5(g)(1) – namely, the concern that private automated enforcement companies may have an incentive to increase citations generated by their systems in an attempt to maximize profit. The California Supreme Court granted but then dismissed review of this case. See In re Red Light Photo Enforcement Cases (2010) 242 P.3d 104.

Contrary to Appellant's contention, Daugherty simply does not clarify a legal issue of continuing interest. Such a decision should not be permitted to represent persuasive authority on a legal issue, much less binding authority in the County of Napa. Daugherty should therefore not be published. In addition to the confusion and the procedural shortcomings of the case, and as detailed below, Daugherty was wrongly decided.

5. Daugherty Was Wrongly Decided

The Court's decision in Daugherty suffers from various flaws, apart from the fact it is based on an incomplete record containing only Appellant's briefing and arguments without operation of the adversarial process. Daugherty simply misconstrues the plain language of California Vehicle Code section 21455.5(g)(1), and misinterprets the operation of cost neutral fee arrangements. Contrary to the court's holding, the cost neutral fee arrangement in the

Contract complies with the plain language of Section 21455.5(g)(1) because it provides for a monthly fixed fee per intersection, subject to only a deferred payment provision in limited circumstances. The fee arrangement also complies with the purpose behind the statute because Redflex is not at all involved in citation decisions, and therefore cannot have any incentive to increase the number of citations issued.

a. The Cost Neutral Fee Arrangement Complies with the Plain Language Vehicle Code Section 21455.5(g)(1)

California Vehicle Code section 21455.5(g)(1) prohibits contracts between cities and private automated enforcement service providers with a provision for payment to the provider "based on the number of citations generated or as a percentage of the revenue generated, as a result of the use of the equipment authorized under this section." As explained below, the Daugherty court erred in holding that Redflex's compensation under the Contract was "dependent on the issuance of a sufficient number of citations."

In interpreting a statute, the court must first examine the words of the statute, giving them their usual and ordinary meaning and construing them in the context of the statute as a whole. People v. Garcia (2002) 28 Cal.4th 1166, 1172; People v. Murphy (2001) 25 Cal.4th 136, 142. If the plain language of the statute is unambiguous and does not involve an absurdity, the plain meaning governs. Garcia, 28 Cal.4th at 1172; People v. Ledesma (1997) 16 Cal.4th 90, 95. Moreover, "[w]here the words of a statute are clear, [the court] may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." Burden v. Snowden (1992) 2 Cal.4th 556, 562.

The Contract expressly requires the City to pay Redflex "a fixed fee" per month for each intersection. Over the term of the contract, Redflex is paid no more, and no less, than the fixed fee. The City is protected if on a monthly basis the revenue received by the City from the system falls short of that fixed fee; in that event, the City pays Redflex the amount of the revenue received that month only. The difference between the fixed fee and the revenue carries over, so that if sufficient revenues are received in subsequent months, the deficit on the fixed fee balance can be satisfied. Put another way, if the City were to generate a surplus by generating revenue in excess of the anticipated revenue, Redflex would still only be entitled to recover its monthly fixed fee.

The Ninth Circuit has held that this same Redflex cost neutral fee arrangement does not violate Washington's analogue to Section 21455.5(g)(1). See Todd v. City of Auburn, Case No. 10-352222 (9th Cir. Mar. 31, 2011), a copy of which is enclosed. Like Section 21455.5(g)(1), the Washington statute prohibits payment "based upon a portion of the fine or civil penalty imposed or the revenue generated from the equipment." Wash. Rev. Code § 46.63.170(1)(i). Applying the plain language of the statute, the Todd court held that "cost neutrality provisions alter the timing of fee payments in accordance with monthly revenue fluctuations, but they do not base the amount of fees upon a *portion* of the revenue generated." Id. at *5 (emphasis in original).

The language of Section 21455.5(g)(1) is clear and unambiguous – the statute prohibits payment "based on the number of citations generated or as a percentage of the revenue generated" by the system." As the Todd court held, nothing in the Contract's fixed fee payment provision described above provides for such payment. Rather, it explicitly provides for a monthly fixed fee, and allows the City to defer payment in months where revenue falls short of the fixed fee. Over the term of the Contract and even 12 months after its termination, the City remains obligated to pay Redflex the monthly fixed fee. In finding that the fee arrangement violated Section 21455.5(g)(1), the Daugherty court either improperly read into the plain language of the statute a prohibition on deferred payment plans, or improperly read into the fee arrangement a term providing for payment based on the number of citations generated or as a percentage of revenue generated by the system. Either way, the court erred.

b. The Cost Neutral Fee Arrangement Complies with the Purpose of Section 21455.5(g)(1)

Even if Section 21455.5(g)(1) were ambiguous (which it is not), hence requiring reference to legislative intent, the cost neutral fee arrangement in the Contract complies with the purpose of the statute. The purpose of Section 21455.5(g)(1) is to ensure that private red light automated enforcement companies do not have an incentive to increase the number of citations issued and paid through the use of their equipment in an attempt to maximize profit. See California Bill Analysis, A.B. 1022, April 21, 2003, p. 5 ("[P]aying red light camera vendors based on the number of tickets issued undermines the public's trust and raises concerns that these systems can be manipulated for profit.").

The Contract makes clear that "the decision to issue a citation shall be the sole, unilateral and exclusive decision of the Authorized Officer and shall be made in such Authorized Officer's sole discretion." Because Redflex has no control over the issuance of a citation, there is no danger that Redflex will issue excess tickets to ensure that revenue generated by the system meets or exceeds the monthly flat fee. Indeed, even if Redflex were to generate additional citations, the ultimate decision whether to actually issue the citation to the motorist is left to the sole discretion of the police department. As such, even if Redflex would prefer that more citations be issued, it would have no ability to take any action in furtherance of that goal. The fee arrangement therefore is not the type that the Legislature sought to prohibit by way of Section 21455.5(g)(1).

c. Even if the Fee Arrangement Were in Violation of Section 21455.5(g)(1), That Would Not Have Rendered the Evidence of Appellant's Violation Inadmissible

The cost neutral fee arrangement in the Contract complies with Section 21455.5(g)(1), but even if it did not, the evidence of Appellant's violation would nonetheless have been admissible. As the court held in People v. McDonald, Case No. BR046561 (Los Angeles Super. Ct., App. Div., filed Feb. 23, 2009), nothing in the Vehicle Code requires the prosecution to prove compliance with Section 21455.5(g)(1) to obtain a conviction for a violation of Section

21453(a) based on automated enforcement evidence. Indeed, courts have long held that compliance with a statute regarding the collection of evidence is not necessary for admission because noncompliance goes only to the weight of the evidence. See People v. Williams (2002) 28 Cal.4th 408, 414.

There is no causal connection between the Contract's cost neutrality provision and whether Appellant committed the offense at issue. She did not suggest, much less prove, that the amber timing was incorrect, that the automated enforcement system was not functioning properly, or that she did not run a red light. She simply seized on a contract issue that has nothing to do with her own red light running. Furthermore, Appellant never showed that the cost-neutrality provision was ever invoked, *i.e.*, there was no evidence suggesting that the City ever deferred payment at any time during the term of the Contract.

Thus, even if the fee arrangement in the Contract were to violate Section 21455.5(g)(1), evidence of Appellant's violation would nonetheless have been admissible. Such a finding would have been permitted to affect only the weight, but not the admissibility, of the evidence. As such, the Daugherty court erred in finding the evidence inadmissible on the ground that the fee arrangement violated Section 21455.5(g)(1).

d. Cost Neutral Fee Arrangements Promote Public Safety by Making Automated Red Light Camera Enforcement Systems Affordable

The Daugherty court ignored the substantial public policy benefits of cost neutral fee arrangements in automated enforcement contracts. Some California cities insist on cost neutral payment provisions to make automated enforcement systems affordable and thereby promote public safety.

While providing for a monthly fixed fee, cost neutral fee arrangements also allow cash strapped cities to defer payment in months in which the fixed fee exceeds revenue generated by the system, provided that the cities make up the deficit in subsequent months. This payment deferral mechanism provides cities with a much needed break in slow months, especially during this time of fiscal turmoil, while at the same time ensuring that automated enforcement service providers will be compensated in full over the life of the contract and thus remain incentivized to offer automated enforcement services.

Such a fee arrangement comports with the statutory requirement while also ensuring financial flexibility to California cities. These provisions thereby promote public safety on California roadways.

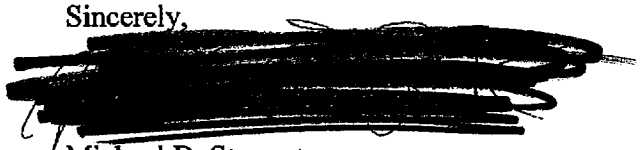
6. Conclusion

Redflex submits that the Legislature did not enact the statutory framework for automated traffic enforcement systems and allow cities and others to invest millions of dollars in such systems, so that those systems and investments could be undermined by a case with as poor a record as Daugherty.

If published, Daugherty will cause significant confusion in the courts and in the public. A two and one-half page decision based on arguments from only one of the parties and which does not cite to any case law or other authority in support of its conclusion should not be permitted to represent binding law in the County of Napa and persuasive authority in other California jurisdictions. Publishing a decision that is not the result of a full adversarial proceeding would be wholly inconsistent with California selective publication policy.

If Daugherty were published and thus permitted to undermine automated enforcement programs, the State, counties and cities could lose millions of dollars in revenue, while red light violators would go unscathed, and the public would lose an important safeguard. Redflex respectfully requests that the Court reject Appellant's request for publication of Daugherty.

Sincerely,



Michael D. Stewart

for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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Enclosures

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[redacted] TODD; [redacted]

No. 10-35222

D.C. No. 2:09-cv-01232-JCC

MEMORANDUM*

*This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

individually and on behalf of two classes of similarly situated persons,

Plaintiffs - Appellants,

v.

CITY OF AUBURN; CITY OF BELLEVUE; CITY OF BONNEY LAKE; CITY OF BREMERTON; CITY OF BURIEN; CITY OF FEDERAL WAY; CITY OF FIFE; CITY OF ISSAQUAH; CITY OF LACEY; CITY OF LAKE FOREST PARK; CITY OF LAKEWOOD; CITY OF LYNNWOOD; CITY OF PUYALLUP; CITY OF RENTON; CITY OF SEATAC; CITY OF SEATTLE; CITY OF SPOKANE; CITY OF TACOMA; AMERICAN TRAFFIC SOLUTIONS, INC., doing business as ATS; AMERICAN TRAFFIC SOLUTIONS, LLC, doing business as ATS Solutions; REDFLEX TRAFFIC SYSTEMS, INC.,

Defendants - Appellees.

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted March 11, 2011
Seattle, Washington

Before: FISHER, GOULD and TALLMAN, Circuit Judges.

The plaintiffs in this putative class action ran red lights or sped in school zones and were photographed by automated traffic safety cameras installed by the defendant cities and camera companies. The plaintiffs argue that the fines they received for these infractions exceed limits set by Revised Code of Washington section 46.63.170 and that payment provisions in the cities' contracts with the camera companies violate statutory restrictions on the form of compensation. They also contend the defendant cities should have had the Notices of Infraction (NOIs) used to issue the camera citations approved by the Washington Administrative Office of the Courts (AOC).

The plaintiffs sued in state court, and the defendants removed to federal court under the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1332(d).[1] The district court granted the defendants' Rule 12(b)(6) motion to dismiss. We affirm.

I.

[1] We do not consider the plaintiffs' argument, raised for the first time on appeal, that the district court should have remanded this case to state court under CAFA's local controversy exception, 28 U.S.C. § 1332(d)(4)(A). The plaintiffs forfeited this argument by not raising it in the district court, *see Hillis v. Heineman*, 626 F.3d 1014, 1019 (9th Cir. 2010), and the potential applicability of the local controversy exception does not undermine the district court's jurisdiction. *See Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1022-24 (9th Cir. 2007) ("Implicit in . . . subsection[] [1332](d)(4) is that the court *has* jurisdiction, but the court . . . must decline to exercise such jurisdiction." (emphasis added)).

The fines the defendant cities charge for infractions captured on traffic safety cameras do not exceed limits imposed by section 46.63.170. Under section 46.63.170(2), "the amount of the fine issued for an infraction generated through the use of an automated traffic safety camera shall not exceed the amount of a fine issued for other parking infractions within the jurisdiction." Here, the camera fines plainly do not exceed the fines imposed for certain other parking infractions. *See, e.g.*, Wash. Rev. Code. § 46.16.381(7)-(9) ($250 fine for disabled parking); Seattle, Wash., Mun. Code § 11.31.121 (same). They are therefore within statutory limits. Nothing in the statute limits camera fines to the amount charged for "standard" or "typical" parking infractions, or to the amount charged for infractions authorized solely by local law.

Because the plain language of section 46.63.170(2) unambiguously authorizes the fines the defendants impose, we are precluded from considering the plaintiffs' argument that the legislative history compels a contrary conclusion. *See State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 999 P.2d 602, 611 (Wash. 2000) ("When words in a statute are plain and unambiguous, this Court is required to assume the Legislature meant what it said and apply the statute as written.").

II.

The district court also correctly rejected the plaintiffs' challenges to two types of compensation provisions in the contracts between the defendant cities and camera companies.

The plaintiffs first challenge the "stop-loss" or "cost neutrality" provisions that allow the cities to delay payment of any fees greater than the amount of revenues generated by citations that month until revenues exceed monthly fee obligations. The plaintiffs argue that these provisions violate the statutory directive that "the compensation paid . . . must be based only upon the value of the equipment and services provided . . . , and may not be based upon a portion of the fine or civil penalty imposed or the revenue generated by the equipment." Wash. Rev. Code. § 46.63.170(1)(i). We disagree. The cost neutrality provisions alter the timing of fee payments in accordance with monthly revenue fluctuations, but they do not base the amount of fees upon a *portion* of the revenue generated.

We likewise reject the plaintiffs' contention that supplemental fee provisions in some of the defendants' contracts constitute fees improperly "based upon a portion of . . . the revenue generated." *Id.* The relevant provisions obligate certain cities to pay a $5 service fee per citation issued above the first 800 citations per camera per month. These fees are permissible because they constitute

"compensation . . . based . . . upon the value of the . . . services provided or rendered in support of the system." *Id.*

III.

The plaintiffs next argue the NOIs the cities issued to them violate statutory rules for approval of such notices. Under Revised Code of Washington section 46.63.060(2) and Infraction Rules for Courts of Limited Jurisdiction (IRLJ) 2.1(a), "the form used to file cases alleging the commission of a parking, standing or stopping infraction shall be approved by the Administrative Office of the Courts." The plaintiffs argue that because section 46.63.170(2) requires that camera infractions "be processed in the same manner as parking infractions," the NOIs generated for camera infractions must receive AOC approval in accordance with the IRLJ 2.1(a) command that NOIs "alleging the commission of a parking, standing or stopping infraction" be AOC-approved.

We reject this argument for two reasons. First, we agree with the district court that section 46.63.170(2)'s directive that camera infractions "be processed in the same manner as parking infractions" must be construed in light of the accompanying list of purposes for which camera infractions are processed like parking infractions. All of the provisions listed concern aspects of post-infraction procedure rather than initial notification. *See* Wash. Rev. Code §§ 46.63.170(2),

3.50.100, 35.20.220, 46.16.216, 46.20.270(3). Second, section 46.63.170(1)(e) explicitly addresses the form and content of camera infraction notices, suggesting that the legislature expressed relevant restrictions on camera NOIs in this provision alone.

IV.

Finally, we decline to address the plaintiffs' challenge to the use of traffic cameras at three-arterial intersections or their claim that the defendants use "faulty traffic camera system technology." These claims were not articulated in the briefing on the defendants' motion to dismiss and are therefore waived on appeal. *See Walsh v. Nev. Dep't of Human Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006).

Because we affirm the district court's dismissal of the plaintiffs' claims on the merits, we do not address the defendants' contention that the claims are barred by res judicata.

***

The district court correctly rejected the plaintiffs' challenges to the defendants' camera fine amounts, compensation arrangements and camera infraction NOIs.

The order granting the motion to dismiss is AFFIRMED. The defendants' motion for judicial notice is **DENIED** as moot.

AFFIRMED.