

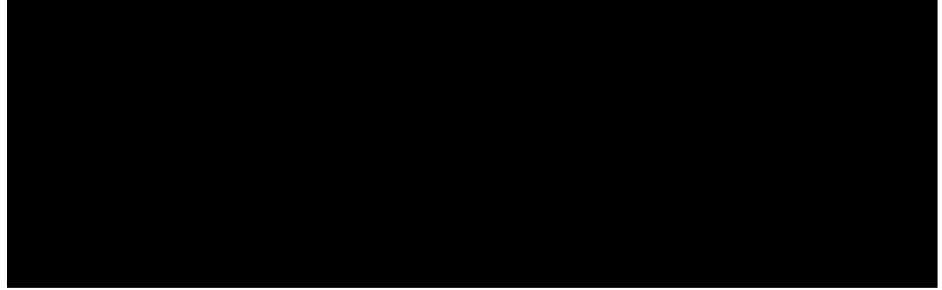
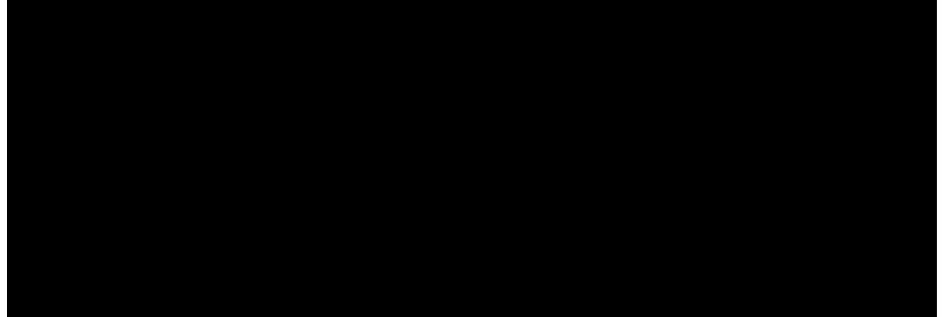
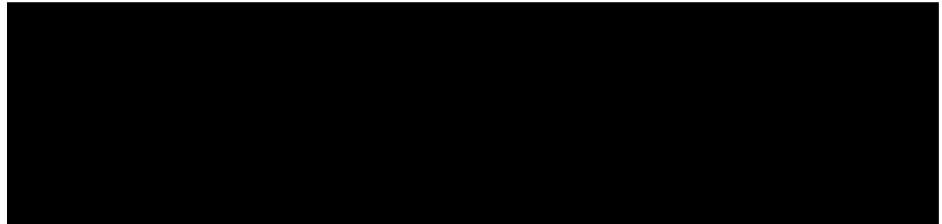
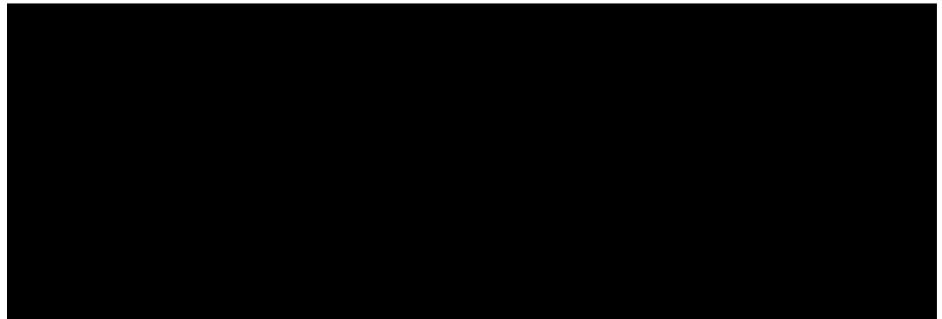
[No. F071884. Fifth Dist. July 1, 2016.]

ERNEST J. BROOKS, Plaintiff and Appellant, v.
MERCY HOSPITAL, Defendant and Respondent.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Ernest J. Brooks, in pro. per., for Plaintiff and Appellant.

Frazier, Watson & Croutch, Craig R. Donahue and Daniel K. Dik for Defendant and Respondent.

OPINION

KANE, Acting P. J.—Plaintiff Ernest J. Brooks appeals from a judgment of dismissal entered in favor of defendant Mercy Hospital after the trial court sustained defendant's demurrer to plaintiff's complaint on statute of limitations grounds. Plaintiff argues the trial court erred because it failed to apply the tolling provision set forth at Code of Civil Procedure section 352.1,¹ which grants a two-year tolling of the statute of limitations to persons who are imprisoned “for a term less than for life.” (§ 352.1, subd. (a).) Plaintiff contends that, under a long-standing judicial construction of this provision (i.e., *Grasso v. McDonough Power Equipment, Inc.* (1968) 264 Cal.App.2d 597 [70 Cal.Rptr. 458] (*Grasso*) [construing predecessor tolling statute, § 352]), the phrase “for a term less than for life” includes a life sentence where there is a possibility of parole. In other words, the tolling provision has been interpreted to apply to all prisoners except those subject to a life sentence *without* the possibility of parole. Plaintiff is correct that *Grasso* is dispositive here. As more fully explained below, we conclude that section 352.1 tolling should have been applied to plaintiff, which means the trial court erred in concluding that the statute of limitations expired. Accordingly, we reverse the judgment appealed from with instructions that the trial court enter a new order overruling defendant's demurrer to plaintiff's complaint.

¹ Unless otherwise indicated, further statutory references are to the Code of Civil Procedure.

FACTS AND PROCEDURAL HISTORY

The parties do not dispute that plaintiff was and is a prison inmate at Corcoran State Prison, serving an indeterminate life sentence that includes a possibility of parole. In April 2013, while serving said life sentence, plaintiff was taken for medical care and treatment to Mercy Hospital in Bakersfield. The parties do not dispute that plaintiff's action arises out of that medical care and treatment. The gist of plaintiff's complaint, as summarized in the parties' briefing, is that defendant negligently overmedicated him and allowed an "IV Port" to become infected, among other things. On September 5, 2013, plaintiff served on defendant a notice of intent to sue.

Plaintiff's complaint was filed on September 24, 2014. Defendant filed a demurrer on the ground that the action was time-barred by the statute of limitations applicable to causes of action for alleged professional negligence by a health care provider—i.e., section 340.5.

The hearing on the demurrer was held on April 16, 2015, after which the trial court took the matter under submission. On May 7, 2015, the trial court issued the following written ruling: "Defendant Dignity Health, dba Mercy Hospital of Bakersfield's demurrer to the complaint is sustained without leave to amend. The one (1) year statute of limitations expired pursuant to . . . section 340.5, and the limitations period was not tolled under . . . section 352.1 as plaintiff is serving an indetermin[ate] life sentence . . ." (Some capitalization omitted.) Having concluded that tolling under section 352.1 was inapplicable, the trial court then proceeded to explain why the one-year provision in section 340.5 had expired: "The date that a cause of action accrues for statute of limitations purposes is the date the plaintiff discovers or has a factual basis to suspect that defendant committed some wrong against him. Based on plaintiff's pleadings he had such factual basis during the period of his hospitalization in 04/2013. He certainly appreciated his claim no later than 09/05/2013 when he gave notice of intent to sue to the hospital. He did not file his action until 09/24/2014, more than one year from either his hospitalization or notice of intent to sue. [¶] . . . [¶] The complaint is to be dismissed as to the demurring defendant." (Some capitalization omitted.)

Subsequent to the trial court's ruling, a judgment of dismissal was entered in favor of defendant. Plaintiff filed a timely notice of appeal.²

² The notice of appeal was filed five days prior to entry of the judgment. We treat the premature notice as being from the judgment. (*Eckhart v. Genuine Parts Distributors* (1997) 53 Cal.App.4th 1340, 1344 [62 Cal.Rptr.2d 487].)

DISCUSSION

I. *Standard of Review*

On appeal from a judgment dismissing an action after sustaining a demurrer, we review de novo whether the complaint states facts sufficient to constitute a cause of action. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415 [106 Cal.Rptr.2d 271, 21 P.3d 1189].) Where a demurrer is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].) Any questions of statutory interpretation are reviewed de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432 [101 Cal.Rptr.2d 200, 11 P.3d 956].)

II. *Scope of Tolling Provision as Construed by Grasso*

■ The applicable statute of limitations for professional negligence by a health care provider is section 340.5, which states in relevant part as follows: “In an action for injury or death against a health care provider based upon such person’s alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person.”

Section 352.1, the special tolling provision relating to prisoners, provides in relevant part as follows: “If a person entitled to bring an action . . . is, at the time the cause of action accrued, imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life, the time of that disability is not a part of the time limited for the commencement of the action, not to exceed two years.” (§ 352.1, subd. (a).)

In *Belton v. Bowers Ambulance Service* (1999) 20 Cal.4th 928, 931–935 [86 Cal.Rptr.2d 107, 978 P.2d 591], the Supreme Court explained the interplay between sections 340.5 and 352.1, holding that the two-year tolling for prisoners as provided in section 352.1 is applicable to the one-year limitations period in section 340.5, but not to the three-year limitations period in that section. Thus, a prisoner’s time to sue a health care provider can be extended by his or her incarceration up to, but never beyond, the maximum three-year deadline contained in section 340.5. (*Belton, supra*, at

pp. 931–935.) In *Belton*, the prisoner had filed his complaint more than one year after discovery of his cause of action, but within the three-year maximum period. Therefore, the complaint was not barred by the statute of limitations because the one-year period was tolled under section 352.1. (*Belton, supra*, at pp. 930–931, 934–935.) The trial court’s contrary decision on demurrer was reversed by the Court of Appeal, and the Supreme Court affirmed the Court of Appeal. (*Id.* at pp. 930, 935.)

Here, the trial court concluded that section 352.1 did not apply because plaintiff was serving a life sentence. It appears the trial court viewed the wording of section 352.1 literally, without adequately considering the prior judicial construction given to it. On appeal, plaintiff argues that since his life sentence includes the possibility of parole, section 352.1 *was* applicable to him. As we explain, plaintiff is correct.

■ In *Grasso*, the Court of Appeal construed the scope of section 352 (the predecessor to § 352.1). It concluded that the statutory language providing for tolling of the limitations period to persons imprisoned “‘for a term less than for life’” should not be interpreted as excluding all life-termers, but only those without the possibility of parole. (*Grasso, supra*, 264 Cal.App.2d at pp. 599–602.) In so holding, *Grasso* explained that in 1872, when section 352 was first enacted, a life sentence “was literally a life sentence.” (*Grasso, supra*, at p. 599.) There was no possibility of parole and during the prisoner’s literal lifetime of incarceration, his or her civil rights were suspended for the duration. (*Id.* at pp. 599–602; see *De Lancie v. Superior Court* (1982) 31 Cal.3d 865, 871 [183 Cal.Rptr. 866, 647 P.2d 142] [as far as civil rights were concerned, life-termers were deemed “‘civilly dead’”].) Thus, no one serving a life sentence in those days would ever be able to avail himself or herself of “the fruits of litigation.” (*Grasso, supra*, at p. 600.) According to *Grasso*, this history reflects why the Legislature originally excluded life-termers from the tolling provision: “In the nineteenth century to have given an exemption from the statute of limitations to one who had no limitation on his confinement save that of death, would have been to bestow a sardonic favor.” (*Ibid.*) However, by the time *Grasso* was decided, nearly a century after section 352 was first enacted, the basic assumptions of what a life term entailed had changed in significant ways: The possibility of parole was built into most life sentences, and other legislation (i.e., Pen. Code, former § 2601) was in place to allow restoration of civil rights to such prisoners.³ Because of these substantial changes in the nature and implications of a typical life sentence,

³ At the time *Grasso* was decided, Penal Code former section 2601 still provided that life-termers were “‘civilly dead,’” but it permitted the “‘Adult Authority’” to restore such civil rights to persons sentenced to life imprisonment as it deemed proper. (*Grasso, supra*, 264 Cal.App.2d at p. 600, italics added.) Now, of course, the balance has shifted even further in favor of recognizing prisoners’ rights. Hence, a prisoner may be deprived of only such rights

and in light of Penal Code former section 2601, *Grasso* construed Code of Civil Procedure section 352 to mean that only those sentenced to life without possibility of parole should be excluded from the tolling provision. (*Grasso, supra*, at pp. 599–602; accord, 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 702, p. 922.)⁴

■ Moreover, the Legislature appears to have signaled its approval of *Grasso*'s judicial construction when, in 1994, it enacted section 352.1 as a separate provision from section 352, utilizing the same statutory wording. (Stats. 1994, ch. 1083, §§ 4–5, pp. 6466–6467 [enacting § 352.1 from former § 352, but limiting tolling to two years, and deleting prisoner tolling provision from revised § 352].) Of course, the Legislature is presumed to be aware of judicial decisions already in existence, and to have enacted or amended a statute in light thereof. (*People v. Giordano* (2007) 42 Cal.4th 644, 659 [68 Cal.Rptr.3d 51, 170 P.3d 623].) Where the language of a statute uses terms that have been judicially construed, courts generally presume that the Legislature intended the terms to have the same precise meaning as was placed on them by the courts. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1046 [95 Cal.Rptr.3d 636, 209 P.3d 963]; *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050 [77 Cal.Rptr.3d 226, 183 P.3d 1199].) “When legislation has been judicially construed and a subsequent statute on a similar subject uses identical or substantially similar language, the usual presumption is that the Legislature intended the same construction, unless a contrary intent clearly appears.” (*People v. Lopez* (2003) 31 Cal.4th 1051, 1060 [6 Cal.Rptr.3d 432, 79 P.3d 548].) ■ Applying this presumption to the present case, we conclude that when the Legislature enacted section 352.1 and continued to use the same language from former section 352, stating that tolling would be granted to persons imprisoned “for a term less than for life” (§ 352.1, subd. (a)), the Legislature did so with knowledge and in light of *Grasso*'s prior judicial construction thereof, and with an intention to continue that construction of the statutory language. Accordingly, *Grasso* remains good law.

■ From what has been discussed above, it is evident that the trial court erred in sustaining the demurrer on statute of limitations grounds, which error stemmed from the trial court's failure to apply the tolling provision in section 352.1 to plaintiff.

as is reasonably related to legitimate penological interests (Pen. Code, § 2600) and the prisoner otherwise retains civil rights, including the right to initiate civil actions (Pen. Code, § 2601, subd. (d)).

⁴ On this point, *Grasso* stated: “The reason for excluding life termers from the lifting of the statute of limitations, valid as it was in 1872, has been largely lost in the developments of the century which has passed, except possibly as the reason may still exist for that limited class of persons who cannot be paroled or released.” (*Grasso, supra*, 264 Cal.App.2d at p. 601.)

DISPOSITION

The judgment is reversed. The trial court is instructed to enter a new order overruling defendant's demurrer to the complaint. Costs on appeal are awarded to plaintiff.

Detjen, J., and Peña, J., concurred.

[No. F071768. Fifth Dist. June 7, 2016.]

NARAGHI LAKES NEIGHBORHOOD PRESERVATION ASSOCIATION,
Plaintiff and Appellant, v.
CITY OF MODESTO, Defendant and Respondent;
BERBERIAN HOLDINGS, L.P., Real Party in Interest and Respondent.

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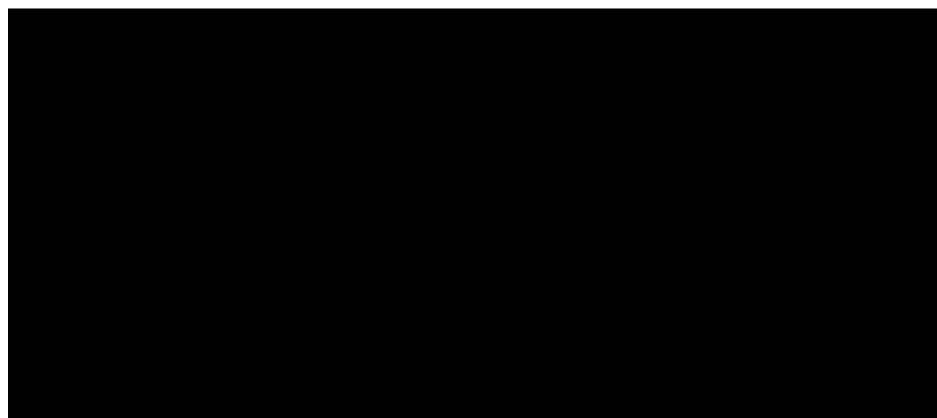
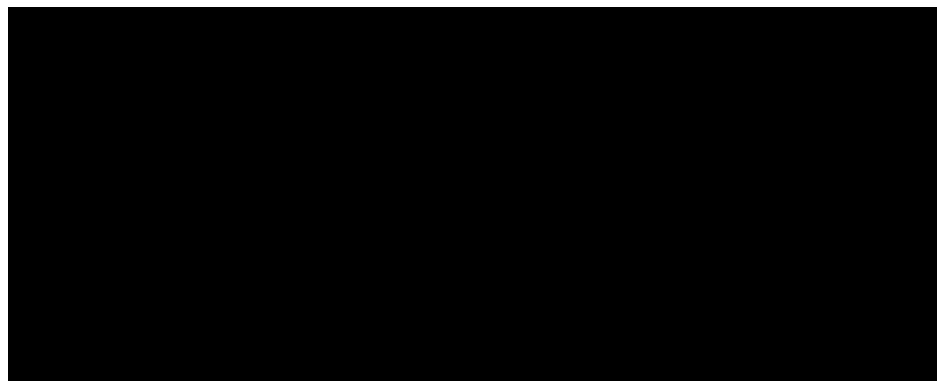
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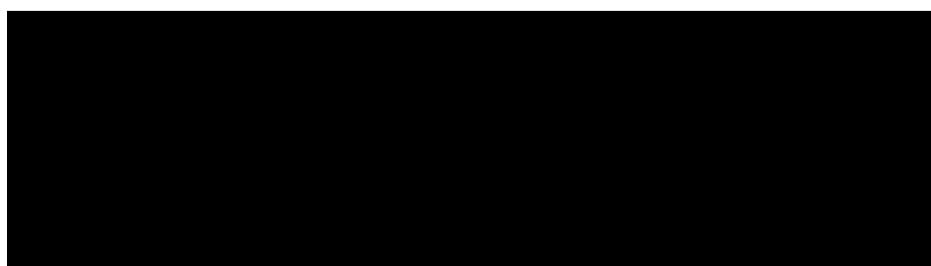
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COUNSEL

Law Office of Donald B. Mooney and Donald B. Mooney for Plaintiff and Appellant.

Meyers, Nave, Riback, Silver & Wilson and Edward Grutzmacher for Defendant and Respondent.

Downey Brand and Donald Sobelman for Real Party in Interest and Respondent.

OPINION

KANE, J.—Following the approval by the City of Modesto (the City) of a shopping center project (the project) that would be adjacent to an established residential neighborhood, Naraghi Lakes Neighborhood Preservation Association (appellant) filed a petition for writ of mandate challenging the approval of the project. Appellant claimed the City failed to follow the City of Modesto Urban Area General Plan (the General Plan), and did not adequately comply with certain requirements of the California Environmental Quality Act (CEQA).¹ The trial court denied the writ petition and entered judgment in favor of the City. Appellant appeals, contending the project was improperly approved and the petition should have been granted because, allegedly, (1) the project was inconsistent with the General Plan regarding the size of neighborhood shopping centers, (2) the City failed to make findings necessary

¹ CEQA is found at Public Resources Code section 21000 et seq.

Unless otherwise indicated, all further statutory references are to the Public Resources Code.

CEQA's policies are implemented through regulations known as the CEQA guidelines (Guidelines) found at California Code of Regulations, title 14, section 15000 et seq.

under the General Plan's rezoning policy, (3) the City failed to comply with CEQA because the environmental impact report (EIR) improperly rejected feasible mitigation measures as to traffic impacts, and (4) no substantial evidence supported the City's CEQA findings regarding urban decay and the statement of overriding considerations. Having reviewed appellant's contentions in light of the entire record, we are unable to conclude that the City prejudicially abused its discretion on any of the grounds raised. Accordingly, the judgment of the trial court is affirmed.

FACTS AND PROCEDURAL HISTORY

The Project Description

The project proposed by real party in interest Berberian Holdings, L.P., is the construction of a new shopping center on approximately 18 acres of vacant land situated in northeast Modesto. The new shopping center, as proposed, will include approximately 170,000 square feet of floor area, with a grocery store serving as the anchor tenant. The proposed site of the project is two contiguous parcels, one 12 acres in size and one six acres in size, bounded by Sylvan Avenue (north), undeveloped land and a stormwater detention basin (south), Oakdale Road (east) and Hashem Drive (west). The completed project (i.e., the new shopping center) as proposed by real party in interest will have two large buildings, one that is 78,290 square feet and another that is 66,230 square feet, each of which will be partitioned into spaces for various tenants. The smaller building is planned to include a 51,730 square foot area for the anchor grocery store tenant. Four freestanding pad buildings, ranging in size from 4,200 square feet to 7,670 square feet, are also part of the overall project. The project calls for 816 parking spaces.

An established residential neighborhood borders the project site on the west side along Hashem Drive. The project will provide an eight-foot-tall masonry wall with a decorative cap along the west and south property lines. A 16-foot-wide landscaped planter on the west side of the masonry wall will provide a further buffer between the development and the residences to the west. The project will be required to provide layered landscaping, shrubs and ornamental trees in the 16-foot-wide planter area.

The project necessitates a General Plan amendment to redesignate the project site from mixed-use (MU) and residential (R) zoning to commercial (C), and to rezone the same property from planned development zone P-D(211) to a new planned development zone, to allow development of a shopping center.

General Plan's Neighborhood Plan Prototype (NPP)

There is no dispute that the project site is located within an area covered by the NPP policies of the General Plan. The General Plan, at chapter III, part C, paragraph 2, explains the purpose of the NPP policies as follows: “The [NPP] was developed in 1974 to provide a ‘blueprint’ for development of future residential neighborhoods. The [NPP] is designed to create residential areas served by neighborhood parks, elementary schools, a neighborhood shopping center, and a collector street pattern connecting these uses. The [NPP] is a model for: subdivision designs, location of parks and other capital facilities, and zoning and pre-zoning studies. As of the baseline year of 1995, much of the Baseline Developed Area has been developed according to this Prototype. [¶] Within the Modesto community, ‘Neighborhoods’ are typically one mile by 3/4 mile (approximately 480 acres in size), and bordered by Arterial streets or Expressways.”

The General Plan’s NPP provisions then go on to describe the various *policies* that are applicable to the subject neighborhoods. After stating policies relating to housing types and the location of elementary schools and parks within each neighborhood, the NPP policies call for a neighborhood shopping center, described as follows: “A 7–9 acre neighborhood shopping center, containing 60,000 to 100,000 square feet of gross leasable space, should be located in each neighborhood. The shopping center should be located at the intersection of two Arterial streets, as shown in Figure III-2.” (General Plan, ch. III, pt. C, § 2, ¶ d.)

The Site’s Entitlement History

The same site has been approved for commercial development as a shopping center on two occasions prior to the instant project. Historically, the zoning for that location has been P-D(211), which allows condominium apartments and cluster houses. In 1981, the City approved a rezoning of the 12-acre parcel² to allow for the development of a shopping center at the corner of Sylvan Avenue and Oakdale Road. When that project did not get developed, the zoning was returned back to P-D(211). In 1987, the City again approved a request to rezone the 12-acre parcel for a shopping center development. When the planned shopping center did not proceed within the time limit for development, the City repealed the zoning changes and returned the zoning to P-D(211). The two shopping center entitlements previously approved (in 1981 and 1987) for this site entailed proposed developments that were approximately 12 acres in size with approximately 80,000 square feet of leasable space.

² Recall that the entire project site is 18 acres, consisting of two vacant parcels, one of 12 acres and one of six acres. The past entitlements involved the 12-acre parcel only.

Real Party In Interest's Initial Application and City's Initial Environmental Study

In November 2011, real party in interest submitted an application to obtain necessary approvals for the proposed project. As noted above, the project set forth in real party in interest's application consisted of a shopping center development on the 18-acre site at the corner of Sylvan Avenue and Oakdale Road, including approximately 170,000 square feet of leasable space with a grocery store as the anchor tenant. The completed shopping center would be called The Marketplace. It would also include an eight-foot-tall wall and landscaping as a buffer on the western side of the shopping center along Hashem Drive. Additionally, an integral part of the project was a General Plan amendment to redesignate the project site from MU and R to C and to rezone the same property from planned development zone P-D(211) to new planned development zone (P-D) to allow development of a shopping center on the project site.

On May 11, 2012, the City released the results of an initial study, which reported that the project was within the scope of the General Plan master EIR (MEIR) and that, pursuant to CEQA, no additional environmental review was required. The initial study concluded that the project would have no significant effects on the environment and was consistent with the General Plan and the MEIR. Regarding traffic impacts, the initial study included a traffic study prepared by the engineering firm of Kimley-Horn & Associates (the first traffic study).

The project was first brought before the City of Modesto Planning Commission (the Planning Commission) on August 6, 2012, and testimony was received. A second hearing before the Planning Commission took place on September 17, 2012. Appellant and individual residents of the neighborhood nearby the project site submitted letters stating their concerns or objections to the project due to apparent adverse impacts on the environment such as urban decay, traffic, noise, and General Plan inconsistency. The Planning Commission recommended approval of the project by the city council, and a public hearing before the city council was set for October 23, 2012.

On October 23, 2012, appellant submitted a detailed comment letter to the city council, setting forth purported deficiencies in the City's and/or the planning staff's assessment of the project's impacts. Appellant asserted that the project created significant traffic, noise, urban decay, General Plan inconsistency and other environmental impacts. In addition, appellant submitted a peer-reviewed traffic memorandum, prepared by VRPA Technologies, which asserted that the first traffic study used incorrect methodologies to measure traffic impacts. VRPA's memorandum asserted that when the proper

[REDACTED]

[REDACTED]

methodology was used, there were unmitigated traffic impacts of a significant nature at several intersections. The city council ultimately continued the public hearing to January 8, 2013.

On January 3, 2013, real party in interest submitted a letter to the city council, acknowledging that the most efficient course of action would be to prepare a project EIR, since that process would allow the issues raised in appellant's letter to be analyzed and put to rest. The project application was taken off of the city council's meeting agenda and the EIR process formally began with the notice of preparation on February 4, 2013.

The EIR Process and Project Approval

The draft EIR (DEIR) was completed on June 19, 2013, and a public comment period commenced on June 20, 2013, and continued through August 5, 2013. The DEIR included a new, much more extensive traffic analysis. Based on that analysis, the DEIR acknowledged the existence of significant traffic impacts that were allegedly unavoidable at several intersections and roadway segments near the proposed project. The City received only three comment letters on the DEIR, two from public agencies and one from appellant. Appellant's comment letter included a memorandum from its traffic consultant pointing out that the DEIR's analysis of traffic impacts had misapplied certain of the City's thresholds of significance. The City apparently agreed because it promptly revised the traffic report and the relevant sections of the DEIR and issued a recirculated DEIR (RDEIR) for public comment from August 26 to October 10, 2013. The City received only three comment letters on the RDEIR, the same three as before. Appellant submitted a comment letter concerning the RDEIR, outlining alleged deficiencies in the RDEIR's analysis of impacts, alternatives and mitigation measures. The City responded to all comment letters received on both the DEIR and RDEIR in the final EIR (FEIR).³

On November 18, 2013, after nine months of work on the EIR, the project returned to the Planning Commission. Testimony was received at the hearing. Appellant's attorney spoke against the project, emphasizing the significant impacts on traffic that would not be adequately mitigated and General Plan inconsistency, among other things. The Planning Commission believed the concerns expressed by appellant were adequately addressed in the EIR. At the conclusion of the hearing, the Planning Commission adopted resolutions recommending that the city council certify the EIR and approve the project.

³ Unless otherwise indicated, the term EIR refers to the FEIR, which is understood to include and incorporate (1) the DEIR and the RDEIR, (2) all comments received, (3) the City's responses to comments or points raised in the review process, and (4) any other information added by the City. (Guidelines, § 15132.) We sometimes refer to the FEIR or DEIR separately, when it is helpful or convenient to do so.

[REDACTED]

[REDACTED]

On December 10, 2013, the city council held its first public hearing on the EIR and the project. Appellant submitted written objections to the project, including challenges to the EIR's conclusions regarding infeasibility of certain mitigation measures as to traffic impacts. At the conclusion of the hearing, the city council closed the public hearing and continued consideration of the EIR and project to allow staff time to review appellant's recent submittal to ensure that the EIR had fully and adequately analyzed all environmental impacts.

We note that the EIR in this case followed a standard organizational approach that sought to address all of the necessary issues. Among other things, it described the project, summarized the potentially significant environmental impacts, discussed development alternatives to the project, and analyzed mitigation measures, including a delineation of which measures were feasible and which were infeasible. Further, the EIR in this case included a detailed description of the project's traffic impacts at several intersections and roadway segments that would be significant impacts but mitigation would allegedly be infeasible. The EIR also purported to explain why the project, despite its size, was in harmony with the policies of the General Plan.

On January 7, 2014, the city council adopted resolutions Nos. 2014-16 through 2014-18, certifying the EIR and making necessary project approvals. The city council also conducted the first reading of ordinance No. 3597-C.S., which was approved on the consent calendar at the January 14, 2014, city council meeting. The approvals included certification of the EIR and other CEQA findings, approval of the project application, and amendment to the General Plan and zoning. The City posted a notice of determination regarding the project on January 8, 2014.

Petition for Writ of Mandate

On February 6, 2014, appellant filed its verified petition for writ of mandate and complaint for declaratory relief (the petition) in the trial court. On March 5, 2015, after full briefing on the issues and a hearing, the trial court denied the relief sought in the petition. In its written order, the trial court reviewed the record and rejected each of appellant's claims. No abuse of discretion was found by the trial court. Judgment was entered in favor of the City and real party in interest, and against appellant, on March 30, 2015. This appeal followed.

DISCUSSION

I. *General Plan Consistency*

Appellant argues the project was in conflict with the General Plan in several key respects and that, consequently, the City abused its discretion in approving the project. Among the claims of General Plan inconsistency, appellant argues that the project did not comply with the NPP policy regarding the size of the shopping center, and that certain mandatory findings necessary to rezoning of the site were not made. We begin by summarizing the applicable law and the standard of review relating to challenges based on alleged General Plan inconsistency.

A. *Applicable Law and the Standard of Review*

■ A city must adopt a “comprehensive, long-term general plan” for its physical development. (Gov. Code, § 65300.) The general plan serves as a “‘charter for future development’” and contains the city’s fundamental policy decisions about such development. (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1194 [24 Cal.Rptr.3d 543].) The policies in a general plan typically reflect a range of competing interests. (*Ibid.*; *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 142 [104 Cal.Rptr.2d 326] (*Save Our Peninsula*).) “General plans ordinarily do not state specific mandates or prohibitions. Rather, they state ‘policies,’ and set forth ‘goals.’” (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 378 [110 Cal.Rptr.2d 579] (*Napa Citizens*)). Nevertheless, a city’s land use decisions must be consistent with the policies expressed in its general plan. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570 [276 Cal.Rptr. 410, 801 P.2d 1161]; *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 536 [277 Cal.Rptr. 1, 802 P.2d 317]; *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 815 [65 Cal.Rptr.3d 251] (*Friends of Lagoon Valley*); Gov. Code, § 65860.) “[T]he propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements.” (*Citizens of Goleta Valley v. Board of Supervisors, supra*, at p. 570.)

■ The rule of general plan consistency is that the project must at least be *compatible* with the objectives and policies of the general plan. (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 717–718 [29 Cal.Rptr.2d 182] (*Sequoyah Hills*); *Friends of Lagoon Valley, supra*, 154 Cal.App.4th at p. 817.) “[S]tate law does not require precise conformity of a proposed project with the land use designation for a site, or

an exact match between the project and the applicable general plan. [Citations.] Instead, a finding of consistency requires only that the proposed project be ‘*compatible*’ with the objectives, policies, general land uses, and programs specified in’ the applicable plan. [Citation.] The courts have interpreted this provision as requiring that a project be ‘“in agreement or harmony with”’ the terms of the applicable plan, not in rigid conformity with every detail thereof.” (*San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 678 [125 Cal.Rptr.2d 745] (*San Franciscans*).) To reiterate, the essential question is “whether the project is compatible with, and does not frustrate, the general plan’s goals and policies.” (*Napa Citizens, supra*, 91 Cal.App.4th at p. 378.)

■ As has been accurately observed by one court: “[I]t is beyond cavil that no project could completely satisfy every policy stated in [a city’s general plan], and that state law does not impose such a requirement. [Citation.] A general plan must try to accommodate a wide range of competing interests . . . and to present a clear and comprehensive set of principles to guide development decisions. Once a general plan is in place, it is the province of elected city officials to examine the specifics of a proposed project to determine whether it would be ‘in harmony’ with the policies stated in the plan. [Citation.] It is, emphatically, *not* the role of the courts to micromanage these development decisions. Our function is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies, whether the city officials made appropriate findings on this issue, and whether those findings are supported by substantial evidence. [Citations.]” (*Sequoyah Hills, supra*, 23 Cal.App.4th at pp. 719–720.)

Where, as here, a governing body has determined that a particular project is consistent with the relevant general plan, that conclusion carries a strong presumption of regularity that can be overcome only by a showing of abuse of discretion. (*Friends of Lagoon Valley, supra*, 154 Cal.App.4th at p. 816; *Napa Citizens, supra*, 91 Cal.App.4th at p. 357; *Sequoyah Hills, supra*, 23 Cal.App.4th at p. 717.) “We may neither substitute our view for that of the city council, nor reweigh conflicting evidence presented to that body.” (*Sequoyah Hills, supra*, at p. 717.)

Moreover, judicial review of consistency findings is highly deferential to the local agency. (*Friends of Lagoon Valley, supra*, 154 Cal.App.4th at p. 816.) “[C]ourts accord great deference to a local governmental agency’s determination of consistency with its own general plan, recognizing that ‘the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity. [Citations.] Because policies in a general plan reflect a

range of competing interests, the governmental agency must be allowed to weigh and balance the plan’s policies when applying them, and it has broad discretion to construe its policies in light of the plan’s purposes. [Citations.] A reviewing court’s role “is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies.” [Citation.]” (*San Franciscans, supra*, 102 Cal.App.4th at pp. 677–678, quoting *Save Our Peninsula, supra*, 87 Cal.App.4th at p. 142.)

In our review of the City’s consistency findings in this case, our role is the same as that of the trial court; we independently review the City’s actions and are not bound by the trial court’s conclusions. (*Napa Citizens, supra*, 91 Cal.App.4th at p. 357.) In applying the substantial evidence standard, we resolve reasonable doubts in favor of the City’s finding and decision. (*Ibid.*) The essential inquiry is whether the City’s finding of consistency with the General Plan was “reasonable based on the evidence in the record.” (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 637 [91 Cal.Rptr.3d 571].) “[A]s long as the City reasonably could have made a determination of consistency, the City’s decision must be upheld, regardless of whether we would have made that determination in the first instance.” (*Id.* at p. 638.) Generally speaking, the determination that a project is consistent with a city’s general plan will be reversed only if the evidence was such that no reasonable person could have reached the same conclusion. (*San Franciscans, supra*, 102 Cal.App.4th at p. 677; accord, *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 26 [161 Cal.Rptr.3d 447] (*San Diego Citizenry Group*)).

B. NPP Policies

Appellant first of all asserts that the project violates the NPP policies of the General Plan. The NPP policy provision at issue relates to the need for local shopping centers in the neighborhoods to which the NPP applies, and provides as follows: “A 7–9 acre neighborhood shopping center, containing 60,000 to 100,000 square feet of gross leasable space, should be located in each neighborhood.” The same policy provision states that the shopping center “should be located at the intersection of two Arterial streets, as shown in Figure III-2.”

We begin our consideration of this issue by noting how the City interpreted this General Plan policy in the proceedings below. The position taken by the City planning staff throughout the project review process, which was expressly adopted by the City in its findings approving the project, was that the project was consistent with the General Plan, including the NPP policies. The City concluded the project was consistent with the NPP policies because the

project (1) provided for a neighborhood shopping center and (2) was properly located at an intersection of arterial streets. Further, while it was acknowledged that the project was larger than the neighborhood shopping center described in the NPP policies, the City understood that the depictions set forth therein were meant to provide guidance in the orderly development of neighborhoods, but were not mandatory limitations on the size of shopping centers. In support of this flexible interpretation, it was noted by staff in the proceedings before the Planning Commission and the city council that several other shopping centers had been approved by the City that exceeded the NPP policy's acreage and square footage descriptions. As one staff report states: "It should be noted that since these policies were adopted, the City has approved eight neighborhood shopping centers that exceeded the size called for in this policy, and in each case the City found the project consistent with the General Plan." It was also noted by staff that for many years the market trend in grocery stores has been for higher square footage, which was represented by the developer to be more economically viable.

In the instant appeal, appellant disagrees with the City's flexible interpretation and takes the position that all of the policies and descriptions set forth in the NPP should be treated as mandatory development standards. Appellant emphasizes that the project at hand is double the acreage amount and 70,000 square feet above the total leasable space contemplated in the NPP. Further, appellant points out that the City did not update the wording of the NPP in either 1995 or 2008, the two most recent occasions on which the City updated its General Plan and, therefore, any attempt to dismiss the NPP as being an outmoded relic in need of updating does not comport with the City's conspicuous failure to revise it. Additionally, appellant argues the City's position that shopping center developments larger than what is depicted in the NPP have routinely been approved by the City is flawed, because not all of the referenced shopping centers were in areas covered by the NPP policies. Finally, appellant argues that if the policies in the NPP were simply flexible goals to guide development, there would be no need for paragraph (f) of the NPP policies, which provides for minor adjustments to accommodate existing development in an area.

The City and real party in interest (together respondents) have filed a joint respondents' brief in the instant appeal. Respondents insist that the NPP policy's enumerations of acreage and leasable square footage when describing a prototypical neighborhood shopping center were not meant as rigid development mandates, but rather were flexible descriptions to provide a basic model or pattern to guide the future development of the applicable

neighborhoods.⁴ Respondents argue that the project, although bigger than the shopping center depicted in the NPP, was essentially compatible with its main goals of providing a needed neighborhood shopping center at the intersection of two arterial streets.

In support of their position, respondents rely on the plain language of the NPP policies as well as the City's history or past practice of flexibly interpreting the NPP policies. As to the NPP's wording, the terms "prototype" and "model" are used in the NPP to describe its overall purpose, which reasonably suggests that the policies stated therein were intended to provide a guiding pattern or a model for future development of applicable neighborhoods. Indeed, the NPP expressly states that it is "a model for: subdivision designs, location of parks and other capital facilities, and zoning and pre-zoning studies," and a "'blueprint' for development of future residential neighborhoods." Further, the NPP states that it was "designed to create residential areas served by neighborhood parks, elementary schools, a neighborhood shopping center, and a collector street pattern connecting these uses." As the City planning staff put it in the proceedings below, "the policies were developed with the intent to provide guidance on how to arrange or lay out land uses in a neighborhood." Additionally, the use of the word "should" in the vast majority of the NPP policies, including the policy at issue in this appeal, while the mandatory term "shall" was used in one instance not applicable to this case, provides a reasonable basis for the more flexible construction of the acreage and square footage provision, as urged by respondents.⁵ Based on the foregoing observations, we conclude that the wording of the NPP is reasonably consistent with the interpretation given to it by the City. Of course, we are required to accord "great deference" to the City's interpretation of its own General Plan. (*Save Our Peninsula, supra*, 87 Cal.App.4th at p. 142.)⁶

Appellant replies that the "[m]inor adjustments" clause in paragraph (f) of the NPP policies indicates strict compliance should be required as to all

⁴ We note that the subject NPP policy, which states that a "7–9 acre neighborhood shopping center" containing "60,000 to 100,000 square feet of gross leasable space" should be located in "each neighborhood" is not overtly phrased in terms of a mandatory cap or limitation. Thus, it may simply be a *descriptive estimate* of the usual or typical size of such a shopping center. Such a possibility fits the more flexible approach adopted by the City, with the City presumably having discretion to approve bigger or smaller centers when deemed advisable.

⁵ Paragraph (g) of the NPP policies states a mandatory requirement: "If the expressway is a Class A expressway, there shall be no Collector streets intersecting with the expressway." Virtually all of the remaining policy statements use the word "should."

⁶ We are not suggesting that the framing of the NPP in terms of policies and goals (i.e., using the word "should"), rather than as rigid mandates, renders them merely advisory in nature. The test of compatibility still applies. (*Napa Citizens, supra*, 91 Cal.App.4th at p. 378.) Nevertheless, in deciding on the question of compatibility, we believe the nature and flexibility of the policy under consideration are important factors.

policy terms, including the size descriptions for neighborhood shopping centers. We think appellant reads too much into that provision, which states in full that “Minor adjustments to the [NPP] can be made to accommodate existing development in an area.” The provision is narrowly focused on what to do about *existing development* in an area. On that issue, it simply allows the City to work around existing uses or conditions on the ground; that is, it may make minor adjustments to accommodate for the same. Contrary to appellant’s suggestion, the provision does not address the broader concern of whether to make all other NPP policies mandatory and binding limitations.

In addition to the plain wording of the NPP policies, respondents assert that “[t]he City’s past practices also demonstrate the City’s consistent construction of the NPP Policies as providing guidance to inform development, not inflexible mandates . . . [since] [t]here are multiple examples of the City’s approval of shopping center projects that exceed the prototype in either acreage, square footage, or both.” Respondents appear to be correct on this point. The two previous entitlements approved at the project site in 1981 and 1987 went substantially beyond the total acreage described in the prototype, each seeking to utilize 12 gross acres. The Lakes shopping center is located in an area covered by the NPP policies, and it exceeded the square footage parameters by 4,000 square feet. Other examples identified by respondents and mentioned in the record include the Standiford Square shopping center (at 10.22 acres and 112,579 sq. ft.), the Dry Creek Meadows shopping center (at 11.25 acres and 112,146 sq. ft.), and Wood Colony Plaza (at 13.76 acres and 171,171 sq. ft.), the latter being larger than the project in total square footage.⁷

Appellant counters that at least two of the prior shopping center developments referenced by the City staff in the proceedings below (i.e., the Crossroads shopping center and Village Center) were not subject to the NPP policies. Respondents do not respond to appellant’s objection as to Village Center, but argue that the NPP policies would have been applicable to the Crossroads shopping center because it was approved and constructed prior to the City’s establishment of the Redevelopment Planning District in that location. We think that uncertainty remains regarding these two challenged examples. Nevertheless, this discrepancy noted by appellant only relates to a part of the overall record and is insufficient to undo the remainder of the evidence on this point. Even if the disputed examples are not counted, there is still sufficient substantial evidence in the record to confirm respondents’ position that there has been a consistent practice to treat the acreage and

⁷ In addition, respondents assert two further examples of approvals of shopping centers where the NPP policies were allegedly in effect, but the acreage and square footage numbers of the NPP were exceeded (i.e., Obrien’s Marketplace and the Crossroads shopping center).

[REDACTED]

[REDACTED]

square footage description in the NPP policy as a flexible guide to neighborhood development, rather than a strict limitation on the size of shopping centers.⁸

As we summarized above, general plan consistency may be found where a project is compatible with, and does not frustrate, the general plan's goals and policies. (*Napa Citizens, supra*, 91 Cal.App.4th at p. 378.) In deciding that question, we are required to accord great deference to an agency's determination that a project is consistent with its own general plan. (*Save Our Peninsula, supra*, 87 Cal.App.4th at p. 142.) That is because "the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity." (*Ibid.*) Furthermore, "[b]ecause policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purposes." (*Ibid.*)

In applying our deferential review, we decide whether the City's finding of consistency with the General Plan was "reasonable based on the evidence in the record." (*California Native Plant Society v. City of Rancho Cordova, supra*, 172 Cal.App.4th at p. 637.) "[A]s long as the City reasonably could have made a determination of consistency, the City's decision must be upheld, regardless of whether we would have made that determination in the first instance." (*Id.* at p. 638.) "An agency's finding that a project is consistent with its general plan can be reversed only if it is based on evidence from which no reasonable person could have reached the same conclusion." (*San Diego Citizenry Group, supra*, 219 Cal.App.4th at p. 26.)

■ We find no abuse of discretion in the City's determination that the project was consistent with its General Plan, including the NPP policies. First, aside from the increased size of the shopping center over the prototypical size, the project fits and is compatible with NPP policies by placing a neighborhood-serving shopping center at the corner of an intersection served by two arterial streets, exactly as depicted on the NPP map, and complying with all other relevant policies. Second, the City's approval of a larger shopping center does not violate the General Plan because the NPP acreage and square footage descriptions were reasonably construed by the City as flexible guides to development, not rigid development limitations. That construction was reasonable based on the language of the NPP policies as well as the City's own past practices in applying the NPP provisions. For all

⁸ We note that in the trial court, respondents distilled from the administrative record the "eight other shopping centers subject to NPP policies" that exceeded the acreage and square footage numbers stated in the NPP policy at issue. The eight were then summarized in a diagram that was attached to the trial court's ruling on petition for writ of mandate.

[REDACTED]

[REDACTED]

of these reasons, we uphold the City's determination that the project was consistent with the NPP policies of the General Plan.

C., D.*

.....

II. *Compliance with CEQA**

.....

DISPOSITION

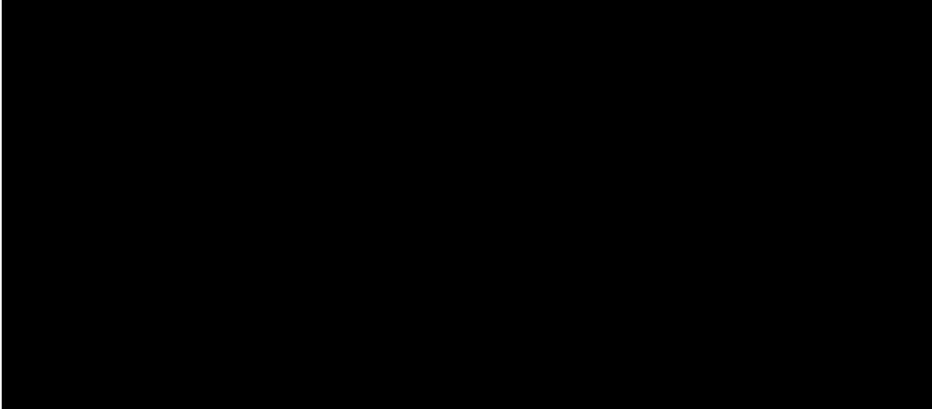
The trial court's denial of the petition for writ of mandate and the resulting judgment in favor of the City is affirmed. Each party shall bear their own costs on appeal.

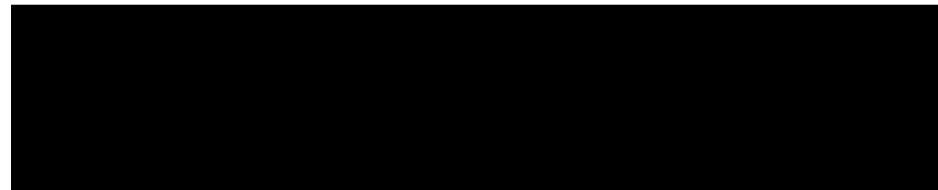
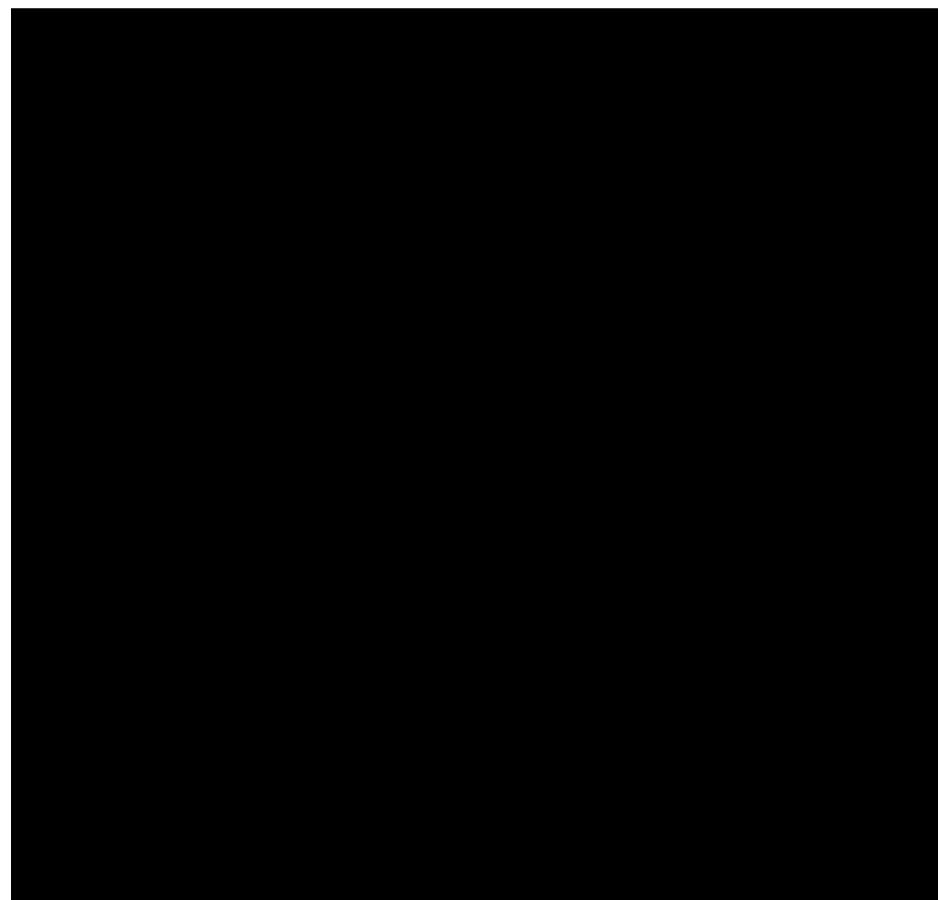
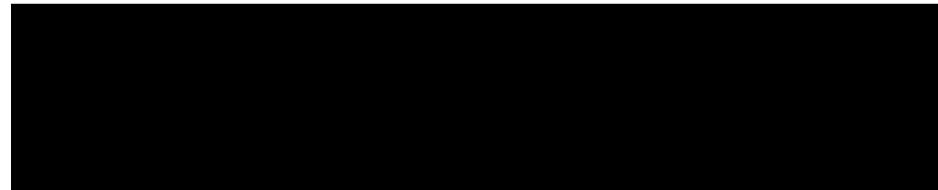
Hill, P. J., and Smith, J., concurred.

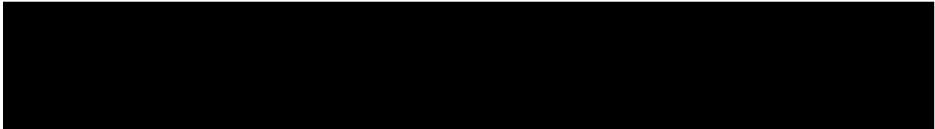
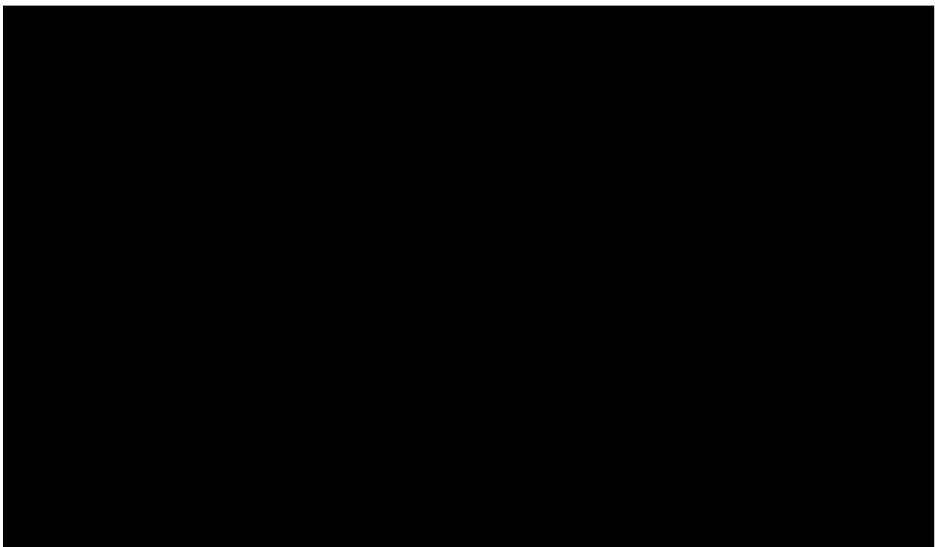
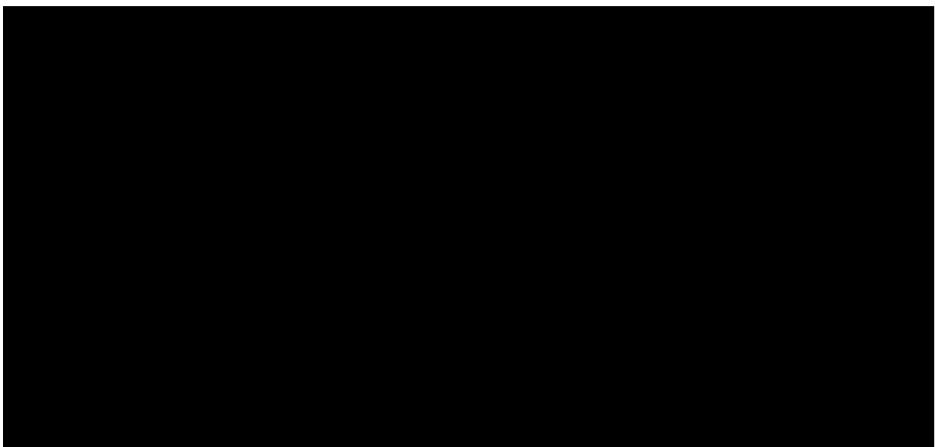
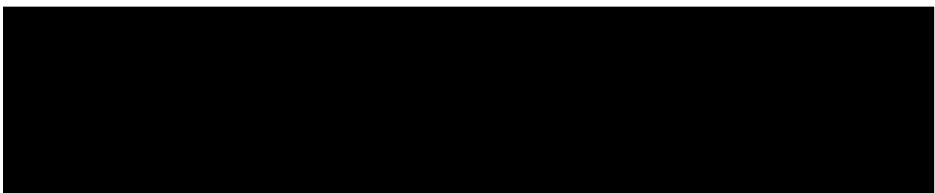
*See footnote, *ante*, page 9.

[No. B261194. Second Dist., Div. Five. June 1, 2016.]

DAVID CHANG et al., Plaintiffs and Respondents, v.
COUNTY OF LOS ANGELES, Defendant and Appellant.







COUNSEL

Hurrell Cantrall, Thomas C. Hurrell and Melinda Cantrall for Defendant and Appellant.

Green & Shinee, Elizabeth J. Gibbons and Amanda J. Waters for Plaintiffs and Respondents.

OPINION

KRIEGLER, J.—A public entity employer provided a defense for three employees under a reservation of rights, then refused to pay the resulting judgment for battery and civil rights violations on the ground that the employees acted with actual malice. The employees sought indemnification from their employer under Government Code section 825.¹ The trial court granted summary judgment in favor of the employees. On appeal, the public entity contends that because the defense was conducted under a reservation of rights, the employees had to satisfy the requirements of section 825.2 for indemnification. We hold that section 825.2 applies when a public entity employer provides a defense under a reservation of rights that includes reservation of the right not to indemnify for acts committed with actual fraud, corruption or actual malice. An employer's reservation of the right to indemnity from the employee for acts committed with actual fraud, corruption or actual malice is necessarily a reservation of the right not to indemnify the employee for such acts. We reverse the judgment with directions.

FACTS AND PROCEDURAL BACKGROUND

On November 5, 2007, Los Angeles County Sheriff's Deputies David Chang, Anthony Pimentel, and Kris Cordova assaulted inmate Alejandro Franco, including using pepper spray on his anus and genital area. Franco brought an action against the deputies for battery and civil rights violations under 42 United States Code section 1983. (*Franco v. Gennaco* (C.D.Cal., Aug. 11, 2015, No. LA CV 09-00893-VBF-FFMx) 2015 U.S.Dist. Lexis 106876 (*Franco*)).

The deputies signed agreements with the County of Los Angeles (County) setting forth the terms and conditions under which the County would defend them. The first paragraph of each agreement listed circumstances under which the County might withdraw from defending a deputy, including if the County determined he did not act within the scope of his employment under section 995.2, subdivision (a)(1), or he acted or failed to act because of actual fraud, corruption, or actual malice under section 995.2, subdivision (a)(2).

The second paragraph stated circumstances under which the County might not indemnify the deputy: "In defending you, the County reserves its right not to pay any judgment, compromise or settlement on your behalf until it is established that the injury arose out of an act or omission occurring within the scope of your employment as an employee or officer of the County. The County also will not pay any party of a claim or judgment that is for punitive or exemplary damages. (Section 825(a).)"

¹ All further statutory references are to the Government Code, unless otherwise stated.

The third paragraph stated circumstances under which the County might seek indemnification from the deputy: “If the County pays any claim or judgment, or any portion thereof, for an injury arising out of your act or omissions, the County may recover the amount of such payment from you unless you establish that the act or omission upon which the claim or judgment is based occurred within the scope of your employment as an employee or official of the County, and the County fails to establish that you acted or failed to act because of actual fraud, corruption or actual malice, or that you willfully failed or refused to reasonably cooperate in good faith in the defense conducted by the public entity. (Section 825.6.)”

The agreement ended with a recitation in capital letters, “I request and agree that the County may provide for my defense in the subject action, subject to the reservations set forth above. I agree to cooperate fully with the attorneys the County provides to me, and keep them advised at all times of my mailing address and telephone number.”

On September 9, 2010, following a jury trial, the jury found the deputies violated Franco’s federal civil rights, causing injury or harm to him. The jury also found each of the deputies acted with malice, oppression or reckless disregard in violating Franco’s civil rights. In addition, the jury found each of the deputies committed battery on Franco while acting within the course and scope of their employment with the Los Angeles County Sheriff’s Department, causing Franco injury or harm. Each of the deputies acted with malice, oppression, or fraud in committing battery on Franco.

Against each deputy, the jury awarded compensatory damages of \$85,000 and punitive damages of \$50,000. The total compensatory damage award was \$255,000. Judgment was entered on September 28, 2010, against the deputies and in favor of Franco. The deputies were jointly and severally liable for an award of costs of \$6,754.80 and attorney fees of \$189,331.67. The total judgment, excluding punitive damages, was \$451,086.47. The judgment has not been paid.

The deputies’ request for indemnification from the Los Angeles County Board of Supervisors was denied. The deputies filed a claim for damages with the County on July 11, 2011. On February 28, 2012, the deputies filed a complaint against several defendants, including the County, the board of supervisors, and the Los Angeles County Office of the County Counsel, seeking to compel payment of the *Franco* judgment. On June 17, 2013, the deputies filed the operative third amended complaint for indemnification of the compensatory damages award. The complaint alleged Franco was the “real party in interest” to whom the damages were owed. The deputies were seeking indemnification for these damages. The cause of action for indemnification was based on sections 814 and 825. The deputies alleged they were

entitled to indemnification for all economic, non-punitive damages awarded in *Franco* as a matter of law.

On August 14, 2014, the county defendants filed a motion for summary judgment, or in the alternative, summary adjudication, on grounds including that (1) the deputies' claim for indemnification was barred under section 825, subdivision (b), because the jury found the deputies acted with malice (2) the deputies were not entitled to attorney fees under section 800; and (3) the board of supervisors and the county counsel were immune as a matter of law. The deputies opposed the motion.

The deputies filed a motion for summary judgment, or in the alternative, summary adjudication, on August 15, 2014. The deputies argued the County must indemnify them, because (1) the County was liable for their conduct in the course and scope of their employment under section 815.2; (2) the County provided a defense under section 825, subdivision (a), and as a result, the County is required to pay the judgment based on acts arising out of the course and scope of their employment; and (3) the County reserved the right not to pay the judgment only if the acts were not in the course and scope of employment. The County opposed the motion.

A hearing was held on the motions. At the time of the hearing, Franco had attached the deputies' bank accounts and was seeking to execute on the judgment in the underlying action. On December 18, 2014, the trial court granted the deputies' motion for summary adjudication on the issue of indemnification based on finding the County was required to indemnify the deputies, excluding punitive damages, pursuant to section 825, subdivision (a), and the reservation of rights. The trial court denied the county defendants' motion for summary adjudication of the indemnification claim, finding it was not barred by application of section 825.2, subdivision (b), but granted summary adjudication on the issues of attorney fees and immunity of the board of supervisors and the county counsel. The trial court entered judgment in favor of the deputies based on the court's rulings on the summary adjudication motion, ordering that the deputies recover indemnification from the County of \$451,086.47. The County filed a timely notice of appeal.

DISCUSSION

Standard of Review and Principles of Statutory Interpretation

We review the trial court's rulings on summary judgment motions de novo. (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1081–1082 [36 Cal.Rptr.3d 650] (*MacIsaac*).) “On appeal

from the granting of a motion for summary judgment, we examine the record de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party.” (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460 [30 Cal.Rptr.3d 797, 115 P.3d 77].)

■ We also review questions of statutory interpretation de novo. (*MacIsaac, supra*, 134 Cal.App.4th at pp. 1081–1082.) “We begin with the fundamental rule that our primary task is to determine the lawmakers’ intent.” (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 [268 Cal.Rptr. 753, 789 P.2d 934].) To determine legislative intent, “we first look to the plain meaning of the statutory language, then to its legislative history and finally to the reasonableness of a proposed construction.” (*Riverview Fire Protection Dist. v. Workers’ Comp. Appeals Bd.* (1994) 23 Cal.App.4th 1120, 1126 [28 Cal.Rptr.2d 601].)

■ The words of the statute are the first step in the interpretive process. (*Mt. Hawley Ins. Co. v. Lopez* (2013) 215 Cal.App.4th 1385, 1397 [156 Cal.Rptr.3d 771].) “We give the words of the statute ‘a plain and commonsense meaning’ unless the statute specifically defines the words to give them a special meaning. [Citations.] If the statutory language is clear and unambiguous, our task is at an end, for there is no need for judicial construction. [Citations.] In such a case, there is nothing for the court to interpret or construe. [Citation.]” (*MacIsaac, supra*, 134 Cal.App.4th at p. 1083.)

We do not interpret the words of the statute in isolation. (*MacIsaac, supra*, 134 Cal.App.4th at p. 1083.) “Rather, we construe the words of the statute in context, keeping in mind the statutory purpose. [Citation.] We will not follow the plain meaning of the statute ‘when to do so would “frustrate[] the manifest purposes of the legislation as a whole or [lead] to absurd results.”’ [Citations.] Instead, we will ‘“interpret legislation reasonably and . . . attempt to give effect to the apparent purpose of the statute.”’ [Citation.]’ (*Ibid.*)

“When the plain meaning of the statute’s text does not resolve the interpretive question, we must proceed to the second step of the inquiry. [Citations.] In this second step, ‘the courts may turn to rules or maxims of construction “which serve as aids in the sense that they express familiar insights about conventional language usage.”’ [Citation.] We may also look to a number of extrinsic aids, including the statute’s legislative history, to assist us in our interpretation. [Citations.]” (*MacIsaac, supra*, 134 Cal.App.4th at pp. 1083–1084, fn. omitted.)

“If ambiguity remains after resort to secondary rules of construction and to the statute’s legislative history, then we must cautiously take the third and

final step in the interpretive process. [Citation.] In this phase of the process, we apply ‘reason, practicality, and common sense to the language at hand.’ [Citation.] Where an uncertainty exists, we must consider the consequences that will flow from a particular interpretation. [Citation.]” (*MacIsaac, supra*, 134 Cal.App.4th at p. 1084.)

Indemnification

■ The deputies contend they are entitled to indemnification from the County under section 825. The County asserts section 825.2 applies in this case, because the defense was provided under a reservation of rights. We conclude that section 825.2 applies when a public entity employer provides a defense under a reservation of rights that includes a reservation of the right not to pay a judgment based on actual fraud, corruption or actual malice.

■ “In 1963, the Tort Claims Act was enacted in order to provide a comprehensive codification of the law of governmental liability and immunity in California. (*Los Angeles Police Protective League v. City of Los Angeles* (1994) 27 Cal.App.4th 168, 174 [32 Cal.Rptr.2d 574].) As part of its overall statutory scheme, the Tort Claims Act provides that in the usual civil case brought against a public employee, a public entity is required to defend the action against its employee [§ 995 et seq.] and to pay any claim or judgment against the employee in favor of the third party plaintiff (§ 825 et seq.). A principal purpose of the indemnification statutes is to assure ‘the zealous execution of official duties by public employees.’ (*Johnson v. State of California* (1968) 69 Cal.2d 782, 792 [73 Cal.Rptr. 240, 447 P.2d 352].)” (*Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1001 [47 Cal.Rptr.2d 478, 906 P.2d 440], fn. omitted.)

■ A public entity’s duty to defend an employee is contained in sections 995 through 996.6. Upon an employee’s request, with certain exceptions as provided in sections 995.2 and 995.4, “a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity.” (§ 995) A public entity may refuse to provide for an employee’s defense if the public entity determines (1) the act or omission was not within the employee’s scope of employment; (2) the employee acted or failed to act because of actual fraud, corruption, or actual malice; or (3) the defense would create a specific conflict of interest between the public entity and employee, as defined by the statute. (§ 995.2, subd. (a).)

■ A public entity’s duty to indemnify an employee is contained in sections 825 through 825.6. Under section 825, subdivision (a), if an employee makes a timely request in writing that a public entity provide a

defense in a civil action for an injury arising out of an act or omission occurring within the scope of his or her employment, and the public entity conducts the defense with the employee's reasonable good faith cooperation, "the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed."² If the public entity conducted the defense pursuant to an agreement reserving the right not to pay the judgment until it is established that the injury occurred from an act or omission within the scope of employment, then the public entity is required to pay the judgment only if it is established that the injury occurred from an act or omission within the scope of employment. (§ 825, subd. (a).) The public entity is not authorized under this section to pay punitive or exemplary damages. (*Ibid.*)

It is clear that under the provisions of section 825 alone, the County would be required to pay the non-punitive damages awarded against the deputies. The County conducted the defense. It reserved the right not to pay the judgment until it was established that the acts occurred within the scope of employment, but the jury found the acts causing Franco's injuries occurred within the scope of the deputies' employment.

The County contends, however, that section 825.2 applies when an employee seeks indemnification and the public entity conducted the employee's defense under a reservation of rights. Section 825.2, subdivision (a), states that, except as provided in subdivision (b), if an employee pays a judgment, or any portion of a judgment, that the public entity is required to pay under section 825, he is entitled to recover the amount of the payment from the public entity. Section 825.2, subdivision (b), provides: "If the public entity did not conduct his defense against the action or claim, or if the public entity

² Section 825, subdivision (a), provides: "Except as otherwise provided in this section, if an employee or former employee of a public entity requests the public entity to defend him or her against any claim or action against him or her for an injury arising out of an act or omission occurring within the scope of his or her employment as an employee of the public entity and the request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed. [¶] If the public entity conducts the defense of an employee or former employee against any claim or action with his or her reasonable good-faith cooperation, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed. However, where the public entity conducted the defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise, or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his or her employment as an employee of the public entity, the public entity is required to pay the judgment, compromise, or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his or her employment as an employee of the public entity. [¶] Nothing in this section authorizes a public entity to pay that part of a claim or judgment that is for punitive or exemplary damages."

conducted such defense pursuant to an agreement with him reserving the rights of the public entity against him, an employee or former employee of a public entity may recover from the public entity under subdivision (a) only if he establishes that the act or omission upon which the claim or judgment is based occurred within the scope of his employment as an employee of the public entity and the public entity fails to establish that he acted or failed to act because of actual fraud, corruption or actual malice or that he willfully failed or refused to conduct the defense of the claim or action in good faith or to reasonably cooperate in good faith in the defense conducted by the public entity.”

■ Although section 825.2 states that it applies when an employee pays a judgment and seeks to recover those payments, the terms “pays” and “recover” have been interpreted broadly and do not require literal payment. (*Rivas v. City of Kerman* (1992) 10 Cal.App.4th 1110, 1120 [13 Cal.Rptr.2d 147].) Section 825.2 has been interpreted to apply when a judgment is entered against the employee. (*Ibid.*) “A literal interpretation of section 825.2, subdivision (a) would also lead to great injustice for potentially innocent employees, denied a defense by their public entity employer, who nonetheless become liable for a judgment arising out of the course and scope of their employment with the public entity. Such employees would be required to pay the judgment, in many cases bankrupting themselves, before triggering any duty on the part of the public entity employer to reimburse them for their losses. To the extent the judgment exceeds the employee’s assets, the injured plaintiff would also be irreparably injured as he or she would have no ability to collect on the judgment for any amount in excess of the employee’s ability to pay.” (*Id.* at pp. 1120–1121.)

In cases where the public entity has defended an action under a reservation of rights, it would lead to an absurd result to require literal payment before applying section 825.2. If literal payment were required to satisfy section 825.2, then the right to indemnification when a defense has been conducted under a reservation of rights would depend on the speed and success of a third party’s enforcement procedures. In this case, for example, the deputies would have the right to indemnification under section 825 as long as no payment has been made, but as soon as Franco attached their bank accounts and obtained a payment on the judgment, the deputies would have been required to satisfy the provisions of section 825.2 to receive indemnification. This would lead to injustice. The terms “pays” and “recover” must be interpreted broadly to include situations where a judgment is entered against an employee in order to harmonize the provisions of sections 825 and 825.2.

■ Section 825.2, subdivision (b), applies when a public entity conducts a defense pursuant to an agreement “reserving the rights of the public entity

against him,” but it is not clear from the statute which rights the public entity must reserve to trigger the protections of section 825.2. A literal interpretation of section 825.2 would allow the public entity to reserve any right and invoke the protections of section 825.2. Under this interpretation, the rights reserved in the agreement could have no connection to the rights enforced in section 825.2, which would not effect the purpose of the statutory scheme. The agreement referred to in section 825.2 could be the same as the agreement referred to in section 825 reserving the right not to pay any judgment until it is established that the injury occurred from an act or omission within the scope of employment. Although this interpretation would harmonize the statutory provisions, it would not provide any notice that the public entity would have the right not to pay a judgment arising from an act or omission within the scope of employment because of actual malice, corruption or actual fraud. The most sensible interpretation is that the agreement must reserve the right not to pay a judgment arising from an act or omission within the scope of employment because of actual malice, corruption or actual fraud in order for the public entity to rely on the protection of that right under section 825.2.

Our interpretation is supported by the legislative history. The California Law Revision Commission issued several recommendations in 1963 which formed the basis of the Tort Claims Act, including the following: “11. Whenever a public entity is held liable for acts of an employee committed with actual fraud, corruption or actual malice, the public entity should have the right to indemnity from the employee. This right to indemnity, however, should not exist in any case where the public entity has undertaken the defense of the employee, unless the public entity has reserved a right of indemnity by agreement with the employee. In conducting an employee’s defense, the entity’s interest might be adverse to the interest of the employee. For example, if both the employee and the entity were joined as defendants, the public entity’s interest might be best served by showing malice on the part of the employee; for if the employee acted with malice the public entity could recover indemnity from the employee for any amounts the entity was required to pay. Hence, the undertaking of an employee’s defense should constitute a waiver of the public entity’s right to indemnity unless, by agreement between the entity and the employee, the public entity’s right of indemnity is reserved.” (Recommendation Relating to Sovereign Immunity, Tort Liability of Public Entities and Public Employees (Jan. 1963) 1 Cal. Law Revision Com. Rep. (1963) p. 819.)

■ We hold that when a public entity defends an employee under a reservation of rights which includes reserving the right of indemnity for acts or omissions because of actual malice, corruption or actual fraud, then the requirements of section 825.2 must be satisfied to be entitled to indemnification.

The agreement reserving the public entity's rights in this case included a reservation of the right to indemnity from the deputies for acts or omissions taken because of actual malice, corruption or actual fraud, as authorized under section 825.6.³ By necessary implication, the County reserved the right not to indemnify the deputies for acts within the course and scope of their employment that were taken with actual malice. Having reserved that right, the County could invoke section 825.2. The County showed the jury found the deputies acted with actual malice, or at the very least, a triable issue of fact existed as to whether the deputies acted with malice. Therefore, the deputies' motion for summary adjudication of the issue of indemnification should have been denied.

The judgment in favor of the deputies and the portion of the order granting the deputies' motion for summary adjudication of the indemnification claim are reversed. The portion of the order denying the county defendants' motion for summary adjudication based on the application of section 825.2 must also be reversed. The matter is remanded for further proceedings consistent with this opinion.

DISPOSITION

The judgment and the portion of the order granting summary adjudication in favor of David Chang, Anthony Pimentel, and Kris Cordova are reversed.

³ Section 825.6 provides, “(a)(1) Except as provided in subdivision (b), if a public entity pays any claim or judgment, or any portion thereof, either against itself or against an employee or former employee of the public entity, for an injury arising out of an act or omission of the employee or former employee of the public entity, the public entity may recover from the employee or former employee the amount of that payment if he or she acted or failed to act because of actual fraud, corruption, or actual malice, or willfully failed or refused to conduct the defense of the claim or action in good faith. Except as provided in paragraph (2) or (3), a public entity may not recover any payments made upon a judgment or claim against an employee or former employee if the public entity conducted his or her defense against the action or claim. [¶] (2) If a public entity pays any claim or judgment, or any portion thereof, against an employee or former employee of the public entity for an injury arising out of his or her act or omission, and if the public entity conducted his or her defense against the claim or action pursuant to an agreement with him or her reserving the rights of the public entity against him or her, the public entity may recover the amount of the payment from him or her unless he or she establishes that the act or omission upon which the claim or judgment is based occurred within the scope of his or her employment as an employee of the public entity and the public entity fails to establish that he or she acted or failed to act because of actual fraud, corruption, or actual malice or that he or she willfully failed or refused to reasonably cooperate in good faith in the defense conducted by the public entity. [¶] (3) If a public entity pays any claim or judgment, or any portion thereof, against an employee or former employee of the public entity for an injury arising out of his or her act or omission, and if the public entity conducted the defense against the claim or action in the absence of an agreement with him or her reserving the rights of the public entity against him or her, the public entity may recover the amount of that payment from him or her if he or she willfully failed or refused to reasonably cooperate in good faith in the defense conducted by the public entity.”

The portion of the order denying the County's motion for summary adjudication of the indemnification claim is also reversed. The trial court is directed to enter a new and different order denying the motion for summary adjudication brought by Chang, Pimentel, and Cordova, and to conduct further proceedings on the County's motion for summary adjudication in accordance with this opinion. The County is awarded its costs on appeal.

Turner, P. J., and Baker, J., concurred.

Respondents' petition for review by the Supreme Court was denied September 14, 2016, S236460. Corrigan, J., did not participate therein.

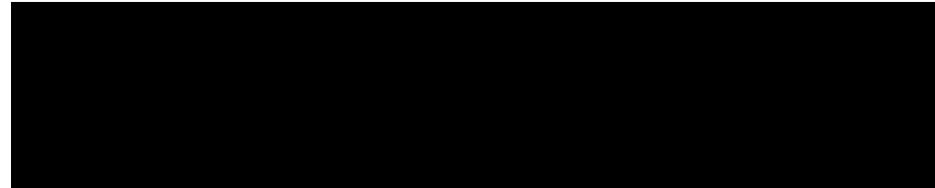
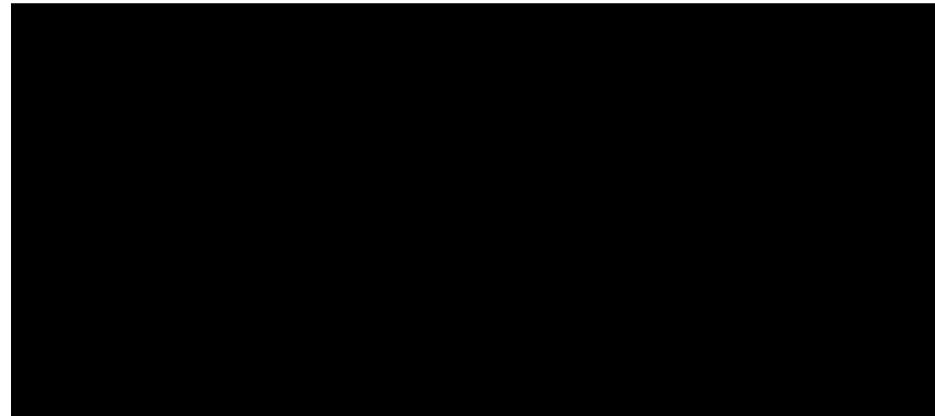
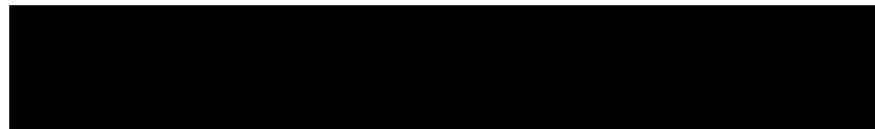
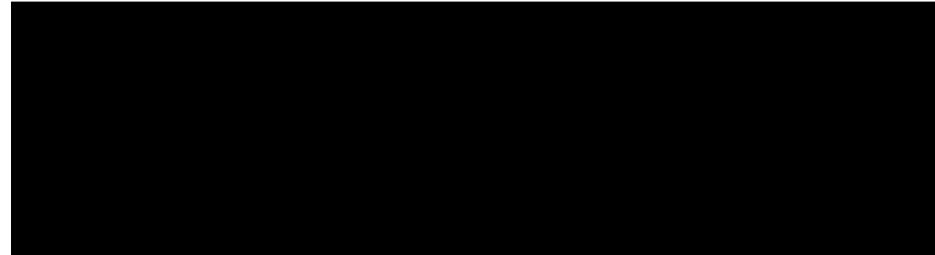
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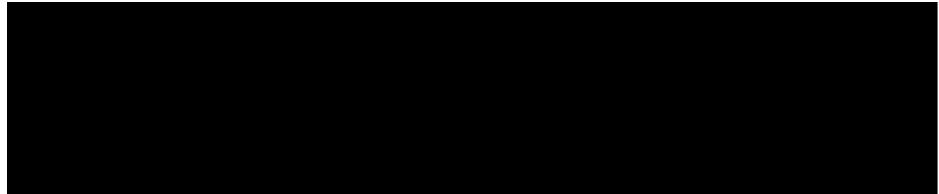
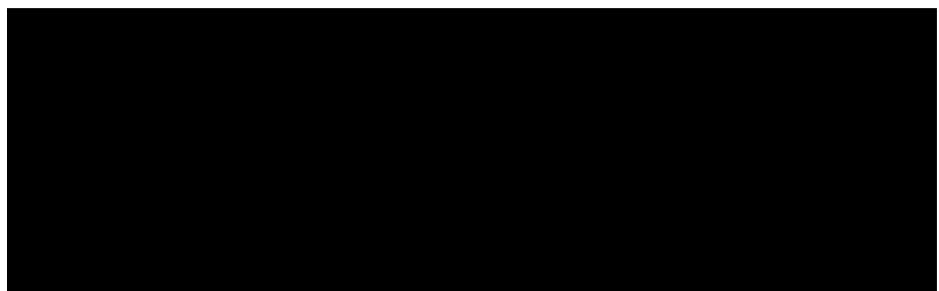
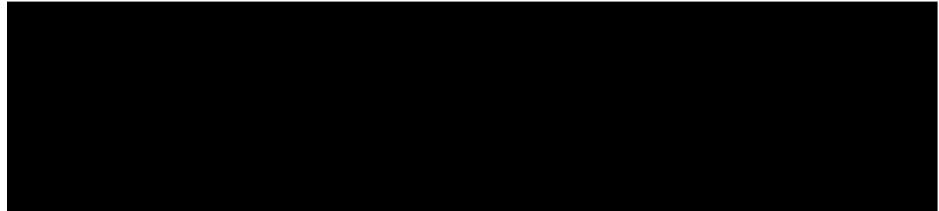
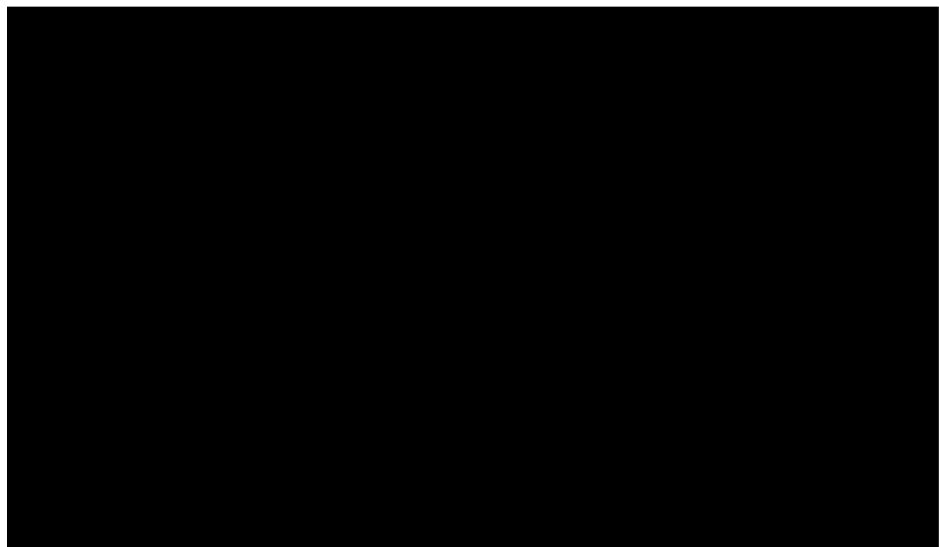
DAN POPESCU, Plaintiff and Appellant, v.
APPLE INC., Defendant and Respondent.

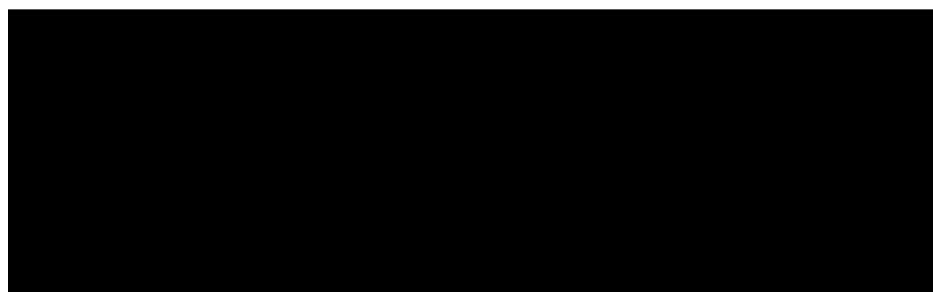
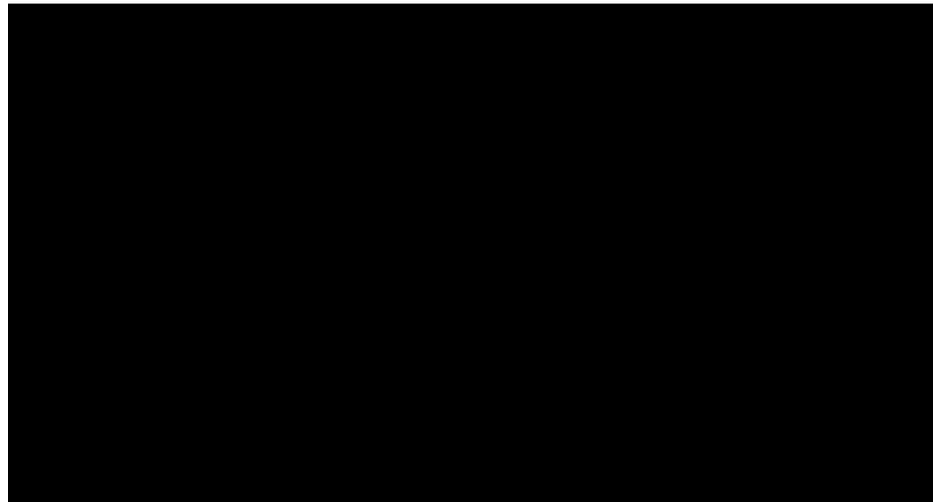
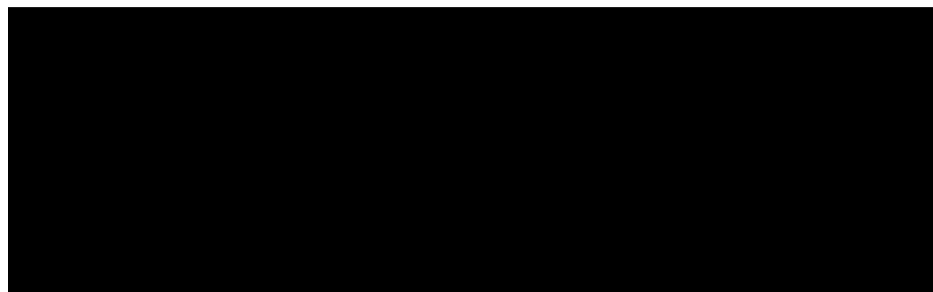
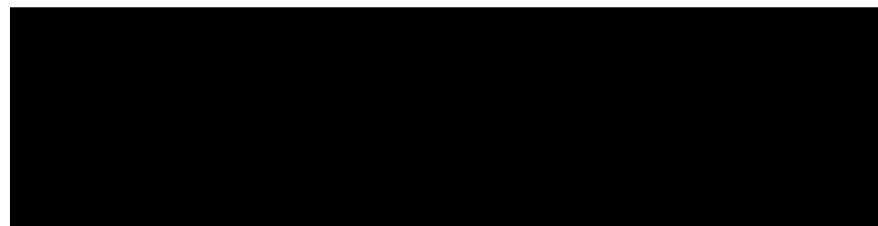
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[REDACTED]

ANSWER The answer is (A). The first two digits of the number 1234567890 are 12.

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the first time in the history of the world, the people of the United States have been called upon to determine whether they will submit to the law of force, or the law of the Constitution. We consider the question to be, whether the Southern Slaveholding States have a right to secede from the Federal Union; and, if so, whether the Federal Government has a right to suppress them by force.

COUNSEL

Richard D. Schramm and Amy Carlson for Plaintiff and Appellant.

Littler Mendelson, Todd K. Boyer, Benjamin A. Emmert and Robert J. Wilger
for Defendant and Respondent.

OPINION

MÁRQUEZ, J.—Plaintiff Dan Popescu sued Apple Inc. (Apple) for damages after he was fired by his employer, Constellium Rolled Products Ravenswood, LLC (Constellium). He alleged that between August and October 2011, Apple took affirmative steps to convince Constellium to terminate him in retaliation for his resistance to Apple’s alleged illegal anticompetitive conduct. The court sustained Apple’s demurrer to Popescu’s first amended complaint (Complaint) without leave to amend.

This appeal involves Popescu’s claim for intentional interference with contractual relations (contract interference) and his claim for intentional interference with prospective economic advantage (business interference). Claims for contract interference and business interference are separate but related torts. The elements of the two claims are substantially the same, but a plaintiff alleging business interference must also show that the defendant’s action “was wrongful ‘by some measure beyond the fact of the interference itself.’ [Citation.]” (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393 [45 Cal.Rptr.2d 436, 902 P.2d 740] (*Della Penna*).) As a general rule, this wrongfulness element is not required in a contract interference claim because contracts are entitled to greater protection from interference.

Among the issues we will address in this appeal are whether (1) an employee (Popescu) whose at-will employment contract is terminated as a result of a third party’s (Apple’s) interference must allege that the defendant’s conduct was independently wrongful to state a contract interference claim, and (2) a third party’s alleged anticompetitive conduct may constitute independently wrongful acts to support a business interference claim, even if the plaintiff is not directly harmed by the wrongful acts.

In our review of the sustaining of a demurrer, we must accept as true all material allegations of fact that are well pleaded in the complaint (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 866–867 [76 Cal.Rptr.3d 325]), regardless of how “improbable they may be. [Citation.]” (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604 [176 Cal.Rptr. 824] (*Del E. Webb Corp.*)).) Based upon this standard and the law applicable to contract and business interference claims, we conclude the trial court erred.

In sustaining the demurrer to the contract interference claim, the trial court concluded that Popescu had alleged an at-will employment agreement with Constellium, and that under *Reeves v. Hanlon* (2004) 33 Cal.4th 1140 [17 Cal.Rptr.3d 289, 95 P.3d 513] (*Reeves*), Popescu could not state a contract

interference claim as a matter of law. As to the business interference claim, the court held that Apple’s alleged anticompetitive conduct did not constitute an independently wrongful act supporting Popescu’s claim because it was not “designed to, and [did not] actually cause interference with the economic relationship” between Popescu and Constellium.

■ We will conclude that the trial court correctly found that Popescu had alleged an at-will employment agreement. But the court then erroneously interpreted and applied *Reeves* as compelling the conclusion that Popescu “cannot state a claim for intentional interference with contract.” *Reeves*, however, concerned a type of claim that is not at issue here—a claim by a former employer whose at-will employee was hired away by a new employer. Because of the dual policy concerns of employee mobility and the promotion of legitimate competition, the California Supreme Court held in *Reeves* that the former employer had to show that the new employer’s conduct in recruiting and hiring its at-will employee was independently wrongful. (*Reeves, supra*, 33 Cal.4th at pp. 1149–1153.) Those same policy considerations do not exist here. This case involves an employee—not his former employer—suing a third party for interfering with his employment agreement. We thus hold that *Reeves* does not require Popescu to allege or prove as part of his contract interference claim that Apple’s conduct in interfering with his at-will employment contract was independently wrongful.

We also hold that Popescu alleged the required elements of a business interference claim. As part of that claim, Popescu was not required to allege that he was directly harmed by an independently wrongful act so long as he alleged (as he did) that Apple’s wrongful act interfered with his economic relationship with Constellium.

Because the demurrer to both causes of action should have been overruled, we need not address Popescu’s contention that the trial court abused its discretion by denying leave to amend. We will reverse the judgment with directions that the court vacate its prior order and enter a new order overruling the demurrer to both causes of action.

PROCEDURAL BACKGROUND

I. *Complaint*

On July 9, 2013, Popescu initiated this action against Apple, alleging contract interference and business interference claims. Apple filed a demurrer to the initial pleading. Apple’s demurrer was not heard by the court because, in response to the demurrer, Popescu filed an amended pleading, the Complaint, that is at issue in this appeal.

Popescu, an Arizona resident, alleged¹ that he is “an aluminum engineering manager who developed cutting edge alloys for high-tech customers.” The gist of his action is that he “objected to Apple’s unlawful trade practices,” and that Apple therefore “convinced [his] employer to terminate him for cause on a trumped up basis,” thereby “blackball[ing] Popescu from his profession.”

In 2000, Popescu was working for Alcoa, Inc. (Alcoa). He was hired that year by Algroup Alusuisse (Algroup), an aluminum supplier that is Alcoa’s largest competitor. Algroup hired Popescu because he had expertise “in marketing value-added aluminum substrates directly to end users in high-tech industries.” Algroup and Popescu entered into an employment agreement, which included the following provision for Popescu’s benefit: “‘An extended separation support package (as an exception to current policy) which would provide you with up to twelve months of base salary and medical/dental coverage through paid COBRA, as well as outplacement services, should your employment terminate for any reason other than misconduct or resignation.’” Algroup was acquired by Alcan Corporation (Alcan) in 2001.

Popescu alleged that he was “a stellar and highly valued employee [who] survived a series of corporate transactions” that resulted in his employment by Constellium. In a June 2009 written employment agreement, Constellium reaffirmed Popescu’s severance provision in his prior agreement with Algroup: “‘Algroup Severance Plan: Provisions of the Algroup severance, offered to you at the time of your employment with Algroup, will continue to be honored, up to one year’s severance pay while unemployed, COBRA benefits (if not eligible elsewhere), outplacement services and unused earned vacation.’”

Popescu alleged that he received performance reviews from Alcan and Constellium that were “exemplary.” His employer used a scoring system that rated him as “‘Very Successful’ or ‘Exceptional.’” During his last review in February 2011, Constellium designated Popescu as being in “the very highest ‘Critical Resource’ category.” The next month, it designated him as the lead employee in pursuing a relationship with Apple in which it was looking “to expand the aluminum look and design of the MacBook and iPad to its iPhone. Popescu performed superbly.”

By early 2011, Apple had determined it would “replace the stainless steel iPhone body with a thinner and lighter extruded, anodized aluminum alloy.”

¹ A demurrer admits the truth of all facts properly pleaded. (*Aubrey v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966–967 [9 Cal.Rptr.2d 92, 831 P.2d 317].) Accordingly, we will sometimes refer to the allegations in the Complaint without using the prefatory phrase “Popescu alleged” to avoid undue repetition of that phrase.

Apple approached Constellium to develop an alloy with “specifications [that] were very demanding and required state of the art expertise and technology.” In March 2011, the business unit president of Constellium Global ATI (of which Constellium is a subdivision) designated Popescu to lead in the pursuit of a relationship with Apple in the latter’s goal of using an aluminum alloy for its iPhone products. Popescu was designated the project lead because of his “expertise and performance.”

Popescu and a team of engineers from Constellium commenced work on the Apple custom alloy project. Between April and August 2011, Popescu oversaw the project, which involved Apple engineers and managers in California, Constellium’s research and development center in France, and Constellium’s Swiss-based manufacturing unit. Apple sought and obtained a large degree of information from Constellium, including its trade secrets regarding aluminum alloy manufacturing formulas and processes. Constellium, through Popescu, also gave Apple samples of its extruded custom alloy and other non-custom alloys.

While development was progressing, Apple insisted that Constellium sign a “‘Development Agreement’” containing “restrictive terms,” including provisions that (a) Apple was not obligated to purchase any developed products or to use Constellium as its supplier, and (b) Constellium, for an effective period of five years, “would [be] precluded . . . from supplying alloy to any manufacturer of consumer electronics.” Apple advised Constellium that Constellium’s competitors (other elite aluminum alloy suppliers) had already signed such an agreement. Popescu objected to the agreement and refused to sign it on Constellium’s behalf.

Popescu alleged that he subsequently attended a meeting with Apple in Cupertino on August 30, 2011. The Apple engineers with whom Popescu had worked for months were silent, while their superiors, who were new to the project, led the meeting and “were visibly upset that the nearly complete custom alloy had outpaced the execution of the development agreement (Development Agreement).” Apple representatives insisted that Constellium sign the Development Agreement, which included an additional restrictive term that required Constellium to transfer its intellectual property interests in the custom aluminum alloy to Apple. Popescu again refused to sign the agreement on behalf of Constellium.

Popescu alleged that Apple wanted to use the executed Development Agreement to restrict competition in the smartphone market. He alleged that by “lock[ing] up [the elite aluminum] suppliers with the [R]estrictive Development Agreement, Apple would be free to develop . . . its own extruded alloy body for the iPhone 5,” and to prevent its competitors from developing

a smartphone with a comparable aluminum alloy body. “Apple saw Popescu as an obstacle to the Development Agreement, so he was an obstacle to the larger scheme to restrict competition in smartphones.”

Popescu also alleged that, during the August 30 meeting, he had inadvertently activated the recording feature of his Livescribe Smartpen (the recording incident). Apple’s attorney noticed that the meeting was being recorded, confiscated the Smartpen, and the meeting continued. After the meeting, Apple insisted that Constellium commence an investigation into the recording incident. Apple also requested that Constellium terminate Popescu, but his supervisors resisted. Apple then appealed to the executive management of the private equity firm that owned Constellium, after which Popescu was terminated for cause. Popescu alleged that Apple “used the recording incident to leverage both [his] termination and Constellium’s execution of the Development Agreement.” Apple’s action allegedly prevented Popescu from obtaining other employment in the aluminum alloy industry. At the time he was terminated on October 28, 2011, Popescu earned more than \$200,000 per year, and he intended to work at Constellium for at least 10 more years, until he retired.

After Popescu was terminated, Constellium signed the Development Agreement. Constellium was “the last of the elite aluminum suppliers to sign the Development Agreement and, thus, the last supplier capable of producing an extruded alloy case equal or superior to Apple’s extruded . . . iPhone 5 case.” Popescu alleged that as a result of his termination and Constellium’s execution of the Development Agreement, Apple was able to misappropriate Constellium’s aluminum alloy trade secrets. He alleged that the Development Agreements signed by Constellium and other elite aluminum suppliers—which agreements were “naked output contracts . . . in which a firm bargains for another’s entire output on the condition that the seller does not deal with the firm’s rivals”—had anticompetitive effects in the global marketplace because “Apple’s competitors [were] denied a potentially efficiency-increasing resource while the public [was] denied a better, more durable smartphone.” He also alleged that Apple’s anticompetitive actions negatively impacted elite aluminum suppliers, consumer electronics companies (including smartphone manufacturers), and smartphone consumers.

In the first cause of action, Popescu alleged a claim for contract interference. He claimed he had an employment contract with Constellium that restricted its ability to terminate him and therefore he was not an at-will employee when he was terminated. He also alleged that (1) Apple was aware of his contract; (2) it intentionally induced Constellium to terminate his employment; (3) as a result of Apple’s actions, Constellium terminated him, purportedly for cause, on October 28, 2011; and (4) he was damaged as a result of Apple’s conduct.

[REDACTED]

In the second cause of action, Popescu alleged a claim for business interference. He claimed (1) he had an employment relationship with Constellium under which there was a probability he would receive future economic benefits; (2) he had intended to work for at least 10 more years at the time his employment was terminated; and (3) had it not been for Apple's actions, it was extremely likely he would have stayed employed with Constellium as he had planned. He also alleged that (1) Apple was aware of his employment relationship with Constellium, (2) Apple intentionally induced Constellium to terminate his employment, and (3) Constellium terminated him, purportedly for cause, on October 28, 2011, as a result of Apple's actions.

Popescu claimed in the second cause of action that Apple's actions were independently wrongful because (1) the Development Agreement was a contract in restraint of trade in violation of the Sherman Act (15 U.S.C. § 1 et seq.) and Business and Professions Code section 16600; (2) Apple engaged in a trust to restrict trade and prevent competition in violation of the Cartwright Act (Bus. & Prof. Code, § 16720 et seq.); (3) Apple's conduct was a scheme to misappropriate Constellium's trade secrets in violation of Civil Code section 3426; (4) Apple's conduct constituted intentional interference with Popescu's contract with Constellium; and (5) Apple's conduct violated Business and Professions Code section 17200 et seq., in that it (a) threatened an incipient violation of antitrust laws or a violation of the policy and spirit of the laws, (b) violated Business and Professions Code section 16600, (c) was an unfair business practice, (d) was a deceptive business practice, (e) was an unlawful business practice, and (f) included implementation of the Development Agreement which contained unconscionable terms.

II. *The Demurrer*

Apple filed a demurrer to the Complaint under Code of Civil Procedure section 430.10,² asserting that the first and second claims failed to state facts sufficient to constitute causes of action (§ 430.10, subd. (e)) and were uncertain (§ 430.10, subd. (f)). Apple urged that the court sustain the demurrer without leave to amend.

The court sustained the demurrer without leave to amend. In a lengthy order filed October 15, 2013, the court reasoned, among other things, that Popescu failed to state a cause of action (1) for contract interference because his allegations demonstrated he was an at-will employee, and (2) for business interference because he had not alleged that Apple, in allegedly taking action to encourage Constellium to launch an investigation into the recording

² Further statutory references are to the Code of Civil Procedure unless otherwise stated.

incident that resulted in Popescu's termination, had committed an independently unlawful act. Judgment was entered in favor of Apple.

DISCUSSION

I. *Applicable Law and Standard of Review*

We perform an independent review of a ruling on a demurrer and decide de novo whether the challenged pleading states facts sufficient to constitute a cause of action. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42 [105 Cal.Rptr.3d 181, 224 P.3d 920]; *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415 [106 Cal.Rptr.2d 271, 21 P.3d 1189].) “In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58]; see also *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1075 [60 Cal.Rptr.2d 263, 929 P.2d 582]; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125 [271 Cal.Rptr. 146, 793 P.2d 479].)

“It is not the ordinary function of a demurrer to test the truth of the plaintiff’s allegations or the accuracy with which he [or she] describes the defendant’s conduct. A demurrer tests only the legal sufficiency of the pleading.” (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213 [197 Cal.Rptr. 783, 673 P.2d 660].) “[T]he facts alleged in the pleading are deemed to be true, however improbable they may be. [Citation.]” (*Del E. Webb Corp., supra*, 123 Cal.App.3d at p. 604; see also *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496 [86 Cal.Rptr. 88, 468 P.2d 216] (*Alcorn*) [court reviewing propriety of ruling on demurrer is not concerned with the “plaintiff’s ability to prove . . . allegations, or the possible difficulty in making such proof”].)

On appeal, we will affirm a “trial court’s decision to sustain the demurrer [if it] was correct on any theory. [Citation.]” (*Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 808 [50 Cal.Rptr.2d 736], fn. omitted.) Thus, “we do not review the validity of the trial court’s reasoning but only the propriety of the ruling itself. [Citations.]” (*Orange Unified School Dist. v. Rancho Santiago Community College Dist.* (1997) 54 Cal.App.4th 750, 757 [62 Cal.Rptr.2d 778].)

II. Order Sustaining Demurrer to Contract Interference Claim

A. Background

■ Five elements must be alleged to support a claim for intentional interference with contractual relations (contract interference). They are “(1) a valid contract between plaintiff and a third party; (2) defendant’s knowledge of this contract; (3) defendant’s intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.” (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 [270 Cal.Rptr. 1, 791 P.2d 587] (PG&E).) It is not a requirement that “the defendant’s conduct be wrongful apart from the interference with the contract itself. [Citation.]” (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55 [77 Cal.Rptr.2d 709, 960 P.2d 513] (Quelimane).) Furthermore, a plaintiff need not establish that the primary purpose of the defendant’s actions was to disrupt the contract. The tort is shown even where “‘the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result of his [or her] action.’” (*Ibid.*, quoting Rest.2d Torts, § 766, com. j, p. 12.)

On its face, the Complaint alleges facts demonstrating each of the five elements of a contract interference claim. But the trial court held that (1) the allegations of the Complaint demonstrated that Popescu had an at-will employment relationship with Constellium, and (2) because Popescu was an at-will employee, he “cannot state a claim for intentional interference with contract.” In reaching this conclusion, the court cited *Reeves, supra*, 33 Cal.4th 1140.

Popescu claims on appeal that he was not an at-will employee, and that in any event, an at-will employee is not barred under *Reeves, supra*, 33 Cal.4th 1140 from asserting a contract interference claim. Apple responds that the allegations of the Complaint demonstrated that Popescu had an at-will employment relationship with Constellium, and that the trial court correctly held that Popescu’s contract interference claim was barred under *Reeves*. Apple argues in the alternative—relying on *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503 [28 Cal.Rptr.2d 475, 869 P.2d 454] (*Applied Equipment*)—that because it “was not a stranger to [Popescu’s] employment relationship with Constellium,” it was immune from suit for intentional interference with that contractual relationship.

B. Apple’s Claim It Was “Not a Stranger” to the Contract

In *Applied Equipment*, our high court addressed whether a contracting party may be held liable in tort for conspiracy to interfere with its own

contract. (*Applied Equipment*, *supra*, 7 Cal.4th at p. 507.) The court said it could not. It concluded that the imposition of tort liability upon a contracting party would “(1) . . . illogically expand[] the doctrine of civil conspiracy by imposing tort liability for an alleged wrong—interference with a contract—that the purported tortfeasor is legally incapable of committing; and (2) . . . obliterate[] vital and established distinctions between contract and tort theories of liability by effectively allowing the recovery of tort damages for an ordinary breach of contract.” (*Id.* at p. 510.) The court noted that “California recognizes a cause of action against *noncontracting parties* who interfere with the performance of a contract.” (*Id.* at p. 513, original italics.) But in rejecting the imposition of tort liability upon a breaching party to the contract, the court held: “‘While the imposition of liability in tort upon the non-party interferer may be justified in all cases for his [or her] intentional disruption of the contractual relation, the party who merely breaches his [or her] contract should in all cases be exposed only to contractual liability as he [or she] has not assumed the role of an intentional interferer. To impose tort liability upon the contract breaker because of the involvement of a third person (when liability is limited to contract damages when the contract breaker is acting alone) undermines the policies which have developed limited contractual liability.’ [Citation.]” (*Id.* at p. 517.)

Apple relies on *Applied Equipment* to argue it has no liability for contract interference because, “while [it] was not [Popescu’s] employer, [Apple nevertheless] [‘]was not a stranger[’] to his ‘at-will’ employment” arrangement with Constellium. Apple contends that Popescu alleged that Apple “contracted with Constellium to develop a proprietary aluminum extruding process. [Citation.] This research and development [process] would represent a significant investment of time and resources by Apple. Apple therefore had a legitimate economic interest in making sure the individuals Constellium staffed the project with would not cause Apple any harm.” Apple relies on the following language in *Applied Equipment*: “‘It has long been held that *a stranger to a contract* may be liable in tort for intentionally interfering with the performance of the contract.’ [Citation.] [¶] However, consistent with its underlying policy of protecting the expectations of contracting parties against frustration by *outsiders* who have no legitimate social or economic interest in the contractual relationship, the tort cause of action for interference with contract does not lie against a party to the contract. [Citations.] [¶] Applied’s conspiracy theory is fundamentally irreconcilable with the law of conspiracy and the tort of interference with contract One contracting party owes no general tort duty to another not to interfere with performance of the contract; its duty is simply to perform the contract according to its terms. The tort duty not to interfere with the contract falls only on strangers—interlopers

who have no legitimate interest in the scope or course of the contract's performance." (*Applied Equipment*, *supra*, 7 Cal.4th at pp. 513–514, fn. omitted & original italics.)

■ We do not read the foregoing language from *Applied Equipment* (as asserted by Apple) to immunize a noncontracting party from tort liability because the noncontracting party has a "legitimate interest in the scope or course of the contract's performance." The plaintiff there, Applied Equipment (Applied), alleged that the codefendants (Litton Saudi Arabia Limited (Litton) and Varian Associates Inc. (Varian)) were both liable for conspiracy to interfere with two Applied contracts—a subcontract with Litton and a purchase order with Varian. (*Applied Equipment*, *supra*, 7 Cal.4th at p. 508.) The issue was whether a *contracting party* could be found liable for conspiring with a third party to deprive the plaintiff of the benefits of its contract—namely, whether (1) Litton could be liable in tort for conspiracy with Varian in connection with the breach of the Applied/Litton subcontract, and (2) Varian could be liable in tort for conspiracy with Litton in connection with the breach of the Applied/Varian purchase order. The court did not address whether a tort claim for contract interference or conspiracy could be made against a *noncontracting party* who had a "legitimate interest" in the contract, let alone hold that such a claim could never be asserted as a matter of law. Cases are not authority for propositions not considered. (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 680 [36 Cal.Rptr.3d 495, 123 P.3d 931].)

■ Dictum in *Applied Equipment* suggests a conclusion adverse to Apple's position. In the opinion's penultimate paragraph, the court noted that, since the plaintiff alleged the disruption of two contracts with two different contracting parties, "[n]othing we have said suggests that Litton may not be held liable for direct interference with the Applied/Varian purchase order (to which it was not a party) or that Varian may not be held liable for direct interference with the Applied/Litton subcontract (to which it was not a party), provided that each of the elements of the tort of interference with contract is satisfied." (*Applied Equipment*, *supra*, 7 Cal.4th at p. 521, fn. omitted.) We thus conclude that the "'stranger to a contract'" language (*id.* at p. 513, italics omitted)—which immediately follows the high court's statement that *noncontracting* parties may be held liable for interference with a contract—is used as a synonym for "noncontracting party."

An extension of *Applied Equipment*'s holding to immunize a third party from tortious interference claims simply because the third party asserts some economic or other interest in a contract would significantly undercut the tort itself and the public policy underlying it. As noted recently by the Ninth Circuit Court of Appeals: "To shield parties with an economic interest in the contract from potential liability would create an undesirable lacuna in the law

between the respective domains of tort and contract. A party with an economic interest in a contractual relationship could interfere without risk of facing either tort or contract liability. This result is particularly perverse as it is those parties with some type of economic interest in a contract whom [sic] would have the greatest incentive to interfere with it. Such a result would hardly serve the established goal of protecting ‘a formally cemented economic relationship . . . from interference by a stranger to the agreement.’ [Citation.]” (*United National Maintenance, Inc. v. San Diego Convention Center, Inc.* (9th Cir. 2014) 766 F.3d 1002, 1007, quoting *Della Penna, supra*, 11 Cal.4th at p. 392.)

In support of Apple’s position that under *Applied Equipment, supra*, 7 Cal.4th 503, it cannot be liable for contract interference, Apple quotes from *Marin Tug & Barge, Inc. v. Westport Petroleum, Inc.* (9th Cir. 2001) 271 F.3d 825 (*Marin Tug*): “California law has long recognized that ‘an entity with a direct interest or involvement in that relationship is not usually liable for harm caused by pursuit of its interests.’ [Citation.]” (Quoting from *Marin Tug*, at p. 832.) This reliance is misplaced. *Marin Tug* was concerned with a business interference claim, not a contract interference claim. Moreover, the *Marin Tug* court did not cite *Applied Equipment* in its opinion.

We find *Woods v. Fox Broadcasting Sub., Inc.* (2005) 129 Cal.App.4th 344 [28 Cal.Rptr.3d 463] to be instructive. In *Woods*, the plaintiffs, employees of Fox Family Worldwide, Inc., who held stock option rights by contract, sued their employer’s majority shareholder (a nonparty to the stock option contracts) for interference with contractual relations. (*Id.* at pp. 347–348.) The trial court sustained the defendant’s demurrer to the contract interference claim because the defendant “was not a stranger to the contracts.” (*Id.* at p. 349.) But the appellate court reversed, rejecting the defendant’s contention—similar to Apple’s here—that under *Applied Equipment, supra*, 7 Cal.4th 503, a noncontracting party that is not a stranger to the contract and that has some interest in the contract is immune from a contract interference claim. (*Woods, supra*, at pp. 352–353.) The *Woods* court noted: “When *Applied Equipment* did use the term ‘‘stranger to a contract,’’ it did so interchangeably with the terms ‘noncontracting parties’ [citation] and ‘third parties.’ [Citation.]” (*Id.* at p. 353.) Accordingly, the appellate court held that *Applied Equipment* should not be read “as holding . . . that persons or entities with an ownership interest in a corporation are automatically immune from liability for interfering with their corporation’s contractual obligations. [Citation.]” (*Woods*, at p. 353; see also *Asahi Kasei Pharma Corp. v. Actelion Ltd.* (2013) 222 Cal.App.4th 945, 963–964 [166 Cal.Rptr.3d 134] [corporate defendant that acquired entity with existing license agreement not immune from suit for interference with that agreement under theory it was not a stranger to it; “[a] stranger,’ as used in *Applied Equipment*, means one who is not a party to the contract or an agent of a party to the contract”].)

Apple also cites *Mintz v. Blue Cross of California* (2009) 172 Cal.App.4th 1594 [92 Cal.Rptr.3d 422] (*Mintz*) in support of its position. There, the plaintiff, an insured under a health insurance plan (PERS Choice) which was issued and funded by Public Employees' Retirement System (CalPERS), sued Blue Cross of California (Blue Cross), the administrator of the plan. The claims arose out of the denial of insurance coverage for a requested treatment Blue Cross deemed "investigational." (*Id.* at p. 1598.) Blue Cross advised the plaintiff of his right to appeal the decision by asking for another review, but it did not advise him that he had a right under his policy "to request an independent external review" of the decision. (*Id.* at p. 1600.) In his suit, the plaintiff alleged, among other things, interference with contractual relations. (*Ibid.*) The plaintiff appealed from a dismissal entered after a demurrer was sustained. (*Id.* at p. 1602.) On appeal, the court, citing *Applied Equipment*, *supra*, 7 Cal.4th at page 513, noted that "only 'a stranger to [the] contract' may be liable for interfering with it. [Citation.]" (*Mintz*, at p. 1603.) The court held that Blue Cross could not be sued for interference with the insurance contract for which it acted as administrator because (1) the insurance contract expressly identified Blue Cross as the agent for CalPERS in administering the contract (*ibid.*); and (2) "it is settled that 'corporate agents and employees acting for and on behalf of a corporation cannot be held liable for inducing a breach of the corporation's contract.' [Citations.]" (*Id.* at p. 1604, quoting *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 24 [276 Cal.Rptr. 303, 801 P.2d 1054].)

Mintz is distinguishable. Apple was not mentioned—as a named agent or otherwise—in Popescu's employment contract. Nor did Apple act on behalf of Constellium in connection with the employment agreement. Thus, Apple's relationship to the agreement was wholly tangential. Apple nonetheless describes itself as having "a legitimate economic interest in making sure that individuals Constellium staffed the project with [i.e., Popescu] would not cause Apple any harm." While we do not question the result in *Mintz*—that a defendant is immune from a contract interference claim because it was serving as an agent/administrator of a contracting party—it cannot be read to support Apple's view that any noncontracting defendant that can articulate an interest in an interfered-with contract is immune from tort liability. (See *Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 883–884 [164 Cal.Rptr.3d 811] [motorcycle manufacturer/franchisor could not claim "not a stranger" immunity to claim for interference with contract for sale of dealership by franchisee to third party].)

Apple also relies on *Warwick v. University of the Pacific* (N.D.Cal., July 6, 2010, No. C 08-03904 CW) 2010 WL 2680817 [2010 U.S.Dist. Lexis 67107] (*Warwick*). In *Warwick*, the plaintiff was an independent contractor panel attorney with a California Parole Advocacy Program (CalPAP) operated by

the University of the Pacific (UOP). (*Id.*, 2010 U.S.Dist. Lexis at p. *2.) The program arose out of a court-ordered injunction requiring the state to establish a program providing attorneys for parole revocation proceedings. (*Ibid.*) The contract provided it was terminable at will by either party upon notice, and CalPAP retained sole discretion as to the assignment of any parolee clients to the plaintiff. (*Id.* at p. *29.) After approximately six months—during which time various issues arose—the plaintiff’s contract was terminated. (*Id.* at pp. *3-*13.) After the plaintiff sued UOP, the defendants, Department of Corrections and Rehabilitation (CDCR) and various individuals, moved for summary judgment. The district court granted the motion of the CDCR as to the contract interference claim because the plaintiff admitted she had an at-will contract with CalPAP. The district court observed that “[u]nder California law, a party who interferes with an at-will contract cannot be sued for interference with contract. [Citation.]” (*Id.* at pp. *32-*33.) Citing *Reeves, supra*, 33 Cal.4th at page 1152, the court concluded that “[a]ny such claim is more properly viewed as an interference with a prospective economic advantage [claim]. [Citation.]” (*Warwick*, at p. *33.)

■ *Warwick* does not support Apple’s position here. First, in the context of a contract interference claim, *Warwick* did not hold that a noncontracting party having an economic interest in a contract is immune from tort liability for alleged disruption of a contractual relationship. Indeed, the district court did not cite *Applied Equipment*. Further, we disagree with the *Warwick* court’s recitation of California law as it concerns contract interference claims based upon at-will contracts. As we will discuss (see pt. II.D., *post*), we conclude that under *Reeves, supra*, 33 Cal.4th 1140, where an employee’s at-will contract is terminated as a result of interference by a third party, the employee may assert a contract interference claim against the third party without showing that the third party committed an independently wrongful act. And, more generally, to the extent *Warwick* suggests that under California law a third party may not be held liable for interfering with a business relationship (whether or not based upon an existing contract) because the third party is not a “stranger” to that relationship and has “a substantial interest” in it, we disagree. The *Warwick* court, in support of this position, cited no California cases, instead relying on *Marin Tug, supra*, 271 F.3d 825. No California case has made such a sweeping pronouncement that would immunize third parties from liability for contract interference and business interference claims.

We conclude that Apple, even as a third party having some interest in the manner in which Popescu performed his employment agreement with Constellium, is not immune from tort liability for interfering with his contract. We next address whether the trial court correctly found that Popescu alleged an at-will employment relationship with Constellium, and, if so, whether his contract interference claim was precluded as a matter of law.

C. Popescu's At-will Employment Relationship

Under California law, it is presumed that employment with no specified term is at-will and may be terminated at any time for any lawful reason by the employer or employee. (Lab. Code, § 2922.)³ “While the statutory presumption of at-will employment is strong . . . [Labor Code section 2922] does not prevent the parties from *agreeing* to any limitation, otherwise lawful, on the employer’s termination rights. [Citation.]” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 335–336 [100 Cal.Rptr.2d 352, 8 P.3d 1089], original italics (*Guz*); see also *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 677 [254 Cal.Rptr. 211, 765 P.2d 373] [at-will presumption may be rebutted “by evidence that despite the absence of a specified term, the parties agreed that the employer’s power to terminate would be limited in some way, e.g., by a requirement that termination be based only on ‘good cause’ ”].) “The contractual understanding need not be express, but may be implied in fact, arising from the parties’ conduct evidencing their actual mutual intent to create such enforceable limitations. [Citation.]” (*Guz*, at p. 336, italics omitted.) Factors that may bear upon a determination of the existence of an implied-in-fact contract and its contents include “‘the personnel policies or practices of the employer, the employee’s longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.’ [Citations.]” (*Foley*, at p. 680, quoting *Pugh v. See’s Candies, Inc.* (1981) 116 Cal.App.3d 311, 327 [171 Cal.Rptr. 917].) The existence or nonexistence of an implied-in-fact contract under which the employee may be terminated only for good cause is generally a question of fact. (*Foley*, at p. 682; see also *Stillwell v. The Salvation Army* (2008) 167 Cal.App.4th 360, 380 [84 Cal.Rptr.3d 111].)

It is the statutory presumption in Arizona—the state of Popescu’s domicile—that the relationship between employer and employee is at will. (See Ariz. Rev. Stat. § 23-1501.) Under Arizona law, an employee (except a public employee) may bring suit for wrongful discharge under only three circumstances: “(1) termination in breach of a written contract (signed by both the employer and employee or expressly included in an employment handbook) setting forth that the employment relationship shall remain in effect for a specified duration of time or otherwise expressly restricting the right of either party to terminate the employment relationship; (2) termination in violation of an Arizona statute . . . ; [or] (3) termination in retaliation for the refusal to violate the Arizona Constitution or an Arizona statute.” (*Bodett v. CoxCom, Inc.* (9th Cir. 2004) 366 F.3d 736, 746.)

³ “An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month.” (Lab. Code, § 2922.)

Popescu argues that the trial court erred by failing to apply Arizona law to the issue of whether he had an at-will employment relationship with Constellium. He contends there were sufficient facts alleged in the Complaint that he was not an at-will employee under Arizona law because he alleged that his contract “‘restricted Constellium’s ability to terminate him’” and he “was not an ‘at will’ employee at the time of his termination on October 28, 2011.”

■ Popescu did not make the assertion below that Arizona law applied to the determination of whether he was an at-will employee. Rather, he argued—citing *Guz, supra*, 24 Cal.4th 317 and *CRST Van Expedited, Inc. v. Werner Enterprises* (9th Cir. 2007) 479 F.3d 1099 (*CRST*)—that *under California law*, because his agreement restricted Constellium’s ability to terminate him, he was not an at-will employee. Further, although he alleged that he was at all times a resident of Phoenix, Arizona, he did not allege the location of the execution, performance, or termination of his employment agreement with Constellium. And in his appellate briefs, Popescu fails to provide a substantive legal argument in support of his contention that Arizona law applies to the issue of whether he was an at-will employee. We conclude that since Popescu has not shown that Arizona law differs from California law on whether he was an at-will employee, there is no choice of law issue presented here. (See *Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 580 [114 Cal.Rptr. 106, 522 P.2d 666] [no choice of law issue presented “where the laws of the two states are identical”]; see also *Smith v. Cimmet* (2011) 199 Cal.App.4th 1381, 1397 [132 Cal.Rptr.3d 276].)

Renewing its argument below, Apple argues on appeal that Popescu was an at-will employee, relying in part on *DeHorney v. Bank of America National Trust & Savings Assn.* (9th Cir. 1989) 879 F.2d 459 (*DeHorney*). The trial court likewise relied on *DeHorney* in concluding Popescu was an at-will employee.

In *DeHorney*, a terminated bank teller alleged, among other things, a cause of action for wrongful discharge. (*DeHorney, supra*, 879 F.2d at p. 460.) Under her written agreement with the bank, DeHorney acknowledged that she would not be a permanent employee “‘until a conclusion of a trial period, which shall not exceed three months (90 days), and that during such trial period, I may be released with or without cause and shall be entitled only to my salary at the agreed upon rate to the date of release.’” (*Id.* at p. 465.) The agreement also provided (in § 8) that after DeHorney became a permanent employee, she would “‘be entitled to two weeks’ notice or one-half month’s salary in lieu thereof in case of dismissal unless such dismissal results from [her] dishonesty, disloyalty, insubordination or other good cause.’” (*Ibid.*) The Ninth Circuit Court of Appeals agreed with the district court that the agreement demonstrated that DeHorney was an at-will employee, reasoning:

“Section 8 is unmistakably clear that ‘permanent employees’ are not in fact permanent, but are only entitled to certain benefits upon termination, depending on whether they are dismissed for cause or without cause . . . [W]hen DeHorney signed the contract, she agreed that Bank of America could terminate her with or without cause, so long as the bank complied with the notice and severance provisions set forth in Section 8 of the contract.” (*Ibid.*; see also *Siddoway v. Bank of America* (N.D.Cal. 1990) 748 F.Supp. 1456, 1460 [following *DeHorney* in concluding that identical provisions created at-will employment contract].)

We find the reasoning in *DeHorney* persuasive. The agreement between Popescu and Constellium as pleaded here was subject to the presumption under Labor Code section 2922 that it was terminable at will. As pleaded, Constellium retained the right to terminate Popescu for any lawful reason. Thus, as was true in *DeHorney*, the fact that Constellium was obligated to pay compensation if it terminated Popescu for reasons other than his misconduct did not convert an otherwise at-will agreement into a for-cause agreement. (*DeHorney, supra*, 879 F.2d at p. 465; see also *Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1102–1103 [38 Cal.Rptr.3d 240] [rejecting contention that employer’s two-installment bonus program created implied contract that the plaintiff’s employment would continue until date second installment was due].)

Popescu nonetheless contends he adequately pleaded that he was not an at-will employee by so averring, and by alleging that his “employment contract . . . ‘restricted Constellium’s ability to terminate him.’” These conclusory allegations were insufficient to support a claim based upon an alleged employment contract under which the plaintiff may be terminated only for good cause. Although a demurrer admits pleaded facts, it does not admit pleaded matters, such as Popescu’s legal status as an at-will employee, that are “‘‘contentions, deductions or conclusions of fact or law’’” (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 [119 Cal.Rptr.2d 709, 45 P.3d 1171] [demurrer admits pleaded facts]; see also *Building Industry Assn. v. Marin Mun. Water Dist.* (1991) 235 Cal.App.3d 1641, 1645 [1 Cal.Rptr.2d 625] [“demurrer does not admit the truth of argumentative allegations about the legal construction, operation, and effect of statutory provisions”].)

Accordingly, the trial court correctly concluded that Popescu had an at-will employment relationship with Constellium, not a for-cause agreement.⁴

⁴ Popescu below relied on *CRST, supra*, 479 F.3d 1099 in support of his position that he was not an at-will employee of Constellium. He does not rely on *CRST* in this appeal and, accordingly, has abandoned that argument. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 [188 Cal.Rptr. 115, 655 P.2d 317].)

D. Application of Reeves v. Hanlon

The trial court held that since Popescu had alleged facts demonstrating he was an at-will employee, under *Reeves, supra*, 33 Cal.4th 1140, he could not state a contract interference claim. It therefore sustained the demurrer to the first cause of action without leave to amend. Popescu argues that the court erred because it erroneously interpreted *Reeves* as holding that an at-will employee cannot maintain a contract interference claim.

In *Reeves*, the plaintiffs, a law firm and one of its partners, alleged that the defendants, attorneys who left the firm, unlawfully lured the plaintiffs' employees to join the defendants' new firm. (*Reeves, supra*, 33 Cal.4th at pp. 1145–1146.) The plaintiffs prevailed at trial. (*Id.* at pp. 1146–1147.) The Supreme Court addressed (1) a contract interference theory as it pertained to the workers who were induced to leave plaintiffs' law firm, and (2) a claim for violation of the Uniform Trade Secrets Act (Civ. Code, § 3426 et seq.). (*Reeves*, at pp. 1145–1146.) It was undisputed that the nine employees who left the law firm, including six who went to work for the defendants, were the plaintiffs' at-will employees. (*Id.* at p. 1147.) The *Reeves* court considered the correctness of “the Court of Appeal's legal conclusion that ‘an employer may recover for interference with the employment contracts of its at-will employees by a third party when the third party does not show that its conduct in hiring the employees was justifiable or legitimate.’” (*Id.* at p. 1148.)

■ The Supreme Court noted initially that it has been recognized historically that a contract interference claim may be based upon disruption of an at-will contract under the theory that “[a] third party's ‘interference with an at-will contract is actionable interference with the contractual relationship’ because the contractual relationship is at the will of the parties, not at the will of outsiders. [Citations.]” (*Reeves, supra*, 33 Cal.4th at p. 1148, quoting *PG&E, supra*, 50 Cal.3d at p. 1127.) The court also noted that this principle had been applied historically to at-will employment contracts. (*Reeves*, at p. 1149.) ■ But it observed that this state's public policy has long been “that ‘[a] former employee has the right to engage in a competitive business for himself and to enter into competition with his former employer, even for the business of . . . his former employer, provided such competition is fairly and legally conducted.’ [Citations.]” (*Ibid.*, quoting *Continental Car-Na-Var Corp. v. Moseley* (1944) 24 Cal.2d 104, 110 [148 P.2d 9].) Further, the court noted that “‘it is not ordinarily a tort to hire the employees of another for use in the hirer's business,’” subject to the exception that liability will be imposed “‘if unfair methods are used in interfering in such advantageous relations.’ [Citation.]” (*Reeves*, at p. 1149, quoting *Buxbom v. Smith* (1944) 23 Cal.2d 535, 547 [145 P.2d 305].)

■ Based upon these policy considerations, the court concluded that “[w]here no unlawful methods are used, public policy generally supports a competitor’s right to offer more pay or better terms to another’s employee, so long as the employee is free to leave.” (*Reeves, supra*, 33 Cal.4th at p. 1151.) Accordingly, the court held: “[A] plaintiff may recover damages for intentional interference with an at-will employment relation under the same California standard applicable to claims for intentional interference with prospective economic advantage. That is, to recover for a defendant’s interference with an at-will employment relation, a plaintiff must plead and prove that the defendant engaged in an independently wrongful act—i.e., an act ‘proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard’ [citation]—that induced an at-will employee to leave the plaintiff.” (*Id.* at pp. 1152–1153, fn. omitted.)

The trial court here interpreted *Reeves*, as applied to Popescu’s at-will employment relationship, as barring his contract interference claim. Apple reiterates on appeal its view that under *Reeves*, Popescu cannot assert a contract interference claim. Apple contends he can only assert “a cause of action for intentional interference with prospective economic advantage.”

■ Even if we were to construe *Reeves* as requiring in *all circumstances* involving a claim for intentional interference with an at-will employment contract that a plaintiff must show that a defendant’s conduct was independently wrongful, it would be incorrect to say that a plaintiff *as a matter of law* cannot state a contract interference claim. Our high court clearly held that a contract interference claim involving an at-will contract is viable under California law. (*Reeves, supra*, 33 Cal.4th at pp. 1152–1153.) But it held that a plaintiff, to establish such a contract interference claim, must plead and prove the defendant’s action in inducing the at-will employee to terminate his or her employment involved the defendant’s commission of “an independently wrongful act.” (*Id.* at p. 1152.) The court did not hold that a contract interference claim involving an at-will employment contract is not actionable under any circumstance. Rather, it concluded that a plaintiff could recover under such a claim “under the same California standard applicable to claims for intentional interference with prospective economic advantage.” (*Ibid.*) In other words, our high court did not negate the contract interference claim involving an at-will employment agreement entirely; it merely subjected it to an additional “independent wrongful act” requirement. (See *Quelimane, supra*, 19 Cal.4th at p. 56 [noting that contract interference and business interference claims are separate and distinct torts].)

The trial court appears to have concluded that *Reeves* held that a plaintiff, *in all circumstances*, may only pursue a contract interference claim based upon an at-will employment relationship if “the defendant engaged in an

independently wrongful act.” (*Reeves, supra*, 33 Cal.4th at p. 1152.) As noted above, however, the Supreme Court based its conclusion that interference with an at-will employment relationship was not actionable without an independent wrongful act upon the dual public policy considerations of employee freedom of movement and a business’s right to legitimately compete in the marketplace. (*Id.* at pp. 1149–1151.) Those underlying policy considerations are specific to the typical employment contract interference claim at issue in *Reeves*: where the defendant company (current employer) has induced an employee to breach an at-will employment contract he or she had with the plaintiff company (former employer and competitor of the defendant). By contrast, the claim here is an atypical one in which the defendant company (not a prospective employer) allegedly induced an employer (Apple’s business partner, not its competitor) to breach an at-will employment agreement with plaintiff employee. Under these circumstances, neither policy consideration that animated our high court’s holding in *Reeves* is present.

■ Furthermore, the dispositive language in *Reeves* shows that our high court intended the “independently wrongful act” requirement to apply to the specific circumstances of that case: “[T]o recover for a defendant’s interference with an at-will employment relation, a plaintiff must plead and prove that the defendant engaged in an independently wrongful act . . . *that induced an at-will employee to leave the plaintiff*. Under this standard, a defendant is not subject to liability for intentional interference *if the interference consists merely of extending a job offer that induces an employee to terminate his or her at-will employment*.” (*Reeves, supra*, 33 Cal.4th at pp. 1152–1153, fn. omitted & italics added.)

We hold that *Reeves*’s additional requirement of pleading and proof of an independently wrongful act in contract interference claims involving at-will employment contracts does not apply where, as here, the employee is the alleged victim of a third party’s conduct in inducing its business partner to terminate his or her employment contract. (See Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2015) ¶ 5:625, p. 5(I)-69 [noting that *Reeves* involved suit by employer against competitor, and may not apply to employee suits against third parties who induce termination of his or her employment].) Accordingly, since Popescu alleged each of the five elements of a contract interference claim (*PG&E, supra*, 50 Cal.3d at p. 1126), it was error to sustain the demurrer to the first cause of action.

III. Order Sustaining Demurrer to Business Interference Claim

A. Applicable Law

■ The elements of the tort of intentional interference with prospective economic advantage (business interference) are “(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant’s knowledge of that relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. [Citation.]” (*Youst v. Longo* (1987) 43 Cal.3d 64, 71, fn. 6 [233 Cal.Rptr. 294, 729 P.2d 728].) The business interference tort “is considerably more inclusive than actions based on contract or interference with contract, and thus is not dependent on the existence of a valid contract.” (*Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 826–827 [122 Cal.Rptr. 745, 537 P.2d 865], disapproved on other grounds in *Della Penna*, *supra*, 11 Cal.4th at p. 393, fn. 5.)

■ Although business interference is related to contract interference, our high court has noted that a distinction must be made between the two, and “a greater solicitude [must be afforded] to those relationships that have ripened into agreements.” (*Della Penna*, *supra*, 11 Cal.4th at p. 392.) Based upon this distinction, a plaintiff alleging business interference must also plead and prove “that the defendant’s interference was wrongful ‘by some measure beyond the fact of the interference itself.’ [Citation.]” (*Id.* at p. 393, fn. omitted; see *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1154 [131 Cal.Rptr.2d 29, 63 P.3d 937] (*Korea Supply*) [noting that *Della Penna*, rather than overruling authority identifying five elements of claim, “merely clarified the plaintiff’s burden as to the third element”].)

■ The Supreme Court in *Della Penna* expressly declined to provide more detail as to the exact definition and scope of the wrongfulness component of a business interference claim. (*Della Penna*, *supra*, 11 Cal.4th at p. 393.) But in *Korea Supply*, *supra*, 29 Cal.4th at page 1159, the court explained that wrongful conduct is sufficient to support a business interference claim if it is proscribed by “some constitutional, statutory, regulatory, common law, or other determinable legal standard” where it amounts to “independently actionable conduct.” The court explained that this requirement serves to “distinguish[] lawful competitive behavior from tortious interference.” (*Ibid.*) It also clarified the intent element of the tort, concluding that a plaintiff is not required to plead and prove a defendant’s specific intent to disrupt the plaintiff’s prospective economic advantage. Rather, the plaintiff may either plead specific intent, or, alternatively, “plead that the defendant

knew that the interference was certain or substantially certain to occur as a result of its action.” (*Id.* at p. 1154.)

B. Demurrer Should Have Been Overruled

The trial court concluded that Popescu failed to state facts sufficient to constitute a cause of action for business interference. It noted that the wrongful acts alleged by Popescu consisted of Apple’s “misappropriation of trade secrets from Constellium through the execution of a [Constellium/Apple] Development Agreement . . . , negatively impacting competition, and [Apple’s] ‘insistence [that] Constellium launch[] an investigation into the recording incident . . . to get Popescu terminated for cause’” The trial court reasoned that Popescu lacked standing to assert a trade secrets misappropriation claim, and that “the alleged misappropriation of trade secrets and wrongful inducement to enter into the Development Agreement . . . is [*sic*] not alleged to have been designed to disrupt the economic relationship between [Popescu] and Constellium, actually disrupting that economic relationship or proximately causing economic harm to [Popescu].” The trial court therefore held that Popescu had failed to state a business interference claim, because neither Apple’s alleged conduct directed toward Constellium, nor its insistence that Constellium investigate the recording incident, satisfied the “independent wrongful act” requirement.

Popescu contends he alleged each of the required elements of a business interference claim. He argues that Apple’s alleged “acts [of] pressuring Constellium to terminate [him] were . . . independently wrongful because they were necessary elements in [Apple’s] unlawful scheme to misappropriate trade secrets by fraud and false pretenses, to induce the execution of a Development Agreement that violates state and federal antitrust laws, and to violate California’s Unfair Business Practices Act. [Citations.]”

Initially, we address Apple’s position that Popescu’s claim was not actionable because “Apple had a protectable legitimate interest in [Popescu’s] employment with Constellium.” In making this argument, Apple refers to its argument in connection with the contract interference claim, again citing, among other authorities, *Warwick, supra*, 2010 U.S.Dist. Lexis 67107 and *Marin Tug, supra*, 271 F.3d 825. For the reasons already stated in part II.B., *ante*, we conclude that Apple cannot claim immunity to a tort suit for alleged interference with Popescu’s employment relationship with Constellium founded upon a theory that Apple is “not a stranger” to that employment relationship.

Next, Apple argues that Popescu did not allege any conduct that was independently wrongful because “[t]here is simply no law prohibiting an

individual or entity from reporting an employee’s unlawful conduct to his/her employer.” By itself, Apple’s conduct as alleged by Popescu of requesting that Constellium investigate the recording incident was not independently wrongful. And we will assume for purposes of this discussion that Apple’s alleged exertion of additional pressure upon Constellium by contacting its majority shareholder to request that it terminate Popescu’s employment for cause was not independently wrongful to support a business interference claim. But Popescu alleged in the Complaint that Apple’s conduct in persuading Constellium to terminate him was interconnected with Apple’s larger goal of requiring Constellium to sign the Development Agreement and “thereby complete its fraud of Constellium, further misappropriate its trade secrets, obtain non-trade secret information and materials, and restrict competition in the smartphone market.” Apple describes these allegations as Popescu’s having “concoct[ed] a fanciful anticompetitive scheme . . . result[ing] in his termination.” But in considering a demurrer, the factual allegations of the Complaint are deemed to be true. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787 [101 Cal.Rptr.3d 821].) Therefore, in determining whether Popescu alleged an independent wrongful act, we must consider not only Apple’s actions made directly in conjunction with Popescu’s termination, but also its interconnected dealings with Constellium in the development of custom aluminum alloys for Apple’s smartphone products.

Accepting the allegations of the Complaint as true for purposes of demurser, Popescu adequately alleged independently wrongful conduct. He alleged that Apple’s conduct in persuading Constellium to terminate Popescu—by removing him as an obstacle to execution of the Development Agreement—was connected with its effort to misappropriate Constellium’s trade secrets. This same alleged conduct, combined with Apple’s successfully obtaining the execution of similar Development Agreements from other aluminum alloy manufacturers, was alleged to have the anticompetitive purpose and effect of denying Apple’s smartphone competitors an aluminum alloy resource, and denying consumers “a better, more durable smartphone.” Popescu therefore alleged independently wrongful conduct by Apple, including (1) a violation of the Sherman Act (15 U.S.C. § 10); (2) a violation of the Cartwright Act (Bus. & Prof. Code, § 16720 et seq.); (3) a Development Agreement that amounts to an unlawful restraint of trade (Bus. & Prof. Code, § 16600); (4) a violation of the Uniform Trade Secrets Act (Civ. Code, § 3426 et seq.); and (5) a scheme intending to defraud Constellium.

Apple argues at length that the alleged anticompetitive conduct directed toward Constellium should not be considered because Popescu was not directly impacted by it. Apple contends, for example, that Popescu failed to allege (1) “how Constellium’s executing the Development Agreement has impacted or damaged him” in connection with the alleged Sherman Act and Cartwright Act violations; (2) “that Apple restrained [him] from engaging in

his profession as required to establish a violation of [Business and Professions Code § 16600]”; (3) “any facts establishing his standing to assert a trade secret misappropriation claim of himself [*sic*] or Constellium since he has not alleged he was the owner of any trade secret”; and (4) “facts establishing Apple made any actionable intentional or negligent misrepresentations to him.” But Popescu is alleging a claim of business interference based upon Apple’s disruption of his employment relationship with Constellium. He is not asserting his own claims of fraud, trade secrets misappropriation, or antitrust violations.

■ Apple’s argument that Popescu has not alleged that its conduct directed toward Constellium was independently wrongful appears to be based upon the assumption that the wrongful conduct must be wrongful *toward the plaintiff*. But the California Supreme Court has held to the contrary: “[W]e find no sound reason for requiring that a defendant’s wrongful actions must be directed toward[] the plaintiff seeking to recover for this tort. The interfering party is liable to the interfered-with party ‘when the independently tortious means the interfering party uses are independently tortious *only as to a third party*. Even under these circumstances, the interfered-with party remains an intended (or at least known) victim of the interfering party—albeit one that is indirect rather than direct.’ (*Della Penna, supra*, 11 Cal.4th at p. 409 (conc. opn. of Mosk, J.) [citation].) In fact, ‘[t]he most numerous of the tortious interference cases are those in which the disruption is caused by an act directed not at the plaintiff, but at a third person.’ [Citation.]” (*Korea Supply, supra*, 29 Cal.4th at p. 1163, original italics; see also *Crown Imports, LLC v. Superior Court* (2014) 223 Cal.App.4th 1395, 1405 [168 Cal.Rptr.3d 228] (“interfering act [need not] be independently wrongful *as to the plaintiff*”).)

Popescu alleged in the Complaint sufficient facts which, deemed to be true (*Del E. Webb Corp., supra*, 123 Cal.App.3d at p. 604), supported a business interference claim. Accordingly, the trial court erred in sustaining the demurrer to the second cause of action. Because at this stage of the proceedings we are not concerned with the “plaintiff’s ability to prove . . . allegations, or the possible difficulty in making such proof” (*Alcorn, supra*, 2 Cal.3d at p. 496), we express no view as to the likelihood that Popescu will be able to establish that Apple intentionally interfered with his employment relationship with Constellium or that Apple’s conduct was independently wrongful.

DISPOSITION

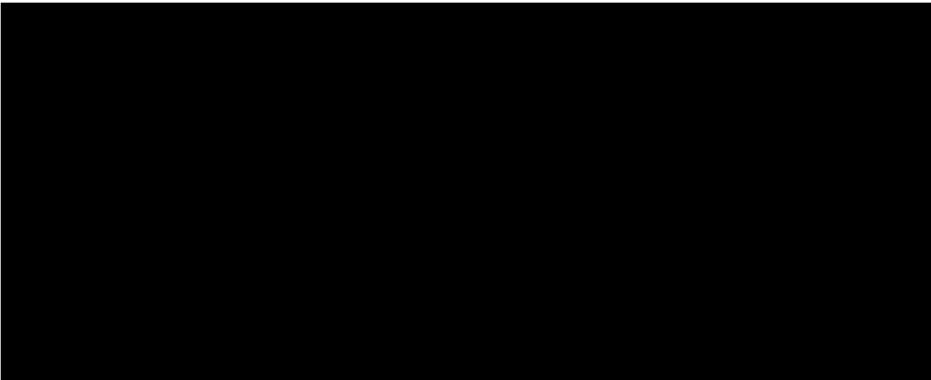
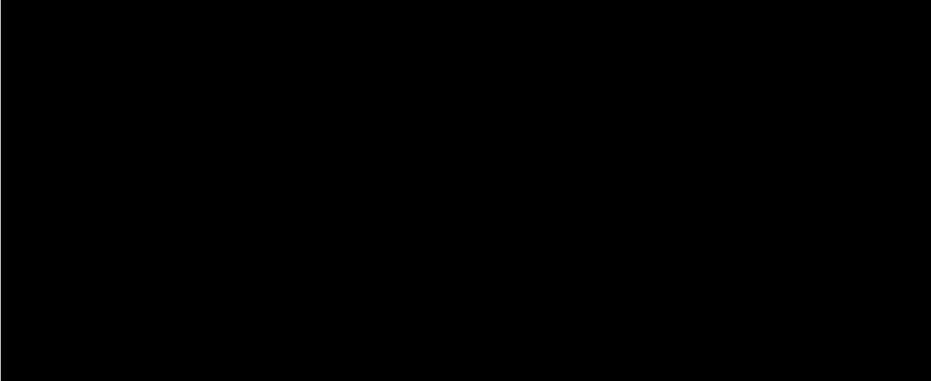
The judgment is reversed with directions to the trial court that it (1) vacate its prior order sustaining without leave to amend Apple Inc.’s demurrer to the

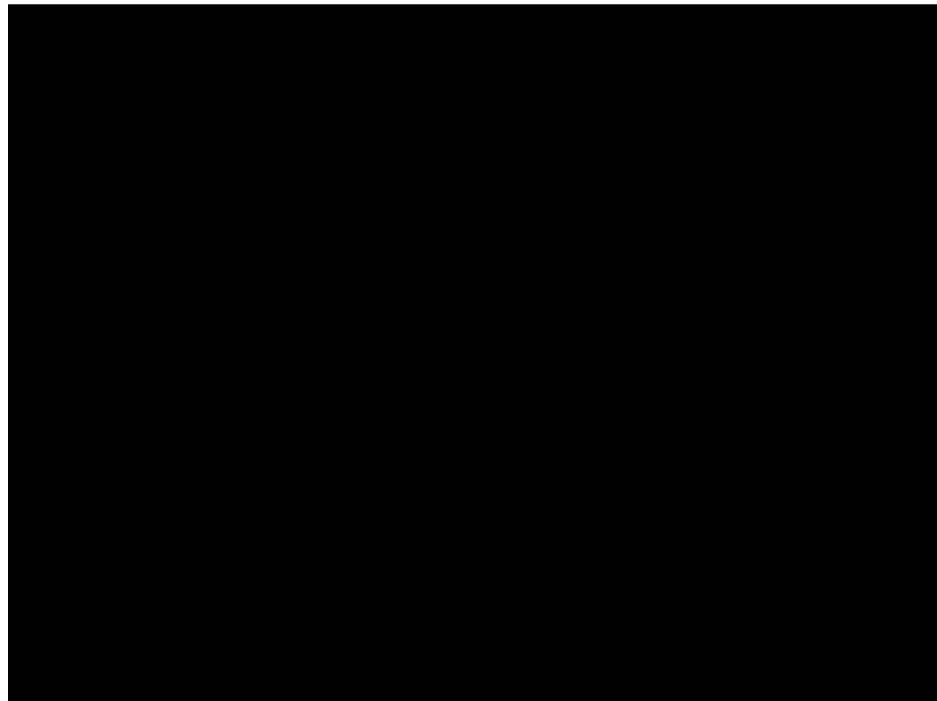
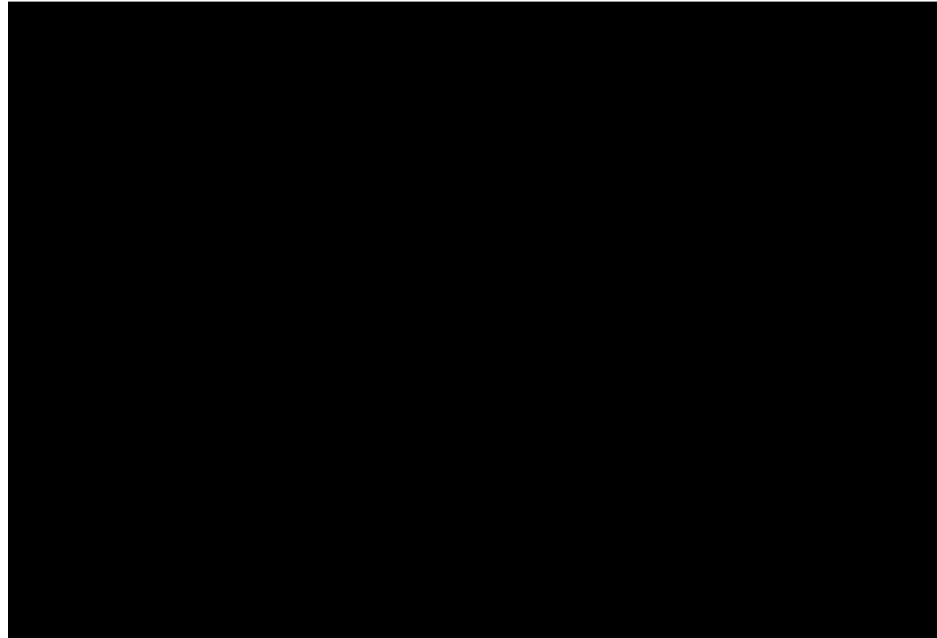
Complaint, and (2) enter a new order overruling the demurrer to the first and second causes of action and granting Apple Inc. leave to answer the Complaint.

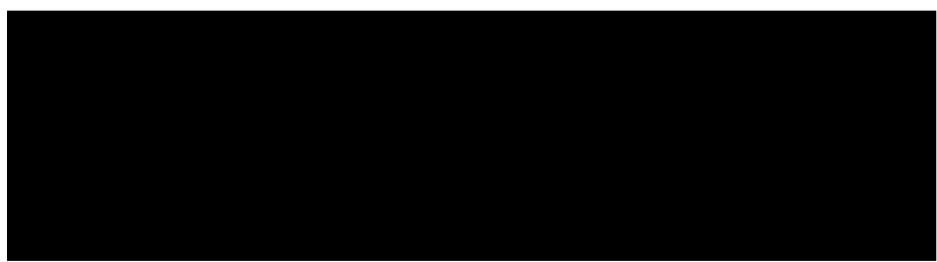
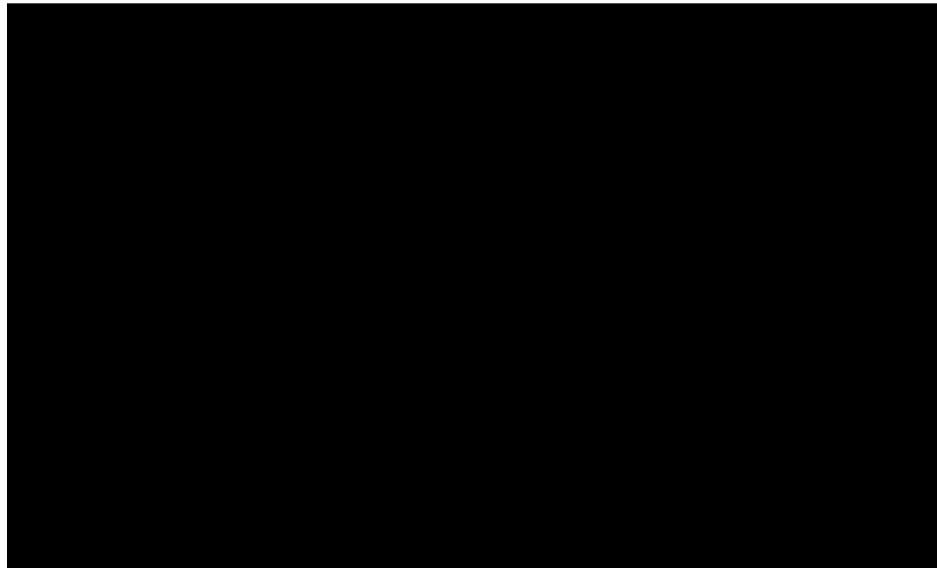
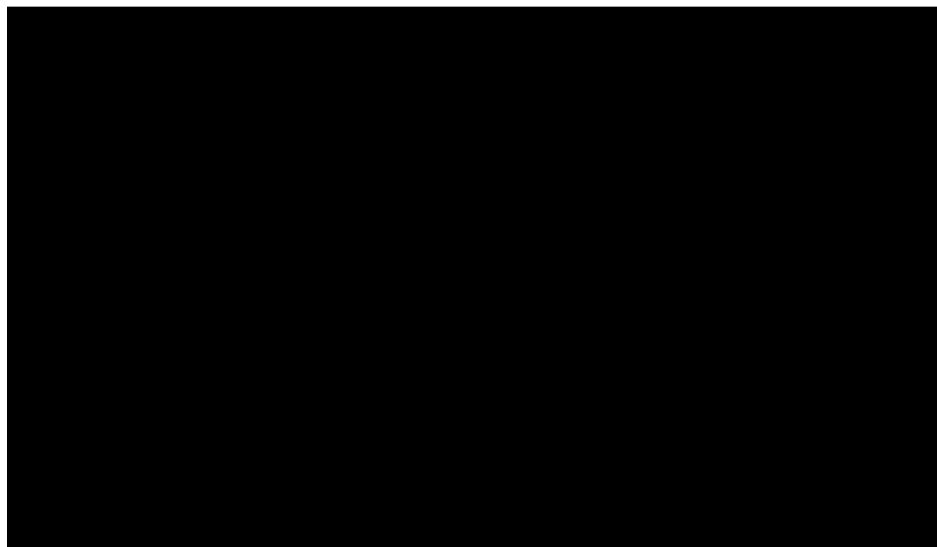
Rushing, P. J., and Mihara, J., concurred.

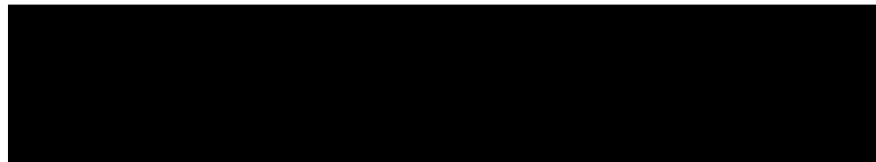
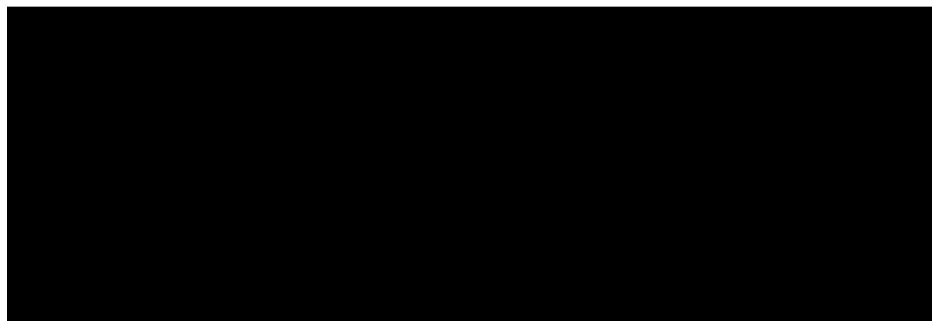
[No. A140000. First Dist., Div. Four. July 1, 2016.]

PANO CHE ENERGY CENTER, LLC, Plaintiff and Respondent, v.
PACIFIC GAS AND ELECTRIC COMPANY, Defendant and Appellant.









COUNSEL

Cooley, Martin S. Schenker, Jeffrey M. Gutkin and Lori R. Mason for Defendant and Appellant.

Manatt, Phelps & Phillips, David L. Huard, Andrew A. Bassak, Benjamin G. Shatz and Kevin P. Dwight for Plaintiff and Respondent.

OPINION

STREETER, J.—

I. INTRODUCTION

This case involves a long-running dispute between Panoche Energy Center, LLC (Panoche), a producer of electricity, and Pacific Gas and Electric Company (PG&E), a utility that purchases electricity from Panoche, over which of them should bear the costs of complying with a legislatively mandated program to reduce greenhouse gas (GHG) emissions pursuant to the California Global Warming Solutions Act of 2006 (Health & Saf. Code, § 38500 et seq.; Assem. Bill No. 32 (2005–2006 Reg. Sess.) (Assembly Bill 32)).

In an effort to resolve the matter, PG&E invoked the arbitration clause in its power purchase and sale agreement (PPA) with Panoche, seeking an arbitral declaration of Panoche's obligations under the PPA. Panoche resisted the arbitration, moving to dismiss or stay it on grounds the controversy was not ripe for resolution because of ongoing regulatory proceedings at California's Air Resources Board (CARB) and the Public Utilities Commission (CPUC). These proceedings, Panoche argued, would at least provide guidance in the arbitration and could render the proceeding unnecessary.

The arbitration panel denied Panoche's motion, and after a five-day hearing rendered a decision declaring that Panoche had indeed assumed the cost of implementing Assembly Bill 32 under the PPA and fully understood this to be the case at the time of signing. In response to a counterclaim for declaratory relief filed by Panoche, the arbitrators also concluded that the parties "provide[ed] for recovery of GHG costs" by Panoche through a "payment mechanism" in section 4.3 of the PPA.

Panoche filed a petition to vacate the arbitration award under Code of Civil Procedure¹ section 1286.2, subdivision (a)(5), alleging its rights were "substantially prejudiced" by the arbitrators' refusal to "postpone" the hearing "upon sufficient cause being shown" (i.e., until the regulatory proceedings were completed so that the outcome of those proceedings could be considered in the arbitration). PG&E, for its part, requested confirmation of the award under section 1287.4. The trial court agreed with Panoche, ruled that the arbitration had been premature, and vacated the arbitration award.

PG&E now appeals. We shall reverse the court's order vacating the arbitration award and direct that the award be confirmed.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Power Purchase Agreement

PG&E, an investor-owned utility (IOU) regulated by the CPUC, provides gas and electrical service to some 15 million end users in northern and central California. In 2004, with the CPUC's approval, PG&E published a long-term request for offers (LTRFO) for the construction and operation of new electrical generating facilities to help meet anticipated future demands for electricity in Northern California. Panoche, a Delaware-based privately owned energy production company, submitted a proposal to build a 400-megawatt, natural gas-fired electrical production facility in Firebaugh, near Fresno.

¹ Statutory references, unless otherwise indicated, are to the Code of Civil Procedure. References to subdivisions without statutory designations are to the subdivisions of section 1286.2.

The ensuing negotiations concerning Panoche's proposal culminated in a PPA executed on March 28, 2006, which was approved by the CPUC in November 2006. Under the PPA, PG&E supplies natural gas to the Firebaugh facility, Panoche converts that gas into electricity, and PG&E purchases the electricity under a 20-year "tolling agreement" for a "peaking plant," meaning that PG&E dictates when the facility will be operated and how much electricity will be generated, and the plant runs only when PG&E's power needs are especially high and it needs extra power on its grid to ensure consistent power supply.

B. *Assembly Bill 32: The California Global Warming Solutions Act of 2006*

While the PPA was being negotiated, proposed legislation aimed at addressing climate change through the regulation of GHG emissions came before the California Legislature. As introduced in December 2004, Assembly Bill 32 dealt primarily with carbon emissions recordkeeping, reporting and protocols. It did not require electricity generators such as Panoche to bear any costs associated with reducing GHG emissions. But Assembly Bill 32 went through several amendments before it was finally passed at the end of August 2006, and as the bill progressed through the legislative process, it focused increasingly on reduction of GHG emissions.

The Legislature was not alone in moving on this issue. In June 2005, Governor Schwarzenegger issued an executive order directing the California Environmental Protection Agency (CEPA) to coordinate the efforts of various state agencies to reduce California GHG emissions by certain target amounts between 2010 and 2050. (Governor's Exec. Order No. S-3-05 (June 1, 2005) at <<https://www.gov.ca.gov/news.php?id=1861>> [as of July 1, 2016].) Specifically, the Governor called for reduction of GHG emissions to 1990 levels by 2020 and to 80 percent below 1990 levels by 2050. (*Ibid.*)

On August 15, 2005, an amendment to Assembly Bill 32 was introduced, including The California Climate Act of 2006, which would have required the CEPA "to institute a cap on greenhouse gas emissions" from, among other sectors, the electrical power industry. (Legis. Counsel's Dig., Assem. Bill 32, as amended Aug. 15, 2005, & introducing proposed Health & Saf. Code, § 42877, subd. (a)(2) & (3) at <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200520060AB32> [as of July 1, 2016].) The intent of the proposed amendments was to require the CEPA to "institute a schedule of emissions reductions for specified entities, develop an enforcement mechanism for reducing greenhouse gas emissions to the target level, and establish a program to track and report greenhouse gas emissions and to monitor and enforce compliance with the greenhouse gas emissions cap" by January 1,

2008. (*Ibid.*) Although this amendment did not become part of the law as finally adopted, its pendency was no doubt on the radar screens of market participants in the energy field in California.

By April 18, 2006, approximately three weeks after the PPA was signed, the Legislative Counsel's Digest for the version of Assembly Bill 32 then under consideration summarized the proposed legislation as follows: "The bill would require the state board to adopt regulations, on or before January 1, 2008, to reduce statewide greenhouse gas emissions to 1990 emission levels by 2020 . . ." (Legis. Counsel's Dig., Assem. Bill 32, as amended Apr. 18, 2006.) That iteration of the bill also included a requirement that the CARB adopt regulations to, among other things, "[d]istribute the costs and benefits of the program, including emission allowances, in a manner that is equitable, maximizes the total benefit to the economy, does not disproportionately burden low- and moderate-income households, provides compliance flexibility where appropriate, and ensures that entities that have voluntarily reduced their emissions receive appropriate consideration for emissions reductions made prior to the implementation of this program." (Legis. Counsel's Dig., Assem. Bill 32, as amended Apr. 18, 2006, proposed amends. to Health & Saf. Code, § 42877, subd. (c)(1).) Again, though the quoted language was not ultimately included in Assembly Bill 32 as passed, it presumably constituted a red flag to participants in energy production indicating that costs would be entailed in implementing Assembly Bill 32 if it did ultimately pass.

By June 2006, although the term "cap-and-trade" had not yet come into common use, Assembly Bill 32 had further evolved and began to include the concept of "allowances"—defined as "authorization[s] to emit, during a specified year, up to one ton of carbon dioxide equivalence"—and "'[f]lexible compliance mechanisms'" that would allow GHG emitters to "bank[], borrow[], and [use other] market mechanisms that provide compliance flexibility to entities that are required to ensure that their greenhouse gas emissions do not exceed their emissions allowances."² (Assem. Bill 32, as amended June 22, 2006, proposed amends. to Health & Saf. Code, § 42876, subds. (a) & (g).)

² The legislative analysis discussed the prospect of "trading" of allowances: "The bill, as amended, strongly appears to lay the foundations for market mechanisms, including potentially trading. The adoption of regulations to limit GHGs, for example, is explicitly based on banking, borrowing, and market mechanisms. The same regulations also include the 'distribution of emissions allowances,' or authorizations to emit a [sic] GHGs." (Sen. Com. on Environmental Quality, Analysis of Assem. Bill 32, as amended June 22, 2006, p. 8 at http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0001-0050/ab_32_cfa_20060626_101302_sen_comm.html [as of July 1, 2016].)

After further amendment in late August 2006, Assembly Bill 32 was signed into law in September 2006 as the California Global Warming Solutions Act of 2006, some six months after the PPA was signed, and was codified as Health and Safety Code sections 38500–38599, effective January 1, 2007. (See Stats. 2006, ch. 488, § 1, p. 3419.) As initially adopted, however, the legislation did not pinpoint how emissions were to be reduced or who was to pay associated costs. Those questions were left to CARB to answer.

C. *Impact of the Pending Legislation on PPA Negotiations*

According to PG&E, during the PPA negotiations the negotiators on both sides were aware of developments in the GHG legislation as it progressed through the Legislature, and they all understood it could have significant financial and other impacts on future energy production in California. PG&E claims that under a “change in law” provision in the draft PPA, a clause it insisted upon in all of its power purchase agreements at the time, both parties fully understood Panoche would be responsible for any costs associated with the pending GHG legislation, and indeed the PPA negotiators specifically discussed the fact that this clause covered potential GHG compliance costs, even though the legislation had not yet progressed to the point where those costs could be quantified.

Panoche, on the other hand, claims to have been blindsided by Assembly Bill 32. Panoche argues it was not foreseeable to energy producers until at least June 2006 that Assembly Bill 32 costs could become a major concern. The change in law provision, it argues, was just a “generic” clause that made no specific reference to Assembly Bill 32 or GHG costs and therefore did not apply to such costs; allocation of such costs was “never part of the parties’ deal.” Because such costs were not quantifiable when it signed the PPA, Panoche asserts it “would never have signed” if it had understood it would be on the hook for unknown and unquantifiable future costs.

PG&E supports its position by pointing out that on December 16, 2004, eight days after Assembly Bill 32 was introduced in the Assembly and 15 months before the PPA was signed, the CPUC issued a long-term plan decision in which it insisted, for the first time, that PG&E and certain other utilities then in the process of negotiating power purchase agreements take into account the cost of GHG emissions in evaluating bids under the LTRFO. “To further the state’s clear goal of promoting environmentally responsible energy generation, [the CPUC] also adopt[s] a policy that reflects and attempts to mitigate the impact of GHG emissions in influencing global climate patterns. As described in this decision, the IOUs are to employ a ‘GHG adder’ when evaluating fossil and renewable generation bids. This method, which will be refined in future proceedings, will serve to internalize

the significant and under-recognized cost of GHG emissions, help protect customers from the financial risk of future climate regulation, and continue California’s leadership in addressing this important problem.” (*Opinion Adopting PG&E’s Long-term Procurement Plans* (Dec. 16, 2004) Cal.P.U.C. Dec. No. 04-12-048 [2004 Cal.P.U.C. Lexis 598 at pp. *15-*16].)

In response to the CPUC’s long-term plan decision, PG&E updated its LTRFO to require bidders on new electrical generating facility projects to accept liability for changes in the law, and it specifically assessed applicants’ bids in part on their willingness to assume financial responsibility for what PG&E deemed to be foreseeable changes in the law. In March 2005, PG&E reissued the LTRFO, requiring that all counterparties getting contract positions would have to take on the risk of future changes in the law,³ specifically insisting on adherence to a change in law provision that cast upon PG&E’s counterparty in each contract the obligation to assume the risk of associated costs.⁴

Aside from the evidence of the negotiations surrounding the amended LTRFO, PG&E argues that at least as of the time of the August 2005 amendments to Assembly Bill 32, more than seven months before the PPA was signed, those following the progress of Assembly Bill 32 were aware that (1) GHG emissions would have to be reduced over time, (2) there would be a regulatory “cap” on such emissions, and (3) some “enforcement mechanism” would be used to ensure compliance. To a sophisticated participant in energy production such as Panoche, PG&E argues, all of this clearly signaled that the passage of Assembly Bill 32 would entail a significant new cost burden of GHG emissions reduction compliance.

PG&E claims its view of what sophisticated parties would have known is more than a matter of revisionist history. It points out the CPUC has taken that view as well, opining in a 2012 settlement approval decision that “contracts negotiated and executed when AB 32 was working its way through

³ According to PG&E, its amended LTRFO led to the inclusion in the PPA of section 3.6, “Standards of Care,” subsection (a), “General Operations”: “Seller [Panoche] shall comply with all applicable requirements of Law . . . relating to the Facility [including those related to operation of the Facility and the sale of Product therefrom]. For the avoidance of doubt, Seller will be responsible for procuring and maintaining, at its expense, all Governmental Approvals and emissions credits required for operation of the Units throughout the Service Term in compliance with Law and to permit operation as specified in Section 11.3(a)(v). Buyer [PG&E] shall cooperate with Seller’s efforts to acquire all such Governmental Approvals.”

⁴ When another new power plant bidder objected to incorporating the changes PG&E demanded, PG&E stopped negotiating with that bidder. Thus, it may be inferred that PG&E would not have entered into the contract with Panoche had it understood that Panoche would later seek regulatory “relief” from costs it had agreed to assume, at least not if it meant shifting those costs to PG&E.

the legislature should have taken the potential impacts of AB 32 into consideration. Even those negotiating contracts shortly before then might also have reasonably foreseen that this issue could arise.” (*Decision on System Track I and Rules Track III of the Long-term Procurement Plan Proceeding and Approving Settlement* (Apr. 19, 2012) Cal.P.U.C. Dec. No. 12-04-046 [2012 Cal.P.U.C. Lexis 192, p. *93].) And in another 2012 decision, PG&E points out, the CPUC specifically identified the August 15, 2005 amendments as being a significant indicator that GHG costs should be considered in negotiating power purchase agreements. (*Decision Granting Petition for Modification of Decision 04-06-011 Regarding Otay Mesa Energy Center* (Dec. 20, 2012) Cal.P.U.C. Dec. No. 12-12-002 [2012 Cal.P.U.C. Lexis 563, pp. *13-*14].)

D. The Regulatory Proceedings and the Cap-and-trade Program

As noted, the Legislature largely delegated to the CARB the task of determining how best to implement the broad goal of reducing GHG emissions. (Health & Saf. Code, § 38501, subds. (f)-(h).) The CARB held public hearings to assist in formulating a plan for implementing Assembly Bill 32, and in June 2008, the CARB released a draft scoping plan that included a proposed “cap-and-trade” program for the first time. (CARB Climate Change Draft Scoping Plan (June 2008) Executive Summary, pp. ES-1 to ES-9 at <<http://www.arb.ca.gov/cc/scopingplan/document/draftscopingplan.htm>> [as of July 1, 2016].)

After much consideration, on October 26, 2011, the CARB adopted final rules for a GHG cap-and-trade program, which became effective January 1, 2012. (See “California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms,” Cal. Code Regs., tit. 17, art. 5, § 95801 et seq.) Under that program, utilities are granted free of charge emissions permits (called “allowances”), each authorizing the emission of one metric ton of GHG. (Cal. Code Regs., tit. 17, §§ 95820, subds. (a) & (c), 95892.) The utilities must then surrender their allowances to CARB, which in turn sells allowances to emissions generators, such as Panoche, in periodic auctions. (Cal. Code Regs., tit. 17, § 95910.) Allowances may be bought, banked, or sold. (*Id.*, §§ 95910, 95920, 95922; *Our Children’s Earth Foundation v. State Air Resources Bd.* (2015) 234 Cal.App.4th 870, 877 [184 Cal.Rptr.3d 365].) Energy producers must acquire, through quarterly auctions, sufficient allowances to cover the amount of their GHG emissions.

For Panoche, continued operation of its power plant requires procurement of allowances, which will become increasingly expensive over time. The theory underlying cap-and-trade is that, as time goes by, fewer allowances will be issued, thereby raising the price of allowances and creating a financial

incentive for energy generators to find ways to reduce GHG emissions. Reducing public consumption is also a component of the emissions reduction plan, so the CARB also wanted to send a “price signal” to consumers. As the details of the program came into sharper focus, both the CARB and the CPUC received specific input from stakeholders about who should bear the cost of allowances (i.e., emissions generators or utilities, which could pass the cost on to the ultimate consumers through their approved rates).

Panoche claims the CARB made a policy determination that the ultimate consumer should bear the costs of GHG regulation on the theory that increased cost to the consumer would lead to reduced consumption and thus to curtailed GHG emissions. The CARB’s final statement of reasons (FSOR) adopting the cap-and-trade program, dated October 2011, does say: “A primary goal of the program is to create a price signal to reduce greenhouse gas emissions.” (CARB, FSOR for California’s Cap-and-Trade Program (Oct. 2011) Response to Comment I-49, p. 592 at <<http://www.arb.ca.gov/regact/2010/capandtrade10/capandtrade10.htm>> [as of July 1, 2016].) With respect to GHG compliance costs generally, the CPUC also expressed a policy preference that utilities pay the costs of GHG compliance and compensate generators for those costs, including through modifications to power purchase agreements if necessary.

E. *“Legacy Contracts”*

Once cap-and-trade was in place, both the CARB and the CPUC showed some sensitivity to the plight of energy producers whose contracts had been negotiated before Assembly Bill 32 went into effect, since those producers could be subjected to unexpected and unforeseeable costs associated with the cap-and-trade program. To the extent such costs were not considered in negotiating these antecedent contracts, the costs of cap-and-trade were likely to be “stranded” with these producers. Such contracts became known as “legacy contracts.” The regulatory definition of that term—and whether the PPA in this case qualifies as a legacy contract—became a matter of intense dispute between Panoche and PG&E.

Both Panoche and PG&E participated in the CPUC and CARB proceedings to implement the cap-and-trade regulation, advocating opposite viewpoints. While Panoche favored imposing GHG compliance costs on the utilities and passing on the cost to consumers, PG&E advocated making the energy producers pay for allowances if they had contracted to do so. Panoche emphasized that its point of view best aligned with the intent of Assembly Bill 32 since putting compliance costs on utilities would send a “price signal” to consumers and thereby reduce consumption, but PG&E’s theory was that where power purchase contracts are negotiated with anticipated GHG costs

built into the price term, then the utility's ratepayers had already been paying those costs and should not be charged twice.

With respect to Panoche in particular, PG&E told the regulators that Panoche had undertaken in the PPA to pay for costs related to Assembly Bill 32 and this was a "key issue in the parties' negotiations." Panoche told them the opposite: "The issue of GHG compliance cost responsibility is not addressed in the PPA, the CPUC testimony or exhibits, nor is there any allegation that [Panoche] would bear such potential costs in the CPUC public record." "Furthermore, the . . . PPA does not include a change in law provision." Panoche even went so far as to say that "PG&E stated it was too early in the legislative process to address [GHG legislation] in the contract and withdrew the issue from consideration." Panoche further suggested to the CPUC it would be financially crippled and might be forced to discontinue operations if required to foot the whole bill for compliance with Assembly Bill 32. Panoche also opined that imposing Assembly Bill 32's GHG costs on energy generators might well be considered an unconstitutional "taking" or an "unlawful tax."

In April 2012, the CPUC ordered utilities such as PG&E to renegotiate within 60 days any contracts entered before Assembly Bill 32's effective date that "do not address the allocation of AB 32 compliance costs," so that they would "be consistent with [the CPUC] policy," including revisiting if necessary "questions of whether the existing contract may have taken the passage of AB 32 into consideration."⁵ (Cal.P.U.C. Dec. No. 12-04-046, *supra*, 2012 Cal.P.U.C. Lexis 192 at p. *94.) Panoche claims the CPUC was concerned with the fair treatment of independent energy producers, quoting the statement that it "appears somewhat arbitrary and unfair for the recovery of greenhouse gas compliance costs to vary between otherwise similarly-situated generators based on whether the applicable contract was signed before or after the passage of AB 32."⁶ (2012 Cal.P.U.C. Lexis 192 at p. *93.) At the same time, the CPUC made clear it was not interested in "bailing . . . out"

⁵ PG&E informs us that it has successfully renegotiated all such contracts except its PPA with Panoche.

⁶ The full quote suggests the CPUC was concerned with fairness to all participants, not just energy producers: "As a general matter, the independent generators are correct that it appears somewhat arbitrary and unfair for the recovery of greenhouse gas compliance costs to vary between otherwise similarly-situated generators based on whether the applicable contract was signed before or after the passage of AB 32. *At the same time, contracts negotiated and executed when AB 32 was working its way through the legislature should have taken the potential impacts of AB 32 into consideration. Even those negotiating contracts shortly before then might also have reasonably foreseen that this issue could arise.*

"In D.08-10-037, we emphasized the importance of treating all market participants equitably and fairly, and reiterated our statement in D.08-03-018 that, '[I]t is not our intent to treat any market participants unfairly based on their past investments or decisions made prior to the passage of AB 32.' (D.08-10-037 at 144–145, citing D.08-03-018 at 18.) While we do not need

energy producers who had simply made an error in business judgment during contract negotiations. (See fn. 6, *ante*.)

Beginning in June 2012, Panoche and PG&E exchanged correspondence in which both claimed they had attempted to renegotiate their dispute, each blaming the other for failure of the negotiations. Nearing the end of the 60-day period specified in the CPUC's renegotiation order, PG&E requested an extension. The executive director of the CPUC replied in a letter dated June 20, 2012, that the 60-day period indicated in the renegotiation order was not intended to impose a deadline: "The [CPUC] has a strong preference that contract disputes be addressed by the signatories to the contract given that such parties have the most in-depth knowledge of the contract itself and their own operations." The letter advised PG&E that it "may and should continue to negotiate bilaterally," although the CPUC did not intend to allow the issue to "languish indefinitely." The impasse in renegotiation ultimately led to PG&E's filing of a request for arbitration some four or five months later.

Meanwhile, after expiration of the 60-day renegotiation period, Panoche sought and was granted party status in the CPUC rulemaking proceeding (*Administrative Law Judge's Ruling Confirming Party Status*, Cal.P.U.C. Ruling No. 11-03-012 (July 9, 2012) <<http://www.cpuc.ca.gov>> [as of July 1, 2016]) in early July 2012 and also successfully moved to enlarge the scope of the CPUC proceeding to consider which party should bear responsibility for GHG compliance costs in legacy contracts. At this point the dispute between the parties intensified because, according to PG&E, Panoche had misrepresented to the regulators the contractual provisions of the PPA. PG&E suggested Panoche cannot rightly be considered a party to a "legacy contract" at all and is not being saddled with costs stranded by the PPA. Instead, according to PG&E, Panoche negotiated and entered into the PPA with its eyes wide open to the potential costs associated with GHG emissions, and yet was trying to evade the bargained-for costs that it agreed to bear and, at least at that point in the dispute, was attempting to shift those costs to PG&E and its ratepayers.

Panoche's version of events, not surprisingly, was sharply different. It told the CPUC on July 3, 2012: "The PPA does not address GHG compliance cost responsibility and does not compensate [Panoche] for the costs of obtaining GHG allowances" In a separate filing the same date, Panoche elaborated: "The [Panoche] PPA includes no provision that can be reasonably read to assign GHG cost responsibility to [Panoche]. . . . PG&E's position

to treat everyone identically, and we are not in the business of bailing unregulated market participants out from their own past missteps, this fundamental concept still holds true; we do not want to inadvertently create or maintain unfair competitive impacts." (Cal.P.U.C. Dec. No. 12-04-046, *supra*, 2012 Cal.P.U.C. Lexis 192 at pp. *93-*94, *italics added*.)

that [Panoche] assumed responsibility for GHG compliance costs and priced this cost into the price of energy in the PPA is not only completely unsupported by any provision in the PPA but also contrary to common sense. [Panoche] could not have priced GHG compliance costs into the PPA because GHG compliance costs were speculative and unquantifiable at the time the PPA was executed.”

In August 2012, two CPUC administrative law judges (ALJs) issued proposed criteria for determining whether parties to legacy contracts could obtain financial relief, which came to be known as “transition assistance” to the new cap-and-trade regime. The CPUC requested comment on the following proposed “Eligibility Guidelines”: “We propose for comment that a contract between a generator and a utility must meet the following criteria in order to be eligible to receive relief, should the Commission decide relief is warranted, in this proceeding: ¶¶ 1. The contract must have been executed prior to the effective date of AB 32 (January 1, 2007); ¶¶ 2. The contract must not have been subsequently amended; ¶¶ 3. The contract does not provide for recovery of GHG costs, either explicitly or by virtue of a payment mechanism . . . ; and, ¶¶ 4. The contract does not expire before the start of the first cap-and-trade compliance period (i.e., January 1, 2013).” (*Administrative Law Judges’ Ruling Setting Forth Next Steps in Track 1 Phase 2 of This Proceeding*, Cal.P.U.C. Ruling No. 11-03-012 (Aug. 7, 2012) <<http://www.cpuc.ca.gov>> [as of July 1, 2016].) The purpose of the proposal was to “set boundaries on the world of contracts that may be eligible for compensation.” Compensation was not guaranteed by the establishment of these criteria, and no final resolution of the issue of stranded GHG costs was achieved. But at the time PG&E initiated arbitration some two or three months later, this pronouncement from the CPUC ALJs was the most recent regulatory iteration of the definition of a “legacy contract.”

Later in August 2012, Panoche submitted comments on the proposed criteria. First, Panoche urged the CPUC to adopt a bright-line rule granting transitional relief to all independent energy producers who entered into PPAs with utilities “executed prior to the . . . effective date” of Assembly Bill 32, arguing this should be the “sole necessary criterion” for such relief. Second, Panoche suggested the CPUC “may wish to avoid establishing criteria that will require the [CPUC] to review and interpret individual contracts.” And third, Panoche suggested the CPUC should “provide relief for any generator providing service under a legacy PPA that does not include an *express and explicit* provision imposing GHG emissions reduction program costs . . . on the seller. Mere reference to GHG reporting, environmental attributes, or Clean Air Act emissions reductions credits in the PPA should not be construed as addressing GHG compliance costs nor should any implicit assumptions be the basis for denying relief to the generator.” (Original italics.) It appears, therefore, that Panoche was maneuvering in the regulatory

proceedings to make sure its own PPA with PG&E would fit within the regulatory definition of a “legacy contract,” with the hope that it would then be deemed entitled to transition assistance.

PG&E’s comments on the proposed definition of “legacy contracts,” likewise, reflected the position it had been taking for years on who ought to bear the burden of Assembly Bill 32 GHG compliance costs. PG&E opposed inclusion in the eligibility criteria of any requirement that the contract “explicitly” or “specifically” allocate costs to the energy producers. (Pacific Gas and Electric Company’s (U 39 E) Comments on Administrative Law Judge’s Ruling on Track 1 Phase 2 Issues, p. 3 <<http://www.cpuc.ca.gov>> [as of July 1, 2016].) PG&E also proposed that if contracts were modified to shift GHG costs to PG&E, the energy producers should be required to accept in return certain contractual modifications “to ensure that PG&E’s customers are compensated for accepting GHG compliance cost responsibility for these sellers.” It further recommended the “use of contractual dispute resolution processes to resolve disputes over” individual contracts. (*Ibid.*)

Complicating the picture, in the fall of 2012 the CARB turned its attention to legacy contracts as well, which meant that regulatory proceedings on that issue were taking place before two different agencies. On September 20, 2012, the CARB issued a resolution stating its intention to develop a methodology to provide transition assistance to energy producers with a compliance obligation cost under the cap-and-trade regulation that could not be “reasonably recovered due to a legacy contract.” (CARB Resolution 12-33 (Sept. 20, 2012), p. 3 <<http://www.arb.ca.gov/cc/capandtrade/res12-33.pdf>> [as of July 1, 2016].) Although the CARB would ultimately take the lead in propounding regulations to deal with legacy contracts, at the time of the arbitration the most recent attempt to establish a working definition was the August 2012 definition by the CPUC ALJs.

F. *The Arbitration*

1. *The initiation of the arbitration*

Negotiation and mediation having failed,⁷ on November 8, 2012, PG&E initiated arbitration in accordance with the dispute resolution provisions of

⁷ In June 2012, PG&E, under order by the CPUC to renegotiate its contract with Panoche, wrote to Panoche, seeking negotiation or mediation of the dispute about the obligations Panoche had assumed under the PPA. This triggered the PPA’s dispute resolution provision, which required negotiation and mediation as precursors to arbitration. Panoche responded that its efforts at negotiation had been “utterly fruitless” and expressed its unwillingness to meet further. A similar request for mediation by PG&E was rebuffed by Panoche in September 2012, with Panoche contending the matter was not “ripe for mediation or arbitration.”

the PPA. A panel of three arbitrators was convened to hear the dispute: Judge W. Scott Snowden, retired; Judge Richard M. Silver, retired; and Attorney Martin Quinn.

PG&E sought a declaration that the PPA (1) “addresses GHG compliance costs” and “assigns responsibility for those costs to Panoche,” and (2) “at the time the PPA was signed, Panoche understood that, under the PPA, if there was a future change in law that imposed a cost on the facility because of its GHG emissions, Panoche would be responsible for paying that cost.” PG&E sought a definitive interpretation of the PPA in the hope of convincing the regulators that Panoche should not be entitled to “legacy contract” status or to transitional relief.

Panoche filed a counterclaim for declaratory relief that (1) the PPA does not “provide for recovery of GHG costs, either explicitly or by virtue of a payment mechanism” (based on the language of the CPUC ALJs’ August 2012 proposed eligibility criteria, and (2) “under section 3.1(b) of the PPA, [Panoche is not] required to bear AB 32 GHG compliance costs that exceed an annual average of the greater of \$100,000 per year or \$.50 per kW year.”

2. Panoche’s motion to dismiss or stay the arbitration

On January 15, 2013, Panoche filed a motion to dismiss or stay the arbitration pending further proceedings by the CARB and the CPUC. It argued PG&E’s declaratory relief claim was not “ripe” because of the pending regulatory proceedings. In Panoche’s view, the real dispute between the parties was in relation to how the regulatory bodies would allocate costs for allowances. According to Panoche’s theory, the action taken by the CARB and the CPUC would trump any contractual provision related to allocation of costs, and it was a waste of time and resources to arbitrate the contractual issues before the regulatory bodies had adopted a definite policy governing legacy contracts. Without the expected regulatory rules or criteria—rules or criteria that the CPUC and/or the CARB anticipated would issue by the end of August 2013—Panoche contended that it was impossible for the arbitration panel to reach a decision that would dispose of the controversy between Panoche and PG&E over GHG costs. The sole basis Panoche gave for requesting a stay or dismissal was the claim of unripeness.

PG&E argued the arbitration concerned a simple matter of contract interpretation based on an analysis of the PPA’s terms and the course of negotiations that occurred in 2005 and 2006. According to PG&E, this was not the same broad policy issue relating to overall GHG cost allocation that the CARB and the CPUC were considering, and the regulatory bodies had no intention of delving into the details of individual PPAs. Moreover, PG&E

claimed, the CPUC had directed PG&E to attempt to renegotiate its PPA with Panoche, which included the question whether “the existing contract may have taken the passage of AB 32 into consideration.” (Cal.P.U.C. Dec. No. 12-04-046, *supra*, 2012 Cal.P.U.C. Lexis 192 at p. *94.) And, of course, PG&E argued that an arbitration award settling the parties’ contractual dispute would not be simply an “advisory” opinion, but rather would be useful to the regulators in determining public policy.

The arbitrators found the dispute was ripe for adjudication and denied Panoche’s motion. They reasoned: ‘Panoche has failed to demonstrate how proceeding with this arbitration would either replicate, interfere or conflict with, or provide an advisory opinion to the ongoing CPUC and CARB proceedings. Indeed, by Panoche’s own admission, these public agencies are merely deciding how to handle power purchase agreements that were executed prior to AB 32 that lack terms and conditions specifically designating responsibility for GHG costs. . . . They are *not* deciding whether any individual contracts, such as the parties’ PPA, actually lacked such terms and conditions—the sole and exact issue before the Panel here. [¶] Thus, because PG&E has presented a real controversy that is appropriate for immediate judicial resolution because it concerns an issue that will not be resolved by either of the public agencies, this contractually-agreed-to forum is the appropriate venue for the parties to resolve their claims.’ After significant discovery was conducted, a five-day arbitration was held in April 2013.

3. *The arbitrators’ decision on the merits*

On May 2, 2013, the panel reached its decision, ruling in favor of PG&E. As quoted above, the PPA included section 3.6(a), a change in law provision, under which PG&E claimed the costs of compliance with Assembly Bill 32 had been assumed by Panoche. (See fn. 3, *ante*.) That provision required Panoche to “comply with all applicable requirements of Law . . . relating to the Facility” and to “be responsible for procuring and maintaining, at its expense, all Governmental Approvals and emissions credits required for operation of the Units throughout the Service Term” “Law” was also defined in the PPA to include a “statute, law, . . . [or] enactment,” including one “enacted, amended, or issued after the Execution Date [of the PPA] and which becomes effective during the Contract term,” and it also included “regulation[s].” Thus, the arbitrators ruled that both Assembly Bill 32 and the CARB’s cap-and-trade regulations were part of the “Law,” as defined in the PPA, and by committing to comply with the “Law” within the meaning of the PPA, Panoche had contractually agreed to bear the costs of compliance. The arbitrators specifically concluded that “[o]ne such ‘Law’—the cap-and-trade regulations—requires entities such as Panoche to pay for and acquire sufficient GHG allowances to cover their carbon emissions. Panoche, therefore, agreed to comply with this requirement of the cap-and-trade regulations.”

Both the term “Law” and the term “Governmental Approval” as used in the PPA were also defined to include an “authorization.” Because an “allowance” is defined by statute as “an authorization to emit, during a specified year, up to one ton of carbon dioxide equivalent” (Health & Saf. Code, § 38505, subd. (a)), the emission allowances required under Assembly Bill 32 and its implementing regulations constituted “Governmental Approvals” within the meaning of the PPA, and “Panoche, therefore, contractually agreed to procure AB 32 allowances at its expense.” Despite the fact that GHG emissions were never mentioned by name in the PPA, the arbitrators concluded the PPA’s “change in law” provision required Panoche to assume the costs of GHG compliance.

The arbitrators found support for this conclusion in the testimony of Panoche’s lead negotiator, Keith Derman, one of Panoche’s key witnesses in the arbitration. Derman was a partner at Energy Investors Funds (EIF), a private equity fund based in Boston, Massachusetts, that owns the Firebaugh plant. He admitted in a deposition that he understood when the PPA was signed that the “four corners of the contract” made Panoche responsible for the costs “if a government law changed and imposed a cost on Panoche relating to the facility’s carbon emissions.” His follow-up observation that “there was no specific language in the agreement to deal with greenhouse gases” struck the arbitrators as “unpersuasive.”

As further support for their decision, the arbitrators noted that during contract negotiations, in response to PG&E’s proposed change in law amendments, Panoche suggested that it should receive higher compensation in the event of a change in the law that imposed higher costs of performance on Panoche, but this change was never incorporated into later revisions. Panoche also proposed that both parties share responsibility for compliance with all applicable requirements of law; that the PPA should eliminate the language specifying that Panoche would have to pay for all “Governmental Approvals”; that Panoche could not be declared in default if it was unable to (or simply failed to) obtain necessary Governmental Approvals; that the PPA should eliminate the requirement that Panoche obtain all needed “emissions credits”; and that the force majeure clause should be modified to include Panoche’s “inability to obtain and maintain any governmental Approvals required” The markups of the PPA also show a note by Panoche requesting that the parties “[d]iscuss change in law issues.”

PG&E also sent a letter to Panoche explaining that Panoche’s proposed changes to the amended PPA “would make major changes to the benefits and burdens of PG&E’s form PPA, significantly affecting the value of your Final Offers to PG&E.” PG&E insisted that Panoche’s offer “needs improvement in order to be further considered.” Despite Panoche’s early resistance to the

changes, negotiations continued and Panoche eventually accepted PG&E's proposed amendments to the PPA so that section 3.6(a) now reads as quoted in footnote 3, *ante*.

Documents generated by Panoche outside of the direct negotiations confirmed Panoche's contemporaneous understanding that it bore the risk of costs to comply with future GHG legislation. For instance, in a memorandum in March 2006 (before the PPA was signed), Derman advised EIF's investment committee of the benefits and risks of the Panoche project, noting as a risk that "there is remaining fear that [California] is monitoring carbon emissions" and that there was "no current mitigation in place" to address this risk. He testified in his deposition it was "true" that he understood that "California might impose a cost on carbon emissions." The arbitrators found Derman's admissions "telling" in reaching their conclusions.

EIF also issued a bond offering memorandum some two years after the PPA was signed (but before the present dispute arose), which discussed Assembly Bill 32, including that its "regulatory program may include a trading market for greenhouse gas emissions credits" and "the Facility [in Firebaugh] . . . likely will be required to comply with these AB 32 regulations" and "likely . . . will participate in the greenhouse gas emissions credit market, and will be required to make certain expenditures from time to time to purchase such credits." The arbitrators also considered this document to be "proof of Panoche's understanding and consideration of the impact that AB 32 could have on the [Firebaugh] Facility and its bottom line . . ."

Panoche argued that it would never have accepted the cost risk associated with GHG emissions because it would have viewed this risk as too "unknown, unlimited, unquantifiable." The arbitrators, however, found "overwhelming evidence" to the contrary. The arbitrators tracked the drafting changes proposed to the PPA during negotiations, which (as outlined above) showed that Panoche had initially resisted taking responsibility for costs of implementing Assembly Bill 32, but eventually agreed.

After weighing the evidence bearing on the parties' contracting intent, the arbitration panel found "clearly, Panoche was aware that it would be responsible for paying the cost of any change in law that imposed a cost on the Plant because of its GHG emission." The arbitrators concluded Panoche's failure to raise its price for electricity after PG&E insisted on the change in law provision reflected its "own evaluation of the risks"—which some of its witnesses considered "minimal"—rather than any misunderstanding that it was assuming the cost of changes in the law. Though they did not use the term "business judgment," the arbitrators found in essence that Panoche appreciated the risk involved in its decision not to raise the price of electricity

in its bid after being forewarned by PG&E that it would be required to cover Assembly Bill 32 compliance costs. Evidently, though, Panoche wanted to be awarded the contract with PG&E badly enough that it took a gamble that those risks would not prove too onerous. The arbitrators found that the contract price in the PPA took into account the costs associated with Assembly Bill 32's impending GHG regime. And the panel concluded there is no danger that Panoche will lose money on the contract, specifically finding that "Panoche's projected profit margins were of such a substantial size . . . that there was still ample room for profit even with GHG compliance costs being considered."

In light of their findings, the arbitrators granted PG&E's request for declaratory relief on both of its issues, as follows: (1) "It is hereby declared that the PPA addresses greenhouse gas emissions . . . compliance costs and assigns responsibility for those costs to Panoche" and (2) "It is hereby declared that at the time the PPA was signed, Panoche understood that, under the PPA, if there was a future change in the law that imposed a cost on the facility because of its GHG emissions, Panoche would be responsible for paying that cost." The arbitrators emphasized they were "not rendering an advisory decision on an issue of great policy importance," but rather were concerned solely with "contract interpretation" and "what, exactly, the [p]arties understood."

With respect to Panoche's first counterclaim for declaratory relief, the panel was not swayed by the fact that the PPA does not specifically mention cost recovery for Assembly Bill 32 allowances or GHG emissions by name and found that fact was "not dispositive." The arbitrators found there was a "payment mechanism" in place under the PPA that allowed Panoche to recover GHG costs in that PG&E was required under section 4.3 of the PPA to make "full payment" for the electrical power produced by Panoche, in accordance with formulas set forth in the PPA. The arbitrators therefore denied Panoche's first counterclaim for declaratory relief. Panoche's second counterclaim for declaratory relief sought to establish limits on Panoche's liability for GHG costs based on section 3.1 of the PPA, which covered "Resource Adequacy Requirement." The arbitrators found that section inapplicable to GHG costs and denied the requested relief. Finally, the arbitrators postponed decision on attorney fees and costs under the PPA, section 12.4(c).

Eight days after the arbitrators' decision, PG&E advised the CPUC of the arbitrators' decision, apparently sending it a copy of the arbitration award. Shortly thereafter, on June 25, 2013, Panoche petitioned the superior court for an order vacating the award under section 1286.2, subdivision (a)(5). The award remained in effect from its inception until vacated by the superior court in late September 2013.

G. *Additional Regulatory Developments While the Arbitration Award Was in Effect*

Even as the arbitration proceeded and afterwards, the regulators continued attempting to decide how to deal with legacy contracts. On May 1, 2013, the CARB held a workshop to discuss the issue of legacy contracts with stakeholders, at which it was suggested that contracts involving IOUs and contracts involving other utilities should all be dealt with by the CARB, not the CPUC, and should be subject to the same rules. Beginning in late June 2013, the CPUC began expressing a willingness to cede authority to the CARB over contracts involving IOUs, so that all parties in legacy contracts would be treated the same; ultimately, in March 2014, the CPUC did cede authority to the CARB. (*Decision Clarifying Commission Policy on Greenhouse Gas Cost Responsibility for Contracts Executed Prior to the Passage of Assembly Bill 32* (Mar. 13, 2014) Cal.P.U.C. Dec. No. 14-03-003 [2014 Cal.P.U.C. Lexis 145, p. *1] (*Decision Clarifying CPUC Policy*)).)

The CARB proposed a new regulation on July 15, 2013, that would provide transition assistance to energy producers in legacy contracts through the year 2014. The essence of that regulation, as will be discussed more fully below, was that energy producers who were party to a PPA in which the “price . . . does not provide for recovery of the costs associated with compliance with” the cap-and-trade program would be entitled to free “direct allocation” of allowances by the CARB through 2014. (Cal. Code Regs., tit. 17, §§ 95802, subd. (a)(204), 95890, subd. (e), 95894.)

In recommending the new regulations, the CARB staff identified 19 contracts in dispute statewide and said: “In all cases, [the CARB] has encouraged resolution through contract renegotiation between the parties. In several cases, renegotiation has resolved the legacy contract concern. [The CARB] understands the approximately 19 remaining contracts to be in various stages of renegotiation. [The CARB] continues to encourage private resolution.” The regulation the CARB proposed, staff believed, “maintain[ed] a strong incentive to continue renegotiation.”

Stakeholder commentary on the proposed regulations continued through the summer, including commentary from PG&E and Panoche. Generally speaking, Panoche supported the new CARB regulation, while PG&E recommended changes. Among other things, PG&E suggested that “transition assistance” be provided only to those energy producers who signed contracts before August 15, 2005, when PG&E claimed the prospect of GHG-related costs was already clear. PG&E also suggested that the definition of legacy contracts should exclude contracts of energy producers against whom an

arbitrator had ruled on the contract dispute with the utility.⁸ PG&E also suggested that the CARB incorporate into its definition of “legacy contracts” language designed around its own second claim for declaratory relief: namely, that a power purchase agreement would not be considered a legacy contract if, “at the time the agreement was executed, the [energy generator] understood that if there were a future change in the law that imposed a cost on the facility because of its greenhouse gas emissions, the [energy generator] would be responsible for paying that cost.” These changes were not adopted by the CARB.

On September 4, 2013, while Panoche’s petition to vacate the arbitration award was still pending, the CARB issued an initial statement of reasons (ISOR) for its proposed regulations, including proposing to add a definition of “legacy contracts” that in substance is identical to the definition ultimately adopted some nine months later. (Compare CARB, Proposed Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms, ISOR, appendix E (Sept. 4, 2013) Proposed Regulation Order, § 95802, subd. (a)(195) at <<http://www.arb.ca.gov/regact/2013/capandtrade13/capandtrade13.htm>> [as of July 1, 2016] with current Cal. Code Regs., tit. 17, § 95802, subd. (a)(204).)

With respect to consideration of individual contracts, the ISOR explained: “[The CARB] is not in a position to have full knowledge of the original negotiation and how GHG costs were discussed during these contract negotiations. In comments that [the CARB] received, there was apparent disagreement during the various discussions among parties as to how to consider the inclusion of such costs. It is not appropriate for [the CARB] to interject itself into the interactions between parties in private contract discussions where [the CARB] cannot possibly know what both sides intended when they executed the contract.”

The ISOR did not, however, abandon the notion that the parties should continue trying to resolve their differences independently: “While [the CARB’s] preferred approach to resolving the situation is for the parties to renegotiate the contracts, [the CARB] recognizes that renegotiation takes time.” In the meantime, the ISOR explained, transitional relief for generators in legacy contracts would be provided under section 95894 of title 17 of the Code of Regulations.

⁸ After winning the arbitration with Panoche, PG&E began a fruitless attempt to convince the CARB and the CPUC that any proposed regulation to provide relief to energy producers under legacy contracts should exclude contracts in which an arbitration had determined the PPA accounted for GHG cost recovery. Although Panoche construes this as evidence that the CARB is simply not interested in whatever results arbitration may produce, we think that reads too much into the regulators’ failure to adopt PG&E’s suggestion.

H. *The Court Order Vacating the Arbitration Award*

Panoche brought its petition to vacate the arbitration awards under section 1286.2, subdivision (a)(5), which authorizes a court to vacate an arbitration award if the “rights of the [petitioning] party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown” Under that section, if the statutory requirements are met, the court “shall” vacate the arbitration award. PG&E opposed the petition and requested that the court instead confirm the arbitrators’ interim award and enter judgment accordingly pursuant to section 1287.4. Again, Panoche’s briefing focused exclusively on the concept of ripeness, but this time it attempted to mold its arguments to fit within the linguistic frame established by section 1286.2, subdivision (a)(5) by arguing that the lack of ripeness constituted “sufficient cause” to “postpone” the arbitration.

On September 20, 2013, the trial court, having been kept up to date on the regulatory developments, granted Panoche’s petition. The court ruled that Panoche’s ripeness motion before the arbitration panel could be reviewed under section 1286.2, subdivision (a)(5) because (1) it amounted to a request to “postpone” the arbitration within the meaning of the statute; (2) it was supported by “sufficient cause”; and (3) Panoche was “substantially prejudiced” by the arbitrators’ refusal to grant a delay in the proceedings while the CPUC and the CARB completed their regulatory proceedings. PG&E filed a timely notice of appeal from the court’s order.

I. *Further Regulatory Developments After the Appeal Was Filed*

In response to a request by Panoche, we take judicial notice of the following developments in the regulatory proceedings after the notice of appeal was filed. On November 8, 2013, the CARB proposed the amendments to the cap-and-trade regulation from the September 2013 ISOR, discussed above. Those amendments were adopted by the CARB in April 2014, and went into effect July 1, 2014. (CARB, Amendments to California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms, Resolution 14-4 (Apr. 25, 2014) (CARB Resolution 14-4) at <www.arb.ca.gov/regact/2013/capandtrade13/res14-4.pdf> [as of July 1, 2016]; history foll. Cal. Code Regs., tit. 17, § 95894.)

Meanwhile, at the CPUC, by February 10, 2014, an ALJ had also addressed the issue of legacy contracts in a proposed decision (Proposed CPUC Clarification Decision) setting forth a policy statement of the CPUC with respect to legacy contracts: “It is the policy of the [CPUC] that greenhouse gas costs and responsibility for such costs should be clearly articulated in Legacy Contracts in order to account for greenhouse gas costs

in generation dispatch decisions. The [CPUC] reiterates this policy and orders the utilities to continue renegotiating contracts to include provisions to ensure that generators party to Legacy Contracts receive compensation for their greenhouse gas costs.” The proposed decision again expressed the CPUC’s disinclination to address the issue by interpreting individual contracts: “[The CPUC] does not find it appropriate to address issues of greenhouse gas cost responsibility at the individual contract level.” We do not read that statement to mean that issues concerning contractual interpretation were to be ignored. Instead, the ALJ said, “The [CPUC] has consistently encouraged parties to resolve disputes over GHG cost responsibility in Legacy Contracts through negotiation and settlements or (if necessary) through the dispute resolution processes articulated in existing contracts.” These observations were retained in the CPUC’s *Decision Clarifying CPUC Policy*, *supra*, 2014 Cal.P.U.C. Lexis 145 at p. *1.

In the Proposed CPUC Clarification Decision, the CPUC also made the following observation: *“Most of the contracts raised in this proceeding, including the Panoche contract, were negotiated and signed at a time when it was reasonably foreseeable that there would be costs for GHG compliance in the future, but the extent to which such costs were accounted for in the contracts may not be clear. To the extent that these Legacy Contracts do not contain terms that explicitly allocate responsibility for GHG compliance costs, it may not be clear which party, if any, bears responsibility for those costs under the contract. It would be inappropriate to amend a contract to require utilities and their ratepayers to pay those compliance costs a second time if they were accounted for in the original contract. At the same time, the [CPUC] is not in a position to know whether GHG costs are already embedded in existing contracts; that is a factual question that is beyond the scope of this proceeding. To make these factual determinations, Legacy Contracts must be examined individually, and avenues exist, such as a contract’s explicit dispute resolution process, that are more appropriate than this proceeding for resolving questions of the presence or absence of specific GHG cost compensation terms and conditions in Legacy Contracts.”* (Italics added & fn. omitted.) The final decision omitted the first sentence of the quoted paragraph at Panoche’s request. (See *Decision Clarifying CPUC Policy*, *supra*, 2014 Cal.P.U.C. Lexis 145 at pp. *14-*15, *19-*20.)

At the same time, however, the CPUC decided to defer to the developing CARB regulations on the issue of legacy contracts. Essentially, the CPUC decided that energy producers in contracts with IOUs should be treated the same as producers under contract with other utilities. The regulations now in force include the definition of “Legacy Contract” adopted by the CARB: “‘Legacy Contract’ means a written contract or tolling agreement, originally executed prior to September 1, 2006, governing the sale of electricity and/or legacy contract qualified thermal output *at a price*, determined by either a

fixed price or price formula, *that does not provide for recovery of the costs associated with compliance with this regulation*; the originally executed contract or agreement must have remained in effect and must not have been amended since September 1, 2006 to change or affect the terms governing the California greenhouse gas emissions responsibility, price, or amount of electricity or legacy contract qualified thermal output sold, or the expiration date. . . .” (Cal. Code Regs., tit. 17, § 95802, subd. (a)(204), italics added.) Energy producers who are parties to legacy contracts are granted “direct allocation” of allowances from the CARB, at no cost to the producers, under the new regulations. (*Id.*, § 95894.)

However, before receiving the first such direct allocation, and for each year in which an energy producer seeks to renew its eligibility, it is required to make a “[d]emonstration of [e]ligibility,” including an attestation under penalty of perjury that its PPA “does not allow the covered entity to recover the cost of legacy contract emissions from the legacy contract counterparty purchasing electricity and/or legacy contract qualified thermal output from the unit or facility.”⁹ (Cal. Code Regs., tit. 17, § 95894, subd. (a) & (a)(3)(A).) This requirement was included because it was “necessary to prove the information declared is true and to facilitate [the CARB] legal action against the entity requesting allowance allocation if the information submitted is false information.” We take judicial notice that Panoche was granted transition assistance for the years 2013, 2014 and 2015 after review of its application for the reporting period ending September 2, 2014.

⁹ The regulation, entitled “Allocation to Legacy Contract Generators for Transition Assistance,” requires any legacy contract generator seeking transition assistance to submit to the CARB by September 2 “each year,” among other things, a copy of portions of its power purchase agreement reflecting commencement and cessation dates and the “[t]erms governing price per unit of product.” (Cal. Code Regs., tit. 17, § 95894, subd. (a)(2).) In addition, each such generator must submit an annual “attestation under penalty of perjury” that: “(A) Each legacy contract does not allow the covered entity to recover the cost of legacy contract emissions from the legacy contract counterparty purchasing electricity and/or legacy contract qualified thermal output from the unit or facility; [¶] (B) The legacy contract was originally executed prior to September 1, 2006, remains in effect, and has not been amended since that date to change the terms governing the price or amount of electricity or legacy contract qualified thermal output sold, the GHG costs, or the expiration date; [and] [¶] (C) The operator of the legacy contract generator with an industrial counterparty or the legacy contract generator without an industrial counterparty made a good faith effort, but was unable to renegotiate the legacy contract with the counterparty to address recovery of the costs of compliance with this regulation.” (*Id.*, subd. (a)(3).) The effort at renegotiation must have occurred since the last annual attestation was filed. Applicants must also update their submissions with any material changes occurring after submission. (*Id.*, subd. (a)(5).)

III. DISCUSSION

A. Because the PPA Restricted the Arbitrators' Power to That of a California Superior Court Judge, the Arbitrators Were Not Authorized to Entertain an Unripe Dispute.

Panoche structured its arguments both in the arbitration and before the trial court around a tenet of justiciability—ripeness—that is fundamental to judicial decisionmaking. But does the concept of ripeness apply in an arbitral setting to the same extent that it applies in court? After briefing in this appeal was completed, Division Four of the Second District Court of Appeal answered that question in the negative in *Bunker Hill Park Ltd. v. U.S. Bank National Assn.* (2014) 231 Cal.App.4th 1315 [180 Cal.Rptr.3d 714] (*Bunker Hill*). Absent an agreement by the parties to import the doctrine of ripeness into their arbitration contract, the panel explained in *Bunker Hill*, a dispute that might not be justiciable in court for lack of ripeness is nonetheless arbitrable if it otherwise falls within the scope of the governing arbitration clause. (*Id.* at pp. 1325–1330.)

Bunker Hill reasoned: “Arbitration is foremost a creature of contract. [Citation.] ‘Arbitration’s consensual nature allows the parties to structure their arbitration agreements as they see fit. They may limit the issues to be arbitrated, specify the rules and procedures under which they will arbitrate, designate who will serve as their arbitrator(s), and limit with whom they will arbitrate.’ [Citation.] Contracting parties also are free to negotiate and restrict the powers of an arbitrator and the universe of issues that he or she may resolve; ‘[t]he powers of an arbitrator derive from, and are limited by, the agreement to arbitrate.’’ [Citation.] ‘As for the requirement that there exist a controversy, it is sufficient the parties *contractually* have agreed to resort to a third party to resolve a particular issue.’ [Citation.] ‘The limited function reserved to the courts in ruling on an application for arbitration is not whether the claim has merit, but whether on its face the claim is covered by the contract.’ [Citation.] Thus, we look to the terms of the parties’ contract to ascertain whether they agreed to arbitrate a particular disagreement or to restrict the arbitrator to resolving certain issues.” (*Bunker Hill, supra*, 231 Cal.App.4th at p. 1326.) Based on the foregoing considerations, the Court of Appeal in *Bunker Hill* ordered the superior court to compel the arbitration to proceed. (*Id.* at p. 1330.)

Bunker Hill recognized that parties may contractually limit arbitrators’ roles to the adjudication of justiciable controversies, and the present dispute is one in which they have done just that. The clause in question, part of the arbitration provision (section 12.4(c)), does not actually mention ripeness or justiciability, but simply provides: “The Parties are aware of the decision in

Advanced Micro Devices, Inc. v. Intel Corp., 9 Cal.4th 362 [36 Cal.Rptr.2d 581, 885 P.2d 994] (1994), and, except as modified by this Agreement, intend to limit the power of the arbitrator to that of a Superior Court judge enforcing California Law.”

In *Advanced Micro Devices, Inc. v. Intel Corp., supra*, 9 Cal.4th 362 (*Advanced Micro Devices*), the Supreme Court upheld an arbitrator’s award that arguably exceeded the powers a superior court judge could have exercised in fashioning a remedy for breach of contract. (*Id.* at pp. 367, 390–391.) Specifically, the arbitrator fashioned a remedy for Intel’s breach of implied covenants of good faith and fair dealing that gave Advanced Micro Devices (AMD) a permanent, nonexclusive, royalty-free license to Intel’s 8086 generation of microprocessors. (*Id.* at pp. 385–386.) AMD petitioned to have the superior court confirm the award (§§ 1286, 1287.4), and Intel petitioned for it to correct the award (§ 1286.6) by striking two paragraphs, arguing that the remedy granted by the arbitrator exceeded the contractual remedies for breach. (*Advanced Micro Devices, supra*, at p. 371.) The trial court confirmed the arbitrators’ award, but the Court of Appeal reversed, granting Intel the relief it requested. The Supreme Court later reversed the Court of Appeal’s decision.

The Supreme Court held “our statutes (§§ 1286.2, [former] subd. (d), 1286.6, subd. (b)) do not distinguish between the arbitrators’ power to decide an issue and their authority to choose an appropriate remedy; in either instance the test is whether the arbitrators have ‘exceeded their powers.’ Because determination of appropriate relief also constitutes decision on an issue, these two aspects of the arbitrators’ authority are not always neatly separable.” (*Advanced Micro Devices, supra*, 9 Cal.4th at p. 373.) “Arbitrators, unless specifically restricted by the agreement to following legal rules, ‘may base their decision upon broad principles of justice and equity’ [Citations.] As early as 1852, this court recognized that, ‘The arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good].’ [Citation.]’ (*Moncharsh [v. Heily & Blase* (1992) 3 Cal.4th 1, 10–11 [10 Cal.Rptr.2d 183, 832 P.2d 899]).] Were courts to reevaluate independently the merits of a particular remedy, the parties’ contractual expectation of a decision according to the arbitrators’ best judgment would be defeated.” (*Advanced Micro Devices, supra*, at pp. 374–375, fn. omitted.)

PG&E argues section 12.4(c) of the PPA does not incorporate the concept of ripeness into the arbitration because *Advanced Micro Devices* dealt only with the *remedial* powers of an arbitrator, whereas the ripeness limitation on adjudication has nothing to do with available remedies. Because of the

reference to *Advanced Micro Devices* in the preamble to section 12.4(c), PG&E would have us interpret this language to mean “the *remedial* power . . . of a Superior Court judge.” Even if the decisionmaking power of courts and arbitrators could be neatly compartmentalized into “*remedial*” power and other kinds of power—an idea the Supreme Court rejected in *Advanced Micro Devices*—the plain language of section 12.4(c) undercuts PG&E’s argument. We will not insert additional language into the PPA that the parties themselves did not include. We instead conclude that part of “California law,” which the arbitrators were empowered to enforce only to the same extent as a superior court judge, was the rule limiting courts to the resolution of “ripe” controversies. This case therefore comes within the exception envisioned in *Bunker Hill*.

B. The Appeal Is Not Moot.

Before addressing the ripeness issue, we turn to another threshold issue, this one at the other end of the justiciability spectrum—mootness. On June 19, 2014, contemporaneously with filing its respondent’s brief, Panoche filed a motion to dismiss the appeal as moot based on after-occurring developments in the regulatory proceedings, as described above.¹⁰ Panoche argued that “[o]n April 25, 2014, the CARB passed its final cap-and-trade amendments, awarding Panoche and other similarly-situated parties ‘transitional relief’ to cover their GHG costs for the first five years of the CARB’s cap-and-trade program (i.e., until AB 32’s expiration), with the opportunity to obtain additional relief in the future.” Ironically, by arguing mootness, Panoche in effect claims its disagreement with PG&E is both unripe and overripe. Panoche never explains when exactly, if ever, the controversy was ripe. It has consistently claimed and continues to claim the contract dispute had not yet “congealed” into a justiciable controversy as of the time of the arbitration, yet also claims that by June 19, 2014—before this appeal was fully briefed—events in the regulatory arena had so far overtaken these proceedings as to render the appeal moot. For the reasons that follow, we cannot accept this logic.

■ “[W]hen, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal

¹⁰ Panoche’s motion to dismiss was initially denied, and the accompanying request for judicial notice was granted. Those orders were vacated, however, on the court’s own motion, and the court ordered the motion and request for judicial notice to be decided with the appeal. For reasons stated in the text, we now deny Panoche’s motion to dismiss the appeal and grant its request for judicial notice. (Evid. Code, §§ 452, 459.) Panoche’s supplemental request for judicial notice filed November 26, 2014, is also granted. PG&E’s request for judicial notice filed January 4, 2016, is denied.

judgment, but will dismiss the appeal.’ ” (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132 [41 Cal.Rptr. 468, 396 P.2d 924], quoting *Consolidated etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 863 [167 P.2d 725].) Witkin, with characteristic clarity, distinguishes the two concepts thusly: Unripe cases are “[t]hose in which parties seek a judicial declaration on a question of law, though no actual dispute or controversy ever existed between them requiring the declaration for its determination.” (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 21, p. 85.) Moot cases, in contrast, are “[t]hose in which an actual controversy did exist but, by the passage of time or a change in circumstances, ceased to exist.” (*Id.* at p. 86.)

Thus, “ ‘ripeness is not a static state’[citation], and a case that presents a true controversy at its inception becomes moot ‘if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character’ ” (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573 [120 Cal.Rptr.3d 665] (*Wilson & Wilson*).) “The pivotal question in determining if a case is moot is . . . whether the court can grant the plaintiff any effectual relief. [Citations.] If events have made such relief impracticable, the controversy has become ‘overripe’ and is therefore moot.” (*Id.* at p. 1574.) An appeal is not moot, however, where “a material question remains for the court’s consideration,” so long as the appellate decision can grant a party to the appeal effectual relief. (*Vargas v. Balz* (2014) 223 Cal.App.4th 1544, 1550–1551 [168 Cal.Rptr.3d 154].) Thus, “[a]n appeal will be decided . . . where part but not all of the controversy has been rendered moot.” (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 78 [70 Cal.Rptr.3d 88].)

The unresolved question of costs and attorney fees, by itself, is enough to defeat Panoche’s mootness argument. The PPA includes a fee-shifting provision that allows recovery of arbitration costs and reasonable attorney fees to the “prevailing party.” The arbitrators’ decision in May 2013 left the question of fees open, but PG&E was determined to be the prevailing party. After the arbitration, PG&E submitted a petition for fees and costs, claiming approximately \$1.5 million in fees and nearly \$228,000 in costs. After the arbitration award was vacated, Panoche filed a claim in the arbitration for approximately \$1.7 million in attorney fees and \$383,000 in costs. The arbitrators have postponed ruling on the fees issue pending the outcome of this appeal. Since the arbitrators’ decision may drive the “prevailing party” determination in the arbitration, this appeal is not moot for that reason alone. (*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 881 [111 Cal.Rptr.3d 374]; *Carson Citizens for Reform v. Kawagoe* (2009) 178 Cal.App.4th 357, 365 [100 Cal.Rptr.3d 358]; *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 510, fn. 3 [83 Cal.Rptr.2d 850]; *Mapstead v. Anchundo* (1998) 63 Cal.App.4th 246, 278–279 [73 Cal.Rptr.2d 602] [no rationale supports the theory that “a party who should have lost on

the merits at trial becomes the ‘successful party’ when the issues become moot on appeal”]; *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745, 1750–1751 [12 Cal.Rptr.2d 308].)

While Panoche may ultimately be correct in its assessment of the course of public policy going forward, we note that it overstates what the future holds for GHG regulation in California. Panoche contends that Assembly Bill 32 “expi[es]” in 2017, but that does not appear to be the case. The current GHG reduction targets under Assembly Bill 32 extend until 2020 (Health & Saf. Code, § 38550), and the Legislature has expressed the intent that GHG emissions limits “shall remain in effect unless otherwise amended or repealed,” with the expectation that such limits will “continue in existence and be used to maintain and continue reductions in emissions of greenhouse gases beyond 2020.” (Health & Saf. Code, § 38551, subds. (a) & (b).) Thus, one of the foundations of Panoche’s mootness argument crumbles. In addition, the PPA will remain in effect until sometime in 2029. Given these long-range legislative objectives and the long-term contract in dispute, we expect the question of GHG emissions and the cost of reducing those emissions to continue to be an issue subject to regulation in California—and subject to dispute between the parties—for the foreseeable future, not a matter that has been settled definitively by the regulations now in effect. Moreover, although the CARB has arrived at a final definition of “legacy contracts,” Panoche suggests that this definition resolves all issues related to this appeal, but that is plainly not the case. The new regulation is not a self-executing grant of free allowances in perpetuity. It merely allows Panoche to receive such allowances if it attests under oath, annually, that the PPA “does not allow [Panoche] to recover the cost of legacy contract emissions from [PG&E].” (Cal. Code Regs., tit. 17, § 95894, subd. (a)(3)(A).)

Given the parties’ disagreement over whether the PPA allows Panoche to “recover” the costs of GHG compliance, we think it undeniable that the “demonstration of eligibility” requirement contained in the new regulation draws into question the contents and meaning of the PPA, including the arbitrators’ resolution of that dispute. Although we are of the view that the arbitration decision has clear, ongoing relevance to Panoche’s eligibility for “legacy contract” treatment going forward, we hasten to add that it in no way binds the hands of the regulators. The CARB may decide for policy reasons that Panoche should get free allowances in spite of the arbitrators’ decision. We have nothing to say about that. The regulators have broad policy-making power and they might decide, for example, that the general policy of sending a “price signal” to the public is a paramount consideration. Clearly, the arbitrators believed the risk of exposure to Assembly Bill 32 compliance costs was known to and taken into account by Panoche when it entered the PPA in March 2006. While they made a thoughtful, considered, and in many ways compelling determination on that issue, they repeatedly emphasized that

their focus was limited to contract interpretation.¹¹ As we explain further below, the arbitrators were tasked with deciding an issue that, while *relevant* to ongoing regulatory proceedings, was fundamentally retrospective in nature, while the “legacy contract” issue pending in the regulatory arena was not only prospective in nature, but was suffused with policy considerations that the arbitrators were not capable of addressing.

C. *The Contractual Dispute Between PG&E and Panoche Was Ripe When the Arbitration Commenced, and Panoche Failed to Show Sufficient Cause to Postpone the Arbitration Under Section 1286.2, Subdivision (a)(5).*

1. *Limited judicial review of arbitration awards and the standard of review on appeal.*

“The merits of the controversy between the parties [to a private arbitration agreement] are not subject to judicial review.’ [Citations.] More specifically, courts will not review the validity of the arbitrator’s reasoning. [Citations.] Further, a court may not review the sufficiency of the evidence supporting an arbitrator’s award. [Citations.] [¶] Thus, it is the general rule that, with narrow exceptions, an arbitrator’s decision cannot be reviewed for errors of fact or law.” (*Moncharsh v. Heily & Blase, supra*, 3 Cal.4th at p. 11; see also, e.g., *Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 916 [182 Cal.Rptr.3d 644, 341 P.3d 438]; *SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1195 [58 Cal.Rptr.3d 904] (*SWAB Financial*); *Jones v. Humanscale Corp.* (2005) 130 Cal.App.4th 401, 407–408 [29 Cal.Rptr.3d 881].) Section 1286.2, subdivision (a), which sets forth grounds for vacating an arbitration award, is an exception to the general rule. (*SWAB Financial, supra*, at p. 1196.) We are concerned in this appeal with subdivision (a)(5), which has been called “a safety valve in private arbitration that permits a court to intercede when an arbitrator has prevented a party from

¹¹ Panoche argues vehemently that the panel got it wrong, since “when the PPA was signed in March 2006—months before AB 32 was passed and years before CARB proposed any cap-and-trade program—the parties could not have specifically addressed GHG allowances under any regulatory cap-and-trade scheme because no such regulations existed at the time.” The point is not without force, but assessing as a factual matter what the parties discussed and understood in the negotiation of the PPA was a matter exclusively for the arbitrators. And in any event, to the extent Panoche complains that the full weight of the cost burden it undertook could never have been foreseen until the legislative and regulatory process that created cap-and-trade in California had run its course, a more fitting contract defense may have been commercial frustration, which it has never argued. (See *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1336 [96 Cal.Rptr.3d 813] [“where performance remains possible, but the reason the parties entered the agreement has been frustrated by a supervening circumstance that was not anticipated, such that the value of performance by the party standing on the contract is substantially destroyed, the doctrine of commercial frustration applies to excuse performance”].)

fairly presenting its case.” (*Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 439 [22 Cal.Rptr.2d 376] (*Hall*) [discussing § 1286.2, former subd. (e), which is now subd. (a)(5)]; accord, *Epic Medical Management, LLC v. Paquette* (2015) 244 Cal.App.4th 504, 518 [198 Cal.Rptr.3d 28]; *Schlessinger v. Rosenfeld, Meyer & Susman* (1995) 40 Cal.App.4th 1096, 1111 [47 Cal.Rptr.2d 650].)

The parties agree that the court’s order vacating the arbitration award is subject to de novo review on appeal. “We review the trial court’s ruling de novo, but defer to the factual and legal findings made by the arbitrator. (*California Faculty Assn. v. Superior Court* (1998) 63 Cal.App.4th 935, 943–945 [75 Cal.Rptr.2d 1]; *Oaktree Capital Management, L.P. v. Bernard* (2010) 182 Cal.App.4th 60, 68–69 [106 Cal.Rptr.3d 16]) ‘[W]e do not review the arbitrator’s findings . . . , but take them as correct.’ (*Roehl v. Ritchie* (2007) 147 Cal.App.4th 338, 347 [54 Cal.Rptr.3d 185].)’” (*Cotchett, Pitre & McCarthy v. Universal Paragon Corp.* (2010) 187 Cal.App.4th 1405, 1416 [114 Cal.Rptr.3d 781].) To the extent the superior court judge made factual findings that are not inconsistent with the arbitrators’ findings, we review them for substantial evidence. (*SWAB Financial, supra*, 150 Cal.App.4th at pp. 1196, 1198.) Ripeness, too, is generally a legal issue subject to de novo review. (*Bunker Hill, supra*, 231 Cal.App.4th at p. 1324; *Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 885 [70 Cal.Rptr.3d 474].) We therefore employ our independent judgment in deciding this issue.

2. *The question of contract interpretation was ripe for arbitration.*

■ “The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions. [Citation.] It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion. It is in part designed to regulate the workload of courts by preventing judicial consideration of lawsuits that seek only to obtain general guidance, rather than to resolve specific legal disputes. However, the ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy. On the other hand, the requirement should not prevent courts from resolving concrete disputes if the consequence of a deferred decision will be lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question. [Citations.]’ . . . As the Court of Appeal observed in *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 22 [61

Cal.Rptr. 618], ‘[a] controversy is “ripe” when it has reached . . . the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.’ ” (*Vandermost v. Bowen* (2012) 53 Cal.4th 421, 452 [137 Cal.Rptr.3d 1, 269 P.3d 446], italics omitted, quoting *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170 [188 Cal.Rptr. 104, 655 P.2d 306].)

■ When applied in the context of concurrent judicial and administrative proceedings, the ripeness doctrine can serve the salutary purpose of “ ‘“prevent[ing] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” ’ ” (*Davis v. Southern California Edison Co.* (2015) 236 Cal.App.4th 619, 645, fn. 19 [186 Cal.Rptr.3d 587], quoting *Pacific Legal Foundation v. California Coastal Com.*, *supra*, 33 Cal.3d at p. 171.) Whether in that context or others, however, an issue is ripe for resolution if it “arises from a genuine present clash of interests and the operative facts are sufficiently definite to permit a particularistic determination rather than a broad pronouncement rooted in abstractions.” (*Safai v. Safai* (2008) 164 Cal.App.4th 233, 244 [78 Cal.Rptr.3d 759].) Analytically, the test for ripeness is twofold: we must (1) determine whether the issue is “ ‘appropriate for immediate judicial [or arbitral] resolution,’ ” and then (2) analyze “ ‘the hardship that may result from withholding court [or the arbitrators’] consideration.’ ” (*Wilson & Wilson*, *supra*, 191 Cal.App.4th at p. 1582.)

■ We are satisfied that, on the first step, PG&E’s contract dispute with Panoche was “ ‘appropriate for immediate [arbitral] resolution.’ ” PG&E argues, and we agree, that the question of transitional relief for legacy contract power generators involves two distinct issues—contract interpretation and policy making. That the contract issues and the regulatory issues were “intertwined,” as the superior court suggested, does not lead inexorably to the conclusion that a proceeding to interpret the PPA would be in conflict with the progress of the regulatory proceedings, would be dependent on the outcome of the regulatory proceedings, or would be in some other way premature. Nor do we agree that addressing the contractual issues prior to the regulators’ resolution of the policy questions caused the arbitrators or the courts to “step outside the courtroom into the vortex of political activity.” (*Hobson v. Hansen* (D.D.C. 1967) 265 F.Supp. 902, 923.) On the contrary, we conclude the arbitrators and the regulators were operating in largely distinct spheres and addressing largely different questions. Accordingly, the pendency of regulatory proceedings did not, in and of itself, render the contractual issues unripe for arbitration.

Panoche's lack-of-ripeness argument rests on the premise that contract interpretation was pointless because the regulators had decided they would not look at the provisions of individual contracts to establish statewide policy. Ergo, Panoche suggests, the arbitration should have been dismissed. Alternatively, Panoche argues, the arbitration at least should have been postponed until after the regulators made a final determination about the definition of "legacy contract." We are not persuaded. In our view, by referring to contractual provisions in their various pronouncements, proposed rules, and final rules concerning "legacy contracts," the CPUC and the CARB embedded into the test for eligibility a need to consider the PPA's terms. Given the CPUC's and the CARB's refusal to try to resolve conflicts between individual parties as to the terms of their contracts, the agencies' continuing expressed preference for the parties to resolve their contractual disputes independently, and the persistent dispute between PG&E and Panoche over whether Assembly Bill 32 compliance costs were addressed in the PPA, PG&E was justified in viewing arbitration as a practical necessity to resolve that contract interpretation dispute.

The regulatory proceedings, on the other hand, have led to and will continue to involve public policy determinations about how to fairly allocate the cost burden of Assembly Bill 32 more broadly. The interpretation of the PPA as reflected in the arbitrators' reasoned decision was certainly relevant to the public policy issues before the CPUC and the CARB; indeed, the pendency of those regulatory issues was the very reason PG&E initiated the arbitration. Panoche, understandably, wished to remain free in the regulatory arena to place its own "spin" on the PPA, but by agreeing to a private dispute resolution procedure, Panoche ran the risk that PG&E would call its bluff, obtain a binding ruling from an arbitration panel on disputed issues of contract interpretation, and use that ruling to try to block Panoche from continuing to promote what PG&E believed was an inaccurate view of the PPA before the agencies. The risk ran the other way as well, of course, and had the arbitrators adopted Panoche's perspective, the shoe would have been on the other foot. Because these are two very sophisticated parties, fully capable of assessing how the arbitration clause might be used—and rejecting it upfront, if it was a poor fit for the highly regulated environment involved here—we are loathe to prevent enforcement of the clause because the party invoking it, PG&E, may have found it useful as a means to gain perceived tactical advantage before the regulators. We would be surprised if there was not some such motivation at work, but in the end PG&E's motivation is irrelevant. Arbitration was a tool at the disposal of both parties, and we see nothing wrong with the way PG&E chose to use it here.

It is no mystery how the parties' contract interpretation dispute was pertinent to the regulatory proceedings at the time this dispute was arbitrated. The parties have long disagreed, and disagreed sharply, on who ultimately

should bear the costs of Assembly Bill 32 compliance. At the time PG&E demanded arbitration, the parties were engaged in vigorous lobbying campaigns centering on this issue, each offering diametrically opposing views to the regulators about whether, in fact, the PPA addressed Assembly Bill 32 compliance costs. Panoche argues that, to resolve the dispute, it was necessary for the arbitrators to wait for the regulatory process to run its course, because that process was bound to provide “guidance,” and perhaps would be outcome-determinative. As the arbitrators noted, however, the meaning of the contract was something to be determined retrospectively, looking at the historical facts, and applying well-known principles of contract law. Nothing pending before the regulators was going to change that decisionmaking frame. Granted, if, *going forward*, the regulators wish to override the PPA for policy reasons, they were and are empowered to do so, but that is a separate regulatory issue, which the arbitrators eschewed any interest in addressing. The CPUC and the CARB, for their part, drew the same line of demarcation from the opposite perspective, commenting repeatedly on the impracticality of attempting their own examination and interpretation of individual power purchase and sale contracts.

But while it is clear the CPUC and the CARB wished to avoid deciding contract-specific issues, they never *affirmatively* indicated a disinterest in, refusal to consider, or rejection of the relevancy of such contracts to the question of an individual energy generator’s eligibility for transition assistance. That is understandable because the issue of whether a particular contract allocated GHG compliance costs in a particular way was so plainly relevant for regulatory purposes when PG&E demanded arbitration, and is still relevant today. The CPUC ALJ’s proposed definition of “legacy contracts” in August 2012—the proposed definition upon which Panoche framed its counterclaim—focused on whether the contract at issue “explicitly” provided for allocation of GHG compliance costs or had a “mechanism” of doing so. And under the CARB’s “legacy contract” definition, as finally adopted, any entity claiming to be a party to a legacy contract must *prove* its eligibility by attesting that the PPA “does not allow the covered entity to recover the cost of legacy contract emissions from the legacy contract counterparty” (Cal. Code Regs., tit. 17, § 95894, subd. (a)(3)(A).) Thus, the definition adopted by the CARB, and the transitional relief offered, both to some degree turn on the content of the PPA: specifically, whether it “provide[d or did not provide] for recovery of the costs associated with compliance with [the cap-and-trade] regulation” (Cal. Code Regs., tit. 17, § 95802, subd. (a)(204)) and whether it “allow[ed or did not allow] the covered entity to recover the cost of legacy contract emissions from the legacy contract counterparty purchasing electricity . . . from the unit or facility” (*id.*, § 95894, subd. (a)(3)(A)).

We therefore agree with the arbitrators that their opinion was not merely advisory. It settled a real and ongoing dispute between the parties that had reached a point at which the dispute was threatening to have a significant financial impact on one party or the other. The fact that the panel's resolution of that bilateral dispute might ultimately be disregarded by the regulators did not transform the arbitrators' decision into a merely "advisory" opinion, particularly given the potential for recurrence of the dispute in the future. We think this case is comparable to *Steinberg v. Chiang* (2014) 223 Cal.App.4th 338 [167 Cal.Rptr.3d 249], in which a dispute between the State Controller and the state Legislature developed regarding the Controller's authority to withhold legislators' paychecks for the alleged failure of the Legislature to enact a balanced budget by the constitutional deadline. (*Id.* at pp. 341–342; Cal. Const., art. IV, § 12(c)(3), (g) & (h).) One week after their paychecks were suspended, the legislators passed a new balanced budget and their pay was reinstated. (*Steinberg*, at p. 342.) Though the Controller claimed there was no live controversy and the plaintiffs were requesting an advisory opinion, a panel of the Third District Court of Appeal deemed the issue ripe for resolution because "the parties have an ongoing relationship in which this existing dispute . . . can arise again in the future." (*Id.* at p. 341.) Likewise in our case, though the parties may be in a temporary state of uneasy détente due to the regulators' largesse, in this contentious area of energy regulation the dispute between PG&E and Panoche relating to the correct interpretation of their PPA could flare up at any time in the future, depending on further regulatory action or even in its absence.

Even to the extent there may have been some duplication of effort or some expense in conducting the arbitration, which Panoche characterizes as "wasted" if the regulators were to end up ignoring the arbitrators' reasoned decision, that risk is overridden when the second prong of the ripeness inquiry is considered, namely "'the hardship that may result from withholding [the arbitrators'] consideration'" (*Wilson & Wilson, supra*, 191 Cal.App.4th at p. 1582; accord, *Pacific Legal Foundation v. California Coastal Com.*, *supra*, 33 Cal.3d at p. 171), which must be an "'imminent and significant hardship inherent in further delay'" (*Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 542 [84 Cal.Rptr.3d 223]; see *Farm Sanctuary, Inc. v. Department of Food & Agriculture* (1998) 63 Cal.App.4th 495, 502 [74 Cal.Rptr.2d 75]). PG&E has made a sufficient showing of hardship.

Panoche had been advocating in regulatory proceedings that PG&E should bear the cost of GHG allowances itself because it could pass the cost along to its customers, thereby sending a "price signal" to reduce consumption. The CPUC and the CARB both thought the best general policy was to have the utilities pay. But that is precisely what PG&E claims it had bargained to avoid before this general policy had been articulated, and the CPUC agreed

that putting the cost burden on PG&E in such a case would effectively make PG&E's ratepayers pay twice, while Panoche would be let off the hook altogether. Given the potential financial impact on PG&E and its customers, together with PG&E's desire to influence the regulators before it was too late for them to choose a different path where Panoche was concerned, we perceive a plain and imminent hardship to PG&E if the arbitration had been postponed. The fact that the CARB, as an interim solution, after the arbitration, elected to grant Panoche direct allocation of free allowances through a transition period without cost to PG&E, does not alter the fact that PG&E faced a looming potential liability for Panoche's allowances at the time it initiated the proceeding.

Panoche insists that the CARB and the CPUC have no use for any consideration of the terms of individual contracts when making policy for the whole state. We do not agree. We are not suggesting the regulators will necessarily be guided by the terms of individual contracts, nor does confirmation of the arbitration award in any way imply they should. But every indication so far from the regulators is that they are expecting and awaiting a definitive resolution of the parties' contractual dispute, which the regulators have instructed the parties to pursue outside of the regulatory proceedings. The weight to be given the arbitration award by the regulators—indeed, whether they will consider it at all—is entirely up to them, but for purposes of evaluating whether the dispute presented to the arbitration panel was sufficiently concrete for decision and whether its resolution was capable of putting to rest uncertainty *around the meaning of the contract*, the controversy was ripe.

Finally, we must note, to the extent any matter in dispute in the arbitration was unripe, it would appear to be Panoche's first counterclaim, which asked for an interpretation of the contract in accordance with the interim CPUC definition of legacy contracts, rather than awaiting the CARB's final definition. (Cf. *Pacific Gas & Electric Co. v. Lynch* (C.D.Cal., May 2, 2001, No. CV 01-1083-RSWL (SHx)) 2001 U.S.Dist. Lexis 5500, pp. *47-*51 [challenge to "non-final interim order of a state agency" held to be unripe].) By its framing of that counterclaim Panoche attempted to link inextricably the contract issues with the regulatory proceedings, arguing that the former could not be decided until after the latter were completed. As we have now explained, there is no necessity that the regulators decide the policy issue before the contract issues may be determined, and to the extent there is a natural sequence, it would seem better to decide the contract issues sooner rather than later. Panoche could not render the entire arbitration "unripe" by interjecting a premature counterclaim. PG&E's distinct contract interpretation claims were certainly ripe and subject to immediate arbitration. We conclude that, under both the first and second prongs of the ripeness analysis, the dispute between PG&E and Panoche was ripe at the time of the arbitration.

3. *Panoche Failed to Show Sufficient Cause for a Postponement Because It Did Not Show That Denying a Stay of the Arbitration Prevented It from Fairly Presenting Its Case or Otherwise Put It at a Procedural Disadvantage in Defending Against PG&E's Claim for Declaratory Relief.*

Despite our resolution of the ripeness issue, Panoche argues that “sufficient cause” may have existed for a postponement, even if PG&E’s claims technically were ripe. Although we agree that the nomenclature of the statute governs the appeal, we note that Panoche’s present stance seems at odds with the position it took in its motion for dismissal or stay of the arbitration, which was devoted exclusively to the question of ripeness, and the position it consistently took in the trial court and before this court that “sufficient cause” was established for a postponement precisely *because* the issues were unripe for arbitration.

Turning to the statute, preliminarily we note that Panoche asked for dismissal or a “stay” of the arbitration,¹² not a brief postponement. The Supreme Court recently had occasion to distinguish a stay of proceedings from a continuance. Whereas a “stay” “refers to those postponements that freeze a proceeding for an indefinite period, until the occurrence of an event that is usually extrinsic to the litigation and beyond the plaintiff’s control,” a “continuance” is more likely to postpone a trial to a “date certain” which is “not tied to any matter outside the parties’ control.”¹³ (*Gaines v. Fidelity National Title Ins. Co.* (2016) 62 Cal.4th 1081, 1092–1094 [199 Cal.Rptr.3d 137, 365 P.3d 904].) Given this distinction, it is certainly arguable that a request for a “stay” is not tantamount to a request “to postpone” the arbitration.

But moving beyond that issue, we also decline Panoche’s invitation to formulate a shorthand standard expressly adapted to determining “sufficient

¹² When Panoche made its ripeness motion in January 2013, it predicted that the regulatory proceedings would result in a final resolution of the legacy contract issue by August 2013. Instead, governing regulations were not adopted by the CARB until April 2014. (CARB Resolution 14-4.)

¹³ Because it sought a stay, rather than a brief time-limited postponement, Panoche’s argument is similar to a claim that a court should abstain from hearing a case due to the pendency of related legislative proceedings. In that context, it is not enough that regulatory action *might* at some point in the future resolve the issue subject to litigation. For the doctrine of judicial abstention to apply, it must be clear that (1) the issue being litigated in the judicial forum would enmesh the court in complex issues of regulatory policy that are better addressed in a regulatory forum, and (2) the Legislature is seeking to address the exact issues being litigated in the judicial forum or has provided an alternative means of resolving them, rather than simply having announced an intention to act in the area or undertaken investigatory activities that indicate a mere possibility of the issues in litigation being addressed sometime in the future. (See *Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1367–1373 [137 Cal.Rptr.3d 293].)

cause” for postponing an arbitration in the case of concurrent arbitration and regulation. Panoche cites *Naing Internat. Enterprises v. Ellsworth Associates* (D.D.C. 1997) 961 F.Supp. 1, 3–4 (*Naing*) for the proposition that “[a] party presents ‘sufficient cause’ necessary to postpone an arbitration by establishing that a government agency is considering information ‘pertinent and material’ to [the party’s] claims and defenses during arbitration.”¹⁴ We think adopting this as an across-the-board standard in cases involving pending regulation adds an unnecessary gloss to the “sufficient cause” standard, too thoroughly ties arbitrators’ hands in ruling on continuance motions, and lends itself too easily to manipulation of the timing of arbitration for purposes other than obtaining a fair hearing. We need not reach across the country to find case law or borrow language from a federal statute to find a useful measure of “sufficient cause.” We have already cited *Hall* and similar cases calling section 1286.2 “a safety valve in private arbitration that permits a court to intercede when an arbitrator has *prevented a party from fairly presenting its case.*” (*Hall, supra*, 18 Cal.App.4th at p. 439, italics added.) In other words, a party seeking a continuance of arbitration may later have the arbitration award vacated only if the court finds the denial of the continuance imposed upon the moving party a procedural disadvantage in the arbitration due to its scheduling.¹⁵ Identifying an abstract “pertinent and material” relationship between regulatory action and issues subject to arbitration is not enough.

The trial court, too, relied heavily on *Naing*, calling it “largely indistinguishable.” We disagree. In that case, Naing International Enterprises, Inc. (*Naing*), one of two companies that had signed a merger agreement, represented in the contract that it was eligible for participation in the Small Business Administration’s (SBA) section 8(a) program (15 U.S.C. § 637(a)), which allows preferences in government contracting for disadvantaged minority-owned firms, and made related representations tending to assure such eligibility would continue. (*Naing*, at p. 2.) The other company (EAI) refused to go through with the merger after questions developed as to whether Naing’s representations concerning eligibility were true. (*Ibid.*) The parties submitted the dispute to arbitration for alleged breach of contract. (*Ibid.*)

¹⁴ Alternatively, Panoche suggests that the phrase “sufficient cause” should be equated with “good cause” for continuance of a trial, citing *Roitz v. Coldwell Banker Residential Brokerage Co.* (1998) 62 Cal.App.4th 716, 724 [73 Cal.Rptr.2d 85] (*Roitz*) and *Moore v. Griffith* (1942) 51 Cal.App.2d 386, 389 [124 P.2d 900] (*Moore*). But good cause for continuance of trial also focuses on threats to procedural fairness as the touchstone for granting such a motion. (See § 595.4; Cal. Rules of Court, rule 3.1332.)

¹⁵ Indeed, in the majority of cases decided under section 1286.2, parties have invoked the “sufficient cause” language of the statute to ensure personal presence during the arbitration (*Humes v. MarGil Ventures, Inc.* (1985) 174 Cal.App.3d 486, 496–498 [220 Cal.Rptr. 186]), to secure additional evidence (*Roitz, supra*, 62 Cal.App.4th at pp. 720, 722–725; *Communications Workers v. General Telephone Co.* (1981) 127 Cal.App.3d 82, 86–87 [179 Cal.Rptr. 204]; *Shammas v. National Telefilm Associates* (1970) 11 Cal.App.3d 1050, 1055–1056 [90 Cal.Rptr. 119]), or to be represented by counsel (*Moore, supra*, 51 Cal.App.2d at p. 388).

At the time arbitration was initiated, the SBA was investigating the very same issue—Naing’s eligibility for section 8(a) participation—and the issue apparently hinged on whether the merged entity could assume contracts then held by EAI and still retain eligibility. (*Naing, supra*, 961 F.Supp. at pp. 2, 4.) Less than two months before the arbitration hearing began, the SBA’s Inspector General issued a report recommending that Naing be terminated from the section 8(a) program. (*Ibid.*) The report set a deadline less than a month after the arbitration was scheduled to begin for the SBA to act on the recommendation. (*Id.* at p. 4.) Shortly before the start of arbitration, a party aligned with EAI moved to postpone the hearing until the SBA acted, but the request was denied. (*Ibid.*) Naing prevailed in the arbitration, and EAI sought to vacate the award under the Federal Arbitration Act (9 U.S.C. § 10(a)(3)) on grounds similar to those asserted by Panoche here.¹⁶ (*Naing*, at pp. 2–3.)

The federal district court granted the motion to vacate the award because “[t]here is little doubt that a final action by the SBA as a result of its investigation into [Naing’s] eligibility would have been pertinent and material to EAI[’s] . . . claims and defenses during arbitration. The SBA, as the agency responsible for the 8(a) Program, is responsible for determining eligibility for participation in the program and to investigate matters related to participation therein. Its determination as to [Naing’s] eligibility and the accuracy of the information [Naing] submitted to it would have been compelling evidence as to the respondents’ principal claims and defenses.” (*Naing, supra*, 961 F.Supp. at p. 3.) We note, in addition, that *Naing* never mentioned the word “ripeness,” but rather focused its analysis on evidence that could have been admitted if a continuance had been granted, resulting in the deprivation of one party’s right to a full and fair hearing. (*Id.* at pp. 3–6.)

Naing presents a factual scenario that in significant respects is quite different from ours. As noted, in *Naing*, the issue under regulatory consideration—Naing’s eligibility for the section 8(a) program—was identical to the issue EAI was raising as its defense in the breach of contract arbitration as its explanation for refusing to go through with the merger. (*Naing, supra*,

¹⁶ The statutory standard under the Federal Arbitration Act (9 U.S.C. § 1 et seq.) applied in *Naing*, to be sure, differs in at least one significant respect from section 1286.2, subdivision (a)(5), the provision of the California Arbitration Act invoked in this case by Panoche. The federal statute requires “misconduct” by the arbitrator “in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy” before an arbitration award will be vacated. (9 U.S.C. § 10(a)(3).) A statutory precursor to current section 1286.2, subdivision (a)(5) was former section 1288, subdivision (c): “Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy.” (Former § 1288, enacted 1872, amended by Stats. 1927, ch. 225, § 9, p. 406, repealed by Stats. 1961, ch. 461, § 1, p. 1540.) The “misconduct” element of the test for improper refusal to postpone an arbitral hearing no longer appears in section 1286.2, subdivision (a)(5).

961 F.Supp. at pp. 3–4.) If the SBA were to determine that Naing was not eligible, as appeared likely, that certainly would have a direct bearing on whether Naing misrepresented its eligibility status and prospects, as EAI alleged. The district court in *Naing* noted that the arbitrators themselves knew the SBA investigation was pending during the arbitration (*ibid.*) and had “acknowledged the relevancy of any SBA investigation to the arbitration” (*id.* at p. 3). In other words, the crux of the parties’ dispute in arbitration *turned on* the outcome of the regulatory proceedings. The same is not true here.

Thus, we do not read *Naing* as having the far-reaching significance that Panoche ascribes to it. First, we do not agree that *Naing* sets forth a new and distinct “pertinent and material” standard for determining “sufficient cause” for a postponement of arbitration in light of pending regulatory action. The “pertinent and material” language is derived from a different clause of the federal statute, which relates to the arbitrators’ refusal to hear evidence “pertinent and material to the controversy.” (9 U.S.C. § 10(a)(3).) Moreover, the regulatory proceedings in *Naing* were not just “pertinent and material” to the broadly stated *issues* being arbitrated; the proceedings were “pertinent and material” to specific “claims and defenses” asserted in the arbitration, and were in fact likely to produce “‘pertinent and material evidence’ ” for use in the arbitration. (*Naing, supra*, 961 F.Supp. at p. 3.) As we read *Naing*, it was the impact on the procedural fairness of the arbitration that the court found controlling: “[I]f the failure of an arbitrator to grant a postponement or adjournment *results in the foreclosure of the presentation of ‘pertinent and material evidence,’* it is an abuse of discretion.” (*Ibid.*, *italics added*.)

Hence, the rule we apply is consistent with *Naing*. A procedural disadvantage—or that a party was “prevented . . . from fairly presenting its case” (*Hall, supra*, 18 Cal.App.4th at p. 439)—was a factor certainly at play in *Naing*, where EAI had a potential defense to the breach of contract claim based on Naing’s failure to retain section 8(a) status. (*Naing, supra*, 961 F.Supp. at p. 3.) In our case, though Panoche refers to its “defenses” to PG&E’s contract-related claims being dependent upon the regulators’ decisions, in fact Panoche’s entitlement or lack of entitlement to transition assistance would not constitute a “defense” to PG&E’s declaratory relief claims. Nor has there been a regulatory determination that Panoche is entitled to transition relief “for at least the first five years of [the] CARB’s cap-and-trade program,” as it has represented; rather, Panoche is simply entitled to *apply* for such relief on an annual basis, with its ultimate eligibility to be determined on an individual year-to-year basis depending on a sworn factual showing. To the extent there is any required order in which the resolution of issues should proceed, we view the resolution of the contractual issues as a prerequisite to application of the entitlement criteria, and thus it was perfectly appropriate for the arbitrators to address the contract questions before the regulators’ decisions were finalized.

Though *Naing* bears some similarity to our case in that both involve construction of a contract by an arbitration panel while related regulatory proceedings are ongoing, the similarity ends there. The SBA's ruling would have a direct and substantial bearing on whether Naing had breached the agreement (and whether EAI was or was not required to go through with the merger regardless of the breach)—which were the issues in dispute. EAI was able to point to specific evidence likely to come out of the regulatory proceedings—namely, a determination whether Naing was eligible for section 8(a)—that would have materially strengthened its defense in the arbitration. Panoche has never identified any specific anticipated decision by the regulators that would influence the retrospective *contract interpretation* issues before the arbitrators. Although it complains of its inability to furnish the arbitrators with the final regulations, as we have discussed, that “evidence” is unlikely to have influenced their interpretation of the PPA. Moreover, in our case, no breach of the PPA was alleged. The only relief sought was a declaration of Panoche’s obligations under the PPA at the time it was signed. PG&E’s request for declaratory relief on a matter of contract interpretation was not dependent on any issues pending before the CARB or the CPUC. From PG&E’s perspective, the purpose of the arbitration was to *inform* the regulators’ ongoing consideration of the policy issue, and thus there was some urgency in having a resolution *before* the regulators made any final decisions.

Panoche identifies no procedural disadvantage it suffered in going forward with the arbitration as scheduled. Because Panoche failed to meet the “sufficient cause” prong under subdivision (a)(5), we need not decide whether its “rights” were “substantially prejudiced” by the arbitrators’ ruling on the ripeness motion under the second prong of the statute.¹⁷ (§ 1286.2, subd. (a)(5).)

D. The Arbitrators’ Award Must Be Confirmed Under Section 1287.4.

■ Section 1286 makes clear, “If a petition or response under this chapter is duly served and filed, the court shall confirm the award as made . . . unless in accordance with this chapter it corrects the award and confirms it as corrected, vacates the award or dismisses the proceeding.” That is, once a petition to vacate or correct is made, the court has only four options: dismiss

¹⁷ Suffice it to say, the “rights” referred to in the statute would appear to be the procedural rights available in the arbitration, and the “prejudice” referred to would also appear to be prejudice *in the arbitration* as a result of the refusal to postpone it. It is equally clear that “prejudice” under the statute must be attributable to the scheduling of the arbitration, not its mere pendency. Many of Panoche’s claims of prejudice were claims of financial impacts extrinsic to the arbitration and unrelated to its timing, such as the downgrading of Panoche’s credit rating by Standard & Poor’s, the cost of conducting the arbitration, attorney fees, and the like. We seriously question whether this is the type of “prejudice” to which the statute refers.

the petition; vacate; correct the award and confirm; or confirm the award. Thus, in *Law Offices of David S. Karton v. Segreto* (2009) 176 Cal.App.4th 1 [97 Cal.Rptr.3d 329], where the defendant petitioned to correct an initial arbitration award, and the trial court did not correct or vacate the award or dismiss the petition, the Court of Appeal ordered it to confirm the award. (*Id.* at pp. 8, 11; see also *Louise Gardens of Encino Homeowners' Assn, Inc. v. Truck Ins. Exchange, Inc.* (2000) 82 Cal.App.4th 648, 659 [98 Cal.Rptr.2d 378] [“[I]f a timely petition to vacate had been filed, its denial would have directly and necessarily led to entry of a confirmation order . . .” (italics omitted)].) Because Panoche's petition to vacate should have been denied, the arbitration award should have been confirmed and judgment entered in accordance with section 1287.4.

IV. DISPOSITION

The judgment is reversed. Panoche's motion to dismiss the appeal as moot is denied. Panoche's requests for judicial notice filed June 19, 2014, and November 26, 2014, are granted. PG&E's request for judicial notice filed January 4, 2016, is denied. The superior court's order vacating the arbitration award is reversed, as is the denial of PG&E's request to confirm the arbitration award. The superior court is ordered to confirm the arbitration award under section 1287.4, as requested by PG&E. PG&E shall recover its costs on appeal.

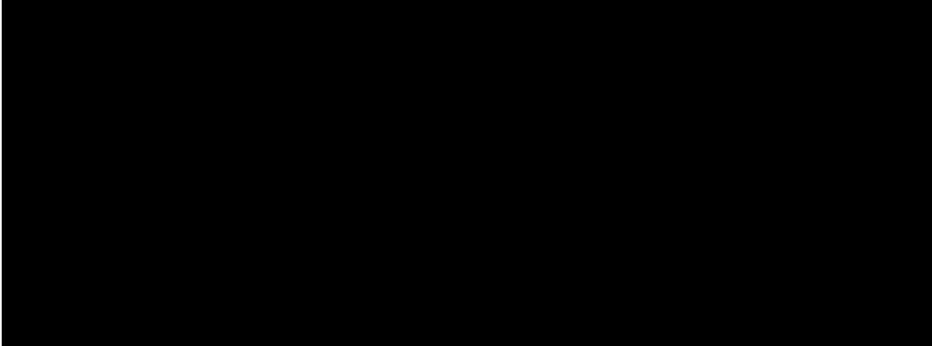
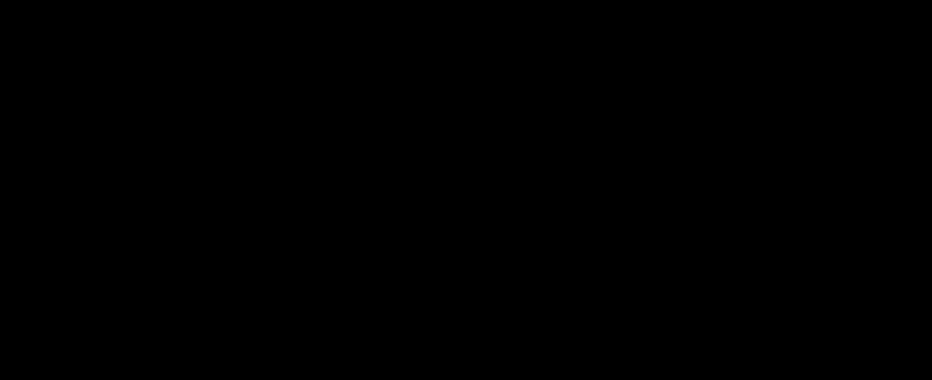
Ruvolo, P. J., and Reardon, J., concurred.

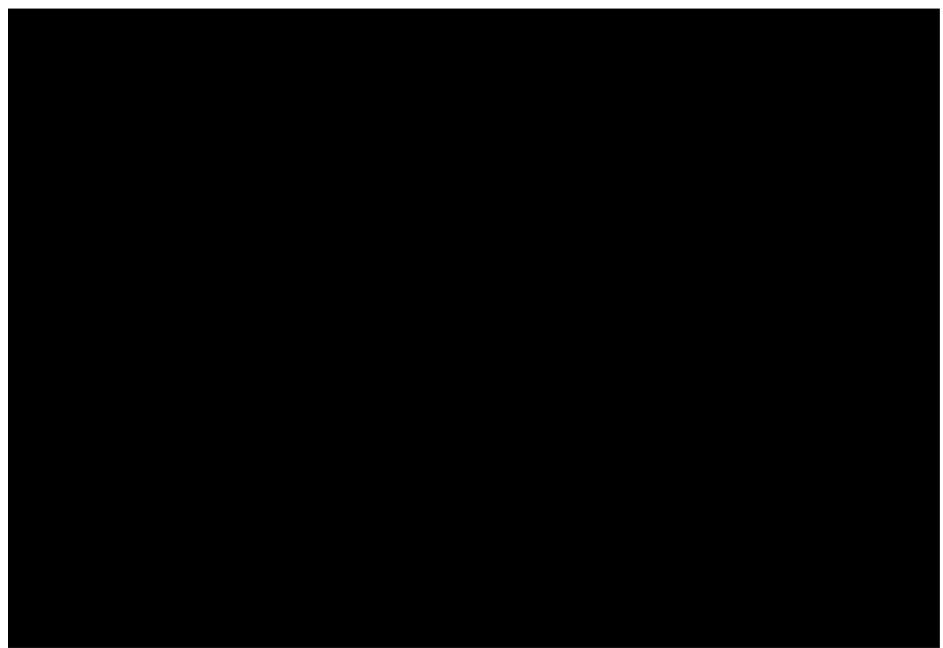
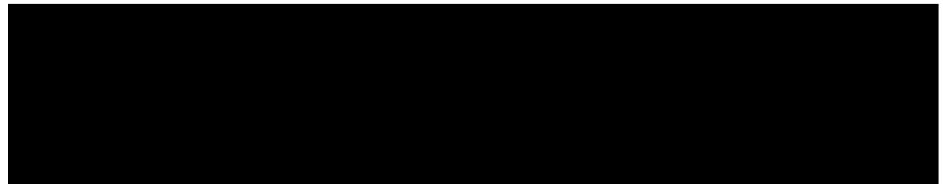
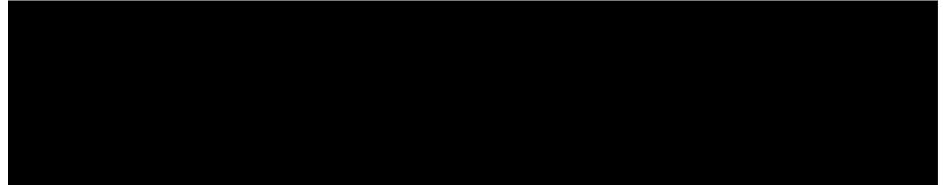
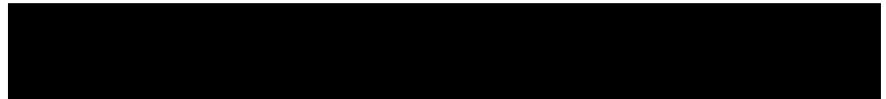
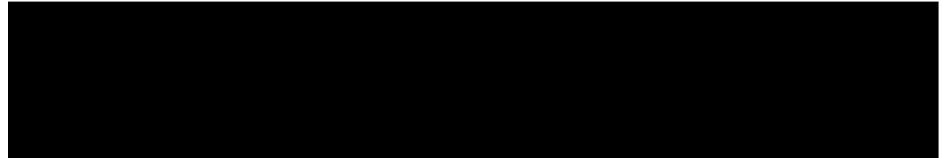
Respondent's petition for review by the Supreme Court was denied October 12, 2016, S236491. Chin, J., and Corrigan, J., did not participate therein.

[No. B263377. Second Dist., Div. Four. July 5, 2016.]

JOHN C. TORJESEN, Plaintiff and Respondent, v.
HARRY MANSDORF, Individually and as Trustee, etc., et al., Defendants;
JAIME DEJESUS GONZALEZ, Third Party Claimant and Appellant.

[REDACTED]





[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Long Beach Legal, John C. Feely; and Jaime DeJesus Gonzalez, in pro. per., for Third Party Claimant and Appellant.

John C. Torjesen, in pro. per., for Plaintiff and Respondent.

OPINION

WILLHITE, J.—The Enforcement of Judgments Law (Code Civ. Proc., § 680.010 et seq.) (the EJL) provides that “[a]fter the death of the judgment debtor, enforcement of a judgment against property in the judgment debtor’s estate is governed by the Probate Code, and not by this title.” (Code Civ. Proc., § 686.020.) The Probate Code provides that money judgments against a decedent, or claims against a deceased settlor or trustee of a trust, are payable in the course of administration, and are not enforceable under the EJL against property in the estate of the decedent or the trust estate unless the property had been levied upon before the decedent died. (Prob. Code, §§ 9300, 9303, 19300, 19303.)

In the case before us, a judgment creditor obtained a judgment against a judgment debtor (individually and as trustee of the debtor’s trust), but did not levy on the debtor’s property until after the debtor died. A third party claimant to the property filed a third party claim, and the judgment creditor filed a petition under the EJL to invalidate the third party claim. The trial court granted the judgment creditor’s petition. The third party claimant did not appeal from that ruling. Two years later, the third party claimant filed a motion to vacate the order granting the petition, on the ground that it is void because the trial court did not have jurisdiction to proceed under the EJL. The trial court denied the motion, and the third party claimant appealed.

■ We conclude that the underlying order invalidating the third party claim was voidable, not void, and became final once the time to appeal that order ran. Therefore, we hold the trial court properly denied the third party claimant's belated motion to vacate that order.

BACKGROUND

Plaintiff John C. Torjesen obtained a \$2 million judgment against defendants Harry Mansdorf, individually and as trustee of the Mansdorf Family Revocable Trust (the Trust) on January 31, 2012. On September 17, 2012, he obtained a writ of execution¹ and on October 11, 2012, the Ventura County Sheriff's Department, at the direction of Torjesen, levied on property (the Malibu property) owned by Mansdorf as trustee of the Trust. Mansdorf, however, had died on August 27, 2012.

On March 6, 2013, the Ventura County Sheriff's Department mailed to the Trust a notice that the Malibu property was scheduled to be sold at a sheriff's auction on April 18, 2013. Eight days later, third party claimant Jaime DeJesus Gonzalez filed a third party claim to ownership and possession of the Malibu property pursuant to Code of Civil Procedure section 720.130 (part of the EJL). Gonzalez asserted that in 2008, Mansdorf, in his capacity as trustee of the Trust, had transferred the Malibu property to himself (in his individual capacity) and Gonzalez as joint tenants. Gonzalez contended that at the time Torjesen levied on the property, neither Mansdorf nor the Trust owned it because it had passed to Gonzalez by right of survivorship, free and clear of Torjesen's liens, at the time of Mansdorf's death.

In response, on March 25, 2013, Torjesen sought and obtained a temporary restraining order to enjoin the Ventura County Sheriff's Department from releasing the Malibu property from the execution levy until the trial court could hear and determine a petition on the validity of the third party claim. Two days later, Torjesen filed a petition under the EJL to invalidate Gonzalez's third party claim. The petition alleged that (1) Gonzalez was not a valid third party claimant under Code of Civil Procedure section 720.110; (2) the grant deed under which Gonzalez claimed ownership was recorded after Torjesen's judgment, and therefore did not supersede Torjesen's interest; (3) the grant deed was inconsistent with the terms of the joint venture agreement pursuant to which the transfer allegedly occurred; (4) the grant deed Gonzalez filed

¹ An earlier writ of execution had been issued on June 28, 2012, but that writ incorrectly listed "Mansford Family Trust" as a judgment debtor. A new writ of execution that correctly identified the Trust was issued on September 17, 2012. The Ventura County Sheriff levied under the later writ of execution.

was altered, which rendered it void; (5) there was no effective delivery of the grant deed from Mansdorf to Gonzalez; and (6) Gonzalez's claim of ownership under joint tenancy was contrary to representations he made in federal court that the Malibu property passed to Mansdorf's estate upon his death.

Gonzalez's opposition to the petition was due a week later, on April 3, 2013. The day before the opposition was due, Gonzalez's attorney sought an extension of time to file the opposition, citing a medical issue, but the trial court denied the request. The next day, Gonzalez filed a declaration by Mansdorf's widow in support of his third party claim; he filed no points and authorities in opposition to Torjesen's petition.

On April 8, 2013, the day before the scheduled hearing, Gonzalez's attorney substituted out of the case, and Gonzalez, *in propria persona*, filed a request for dismissal without prejudice of his claim. The court entered the dismissal that same day. A week later, Torjesen filed an ex parte application asking the trial court to reconsider its ruling dismissing Gonzalez's claim, arguing that under the EJL, proceedings to determine the validity of a third party claim cannot be dismissed without the consent of the judgment creditor. On April 15, 2013, the trial court granted Torjesen's request for reconsideration, retracted its order dismissing the third party claim, and granted Torjesen's petition to invalidate Gonzalez's third party claim. Gonzalez did not appeal the trial court's order.

Two years later, Gonzalez, represented by new counsel, filed an ex parte application to vacate the trial court's order invalidating his third party claim. Gonzalez argued that the third party claim process used in the case was unlawful because the judgment debtor had died before the execution lien was perfected (citing Code Civ. Proc., § 686.020 and Prob. Code, §§ 19300, 19303), and therefore the order was void. The trial court denied the application on March 18, 2015, stating that the matter was resolved when the court granted Torjesen's petition to invalidate the third party claim in April 2013. Gonzalez timely filed a notice of appeal from the order denying his application.

DISCUSSION

On appeal, Gonzalez argues that the April 15, 2013 order invalidating his third party claim was void *ab initio* because Code of Civil Procedure section 686.020 and Probate Code sections 9300 and 19300 expressly disallow enforcement of judgments under the EJL against property of a judgment debtor after the judgment debtor's death, unless that property was subject to

an execution lien at the time of the debtor's death. Therefore, he contends, the trial court's March 18, 2015 order denying his motion to vacate the April 15, 2013 order also is void and appealable.

■ We agree that judgment creditor Torjesen proceeded to enforce his judgment in a manner that unquestionably was improper.² The statutory scheme could not be more clear: following the death of a judgment debtor, a judgment cannot be enforced against the judgment debtor's property, or property in his trust, by levying on that property under a writ of execution, and the judgment creditor must instead proceed under the Probate Code. (Code Civ. Proc., § 686.020; Prob. Code, §§ 9300, 19300.) But the question here is, did the statutory scheme deprive the court of fundamental jurisdiction with respect to Torjesen's enforcement of his judgment, or did the court merely act in excess of its jurisdiction by ruling on Torjesen's petition under the EJL? The answer matters, because if it is the former, the court's order is void, and subject to collateral attack at any time. But if the answer is the latter, the order is merely voidable, and it cannot be collaterally attacked once it is final, i.e., after the time to appeal has run. We conclude that under the circumstances here, the court's order was in excess of its jurisdiction, and was not subject to collateral attack two years after it was entered.³

A. Law Governing Attacks on Final Orders and Judgments

■ "A motion to vacate a judgment, made after the expiration of the six-month period allowed in section 473 of the Code of Civil Procedure . . . is governed by the rules applicable to collateral attack. [Citations.] In the absence of extrinsic fraud or mistake [citation] a judgment so attacked cannot be set aside unless it is void on its face. [Citations.]" (*Wells Fargo & Co. v. City etc. of S.F.* (1944) 25 Cal.2d 37, 40 [152 P.2d 625]; see also *Thompson v. Cook* (1942) 20 Cal.2d 564, 569 [127 P.2d 909] ["It is well settled in this state that a court has no power to set aside on motion a judgment or order not void on its face unless the motion is made within a reasonable time, and it has been definitely determined that such time will not extend beyond the limited time fixed by section 473 of the Code of Civil Procedure as at present in force"].)

² We note that Mansdorf's attorney filed and served on Torjesen's attorney a request for judicial notice of Mansdorf's death on October 25, 2012. Thus, Torjesen had notice of Mansdorf's death no later than two weeks after the Malibu property was levied upon, well before the property was sold.

³ We might reach a different conclusion if the record showed that Mansdorf's estate was being administered in probate, because the probate court would then have had jurisdiction in rem over the property at issue. (*Estate of Radovich* (1957) 48 Cal.2d 116, 121 [308 P.2d 14].) But there is no indication in the record that the estate was in probate.

■ In *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653 [16 Cal.Rptr.3d 76, 93 P.3d 1020], the Supreme Court addressed when a jurisdictional error renders a judgment (or a final order) subject to collateral attack. The court explained that “jurisdictional errors are of two types. ‘Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.’ [Citation.] When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and ‘thus vulnerable to direct or collateral attack at any time.’ [Citation.] ¶ However, ‘in its ordinary usage the phrase “lack of jurisdiction” is not limited to these fundamental situations.’ [Citation.] It may also ‘be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no “jurisdiction” (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.’ [Citation.] ‘ “[W]hen a statute authorizes [a] prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction.” ’ [Citation.] When a court has fundamental jurisdiction, but acts in excess of its jurisdiction, its act or judgment is merely voidable. [Citations.] That is, its act or judgment is valid until it is set aside, and a party may be precluded from setting it aside by ‘principles of estoppel, disfavor of collateral attack or res judicata.’ [Citation.] Errors which are merely in excess of jurisdiction should be challenged directly, for example by motion to vacate the judgment, or on appeal, and are generally not subject to collateral attack once the judgment is final unless ‘unusual circumstances were present which prevented an earlier and more appropriate attack.’ [Citations.]’ (*People v. American Contractors Indemnity Co., supra*, at pp. 660–661.)

B. The Trial Court Properly Denied Gonzalez’s Motion to Vacate

In his appellant’s opening brief, Gonzalez does not specifically address the trial court’s fundamental jurisdiction or the difference between void and voidable orders. Instead, he relies upon language from *Casa Eva I Homeowners Assn. v. Ani Construction & Tile, Inc.* (2005) 134 Cal.App.4th 771 [36 Cal.Rptr.3d 401] (*Casa Eva*) to assert that “[t]he trial court had no jurisdiction to utilize an expressly unauthorized statutory scheme to entertain the Third Party Claim process nor enter the April 15, 2013, Order.” His reliance on *Casa Eva* is misplaced.

To be sure, the appellate court in *Casa Eva* referred to an order made in contravention of the EJL as void: “ ‘These judgment lien statutes are subject to strict construction because they are purely the creation of the Legislature.

[Citations.] Thus, where a statute requires a court to exercise its jurisdiction in a particular manner, follow a particular procedure, or be subject to certain limitations, an act beyond those limits is in excess of its jurisdiction and void.’ [Citations.]’ (*Casa Eva, supra*, 134 Cal.App.4th at pp. 778–779, citing *Pangborn Plumbing Corp. v. Carruthers & Skiffington* (2002) 97 Cal.App.4th 1039, 1056 [119 Cal.Rptr.2d 416] and *Epstein v. Abrams* (1997) 57 Cal.App.4th 1159, 1167 [67 Cal.Rptr.2d 555].) But *Casa Eva*, and the cases upon which it relied, did not involve collateral attacks on final judgments or orders. Rather, those cases involved *direct* attacks on judgments or orders by means of timely appeals. Thus, the appellate courts declared those *voidable* judgments void, not because the trial courts lacked fundamental jurisdiction, but because they acted in excess of their jurisdiction. Those cases have no bearing on the present case.

Because the present case involves a collateral attack on a final order, the relevant question is whether the trial court had fundamental jurisdiction, i.e., jurisdiction over the subject matter and the parties. Gonzalez appears to argue that the statutory scheme at issue here—Code of Civil Procedure section 686.020 and Probate Code sections 9300 and 19300—deprived the trial court of subject matter jurisdiction. He is incorrect.

Without question, the superior court has jurisdiction over disputes related to the enforcement of judgments and the validity of claims to property that has been levied upon. (See, e.g., Code Civ. Proc., §§ 720.310, subd. (a) [providing that creditor or third party claimant “may petition the court for a hearing to determine the validity of the third-party claim and the proper disposition of the property that is subject of the claim”], 680.160 [“‘Court’ means the court where the judgment sought to be enforced was entered”].) The statutory scheme does not deprive the superior court of jurisdiction over these matters. It simply limits the manner in which a judgment creditor may enforce a judgment against a deceased judgment debtor’s property.

The trial court’s error in this case was in allowing Torjesen to proceed under the EJL.⁴ But that error was an act in excess of jurisdiction, which could have been addressed in an appeal from the order granting Torjesen’s petition. Because Gonzalez did not appeal from that order, it is a final order not subject to collateral attack. Therefore, the trial court properly denied Gonzalez’s motion to vacate the earlier order.

⁴ To be fair to the trial court, Gonzalez himself proceeded under the EJL when he filed his third party claim, and did not bring to the court’s attention that Torjesen could not enforce his judgment under the EJL due to Mansdorf’s death.

DISPOSITION

The order denying Gonzalez's motion to vacate the April 15, 2013 order is affirmed. The parties shall bear their own costs on appeal.

Epstein, P. J., and Collins, J., concurred.

A petition for a rehearing was denied July 25, 2016.

[No. B261916. Second Dist., Div. Six. July 5, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
ANGEL ROBERT TREVINO, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

10

ANSWER The answer is (A). The first two digits of the number 1234567890 are 12.

10. The following table summarizes the results of the study. The first column lists the variables, the second column lists the estimated coefficients, and the third column lists the standard errors.

ANSWER The answer is (A) $\frac{1}{2}$.

COUNSEL

Christina Alvarez Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, William H. Shin and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

PERREN, J.—Angel Robert Trevino appeals his conviction by jury of first degree burglary of an inhabited recreational vehicle (RV). (Pen. Code, §§ 459, 460.)¹ Section 460, subdivision (a) categorizes burglary as first degree if it is of “an inhabited dwelling house, vessel . . . , floating home . . . , or trailer coach . . . , or the inhabited portion of any other building” Appellant contends that because an RV, statutorily referred to as a “house car,”² is not specifically included in section 460, subdivision (a), his first degree burglary conviction cannot stand. We conclude that the absence of the words “recreational vehicle” or “house car” from section 460, subdivision (a) is not determinative, and that the phrase “inhabited dwelling house,” as used in that subdivision, includes an inhabited RV. Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND

On August 29, 2013, Cathy Coggins-Allen and her husband, Mike Allen, had dinner at a restaurant with appellant and his wife, Linda Trevino (Linda). Allen and appellant drank alcohol. After dinner, appellant drove Coggins-Allen and Allen to the RV where the couple had been living for several years. The RV has a truck-style cab with doors and is described as C-style, with a bed over the cab.

Appellant parked his van in front of the RV. Around 2:15 a.m., appellant woke up Allen and Coggins-Allen and asked for a cigarette. He appeared intoxicated and distraught. A short while later, Coggins-Allen heard appellant arguing with Linda. Appellant then drove away in the van. When he returned, he started punching Linda and kicking her in the shins.

After appellant drove away again, Coggins-Allen invited Linda into their RV. Appellant subsequently returned, pounded on the RV’s side door and demanded that Linda come out. Linda refused. Appellant kicked the door numerous times, causing severe damage.

Appellant started to climb into the RV through an open window. Allen tried to push appellant out of the window, but appellant grasped Allen’s arms and dug his fingernails into them. Appellant entered the RV, grabbed Linda by her

¹ All further statutory references are to the Penal Code unless otherwise stated.

² “A ‘house car’ is a motor vehicle originally designed, or permanently altered, and equipped for human habitation, or to which a camper has been permanently attached.” (Veh. Code, § 362.) It is distinguishable from a “trailer coach,” which is defined as “a vehicle, other than a motor vehicle, designed for human habitation or human occupancy for industrial, professional, or commercial purposes, for carrying property on its own structure, and for being drawn by a motor vehicle.” (*Id.*, § 635.)

clothing and pushed her down toward the floor. Linda stepped into a portable barbecue, where she lost her balance, and fell down. While Linda was on the floor, appellant kicked her in the shins. He then pulled her back up and hit her in the shoulders before driving away in the van.

Coggins-Allen called 911. Paramedics took Linda to the hospital while Allen drove himself to the emergency room in the RV. Later, appellant also went to the hospital.

During the ensuing investigation, Santa Barbara Police Officer Chad Hunt noticed that the RV's door was damaged. Linda told Hunt that appellant caused the damage when he kicked the door. Hunt observed that Allen had scratches on both arms and that Linda had a bruise above her knee. A restraining order existed protecting Linda from appellant.

Appellant was charged with first degree residential burglary (§§ 459, 460, subd. (a); count 1); corporal injury to spouse (§ 273.5, subd. (a); count 2); battery with serious bodily injury (§ 243, subd. (d); count 3); vandalism exceeding \$400 (§ 594, subd. (b)(1); count 4); and misdemeanor domestic violence contempt of court (§ 166, subd. (c)(1); count 5). Count 1 alleged that the offense was a burglary of an inhabited dwelling (§ 460, subd. (a)).

Appellant moved to dismiss the first degree burglary allegation pursuant to section 1118.1. He argued that no reasonable trier of fact could find the allegation true because an RV is a motor vehicle and not an "inhabited dwelling house" as required by statute. Appellant asserted that because the Legislature included burglary of motor vehicles in section 459, but not in section 460, it meant to exclude vehicular burglaries from those classified as first degree. The trial court denied the motion, relying upon the holding in *People v. Wilson* (1992) 11 Cal.App.4th 1483 [15 Cal.Rptr.2d 77] (*Wilson*) that a tent is an "inhabited dwelling house" or building for purposes of section 460. The court analogized an RV to a tent as they both have walls and a roof.

The jury found appellant guilty of counts 1, 2, 4 and 5. As to count 3, the jury found appellant guilty of the lesser included offense of battery. The jury also found the residential burglary allegation in count 1 to be true.

The trial court suspended imposition of sentence and placed appellant on probation. As a condition of probation, appellant was ordered to serve 240 days in jail, with 105 days of presentence custody credit.

DISCUSSION

Appellant contends the Legislature did not intend for burglary of an inhabited RV to be of the first degree because it specifically included the

terms “house car” and “vehicle” in section 459,³ which generally defines burglary, but not in section 460, subdivision (a),⁴ which defines first degree burglary. He relies largely upon *People v. Moreland* (1978) 81 Cal.App.3d 11 [146 Cal.Rptr. 118] (*Moreland*), in which the defendant discharged a firearm into an RV and was convicted of shooting at an “inhabited dwelling house” under section 246.⁵ In a split decision, the Court of Appeal reversed, holding that an RV was not included in the definition of “‘inhabited dwelling house’” under section 246. (*Moreland*, at p. 21.) In reaching its decision, the *Moreland* majority opined that a reasonable inference could be drawn that because an RV, even if inhabited, is listed in section 459 as a “house car,” but not in section 460, it is not included in the term “‘inhabited dwelling house’” in section 460. (*Moreland*, at p. 21.)

Our Supreme Court was not convinced by *Moreland’s* interpretation of sections 459 and 460. (*People v. Cruz* (1996) 13 Cal.4th 764, 778 [55 Cal.Rptr.2d 117, 919 P.2d 731] (*Cruz*).) It did “not believe that the Legislature would conclude from [*Moreland*], that *any structure* listed in section 459—but not specifically enumerated in section 460—was excluded from the latter section.” The court explained that “[t]he *Moreland* opinion did not purport to establish such a broad rule, nor would such a rule be at all reasonable, since many structures that are enumerated in section 459 but not mentioned in section 460, most notably ‘room,’ ‘tenement,’ and ‘apartment,’ long have been understood as included in the term ‘inhabited dwelling house.’” (*Ibid.*; see, e.g., *People v. Fond* (1999) 71 Cal.App.4th 127, 131–132 [83 Cal.Rptr.2d 660] [hospital room]; *People v. DeRouen* (1995) 38 Cal.App.4th 86, 91–92 [44 Cal.Rptr.2d 842] [vacation home and trailer], overruled on another ground by *People v. Allen* (1999) 21 Cal.4th 846,

³ Section 459 states, in pertinent part: “Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, ‘inhabited’ means currently being used for dwelling purposes, whether occupied or not.”

⁴ Section 460 states, in pertinent part: “(a) Every burglary of an inhabited dwelling house, vessel, as defined in the Harbors and Navigation Code, which is inhabited and designed for habitation, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, or trailer coach, as defined by the Vehicle Code, or the inhabited portion of any other building, is burglary of the first degree. [¶] (b) All other kinds of burglary are of the second degree.”

⁵ At the time relevant in *Moreland*, section 246 provided that “[a]ny person who shall maliciously and wilfully discharge a firearm at an inhabited dwelling house or occupied building, is guilty of a felony” (*Moreland, supra*, 81 Cal.App.3d at p. 14.)

864–866 [89 Cal.Rptr.2d 279, 984 P.2d 486]; *People v. Fleetwood* (1985) 171 Cal.App.3d 982, 988 [217 Cal.Rptr. 612] [apartment and hotel room].)

■ Appellant argues that to qualify as an “inhabited dwelling house,” a residence must be a structure that is fixed to the ground and either cannot be moved at all or cannot be moved without being first dismantled and detached from the ground. *Cruz* rejected this argument, reasoning that “‘inhabited dwelling house’” has a “broad, inclusive definition” that depends on “whether the dwelling was being used as a residence.” (*Cruz, supra*, 13 Cal.4th at p. 776.) The court noted that “the distinction between first and second degree burglary is founded upon the perceived danger of violence and personal injury that is involved when a residence is invaded” and that the term “‘inhabited dwelling house’” in section 460 “should be construed to effectuate the legislative purposes underlying the statute, namely, to protect the peaceful occupation of one’s residence.” (*Cruz*, at pp. 775–776.) The court found no cases “indicating that an inhabited dwelling house must be set on a foundation in order to be subject to the protection provided by the additional punishment set forth under section 460.” (*Id.* at p. 778.) Indeed, it quoted Perkins and Boyce, *Criminal Law* (3d ed. 1982), page 256, for the proposition that “[a] regular place of abode is a “dwelling house” for purposes of burglary . . . even if it is on wheels and not restricted to a particular locality.” (*Cruz*, at p. 778, italics added.)

■ Thus, “it is the element of habitation, not the nature of the structure that elevates the crime of burglary to first degree.” (*Wilson, supra*, 11 Cal.App.4th at p. 1489 [a tent, though specifically included in § 459 and not in § 460, may be a “dwelling house” for purposes of § 460 if it is inhabited, meaning it is “used for sleeping and storage of [the inhabitants’] possessions”]; *People v. Fleetwood, supra*, 171 Cal.App.3d at p. 987 [“A place is an inhabited dwelling if a person with possessory rights uses the place as sleeping quarters intending to continue doing so in the future”].) As *Fond* observed, “[t]he burglary of an inhabited dwelling is more serious than other types of burglaries because it violates the victim’s need to feel secure from personal attack. People simply need some place where they can let down their guard and where they can sleep without fear for their safety.” (*People v. Fond, supra*, 71 Cal.App.4th at p. 131; see *People v. DeRouen, supra*, 38 Cal.App.4th at pp. 91–92 [noting “important societal policies” of protecting personal safety of occupants and protection of an inhabitant’s “‘most secret zone of privacy’” support distinction of burglary of inhabited dwellings as being of first degree].)⁶

⁶ Appellant’s reliance on *People v. Goolsby* (2014) 222 Cal.App.4th 1323 [166 Cal.Rptr.3d 697], reversed by *People v. Goolsby* (2015) 62 Cal.4th 360 [196 Cal.Rptr.3d 726, 363 P.3d 623], is misplaced for two reasons. First, its precedential value was eradicated when the

■ Here, it is undisputed that the RV was Coggins-Allen and Allen's sole place of abode. They had inhabited it for several years and used it for sleeping and storing their possessions. (See *Cruz, supra*, 13 Cal.4th at pp. 776–779; *Wilson, supra*, 11 Cal.App.4th at p. 1489.) Their RV therefore qualifies as an “inhabited dwelling house” for purposes of section 460, subdivision (a). Because appellant unlawfully entered an “inhabited dwelling house” with the intent to commit a felony, the jury properly convicted him of first degree burglary. (§§ 459, 460, subd. (a).)

The judgment is affirmed.

Gilbert, P. J., and Yegan, J., concurred.

On July 12, 2016, the opinion was modified to read as printed above. Appellant’s petition for review by the Supreme Court was denied October 12, 2016, S236651.

Supreme Court granted review. (See Cal. Rules of Court, former rule 8.1105(e)(1).) Second, it concerned the definition of “inhabited structures” under an entirely different statutory scheme. (See §§ 450, 451.)

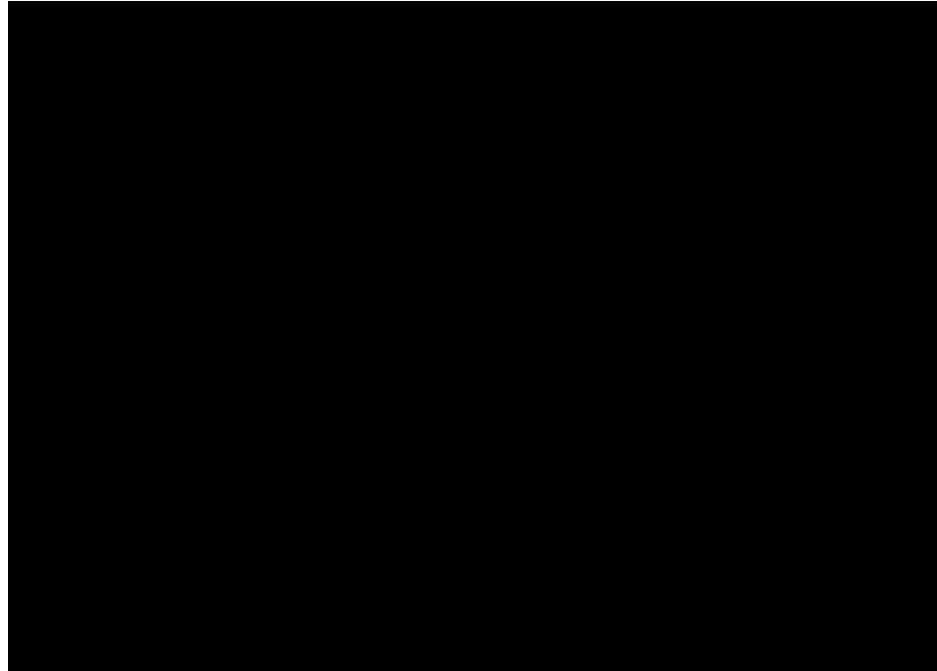
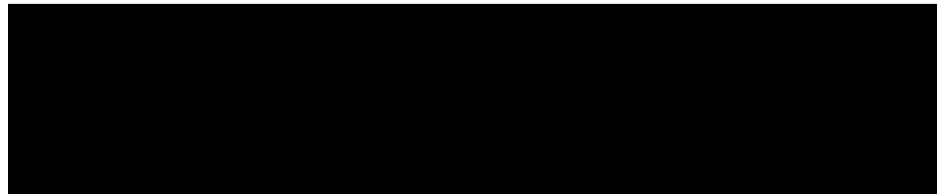
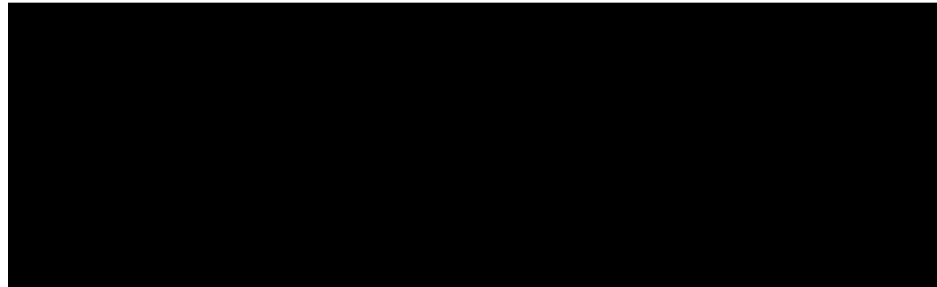
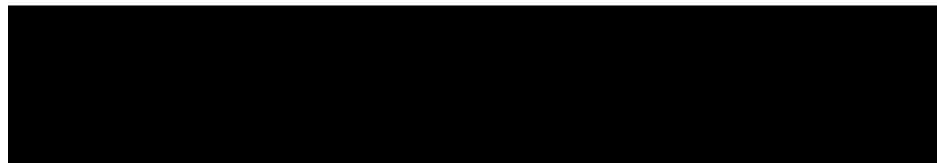
[No. A134913. First Dist., Div. Four. July 5, 2016.]

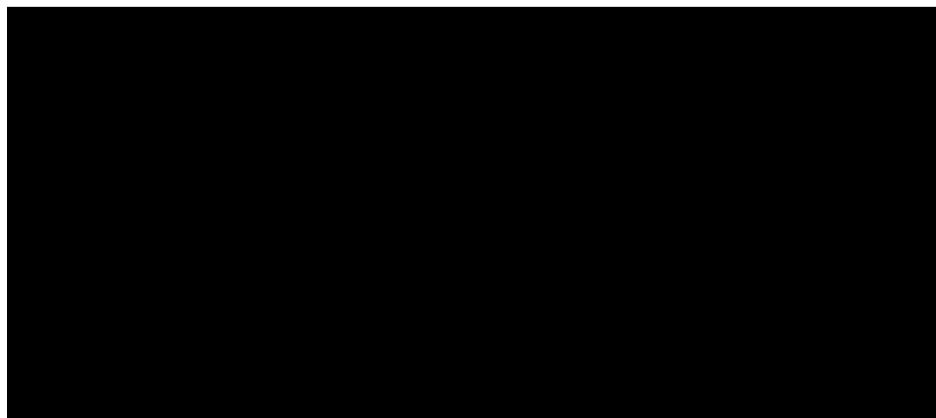
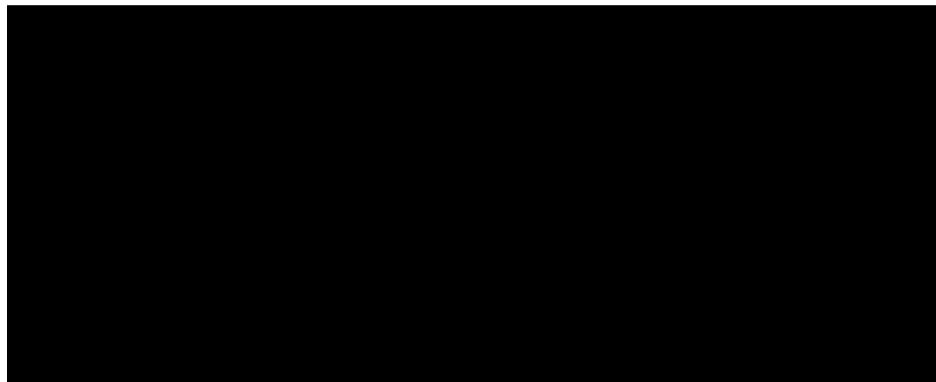
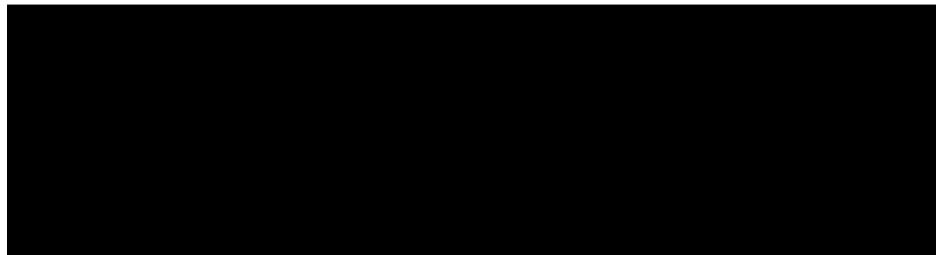
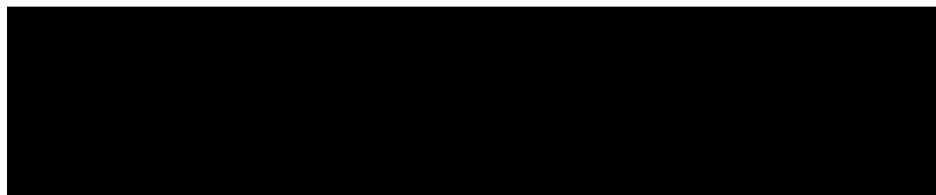
In re AUTOMOBILE ANTITRUST CASES I and II.

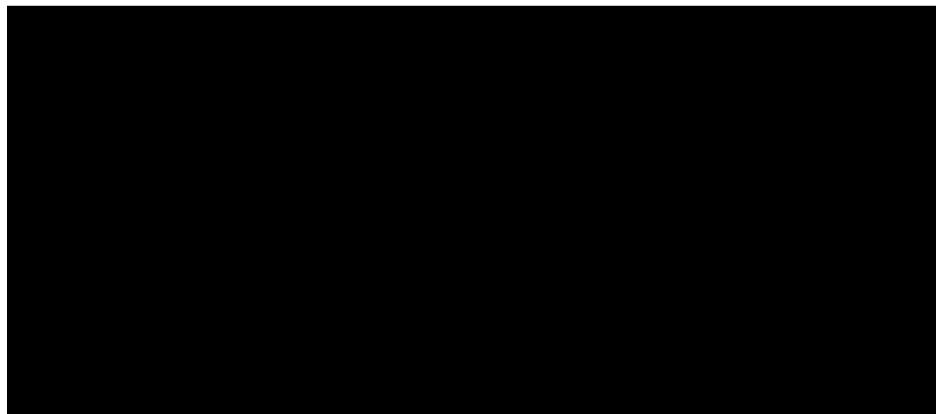
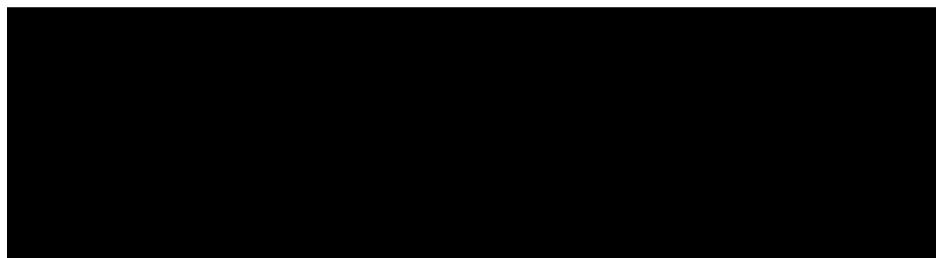
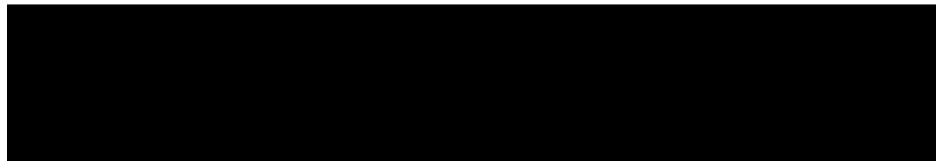
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Latham & Watkins, Margaret M. Zwisler, Gregory G. Garre, Jason L. Daniels, Michael E. Bern, Katherine I. Twomey and Adam R. Thomas for Respondents.

OPINION

REARDON, J.—In this coordinated proceeding, certain purchasers of new automobiles in California (plaintiffs) brought state law claims against a number of automobile manufacturers and dealer associations under the Cartwright Act (Bus. & Prof. Code, §§ 16720–16728) and the unfair competition law (Bus. & Prof. Code, §§ 17200–17210). Specifically, plaintiffs allege that defendant manufacturers and associations conspired to keep lower priced, yet virtually identical, new cars from being exported from Canada to the United States, thereby keeping new vehicle prices in California higher than they would have been in a properly competitive market. After years of litigation, the trial court granted summary judgment in favor of the two

remaining defendants in the case—Ford Motor Company (Ford U.S.) and its subsidiary, Ford Motor Company of Canada, Ltd. (Ford Canada) (collectively, Ford)—concluding that plaintiffs had failed to produce sufficient evidence of an actual agreement among Ford and the other manufacturers to restrict the export of new vehicles from Canada to the United States.

On appeal, plaintiffs challenge the trial court’s grant of summary judgment in favor of Ford, arguing that the evidence presented in this case was more than sufficient to raise a triable issue of material fact as to the existence of an illegal agreement to curb exports. In addition, they claim that the trial court improperly excluded certain direct evidence of the alleged conspiracy. Based on our de novo review of this matter, we conclude that summary judgment was appropriately granted to Ford U.S. However, we agree with plaintiffs that the admissible evidence presented was sufficient to demonstrate the existence of a material fact as to whether Ford Canada participated in an illegal agreement to restrict the export of automobiles from Canada to the United States in violation of the Cartwright Act.¹ We therefore reverse the trial court’s grant of summary judgment in favor of Ford Canada.

I. BACKGROUND

A. Preliminary Matters

This litigation began over a decade ago when, in early 2003, more than a dozen different lawsuits were filed in California against various automobile manufacturers and trade associations, each alleging state law causes of action for antitrust conspiracy and unfair business practices and each filed as a class action on behalf of individuals who purchased or leased new vehicles in California that were manufactured or distributed within a certain period of time by one of the named defendants. The lawsuits were eventually coordinated into this proceeding. (*In re Automobile Antitrust Cases I & II* (2005) 135 Cal.App.4th 100, 106 [37 Cal.Rptr.3d 258] (*Automobile Antitrust Cases*).) Thereafter, in October 2003, plaintiffs filed their consolidated amended class action complaint, the operative pleading in this matter.² In addition to Ford, the class action complaint named numerous other automobile manufacturers

¹ The trial court concluded below that plaintiffs’ unfair competition claim was founded upon the alleged violation of the Cartwright Act, and was thus derivative of the complaint’s antitrust allegations. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 866–867 [107 Cal.Rptr.2d 841, 24 P.3d 493] (*Aguilar*); *Eddins v. Redstone* (2005) 134 Cal.App.4th 290, 344 [35 Cal.Rptr.3d 863]. Plaintiffs have not challenged this determination on appeal. Since the two causes of action stand or fall together, we will not separately discuss plaintiffs’ unfair competition claim.

² Plaintiffs—the majority of whom eventually became class representatives in this litigation—are George Bell, Wei Cheng, Laurance de Vries, Joshua Chen, Jason Gabelsberg, Ross Lee, Jeffrey M. Lohman, Christine Nichols, Local 588 of the United Food & Commercial

as defendants.³ Also designated as defendants were the Canadian Automobile Dealers Association (CADA)—a trade organization that represents, promotes, and protects the interests of franchised automobile dealers in Canada—and the National Automobile Dealers Association (NADA), CADA’s United States counterpart. (See *Automobile Antitrust Cases*, at p. 106.) All told, the manufacturer defendants accounted for approximately 88 percent of automobile sales in the United States and Canada from 2001 to 2003. Sales by Ford, General Motors, and Chrysler—sometimes referred to as the “Big 3”—constituted approximately 67 percent of that market.

As indicated above, the complaint alleges that defendant automobile manufacturers and dealer associations violated state antitrust and unfair competition laws by conspiring to restrict the movement of lower priced Canadian vehicles into the United States market, thereby avoiding downward pressure on new vehicle prices in the United States. According to plaintiffs, during the time frame relevant to this litigation, defendant automobile manufacturers typically charged their California dealers between 10 and 30 percent more than they charged their Canadian dealers for the same make and model vehicle. Ford Canada, for example, estimated that a 2000 model F350 crewcab 4x4 DRW Lariat could be imported from Canada and sold at a price \$8,265 less than its United States counterpart (\$29,569 as opposed to \$37,834). Maintenance of this two-tiered pricing system required the continued segregation of the Canadian and United States automobile markets.

Beginning in the 1990’s, however, trade policy between the United States and Canada made exporting simpler and less expensive. Moreover, after the safety and environmental regulations governing new vehicles sold in the United States and Canada were harmonized between 1998 and 2000, the vehicles sold in the two countries became virtually identical.⁴ Then, from at least 2001 through 2003, the currency exchange rate differential between the

Workers Union, Estelle Weyl, Michael Wilsker, and W. Scott Young. Each plaintiff alleges an injury caused by one or more of defendants.

³ The named manufacturer defendants include General Motors Corporation (GM) and General Motors of Canada, Ltd. (GM Canada) (collectively, General Motors); Volkswagen AG, Volkswagen of America, Inc., and Volkswagen Canada, Inc. (Volkswagen Canada); Toyota Motor Corporation, Toyota Motor Sales, U.S.A., Inc., and Toyota Canada, Inc. (Toyota Canada) (collectively, Toyota); Honda Motor Company, Ltd. (Honda Japan); American Honda Motor Co., Inc., and Honda Canada, Inc. (Honda Canada) (collectively, Honda); Daimler-Chrysler Aktiengesellschaft (DaimlerChrysler AG); DaimlerChrysler Corporation (Daimler-Chrysler U.S.), DaimlerChrysler Motors Co., LLC, and DaimlerChrysler Canada, Inc. (Chrysler Canada) (collectively, Chrysler); Nissan Motor Company, Ltd. (Nissan Japan), Nissan North America, Inc. (Nissan USA), and Nissan Canada, Inc. (Nissan Canada); Bayerische Motoren Werke Aktiengesellschaft (BMW AG), BMW of North America, LLC, and BMW Canada, Inc. (BMW Canada); and various subsidiaries of these entities.

⁴ Specifically, according to plaintiffs, the only changes typically required for Canadian vehicles exported to the United States were replacement of odometers/speedometers (Canadian

strong United States dollar and the cheaper Canadian dollar made export sales increasingly attractive. (See *In re New Motor Vehicles Canadian Export Antitrust Litigation* (1st Cir. 2008) 522 F.3d 6, 9–10.) Faced with this particularly advantageous arbitrage opportunity,⁵ exporters began buying more and more Canadian vehicles and selling them in the United States to franchised dealers, dealers of another brand, independent dealers, and used car dealers. This created a discount distribution channel, or “gray market” for Canadian vehicles in the United States.⁶

Plaintiffs claim that, in the face of this mounting activity by exporters, the manufacturer defendants illegally agreed that they would all hold firm, each doing their part to stamp out Canadian exports, rather than taking the profits available by permitting their Canadian dealers to sell Canadian cars freely into the United States market. According to plaintiffs, this alleged conspiracy was created and implemented through a series of meetings and conference calls among defendant manufacturers. These contacts were facilitated by a number of trade associations, including CADA; the Canadian Vehicle Manufacturers’ Association (CVMA), which represented the “key or leading” automobile manufacturers in Canada, including Ford Canada, Chrysler Canada, and GM Canada; and the Association of International Automobile Manufacturers of Canada (AIAMC), which represented international manufacturers such as Honda Canada, Toyota Canada, Nissan Canada, BMW Canada, and Volkswagen Canada.

Plaintiffs further contend that the manufacturers used a variety of different tools to discourage the export of new Canadian vehicles to the United States, thereby furthering the goals of their conspiracy. By the late 1980’s, for example, Ford had modified its Canadian dealer franchise agreements (generally Franchise Agreements) to forbid export sales. The Franchise Agreements of other manufacturers contained similar provisions. In addition, manufacturers created and frequently updated “blacklists” of entities known to export vehicles for resale so that their Canadian dealers could consult the lists and refrain from selling to those entities. Additionally, the manufacturers began

automobiles record kilometers, while United States automobiles record miles) and certain headlight adjustments. (*Automobile Antitrust Cases, supra*, 135 Cal.App.4th at pp. 105–106 & fn. 2.)

⁵ “Arbitrage describes the practice of simultaneously buying and selling identical securities, currency, or other assets in different markets, ‘with the hope of profiting from the price difference in those markets.’ ” (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra*, 522 F.3d at p. 9, fn. 2.)

⁶ “A gray market is one ‘in which the seller uses legal but sometimes unethical methods to avoid a manufacturer’s distribution chain and thereby sell goods (esp. imported goods) at prices lower than those envisioned by the manufacturer.’ ” (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra*, 522 F.3d at p. 9, fn. 3.)

tracking every vehicle's unique Vehicle Identification Number (VIN) to determine which new vehicles made for sale in Canada had actually been exported to the United States. Once an exported vehicle was traced back to the particular dealer who made the export sale, many Franchise Agreements allowed for the imposition of "chargebacks," substantial fines (often in the thousands of dollars) paid by the dealer to the manufacturer. The manufacturers also imposed vehicle allocation restrictions on exporting Canadian dealers, and, at times, pursued termination of dealers engaged in the export trade. Ford, for example, initiated successful termination proceedings against a dealer that had a high incidence of export sales in 1999 and 2000.

Some manufacturers also required their Canadian dealers to include "no export" clauses in their sales agreements, under which buyers, themselves, could be required to pay a penalty if the purchased vehicle was transferred to the United States within a designated period of time. Moreover, Canadian dealers were required to conduct a "due diligence" investigation of every buyer to identify potential exporters. If a Canadian car arrived in the United States despite the erection of these substantial barriers to export, manufacturers voided warranties for the repair of new vehicles exported from Canada, declined to provide information regarding recalls, and withheld certificates of origin from exporters. Distribution controls were also placed on the parts used to convert odometers from kilometers to miles.

Although the cross-border sale of *used* vehicles began to skyrocket in 1999 and 2000 and continued at very high levels throughout the alleged conspiracy period, plaintiffs presented evidence that the manufacturers' multi-faceted attempt to restrict the export of *new* vehicles from Canada to the United States proved effective. In fact, export sales of new vehicles actually decreased during the alleged conspiracy period, despite circumstances amounting to a "perfect storm" for cross-border arbitrage. (Cf. *In re New Motor Vehicles Canadian Export Antitrust Litigation*, *supra*, 522 F.3d at p. 10.) Plaintiffs maintain that cutting off this discount distribution channel allowed defendant automobile manufacturers to sell or lease new cars in California, and indeed throughout the United States, at artificially inflated prices. Thus, according to plaintiffs, class members paid more to buy or lease new vehicles during the conspiracy period than they would have in the absence of defendants' illegal agreement to restrict exports. Plaintiffs' expert estimates total class damages at \$1.07 billion.

During 2004 and into 2005, the trial court considered a number of preliminary motions filed by defendants, including motions contesting personal jurisdiction and demurrers to the consolidated complaint. For example, the trial court concluded that it lacked personal jurisdiction over four of the nonresident defendants—Honda Japan, Volkswagen AG, Nissan Japan, and

CADA—and thus granted their motions to quash service of summons. (*Automobile Antitrust Cases, supra*, 135 Cal.App.4th at p. 105.) We subsequently affirmed this determination on appeal. (*Ibid.*)

In addition, a similar lawsuit had been filed in federal court against many of the same defendants, alleging violation of federal antitrust laws. (See *In re New Motor Vehicles Canadian Export* (D.Me. 2004) 307 F.Supp.2d 136, 137–138 (the federal multidistrict litigation or federal MDL).) Parallel cases were also pending in a number of other state courts. In June 2004, the trial court issued an order, after consultation with Judge Hornby—the judge in the federal MDL—coordinating discovery among this action, the federal action, and other state actions.

Plaintiffs filed their motion for class certification in the instant matter in the spring of 2005. Proceedings were stayed, however, while the parties conducted extensive coordinated discovery and litigated their class certification motion in the federal MDL.⁷ Ultimately, in May 2009, the trial court granted plaintiffs' motion for class certification in this proceeding. The court defined the class generally as: “All persons and entities residing in California on the date notice is first published, who purchased or leased a new motor vehicle manufactured or distributed by a defendant, from an authorized dealer located in California, during the period January 1, 2001 through April 30, 2003, for their own use.” We later denied defendant's petition for writ of mandate seeking review of the class certification order. (*General Motors of Canada, Ltd. v. Superior Court* (Aug. 13, 2009, A125424) [nonpub. order].)

In the interim, Judge Hornby issued an opinion on July 2, 2009, in the federal MDL action, addressing the viability of the remaining state law damage claims. (*In re New Motor Vehicles Canadian Export Litigation, supra*, 632 F.Supp.2d at pp. 42, 44–45.) Before the federal court were summary judgment motions from each of the remaining manufacturer defendants challenging the existence of a conspiracy and a joint summary judgment motion arguing lack of evidence of antitrust impact. (*Id.* at p. 45.) With respect to the conspiracy issue, Judge Hornby concluded that there “is probably enough evidence to reach a jury on whether the manufacturers had

⁷ Although Judge Hornby certified a nationwide injunctive class and exemplar state damage classes (including a California class) in 2006, the First Circuit subsequently vacated his certification orders in 2008. (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra*, 522 F.3d 6; *In re New Motor Vehicles Canadian Export Antitrust* (D.Me. 2006) 235 F.R.D. 127 [certifying exemplar state damage classes]; *In re New Motor Vehicles Canadian Export Antitrust Litigation* (D.Me., Mar. 10, 2006, MDL Docket No. 1532) 2006 U.S.Dist. Lexis 10240 [certifying nationwide injunctive class].) Plaintiffs later elected not to pursue California class certification in the federal action and Judge Hornby dismissed the California claims. (*In re New Motor Vehicles Canadian Export Litigation* (D.Me. 2009) 632 F.Supp.2d 42, 63.)

an illegal horizontal agreement.” (*Id.* at p. 47.) Of particular interest here, the judge opined that this conclusion “is easiest for Ford and Chrysler; it is somewhat closer for GM because of disclaimer statements it made; it is closest of all for the Honda and Nissan entities because for them the evidence is almost entirely circumstantial.” (*Ibid.*, fns. omitted.) In the end, however, Judge Hornby did not finally decide the issue, because he concluded that the manufacturers were entitled to summary judgment on the issue of antitrust impact.⁸ (*In re New Motor Vehicles*, at p. 45.)

While this litigation progressed in both state and federal courts, Toyota reportedly agreed to settle. Additionally, in 2009, both GM and Daimler-Chrysler U.S. declared bankruptcy, effectively removing them from the case. Following these settlements and bankruptcies, the remaining defendants litigating this action were Ford, GM Canada, Nissan USA, and Honda.

B. *Ford’s Summary Judgment Motion and Plaintiffs’ Response*

In January 2010, Ford filed a motion for summary judgment, arguing that plaintiffs could not prove on the evidence presented that Ford’s conduct in restraining exports during the identified conspiracy period was more likely than not the result of an unlawful agreement rather than independent action.⁹ Specifically, Ford advanced evidence that it had been independently combatting the problem of what it termed “gray market exports” for decades prior to the designated conspiracy period and continued to do so during that period for the same legitimate business reason—that is, to preserve the integrity of its dealer distribution system. Given this non-conspiratorial explanation for its enforcement of export restraints, Ford argued that its conduct was as consistent with permissible competition as it was with unlawful conspiracy. Thus, summary judgment in its favor was appropriate. In addition, although Ford conceded that it had attended a number of meetings with other manufacturers during the conspiracy period at which possible joint action to combat the export problem was discussed, it asserted that no such joint action was ever taken as a result of those meetings. Indeed, Ford claimed that its actions to stop exports after these industry meetings clearly differed from the methods

⁸ The parties disagree as to the import of Judge Hornby’s conspiracy discussion. While certainly relevant, we do not view Judge Hornby’s analysis as binding on us in any way, especially since he appears to have considered much more of plaintiffs’ evidence than our own trial court did. (*In re New Motor Vehicles Canadian Export Litigation*, *supra*, 632 F.Supp.2d at pp. 47–50.)

⁹ The other manufacturers filed similar summary judgment motions on the conspiracy issue, which are not included in the record before us. In addition, all of the remaining defendants filed a joint motion for summary judgment on the issue of antitrust impact as well as a motion to exclude the opinions and testimony of plaintiffs’ expert witness, Robert E. Hall, Ph.D. Although fully briefed, these two joint motions have not been argued or decided by the trial court.

used by its competitors to combat exports, making it “impossible” for plaintiffs to establish any kind of conspiracy among defendants.

In opposition to Ford’s summary judgment motion, plaintiffs contended that they had produced documentary and testimonial evidence showing that defendants made a conscious commitment to a common scheme—the restraint of Canadian new vehicle exports to the United States—and thus summary judgment was inappropriate. Further, plaintiffs suggested that the manufacturers’ claimed “legitimate business reason” for their export restraints was likely pretextual given the economic realities of the situation. Specifically, according to plaintiffs’ expert, absent an agreement among the manufacturers to block exports, all defendant manufacturers facing competition from Canadian exports would have maximized profits by lowering list prices in the United States rather than losing United States sales to competitors’ Canadian exports. Finally, plaintiffs argued that it was irrelevant that the manufacturers did not impose the exact same export restrictions during the alleged conspiracy period. Rather, evidence that all of the manufacturers imposed some form of restraint during the relevant time frame and that none chose to abandon their export controls in favor of quick profits was sufficient evidence of parallel conduct.

C. *The Summary Judgment Hearings and Decisions*

The trial court ultimately held a number of hearings on the four summary judgment motions before it which argued lack of an actionable conspiracy. After a hearing on January 18, 2011, the trial court granted summary judgment motions in favor of Nissan USA and Honda. In particular, the trial court concluded that the evidence produced by the two manufacturers—including evidence of a legitimate business purpose for the challenged conduct, denials of wrongful behavior, and evidence of refusal to participate in meetings that might possibly have been viewed as conspiratorial—was sufficient to shift the burden to plaintiffs to produce evidence of an issue of material fact regarding the existence of the alleged conspiracy. Although the trial court acknowledged that such a conspiracy was “in the economic self-interest of each of the defendants, perhaps,” it did not find this fact probative of the existence of an impermissible agreement among the parties, which it deemed “the heart” of any Cartwright Act claim. Nor did it find evidence of shared warranty policies or of the “stepping up” of anti-export activities after the date of the alleged conspiracy particularly relevant to the existence of an actionable agreement. In sum, since the evidence submitted by plaintiffs was “not sufficient to raise a plausible inference that either Honda or Nissan USA entered into an agreement with any competitor to restrict export sales from Canada,” the trial court granted both parties’ summary judgment motions.

The trial court next turned to the summary judgment motions of Ford and GM Canada. At a hearing on January 24, 2011, the court discussed its tentative decision to deny the summary judgment motions of both manufacturers. As with Honda and Nissan USA, the trial court concluded that the evidence produced by Ford and GM Canada—including evidence of a legitimate business purpose behind the conduct at issue, denials of any wrongful behavior, and refusals to participate in certain joint export activities—was sufficient to shift the burden to plaintiffs to establish an issue of material fact regarding the existence of the alleged conspiracy. In the case of Ford and GM Canada, however, the trial court initially believed that plaintiffs had satisfied their burden, creating a material issue of fact with respect to the existence of an unlawful agreement to restrict exports in violation of the Cartwright Act. As the court framed the issue, the crucial question was whether the manufacturers acted independently to restrict exports or whether they agreed “to take steps in concert to reduce the flow of cars.”

In response, Ford first maintained that there was no evidence that Ford U.S. “conspired with anyone in Canada to do anything.” Ford further asserted that, with respect to Ford Canada, the evidence established, at most, that the manufacturer attended meetings and conference calls at which possible solutions to the export problem were discussed. But, according to Ford, no agreement with respect to any particular joint course of action was ever reached. Rather, Ford strenuously claimed, the evidence established that it had been taking unilateral action to curb exports for 15 years, and there was no evidence that its actions changed in any way during the period of the alleged conspiracy. GM Canada made similar arguments, stressing its repeated refusals, when asked, to engage in meetings or any kind of joint activity. After argument, the trial court directed plaintiffs to submit a summary of their conspiracy evidence.

While these summary judgment proceedings were pending, however, GM Canada agreed to settle its four remaining state court actions, including this California proceeding. This left Ford U.S. and Ford Canada as the sole remaining defendants in the case. At the continued hearing on May 10, 2011, plaintiffs reviewed the evidence they believed supported the existence of an unlawful agreement to restrain exports. Ford then challenged plaintiffs’ evidence and conclusions. In the end, the trial court authorized certain additional filings and indicated that it would take the matter under submission as of July 8, 2011.

Thereafter, by order dated November 4, 2011, the trial court granted the summary judgments motions of both Ford U.S. and Ford Canada.¹⁰ Specifically, the trial court found that the evidence produced by the two manufacturers was sufficient under *Aguilar, supra*, 25 Cal.4th 826, to shift the burden to plaintiffs to produce evidence of an issue of material fact regarding the existence of the alleged conspiracy. However, contrary to its earlier tentative ruling, the trial court now determined that plaintiffs had failed to satisfy this burden.

In particular, the trial court concluded that while Ford “met at different times with other alleged co-conspirators and discussed their common problem of the importation of cars from Canada to the United States, . . . such discussion of a common problem by itself is not a violation of the Cartwright Act.” Further, the trial court opined that, where there was insufficient evidence of an agreement, evidence that information was exchanged among alleged co-conspirators, or that some alleged co-conspirators “stepped up” their efforts to restrict exports after the start of the alleged conspiracy period, was not enough to carry plaintiffs’ burden. Finally, the trial court stated that the evidence presented by plaintiffs regarding the alleged co-conspirators’ motive and economic interest to conspire was insufficient, standing alone, to satisfy plaintiffs’ burden of production. In sum, under *Aguilar*, “[t]here was no evidence to support a conclusion that it was more likely than not that [Ford U.S.] and/or Ford Canada entered into an agreement with any other alleged co-conspirator.”

Final judgment was entered with respect to Ford U.S. on January 9, 2012, and with respect to Ford Canada on January 13, 2012. Plaintiffs’ timely notice of appeal again brought the matter before this court.

II. EVIDENTIARY ISSUES

We first address plaintiffs’ challenge to two evidentiary rulings made by the trial court in connection with the summary judgment motion here at issue. Specifically, plaintiffs contend that, in making its summary judgment determination, the trial court erred in refusing to consider on hearsay grounds certain deposition testimony of Pierre Millette, general counsel for Toyota Canada, regarding a May 15, 2001, CADA meeting, as well as the minutes of that meeting that were prepared by a CADA employee. The hearsay rule is easily articulated: Hearsay evidence is “evidence of a statement that was made other than by a witness while testifying at the hearing and that is

¹⁰ In conjunction with its order granting summary judgment, the trial court issued separate orders ruling on plaintiffs’ objections to Ford’s evidence, Ford U.S.’s evidentiary objections, and the objections to plaintiffs’ evidence filed by Ford Canada.

offered to prove the truth of the matter stated.” (Evid. Code, § 1200, subd. (a).) It is generally inadmissible, absent a recognized exception to the rule. (*Id.*, § 1200, subd. (b); see also *People v. Seumanu* (2015) 61 Cal.4th 1293, 1307 [192 Cal.Rptr.3d 195, 355 P.3d 384] (*Seumanu*) [“ ‘[h]earsay is generally excluded because the out-of-court declarant is not under oath and cannot be cross-examined to test perception, memory, clarity of expression, and veracity, and because the jury (or other trier of fact) is unable to observe the declarant’s demeanor’ ”].)

Of course, when dealing with the hearsay rule, the devil is in the details of its application to the facts of a particular case. As we review the trial court’s treatment of the alleged hearsay in this matter, we note that there is some dispute regarding our standard of review for such determinations. “[T]he weight of authority holds that an appellate court reviews a court’s final rulings on evidentiary objections by applying an abuse of discretion standard.” (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694 [23 Cal.Rptr.3d 915] (*Carnes*); see also *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 852 [172 Cal.Rptr.3d 732].) However, in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512 [113 Cal.Rptr.3d 327, 235 P.3d 988] (*Reid*), our high court acknowledged the argument that a different rule should apply when evidentiary rulings are made in the context of a summary judgment motion: “ ‘Because summary judgment is decided entirely on the papers, and presents only a question of law, it affords very few occasions, if any, for truly discretionary rulings on questions of evidence. Nor is the trial court often, if ever, in a better position than a reviewing court to weigh the discretionary factors.’ ” (*Id.* at p. 535, quoting the appellate court opinion). Ultimately, the *Reid* court concluded that it “need not decide generally whether a trial court’s rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed *de novo*. ” (*Ibid.*; see also *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 255, fn. 4 [100 Cal.Rptr.3d 296] (*Nazir*) [observing that the standard of review is unsettled].)

Similarly, we will not here resolve this outstanding issue, as our conclusions are sound under either theory. (See *In re R.T.* (2015) 232 Cal.App.4th 1284, 1301 [182 Cal.Rptr.3d 338] [a court abuses its discretion when it applies an incorrect legal standard]; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281 [88 Cal.Rptr.3d 186] [an evidentiary ruling that “ ‘transgresses the confines of the applicable principles of law’ ” is an abuse of discretion].) With respect to the consequences of our evidentiary review, however, we will follow the tenet—correctly pointed out by both parties—that the erroneous exclusion of evidence by the trial court is not grounds for reversal unless we also determine that the error was prejudicial. (Evid. Code, § 354, subd. (a) [judgment shall not be reversed due to the erroneous exclusion of evidence unless the error resulted in a miscarriage of

justice]; see also Cal. Const., art. VI, § 13 [same]; *Carnes, supra*, 126 Cal.App.4th at p. 694 [citing the constitutional provision].) Thus, plaintiffs must demonstrate that, absent the error, “‘a different result would have been probable.’” (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317 [120 Cal.Rptr.3d 605] (*Pannu*).) With these standards in mind, we turn to the particular evidence excluded by the trial court in this case.

A. *The Millette Deposition Testimony*

During his March 2007 deposition, Pierre Millette of Toyota Canada was questioned about the May 15, 2001, CADA meeting which he attended along with representatives of Ford Canada, AIAMC, CVMA, GM Canada, Chrysler Canada, CADA, and various local dealer associations. Both Ford and Ford Canada objected on hearsay grounds to the following colloquy between counsel for plaintiffs and Millette: “Q. Did CADA indicate that they would not support dealers who were involved in regular exporting of vehicles from Canada to the United States? ¶ [Objection.] ¶ A. I can remember comments being made that everyone supported the concept of trying to keep the vehicles in Canada, but who said what, on a general basis, I can’t help you there. ¶ [Answer read back.] ¶ And that was your understanding that there was a general consensus that the vehicles would be kept in Canada, not be exported from Canada to the United States? ¶ [Objection.] ¶ A. There was general support for the approach.”

Later in the deposition, counsel for Ford elicited this additional testimony from Millette, which it now also claims is inadmissible hearsay: “Q. Okay. Was there any agreement, at that meeting or any time, to work together to keep vehicles in Canada? ¶ A. I think that would be characterizing it as a little more than what it was. It wasn’t an agreement. It was simply a concept that there was some consensus on from everyone at the meeting.” As Ford correctly notes, this discussion was immediately followed by an additional exchange to which no objection has been lodged. Specifically Ford’s attorney queried: “Just to be clear in my question, did the participants in the meeting ever agree to work together to keep vehicles in Canada?” Millette responded: “No, absolutely not.”

At the summary judgment hearing on January 24, 2011, after reference by GM Canada to Millette’s statements, the trial court responded: “I intentionally left out references to Mr. Millette. I still haven’t sorted out in my mind to what extent, assuming Mr. Millette didn’t testify at trial, anything that Mr. Millette said is admissible for any purpose.” However, when discussing the Millette testimony at the continued hearing on May 10, 2011, in response to Ford’s hearsay objection, the trial court stated: “I don’t know if any of this

is hearsay. It's all his understanding of what happened. No out-of-court statement offered for the truth. It's just what his understanding was."

Later in the hearing, plaintiffs' counsel and the trial court had an extended discussion regarding the admissibility of the Millette testimony. According to counsel for plaintiffs, the hearsay rule was not implicated by the deposition testimony because "there are no other out-of-court statements here with the exception of Mr. Millette's testimony itself. There's no other—he is a percipient witness at a meeting. He perceives what happens at the meeting. He takes away an understanding of that. He is competent to testify about what he perceived at the meeting, that where before there wasn't a consensus and now there was, there was a consensus to keep the cars in Canada, to paraphrase Mr. Millette. He's not reporting about anything anyone else said." Again, the trial court seemed to agree, stating: "Well, that's what I think—my present view of that is that he is giving his understanding of what happened and that this is not hearsay." Nevertheless, when the trial court issued its written ruling on Ford's evidentiary objections in connection with its grant of summary judgment, the court sustained Ford's hearsay objections to both of the Millette deposition excerpts.

Initially, in considering the potential hearsay nature of the Millette statements, we note that Ford is not arguing that the challenged testimony is inadmissible hearsay because it is out-of-court deposition testimony. And, indeed, pursuant to section 2025.620 of the Code of Civil Procedure (section 2025.620), "[a]t the trial or any other hearing in the action, any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition . . . so far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness . . ." (See *id.*, subd. (c)(1) [deposition testimony may be used "for any purpose" where deponent resides more than 150 miles from the place of the trial]; see also Code Civ. Proc., § 437c, subd. (b)(1) [listing depositions among the documentation appropriate for use in support of a summary judgment motion].) Moreover, in accordance with section 1291 of the Evidence Code (section 1291), "former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] . . . [¶] . . . [t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." (§ 1291, subd. (a)(2).) As with section 2025.620 testimony, however, the admissibility of former testimony under section 1291 is generally "subject to the same limitations and objections as though the declarant were testifying at the hearing." (§ 1291, subd. (b).) Thus, the question before us is whether Millette's testimony would constitute inadmissible hearsay if he were testifying as a witness in court.

Ford argues that the Millette statements at issue are indeed inadmissible on this basis because they “conveyed” hearsay. Specifically, according to Ford, when the testimony is read in context, it is “clear Millette was describing *statements* made by the other participants in the meeting.” Ford contends that these out-of-court statements of other declarants are hearsay, and no exception to the hearsay rule has been offered justifying their admission. We disagree. None of the challenged testimony purported to recount “a statement,” let alone to prove what was “stated.”¹¹ Millette was not reporting particular statements made by particular participants. Rather, he was simply recounting generally his impressions and conclusions based on his participation in the meeting. This is not hearsay, and the trial court erred in concluding that it was.¹²

The more difficult question, however, is whether the trial court’s evidentiary error was prejudicial such that it provides grounds for reversal of the court’s grant of summary judgment in favor of Ford. (See Evid. Code, § 354, subd. (a); see also *Carnes*, *supra*, 126 Cal.App.4th at p. 694.) As stated above, to make a finding regarding prejudice we must determine whether, absent the error, “‘a different result would have been probable.’” (*Pannu*, *supra*, 191 Cal.App.4th at p. 1317.) In our view, this determination rests on two separate lines of inquiry. First, we must consider whether the Millette statements—improperly excluded on hearsay grounds—are otherwise admissible. Next, if they are admissible, we must resolve whether it is reasonably probable that their admission would have changed the outcome.

With respect to the admissibility of Millette’s statements, plaintiffs argue that the testimony is admissible nonhearsay because it was based on his “personal knowledge, which he gained from having participated in the May 15, 2001 meeting (and other conspiratorial meetings) on behalf of Toyota,

¹¹ On appeal, plaintiffs do not challenge the trial court’s exclusion of Millette’s first statement—that he remembered “comments being made that everyone supported the concept of trying to keep the vehicles in Canada.” We therefore focus our review on the admissibility of his two subsequent statements and do not consider the first statement in our summary judgment analysis.

¹² Although not necessary to our resolution of this matter, we note that if statements attributable to all of the other participants at the May 15 meeting were the basis for Millette’s conclusion that a consensus had been reached to keep Canadian automobiles in Canada, then any such statements would likely themselves be admissible as admissions of co-conspirators, because they would have then been made while participating in a conspiracy and in furtherance of the objective of that conspiracy. (Evid. Code, § 1223.) Indeed, such statements could also be understood as operative facts, evincing the conspiratorial agreement itself, and therefore be deemed admissible as nonhearsay. (See 1 Witkin, Cal. Evidence (5th ed. 2012) *Hearsay*, §§ 32–36, pp. 825–830.) Of course, logically, it is difficult if not impossible to reach any ultimate conclusion regarding how these alleged “statements” should be characterized as there is absolutely no evidence of who actually said what, a circumstance which underscores the inherent unworkability of Ford’s “conveyed” hearsay theory.

alongside executives from Ford, GM, Chrysler and CADA.” While this makes him *competent* to testify as to facts he personally observed, it does not necessarily make admissible his inferences drawn from those facts. Rather, “[t]he *opinion rule*, which often rejects testimony of a competent witness because of the form in which the testimony is given, is distinct from the knowledge rule, which lays down a requirement of *competency of witnesses*. A witness is not competent to testify on a matter—either as to facts or opinions—if the witness lacks personal knowledge of it.” (1 Witkin, Cal. Evidence (5th ed. 2012) Opinion Evidence, § 1, p. 608.) Thus, plaintiffs’ argument does not go far enough, on its own, to justify the admission of the Millette statements.

■ Instead, we believe that the challenged deposition testimony is best understood as an opinion of a lay witness, admissible in accordance with section 800 of the Evidence Code (section 800).¹³ That statute provides: “If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony.” (§ 800.) A trial court has broad discretion to admit lay opinion testimony, especially where adequate cross-examination has been allowed. (*Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 112 [273 Cal.Rptr. 457] (*Osborn*).)

Our Supreme Court has recently summarized the law regarding lay opinions under section 800 as follows: “ ‘A lay witness may express an opinion

¹³ In November 2015, the parties were given the opportunity to file supplemental letter briefs addressing this theory of admissibility, along with certain others. Both did so, and we have considered their submissions in rendering our decision. In Ford’s supplemental briefing, the automobile manufacturer argues that plaintiffs’ failure to specifically reference section 800—either in the trial court or on appeal—precludes any reliance on it. As described in detail above, however, Ford claimed in the trial court that the statements at issue are hearsay and plaintiffs have argued strongly, both below and before this court, that they are not. We believe that this was more than sufficient to preserve the issue. Having agreed with plaintiffs that the testimony is nonhearsay and was erroneously excluded, we consider section 800 only as part of our prejudice analysis. Indeed, even if further specificity were required to preserve the argument in this limited context, plaintiffs claimed in their appellate briefing that “Mr. Millette used his senses to observe behavior at the meeting and form an *understanding* of what happened. He conveyed *his understanding* through his testimony.” And, before the trial court, plaintiffs similarly argued: “He perceives what happens at the meeting. He takes away *an understanding* of that. He is competent to testify about what he perceived at the meeting, that where before there wasn’t a consensus . . . now there was.” The trial court seemed to agree, stating: “[M]y present view of that is that he is giving *his understanding* of what happened and that this is not hearsay.” (Italics added.) Thus, plaintiffs have adequately raised the question of whether Mr. Millette could properly testify as to his understanding or opinion regarding the events at issue.

based on his or her perception, but only where helpful to a clear understanding of the witness's testimony (Evid. Code, § 800, subd. (b)), "i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed." [Citation.]' [Citation.] Such a situation may arise when a witness's impression of what he or she observes regarding the appearance and demeanor of another rests on 'subtle or complex interactions' between them [citation] or when it is impossible to otherwise adequately convey to the jury the witness's concrete observations. [Citations.] A lay witness generally may not give an opinion about another person's state of mind, but may testify about objective behavior and describe behavior as being consistent with a state of mind. [Citation.]" (*People v. DeHoyos* (2013) 57 Cal.4th 79, 130–131 [158 Cal.Rptr.3d 797, 303 P.3d 1] (*DeHoyos*)).

Put another way, the opinion rule for nonexperts "merely requires that witnesses express themselves at the lowest possible level of abstraction. [Citation.] Whenever feasible "concluding" should be left to the jury; however, when the details observed, even though recalled, are "too complex or too subtle" for concrete description by the witness, he may state his general impression.' " (*Angelus Chevrolet v. State of California* (1981) 115 Cal.App.3d 995, 1001 [171 Cal.Rptr. 801] (*Angelus Chevrolet*)). Thus, for example, "a lay witness may express an opinion that a person was 'drunk' [citation], or that people engaged in a discussion were 'angry' [citation], or that an impact was strong enough to jar a passenger from a seat [citation], or that someone appeared to be 'trying to break up a fight.' [Citation.]" (*Osborn, supra*, 224 Cal.App.3d at p. 113.) Where a lay opinion is otherwise admissible, the witness's experience may affect the weight of the testimony. (See *People v. McAlpin* (1991) 53 Cal.3d 1289, 1307 [283 Cal.Rptr. 382, 812 P.2d 563].)

We find Justice Werdegar's recent opinion in *Seumanu, supra*, 61 Cal.4th 1293, particularly useful. In that case, a murder defendant (Ropati) presented testimony at trial from his brother (Tautai) claiming that he—Tautai—was the one who killed the victim rather than Ropati. (*Id.* at pp. 1303, 1306.) To counteract this testimony, the prosecution presented evidence from a third crime partner, Iuli, who had pleaded guilty to reduced charges and agreed to testify for the prosecution. (*Id.* at pp. 1304, 1309–1310.) In particular, Iuli described a pretrial encounter he had when he, Tautai, and Ropati were together in a holding cell. Iuli testified that Ropati "asked him and Tautai to 'take the blame off of him and that he would be out there taking care of us' by sending them money in prison." (*Id.* at p. 1309.) Iuli rejected the proposal, but stated that Tautai "remained silent and did not appear angry." (*Ibid.*) Follow-up questions indicating that Iuli thought Tautai looked like he was going to take the blame were objected to as improperly calling for an opinion. (*Id.* at p. 1310.) However, under these circumstances, the *Seumanu* court concluded that "Iuli's testimony regarding his perceptions was not improper

opinion evidence from a lay witness.” (*Ibid.*) Rather, “Iuli was a perceiving witness to the encounter in the holding cell and he thus spoke from personal knowledge gleaned from his own participation in, and observation of, the event in question.” (*Id.* at p. 1311.)

Similarly, in this case, Millette was a perceiving witness to the May 15, 2001, meeting, and his opinion was based on personal knowledge gleaned from his own participation in, and observation of, that interaction, as well as his numerous previous contacts with the alleged co-conspirators. (Cf. *Seumanu, supra*, 61 Cal.4th at pp. 1309–1311.) Further, it is quite likely that his conclusions were based, at least in part, on observations regarding the appearance and demeanor of other meeting participants and rested on the “‘subtle or complex interactions’” among them. (*DeHoyos, supra*, 57 Cal.4th at pp. 130–131; see also *People v. Hinton* (2006) 37 Cal.4th 839, 889 [38 Cal.Rptr.3d 149, 126 P.3d 981] [lay opinion by third party that a defendant was directing another individual in a drug transaction may be proper where it is “certainly possible” that the third party’s impression “rested on subtle or complex interactions . . . that were difficult to put in words”]; *Angelus Chevrolet, supra*, 115 Cal.App.3d at p. 1001.) Moreover, there is no indication in the record that Millette was able to recall any particular statements or actions by any of the meeting participants. Thus, his comments were useful to understanding what transpired at this all-important meeting because the concrete observations on which his opinion was based likely could not otherwise be conveyed. (See *DeHoyos, supra*, 57 Cal.4th at pp. 130–131.) Under such circumstances, he was testifying at the “‘lowest possible level of abstraction.’” (*Angelus Chevrolet, supra*, 115 Cal.App.3d at p. 1001.) In sum, although Millette could not properly testify as to the actual state of mind of any of the other meeting participants, he was allowed to express his opinion that they behaved in a way consistent with reaching a consensus to restrict exports. (See *DeHoyos, supra*, 57 Cal.4th at pp. 130–131.) His challenged testimony is therefore properly admissible in accordance with section 800.¹⁴

Having determined that the testimony at issue is admissible, we next consider the second prong of our prejudice analysis: whether consideration of that evidence, in conjunction with the other admissible evidence presented by plaintiffs, would likely have led to a different outcome. We believe that, with respect to Ford Canada’s summary judgment motion, it is probable that it would have. We discuss this conclusion in detail below, in the context of our

¹⁴ Ford repeatedly urges us to defer to the trial court’s exercise of discretion in this case. However, because the trial court made a legal error—characterizing nonhearsay as hearsay—it never exercised its discretion with respect to whether the testimony at issue was otherwise admissible. If anything, though, the court’s comments seem to indicate that it properly understood Millette’s statements for what they are: His *understanding* of what happened at the May 2001 meeting.

review of plaintiffs' conspiracy evidence as it relates to Ford Canada. In sum, plaintiffs' entire case stands or falls on whether they have presented sufficient admissible evidence of an illegal agreement to restrict Canadian exports. Unsurprisingly, there is no unambiguous evidence of such an agreement in the record before us. However, Millette's statements are important evidence suggesting conspiracy and could clearly have tipped the balance in plaintiffs' favor. In short, based on his testimony, a reasonable juror could conclude that—at least in the mind of one of the key alleged co-conspirators—all of the participants at the May 15, 2001, CADA meeting had reached a consensus to keep Canadian automobiles in Canada. Under these circumstances, exclusion of the Millette statements was not only erroneous, but also prejudicial.

B. *The CADA Minutes of the May 2001 Meeting*

After the May 15, 2001, meeting discussed in the Millette testimony, Melissa Clark—a CADA employee who attended the meeting—drafted minutes based on her handwritten notes. The document indicates that it is “confidential notes” from the “Export Sales Meeting” held on May 15, 2001, and lists the individuals from Ford Canada, Toyota Canada, AIAMC, CVMA, GM Canada, Chrysler Canada, CADA, and various local dealer associations who participated. According to the minutes, after a CADA representative articulated the meeting objective of “developing a strategy to solve the industry problem of export sales,” the meeting participants discussed the pros and cons of various ways they could work together to make export restraints more effective. The minutes also include a laundry list of proposed follow-up actions, such as obtaining industry-wide statistics on the size of the export problem and seeking “advice from outside counsel with respect to any Competition Act implications of any industry-wide export sales initiatives.” They end with the admonition: “**PLEASE KEEP THESE NOTES CONFIDENTIAL.**”

In connection with its summary judgment motion, Ford objected to the admission of the Export Sales Meeting minutes on hearsay grounds and to certain statements of CADA representatives memorialized in those minutes as multiple hearsay. In response, plaintiffs argued that the minutes were admissible under numerous exceptions to the hearsay rule, including the business record exception (Evid. Code, § 1271), the exception for adoptive admissions (Evid. Code, § 1221), and the co-conspirator exception (Evid. Code, § 1223). In the end, however, the trial court sustained Ford's hearsay objection. On appeal, plaintiffs renew their argument that the meeting minutes are properly admissible, both as a business record and as an adoptive admission of Ford Canada.

■ We agree with plaintiffs that the meeting minutes here at issue are a “textbook example” of an adoptive admission of Ford Canada under section 1221 of the Evidence Code (section 1221). Pursuant to section 1221, “[e]vidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.” The theory of adoptive admissions expressed in section 1221 ‘is that the hearsay declaration is in effect repeated by the party; his conduct is intended by him to express the same proposition as that stated by the declarant.’” (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 326 [94 Cal.Rptr.3d 198]; see also *People v. Hayes* (1999) 21 Cal.4th 1211, 1257 [91 Cal.Rptr.2d 211, 989 P.2d 645] [“[t]he hearsay rule does not bar evidence offered against a party who has admitted the *truth* of the hearsay statement”]; *People v. Osuna* (1969) 70 Cal.2d 759, 765 [76 Cal.Rptr. 462, 452 P.2d 678] (*Osuna*) [conversation among codefendants admitted under adoptive admission rule where “[h]ad one disagreed with what the other said, it is reasonable to assume that he would have said so”].)

In the instant case, after Melissa Clark of CADA drafted the meeting minutes, she forwarded them to Norm Stewart—vice-president of government relations and general counsel for Ford Canada—for his review and comment. According to Stewart, he made a few comments that were not “super substantive” and sent the revised minutes back to Clark. Stewart also stated that he felt that the minutes “generally captured the sense of what went on at the meeting” and were “pretty accurate.” Indeed, the only complaint he was able to articulate was that he “didn’t think” the minutes “totally accurately recaptured the concept that issues were put out, but not necessarily brought to closure,” an idea which, in our view, is adequately conveyed within the document. In sum, by engaging in this review and revision process, Stewart (on behalf of Ford Canada) clearly manifested his belief in the accuracy of the meeting minutes. Presumably, had he seen any errors, he would have corrected them. (*Osuna, supra*, 70 Cal.2d at p. 765.) Thus, the minutes were admissible against Ford Canada as an adoptive admission and were erroneously excluded by the trial court.

On appeal, Ford does not challenge plaintiffs’ characterization of the meeting minutes as adoptive admissions. Instead, it argues only that plaintiffs were not prejudiced by the exclusion of the minutes because evidence of the “content of the discussion at the CADA meeting” was “plainly before the court.” Moreover, according to Ford, the minutes do not support an inference of conspiracy because the meeting participants never adopted any of the specific actions proposed on May 15. As we discuss further below, we do not find the failure of the alleged co-conspirators to implement any of the joint actions suggested at the May 15 meeting to be particularly relevant to the existence of plaintiffs’ claimed conspiracy. Moreover, we doubt that being

aware of the gist of what was discussed at the meeting has the same impact as viewing an official document, which sets forth the names of each alleged co-conspirator; indicates the willingness of each to discuss at length engaging in patently anticompetitive behavior; evinces knowledge by the participants of the possible anticompetitive nature of their pursuits; and requests that confidentiality be maintained. However, ultimately, we need not decide the issue of prejudice because—irrespective of our proper consideration of the minutes as part of our de novo review—we would reverse the trial court’s grant of summary judgment in favor of Ford Canada for the other reasons stated herein. Because we do not rely on the improper exclusion of the minutes as a basis for reversal, we need not determine whether that exclusion was prejudicial.

Having resolved these preliminary matters, we turn now to the sufficiency of plaintiffs’ conspiracy evidence.

III. SUMMARY JUDGMENT ON EXISTENCE OF AGREEMENT

A. Analytical Framework and Standard of Review

The standards for granting summary judgment are well settled and easily delineated. A trial court must grant a motion for summary judgment “if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c).) When, as here, defendants move for summary judgment, they can “meet their burden by demonstrating that ‘a cause of action has no merit,’ which they can do by showing that ‘[o]ne or more elements of the cause of action cannot be separately established’ [Citations.] Once defendants meet this burden, the burden shifts to plaintiff to show the existence of a triable issue of material fact.” (*Nazir, supra*, 178 Cal.App.4th at p. 253.) The initial burden of a defendant moving for summary judgment is a “burden of production to make a *prima facie* showing of the nonexistence of any triable issue.” (*Aguilar, supra*, 25 Cal.4th 826, 850.) Thus, such a defendant is only required to present some evidence creating a rebuttable presumption that no material fact issue exists before the burden shifts to the plaintiff opposing the motion. (*Id.* at pp. 850–851.)

Our review of an order granting summary judgment is *de novo*. Under such circumstances, the trial court’s stated reasons for granting summary judgment “are not binding on us because we review its ruling, not its rationale.” (*Ram’s Gate Winery, LLC v. Roche* (2015) 235 Cal.App.4th 1071, 1079 [185 Cal.Rptr.3d 935].) Thus, “[t]he sole question properly before us on review of

the summary judgment is whether the judge reached the right *result* . . . whatever path he might have taken to get there.” (*Carnes, supra*, 126 Cal.App.4th at p. 694.)

In undertaking our analysis, we “‘accept as true the facts . . . in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them.’” (*Nazir, supra*, 178 Cal.App.4th at p. 254.) We must, however, disregard any evidence to which objections have been made and sustained. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 [100 Cal.Rptr.2d 352, 8 P.3d 1089] (*Guz*); Code Civ. Proc., § 437c, subds. (b)(5), (c) & (d).) Finally, as an overarching principle, we view the evidence in the light most favorable to the losing party—here plaintiffs—liberally construing plaintiffs’ evidentiary submissions and strictly scrutinizing the defendants’ evidence in order to resolve any evidentiary doubts or ambiguities in plaintiffs’ favor. (*Cheal v. El Camino Hospital* (2014) 223 Cal.App.4th 736, 741 [167 Cal.Rptr.3d 485]; *Nazir, supra*, 178 Cal.App.4th at p. 254.)

In addition to these general tenets regarding motions for summary judgment, our Supreme Court in the seminal case of *Aguilar, supra*, 25 Cal.4th 826, set forth guidance specifically applicable to summary judgment motions in antitrust actions for unlawful conspiracy. (*Id.* at p. 843.) In *Aguilar*, the plaintiffs argued that nine petroleum companies had violated the Cartwright Act by “enter[ing] into an unlawful conspiracy to restrict the output of CARB [State Air Resources Board cleaner burning] gasoline and to raise its price.” (*Id.* at pp. 837–839.) While concluding that summary judgment was appropriate on the facts before it, the *Aguilar* court clarified “the law that courts must apply in ruling on motions for summary judgment, both in actions generally and specifically in antitrust actions for unlawful conspiracy.” (*Id.* at pp. 842–843.)

With respect to antitrust conspiracy cases in particular, the *Aguilar* court—after reviewing recent state and federal law on the subject¹⁵—opined: “On the defendants’ motion for summary judgment, in order to carry a burden of production to make a *prima facie* showing that there is a triable issue of the material fact of the existence of an unlawful conspiracy, a plaintiff, who would bear the burden of proof by a preponderance of evidence at trial, must present evidence that would allow a reasonable trier of fact to find in his favor on the unlawful-conspiracy issue by a preponderance of the evidence, that is, *to find an unlawful conspiracy more likely than not*. Ambiguous

¹⁵ “In antitrust actions brought under the Cartwright Act, we look to interpretations of its federal law counterpart, the Sherman Antitrust Act (15 U.S.C. § 1 et seq.), for guidance since the federal act was a model for our own in most respects.” (*Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1420 [267 Cal.Rptr. 819] (*Biljac*), disapproved on other grounds as stated in *Reid, supra*, 50 Cal.4th at p. 532, fn. 8.)

evidence or inferences showing or implying conduct that is as consistent with permissible competition by independent actors as with unlawful conspiracy by colluding ones do not allow such a trier of fact so to find.” (*Aguilar, supra*, 25 Cal.4th at p. 852, italics added; see also *Matsushita Elec. Industrial Co. v. Zenith Radio* (1986) 475 U.S. 574, 588 [89 L.Ed.2d 538, 106 S.Ct. 1348] (*Matsushita*).) Thus, an antitrust plaintiff must also “present evidence that tends to exclude, although it need not actually exclude, the possibility that the alleged conspirators acted independently rather than collusively.” (*Aguilar, supra*, 25 Cal.4th at p. 852; see also *Matsushita, supra*, 475 U.S. at p. 588.) “Insufficient is a mere assertion that a reasonable trier of fact might disbelieve any denial by the defendants of an unlawful conspiracy.” (*Aguilar, supra*, 25 Cal.4th at p. 852.)

When attempting to prove unlawful conspiracy, antitrust plaintiffs may rely on both direct and circumstantial evidence. “‘[D]irect evidence’ means evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.’” (*Biljac, supra*, 218 Cal.App.3d at p. 1430, quoting Evid. Code, § 410.) An inference, in contrast, is “‘a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.’” (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1529 [152 Cal.Rptr.3d 154], quoting Evid. Code, § 600, subd. (b).) As the *Aguilar* court acknowledged, antitrust plaintiffs “must often rely on inference rather than evidence since, usually, unlawful conspiracy is conceived in secrecy and lives its life in the shadows.” (*Aguilar, supra*, 25 Cal.4th at p. 857.)

Whether direct evidence or inference, however, “if the court determines that any evidence or inference presented or drawn by the plaintiff indeed shows or implies unlawful conspiracy *more likely than* permissible competition, it must then deny the defendants’ motion for summary judgment, even in the face of contradictory evidence or inference presented or drawn by the defendants, because a reasonable trier of fact could find for the plaintiff.” (*Aguilar, supra*, 25 Cal.4th at pp. 856–857.) In addition, *Continental Ore Co. v. Union Carbide* (1962) 370 U.S. 690, 699 [8 L.Ed.2d 777, 82 S.Ct. 1404] (*Continental Ore*) teaches that the plaintiffs in an antitrust action for unlawful conspiracy “should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.” Thus, “[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.” (*Ibid.*)

With respect to the substantive law of conspiracy, while some sort of concerted activity is necessary for an antitrust claim, it is well settled that an

explicit or formal agreement is not required. (*United States v. General Motors* (1966) 384 U.S. 127, 142–143 [16 L.Ed.2d 415, 86 S.Ct. 1321] (*General Motors*); *Biljac, supra*, 218 Cal.App.3d at p. 1423.) In *General Motors*, for instance, the United States Supreme Court found sufficient evidence of conspiracy under the federal antitrust laws where General Motors worked with a number of its dealers and local dealer associations, to “persuade” a subset of dealers to agree not to sell Chevrolets through certain discount houses.¹⁶ (*General Motors, supra*, 384 U.S. at pp. 130–131, 134–138.) In rejecting the trial court’s conclusion that each alleged co-conspirator was engaging solely in parallel action in furtherance of its own self-interest rather than acting pursuant to an illegal agreement, the Supreme Court opined: “[I]t has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy—certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan.” (*Id.* at pp. 142–143.) Rather, to maintain an actionable antitrust claim, “[c]ircumstances must reveal ‘a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.’” (*Monsanto Co. v. Spray-Rite Service Corp.* (1984) 465 U.S. 752, 764 [79 L.Ed.2d 775, 104 S.Ct. 1464] (*Monsanto*)). Thus, as the *Biljac* court put it in the context of a Cartwright Act claim, all that is required from an antitrust plaintiff is “‘direct or circumstantial evidence that reasonably tends to prove that the [defendant] and others ‘had a conscious commitment to a common scheme designed to achieve an unlawful objective.’’” (*Biljac, supra*, 218 Cal.App.3d at p. 1425, quoting *Monsanto, supra*, 465 U.S. at p. 764.)

■ In attempting to prove unlawful conspiracy, one type of evidence antitrust plaintiffs often present—as plaintiffs do here—is evidence that the alleged co-conspirators met and shared industry information at conferences or trade association meetings. The law is clear, however, that “[i]n general, trade association activities tend to promote competition and are lawful. Gathering and compiling industry information and disseminating it among members does not offend antitrust policy, even though to do so naturally ‘tends to

¹⁶ Other cases considering conspiracy allegations in the context of cutting off a discount channel of distribution include *Coca-Cola Co. v. Omni Pacific Co., Inc.* (N.D.Cal., Sept. 27, 2000, No. C 98-0784 SI) 2000 U.S. Dist. Lexis 17089 (*Coca-Cola*) (sufficient evidence to survive summary judgment on claim of illegal horizontal conspiracy between Coca-Cola and its competitors to eliminate exporters selling lower priced United States beverages into higher priced foreign markets based on exchanges of information regarding those exporters), *Toys “R” Us, Inc. v. F.T.C.* (7th Cir. 2000) 221 F.3d 928 (agreements between Toys “R” Us and toy manufacturers to restrict sales to a discount competitor of Toys “R” Us constitute illegal horizontal conspiracy where toy manufacturers would not enter into agreements without assurances that other manufacturers were also bound), and *Alvord-Polk, Inc. v. F. Schumacher & Co.* (3d Cir. 1994) 37 F.3d 996, 1005–1006, 1013–1014 (*Alvord-Polk*) (evidence insufficient to prove conspiracy among wall-covering manufacturers to restrict sales by discount 800-number dealers).

stabilize that trade or business and to produce uniformity of price and trade practice.’” (*Biljac, supra*, 218 Cal.App.3d at p. 1430, quoting *Maple Flooring Assn. v. U. S.* (1925) 268 U.S. 563, 582 [69 L.Ed. 1093, 45 S.Ct. 578] (*Maple Flooring*).) Moreover, trade association members do not “‘become . . . conspirators merely because they gather and disseminate information . . . bearing on the business in which they are engaged *and make use of it in the management and control of their individual businesses*’” (*Biljac*, at p. 1430, quoting *Maple Flooring*, at p. 584.) “Only when they take *concerted action to restrain trade* based on such information do they act illegally.” (*Ibid.*)

Thus, for instance, in *Biljac*, the plaintiffs argued the existence of a conspiracy to manipulate variable interest rates on certain loans. (*Biljac, supra*, 218 Cal.App.3d at p. 1415.) In support of their position, the *Biljac* plaintiffs pointed to evidence that interest rates and interest-rate pricing were topics of discussion at trade association meetings. This, however, was deemed insufficient to prove the existence of the claimed conspiracy. (*Id.* at p. 1430.) Specifically, the *Biljac* court concluded that no inference of conspiracy could be drawn from industry discussions of this nature “without proof of agreement or concerted action to manipulate the . . . market with such information.” (*Ibid.*) Put another way, the *Biljac* plaintiffs’ proof failed because “further inferences” were required “to conclude that any *agreement or consensus* came out of those discussions.” (*Ibid.*; see *Aguilar, supra*, 25 Cal.4th at pp. 839–840, 862–863 [concluding that the gathering and dissemination of pricing information by the petroleum companies through an independent industry service did not imply collusive action where there was no evidence the information was misused as a basis for an unlawful conspiracy; rather, evidence suggested that individual companies used all available resources “‘to determine capacity, supply, and pricing decisions which would maximize their own individual profits’”]; see also *In re Citric Acid Litigation* (9th Cir. 1999) 191 F.3d 1090, 1097–1099 [insufficient evidence that defendant was part of price-fixing conspiracy where there was no evidence illegal activities took place at trade association meetings attended by the defendant; further, gathering information about pricing and competition in the industry was a legitimate function of the trade association]; *Alvord-Polk, supra*, 37 F.3d at pp. 1005–1006, 1013–1014 [evidence insufficient to prove conspiracy among wall-covering manufacturers to restrict sales by discount dealers where discussion of issue and possible responses to it at conventions was an information exchange only, providing no evidence of an illegal agreement].)

Finally, as we conduct our review of these proceedings, we are also mindful that “both California and federal decisions urge caution in granting a defendant’s motion for summary judgment in an antitrust case.” (*Fisherman’s Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 321 [7 Cal.Rptr.3d 628] (*Fisherman’s Wharf*)). As the United States Supreme Court

stated in *Poller v. Columbia Broadcasting* (1962) 368 U.S. 464, 473 [7 L.Ed.2d 458, 82 S.Ct. 486]: “We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.” (See also *Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 852 [94 Cal.Rptr. 785, 484 P.2d 953], quoting *Poller* with approval; *Fisherman’s Wharf, supra*, 114 Cal.App.4th at p. 321 [same].) The *Aguilar* court acknowledged as much. (*Aguilar, supra*, 25 Cal.4th at p. 852.) However, it went on to opine that the presumption that such a motion should be granted “‘sparingly’ does *not* mean ‘seldom if ever.’ Hence, although such motions should be denied when they should, they must be granted when they must.” (*Id.* at pp. 847, 852.) On this relatively unhelpful note, we turn to our review of the conspiracy evidence presented by plaintiffs in the instant case.

B. *Sufficiency of the Conspiracy Evidence: Ford U.S.*

■ We consider first whether the evidence submitted by plaintiffs is sufficient to raise a triable issue of material fact with respect to Ford U.S.’s participation in the alleged conspiracy to restrict Canadian exports. Specifically, under *Aguilar*, we ask whether it is more likely than not—on the evidence presented—that Ford U.S. entered into an illegal agreement with any other alleged co-conspirator to restrict the export of Canadian vehicles into the United States. As a preliminary matter, we acknowledge the authority cited by Ford for the proposition that a corporation and its wholly owned subsidiary are incapable of conspiring under the antitrust laws. (See *Copperweld Corp. v. Independence Tube Corp.* (1984) 467 U.S. 752, 769–771 [81 L.Ed.2d 628, 104 S.Ct. 2731] (*Copperweld*); *Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 189 [91 Cal.Rptr.2d 534].) As the United States Supreme Court explained in *Copperweld*: “[T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of [section] 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal ‘agreement,’ the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do ‘agree’ to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for [section] 1 scrutiny.” (*Copperweld, supra*, 467 U.S. at p. 771.) In fact, plaintiffs here acknowledge that they are not arguing that Ford U.S. is liable because it conspired with its subsidiary, Ford Canada. Thus, in reviewing the materials plaintiffs contend establish Ford U.S.’s participation in the alleged conspiracy, evidence that Ford U.S.

and Ford Canada were working together to combat the export of Canadian vehicles to the United States proves nothing more than unilateral action by Ford in response to a perceived threat.

Nevertheless, in an attempt to meet their burden under *Aguilar*, plaintiffs point first to a collection of materials prepared in advance of a November 2001 meeting between Ford U.S. and Ford Canada on the issue of unauthorized Canadian exports, referred to in the documents as “Canadian brokering.” The record contains three different iterations of an agenda or talking points for this anticipated “Canadian Brokering Summit,” which were prepared by Ford U.S. and make clear that the company was concerned about the Canadian export issue from a dealer relations standpoint. Specifically, Ford U.S. was receiving a substantial number of complaints from their United States dealers regarding unfair competition from Canadian exports being sold as “new” within their franchise areas. The issue was particularly contentious with respect to the Thunderbird, a “high-profile, high-margin vehicle.” In addition, Canadian brokering was problematic for Ford U.S. because it was costing them money. Indeed, according to the materials, Ford U.S. was making “as much as \$5000 less on some vehicles which [were] sold in Canada and then brokered, compared to what [they] would have earned had the vehicle gone directly to a US dealer.”

Attached to the agenda was a list of suggested actions that could be taken to help solve the export problem, including the pros and cons of each. For instance, Ford U.S. suggested adding a unique character to Canadian VIN’s to make the Canadian vehicles easier to track. Another proposal was to cancel the sale of an exported vehicle, charge back the Canadian dealer who sold it, and then re-report the sale using the appropriate United States dealer code. None of the proposed action items, however, suggested or required the involvement of any other manufacturer; nor did any of the agenda materials mentioned above discuss coordination with competitors. Indeed, plaintiffs conceded as much below, but argued that the documents show that Ford U.S. exercised “a modicum of control” and directed Ford Canada on the issue of exports. To the contrary, we view these materials as revealing only that Ford U.S. had identified what it saw as a significant problem and was looking to Ford Canada to help solve it. There is certainly no evidence that Ford Canada was acting as an authorized agent of Ford U.S. for purposes of entering into an unlawful conspiracy. (See *United States v. Bestfoods* (1998) 524 U.S. 51, 61 [141 L.Ed.2d 43, 118 S.Ct. 1876] (*Bestfoods*) [a parent corporation generally “is not liable for the acts of its subsidiaries”]; see also *In re Capacitors Antitrust Litigation* (N.D.Cal. 2015) 106 F.Supp.3d 1051, 1071 [quoting *Bestfoods* in dismissal of parent corporation from antitrust action where there were no allegations that the parent company, itself, participated in the alleged conspiracy].)

Plaintiffs also claim that Ford U.S. was likely part of the alleged conspiracy because it was the primary beneficiary of the export restrictions, which allowed the manufacturer to sell its United States vehicles at a premium. The evidence does reveal that Ford U.S. possessed a motive to conspire. Reportedly, for instance, the consensus at the November 2001 Canadian Brokering Summit was that between 500 and 700 Ford vehicles per month were being brokered from Canada to the United States at that time. As stated above, Ford was losing as much as \$5,000 on each Canadian brokered sale. Indeed, in considering the situation, Bill Glick, a Ford U.S. executive, opined: “There still appears to be a substantial revenue/profit opportunity for the Company if we can effectively address the Canadian brokering situation.” In line with this conclusion, Ford U.S. generated a list of proposed follow-up actions after the November 2001 meeting which included redefining “new vehicle” as having less than a certain number of miles; working toward eliminating the Canadian tax rebate for exported vehicles; rewriting buyer orders to be cancelable if the buyer is determined to be a broker; increasing manpower to audit dealerships; reviewing competitive procedures regarding warranties (especially Honda’s); providing feedback to dealers on actions taken; engaging a consultant to study the brokering issue and recommend solutions; and investigating specific brokering activity involving Hertz as well as the brokering of Ford Thunderbirds. Again, however—other than collecting information regarding competitors’ warranty procedures—none of these proposed actions mentioned involvement of, or coordination with, competitors.¹⁷ Moreover, although the evidence may show that Ford U.S had motive to conspire with other automobile manufacturers to restrict Canadian exports, this, without more, is insufficient to prove conspiracy. (See *Aguilar, supra*, 25 Cal.4th at p. 864 [“We recognize that Aguilar did indeed present evidence that the petroleum companies may have possessed the motive, opportunity, and means to enter into an unlawful conspiracy. But that is all. And that is not enough.”].) In sum, nothing in the Canadian Brokering Summit materials “tends to exclude” the possibility that Ford U.S. was acting independently and in its own self-interest, rather than collusively with other alleged co-conspirators. (*Aguilar, supra*, 25 Cal.4th at p. 852.)

■ In addition, however, plaintiffs point to several e-mails they claim are evidence that Ford U.S. “was involved with and approved of communications with competitors.” The first is a December 1999 e-mail from a Ford Canada executive to Ford U.S. stating that he had been in touch with his “contact” at Honda Canada, who reported the use of export controls very similar to those used by Ford Canada. The e-mail additionally mentions that Honda Canada had been voiding warranties, but had been receiving a significant amount of “push back” from relocated Canadian consumers and United States customers

¹⁷ We discuss below the insufficiency of information gathering from competitors as a basis for establishing antitrust liability.

who had unknowingly purchased gray market vehicles. The second e-mail was written by a Ford U.S. executive, Bill Glick, in March 2002 and indicates that representatives of Ford U.S. had learned from a former Ford employee working for Chrysler that Chrysler was considering voiding warranties. With respect to the Ford Canada e-mail, there is no indication that Ford U.S. either solicited or approved of Ford Canada's collection and dissemination of industry information from Honda Canada. More importantly, though, both e-mails fail to go beyond information gathering from competitors regarding an industry problem, activity that is condoned under the antitrust laws. (See *Biljac*, *supra*, 218 Cal.App.3d at p. 1430 [industry participants do not "become . . . conspirators merely because they gather and disseminate information . . . bearing on the business in which they are engaged and make use of it in the management and control of their individual businesses . . ."].) Thus, these e-mails do little to prove unlawful collusion.

The only other conspiracy evidence identified by plaintiffs involving Ford U.S. is a March 2002 internal Ford U.S. memorandum written by Bill Glick. In that document, Bill Glick stated: "[P]lease note that Dave Kelleher [an in-house attorney for Ford U.S.] has calls into his counterparts at DCX [DaimlerChrysler U.S.] and GM to discuss potential industry-wide solutions." Plaintiffs contended in the trial court that this evidence alone showed Ford U.S. "actively participating in the conspiracy."

However, even assuming the calls were made—a fact disputed below—there is no indication in this statement that Ford U.S. did anything more than make initial contact with certain competitors to discuss an industry issue. Further—in contrast to the meeting evidence discussed below where numerous alleged co-conspirators accepted an invitation to meet, knowing that the sole topic of discussion would be the development of an industry-wide solution to the Canadian export problem—there is no indication here that Ford U.S.'s competitors were even willing to talk about these issues. Under such circumstances, there is simply no evidence, or even inference, from which a reasonable jury could conclude that Ford U.S. agreed with any other alleged co-conspirator to do something together about the export problem or that it even understood the goals of the alleged conspiracy and actively participated in it. (See *Biljac*, *supra*, 218 Cal.App.3d at pp. 1425–1426; see also *In re TFT-LCD (Flat Panel) Antitrust Litigation* (N.D.Cal. 2008) 586 F.Supp.2d 1109, 1117 [“the heart of an antitrust conspiracy is an agreement and a *conscious decision by each defendant to join it*” (italics added)]; *ibid.* [finding general allegations against all corporate entities in a single corporate structure insufficient under federal antitrust law; leave to amend granted to more specifically plead how each individual corporate defendant joined the alleged conspiracy].) This single e-mail, then, is manifestly not enough to raise a triable issue of material fact as to whether Ford U.S. unlawfully conspired with its competitors in violation of the

Cartwright Act. (See *Aguilar, supra*, 25 Cal.4th at p. 852.) Thus, with respect to Ford U.S., the trial court's grant of summary judgment was proper.

C. *Sufficiency of the Conspiracy Evidence: Ford Canada*

A summary judgment determination with respect to Ford Canada, however, is less straightforward. Indeed, the record in this matter—including deposition testimony, declarations, expert opinions, interrogatories, requests for admission, and related document production—is factually complex and fills more than 26,000 pages. Because we need only identify evidence sufficient to establish the existence of one issue of material fact in order to reverse the trial court's grant of summary judgment in favor of Ford Canada, however, we need not engage in an exhaustive recitation of all of the potentially relevant evidence presented below.

Moreover, we note that, in ruling on Ford Canada's summary judgment motion, the trial court excluded vast amounts of potentially highly relevant evidence related to Ford Canada's alleged co-conspirators on hearsay grounds, presumably concluding that plaintiffs had failed to make the *prima facie* showing necessary for application of the co-conspirator exception to the hearsay rule. (See Evid. Code, § 1223.) Since, on appeal, plaintiffs have only challenged the trial court's rejection of the two pieces of evidence discussed above, we will not consider the remainder of the excluded materials in reaching our decision. (*Biljac, supra*, 218 Cal.App.3d at p. 1420 [failure to raise issue on appeal constitutes abandonment]; see also *Guz, supra*, 24 Cal.4th at p. 334 [evidence to which objections have been made and sustained must be disregarded on review of summary judgment].) Finally, since plaintiffs have not contested the trial court's conclusion that Ford Canada met its initial burden of production, making—through general denials of wrongdoing; proof of prior consistent conduct; and evidence of independent business reasons for its actions—a *prima facie* showing of the absence of any conspiracy, we will not here revisit that determination.

Rather, we are left solely with the question of whether plaintiffs have carried the burden of production, as shifted onto their shoulders, to make a *prima facie* showing of the presence of an illegal agreement among the named defendants to curb Canadian exports. In the words of the trial court, we explore whether plaintiffs produced evidence “that tends to exclude the possibility that the defendants acted independently rather than collusively.” We believe that plaintiffs have produced such evidence in an amount sufficient to defeat Ford Canada's bid for summary judgment.

■ Preliminarily, however, we note that there is some evidence which, although stressed by one party or the other, is not particularly helpful in

resolving the question before us. For instance, we do not believe the fact that some or all of the relevant automobile manufacturers, including Ford, might have engaged in unilateral activities designed to curtail Canadian exports in the decades preceding the alleged conspiracy period negates the possibility of unlawful collusive action during that period. Rather, as the trial court correctly noted,¹⁸ entering into an anticompetitive agreement not to stop doing what you previously may have had the ability to do on your own is sufficient for purposes of liability under the Cartwright Act. (See *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 41–43, 49–50 [77 Cal.Rptr.2d 709, 960 P.2d 513] (*Quelimane*).)

For example, *Quelimane* involved an alleged conspiracy under the Cartwright Act among title insurers who refused to sell title insurance on real property acquired through a tax sale. (*Quelimane, supra*, 19 Cal.4th at p. 48.) Our Supreme Court determined that the allegations in the complaint were not subject to demurrer despite the fact that “an insurer may lawfully and individually conclude that the risks inherent in insuring a title to property conveyed by tax deed outweigh the potential benefit and decline to issue title insurance to purchasers of tax-deeded property.” (*Id.* at p. 49.) The high court reached this conclusion because “[r]ecognition that a single participant in the market might refuse to insure tax deed titles for a legitimate business reason does not demonstrate that there is ‘a purpose unrelated to elimination or reduction of competition’ [citation] for *an agreement* by a combination of insurers to refuse such policies” (*Id.* at pp. 49–50, italics added.)

Rather, “[a]n agreement among all title insurers in a county that none will issue policies on property conveyed by tax deed . . . implies a purpose of *ensuring that none will seek what might otherwise become a sufficiently lucrative business opportunity to outweigh the risk.*” (*Quelimane, supra*, 19 Cal.4th at p. 50, italics added.) In sum, “[w]hile refusing to sell a product to a consumer does not itself violate the Cartwright Act, when that refusal is the result of a combination, agreement, or conspiracy to make that product unavailable in a given market a prohibited restraint of trade may be found.” (*Id.* at p. 49.) Thus, it is the existence of an agreement (or lack thereof) that is controlling. (See also *General Motors, supra*, 384 U.S. at p. 140 [noting that whatever General Motors might lawfully have done individually to enforce its

¹⁸ Specifically, the trial judge opined: “I think the law is that if you’re doing something parallel without concerted effort and then at some point you go into—you enter into an arrangement, an agreement, by which you say we’re going to keep doing this and now we’re all going to do it together like we were before, but we’re going to keep doing this, maybe step up our—but we promise we won’t stop. I think that’s enough to get to a jury as a matter of law. I think that is covered by the Cartwright Act.” In the end, however, the trial court described plaintiffs’ assertion that Ford Canada had conspired with others to continue doing what it had previously been doing unilaterally as “pure speculation.” As we discuss in detail below, we disagree with this characterization of plaintiffs’ evidence.

dealer agreements “is beside the point” in the face of evidence of an unlawful combination in restraint of trade].)

Moreover, evidence of the manufacturers’ prior course of conduct becomes less meaningful if a plausible argument can be made that industry conditions changed significantly at or around the time of the alleged conspiracy. Here, evidence exists from which a reasonable jury could conclude that segregating the Canadian and American automobile markets was becoming increasingly difficult by the end of the last century. Specifically, in the 1980’s, Canadian vehicles differed from their United States counterparts with respect to physical and mechanical attributes, emission control systems, and safety parameters. For instance, in 1983, Ford Canada projected that 70 percent of its 1984 Canadian cars and light trucks would not comply with United States exhaust regulations and could not legally be imported or operated in the United States. GM informed its dealers in 1986 that some of its Canadian vehicles “may not meet U.S. EPA requirements.” Under such circumstances, it appears that the “export problem” during this time frame was smaller and often involved particularly desirable, or “hot” cars.

In addition, while manufacturers, including Ford Canada, employed certain export restraints to address the issue, evidence presented suggests that those controls were based, at least in part, on legitimate customer satisfaction and legal concerns that no longer existed during the alleged conspiracy period. For instance, Ford Canada opined that export sales of its 1984 vehicles would present United States purchasers with “insurmountable difficulties” and could result in repercussions for the dealer, Ford Canada, and Ford U.S. In 1986, GM stated that the importation of gray market vehicles made it difficult to administer safety recalls and vehicle warranties and led to “some customer dissatisfaction.” In 1988, Honda noted that parts for warranty service on non-United States vehicles might not be readily available in the United States.

However, as Ford Canada itself recognized, by 1999 the gray market export of its vehicles “seemed to be spiking up fairly significantly.” At the same time, the harmonization of the Canadian and United States markets occurred and a favorable exchange rate for arbitrage was available. As a result, for the first time, automobile manufacturers faced the possibility of large numbers of essentially fungible, yet less expensive, cars crossing the border from Canada to the United States.¹⁹ No longer primarily an issue of

¹⁹ Unsurprisingly, this coincided with information gathering by the manufacturers with respect to the scope of the problem and possible solutions implemented by competitors. In December 1999, a Ford Canada employee reported a discussion with his “contact” at Honda Canada regarding Honda Canada’s existing export restrictions, including the voiding of warranties. In June 2000, a Ford Canada employee contacted his counterpart at Chrysler

customer dissatisfaction, it became more clearly a lost profits issue, especially if another manufacturer chose not to enforce export restrictions in order to reap the profits available from selling into this new discount channel of distribution.

In fact, the evidence shows that this very thing happened to Ford Canada immediately prior to the alleged conspiracy period. Specifically, Ford Canada was approached in 1999 by an alleged rental car dealer seeking to buy 1,300 automobiles. Suspicious that the company was actually buying the vehicles for export, Ford Canada declined the transaction. However—as reported to Ford U.S. by two different Ford Canada executives—GM Canada and Chrysler Canada subsequently agreed to split the sale of the 1,300 automobiles “despite the export ‘compromise.’” Arguably, these statements indicating the existence of an “export compromise” could be viewed as evidence that some type of conspiracy involving exports was in existence as early as 1999.²⁰ At a minimum, however, the evidence of this aborted rental car transaction suggests that Ford Canada’s adherence to its export policies cost it millions of dollars in profits and significant market share because its vehicles were viewed as interchangeable with the vehicles of other manufacturers for gray market purposes. Indeed, Ford Canada acknowledged that it would “feel the share impact.” Further, not only did Ford lose money on the initial sale of the vehicles in Canada, but the exported cars became cheaper, intra-brand competition for Ford in the United States. Construing all of this evidence in the light most favorable to plaintiffs, a plausible inference exists that—whatever Ford Canada’s previous policies or “compromises” regarding export sales—a substantial, and seemingly different, problem was emerging as early as 1999 that may have demanded a new response.

In arguing against the existence of an illegal conspiracy, Ford also continually stresses that no agreement to take joint action came out of any of the allegedly conspiratorial meetings. However, the absence of any post-agreement indication of specific joint activity among the manufacturers is not fatal to plaintiffs’ conspiracy claim. Ford simply ignores the fact that the posited conspiracy was not necessarily to work together on joint initiatives, but rather, as plaintiffs described it: “to provide assurances that each defendant would enforce anti-export policies.” That is, it was an agreement that no one would break ranks and take for themselves the significant profits available in the export market, as had happened in 1999 to the financial detriment of Ford Canada. Judge Hornby concluded as much in the federal

Canada and learned exports were a major problem for them. In September 2000, a Ford Canada executive spoke with Toyota Canada and learned about its response to the export problem, including pricing “hot” cars the same in the United States and Canada.

²⁰ When deposed, both Ford Canada executives offered nonconspiratorial, though differing, explanations for their use of the term “export compromise.”

MDL action when, after detailing the many ways in which defendants declined to take industry-wide action, he opined: “But there is nevertheless probably enough for a jury to find at least an informal agreement to restrain Canadian exports.” (*In re New Motor Vehicles Canadian Export Litigation*, *supra*, 632 F.Supp.2d at p. 47 & fn. 8; see also *Monsanto*, *supra*, 465 U.S. 752, 764; *Jones v. City of Chicago* (7th Cir. 1988) 856 F.2d 985, 992 (“[i]t is enough if you understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do your part to further them”).) Thus, we are not persuaded that the lack of evidence of an adopted industry-wide “solution” necessarily undercuts plaintiffs’ conspiracy claims.

Finally, we agree with the trial court that evidence indicating that certain of the defendant manufacturers “stepped up” their anti-export policies after the start of the alleged conspiracy period is not necessarily evidence of an agreement to do so. The evidence that plaintiffs themselves present shows that manufacturers were facing an entirely new economic climate in which an unprecedented number of essentially fungible lower-priced Canadian vehicles were suddenly available for profitable export to the United States. Under such circumstances, it seems plausible, that—even in the absence of a conspiracy—manufacturers might decide unilaterally to boost their efforts to combat this extremely costly problem. Thus, in this case, without other evidence tending to exclude the possibility of unilateral behavior, documentation of increased action to combat exports is not particularly probative of unlawful conspiracy.

Having described the evidence and arguments we find unconvincing, we turn now to a discussion of the evidence that could be interpreted as tending to exclude unilateral action, thereby making unlawful conspiracy more likely than not.²¹

1. Meeting Evidence

First, plaintiffs have produced significant evidence of telephone and in-person meetings among the manufacturers, aided by CADA, the express purpose of which was to come up with a joint approach to stamping out the

²¹ Citing *Continental Ore*, plaintiffs argue on appeal that the trial court erred by failing to consider all of the conspiracy evidence as a whole. Instead, they claim, the court below compartmentalized the various types of evidence and then gave the benefit of the doubt to Ford on every category. The trial court, however, expressly addressed this very argument, stating: “I didn’t compartmentalize the evidence. I’m aware that when you have a claimed conspiracy, the parts relate to each other.” More fundamentally, given our de novo review of the matter, the trial court’s process in reaching its decision is essentially irrelevant. We will engage in our own review of all of the evidence presented. (See *Continental Ore*, *supra*, 370 U.S. at p. 699; see also Code Civ. Proc., § 437c, subd. (c) [summary judgment appropriate only when “all the papers submitted” show no issue of material fact].)

gray market export of Canadian vehicles to the United States. As stated above, there is evidence in the record that, by 2000, the manufacturers were discussing the magnitude of the export problem among themselves. In addition, during this time frame, individual manufacturers conferred regarding the possibility of working together to address unauthorized export sales. For instance, Toyota Canada asked a representative of Honda Canada (Miller) if he was “interested in joining with some other manufacturers to come up with a common method of resolving export sales.” Miller was also contacted by Ford Canada and Chrysler Canada to the same effect. Indeed, a representative of Ford Canada called Miller in an attempt to persuade him to work together on the export issue, stating that Honda Canada “should join them. It was for the betterment of the industry” and “it would be easier if all the manufacturers were common in their approach to the dealers, as it relates to export sales.”²²

On October 25, 2000, Norm Stewart, general counsel for Ford Canada, sent a message via facsimile to the CVMA indicating that he wanted the CVMA to “initiate a conference call” with representatives of GM Canada, Chrysler Canada, Honda Canada, and Toyota Canada “as soon as possible, to discuss a proposed meeting with CADA . . . *aimed at developing an industry-wide approach to ending unauthorized export sales*” (italics added). On October 27, 2000, Stewart participated in a conference call with representatives of other automobile manufacturers, including Chrysler Canada (Grant), GM Canada (McDonald), Honda Canada (Miller), and Toyota Canada (Millette). According to Stewart, who admitted that the call was organized at his request, the purpose of the call was to “talk about export issues.” Stewart’s deposition testimony further reveals that the result of the call was direction to Dave Adams at CVMA “to get back to CADA to indicate that we would be prepared to meet.”

Ultimately, an industry meeting was scheduled at CADA’s offices on May 15, 2001, to discuss the export sales problem. Representatives of Ford Canada (Stewart), GM Canada (Risebrough and McClean), Chrysler Canada (Rose), Toyota Canada (Millette), the CVMA (Adams), and the AIAMC (Biggs) attended a “pre-meeting” on May 15 to discuss the issues that they anticipated would be raised at this CADA-sponsored event. These same individuals—along with additional representatives of the AIAMC (Hodges and Watkins) and Chrysler Canada (LeBlanc), representatives from CADA (Little, Gauthier, Ryan, Riccoboni, and Clark) and representatives of certain regional dealer associations—then attended the actual meeting in CADA’s offices, which reportedly lasted from lunchtime until 4:00 or 5:00 o’clock.

²² These statements regarding the potential benefits of joint action were not admitted by the trial court for their truth.

Minutes from the meeting, the admissibility of which was determined above, indicate that the meeting's objective, as articulated by CADA, was to develop "a strategy to solve the industry problem of export sales of new automobiles to the United States," including the possibility of "one set of rules, a protocol, which could be applied across the industry." Possible industry solutions, and the difficulties associated with them, were explored. For instance, a representative of a regional dealer association indicated that no-export clauses in sales agreements did not appear to be an effective deterrent. A common due diligence list was seen as problematic because it would be overly cumbersome to use with every customer; sophisticated export brokers would likely find ways to circumvent the standard process; and customers were reported to resent being questioned regarding their purchase. Development of a shared database of known exporters, possibly maintained by CADA, was criticized due to possible definitional differences among manufacturers, the need for constant updating, and Unfair Competition Act, Privacy Act, and defamation concerns. Participants also discussed the development of a best practices list through dialogue with the dealers and lobbying the government for tax reform aimed at combating export sales.

In the end, as mentioned previously, no particular solution was adopted. Rather, a list of proposed actions was generated, including (1) determining the size of the problem through collection of statistical data from all manufacturers; (2) developing an employee education program for the dealers on the export issue; (3) tax reform to eliminate certain rebates for gray market exports; (4) profiling the importance of the two-tiered distribution system to Canada, as equalization of pricing in Canada and the United States could lead to fewer sales in Canada, lost jobs, and older cars on the road; (5) seeking advice from outside counsel "with respect to any Competition Act implications of any industry-wide export sales initiatives"; (6) surveying dealers with respect to their best practices in the prevention of exports; (7) checking with NADA to assess the export situation from the United States perspective; and (8) investigating the possible future development of a shared database. As stated above, the minutes ended with the admonition: "**PLEASE KEEP THESE NOTES CONFIDENTIAL.**"

Citing *Biljac* and the trade association meeting cases, Ford argues that discussing an industry problem as a group is not evidence of an illegal agreement to restrain trade and, in fact, is actually condoned by the Cartwright Act. (See *Biljac*, *supra*, 218 Cal.App.3d at p. 1430; see also *Aguilar*, *supra*, 25 Cal.4th at pp. 839–840, 862–863; *In re Citric Acid Litigation*, *supra*, 191 F.3d at pp. 1097–1099; *Alvord-Polk*, *supra*, 37 F.3d at pp. 1005–1006, 1013–1014.) We agree that, given the evidence of changed market forces during the time frame of the alleged conspiracy—including the harmonization

of safety and environmental standards, the weakening of the Canadian dollar, and the recent spike in gray market exports—the issue of export sales was a “timely and natural one[] within the industry.” (*Biljac, supra*, 218 Cal.App.3d at p. 1430.) However, we believe the evidence in this case goes significantly beyond the benign exchange of information on a common industry problem permitted under the antitrust laws. Indeed, this is not a situation where the export issue was part of a general industry discussion covering a large number of topics. (*Biljac, supra*, 218 Cal.App.3d at p. 1433.) Instead, the evidence shows a series of communications and meetings the sole purpose of which was, as plaintiffs put it, “to figure out an industry solution to stamp out the export problem.”²³ In addition, the record is clear that the participants were aware of the legal problems inherent in concerted activity among the manufacturers. Yet they met and discussed working together on restricting exports anyway. Under these circumstances, we believe that the evidence of telephone and in-person meetings among the alleged co-conspirators proffered by plaintiffs could be viewed as tending to exclude the possibility that the manufacturers acted independently rather than collusively with respect to exports. (See *Aguilar, supra*, 25 Cal.4th at p. 852.)

Moreover, our conclusion is not altered by Ford’s additional claim that *agreeing to meet* with competitors to discuss the possibility of an industry-wide solution does not make it more likely than not that the individual actions subsequently taken by the manufacturers to restrict exports were the result of an illegal agreement, especially where the evidence shows that no industry-wide solution was ever implemented. As discussed above, we do not believe the fact that no common response to the export problem was ever adopted by the manufacturers precludes a finding of conspiracy. As for the argument that agreeing to meet is different than agreeing to conspire, that is, of course, true. However, agreeing to meet extensively on the sole topic of how best to restrict exports as an industry certainly raises a plausible inference that the alleged co-conspirators had all previously agreed to hold the line together on export sales, and were thus willing to explore together in detail the most effective means of implementing that anticompetitive pact. Thus, the meeting evidence might be sufficient, in and of itself, to defeat Ford Canada’s summary judgment motion. Ultimately, however, we need not

²³Indeed, this is the position that was initially articulated by the trial court, which stated during the summary judgment hearings below: “You can’t satisfy your burden by showing that there was an opportunity to meet. You can’t satisfy your burden to show that they simply met without regard to regarding [sic] anything. So the type of evidence you usually see that there was a convention and they all went to the convention, and they all had dinners together and the like; not enough. [] What you have here is a series of communications where it is clear what the topic of the communications would be, and I think there is admissible evidence as to each of the defendants here that they participated to some extent in communications with each other where the topic of the problem that they all shared was discussed. So that’s different than saying, well, they had lunch at the American Bankers Association.”

decide whether this evidence, standing alone, is sufficient to persuade a trier of fact that unlawful conspiracy among the automobile manufacturers is “more likely” than permissible competition, because the record contains additional evidence supporting the existence on an illegal agreement to restrict Canadian exports. (See *Aguilar*; *supra*, 25 Cal.4th at p. 852.)

2. Possible Direct Evidence of Agreement

For instance, as discussed at length above, Pierre Millette’s conclusion after participating in the May 15, 2001, CADA meeting—as well as a number of previous meetings and calls—was that there was “general support for the approach” of trying to keep Canadian vehicles in Canada. Moreover, when asked if there was an agreement among the manufacturers “to work together to keep vehicles in Canada,” Millette responded that it was not an “agreement,” but was instead “simply a concept that there was some consensus on from everyone at the meeting.” We believe that this evidence—that one of the key alleged co-conspirators thought that there was a “consensus” among all of the meeting participants to work together to keep Canadian vehicles from crossing the border—could be viewed as highly probative of conspiracy. Indeed, based on these comments, which the trial court expressly refused to consider, a reasonable juror could conclude that Ford Canada and the other alleged co-conspirators “ ‘had a conscious commitment to a common scheme designed to achieve an unlawful objective’ ” (*Biljac*, *supra*, 218 Cal.App.3d at p. 1425.) In other words, the trier of fact could find that each member of the group had committed to do its part to restrain Canadian new vehicle exports to the United States, thereby cutting off a burgeoning discount channel of distribution. (Cf. *General Motors*, *supra*, 384 U.S. at p. 144 [“General Motors sought to elicit from all the dealers agreements, substantially interrelated and interdependent, that none of them would do business with the discounters. These agreements were hammered out in meetings . . . and in telephone conversations . . . It was acknowledged from the beginning that substantial unanimity would be essential if the agreements were to be forthcoming”].)

Of course, we recognize that Mr. Millette’s comments are subject to interpretation and are at least potentially contrary to other of his statements contained in the record. Indeed, for its part, Ford argues that the Millette testimony is not direct evidence of conspiracy proving, at most, only that all of the manufacturers viewed Canadian exports as a problem. However, as our Supreme Court recently reiterated: “[T]he task of disambiguating ambiguous utterances is for trial, not for summary judgment.” (*Reid*, *supra*, 50 Cal.4th at p. 541; see also *ibid.* “[d]etermining the weight of . . . ambiguous remarks is a role reserved for the jury”.) Put another way, in ruling on a motion for summary judgment, “the court may not weigh the plaintiff’s

evidence or inferences against the defendants’ as though it were sitting as the trier of fact.” (*Aguilar, supra*, 25 Cal.App.4th at p. 856; see also *Monsanto, supra*, 465 U.S. at pp. 767–768 & fn. 12 [“[t]he choice between two reasonable interpretations of the testimony was properly left for the jury”].)

For our purposes, then, it is sufficient to conclude that if presented with the Millette testimony—especially in the context of the meeting evidence discussed above—a reasonable juror could find an unlawful conspiracy to restrict Canadian exports more likely than not. (See *Aguilar, supra*, 25 Cal.4th at p. 852.) Further, we need not determine whether the deposition testimony is best characterized as direct or circumstantial evidence of the alleged conspiracy because we conclude that, regardless, it is evidence that tends to exclude the possibility that the alleged co-conspirators acted independently rather than collusively. (See *ibid.*) Thus, it is sufficient to support reversal of the trial court’s summary judgment decision in favor of Ford Canada.²⁴

3. Evidence of Actions Taken to Further Alleged Conspiracy

In addition to the materials detailed above, several other categories of evidence presented by the plaintiffs—while perhaps not sufficient in and of themselves to send the issue of conspiracy to a jury—do tend to lend further support to the plaintiff’s theory of the case. For instance, the uncontested evidence shows that all of the manufacturers continued to enforce export restrictions in the wake of the May 15, 2001, CADA meeting, with many “stepping up” their export efforts. In June 2001, Ford Canada generated a list of export sales policy actions, including “[o]ngoing dialogue with industry contacts to share ‘best practices.’ ” Thereafter, in August 2001, Ford Canada requested that its regional managers contact dealers, informing them that continued export sales would “result in restricted allocations of high demand products for Canadian Dealers and increased pressure to increase prices.” Further, they were to indicate that such sales could lead to termination, chargebacks, and suspension from dealer incentive programs. Finally, the managers were instructed to assure the dealers that “[t]he company will share

²⁴ Although we do not consider it in reaching our decision, we note that there is other potential direct evidence of conspiracy in the record that the trial court excluded on hearsay grounds, a decision not challenged by plaintiffs for purposes of this summary judgment motion. For instance, a draft letter by a senior executive at Chrysler Canada dated April 2002 to “All DaimlerChrysler Canada Retailers” states: “*We have joined forces with the other manufacturers* (with CVMA and AIAMC) and have met with CADA officials to explore *additional deterrents to the export activity.*” (Italics added.) In addition, an internal e-mail from Pierre Millette to others at Toyota Canada describes an April 2002 meeting among representatives of CADA, various manufacturers, and dealers as follows: “GM was not present but had advised they were supportive of joint action. They are involved in a lawsuit with one of the biggest exporters and one of the allegations is an industry conspiracy to stop exports which makes their participation in the conspiracy (all present agreed there was nothing illegal with what was being done) to stop exports a problem.” (Italics added.)

best practices volunteered by you and your fellow Dealers in preventing export sales as well as working with CADA and other vehicle manufacturers on an industry-wide approach to deter export sales.” (Italics added.) There is also evidence that Ford Canada actually reduced vehicle allocations, provided blacklists of known exporters to its dealers, circulated best practices, imposed chargebacks, and initiated dealer termination proceedings during this time frame.

Other manufacturers followed suit, each relying on the export restrictions they found most effective for their particular situation. Chrysler Canada, for instance, issued chargebacks, maintained a blacklist of known or suspected exporters, and supplied its dealers with a list of due diligence “checkpoints” to be employed to uncover exporters. It began refusing to honor warranties beginning in 2002. GM Canada issued chargebacks; enhanced its best practices list; and strengthened its Franchise Agreement to allow for penalties on, and termination of, exporting dealers. Toyota Canada had an online blacklist of suspected exporters, issued chargebacks, and monitored the availability of replacement speedometers. Honda Canada stopped honoring warranties in 1998 for gray market vehicles. During the period of the alleged conspiracy, it maintained a due diligence checklist, issued chargebacks, and reduced vehicle allocations to exporting dealers. Thus, the manufacturers consistently enforced export restraints during the time frame of the alleged conspiracy, and there is no evidence in the record that any manufacturer broke ranks during this period and decided to collect the easy profits available to it from allowing gray market sales. Although insufficient standing on its own, such parallel conduct can be probative evidence of unlawful collusion. (*Apex Oil Co. v. DiMauro* (2d Cir. 1987) 822 F.2d 246, 253.)

■ An agreement among competitors, however “‘may be inferred on the basis of conscious parallelism, when such interdependent conduct is accompanied by circumstantial evidence and plus factors.’” (*Mayor and Council of Baltimore v. Citigroup* (2d Cir. 2013) 709 F.3d 129, 136 (*Citigroup*).) These plus factors include things such as: “a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications.” (*Ibid.*) Here, the alleged co-conspirators continued to meet and otherwise communicate regarding the export issue during the alleged conspiracy period. An additional conference call on export sales was held on May 28, 2001. Representatives of Ford Canada met with CADA in February 2002 to discuss exports. Toyota Canada met with CADA in March 2002 with respect to similar concerns. Two other CADA-sponsored industry meetings on the topic of export sales were held in April and November 2002. Thus, there was a high level of interfirm communication.

In addition, the plaintiffs presented evidence that the alleged co-conspirators shared information throughout the alleged conspiracy period. For example, in March 2001, Ford Canada obtained a copy of Chrysler Canada's blacklist and added the names to Ford's blacklist. During the May 28, 2001, conference call, Norm Stewart explained Ford Canada's process for tracking exports through VIN's and suggested that the industry could undertake a similar analysis. In March 2002, GM Canada was in possession of export volume data pertaining to both Ford and Chrysler. Further, as stated above, in June 2001, Ford Canada espoused "[o]ngoing dialogue with industry contacts to share 'best practices.'" It sent a copy of its best practices to CADA in March 2002. However, Ford's own expert testified that enforcing export restraints was a difficult and expensive thing to do and that sharing know-how with a rival that would reduce its export costs or help protect its dealer network would not be in Ford's unilateral self-interest absent receipt of something in return.

In fact, such information sharing, in and of itself, was found sufficient to defeat summary judgment in *Coca-Cola, supra*, 2000 U.S.Dist. Lexis 17089. In that case, the plaintiff alleged that the Coca-Cola Company and its horizontal competitors, including Pepsi Cola and Cadbury Schweppes, were engaged in a conspiracy to exchange information about exporters and drive them out of business. (*Id.* at p. *28.) Although there was no direct evidence of an express conspiracy to boycott exporters, there was circumstantial evidence, including (1) documentation that Coca-Cola and Pepsi exchanged information regarding exporters; (2) a request from certain distributors that Coca-Cola handle exports for Canada Dry in the same way it handled Coca-Cola exports; (3) a memorandum indicating that Coca-Cola had provided Canada Dry with the names of three exporters; and (4) a report by Cadbury Beverages which included information on Coca-Cola exports. (*Id.* at pp. *29-*30.) Rejecting Coca-Cola's argument that this information sharing revealed only "isolated contacts" that occurred after each manufacturer independently adopted its own [anti-export] program in the pursuit of each licensors' independent economic interest," the trial court concluded that summary judgment was inappropriate because "evidence of this concerted activity is more consistent with an impermissible purpose, an agreement to jointly combat the [exporting] competitors." (*Id.* at p. *31.)

In sum, given the particular circumstances of this case, the parallel conduct engaged in by the manufacturers during the alleged conspiracy period provides additional support for the plaintiffs' claimed conspiracy.

4. Evidence of Economic Motive to Conspire

Finally, there is motive evidence in the record, suggesting that the alleged co-conspirators had no economic incentive to maintain or increase export

restraints during the time frame of the alleged conspiracy in the absence of an illegal agreement. (See *Citigroup, supra*, 709 F.3d at p. 136.) Although the economic analysis is complex and vigorously disputed by Ford, plaintiffs' expert Professor Robert E. Hall, of Stanford University and the Hoover Institute, essentially maintains that—under the conditions prevailing during the class period—the unilateral imposition of export restraints by an automobile manufacturer would have been unprofitable because that manufacturer would lose the profits available to it from selling Canadian vehicles into the United States market. Although the manufacturer would profit from selling more higher priced American vehicles in the United States, the loss in profits would be greater than any gain because “the gray-market sales for one manufacturer displace the gray-market sales of other manufacturers sufficiently to more than offset the loss of authorized sales in the U.S.” Thus, in Professor Hall’s opinion, “export restraints would not have been in place or enforced during the class period under unilateral action by the manufacturers.”²⁵

The plaintiffs argued below that such evidence made unlawful conspiracy “more likely” than permissible competition and also showed the pretextual nature of the manufacturers’ asserted justifications for their export restraints. The trial court, however, was not convinced that this evidence had any probative value. Indeed, during the hearings on the various summary judgment motions before it, the trial court at one point stated: “I am mindful that the claimed conspiracy is in the economic self-interest of each of the defendants, perhaps. That alone doesn’t do anything for you. That’s not evidence, that’s simply a perspective. And the fact that it would be in somebody’s self-interest to conspire doesn’t mean that they did.”

In its order granting summary judgment for Ford, the court acknowledged that the plaintiffs had presented “evidence of motive and economic interest to conspire” among the alleged co-conspirators. Citing *Aguilar*, however, the trial court concluded that “[t]his evidence alone does not satisfy plaintiffs’ burden of production.” (See *Aguilar, supra*, 25 Cal.4th at p. 864 [“We recognize that Aguilar did indeed present evidence that the petroleum companies may have

²⁵ As mentioned above, Ford has filed a motion to exclude the opinions and testimony of Robert Hall in the trial court, along with voluminous supporting documentation. Plaintiffs, for their part, have responded with extensive materials of their own opposing Ford’s motion. The trial court, however, has yet to take any action on Ford’s motion to exclude, and thus the Hall reports submitted by plaintiffs in opposition to Ford’s summary judgment motion remain “evidence set forth in the papers” to which no objection has been sustained by the trial court. (Code Civ. Proc., § 437c, subd. (c).) As such, they must be considered by the trial court—and in this court’s de novo review “[i]n determining whether the papers show that there is no triable issue as to any material fact.” (*Ibid.*; see also Code Civ. Proc., § 437c, subd. (b)(2).)

possessed the motive, opportunity, and means to enter into an unlawful conspiracy. But that is all. And that is not enough. Such evidence merely allows speculation about an unlawful conspiracy. Speculation, however, is not evidence”]; see also *Serfecz v. Jewel Food Stores* (7th Cir. 1995) 67 F.3d 591, 600–601, quoted with approval in *Aguilar, supra*, 25 Cal.4th at p. 865, fn. 32 [“[t]he mere existence of mutual economic advantage, by itself, does not tend to exclude the possibility of independent, legitimate action and supplies no basis for inferring a conspiracy”].) While we agree that motive evidence alone is insufficient to prove conspiracy, we believe it is nevertheless a relevant consideration.

Here, if believed (and again we acknowledge that its validity is the subject of intense debate), Hall’s economic analysis posits that the auto manufacturers would not have continued to restrict exports during the alleged conspiracy period in the absence of an agreement that none of them would break ranks and reap the profits available in the export market. If true, this “tends to exclude” the possibility that the alleged conspirators acted independently rather than collusively. (See *Aguilar, supra*, 25 Cal.4th at p. 852.) Moreover, this evidence of potential economic motive to conspire does not exist in a vacuum. Rather, it merely further supports the meeting evidence discussed above, Millette’s statements regarding the existence of a “consensus” to keep Canadian cars in Canada, and the manufacturers’ parallel conduct in restricting exports.

■ In the end, this is, perhaps, as the trial court acknowledged, “not an easy case.” Nevertheless, we are mindful of Justice Mosk’s admonition in *Aguilar* with respect to summary judgment motions in antitrust proceedings that “although such motions should be denied when they should, they must be granted when they must.” (*Aguilar, supra*, 25 Cal.4th at pp. 847, 852.) Viewing all of the evidence as a whole and in the light most favorable to the plaintiffs, we conclude that summary judgment must be denied in this case because it should. Plaintiffs have produced sufficient evidence to create a genuine issue of material fact as to whether Ford Canada and its competitors entered into an illegal conspiracy to restrict the export of lower priced Canadian vehicles to the United States.

IV. DISPOSITION

The judgment of the trial court with respect to Ford U.S. is affirmed. The trial court’s summary judgment in favor of Ford Canada, however, is reversed

and the matter remanded for further proceedings consistent with this opinion. The plaintiffs are entitled to their costs on appeal.

Ruvolo, P. J., and Rivera, J., concurred.

The petition of respondent Ford Motor Company for review by the Supreme Court was denied October 19, 2016, S236604.

[No. D069661. Fourth Dist., Div. One. July 6, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
MARTIN FIELD, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

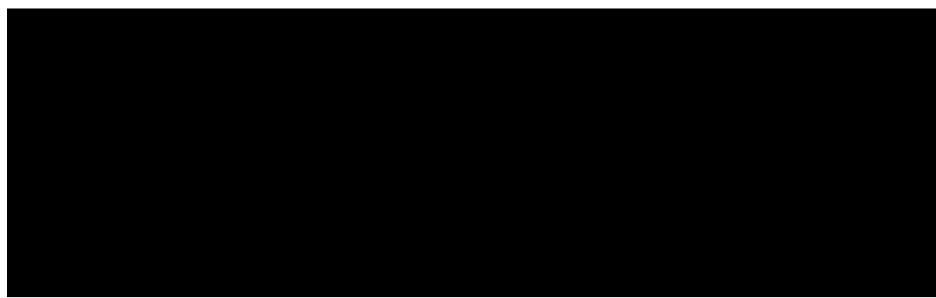
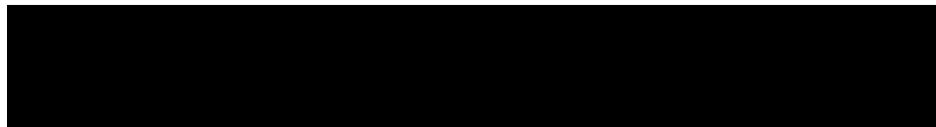
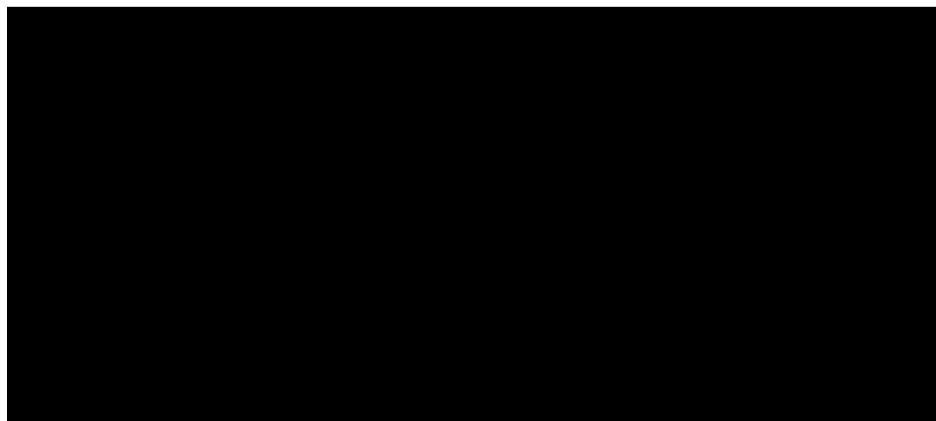
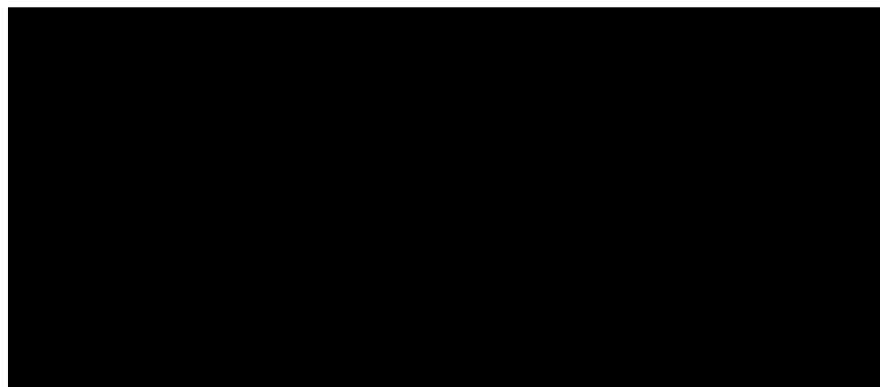
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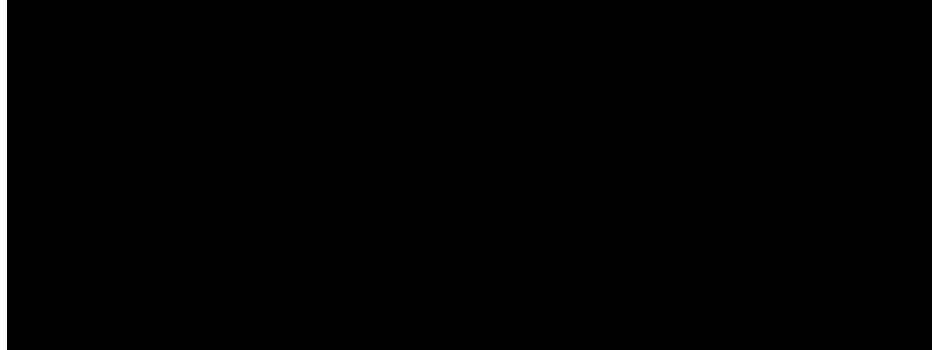
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COUNSEL

Ronald R. Boyer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

HUFFMAN, J.—Martin Field was committed to a mental hospital after a jury found he was a sexually violent predator (SVP) under the Sexually Violent Predators Act (Welf. & Inst. Code,¹ § 6600 et seq.; SVPA or the Act). Field appeals, contending (1) the court prejudicially erred by failing to provide a certain pinpoint jury instruction; (2) the repeated use of the term “sexually violent predator” during trial violated his due process rights; (3) the court prejudicially erred in failing to properly instruct the jury regarding the meaning of the word “likely”; (4) cumulative error requires reversal; (5) the SVPA violates the equal protection, double jeopardy, due process, and ex post facto clauses of the federal Constitution; and (6) his equal protection rights under the state and federal Constitutions were violated when the court permitted the district attorney to call Field as a witness over his objection. Regarding Field’s last contention, he argues that because a person found not guilty of crimes by reason of insanity (NGI) may not be compelled to testify at hearings to extend his or her commitment, neither should a person found to be an SVP be compelled to testify.

¹ Statutory references are to the Welfare and Institutions Code unless otherwise specified.

We conclude Field's equal protection claim involving testifying at trial may have merit and remand the matter to the superior court for an evidentiary hearing on that issue. We reject Field's other contentions.

FACTUAL AND PROCEDURAL BACKGROUND

A. Field's Sexual Misconduct

Field has a long history of sexual misconduct. In 1972, Field convinced a five-year-old boy that was playing outside to follow Field inside his home. Once inside, Field molested him. Field was convicted of violating Penal Code section 288.

The following year, Field married a woman named Patricia and lived with her and her three sons, whom he adopted. From around 1974 to 1981, Field molested his adopted son Joseph. Joseph was about five years old at the time Field started molesting him. Field would fondle and orally copulate Joseph and then force Joseph to fondle him. During this time, Field also was regularly molesting one of his other sons, Eric. Field molested Eric over the course of several years, starting when Eric was around four years old. Field forced Eric to submit to and perform oral copulation.

During this same time period, Field also molested a nine-year-old cousin of Joseph and Eric. Field was convicted of violating Penal Code section 288 for his offenses against Eric. He subsequently was committed to a state hospital for treatment as a mentally disordered sex offender. However, he was kicked out of treatment and sent back to prison because he disregarded the hospital's rules and was "unamenable to treatment."

After Field was released, Field moved to Montana with his wife and Eric. In 1986, Field was convicted of molesting his young neighbor, who was nine or 10 years old at the time, after he kissed the boy all over his genital area and body. He was sentenced to 16 years in prison with eight years suspended.

After Field was released for this offense, for the next eight years, Field would have sex with teenage boys in an attempt to "change his sexual attraction" from young boys. The boys were reported to be between 15 and 18 years old. Field claimed they were all over the age of 16.

Field became a long haul truck driver so that he could reduce his contact with children. While on the road as a truck driver, Field had sex with prostitutes, both male and female, but stated they were all above the age of consent.

Also, while working as a truck driver Field was at a truck stop when he saw two young children by themselves. He bought them food and gave them money to play video games. When the manager came by and saw Field with the children, he asked Field if he was related to the children. When Field said no, the manager told the children to leave.

In 1991, Field wrote a letter to Joseph and said that if he had the opportunity, he would molest Joseph's three-year-old son.

During this time, Field was vocal about his sexual attraction to children.

In 2006, Field was arrested for possession of amphetamine and controlled substance paraphernalia. While he was in custody, Field started rubbing the leg and genital area of an inmate he was handcuffed to, despite the man's attempts to stop him. The inmate was a young man in his early 20's.

Field has been housed at Coalinga State Hospital since 2009. He has not participated in treatment there. Between 2012 and 2013, there were three incidents involving Field at the hospital. Field grabbed the hand of another patient and put it on his crotch. Field also gave another patient an enema after the patient asked for one. A nurse was present outside the open door while Field gave the patient an enema. Finally, Field kissed the forehead of a demented, older male patient and put his arm around him. Field claimed the patient needed some support.

At the time of his trial, Field was 63 years old. He planned to return to work as a truck driver if released.

B. Prosecution's Experts²

Drs. Erik Fox and Preston Sims are licensed psychologists who testified for the prosecution. Both worked as SVP evaluators for the State Department of State Hospitals, and evaluated Field to determine whether he met the statutory criteria for civil commitment as an SVP. The applicable criteria consists of: (1) was the individual convicted of a qualifying sexually violent offense; (2) does the individual have a diagnosable mental disorder predisposing him to commit criminal sexual acts; and (3) is the individual likely to commit future predatory sexually violent acts.

Dr. Fox reviewed Field's medical and criminal records as well as his sexual history. He found that the 1972 and 1981 convictions were qualifying

² Although a proceeding under the SVPA is civil in nature (*People v. Allen* (2008) 44 Cal.4th 843, 860 [80 Cal.Rptr.3d 183, 187 P.3d 1018]), we follow the common practice of characterizing the parties to the action as the "prosecution" and "defense" (see, e.g., *id.* at p. 866).

offenses under the SVPA. Based on his review of Field's "long history of having an arousal to children and acting on that arousal," he diagnosed Field with pedophilic disorder, alcohol dependence, amphetamine abuse, and a personality disorder. Dr. Fox explained that pedophilic disorder is a lifelong condition that cannot go into remission. Given that Field's numerous convictions, incarcerations, and attempts to receive treatment did not deter his criminal conduct, Dr. Fox opined that Field's pedophilic disorder caused him serious difficulty controlling his behavior.

Dr. Sims also diagnosed Field with pedophilic disorder. Dr. Sims noted that, as recently as 2006, Field had told his probation officer that he was a pedophile and, in 2009, he also told his evaluators that he was sexually attracted to children. He also noted that although Field was only convicted for his sexual offenses as to one of his adopted sons, Field had since admitted that he molested all three. Dr. Sims opined that Field was sexually preoccupied and that, given the frequency of his offenses and convictions, Field had emotional and volitional impairment.

Both doctors opined that, as a result of his mental disorder, Field was likely to engage in sexually violent predatory behavior if released. They based their opinions, in part, on the use of the Static-99R, an actuarial tool used to assess an offender's risk of recidivism. Both doctors independently scored Field as a six on the diagnostic scale, which placed him in the high risk category. Field's risk score placed him within a group of offenders that have a 29.4 percent recidivism risk within a five-year period, which Dr. Fox opined was a "substantial" risk.

C. Defense Expert

Dr. Mary Jane Alumbaugh, a licensed psychologist, evaluated Field and testified in his defense. She diagnosed Field with pedophilic disorder; however, she opined that Field did not have serious difficulty controlling his pedophilic behavior. She based her opinion on the fact that Field is getting older and explained that recidivism literature shows a decline in sexual offenses as a person ages. She noted that Field's last offense was in 1987 and that during the time he was in the community, between periods of incarceration or commitment, he did not offend against children. Using the Static-99R assessment tool, Dr. Alumbaugh scored Field with a three, which put him in the "low/moderate risk category." Based on these considerations, Dr. Alumbaugh opined that Field was not likely to reoffend, and thus that he was not an SVP.

DISCUSSION

I

SVPA

We need not provide a detailed explanation of the SVPA as the California Supreme Court has done that on numerous occasions. (*Reilly v. Superior Court* (2013) 57 Cal.4th 641, 646 [160 Cal.Rptr.3d 410, 304 P.3d 1071] (*Reilly*); *In re Lucas* (2012) 53 Cal.4th 839, 845 [137 Cal.Rptr.3d 595, 269 P.3d 1160]; *People v. McKee* (2010) 47 Cal.4th 1172, 1183, 1185 [104 Cal.Rptr.3d 427, 223 P.3d 566] (*McKee I*); *People v. Roberge* (2003) 29 Cal.4th 979, 982, 984 [129 Cal.Rptr.2d 861, 62 P.3d 97] (*Roberge*); *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 893, 902 [119 Cal.Rptr.2d 1, 44 P.3d 949] (*Ghilotti*)).

■ Suffice it to say, the SVPA provides for indefinite involuntary civil commitment of certain offenders who are found to be SVP's following the completion of their prison terms. (*McKee I, supra*, 47 Cal.4th at pp. 1186–1187.) Except for nonsubstantive differences in grammar, the SVPA tracks verbatim the Kansas SVP law approved in *Kansas v. Crane* (2002) 534 U.S. 407 [151 L.Ed.2d 856, 122 S.Ct. 867] (*Crane*), and *Kansas v. Hendricks* (1997) 521 U.S. 346 [138 L.Ed.2d 501, 117 S.Ct. 2072] (*Hendricks*). (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1157 [81 Cal.Rptr.2d 492, 969 P.2d 584] (*Hubbart*).) Section 6600, subdivision (a)(1), states: “ ‘Sexually violent predator’ means a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.”

To establish that a person is an SVP, the prosecution is required to prove the following: (1) the offender has been convicted of a qualifying sexually violent offense against at least two victims; (2) the offender has a diagnosed mental disorder; (3) the disorder makes it likely the offender would engage in sexually violent conduct if released; and (4) this sexually violent conduct will be predatory in nature. (*Roberge, supra*, 29 Cal.4th at pp. 984–985.) The prosecutor must establish these elements beyond a reasonable doubt and the jury verdict must be unanimous. (*Reilly, supra*, 57 Cal.4th at p. 648.)

II

JURY INSTRUCTIONS

Field raises two issues regarding jury instructions. First, he claims the trial court prejudicially erred in refusing to provide a pinpoint instruction telling

the jury that Field's mental diagnosis must cause him serious difficulty controlling his behavior. Second, Field contends the court did not properly instruct the jury as to the definition of "likely." We reject both contentions.

A. The Requested Pinpoint Instruction

Prior to trial, Field filed a motion requesting the trial court to provide the jury with the following pinpoint jury instruction modifying CALCRIM No. 3454:

"In order to find that Respondent meets the criteria as a sexually violent predator, as that term is described in these instructions, Petitioner must prove that:

"1. Respondent suffers from a diagnosed mental disorder, as defined elsewhere in these instructions;

"AND

"2. That diagnosed mental disorder must cause Respondent to have serious difficulty in controlling his sexually violent behavior;

"AND

"3. As a result of that diagnosed mental disorder, he is a danger to the health and safety of others because it is likely that he will engage in sexually predatory criminal behavior."

The prosecutor opposed the motion, arguing that the California Supreme Court held the standard definition of "diagnosed mental disorder" contained in CALCRIM No. 3454 encompassed the requested pinpoint instruction and that no additional language was necessary. The trial court denied the motion and provided the jury with an instruction consistent with CALCRIM No. 3454 as follows:

"The petition alleges that Martin Field is a sexually violent predator. To prove this allegation, the People must prove beyond a reasonable doubt that: One, he has been convicted of committing sexually violent offenses against one or more victims; two, he has a diagnosed mental disorder; and, three, as a result of that diagnosed mental disorder, he is a danger to the health and safety of others because it is likely that he will engage in sexually violent predatory criminal behavior.

“The term ‘diagnosed mental disorder’ includes conditions either existing at birth or acquired after birth that affect a person’s ability to control emotions and behavior and predisposed^[3] that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others.

“A person is more likely to engage in a sexually violent predatory criminal behavior if there is a substantial danger, that is, a serious and well-founded risk, that the person will engage in such conduct if released into the community. The likelihood that the person will engage in such conduct does not have to be greater than 50 percent but be much more than a mere possibility.”

B. Analysis

Relying on *Crane, supra*, 534 U.S. 407, Field contends that, under federal law, a person cannot be subjected to civil commitment unless he suffers from a mental disorder making it seriously difficult for him to control his dangerous behavior. Field thus asserts the trial court committed reversible error by denying his request for a pinpoint instruction that explained this legal principle.

■ In *People v. Williams* (2013) 31 Cal.4th 757, 774 through 776 [3 Cal.Rptr.3d 684, 74 P.3d 779] (*Williams*), the California Supreme Court rejected a substantially similar argument to that made by Field. In that case, the petitioner challenged his commitment under the SVPA, arguing the jury in his case did not receive special, specific instruction regarding the need to find serious difficulty in controlling behavior. (*Williams, supra*, at pp. 759–760.) The court held that specific impairment-of-control instructions are not constitutionally required in California. (*Id.* at pp. 776–777.) The court reasoned the language of the SVPA “inherently encompasses and conveys to a fact finder the requirement of a mental disorder that causes serious difficulty in controlling one’s criminal sexual behavior.” (*Williams, supra*, at p. 759.)

The court also expressly concluded that “[*Crane, supra*, 534 U.S. 407, does not compel us to hold that further lack-of-control instructions or findings are necessary to support a commitment under the SVPA.]” (*Williams, supra*, 31 Cal.4th at pp. 774–775.) In reaching this conclusion, our high court emphasized: “[A] judicially imposed requirement of special instructions augmenting the clear language of the SVPA would contravene the premise of . . . [*Crane, supra*, 534 U.S. 407, that, in this nuanced area, the Legislature is the primary

³ The trial court used the word “predisposed” when it instructed the jury. The written instruction, however, contained the term “predispose.”

arbiter of how the necessary mental-disorder component of its civil commitment scheme shall be defined and described.” (*Williams, supra*, at p. 774, italics omitted.)

Field acknowledges *Williams, supra*, 31 Cal.4th 757, but argues that *Crane, supra*, 534 U.S. 407 and *Williams* are in conflict, and as such, we must follow the opinion of the United States Supreme Court. (See *Cooper v. Aaron* (1958) 358 U.S. 1, 17–19 [3 L.Ed.2d 5, 78 S.Ct. 1401].) However, in *Crane*, the United States Supreme Court did not address the constitutionality of the SVPA, but, in *Williams*, the California Supreme Court did so while considering the impact of *Crane* as part of its analysis. (See *Williams, supra*, at pp. 774–775.) Therefore, we do not agree that the two cases are in conflict on the issue before us. Consequently, Field is asking us to either ignore or overrule *Williams*. This we cannot do. We are bound by *Williams* and thus summarily reject Field’s argument. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937] (*Auto Equity*)).

Alternatively, Field asserts that even if we follow *Williams, supra*, 31 Cal.4th 757, and find, in general, CALCRIM No. 3454 is proper, under the specific circumstances of this case, a pinpoint instruction was necessary. To this end, Field insists when the trial court instructed the jury with the word “predisposed” instead of “predispose” within CALCRIM No. 3454, it rendered the instruction ambiguous. Field claims that the use of the word “predisposed” allowed the prosecution to emphasize Field’s recidivism to prove volitional impairment as opposed to requiring the prosecution to prove that he has a serious difficulty in controlling his behavior.

The People point out that Field did not challenge the court’s use of the word “predisposed” at trial, and therefore, Field forfeited his instant challenge. (*People v. Lee* (2011) 51 Cal.4th 620, 638 [122 Cal.Rptr.3d 117, 248 P.3d 651].) We agree with the People on this point. Yet, even if we were to consider Field’s contention on the merits, we would find his argument wanting.

As Field is claiming the jury instruction is ambiguous, we must view the instructions as a whole to determine whether there was a reasonable likelihood the jury was misled by the claimed error. (*People v. Tate* (2010) 49 Cal.4th 635, 696 [112 Cal.Rptr.3d 156, 234 P.3d 428].) Field argues that the term predispose “carries none of the meaning of having a ‘serious difficulty in controlling behavior’ ” and that it “connotes no more than an inclination or a tendency” However, the jury also was instructed it must find that Field’s diagnosis affected his ability to control his behavior and that he posed a “substantial danger” to others, such that there is a “serious and well-founded risk” that he will commit sexual criminal acts if released into the

community. These instructions, considered together, made clear to the jury that Field's mental diagnosis must so affect his ability to control himself that he is a substantial danger to others and likely to recommit sexual offenses. Put differently, CALCRIM No. 3454 required Field to be indefinitely committed as an SVP if the prosecution proved beyond a reasonable doubt that he had serious difficulty controlling his deviant behavior. The fact that the judge instructed the jury with the word "predisposed" in lieu of "predispose" did not meaningfully alter CALCRIM No. 3454 or otherwise render it ambiguous.

Finally, the foundation of Field's alternative argument remains that we must follow *Crane, supra*, 534 U.S. 407. As we discuss *ante*, we lack the discretion to simply ignore *Williams, supra*, 31 Cal.4th 757, which addressed the very jury instruction challenged here. (See *Auto Equity, supra*, 57 Cal.2d at p. 455.) Further, there is nothing in the record that compels us to distinguish *Williams* from the instant case. There was no error in the trial court providing CALCRIM No. 3454 to the jury and refusing to provide Field's requested pinpoint instruction.

C. The Definition of "Likely"

Prior to trial, Field moved to add language to the definition of the term "likely" in CALCRIM No. 3454. Field asked the court to modify a portion of the instruction so the sentence, "The likelihood that the person will engage in such conduct does not have to be greater than 50 percent" would include the clause, "but must be more than the mere possibility that he will engage in such conduct." After hearing argument from the parties, the court granted Field's motion and agreed to modify the jury instruction.

At trial, the court modified the instruction as follows: "The likelihood that the person will engage in such conduct does not have to be greater than 50 percent but be much more than a mere possibility." There is no indication in the record that Field objected to this modified version at trial.

Now, Field maintains the trial court erred in providing the jury with the modified instruction because it was incomprehensible, at best, and misleading, at worst. We disagree.

As a threshold issue, the People point out that Field did not object to the modified instruction at trial. Thus, they contend Field forfeited the issue. In general, a party may not complain on appeal that a given instruction was incomplete or unclear unless the party requested an appropriate clarifying instruction. (*People v. Bolin* (1998) 18 Cal.4th 297, 329 [75 Cal.Rptr.2d 412, 956 P.2d 374].) Here, we are faced with a somewhat unique situation. Field

requested a modified instruction, the court agreed to provide the modified instruction, but the actual modified instruction is slightly different than the version requested by Field. That said, we are troubled by Field's failure to object at trial in light of his insistence on appeal that the instruction as given clearly was either incomprehensible or misleading. If the jury instruction was so obviously incorrect, it begs the question why Field did not object at trial, particularly when the court was attempting to instruct the jury as he requested. Viewing the lack of objection at trial in this context, we tend to agree with the People that Field forfeited this challenge.

In regard to the forfeiture issue, Field frames the issue as the trial court neglecting its *sua sponte* duty to instruct on general principles of law. In other words, Field maintains that he had no duty to object to the instruction because it is not a correct statement of law. We are not persuaded.

■ “[T]he phrase ‘*likely* to engage in acts of sexual violence’ . . . , as used in section 6601, subdivision (d), connotes much more than the mere *possibility* that the person will reoffend as a result of a predisposing mental disorder that seriously impairs volitional control. On the other hand, the statute does not require a precise determination that the chance of reoffense is *better than even*. Instead, an evaluator applying this standard must conclude that the person is ‘*likely*’ to reoffend if, because of a current mental disorder which makes it difficult or impossible to restrain violent sexual behavior, the person presents a *substantial danger*, that is, a *serious and well-founded risk*, that he or she will commit such crimes if free in the community.” (*Ghilotti, supra*, 27 Cal.4th at p. 922; *Roberge, supra*, 29 Cal.4th at p. 989 [following *Ghilotti’s* definition of “*likely*” in regard to § 6600, subd. (a)].)

As relevant here, the trial court instructed the jury with a modified version of CALCRIM No. 3454 as follows: “A person is likely to engage in sexually violent predatory criminal behavior if there is a substantial danger, that is, serious and well-founded risk that the person will engage in such conduct if released into the community. The likelihood that the person will engage in such conduct does not have to be greater than 50 percent but be much more than a mere possibility.” Thus, the jury was told that to find Field was an SVP, there had to be a “substantial danger” and a “serious and well-founded risk,” that he would reoffend if released. Such language tracked the language in *Roberge, supra*, 29 Cal.4th at page 988. Further, we are not troubled by the modification of the last sentence above. Although the court could have stated it more artfully, the use of the conjunction “but” makes clear that to find Field was likely to reoffend, the jury had to be convinced that the likelihood Field would reoffend needed to be much more than a mere possibility. Considering the instruction as a whole (see *People v. Tate, supra*, 49 Cal.4th at p. 696), we are confident that no reasonable juror would have understood the instruction

to conclude a mere possibility of reoffending would suffice to qualify Field as an SVP. The instruction was accurate as given and satisfactorily tracked the definition of likely articulated in *Ghilotti, supra*, 27 Cal.4th 888 and *Roberge, supra*, 29 Cal.4th 979.

III

USE OF THE TERM “SEXUALLY VIOLENT PREDATOR”

Field next argues that the use of the term “sexually violent predator” during his commitment proceeding was unnecessarily inflammatory and a denial of his federal due process rights. We reject this argument.

A. Background

Field moved in limine to bar, during trial, the use of the term “sexually violent predator.” He asked that words like “meets the criteria” be substituted for “sexually violent predator” and “qualifying offense” be substituted for “sexually violent offense.” The trial court denied the motion, noting, “Certainly I think there’s no way of getting around using the term that the legislature [has] chosen.”

B. Analysis

Field notes that our high court recognized that the SVPA has an “ominous name.” (See *Hubbart, supra*, 19 Cal.4th at p. 1142.) Despite this observation, the California Supreme Court was not asked to address the use of the term “sexually violent predator,” but instead held that the SVPA’s scheme did not violate due process, equal protection, and ex post facto principles. (*Hubbart, supra*, at pp. 1142–1143.) Nevertheless, based on *Hubbart*, Field insists that the term “sexually violent predator” “is a name that is gratuitously and prejudicially ominous.” He then concludes that its repeated use before the jury was a denial of due process. We disagree.

Initially, we observe that Field has not cited any authority where a court found that the use of the term “sexually violent predator” during a trial under the SVPA was found to be prejudicial or a violation of the defendant’s due process rights. Instead, Field relies on cases that are not instructive here.

For example, Field cites *People v. Earle* (2009) 172 Cal.App.4th 372, 410 [91 Cal.Rptr.3d 261] for the proposition that the term “predator” can incite passion and prejudice. However, Field glosses over the context in which the court made its statement. In that case, the court was troubled that the

prosecutor used the defendant's act of indecent exposure to argue that the defendant was a "loathsome and dangerous pariah" who decided to commit sexual assault. (*Id.* at p. 411.) The court cautioned against "the inherent potential of the indecent exposure to convey an inflammatory impression of defendant as a deviant or pervert." (*Id.* at p. 410.) It was in this vein that the court cautioned that the term "predator" can incite passion and prejudice. (*Ibid.*) Nevertheless, the court also stated that the term predator "connotes . . . one who habitually commits sex offenses characterized by violence, pedophilia, or both." (*Ibid.*) It then notes that the SVPA concerns sexually violent predators. (*Earle, supra*, at p. 410.) It is undisputed that Field has sexually assaulted minors. It is undisputed that Field is a pedophile. Indeed, Field has a long and disturbing history of molesting young boys. In short, Field is precisely the type of sexually violent predator the SVPA was meant to address.

Similarly, we are unpersuaded by Field's reliance on a litany of non-SVPA cases wherein courts found misconduct when the prosecutors used certain epithets like "slimy crook" or "Nazi." Here, the trial concerned whether Field should be committed indefinitely to a mental hospital under the SVPA, which required the jury to find Field was a sexually violent predator. Thus, the term "sexually violent predator" needed to be defined to the jury and the prosecution had to prove beyond a reasonable doubt that Field fit that definition. There was nothing improper about the use of the term "sexually violent predator" during the trial.⁴

IV

CUMULATIVE ERROR

Field also contends the cumulative effect of the asserted errors rendered the trial so unfair and unlawful that reversal of the judgment is warranted. Because we hold no errors exist, this cumulative error argument necessarily fails. (See *People v. McWhorter* (2009) 47 Cal.4th 318, 377 [97 Cal.Rptr.3d 412, 212 P.3d 692] [no cumulative effect of errors when no error]; *People v. Butler* (2009) 46 Cal.4th 847, 885 [95 Cal.Rptr.3d 376, 209 P.3d 596] [rejecting cumulative effect claim when court found "no substantial error in any respect"].)

⁴ We note that Field does not argue that substantial evidence does not support the jury's finding below.

CONSTITUTIONALITY OF THE SVPA

Field also asserts the SVPA violates due process, ex post facto, and double jeopardy provisions of the United States Constitution. In addition, he argues the SVPA violates equal protection because the burden of proof is placed on SVP's when they seek release from civil confinement and the Act's term of confinement is indefinite. We have considered these arguments in light of our Supreme Court's opinion in *McKee I*, *supra*, 47 Cal.4th 1172, and this court's final opinion on remand in the same case, *People v. McKee* (2012) 207 Cal.App.4th 1325 [144 Cal.Rptr.3d 308] (*McKee II*). Based on these opinions, we reject Field's assertions.

A. Due Process and Ex Post Facto Challenges

Field argues the indeterminate commitment term under the SVPA violates the federal Constitution's due process clause. He also contends the SVPA violates the ex post facto clause of the federal Constitution. Nevertheless, he acknowledges the California Supreme Court has decided against his position on these points. (*McKee I*, *supra*, 47 Cal.4th at pp. 1184, 1188–1195.) *McKee I* is binding on us. (*Auto Equity*, *supra*, 57 Cal.2d at p. 455.) We thus summarily reject these challenges.

B. Double Jeopardy Challenge

Additionally, Field maintains his indeterminate commitment under the SVPA violates the federal Constitution's double jeopardy clause as the Act is punitive. Also, he insists that the restrictions he faces while petitioning for release (he must be committed for a year before petitioning for release and he bears the burden to prove his suitability for release) renders the SVPA punitive and thus in violation of the double jeopardy clause. In support of his argument, he urges us to follow *Hendricks*, *supra*, 521 U.S. 346. In doing so, he emphasizes certain differences between the SVPA and the Kansas law considered by the United States Supreme Court in *Hendricks* and argues that if we focus on these differences, we would have to conclude the SVPA is punitive and therefore violates the double jeopardy clause.

However, Field's argument overlooks that the California Supreme Court, considering the factors articulated by the United States Supreme Court in *Hendricks*, *supra*, 521 U.S. 346, determined the SVPA is not punitive. (*McKee I*, *supra*, 47 Cal.4th at pp. 1194–1195.) We must follow *McKee I*. (*Auto Equity*,

supra, 57 Cal.2d at p. 455.) Because Field's double jeopardy challenge to the Act hinges on our finding that the SVPA is punitive, this challenge necessarily fails.⁵

C. Equal Protection Challenge

Field contends that his indeterminate term under the SVPA violates his right to equal protection. He argues SVP's are similarly situated to mentally disordered offenders (MDO's) and NGI's, but the groups are treated differently because MDO's and NGI's are committed for a limited period of time although, in contrast, SVP's are committed indeterminately. He also maintains that his equal protection rights are violated by the SVPA's requirement that SVP's have the burden of proof for release, unlike the MDO and NGI commitment procedures wherein the People have the burden of proof to show that the patients should be recommitted. He therefore requests that we remand the instant case for a hearing to determine if the People can justify his disparate treatment.

In making his contentions, however, Field acknowledges that we addressed these issues in *McKee II*, *supra*, 207 Cal.App.4th 1325. Nevertheless, he asks us to "consider the issue independently" because we wrongly decided *McKee II*. We decline to do so.

■ In *McKee I*, *supra*, 47 Cal.4th 1172, the Supreme Court held the SVPA is subject to equal protection analysis because it "treats SVP's significantly less favorably than those similarly situated individuals civilly committed under other statutes" including MDO's and NGI's. (*McKee I*, *supra*, at pp. 1196, 1203, 1207.) Because individuals within each of these categories "have the same interest at stake—the loss of liberty through involuntary civil commitment—it must be the case that when society varies the standard and burden of proof for SVP's . . . , it does so because of the belief that the risks involved with erroneously freeing SVP's from their commitment are significantly greater than the risks involved with freeing" other civil committees. (*Id.* at p. 1204.)

The Supreme Court remanded the case for a hearing on whether the People could justify disparate treatment for SVP's. The court instructed: "It must be shown that, notwithstanding the similarities between SVP's and [other civil committees], the former as a class bear a substantially greater risk to society,

⁵ A similar double jeopardy challenge based on *Hendricks*, *supra*, 521 U.S. 346 was rejected by our colleagues in Division Three. (See *People v. Landau* (2013) 214 Cal.App.4th 1, 44–45 [154 Cal.Rptr.3d 1] (*Landau*).) We find Division Three's reasoning on that issue persuasive and follow it here. As such, for the reasons expressed in *Landau*, *supra*, at pages 44 through 45, we reject Field's double jeopardy argument as well.

and that therefore imposing on them a greater burden before they can be released from commitment is needed to protect society. This can be shown in a variety of ways. For example, it may be demonstrated that the inherent nature of the SVP's mental disorder makes recidivism as a class significantly more likely. Or it may be that SVP's pose a greater risk to a particularly vulnerable class of victims, such as children. . . . Or the People may produce some other justification." (*McKee I*, *supra*, 47 Cal.4th at p. 1208, fn. omitted.)

■ After remand, the superior court conducted a 21-day evidentiary hearing on the justification of disparate treatment for SVP's and concluded the People had met their burden. On appeal, we reviewed the matter de novo, which was the correct standard of review. (*McKee II*, *supra*, 207 Cal.App.4th at p. 1338.) Field contends we applied a more deferential standard of review, implying that we employed a substantial evidence review.⁶ He is mistaken. In *McKee I*, Field singles out the reference to "'reasonable inferences based on substantial evidence'" without reading the context of the passage: "When a constitutional right, such as the right to liberty from involuntary confinement, is at stake, the usual judicial deference to legislative findings gives way to an exercise of independent judgment of the facts to ascertain whether the legislative body 'has drawn reasonable inferences based on substantial evidence.'" (*McKee I*, *supra*, 47 Cal.4th at p. 1206.) In *McKee II*, we concluded "[t]he People have shown 'that the inherent nature of the SVP's mental disorder makes recidivism as a class significantly more likely[;] . . . that SVP's pose a greater risk [and unique dangers] to a particularly vulnerable class of victims, such as children'; and that SVP's have diagnostic and treatment differences from MDO's and NGI's, thereby supporting a reasonable perception by the electorate . . . that the disparate treatment of SVP's under the amended [SVPA] is necessary to further the state's compelling interests in public safety and humanely treating the mentally disordered." (*McKee II*, *supra*, 207 Cal.App.4th at p. 1347.) The Supreme Court denied a petition for review, making *McKee II* final.

⁶ Field somewhat confusingly argues that we improperly applied a rational relationship type review instead of a strict scrutiny review. As we discuss above, we applied a de novo review in *McKee II*. Instead, we interpret Field's argument that we improperly applied the strict scrutiny test although he does not cogently argue as much. Nonetheless, we note that our Supreme Court in *McKee I*, *supra*, 47 Cal.4th 1172, did not require a finding that the government use the least restrictive means available to meet the state's compelling interest to allow the SVPA to pass constitutional muster. We expressly rejected that argument in *McKee II*, concluding the least restrictive means available requirement applies only to disparate treatment of a suspect class. (*McKee II*, *supra*, 207 Cal.App.4th at p. 1349.) Our colleagues in Division Three also rejected that argument. (*People v. McDonald* (2013) 214 Cal.App.4th 1367, 1380 [154 Cal.Rptr.3d 823] (*McDonald*)). To the extent Field is attempting to make a similar argument here, we reject it for the same reasons articulated in *McKee II* and *McDonald*.

As Field notes, this court has, of course, followed *McKee II*, *supra*, 207 Cal.App.4th 1325, and other Courts of Appeal have as well. (See, e.g., *McDonald*, *supra*, 214 Cal.App.4th at pp. 1376–1382; *Landau*, *supra*, 214 Cal.App.4th at pp. 47–48; *People v. McCloud* (2013) 213 Cal.App.4th 1076, 1085–1086 [153 Cal.Rptr.3d 10]; *People v. McKnight* (2012) 212 Cal.App.4th 860, 863–864 [151 Cal.Rptr.3d 132].) Although it is clear Field believes the evidence relied on in *McKee II* is insufficient to justify disparate treatment of SVP’s, we have carefully evaluated it and conclude otherwise.⁷

VI

FIELD’S TESTIMONIAL PRIVILEGE

Field maintains that the trial court erred by allowing the prosecutor to call him as a witness in his commitment trial. Relying on *Hudec v. Superior Court* (2015) 60 Cal.4th 815 [181 Cal.Rptr.3d 748, 339 P.3d 998] (*Hudec*), Field asserts that SVP’s are similarly situated to NGI’s, and therefore, he had an equal protection right not to be called to testify.⁸ In response, the People insist the legislative and procedural differences between NGI’s and SVP’s establish that the two groups are not similarly situated for purposes of testimonial privilege. In the alternative, the People argue that even if SVP’s and NGI’s are similarly situated, a rational basis supports any disparate treatment.

■ Field’s argument before us was successfully made in *People v. Curlee* (2015) 237 Cal.App.4th 709 [188 Cal.Rptr.3d 421] (*Curlee*). In that case, the appellate court recognized that a necessary prerequisite to a valid equal protection claim is that the groups being compared must be “similarly situated” with respect to the particular right in question. (*Curlee*, at p. 720.) After reviewing *McKee I*, *supra*, 47 Cal.4th 1172, which determined SVP’s were similarly situated to NGI’s with respect to the burden of proof and length of their commitments, the court concluded SVP’s were similarly situated to NGI’s for purposes of the right against self-incrimination. The court reasoned, “Both groups have committed a criminal act and have been found to suffer from a mental condition that might present a danger to others.

⁷ For example, Field contends we erred in *McKee II*, *supra*, 207 Cal.App.4th 1325 by (1) only looking at evidence of the recidivism of sex offenders and (2) failing to consider evidence comparing the trauma suffered by victims of the crimes committed by SVP’s with the trauma experienced by victims of crimes committed by MDO’s and NGI’s. In addition, he contends the evidence of “diagnostic and treatment differences” is not relevant to the issues he raises here.

⁸ Our high court concluded that persons who have been civilly committed after being found not guilty by reason of insanity have a statutory right to refuse to testify. (*Hudec*, *supra*, 60 Cal.4th at p. 826.)

[Citation.] At the end of the SVP's prison term, and at the end of the term for which an NGI could have been imprisoned, each is committed to the state hospital for treatment if, at the end of that period, the district attorney proves in a jury trial beyond a reasonable doubt that the person presents a danger to others as a result of a mental disease, defect, or disorder. [Citations.] The purpose of the commitment is the same: To protect the public from those who have committed criminal acts and have mental disorders and to provide mental health treatment for the disorders." (*Curlee, supra*, at p. 720.)

Next, the court examined whether the disparate treatment between SVP's and NGI's with respect to the right against self-incrimination was justified on the record before it. In doing so, the court noted that in *McKee II, supra*, 207 Cal.App.4th 1325, the state was able to justify the disparate treatment at issue in that case. It did so by showing "SVP's were more likely [than NGI's] to commit new sexual offenses when released . . . ; victims of sex offenses suffered unique and, in general, greater trauma, than victims of other offenses; and SVP's were less likely to participate in treatment and more likely to be deceptive and manipulative than [NGI's]." (*Curlee, supra*, 237 Cal.App.4th at p. 721.)

However, as the court recognized, that showing was made during the course of an evidentiary hearing that occurred on remand from the Supreme Court's ruling in *McKee I*. (See *McKee I, supra*, 47 Cal.4th at pp. 1208–1209 [ordering remand]; *McKee II, supra*, 207 Cal.App.4th 1325 [appeal from remand hearing].) Because the equal protection issue presented in *Curlee* was different from the one raised in *McKee I*, and because the issue in *Curlee* had not been litigated in the trial court, the court in *Curlee* followed our high court's lead in *McKee I* and remanded the matter to allow the state the opportunity to demonstrate a constitutional justification for giving NGI's the right against self-incrimination but not SVP's. (*Curlee, supra*, 237 Cal.App.4th at p. 722.)

The opinion in *Curlee, supra*, 237 Cal.App.4th 709 was not filed before Field submitted his opening brief in the instant matter. Neither the respondent's brief nor the reply brief discuss *Curlee*. As such, we asked for supplemental briefing regarding the impact of *Curlee* on the instant matter.

■ In their supplemental letter briefs, neither Field nor the People take issue with the holding in *Curlee, supra*, 237 Cal.App.4th 709 that SVP's and NGI's were similarly situated in regard to being called to testify at trial. In fact, the People point out that Division Three, in *People v. Landau* (2016) 246 Cal.App.4th 850 [201 Cal.Rptr.3d 684], and Division Two, in *People v. Dunley*

(2016) 246 Cal.App.4th 691 [201 Cal.Rptr.3d 630] (*Dunley*),⁹ both recently followed *Curlee*.¹⁰ Like our colleagues in Division Two and Division Three, we too follow *Curlee* and find that SVP's are similarly situated to NGI's and MDO's as to the testimonial privilege.

Having found SVP's and NGI's similarly situated, we next must address whether the People have justified the disparate treatment. Before we do so, however, we address the proper equal protection test to be applied.

The People contend that any disparate treatment here need only be justified under the rational basis test. To this end, the People emphasize that our high court has held that the higher strict scrutiny standard of review is required only where "a constitutional right, such as the right to liberty from involuntary confinement is at stake." (*McKee I, supra*, 47 Cal.4th at p. 1206.) The People contend the right to refuse to testify at a commitment trial is nonconstitutional as it does not lengthen or alter the length on a commitment term and does not affect the definitional standards or burdens of proof for commitment. In support of their position, the People rely on *Hubbart, supra*, 19 Cal.4th 1138; *Conservatorship of Hofferber* (1980) 28 Cal.3d 161 [167 Cal.Rptr. 854, 616 P.2d 836] (*Hofferber*) and *In re Moye* (1978) 22 Cal.3d 457 [149 Cal.Rptr. 491, 584 P.2d 1097] (*Moye*).

In *Hubbart*, the California Supreme Court upheld the substantive definitional standards and the two-year commitment term prescribed under the former version of the SVPA. (*Hubbart, supra*, 19 Cal.4th at pp. 1151–1170.) In doing so, the court noted "this court has traditionally subjected involuntary civil commitment statutes to the most rigorous form of constitutional review—an approach we follow in upholding the SVPA here." (*Hubbart, supra*, at p. 1153, fn. 20.)

In *Hofferber*, our high court upheld the constitutionality of civil commitments under the Lanterman-Petris-Short Act (LPSA; § 5000 et seq.). (*Hofferber, supra*, 28 Cal.3d at pp. 171–172.) The People emphasize in that

⁹ After the People's letter, Division Two granted a rehearing in *Dunley, supra*, 246 Cal.App.4th 691, vacating the opinion. In a subsequent opinion, Division Two again concluded MDO's, SVP's, and NGI's are similarly situated with respect to the testimonial privilege, but ultimately found the appeal moot because the trial court denied a subsequent petition for recommitment based on the court's finding that the appellant no longer met the criteria for commitment as an MDO. (*People v. Dunley* (2016) 247 Cal.App.4th 1438, 1442–1443 [203 Cal.Rptr.3d 335].)

¹⁰ In their respondent's brief, the People took the position that SVP's and NGI's were not similarly situated in regard to the testimonial privilege. In light of the People's supplemental letter brief, we conclude the People have abandoned that position. To the extent they have not abandoned it, we reject it for the same reasons set forth in *Curlee, supra*, 237 Cal.App.4th at pages 720 through 721.

case, the conservator conceded that because the challenged law subjected a person to involuntary commitment, it necessarily affected the conservatee's fundamental liberty interest, and the law was subject to strict scrutiny review. (*Id.* at p. 171, fn. 8.)

In *Moye*, the California Supreme Court held that statutes allowing for an NGI to be committed for a period of time longer than the maximum term punishable for the criminal offense violated equal protection principles because NGI's were similarly situated to defendants under the former Mentally Disordered Sex Offenders Act (MDSO Act), who were subject to a shorter commitment term. (*Moye, supra*, 22 Cal.3d at p. 466.) The court observed that because the "petitioner's liberty is at stake," the justification for the disparate treatment of NGI's and mentally disordered sex offenders (MDSO) as to the length of commitment must pass muster under strict scrutiny review. (*Id.* at p. 465.)

The People point out that *Moye*, *Hofferber* and *Hubbart, supra*, 19 Cal.4th 1138 all involve a challenge to a portion of the law affecting the length of the committee's civil commitment term. Further, in *Moye* and *Hofferber*, the People conceded that strict scrutiny review was the applicable standard. (*Moye, supra*, 22 Cal.3d at p. 465; *Hofferber, supra*, 28 Cal.3d at p. 171, fn. 8.)

In summary, the People maintain the challenged issue here, an SVP's statutory right to refuse to testify at a commitment trial, does not affect the length of the commitment term, and does not involve the definitional standards or burden of proof for commitment. As such, the People claim the proper test is whether they can justify the disparate treatment under a rational basis test. We disagree.

■ California courts have not limited strict scrutiny review in cases concerning involuntary commitment only to situations involving the length of commitment, definitional standards, or burden of proof. For example, in *In re Gary W.* (1971) 5 Cal.3d 296 [96 Cal.Rptr. 1, 486 P.2d 1201] (*Gary W.*), and its companion case, *People v. Smith* (1971) 5 Cal.3d 313 [96 Cal.Rptr. 13, 486 P.2d 1213], the Supreme Court concluded that a juvenile facing an extension of his or her commitment to the former California Youth Authority under section 1800 is entitled to a jury trial, noting that MDSO's were entitled by statute to jury trials (former § 6318), as are narcotics addicts (former §§ 3050, 3051, 3108).¹¹ The right to a jury trial is required by both due process and equal protection where there is no "compelling state purpose for the distinction between the class of persons subject to commitment pursuant to section 1800 and to other classes of

¹¹ These statutes were repealed in 2015.

persons subject to involuntary confinement” through civil commitment proceedings. (*Gary W.*, *supra*, 5 Cal.3d at p. 307.) In *Gary W.*, the right to a jury trial was based on statute. (*Id.* at pp. 304–306; see *People v. Feagley* (1975) 14 Cal.3d 338, 348 [121 Cal.Rptr. 509, 535 P.2d 373] (*Feagley*).)

In *Feagley*, one of the issues addressed by the Supreme Court was whether California could constitutionally deny to persons committed under the MDSO Act the right to a unanimous jury verdict, which it granted to persons committed under the LPSA. (*Feagley*, *supra*, 14 Cal.3d at p. 352.) In analyzing this issue under equal protection principles, the court noted that it had characterized the right to a unanimous verdict under the California Constitution as “fundamental” and, per *People v. Smith*, *supra*, 5 Cal.3d at pages 318 through 319, California “must bear the burden of demonstrating there is a compelling interest which justifies this significant distinction between the rights of mentally disordered sex offenders and those of persons committed under the [LPSA], and that the distinction is necessary to further such purpose.” (*Feagley*, *supra*, at p. 356.) Accordingly, like it did in *Gary W.*, the court applied strict scrutiny review under equal protection when a “fundamental” right was granted to one group and not another similarly situated group. The grant of that right, however, was by statute.

Here, the right at issue is the statutory right not to testify under Penal Code section 1026.5, subdivision (b)(7) provided to NGI’s, but not given to SVP’s. The fact that the claimed right is found in a statute and not the California or United States Constitution does not mandate that we apply a rational basis review. (See *Gary W.*, *supra*, 5 Cal.3d at p. 307; *Feagley*, *supra*, 14 Cal.3d at p. 356.) And we are not persuaded by the People’s claim that “the right at issue here touches on only a *single* procedural aspect of the trial process.” (Original italics.) To the contrary, the ability to call an SVP in the prosecution’s case could be the most important evidence it places before the jury. As our Supreme Court observed, permitting the jury to observe the person sought to be committed and to hear him speak and respond provided “the most reliable proof and probative indicator of the person’s present mental condition.” (*Cramer v. Tyars* (1979) 23 Cal.3d 131, 139 [151 Cal.Rptr. 653, 588 P.2d 793].) Further, “[b]y calling the person in its case-in-chief, the state is essentially saying that his or her testimony is necessary for the state to prove its case.” (*People v. Haynie* (2004) 116 Cal.App.4th 1224, 1230 [11 Cal.Rptr.3d 163].) Considering the potential impact of an SVP testifying at his or her commitment hearing, it logically follows that an SVP’s testimony could have a direct impact on the SVP’s liberty interest, namely the prosecution could use the testimony to prove that he or she should remain committed. Against this backdrop, we determine that strict scrutiny is the proper test to apply to the People’s justification of the disparate treatment. (See *People v. Dunley*, *supra*, 247 Cal.App.4th at p. 1453.)

Under the strict scrutiny test, the state has the burden of establishing it has a compelling interest that justifies the law and that the distinctions, or disparate treatment, made by that law are necessary to further its purpose. (*McKee II, supra*, 207 Cal.App.4th at p. 1335.) Here, the People have offered no justification under the strict scrutiny test to justify the disparate treatment. Thus, following *Curlee, supra*, 237 Cal.App.4th at page 722, “[w]e emphasize that, like our high court in *McKee I*, we do not conclude the People cannot meet their burden to show the testimony of an NGI is less necessary than that of an SVP. We merely conclude that they have not yet done so. In our view, the proper remedy is to remand the matter to the trial court to conduct an evidentiary hearing to allow the People to make an appropriate showing.”

DISPOSITION

The matter is remanded to the superior court for further proceedings. On remand, the superior court is directed to conduct an evidentiary hearing at which the People will have the opportunity to show that the differential statutory treatment of SVP’s and NGI’s is justified. If the trial court determines the People have carried their burden to do so, it shall confirm its order finding Field an SVP and committing him to a mental hospital. If it determines the People have not carried their burden, the superior court shall conduct a new hearing under the SVPA to determine whether Field is an SVP.

McConnell, P. J., and Nares, J., concurred.

The petitions of both respondent and appellant for review by the Supreme Court were denied October 19, 2016, S236616.

[No. H041521. Sixth Dist. July 6, 2016.]

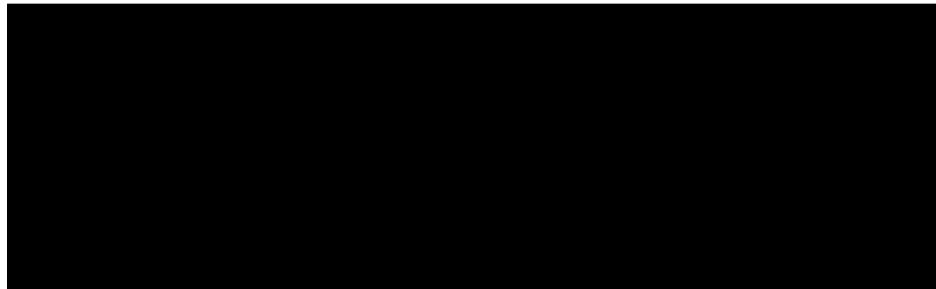
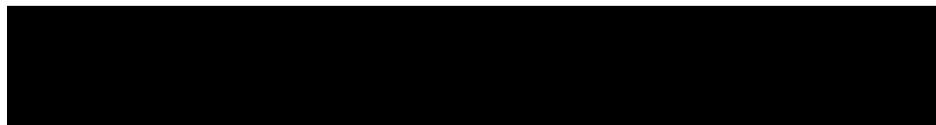
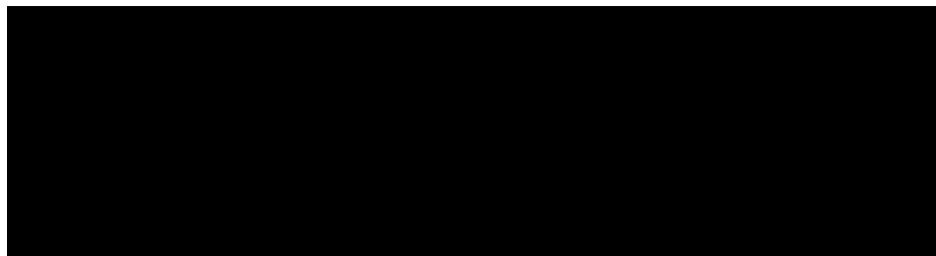
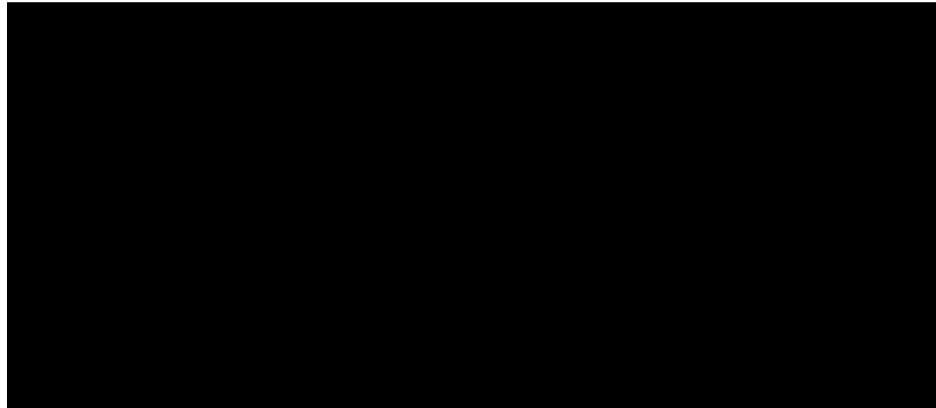
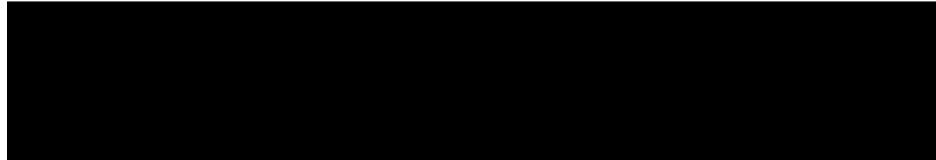
VIAVIEW, INC., Plaintiff and Respondent, v.
THOMAS RETZLAFF, Defendant and Appellant.

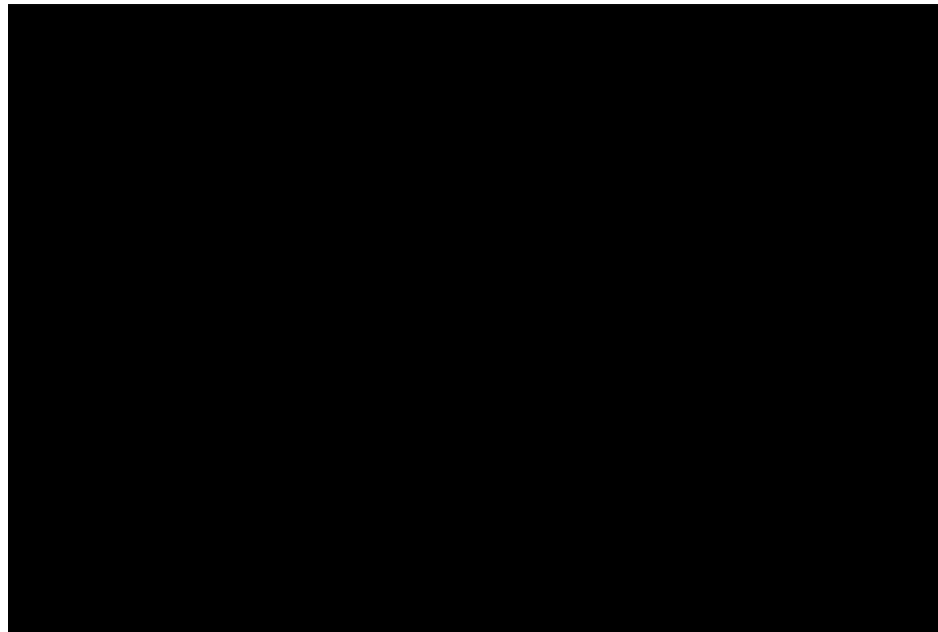
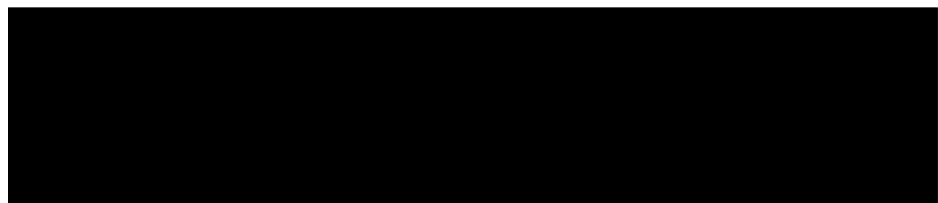
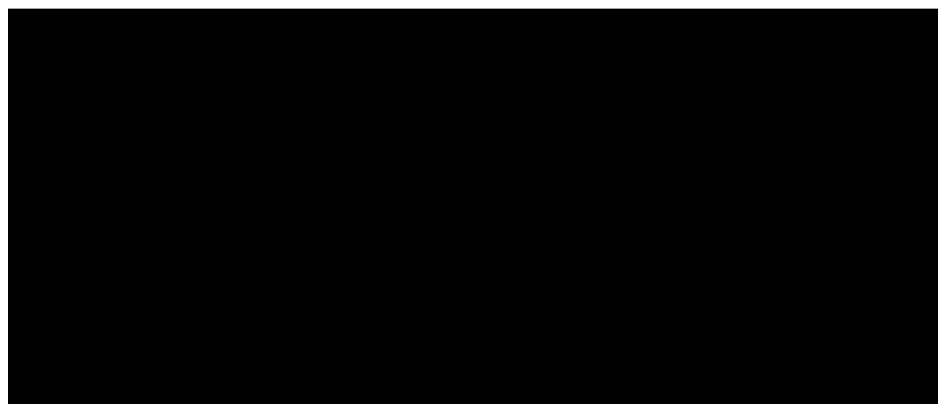
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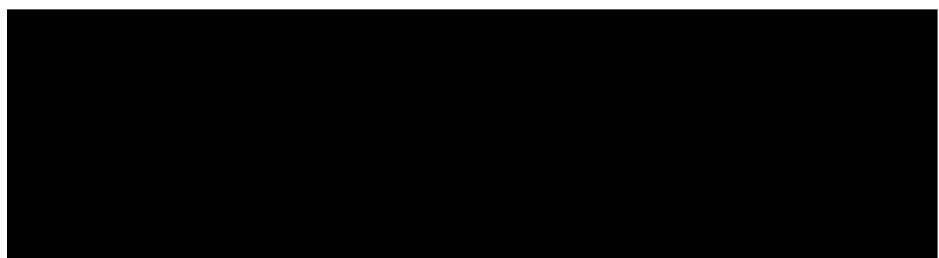
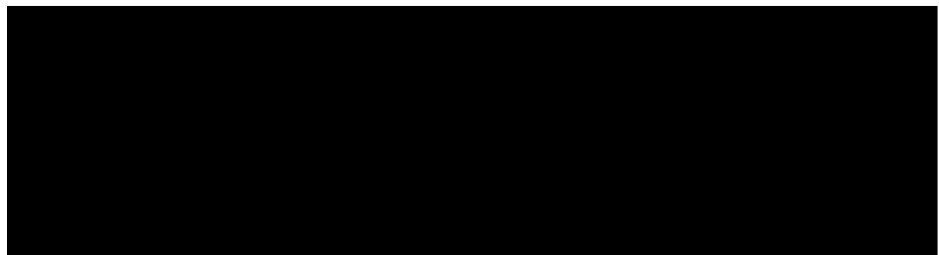
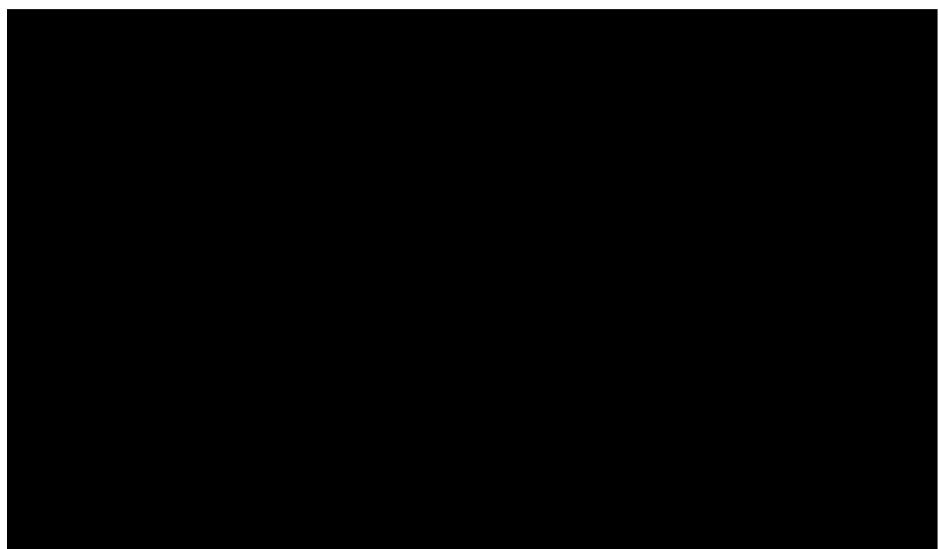
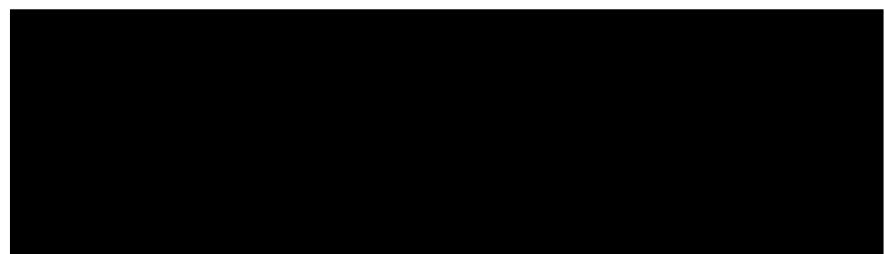
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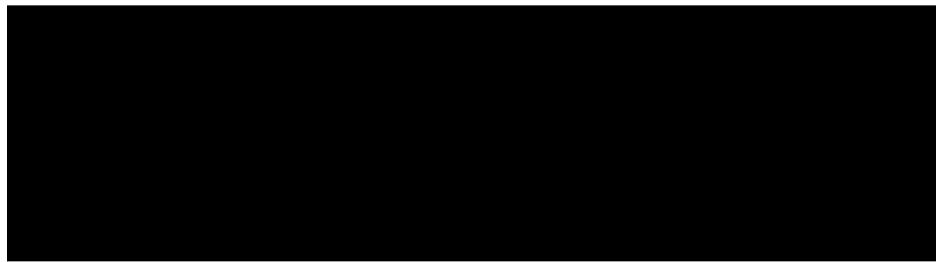
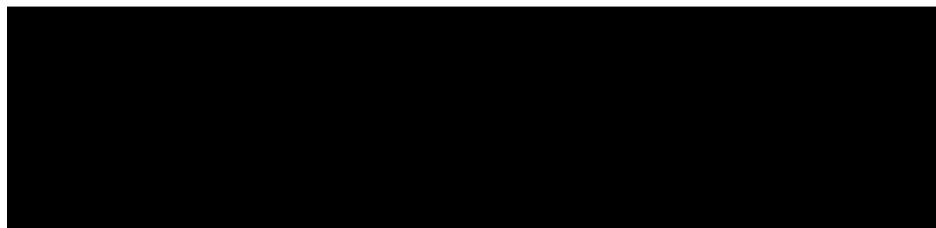
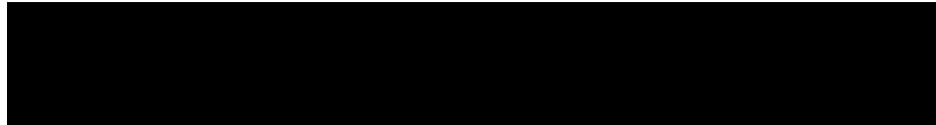
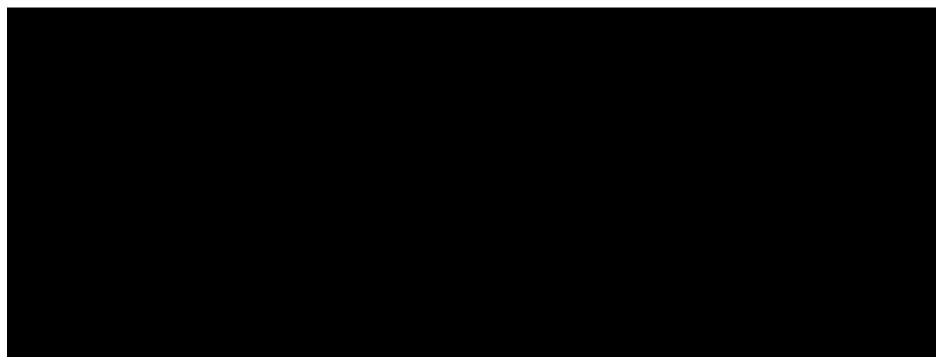
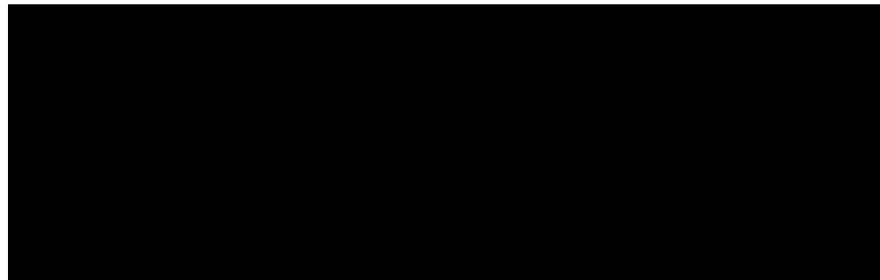
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COUNSEL

Thomas Retzlaff, in pro. per., for Defendant and Appellant.

Law Offices of Jay Leiderman and Jason S. Leiderman for Plaintiff and Respondent.

OPINION

THE COURT.*—Plaintiff and respondent ViaView, Inc. (hereafter ViaView), filed a petition for a workplace violence restraining order (Code Civ. Proc., § 527.8)¹ against defendant and appellant Thomas Retzlaff. Retzlaff, a resident of Texas, filed a motion to quash the petition for lack of personal jurisdiction. He also filed other motions, either concurrently with or after he filed the motion to quash. The trial court concluded that Retzlaff had made a general appearance since he had participated in the litigation beyond filing the motion to quash. On that basis, it denied the motion to quash.

We conclude the trial court erred when it denied the motion to quash. The motion should have been granted because under section 418.10, subdivision (e), a party who moves to quash may—concurrently with or after filing a motion to quash—participate in the litigation and “no act” by the party constitutes an appearance unless and until the proceedings on the motion to quash are finally decided adversely to that party. (§ 418.10, subd. (e); see *Air Machine Com SRL v. Superior Court* (2010) 186 Cal.App.4th 414, 425–427 [112 Cal.Rptr.3d 482] (*Air Machine*).) We will therefore grant writ relief, vacate the trial court’s order denying the motion to quash, and direct the court to enter a new order granting the motion.

FACTS AND PROCEDURAL HISTORY

James McGibney, a resident of California, is the CEO and founder of ViaView, which operates the websites BullyVille, CheaterVille, and others.

*Rushing, P. J., Premo, J., and Márquez, J.

¹ All further statutory references are to the Code of Civil Procedure unless otherwise stated.

Retzlaff, who at all relevant times resided in Texas or Arizona, is a critic of the BullyVille and CheaterVille websites.

On March 17, 2014, ViaView filed a petition for a workplace violence restraining order against Retzlaff. The petition alleged that Retzlaff had made credible threats of violence against McGibney to be carried out at his workplace. (McGibney works out of his home.) ViaView's petition described 29 social media postings or e-mails allegedly authored by Retzlaff, four of which could be construed as containing threats of violence.² In February 2014,³ McGibney reported the alleged threats to the San José Police Department, which recommended he petition the court for a restraining order. The petition asked for a restraining order on behalf of McGibney, McGibney's wife, and their three young children.

A. *The March 17, April 8, and May 12 Ex Parte Hearings*

ViaView asked for a temporary restraining order (TRO) against Retzlaff, which the court granted in an ex parte hearing on March 17, the day the petition was filed. Among other things, the TRO directed Retzlaff not to “[e]ngage in . . . defamation, stalk, threaten, or harass friends or business associates” and to stay at least 300 feet away from McGibney, his workplace, home, vehicle, family members, and his children’s school or child care facility. The court set the matter for a hearing on ViaView’s request for a permanent injunction on April 8.

McGibney and ViaView’s attorney, Jason Leiderman, appeared at the April 8 hearing on the permanent injunction. Leiderman advised the court that ViaView had not yet served Retzlaff. He asked the court to continue the hearing and reissue the TRO. Throughout the hearing, the court questioned whether it had jurisdiction over Retzlaff, who lived in Texas. ViaView argued that the court had personal jurisdiction because Retzlaff’s conduct was directed at California since he published McGibney’s California address and was “telling people to go kill [McGibney] and rape his wife here in San Jose.” ViaView submitted a brief and “a massive stack of proof” to support its allegations, which the court agreed to read over a break. (Neither the brief nor the “massive stack of proof” is in the record.)

After reviewing ViaView’s submissions, the court agreed to extend the TRO for 30 days to allow ViaView to serve Retzlaff. The court also continued the hearing on the permanent injunction to May 12.

² McGibney and ViaView made the same allegations against Retzlaff and others in two other lawsuits filed in state court in Texas and in the federal district court for the Northern District of California, which alleged causes of action for defamation, tortious interference with business relations, invasion of privacy, and other related torts.

³ All further date references are to events that occurred in 2014.

At the May 12 hearing, ViaView advised the court that Retzlaff had moved to Phoenix, Arizona, and had not been served. ViaView then asked the court to reissue the TRO and to add Retzlaff's adult daughter (Daughter) as a protected person under the TRO. ViaView conceded that Daughter was not its employee, but argued that she qualified for protection under section 527.8 as a volunteer since she was providing ViaView with information about Retzlaff. The court noted that section 527.8 applies to "a volunteer or independent contractor who performs services for the employer at the employer's worksite." (§ 527.8, subd. (b)(3).) It questioned whether the statute applied to Daughter, who lives in a foreign country. ViaView responded that it is an Internet-based company with at least 20 worksites since most of its employees work remotely out of their homes.

The court reissued the TRO and continued the hearing on the permanent injunction to July 29. The court found that Daughter was a volunteer within the meaning of section 527.8, and it amended the TRO to add Daughter as a protected person. The court also ordered "Retzlaff and all other owners, operators and administrators" of a specified blog to "remove the blog from the internet and cease their campaign of threats, harassment and stalking of Mr. McGibney and not re-post any blogs with similar content."

B. Service of Petition, Motion to Quash, and Other Court Filings

Retzlaff was purportedly served on July 14. (The proof of service is not in the record.) On July 21, Retzlaff—who was self-represented—filed a motion to quash on the ground the court lacked personal jurisdiction over him since he lived in either Texas or Arizona at all relevant times and he did not have minimum contacts with California.

ViaView filed written opposition to the motion. ViaView argued that Retzlaff's contacts with California were prolific, intentional, and repeated, and that by making criminal threats to a California resident, Retzlaff had purposefully availed himself of the forum. ViaView's opposition included a declaration signed by McGibney, which stated that Retzlaff had continued to make threats of violence toward him and his family, but provided little specific information about the alleged new threats. McGibney's declaration was not signed under penalty of perjury under the laws of the State of California as required by section 2015.5.

On July 21—the same day he filed his motion to quash—Retzlaff filed an ex parte motion to continue the July 29 hearing on the permanent injunction because he had just had abdominal surgery and could not travel for the hearing. The court did not rule on the ex parte motion until July 29, as discussed below.

On July 25, Retzlaff filed a “Notice . . . of Perjury . . . by . . . McGibney” which asserted that McGibney had lied to the court about his military experience and computer expertise and falsely claimed specialized knowledge to obtain the TRO.

C. July 29 Hearing on Motion to Continue, Motion to Quash, Anti-SLAPP Motion, and Permanent Injunction

Motion to Continue—Attorney Katrina Saleen specially appeared at the July 29 hearing on behalf of Retzlaff. Before the hearing, but after filing his motion to quash, Retzlaff had attempted to file a special motion to strike the petition for a workplace violence restraining order under section 425.16, the anti-SLAPP statute. Saleen stated that the court clerks refused to file the anti-SLAPP motion because the ex parte motion to continue was still undecided. Before considering the motion to continue, the court agreed to file the anti-SLAPP motion and indicated that it was prepared to hear it. Although ViaView had not been served with the anti-SLAPP motion, Leiderman said he believed he could argue it that day. The court then denied the motion to continue the hearing.

Motion to Quash—ViaView (1) urged the court to treat Retzlaff’s notice of alleged perjury by McGibney as an answer, (2) requested a finding that the court had jurisdiction over Retzlaff because Retzlaff had filed an answer, and (3) repeated its contention that the court had jurisdiction over Retzlaff because he had directed his conduct at a California resident. After hearing from both sides, the trial court denied the motion to quash in open court. The court “found that the making of the [anti-]SLAPP motion itself constituted a general appearance.” Neither the court nor the parties prepared a written order denying the motion to quash.

Anti-SLAPP Motion—The court then heard the anti-SLAPP motion. It denied that motion orally in open court. The court reasoned that since Retzlaff denied making any threats, there is no speech to protect, and Retzlaff had therefore failed to carry his initial burden of demonstrating that what he said was constitutionally protected.

Permanent Injunction—At the hearing on the permanent injunction, ViaView presented documentary evidence, but no live testimony. Leiderman asked to be added as a protected person, arguing that Retzlaff had been conflating him with McGibney and encouraging others to file fraudulent lawsuits against him. After the hearing, the court granted a permanent injunction against workplace violence. In addition to McGibney and his family, the order lists Daughter and Leiderman as protected persons. The court also ordered Retzlaff to pay ViaView \$10,000 in “costs” for the three TRO hearings and the hearing on the permanent injunction.

D. *New Trial Motion*

Retzlaff filed a timely motion for a new trial in which he challenged the court’s orders (1) denying the motion to quash, (2) denying the motion to strike, and (3) granting the permanent injunction. The new trial motion was denied by operation of law on September 28. (§ 660.) On October 10, Retzlaff filed a timely notice of appeal.

DISCUSSION

I. *Preliminary Matters*

A. *No Special Consideration Is Given to a Self-represented Party*

■ In his opening brief and in other submissions, Retzlaff argues that he is a self-represented party and therefore entitled to special consideration, including “the full measure of pro se Constitutional protections and the benefit of the doubt.” Retzlaff has not received special consideration from this court because he is self-represented. While a party may choose to act as his or her own attorney, “[s]uch a party is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys. [Citation.]’ [Citation.] Thus, as is the case with attorneys, [self-represented] litigants must follow correct rules of procedure. [Citations.]” (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246–1247 [19 Cal.Rptr.3d 416]; see *Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 524 [134 Cal.Rptr.3d 604] [“Although plaintiffs appear in this court without counsel, that does not entitle them to special treatment”].)

B. *ViaView’s Failure to Provide Record Citations and Reliance on Matters Outside the Record*

ViaView’s original respondent’s brief did not contain any citations to the record. On April 12, 2016, this court issued an order setting forth legal authority regarding the requirement to cite to the record, and we ordered ViaView to file an amended brief “which shall contain appropriate citations to the record in compliance with” that authority. We also ordered that the amended brief “shall not refer to matters outside the record,” citing to *Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632 [227 Cal.Rptr. 491] and *Kendall v. Barker* (1988) 197 Cal.App.3d 619, 625 [243 Cal.Rptr. 42]. Despite our order, ViaView’s amended brief—including its argument on the motion to quash—recites facts that are not supported by citations to the record, and it continues to refer to matters outside the record. In light of our prior order and the legal authority set forth therein, we will

disregard all factual assertions in ViaView's amended respondent's brief that are not supported by citations to the record or that refer to matters outside the record.

II. *Motion to Quash for Lack of Personal Jurisdiction*

A. *General Principles*

Under California's long-arm statute, California courts may exercise personal jurisdiction over nonresidents "on any basis not inconsistent with the Constitution of this state or of the United States." (§ 410.10.) "A state court's assertion of personal jurisdiction over a nonresident defendant who has not been served with process within the state comports with the requirements of the due process clause of the federal Constitution if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate 'traditional notions of fair play and substantial justice.'" (Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal.4th 434, 444 [58 Cal.Rptr.2d 899, 926 P.2d 1085] (Vons), quoting *Internat. Shoe Co. v. Washington* (1945) 326 U.S. 310, 316 [90 L.Ed. 95, 66 S.Ct. 154].) "The due process clause is concerned with protecting nonresident defendants from being brought unfairly into [a forum state], on the basis of random contacts." (Vons, at p. 452.)

"Personal jurisdiction may be either general or specific. A nonresident defendant may be subject to the general jurisdiction of the forum if his or her contacts in the forum state are 'substantial . . . continuous and systematic.' [Citations.]" (Vons, *supra*, 14 Cal.4th at p. 445, italics omitted.) Specific jurisdiction exists when, although the defendant lacks such pervasive forum contacts that the defendant may be treated as present for all purposes, it is nonetheless proper to subject the defendant to the forum state's jurisdiction in connection with a particular controversy. (Epic Communications, Inc. v. RichwaveTechnology, Inc. (2009) 179 Cal.App.4th 314, 327 [101 Cal.Rptr.3d 572].)

ViaView argued below that the court has specific jurisdiction over Retzlaff. "The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant 'focuses on "the relationship among the defendant, the forum, and the litigation.'" (Walden v. Fiore (2014) 571 U.S. ___, ___ [188 L.Ed.2d 12, 134 S.Ct. 1115, 1121] (Walden); accord, Pavlovich v. Superior Court (2002) 29 Cal.4th 262, 269 [127 Cal.Rptr.2d 329, 58 P.3d 2] (Pavlovich).)

B. *Burden of Proof and Standard of Review*

On a challenge to personal jurisdiction by a motion to quash, the plaintiff has the burden of proving, by a preponderance of the evidence, the

factual bases justifying the exercise of jurisdiction. (*Vons, supra*, 14 Cal.4th at p. 449.) The plaintiff must come forward with affidavits and other competent evidence to carry this burden and cannot simply rely on allegations in an unverified complaint. (*In re Automobile Antitrust Cases I & II* (2005) 135 Cal.App.4th 100, 110 [37 Cal.Rptr.3d 258].) If the plaintiff meets this burden, “it becomes the defendant’s burden to demonstrate that the exercise of jurisdiction would be unreasonable.” (*Vons*, at p. 449.)

“When the evidence of jurisdictional facts is not in dispute, the issue whether the defendant is subject to personal jurisdiction is a legal question subject to de novo review. (*Vons, supra*, 14 Cal.4th at p. 449.) When evidence of jurisdiction is in dispute, we accept the trial court’s resolution of factual issues, draw all reasonable inferences in support of the trial court’s order, and review the trial court’s determination of factual issues for substantial evidence. [Citations.] ‘The ultimate question whether jurisdiction is fair and reasonable under all of the circumstances, based on the facts which are undisputed and those resolved by the court in favor of the prevailing party, is a legal determination warranting our independent review.’ [Citation.]” (*Burdick v. Superior Court* (2015) 233 Cal.App.4th 8, 17 [183 Cal.Rptr.3d 1] (*Burdick*).)

C. Nature of a General Appearance

■ A defendant submits to the court’s jurisdiction by making a general appearance in an action and thereby waives the defense of lack of personal jurisdiction. (*Roy v. Superior Court* (2005) 127 Cal.App.4th 337, 341 [25 Cal.Rptr.3d 488] (*Roy*).) “‘A general appearance occurs when the defendant takes part in the action or in some manner recognizes the authority of the court to proceed.’ [Citation.] Such participation operates as consent to the court’s exercise of jurisdiction in the proceeding. ‘Unlike jurisdiction of the subject matter . . . jurisdiction of the person may be conferred by consent of the person, manifested in various ways’ including a ‘general appearance.’ [Citations.] By generally appearing, a defendant relinquishes all objections based on lack of personal jurisdiction or defective process or service of process. [Citations.]” (*In re Marriage of Obrecht* (2016) 245 Cal.App.4th 1, 7–8 [199 Cal.Rptr.3d 438].)

D. Waiver of Jurisdiction and Statutory Procedures for Challenging Jurisdiction

The traditional rule in California was “that a defendant who chooses to litigate the merits of a lawsuit after its motion to quash has been denied has no right to raise the jurisdictional question on appeal. [Citations.] It was said that by contesting the merits, ‘the defendant made a general appearance and

submitted itself to the jurisdiction of the court”’ and ‘“thereby waived any right it may have had to insist that jurisdiction of its person had not been obtained.”’” (*State Farm General Ins. Co. v. JT’s Frames, Inc.* (2010) 181 Cal.App.4th 429, 437 [104 Cal.Rptr.3d 573] (*State Farm*), quoting *Jardine v. Superior Court* (1931) 213 Cal. 301, 304 [2 P.2d 756].)

■ In 1955, the Legislature made changes to the Code of Civil Procedure that (1) “extended the time within which a defendant who moved to quash was required to respond to the complaint, giving the defendant until after service of an order denying the motion”; (2) provided for appellate review by way of a petition for writ of mandate; and (3) “gave a defendant who sought a writ additional time to plead, precluding entry of default while the writ petition was pending.” (*State Farm, supra*, 181 Cal.App.4th at p. 438, citing former sections 416.1 and 416.3.) The current statutory scheme continues “to provide that a party whose motion to quash has been denied may seek relief through a petition for writ of mandate and continue[s] to specify that the time to respond to the complaint does not expire while the motion to quash and the writ are pending.” (*State Farm*, at p. 439, citing § 418.10, subds. (b), (c).)

■ In 2002, the Legislature added subdivision (e) to section 418.10, the statute that currently governs motions to quash. (Stats. 2002, ch. 69, § 1, p. 578.) Under subdivision (e), a defendant or cross-defendant may move to quash and “simultaneously answer, demur, or move to strike the complaint or cross-complaint.” (§ 418.10, subd. (e).) Moreover, “no act” by a party who first makes a motion to quash, “including filing an answer, demurrer, or motion to strike,” constitutes an appearance “unless the court denies the motion.” (§ 418.10, subd. (e)(1).) If the trial court denies the motion, the defendant is “not deemed to have generally appeared until entry of the order denying the motion.” (*Ibid.*) And if the party whose motion to quash has been denied files a timely petition for writ of mandate, that party “is not deemed to have generally appeared until the proceedings on the writ petition have finally concluded.” (§ 418.10, subd. (e)(2).) “[S]ubdivision (e) does not change the essential rule that ‘[a] defendant submits to the court’s jurisdiction by making a general appearance in an action’ by ‘participat[ing] in the action in a manner which recognizes the court’s jurisdiction.’” (*Factor Health Management v. Superior Court* (2005) 132 Cal.App.4th 246, 250 [33 Cal.Rptr.3d 599]; accord, *Roy . . . supra*, 127 Cal.App.4th at p. 341.) It merely delays the effect of such actions until the motion to quash is denied or, if the defendant seeks writ review, until proceedings on the writ have concluded.” (*State Farm, supra*, 181 Cal.App.4th at p. 441.)

■ Before we address the merits of Retzlaff’s jurisdictional argument, we must first determine whether Retzlaff has made a general appearance, thereby waiving the jurisdictional defect. In our review of that question, we are

presented with an issue regarding the appealability of the order on the motion to quash. Since “the question of appealability goes to our jurisdiction, we are dutybound to consider it on our own motion.” (*Olson v. Cory* (1983) 35 Cal.3d 390, 398 [197 Cal.Rptr. 843, 673 P.2d 720] (*Olson*)).

E. Appealability

■ Section 418.10 fixes the point in time at which a defendant who participates in litigation after filing a motion to quash will be deemed to have made a general appearance. (*State Farm, supra*, 181 Cal.App.4th at p. 442.) Subdivision (e)(1) of section 418.10 provides: “If the court denies the motion [to quash], the defendant or cross-defendant *is not deemed to have generally appeared until entry of the order denying the motion.*” (Italics added.) Subdivision (e)(2) extends that time in cases where a party petitions for a writ of mandate: “If the motion . . . is denied and the defendant . . . petitions for a writ of mandate . . . , the defendant . . . *is not deemed to have generally appeared until the proceedings on the writ petition have finally concluded.*” (Italics added.) The petition for writ of mandate must be filed “within 10 days after service . . . of a *written notice of entry of an order of the court denying [the] motion*, or within any further time not exceeding 20 days that the trial court may for good cause allow.” (§ 418.10, subd. (c), italics added.)

There is no written order denying the motion to quash in this case, and hence no notice of entry of order. The record does not reflect when the court’s oral order was entered in the minutes. Moreover, since Retzlaff sought appellate review of the court’s decision denying his motion to quash, section 418.10 subdivision (e)(2) extended the time he would not be “deemed to have generally appeared until the proceedings on the writ petition have finally concluded.” (§ 418.10, subd. (e)(2).) Retzlaff had “10 days after service upon him . . . of a written notice of entry of an order of the court denying his . . . motion” to file a writ petition. (§ 418.10, subd. (c).) Since there was no written order on the motion to quash and neither the court nor ViaView served Retzlaff with “written notice of entry of an order denying” his motion to quash, the time for Retzlaff to file a petition for writ of mandate challenging the court’s order on the motion to quash has never run. (*Id.*, subd. (b).)

■ In *McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252 [74 Cal.Rptr. 389, 449 P.2d 453], the California Supreme Court held that the Legislature’s decision to provide for appellate review of a trial court order denying a motion to quash by writ of mandate precluded review of such orders “upon appeal from a judgment entered after trial on the merits.” (*Id.* at p. 257; see also *People v. Mena* (2012) 54 Cal.4th 146, 155 [141 Cal.Rptr.3d 469, 277 P.3d 160] [in § 418.10, “the Legislature has made writ relief the

exclusive avenue to address trial court error”].) But rather than file a petition for writ of mandate, as required by section 418.10, subdivision (c), Retzlaff filed this appeal. ■ Although Retzlaff failed to petition for a writ of mandate, in “unusual circumstances,” we may treat an appeal as a petition for an extraordinary writ. (*Olson, supra*, 35 Cal.3d at p. 401.) As we shall explain, after examining the factors from *Olson*, we conclude such circumstances are present here.

■ The procedural history of this case is unusual. The court heard Retzlaff’s motion to quash, ruled on his anti-SLAPP motion, and conducted the trial on the permanent injunction all in the same day, only 15 days after Retzlaff was served. Invariably, a motion to quash is heard as a preliminary matter, before other motions attacking the pleadings and before proceedings on the merits. Moreover, the hearing on the permanent injunction resolved the issues presented by the workplace violence petition, and the record and the briefs are adequate for writ review. (*Olson, supra*, 35 Cal.3d at p. 401.) Both parties assert that the order denying the motion to quash is appealable, and the fact that the trial court is not a party is not an obstacle “since there is no indication that the court . . . would . . . become more than a nominal party.” (*Ibid.*)

To dismiss the appeal rather than exercise our power to reach the merits through a mandate proceeding would be “ ‘unnecessarily dilatory and circuitous,’ ” particularly since the time for Retzlaff to petition for writ of mandate has never run. (*Olson, supra*, 35 Cal.3d at p. 401.) Given the threshold nature of the jurisdictional question, it would make no sense to dismiss the appeal as to that issue, decide the other issues presented, and then address the jurisdictional question in a later writ proceeding. Instead, treating the appeal as a petition for writ of mandate avoids piecemeal litigation and further delay, and allows for an orderly examination of the issues presented. Moreover, if we conclude—as we do—that the trial court erred in its jurisdictional ruling, that will end the litigation. We shall therefore treat the appeal of the court’s order denying the motion to quash as a petition for writ of mandate.

F. Analysis of Waiver Claim

■ Citing *State Farm*, ViaView argues that Retzlaff waived his jurisdictional challenge by litigating the merits of the petition for a workplace violence restraining order after his motion to quash was denied. We disagree.

■ Under section 418.10, subdivision (e), “no act by a party who makes a [motion to quash], including filing an answer, demurrer, or motion to strike,” before or concurrently with taking that action will be deemed a

general appearance until litigation of the motion to quash is finally resolved adversely to the defendant. (§ 418.10, subd. (e), italics added; see *Air Machine*, *supra*, 186 Cal.App.4th at pp. 425–427.) Courts have interpreted the italicized language broadly. The *State Farm* court stated, for example, that “[a] party may answer, demur, move to strike and perform other actions related to the merits without fear of accidentally waiving a potentially meritorious attack on personal jurisdiction.” (*State Farm*, *supra*, 181 Cal.App.4th at p. 441, italics added; see also *Air Machine*, at p. 427 [the word “act” in § 418.10, subd. (e)(1) applies “broadly”; it “means any act [by the defendant,] and is not limited to an ‘act’ that is defensive in nature”]; *Roy*, *supra*, 127 Cal.App.4th at p. 345 [“Nothing could be clearer: a defendant may move to quash coupled with any other action without being deemed to have submitted to the court’s jurisdiction”].)

This case is distinguishable from other cases in which the defendant was found to have made a general appearance. In *Factor Health*, the court held that the defendants who filed ex parte applications for discovery related to the merits of the case *before* filing their motion to quash had made a general appearance and submitted to the court’s jurisdiction. (*Factor Health Management v. Superior Court*, *supra*, 132 Cal.App.4th at pp. 250–252.) And in *Roy*, the court held that the defendants who filed case management statements, attended conferences, propounded discovery, filed numerous motions to compel, requested continuances, and filed a motion for summary judgment *before* they filed their motion to dismiss for lack of personal jurisdiction had waived the jurisdictional defect. (*Roy*, *supra*, 127 Cal.App.4th at pp. 340, 346.) Unlike the defendants in *Factor Health* and *Roy*, Retzlaff filed his motion for a continuance *concurrently with* his motion to quash. He filed his notice of perjury by McGibney (which ViaView argued was the equivalent of an answer) and his anti-SLAPP motion *after* he filed the motion to quash. He also participated in the July 29 hearing *after* he filed the motion to quash. Thus, Retzlaff preserved his jurisdictional claim by filing his motion to quash first. None of the actions he took concurrently with or after filing that motion will be deemed a general appearance unless and until this writ proceeding is decided adversely to him. (§ 418.10, subd. (e); *Air Machine*, *supra*, 186 Cal.App.4th at pp. 417, fn. 3, 421–422, 426.)

This case is also distinguishable from *State Farm*, in which the appellate court found the plaintiff had waived its right to contest personal jurisdiction. In that case, State Farm General Insurance, a California company, sued JT’s Frames, Inc. (JTF), an Illinois corporation, in California for a declaration that State Farm’s insurance policy did not cover JTF’s claim against State Farm’s insured. (*State Farm*, *supra*, 181 Cal.App.4th at pp. 433–434.) JTF moved to quash service for lack of personal jurisdiction. The trial court denied the motion and JTF petitioned for a writ of mandate. (*Id.* at pp. 435–436.) While the writ petition was pending in the Court of Appeal, JTF propounded

discovery, filed opposition to State Farm’s choice of law motion, and opposed State Farm’s motion for summary judgment. After the trial court granted summary judgment for State Farm, the appellate court summarily denied JTF’s writ petition on the motion to quash. (*Id.* at p. 436.) Pursuant to section 418.10, subdivision (e)(2), once the writ proceeding was final, the actions JTF took while the “writ was pending that recognized the trial court’s jurisdiction [were] ‘deemed’ to constitute a general appearance, and no further objection to jurisdiction [would] be permitted.” (*State Farm*, at p. 441.)

After JTF’s writ petition was denied, JTF appealed the summary judgment, as well as the order on the motion to quash, in effect seeking a second bite at the apple from the appellate court on the question of personal jurisdiction. (*State Farm, supra*, 181 Cal.App.4th at pp. 433, 437.) The appellate court concluded that the jurisdictional issue was not cognizable in the appeal. The court held that by participating “fully in resolving the merits of the litigation while the writ was pending, [JTF] submitted itself to the jurisdiction of the court and waived any further right to contest personal jurisdiction.” (*Id.* at pp. 437, 441.) ViaView relies on this language from *State Farm* and argues that by participating in the hearing on the permanent injunction, Retzlaff waived his jurisdictional claim.

■ ViaView’s reliance on *State Farm* is misplaced. Although the language quoted above, read out of context, supports ViaView’s argument, it must be interpreted in light of the paragraph in which it appears. In that paragraph, the court stated: “However, subdivision (e) does not change the essential rule that ‘[a] defendant submits to the court’s jurisdiction by making a general appearance in an action’ by ‘participat[ing] in the action in a manner which recognizes the court’s jurisdiction.’ [Citations.] It merely delays the effect of such actions until the motion to quash is denied or, if the defendant seeks writ review, until proceedings on the writ have concluded. Once the motion is denied or writ proceedings have concluded, the actions undertaken by the defendant while the motion or writ was pending that recognized the trial court’s jurisdiction will be ‘deemed’ to constitute a general appearance, and no further objection to jurisdiction will be permitted. [JTF], having participated fully in resolving the merits of the litigation while the writ was pending, submitted itself to the jurisdiction of the court and waived any further right to contest personal jurisdiction.” (*State Farm, supra*, 181 Cal.App.4th at p. 441.) We emphasize that JTF’s participation in the litigation was deemed a general appearance only because—unlike this case—its writ petition had been denied.

This case is distinguishable from *State Farm*. First, this appeal is Retzlaff’s first attempt to obtain appellate review of the order denying his motion to

quash. Second, unlike the appeal in *State Farm*, since we treat this appeal as a petition of writ of mandate, writ review of the order denying the motion to quash in this case is not yet final. And third, unlike JTF, Retzlaff has not attempted to appeal the court's ruling on the jurisdictional question after a writ petition was finally decided adversely to him. Thus, any act Retzlaff engaged in to defend against the workplace violence petition has not yet been deemed a general appearance. Since Retzlaff filed his motion to quash concurrently with or before taking any other action in response to the petition, and since his jurisdictional claim has not yet been deemed waived, we will proceed to consider it on the merits.

G. *Merits of Jurisdictional Claim*

■ A nonresident defendant may be subject to the court's specific jurisdiction if three requirements are met: (1) the defendant has purposefully availed itself of forum benefits with respect to the matter in controversy; (2) the controversy is related to or arises out of the defendant's contacts with the forum; and (3) the exercise of jurisdiction would be reasonable and comports with fair play and substantial justice. (*Pavlovich, supra*, 29 Cal.4th at p. 269; *Vons, supra*, 14 Cal.4th at pp. 446, 447.)

■ “The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant ‘focuses on “the relationship among the defendant, the forum, and the litigation.”’ [Citation.] For a State to exercise jurisdiction consistent with due process, the defendant’s suit-related conduct must create a substantial connection with the forum State.” (*Walden, supra*, 571 U.S. at p. ___ [134 S.Ct. at p. 1121].) “First, the relationship must arise out of contacts that the ‘defendant *himself* creates with the forum State. [Citation.] Due process limits on the State’s adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties. [Citation.] [The United States Supreme Court has] consistently rejected attempts to satisfy the defendant-focused ‘minimum contacts’ inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State.” (*Id.* at p. ___ [134 S.Ct. at p. 1122], original italics.) “Second, [the] ‘minimum contacts’ analysis looks to the defendant’s contacts with the forum State itself, not the defendant’s contacts with persons who reside there.” (*Ibid.*) “[M]ere injury to a forum resident is not a sufficient connection to the forum.” (*Id.* at p. ___ [134 S.Ct. at p. 1125].)

■ Since Retzlaff challenged personal jurisdiction by a motion to quash, ViaView had the burden of proving, by a preponderance of the evidence, the factual bases justifying the exercise of jurisdiction. (*Vons, supra*, 14 Cal.4th at p. 449.) To that end, ViaView was required to “‘present facts demonstrating that the conduct of [Retzlaff] related to the pleaded causes is such as to

constitute constitutionally cognizable “minimum contacts.” [Citation.]” (*DVI, Inc. v. Superior Court* (2002) 104 Cal.App.4th 1080, 1090–1091 [128 Cal.Rptr.2d 683].) To carry this burden, ViaView was required to come forward with affidavits, declarations, and other competent evidence. (*In re Automobile Antitrust Cases I & II, supra*, 135 Cal.App.4th at p. 110.) If ViaView had met this burden, Retzlaff would then have had the burden to demonstrate that the exercise of jurisdiction would be unreasonable. (*Vons, supra*, 14 Cal.4th at p. 449.)

In his declaration in support of the motion to quash, Retzlaff stated that he resided in “Arizona and/or Texas,” he has never lived in California, and he has never considered California his domicile. He declared that he has never owned real property, voted, or held a driver’s license in California, and that he has never done business in California or worked for a California employer. He also said he has never sued or been sued in California, never consented to the jurisdiction of a California court, and never purposefully availed himself of the benefits or protections of California’s laws. Retzlaff also declared that he has “never had any communications with” McGibney, and has “never sent him any death threats, as alleged in his complaint.”

■ McGibney did not present any evidence that disputed these facts. As we have noted, McGibney’s declaration in opposition to the motion to quash was not signed under penalty of perjury under the laws of the State of California as required by section 2015.5. It therefore had no evidentiary value and we shall not consider it in our review of the jurisdictional issue. (*Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 601–611 [15 Cal.Rptr.3d 793, 93 P.3d 386] [declaration that does not comply with § 2015.5 is not sufficiently reliable to be admitted into evidence].)

■ ViaView’s workplace violence petition was verified by McGibney as CEO of ViaView. Generally, a properly verified complaint—or in this case a properly verified petition—may be treated as a declaration or affidavit. (*Evangelize China Fellowship, Inc. v. Evangelize China Fellowship* (1983) 146 Cal.App.3d 440, 444 [194 Cal.Rptr. 240].) However, “when the verification is made on behalf of a corporation . . . by any officer thereof,” as McGibney did on behalf of ViaView, “the pleadings shall not otherwise be considered as an affidavit or declaration establishing the facts therein alleged.” (§ 446, subd. (a).) Thus, ViaView cannot rely on its verified petition to establish that Retzlaff had the requisite minimum contacts with California. Since neither McGibney’s declaration nor ViaView’s petition have any evidentiary value on the jurisdictional question, we conclude that ViaView did not meet its evidentiary burden of proving, by a preponderance of the evidence, the factual bases justifying the exercise of personal jurisdiction over Retzlaff. (*Vons, supra*, 14 Cal.4th at p. 449.)

ViaView nonetheless argues there are sufficient minimum contacts for California to exercise personal jurisdiction because Retzlaff knew McGibney lived in San José and he published McGibney's California address on a blog. But to oppose the motion to quash, ViaView had to do more than rely on allegations. It had to produce admissible evidence that supported its jurisdictional facts. ViaView produced no evidence to support this assertion.

ViaView also argues that when a defendant commits a crime in the forum state, he purposefully avails himself of the forum. It argues that it is illegal to harass, threaten, and stalk an individual, and it asserts that jurisdiction is proper based on the criminal nature of Retzlaff's alleged threats against McGibney and his family. But this is a civil case, not a case about a prosecutor's ability to prosecute alleged criminal acts that originate outside the prosecutor's home state.

ViaView also asserts that Retzlaff's conduct implicated this state because "the San José Police Department and the District Attorney became heavily involved and began investigating Retzlaff's conduct." But ViaView did not present any competent evidence in opposition to the motion to quash that Retzlaff made the threats alleged in the petition or the additional threats McGibney complained of at the hearings on the TRO. While an offer of proof may have been sufficient at the ex parte hearing to obtain the TRO, more was required to oppose Retzlaff's motion to quash. In addition, there was no evidence the police or the district attorney are investigating this case other than an unauthenticated incident report card from the San José Police Department that was attached to the petition. Even if we were to consider that incident report card, all it purports to show is that someone filed a police report.

■ Both parties cite *Burdick*, which involved the posting of allegedly defamatory material on Facebook. The court in *Burdick* held that posting defamatory statements about a person on social media or the Internet, "while knowing that person resides in the forum state, is insufficient in itself to create the minimum contacts necessary to support specific personal jurisdiction in a lawsuit arising out of that posting. Instead, it is necessary that the nonresident defendant not only intentionally post the statements . . . , but that the defendant expressly aim or specifically direct his or her intentional conduct at the forum, rather than at a plaintiff who lives there." (*Burdick*, *supra*, 233 Cal.App.4th at pp. 13, 25.)

The *Burdick* court observed that courts in a number of jurisdictions had held that online postings that are accessible by anyone who is interested in them, and are not specifically directed at the forum state, do not support exercising jurisdiction over the case. (*Burdick*, *supra*, 233 Cal.App.4th at

pp. 20–21.) The court held that the plaintiffs in that case did not meet their evidentiary burden because they “did not produce evidence to show [that the defendant’s] personal Facebook page or the allegedly defamatory posting was expressly aimed or intentionally targeted at California, that either the Facebook page or the posting had a California audience, that any significant number of Facebook ‘friends,’ who might see the posting, lived in California, or that the Facebook page had advertisements targeting Californians.” (*Id.* at p. 25.) The court observed that while the allegedly defamatory Internet posting could be read as being expressly aimed at the plaintiffs, whom the defendant knew to be California residents, the plaintiffs did not present evidence that the postings were directed at the State of California or at a California audience. The court concluded: “The readers of the allegedly defamatory Facebook posting ‘most likely would be spread all around the country—maybe even around the world—and not necessarily in the [California] forum.’” (*Id.* at p. 27.)

Although both parties cite *Burdick*, they do not discuss whether or how its holdings apply to this case. ViaView contends the alleged threats were part of a campaign to harass and defame McGibney and destroy ViaView’s businesses. It contends the threats were made on Twitter accounts and the comments page of an article on BullyVille. Thus, it argues, the threats were published to anyone who chose to access those accounts, and were not directed solely to McGibney and ViaView. But to the extent the threats were defamatory, ViaView failed to meet its burden to demonstrate that the threats were aimed at a California audience, that a significant number of California residents saw them, or that the social media platforms allegedly used by Retzlaff were targeted to California.

For all these reasons, we conclude that ViaView has failed to demonstrate with competent evidence that Retzlaff had sufficient minimum contacts with California such that the exercise of specific personal jurisdiction over him would comport with “‘‘traditional notions of fair play and substantial justice.’’” (*Vons, supra*, 14 Cal.4th at p. 444.) We will therefore reverse the order on the motion to quash. In light of our conclusion, we need not reach the parties’ contentions regarding the anti-SLAPP motion or the order granting the permanent injunction.

III. *Motions on Appeal*

While this appeal was pending, the parties filed 40 motions in this court. The court has already ruled on 19 of those motions. The court deferred ruling on 21 motions for consideration with the merits of the appeal. We have ruled on the pending motions by separate order, filed concurrently herewith.

DISPOSITION

Let a peremptory writ of mandate issue directing the superior court to vacate its order denying Retzlaff's motion to quash for lack of personal jurisdiction and enter a new order granting the motion to quash. Retzlaff is awarded his costs in this appellate proceeding.

A petition for a rehearing was denied July 25, 2016.

[No. E063745. Fourth Dist., Div. Two. July 7, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
CASEY JONES, JR., Defendant and Appellant.

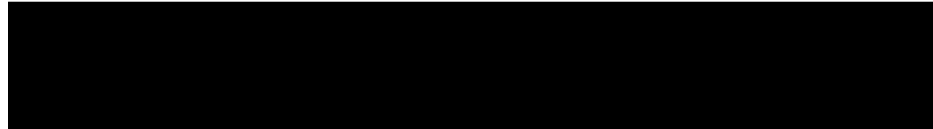
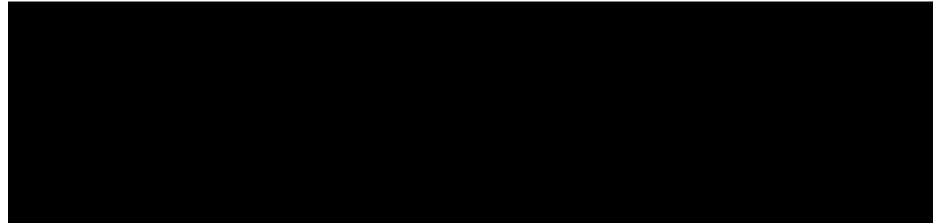
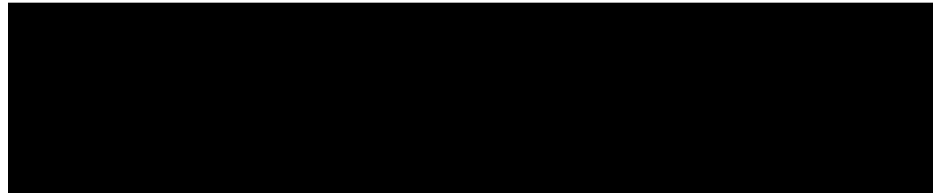
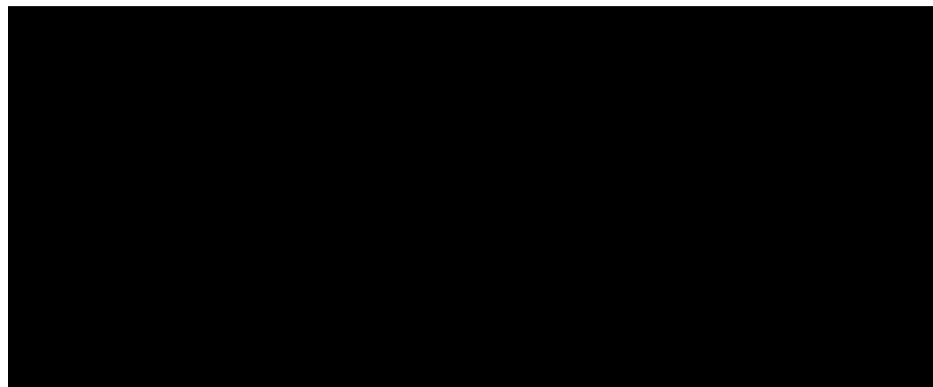
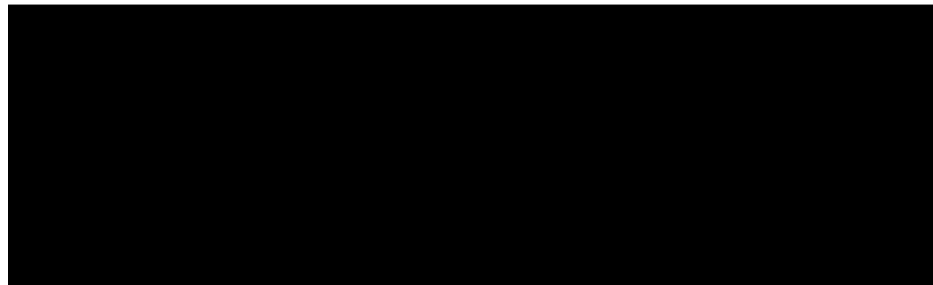
THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) September 14, 2016, S235901.

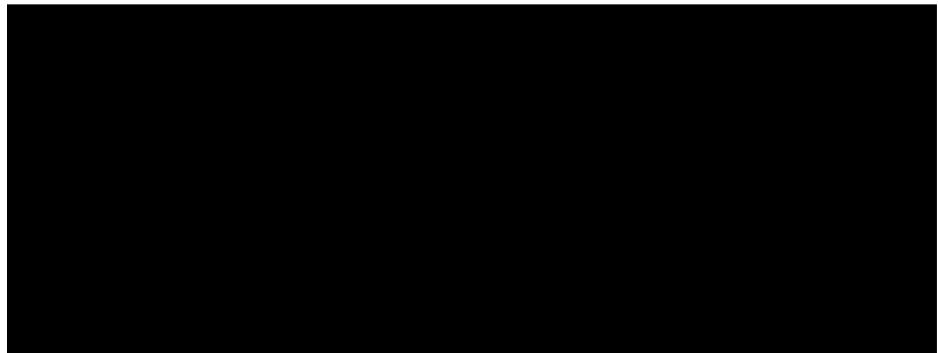
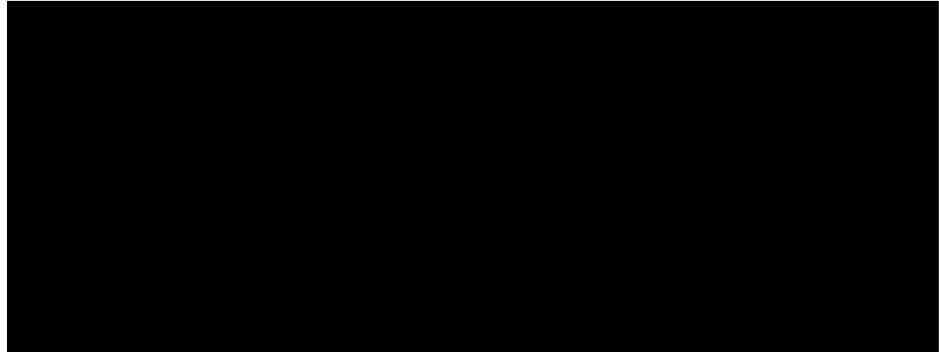
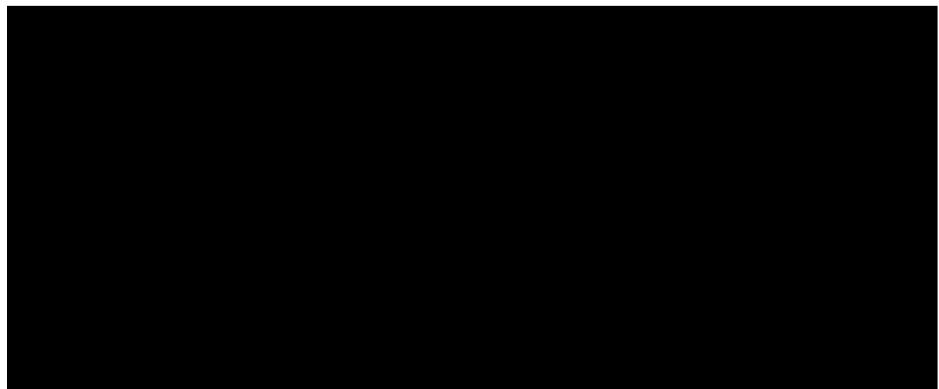
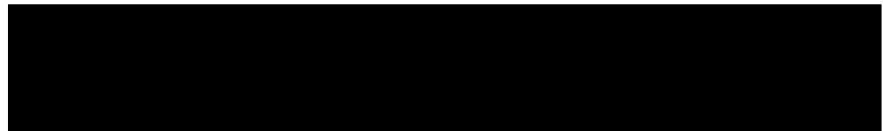
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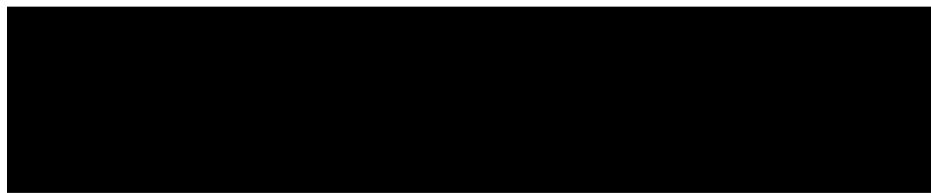
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COUNSEL

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Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

SLOUGH J.—Defendant and appellant, Casey Jones, Jr., appeals an order denying his petition to designate his conviction for burglary (Pen. Code, § 459) as misdemeanor shoplifting (§ 459.5)¹ under section 1170.18, which California voters enacted as part of the Safe Neighborhoods and Schools Act (Proposition 47). Jones also appeals the order denying his motion to strike the one-year prison prior enhancement (§ 667.5, subd. (b)) imposed in this case on the basis of a conviction in a prior case which the superior court had previously designated a misdemeanor. Jones contends the superior court erred by inadvertently denying his petition to designate the burglary conviction a misdemeanor and by denying his motion to strike the enhancement because the redesignated misdemeanor conviction could not have supported an enhancement had Proposition 47 been in effect at the time of his offenses.

Proposition 47 creates a procedure for offenders to obtain reclassification and resentencing on convictions on a retroactive basis, but does not provide a

¹ Unlabeled statutory citations refer to the Penal Code.

similar procedure for striking or dismissing sentence enhancements retroactively. As a result, we conclude the superior court did not err in refusing to strike the prison prior enhancement. However, we conclude the superior court erred in summarily denying Jones's petition to have his burglary conviction reclassified as misdemeanor shoplifting. We therefore affirm in part, reverse in part, and remand for further proceedings.

FACTUAL BACKGROUND

In case No. FVA1301982, prosecutors charged Jones with one felony count of commercial burglary (§ 459; count 1), one felony count of petty theft with three priors (§ 666, subd. (a); count 2), one misdemeanor count of assault on a police animal (§ 600, subd. (a); count 3), and two felony counts of resisting an executive officer (§ 69; counts 4, 5). The complaint alleged Jones had two prison priors. (§ 667.5, subd. (b).)

In the commercial burglary count, the prosecution alleged, "On or about November 6, 2013 . . . the crime of SECOND DEGREE COMMERCIAL BURGLARY, in violation of PENAL CODE SECTION 459, a felony, was committed by Casey Jones Jr, who did enter a commercial building occupied by Walgreens with the intent to commit larceny and any felony." According to a police incident report, Jones was arrested because he "walked into the Walgreens business and placed miscellaneous items into his pants pockets and waistband and walked out of the business without paying for them." The report indicates Jones stole three packages of Dove body wash and one six-pack of Dove body soap. Together, the items were worth \$35.46.

Regarding the prison priors, the prosecution "further alleged as to count(s) 1, 2, 4, 5 pursuant to Penal Code section 667.5(b) that the defendant(s) Casey Jones Jr, has suffered . . . prior conviction(s)" in "Court Case FVI1202922 [for violating] PC459" and in "Court Case FSB1302227 [for violating] PC 666(A)," and "a term was served as described in Penal Code section 667.5 for said offense(s), and that the defendant(s) did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term."

On November 22, 2013, Jones pled guilty to the commercial burglary count, the two resisting an executive officer counts, and admitted the prison prior allegation related to case No. FSB1302227. (*People v. Jones* (Super. Ct. San Bernardino County, 2013, No. FSB1302227).) On motion of the prosecution, the trial court dismissed counts 2 and 3 and struck the prison prior allegation related to case No. FVI1202922. (*People v. Jones* (Super. Ct. San Bernardino County, 2012, No. FV1202922).) The trial court sentenced Jones

to the upper term of three years in county jail for the burglary conviction, two concurrent upper terms of three years for the resisting an executive officer convictions, and a consecutive one-year enhancement for the prison prior. The trial court ordered two years six months of the sentence suspended and imposed mandatory supervision for the same period. However, on March 5, 2014, the trial court found Jones had violated the conditions of mandatory supervision and ordered him to serve 730 days in county jail.

■ On November 4, 2014, the voters of California passed Proposition 47, reducing some felony theft-related offenses to misdemeanors when the value of the stolen property does not exceed \$950. (E.g., §§ 459.5, subd. (a) [redefining some theft as shoplifting], 490.2, subd. (a) [redefining some grand theft offenses as petty theft].) The initiative also created a procedure allowing offenders “who would have been guilty of a misdemeanor under [Proposition 47] had [the] act been in effect at the time of the offense” to file a petition (or application) in the trial court that entered the judgment of conviction “to have the felony conviction or convictions designated as misdemeanors” if the offender has completed serving his or her sentence (§ 1170.18, subd. (f)) or “to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added” by Proposition 47. (§ 1170.18, subd. (a).)

Jones filed a Proposition 47 petition in a prior case (No. FSB1302227), requesting the conviction treated as a prison prior in this case (No. FVA1301982) be designated a misdemeanor. On April 24, the trial court granted the petition in the prior case and ordered his felony conviction for violating section 666 reduced to a misdemeanor under section 1170.18.²

On April 10, 2015, Jones submitted a petition in this case asking the trial court to designate his second degree burglary conviction as a misdemeanor under section 1170.18, subdivision (f). Jones requested a hearing under section 1170.18, subdivision (h). On April 20, 2015, Jones filed a motion for resentencing in this case.³ Jones sought “an overall reduction in his sentence of one year based on the reclassification of the ‘prison prior’ to a misdemeanor.”

² At Jones’s request, we take judicial notice of the minute order designating his prison prior conviction a misdemeanor. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).) The People do not oppose Jones’s request.

³ Jones’s motion precedes the superior court’s order designating the prison prior as a misdemeanor. Jones based the motion on his understanding that “opposing counsel appear to be in agreement that defendant is entitled to reclassification of this offense to misdemeanor status pursuant to Penal Code Section 1170.18 (f)–(n).”

On May 22, 2015, the superior court held a hearing.⁴ As the People concede, neither the parties nor the superior court mentioned Jones's petition to reclassify his second degree commercial burglary conviction as misdemeanor shoplifting at the hearing. Nor did the superior court take evidence at the hearing. Instead, the court heard argument limited to the issue of whether a prison prior enhancement must be stricken if the underlying conviction has been designated a misdemeanor under a separate section 1170.18 petition. The trial court held “[t]he fact that the underlying offense has now been re-classified as a misdemeanor does not change the fact that the person, in fact, did serve a prior prison term. And does not change the public policy arguments behind [section] 667.5(b), that a person who did serve a prior prison term deserves an enhanced sentence for that effect [sic], despite the fact that that underlying conviction has been reduced to a misdemeanor.” The trial court also rejected the objection that interpreting the statutes in that way violates equal protection. The court concluded that for those reasons “the petition for resentencing to strike the prior prison term allegation and strike the one-year enhancement for that prior prison term allegation is denied.” In a minute order filed after the hearing, the superior court denied Jones's petition.

DISCUSSION

I. Standard of Review

■ The interpretation of a statute is subject to de novo review on appeal. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916 [129 Cal.Rptr.2d 811, 62 P.3d 54].) We apply the same principles that govern statutory construction to interpret a voter initiative. (*People v. Rizo* (2000) 22 Cal.4th 681, 685 [94 Cal.Rptr.2d 375, 996 P.2d 27].) “The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]” (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276 [87 Cal.Rptr.2d 222, 980 P.2d 927].) “In determining intent, we look first to the words themselves. [Citations.] When the language is clear and unambiguous, there is no need for construction. [Citations.] When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]” (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007–1008 [239 Cal.Rptr. 656, 741 P.2d 154].) This appeal also requires us to decide whether the principles of equal protection require striking Jones's sentencing

⁴ The superior court heard consolidated argument in two cases on the issue.

enhancement, a question we review de novo. (*Raef v. Appellate Division of Superior Court* (2015) 240 Cal.App.4th 1112, 1120 [193 Cal.Rptr.3d 159].)

II. Motion to Strike the Prison Prior Enhancement

A. Proposition 47 does not provide for striking enhancements retroactively

Jones contends the superior court erred by denying his motion to strike the one-year enhancement of his sentence based on a felony conviction in a prior case (No. FSB1302227) reclassified as a misdemeanor after his conviction was final and he had begun serving his prison sentence. We disagree.

Proposition 47 changed portions of the Penal Code to reduce certain theft-related offenses from felonies or wobblers to misdemeanors, unless the offenses were committed by certain ineligible offenders. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091 [183 Cal.Rptr.3d 362].) Proposition 47 also created a procedure making those changes available to offenders who had previously been convicted of reclassified offenses. (§ 1170.18; *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, 1217 [189 Cal.Rptr.3d 907].)

The plain language of the section setting out the new procedures expressly allows offenders to seek redesignation of and resentencing on felony convictions that have become final. (§ 1170.18.) An offender “currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section (‘this act’) had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing.” (§ 1170.18, subd. (a).) An offender who has “completed his or her sentence for a conviction . . . of a felony or felonies who would have been guilty of a misdemeanor under this act had [it] been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.” (§ 1170.18, subd. (f).)

■ The focus of these procedures is redesignation of *convictions*, not enhancements. Neither procedure provides for either the recall and resentencing or the redesignation, dismissal, or striking of sentence enhancements. (§ 1170.18, subds. (a), (b), (f), (g).) No similar provision provides a process

for offenders to seek to strike or otherwise redesignate sentencing enhancements. It follows that nothing in the language of section 1170.18 allows or even contemplates the retroactive redesignation, dismissal, or striking of sentence enhancements imposed in a final judgment entered before Proposition 47 passed, even where the offender succeeds in having the underlying conviction itself deemed a misdemeanor.

Jones contends section 1170.18, subdivision (k) provides the statutory basis for altering sentencing enhancements. That subdivision states “[a]ny felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) *shall be considered a misdemeanor for all purposes.*” (Italics added.) According to Jones, since the conviction underlying his prison prior was deemed a misdemeanor, subdivision (k) required the superior court (and requires us) to treat the offense as a misdemeanor for all purposes, including “for the purpose of [the] prison prior enhancement.” Imposing a sentence enhancement under section 667.5, subdivision (b) requires proof the defendant was previously convicted of a felony. (*In re Preston* (2009) 176 Cal.App.4th 1109, 1115 [98 Cal.Rptr.3d 340].) Thus, Jones argues, his prior conviction—now a misdemeanor—no longer supports imposing the enhancement.

■ We assume, without deciding, that subdivision (k) bars a post-Proposition 47 sentencing court from imposing a section 667.5, subdivision (b) enhancement based on a prior felony conviction that has been redesignated as a misdemeanor. It does not follow, however, that subdivision (k) allows the courts to strike prison prior enhancements imposed prior to Proposition 47 based on prior convictions redesignated as misdemeanors after judgment and sentence have become final. The first case involves the *prospective* application of section 1170.18, subdivision (k). The second case, which describes Jones’s situation, involves its *retroactive* application. We conclude subdivision (k) does not apply retroactively.

■ No part of the Penal Code is retroactive, unless it expressly so declares. (§ 3; *People v. Brown* (2012) 54 Cal.4th 314, 319 [142 Cal.Rptr.3d 824, 278 P.3d 1182].) Proposition 47 does not contain a provision declaring its provisions automatically retroactive. Instead, it provides procedures making its provisions *available* retroactively to certain offenders who petition for resentencing or redesignation of their convictions. (§ 1170.18; *Alejandro N. v. Superior Court, supra*, 238 Cal.App.4th at p. 1217 [“By adding section 1170.18 to the Penal Code, the Proposition 47 voters made this felony-to-misdemeanor reclassification *available* to qualifying offenders on a retroactive basis” (italics added)].) Thus, Proposition 47 has retroactive effect only to the extent section 1170.18 provides a procedure to petition for reclassification or resentencing.

As we conclude above, section 1170.18 provides no such procedure for the retroactive dismissal or striking of enhancements. Absent express language in section 1170.18 allowing the redesignation, dismissal, or striking of past sentence enhancements, we cannot infer voters intended the act to apply retroactively to past sentence enhancements. As a result, the direction of section 1170.18, subdivision (k) that any redesignated conviction “shall be considered a misdemeanor for all purposes,” applies, at most, prospectively to preclude future or non-final sentence enhancements based on felony convictions redesignated as misdemeanors under Proposition 47.

■ We conclude section 1170.18, subdivisions (a), (b), (f), and (g) explicitly allow offenders to request and courts to grant retroactive designation of offenses such as Jones’s prison prior, but no provision allows offenders to request or courts to order retroactively striking or otherwise altering an enhancement based on such a redesignated prior offense. Absent such an express provision, we cannot apply the statute retroactively.⁵ (§ 3.)

B. *Equal protection does not require retroactive striking of enhancements*

Jones contends refusing to strike the prison prior enhancement retroactively violates his right to equal protection of the laws. (U.S. Const., 14th Amend., § 1 [“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws”]; Cal. Const., art. I, § 7 [“A person may not be . . . denied equal protection of the laws”].) We disagree.

■ “The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated groups* in an unequal manner.” (*In re Eric J.* (1979) 25 Cal.3d 522, 530 [159 Cal.Rptr. 317, 601 P.2d 549].) If the state has adopted such a classification, the courts review it under a level of scrutiny adjusted according to the nature of the distinction the law makes between groups of people. If the law makes distinctions based on suspect classifications or impacts exercise of a fundamental right, the court will uphold the law only if it is necessary to advancing a compelling state interest.

⁵ Our holding is limited to the retroactive application of section 1170.18 and does not imply a superior court may impose an enhancement based on a prison prior reclassified before the court imposes the sentence. (See *People v. Abdallah* (2016) 246 Cal.App.4th 736 [201 Cal.Rptr.3d 198]; see also Couzens & Bigelow, Proposition 47: “The Safe Neighborhoods and Schools Act” (May 2016) pp. 94–95, at <<http://www.courts.ca.gov/documents/Prop-47-Information.pdf>> [as of June 7, 2016] “[C]hanging the sentence of one count fairly puts into play the sentence imposed on non-Proposition 47 counts, at least to the extent necessary to preserve the original concurrent/consecutive sentencing structure. *The purpose of section 1170.18 is to take the defendant back to the time of the original sentence and resentence him with the Proposition 47 count now a misdemeanor*”].)

(*People v. Silva* (1994) 27 Cal.App.4th 1160, 1167 [33 Cal.Rptr.2d 181].) Other legal distinctions are permissible provided they bear a rational relationship to a legitimate state purpose. (*Ibid.*)

Jones contends our interpretation of section 1170.18 creates two similarly situated groups, members of which will be treated differently under the law.⁶ Jones suggests “a defendant who is serving a prison sentence for violating section 666 is eligible for relief under section 1170.18” whereas “a defendant who is serving an additional year of custody under section 667.5, subdivision (b)” for the same offense would not be eligible for relief. We do not understand how the class of offenders who violated section 666 are situated similarly to Jones. At the time Jones committed his offenses, section 666 imposed increased punishment only for offenders who had *three* or more qualifying prior convictions. (§ 666, subd. (a), as amended by Stats. 2010, ch. 219, § 15, eff. Sept. 9, 2010.) Proposition 47 amended section 666 by requiring only one qualifying prior conviction, but limited its application to offenders who are “required to register pursuant to the Sex Offender Registration Act, or who ha[ve] a prior violent or serious felony conviction” under section 667, subdivision (e)(2)(C). (§ 666, subd. (b).) In addition, an offender convicted of petty theft with priors faced a maximum sentence of three years in state prison (§§ 666, 18), instead of six months in county jail (§ 490). A defendant who committed the same crime, but pled guilty (as Jones did in this case) to felony second degree commercial burglary (§ 459) and admitted serving a prison prior (§ 667.5, subd. (b)), faced a sentence of up to three years in state prison for the burglary (§§ 461, subd. (b), 1170, subd. (h)) and an additional year for the enhancement (§ 667.5, subd. (b)). Thus, the defendants Jones posits would face different sentences even before application of Proposition 47.

■ In any event, the California Supreme Court has held “neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor’s discretion in charging under one such statute and not the other, violates equal protection principles.” (*People v. Wilkinson, supra*, 33 Cal.4th at p. 838.) The same reasoning applies to Proposition 47’s provision for the possibility of sentence reduction for a defendant whose sentence was increased under section 666, but not one whose sentence was enhanced under section 667.5, subdivision (b). Absent a

⁶ Jones also contends we should apply strict scrutiny “because personal liberty is a fundamental right.” However, our Supreme Court has rejected that position, concluding that “subject[ing] all criminal classifications to strict scrutiny requiring the showing of a compelling state interest” would “‘intrude[] too heavily on the police power and the Legislature’s prerogative to set criminal justice policy.’ ” (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838 [16 Cal.Rptr.3d 420, 94 P.3d 551].)

showing that a particular defendant “‘has been singled out deliberately for prosecution on the basis of some invidious criterion,’ . . . the defendant cannot make out an equal protection violation.” (*People v. Wilkinson, supra*, at p. 839.) Jones has made no such showing.

■ Nor does the sentencing disparity violate equal protection for treating defendants who *have yet* to be sentenced and have a prison prior where the underlying conviction has been reduced to a misdemeanor differently from defendants who *are* serving or *have* served a prison sentence under a judgment imposing a prison prior enhancement based on a redesignated offense. “A refusal to apply a statute retroactively does not violate the Fourteenth Amendment.” (*People v. Aranda* (1965) 63 Cal.2d 518, 532 [47 Cal.Rptr. 353, 407 P.2d 265], superseded by statute on another ground as recognized in *People v. Capistrano* (2014) 59 Cal.4th 830, 868, fn. 10 [176 Cal.Rptr.3d 27, 331 P.3d 201].) Equal protection principles do “not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.” (*Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S. 502, 505 [55 L.Ed. 561, 31 S.Ct. 490].) (10) Furthermore, because prospective sentencing changes presumably recognize “legitimate . . . concerns associated with the transition from one sentencing scheme to another,” applying the act prospectively but not retrospectively bears a rational relationship to the legitimate state interest of transitioning from the old sentencing scheme to the new sentencing scheme. (*People v. Floyd* (2003) 31 Cal.4th 179, 191 [1 Cal.Rptr.3d 885, 72 P.3d 820].) Consequently, we conclude Jones has not shown the superior court’s refusal to strike his sentence enhancement retroactively violated his right to equal protection of the laws.

III. Petition for Resentencing on the Burglary Conviction

Jones contends the superior court erred by ruling summarily that he was not entitled to resentencing on his conviction for burglary of the Walgreens under new section 459.5.⁷ We agree.

Proposition 47 added section 459.5 to the Penal Code. The new section provides: “(a) Notwithstanding Section 459 [burglary], shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of

⁷ Jones also contends the superior court intended to grant his petition and denied it inadvertently. However, the record on appeal establishes only that Jones believed the superior court had granted the petition.

the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950). Any other entry into a commercial establishment with intent to commit larceny is burglary.” Except in the cases of offenders with specified serious prior convictions, section 459.5 directs “[s]hoplifting shall be punished as a *misdemeanor.*” (§ 459.5, subd. (a), italics added.) Subdivision (b) further directs “[a]ny act of shoplifting as defined in subdivision (a) shall be charged as *shoplifting*” and that “[n]o person who is charged with shoplifting may also be charged with burglary or theft of the same property.” (§ 459.5, subd. (b), italics added.)

Under section 459.5, subdivision (a), Jones would be entitled to resentencing for misdemeanor shoplifting if the items he stole did not exceed \$950 in value. The police incident report related to Jones’s burglary arrest indicates he was arrested because he “walked into the Walgreens business and placed miscellaneous items into his pants pockets and waistband and walked out of the business without paying for them.” According to the report, Jones stole three packages of Dove body wash and one six-pack of Dove body soap. Together, these items were worth \$35.46. This information appears to establish Jones “would have been guilty of a misdemeanor” had section 459.5 “been in effect at the time of the offense.” (§ 1170.18, subds. (a), (f).) If the police report is credited, his offense is a classic case of shoplifting and the superior court should have reclassified his conviction.

Jones filed his petition for resentencing under section 1170.18, subdivision (f) and requested a hearing to determine his eligibility. Given such a request, the trial court was required to provide a hearing. (*People v. Shabazz* (2015) 237 Cal.App.4th 303, 311 [187 Cal.Rptr.3d 828]; § 1170.18, subd. (h) [“Unless requested by the applicant, no hearing is necessary to grant or deny an application filed under subsection (f)”.]) According to the record, the superior court held a hearing, but the issue of reducing the second degree burglary conviction to a misdemeanor conviction was never addressed. Further, the trial court never indicated its intention to deny the petition with respect to the commercial burglary count, despite the agreement of the parties that defendant was entitled to relief. Defendant was thereby denied any opportunity to address the reasons leading the court to its conclusion. The trial court’s course of action effectively denied Jones a hearing on his petition for resentencing his commercial burglary conviction.

We do not hold the superior court may never summarily deny a resentencing petition. However, when a defendant has requested and is statutorily entitled to a hearing, the superior court must hold a hearing and give the defendant a fair opportunity to make his case. That did not happen here.

DISPOSITION

We reverse the order to the extent it denied Jones's petition for resentencing on count 1, affirm the order to the extent it denied his motion to strike the prison prior enhancement, and remand for further proceedings consistent with this opinion.

Hollenhorst, Acting P. J., and Miller, J., concurred

Appellant's petition for review by the Supreme Court was granted September 14, 2016, S235901. Corrigan, J., did not participate therein.

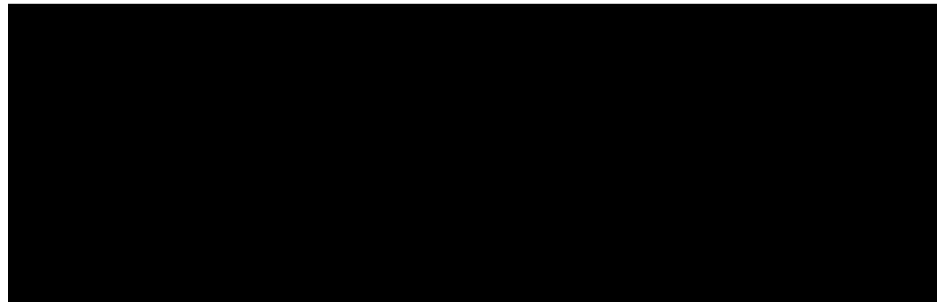
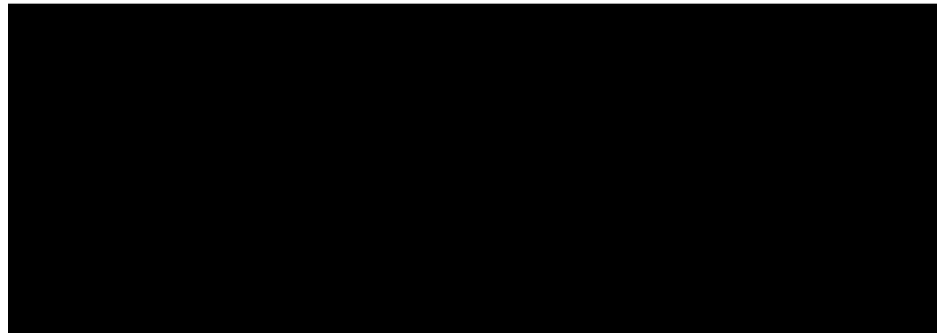
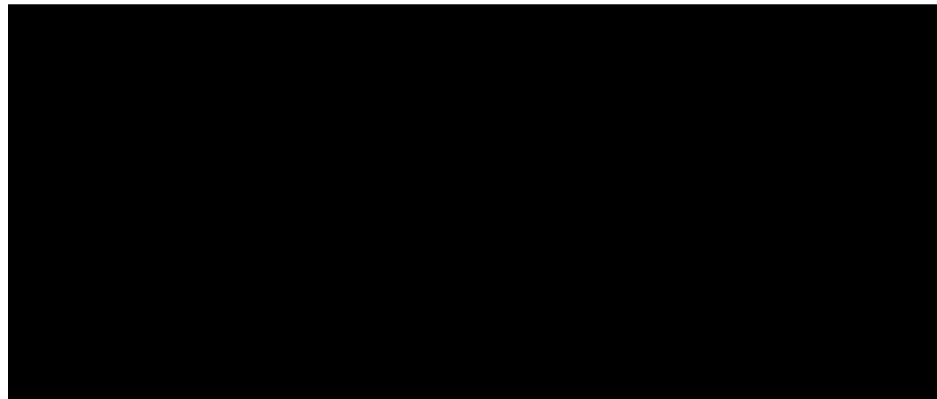
[No. E063900. Fourth Dist., Div. Two. July 7, 2016.]

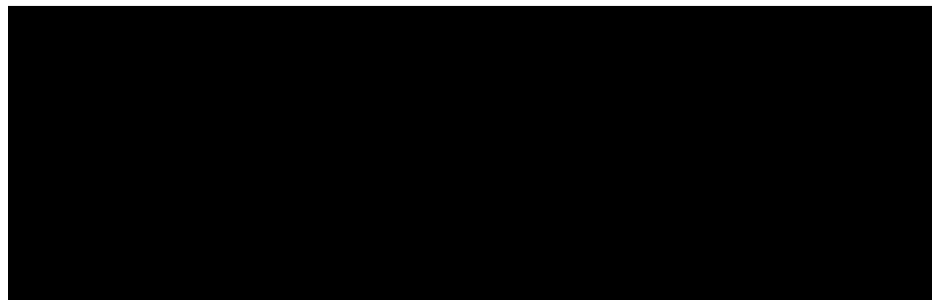
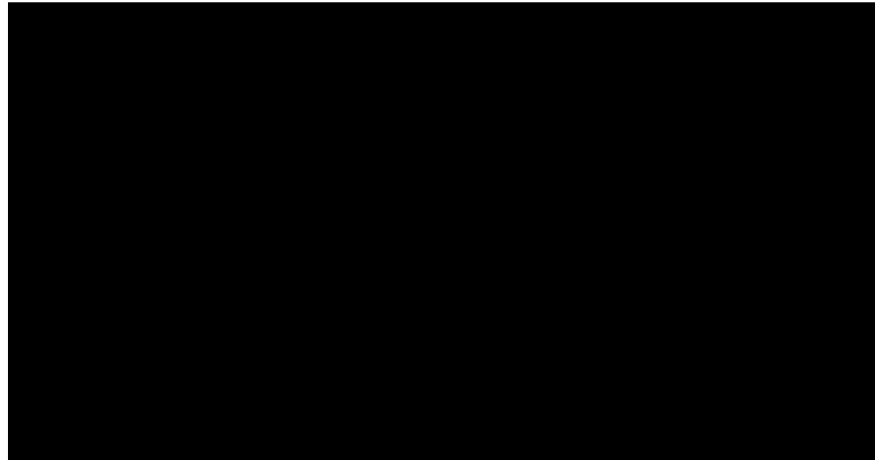
THE PEOPLE, Plaintiff and Respondent, v.
LAMONTE ALVIN JEFFERSON, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Tanya Dellaca, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Barry Carlton, Sabrina Y. Lane-Erwin, Heidi Salerno and Allison V. Hawley, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION**CODRINGTON, J.—****I. INTRODUCTION**

While serving a 32-month sentence for commercial burglary (Pen. Code, § 459),¹ defendant and appellant, Lamonte Alvin Jefferson, petitioned the trial court to recall his sentence and resentence him as if he had been convicted of misdemeanor shoplifting (§§ 459.5, 1170.18, subd. (a)). Defendant stole an ink cartridge worth \$24.99 from a Riverside Kmart store.

The parties agreed that defendant's commercial burglary conviction qualified as a misdemeanor shoplifting conviction. (§ 459.5 [defining shoplifting as including entering a commercial establishment during regular business hours with intent to commit or committing larceny where value of property taken or intended to be taken does not exceed \$950].) The parties also agreed that, had defendant's petition been granted at the January 12, 2015, hearing on the petition, defendant would have been eligible for immediate release from prison. However, the court denied the petition on the ground defendant posed an unreasonable risk of danger to public safety. (§ 1170.18, subds. (b), (c).)

Defendant claims the court erroneously applied the preponderance of the evidence standard to its unreasonable risk of dangerousness determination. He argues the prosecution was required to prove his dangerousness to a jury beyond a reasonable doubt or, at the very least, based on clear and convincing evidence. He also claims the court abused its discretion in finding he posed an unreasonable risk of danger to public safety under any standard of proof. We find no error or abuse of discretion and affirm.

II. BACKGROUND

On September 16, 2014, defendant pled guilty to commercial burglary (§ 459), a felony, and admitted a strike prior. In entering his plea, defendant admitted in court that he entered a Kmart store in the City of Riverside "with the idea of taking some of their property." The guilty plea form that

¹ Unspecified statutory references are to the Penal Code.

defendant signed does not indicate the circumstances of the crime, but the People represent that the commercial burglary was committed on September 3, 2014, when defendant, while on active parole, left a Kmart store without paying for an ink cartridge worth \$24.99.² On September 16, 2014, defendant was sentenced to 16 months in prison on the burglary conviction, doubled to 32 months based on the strike prior.

On November 14, 2014, defendant petitioned the court to recall his 32-month sentence and resentence him to not more than six months in county jail, or time served. (§§ 19, 459.5, 1170.18, subd. (a).) The People opposed the petition and requested a hearing to determine whether defendant posed an unreasonable risk of danger to public safety. At a June 12, 2015, hearing, the court found that defendant posed an unreasonable risk of danger to public safety and denied the petition.

III. DISCUSSION

A. *Proposition 47, Overview of Relevant Provisions*

In the November 4, 2014, election, the voters enacted Proposition 47, “The Safe Neighborhoods and Schools Act” (Proposition 47 or the Act), and the Act went into effect on November 5, 2014. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 [183 Cal.Rptr.3d 362].) As pertinent, the Act added sections 459.5 and 1170.18 to the Penal Code. (*People v. Rivera, supra*, at p. 1091.) Section 459.5 defines “shoplifting” as “entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950).” (§ 459.5, subd. (a).) Shoplifting must be punished as a misdemeanor unless the defendant has one or more disqualifying prior convictions. (*Ibid.*)³ Generally, misdemeanors are punishable by imprisonment in the county jail for not more than six months. (§ 19.)

■ Under section 1170.18, subdivision (a), a person who is currently serving a sentence for a felony conviction that would have been a misdemeanor under the Act may petition the court that entered the judgment of

² In exchange for defendant’s guilty plea to commercial burglary, the People dismissed two misdemeanor charges, one for theft (Pen. Code, § 490.5) and another for possessing a glass methamphetamine pipe (Health & Saf. Code, § 11364.1).

³ For purposes of section 459.5, a prior conviction is a conviction for an offense specified in section 667, subdivision (e)(2)(C), or an offense requiring registration as a sex offender under section 290, subdivision (c). Persons with one or more such prior convictions may be punished pursuant to section 1170, subdivision (h).

conviction to recall the person's felony sentence and resentence the person as if he or she had been convicted of the misdemeanor. If the court determines that the defendant satisfies the criteria of section 1170.18, subdivision (a), the court is required to recall the felony sentence and resentence the defendant to the misdemeanor sentence, "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)

B. *Defendant Was Not Entitled to a Jury Trial on the Dangerousness Finding, and the Proper Standard of Proof Was Preponderance of the Evidence*

Defendant first claims he had a right to a jury trial on the dangerousness finding, and that the prosecutor had the burden of proving his dangerousness beyond a reasonable doubt or, at the very least, by clear and convincing evidence. We disagree.

Other courts have rejected this claim in the context of Proposition 36, the Three Strikes Reform Act of 2012 (Proposition 36) and its resentencing provision, section 1170.126. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1302–1305 [155 Cal.Rptr.3d 856] (*Kaulick*); *People v. Flores* (2014) 227 Cal.App.4th 1070, 1075–1076 [174 Cal.Rptr.3d 390].) Like section 1170.18, which requires the court not to recall a defendant's felony sentence and resentence the defendant under Proposition 47 if the court finds the defendant would pose an unreasonable risk of danger to public safety (§ 1170.18, subds. (b), (c)), section 1170.126 includes a similar dangerousness provision (§ 1170.126, subd. (f)). The reasoning of *Kaulick* and *Flores* applies with equal force to dangerousness determinations under Proposition 47, regardless of whether "'unreasonable risk of danger to public safety'" has the same meaning in sections 1170.18 (Prop. 47) and 1170.126 (Prop. 36). (See § 1170.18, subd. (c) [defining "'unreasonable risk of danger to public safety'" "[a]s used throughout this Code"]; *People v. Cordova* (2016) 248 Cal.App.4th 543 [204 Cal.Rptr.3d 52] [definition of "unreasonable risk of danger to public safety" in § 1170.18, subd. (c) applies to dangerousness determinations under both Props. 47 and 36].)

■ Defendant's argument begins with the settled principal that, " 'under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.' " (*Kaulick, supra*, 215 Cal.App.4th at p. 1302, quoting *Cunningham v.*

California (2007) 549 U.S. 270, 281 [166 L.Ed.2d 856, 127 S.Ct. 856] & *People v. Towne* (2008) 44 Cal.4th 63, 74 [78 Cal.Rptr.3d 530, 186 P.3d 10].) A finding of dangerousness under Proposition 36 or Proposition 47 is not a fact that exposes the defendant to a greater potential sentence, however. If the court finds the defendant would pose an unreasonable risk of danger to public safety if he is resentenced under Proposition 36 or Proposition 47, the defendant “simply finishes out the term to which he or she was originally sentenced.” (*Kaulick, supra*, at p. 1303 [Prop. 36].)

Additionally, because Propositions 36 and 47 only allow the defendant’s original sentence to be modified downward, not upward, any facts found in a proceeding under section 1170.18 or section 1170.126, including the defendant’s dangerousness, do not implicate the defendant’s Sixth Amendment rights. (*Kaulick, supra*, 215 Cal.App.4th at pp. 1303–1305.) Thus, the principle established by the *Apprendi* line of cases, that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt” (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435, 120 S.Ct. 2348]) is inapplicable to dangerousness determinations under Propositions 36 and 47 (*Kaulick, supra*, at pp. 1303–1305).

■ Further, a defendant has no constitutional right to be resentenced under Proposition 36 or Proposition 47. Rather, the resentencing provisions of Propositions 36 and 47 are acts of lenity on the part of the electorate. (*Kaulick, supra*, 215 Cal.App.4th at p. 1304 [Prop. 36].) They do not call for the “wholesale resentencing of eligible petitioners.” (*Ibid.*) Thus, there is no Sixth Amendment or other constitutional right to have the prosecution prove dangerousness to a jury beyond a reasonable doubt. (*Id.* at pp. 1304–1305; see *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 451–452 [193 Cal.Rptr.3d 651] [following the reasoning of *Kaulick* and holding that a Prop. 47 defendant has no right to a jury trial on the value of the property stolen, a question essential to the defendant’s eligibility for resentencing under Prop. 47].)

Lastly, the proper standard of proof on a dangerousness finding is the default standard of proof by a preponderance of the evidence. (*Kaulick, supra*, 215 Cal.App.4th at p. 1305; *People v. Flores, supra*, 227 Cal.App.4th at p. 1076.) Evidence Code section 115 provides that, “[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.” No statute or case law provides for a higher standard of proof, including proof by clear and convincing evidence.

Defendant maintains that a defendant whose felony offense satisfies the eligibility requirements of section 1170.18, subdivision (a) is entitled to have

his or her felony sentence recalled; the misdemeanor sentence is the *presumptive* sentence; and the court is authorized to resentence the defendant to the original felony sentence *only* upon proof beyond a reasonable doubt of the *additional factor* of dangerousness. Nothing in the language of section 1170.18 or in the other Penal Code provisions added or amended by Proposition 47 supports this interpretation. (See *Kaulick, supra*, 215 Cal.App.4th at p. 1303 [rejecting similar argument in Prop. 36 context].)

C. *The Court Did Not Abuse Its Discretion in Finding Defendant Posed an Unreasonable Risk of Danger to Public Safety*

Defendant claims that, under any standard of proof, the court abused its discretion in finding he posed an unreasonable risk of danger to public safety. Again, we disagree.

1. *Relevant Legal Principles and Standard of Review*

■ For purposes of Proposition 47, an “unreasonable risk of danger to public safety” means “an unreasonable risk that the petitioner will commit a new violent felony” described in section 667, subdivision (e)(2)(C)(iv). (§ 1170.18, subd. (c).) These violent felonies are known as “super strikes” and include murder, attempted murder, solicitation to commit murder, assault with a machine gun on a police officer, possession of a weapon of mass destruction, and any serious or violent felony punishable by death or life imprisonment. (Couzens & Bigelow, Proposition 47: “The Safe Neighborhoods and Schools Act” (Feb. 2016) pp. 77, 122–123, appen. V [complete listing of super strikes described in § 667, subd. (e)(2)(C)(iv) <<http://www.courts.ca.gov/documents/Prop-47-Information.pdf>> [as of July 7, 2016].])

In determining whether there is an unreasonable risk that the defendant will commit a super strike, the court may consider: “(1) The petitioner’s criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes. [¶] (2) The petitioner’s disciplinary record and record of rehabilitation while incarcerated. [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety.” (§ 1170.18, subd. (b)(1)–(3).)

We review a dangerousness finding for an abuse of discretion, given that the court is statutorily required to determine dangerousness “in its discretion.” (§ 1170.18, subd. (b).) “Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion ‘must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an

arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125 [36 Cal.Rptr.2d 235, 885 P.2d 1].) The abuse of discretion standard “involves abundant deference” to the court’s ruling. (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018 [27 Cal.Rptr.3d 596].)

2. Relevant Background

Before the June 12, 2015, hearing on defendant’s dangerousness, the parties submitted briefs on whether defendant posed an unreasonable risk of danger to public safety. Evidence concerning defendant’s dangerousness, or lack of dangerousness, was included in the briefs, and both sides presented additional argument at the hearing. The pertinent evidence and argument presented on the question of defendant’s dangerousness are set forth here.

(a) The People’s Evidence

(i) The 1997 Home Invasion Robbery

When he was 20 years old in 1997, defendant was a principal in an armed home invasion robbery. As a result, he was convicted of residential robbery, assault with a firearm, battery with serious bodily injury, and unlawful taking of a vehicle. (Pen. Code, §§ 211, 245, subd. (a)(2), 243, subd. (d); Veh. Code, § 10851, subd. (a).) The jury found he personally used a firearm in each count, and personally inflicted great bodily injury in the robbery and assault counts. (Pen. Code, former §§ 12022.5, 12022.7.)

The 1997 crimes occurred in San Diego and their circumstances are briefly described in *People v. Jefferson* (Sept. 30, 1998, D029498) (nonpub. opn.): “Jefferson and three other masked men entered an apartment where the victim, Laura Mootry, was staying. The apartment belonged to her boyfriend. The men were looking for money and expensive tire rims which belonged to the boyfriend. Eventually the men left, taking a VCR, a gold chain and the tire rims. [¶] During the robbery Mootry was repeatedly struck on the head by the robbers. They also drug her around the apartment by her hair. Mootry was rendered unconscious at one point and ultimately required 13 stiches to close her wounds. [¶] As the robbers were leaving the apartment, they took Mootry’s car keys. They then took her car, which was not recovered until approximately six weeks later.” (*Ibid.*)

(ii) Defendant’s Prison Record and Parole Violations

For the 1997 crimes, defendant was sentenced to 16 years eight months in prison and was released on parole in July 2011. While in prison, he was

placed in administrative segregation five times, in 1998, 2000, July 2001, October 2001, and 2006. In the 1998, 2000, and July 2001 incidents, he was involved in melees between Crips and Bloods and ignored repeated commands to “get down” or stop fighting. In the 1998 and July 2001 incidents, he was pepper sprayed. In 2004, he wrote a kite indicating his loyalty to the Blood gang. The kite stated he “keeps it Gangsta 24-7,” told a “Soulja” Blood “to Death Do Us Part,” and was signed, “Bulletproof Love, Black Money, South Side Soulja 4 Life, Death View Side, 59 Brim.” In October 2001, defendant threatened a correctional officer that he would “kick [the officer’s] mother fucking ass” if the officer searched his cell, and in 2006, defendant gassed a correctional officer with pruno.

Defendant violated parole 10 times following his July 2011 release on parole. He was “at large” for 226 days, between May 11, 2012, and April 14, 2014. Twice in April 2014, he violated section 148.9, indicating he was lying about his identity in order to avoid being returned to prison on parole violations. Defendant was still on parole when he committed the commercial burglary of the Kmart store on September 3, 2014, and was sentenced to 32 months in prison.

(b) *Defendant’s Evidence*

Defendant’s prison records showed the “RVR” or “Rules Violation Report” for the 1998 incident was dismissed; a correctional sergeant determined he was not a participant in the 2000 incident, and, in the July 2001 incident, he was not alleged to be one of the inmates engaging in combat. Regarding the 2006 pruno gassing incident, he was “found guilty of a lesser, but included offense” of possessing manufactured alcohol. He emphasized his other RVR’s were many years old, and he had “no RVR’s” for fighting with other inmates and no physical altercations with prison staff. He was eligible for and participated in employment while in prison.

When released on parole in July 2011, defendant had an “assessment score” of 19, the lowest possible score for his commitment offense, qualifying him to be housed at a “Level 2” facility or yard. When he was sentenced to prison in 1998, his assessment score was 69. Defense counsel argued that defendant’s low assessment score “speaks for itself in his level of dangerousness” and his conduct in prison. Counsel also pointed out that defendant was part of a group of 72 men who were pepper sprayed for a gang-fighting incident, and none of defendant’s parole violations involved violence or injury to anyone.

Defense counsel also emphasized that defendant was sentenced to the *low term* of 16 months, doubled to 32 months, on his current conviction, because “[c]learly there was something in mitigation that the [district attorney] that pled it out in that case felt that it was not worthy of upper term times two, because he did not get six years.”

In 2009, defendant married Janice Higgins, who ran a program called “Project R.A.G.E.—Release Anger and Guilt for Empowerment.” He was actively involved in the R.A.G.E. program, and Ms. Higgins was committed to ensuring that he led “a clean, sober and productive” life. Defendant had a job waiting for him upon his release from prison on his current 32-month sentence.

(c) *The Court’s Ruling*

In denying defendant’s petition on dangerousness grounds, the court noted that defendant’s “most serious” crime was the 1997 robbery, and “as robberies go” it was “one of the worst ones.” The court reasoned that defendant’s 1997 robbery and related convictions, in combination with his rule violations in prison, his “string of parole violations,” and his current felony conviction showed he was likely to commit a super strike.⁴ (§§ 667, subd. (e)(2)(C)(iv), 1170.18, subd. (b)(1), (2).)

3. *Analysis*

■ The court did not exceed the bounds of reason in determining that defendant was likely to commit a super strike if resentenced under Proposition 47. The court reasonably determined that defendant’s 1997 robbery, assault, and battery convictions, in combination with his multiple rule violations in prison and his multiple parole violations following his July 2011 release from prison showed he was likely to commit a super strike. Indeed, defendant personally used a firearm in the 1997 robbery, and personally inflicted great bodily injury on Mootry, the victim of the 1997 robbery. In sum, the evidence amply supports the court’s determination that defendant posed an unreasonable risk of danger to public safety, that is, that he was likely to commit a super strike, namely, murder, attempted murder, or solicitation to commit murder, if resentenced on his 2014 commercial burglary conviction under Proposition 47.

⁴ The People also presented evidence that defendant was indicted in 1995 on charges that were later dismissed, and was arrested in 2014 but not charged with a crime. At the June 12, 2015, hearing, the court made it clear that it was not considering the evidence of defendant’s 1995 indictment or his 2014 arrest in denying defendant’s resentencing petition on dangerousness grounds.

IV. DISPOSITION

The order denying defendant's Proposition 47 petition is affirmed.

Ramirez, P. J., and McKinster, J., concurred.

Appellant's petition for review by the Supreme Court was denied October 19, 2016, S236639.

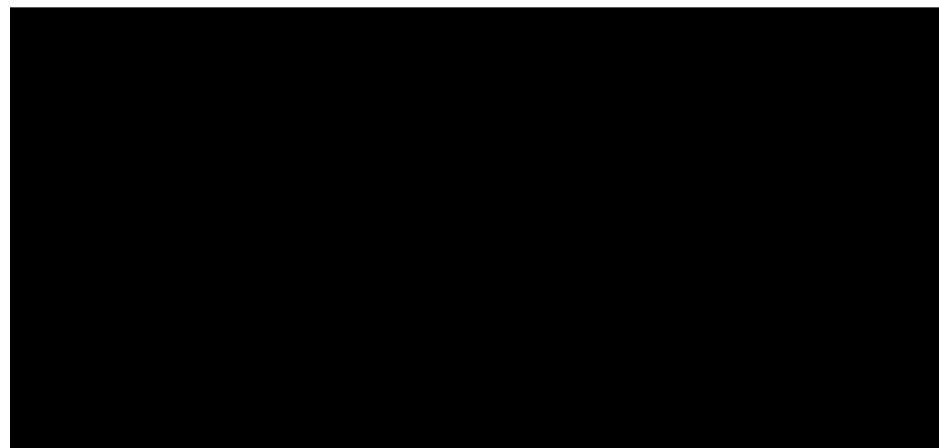
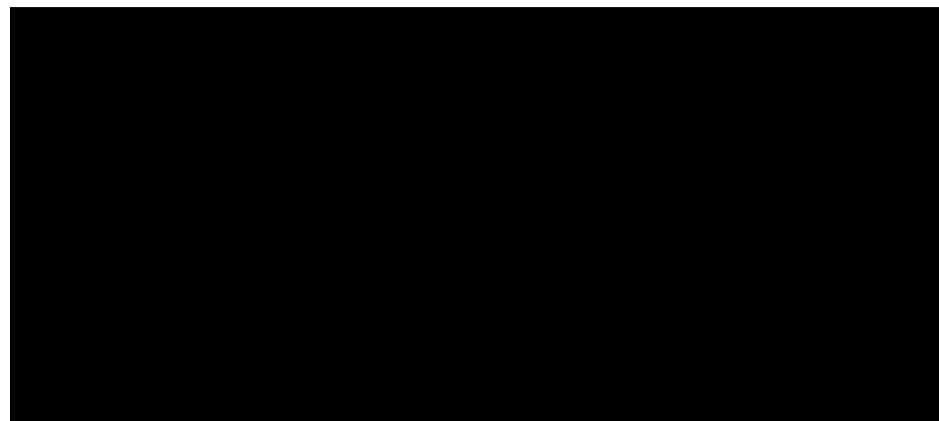
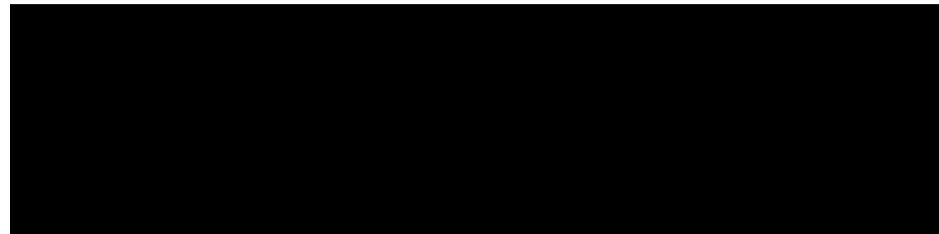
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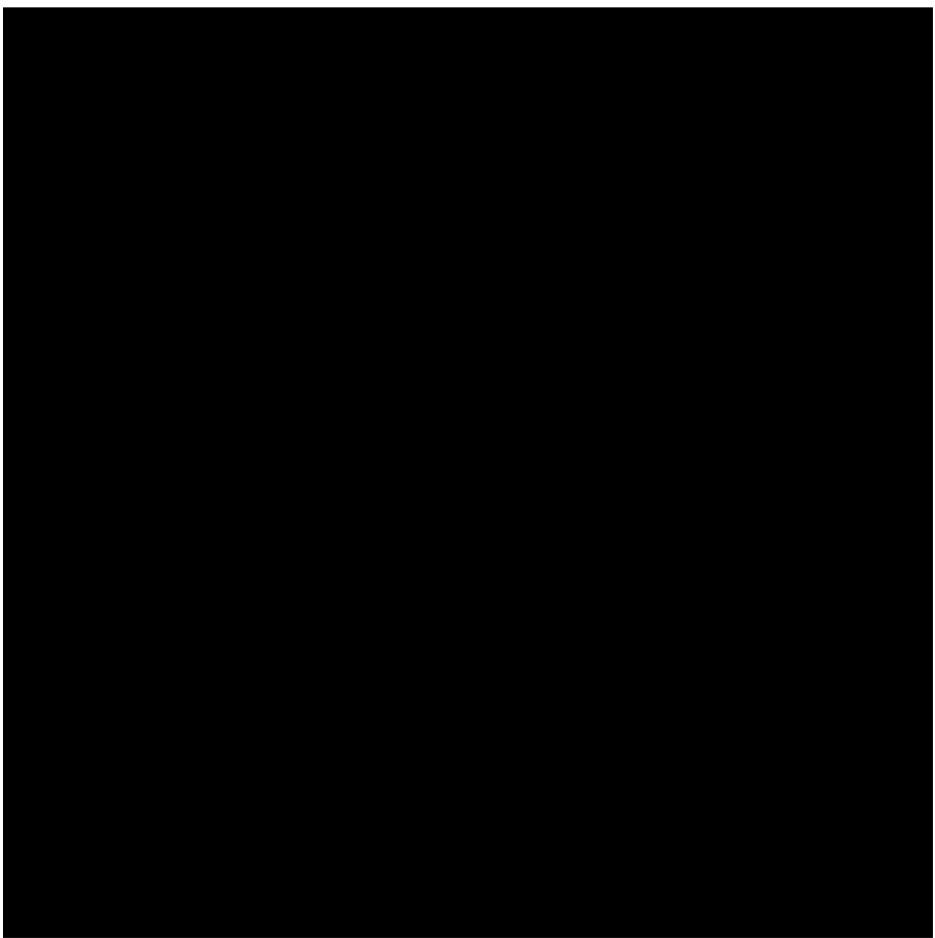
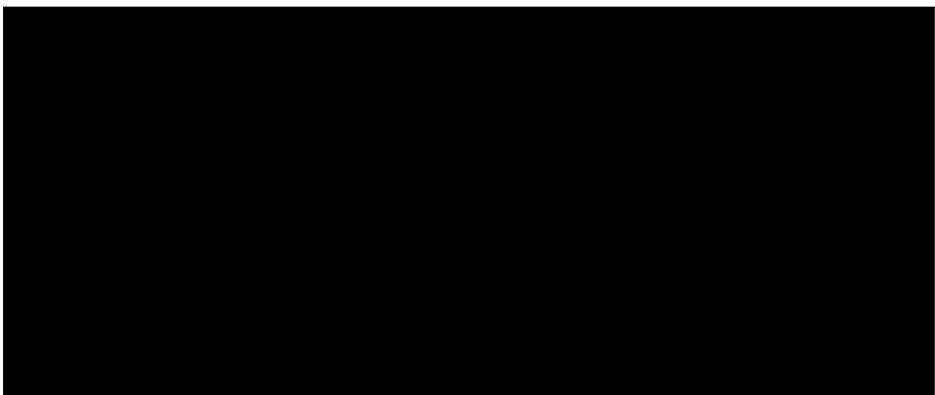
ERNEST J. FRANCESCHI, JR., Plaintiff and Appellant, v.
FRANCHISE TAX BOARD et al., Defendants and Respondents.

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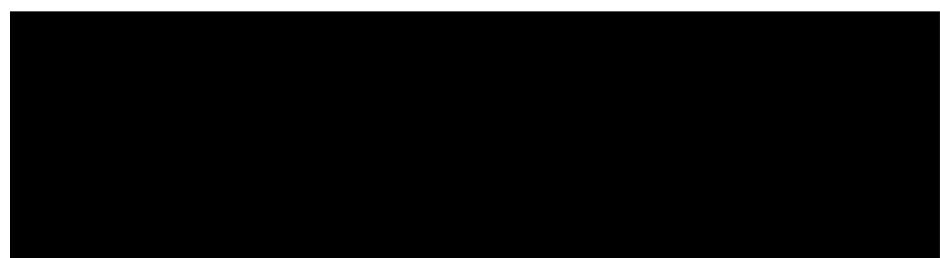
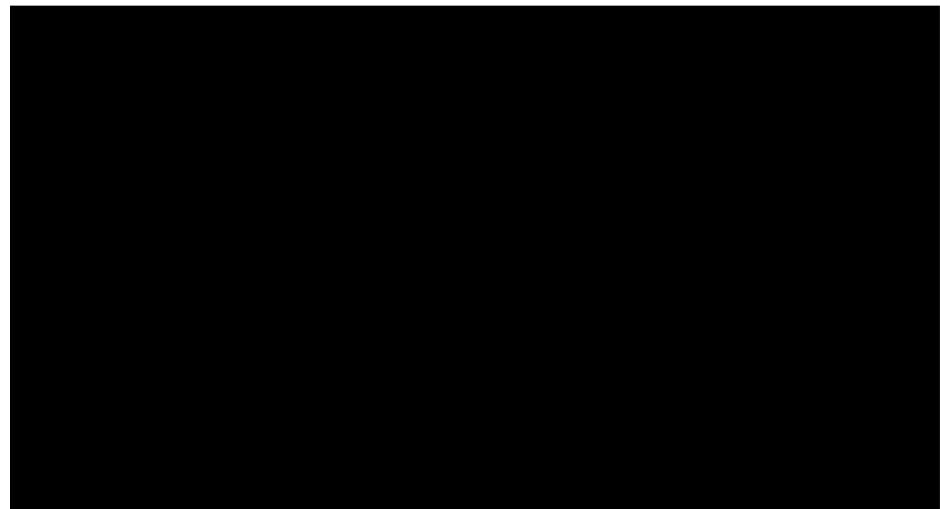
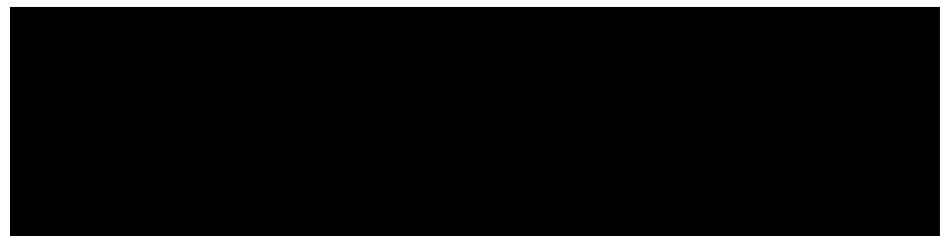
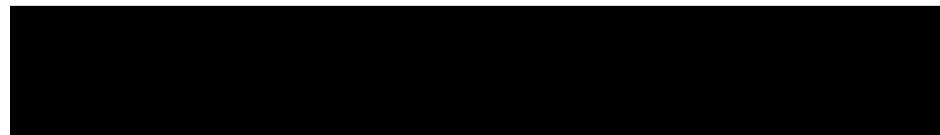
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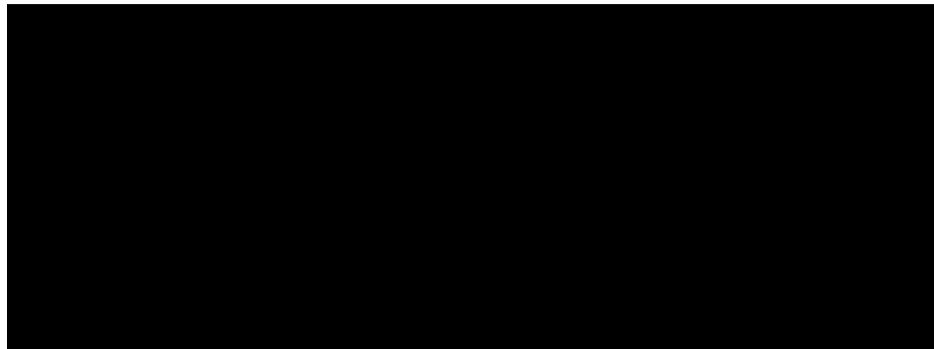
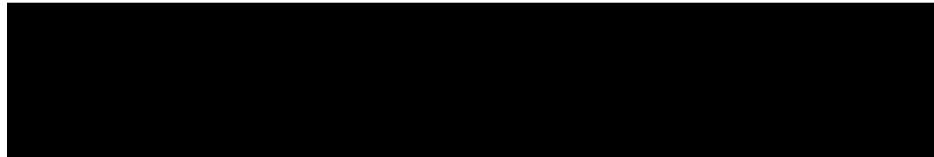
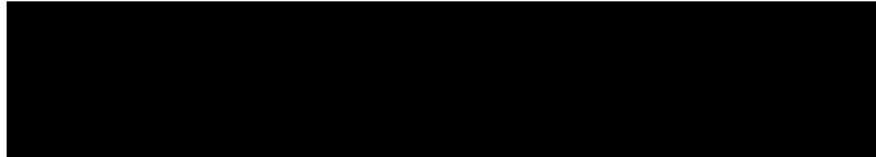
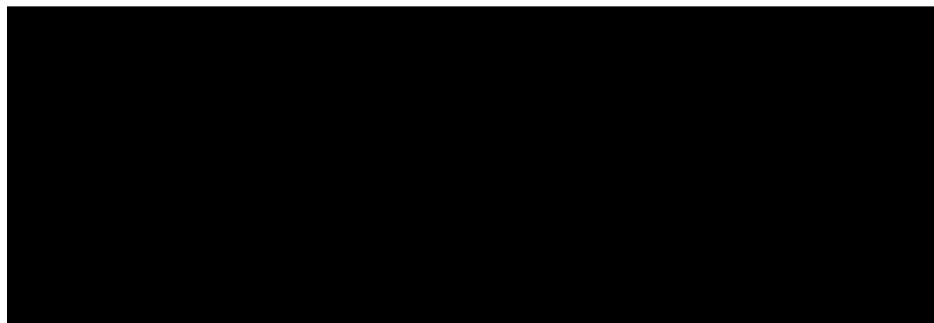
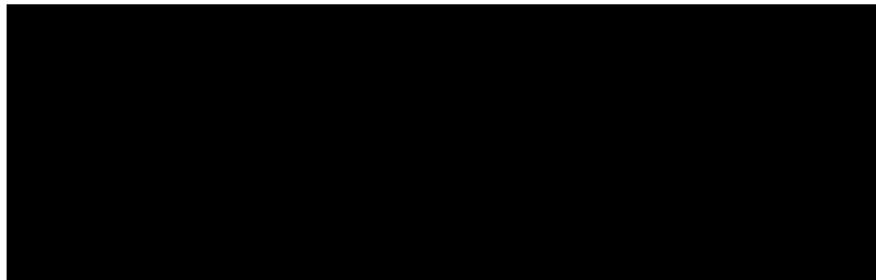
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COUNSEL

Ernest J. Franceschi, Jr., in pro. per., for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Diane S. Shaw, Assistant Attorney General, Stephen Lew and Matthew C. Heyn, Deputy Attorneys General, for Defendants and Respondents.

OPINION

JOHNSON, J.—Ernest J. Franceschi, Jr. (Franceschi), petitioned the superior court for a writ directing the then-serving members of the Franchise Tax Board (FTB)—Betty Yee, Jerome E. Horton and Michael Cohen, sued in their official capacities only—to cease publishing his name on the FTB’s list of the state’s “Top 500” income tax debtors (the List). In his petition, Franceschi argued that publication of his name on the List violates his right to privacy. The FTB’s members demurred to the petition, arguing in the main that (1)

Franceschi could not state a legally viable cause of action because publication of his name on the List did not violate his privacy rights and (2) even if he could state a viable privacy claim, the doctrine of res judicata barred his petition—Franceschi had previously sought redress in federal court for having his name placed on the List, but the district court dismissed the action with prejudice for failure to state a claim. The trial court agreed on both grounds and sustained the demurrer. As Franceschi did not seek leave to amend his petition, the trial court dismissed the action with prejudice. In addition, because it found the action to be “frivolous and groundless,” the trial court sanctioned Franceschi in the amount of \$5,000.

On appeal, Franceschi challenges both the dismissal of his petition and the sanctions award. As discussed in more detail below, we hold that the petition was barred by the doctrine of res judicata. As that issue is determinative, we need not and do not reach the issue of whether Franceschi’s petition stated a claim (or could be amended to state a claim) for violation of his privacy rights. We also hold that the trial court did not abuse its discretion in sanctioning Franceschi. Accordingly, we affirm the order.

BACKGROUND

Section 19195 of the Revenue and Taxation Code requires the FTB to publish the List at least twice each year. (Rev. & Tax. Code, § 19195, subd. (a).) Under section 494.5 of the Business and Professions Code, when a state licensing agency, such as the Department of Motor Vehicles, receives a delinquency list containing the name of a taxpayer to whom the agency has issued a license, that agency is required to suspend the taxpayer’s license. (Bus. & Prof. Code, § 494.5, subds. (a)(1)–(2) & (b)(4).) The State Bar of California is exempt from the mandatory suspension requirement but may recommend the suspension of a license if an attorney’s name is included on the List. (Bus. & Prof. Code, § 494.5, subd. (a)(3).) Franceschi is an attorney licensed to practice in California.

I. *Franceschi’s first action regarding the List*

In February 2014, Franceschi received a “notice of public disclosure of tax delinquency” from the FTB, advising him that he owed over \$242,000 in taxes and, that unless he corrected this delinquency by March 17, 2014, the FTB might add his name, his address, his occupational and professional licenses, and the amount owed to the FTB’s public website—that is, put his name on the List. The FTB’s notice further advised Franceschi that the inclusion of his name on the List might result in the denial or suspension of various licenses pursuant to Business and Professions Code section 494.5.

A. *Franceschi's complaint*

On March 14, 2014, Franceschi filed a complaint in federal district court seeking declaratory and injunctive relief (the First Action). The First Action was brought against the then-serving members of the FTB and the Director of the Department of Motor Vehicles. The gravamen of the complaint was that Franceschi's name should not have been put on the List and, by so doing, defendants violated certain of his civil rights. More specifically, Franceschi asserted four claims for relief under title 42 United States Code section 1983 (section 1983): (1) violation of substantive and procedural due process rights secured by the Fourteenth Amendment to the United States Constitution; (2) violation of the equal protection clause of the Fourteenth Amendment; (3) violation of the privileges and immunities clause of the Fourteenth Amendment; and (4) violation of the prohibition against bills of attainder set forth in article I, section 10, clause 1 of the United States Constitution. The complaint in the First Action, however, did not assert any claim based on Franceschi's right to privacy under either the United States Constitution or the California Constitution. In the First Action, Franceschi sought to have Revenue and Taxation Code section 19195 and Business and Professions Code section 494.5 declared unconstitutional and to prohibit defendants from "including [him] on the FTB list and/or suspending [his] California Driver's License."

B. *The dismissal of Franceschi's complaint*

On August 4, 2014, after briefing and oral argument, the federal district court granted defendants' motion to dismiss for failure to state a claim, finding that Franceschi's complaint was defective on substantive legal grounds, not narrow procedural grounds. In a tentative order distributed to the parties in advance of the hearing, the district court indicated its willingness to grant Franceschi leave to amend his complaint. At the hearing, however, Franceschi declined this invitation, stating that "he did not believe he could amend his complaint to plead additional facts that would correct what the district court found to be legal deficiencies in his claims." As a result, the district court dismissed the complaint with prejudice and entered judgment in favor of defendants.

II. *Franceschi's second action regarding the List*

A. *Franceschi's petition*

On March 18, 2015, Franceschi petitioned the superior court for a writ of mandamus (the Second Action). As with the First Action, Franceschi sued the then-current members of the FTB. As with the First Action, Franceschi premised the petition on the fact that, pursuant to Revenue and Taxation Code

section 19195 and Business and Professions Code section 494.5, his name had been placed on the List. Accordingly, Franceschi sought the same relief as in the First Action; specifically, Franceschi sought to have those code sections declared unconstitutional—this time under the California Constitution—and to prohibit respondents from “publishing [his] name on the FTB ‘Top 500’ list of the largest state income tax debtors.” However, the reason for the requested relief in the state court petition differed from that in the federal court complaint—the Second Action was premised solely on Franceschi’s right to privacy under the California Constitution. (See Cal. Const., art. I, § 1.)

B. *The dismissal of Franceschi’s petition*

Respondents demurred to the petition, arguing, *inter alia*, that the doctrine of res judicata barred the petition. In response, Franceschi did not dispute that the Second Action involved the same parties as in the First Action, rested on the same basic facts as the First Action, was based on the same primary right—to be free from having his name placed on the List—and sought the same relief. Instead, Franceschi argued that had he brought his mandamus/privacy claim in the First Action, the federal district court would not have exercised supplemental jurisdiction because the claim was based on complex issues of state law.

In an order dated August 24, 2015, the trial court, *inter alia*, rejected Franceschi’s arguments against the application of the res judicata doctrine and did so for two reasons. “First, a litigant cannot avoid the impact of the rule against splitting causes of action by choosing to file the first action in a tribunal of limited jurisdiction, such as the federal district court. [Citation.] There is no reason [Franceschi] could not have brought his . . . Section 1983 claims against Respondents in California state court and joined his petition for mandamus relief with those claims. His election to file the Section 1983 claims in federal court renders his subsequent mandamus petition in California a prohibited attempt to split his cause of action. [Citation.] Second, [Franceschi] asserts that forcing him to join his petition for mandamus to his federal suit only to have it then dismissed without prejudice under . . . Section 1376(c) would have required an ‘idle act’ of him, in contravention of the maxims of jurisprudence. [Franceschi’s] invocation of the maxims of jurisprudence to excuse what was clearly an effort on his part to secure a ‘second bite at the apple’ if his Federal Court action failed is unpersuasive and distasteful.”

Because Franceschi’s attempt to split his claims between his federal and state actions rendered the Second Action “frivolous and groundless,” the trial court sanctioned Franceschi in the amount of \$5,000. As an “experienced

litigator,” Franceschi, in the words of the trial court, had “no excuse” for not knowing that the Second Action was barred by the doctrine of res judicata: “[Franceschi’s] filing of his first action in a court of limited jurisdiction (the Federal District Court) when he could have filed an action in California court that would have encompassed all of his claims, suggests a premeditated effort on [Franceschi’s] part to reserve a second bite at the apple in the event his Federal Court case was unsuccessful.”

DISCUSSION

I. *Standards of review*

A. *De novo review for a demurrer*

■ A petition for a writ is subject to a demurrer. (Code Civ. Proc., § 1089; *Rodriguez v. Municipal Court* (1972) 25 Cal.App.3d 521, 526 [102 Cal.Rptr. 45].)

We independently review the ruling on a demurrer and determine de novo whether the pleading alleges facts sufficient to state a cause of action. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415 [106 Cal.Rptr.2d 271, 21 P.3d 1189].) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and facts of which judicial notice can be taken. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 [6 Cal.Rptr.3d 457, 79 P.3d 569].) “It is not the ordinary function of a demurrer to test the truth of the plaintiff’s allegations or the accuracy with which he describes the defendant’s conduct. A demurrer tests only the legal sufficiency of the pleading.” (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213 [197 Cal.Rptr. 783, 673 P.2d 660].) Accordingly, in considering the merits of a demurrer, “the facts alleged in the pleading are deemed to be true, however improbable they may be.” (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604 [176 Cal.Rptr. 824].)

B. *Abuse of discretion for imposition of monetary sanctions*

Traditionally, we review a trial court’s order imposing sanctions for abuse of discretion. (*20th Century Ins. Co. v. Choong* (2000) 79 Cal.App.4th 1274, 1277 [94 Cal.Rptr.2d 753].) “Where . . . a discretionary power is inherently or by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner

that resulted in a manifest miscarriage of justice.” (*People v. Jordan* (1986) 42 Cal.3d 308, 316 [228 Cal.Rptr. 197, 721 P.2d 79].) To the extent we engage in statutory interpretation, our review is de novo. (See, e.g., *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, 1176 [86 Cal.Rptr.2d 917].)

II. *The Second Action is barred by the doctrine of res judicata*

■ Where an action is filed in a California state court and the defendant claims the suit is barred by a final federal judgment, California law will determine the res judicata effect of the prior federal court judgment on the basis of whether the federal and state actions involve the same primary right. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954–955 [160 Cal.Rptr. 141, 603 P.2d 58], disapproved on other grounds in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

■ Under California law, “‘[t]he doctrine of *res judicata* gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy.’” (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797 [108 Cal.Rptr.3d 806, 230 P.3d 342].) “Res judicata precludes the relitigation of a cause of action only if (1) the decision in the prior proceeding is final and on the merits; (2) the present action is on the same cause of action as the prior proceeding; and (3) the parties in the present action or parties in privity with them were parties to the prior proceeding.” (*Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 82 [70 Cal.Rptr.3d 817].) Res judicata bars the litigation not only of issues that were actually litigated in the prior proceeding, but also issues that could have been litigated in that proceeding. (*Busick v. Workmen’s Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 975 [104 Cal.Rptr. 42, 500 P.2d 1386].) “A predictable doctrine of res judicata benefits both the parties and the courts because it ‘seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration.’” (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897 [123 Cal.Rptr.2d 432, 51 P.3d 297].)

■ For purposes of applying the doctrine of res judicata, the phrase “cause of action” has a precise and particular meaning: the cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced. (See *Bay Cities Paving & Grading, Inc. v. Lawyers’ Mutual Ins. Co.* (1993) 5 Cal.4th 854, 860 [21 Cal.Rptr.2d 691, 855 P.2d 1263].)

As explained by our Supreme Court, California’s res judicata doctrine and its definition of “cause of action” are based upon the primary right theory:

“The primary right theory is a theory of code pleading that has long been followed in California. It provides that a ‘cause of action’ is comprised of a

'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation.] . . .

■ "As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: 'Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.' [Citation.] The primary right must also be distinguished from the *remedy* sought: 'The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.' [Citation.]

■ "The primary right theory . . . is invoked . . . when a plaintiff attempts to divide a primary right and enforce it in two suits. The theory prevents this result by either of two means: (1) if the first suit is still pending when the second is filed, the defendant in the second suit may plead that fact in abatement [citations]; or (2) if the first suit has terminated in a judgment on the merits adverse to the plaintiff, the defendant in the second suit may set up that judgment as a bar under the principles of *res judicata*." (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681–682 [34 Cal.Rptr.2d 386, 881 P.2d 1083].)¹ In short, under California law, the significant factor guiding the application of the doctrine is whether the "cause of action" is for invasion of a single primary right; whether the same facts are involved in both suits is not conclusive. (*Agarwal v. Johnson*, *supra*, 25 Cal.3d at p. 954.)

The doctrine not only precludes relitigation of claims resolved in a prior action, but it also precludes litigation of claims that could have been brought in the prior action but were not. As our Supreme Court has stated, "The law abhors a multiplicity of actions . . . [A] party cannot by negligence or design withhold issues and litigate them in successive actions; he may not split his demands or defenses; he may not submit his case in piecemeal fashion." (*Flickinger v. Swedlow Engineering Co.* (1955) 45 Cal.2d 388, 393 [289 P.2d 214].) "This principle is fundamental and has been consistently applied by

¹ In contrast, the federal courts utilize a transactional analysis; i.e., two suits constitute a single cause of action if they both arise from the same "'transactional nucleus of facts'" (*Derish v. San Mateo-Burlingame Bd. of Realtors* (9th Cir. 1983) 724 F.2d 1347, 1349, overruled on other grounds in *Marrese v. American Academy of Ortho. Surgeons* (1985) 470 U.S. 373 [84 L.Ed.2d 274, 105 S.Ct. 1327] as noted in *Eichman v. Fotomat Corp.* (9th Cir. 1985) 759 F.2d 1434, 1437) or a single "'core of operative facts.'" (*Shaver v. F. W. Woolworth Co.* (7th Cir. 1988) 840 F.2d 1361, 1365.)

our courts.’” (*Panakosta, Partners, LP v. Hammer Lane Management, LLC* (2011) 199 Cal.App.4th 612, 634 [131 Cal.Rptr.3d 835].)

In other words, the doctrine of res judicata goes beyond the four corners of the operative pleading in the prior action: “‘If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable.’” (*Warga v. Cooper* (1996) 44 Cal.App.4th 371, 377–378 [51 Cal.Rptr.2d 684].)

A. *The decision in the First Action was final and on the merits*

“Full faith and credit must be given to a final order or judgment of a federal court.” (*Levy v. Cohen* (1977) 19 Cal.3d 165, 172 [137 Cal.Rptr. 162, 561 P.2d 252]; see Code Civ. Proc., § 1908.) A dismissal under rule 12(b)(6) of the Federal Rules of Civil Procedure (28 U.S.C.) for failure to state a claim is regarded by federal courts as a judgment on the merits. (*Federated Department Stores v. Moitie* (1981) 452 U.S. 394, 399, fn. 3 [69 L.Ed.2d 103, 101 S.Ct. 2424]; *Boccardo v. Safeway Stores, Inc.* (1982) 134 Cal.App.3d 1037, 1042 [184 Cal.Rptr. 903].) Here, the dismissal with prejudice of the First Action was for Franceschi’s failure to state a claim and, as such, it was a judgment on the merits.

B. *The First and Second Actions involved the same parties*

In both the First Action and the Second Action, Franceschi sued the then-serving members of the FTB. In other words, in both actions, Franceschi sued the FTB. As a result, the parties in both actions are the same.

C. *The First and Second Actions involved the same primary right*

Although the First and Second Actions involve different legal theories, they were based on the same primary right—that is, Franceschi’s (alleged) right not to have his name and other personal information placed on the List.

On appeal, Franceschi effectively concedes that he asserted the same primary right against the same parties in both the First and Second Actions. Instead, he argues that the primary right analysis is largely irrelevant in this instance: “the question of whether a federal judgment will be *res judicata* on a state law claim turns not on whether the [state] claim flows from [the]

primary right [asserted in the federal action], but on whether the federal court would have exercised supplemental jurisdiction over the claim.” (Italics omitted.) Franceschi maintains that the federal district court in the First Action would not have exercised supplemental jurisdiction, because the Second Action was a mandamus proceeding involving the right to privacy under the California Constitution; as a result, the federal district court “would have been required to dismiss” Franceschi’s privacy claim had he asserted it in the First Action. We are not persuaded by Franceschi’s argument.

■ The rule in California is that “ ‘[i]f . . . the court in the first action would *clearly* not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would *clearly* have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory or ground should be held not precluded.’ ” (*Koch v. Hankins* (1990) 223 Cal.App.3d 1599, 1605 [273 Cal.Rptr. 442], italics added, quoting § 25, com. e of Rest.2d Judgments; see *Merry v. Coast Community College Dist.* (1979) 97 Cal.App.3d 214, 229 [158 Cal.Rptr. 603] [same].) Franceschi, however, failed to ask the federal district court to exercise supplemental jurisdiction over his mandamus/privacy claim; he simply assumed that it would decline to do so. As a result, we must now consider whether Franceschi’s assumption was justified, whether it was “clear” that the federal district court would decline to exercise supplemental jurisdiction. As discussed below, we hold that it was by no means clear that the federal court would have refused to consider the mandamus/privacy claim; in fact, it is likely that the district court would have exercised supplemental jurisdiction.

■ Although federal court jurisdiction is generally limited to claims presenting a federal case or controversy or disputes between diverse parties, federal courts may exercise supplemental jurisdiction over related state law claims that “form part of the same case or controversy.” (28 U.S.C. § 1337(a); see *Mine Workers v. Gibbs* (1966) 383 U.S. 715, 725 [16 L.Ed.2d 218, 86 S.Ct. 1130] [jurisdiction extends to state claims sharing “common nucleus” of fact with federal claims]; see also *City of Los Angeles v. County of Kern* (2014) 59 Cal.4th 618, 622 [174 Cal.Rptr.3d 67, 328 P.3d 56].) “[I]f, considered without regard to their federal or state character, a plaintiff’s claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.” (*Mine Workers*, at p. 725.) If, however, “it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals.” (*Id.* at pp. 726–727.) In addition, a federal district court may decline to exercise supplemental jurisdiction over a claim if “the claim raises a novel or complex issue of State law.” (28 U.S.C. § 1337(c)(1).)

We believe that the federal district court in the First Action would have exercised supplemental jurisdiction over Franceschi's mandamus/privacy claim for several reasons.

First, the Second Action grew out of the same set of operative facts that gave rise to the First Action—the placement of Franceschi's name and other personal information on the List.

Second, given the number and weight of the section 1983 claims asserted in the First Action—procedural due process, substantive due process, equal protection, violation of the privileges and immunities clause, and violation of the prohibition against bills of attainder—it is unlikely that the lone state law claim in the Second Action would have predominated over the federal claims, let alone have substantially predominated over them.

Third, the mandamus/privacy claim does not present a particularly novel or complex issue of state law, either substantively or procedurally. With regard to the substance of Franceschi's privacy claim, federal district courts routinely exercise their discretion so as to resolve both federal civil rights claims brought under section 1983 and state law claims brought pursuant to the right to privacy under the California Constitution. (See, e.g., *Doe v. Beard* (C.D.Cal. 2014) 63 F.Supp.3d 1159 [disclosure of content's of prisoner's medical file]; *Olivera v. Vizzusi* (E.D.Cal., Nov. 15, 2010, No. CIV. 2:10-1747 WBS GGH) 2010 WL 4723712 [disclosure of police officer's personnel records]; *Blanco v. County of Kings* (E.D.Cal. 2015) 142 F.Supp.3d 986 [improper strip search at county jail].) Indeed, the right to privacy claim would have dovetailed nicely with Franceschi's other Fourteenth Amendment claims. (See *In re Crawford* (9th Cir. 1999) 194 F.3d 954, 958 [14th Amend. protects “‘individual interest in avoiding disclosure of personal matters’”].) In other words, if Franceschi had brought all his claims at once in the First Action—both the section 1983 claims and the right to privacy claim—the complaint in the First Action would have been entirely consistent with accepted practice.

■ As for the procedural fact that Franceschi brought the Second Action as a mandamus claim, it would not have been an “idle act” for Franceschi to bring such a claim in the First Action. While federal courts are properly cautious about exercising supplemental jurisdiction over a state law mandamus claim, there is no iron rule prohibiting the exercise of such jurisdiction. Indeed, the opposite is true—Congress has given federal courts the discretion to hear mandamus claims. As the United States Supreme Court has stated, “There is *nothing* in the text of [28 U.S.C.] § 1367(a) that indicates an exception to supplemental jurisdiction for claims that require on-the-record review of a state or local administrative determination. Instead, the statute generally confers supplemental jurisdiction over ‘*all* other claims’ in the same

case or controversy as a federal question, without reference to the nature of review. Congress could of course establish an exception to supplemental jurisdiction for claims requiring deferential review of state administrative decisions, but the statute, as written, bears *no* such construction.” (*City of Chicago v. International College of Surgeons* (1997) 522 U.S. 156, 169 [139 L.Ed.2d 525, 118 S.Ct. 523], italics added.)

Given this legislative license, federal courts, including the Ninth Circuit, have consistently recognized that a district court may exercise supplemental jurisdiction over mandamus claims. (See *Clark v. Yosemite Community College Dist.* (9th Cir. 1986) 785 F.2d 781, 786, fn. 5 [“claim involving federal constitutional rights may be joined to a California mandamus action”]; *Manufactured Home Communities, Inc. v. City of San Jose* (9th Cir. 2005) 420 F.3d 1022, 1027, fn. 6 [same].) And, in fact, federal courts have regularly applied California mandamus law. (See, e.g., *Academy of Our Lady of Peace v. City of San Diego* (S.D.Cal. 2011) 835 F.Supp.2d 895, 902 [denying dispositive motion on petition pursuant to Code Civ. Proc., § 1094.5]; *Tonsing v. City and County of San Francisco* (N.D.Cal., Jan. 22, 2010, No. C 09-01446 CW) 2010 WL 334859 [same]; *Selvitella v. City of South San Francisco* (N.D.Cal., July 20, 2009, No. C 08-04388 CW) 2009 WL 2169860 [bifurcating trial of petition pursuant to Code Civ. Proc., § 1094.5 from civil rights claims]; *In re Lazar* (Bankr. C.D.Cal., Aug. 28, 1997, No. LA 96-01575-SB) 1997 WL 33420089 [granting trustee’s petition for writ of mandate under Code Civ. Proc., § 1094.5]; *Kucharczyk v. Regents of University of California* (N.D.Cal. 1996) 946 F.Supp. 1419, 1438–1444 [granting summary judgment to the defendant on the plaintiff’s mandamus claims].)

■ In short, we reject Franceschi’s argument that although the First and Second Actions are similar, they are fundamentally different because one of those actions happens to be a state law mandamus claim. We reject Franceschi’s argument because the First and Second Actions arise out of a shared set of facts, they involve the same parties, and, perhaps most critically, the same primary right. Moreover, Franceschi has argued in a wholly conclusory manner that the federal district court would have been “required” to dismiss his mandamus/privacy claim had he brought it in the First Action solely because a “mandamus claim is inherently different from garden variety state law contract or tort claims.” As discussed above, it is far from clear that the district court would have declined to exercise jurisdiction over Franceschi’s mandamus/privacy claim.

The simple fact of the matter is that Franceschi gambled and lost—he believed that it was “reasonably clear that [his] mandamus claim could not have been litigated in federal court concurrently with [his] federal constitutional claims.” In other words, at the time he filed the First Action, he knew

he had a mandamus/privacy claim, but deliberately elected not to pursue it. The only remaining question is whether Franceschi should be sanctioned for his gamble.

III. *The trial court did not abuse its discretion in sanctioning Franceschi*

After sustaining respondents' demurrer without leave to amend, the trial court sanctioned Franceschi in the amount of \$5,000 pursuant to section 19714 of the Revenue and Taxation Code. Under section 19714, “[w]henever it appears to the State Board of Equalization or any court of record of this state that proceedings before it under this part have been instituted or maintained by the taxpayer primarily for delay or that the taxpayer's position in the proceedings is frivolous or groundless, or that the taxpayer unreasonably failed to pursue available administrative remedies, a penalty in an amount not in excess of five thousand dollars (\$5,000) shall be imposed.” In imposing sanctions against Franceschi, the trial court found the petition to be both “frivolous and groundless.”

■ An action “should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or *when it indisputably has no merit*—when *any reasonable attorney would agree that the [action] is totally and completely without merit.*” (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 [183 Cal.Rptr. 508, 646 P.2d 179], italics added.) There is nothing in the record below to suggest that the Second Action was brought to harass the FTB. As a result, our focus is on whether Franceschi’s gamble—his decision to assume that the federal district court would necessarily decline to exercise supplemental jurisdiction—was a reasonable one. We do not believe that it was.

■ A litigant with both federal and state law claims that are related may hedge his or her bets in any number of ways, but not by splitting his or her claim between two different actions. As the court in *Mattson v. City of Costa Mesa* (1980) 106 Cal.App.3d 441, 454–455 [164 Cal.Rptr. 913], explained: “The initial choice by the plaintiff to file suit in federal court will not necessarily result in splitting his cause of action, because the federal court may well exercise pendent jurisdiction over the nonfederal claim. However, when the federal court has been requested to and has declined to exercise pendent jurisdiction over the nonfederal claim, the plaintiff is presented with a new choice. He may proceed to trial on the federal claim or, usually, he may elect to dismiss the federal claim without prejudice [citation] and litigate both claims in the state court [fn. omitted] [citations]. . . . [¶] . . . [O]nce the federal court has declined to exercise pendent jurisdiction over the state claim, if the plaintiff then elects to proceed to trial and judgment in the federal court, his entire cause of action is either merged in or barred by the

federal court judgment so that he may not thereafter maintain a second suit on the same cause of action in a state court.” (*Id.* at pp. 454–455.) To force a plaintiff to make such choices is essential to the efficient administration of justice. Indeed, a “contrary rule would invite manipulation.” (*Id.* at p. 455.)

■ Franceschi’s conduct here raises more questions than it answers. First, why did he not ask the federal district court to exercise supplemental jurisdiction? He had much to lose by not doing so. California courts have held that where a plaintiff makes no attempt to have a federal court exercise supplemental jurisdiction over a related state law claim, and then later files that state law claim in state court, such claims are barred by res judicata and the related prohibition against claim splitting. (See *Mattson v. City of Costa Mesa*, *supra*, 106 Cal.App.3d at pp. 449, 454–455 [discussing *City of Los Angeles v. Superior Court* (1978) 85 Cal.App.3d 143 [149 Cal.Rptr. 320] and *Ford Motor Co. v. Superior Court* (1973) 35 Cal.App.3d 676 [110 Cal.Rptr. 59]]).)

Second, why did Franceschi bring the First Action in a court of limited jurisdiction when he could have brought both his section 1983 claims and his mandamus/privacy claim in a state court action? It is well established that “[a] section 1983 claim may be brought in California state courts.” (*Clark v. Yosemite Community College Dist.*, *supra*, 785 F.2d at p. 786.) Indeed, California courts have long held that a writ of mandate is an appropriate remedy for the enforcement of a civil right. (See *Hardy v. Stumpf* (1974) 37 Cal.App.3d 958, 961 [112 Cal.Rptr. 739], *Wrather-Alvarez etc., Inc. v. Hewicker* (1957) 147 Cal.App.2d 509, 511 [305 P.2d 236].) Such questions are more than a little troubling given that Franceschi is an experienced litigator, one who has been practicing continuously since 1984.

■ The trial court’s decision to sanction Franceschi for his gamble was not an abuse of discretion because a reasonable attorney looking at the applicable law and the shared facts in the First and Second Actions would not have instituted the Second Action after the First Action was dismissed. As explained by one court, “a litigant cannot avoid the impact of the rule against splitting causes of action by choosing for his first foray a tribunal of limited jurisdiction.” (*City of Los Angeles v. Superior Court*, *supra*, 85 Cal.App.3d at p. 151.) In other words, the trial court’s finding that the Second Action was a “premeditated effort on [Franceschi’s] part to reserve a second bite at the apple in the event his Federal Court case was unsuccessful,” was both reasoned and reasonable. Because the trial court did not exercise its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice, we affirm the award of sanctions.

DISPOSITION

The order is affirmed. Respondents are to recover their costs on appeal.

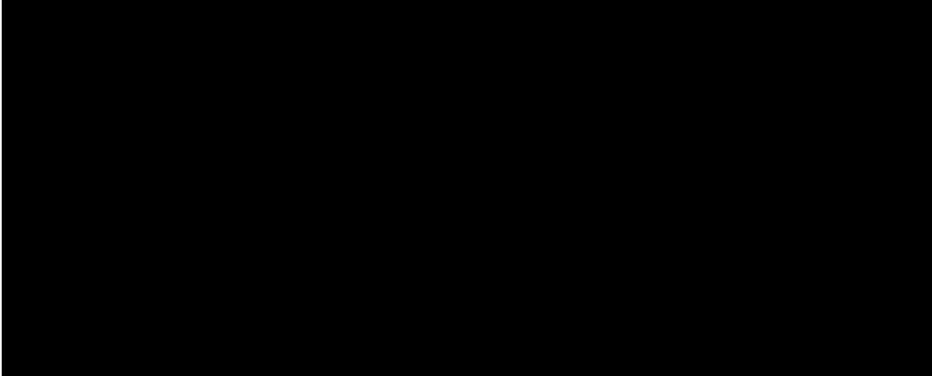
Chaney, Acting P. J., and Lui, J., concurred.

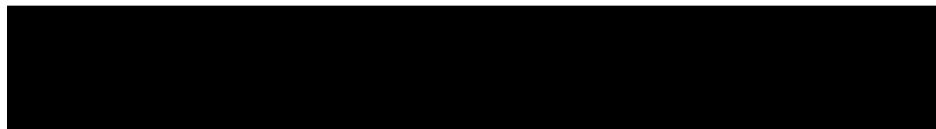
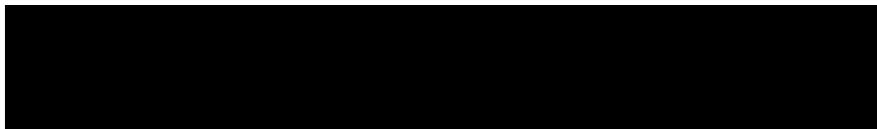
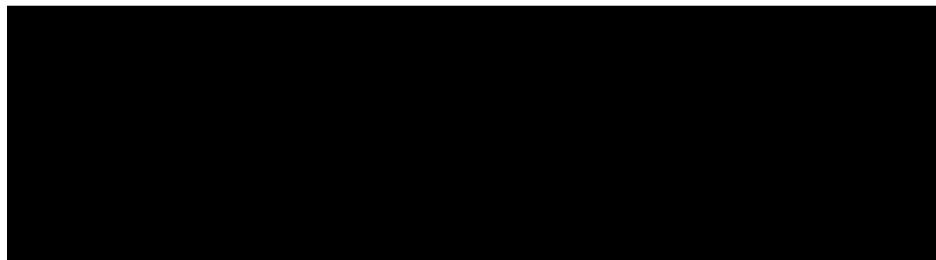
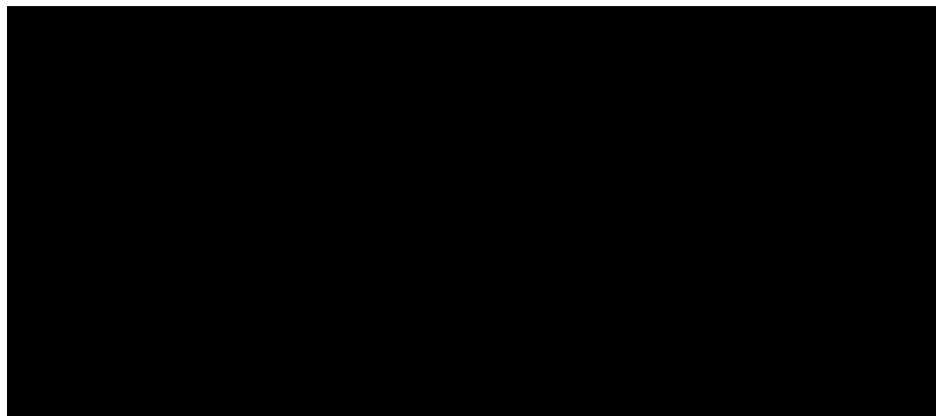
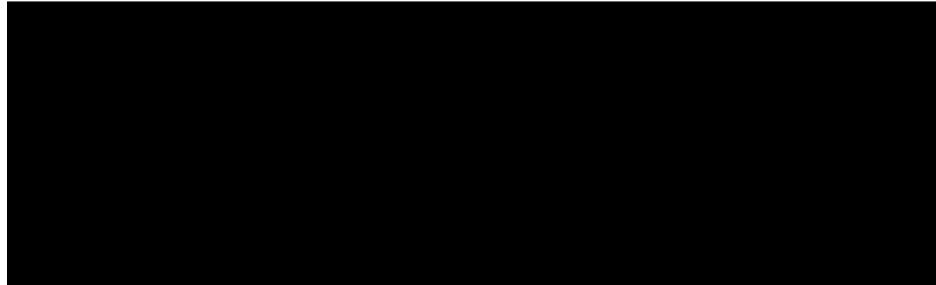
Appellant's petition for review by the Supreme Court was denied September 21, 2016, S236633.

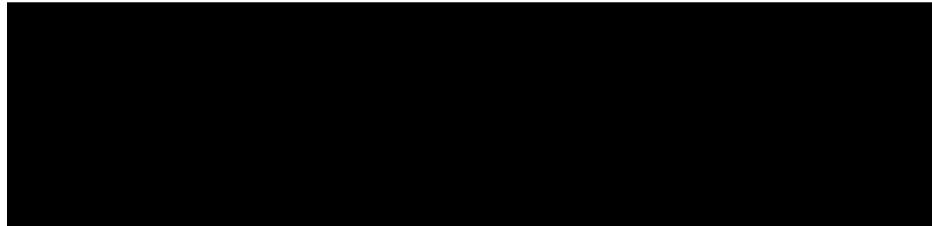
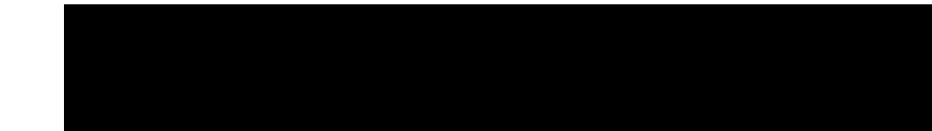
[No. E062858. Fourth Dist., Div. Two. July 8, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
MICHAEL LEE SMITH, Defendant and Appellant.

THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) September 14, 2016, S236112.







COUNSEL

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

SLOUGH, J.—Defendant Michael Lee Smith appeals from the summary denial of his Proposition 47 resentencing petition. (Pen. Code, § 1170.18.) Using Riverside County Superior Court’s standard petitioning form, Smith sought to have two felony second degree commercial burglary (§ 459)¹ convictions (counts 1, 2) designated as misdemeanor shoplifting (§ 459.5). As part of his petition, Smith declared as to both counts that “[t]he value of the check or property does not exceed \$950.00.” The People responded by representing Smith “*is entitled* to resentencing” on count 2 and requesting a hearing to determine the new sentence. The People did not contest the value of the loss in count 1, but did request a hearing to determine eligibility because the “People do not believe count one is eligible as” the victim check exchange business “is not a commercial establishment,” which is a required element of shoplifting under new section 459.5. The superior court agreed the victim in count 1 was not a commercial establishment and denied relief, and also summarily denied Smith’s petition as to count 2 without explanation.

¹ Unlabeled statutory citations refer to the Penal Code.

Smith argues the victim check exchange business is a commercial establishment and there is otherwise insufficient evidence to support the court's denial of his petition as to counts 1 and 2. We agree.

I

FACTUAL BACKGROUND

The Riverside County District Attorney charged Smith with one felony count of burglary of a Check Exchange located in Hemet, California (§ 459; count 1), one felony count of burglary of a Staples located in Hemet, California (§ 459; count 2), and one felony count of making, passing, uttering, publishing, or possessing counterfeit bills (§ 476; count 3). The information also alleged Smith had six prison priors (§ 667.5, subd. (b)) and three strike priors (§§ 667, subds. (c), (e)(2)(A), 1170.12, subd. (c)(2)(A)).

In the first burglary count, the prosecution accused "MICHAEL LEE SMITH of a violation of Penal Code section 459, a felony, in that on or about March 8, 2010, in the County of Riverside, State of California, [he] did willfully and unlawfully enter a certain building located at CHECK EXCHANGE, 1015 W. FLORIDA AVE., HEMET, with intent to commit theft and a felony."

In the second burglary count, the prosecution accused "MICHAEL LEE SMITH of a violation of Penal Code section 459, a felony, in that on or about March 8, 2010, in the County of Riverside, State of California, [he] did willfully and unlawfully enter a certain building located at STAPLES, 3381 W. FLORIDA AVE., HEMET, with intent to commit theft and a felony."

In the counterfeiting count, the prosecution accused "MICHAEL LEE SMITH of a violation of Penal Code section 476, a felony, in that on or about March 8, 2010, in the County of Riverside, State of California, [he] did willfully and unlawfully make, pass, utter, publish, or possess, with intent to defraud any other person, a COUNTERFEIT BILLS [sic]."

On January 12, 2011, Smith pled guilty to all three counts, six prison priors, and one strike prior. On February 4, 2011, the trial court sentenced Smith to an aggregate term of 13 years four months in state prison, including six years for the burglary of Check Exchange, one year four months for the counterfeiting offense, and a one-year enhancement for each of the six prison priors. The trial court stayed the sentence for the burglary of Staples under section 654.

■ On November 4, 2014, the voters of California passed Proposition 47, reducing some felony theft- and forgery-related offenses to misdemeanors

when the value of the stolen property does not exceed \$950. (E.g., §§ 459.5, subd. (a) [redefining some theft as shoplifting], 490.2, subd. (a) [changing punishment for some theft offenses], 473, subd. (b) [changing punishment for some forgery and counterfeiting offenses].) The initiative also created a resentencing procedure allowing offenders to petition for resentencing if they are “currently serving a sentence for a conviction” for committing a felony and “would have been guilty of a misdemeanor under” the provisions added by Proposition 47. (§ 1170.18, subd. (a).)

On November 19, 2014, Smith submitted a form petition asking the superior court to resentence him on all three counts under section 1170.18, subdivision (a).² Smith’s petition took the form of a declaration, signed under penalty of perjury. In the petition, Smith declared as to both counts that the value of the stolen property did not exceed \$950. However, he did not attach additional evidence.

On November 26, 2014, the prosecution submitted a form response indicating Smith had “filed a ‘Petition for Resentencing’ on felony count(s) 1, 2, 3 . . . violation of 459 PC (2ND), 459 PC (2nd), 476 PC pursuant to Penal Code § 1170.18.” The prosecution marked the box indicating “[d]efendant is still serving his/her sentence and is entitled to resentencing,” not the box indicating “[d]efendant is not entitled to the relief requested.” However, the prosecution requested a hearing in connection with the conviction for burglary of Check Exchange, stating the “People do not believe count one is eligible as [Check Exchange] is not a commercial establishment.” The prosecution’s response also indicated the hearing should be set to determine “[r]e-sentencing on Ct 2.”

On January 2, 2015, the superior court entered an order denying Smith’s petition. The order indicates the superior court did not hold a hearing on his petition. The order states only that Smith has “476—counterfeit bills—not qualifying felony; 459-2—presenting counterfeit bills at ‘check exchange.’ ”³ The superior court did not mention the conviction for committing the burglary of Staples. The minute order provides no additional explanation of the superior court’s ruling.

² Smith mistakenly checked the box for “Penal Code § 476a Writing Bad Checks” instead of the box for section 473, which is the provision setting out punishment for Smith’s conviction for violating section 476. The superior court’s form did not include section 476 as an option. The prosecution and the superior court correctly disregarded the error.

³ Smith did not appeal the denial of resentencing on his conviction for making, passing, or possessing counterfeit bills.

II**DISCUSSION****A. Legal Background**

On November 4, 2014, the voters of California enacted “the Safe Neighborhoods and Schools Act” (hereinafter Proposition 47), which became effective the next day. (Cal. Const., art. II, § 10, subd. (a).) Proposition 47 changed portions of the Penal Code to reduce certain theft-related offenses from felonies or wobblers to misdemeanors, unless the offenses were committed by certain ineligible offenders. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091 [183 Cal.Rptr.3d 362].) Proposition 47 directs the “act shall be broadly construed to accomplish its purposes.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 15, p. 74, online at <<http://vигcdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf>> [as of July 1, 2016].)

■ The interpretation of a statute is subject to *de novo* review on appeal. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916 [129 Cal.Rptr.2d 811, 62 P.3d 54].) “In interpreting a voter initiative like [Proposition 47], [the courts] apply the same principles that govern statutory construction.” (*People v. Rizo* (2000) 22 Cal.4th 681, 685 [94 Cal.Rptr.2d 375, 996 P.2d 27].) “The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]” (*Horwitz v. Superior Court* (1999) 21 Cal.4th 272, 276 [87 Cal.Rptr.2d 222, 980 P.2d 927].) “In determining intent, we look first to the words themselves. [Citations.] When the language is clear and unambiguous, there is no need for construction. [Citations.] When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]” (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007–1008 [239 Cal.Rptr. 656, 741 P.2d 154].)

B. Petition for Resentencing on Burglary of Check Exchange

Smith contends the superior court erred by determining he was not entitled to resentencing on his conviction for burglarizing Check Exchange under new section 459.5 on the ground that Check Exchange is not a commercial establishment. We agree.

Proposition 47 added section 459.5 to the Penal Code. The new section provides: “(a) Notwithstanding Section 459 [burglary], shoplifting is defined

as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950). Any other entry into a commercial establishment with intent to commit larceny is burglary.” (§ 459.5, subd. (a).) Except in the cases of offenders with specified serious prior convictions, section 459.5 directs “[s]hoplifting shall be punished as a *misdemeanor*.” (*Ibid.*, italics added.) Subdivision (b) further directs “[a]ny act of shoplifting as defined in subdivision (a) shall be charged as *shoplifting*” and that “[n]o person who is charged with shoplifting may also be charged with burglary or theft of the same property.” (§ 459.5, subd. (b), italics added.) The Legislative Analyst’s analysis of Proposition 47 explained: “Under current law, shoplifting property worth \$950 or less (a type of petty theft) is often a misdemeanor. However, such crimes can also be charged as burglary, which is a wobbler. Under this measure, shoplifting property worth \$950 or less would always be a misdemeanor and could not be charged as burglary.” (Voter Information Guide, Gen. Elec., *supra*, analysis of Prop. 47 by Legis. Analyst, p. 35.)

Under section 459.5, subdivision (a), Smith would be entitled to resentencing for misdemeanor shoplifting if (1) Check Exchange is a commercial establishment, (2) Smith entered Check Exchange with the intent to commit larceny,⁴ and (3) the stolen property or counterfeit bills passed did not exceed \$950 in value. The superior court held Smith was not eligible because the conviction was for “presenting counterfeit bills at ‘check exchange.’” The People contend the superior court’s “actual reason” for denying the petition “cannot be determined” from this statement. We agree the order is less than clear. However, in the context of the prosecution’s objection that Smith was not eligible for resentencing as a legal matter because Check Exchange is not a commercial establishment, we understand the superior court to have ruled on that basis. That conclusion was erroneous.

The People do not defend the position that a check cashing business is not a commercial establishment on appeal. However, we address the issue because it was the basis of the superior court’s ruling and the law on the issue is unsettled. Neither Proposition 47 nor the Penal Code defines “commercial establishment.” We therefore understand it to have the meaning it bears in ordinary usage. (See *Title Ins. & Trust Co. v. County of Riverside* (1989) 48 Cal.3d 84, 91 [255 Cal.Rptr. 670, 767 P.2d 1148].) If the language is unambiguous on its face, we interpret it accordingly. If the language is ambiguous, we may consult ballot summaries and other extrinsic materials to aid us in determining the voters’ intent. (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571 [107 Cal.Rptr.3d 265, 227 P.3d 858].)

⁴ Entry must be “while th[e] establishment is open during regular business hours,” (§ 459.5, subd. (a)), but that fact is not in question.

■ “When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word.” (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121–1122 [29 Cal.Rptr.3d 262, 112 P.3d 647].) Black’s Law Dictionary defines “establishment” as “[a]n institution or place of business.” (Black’s Law Dict. (7th ed. 1999) p. 566, col. 2.) It defines “commerce” to mean: “The exchange of goods *and services*.” (*Id.* at p. 263, col. 1, italics added.) Other sources are in accord. (Merriam-Webster.com [defining “commerce” as “activities that relate to the buying and selling of goods and services”]; BusinessDictionary.com [defining “commerce” as the “[e]xchange of goods or services for money or in kind”].) Thus, we interpret the term “commercial establishment” as it appears in section 459.5, subdivision (a) to mean a place of business established for the purpose of exchanging goods or services.

A check cashing business clearly satisfies this definition. A person in possession of a check made out in his or her name can endorse the check to the check cashing business and receive the proceeds in cash, less a commission paid to the check cashing business. The check cashing business then redeems the check from the issuing bank for the full amount of the check. (See *Grasso v. Crow* (1997) 57 Cal.App.4th 847, 849 [67 Cal.Rptr.2d 367] [describing a transaction at a check cashing business].) The Court of Appeal has noted in another context that “the role of check cashing companies in the general American economy has grown tremendously over the past 20 or so years. They facilitate financial services for large numbers of people who are not now connected to traditional banking institutions.” (*HH Computer Systems, Inc. v. Pacific City Bank* (2014) 231 Cal.App.4th 221, 230–231 [179 Cal.Rptr.3d 689].) Thus, a business like Check Exchange provides financial services in exchange for fees, and is therefore a commercial establishment within the ordinary meaning of that term. We conclude, therefore, that the superior court erred in denying Smith’s petition for resentencing on the basis that a Check Exchange store is not a commercial establishment under section 459.5, subdivision (a).

■ We are aware it is possible to take a narrower view of the ordinary meaning of “commercial establishment.” Specifically, some definitions of “commerce” and “commercial” limit it to “the buying and selling of *goods*.” (E.g., American Heritage Dict. (New College ed. 1976) p. 267, italics added.) Under that definition, check cashing businesses would not be commercial establishments because they offer services, not goods or merchandise. At best, this alternative definition creates an ambiguity in the statute. However, as the initiative directs, we construe the act “broadly . . . to accomplish its purposes.” (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, § 15, p. 74; see also *id.*, § 18, p. 74 [act shall be “liberally construed to effectuate its purposes”].) Section 3 of the initiative specifies it was the “purpose and intent of the people of the State of California to:” “[r]equire

misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession,” and “[a]uthorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors.” (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, § 3, subds. (3) & (4), p. 70.) Adopting the limited definition of “commercial establishment” will frustrate those purposes and result in the continued incarceration of persons who committed petty theft crimes. Accordingly, we construe section 459.5, subdivision (a) broadly to include as shoplifting thefts from commercial ventures, such as check cashing stores, which sell services as well as goods and merchandise.

■ The People contend that “even assuming . . . Check Exchange is a commercial establishment, the trial court properly denied the petition because appellant failed to show that he committed larceny, meaning a trespassory taking.” However, section 490a provides that “any law or statute . . . [that] refers to or mentions larceny . . . shall hereafter be read and interpreted as if the word ‘theft’ were substituted therefor.” Section 459.5, subdivision (a), defines shoplifting as “entering a commercial establishment with intent to commit larceny.” Thus, entering a commercial establishment with intent to commit theft is shoplifting. The prosecution charged Smith with entering Check Exchange “with intent to commit theft and a felony” and Smith pled guilty to that charge. The People do not contend there was any predicate for Smith’s burglary conviction other than the theft crime. It follows that Smith need do no more to establish he entered Check Exchange with the intent to commit larceny.

We conclude that larceny as the term appears in section 459.5, subdivision (a) includes theft by false pretenses and does not require a trespassory taking. Our Supreme Court has held “[a]n intent to commit theft by a false pretense or a false promise without the intent to perform will support a burglary conviction.” (*People v. Parson* (2008) 44 Cal.4th 332, 354 [79 Cal.Rptr.3d 269, 187 P.3d 1].) Voters adopted the phrase “intent to commit larceny” in section 459.5, which mirrors the intent element in the general burglary statute. (§ 459.) Because the voters intended section 459.5 to include theft by false pretenses, entering a check cashing establishment and passing counterfeit bills or notes qualifies as shoplifting under section 459.5.⁵

⁵ Some courts have reached the contrary conclusion that shoplifting under section 459.5 requires a taking without the property owner’s consent on the basis of the discussion of robbery (§ 211) in *People v. Williams* (2013) 57 Cal.4th 776 [161 Cal.Rptr.3d 81, 305 P.3d 1241]. (E.g., *People v. Gonzales* (2015) 242 Cal.App.4th 35 [194 Cal.Rptr.3d 856], review granted Feb. 17, 2016, S231171.) We conclude that neither *Williams* nor section 211, which does not contain the term “larceny,” governs the meaning of that term in the new shoplifting statute.

■ The People contend we should affirm on the alternative ground that Smith did not meet his *prima facie* burden that “what he took had a value of \$950 or less.” We decline to affirm on that basis. It is true “‘we may affirm a trial court judgment on any [correct] basis presented by the record whether or not relied upon by the trial court.’” (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1268 [35 Cal.Rptr.3d 343].) However, Smith filed a signed petition in which he declared, under penalty of perjury, that the value of the checks he was convicted of passing did not exceed \$950. At the initial pleading stage, declarations may stand in for the testimony a petitioner would give at a hearing. (See *People v. Sherow* (2015) 239 Cal.App.4th 875, 880 [191 Cal.Rptr.3d 295] [proper petition could contain at least declaration from defendant attesting to value of stolen property]; *People v. Perkins* (2016) 244 Cal.App.4th 129, 140 [197 Cal.Rptr.3d 743] [same].) Moreover, the People did not contest Smith’s assertion in their responsive pleading in the superior court. Under those circumstances, Smith’s declaration and the People’s representation regarding the amount element, the record does not support affirming the order on the basis that Smith failed to carry his *prima facie* burden.

Of course, even where the parties agree on a factual issue related to eligibility, the superior court may, as the fact finder, make rulings based on evidence in the record and hold hearings to resolve factual disputes or otherwise discover facts. As a result, the proper remedy in this case is to reverse the order denying relief and remand for the superior court to determine whether Smith satisfies the conditions for eligibility, including by holding a hearing to hear additional evidence related to the value of the stolen property. (See § 1170.18, subd. (b) [“Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a)”; *People v. Contreras* (2015) 237 Cal.App.4th 868, 892 [188 Cal.Rptr.3d 698] [whether “the value of the property defendant stole disqualifies him from resentencing under sections 459.5 and 1170.18 . . . is a factual finding that must be made by the trial court in the first instance”].)

C. Petition for Resentencing on the Burglary of Staples

Smith contends the superior court erred in denying his petition for resentencing on his conviction for the burglary of Staples (count 2). The People ask that we affirm the superior court order on the ground Smith did not carry his burden of proving the theft was valued at less than \$950. However, Smith declared, under penalty of perjury, that “[t]he value of the check or property does not exceed \$950.00,” and in its response to Smith’s petition for resentencing, the prosecution represented Smith “*is entitled* to resentencing” and requested a resentencing hearing. Thus, the record on appeal does not support affirming the superior court on the ground that Smith failed to carry

his *prima facie* burden of proof as to the value of the stolen property. Accordingly, we reverse the denial of Smith's petition for resentencing on count 2, and remand for the superior court to determine whether Smith satisfies the conditions for eligibility.⁶

III

DISPOSITION

We reverse the order denying Smith's petition for resentencing on counts 1 and 2 and remand for further proceedings consistent with this opinion.

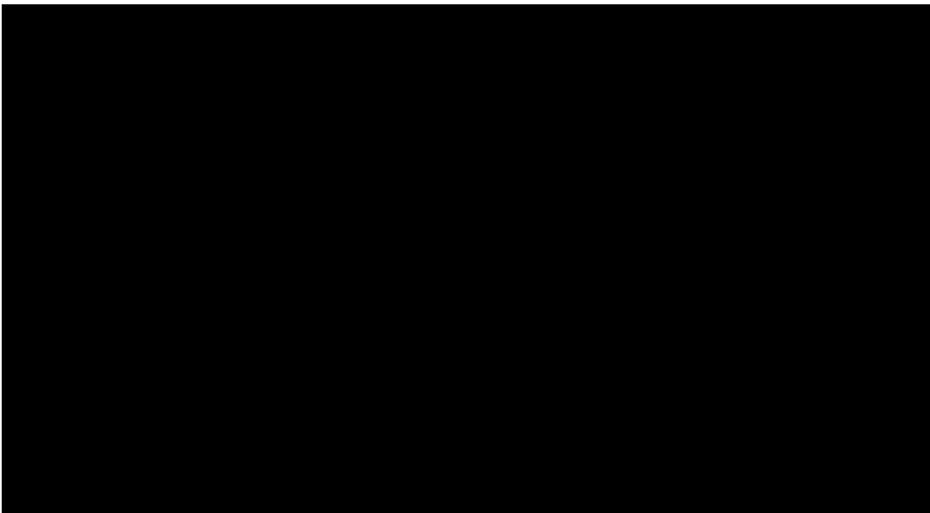
Hollenhorst, Acting P. J., and Miller, J., concurred.

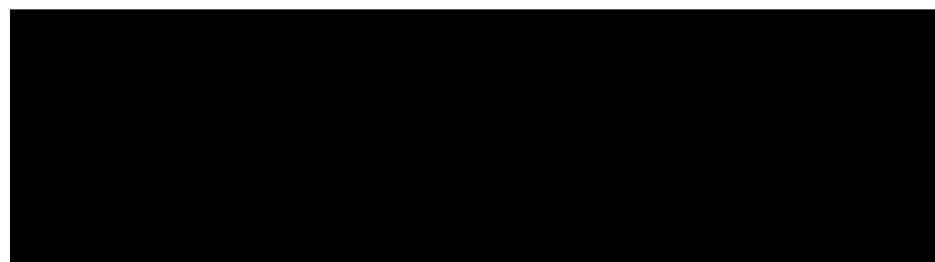
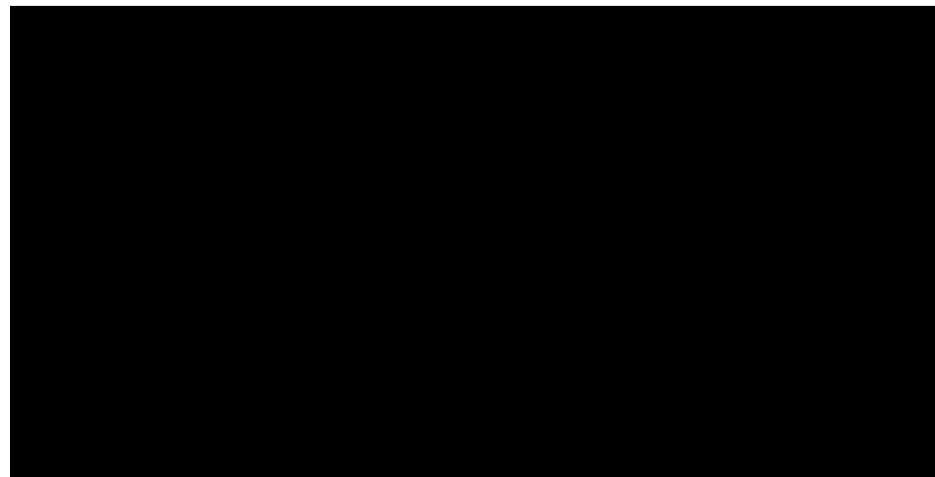
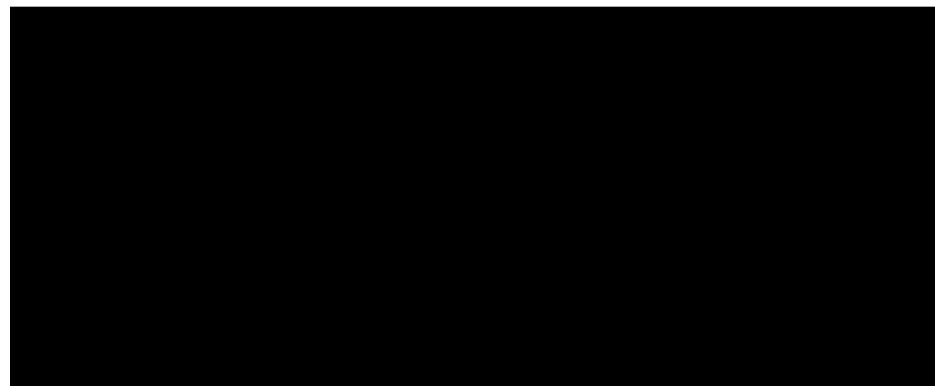
Respondent's petition for review by the Supreme Court was granted September 14, 2016, S236112. Corrigan, J., did not participate therein.

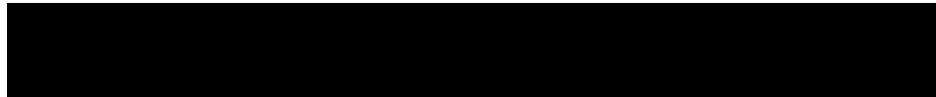
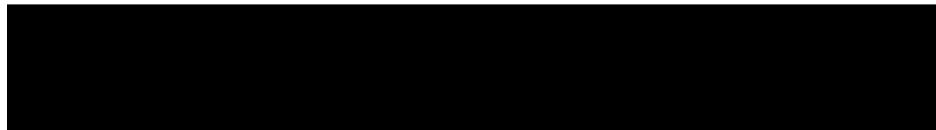
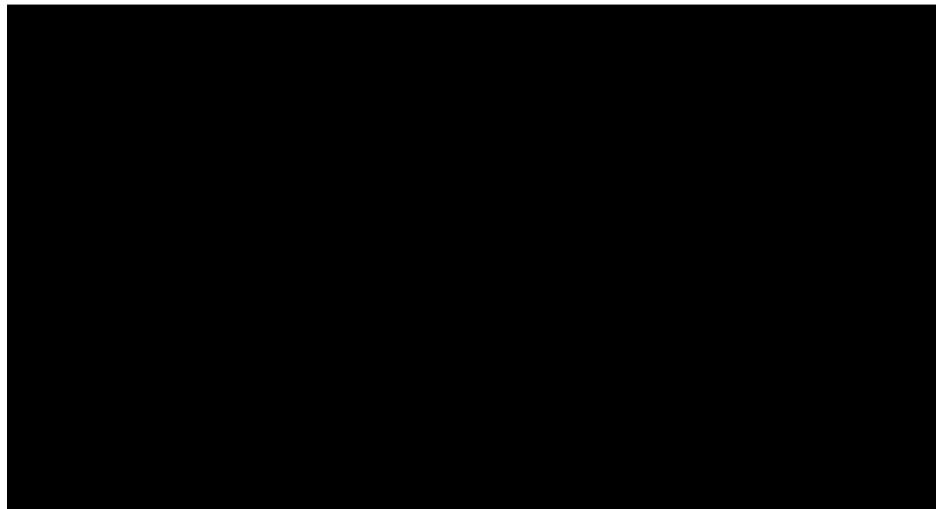
⁶ The superior court also denied Smith's petition for resentencing on his section 476 conviction (count 3) on the ground passing a counterfeit bill is not a qualifying felony. Smith has not appealed that decision, so we do not reach it. However, we note Proposition 47 amended section 473, under which Smith was sentenced for violating section 476, to provide "any person who is guilty of forgery relating to a . . . *bank bill*, [or] *note* . . . where the value of the . . . *bank bill*, [or] *note* . . . does not exceed nine hundred fifty dollars (\$950), *shall* be punishable by imprisonment in a county jail for not more than one year." (Italics added.) Since the superior court refused Smith's request for resentencing, courts have concluded passing a counterfeit bill is a qualifying conviction. (E.g., *People v. Maynarich* (2016) 248 Cal.App.4th 77 [203 Cal.Rptr.3d 260].)

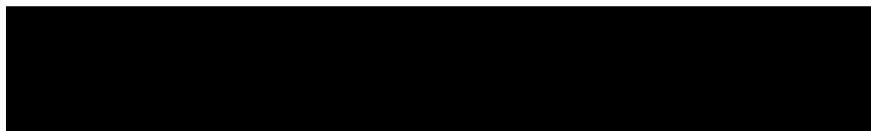
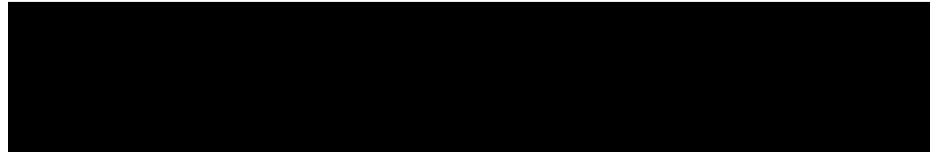
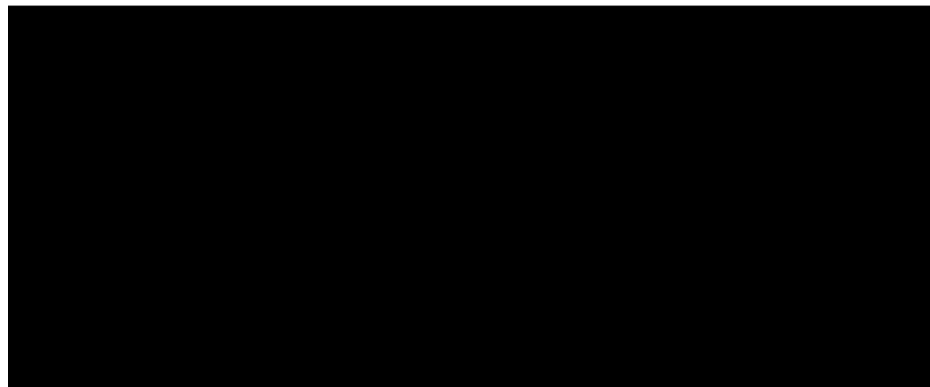
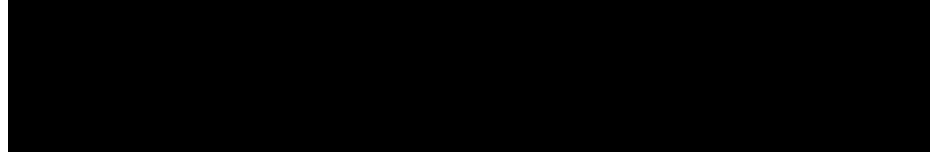
[No. D067687. Fourth Dist., Div. One. June 14, 2016.]

BERNADETTE MAGNO et al., Plaintiffs and Respondents, v.
THE COLLEGE NETWORK, INC., Defendant and Appellant.









COUNSEL

Reich Radcliffe & Hoover, Adam T. Hoover and Richard J. Radcliffe for Defendant and Appellant.

Law Offices of Hannah J. Bingham, Hannah J. Bingham; and Scott A. Savary for Plaintiffs and Respondents.

OPINION

McCONNELL, P. J.—The College Network, Inc. (TCN), appeals from an order denying its motion to compel arbitration of a consumer fraud and breach of contract action brought by plaintiffs Bernadette Magno, Rosanna Garcia, and Sheree Radio. TCN argues the arbitration provision in plaintiffs'

purchase agreements is valid and enforceable and contends the trial court erred when it ruled the provision unconscionable. Alternatively, TCN argues that if the forum selection clause is unconscionable, the court abused its discretion in voiding the arbitration provision altogether rather than severing the objectionable provisions and enforcing the remainder. We conclude the trial court correctly determined the arbitration provision to be procedurally and substantively unconscionable and did not abuse its discretion in voiding it in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

TCN is an Indiana-based company with customers nationwide. In 2012, TCN's California sales representative visited plaintiffs' homes in San Diego County to encourage them to enroll in TCN's distance-learning partnership with Indiana State University (ISU) and California State University (CSU). Plaintiffs, all California residents, were licensed vocational nurses (LVNs) who sought to become registered nurses (RNs) in California. TCN's representative told plaintiffs they could complete much of their necessary coursework for a B.S. degree in nursing online through ISU's distance-learning program and complete their clinical training through CSU. TCN's representative told plaintiffs the program would allow them to obtain B.S. degrees in nursing from ISU and qualify to take the RN examination offered by the California Board of Registered Nursing.

The program involved three phases. First, plaintiffs would satisfy their general education and prerequisite requirements through TCN online to qualify for admission into ISU's LVN to B.S. in nursing program. Next, plaintiffs would apply for admission at ISU. Thereafter, plaintiffs would complete their course requirements online through ISU and complete their clinical training through CSU.

Plaintiffs executed purchase agreements with TCN. Each purchase agreement was a two-sided, 11 by 14 carbon paper form. On the front side of the form, TCN's sales representative inserted information in the blank spaces provided for each plaintiff's name, contact information, date, and purchase price. By executing the purchase agreements, plaintiffs acknowledged having read, understood, and agreed to the terms on both sides of the agreement. The back side of the purchase agreement contained several preprinted terms. One of the terms was an arbitration provision, which stated:

"GOVERNING LAW AND DISPUTE RESOLUTION

"Any and all disputes, claims or controversies (Claims) arising from, out of, or relating to this Agreement, or the relationships between Buyer and TCN

which result from this Agreement, or the breach, termination, enforcement, interpretation or validity thereof, shall be determined, confidentially, by binding arbitration in Marion County, Indiana, before one neutral arbitrator selected by TCN, and with the consent of Buyer (and no other person), which consent shall not be unreasonably withheld; provided, however, that either party may assert an action in small claims court. Any arbitration or small claims action (including any appeal if allowed) shall be conducted between Buyer and TCN only (and only in Buyer's individual capacity), and shall not resolve, seek to resolve, nor purport to resolve any disputes, claims, or controversies of any person other than Buyer and TCN. This agreement to arbitrate shall not preclude either Buyer or TCN from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.

"This Agreement shall, notwithstanding any conflicts of laws, be governed by the laws of Buyer's state of residence when executed by Buyer, and any applicable federal laws; provided, however, Buyer and TCN agree and understand that their decision and agreement to arbitrate shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* The arbitration proceeding may be conducted telephonically or videographically. Any demand for arbitration must be served on the other party (and any small claims action must be filed) within one year of the date any Claims accrue. TCN shall notify Buyer of the arbitrator selected (for Buyer's consent) within 30 days. The arbitrator will adhere to the terms of this arbitration agreement. If TCN and Buyer do not agree otherwise, the rules for the conduct of the arbitration shall be determined by the arbitrator. Judgment may be entered on the award in any court having jurisdiction.

"Buyer shall be required to advance no more than \$250 for the arbitration filing fee and arbitrator's fee. However, the arbitrator may, in the award, allocate, and order reimbursement of all or part of the costs of arbitration, including fees of the arbitrator and the reasonable attorneys' fees to the prevailing party."

In their first year of study, plaintiffs learned they would not be eligible for formal admission into ISU. Plaintiffs requested refunds from TCN, but TCN refused to provide them.

Plaintiffs sued TCN in February 2014, seeking equitable and monetary relief. Plaintiffs' Second Amended Complaint, filed in October 2014, asserted statutory claims under the Consumers Legal Remedies Act (Civ. Code, § 1750 *et seq.*) and unfair competition law (Bus. & Prof. Code, § 17200 *et seq.*) and common law misrepresentation and breach of contract claims. Plaintiffs alleged that in 2012, following an investigation into the clinical component of the program at CSU, ISU had suspended enrollment into its LVN to B.S. in

nursing program. Plaintiffs alleged TCN and other defendants concealed this information and misrepresented that enrolling in the program would enable plaintiffs to qualify for entrance into ISU's nursing program. Plaintiffs alleged each of them had paid program deposits and loan payments based on these representations. Plaintiffs requested compensatory damages and injunctive, declaratory, and equitable relief.

In December 2014, TCN moved to compel arbitration. Plaintiffs opposed TCN's motion, arguing the arbitration provision in the purchase agreement was unconscionable and therefore unenforceable. Each plaintiff submitted a declaration describing the circumstances of TCN's sales pitch and contract execution. TCN did not submit any evidence, but it filed objections to certain representations in plaintiffs' declarations.

The trial court issued a tentative ruling prior to the hearing, granting TCN's motion to compel arbitration. However, on December 31, 2014, following oral argument, the court denied TCN's motion to compel, overruling most of TCN's evidentiary objections and finding the arbitration provision procedurally and substantively unconscionable. TCN timely appealed.

DISCUSSION

TCN challenges the denial of its motion to compel arbitration. As we explain, we conclude the trial court properly found the arbitration provision in TCN's purchase agreement to be procedurally and substantively unconscionable, and therefore unenforceable.

I.

Standard of Review

“Absent conflicting extrinsic evidence, the validity of an arbitration clause, including whether it is subject to revocation as unconscionable, is a question of law subject to de novo review.” (*Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 702 [155 Cal.Rptr.3d 506].) “However, where an unconscionability determination “is based upon the trial court’s resolution of conflicts in the evidence, or on the factual inferences which may be drawn therefrom, we consider the evidence in the light most favorable to the court’s determination and review those aspects of the determination for substantial evidence.”” (*Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 820–821 [104 Cal.Rptr.3d 844] (*Lhotka*); see *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 89 [7 Cal.Rptr.3d 267] (*Gutierrez*).) We review the trial court’s ruling on severance of an unconscionable provision for abuse of discretion. (*Lhotka*, at p. 821;

Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 122 [99 Cal.Rptr.2d 745, 6 P.3d 669] (*Armendariz*).) “In keeping with California’s strong public policy in favor of arbitration, any doubts regarding the validity of an arbitration agreement are resolved in favor of arbitration.” (*Lhotka, supra*, at p. 821.)

II.

Unconscionability

■ In signing the purchase agreements with TCN, plaintiffs agreed to submit “[a]ny and all disputes, claims, or controversies” to binding arbitration governed by the Federal Arbitration Act (FAA). The FAA reflects a “‘liberal federal policy favoring arbitration,’” and the “‘fundamental principle that arbitration is a matter of contract.’” (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339 [179 L.Ed.2d 742, 131 S.Ct. 1740] (*Concepcion*)). California courts favor arbitration “as a voluntary means of resolving disputes, and this voluntariness has been its bedrock justification.” (*Armendariz, supra*, 24 Cal.4th at p. 115.) As a result, arbitration agreements are valid, irrevocable, and enforceable except on grounds that exist for revocation of contracts more generally, such as fraud, duress, or unconscionability. (*Concepcion, supra*, at p. 339; 9 U.S.C. § 2; Code Civ. Proc., § 1281; *Sanchez v. Valencia Holding Co.* (2015) 61 Cal.4th 899, 912–913 [190 Cal.Rptr.3d 812, 353 P.3d 741] (*Valencia*); *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1142 [163 Cal.Rptr.3d 269, 311 P.3d 184] (*Sonic II*).)¹ Courts must consider whether an agreement was “unconscionable at the time it was made.” (Civ. Code, § 1670.5, subd. (a); *Valencia, supra*, at p. 920.) Because unconscionability is a contract defense, the party asserting it bears the burden of proof. (*Valencia, supra*, at p. 911.)

■ Unconscionability consists of both procedural and substantive elements. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246 [145 Cal.Rptr.3d 514, 282 P.3d 1217] (*Pinnacle*).) Procedural unconscionability “addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power.” (*Ibid.*) “Substantive unconscionability pertains to

¹ In *Concepcion*, the United States Supreme Court disapproved of California authority holding class action waivers in consumer form contracts per se unconscionable. As *Concepcion* explained, even if a state law applies evenly to all contracts, the FAA preempts the law if, as applied, it interferes with the fundamental attributes of arbitration such as lower costs, greater efficiency, and speed. (*Concepcion, supra*, 563 U.S. at pp. 344, 348, 352.) Following *Concepcion*, the California Supreme Court reaffirmed that unconscionability remains a potentially viable defense to a motion to compel arbitration. (*Sonic II, supra*, 57 Cal.4th at pp. 1142–1143, 1145; *Valencia, supra*, 61 Cal.4th at p. 912.)

the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided." (*Ibid.*) Both elements must be present for a court to refuse to enforce an arbitration agreement. (*Valencia, supra*, 61 Cal.4th at p. 910.) However, the elements do not need to be present in the same degree and are evaluated on a "‘‘sliding scale.’’" (*Ibid.*) "‘[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.’’" (*Ibid.*) "The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement." (*Id.* at p. 912.)²

A. Procedural Unconscionability

■ Procedural unconscionability pertains to the making of the agreement and requires oppression or surprise. (*Pinnacle, supra*, 55 Cal.4th at p. 247; *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 795 [137 Cal.Rptr.3d 773] (*Ajamian*).) "‘Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form.’’" (*Pinnacle, supra*, at p. 247.) "‘[T]here are degrees of procedural unconscionability. At one end of the spectrum are contracts that have been freely negotiated by roughly equal parties, in which there is no procedural unconscionability. . . . Contracts of adhesion that involve surprise or other sharp practices lie on the other end of the spectrum.’’" (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1244 [200 Cal.Rptr.3d 7, 367 P.3d 6] (*Baltazar*)).

The trial court found procedural unconscionability based on evidence plaintiffs were young, were rushed through the signing process, had no ability to negotiate, did not see the arbitration language "buried on the back page of the preprinted carbon paper forms," and did not separately initial the arbitration clause. The trial court also found procedural unconscionability based on TCN's manner of presenting the program to plaintiffs.

² At the outset, we reject TCN's argument that the trial judge denied TCN's motion to compel arbitration because he was biased against arbitration. TCN argues the court's tentative ruling *granting* TCN's motion to compel suggests its later ruling was motivated by bias. Certainly, the court's rejection of its earlier tentative ruling after oral argument does not demonstrate bias. "A tentative ruling is just that, tentative." (*Guzman v. Visalia Community Bank* (1999) 71 Cal.App.4th 1370, 1378 [84 Cal.Rptr.2d 581].) "[A] trial court's tentative ruling is not binding on the court; the court's final order supersedes the tentative ruling." (*Silverado Modjeska Recreation and Parks Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 300 [128 Cal.Rptr.3d 772].) There is nothing in the record to suggest the ruling was motivated by bias. At oral argument, the court *recognized* the parties' right to contract for arbitration and took the matter under submission to weigh the interests at stake.

Substantial evidence supports the trial court's factual findings. Plaintiffs submitted declarations stating they did not consider themselves "sophisticated or educated at a high level," had no "college degree or any college courses to speak of," and had "difficulty with many of the legal terms in the documents presented" by TCN's sales representative. Plaintiffs said the process "went by in a blur," with TCN's sales representative filling out documents while talking to plaintiffs about the program. TCN's representative described the program, told plaintiffs they would be eligible to sit for the RN examination, and told plaintiffs "how everything would be fine and to simply sign here and there." The representative told plaintiffs they "could get a discount by signing up right away" and did not give plaintiffs an opportunity to sit and read the documents. Plaintiffs stated they were unaware of the arbitration provision on the back page of the preprinted carbon paper form until after filing their lawsuit.

On appeal, TCN describes plaintiffs as "educated and skilled nurses" with LVN licenses. TCN argues each plaintiff had sufficient education and technical training to read and consider the purchase agreements, whether during the meeting with the sales representative or in the days thereafter, and that plaintiffs' version of events is "not credible." However, TCN presented no *evidence* to contradict plaintiffs' declarations before the trial court. TCN filed objections to some of the representations in plaintiffs' declarations but did not submit declarations or evidence of its own. The trial court sustained only one of TCN's evidentiary objections, striking for lack of foundation plaintiffs' representations as to TCN's wealth and size. We accept the trial court's credibility determinations and do not reweigh the evidence on appeal. (*Betz v. Pankow* (1993) 16 Cal.App.4th 919, 923 [20 Cal.Rptr.2d 834].)

Moreover, TCN does not dispute that the arbitration provision lies within a two-page document, the "front and back of an 11 x 14 carbon copy form." The arbitration provision lies within the section labeled, "Governing Law and Dispute Resolution," one of 13 sections preprinted in small font on the back side of the purchase agreement. It is not set apart in a separate box and did not require plaintiffs to initial next to the language. Whereas TCN's sales representative circled, underlined, and added arrows and text next to provisions on the front page and on other documents plaintiffs signed, there are no annotations on the back page containing the arbitration provision.

This uncontested evidence supports the finding of procedural unconscionability. The arbitration agreement is an adhesion contract; it lies within a standardized form drafted and imposed by a party with superior bargaining strength, leaving plaintiffs with only the option of adhering to the contract or rejecting it. (*Armendariz, supra*, 24 Cal.4th at p. 113.) The rushed nature of plaintiffs' contract negotiation, TCN's encouragement to sign up right away

for a discount, and the unequal bargaining power between plaintiffs and TCN indicate a high degree of procedural unconscionability. (See *Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238, 1252–1253 [45 Cal.Rptr.3d 293] (*Higgins*) [high degree of procedural unconscionability where arbitration clause was in a paragraph near the end of a lengthy single-spaced document drafted by sophisticated defendants and signed by young and unsophisticated plaintiffs who had no opportunity to negotiate]; *Gutierrez, supra*, 114 Cal.App.4th at p. 89 [arbitration clause on preprinted automobile lease that was “particularly inconspicuous” and not negotiated or separately initialed supported procedural unconscionability]; cf. *Baltazar, supra*, 62 Cal.4th at p. 1245 [procedural unconscionability limited where plaintiff knew about arbitration provision in her employment agreement and was not manipulated into signing it]; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 179 [185 Cal.Rptr.3d 151] [“where the arbitration provisions presented in a contract of adhesion are highlighted . . . , any procedural unconscionability is ‘limited’ ”].)

As TCN points out, each plaintiff signed the verification on the first page of the purchase agreement attesting she read and understood both pages of the agreement. In addition, the purchase agreements allowed each plaintiff to cancel the agreement within five business days. “This language, although relevant to our inquiry, does not defeat the otherwise strong showing of procedural unconscionability.” (*Higgins, supra*, 140 Cal.App.4th at p. 1253 [considering effect of similar clause].)

TCN cites language in *Valencia* that the drafting party in a consumer contract “was under no obligation to highlight the arbitration clause of its contract, nor was it required to specifically call that clause to [the nondrafting party’s] attention.” (*Valencia, supra*, 61 Cal.4th at p. 914.) However, the Supreme Court found procedural unconscionability in that case despite the consumer’s failure to read the arbitration clause in his purchase agreement. (*Id.* at pp. 914–915.) The quoted language merely stands for the established principle that “simply because a provision within a contract of adhesion is not read or understood by the nondrafting party does not justify a refusal to enforce it. The unbargained-for term may only be denied enforcement if it is also *substantively unreasonable*.” (*Gutierrez, supra*, 114 Cal.App.4th at p. 88.) Consequently, *Valencia* also addressed whether the arbitration clause was substantively unconscionable. (*Valencia*, at p. 915.) Following that approach, we turn to substantive unconscionability.

B. *Substantive Unconscionability*

■ The substantive element looks to the actual terms of the parties’ agreement to “ensure[] that contracts, particularly contracts of adhesion, do

not impose terms that have been variously described as “‘overly harsh’” [citation], “‘unduly oppressive’” [citation], “‘so one-sided as to ‘shock the conscience’’” [citation], or ‘unfairly one-sided.’” (*Sonic II, supra*, 57 Cal.4th at p. 1145.) These formulations “all mean the same thing.” (*Valencia, supra*, 61 Cal.4th at p. 911.) Substantive unconscionability “is concerned not with “a simple old-fashioned bad bargain” [citation], but with terms that are “unreasonably favorable to the more powerful party.”” (*Ibid.*) “The substantive component of unconscionability looks to whether the contract allocates the risks of the bargain in an objectively unreasonable or unexpected manner.” (*Patterson v. ITT Consumer Financial Corp.* (1993) 14 Cal.App.4th 1659, 1664 [18 Cal.Rptr.2d 563] (*Patterson*).) While private arbitration may resolve disputes faster and cheaper than judicial proceedings, it “may also become an instrument of injustice imposed on a “take it or leave it” basis.” (*Armendariz, supra*, 24 Cal.4th at p. 115.) “The courts must distinguish the former from the latter, to ensure that private arbitration systems resolve disputes not only with speed and economy but also with fairness.” (*Ibid.*)

The trial court found substantive unconscionability based on the arbitration provision’s forum selection clause. The arbitration provision required young college-aged students to travel from San Diego, California to Marion County, Indiana to arbitrate their claims against a company that solicited their business in California. The court determined requiring plaintiffs to travel to Indiana, or even to arrange to appear through video, would work a severe hardship on plaintiffs and unfairly benefit TCN by effectively preventing plaintiffs from asserting their claims.

TCN argues this was error. TCN contends the arbitration provision is “fair, neutral, and in many instances deferential” to plaintiffs. For example, TCN argues the provision permits plaintiffs to participate by telephone or video; provides that the laws of the buyer’s state (here, California) apply; requires plaintiffs to advance no more than \$250 for the arbitrator’s filing and arbitrator’s fee; allows plaintiffs to withhold consent to TCN’s choice of arbitrator; allows plaintiffs and TCN to agree on the respective rules of arbitration; sets no limit on the amount the arbitrator may award; and permits plaintiffs to pursue remedies in California small claims court. We conclude the trial court properly found the agreement to arbitrate to be substantively unconscionable.

■ As the trial court determined, the arbitration provision’s forum selection clause is substantively unconscionable. Unconscionable provisions include those “that seek to negate the reasonable expectations of the nondrafting party.” (*Valencia, supra*, 61 Cal.4th at p. 911.) There is nothing in the record to suggest plaintiffs reasonably could have expected at the time of contracting that they would be required to resolve any disputes in Indiana. A

TCN sales representative visited plaintiffs' homes in California and enrolled them in a program that would purportedly enable them to become licensed nurses in California, through a partnership between Indiana and California colleges. Although TCN is based in Indiana, it solicited plaintiffs' business in California through a California-based sales representative. Arbitration in Indiana would not have been in plaintiffs' reasonable expectations, and the forum selection provision renders the agreement to arbitrate substantively unconscionable. (See *Patterson, supra*, 14 Cal.App.4th at p. 1665 ["While arbitration per se may be within the reasonable expectation of most consumers, it is much more difficult to believe that arbitration in Minnesota would be within the reasonable expectation of California consumers."]; *Lhotka, supra*, 181 Cal.App.4th at p. 825 ["plaintiffs, residents of Colorado, were required to mediate and arbitrate in San Francisco—all but guaranteeing . . . that any recovery plaintiffs might obtain would be devoured by the expense they incur in pursuing their remedy"]); *Bolter v. Superior Court* (2001) 87 Cal.App.4th 900, 909 [104 Cal.Rptr.2d 888] (*Bolter*) ["it is simply not a reasonable or affordable option for [small business-owner plaintiffs] to abandon their offices for any length of time to litigate a dispute several thousand miles away"].)

■ That plaintiffs could participate in arbitration proceedings by phone or video does not change the outcome. Plaintiffs must choose whether to incur significant expenses to pursue their claims in an unreasonable forum or to appear remotely, forgoing the ability to testify in person, while TCN, a company that solicited business in California, participates in proceedings in its own backyard. We agree with the trial court that "even arranging to appear through video as allowed in the agreement . . . would unfairly benefit [TCN]." Absent reasonable justification for this arrangement, "arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing [the stronger party's] advantage." (*Armendariz, supra*, 24 Cal.4th at p. 118.) "Arbitration was not intended for this purpose." (*Ibid.*; see *Comb v. PayPal, Inc.* (N.D.Cal. 2002) 218 F.Supp.2d 1165, 1177 ["Limiting venue to PayPal's backyard appears to be yet one more means by which the arbitration clause serves to shield PayPal from liability instead of providing a neutral forum in which to arbitrate disputes."].)

The analysis is also not changed by the fact plaintiffs could pursue remedies in California small claims court. "Presenting a consumer litigant who has suffered a small monetary loss with the Hobson's choice of litigation in a distant forum and the limited relief available in small claims court does not cure the problem. Small claims courts do not provide the panoply of relief available in court or before an arbitrator, such as punitive damages and attorney fees. . . . The possibility of redress in small claims court does not persuade us that a patently unreasonable forum selection clause should be enforced." (*Aral v. EarthLink, Inc.* (2005) 134 Cal.App.4th 544, 562 [36 Cal.Rptr.3d 229] (*Aral*)).

TCN cites *Carnival Cruise Lines v. Shute* (1991) 499 U.S. 585 [113 L.Ed.2d 622, 111 S.Ct. 1522] (*Carnival*), which upheld a forum selection clause requiring Washington State residents to pursue litigation in Florida. TCN contends *Carnival* compels the conclusion that forum selection in Indiana is not unconscionable. We disagree.

In *Carnival*, Washington residents bought tickets from a Florida company to take a cruise from California to Mexico. (*Carnival, supra*, 499 U.S. at pp. 587–588.) In suing *Carnival Cruise Lines* in Washington for personal injury, the plaintiffs *conceded* they had notice of the forum selection clause in their purchase contracts requiring litigation in Florida. (*Id.* at p. 595.) The Supreme Court held the forum selection clause was enforceable. (*Ibid.*)

■ Here, by contrast, substantial evidence supports the trial court's finding that plaintiffs were unaware of the arbitration provision altogether, much less its forum selection in Indiana. Further, *Carnival* emphasized that "forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness." (*Carnival, supra*, 499 U.S. at p. 595.) Unlike *Carnival*, "this dispute [is] an essentially local one inherently more suited to resolution in the State of [California] than in [Indiana]." (Cf. *Carnival, supra*, at p. 594; see *Aral, supra*, 134 Cal.App.4th at p. 561 [distinguishing *Carnival* and holding a provision requiring California consumers to arbitrate claims in Georgia "unreasonable as a matter of law"].)

In addition to the forum selection clause, there are other indicia of substantive unconscionability.³ The arbitration provision allows TCN to select the arbitrator. Although plaintiffs can withhold consent to TCN's choice, consent "shall not be unreasonably withheld." Unlike agreements requiring an arbitrator to be selected from a neutral arbitration service, the parties' arbitration provision contains no assurances of neutrality. At the hearing on TCN's motion to compel, plaintiffs' counsel argued he would have no way to assess whether the arbitrator TCN selected would be biased. We agree that the arbitrator selection procedure renders the arbitration provision substantively unconscionable. (See *Sonic II, supra*, 57 Cal.4th at p. 1152 ["an adhesive agreement that gives the [drafting party] the right to choose a biased arbitrator is unconscionable"], citing *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 826–827 [171 Cal.Rptr. 604, 623 P.2d 165].)

For example, in *Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227 [190 Cal.Rptr.3d 159], a California employee of a Texas-based company sued under California wage and hour laws. The company

³ The trial court premised its finding of substantive unconscionability on the forum selection clause alone. However, we exercise our independent judgment as to the legal effect of undisputed facts. (*Lhotka, supra*, 181 Cal.App.4th at p. 820.)

moved to compel arbitration. The employment agreement limited the pool of potential arbitrators to individuals who resided in Texas and were licensed to practice law in Texas. (*Id.* at p. 253.) Although employees were allowed to participate in choosing an arbitrator, they could not suggest candidates who were licensed in California and experienced in California wage and hour law. (*Ibid.*) The court rejected this selection procedure as unconscionable, holding there was “no rational justification to limit the potential pool of arbitrators in this fashion” in a California wage and hour dispute. (*Ibid.*) The court concluded the arbitrator selection procedure had “no apparent justification other than to tilt the scale of arbitral justice to one side’s advantage”—i.e., the Texas-based employer. (*Ibid.*) Here, the selection procedure is arguably even more one-sided because it allows Indiana-based TCN to *unilaterally* select an arbitrator and limits plaintiffs to providing or “reasonably” withholding consent. Therefore, here, as in *Pinela*, the arbitrator selection procedure is further indication of unconscionability.

■ The arbitration provision’s shortened limitations period provides another indicator of substantive unconscionability. The provision requires claims to be filed within one year of accrual. By contrast, plaintiffs’ unfair competition law claims are subject to a four-year statute of limitations (Bus. & Prof. Code, § 17208), and their Consumers Legal Remedies Act claims are subject to a three-year statute of limitations (Civ. Code, § 1783). An arbitral limitations period that is shorter than the otherwise applicable period is one factor that supports a finding of substantive unconscionability. (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1283, fn. 12 [16 Cal.Rptr.3d 296] [“the shortened limitations period . . . is *one factor* leading us to hold that the contract is substantively unconscionable”]; *Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1145 [140 Cal.Rptr.3d 492] [same].)

Thus, we agree with the trial court that the arbitration provision in TCN’s purchase agreement is so one-sided as to be substantively unconscionable. Combined with the high degree of procedural unconscionability, the arbitration provision as drafted is unconscionable and, therefore, unenforceable.

III.

Severability

■ If an agreement to arbitrate is unconscionable, “the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.” (Civ. Code, § 1670.5, subd. (a).) The trial court declined to sever unconscionable terms

from the parties' arbitration provision. Concluding it could not do so without, in effect, rewriting the arbitration provision, the court voided the entire provision.

■ We review the trial court's decision on severability for abuse of discretion. (*Armendariz, supra*, 24 Cal.4th at p. 122; *Lhotka, supra*, 181 Cal.App.4th at p. 821.) "In deciding whether to sever terms rather than to preclude enforcement of the provision altogether, the overarching inquiry is whether the interests of justice would be furthered by severance; the strong preference is to sever *unless* the agreement is 'permeated' by unconscionability." (*Ajamian, supra*, 203 Cal.App.4th at p. 802.)

■ An agreement to arbitrate is considered "permeated" by unconscionability where it contains more than one unconscionable provision. (*Armendariz, supra*, 24 Cal.4th at p. 124.) "Such multiple defects indicate a systematic effort to impose arbitration on [the nondrafting party] not simply as an alternative to litigation, but as an inferior forum that works to the [drafting party's] advantage." (*Ibid.*) An arbitration agreement is also deemed "permeated" by unconscionability if "there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement." (*Id.* at pp. 124–125.) If "the court would have to, in effect, reform the contract, not through severance or restriction, but by augmenting it with additional terms," the court must void the entire agreement. (*Id.* at p. 125.)

■ As we explained above, the arbitration provision contains multiple unconscionable terms. Some, such as the forum selection in Indiana, may be easy to sever. (See, e.g., *Bolter, supra*, 87 Cal.App.4th at p. 911 [severing unconscionable forum selection clause].) However, other terms, such as the arbitrator selection procedure, can only be remedied by rewriting the parties' agreement to arbitrate. That is not a proper court function. (*Armendariz, supra*, 24 Cal.4th at p. 125 ["Because a court is unable to cure this unconscionability through severance or restriction and is not permitted to cure it through reformation and augmentation, it must void the entire agreement."].)⁴ Therefore, the trial court did not abuse its discretion in voiding the entire arbitration agreement rather than severing unconscionable terms. (See *Ajamian, supra*, 203 Cal.App.4th at pp. 803–804 [no abuse of discretion in voiding entire arbitration provision where there were multiple unconscionable terms that could not be cured by severance]; *Lhotka, supra*, 181 Cal.App.4th at p. 826 [multiple unconscionable terms weighed against severance].)

⁴ TCN's counsel made the same point below, arguing the trial court lacked power to insert terms into the parties' arbitration provision. TCN is correct, however, that it never argued that severance of the forum selection clause would require the court to rewrite the provision.

DISPOSITION

The order denying TCN's motion to compel arbitration is affirmed. Plaintiffs Bernadette Magno, Rosanna Garcia, and Sheree Rudio shall recover their costs on appeal.

Nares, J., and O'Rourke, J., concurred.

[No. D070253. Fourth Dist., Div. One. July 8, 2016.]

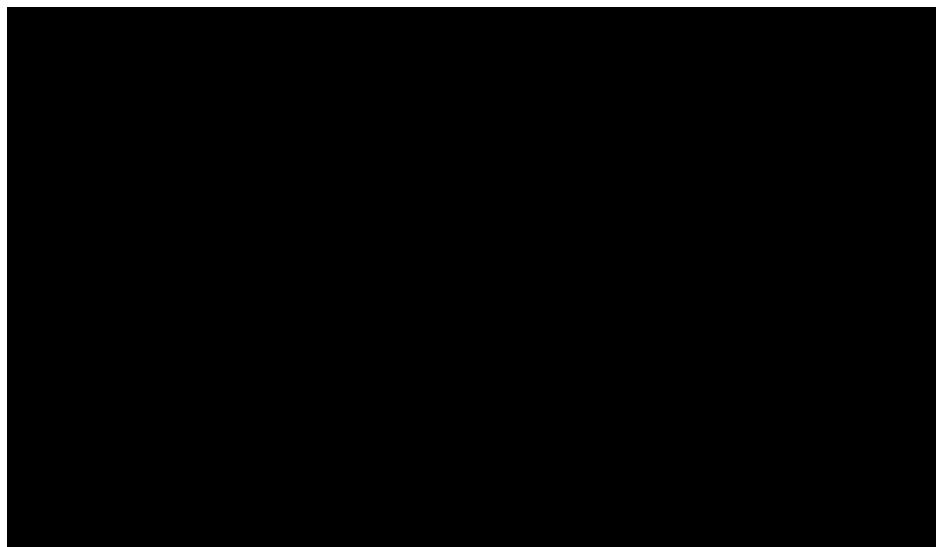
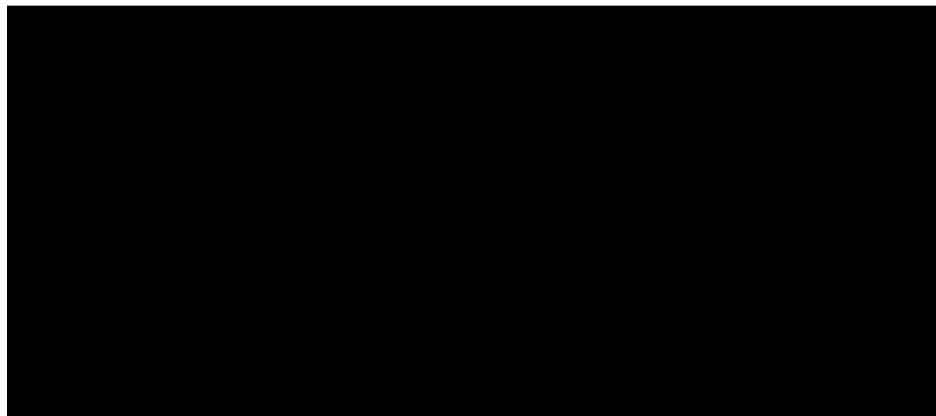
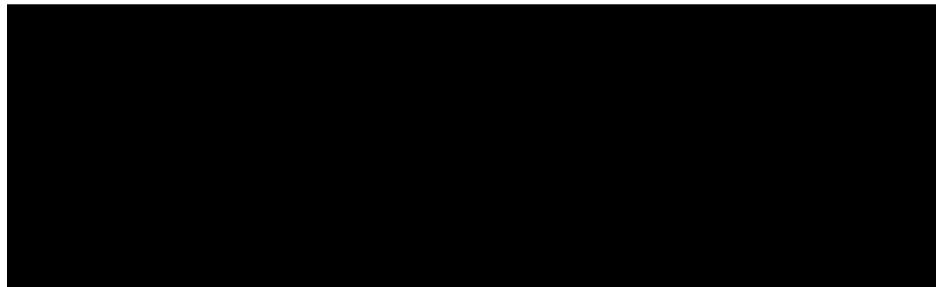
CITY OF CARLSBAD, Plaintiff and Appellant, v.
ED SCHOLTZ, Defendant and Respondent;
STEVEN SEAPKER, Real Party in Interest and Respondent.

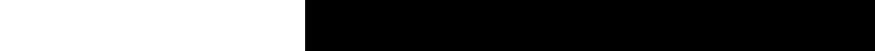
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COUNSEL

Liebert Cassidy Whitmore, Laura J. Kalty and Stephanie J. Lowe for Plaintiff and Appellant.

Stone Busailah, Michael P. Stone, Muna Busailah, Michael D. Williamson and Travis M. Poteat for Real Party in Interest and Respondent.

No appearance for Defendant and Respondent.

OPINION

THE COURT.*—This case presents the question of whether a judgment denying a petition for writ of mandate challenging an evidentiary ruling of a hearing officer is an appealable final judgment or a nonappealable interlocutory judgment. We publish this order to clarify a judgment denying a petition for writ of mandate challenging an evidentiary ruling of a hearing officer is a nonappealable interlocutory judgment where, as here, the superior court did not deny the petition on the merits, the administrative proceedings before the hearing officer have not concluded, the hearing officer is not the final administrative decision maker, and the hearing officer's decision did not create a substantial risk confidential information would be publicly disclosed. We, therefore, dismiss the appeal and deny a related motion for stay as moot.

BACKGROUND

Steven Seapker is administratively appealing a decision by the City of Carlsbad (City) to discharge him from his position as a police officer. His defense to the discharge is that the City is penalizing him more harshly than it has penalized other similarly situated police officers. This defense requires some inquiry into the City's discipline of other police officers, which implicates the discovery procedures discussed in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 [113 Cal.Rptr. 897, 522 P.2d 305] (*Pitchess*). (See, e.g.,

*McConnell, P. J., Benke, J., and Irion, J.

Riverside County Sheriff's Dept. v. Stiglitz (2014) 60 Cal.4th 624, 629 [181 Cal.Rptr.3d 1, 339 P.3d 295]; see also Pen. Code, §§ 832.7, 832.8; Evid. Code, §§ 1043–1045.)

Seapker's administrative appeal has two stages: (1) a hearing before a hearing officer who will submit nonbinding findings and recommendations to the city council and (2) the review of the findings and recommendation and a final decision by the city council. Seapker's administrative appeal is in the first stage and the hearing before the hearing officer has thus far occurred on nine intermittent days between December 2014 and July 2015.

Two separate *Pitchess* issues have arisen since the commencement of the hearing. The first *Pitchess* issue arose when Seapker filed a *Pitchess* motion seeking discovery of documents related to personnel investigations and disciplinary actions of other City police officers during the preceding five years. The hearing officer granted the motion, conducted an in camera review of the personnel files of two officers, referred to by the parties as Officer H and Officer W, and ultimately ordered the disclosure of three pages from the final report of an internal affairs investigation. The hearing officer also ruled Seapker could call the two officers as witnesses.

The second *Pitchess* issue arose when the hearing officer directed a police sergeant to respond to a cross-examination question about whether an officer, referred to by the parties as Officer K, had been reprimanded for an incident in which he and Seapker were both involved and for which Seapker received a written reprimand in November 2012. The City based its decision to discharge Seapker in part on this reprimand.

The City objected to the questioning on the ground Officer K's personnel information was confidential and not subject to disclosure absent compliance with the *Pitchess* discovery procedures. However, Seapker's counsel contends he could not bring a *Pitchess* motion in this instance because he did not have a good faith belief a record of a reprimand existed. To the contrary and consistent with Seapker's disparate penalty defense, Seapker's counsel believed and was attempting to prove a reprimand did not exist. According to Seapker's counsel's offer of proof, Officer K, whom Seapker's counsel represents in unrelated matters, is prepared to testify he had engaged in the same activity as Seapker, but was not disciplined in any manner.

The hearing officer overruled the City's objection and ordered the police sergeant to answer the cross-examination question. A police lieutenant attending the hearing countermanded the hearing officer's order and directed the police sergeant not to answer the question. The police sergeant followed the police lieutenant's directive and declined to answer the question.

Seapker then moved to exclude all testimony and evidence related to Seapker's November 2012 written reprimand. The hearing officer granted the motion, struck all testimony and evidence related to the reprimand from the record, and prohibited the City from presenting any further testimony and evidence related to the reprimand.

The City filed a petition with the superior court seeking a writ of mandate (1) excluding Officer W's and Officer H's testimony as irrelevant; (2) compelling the hearing officer to comply with *Pitchess* as to Officer K; and (3) reversing the evidentiary sanctions for the police sergeant's refusal to comply with the hearing officer's order to answer the cross-examination question about Officer K.

The superior court denied the City's writ petition "on the merits," but without prejudice, primarily on the ground the City had an adequate legal remedy via a petition for writ of administrative mandate at the conclusion of the administrative appeal. The superior court considered the matter to be an evidentiary issue and questioned whether the City was entitled to bring a petition for writ of mandate every time the hearing officer made an unfavorable evidentiary ruling. The court also questioned whether the hearing officer had a clear, present, ministerial duty to conduct a *Pitchess* review of a file where there was common knowledge the file contained no disciplinary action. The court subsequently entered a judgment stating without elaboration that it denied the petition "on the merits."

DISCUSSION

A.

The City appealed the judgment and filed a motion requesting this court stay related matters pending before the superior court and the hearing officer until we decide the outcome of the appeal. Seapker opposed the motion, asserting, among other points, the judgment is not appealable because it is interlocutory. We requested the parties submit letter briefs addressing this point further.

The City contends the judgment is final and appealable because the judgment entirely disposed of the City's writ petition, there is nothing further substantively for the court to decide, there are no other matters pending before the parties in the superior court, and any future petition for administrative mandate would involve the City, not the hearing officer, and present the separate and independent issue of the validity of the City's final decision on Seapker's discharge. If the judgment is not appealable, the City requests this court exercise its discretion to treat the appeal as a petition for writ of mandate.

Seapker contends the judgment is interlocutory and not appealable because there remain issues between the parties to be adjudicated, specifically Seapker's

administrative appeal. The adjudication of Seapker's administrative appeal may obviate the need for this appeal and proceeding with this appeal would needlessly delay matters. In addition, the City is not without a remedy as it can raise its *Pitchess*-related issues in a petition for writ of administrative mandate at the conclusion of the administrative appeal.

B.

■ “The right to appeal is wholly statutory.” (*Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5 [118 Cal.Rptr.3d 571, 243 P.3d 575] (*Dana Point*); *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696 [107 Cal.Rptr.2d 149, 23 P.3d 43].) “At one time, it was thought to be settled law that an order denying a writ of mandate was an appealable order unless the trial court contemplated further orders or action on the petition. [Citations.] However, recent California Supreme Court cases have disapproved this line of authority.” (*Bettencourt v. City and County of San Francisco* (2007) 146 Cal.App.4th 1090, 1097 [53 Cal.Rptr.3d 402], citing *Griset, supra*, 25 Cal.4th at pp. 697–699, and other earlier cases.) Rather, the superior court’s judgment on the City’s writ petition is appealable only if the judgment is not an interlocutory judgment. (Code Civ. Proc., § 904.1, subd. (a)(1) [“An appeal . . . may be taken from . . . ¶ . . . a judgment, except (A) an interlocutory judgment . . . ”].)

■ “A judgment is the final determination of the rights of the parties (Code. Civ. Proc., § 577) ‘‘when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.’’ [Citation.] ‘It is not the form of the decree but the substance and effect of the adjudication which is determinative. As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that *where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final*, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory.’’ [Citation.]” (*Dana Point, supra*, 51 Cal.4th at p. 5.)

■ Although the superior court referred to its judgment as a judgment “on the merits,” the superior court did not, in fact, decide the merits of the writ petition (i.e., whether the hearing officer correctly determined Officer H’s and Officer W’s personnel information was relevant to Seapker’s administrative appeal and whether the hearing officer violated the *Pitchess* discovery procedures by ordering the police sergeant to answer a cross-examination question about whether the City reprimanded Officer K). The superior court effectively summarily denied the writ petition because the superior court determined the City had an adequate appellate remedy via a petition for

administrative mandate at the conclusion of the administrative appeal. (See Code Civ. Proc., § 1086.) The superior court did not issue a final decree with which the parties may comply or not comply.

The procedural posture of this case further supports our conclusion the judgment is not final. Seapker's administrative appeal remains pending and its adjudication is essential to a final determination of the parties' rights (i.e., whether the City properly discharged Seapker). Moreover, the hearing before the hearing officer is not the final step in the administrative appeal. The hearing officer is tasked only with making findings and recommendations to the city council. The city council must then review the findings and recommendations and may affirm, revoke, or modify them. If this appeal were to go forward, this court would not be reviewing the decision of the superior court, or even a decision of the final administrative decision maker. It would be reviewing a decision of a hearing officer who serves a purely advisory role.

Notwithstanding the absence of a final judgment, we have the discretion to treat this appeal as a writ petition. (See *Olson v. Cory* (1983) 35 Cal.3d 390, 400–401 [197 Cal.Rptr. 843, 673 P.2d 720].) However, the Supreme Court has advised against exercising this discretion except under unusual circumstances. (*Id.* at p. 401.) The City has not persuaded us such circumstances exist here.

As the superior court noted, the City has an adequate remedy for any erroneous evidentiary rulings via a petition for writ of administrative mandate at the conclusion of the administrative appeal. Further, to the extent the hearing officer erred by failing to comply with the *Pitchess* discovery procedures as to Officer K, the City also has not established the prospect of irreparable harm. The administrative hearing is closed to the public and, according to Seapker's counsel's offer of proof, there is no applicable reprimand in Officer K's personnel file and Officer K is willing to so testify. Therefore, the hearing officer's ruling requiring the police sergeant to answer Seapker's counsel's cross-examination question presented no substantial threat of the unauthorized disclosure of confidential information.

DISPOSITION

The City's appeal is dismissed. The City's motion for stay is denied as moot.

Appellant's petition for review by the Supreme Court was denied August 23, 2016, S236653.

[No. B270775. Second Dist., Div. Five. July 8, 2016.]

In re ALEXANDRIA P., a Person Coming Under the Juvenile Court Law.
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY
SERVICES, Plaintiff and Respondent, v.
J.E., Defendant and Respondent;
RUSSELL P. et al., Objectors and Appellants;
CHOCTAW NATION OF OKLAHOMA, Intervener and Respondent.

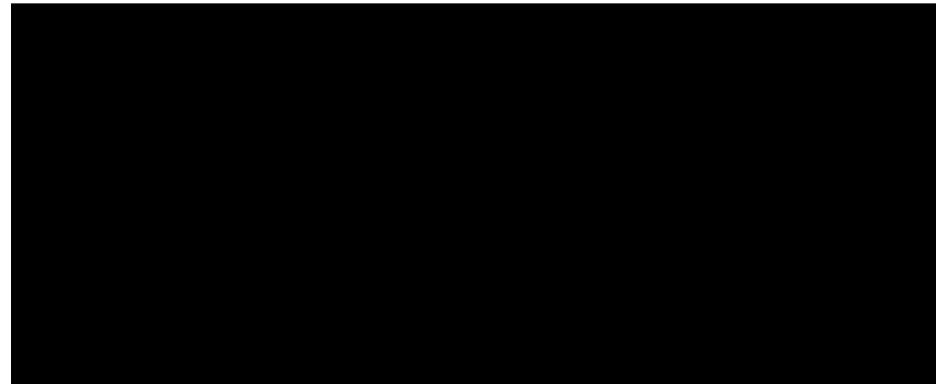
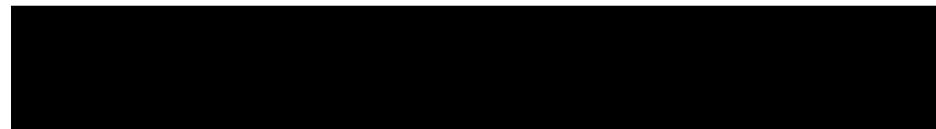
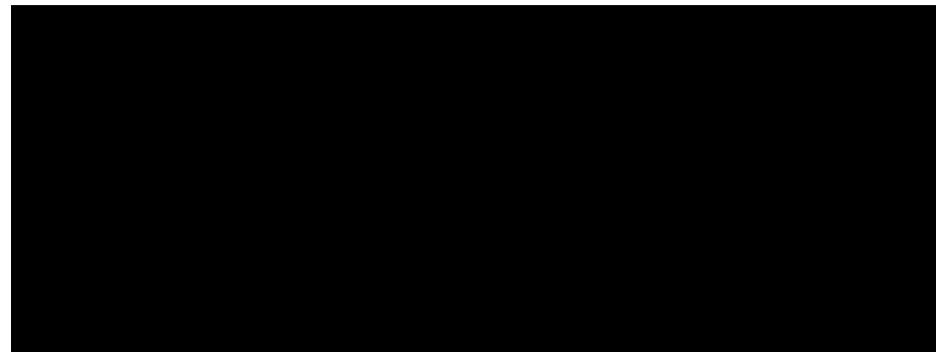
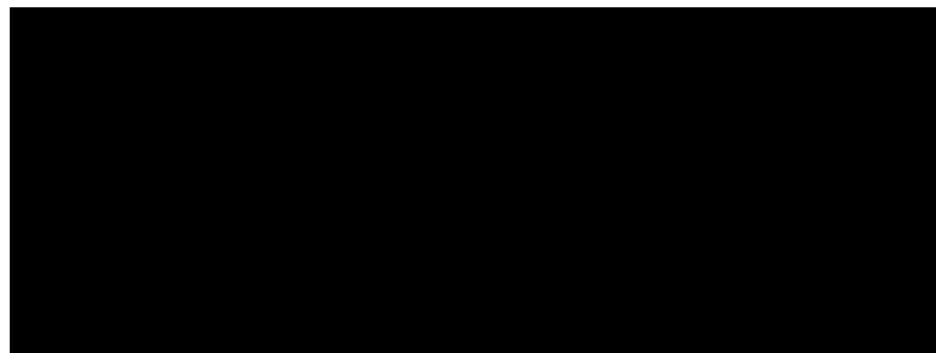
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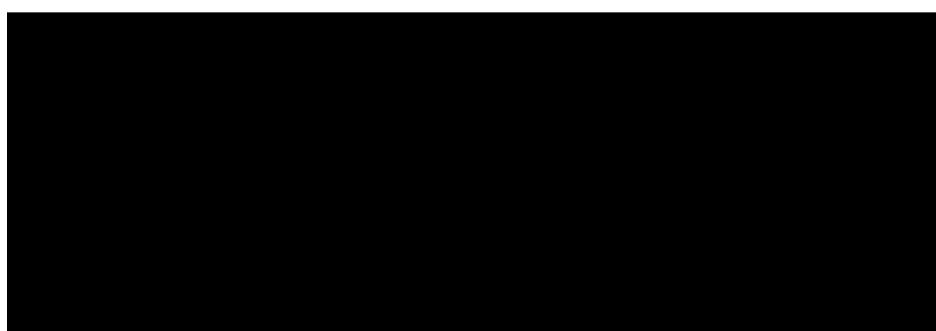
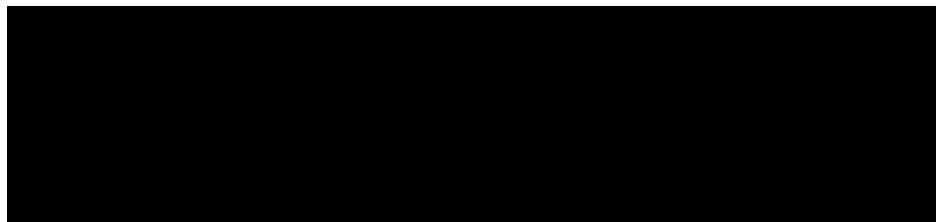
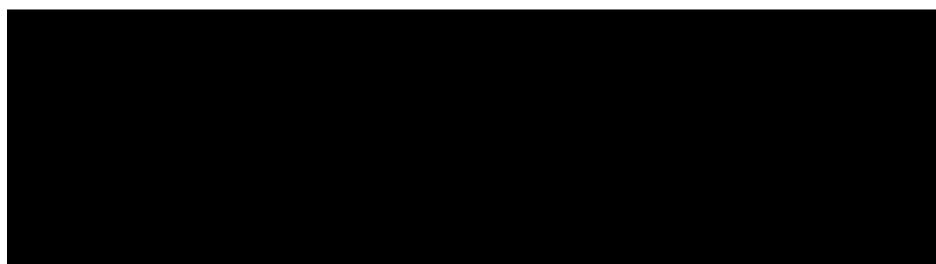
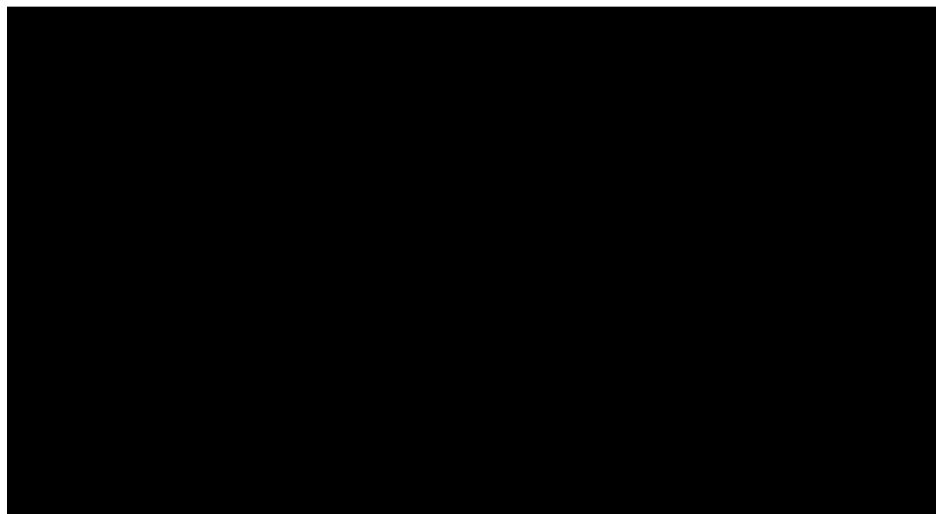
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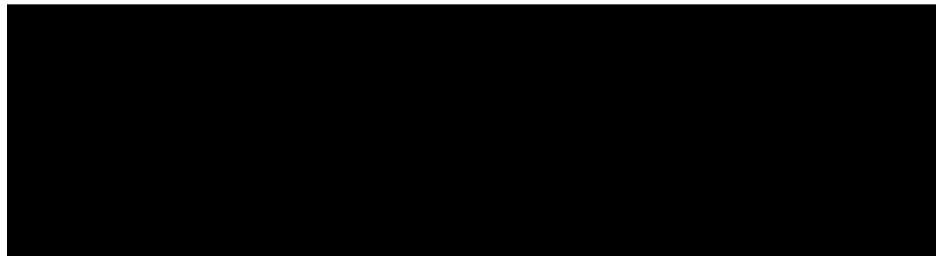
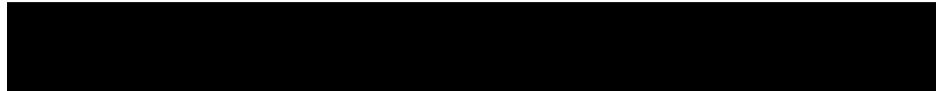
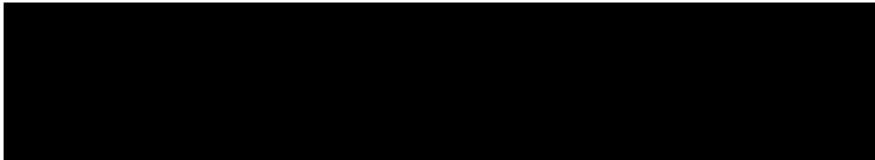
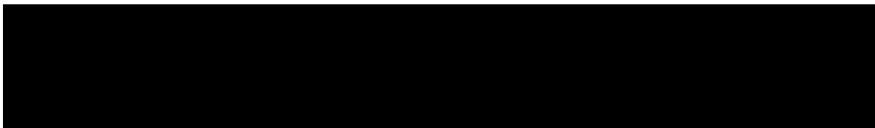
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COUNSEL

Roberto Flores; Wilkinson Walsh + Eskovitz and Lori Alvino McGill for Objectors and Appellants.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, and Kim Nemoy, Principal Deputy County Counsel, for Plaintiff and Respondent.

Joanne D. Willis under appointment by the Court of Appeal, for Defendant and Respondent.

Melissa L. Middleton for Intervener and Respondent.

Christopher Blake, under appointment by the Court of Appeal, for Minor.

Munger, Tolles & Olson, James C. Rutten, Jordan D. Segall, Wesley T.L. Burrell and Varun Behl for Advokids, Center for Adoption Policy and Professors Joan H. Hollinger, Elizabeth Bartholet and Barbara Bennett Woodhouse as Amici Curiae.

OPINION**KRIEGLER, J.—****INTRODUCTION**

For the third time this case comes before us on the issue of whether the lower court has correctly ordered an Indian child, Alexandria P., to be placed with her extended family, Ken R. and Ginger R., in Utah after concluding that Alexandria's foster parents, the de facto parents, Russell P. and Summer P., failed to prove by clear and convincing evidence that there was good cause to depart from the adoptive placement preferences set forth in the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.).¹

We have twice remanded the matter because the lower court used an incorrect standard in assessing good cause. The dependency court has now correctly applied the law governing good cause, considering the bond Alexandria has developed over time with the P.'s, as well as a number of other factors related to her best interests. Those other factors include Alexandria's relationship with her extended family and half siblings; the capacity of her extended family to maintain and develop her sense of self-identity, including her cultural identity and connection to the Choctaw tribal culture; and the P.'s relative reluctance or resistance to foster Alexandria's relationship with her extended family or encourage exploration of and exposure to her Choctaw cultural identity.

Because substantial evidence supports the court's finding that the P.'s did not prove by clear and convincing evidence that there was good cause to depart from the ICWA's placement preferences, we affirm.

PROCEDURAL BACKGROUND

We briefly review the key procedural events that have brought this case up to the current appeal.

¹ All statutory references are to 25 United States Code, unless otherwise indicated.

Initial good cause hearing and decision (Judge Pellman)

The following excerpt from our 2014 opinion (*In re Alexandria P.* (2014) 228 Cal.App.4th 1322 [176 Cal.Rptr.3d 468] (*Alexandria I*)) summarizes the initial history of the case: “A 17-month-old Indian child was removed from the custody of her mother, who has a lengthy substance abuse problem and has lost custody of at least six other children, and her father, who has an extensive criminal history and has lost custody of one other child. The girl’s father is an enrolled member of an Indian tribe, and the girl is considered an Indian child under the ICWA.^[2] The tribe consented to the girl’s placement with a non-Indian foster family to facilitate efforts to reunify the girl with her father. The girl lived in two foster homes before she was placed with de facto parents at the age of two. She bonded with the family and has thrived for the past two and a half years.

“After reunification efforts failed, the father, the tribe, and the Los Angeles County Department of Children and Family Services (Department) recommended that the girl be placed in Utah with a non-Indian couple who are extended family of the father. The de facto parents (de facto parents) argued good cause existed to depart from the ICWA’s adoptive placement preferences and it was in the girl’s best interests to remain with the de facto family. The child’s court-appointed counsel argued that good cause did not exist. The court ordered the girl placed with the extended family in Utah after finding that de facto parents had not proven by clear and convincing evidence that it was a certainty the child would suffer emotional harm by the transfer.” (*Alexandria I, supra*, 228 Cal.App.4th at pp. 1328–1329.) The de facto parents appealed, and this court issued a writ of supersedeas staying the court’s order pending resolution of the appeal, with expedited briefing. (*In re A.P.* (Mar. 4, 2014, B252999) [order].)

Court of Appeal opinion reversing and remanding

In an opinion filed August 15, 2014, we reversed and remanded for the lower court to determine under the appropriate standard whether the de facto parents could show good cause to depart from the placement preferences of the ICWA. (*Alexandria I, supra*, 228 Cal.App.4th 1322.) Our opinion acknowledged that over a year had passed since the earlier good cause hearing, and the court was free to consider facts and circumstances that arose since the filing of the first appeal. (*Id.* at p. 1357.) Remittitur issued on November 7, 2014.

² At the time of our 2014 opinion, Alexandria was eligible for enrollment as a member of the Choctaw Nation of Oklahoma. Since that time, she has become an enrolled member of the tribe.

Additional good cause hearing and decision (Judge Trendacosta)

On remand, the case was assigned to Judge Trendacosta, who held a hearing spanning five days in September 2015 to determine whether good cause existed to depart from the ICWA's placement preferences. The parties submitted written closing arguments on September 16, 2015, and Judge Trendacosta issued a November 3, 2015 statement of decision concluding that the de facto parents had not proven good cause by clear and convincing evidence.

Peremptory writ and remand

The P.'s again sought a supersedeas writ staying Judge Trendacosta's order to transfer Alexandria to the R.s' home in Utah. On November 12, 2015, we issued an order notifying the parties we were considering treating the petition for writ of supersedeas as a petition for writ of mandate, and issuing a peremptory writ in the first instance vacating the court's November 3, 2015 order and directing the court to apply the correct burden of proof. We explained the lower court's error by pointing out that Judge Trendacosta's written decision "described the burden on the de facto parents in language that is identical, word-for-word, to the language we disapproved as an incorrect statement of law in the prior appeal." (*In re Alexandria P.* (Nov. 12, 2015, B268111) [order].) Both Judge Pellman and Judge Trendacosta stated the de facto parents had not proven by clear and convincing evidence "that either the child currently had extreme psychological or emotional problems or would [definitively] have them in the future." In contrast, our *Alexandria I* opinion clarified that the de facto parents needed to show "by clear and convincing evidence that there is a significant risk that a child will suffer serious harm as a result of a change in placement." (*Alexandria I, supra*, 228 Cal.App.4th at p. 1354.)

After considering letter briefs filed by the parties, we directed the trial court to vacate its November 3, 2015 order, and enter a new placement order based on application of the burden of proof set forth in *Alexandria I, supra*, 228 Cal.App.4th at page 1354. We considered the nature of the error, the already lengthy dependency in this case, and the need for a prompt and permanent resolution of the issue of placement. We also emphasized that time was of the essence, directing the Presiding Judge of the Juvenile Court of Los Angeles County Superior Court to ensure a judicial officer was promptly assigned to the case, and directing the lower court to resolve the issue of placement within 30 days of issuance of a remittitur, absent extraordinary circumstances. We stated that we were expressing no opinion on how the issue of placement should be resolved. (*R.P. v. Superior Court* (Nov. 25, 2015, B268111)

[nonpub. opn.].) On January 29, 2016, we dismissed as moot the appeal of Judge Trendacosta's November 3, 2015 order, returning jurisdiction to the lower court.

Third good cause decision (Judge Diaz)

The case was ultimately assigned to Judge Diaz, who rendered a decision from the bench on March 8, 2016. Judge Diaz concluded the de facto parents had not shown good cause to depart from the ICWA's placement preferences, and he ordered Alexandria removed from the custody of the P.'s and placed with the R.'s in accordance with the ICWA.

Current Appeal

The P.'s appealed on March 9, 2016, and petitioned for a writ of supersedeas the following day. This court granted a temporary stay on March 11, 2016, and on March 18, 2016, we denied the petition for writ of supersedeas. In early April, we granted calendar preference and set an expedited briefing schedule, with oral arguments taking place on June 10, 2016.³

FACTUAL BACKGROUND⁴

A. *Facts preceding first good cause hearing*

In order to give adequate background information, we repeat an excerpt from our 2014 opinion summarizing the case history up to Judge Pellman's decision:

"Alexandria's Child Welfare History

"Alexandria was detained from her parents and placed with a foster family when she was 17 months old, based on concerns about her parents' ability to care for her in light of their histories of substance abuse, child welfare

³ Due to the expedited schedule, the parties and this court have relied upon the exhibits filed in connection with the writ proceedings following Judge Trendacosta's decision (B268111, seven volumes of exhibits filed by minor), and the writ proceedings following Judge Diaz's decision (B270775, four volumes of exhibits filed by the P.'s, plus one volume of expedited reporter's transcripts). None of the parties have raised an objection to the adequacy of the record for appellate review.

⁴ When the parties present either contradictory evidence or evidence from which different inferences may be drawn, the substantial evidence standard of review requires the reviewing court to resolve all contradictions and draw all inferences in favor of the judgment or order being appealed. (*Fresno County Dept. of Children & Family Services v. Superior Court* (2004) 122 Cal.App.4th 626, 642–643 [19 Cal.Rptr.3d 155] (Fresno County).)

referrals, and criminal activity. Alexandria reportedly was moved to a different foster family after suffering a black eye and a scrape on the side of her face.^[5] The P.s were Alexandria's third foster care placement, initially arranged in December 2011 as a 'respite care' placement^[6] that evolved into a long-term foster care placement. The P.s were aware that Alexandria was an Indian child and her placement was subject to the ICWA.

"By the time Alexandria was placed with the P.s in December 2011, her extended family in Utah, the R.s, were aware of dependency proceedings and had spoken to representatives of the tribe about their interest in adopting Alexandria. The tribe agreed to initial foster placement with the P.s because it was close to father at a time when he was working on reunification. If reunification services were terminated, the tribe recommended placement with the R.s in Utah.

"Alexandria's Emotional Health

"Alexandria's first months after being placed with the P.s were difficult. She was weepy at times, did not want to be held, and had difficulty differentiating between strangers and caregivers, indiscriminately calling people 'mommy' or 'daddy.' These behaviors were considered signs of a 'reactive attachment, the disinhibitive type.' The P.s addressed Alexandria's attachment issues with consistency and loving care. They did not ask the social worker for a therapy referral, understanding the issues to be ones they could work out on their own. After a few months, Alexandria's behavioral issues resolved, and she formed a strong primary bond and attachment with the entire P. family, viewing the parents as her own parents and the P. children as her siblings.

"On September 17, 2012, Alexandria began play therapy with Ruth Polcino, a therapist with United American Indian Involvement. Sessions took place weekly in the P. home. In a December 31, 2012 letter to the Department's social worker Roberta Javier, Polcino noted Alexandria's 'happiness, playfulness, sense of safety, and positive rapport with her foster parents and siblings' and concluded that her consistent, loving experience in the foster home appears to have fostered a healthy and secure attachment. Notably, the letter concludes 'Based on witnessing Alexandria in the [P.s'] household, and based on her history of repeated separation from caretakers, this therapist highly recommends that Alexandria be allowed to stay in touch with the [P.]

⁵ "Lauren Axline, a rebuttal witness called by the P.s, was the only witness who testified about the transfer from Alexandria's first foster family to her second placement. Department reports indicate that Alexandria's foster placement changed twice between April and December 2011, but do not provide any reason for the changes in placement."

⁶ "The P.s agreed to care for Alexandria while her second foster family went on vacation."

family, even after she is placed with her Aunt [Ginger R.] in Utah. This recommendation is not intended to interfere with the current adoption, but rather to allow Alexandria to stay in touch with the [P.] family as extended family who care about her.'

"An April 3, 2013 report notes the significant advancements made by Alexandria during her placement with the P.s, as well as her ability to form a healthy attachment to new caretakers: 'Alexandria's ability to re-attach to a new caretaker is stronger because of the stability that the [P.] family has provided for her. The behaviors that she presented with initially when placed with the [P.] family were much more indicative of a possible attachment disorder (i.e., the indiscriminate attachment she demonstrated with strangers). Since then, these behaviors have been almost entirely extinguished. In their place are more appropriate behaviors that are evidence of a more healthy and secure attachment'

"Father's Reunification Efforts

"[Alexandria's f]ather successfully complied with reunification services for more than six months, progressing to such an extent that he was granted unmonitored eight-hour visits. By June 2012, the Department reported a substantial probability he would reunify with Alexandria within the next six months. Shortly thereafter, however, father's emotional state deteriorated dramatically. He separated from his new wife, left California, and did not visit Alexandria after July 28, 2012. By September 2012, he had communicated to the Department that he no longer wished to continue reunification services.

"The R. Family

"Because Ginger R.'s uncle is Alexandria's paternal stepgrandfather, the tribe recognizes the R.s as Alexandria's extended family. The R.s have an ongoing relationship with Alexandria's half sister, Anna, who visits the R.s on holidays and for a week or two during the summer. Anna and Alexandria have the same paternal grandmother (who has since passed away) and stepgrandfather, and the stepgrandfather has designated the R.s to care for Anna if he should become unable to care for Anna.

"The R.s expressed their interest in adopting Alexandria as early as October 2011. They were initially told that to avoid confusing Alexandria, they should not contact her while father attempted to reunify. If reunification efforts failed, they were the tribe's first choice for adoption. The family has approval for Alexandria to be placed with them under the Interstate Compact on the Placement of Children (ICPC; Fam. Code, § 7900 et seq.). The R.s

first visited Alexandria shortly after the court terminated father's reunification services. Since then, they video chat with Alexandria about twice a week and have had multiple in-person visits in Los Angeles. The P.s refer to the R.s as family from Utah. At one point, when Alexandria asked if she was going to Utah, the P.s responded that they did not know for sure, but it was possible. Russell and Summer P. testified that before and following a recent visit by the R.s, most likely in June 2013, Alexandria was upset and said she did not want to visit with the R.s and did not like it when they came to visit. Russell P. acknowledged that the change in Alexandria's feelings coincided with the birth of a new baby in the P. family and a transition to a new therapist for Alexandria.

“The P. Family”

“Alexandria has lived with the P.s for over two and a half years, beginning in December 2011. By all accounts, they have provided her with clear and consistent rules and a loving environment. Alexandria is bonded to the P.s, and has a healthy attachment to them. The Department consistently reminded the P.s that Alexandria is an Indian child subject to the ICWA placement preferences. At some point after father’s reunification efforts failed, the P.s decided they wanted to adopt Alexandria. They discussed the issue with the Department social worker, who advised them that the tribe had selected the R.s as the planned adoptive placement.

“Transition Planning”

“As ordered by the court on April 12, 2013, the Department arranged a conference call to discuss a transition plan in anticipation of a possible court order directing placement with the R.s. The call lasted 90 minutes and included the P.s in Los Angeles; the R.s from Utah; Ruth Polcino, Alexandria’s therapist at United American Indian Involvement; Polcino’s supervisor, Jennifer Lingenfelter; Alexandria’s attorney, Kerri Anderson; and Department social worker Roberta Javier, as well as two other Department employees. The participants agreed on a transition plan that involved a relatively short transition, with both families meeting for breakfast or at a park, explaining to Alexandria that she would be going to live with the R.s, who are family who love Alexandria very much and would take good care of her. The P.s would reassure Alexandria that they love her and would always be a part of her family.” (*Alexandria I, supra*, 228 Cal.App.4th at pp. 1330–1333.)

Appeal of Judge Pellman’s Decision

After the good cause hearing, Judge Pellman issued a written order concluding that the P.’s had not demonstrated good cause to depart from the

ICWA's placement preferences. The P.'s appealed, and on August 15, 2014, we published a decision reversing and remanding the matter for a new good cause hearing. (*Alexandria I, supra*, 228 Cal.App.4th 1322.)

B. *Facts preceding second good cause hearing*

While the P.'s first appeal of Judge Pellman's decision was pending, several disputes arose between the parties. In March 2014, the P.'s insisted that they must be present for Alexandria's visits with the R.'s, despite the Los Angeles County Department of Children and Family Service (Department) clarifying that unmonitored visits were permitted. After the P.'s unsuccessfully sought Court of Appeal intervention to prevent the R.'s from taking Alexandria to Disneyland, Judge Pellman ordered that Alexandria's monthly visits with the R.'s would remain unmonitored and would be in accordance with her schedule (around things like naptime).⁷ The R.'s had a four-hour visit with Alexandria at Disneyland, but after Alexandria was delayed in returning home because the social worker was stuck in traffic, the P.'s refused to allow another visit the following day. In July 2014, Alexandria's therapist, Stephanie Wejbe, sought to transition Alexandria's play therapy with the P. family to individual sessions outside of the home. The therapist noted that she had been expressing concern in her written reports since October 2013 about distractions interfering with Alexandria's therapy and gave examples of Summer P. limiting or interfering with therapy. When the Department brought the matter to the court's attention, the P.'s opposed any changes, arguing that the court had never ordered individual therapy for Alexandria, and sessions outside the home would cause her anxiety. Judge Pellman set the matter for a subsequent hearing. Also in July 2014, the P.'s, through their foster family agency, filed a report alleging Ginger R. had driven off at the beginning of a visit when Alexandria did not yet have her seat belt on. The Department did not take any action, and its reports indicated the visit went well.

After remand, the case was assigned to Judge Trendacosta, who ordered individual therapy for Alexandria in December 2014.⁸ Alexandria seemed happier and less anxious in individual sessions and was much more open about discussing family. Wejbe felt that Summer P. was reluctant to implement some of the therapy tools she suggested for Alexandria in the home, and the P. family did not attend many of the cultural activities offered through

⁷ Pursuant to Evidence Code sections 452, subdivision (d)(1), and 459, subdivision (a), we take judicial notice of minute orders dated March 19, 2014, and March 20, 2014.

⁸ The P.'s assert in their brief that at the first in-chambers conference, they sought Judge Trendacosta's permission to obtain a bonding study and asked the judge to promptly set a date for a new good cause hearing, but their requests were ignored. The P.'s do not support these assertions with any evidence in the record, beyond their own counsel's assertion in a later hearing. An unsworn statement of counsel is not evidence. (*In re Zeth S.* (2003) 31 Cal.4th 396, 414, fn. 11 [2 Cal.Rptr.3d 683, 73 P.3d 541].)

United American Indian Involvement. During one session, Wejbe made a dream catcher with Alexandria. Summer P. testified the dream catcher had ended up in the trash.

Alexandria had consistent monthly visits with the R.'s, and video calls with them about twice a week. The video call sessions were sometimes challenging because Alexandria would get distracted. Her in-person visits with the R.'s were generally comfortable and relaxed, and Alexandria would sometimes ask to spend additional time with the R.'s. In contrast to Alexandria's demeanor during visits with the R.'s, the P.'s reported Alexandria would display anxious behaviors upon returning from visits, being clingy and sometimes crying.

The R.'s would usually include Alexandria's older half sister, Anna, in the visits. Alexandria first met Anna during a July 2013 visit, when Anna was about 12 years old. Anna lived with the R.'s for a time, but by September 2015, she had moved down the street from the R.'s. Alexandria's younger half sister Kayla was born in March 2015, and was being cared for by R.'s. Alexandria responded to Kayla positively during Alexandria's first overnight visit with the R.'s in April 2015. On a visit to Utah, Alexandria left Post-it-Notes around the house, including one on Kayla's swing, because she did not want her sister to forget her.

Ginger R. had a close relationship with Alexandria's paternal grandmother, Sharon L., who was married to Ginger's uncle. Sharon was Choctaw, with a close connection to her tribe, and considered Ginger like a daughter, sharing stories with her. Ginger also grew up in a community with many ties to Native American culture. Ginger has been in contact with the Choctaw tribe since Sharon's death in August 2011, and communicates with the tribe at least monthly, but often weekly.

The P.'s have described efforts they made to incorporate Native American culture into their lives. Summer P. has Southern Tuscarora heritage, but the tribe is not enrolling new members and is not a federally recognized tribe. They have painted one wall of their kitchen "Navajo Blue," and are members of the Autry Museum, participating in Native American arts and crafts activities. They attend an annual powwow, and shortly before the September 2015 good cause hearing, Summer and Alexandria attending a sage burning ceremony. However, Summer declined to participate in a part of the activity, and did not encourage Alexandria to participate.

Alexandria began overnight weekend visits with the R.'s in April 2015, staying with them from Friday to Sunday in southern California. In July 2015, she had a weeklong visit in Utah with the R.'s. A social worker traveled

with her, observed her transition to the R.'s, and reported that Alexandria was excited about the visit and appeared to be comfortable in the R. home. On the return trip, Alexandria told the social worker she had a great time and would like to visit her sister and the R.'s again. The P.'s felt that Alexandria was too young for overnight visits, noting that they would not let their son of the same age stay with someone overnight.

On March 26, 2015, the court appointed Linda Doi Fick to conduct an evaluation under Evidence Code 730.⁹ All parties agreed to Doi Fick as a neutral evaluator. She spent over 25 hours on interviews, observations, and consultations, plus another 20 hours reviewing case records in order to write her report, so she was familiar with the history of the case and Alexandria's relationship with the P.'s. During Doi Fick's time observing Alexandria and her interactions with the P.'s and the R.'s, Alexandria had three separate overnight visits with the R.'s, and Doi Fick met with Alexandria and/or the R.'s during or at the end of each visit. She was also able to observe in her office how Alexandria was able to transition from a visit with the R.'s back to the P.'s, and spoke by phone with the P.'s about their concerns with Alexandria's behavior and demeanor after visits with the R.'s. Doi Fick commented that Alexandria appeared to have a good rapport with minor's counsel Jennifer McCartney, who during one visit informed Alexandria of changes to the schedule, which Alexandria easily accepted.

After Doi Fick's report was completed on June 25, 2015, the P.'s asked the court to approve an independent evaluator for a bonding study, emphasizing it was necessary for the good cause hearing. Minor's counsel opposed the request. At a hearing on July 8, 2015, the court explained that Doi Fick, in her capacity as an Evidence Code section 730 expert who was well known to the court, was acting as an independent evaluator, but the court would permit the P.'s to retain an expert to review Doi Fick's report. The P.'s retained Deena McMahon, whose initial report included observations and conclusions based not only on her review of Doi Fick's report and information provided to her by the P.'s, but also observations of and interviews with the P. family and Alexandria. McMahon's report was faxed to the parties on August 17, 2015. On August 20, 2015, minor's counsel filed a motion in limine to exclude the report and sought sanctions on the grounds that the court had not authorized and the P.s' attorney never obtained permission for McMahon to speak with

⁹ Doi Fick is a licensed marriage and family therapist with a master's degree in human development. She has been a member of the court's 730 expert panel since 1991. Evidence Code section 730 states, in relevant part: "When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required."

Alexandria. On the first day of the scheduled good cause hearing, the court heard argument on minor's motion to exclude the McMahon report, and decided it would strike the report, but permit the P.'s to proffer the expert on the limited basis of her review of Doi Fick's report only.

The court's good cause hearing commenced on September 1, 2015, and continued over five separate days. During the hearing, the P.'s presented testimony from the following witnesses: (1) R.P.; (2) Summer P.; (3) McMahon, a bonding and attachment expert; (4) Dr. Michael Ward, a member of the court's Evidence Code section 730 panel; and (5) Lauren Axline, a social worker from their foster family agency. Minor's counsel called the following witnesses: (1) Doi Fick, the expert appointed by the court under Evidence Code section 730; (2) Ginger R.; (3) minor's therapist Wejbe; and (4) Dr. Carrie Johnson, a licensed clinical psychologist who is a director of Seven Generations at United American Indian Involvement and an expert on cultural identity. The Choctaw tribe called tribal social worker Amanda Robinson. Counsel for the Department and father participated in argument and cross-examined witnesses, but did not call any witnesses. The Department offered into evidence reports from January 31, 2013, through August 17, 2015, and asked the court to take judicial notice of all prior findings and orders. The only documents received into evidence from the P.'s that are part of our record on appeal are (1) a second report by McMahon,¹⁰ which does not include any information or conclusions gleaned from her observations of or interactions with Alexandria, and (2) a packet of e-mail correspondence involving the P.'s possible Indian heritage and their efforts to arrange visits with Alexandria's half sister Anna.

As explained in the procedural background section of this opinion, Judge Trendacosta issued a ruling on November 3, 2015, deciding that the P.'s had not proven good cause to depart from the ICWA's placement preferences, and ordering that Alexandria be placed with the R.'s. The ruling was then stayed by peremptory writ, and the matter remanded on January 29, 2016.

C. Facts preceding third good cause hearing

The case was assigned to Judge Diaz on February 2, 2016. On February 5, 2016, Judge Diaz requested all counsel to verify that he had the complete record to review before making a decision. The P.'s filed a request to present additional evidence on February 19, 2015. The court deferred ruling on the request because it had not yet reviewed the entire file, but emphasized that it was hesitant to permit testimony because it would cause a delay, and the appellate court had not given any specific direction about reopening the case for further testimony.

¹⁰ McMahon's original report is included as an exhibit on appeal, but it was not admitted into evidence by the trial court.

On February 26, 2016, the P.'s asked the court to either permit them to cross-examine the Department's social worker Orisco Wilson, or in the alternative, for the court to decline to review the reports submitted by the Department. The court deferred ruling on the request. When minor's counsel pointed out that the 30-day deadline set by this court was only three days away, Judge Diaz found that additional time was necessary to review all the evidence.

On March 8, 2016, the court began by explaining that it would not be appropriate to take additional evidence, given that it was not directed by the appellate court and would cause more delay. The parties argued their positions and the court issued its ruling from the bench without an accompanying written decision. It found the P.'s had not met their burden of proving by clear and convincing evidence that there was a significant risk of serious harm as a result of a change in placement. The court acknowledged Alexandria was bonded to the P.'s, and noted that it would be an "easy call" if Alexandria was going to be "removed from a family who has the strength of the bond and place[d] into a family that is significantly unknown . . ." In contrast, Alexandria had bonded with the R.'s and she had an opportunity to bond with and grow up with her half siblings as well. The court also found it was in Alexandria's best interests to provide her with the opportunity to be raised in the Indian culture, even though she would not be living on a reservation. The court ordered Alexandria to be placed with the R.'s and imposed a seven-day stay, after which Alexandria would be moved without a transition plan.

The P.'s filed a notice of appeal, and also sought another writ of supersedeas to stay Alexandria's transfer. We denied the writ petition on March 18, 2016.¹¹

DISCUSSION

The key question on appeal is whether the dependency court's decision to place Alexandria with the R. family in Utah in accordance with the ICWA's placement preferences is supported by substantial evidence. The P.'s raise a number of collateral issues as well. After reviewing the law governing good cause determinations, we address the following issues: (a) law of the case and the scope of remand; (b) good cause as a matter of law; (c) the substantial evidence supporting the court's finding of no good cause; and (d) the court's evidentiary rulings.

¹¹ The parties have attempted to call the court's attention to a number of facts that occurred after the notice of appeal was filed, most of which relate to Alexandria's transfer to the R.'s. We find the postappeal facts to be irrelevant to our review, and therefore decline to consider them.

A. *The ICWA placement preferences and good cause exception*

■ The oft-discussed history and overall requirements and presumptions of the ICWA are discussed in *Alexandria I*, *supra*, 228 Cal.App.4th at pages 1337 through 1340. Most relevant to the current discussion is the good cause exception to the ICWA's placement preferences. The ICWA provides that when an Indian child is put into an adoptive placement, "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." (§ 1915(a).) California law parallels these federal requirements, and also clarifies that the party requesting departure from the ICWA's placement preferences bears the burden of establishing the existence of good cause. (Welf. & Inst. Code, § 361.31, subd. (j); see also *In re Anthony T.* (2012) 208 Cal.App.4th 1019, 1029 [146 Cal.Rptr.3d 124].)

■ Our earlier opinion referenced guidelines enacted by the Department of the Interior, Bureau of Indian Affairs (Bureau) in 1979, which provided nonbinding guidance on implementation of the ICWA. (44 Fed.Reg. 67584 (Nov. 26, 1979); *Alexandria I*, *supra*, 228 Cal.App.4th at p. 1339.) In 2015, the Bureau issued an updated set of Guidelines for State Courts and Agencies in Indian Child Custody Proceedings (80 Fed.Reg. 10146 (Feb. 25, 2015) (2015 Guidelines)) to replace the 1979 guidelines. The Guidelines are instructive or advisory, not mandatory. (*Fresno County*, *supra*, 122 Cal.App.4th 626, 642–643.) The Bureau also subsequently issued a final rule¹² to govern the ICWA implementation. (81 Fed.Reg. 38778 et seq. (June 14, 2016).) The rule does not directly affect the current proceeding because it does not take effect until December 12, 2016.¹³ We mention the new rule here, however, because the continued relevance and viability of the 2015 Guidelines once the rule takes effect is not entirely clear. The language and substance of the rule differ from the 2015 Guidelines in ways that we will discuss in detail later in this opinion, but nothing in the rule states that it supersedes the 2015 Guidelines. Instead, the new rule states, "In some cases, the [Bureau] determined that

¹² The regulations contained in the rule will appear in title 25 of Code of Federal Regulations as "Subpart I—Indian Child Welfare Act Proceedings." Section 23.101 of the rule states "The regulations in this subpart clarify the minimum Federal standards governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families." (81 Fed.Reg., *supra*, at p. 38868.)

¹³ Section 23.143 of the rule states, "None of the provisions of this subpart affects a proceeding under State law for foster-care placement, termination of parental rights, preadoptive placement, or adoptive placement that was initiated prior to December 12, 2016, but the provisions of this subpart apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child." (81 Fed.Reg., *supra*, at p. 38876.)

particular standards or practices are better suited to guidelines; the [Bureau] anticipates issuing updated guidelines prior to the effective date of this rule (180 days from issuance).” (81 Fed.Reg., *supra*, at p. 38780.) Updated guidelines have not yet been issued, but the new rule does contain provisions that will be relevant to good cause determinations in future cases.

The portion of the 2015 Guidelines outlining what courts should consider in determining good cause cautions against giving weight to ordinary bonding that may occur in a placement that does not comply with the ICWA.¹⁴ (2015 Guidelines, 80 Fed.Reg., *supra*, at p. 10158.) The new final rule provides that “[a] placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.” (81 Fed.Reg., *supra*, at p. 38875; 25 C.F.R. § 132(e), eff. Dec. 12, 2016.) The Bureau explains the distinction between the 2015 Guidelines’ reference to a “placement that does not comply with ICWA” and the rule’s reference to a “placement that was made in violation of ICWA” as follows: “The comments reflected some confusion regarding what constitutes a ‘placement that does not comply with ICWA.’ For clarity, the final rule instead references a ‘violation’ of ICWA to emphasize that there needs to be a failure to comply with specific statutory or regulatory mandates. The determination of whether there was a violation of ICWA will be fact specific and tied to the requirements of the statute and this rule. For example, failure to provide the required notice to the Indian child’s Tribe for a year, despite the Tribe having been clearly identified at the start of the proceeding, would be a violation of ICWA. By comparison, placing a child in a non-preferred placement would not be a violation of ICWA if the State agency and court followed the statute and applicable rules in making the placement, including by properly determining that there was good cause to deviate from the placement preferences.” (81 Fed.Reg., *supra*, at p. 38846.)

On the role a child’s best interests play in a good cause determination, the 2015 Guidelines state “[t]he good cause determination does not include an independent consideration of the best interest of the Indian child because the preferences reflect the best interests of an Indian child in light of the purposes of the Act.” (2015 Guidelines, 80 Fed.Reg., *supra*, at p. 10158.) In contrast, the new regulations that the final rule will add to the Code of Federal Regulations do not contain any reference to a child’s best interests in the context of determining whether good cause exists to depart from the ICWA’s placement

¹⁴ 2015 Guidelines part IV, section F.4., subdivision (c)(3) provides that a finding of good cause could be based on the extraordinary physical or emotional needs of the child, but that “extraordinary physical or emotional needs of the child does not include ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with the Act.” (2015 Guidelines, 80 Fed.Reg., *supra*, at p. 10158.)

preferences. When the notice of proposed rulemaking that led to the final rule was available for public comment, commenters either approved of the omission of any reference to best interests, or objected to the omission. (See 81 Fed.Reg., *supra*, at p. 38847.) The Bureau's response to the comments emphasizes the risk present if courts were to use a best interests analysis as a less rigorous proxy for determining good cause in accordance with the final rule: "ICWA and this rule provide objective mandates that are designed to promote the welfare and short- and long-term interests of Indian children. Congress enacted ICWA to protect the best interests of Indian children. However, the regulations also provide flexibility for courts to appropriately consider the particular circumstances of the individual children and to protect those children. For example, courts do not need to follow ICWA's placement preferences if there is 'good cause' to deviate from those preferences. The 'good cause' determination should not, however, simply devolve into a free-ranging 'best interests' determination. Congress was skeptical of using 'vague standards like "the best interests of the child,"' H.R. Rep. No. 95-1386[, 2d Sess., p. 19 (1978)], and intended good cause to be a limited exception, rather than a broad category that could swallow the rule." (81 Fed.Reg., *supra*, at p. 38847.)

Although our decision is not subject to or controlled by these provisions of the new final rule, the Bureau's issuance of the rule makes us even more reticent to rely on the nonbinding 2015 Guidelines as persuasive authority. The final rule clarifies the Bureau's intent in including the "ordinary bonding or attachment" statement in part IV, section F.4. of the 2015 Guidelines, and no party contends that Alexandria's initial placement with the P.'s was a "placement . . . in violation of ICWA" (81 Fed.Reg., *supra*, at p. 38875)—and for good reason. The Choctaw tribe consented to the placement to facilitate efforts to reunify Alexandria with her father, and the P.'s were informed that Alexandria was an Indian child subject to adoptive placement in accordance with the placement preferences.

We do observe, however, that our earlier opinion (and our analysis here) is fully consistent with the final rule's observation that a good cause determination should not devolve into a standardless, free-ranging best interests inquiry. We held that a child's best interest was a relevant factor in determining good cause, but recognized that it was one factor among several that a court would take into account in determining good cause. (*Alexandria I*, *supra*, 228 Cal.App.4th at pp. 1355–1356.) Our citations to cases from other states made this point clear. (*Native Village of Tununak v. State, Dept. of Health & Social Services, Office of Children's Services* (Alaska 2013) 303 P.3d 431, 451–452 [good cause depends on many factors, including the child's best interests]; *In Interest of A.E.* (Iowa 1997) 572 N.W.2d 579, 585 [good cause depends on a fact determinative analysis consisting of many factors, including the best interests of the child]; *In re Interest of Bird Head*

(1983) 213 Neb. 741, 750 [331 N.W.2d 785, 791] [“[The ICWA] does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus.”].) Nothing in our opinion directed the lower court to give greater weight to any one factor over others. A court tasked with determining good cause will consider a constellation of factors in determining whether a party has proven good cause by clear and convincing evidence. Among those factors will be the Indian child’s best interests and whether the child is at significant risk of suffering serious harm as a result of a change in placement, including the effect of breaking a child’s existing attachments. (*Alexandria I*, *supra*, 228 Cal.App.4th at pp. 1352–1356.)

B. *The court’s decision did not exceed the scope of remand or disregard the law of the case.*

We reject the P.’s contentions that the lower court exceeded the scope of the remand stated in our August 15, 2014 opinion, or that it violated the law of the case established by that opinion. The opinion concluded that Judge Pellman’s 2013 decision had applied an incorrect standard for determining whether the P.’s had demonstrated good cause to depart from the ICWA’s placement preferences. Recognizing that circumstances might have changed in the one-year interim between Judge Pellman’s ruling and our decision to reverse and remand, we emphasized “that in determining whether good cause exists to depart from the placement preferences identified in section 1915(a), the court may consider facts and circumstances that have arisen since the filing of this appeal. (See, e.g., *In re B.C.* (2011) 192 Cal.App.4th 129, 150–151 [121 Cal.Rptr.3d 366] [reversing and remanding with clarification that in determining child’s best interests, the court may consider events arising since the filing of the appeal].)” (*Alexandria I*, *supra*, 228 Cal.App.4th at p. 1357.) The dependency court could consider the evidence that had already been presented, plus any new evidence it deemed relevant to the good cause determination, and decide whether the P.’s had proven by clear and convincing evidence that there was good cause to depart from the ICWA’s placement preferences, based partly on whether there was “a significant risk that [Alexandria] will suffer serious harm as a result of a change in placement.” (*Alexandria I*, at p. 1354.) We noted that “the bond between Alexandria and her caretakers and the trauma that Alexandria may suffer if that bond is broken are essential components of what the court should consider when determining whether good cause exists to depart from the ICWA’s placement preferences.” (*Id.* at p. 1355.) We also concluded Judge Pellman should have given appropriate consideration to facts relevant to Alexandria’s best interests. (*Id.* at pp. 1355–1356).¹⁵

¹⁵ Because the 2015 Guidelines are not binding (and of dubious vitality following the final rule in any event), we decline to consider whether our prior holding is affected by the issuance of those 2015 Guidelines.

■ Consistent with our earlier holding, the P.'s could discharge their burden to show, by clear and convincing evidence, good cause to depart from the ICWA's placement preferences by demonstrating there was a significant risk that Alexandria would suffer serious harm as a result of a change in placement. (*Alexandria I, supra*, 228 Cal.App.4th at p. 1354.)

The P.'s complain that Judge Diaz's decision does not comply with this court's 2014 opinion because he did not make an individualized determination of Alexandria's best interests. They also argue the dependency court impermissibly expanded the scope of its inquiry—thereby exceeding the scope of this court's remand—by considering the impact on Alexandria's cultural identity if she were to remain with the P.'s. Implicit in their claims is an argument that when conducting a best interests inquiry in the context of deciding whether good cause exists to depart from the ICWA's placement preferences, a court should not weigh considerations like cultural identity or connection to extended family, because those considerations are already incorporated into the presumption that placement in accordance with the ICWA is in an Indian child's best interests. We disagree.

The court's inquiries into substantial risk of serious harm and best interests are intertwined, fact specific, and not susceptible to strict boundaries. When the best interests of an Indian child are being considered, the importance of preserving the child's familial and cultural connections often cannot be separated from other factors. The 2015 Guidelines caution against courts conducting "an *independent* consideration of the best interest of the Indian child because the preferences reflect the best interests of an Indian child in light of the purposes of the Act." (2015 Guidelines, 80 Fed.Reg., *supra*, at p. 10158, italics added.) The regulations added by the recently issued final rule, which are intended to be binding on future state court determinations of good cause, are silent on what role a child's best interests will play in such a determination. While we reaffirm our earlier holding that a court should take an Indian child's best interests into account as one of the constellation of factors relevant to a good cause determination, we reject the P.'s argument that the best interests inquiry should exclude consideration of her connection to extended family or her cultural identity. We also caution against using the best interests concept as carte blanche to seize upon any showing as sufficient reason to depart from the ICWA's placement preferences.

Judge Trendacosta and Judge Diaz considered Alexandria's best interests as part of their good cause determinations. Judge Diaz reviewed all of the testimony and evidence presented to Judge Trendacosta, and his ruling from the bench reflected his familiarity with the relevant facts. By considering details specific to Alexandria's circumstances, he conducted a best interests

analysis. In the absence of any evidence that either Judge Trendacosta or Judge Diaz intentionally disregarded this court's directions on remand, we hold the court's March 8, 2016 decision complies with both the law of the case and our directions on remand.

C. *Good cause does not exist as a matter of law.*

We reject any argument that the facts before the court constituted good cause as a matter of law. The P.'s frame the issue as compelling a particular result because Alexandria has been a part of their family for over four years. In their view, because Alexandria had a strong primary bond to the family—which all parties and the court concede she did—she would inevitably suffer trauma if that bond was broken, and so good cause exists as a matter of law. They support their argument by citing to cases and a statute where a minor's interest in stability and permanency prevailed over a biological parent's interests. (See, e.g., Fam. Code, § 3041, subd. (c); *In re Jasmon O.* (1994) 8 Cal.4th 398, 419 [33 Cal.Rptr.2d 85, 878 P.2d 1297] [recognizing child's right to stability and permanence based on risk of serious harm from severing bond to de facto parents]; *In re Marilyn H.* (1993) 5 Cal.4th 295, 306 [19 Cal.Rptr.2d 544, 851 P.2d 826]; *Guardianship of Zachary H.* (1999) 73 Cal.App.4th 51, 64 [86 Cal.Rptr.2d 7].)

■ This argument ignores the multifaceted analysis that precludes reducing a good cause determination to a single question. The longevity of a child's foster placement may sometimes be relevant to deciding whether good cause exists to depart from the ICWA's placement preferences, but it cannot be the sole deciding factor. (See, e.g., *Matter of Adoption of Halloway* (Utah 1986) 732 P.2d 962, 971–972 [acknowledging that placement stability is a paramount value, but it is not “the sole yardstick” for judging the validity of a child's placement].) The United States Supreme Court has cautioned that courts should not “‘reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.’ [Citation.]” (*Mississippi Choctaw Indian Band v. Holyfield* (1989) 490 U.S. 30, 54 [104 L.Ed.2d 29, 109 S.Ct. 1597].) In addition, making the longevity of Alexandria's placement with the P.'s a determinative factor would ignore not just the overall policy behind the ICWA, but also the more general state policy favoring preservation of extended family and sibling relationships in the dependency context.¹⁶

¹⁶ For example, California's dependency statutes require social workers to investigate and locate relatives who may be potential caretakers for children who are removed from their parents, and require courts to consider relative placement as an option. (Welf. & Inst. Code, §§ 309, 319.) Other statutes underscore the importance of ensuring that siblings are placed together in foster care, unless such arrangements are contrary to a minor's safety or well-being. (Welf. & Inst. Code, §§ 361.2, subd. (f)(3), 361.3, subd. (a)(4), 16002, subd. (a)(1).) In

A holding that the facts before us constituted good cause as a matter of law would circumvent the policies favoring relatives and siblings, and it would incentivize families who knowingly accept temporary foster placements to delay an Indian child's ultimate adoptive placement in the hope that as time passes, the family will reach a "safe zone" where harm to a child from disrupting his or her primary attachment is presumed as a matter of law. It is unwise and unnecessary to stretch the bounds of California law in that manner.

We also reject the P.s' contention that the federal Adoption and Safe Families Act of 1997 (the Act) (Pub.L. No. 105-89 (Nov. 19, 1997) 111 Stat. 2115) requires a finding of good cause as a matter of law. The Act encourages child welfare agencies to engage in concurrent planning, meaning that while reunification services for parents are proceeding, the agencies concurrently identify and approve qualified families for adoptive placement if reunification efforts fail. Here, the Department and the tribe identified and approved the R.'s as Alexandria's proposed adoptive placement by late 2012. This case is therefore unlike *In the Matter of M.K.T.* (2016) 2016 OK 4, ¶¶ 67–72 [368 P.3d 771, 791–792], where a tribe opposed a good cause finding even though it had no available adoptive placement two and a half years after the state had assumed custody of the minor. The only delay to Alexandria's adoptive placement has been ongoing litigation over the good cause exception to the ICWA's placement preferences. There is no need to find good cause as a matter of law to avoid a conflict with the Act.

D. There is substantial evidence to support the court's conclusion that the P.'s have not shown good cause to depart from the ICWA preferences.

Substantial evidence standard of review

In evaluating whether there is substantial evidence to support the court's finding that there was no good cause to depart from the ICWA's placement preferences, we apply the standard of review stated in *Alexandria I*.¹⁷ "When

addition, the Bureau's new regulations include "[t]he presence of a sibling attachment that can be maintained only through a particular placement" as a consideration upon which a determination of good cause can be based. (81 Fed.Reg., *supra*, at p. 38874; 25 C.F.R. § 23.132(c)(3) (2016).)

¹⁷ We acknowledge the P.'s seek an abuse of discretion standard of review, because a court making a good cause determination must make factual findings and then apply the facts to legally relevant factors. The county recommends a hybrid approach used by some courts when reviewing application of the beneficial parental relationship exception to termination of parental rights under Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i). Having reviewed the record on appeal, we would affirm under either standard. (See, e.g., *In re G.B.* (2014) 227 Cal.App.4th 1147, 1166, fn. 7 [174 Cal.Rptr.3d 405].)

a party appeals a good cause determination, the appellate court usually applies a substantial evidence standard of review. (*Fresno County, supra*, 122 Cal.App.4th at pp. 644–646.) ‘Under this standard, we do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence, or reweigh the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court’s order and affirm the order even if there is other evidence supporting a contrary finding. [Citations.] The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the court’s findings. [Citation.]’ (*In re G.L.* (2009) 177 Cal.App.4th 683, 697–698 [99 Cal.Rptr.3d 356].)’ (*Alexandria I, supra*, 228 Cal.App.4th at p. 1352.)

Substantial evidence supports a finding of no good cause

The P.’s focus on what they characterize as uncontradicted expert testimony that Alexandria would definitely suffer significant harm if her primary attachment to the P.’s was broken. They argue that because the Evidence Code section 730 expert Doi Fick gave no opinion on that topic, the court’s finding of no good cause lacked evidentiary support. They also claim there was no evidence to support the court’s assumptions that the tribe would be available to support Alexandria’s transition, and that Alexandria saw the R.’s as family.

■ The absence of a report contradicting the opinion of the P.s’ retained expert and the fact that the court drew inferences from evidence about Alexandria’s access to a support system in Utah does not lead to the inevitable conclusion that there was no substantial evidence to support the court’s ruling. Instead, viewing the record as a whole and in the light most favorable to the court’s finding, we conclude that the evidence presented by minor’s counsel, the Department, and the tribe regarding Alexandria’s ability to navigate and develop new attachments; the benefits of preserving the connection to her extended family, half siblings, and her cultural identity; and the adverse effects of the P.s’ unwillingness or inability to support Alexandria’s relationship with the R.’s, constitute substantial evidence that good cause did *not* exist to depart from the ICWA’s placement preferences.

The P.’s primarily rely on four cases they contend establish that the risks of harm to a child removed from a long-term placement are sufficient to establish good cause: *In re N.M.* (2009) 174 Cal.App.4th 328, 335 [94 Cal.Rptr.3d 220]; *In re A.A.* (2008) 167 Cal.App.4th 1292 [84 Cal.Rptr.3d 841]; *Fresno County, supra*, 122 Cal.App.4th 626; and *In re Brandon M.* (1997) 54 Cal.App.4th 1387 [63 Cal.Rptr.2d 671]. In each of these cases the lower court found that good cause had been proven, and the appellate court upheld the determination. Our case comes to us in the opposite procedural posture. The P.’s were the party with the burden of proof, needing to

demonstrate good cause by clear and convincing evidence. (*Alexandria I, supra*, 228 Cal.App.4th at pp. 1348–1352.) To establish that the lower court’s decision was erroneous, they would need to demonstrate that viewing the evidence in the light most favorable to the court’s finding, no judge could reasonably reach the same conclusion. (See, e.g., *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [93 Cal.Rptr.2d 644].)

We understand the court’s decision was not an easy one. When an Indian child has been in a stable foster placement for a long period of time, the inquiry into whether good cause exists to depart from the ICWA’s placement preferences is one of the most difficult determinations a court can make. The pertinent inquiry on appeal is whether substantial evidence supports the finding, not whether a contrary finding might have been made. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228 [33 Cal.Rptr.3d 337].)

The most significant evidence in support of the court’s finding is the report and testimony by Doi Fick. According to Doi Fick, “Alexandria has formed a safe, secure, primary attachment to the [P.’s]. She has formed sibling attachments to the [P.s’] children These attachments have made it possible for Alexandria to form collateral attachments to other meaningful people.” Alexandria had been able to form meaningful and affectionate collateral attachments to the R.’s and her half sisters, Anna and Kayla. Doi Fick noted that if Alexandria were to lose her strong sibling relationship with Anna, it would shake her sense of identity. Both Doi Fick and Alexandria’s therapist Wejbe felt the R.’s would be supportive of a continued relationship between Alexandria and the P.’s. Both also expressed concern that the P. family would be unable to support a continuing relationship between Alexandria and the R.’s and her half sisters, Anna and Kayla. The R.’s were also better able to provide Alexandria with a connection to her cultural identity, as Ginger previously had a close relationship with Alexandria’s paternal grandmother, Sharon L.

In the section of her report titled, “Opinion and insight on Alexandria’s mental and/or emotional health if relationship and/or attachment she has with the P. family is broken,” Doi Fick proffered that there need not be a break in Alexandria’s relationship with the P.’s, and that continuing to maintain some sort of relationship would benefit Alexandria: “Alexandria is a resilient child who has developed coping and adjustment skills. Change is not without reaction. Many of the behaviors and/or anxiety symptoms described by the [P.’s] are due to lack of support within their home, conflicted emotions stimulated by the other children, or issues commonly addressed by therapists when such changes are occurring.” Doi Fick was concerned that a continued loyalty conflict, where Alexandria felt the need to please both the P.’s and the R.’s, would affect Alexandria negatively.

Doi Fick acknowledged Alexandria's move would be difficult, but opined Alexandria has "the emotional resilience, and adaptive, adjustment, and coping skills to resolve a change in place." Doi Fick believed that with therapeutic assistance, Alexandria would be able to adjust and form a new primary attachment with the R.'s. "Her adaptive and coping ability indicate that a positive outcome is likely and with therapeutic assistance, she would likely make a successful adjustment, especially if the [P.s] will continue to maintain a supportive relationship with her."

The P.'s argue that because Doi Fick did not directly state an opinion on whether Alexandria was at significant risk of substantial harm based on a move to Utah, her opinion lacks the weight and specificity necessary to counter their own expert's opinion that Alexandria would suffer trauma if her primary attachment to the P.'s was broken. The lack of a direct correlation between the two expert opinions is not a basis to ignore Doi Fick's observations and conclusions. Doi Fick testified that because Alexandria had a strong collateral bond with the R.'s, looking to them for nurturance, structure, and cooperation, and was able to form that collateral bond based on her strong primary bond with the P.'s, she would be able to transition to custody with the R.'s. She also explained that children are able to have multiple primary attachments in situations with divorced parents or a caretaker who cares for a child from a young age. The P.s' emphasis on possible trauma to Alexandria resulting from a move away from the P.'s ignores the strength of her connection to the R.'s. The court in its ruling emphasized Alexandria was not being placed "into a family that it significantly unknown to the child," but rather her placement would reinforce the bond she already had with the R.'s, and would give her the "opportunity to bond with, to live with, to grow up with" two of her siblings as well.

■ The P.'s disagree with the premise of Doi Fick's report that placement with the R.'s does not necessarily mean that Alexandria's bond with the P.'s must be broken. Dependency law, however, recognizes that unusual arrangements are occasionally crafted to serve the best interests of a child. For example, a parent who is unable to provide day-to-day care for a child may sometimes be permitted to maintain a relationship with the child, while another adult takes up permanent guardianship. (See, e.g., Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i); *In re Scott B.* (2010) 188 Cal.App.4th 452, 470 [115 Cal.Rptr.3d 321] [applying parent-child relationship exception to conclude that guardianship, rather than adoption, was the correct permanent plan].)

Additional evidence weighing against a good cause finding is that the R.'s offer Alexandria a better opportunity to maintain a relationship with two of her siblings, Anna and Kayla. Fourteen-year-old Anna has known the R.'s

most of her life, and for a time was living with them. Infant Kayla was placed with the R.'s sometime shortly after her birth in March 2015. Alexandria first met her during a visit with the R.'s when Kayla was just three weeks old, and had seen Kayla on all her visits with the R.'s up to the September 2015 good cause hearing. At trial, the P.'s relied heavily on e-mails to demonstrate that they had attempted to arrange visits between Alexandria and Anna, but evidence of these unsuccessful efforts does not negate the fact that the R.'s had been able to provide Alexandria contact and a meaningful connection with her siblings, where the P.'s had not. The P.'s also argue on appeal that there was no substantial evidence to support Judge Diaz's statement that placement with the R.'s would give Alexandria the "opportunity to bond with, to live with, [and] to grow up with" her siblings. While the P.'s brief speculates about whether Anna has continued contact with the R.'s and whether Kayla remained with them after the September 2015 hearing, there is no evidence supporting the speculation. The evidence from the September 2015 hearing established that Anna was living down the street from the R.'s, and that Kayla had lived with the R.'s since her birth in March 2015 until the hearing. Both Anna and Kayla have come with the R.'s to visit Alexandria, and Alexandria visited with both on a visit to Utah. The most reasonable inference from the evidence is that the R.'s can best facilitate a continuing relationship between Alexandria and Anna, as well as ensuring that Alexandria and Kayla develop a relationship as they both grow older. Because there was substantial evidence that Alexandria's relationship with her siblings was meaningful and significant, it was reasonable for the trial court to consider the potential long-term benefit of preserving these relationships in weighing Alexandria's best interests.¹⁸

The P.'s also attempt to paint the record as lacking in hard evidence of the R.'s ties to Choctaw culture. Ginger R.'s testimony on this point is sufficient to support a reasonable inference that she will be more effective than the P.'s with giving Alexandria access to her cultural identity.

The P.'s argue that the lower court and respondents placed too great an emphasis on the P.'s knowledge, when they accepted Alexandria into their home, that the placement was temporary and the ICWA's placement preferences applied. They ask us to view the bond from Alexandria's perspective, noting that a two year old cannot be asked to understand the concept of a "temporary placement." However, this argument does not adequately respond to an issue raised by the evidence, which is a concern about the extent to which the P.'s were unable to carry out their role as foster parents in

¹⁸ In fact, under the new regulations that will take effect in December this year, the preservation of such sibling relationships is an explicit consideration when a court is deciding whether good cause exists to depart from the ICWA's placement preferences. (81 Fed.Reg., *supra*, at p. 38874.)

supporting Alexandria as she developed a relationship with the R.'s, who the tribe had identified as an adoptive placement. Evidence of their resistance to increasing visitation, and evidence they insisted that visits and therapy include the entire P. family, rather than Alexandria alone, gives further support to the court's finding that Alexandria's best interests weighed in favor of a change in placement.

Taken together, the evidence and testimony presented at the September 2015 hearing provide substantial evidence to support the court's decision that the P.'s did not carry their burden of proving good cause to depart from the ICWA's placement preferences.

Opposing positions of the P.'s and minor's counsel

■ The P.'s also do not—and in our view cannot—provide an adequate response to an issue raised most effectively by minor's appellate counsel. Even though they appear before the court by virtue of their status as the de facto parents, the P.'s efforts to show good cause are motivated by their own interests. Minor's counsel, not the P.'s, has a legal and ethical obligation to represent Alexandria's interests.¹⁹ (*In re Josiah Z.* (2005) 36 Cal.4th 664, 675–677 [31 Cal.Rptr.3d 472, 115 P.3d 1133].) The P.'s lack the right to assert Alexandria's interests because Alexandria has her own counsel, who represents her interests and also acts as her guardian ad litem. (*In re Zamer G.* (2007) 153 Cal.App.4th 1253, 1263–1271 [63 Cal.Rptr.3d 769] [discussing the role of minor's counsel and guardian ad litem and explaining "it is the attorney's role to make a reasonable, independent determination of the minors' best interests, notwithstanding the minors' preferences"]; see also Welf. & Inst. Code, §§ 317, subd. (e)(1) ["[c]ounsel shall be charged in general with the representation of the child's interests"], 326.5 [child's guardian ad litem may be an attorney or a court-appointed special advocate]; Cal. Rules of Court, rules 5.660, 5.662.) In this case, Alexandria's trial counsel, who replaced prior counsel in October 2014, had visited the minor in multiple settings and established a good rapport with her. For example, when it became necessary to inform Alexandria about a change in plans for a visit with the R.'s, requiring an unexpected transition back to the P.'s for a family barbecue, minor's counsel informed Alexandria of the change. The court's Evidence Code section 730 expert expressed surprise at the ease with which Alexandria accepted the change in plans, and when she asked Alexandria who explained it to her, Alexandria confidently replied "Jennifer [minor's counsel] explained it. She's nice."

¹⁹ We cannot agree with the statement in the P.'s opening brief that "Minor's trial counsel, who vigorously represented the interests of the R.'s, consistently fought the premise of this Court's remand." The record demonstrates that minor's trial counsel was consistently focused on the best interests of her client Alexandria, and comported herself in a professional and ethical manner.

We recognize that the P.'s are claiming that Alexandria's best interests are served by a finding of good cause, but their argument is undermined by the fact that minor's counsel argued just the opposite. We are unaware of any published case where a court has upheld a departure from the ICWA's placement preferences contrary to the position of the minor. In other words, in every published case upholding a good cause finding, counsel for the minor either advocated for the finding, was aligned with the party advocating for a finding of good cause, or was silent. (See, e.g., *In re N.M.*, *supra*, 174 Cal.App.4th at p. 334 [affirming good cause finding in case where father, the tribe, and the Department all favored the ICWA-compliant placement with the paternal grandmother, while minor's counsel favored departure from the ICWA and placement with nonrelative]; *In re A.A.*, *supra*, 167 Cal.App.4th at pp. 1329–1330 [affirming good cause finding against tribe and relatives advocating moving minors into an ICWA-compliant placement from their stable foster placement, where minor's counsel was silent]; *Fresno County*, *supra*, 122 Cal.App.4th at p. 632 [affirming good cause finding where minor's attorney opposed recommendation by tribe, Department, and mother to follow the ICWA's placement preferences].) The P.'s fail in their attempt to analogize this case to others where minor's counsel supported a non-ICWA-compliant placement as being in a child's best interests, because here, minor's counsel supported an ICWA-compliant placement, presented evidence, and argued against a good cause finding.

E. *The court's evidentiary rulings were not an abuse of discretion.*

We review the lower court's evidentiary decisions for abuse of discretion. (*In re Roberto C.* (2012) 209 Cal.App.4th 1241, 1249 [147 Cal.Rptr.3d 505].)

Exclusion of McMahon's initial report

The P.'s claim that the court erred when it initially deferred their request to conduct a bonding study, and then erred again when it excluded the full report prepared by their bonding and attachment expert, McMahon. The error, if any, was harmless.

First, while the P.'s claim they were prejudiced by the court's delay in appointing a bonding expert, there is no admissible evidence of an earlier request in the record. Instead, the P.'s cite to the argument of their own counsel in July 2015, after the Evidence Code section 730 expert had completed her report.

Second, the court had before it ample evidence about the extent to which Alexandria had bonded to the P.'s, and the extent to which a change in placement would create a significant risk of serious harm. Well in advance of

the September 2015 good cause hearing, the court appointed a neutral evaluator, Doi Fick, under Evidence Code section 730. The court's appointment order directed Doi Fick to examine Alexandria, the P.'s, and the R.'s, and to speak with Alexandria's therapist Wejbe, as well as any other person she deemed necessary and appropriate. The order directed Doi Fick to prepare a report containing her opinions, findings, and conclusions on nine different issues, including Alexandria's attachment to the P.'s and the R.'s, "the trauma or impact on Alexandria's mental and/or emotional health" if her attachment with the P. family was broken, and how open the P.'s and the R.'s were to discussing her psychological and emotional well-being. To the extent the P.'s believed Doi Fick had not adequately addressed the required topics in her report, they did not raise an objection. More importantly, no party argued that Alexandria was not bonded to the P.'s, and the only portion of McMahon's report that was removed pertained to her observations of and interactions with Alexandria.

Third, the court's decision to exclude portions of McMahon's report were based on counsel's failure to advise the expert of the limitations the court had placed on her activities. The court had wide discretion on this issue, and even if it was error to exclude the report, any error was harmless because it was undisputed that Alexandria had a strong, primary attachment to the P. family. McMahon testified at the good cause hearing and gave her opinion about the importance of stability and the likelihood Alexandria would suffer trauma. The fact that portions of her report based on her observations of Alexandria had to be removed before her report was admitted into evidence does not rise to the level of prejudicial error.

Cross-examination of social worker

Relying on his discretion under Evidence Code section 352, Judge Trendacosta denied the Ps' request to call Wilson, a Department social worker, as a witness. Later, the P.'s sought to either cross-examine Wilson or have Wilson's reports excluded. Judge Diaz did not take any new testimony, and so did not grant either request.

The P.'s argue that it was an abuse of discretion per se to consider the reports without allowing them to cross-examine the author, citing to *In re Matthew P.* (1999) 71 Cal.App.4th 841, 851–852 [84 Cal.Rptr.2d 269]. The facts here are more analogous to those at issue in *In re Damion B.* (2011) 202 Cal.App.4th 880 [135 Cal.Rptr.3d 742]. In that case, medically fragile twins had lived with the de facto parents since they were six months old, and the social service agency recommended that the children be returned to their mother. The de facto parents opposed the recommendation, and sought an evidentiary hearing. The dependency court noted that it had appointed

counsel to represent the de facto parents, and had considered evidence in the form of caretaker information forms, but it would not permit the de facto parents to cross-examine the social worker. (*Id.* at pp. 883–887.) The Court of Appeal affirmed because the de facto parents had ample opportunity to make their position known to the court, unlike the parents in *In re Matthew P.*, who had been denied any opportunity to fully present their position. In the hearing before Judge Trendacosta, the P.’s had ample opportunity to present evidence, testimony, and argument. The P.’s called five witnesses, including a social worker and two experts who were critical of Doi Fick’s report. The court hearing took place over five separate days, with a total of 10 witnesses. The court reasonably exercised its discretion, because any testimony by Wilson would be cumulative of testimony already before the court. As Judge Trendacosta made clear when he denied the request to have Wilson on call to testify, the P.’s had already “testified at some length about their communication, or . . . lack thereof, with the Department,” and the hearing was not focused on what the Department did or did not do. Similarly, Judge Diaz did not abuse his discretion in denying the P.s’ motion to either exclude the Department reports or permit examination of Wilson.

Request to present additional evidence or testimony

The P.’s argue that a court cannot make credibility determinations or assign relative weight to evidence without hearing live testimony. We disagree. Judge Diaz was following our peremptory writ in assuring that the matter was resolved as promptly as possible, and permitting live testimony would only delay a decision. In our peremptory writ, we specifically directed, “Absent a determination of good cause in the discretion of the dependency court, the court is not obligated to consider additional evidence on the issue of placement.” (*R.P. v. Superior Court* (Nov. 25, 2015, B268111) [nonpub. opn.].) We also directed the court to resolve the issue of placement within 30 days.

Although the P.’s requested to present additional testimony, they did not establish that there was good cause to do so. Their only argument was that a half-year had passed, and additional evidence, including testimony from Alexandria and her kindergarten teacher, would assist the court in making its decision. Simply put, since Judge Diaz was well aware of our November 25, 2015 order and the need to resolve the good cause issue expediently, he did not abuse his discretion in denying the request for additional testimony.

■ To the extent the P.’s are arguing that the court could not make credibility determinations without live testimony, they are essentially arguing that Judge Diaz should have conducted a new good cause hearing, rather than reviewing the court records and the earlier hearing transcripts to make his

determination. That was never our intent. Principles of appellate review constrain the appellate courts from making credibility determinations through transcripts alone. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 494 [274 Cal.Rptr. 911].) But there is no bar to a judge reviewing the record to reach a determination, even in a criminal case. (See, e.g., *People v. Collins* (2010) 49 Cal.4th 175, 257–258 [110 Cal.Rptr.3d 384, 232 P.3d 32] [not a denial of due process for a judge other than the original trial judge to review the record and rule on a motion under Pen. Code, § 190.4, subd. (c), for an automatic application to modify a death penalty verdict].)

DISPOSITION

The court's order finding no good cause to depart from the ICWA's adoptive placement preferences and directing Alexandria to be placed with the R.'s is affirmed.

Turner, P. J., and Baker, J., concurred.

Appellants' petition for review by the Supreme Court was denied September 14, 2016, S236462. Corrigan, J., did not participate therein.

[No. C075191. Third Dist. July 11, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
ADAM BILL RANLET, Defendant and Appellant.

[REDACTED]

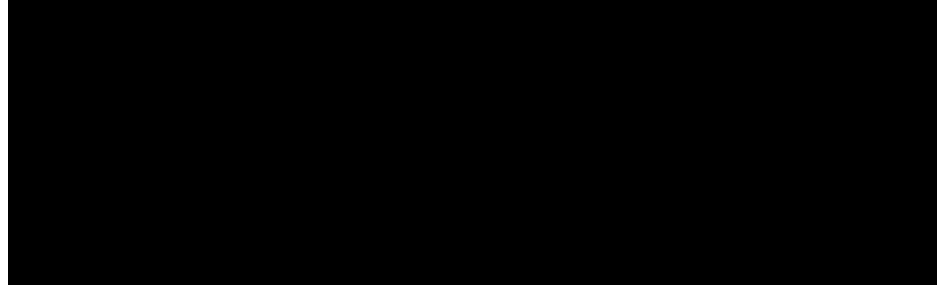
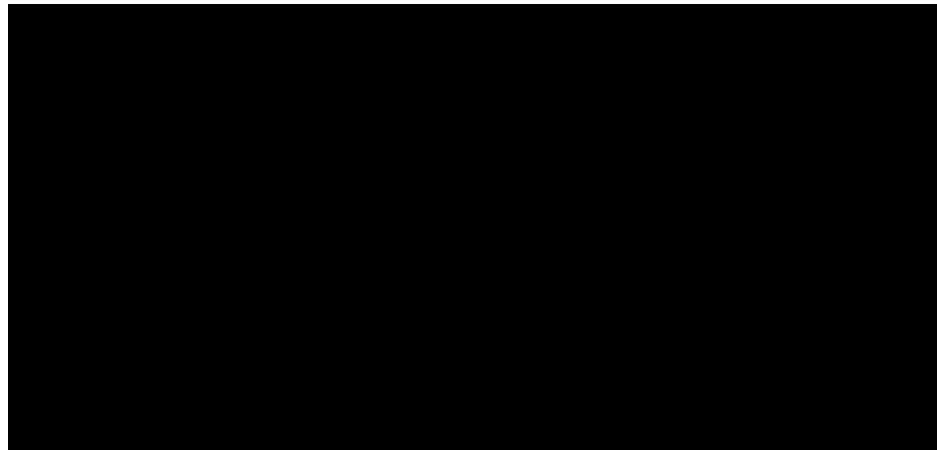
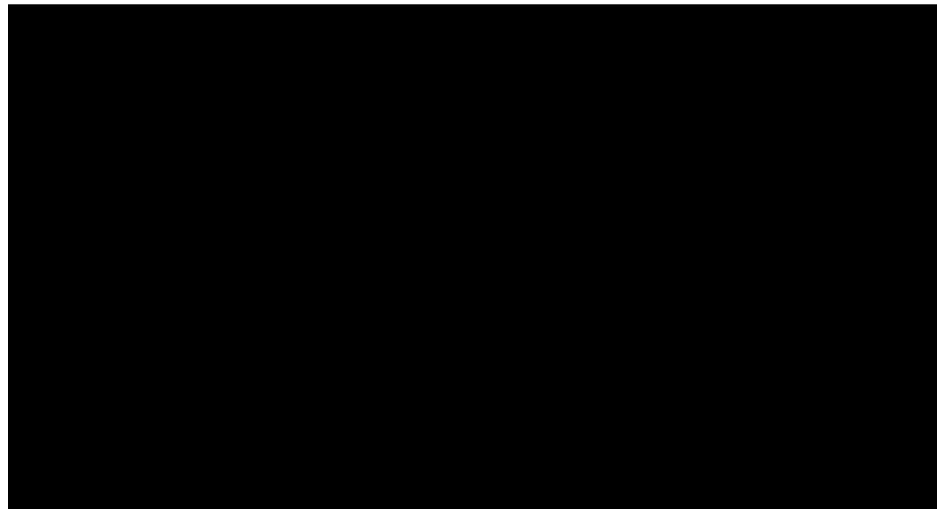
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COUNSEL

Paul V. Carroll, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Jennevee H. de Guzman, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

HOCH, J.—A jury convicted defendant Adam Bill Ranlet of two counts of lewd and lascivious act on a child under the age of 14 years by use of force (Pen. Code, § 288, subd. (b)(1)),¹ four counts of lewd and lascivious conduct on a child under the age of 14 years (§ 288, subd. (a)), and one count of attempted lewd and lascivious conduct on a child under the age of 14 years (§§ 664, 288, subd. (a)). The jury also found true the allegation the offenses were committed against two or more victims under the age of 14 years. The trial court sentenced defendant to serve a term of 93 years to life in prison.

On appeal, defendant contends (1) the trial court erred in admitting evidence of his participation in a private online discussion group called “ptcruzers” in which participants made thinly veiled references to sexual molestations of minors, (2) evidence defendant showed the victim a videotape depicting the rape of a 10- to 12-year-old girl should have been excluded as unduly prejudicial, (3) the jury was misinstructed that his participation in the “ptcruzer” online chat group was an uncharged crime, (4) we must review the sealed documents relating to Child Protective Services (CPS) records for the victim, and (5) we must strike one of his 15-year-to-life terms imposed for his two convictions of committing a lewd and lascivious act on a child under the age of 14 years by use of force against the same victim.

We conclude the online discussion group evidence was admissible under Evidence Code section 1101, subdivision (b), to show defendant’s intent to sexually molest the two victims in this case. Defendant’s argument regarding admission of the videotape has not been preserved for review because his trial attorney did not secure a ruling on his evidentiary objection. As to the instruction regarding the online discussion group, we conclude the trial court erred in stating to the jury that defendant’s participation was an uncharged crime. However, the error was harmless. We have reviewed the sealed record and determined the trial court did not err in ordering part of the CPS record to be disclosed to the parties. Finally, we strike one of the prison terms imposed for defendant’s two convictions of section 288, subdivision (b)(1), against the same victim on the same occasion.

Accordingly, we affirm defendant’s convictions but remand for resentencing.

¹ Undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL HISTORY

Victim C. Doe

C. was born in 1996 and was 17 at the time of trial. Although defendant is her biological father, C. lived with her mother before her mother passed away in August 2012. When she was eight years old in 2004, C. visited defendant approximately two or three times a week—sometimes spending the night. In 2004, C.’s mother was picking up her daughter when she noticed what appeared to her to be thumbnail photos of naked young children on defendant’s computer. In 2004, defendant showed C. a pornographic video involving persons whom defendant “called his friend and his [friend’s] daughter.” C. testified the video showed “[h]is daughter was tied to the bed and he was, in my mind, now raping her.” C. was disturbed by the video. Defendant also showed her pornography involving adults.

Sometime before November 2004, defendant called C. to come into his bedroom. Defendant was “sitting on the bed with chocolate syrup on his penis” and told her: “Lick this. Lick the chocolate syrup. It’s a Sunda[e].” C. refused and defendant made her get him a towel. He told her she could go back to what she had been doing.

When C. was eight years old, defendant woke her up from a nap by putting a vibrator against her vagina. Although she had gone to sleep wearing clothes, she was naked when she awoke. Defendant made her read the package for the vibrator before stating, “[i]t was used for girls to put on themselves or to put on each other.” C. told defendant to stop and he did.

On another occasion, defendant called C. into the bedroom and told her to sit next to him on the bed. He told her to touch his erect penis, but she refused. Defendant grabbed her wrist and pulled it toward his penis, which she touched with one finger. As she tried to pull away, he opened her hand and put it on his penis. C. told him to let her go, but he held her hand there while using his other hand to move his penis back and forth for a minute. C. again told him to let her go, but he did not “until he thought it was the right time.” C. asked him why he did that, and defendant responded: “I might do it again.” Defendant pulled down her shorts and underwear. He then touched her vaginal area on the outside. C. was afraid of defendant and felt he would come after her if she tried to get away.

On a separate occasion, defendant told her “he wanted to do stuff.” Defendant made her lie down and he took off C.’s pants and underwear. He tried to put his fingers into her vagina, but she told him to stop because it hurt. He then tried to insert his penis into her vagina, and again she told him

to stop due to pain. Defendant stopped but told her she “should practice at home.” C. was scared and did not tell her mother about the incident for a long time.

On another occasion, defendant called C. over to his computer and told her to read some e-mails he was sending back and forth with a woman. In the e-mails, defendant “was saying how he would do things to her daughter and she said along the lines of that’s okay, she’s been through that.” C. remembered one of the e-mails involved “pushing [the daughter] onto the bed and holding her down.”

In November 2004, defendant moved to an apartment complex on Moraine Circle. At the apartment, defendant would have C. bring his cat to him and make her watch as the cat licked semen from his penis. C. felt very uncomfortable and scared each time this occurred.

C.’s mother reported the molestations to the police on December 26, 2004. C. had delayed in telling her mother about the molestations because on Father’s Day in 2004, defendant had threatened to kill C.’s family—starting with her grandmother. C. believed the threat.

In January 2005, C. was interviewed by a forensic investigator but did not tell her all the facts because she was embarrassed and in denial. C. and her mother began participating in counseling. Within two months, C. began to describe the molestations more fully as she overcame her embarrassment and fear defendant would hurt her mother.

C. had no contact with defendant from 2006 through 2010, until he sent her a message through Myspace. Defendant also called her on the telephone, but she hung up on him within two minutes. C. told her mother about the Myspace communication and her mother contacted the police. In December 2010, the police set up a pretext call between C. and defendant. During the call defendant “said he was sorry but he did not state what for.”

Victim Ca. Doe

Ca. Doe was born in April 1991. Her father was defendant’s best friend and housemate during 2003 and 2004. Ca. and her sister visited her father during those summers when he worked approximately 10 to 12 hours per day. Ca. and her sister spent time under the care of defendant.

When Ca. was 12 or 13 years old and her father was at work, she was lying on the couch next to defendant when he began rubbing her nipple in a circular motion. Defendant was breathing heavily. Ca. felt uncomfortable, got

up, and left. Defendant engaged in the same conduct again with Ca. later that summer. However, Ca. did not tell her father because she was afraid he would not believe her.

Also that summer, defendant called Ca. into his bedroom. Defendant locked the door, sat her down on the bed, pushed her back, and started rubbing her legs. Defendant slowly rubbed from her knee to her inner thigh and tried to open her legs. Ca. was afraid and struggled to keep her legs closed. She announced she had to do her homework, got off the bed, and left the room. She did not tell her father anything that evening because she was afraid and her father had anger issues. Ca. warned her sister not to go into the bedroom with defendant. After returning to her mother's house, she told her mother and sister about the molestation.

In January 2012, Ca. decided to report the abuse after defendant's girl-friend contacted her and sought Ca.'s help because defendant was in trouble.

Online Chat Room Evidence

On January 7, 2003, defendant created an online Yahoo account with the log-in, "Hardforsubmissive."

Federal Bureau of Investigation (FBI) agent Nikki Badolato testified that in August 2003 she was assigned to the FBI's innocent images task force. The task force investigated child exploitation cases involving individuals who traded child pornography or enticed children to travel for sex. Agent Badolato worked undercover by posing as a 25-year-old mother of a three-year-old daughter. In her undercover capacity, she requested to join a private Yahoo user group called "earlystarters," which had the purpose of locating children for sexual molestation. The group had 511 members in October 2003. Yahoo would periodically locate the group and delete the private discussion forum. However, the forum's moderator would quickly reestablish a new private discussion forum and invite all prior members to rejoin the discussion. In August 2003, a new group, "ptcruzer," was established and "the moderator made it very clear that 'ptcruzer' was preteen cruising, so cruising for preteens." Members used coded language vaguely referencing cars to describe various types of child sexual molestation.

Agent Badolato found defendant was associated with the electronic origin record for the account hardforsubmissive@yahoo.com. Defendant's user profile for the Yahoo account included the nickname "M.D. DADDY," location of Central California, an age of 35, male gender, marital status of divorced, and occupation of "[f]reelance gynecology and photographer." Hobbies were listed as, "Relaxing, chatting, looking for that one female who has very few

limits . . . my only limits are scat, bloodplay, and permanent damage." A favorite quote was listed as, "Will you shut the fuck up!!! It doesn't hurt that bad!!!"

On November 15, 2003, defendant sent the group a message stating: "Just wondering if any females out there are near Sacramento, Cali who wanna play with me and my 7-year-old daughter."

On December 17, 2003, defendant sent the group the following message: "Hey all . . . I am a single male with a 7-year-old almost 8-year-old model. [¶] I have been doing lots of maintenance on my cruiser (lube jobs, engine play . . . et cetera) but haven't 'opened' it up yet that much. [¶] I am looking for a female passenger to be with me when I do. And she can do some driving if she wants. [¶] I am in the Sacramento, Cali area and so should you be too. [¶] I am looking for a long-term relationship as . . . Well having a cruiser of your own is not necessary but it is a plus . . . lol."

Agent Badolato testified this message was innuendo for sexual molestation of a seven-year-old child. As a result of her undercover work, Agent Badolato sent information about defendant and his messages to the Sacramento FBI field office for further investigation. The matter was transferred to the California Department of Justice where Special Agent Tera Mackey took over the investigation as a member of the sexual assault felony enforcement task force. Working undercover, Special Agent Mackey created a Yahoo account from which she sent defendant the following message: "Hi. It's Janette. I'm not sure if you remember me. I used to be a member of the ptcruzer but my computer crashed and I am just now back up. [¶] I live in Sacramento area and if I remember correctly you do too. [¶] I have a 12-year-old daughter Hope. It's just she and I and we [have] a very open and loving relationship. [¶] You and I spoke of having things in common but I don't want to share too much unless you remember me. [¶] We can talk more. Janette."

That same day, defendant responded with the following message: "Hi . . . Yes, I am a member of the ptcruzer group . . . I don't remember chatting with you before but would love to chat sometime. I'm usual[ly] on in the evenings at 8 p.m.'ish. Just p.m. me. Would love to talk about you and your daughter and me and mine."

The next day, Special Agent Mackey replied: "Hi. I'm so glad you're interested in talking more. It's so hard to find like-minded people that share the same interests, especially with a daughter who's close in age to mine. [¶] Can you tell me a little bit about yourself? I'm Janette and have a 12-year-old daughter Hope. She is a beautiful daughter and very curious. I was taught about my body at an early age and have done the same with Hope. Associate

[REDACTED]

doesn't seem to agree with this so I must be very discrete. [¶] Hope is my life and I must be very careful. Obviously, not being a man, I don't have all the tools to help in Hope's teaching. [¶] I work a lot so it's difficult to be online around 8:00. I will definitely check for you when I am. Are any other times good for you?"

To this message, defendant responded as follows on the next day: "Hi Janette. I myself also started at a very young age. My daughter is also as curious as I was when I was her age. Excuse me, but before we go on, maybe I should let you know a little of what I am looking for/not looking for. [¶] Not looking to cyber, looking to chat. Not looking to C2C/looking to meet. Looking for long-term commitment and not just a one-time thing. Someone into the same interests as me. [¶] If this is the same for you, then by all means p.m. me or email me back. LOL. [¶] Also, do you have any pics? Mine are in my photos if you want to go there."

Special Agent Mackey interpreted the message about "cyber" to "mean not to cyber sex. Not just do it online, that he was actually intending to meet."

Four days later, Special Agent Mackey responded she agreed with defendant's list of "wants and don't wants" but Yahoo "seems too difficult" to use. She proposed using AOL instead. Defendant never responded to her. She suspected her professed unfamiliarity with Yahoo tipped defendant off because she had previously stated she was a member of the Yahoo "ptcruzer" group.

CSAAS Testimony

The prosecution called Anthony Urquiza, Ph.D., a licensed psychologist to testify as an expert on child sexual abuse accommodation syndrome (CSAAS). Dr. Urquiza explained CSAAS was first described in a scholarly article written in 1983 to dispel misperceptions about childhood sexual abuse. Dr. Urquiza noted he was not rendering an opinion about whether a particular child was molested or whether a particular individual perpetrated an act of child molestation.

Dr. Urquiza stated CSAAS describes five categories of behaviors commonly engaged in by victims of child sexual abuse: secrecy; helplessness; entrapment and accommodation; delayed and unconvincing disclosure; and retraction. As to CSAAS, Dr. Urquiza asserted generally there is some type of misperception or myth that accompanies behaviors described by the accommodation syndrome. Dr. Urquiza also noted sometimes victims of child sexual molestation describe the abuse in a manner that appears detached or unemotional.

Defense Evidence

The defense called Scott Morgan as a character witness. Morgan testified he had known defendant for eight years, during which he never observed defendant to act inappropriately around children, possess child pornography, or discuss any anything inappropriate about children. Morgan opined defendant is a good man and a hard worker.

DISCUSSION

I

Admissibility of Chat Room Evidence

Defendant contends the trial court erred in admitting evidence regarding his participation with the private Yahoo discussion group “ptcruz.” Specifically, he argues the discussion group evidence was inadmissible under Evidence Code sections 1101, subdivision (b), and 1108. We are not persuaded.

A.

In Limine Motion Regarding Chat Room Evidence

Before trial, the prosecution made a motion to introduce evidence of defendant’s participation in online chat room discussions as admissible under Evidence Code sections 1101, subdivision (b), and 1108. As to Evidence Code section 1101, subdivision (b), the prosecution argued the chat room evidence was admissible to show defendant’s intent and common plan or scheme, as well as corroborating victim testimony. As to Evidence Code section 1108, the prosecution argued the statute was not unconstitutional and required only some similarity between the offered evidence and the charged offenses.

Defendant’s trial attorney opposed admission of the evidence, arguing the chat room participation was not a prior sexual offense under Evidence Code section 1108. Although the written opposition filed by the defense did not expressly cite Evidence Code section 1101, subdivision (b), it did assert the evidence did not meet the test for admissibility articulated in *People v. Ewoldt* (1994) 7 Cal.4th 380 [27 Cal.Rptr.2d 646, 867 P.2d 757] (*Ewoldt*), superseded in part by the enactment of Evidence Code section 1108, as recognized in *People v. Britt* (2002) 104 Cal.App.4th 500 at page 505 [128 Cal.Rptr.2d

290].² Defense counsel also argued the evidence was more prejudicial than probative and should therefore be excluded under Evidence Code section 352.

The trial court found the chat room evidence admissible under Evidence Code sections 1101, subdivision (b), and 1108.

B.

Evidence Code Sections 1101, Subdivision (b), and 1108

Evidence Code section 1101, subdivision (a), provides that “evidence of a person’s character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.” Subdivision (b) of section 1101 qualifies this rule by providing that “[n]othing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.”

■ The California Supreme Court has held subdivision (b) of Evidence Code section 1101 clarifies that “[e]vidence that a defendant committed crimes other than those for which he [or she] is on trial is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive, intent, preparation or identity. [Citations.] The trial court judge has the discretion to admit such evidence after weighing the probative value against the prejudicial effect. [Citation.] When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.] Because this type of evidence can be so damaging, “[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.” [Citation.]’ (*People v. Daniels* (1991) 52 Cal.3d 815, 856 [277 Cal.Rptr. 122, 802 P.2d 906].)’ (*People v. Fuiava* (2012) 53 Cal.4th 622, 667–668 [137 Cal.Rptr.3d 147, 269 P.3d 568].)

² We deem the discussion of the case by defendant’s trial attorney sufficient to preserve for appeal the issue of admissibility of the chat room evidence under section 1101, subdivision (b). (See *Ewoldt, supra*, 7 Cal.4th at pp. 386, 402 [articulating the test for admissibility under Evid. Code, § 1101].)

■ Even if evidence is admissible under Evidence Code section 1101, subdivision (b), it must be excluded nonetheless under Evidence Code section 352 if the probative value of the evidence is outweighed by its prejudicial effect. (*Ewoldt, supra*, 7 Cal.4th at p. 404.) As the California Supreme Court has explained, “ ‘The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. “[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant’s case. The stronger the evidence, the more it is ‘prejudicial.’ The ‘prejudice’ referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues*. In applying section 352, ‘prejudicial’ is not synonymous with ‘damaging.’ ” [Citation.]’ (*People v. Karis* (1988) 46 Cal.3d 612, 638 [250 Cal.Rptr. 659, 758 P.2d 1189], italics added.)” (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214 [40 Cal.Rptr.2d 456, 892 P.2d 1199].)

■ Evidence Code section 1108 provides that, “[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.” The Legislature enacted section 1108 to “relax the evidentiary restraints” imposed by section 1101, “expand the admissibility of disposition or propensity evidence in sex offense cases,” and “assure that the trier of fact would be made aware of the defendant’s other sex offenses in evaluating the victim’s and the defendant’s credibility.” (*People v. Falsetta* (1999) 21 Cal.4th 903, 911 [89 Cal.Rptr.2d 847, 986 P.2d 182].) Thus, “Evidence Code section 1108 ‘radically changed’ the general rule prohibiting propensity evidence in ‘sex crime prosecutions.’ (*People v. Britt* (2002) 104 Cal.App.4th 500, 505 [128 Cal.Rptr.2d 290] (*Britt*).) ‘By removing the restriction on character evidence in [Evidence Code] section 1101, [Evidence Code] section 1108 now “permit[s] the jury in sex offense . . . cases to consider evidence of prior offenses for any relevant purpose” [citation], subject only to the prejudicial effect versus probative value weighing process required by [Evidence Code] section 352.’ (*Ibid.*) Evidence of prior crimes is admissible, unless otherwise excluded by Evidence Code section 352, whenever it may be helpful to the jury on a commonsense basis, for resolution of any issue in the case, including the probability or improbability that the defendant has been falsely accused. (*Britt, supra*, at p. 506.)” (*People v. Robertson* (2012) 208 Cal.App.4th 965, 990 [146 Cal.Rptr.3d 66] (*Robertson*), italics omitted.)

We review a trial court’s admission or exclusion of evidence under the Evidence Code for abuse of discretion and reverse only if the evidentiary ruling was arbitrary or capricious as a matter of law. (*Robertson, supra*, 208 Cal.App.4th at p. 991.)

C.***Admissibility of Chat Room Evidence***

■ The trial court did not abuse its discretion in admitting the online chat room evidence under Evidence Code section 1101, subdivision (b). Defendant was charged with several counts of forcible and nonforcible lewd and lascivious acts on children under the age of 14 years. Defendant's participation in the "ptcruzer" online chat discussion group was highly relevant to the elements of the charges he faced. A plea of not guilty puts in issue every material allegation of the accusatory pleading—including the intent with which he engaged in the charged conduct. (*People v. Steele* (2002) 27 Cal.4th 1230, 1243 [120 Cal.Rptr.2d 432, 47 P.3d 225].) To prove these charges the prosecution had the burden of showing defendant touched C. and Ca. with the intent to sexually gratify himself or them. (*People v. Martinez* (1995) 11 Cal.4th 434, 443–445 [45 Cal.Rptr.2d 905, 903 P.2d 1037].) By pleading not guilty, defendant essentially claimed he did not have the intent to arouse, appeal to, or gratify his lust, passions, or sexual desires. In deciding whether defendant acted with the requisite specific intent, “‘[t]he trier of fact looks to all the circumstances, including the charged act, to determine whether it was performed with the required specific intent.’” (*Id.* at p. 445, quoting *People v. Scott* (1994) 9 Cal.4th 331, 344, fn. 7 [36 Cal.Rptr.2d 627, 885 P.2d 1040].) These “relevant factors can include the defendant's extrajudicial statements.” (*Martinez*, at p. 445, citing *People v. Cantrell* (1973) 8 Cal.3d 672, 681 [105 Cal.Rptr. 792, 504 P.2d 1256].)

Defendant's participation in and statements to the online "ptcruzer" chat room were pertinent to the charged offenses because it showed his intent to sexually molest C. and Ca. Defendant's chat room communications indicated in thinly veiled language that he had a sexual interest in his seven-year-old daughter and other girls of the same age. Moreover, defendant's message to the group indicated he had already sexually molested his daughter and was looking for a female partner to engage in further child sexual molestations. And defendant's listing of a favorite quotation as, “Will you shut the fuck up!!! It doesn't hurt that bad!!!” suggested his willingness to use force to engage in the sexual molestations as he did with C.

Defendant argues the evidence was far more inflammatory than probative as to the charges. We disagree. The chat room evidence was no more repugnant than the testimony of C. that defendant showed her a pornographic video depicting the rape of a child; tried to get her to orally copulate him with chocolate syrup on his penis; forced her to touch his penis; caused her pain trying to penetrate her vagina with his fingers and penis; and had her watch his cat lick semen from his penis. Defendant's online statements provided

[REDACTED]

evidence of his intent and was no more inflammatory than the victims' testimony that was undisputedly admissible.

The trial court did not abuse its discretion when it admitted evidence of defendant's online chat room statements because the probative value substantially outweighed any prejudicial effect.³

II-V*

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DISPOSITION

Defendant's convictions are affirmed. Defendant's sentence is vacated and the matter is remanded for resentencing. On remand, the trial court shall impose a single one strike sentence between counts 3 and 4. The trial court is directed to prepare a corrected abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

Raye, P. J., and Murray, J., concurred.

A petition for a rehearing was denied July 20, 2016, and appellant's petition for review by the Supreme Court was denied October 19, 2016, S236591.

³ Our conclusion the evidence was admissible under Evidence Code section 1101, subdivision (b), obviates the need to consider whether the online chat room evidence was also admissible under Evidence Code section 1108. We also do not address whether defendant's messages to the online chat group were separately admissible as a declarations against penal interest. (Evid. Code, § 1230.)

*See footnote, *ante*, page 363.

[No. C075731. Third Dist. July 11, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
JOSON VANG, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Kat Kozik, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos Martinez and Chung Mi (Alexa) Choi, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

HOCH, J.—In this case, we conclude the death of a structure's inhabitant renders that structure uninhabited within the meaning of the arson statute. This is so even where the arsonists murder that inhabitant before setting fire to the structure.

Defendant Joson Vang and his cousin, Ronnie Vang,¹ broke into Keith Fessler's house to steal some property. Fessler was home at the time. When he came out of a back bedroom and confronted the burglars, they beat him, tied him up, and Ronnie executed him with two shots to the back of the head. After taking several items from the house and leaving with these items in Fessler's car, defendant and Ronnie came back and set fire to the house. Defendant and Ronnie were tried together before separate juries. Defendant's jury convicted him of first degree murder, first degree burglary, robbery, arson of an inhabited structure, and the unauthorized taking or driving of a vehicle. With respect to the murder, the jury found the crime was committed during the commission of both a burglary and a robbery. The jury also found a principal was armed with a firearm during the commission of the murder, burglary, and robbery. The trial court sentenced defendant to serve life imprisonment without the possibility of parole, plus a consecutive determinate term of nine years eight months.

On appeal, defendant contends (1) the evidence is insufficient to support his arson of an inhabited structure conviction because Fessler was dead when he and Ronnie set fire to Fessler's house and there was no evidence anyone else lived there or intended to live there, and (2) the trial court violated the *Aranda/Bruton* rule,² and thereby violated defendant's right of cross-examination under the Sixth Amendment's confrontation clause, by admitting against defendant certain out-of-court statements Ronnie made to two individuals that implicated defendant in the charged crimes and defendant conceded were nontestimonial in nature.

In the published portion of this opinion, we conclude defendant's arson of an inhabited structure conviction must be modified to convict him of arson of

¹ Because defendant and his cousin have the same last name, to avoid confusion, we refer to the latter by his first name throughout this opinion. Others who share this last name shall also be referred to by their first names.

² *Bruton v. United States* (1968) 391 U.S. 123 [20 L.Ed.2d 476, 88 S.Ct. 1620] (*Bruton*); *People v. Aranda* (1965) 63 Cal.2d 518 [47 Cal.Rptr. 353, 407 P.2d 265] (*Aranda*).

a structure. As we shall explain, Fessler's death rendered his house uninhabited. While it is troubling defendant shall be subject to less punishment for what would otherwise be arson of an inhabited structure because he and his cousin murdered the inhabitant before setting fire to the house, we agree with various decisions of our fellow Courts of Appeal that the statutory term "inhabited" requires a present intent to use the structure as a dwelling. The dead simply cannot have such an intent. This is so regardless of how they came to be deceased. Prior iterations of our arson statute would have allowed for conviction of arson of an inhabited structure on these facts. Thus, if the Legislature is troubled by the outcome of this case, it can amend the statute. But we are bound to apply the law as it is presently written. We also note defendant incurred the harshest punishment available short of the death penalty for Fessler's murder.

In the unpublished portion of the opinion, we reject defendant's remaining claim his confrontation rights were violated by the admission of certain statements made by Ronnie. The concededly nontestimonial nature of these challenged statements ends the inquiry under the confrontation clause.

FACTS

Defendant does not challenge the sufficiency of the evidence to support his convictions, except for arson of an inhabited structure based on the undisputed fact Fessler was dead when the fire was set. We therefore dispense with a detailed recitation of the evidence adduced against him at trial. The following brief summary of events will suffice.

The morning of June 23, 2009, defendant and Ronnie set out to burglarize houses in the Meadowview neighborhood of Sacramento. After an unsuccessful attempt to gain entry to one house, they moved their efforts to Fessler's adjacent house.

Ronnie knocked loudly on Fessler's front door and did not receive a response. Believing no one was home, Ronnie and defendant entered the house through either a rear window or sliding glass door and began searching for property to steal. The burglars apparently had masks, but Ronnie was not wearing his. When Fessler came out of his bedroom and confronted them, Ronnie pulled a nine-millimeter handgun and pointed it at him. Fessler pleaded for his life and told them to take whatever they wanted. Concerned Fessler had seen his face and could identify him as one of the burglars, Ronnie decided to kill him. Before doing so, Ronnie and defendant "roughed him up" and hog-tied him with several of his neckties. Ronnie then executed Fessler with two shots to the back of the head.

After murdering Fessler, defendant and Ronnie stole several of his guitars and windsurfing boards, among other items, loaded them into Fessler's small SUV, and drove away in the vehicle. They took the stolen property to a nearby house on Montecito Way (Montecito house) that was routinely used as a gambling parlor by various people associated with defendant and Ronnie, including Tom Vang and Ying Vue. Tom had spent the previous night at the Montecito house with his girlfriend. After the stolen property was unloaded from the stolen SUV, defendant and Ronnie borrowed Tom's car and returned to Fessler's house with some gasoline. Ronnie used to set fire to the house to eliminate any potential evidence.

Defendant and Ronnie then returned to the Montecito house, where defendant called Vue and asked him to come over and bring shirts and gasoline. Vue did so. When Vue arrived, both defendant and Ronnie were sweating and Ronnie was not wearing a shirt. Ronnie washed his hands with the gasoline in the garage. At some point that afternoon, Fessler's SUV was also moved from the Montecito house and parked a short distance away on 67th Avenue. During the early morning hours of the following day, defendant and Ronnie drove defendant's car to where the SUV was parked. Using some of the gasoline Vue had brought over, they also set that vehicle on fire.

Without recounting all of the evidence admitted against defendant at trial, we note he and Ronnie were identified as suspects in Fessler's murder after they attempted to sell several of the stolen guitars to a pawn shop. Ronnie also made various incriminating statements to Tom and Vue that implicated defendant in the burglary, murder, and subsequent arson. We recount these statements in greater detail in the discussion portion of the opinion. Finally, we also note defendant admitted to another cousin that he and Ronnie "burned down the house and robbed a guy." When asked why, defendant responded, "we're just thugs."

DISCUSSION

I

Arson of an Inhabited Structure

Defendant contends the evidence is insufficient to support his arson of an inhabited structure conviction because Fessler was dead when they set fire to his house and there was no evidence anyone else lived there or intended to live there. We agree.

"To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the

prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citations.]’ (*People v. Wallace* (2008) 44 Cal.4th 1032, 1077 [81 Cal.Rptr.3d 651, 189 P.3d 911]; see *Jackson v. Virginia* (1979) 443 U.S. 307, 317–320 [61 L.Ed.2d 560, 99 S.Ct. 2781].)

Penal Code section 451 provides: “A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property.” Where the structure or property burned is “inhabited,” the crime is “a felony punishable by imprisonment in the state prison for three, five, or eight years.” (Pen. Code, § 451, subd. (b).) “‘Inhabited’ means currently being used for dwelling purposes whether occupied or not.” (Pen. Code, § 450, subd. (d).)

Defendant does not challenge the sufficiency of the evidence to support the fact he committed arson; he does dispute the structure burned was “inhabited.” Relying primarily on *People v. Jones* (1988) 199 Cal.App.3d 543 [245 Cal.Rptr. 85] (*Jones*) and *People v. Ramos* (1997) 52 Cal.App.4th 300, 60 Cal.Rptr.2d 523 (*Ramos*), and the undisputed fact Fessler was dead when defendant and Ronnie set fire to his house, defendant argues Fessler lacked the present intent to use the house as his dwelling and, therefore, the house was not inhabited. Having found no published California decisions directly on point, we provide a detailed explication of the case law we find to be analogous, including *Jones* and *Ramos*.

■ In *Jones, supra*, 199 Cal.App.3d 543, the Court of Appeal held that in determining whether or not a structure is “inhabited” for purposes of arson, “it is the present intent to use the [structure] as a dwelling which is determinative.” (*Id.* at p. 548.) There, the defendant and others resided in a rented house. The day after he and the others were evicted, after the others had removed their belongings and left, the defendant set fire to the house. (*Id.* at p. 545.) Rejecting the defendant’s argument the house was not inhabited because he and the other former tenants no longer had any possessory rights to the house following the eviction, the court explained, “[t]he question is whether the house was inhabited, not whether the inhabitants had a legal right to be there.” (*Id.* at p. 546.) Rejecting the Attorney General’s argument whether “the purpose of the structure is to serve as a dwelling” should control, the court explained such an interpretation of the statute “would lead to results that are logically unacceptable and inconsistent with legislative intent,” for example, “if the owner-occupant of a house died, the house would be ‘inhabited’ by a dead person.” (*Ibid.*)

The court then supported its holding that the present intent to use the structure as a dwelling controls the determination of whether or not the structure is “inhabited” with an overview of the history of California arson statutes: “The first arson statute, enacted in 1850, made it a crime to burn ‘any dwelling house’ but did not define the term ‘dwelling house.’ (Stats. 1850, ch. 99, § 56, pp. 234–235.) In 1856, arson was divided into degrees. First degree arson included burning ‘in the nighttime, any dwelling-house in which there shall be at the time some human being’ Second degree arson included burning a dwelling house in which no one was present. The statute further provided, ‘Every house . . . which shall have been usually occupied by persons lodging therein at night, shall be deemed a dwelling-house of any person so lodging therein’ (Stats. 1856, ch. 110, §§ 4, 6.) [¶] Subsequent amendments did not materially alter the statute until 1929. In that year, section 447a was added to the Penal Code defining arson in part as burning ‘any dwelling house’ but the provisions defining a ‘dwelling house’ were repealed. (Stats. 1929, ch. 25, § 1.) Finally, the arson statute was revised in 1979 to provide, ‘Arson that causes an inhabited structure . . . to burn is a felony’ (Pen. Code, § 451, subd. (b).) The statute defines ‘structure’ as a ‘building’ and ‘inhabited’ as ‘currently being used for dwelling purposes whether occupied or not.’ (Pen. Code, § 450, subds. (a) and (d); Stats. 1979, ch. 145, § 6.) [¶] . . . [¶] As can be seen from the review of the arson statute, the Legislature has taken various approaches to the burning of a dwelling. During some periods it has left the term without a definition. During other periods it has defined it as a building ‘usually occupied’ or ‘currently being used.’ The present requirement that the building is ‘currently being used’ is certainly more limiting than the mere reference to a ‘dwelling house’ and more restrictive than the 1856 requirement the building ‘shall have been usually occupied by persons lodging therein’” (*Jones, supra*, 199 Cal.App.3d at pp. 547–548.)

The court concluded: “If arson under [Penal Code] section 451, subdivision (b), could be established by merely proving the defendant set fire to a ‘dwelling house’ or a building ‘usually occupied’ as a dwelling then, clearly, [the] defendant’s conviction would have been proper. But, the requirement the structure be ‘currently used’ for dwelling purposes requires the People to prove at least one of the evicted tenants intended to continue living in the house after the eviction.” (*Jones, supra*, 199 Cal.App.3d at p. 548.) Finally, the court explained this conclusion was “consistent with the interpretation given identical statutory language in Penal Code section 459 applying to burglary,” citing analogous burglary cases holding “whether or not the structure was ‘inhabited’ depended on the intent of the tenants to continue living there.” (*Ibid.*)

In *Ramos, supra*, 52 Cal.App.4th 300, a burglary case, the defendant entered a house, believing no one was home, with the intent to steal property.

Once inside, he discovered the deceased body of the house's former inhabitant, Wagner, who apparently died in his sleep. (*Id.* at pp. 301–302.) Reversing the defendant's first degree burglary conviction for insufficient evidence, the Court of Appeal explained: "To prove first degree burglary of an inhabited dwelling, the People must present evidence that the house is 'currently being used for dwelling purposes, whether occupied or not.' (Pen. Code, § 459.) What this means is that a dwelling is inhabited if the occupant is absent but intends to return and to use the house as a dwelling. [Citations.] To put it plainly, a dead body is not using a house for a 'dwelling' and there is no way to say that a dead [person] is going to return or that he [or she] has an 'intent' of any kind." (*Id.* at p. 302.) Rejecting the Attorney General's argument Wagner "fully intend[ed] to remain in his house" before he died, the court stated: "By the time Ramos got there, Wagner was dead and, to the best of our knowledge, unable to entertain any intent of any kind. The house was no longer occupied." (*Id.* at p. 303, citing a number of out-of-state cases, including one arson case involving a murder followed several days later by the burning of the deceased victim's residence, *State v. Ward* (1989) 93 N.C.App. 682 [379 S.E.2d 251], in which the appellate court held at page 686 that "the inhabitant's death certainly renders [a dwelling] uninhabited since someone must 'live' in a dwelling for it to be 'inhabited' "); but see *State v. Campbell* (1992) 332 N.C. 116, 122 [418 S.E.2d 476] [while not disapproving of the foregoing case, holding "for purposes of the [North Carolina] arson statute, a dwelling is 'occupied' if the interval between the mortal blow and the arson is short, and the murder and arson constitute parts of a continuous transaction"].)

Douglas v. Jacquez (9th Cir. 2010) 626 F.3d 501 involved facts remarkably similar to our own. There, the habeas corpus petitioner and his brother broke into a house to commit a robbery, murdered the house's inhabitant during the robbery, and then set the house on fire. The petitioner was convicted here in California of first degree murder and arson of an inhabited structure.³ The federal district court granted habeas corpus relief on one ground, i.e., insufficient evidence to support the petitioner's arson of an inhabited structure conviction based on the undisputed fact the inhabitant of the house was dead at the time the fire was set. This determination was based on *Ramos*. (*Douglas*, at pp. 503–504.) Because California did not appeal this ruling, the Ninth Circuit Court of Appeals "proceed[ed] under the district court's interpretation of California law," but commented in a footnote: "We note, however, two distinctions between this case and *Ramos*. First, *Ramos* was a burglary case, not an arson case. [Citation.] Second—and more importantly—the already-deceased occupant in *Ramos* died of natural causes. [Citation.] But here,

³ We affirmed these convictions in an unpublished opinion. (*People v. Douglas* (Mar. 31, 1994, C015431) [nonpub. opn.].) The issue of whether the arson of an inhabited structure conviction was supported by substantial evidence was not before us.

Douglas murdered the inhabitant. Again, we proceed under the district court's interpretation of California law. The extension of *Ramos* to these facts strikes us as problematic, but not problematic enough to affect the ground for decision." (*Id.* at p. 504, fn. 1.) The court then turned to the issues raised on appeal, which are not relevant to our case.

Various appellate courts in other states have rejected such a result. For example, as already mentioned, the North Carolina Supreme Court has held "a dwelling is 'occupied' [within the meaning of that state's arson statute] if the interval between the mortal blow and the arson is short, and the murder and arson constitute parts of a continuous transaction," explaining: "To accept [the] defendant's argument would be to say that he is less morally culpable—and hence deserves less punishment—because of his success in killing the victim prior to setting the house on fire. We do not believe this to be the intent of the legislature in enacting the arson statute, nor do we believe it to be sound public policy." (*State v. Campbell, supra*, 332 N.C. at pp. 121–122.) Similarly, in *State v. Edwards* (Minn.Ct.App. 1999) 589 N.W.2d 807), a burglary case, the Minnesota Court of Appeals held the apartment of a murdered tenant is a "dwelling," a term defined by that state's burglary statute to mean "'a building used as a permanent or temporary residence'" (*id.* at p. 810), as long as the apartment was so used "in the immediate past" and "has not been abandoned." (*Id.* at p. 811; see also *People v. Barney* (2002) 294 A.D.2d 811, 812–813 [742 N.Y.S.2d 451, 452–453]; *Cochran v. Commonwealth* (Ky. 2003) 114 S.W.3d 837, 839.)

■ It is not our place to opine on whether the foregoing out-of-state decisions properly construed the arson or burglary statutes at issue therein. Our task is to construe our own arson statute, which defines "inhabited" to mean "*currently* being used for dwelling purposes whether occupied or not." (Pen. Code, § 450, subd. (d), *italics added*.) Merriam-Webster defines "current" to mean "presently elapsing" and "occurring in or existing at the present time." (Merriam-Webster's New Collegiate Dict. (11th ed. 2006) p. 306, col. 2.) This temporal limitation distinguishes our statute from those interpreted by the courts in *State v. Edwards, supra*, 589 N.W.2d 807, *People v. Barney, supra*, 294 A.D.2d 811, and *Cochran v. Commonwealth, supra*, 114 S.W.3d 837. Indeed, in the first of these cases, the court specifically noted the Minnesota statute required only that the building be "'used as a permanent or temporary residence'" and explained, "[t]he word 'used' . . . has no fixed meaning in terms of time [and] can sound in the past, present, or future tense." (*State v. Edwards, supra*, 589 N.W.2d at pp. 810–811.) Conversely, the word "currently" in our arson statute does have a fixed meaning in terms of time, i.e., occurring at the present time. With respect to the latter two cases, the New York statute required only that the building be "'usually

occupied by a person lodging therein at night' " (*People v. Barney, supra*, 294 A.D.2d at p. 812), and the Kentucky statute similarly required that the building be "‘usually occupied by a person lodging therein’" (*Cochran v. Commonwealth, supra*, 114 S.W.3d at p. 838), wording nearly identical to the 1856 version of our own arson statute. (See *Jones, supra*, 199 Cal.App.3d at p. 547.) But we are not interpreting this prior version of our statute. The current version requires current inhabitation, i.e., that the structure be inhabited at the present time. The present for purposes of arson is the time the fire is set. (See Pen. Code, § 451 ["person is guilty of arson when he or she willfully and maliciously sets fire to . . . any structure"].) Borrowing from *Jones*: "If arson under [Penal Code] section 451, subdivision (b), could be established by merely proving the defendant set fire to a ‘dwelling house’ or a building ‘usually occupied’ as a dwelling then, clearly, [the] defendant’s conviction would have been proper. But, the requirement the structure be ‘currently used’ for dwelling purposes requires the People to prove at least one [person] intended to continue living in the house . . ." (*Jones, supra*, at p. 548.) Fessler’s death prevented him from having such an intent. Nor did the prosecution produce any evidence anyone other than Fessler intended to live in the house when the fire was set.

Finally, while the statute at issue in *State v. Campbell, supra*, 332 N.C. 116, does appear to have a temporal requirement, i.e., first degree arson in North Carolina requires that "‘the dwelling burned was occupied *at the time of the burning*,’" this statute left the basic definition of arson to the common law and did not define either "dwelling" or "occupied." (*Id.* at p. 120, italics added.) Moreover, as previously mentioned, the North Carolina Supreme Court did not disapprove of a prior appellate decision that held an "inhabitant’s death certainly renders [a dwelling] uninhabited since someone must ‘live’ in a dwelling for it to be ‘inhabited’" (*State v. Ward, supra*, 93 N.C.App. at p. 686), but in effect created an exception to that rule in cases where the arson immediately follows the murder of the dwelling’s inhabitant and the murder and arson can be said to constitute a single continuous transaction. (*State v. Campbell, supra*, 332 N.C. at pp. 121–122.) In creating this exception, the court extended a "continuous transaction doctrine," which already existed in North Carolina law and was previously applied to robbery cases where the victim was murdered before the defendant formed the intent to steal and sex offense cases where the victim was murdered before the prohibited sex act occurred. (See, e.g., *State v. Fields* (1985) 315 N.C. 191, 201–203 [337 S.E.2d 518]; *id.* at p. 203 [disagreeing with the defendant’s argument an intent to steal formed after the victim’s death vitiates the crime of armed robbery in North Carolina and holding, "when the circumstances of the alleged armed robbery reveal [the] defendant intended to permanently

deprive the owner of his [or her] property and the taking was effectuated by the use of a dangerous weapon, it makes no difference whether the intent to steal was formulated before the use of force or after it, so long as the theft and the use or threat of force can be perceived by the jury as constituting a single transaction”]; *State v. Thomas* (1991) 329 N.C. 423, 434 [407 S.E.2d 141] [holding when the prohibited sex act was part of a continuous transaction that began while the victim was alive, it makes no difference whether that victim was dead when the prohibited act occurred].)

Here in California, however, an intent to take the victim’s property formed after that victim is dead does vitiate the crime of robbery. (See *People v. Davis* (2005) 36 Cal.4th 510, 561 [31 Cal.Rptr.3d 96, 115 P.3d 417] [“some jurors may have had a reasonable doubt as to whether [the victim] was still alive when the intent to take her rings was formed”].) Similarly, in California, where a victim dies during the commission of an attempted rape, and the defendant thereafter has intercourse with the dead body, the defendant is guilty of murder and attempted rape, but not rape. (See *People v. Kelly* (1992) 1 Cal.4th 495, 524 [3 Cal.Rptr.2d 677, 822 P.2d 385] [“Rape requires a live victim”].) Accordingly, unlike North Carolina, we have a more specific arson statute and no prior precedent from our Supreme Court that would allow us to conclude the temporal limitation written into that statute may be ignored where a murder prevents the prosecution from proving present inhabitation.

■ Simply put, “present” does not mean “immediate past,” even where a murder separates the two. We do acknowledge the outcome is somewhat troubling. What would otherwise be arson of an inhabited structure is mitigated to arson of a structure because the inhabitant was murdered shortly before his or her house was set on fire. However, we may not delete the word “currently” from the arson statute. ■ Our role is to interpret, not to rewrite statutes. (Code Civ. Proc., § 1858.) That is the province of the Legislature.

II*

* * * * *

DISPOSITION

The judgment is modified by reducing defendant’s conviction of arson of an inhabited structure (Pen. Code, § 451, subd. (b)) to arson of a structure (*id.*, subd. (c)). As modified, the judgment is affirmed and the matter is remanded

*See footnote, *ante*, page 377.

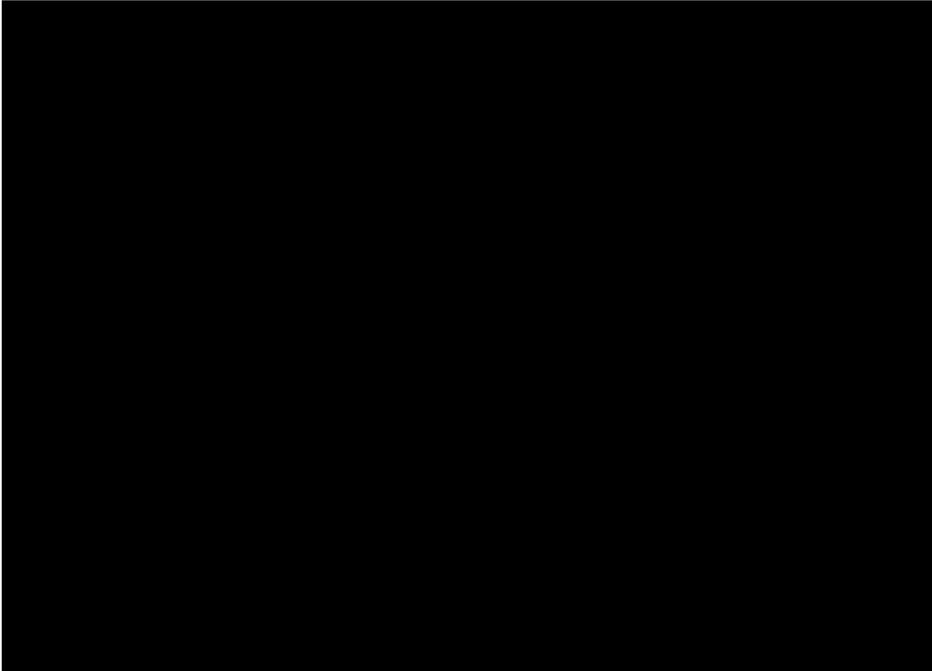
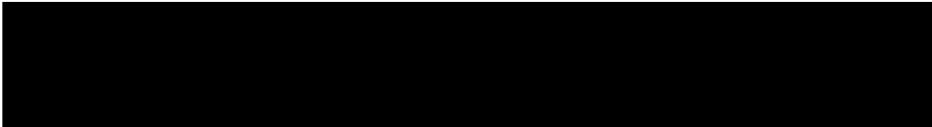
to the trial court with directions to resentence defendant on the modified judgment as provided by law and, after resentencing, to issue an amended abstract of judgment.

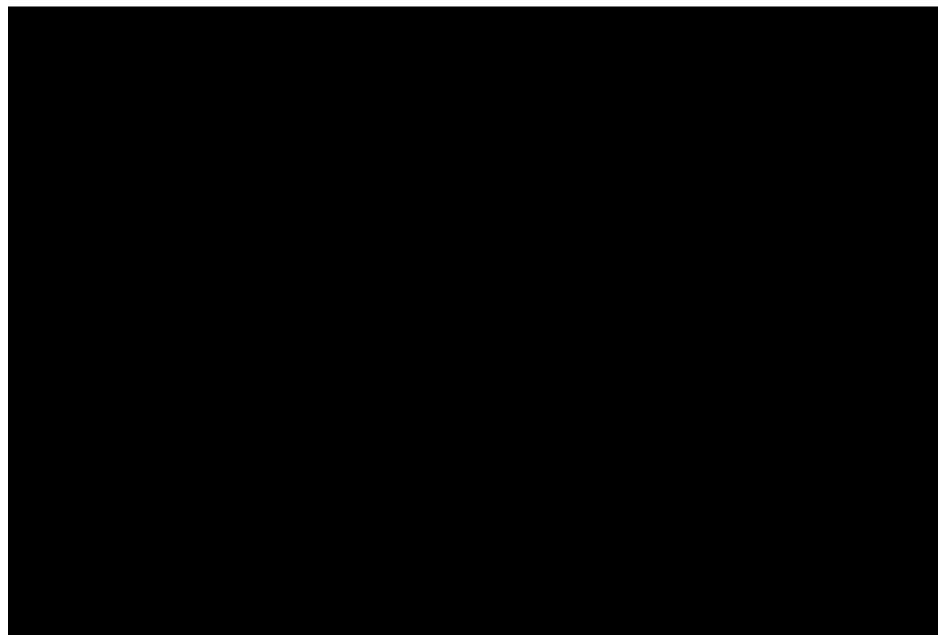
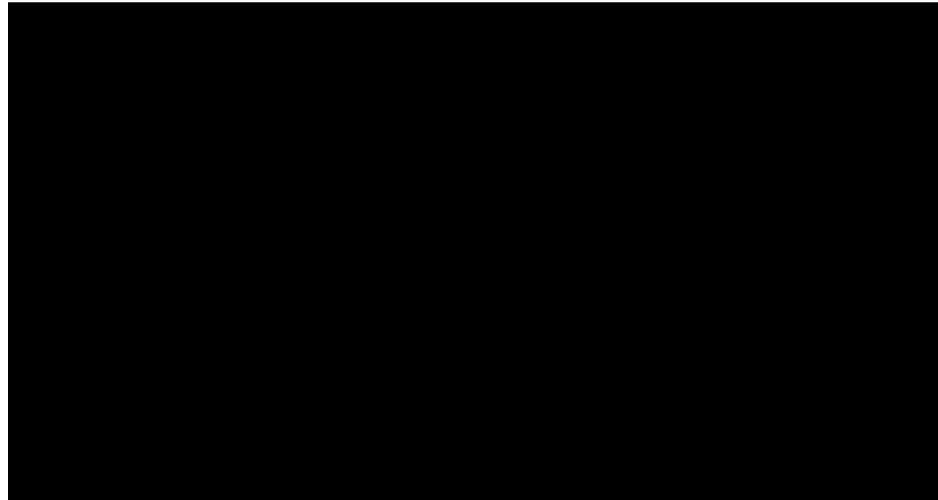
Raye, P. J., and Duarte, J., concurred.

Appellant's petition for review by the Supreme Court was denied October 12, 2016, S236497.

[No. A139710. First Dist., Div. Four. June 9, 2016.]

MARIA DE LA LUZ PEREZ, Plaintiff and Appellant, v.
JOB FRANCISCO TORRES-HERNANDEZ, Defendant and Respondent.





[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Bay Area Legal Aid, Brenda Star Adams; Family Violence Appellate Project, Nancy K.D. Lemon, Jennafer Dorfman Wagner, Shuray Ghorishi; Folger Levin, Andrew J. Davis and Rosha Jones for Plaintiff and Appellant.

Law Offices of Sanjay Bhardwaj and Sanjay Bhardwaj for Defendant and Respondent.

OPINION**RUVOLO, P. J.—****I.****INTRODUCTION**

Appellant Maria de la Luz Perez (Perez) appeals the trial court's denial of the renewal of her domestic violence restraining order (DVRO) against respondent Job Francisco Torres-Hernandez (Torres-Hernandez). Perez alleges that the trial court applied the incorrect legal standard in denying her petition. She asserts the court erroneously concluded that (1) there must be new evidence of abuse or threatened abuse to renew the order, and Torres-Hernandez's past abuse or violations of the existing order did not support renewal; (2) the evidence of "new" abuse must be physical in nature; and (3) evidence of Torres-Hernandez's abuse of the couple's children was not relevant to the DVRO renewal. We agree the court erred in all of these respects, and reverse with directions to grant renewal of the DVRO.

II.**FACTUAL AND PROCEDURAL BACKGROUND**

In February 2010, Perez filed a request for a DVRO against Torres-Hernandez to stay away from her and their two children, eight- and two-year-old daughters, as well as Perez's 10-year-old son from a previous relationship. Perez and Torres-Hernandez had been in a relationship for 10 years and Perez claimed many instances of physical and emotional abuse by Torres-Hernandez. She wrote on the request for the DVRO that Torres-Hernandez was going to kill her and take her children away. In her declaration, she recounted an incident where Torres-Hernandez became angry and yelled "fuck you bitch" at her in front of the children. She said the following day, Torres-Hernandez called her hundreds of times. A few days later, Torres-Hernandez came into her home while she was gone, and without her permission. Later that same day, in the middle of the night, Torres-Hernandez again broke into her home while everyone was sleeping. He startled a friend who was sleeping on the couch and rushed out. She said that she was afraid because Torres-Hernandez was capable of becoming violent and had hit her many times in the past.

The court held a hearing and both Perez and Torres-Hernandez testified. The court issued a three-year restraining order preventing Torres-Hernandez from doing the following things to Perez: “[h]arass, attack, strike, threaten, assault (sexually or otherwise), hit, follow, stalk, molest, destroy personal property, disturb the peace, keep under surveillance, or block movements.” The order provided sole physical custody of the children to Perez, and weekend visitation with Torres-Hernandez. The restraining order expired on March 16, 2013.

In September 2011, Perez filed a petition to modify the restraining order to include protection for her three children. Perez claimed that during Torres-Hernandez’s visits with the children, he had physically abused them. After a visit with Torres-Hernandez, their younger daughter had bruising on her chest. The daughter told Perez that Torres-Hernandez was angry and hit her. Torres-Hernandez was arrested after the incident.

Perez explained that Torres-Hernandez had been abusive to her throughout their relationship but had not previously hit the children. She said that since the restraining order was issued, Torres-Hernandez had hit the children with his hands or objects, including shoes. He had previously hit the younger daughter, causing bruising on her lip. Perez claimed that Torres-Hernandez also hit her son with a belt, causing a welt on his leg.

The court suspended visitation between Torres-Hernandez and the younger daughter and ordered supervised visitation with the older daughter. The court amended the order to prohibit Torres-Hernandez from making contact with Perez, including phone calls, e-mails, and text messages.

In February 2013, Perez petitioned the court for a permanent renewal of the restraining order. Perez alleged that Torres-Hernandez had repeatedly violated the order. He called her from an anonymous number but identified himself as the caller and told her to stop going to court and to stop asking for child support. She also alleged that Torres-Hernandez was facing child abuse charges for hitting their younger daughter.

The court held a contested hearing on March 13, 2013. At the outset, Torres-Hernandez explained that the criminal case for his conduct toward his daughter had been dismissed. When asked by the court, Perez explained that the district attorney’s office had told her that the charges were dropped because their daughter was too young to testify against Torres-Hernandez.

Perez testified that she sought to have the restraining order extended permanently because “I have a lot of fear of him.” She said she feared physical abuse both against herself and her children. Even with the restraining order in place, he had continued to call her, text her, and threaten her. He

had also mistreated their daughters. She explained Torres-Hernandez had hit their younger daughter on the chest causing bruising.

During Perez's testimony, the court initially advised her counsel that any testimony about the abuse towards their daughter was not relevant. The court stated the standard to renew or extend the order "has to do with whether she has a reasonable apprehension of future abuse. The abuse is as to her as opposed to the children." Counsel argued it was relevant to Perez's reasonable apprehension of future abuse and she was seeking to modify the order to add the children as protected parties.

The court then allowed further testimony. Perez testified that Torres-Hernandez had hit their younger daughter once with a shoe, and hit her on another occasion causing a swollen lip. He had also grabbed the older daughter causing a red mark on her wrist. Perez stated: "He is a very aggressive person, and I, frankly, have a lot of fear for my own safety and that of my children." She said the fact he hit her children made her more afraid of him because he had broken the law.

She testified that she received a call from Torres-Hernandez in November 2012 and he threatened her, saying "Fuck you, bitch," and told her to stop going to court to ask for support and custody of their daughters. She said it made her "very fearful" because he was not supposed to call or text her. He also sent her a text after the call, from an anonymous number, but it made reference to the content of the prior call. She said the text made her feel "scared and helpless." He sent her texts on February 4, 2013, the date the criminal charges for hitting their younger daughter were dismissed. The first text stated: "Ha, ha, ha. Poor kids for having a crazy mom like you. Was it worth putting your kids through all that trouble and end up with nothing?" She received another anonymous text that said "the kids pay the consequences," and remarked that he was about to have the son he always wanted. Perez testified that text messages created "a lot of fear."

When she found out the criminal charges had been dismissed, she felt "[v]ery scared, very terrified, because now he feels that he can break the law."

Perez testified that she did not want him bothering her, calling her, or sending her messages because she was "very scared because he has been doing things that have affected me." She stated she was afraid Torres-Hernandez would cause her future physical harm if the order were not renewed. She said that she felt helpless "because in spite of the fact that there's a restraining order, he continues to do that and because the law hasn't been able to stop him. So I feel helpless and fearful at the same time."

The court asked Perez if she had been threatened since the restraining order had been issued, and she responded that his calls were threatening. She said that he told her “You’re going pay for it.” She was not sure “exactly what he can do, but I’m afraid.”

Counsel sought to introduce the testimony of Perez’s father, who had seen the bruising on the younger daughter, but the court excluded the testimony as “redundant.”

Torres-Hernandez denied contacting Perez by phone or sending her text messages. He claimed Perez was making these claims in order to get a green card.

The court found “there is no basis to extend this order on a permanent basis. I find that there is insufficient evidence as to a reasonable belief of continued abuse. There is no evidence before the Court that there has been actual abuse within the time period that the restraining order has been issued.” The court found that the abuse, if true, had been toward the children, but that was irrelevant as to the abuse alleged by Perez “because it does not speak to any abuse that Ms. Perez has been subjected to.” Perez has been subjected to “annoying phone calls. I wouldn’t let it rise to the level of a pattern of harassment, but the phone calls are intended to annoy her.”

The court stated it did not find Torres-Hernandez’s testimony to be “particularly persuasive,” and “there may be some credibility issues.” The court found that Torres-Hernandez made the phone calls and sent the text messages in violation of the restraining order, but that this was not enough to extend the DVRO.

The court stated: “Abuse is not merely simply annoying or harassing—occasional harassing phone calls intended to annoy the other person. Abuse is not exerting your rights under the law to say, you know ‘If you keep going to court, you may lose out. The kids may—they’re tired of putting up with a crazy mother.’” Stating an opinion does not rise to the level of a threat of violence or actual infliction of violence. Abuse must be “violence or the infliction of violence on an individual.” Therefore, there was insufficient evidence of a reasonable belief of continued abuse to support extension of the order.

Since at the time of the hearing the DVRO was set to expire in a few days, and given the court’s denial of the requested renewal, it did not consider the request that the order be modified to include the children as protected parties.

III.**DISCUSSION**

■ The purpose of the Domestic Violence Prevention Act (DVPA; Fam. Code, § 6200 et seq.) is “to prevent acts of domestic violence, abuse, and sexual abuse and to provide for a separation of the persons involved in the domestic violence for a period sufficient to enable these persons to seek a resolution of the causes of the violence.” (Fam. Code,¹ § 6220.) Under the DVPA, “abuse” means intentionally or recklessly causing or attempting to cause bodily injury; sexual assault; placing a person in reasonable apprehension of imminent serious bodily injury to that person or another; or engaging in behavior that could be enjoined pursuant to section 6320. (§ 6203.) Section 6320 includes “molesting, attacking, striking, stalking, threatening, sexually assaulting, [and] battering . . . harassing, telephoning, . . . contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party.” (§ 6320, subd. (a).)

Section 6345, subdivision (a) provides: “In the discretion of the court, the personal conduct, stay-away, and residence exclusion orders contained in a court order issued after notice and a hearing under this article may have a duration of not more than five years, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party. These orders may be renewed, upon the request of a party, either for five years or permanently, *without a showing of any further abuse* since the issuance of the original order, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party.” (Italics added.)

A. Standard of Review

The appropriate standard of review was recently set forth by the Second District Court of Appeal in *Eneaji v. Ubboe*: “The trial court’s ruling on a request to renew a [DVRO] is reviewed for an abuse of discretion. [Citation.] An abuse of discretion occurs when the ruling exceeds the bounds of reason. [Citation.] But, the exercise of discretion is not unfettered in such cases. [Citation.] ‘All exercises of discretion must be guided by applicable legal principles, however, which are derived from the statute under which discretion is conferred. [Citations.] If the court’s decision is influenced by an erroneous understanding of applicable law or reflects an unawareness of the full scope of its discretion, the court has not properly exercised its discretion under the law. [Citation.] Therefore, a discretionary order based on an

¹ All further references are to the Family Code unless otherwise identified.

application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion and is subject to reversal. [Citation.]’ [Citation.] The question of whether a trial court applied the correct legal standard to an issue in exercising its discretion is a question of law [citation] requiring de novo review [citation].” (*Eneaji v. Ubboe* (2014) 229 Cal.App.4th 1457, 1463 [178 Cal.Rptr.3d 162] (*Eneaji*)).

In reviewing the denial of a DVRO request, we determine whether the trial court “‘applied the correct legal standard to the issue in exercising its discretion, which is a question of law for this court.’ ” (*Gou v. Xiao* (2014) 228 Cal.App.4th 812, 817 [175 Cal.Rptr.3d 635] (*Gou*), quoting *Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 420–421 [67 Cal.Rptr.3d 317].)

B. *Renewal of a DVRO Does Not Require Proof of Abuse During the Time Period Since the Restraining Order Was Issued*

■ Section 6345 “makes it unnecessary for the protected party to introduce or the court to consider actual acts of abuse the restrained party committed after the original order went into effect. It would be anomalous to require the protected party to prove further abuse occurred in order to justify renewal of that original order. If this were the standard, the protected party would have to demonstrate the initial order had proved ineffectual in halting the restrained party’s abusive conduct just to obtain an extension of that ineffectual order.” (*Ritchie v. Konrad* (2004) 115 Cal.App.4th 1275, 1284 [10 Cal.Rptr.3d 387] (*Ritchie*).) “A trial court is vested with discretion to issue a protective order under the DVPA simply on the basis of an affidavit showing past abuse.” (*Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 334 [67 Cal.Rptr.3d 286].)

Here, after the contested hearing, the court stated: “There is no evidence before the Court that there has been actual abuse within the time period that the restraining order has been issued.” But, as set forth above, renewal does not require “a showing of any further abuse since the issuance of the original order” (§ 6345, subd. (a)), for the order to be renewed. (*Eneaji, supra*, 229 Cal.App.4th at p. 1464 [“the trial court erred in concluding that the denial was appropriate because nothing happened in the three years since the restraining order”].) The key consideration for the court is not the type or timing of abuse, but whether the protected party has a reasonable fear of future abuse. “A trial court should renew the protective order, if, and only if, it finds by a preponderance of the evidence that the protected party entertains a ‘reasonable apprehension’ of future abuse.” (*Ritchie, supra*, 115 Cal.App.4th at p. 1290.)

Perez testified that Torres-Hernandez’s post-order telephone calls and text messages made her feel “scared and helpless,” particularly in light of the

course of misconduct that led to the original restraining order. She said that the restraining order had not stopped him so she felt fearful and helpless. She described Torres-Hernandez as an aggressive person capable of violence, and testified that she feared for her own safety and the safety of her children.

Perez's testimony established a reasonable apprehension of future abuse. Torres-Hernandez had continued to contact and threaten her even with the DVRO in place. While he did not physically abuse Perez after the order was issued, he had physically abused their children and Perez's son. As detailed below, this abuse was relevant to the continuance of the order.

Here the court's decision was guided by a misunderstanding of the applicable legal principles so it could not properly exercise its discretion, and we must reverse. (*Eneaji, supra*, 229 Cal.App.4th at p. 1463 [the trial court's exercise of discretion must be "guided by applicable legal principles" derived from the statute under which that discretion is conferred].)

C. *The Court Erroneously Found That Torres-Hernandez's Violations of the DVRO Were Not Abuse Under the Statute*

■ Not only did the court err by requiring a showing of ongoing harassment to extend the order, but the court also concluded there must be a showing of post-order abuse constituting "violence or the infliction of violence on an individual." The court incorrectly concluded that the evidence must show "violence or an actual infliction of violence" in order to renew the DVRO order.

■ To the contrary, the definition of abuse under the DVPA is much broader. Annoying and harassing an individual is protected in the same way as physical abuse. "Because of an amendment in 1998, protective orders can be issued because of persistent unwanted phone calls or letters—which fall into the same category as 'molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, [or] harassing' the protected party. That pattern of unwanted phone calls or letters may support the same set of prohibitions in the initial protective order as one predicated on a series of violent beatings." (*Ritchie, supra*, 115 Cal.App.4th at pp. 1290–1291, fn. omitted.)

There can be little doubt that Torres-Hernandez's phone calls and texts constitute continuing abuse under the statute. (See §§ 6203, 6320 [defining abuse to include making annoying phone calls].) The phone calls and texts harassed Perez and disturbed her peace of mind. (See *Burquet v. Brumbaugh* (2014) 223 Cal.App.4th 1140, 1144 [167 Cal.Rptr.3d 664] [unannounced and uninvited visit and repeated contacts by phone, e-mail, and text, despite requests of no contact, "'disturb[ed] the peace'" and constituted "'abuse'"]

within the meaning of § 6320]; *In re Marriage of Evilsizer & Sweeney* (2015) 237 Cal.App.4th 1416, 1425 [189 Cal.Rptr.3d 1] [wife did not have to prove physical abuse to obtain a restraining order where husband accessed and disclosed the contents of her text messages and e-mails, disturbing her peace of mind].) Even after the DVRO was amended to prohibit Torres-Hernandez from calling, e-mailing, or texting Perez, he contacted her by phone and text message. He threatened her by saying “[f]uck you bitch” and telling her to stop seeking child support. He told her she was a “crazy mom” for putting her kids through the “trouble” of reporting him for child abuse. He told her she was “going to pay for it” and that children “pay the consequences.”

While the trial court found that Perez had been subjected to “annoying phone calls,” they did not “rise to the level of a pattern of harassment.” Instead, the court found that “[a]buse is not merely simply annoying or harassing—occasional harassing phone calls intended to annoy the other person.” This finding is incorrect under the DVPA.

In *Lister v. Bowen*, Division Two of this court found that a party’s knowing violation of an existing restraining order supported the court’s renewal of the order. (*Lister v. Bowen* (2013) 215 Cal.App.4th 319 [155 Cal.Rptr.3d 50] (*Lister*).) Lister had obtained a restraining order against Bowen that required him to stay 100 yards away from her and her workplace. (*Id.* at p. 322.) Lister sought to renew the order and presented evidence that Bowen had been to her workplace, although she was not present when he was there. (*Id.* at p. 324.) “It almost goes without saying that any violation of a restraining order is very serious, and gives very significant support for renewal of a restraining order.” (*Id.* at p. 335.) It is reasonable for the court to conclude that a knowing violation of the restraining order made Lister, the protected party, feel apprehensive about her safety. (*Ibid.*) “The court was within its discretion to conclude that the evidence indicated it was more probable than not there was a sufficient risk of future abuse to find that Lister’s apprehension was genuine and reasonable. [Citation.]” (*Ibid.*)

Like the restrained party in *Lister*, Torres-Hernandez violated the expiring restraining order. He made phone calls and sent texts to Perez. Torres-Hernandez argues, without any citation to authority, that the statute requires Perez to prove he had the intent to annoy or harass her. The DVPA focuses on the protected party requiring only that the protected party has a reasonable apprehension of future abuse. (*Ritchie, supra*, 115 Cal.App.4th p. 1290.) These phone calls and texts made Perez feel apprehensive about her safety. Perez specifically stated that the fact Torres-Hernandez violated the

order made her feel “scared and helpless.” She felt that the law had not been able to stop him and it made her fearful all the time.²

Therefore, the court erred both in finding that there had to be evidence of some “abuse” occurring since the issuance of the order, and that the abuse had to be physical violence in order to create a reasonable apprehension of future abuse.

D. *The Court Improperly Concluded That Evidence of Abuse of the Couple’s Children Was Irrelevant*

The court also found that any abuse by Torres-Hernandez towards the couple’s children was irrelevant “because it does not speak to any abuse that Ms. Perez has been subjected to.” We conclude the court also should have considered the abuse of Perez and Torres-Hernandez’s daughters and Perez’s son in determining whether to renew the order.

Under the DVPA, abuse is not limited to the protected party seeking the order. The definition of abuse includes placing “a person in reasonable apprehension of imminent serious bodily injury to that person or *to another*.” (§ 6203, subd. (a)(3), *italics added*.)

Division Three of this court recently held that child abuse, with no abuse of the protected party, can support the issuance of a DVRO. (*Gou, supra*, 228 Cal.App.4th at pp. 817–818.) In *Gou*, the mother witnessed extensive abuse of her son over a period of time, resulting in a charge of child abuse against the father. The trial court found that where there were no allegations of abuse against the mother, the abuse against the child was not sufficient to support a DVRO because the mother was not the victim of domestic violence. (*Id.* at p. 816.) Division Three reversed, holding the factual allegations “would support a finding that [the] respondent’s past behavior was abusive as it had placed [the] appellant in reasonable apprehension of imminent serious bodily injury to herself or the child, and disturbed [the] appellant’s peace by causing the destruction of her mental or emotional calm.” (*Id.* at p. 818.) The trial court erred in denying the DVRO request on the sole ground that appellant had failed to demonstrate she was the victim of domestic violence under the DVPA. (*Gou*, at p. 818.)

Here, Perez presented evidence that since the DVRO was issued, while she had not been physically abused by Torres-Hernandez, he had abused their

² If intent were relevant to the issue of abuse under the DVPA, here the evidence established that Torres-Hernandez meant to be harassing and threatening, including telling Perez she was “going to pay” for what she had done. Indeed, the court found that the “phone calls [were] intended to annoy her.”

children. He had hit their younger daughter, causing bruising on her chest in one incident and a swollen lip in another incident. Perez testified that the fact Torres-Hernandez hit the children made her more afraid of him because he had broken the law. There was also evidence that Torres-Hernandez taunted Perez by sending her texts after the child abuse charges against him were dismissed, telling her that “children pay the consequences,” which caused Perez “a lot of fear.”

■ Section 6320 describes enjoinal behavior as including “disturbing the peace of the other party.” (§ 6320, subd. (a).) “[D]isturbing the peace of the other party” means “conduct that destroys the mental or emotional calm of the other party.” (*In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1497 [93 Cal.Rptr.3d 723].) The abuse of their children destroyed Perez’s emotional calm and made her fear for her safety and the safety of her children. This is evidence the court should have considered under the statute in ruling on the renewal of the DVRO. (See *Rodriguez v. Menjivar* (2015) 243 Cal.App.4th 816, 822 [196 Cal.Rptr.3d 816] [the court must consider evidence of acts of emotional abuse that destroys a person’s “mental and emotional calm” as the basis for a DVPA order].)

The evidence that Perez presented at the hearing about Torres-Hernandez’s abuse of the children was also relevant to her request to modify the DVRO to include the children as protected parties. On remand, the court must consider whether the renewed order should be modified to include the children as protected parties.

IV.

DISPOSITION

The court’s order denying Perez’s request for renewal of the DVRO is reversed. The trial court is hereby ordered to hold a new hearing to determine whether the DVRO should be extended for five years or permanently (§ 6345, subd. (a)), and whether the order should be modified to include Perez’s three children.

Reardon, J., concurred.

STREETER, J., Concurring.—I concur fully in the majority opinion and write to emphasize an aspect of the trial court’s ruling, reversed by us today, that I find especially troubling.

For reasons that escape me, the court found Ms. Maria de la Luz Perez’s proffer of evidence of child abuse to be “irrelevant to the abuse alleged by Ms. Perez because it does not speak to any abuse that Ms. Perez has been subjected to.”

The Family Code authorizes either party to seek modification of a restraining order and sanctions the protection of other family members upon a showing of “good cause.” (Fam. Code, §§ 6320, subd. (a), 6345, subd. (a).)¹ Evidence that Mr. Job Francisco Torres-Hernandez had physically abused the children is plainly relevant to the question of whether “good cause” exists to support modification of a restraining order to protect them. The trial court’s failure to address this issue cannot be reconciled with the provisions of the Domestic Violence Prevention Act (DVPA; Fam. Code, § 6200 et seq.) and its purpose of protecting against “acts of domestic violence, abuse, and sexual abuse.” (Fam. Code, § 6220.) Indeed, the DVPA expressly states that the court “shall consider whether failure to make any of these orders may jeopardize the safety of the petitioner and the children for whom the custody or visitation orders are sought.” (Fam. Code, § 6340.)

The Legislature’s sensitivity to this issue is not surprising, as counsel for Ms. de la Luz Perez has pointed out, given the abundance of social science studies showing a direct correlation between abuse against a parent and abuse against the children of that parent. (See Edleson, *The Overlap Between Child Maltreatment and Woman Abuse* (1997) (rev. Apr. 1999) National Electronic Network on Violence Against Women <http://www.bvsde.paho.org/bvsacd/cd67/AR_overlap.pdf> [as of June 9, 2016], pp. 2–3; see also Meisner & Korn, *Protecting Children of Domestic Violence Victims with Criminal No-Contact Orders* (Apr. 2011) AEQUITAS: The Prosecutor’s Resource on Violence Against Women, STRATEGIES Newsletter <<http://www.aequitasresource.org/Protecting-Children-of-Domestic-Violence-Victims-with-Criminal-No-Contact-Orders.pdf>> [as of June 9, 2016], p. 1; Hart & Klein, *Practical Implications of Current Intimate Partner Violence Research for Victim Advocates and Service Providers* (2013) National Criminal Justice Reference Service <<https://www.ncjrs.gov/pdffiles1/nij/grants/244348.pdf>> [as of June 9, 2016], p. 64 (*Practical Implications*) [citing over 30 studies showing 41% median co-occurrence of child maltreatment and adult domestic violence].)

Within this body of social science literature, most of the studies show that in 30–60 percent of families where either child abuse or spousal abuse exists, both forms of the abuse exist (see Hart & Klein, *Practical Implications*, *supra*, at pp. 64–65), a phenomenon no doubt reflective of the sad reality that some batterers abuse children as a way to inflict pain on the abused spouse. There is also a documented link in the severity of spousal and related child abuse. A number of the studies show that the more severe the spousal abuse, the more severely the battered spouse’s child is likely to be abused. (E.g., Edleson, *The Overlap Between Child Maltreatment and Woman Abuse*, *supra*,

¹ (See also Code Civ. Proc., § 533 [authorizing modification of injunctions and temporary restraining orders upon a showing that the “ends of justice would be served” by such a modification].)

at p. 4.) The overlap between children witnessing domestic violence and being abused themselves has been widely documented as well. (*Ibid.*)

On this record, there is plenty of evidence that, in her own right, Ms. de la Luz Perez deserves further consideration of her request for renewal of the original restraining order. But when that issue is taken up, the interests of the children and whether they ought to be made protected parties by modification of the restraining order must be carefully considered. And to evaluate both of Ms. de la Luz Perez's requests for relief—for renewal and for modification—it is important to recognize that the interests of the children are, as a practical matter, bound up with the interests of their mother under the relevant statutory standard.

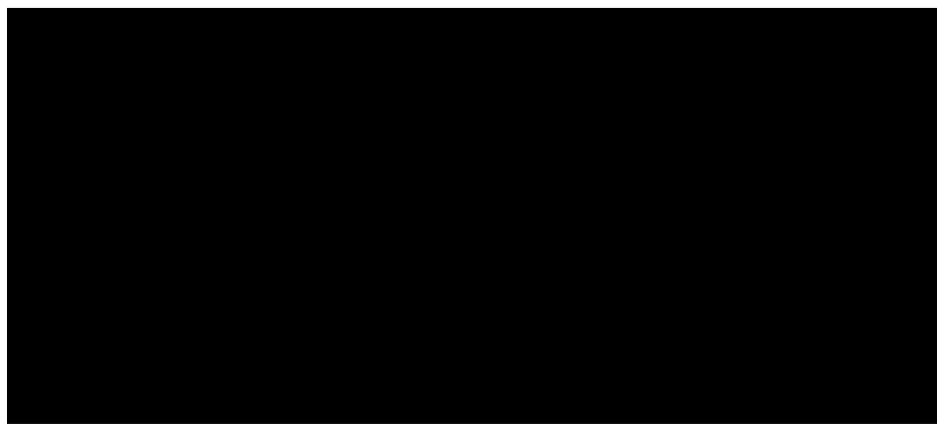
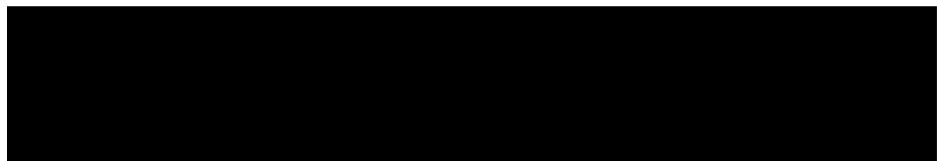
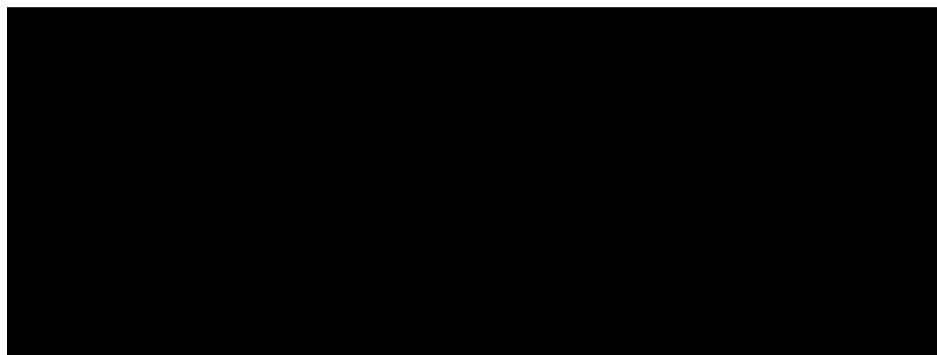
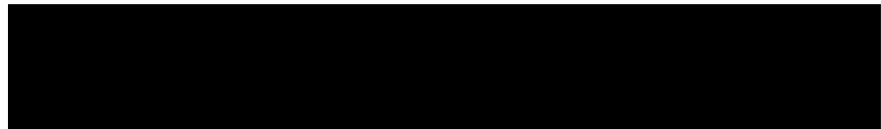
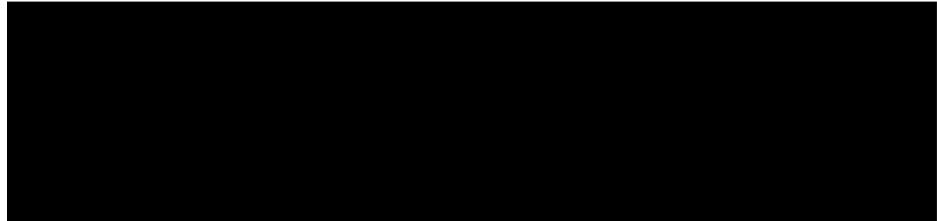
[No. D069050. Fourth Dist., Div. One. July 11, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
MICHAEL EVAN FUSTING, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Edward Mahler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Theodore M. Cropley and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

HUFFMAN, J.—This is another case dealing with the proper interpretation of newly created Penal Code¹ section 459.5² regarding shoplifting. We are

¹ All further statutory references are to the Penal Code unless otherwise specified.

² Section 459.5 provides: “(a) Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor, except that a person with one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290 may be punished

aware our Supreme Court has granted review in numerous cases including opinions on opposing interpretations of the statute. Ultimately our high court will provide guidance on the interpretation and application of the statute. In the interim, it is our obligation to make our best efforts to correctly interpret and apply the section.

The question presented by this appeal is whether a defendant must commit or intend to commit common law larceny at the time the person enters a commercial establishment during regular business hours. The parties do not dispute the building was a commercial establishment, that it was open for business, or that the value of the intended theft was less than \$950.

In 2004, Michael Evan Fusting entered a guilty plea to one count of second degree burglary (§ 459).

Following the passage of Proposition 47 (§ 1170.18, the Safe Neighborhoods and Schools Act) in November 2014, Fusting petitioned to have his burglary conviction reduced to misdemeanor “shoplifting.” The court denied the petition because entry into a building with the intent to commit theft by false pretenses does not qualify as shoplifting.

STATEMENT OF FACTS

According to the change of plea form, Fusting entered a building with the intent to sell a stolen surfboard.

DISCUSSION

Fusting contends the trial court’s analysis of sections 459.5 and 490a was flawed. He argues that the intent to commit larceny as used in section 459.5 must be read consistently with the case law analyzing the same language in section 459. The People, on the other hand, argue we should focus on the commonsense meaning of the term “shoplifting” and give it a dictionary meaning without reference to sections 459 and 490a. The People also argue that Fusting did not enter the surf shop with the intent to commit theft or larceny. They contend he entered with the intent to commit theft by false pretenses. Regarding the People’s latter position, we simply respond he was charged with and convicted of entering a building with the intent to commit theft, which we find entirely consistent with case law analyzing sections 459 and 490a.

pursuant to subdivision (h) of Section 1170. [¶] (b) Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.”

■ The question presented here is whether we restrict our analysis of section 459.5 to the dictionary meaning of the term shoplifting or whether we should interpret the statutory language in light of well-established definitions existing prior to the enactment of section 459.5. We opt for the latter approach.

A. Legal Principles

■ Proposition 47 added section 1170.18, which allows “[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47 had it] been in effect at the time of the offense” to “petition for a recall of sentence” and request resentencing. (§ 1170.18, subd. (a).) A person seeking resentencing under section 1170.18 must show he or she fits the criteria in subdivision (a). If the person satisfies the criteria the person shall have his or her sentence recalled and resentenced to a misdemeanor, unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b); *T. W. v. Superior Court* (2015) 236 Cal.App.4th 646, 649, fn. 2 [186 Cal.Rptr.3d 620].)

■ Relevant here, Proposition 47 also added a new crime of shoplifting, which is defined as “entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950).” (§ 459.5, subd. (a).)

In interpreting section 459.5, Fusting urges we look to section 490a for guidance. Section 490a provides, “[w]herever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word ‘theft’ were substituted therefor.”

■ Specifically, our issue requires us to find the correct interpretation of the term “larceny” as used in section 459.5. “In interpreting a voter initiative like [Proposition 47], we apply the same principles that govern statutory construction.’ [Citation.] ‘The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]’ [Citation.] In the case of a provision adopted by the voters, ‘their intent governs.’ [Citation.] ¶ ‘In determining such intent, we begin with the language of the statute itself.’ [Citation.] We look first to the words the voters used, giving them their usual and ordinary meaning. ‘If there is no ambiguity in the language of the statute, ‘then . . . the plain meaning of the language governs.’” [Citation.] “But when the

statutory language is ambiguous, ‘the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes.’” [Citation.] [¶] In construing a statute, we must also consider “‘the object to be achieved and the evil to be prevented by the legislation.’” [Citation.]’ [Citation.] ‘When legislation has been judicially construed and a subsequent statute on a similar subject uses identical or substantially similar language, the usual presumption is that the Legislature [or the voters] intended the same construction, unless a contrary intent clearly appears.’” (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1099–1100 [183 Cal.Rptr.3d 362].)

B. Analysis

■ The People contend Fusting did not commit shoplifting when he entered the surf shop with the intent to commit theft by false pretenses because shoplifting requires an intent to commit larceny. Also, the People argue section 490a is inapplicable because it does not redefine larceny as any theft. We are not persuaded by these arguments. Historically, the term “larceny” as used similarly in the burglary statute has been interpreted to include all thefts, including theft by false pretenses. (*People v. Dingle* (1985) 174 Cal.App.3d 21, 30 [219 Cal.Rptr. 707]; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 31 [46 Cal.Rptr.2d 840] (*Nguyen*); *People v. Parson* (2008) 44 Cal.4th 332, 353–354 [79 Cal.Rptr.3d 269, 187 P.3d 1].)

In *People v. Williams* (2013) 57 Cal.4th 776 [161 Cal.Rptr.3d 81, 305 P.3d 1241] (*Williams*), our high court discussed whether a man who committed theft by false pretenses and subsequently pushed a security guard in an attempt to flee could satisfy the “felonious taking” requirement of robbery. (*Id.* at p. 779.) One element of robbery, which is not present in any other type of theft, is the “‘felonious taking’” requirement. The defendant argued that the “felonious taking” requirement could only be satisfied by the crime of theft by larceny, and not theft by false pretenses. (*Id.* at p. 781.) The court, after analyzing the common law meanings of the different theft offenses, found that larceny is a necessary element of robbery. (*Id.* at pp. 786–787.) Thus, *Williams* held that theft by false pretenses could not support a robbery conviction, because only theft by larceny could fulfill the “felonious taking” requirement.

The analysis in *Williams*, *supra*, 57 Cal.4th 776 is distinguishable from our current issue of whether section 459.5 can be satisfied by theft by false pretenses. This is because the term “larceny” is not actually present in the statute defining robbery (§ 211). As such, *Williams* looked at the common law meaning of larceny in order to reach the conclusion that larceny is a necessary element of robbery. Therefore, the court was not analyzing the

statutory interpretation of the term “larceny,” but was analyzing the common law meanings and relations of the different theft crimes.

Conversely, in *Nguyen, supra*, 40 Cal.App.4th 28, we discussed whether a defendant could be convicted of burglary for entering the premises of another with the intent to commit theft by false pretenses. *Nguyen* held that the term “larceny” as used in the burglary statute included theft by false pretenses. In reaching our conclusion, we noted that section 490a shows “the Legislature has indicated a clear intent that the term ‘larceny’ as used in the burglary statute should be read to include all thefts, including ‘petit’ theft by false pretenses.” (*Nguyen, supra*, at p. 31.) The *Nguyen* holding is more on point with the issue here, because, unlike *Williams, supra*, 57 Cal.4th 776, we analyzed the interpretation of the term “larceny” as used in a statute.

Additionally, the People argue, in enacting section 459.5, the voters intended to restrict its application to stealing goods or merchandise openly displayed in retail stores. The People assert that “shoplifting” has long and commonly been understood to encompass only the theft of openly displayed merchandise from commercial establishments. As such, the People contend the voters’ reasonable belief was that the crime of “shoplifting” referred only to the common understanding of that crime. However, in viewing the plain text of the statute, we find nothing to support that contention. Had the voters intended “shoplifting” to be confined to that limited meaning, that intention could have easily been expressed in the text of the statute. Instead, the statute was worded substantially similar to the burglary statute (§ 459), which has been judicially interpreted to encompass all thefts. As previously noted, “[w]hen legislation has been judicially construed and a subsequent statute on a similar subject uses identical or substantially similar language, the usual presumption is that the Legislature [or the voters] intended the same construction, unless a contrary intent clearly appears.” (*Rivera, supra*, 233 Cal.App.4th at p. 1100.) We find no indication that a distinction was intended to be made between sections 459 and 459.5 in regard to the interpretation of the term “larceny.”

The People urge us to apply the definition of “shoplifting” as used in dictionaries and as discussed in Wharton’s treatise on criminal law (3 Wharton’s Criminal Law (15th ed. 2015) § 343). We decline to take that approach. The statute does not contain any definition of “shoplifting” other than setting forth the elements of the offense in the specific language of section 459.5. We decline to speculate whether the voters had to resort to dictionaries in formulating their views on the statute. We find it even more unlikely that they were familiar with Wharton’s criminal law treatise. Indeed, we wonder how many law-trained professionals have considered that resource. In short we remain satisfied that analysis of the language of the statute, in light of the case law defining the terms, is the best indicator of the voters’ intent.

Our interpretation is consistent with the voters' overall intent in passing Proposition 47. Proposition 47 was intended to "[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, p. 70.) Petty theft by false pretenses is precisely the type of nonserious, nonviolent crime Proposition 47 was aimed toward affecting. For example, Proposition 47 also made the crimes of forgery and drafting checks without sufficient funds of less than \$950 misdemeanors. (§§ 473, subd. (b), 476a.) Moreover, theft by false pretenses is less likely to involve violence than a situation where a person has the intention to steal openly displayed merchandise from a store. To provide misdemeanors for that type of theft, but not for theft by false pretenses, would contradict the voters' general intent of requiring misdemeanors for nonserious, nonviolent theft crimes.

■ In considering section 490a, we find that it requires us to have the word "larceny" read as "theft" in section 459.5. As such, the "intention to commit larceny" requirement of section 459.5 can be satisfied by the broader sense of an intent to commit theft. Thus, an intent to commit theft by false pretenses would satisfy that element. Not only is this consistent with prior case law regarding the interpretation of the term "larceny" as used in section 459, but it is also consistent with the voters' intent in passing Proposition 47. Lastly, interpreting the term "larceny" differently in section 459.5 than we would in section 459 would cause the interpretations of the two related statutes to be inconsistent and would ignore the mandate of section 490a.

DISPOSITION

The order denying Fusting's petition to reduce his burglary conviction to shoplifting is reversed, with directions to grant the petition.

Benke, Acting P. J., and Haller, J., concurred.

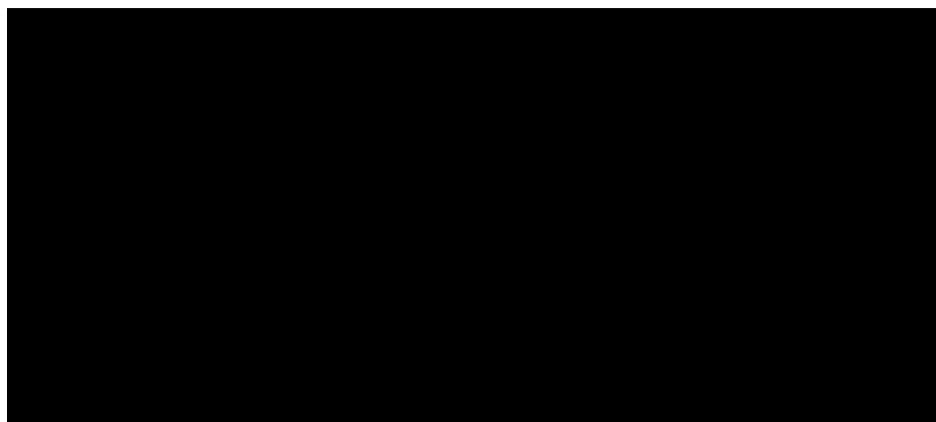
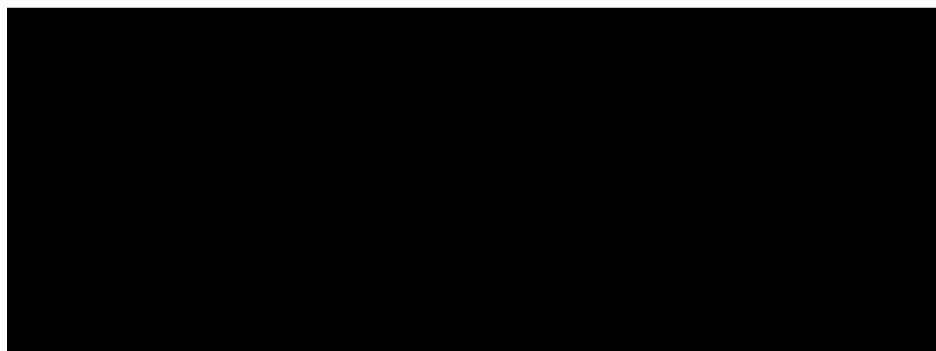
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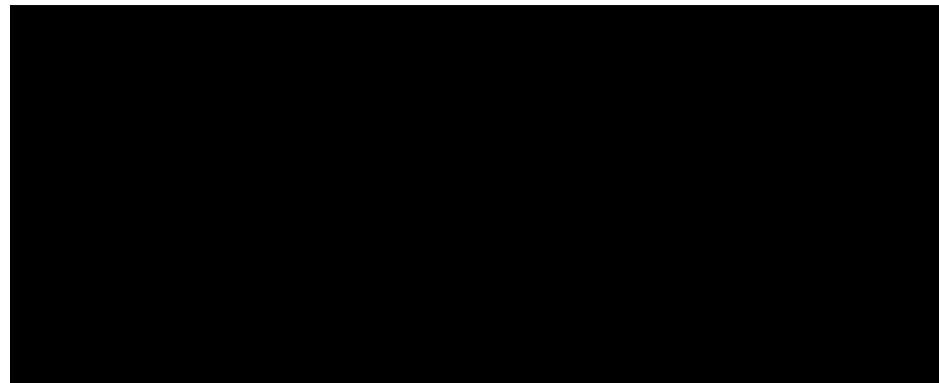
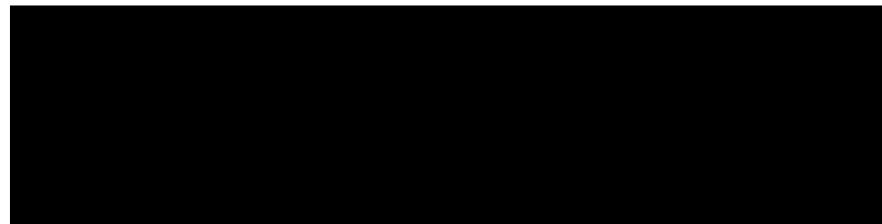
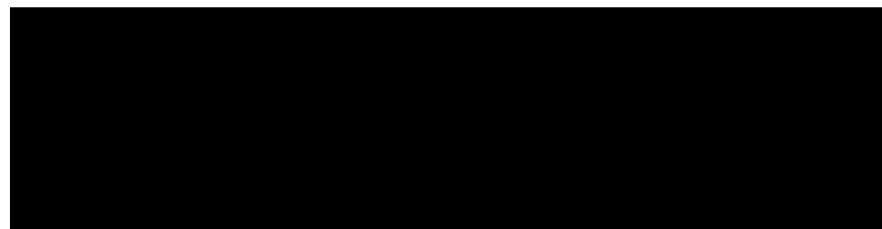
THE PEOPLE, Plaintiff and Respondent, v.
KRISTIE MARIE HAMERNIK, Defendant and Appellant.

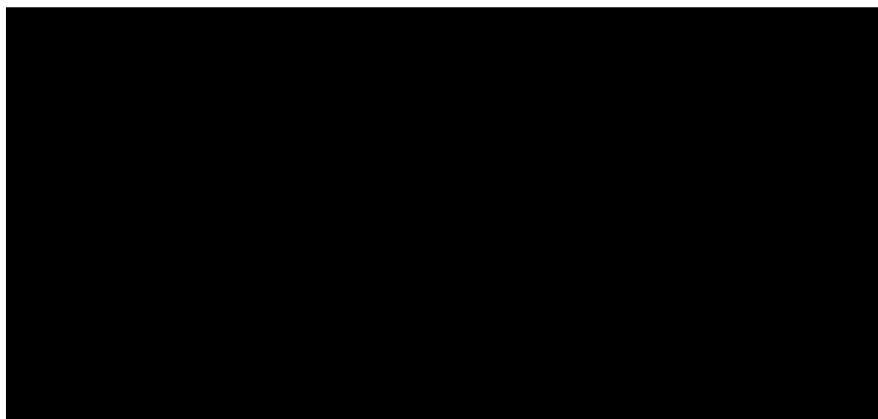
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COUNSEL

Paul J. Katz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

MILLER, J.—Defendant and appellant Kristie Marie Hamernik was a licensed vocational nurse employed at the Vista Cove Care Center in Corona. Defendant was suspended from work but returned to the facility purportedly to retrieve personal items. While at the facility, she entered the room of one of her former patients, Eiko Dorsch. Eiko¹ used a mechanism called a CADD pain pump, which delivered pain medication to her intravenously. After defendant visited Eiko, the pain pump had been emptied of medication. Defendant was found guilty of attempted possession of a controlled substance.

Defendant makes two claims on appeal, as follows: (1) the trial court erred by finding that attempted possession of a controlled substance was a lesser included offense of possession of a controlled substance, thereby substituting the attempted possession of a controlled substance for the drug possession charge after granting defendant's motion to dismiss the greater charge at the end of the People's case-in-chief, and (2) the trial court erred by admitting prior acts evidence pursuant to Evidence Code section 1101, subdivision (b).

¹ We use first names for the sake of clarity; no disrespect is intended.

We agree with defendant that the trial court erred by substituting attempted possession of a controlled substance for the possession of a controlled substance. Moreover, we reject the argument that we can correct the error by ordering the trial court to amend the information or that such error was harmless. We reverse defendant's conviction.

FACTUAL AND PROCEDURAL HISTORY

A. *Procedural History*

The information filed against defendant by the California Attorney General's Office charged her with unlawful possession of a controlled substance, Dilaudid, in violation of Health and Safety Code section 11350, subdivision (a) (count 1). She was also charged with misdemeanor theft from an elder of property not exceeding \$950 within the meaning of Penal Code section 368, subdivision (d)(2) (count 2). After the presentation of evidence, the trial court dismissed the possession of a controlled substance charge, and substituted attempted possession of a controlled substance for the charge in count 1, a lesser related offense. The jury found defendant guilty of attempted possession of a controlled substance within the meaning of Penal Code section 664 and Health and Safety Code section 11350, subdivision (a). Defendant was found not guilty of theft from an elder.

After she was convicted, defendant filed a motion to have her conviction of attempted possession of a controlled substance reduced to a misdemeanor pursuant to Penal Code section 1170.18, e.g., Proposition 47. The motion was granted. On November 14, 2014, defendant was granted summary probation for a period not to exceed 36 months. Defendant filed a notice of appeal on November 21, 2014.

B. *Factual History*

1. *People's Case-in-chief*

Debbie Dorsch was Eiko's daughter. In June 2012, Eiko was a resident at Vista Cove Care Center in Corona (Vista Cove). Eiko was 79 years old at the time; she was at Vista Cove because she had terminal cancer. Defendant was a licensed vocational nurse (LVN) and one of Eiko's nurses at Vista Cove. The decision was made that Eiko not be treated with chemotherapy drugs or radiation; she was treated with "comfort measures," i.e., pain medication. The pain medication was dispensed through a CADD pump.²

² A pharmacist testified that a CADD pump consisted of a cassette filled with medication prescribed by a physician. The cassette was put in the pump, which continuously dispensed

On June 28, 2012, around 9:00 p.m., Debbie was visiting Eiko at Vista Cove. At around that time, defendant came to Eiko's room. Defendant was not wearing a uniform. Defendant sat on the other bed in the room, which was empty. Debbie asked her what she was doing. Defendant told her that she was hiding from the other patients. Defendant did not otherwise talk to Debbie and Eiko. Defendant was still in the room when Debbie left to go home. Defendant was the only one in the room.

Prior to that night, Debbie had seen defendant handling the CADD pump belonging to Eiko. Debbie had seen her use a key to open up the CADD pump; she had seen defendant touch buttons, and had seen her handle the cassette that contained the pain medication, which was placed in the CADD pump. Defendant had touched the pump at least six times.

Debra Miller had worked at Vista Cove as a certified nursing aide. Miller had cared for Eiko. The only authority Miller had to touch the CADD pump was to reposition it when she would move Eiko in the bed. On June 28, Miller was in Eiko's room around 9:00 p.m. She saw defendant sitting on the other bed in the room playing on her cell phone. She was in regular clothes.

Miller turned her back to defendant to write on a white board that was in the room. She asked defendant if she would want to go outside and have a cigarette during her break but defendant told her she had quit smoking. When Miller turned back around, defendant was standing over Eiko. She had the pain pump in her hand. She told Miller that the medication was almost gone. Defendant left the room. Miller went to her supervisor because she thought it was strange defendant was holding the pain pump.

Esperanza Ladia was a registered nurse. In 2012, she was the shift supervisor from 3:00 p.m. to 11:00 p.m. at Vista Cove. Ladia supervised the giving of intravenous drugs including through the CADD pump. As a registered nurse, she was qualified to handle the pain medication in the pumps. Defendant, as an LVN, would not be allowed to remove an empty pain cassette for a patient or change the dosage.

Ladia cared for Eiko. Ladia could not recall without the records what kind of medication Eiko had in the CADD pump. Ladia checked Eiko's pump at 3:30 p.m. on June 28; it was working. There were 32 milliliters of pain medication remaining in the pump. Ladia went to Eiko's room around 9:00 p.m. The bag on the pump was empty but no alarm had sounded. An alarm

medication through a tubing connected to an intravenous line in the patient. The pump could be tampered with by breaking the seal on the tubing and pulling out the drug with a syringe. The cassette could only be removed by using a key.

usually sounded when the medication was low or gone. The monitor showed 25 milliliters but the bag was empty. Further, a seal on the CADD pump was broken.

Coszette Cobb, a registered nurse, was the director of nurses at Vista Cove. Cobb had training in using CADD pain pumps. Only registered nurses were permitted to work with the pain pumps; defendant was not permitted to work with the CADD pump. Cobb observed Eiko's CADD pump on June 28. The display stated it had 25 milliliters of medication. However, the cassette appeared empty although it was still locked in place. The seal on the pump was broken. In her experience, she had never seen a tamper seal break on a pump. Cobb tested the pain pump and there was no medication left. On the night of June 28, defendant had been suspended and was not permitted to be in the facility.

Cobb explained that at Vista Cove only pharmacists programmed the amount of pain medication dispensed to the patients. They were the only ones with access to the code for the pumps.

Judy Dacayo was a registered nurse and worked at Vista Cove in 2012. Dacayo checked Eiko's CADD pump on June 28 at 7:30 p.m. It had 28 milliliters of medication remaining. The blue tamper seal was intact. Dacayo saw defendant at Vista Cove around 9:00 p.m. Defendant came to the nurse's station. Defendant told Dacayo that she was at the facility to pick up her blood pressure cuff. Defendant told Dacayo that Eiko's pump was empty. Dacayo did not hear the pump beeping, which it should have done if it was empty. Defendant did not have anything in her hands.

Dacayo spoke with Dennis Santos, who was the LVN on duty passing out medication. Ladia, Dacayo and Santos all went to Eiko's room. They all noticed that the blue seal on the tubing was broken and the cassette was empty. There was no medication in the bag. Dacayo did not see defendant after she left the nurse's station. Eiko received four milliliters of pain medication each hour.

Santos was making rounds giving out medication around 9:00 p.m. He observed defendant in Eiko's room. Debbie was also in the room. Santos asked defendant what she was doing and she told him that she was visiting the family. He assumed that she was friends with Eiko and Debbie. Santos left the room. Sometime later he was informed that Eiko's pain pump was empty. Santos observed defendant go into the restroom. He then saw her leave the restroom and walk out of Vista Cove.

Sue Selfridge was another one of Eiko's daughters. Defendant did not have a close relationship with their family. In June 2012, Eiko had to be hospitalized at the Corona Regional Medical Center. Selfridge did not advise

defendant that Eiko was at the facility. However, defendant appeared in Eiko's room. Defendant told Selfridge that she had been advised by staff at Vista Cove that Eiko had been taken to the medical center. Defendant sat next to Eiko. Selfridge left the room for about five minutes. When Selfridge returned, the curtains were drawn around Eiko's bed; they were not like that when she left the room. When Selfridge pulled back the curtain, defendant was holding Eiko's CADD pain pump in her hand. When Selfridge made eye contact with defendant, defendant pushed the pain pump back toward Eiko. While Selfridge was visiting Vista Cove, each time that she saw defendant in Eiko's room, defendant would touch the CADD pump.

Steve Perez was a special agent employed by the Department of Justice. He was assigned to the elder abuse department. Perez investigated Eiko's empty CADD pump. Perez discovered defendant had been suspended by Vista Cove. Perez spoke with defendant in September 2012 at her home. Defendant told Perez she had gone to visit Eiko. Eiko told her the CADD pump was not working and to tell someone. Defendant checked the bag and noticed it was empty. She went and told the nurse. Defendant told Perez that Eiko's pain pump contained Dilaudid. Defendant denied she had taken the Dilaudid. Defendant claimed she was close with Eiko and the family.

Defendant claimed the family called her to tell her that Eiko had been moved to the Corona Regional Medical Center. She went to the hospital as suggested by the family to check on her. Defendant then changed her story that she tried to call the daughter and got no answer. Defendant denied holding the pain pump while she was at the hospital. She claimed if anyone said that she had been holding the pain pump, they would be lying. Defendant told Perez she had been prescribed Dilaudid 15 times for medical conditions including kidney stones.

2. *Defense*

Defendant testified on her own behalf. Defendant went to Vista Cove on June 28 to get her blood pressure cuff and stethoscope. She left her belongings in her car. Defendant found Santos in Eiko's room; she asked him about her medical equipment. Defendant sat on the empty bed in the room while Santos finished treating Eiko. Everyone left the room and she stayed to tell Eiko she hoped she got better. Eiko motioned for her to check the pain pump. Defendant picked it up and determined it was low. Defendant went to the nurse's station to make sure that the CADD pump was checked.

Defendant visited Eiko at the Corona Regional Medical Center because she was told by other staff members Eiko had been admitted. Defendant had a relationship with the family and wanted to make sure Eiko was okay.

Defendant had assisted Eiko to reposition herself because Eiko was uncomfortable. As defendant was repositioning Eiko, defendant touched the CADD pain pump to move it out of the way. Defendant denied she ever took Dilaudid from Eiko. Defendant was terminated due to the June 28 visit.

DISCUSSION

Defendant contends the trial court erred by substituting the charge of attempted possession of a controlled substance for possession of a controlled substance, specifically Dilaudid, charged in count 1. Defendant claims attempted possession of a controlled substance is not a lesser included offense of possession of a controlled substance because the latter requires only general intent, and the former requires specific intent. This last minute change violated her Sixth Amendment right to be advised of the charge against her. The People concede that attempted possession of a controlled substance is not a lesser included offense of possession of a controlled substance. However, the People contend the trial court should have granted the prosecution's motion to amend the information to add the charge. The People insist remand or reversal is not required and that this court can order the trial court to amend the information. Further, the People contend that such error was harmless because substantial evidence supported that defendant committed attempted possession of a controlled substance.

A. *Additional Factual Background*

Throughout the prosecution's case-in-chief, defendant's counsel objected to any witness who attempted to identify the medication in Eiko's CADD pump as Dilaudid. For example, during the examination of Debbie, the trial court sustained the objection by defendant's counsel that Debbie had knowledge the pain medication in Eiko's CADD pump was Dilaudid. The pharmacist, who was called to explain how CADD pumps operate, was not able to testify that Eiko was receiving Dilaudid.

When Dacayo testified, the prosecutor argued Dacayo could state what was in the cassette for Eiko because Dacayo signed for it and she was a registered nurse. Defendant's counsel argued Dacayo had not tested or placed the medication in the bag. There was no foundation for her knowledge of the substance and there was a chain of custody problem. The prosecutor explained, "Your Honor, we have charged [defendant] with theft from an elder and possession of Dilaudid. The theft was the Dilaudid. We have put on, I think, six professionals and a family member that have all attempted to explain that Dilaudid was in the pain pump. Foundation has been—objections have been sustained to every single one of them." The trial court sustained the objection to Dacayo's testimony on hearsay grounds. The prosecutor

stated she would need a continuance in order to present the testimony of the pharmacist who filled the cassettes placed in Eiko's pump. Defendant's counsel objected to a continuance. He also objected to what he considered late discovery.

At the next hearing, the prosecutor reported she had been in contact with the pharmacy that dispensed the Dilaudid, and was waiting to hear from the pharmacist. Defendant was not willing to stipulate that the substance was Dilaudid and objected to a continuance. The trial court stated, after an in-chamber conference, that the prosecutor sought to have the information amended to change the charge in count 1 to attempted possession of a controlled substance. Defendant's counsel objected on the grounds of due process and defendant's right to a fair trial and to effective assistance of counsel. Defendant's counsel argued there was no notice prior to the trial that there would be a problem of proof. There was no notice during the preliminary hearing. Defendant's counsel also noted that the general intent crime of possession was now a specific intent attempt crime. It "drastically" changed the trial strategy. All of the witnesses had already testified.

The trial court noted, "[A]ttempt is a lesser included offense with regard to Count 1. It's very clear to that. This isn't a secret to the defense in this matter that it's a lesser included offense." There was no problem with notice. Further, the trial court had the obligation to instruct the jury on lesser included offenses. The trial court did not believe a continuance was appropriate.

Defendant then brought a Penal Code section 1118.1 motion to dismiss both counts. Defendant argued that there was no evidence the substance in Eiko's pump was Dilaudid. Further, there was no showing of a useable amount. The trial court found there was insufficient evidence to support the greater offense of possession. The trial court stated it had discretion, however, to have the jury consider the necessarily lesser included offense of attempted possession. Defendant had notice of the lesser included offense of attempted possession. The trial court stated, "I also want to note that the fact that the drug in question has not been proven to be Dilaudid is not fatal to a lesser included offense being submitted to the jury. Obviously, the attempt would mean it's specific intent. And the case law does support where there is testimony and evidence that the intent of the defendant in acting was that their understanding that the item being taken was a drug, that that is sufficient evidence that would allow it to go to the trier of fact." The trial court dismissed the greater offense. The trial court found the motion to amend the information was moot.

On October 20, 2014, defendant filed a motion to reconsider the trial court's determination that the People could proceed as an attempted possession case, because there had been a failure in the People's case-in-chief to prove the substance was in fact a controlled substance, specifically Dilaudid. Defendant's counsel argued that attempted possession was not a lesser included offense of simple possession. There was no notice that this was an attempted possession case. Defendant relied on the case of *People v. Bailey* (2012) 54 Cal.4th 740 [143 Cal.Rptr.3d 647, 279 P.3d 1120], in arguing that the completed crime of possession was a general intent crime, and attempted possession was a specific intent offense.

The prosecutor orally responded to the motion. She renewed her request to have the information amended to include a charge of attempted possession of a controlled substance. The trial court denied the motion for reconsideration. The trial court felt the testimony of the witnesses established attempted possession of a controlled substance. The trial court also ruled that the motion to amend the information was denied because it was moot.

The jury was instructed that in order to find defendant guilty of attempted possession of a controlled substance, it must find defendant took a direct but ineffective step toward possessing Dilaudid, and intended to possess Dilaudid. Additionally, they were instructed that it must be proven (1) that defendant unlawfully possessed a controlled substance; (2) defendant knew of its presence; (3) defendant knew of the substance's nature or character as a controlled substance; (4) the controlled substance was Dilaudid; and (5) the controlled substance was a useable amount. The jury was also instructed on theft from an elder, which required that the Dilaudid be taken from an elder.

B. *Attempted Possession Is Not a Lesser Included Offense of Possession*

It is clear that attempted possession of a controlled substance is not a lesser included offense of possession of a controlled substance. "Although the evidence may fail to support a conviction of the charged offense, the trial court has discretion to substitute a lesser included offense for the jury's consideration. ' '[I]n determining a motion pursuant to Penal Code section 1118.1, the trial judge is entitled to consider whether, although the evidence is insufficient to establish the commission of the crime specifically charged in the accusatory pleading, the evidence is sufficient to sustain a conviction of a necessarily included offense which the evidence tends to prove. A defendant may be convicted of a lesser offense if he was charged with a felony which included the lesser offense.' ' '(*People v. Powell* (2010) 181 Cal.App.4th 304, 311 [105 Cal.Rptr.3d 7].)

■ “The essential elements of unlawful possession of a controlled substance are ‘dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character.’” (*People v. Martin* (2001) 25 Cal.4th 1180, 1184 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) “It has been observed that the statute proscribing the unlawful possession of controlled substances [citations] ‘makes possession illegal without regard to the specific intent in possessing the substance.’” (*Ibid.*) On the other hand, attempted possession of a controlled substance requires “a specific intent and an ineffectual overt act directed at its consummation.” (*People v. Gibson* (1949) 94 Cal.App.2d 468, 470 [210 P.2d 747].) “[W]hen the completed offense is a general intent crime, an attempt to commit that offense does not meet the definition of a lesser included offense under the elements test because the attempted offense includes a specific intent element not included in the complete offense.” (*People v. Ngo* (2014) 225 Cal.App.4th 126, 156 [170 Cal.Rptr.3d 90], fn. omitted; see also *People v. Bailey*, *supra*, 54 Cal.4th at p. 749 [attempted escape is not a lesser included offense of escape because escape is a general intent crime].)

Here, the trial court dismissed the greater offense of possession of Dilaudid, because the prosecution failed to present evidence that the substance in Eiko’s CADD pain pump was, in fact, Dilaudid; the court then substituted what it believed was the lesser included offense of attempted possession of a controlled substance. It is undisputed by the parties on appeal that attempted possession of a controlled substance is not a lesser included offense of possession of a controlled substance. As such, the trial court erred by substituting the lesser offense for the greater offense.

The People, relying on the language in Penal Code section 1009, contend reversal of defendant’s conviction of attempted possession of a controlled substance is not mandated. The People contend since a properly instructed jury found defendant guilty of the crime of attempted possession of a controlled substance, this court can correct the trial court’s erroneous order finding the motion to amend the information moot, and order the information amended.

Penal Code section 1009 provides in relevant part: “An indictment, accusation or information may be amended by the district attorney, and an amended complaint may be filed by the prosecuting attorney, without leave of court at any time before the defendant pleads or a demurrer to the original pleading is sustained. The court in which an action is pending may order or permit an amendment of an indictment, accusation or information, or the filing of an amended complaint, for any defect or insufficiency, at any stage of the proceedings, or if the defect in an indictment or information be one that

cannot be remedied by amendment, may order the case submitted to the same or another grand jury, or a new information to be filed.”

■ “Under [Penal Code] section 1009, the People may amend an information without leave of court prior to entry of a defendant’s plea, and the trial court may permit an amendment of an information at any stage of the proceedings.” (*People v. Lettice* (2013) 221 Cal.App.4th 139, 147 [163 Cal.Rptr.3d 862].) “[Penal Code] section 1009 authorizes amendment of an information at any stage of the proceedings provided the amendment does not change the offense charged in the original information to one not shown by the evidence taken at the preliminary examination. If the substantial rights of the defendant would be prejudiced by the amendment, a reasonable postponement not longer than the ends of justice require may be granted. . . . Similarly, where the amendment makes no substantial change in the offense charged and requires no additional preparation or evidence to meet the change, the denial of a continuance is justified and proper.” (*People v. Winters* (1990) 221 Cal.App.3d 997, 1005 [270 Cal.Rptr. 740].) “The questions of whether the prosecution should be permitted to amend the information and whether continuance in a given case should be granted are matters within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent a clear abuse of discretion.” (*Id.* at p. 1005; see also *People v. Witt* (1975) 53 Cal.App.3d 154, 165 [125 Cal.Rptr. 653], disapproved on other grounds in *People v. Posey* (2004) 32 Cal.4th 193 [8 Cal.Rptr.3d 551, 82 P.3d 755].)

Initially, respondent provides no authority to this court other than the language of Penal Code section 1009 that we can order amendment of the information on appeal after conviction. Numerous courts have concluded that amendment to the information can occur “at any stage of the proceeding, up to and including the close of trial.” (*People v. Graff* (2009) 170 Cal.App.4th 345, 361 [87 Cal.Rptr.3d 827]; see also *People v. Flowers* (1971) 14 Cal.App.3d 1017, 1020 [92 Cal.Rptr. 647].) We have found no authority to support respondent’s position that we have authority to order the trial court to amend the information after conviction.

Further, it is clear and undisputed by the People that this court reviews the trial court’s ruling on a motion to amend the information for abuse of discretion. Here, the trial court made no ruling on the motion to amend the information finding that it was moot. We have nothing to review. This court cannot engage in de novo review of the request by the People to amend the information, determining that the amendment does not prejudice defendant’s substantial rights, and that it does not charge an offense different than that shown at the preliminary hearing. Those matters are left to the sound discretion of the trial court.

The People contend that had the trial court been aware that attempted possession of a controlled substance was not a lesser included offense of possession of Dilaudid, it would have amended the information because it had already concluded that defendant had notice of the attempt charge. However, the trial court found defendant had notice because attempted possession was a lesser included offense of possession. Further, defendant raises the reasonable argument that the defense strategy would have been different had defendant been aware that the charge was attempted possession, rather than the general intent crime of possession.

Further, even if we were to consider whether we can order the trial court to amend the information, the People do not explain the procedure the trial court would follow. “Where an information is amended, regular and orderly procedure requires the defendant be rearraigned and required to plead thereto before trial.” (*People v. Walker* (1959) 170 Cal.App.2d 159, 164 [338 P.2d 536].) Would defendant be rearraigned in the trial court? Would defendant be able to enter a plea of not guilty and the trial court would immediately find her guilty? Other courts have held that when a “minor change[]” that does not “alter the nature of the charge alleged,” is made to the information, it is not error to fail to arraign the defendant on the amended information and take a plea. (*People v. McQuiston* (1968) 264 Cal.App.2d 410, 417 [70 Cal.Rptr. 531].) Should we conclude this amendment was only a minor change that does not require defendant be rearraigned? The People provide no argument as to the procedure that should be followed.

■ Procedurally, this court has no ability to correct the errors committed by the trial court. The trial court erroneously determined that attempted possession of a controlled substance was a lesser included offense of possession of a controlled substance. It thereafter determined the motion to amend the information was moot, failing to exercise its discretion as to whether amendment to the information was appropriate.

For the first time at oral argument, the People contend reversal is not required because the erroneous instruction to the jury on attempted possession of a controlled substance was not prejudicial. The People insist that the decision to reverse defendant’s conviction amounts to “form over substance” as it was clear the evidence supported the attempted possession charge despite the lesser related offense not being charged in the information.

■ “‘No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.’” (*People v. Thomas* (1987) 43 Cal.3d 818, 823 [239 Cal.Rptr. 307, 740 P.2d

419].) “[T]he role of the accusatory pleading is to provide notice to the defendant of the charges that he or she can anticipate being proved at trial. ‘When an accusatory pleading alleges a particular offense, it thereby demonstrates the prosecution’s intent to prove all the elements of any lesser necessarily included offense. Hence, the stated charge notifies the defendant, for due process purposes, that he must also be prepared to defend against any lesser offense necessarily included therein, even if the lesser offense is not expressly set forth in the indictment or information.’” (*People v. Anderson* (2006) 141 Cal.App.4th 430, 445 [45 Cal.Rptr.3d 910].)

■ “It is fundamental that “When a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime. [Citations.] This reasoning rests upon a constitutional basis: ‘Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.’”’ (*People v. Parks* (2004) 118 Cal.App.4th 1, 5–6 [12 Cal.Rptr.3d 635] (*Parks*).) “‘However, an exception to this rule has long been recognized in cases where a defendant expressly or impliedly consents to have the trier of fact consider a nonincluded offense: “Since a defendant who requests or acquiesces in conviction of a lesser offense cannot legitimately claim lack of notice, the court has jurisdiction to convict him of that offense.”’” (*Id.* at p. 6; see also *People v. Toro* (1989) 47 Cal.3d 966, 975 [254 Cal.Rptr. 811, 766 P.2d 577], disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558 [76 Cal.Rptr.2d 239, 957 P.2d 928] [the due process notice requirement precludes conviction of a lesser related offense when the defendant has not consented to it being considered by the trier of fact].)

In *Parks*, the defendant was convicted of a lesser related offense that was not charged in the information. The court found, “[The defendant] lacked ‘warning or notice that he was subject to the charge of the lesser related offense.’ [Citation.] Because it cannot be said that [the defendant] consented to the trial court’s consideration of lesser related offenses, the conviction must be reversed.” (*Parks, supra*, 118 Cal.App.4th at p. 8.)

Here, defendant was convicted of attempted possession of a controlled substance, a charge not included in the information and which the People contend was a lesser related offense to the charged possession count. Defendant objected to the amendment to the information on the grounds it would violate her rights to due process and a fair trial. Defendant strenuously objected to the instructions on attempted possession arguing it was not a lesser included offense and had not been charged in the information. Defendant clearly did not agree to the change to the charges by the trial court. As such, based on the foregoing, the conviction of a lesser related offense cannot stand.

We have found no case to support the People's argument that since the evidence supported the lesser related offense, any failure to charge the defendant in the information was harmless. However, since the attempted possession charge was not included in the information, the trial court lacked jurisdiction to convict defendant of the lesser related offense. (*Parks, supra*, 118 Cal.App.4th at pp. 5–6.) Reversal is required.

■ Also at oral argument, defendant asked this court to find she cannot be retried on the charge of attempted possession of a controlled substance because it would violate double jeopardy principles. She contends since she was charged with and acquitted of possession of a controlled substance, she cannot be retried for attempted possession, which is based on the same facts and circumstances. “[Penal Code section 654, subdivision (a) provides that ‘[a]n acquittal or conviction and sentence under any one [provision of law] bars a prosecution for the same act or omission under any other.’ In *Kellett v. Superior Court* (1966) 63 Cal.2d 822, 827 [48 Cal.Rptr. 366, 409 P.2d 206], the court stated that ‘[w]hen, as here, the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence.’” (*Sanders v. Superior Court* (1999) 76 Cal.App.4th 609, 614 [90 Cal.Rptr.2d 481], fn. omitted.)

“Whether *Kellett* applies must be determined on a case-by-case basis. [Citation.] Appellate courts have adopted two different tests to determine a course of conduct for purposes of multiple prosecution.” (*People v. Valli* (2010) 187 Cal.App.4th 786, 797 [114 Cal.Rptr.3d 335].) The first test involves crimes committed at different times and places (*id.* at p. 797) which is not relevant here. Further, courts have applied an evidentiary test. In *People v. Hurtado* (1977) 67 Cal.App.3d 633 [136 Cal.Rptr. 774], the court set forth the test as follows: “More specifically, if the evidence needed to prove one offense necessarily supplies proof of the other, we concluded that the two offenses must be prosecuted together, in the interests of preventing needless harassment and waste of public funds.” (*Id.* at p. 636.)

Recently the California Supreme Court reiterated the rule in *Kellett*. It found, “*Kellett* held that when ‘the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or

conviction and sentence.’” (*People v. Goolsby* (2015) 62 Cal.4th 360, 366 [196 Cal.Rptr.3d 726, 363 P.3d 623].)

In *Goolsby*, the Supreme Court found no problem with a retrial on a lesser related offense when the greater offense was reversed for insufficient evidence because the jury had been instructed with the lesser related offense, even though it was not charged in the information, and the defendant did not object to the instruction. Further, since the jury found the defendant guilty of the greater charge, and did not reach the lesser offense, the lesser offense was left “unresolved” and retrial was appropriate. (*People v. Goolsby, supra*, 62 Cal.4th at pp. 366–367.)

This case differs from *Goolsby*. Here, defendant objected to amendment of the information or lesser related instructions. The prosecutor had to charge defendant in the information with both possession and attempted possession of a controlled substance based on the same facts in the same proceeding. Retrial is not allowed under the principles of *Kellett v. Superior Court, supra*, 63 Cal.2d 822 and Penal Code section 654.

We must reverse defendant’s conviction; retrial is barred under Penal Code section 654 and *Kellett v. Superior Court, supra*, 63 Cal.2d 822.³

DISPOSITION

The judgment is reversed and retrial is barred under Penal Code section 654 and *Kellett v. Superior Court, supra*, 63 Cal.2d 822.

Hollenhorst, Acting P. J., and McKinster, J., concurred.

A petition for a rehearing was denied August 2, 2016, and the opinion was modified to read as printed above. Respondent’s petition for review by the Supreme Court was denied October 26, 2016, S236632.

³ Since we conclude reversal of the conviction is necessary, we need not address whether the trial court erred by admitting the prior acts evidence.

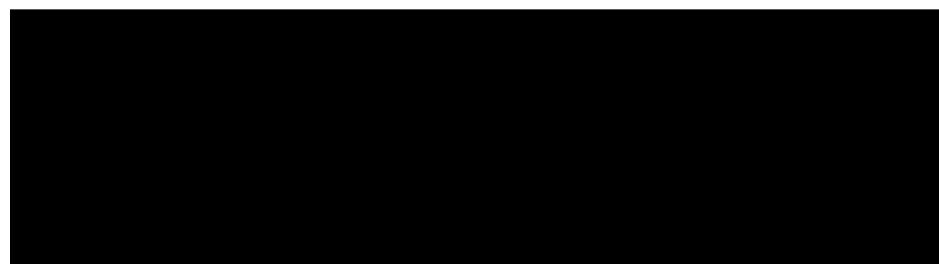
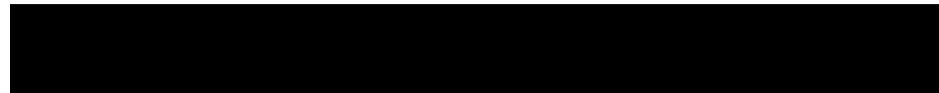
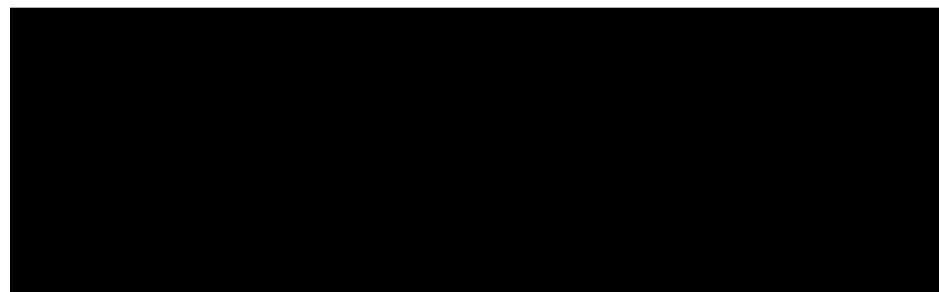
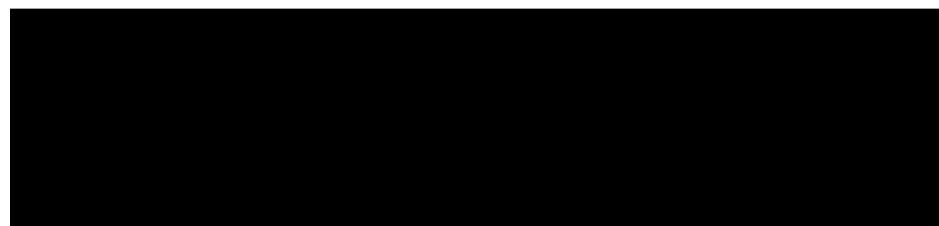
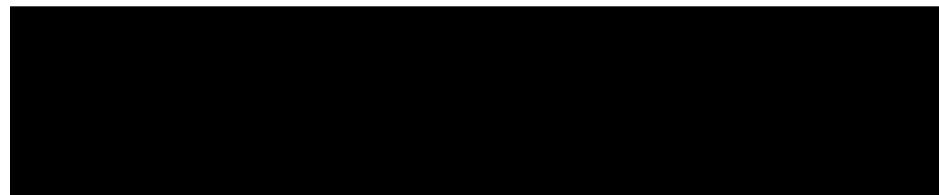
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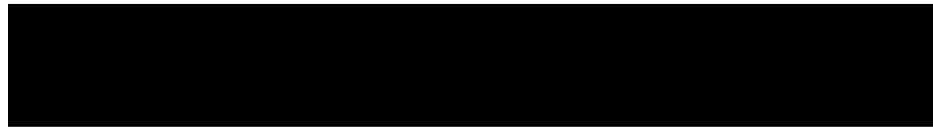
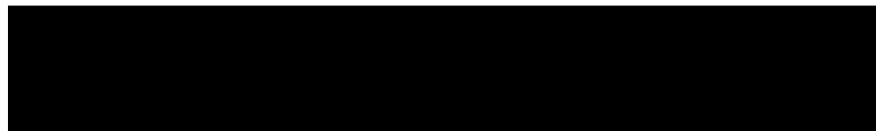
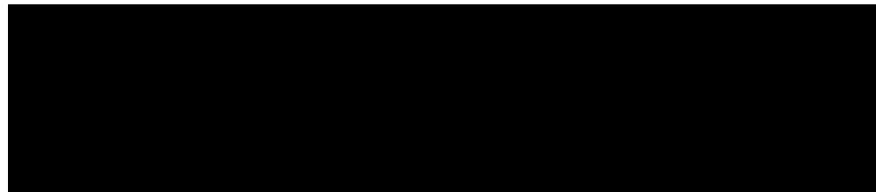
THE PEOPLE, Plaintiff and Respondent, v.
JAMES CARL MUTTER, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Daniel Hilton, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

MILLER, J.—The trial court denied the Proposition 47 petition for resentencing of defendant and appellant James Carl Mutter. (Pen. Code, § 1170.18.)¹ Defendant contends the trial court erred because the crime for which he sought resentencing—possession or receipt of counterfeit currency (§ 475, subd. (a))—is a misdemeanor after the passage of Proposition 47. The denial of the petition is reversed.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

FACTUAL AND PROCEDURAL HISTORY

Defendant was charged with two offenses, both alleged to have occurred on or about November 30, 2013: (1) forgery, in that defendant willfully and unlawfully possessed or received a counterfeit item with the intent to pass the item, knowing it to be counterfeit (Pen. Code, § 475, subd. (a)) and (2) possession of heroin (Health & Saf. Code, § 1350, subd. (a)). The information did not identify the counterfeit item or its value. Two prison priors were also alleged against defendant. (Pen. Code, § 667.5, subd. (b).)

On January 16, 2015, defendant pled guilty to the forgery count (§ 475, subd. (a)). The trial court imposed a 16-month sentence, with four months to be served in the county jail and 12 months of mandatory supervision. At the plea hearing defendant admitted he had “some counterfeit bills and tried to pass them.” The amount of the counterfeit bills was not given at the hearing. Defendant’s plea form reflects the item possessed was counterfeit bills, but does not include the amount of the counterfeit bills.

On April 6, 2015, the Riverside County Probation Department moved the trial court to transfer defendant’s mandatory supervision to Orange County because defendant was residing in Orange County. The motion to transfer probation was combined with a Proposition 47 hearing. Defendant did not file a Proposition 47 petition, but did file a memorandum of points and authorities explaining why possession or receipt of counterfeit bills is now a misdemeanor under Proposition 47. Presumably, defendant did not file a Proposition 47 petition because there was a suggestion that defendant’s probation might not need to be transferred because defendant could qualify for Proposition 47 relief, thus freeing him from mandatory supervision.

In defendant’s points and authorities, he argued Proposition 47 altered section 473, which sets forth the punishment for a variety of forgery offenses, including section 475, subdivision (a), which is the offense for which defendant was convicted. Defendant argued that although Proposition 47 did not directly alter section 475, subdivision (a), it altered the relevant punishment statute (§ 473) by reducing forgery related to a “bank bill” to a misdemeanor. Defendant asserted currency (§ 475, subd. (a)) qualified as a “bank bill” (§ 473, subd. (b)), and therefore, his conviction should be reduced to a misdemeanor.

The People responded that defendant did not qualify for Proposition 47 relief because (1) section 475, subdivision (a), was not a qualifying crime, i.e., it had not been altered by Proposition 47, and (2) defendant possessed six counterfeit \$100 bills.

On July 31, 2015, the trial court held the combined hearing. At the hearing, the prosecutor asserted defendant possessed seven \$100 bills. The court

questioned why Proposition 47 would apply to section 475, subdivision (a) (defendant's crime) when that statute was not specifically listed in Proposition 47. Defense counsel asserted that was a technicality and the electorate intended to alter all forgery statutes via alteration of the forgery punishment statute (§ 473).

The trial court explained that it did not think "bank note" in the punishment statute (§ 473) included currency. The court said, "I think they would have easily said 'currency,' if they meant to include that, and I don't honestly know what they meant by bank note, but I don't think they meant cash. I think they meant a bank document that could be forged which had a dollar amount, like a check. [¶] So I'm going to find he's not eligible for relief because he had hundred-dollar bank notes, which were in fact translated to cash. He had cash, which although they say bank note on them, I don't think the bank note in [Proposition 47] is cash. Maybe it is. But I'm going to find him not eligible."

DISCUSSION

A. *Contention*

Defendant contends the trial court erred by concluding currency does not fall within the definition of a "bank bill."

B. *Law*

■ No evidence was submitted at the trial court, so we will apply the de novo standard of review. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 878 [191 Cal.Rptr.3d 295].) Interpretation of statutes and voter initiatives requires application of the same principles. "'[W]e turn first to the language of the statute, giving the words their ordinary meaning.' [Citation.] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme . . .' " (*People v. Briceno* (2004) 34 Cal.4th 451, 459 [20 Cal.Rptr.3d 418, 99 P.3d 1007].)

Section 1170.18, subdivision (a), provides, "A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with . . . Section . . . 473 . . . of the Penal Code, as those sections have been amended or added by this act."

Defendant was convicted of violating section 475, subdivision (a), which provides, “Every person who possesses or receives, with the intent to pass or facilitate the passage or utterance of any forged, altered, or counterfeit items, or completed items contained in subdivision (d) of Section 470 with intent to defraud, knowing the same to be forged, altered, or counterfeit, is guilty of forgery.”

Section 470, subdivision (d), includes a lengthy list of items. A partial list of the enumerated items is: “any check, bond, bank bill, or note, cashier’s check, traveler’s check, money order.”

The punishment for violating section 475, subdivision (a), is provided in section 473. Prior to the passage of Proposition 47 (§ 1170.18), section 473 reflected the crime of forgery was a wobbler. After the passage of Proposition 47, section 473 has been separated into two subdivisions. Subdivision (a) still reflects the crime of forgery is a wobbler. However, subdivision (b) reflects “any person who is guilty of forgery relating to a check, bond, bank bill, note, cashier’s check, traveler’s check, or money order, where the value . . . does not exceed nine hundred fifty dollars (\$950)” is guilty of a misdemeanor.

C. Analysis of the Law

■ We begin with the language of section 475, subdivision (a), in particular the portion prohibiting “any forged, altered, or counterfeit items, or completed items contained in subdivision (d) of Section 470.” The first portion, “any forged, altered, or counterfeit items” is one category set apart by the word “any,” which means no particular limit is placed on the type of forged, altered, or counterfeit items.

The second portion, “completed items contained in subdivision (d) of Section 470,” in its plain meaning, is limited to completed items listed in section 470, subdivision (d). Section 470, subdivision (d), provides in relevant part, “Every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any of the following items, knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery: any check, bond, bank bill, or note, cashier’s check, traveler’s check, money order, post note, draft . . .”

■ This second portion, by its plain language, refers to forged or counterfeit items (language from § 470, subd. (d)) that require completion (language from § 475, subd. (a)). For example, a forged check that is incomplete because a monetary amount has not been written on it would not qualify under section 475, subdivision (a), because the check is not complete.

Defendant asserts his counterfeit currency is a “bank bill” or “note” as set forth in section 470, subdivision (d). This reading of section 475, subdivision (a), does not comport with the statute’s plain language. Counterfeit currency is not the type of item that needs completion, in the way a counterfeit check needs completion. For example, a check needs the user to complete the date, signature, payee, and monetary amount. So the question becomes, what is a “bank bill” and/or “bank note”?

“Bank bill” and “bank note” are synonymous terms that are “derived from the expression ‘bill of credit’ as used in early banking history.” (*People v. Bedilion* (1962) 206 Cal.App.2d 262, 269 [24 Cal.Rptr. 19].) “‘A bank bill or a bank note may be defined as a written promise on the part of the bank to pay to the bearer a certain sum of money, on demand; an obligation for the payment of money on demand, passing from hand to hand as money.’” (*Ibid.*) In modern times, private banks are generally prohibited from issuing such bank notes or bills. “[B]ills,’ our paper currency, are issued only by the Federal Reserve banks.” (*Ibid.*) Thus there are two possible meanings for “bank bill”: (1) the historic meaning, which is a written promise on the part of the bank to pay the bearer a certain sum of money and (2) the modern meaning, which is our paper currency. (*Ibid.*; *People v. Ray* (1996) 42 Cal.App.4th 1718 [50 Cal.Rptr.2d 612] [“bills” means paper currency].)

These two meanings are reflected in the Penal Code. First, the historic meaning is reflected in section 475, subdivision (a), which refers to a “completed” bank bill. The concept of a partially unfinished bank bill lends itself to the historic definition because it is closer in nature to a check, i.e., a written promise to pay. A check can be unfinished, for example missing a payee, date, amount, or signature. A written promise to pay could also be unfinished because it is missing necessary information. Currency, on the other hand, would tend to be complete upon printing and thus would not logically fall into a category that requires the items to be completed.

Second, the modern meaning is reflected in section 480, subdivision (a), which provides, “Every person who makes, or knowingly has in his possession any die, plate, or any apparatus, paper, metal, machine, or other thing whatever, made use of in counterfeiting coin current in this state, or in counterfeiting gold dust, gold or silver bars, bullion, lumps, pieces, or nuggets, or in counterfeiting bank notes or bills, is punishable by imprisonment” (*People v. Ray, supra*, 42 Cal.App.4th at p. 1721.) The “bank notes or bills” in section 480, subdivision (a), has been interpreted as referring to paper currency. (*Ray*, at p. 1722.) In the context of section 480, subdivision (a), it is reasonable to interpret the statute as referring to currency because “coin” and written promises to pay (the historic definition) do not provide compatible results, whereas “coin” and “currency” (the modern definition) are compatible.

In sum, we have two meanings for the term “bank bill,” the historic definition and the modern definition. Section 473, subdivision (b), provides, “[A]ny person who is guilty of forgery relating to a check, bond, bank bill, note, cashier’s check, traveler’s check, or money order, where the value of the check, bond, bank bill, note, cashier’s check, traveler’s check, or money order does not exceed nine hundred fifty dollars (\$950)” is guilty of a misdemeanor.

■ The question is whether “bank bill” as used in section 473, subdivision (b), refers to the historic or modern definition of the term. Under the lenity rule, “a court must generally interpret an ambiguous criminal statute in the defendant’s favor.” (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1330 [88 Cal.Rptr.3d 41], fn. omitted.) (5) Therefore, as required by the lenity rule, we conclude “bank bill” refers to the modern definition, i.e., currency.

D. Analysis of the Current Case

■ In the instant case, defendant was convicted of possessing or receiving counterfeit currency with the intent to pass the currency, knowing it to be counterfeit (§ 475, subd. (a).) Defendant’s conviction would have fallen under the first category of section 475, subdivision (a), which prohibits possession or receipt of “any forged, altered, or counterfeit items.” Because the “item” was currency, the offense is now a misdemeanor under section 473, subdivision (b), when the modern definition of “bank bill” is employed. Accordingly, defendant’s offense could be a misdemeanor if the amount of the counterfeit currency was \$950 or less.

There was no evidence provided at the trial court that the amount of counterfeit currency was less than \$950. (See *People v. Sherow, supra*, 239 Cal.App.4th at p. 880 [“A proper petition could certainly contain at least [the defendant’s] testimony about the nature of the items taken”].) However, the prosecutor argued the value was, at most, \$700. Because the prosecutor affirmatively agreed the value of the counterfeit bills was less than \$950, thus reflecting there was no issue as to value in the trial court, we will find the value element has been satisfied. (*People v. Peters* (1950) 96 Cal.App.2d 671, 677–678 [216 P.2d 145] [a finding of fact can be based upon a concession].) Accordingly, defendant’s offense qualifies as a misdemeanor because he possessed counterfeit currency in an amount less than \$950.

E. Date of Conviction

We asked the parties to provide supplemental briefing on the issue of whether defendant could apply for Proposition 47 relief when he was convicted and sentenced after the effective date of section 1170.18.

■ Our concern was as follows: Section 1170.18 became effective on November 5, 2014. (Prop. 47, § 14, as approved by voters, Gen. Elec. (Nov. 4, 2014), eff. Nov. 5, 2014.) On January 16, 2015, defendant pled guilty to forgery. (§ 475, subd. (a).) Defendant was also sentenced on January 16, 2015. A statutory amendment lessening punishment is presumed to apply in all cases not yet reduced to final judgment as of the amendment's effective date. (*People v. Floyd* (2003) 31 Cal.4th 179, 184 [1 Cal.Rptr.3d 885, 72 P.3d 820].) Therefore, arguably, the newly revised laws should have been applied at defendant's hearing on January 16, 2015, and if they were not applied, he had an appealable issue (see § 1237.5 [appeal from guilty plea]).

■ Section 1170.18, subdivision (a), provides, "A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect *at the time of the offense* may petition for a recall of sentence . . ." (Italics added.) Defendant's offense was committed on November 30, 2013—prior to the effective date of the act. Accordingly, even though defendant was convicted and sentenced after the effective date of the act, because the act was not in effect at the time of his offense, he may properly file a petition for recall of his sentence.

DISPOSITION

The denial of defendant's petition is reversed. If defendant is still serving his sentence, then the trial court shall resentence defendant to a misdemeanor under § 473, unless the court in its discretion determines resentencing defendant would pose an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b).) If defendant has already completed serving his sentence, then the trial court is directed to reduce defendant's felony conviction (§ 475, subd. (a)) to a misdemeanor (§ 1170.18, subd. (f)).

Hollenhorst, Acting P. J., and Slough, J., concurred.

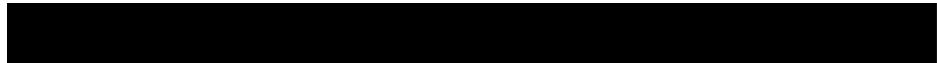
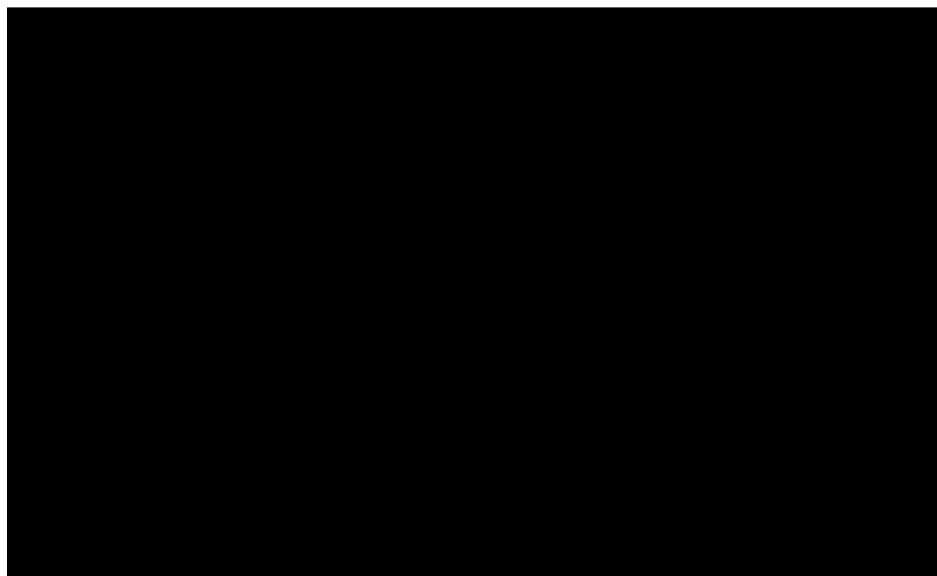
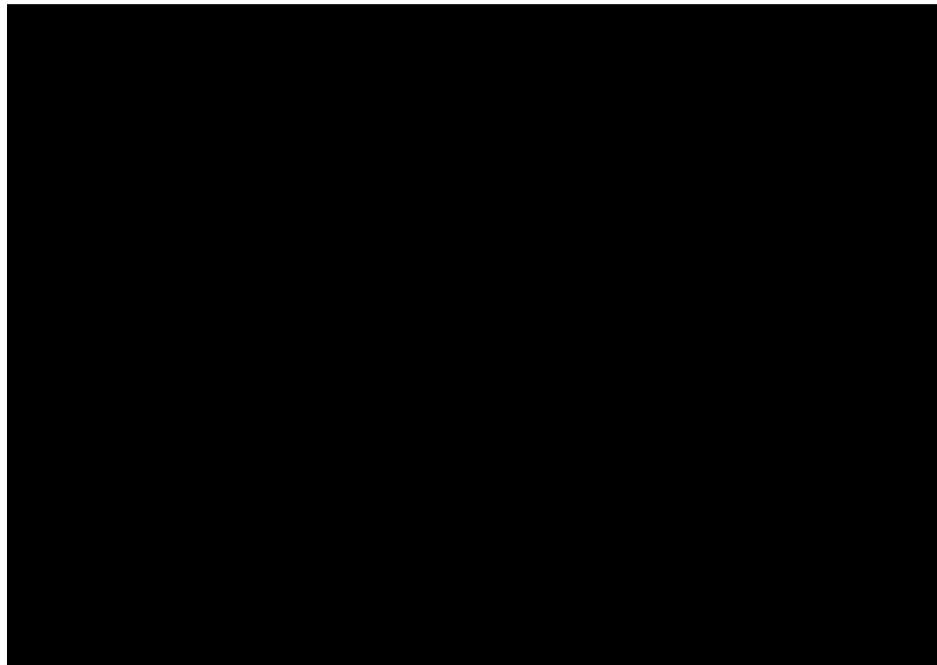
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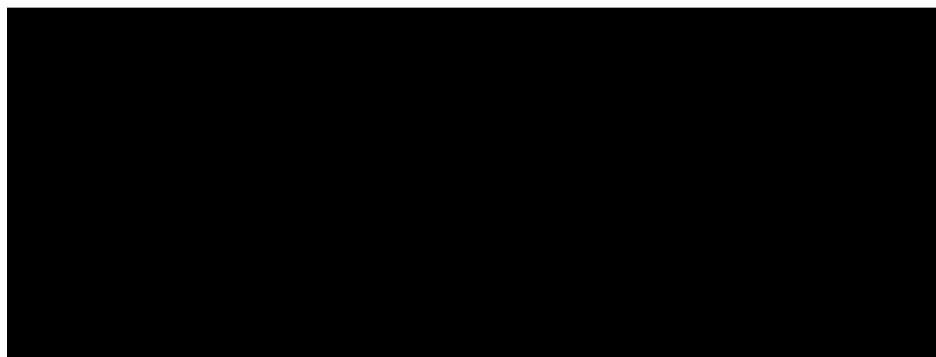
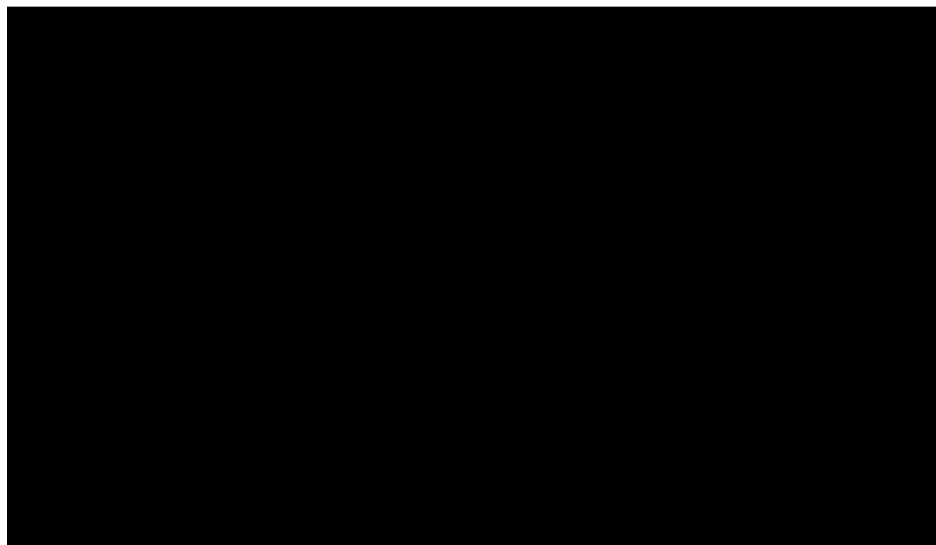
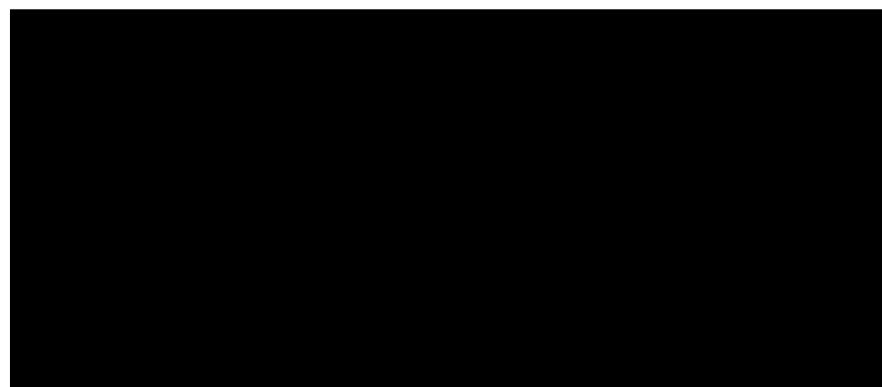
AMIR PIROUZIAN, Petitioner, v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
MEDICAL BOARD OF CALIFORNIA, Real Party in Interest.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Law Offices of William J. Kopeny and William J. Kopeny for Petitioner.

No appearance for Respondent.

Kamala D. Harris, Attorney General, Gloria L. Castro, Assistant Attorney General, Thomas S. Lazar and Martin W. Hagan, Deputy Attorneys General, for Real Party in Interest.

OPINION

ROTHSCHILD, P. J.—The Medical Board of California (the Board) revoked Amir Pirouzian, M.D.’s medical license. Dr. Pirouzian filed a petition in the superior court for a writ of administrative mandamus to set aside the Board’s decision, which the trial court denied. Dr. Pirouzian then filed a petition for writ of mandate in this court. We requested opposition and notified the parties of our intention to issue a peremptory writ. (See *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180 [203 Cal.Rptr. 626, 681 P.2d 893] (*Palma*).) We now grant the petition.

FACTUAL AND PROCEDURAL BACKGROUND

The Board granted a medical license to Dr. Pirouzian in 1996. Before the actions that gave rise to this proceeding, Dr. Pirouzian had no record of disciplinary action against him. It is undisputed that he is, as the administrative law judge (ALJ) found, “a highly skilled, competent physician and surgeon who has never been found responsible for causing any patient harm.”

In 2006, Dr. Pirouzian began working as a pediatric ophthalmologist at Children’s Specialists of San Diego (CSSD). CSSD provided him with a group disability insurance plan from Northwestern Mutual. Dr. Pirouzian purchased additional disability insurance from the same insurer.

On August 1, 2006, Dr. Pirouzian took a medical leave of absence from CSSD due to depression. A psychiatrist, Dr. Brett Johnson, diagnosed Dr. Pirouzian as suffering from a recurring “major depressive disorder, moderate, recurrent” and certified him as being totally and temporarily disabled. While on leave, Dr. Pirouzian submitted claims for and received disability insurance benefits from Northwestern Mutual.

In October 2006, Dr. Johnson released Dr. Pirouzian to return to CSSD on a part-time basis, and Northwestern Mutual reduced his disability payments.

In late December 2006, Dr. Pirouzian applied for full-time employment with Kaiser Permanente Santa Clara Medical Hospital (Kaiser). He accepted an offer for the position in May 2007 and began working at Kaiser as an ophthalmologist in July. At the same time, CSSD placed Dr. Pirouzian on unpaid medical leave. Meanwhile, he failed to disclose to Dr. Johnson, CSSD, or Northwestern Mutual that he had applied for, and accepted, the position at Kaiser.

For approximately three months—from July 2007 to October 2007—Dr. Pirouzian made a series of affirmative misrepresentations regarding his employment status to Dr. Johnson, CSSD, Northwestern Mutual, and the Employment Development Department (EDD). Specifically (1) he failed to tell Dr. Johnson or CSSD that he had accepted the position with Kaiser; (2) two weeks after Dr. Pirouzian began working at Kaiser, he falsely told a Northwestern Mutual benefits specialist that he was not working, and repeated this falsehood in a letter to Northwestern Mutual the next day; (3) approximately one week later, Dr. Pirouzian spoke by telephone with another Northwestern Mutual benefits specialist and falsely told her that he had been visiting family in Iran in July and would be spending more time with them in August; (4) in a written financial statement that called for information about Dr. Pirouzian’s salary for each of his employers, he identified CSSD as his employer (from whom he received no income), and did not disclose his employment with Kaiser; (5) in early September, Dr. Pirouzian signed an EDD form stating that he had worked “0” hours from July 30 to August 12, had no earnings, and was unable to work as a result of a disability; and (6) in late September, Dr. Pirouzian falsely told a Northwestern Mutual benefits specialist that he was in Europe. As a result of Dr. Pirouzian’s misrepresentations and the concealment of his employment with Kaiser, Northwestern Mutual continued to pay disability benefits to him.

Northwestern Mutual discovered the misrepresentations in October 2007 and cancelled Dr. Pirouzian’s insurance. He had received approximately \$10,700 in disability payments that should not have been paid.¹ During an investigation by the Department of Insurance, Dr. Pirouzian said that he had repaid some of the disability payments and was willing to pay the remaining sum.

¹ In his petition, Dr. Pirouzian stated that the “actual amount” he received was approximately \$8,600, and indicated that references to larger amounts are due to interest on that amount. Dr. Pirouzian did not provide any record citations to support this information.

The court’s order denying Dr. Pirouzian’s petition stated on page 4 that Dr. Pirouzian “received a total of approximately \$10,000 in disability payments to which he was not entitled,” and on page 9 that Dr. Pirouzian “received \$18,633 in overpayments.” The court’s order did not cite to the record as to the latter fact.

In June 2011, Dr. Pirouzian left Kaiser and, the following month, began a research fellowship with Gavin Herbert Eye Institute at the University of California, Irvine.

In November 2011, the San Diego County District Attorney charged Dr. Pirouzian with two counts of insurance fraud. (Pen. Code, § 550, subds. (a)(1) & (b)(1)).² A third count was later added: willfully delaying a public officer in the discharge of official duties, a misdemeanor, under Penal Code section 148, subdivision (a)(1).³ After the criminal complaint was filed, Dr. Pirouzian paid Northwestern Mutual \$10,700.

As part of a plea agreement, Dr. Pirouzian pled guilty to the misdemeanor count and the district attorney dismissed the insurance fraud counts. Dr. Pirouzian agreed to pay \$5,000 in restitution to the Department of Insurance. The plea agreement and the court's minutes indicated that full restitution had been paid to Northwestern Mutual. The trial court placed Dr. Pirouzian on three years' probation, which was later reduced to 60 days. The court subsequently expunged the conviction.

Dr. Pirouzian did not report his conviction to the Board based on the advice of his counsel that he was not required to do so.

Dr. Pirouzian completed his fellowship with the Gavin Herbert Eye Institute in July 2012, then worked as a consultant for Tayani Institute through March 2013. He thereafter worked at a hospital in Saudi Arabia.

In February 2013—more than five years after his misrepresentations came to light—the Board filed an accusation alleging four causes for discipline based on (1) acts of dishonesty or corruption (cause 1); (2) conviction of a crime (cause 2); (3) failure to report a conviction (cause 3); and (4)

² Subdivision (a) of Penal Code section 550 provides: “It is unlawful to do any of the following, or to aid, abet, solicit, or conspire with any person to do any of the following: [¶] (1) Knowingly present or cause to be presented any false or fraudulent claim for the payment of a loss or injury, including payment of a loss or injury under a contract of insurance.”

Subdivision (b) of Penal Code section 550 provides: “It is unlawful to do, or to knowingly assist or conspire with any person to do, any of the following: [¶] (1) Present or cause to be presented any written or oral statement as part of, or in support of or opposition to, a claim for payment or other benefit pursuant to an insurance policy, knowing that the statement contains any false or misleading information concerning any material fact.”

³ Subdivision (a)(1) of Penal Code section 148 provides in pertinent part: “Every person who willfully resists, delays, or obstructs any public officer, peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.”

unprofessional conduct (cause 4).⁴ A hearing took place over four days in December 2013. During that hearing, Dr. Pirouzian admitted that he acted dishonestly and intended to do so. He explained that he lied about his employment with Kaiser in order to continue the lie that he was disabled and to keep his employment options with CSSD open. He also admitted that he always knew that concealing his Kaiser employment was wrong, and that his dishonesty was motivated by self-interest.

The ALJ found that although Dr. Pirouzian testified that he was ashamed and remorseful, he expressed no regret for the victims of his dishonesty; his “most evident concern was the impact [the] disciplinary action might have on his future academic and employment opportunities.” The ALJ also noted “Dr. Pirouzian’s ability to plan ahead and blame others for his own misconduct” and that he “exploited his mental condition to get his way.”

Dr. David Sheffner, a psychiatrist retained by the Board, and Dr. Martin Williams, a psychologist retained by Dr. Pirouzian, testified as to Dr. Pirouzian’s mental state and motivations during the relevant time. Dr. Sheffner opined that Dr. Pirouzian’s actions reflected logical thinking and a cognitive strategy designed to hide his employment with Kaiser and to preserve the possibility of returning to CSSD. Dr. Williams testified that Dr. Pirouzian “was thinking poorly and was in a confused mental state.” He believed that Dr. Pirouzian was motivated to preserve his employment option at CSSD; he was not motivated by financial gain.

The ALJ determined that there was cause to discipline Dr. Pirouzian based on causes 1, 2, and 4, but no such cause under cause 3. Dr. Pirouzian, the ALJ explained, “engaged in a pattern of dishonest behavior between July 2007 and October 2007 that included, but was not limited to, receiving disability insurance benefits from Northwestern Mutual by representing that he was unemployed when that was not the case,” and that such “dishonesty is substantially related to the qualifications, functions and duties of a physician and surgeon.” The ALJ further found that his conviction of willfully delaying a public officer in the discharge of official duties was “substantially related to the qualifications, functions and duties of a physician and surgeon.”

The ALJ noted that there was no evidence that Dr. Pirouzian’s dishonesty caused harm to any patient.

⁴ The accusation also alleged a “First Cause for Fine,” based on the alleged failure to report to the Board within the time required by Business and Professions Code section 802.1 the bringing of a criminal information or his misdemeanor conviction. The ALJ rejected this cause because Dr. Pirouzian’s failure to provide the required report was based on “the mistaken advice of a licensed attorney.”

In imposing the discipline of revocation, the ALJ stated: “Not enough time has passed since the most recent misconduct to conclude that Dr. Pirouzian is rehabilitated to the extent that it would be in the public interest to permit him to retain his certificate, even on a probationary basis. Given all that has happened the only measure of discipline that will protect the public is the outright revocation of Dr. Pirouzian’s medical certificate.”

The Board adopted the ALJ’s decision and revoked Dr. Pirouzian’s license. Dr. Pirouzian filed a motion for reconsideration, which the Board denied.

Dr. Pirouzian sought review in the superior court on the grounds that the ALJ was biased, the Board’s decision was “irrational” and “internally inconsistent,” and that revocation was grossly disproportionate to his actions. The court denied the petition. Regarding revocation of Dr. Pirouzian’s license, the court stated that “the ALJ was entitled to rely on [Dr.] Pirouzian’s repeated dishonesty as ‘very serious,’ and couple the misconduct with [Dr.] Pirouzian’s lack of remorse and less than candid testimony to conclude that license revocation was required.”

Dr. Pirouzian filed a petition for a writ of mandate in this court pursuant to Business and Professions Code section 2337. We stayed the revocation of his license pending resolution of the petition and informed the parties that we were considering the issuance of a peremptory writ in the first instance (see *Palma*, *supra*, 36 Cal.3d 171). We requested briefing on two issues: (1) Given the facts and circumstances of this case, was it a manifest abuse of discretion for the Board to impose any penalty? (2) If it was not a manifest abuse of discretion for the Board to impose a penalty, was it a manifest abuse of discretion to impose as harsh a penalty as revocation of Dr. Pirouzian’s license? Each side filed the requested briefs.

DISCUSSION

I. Applicable Legal Principles and Standards of Review

■ The Board is authorized to discipline a medical licensee who commits “unprofessional conduct.” (Bus. & Prof. Code, § 2234.)⁵ Unprofessional conduct includes (1) the “commission of any act involving dishonesty . . . that is substantially related to the qualifications, functions, or duties of a physician and surgeon”; (2) the “conviction of any offense substantially related to the qualifications, functions, or duties of a physician and surgeon”; and (3) “conduct which breaches the rules or ethical code of a profession, or

⁵ All subsequent statutory references are to the Business and Professions Code unless otherwise indicated.

conduct which is unbecoming a member in good standing of a profession.” (§§ 2234, subd. (e), 2236, subd. (a); *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 575 [146 Cal.Rptr. 653].)

When a licensee is found to have committed unprofessional conduct, the Board has the authority to discipline the licensee with a public reprimand (which may include a requirement that the licensee complete relevant educational courses), probation, suspension, or revocation of the physician’s license. (§ 2227, subd. (a).) The maximum discipline—revocation—deprives the licensee of a “fundamental right[]” to practice his or her profession (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143 [93 Cal.Rptr. 234, 481 P.2d 242] (*Bixby*); cf. *Meyer v. Nebraska* (1923) 262 U.S. 390, 399 [67 L.Ed. 1042, 43 S.Ct. 625] [due process protects the right of individuals “to engage in any of the common occupations of life”]), and is considered a “drastic penalty” (*Cooper v. State Bd. of Medical Examiners* (1950) 35 Cal.2d 242, 252 [217 P.2d 630]). If the Board decides to revoke a license, it may stay the revocation subject to specified terms and conditions. (See *Grannis v. Board of Medical Examiners* (1971) 19 Cal.App.3d 551, 563–564 [96 Cal.Rptr. 863]; Medical Board of Cal., Manual of Model Disciplinary Orders and Disciplinary Guidelines (11th ed. 2011) pp. 9 & 27.)

■ In exercising its disciplinary authority, the Board is required to give “highest priority” to “[p]rotection of the public.” (§ 2229, subd. (a); see *Landau v. Superior Court* (1998) 81 Cal.App.4th 191, 218 [97 Cal.Rptr.2d 657] (*Landau*).) Priority shall also be “given to those measures, including further education, restrictions from practice, or other means, that will remove” the physician’s “demonstrated deficiencies in competency.” (§ 2229, subd. (c).) In addition, the Board “shall, wherever possible, take action that is calculated to aid in the rehabilitation of the licensee, or where, due to a lack of continuing education or other reasons, restriction on scope of practice is indicated, to order restrictions as are indicated by the evidence.” (*Id.*, subd. (b).) As one court stated, the object of the Board’s discipline “is not to punish” the physician, but “rather, ‘to protect the life, health and welfare of the people at large and to set up a plan whereby those who practice medicine will have the qualifications which will prevent, as far as possible, the evils which could result from . . . a lack of honesty and integrity.’ [Citation.] In short, the purpose of discipline is to make the [physician] a better physician.” (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473 [163 Cal.Rptr. 566] (*Windham*), quoting *Furnish v. Board of Medical Examiners* (1957) 149 Cal.App.2d 326, 331.)

Review of a Board decision is by petition for administrative mandamus in the superior court. (Code Civ. Proc., § 1094.5; see *Landau, supra*, 81 Cal.App.4th at p. 198.) The trial court is required to review the Board’s

decision to determine whether the Board “proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion.” (Code Civ. Proc., § 1094.5, subd. (b).) “Abuse of discretion is established if the [Board] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.” (*Ibid.*)

When, as here, the Board’s decision affects a petitioner’s fundamental rights, the trial court exercises its independent judgment based on the administrative record. (*Bixby, supra*, 4 Cal.3d at p. 143.) Although the “starting point” for the trial court is a presumption of correctness concerning the Board’s decision, the trial court “is free to substitute its own findings after first giving due respect to the agency’s findings.” (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 818 [85 Cal.Rptr.2d 696, 977 P.2d 693].)

Appellate review of a superior court’s decision is by a petition for an extraordinary writ. (§ 2337; *Sela v. Medical Bd. of California* (2015) 237 Cal.App.4th 221, 230 [187 Cal.Rptr.3d 694].) We review challenges to the court’s factual findings to determine whether the findings are supported by substantial evidence. (*Cassidy v. California Bd. of Accountancy* (2013) 220 Cal.App.4th 620, 627 [163 Cal.Rptr.3d 346].) Pure questions of law and “issues regarding the nature or degree of an administrative penalty are given a de novo review, the latter being examined to determine whether the administrative agency abused its discretion.” (*Antelope Valley Press v. Poizner* (2008) 162 Cal.App.4th 839, 851 [75 Cal.Rptr.3d 887]; see also *Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 46 [84 Cal.Rptr.2d 690] [appellate court gives no deference to trial court’s determination of the discipline the agency imposed].) An abuse of discretion may be found if, under all the facts and circumstances, “the penalty imposed was . . . clearly excessive.” (*Szmaciarz v. State Personnel Bd.* (1978) 79 Cal.App.3d 904, 921 [145 Cal.Rptr. 396].)

II. Unprofessional Conduct

■ Here, Dr. Pirouzian does not dispute the ALJ’s findings that he committed numerous acts of dishonesty in 2007 with respect to his employment status and disability insurance benefits. Such acts of dishonesty can be the basis for disciplinary actions if they were related to his fitness or competence to practice medicine. (See *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 788 [72 Cal.Rptr.2d 624, 952 P.2d 641]; *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 769 [117 Cal.Rptr.2d 445] (*Griffiths*); *Foster v. Board of Medical Quality Assurance* (1991) 227 Cal.App.3d 1606, 1610 [278 Cal.Rptr. 117].) Although there is no evidence that Dr. Pirouzian was dishonest or acted improperly with respect to any

patient, the Board may conclude that intentional dishonesty, even toward persons outside the practice of medicine, relates to the qualifications for practicing medicine and can be the basis for imposing discipline. (See, e.g., *Matanky v. Board of Medical Examiners* (1978) 79 Cal.App.3d 293, 301–302 [144 Cal.Rptr. 826] (*Matanky*); *Windham, supra*, 104 Cal.App.3d at pp. 469–470.) As stated in *Griffiths*, although a “physician who commits income tax fraud, solicits the subornation of perjury, or files false, fraudulent insurance claims has not practiced medicine incompetently[,] that physician has shown dishonesty, poor character, a lack of integrity, and an inability or unwillingness to follow the law, and thereby has demonstrated professional unfitness meriting license discipline.” (*Griffiths, supra*, 96 Cal.App.4th at pp. 771–772.) The ALJ could, therefore, reasonably conclude that Dr. Pirouzian’s series of intentional misrepresentations to his psychiatrist, his employer, his disability insurance carrier, and the EDD are substantially related to the qualifications for practicing medicine.

III. *The Discipline*

Dr. Pirouzian contends that revoking his license to practice medicine was excessive and an abuse of discretion. We agree.

■ Although the Board has discretion in determining the discipline to impose for unprofessional conduct, such discretion “ ‘is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action.’ ” (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297 [255 Cal.Rptr. 704].) Here, the Board’s discretion is subject to the Legislative mandate that the Board’s highest priority be protection of the public; and, secondarily, discipline should “aid in the rehabilitation of the licensee.” (§ 2229, subds. (a) & (b).) Punishment is not a goal. (*Windham, supra*, 104 Cal.App.3d at p. 473.)

As the ALJ noted, the Board’s medical practice regulations provide the following criteria for determining whether a physician has been rehabilitated: the nature and severity of the acts or offenses; the total criminal record; the time that has elapsed since commission of the acts or offenses; whether the licensee has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against the licensee; evidence of expungement; and evidence of rehabilitation. (Cal. Code Regs., tit. 16, § 1360.1.)

In this case, the Board’s imposition of the maximum discipline of revoking Dr. Pirouzian’s license to practice medicine is inconsistent with these priorities because it was not necessary to protect the public and did nothing to help make Dr. Pirouzian “a better physician.” (*Windham, supra*, 104 Cal.App.3d at

p. 473.) Dr. Pirouzian's dishonest acts, while serious, were focused on his efforts to obtain disability insurance benefits and preserve the possibility of returning to work at CSSD. Significantly, there is no evidence that his dishonesty involved or affected the treatment or care of any patient, or the billing of clients. His probation for his misdemeanor conviction was reduced from three years to 60 days, and the conviction was ultimately expunged. The amount of disability payments he received based upon his fraud was relatively small, and he eventually made full restitution to Northwestern Mutual (albeit not until he was charged with a crime).

Dr. Pirouzian's acts of dishonesty took place over a discrete period of several months in 2007, during a period of time when he was diagnosed with depression. Prior to and since that time, there was and has been nothing (so far as the record discloses) to indicate that Dr. Pirouzian behaved unprofessionally in any way. Indeed, his record is otherwise unblemished. After his series of related falsehoods were discovered in late 2007, he continued his work as a physician and medical research fellow without incident. As the ALJ noted in 2014, "six years have passed since the last act of dishonesty." There is nothing in the record to suggest that Dr. Pirouzian would repeat his dishonest conduct or to indicate that he is now a danger to the public.

Without diminishing the seriousness of Dr. Pirouzian's conduct, our review of the entire record, in light of the applicable criteria and legislative priorities, compels the conclusion that outright revocation of Dr. Pirouzian's license was unnecessary to protect the public and contrary to the goal of making him "a better physician." (*Windham, supra*, 104 Cal.App.3d at p. 473.) The discipline was excessive and, therefore, an abuse of discretion.

Two cases upon which the Board relies are instructive and distinguishable. In *Matanky, supra*, 79 Cal.App.3d 293, the Board revoked the medical license of a physician who had been convicted of 39 counts of Medicare fraud arising from the physician's fraudulent statements concerning services to 13 convalescent hospital patients. (*Id.* at pp. 297–298.) The revocation was not an abuse of discretion, the court explained, because although the federal government, which paid the fraudulent claims, "was not a patient," it "was nonetheless a 'client' in the professional practice of Matanky. He also defrauded the patient [because] the federal government only pays on behalf of the patient." (*Id.* at p. 306.) In contrast to the physician's conviction of 13 counts of Medicare fraud in *Matanky*, Dr. Pirouzian was convicted of one misdemeanor count, which was unrelated to Medicare or client billings and ultimately expunged. Even if Dr. Pirouzian's actions constituted insurance fraud, it cannot be said, as it was in *Matanky*, that he "defrauded the patient." (*Ibid.*)

In *Windham, supra*, 104 Cal.App.3d 461, the physician was convicted of two counts of federal tax fraud. The total tax deficiency was about \$65,000. The Board found him guilty of unprofessional conduct and ordered his license revoked, but stayed the revocation and placed him on probation for three years, conditioned upon his performance of professional services for a community health institution. (*Id.* at pp. 464, 467–468, 473.) The court upheld the disciplinary order and rejected the physician’s argument that the probation condition “was too severe.” (*Id.* at p. 473.) The “charitable work,” the court explained was “right in line with the purpose of the proceedings below.” (*Id.* at pp. 473–474.) Here, by contrast, although Dr. Pirouzian’s dishonest acts are no more egregious—and arguably far less egregious—than the tax fraud in *Windham*, the career-ending revocation *without a stay* imposed on Dr. Pirouzian is significantly more severe than the revocation and stay imposed in *Windham*. (See also *Shea v. Board of Medical Examiners, supra*, 81 Cal.App.3d at p. 570 [where physician made sexually explicit remarks, unrelated to diagnosis or treatment, to patients he had hypnotized, Board suspended his license and gave him the opportunity to resume medical practice after submitting to a psychiatric examination, subject to five years’ probation].)

Finally, our conclusion that the revocation constitutes an abuse of discretion is supported by the ALJ’s statements during the hearing and in his written findings that indicate the discipline was imposed for the improper purpose of punishing Dr. Pirouzian. During the hearing, the ALJ informed Dr. Pirouzian that his plea bargain was “a great deal,” that his criminal defense “lawyer did a wonderful job,” and that Dr. Pirouzian received “better treatment from the criminal justice system than virtually any man that has walked the streets of San Diego County since 1900.” This sentiment was followed in the ALJ’s proposed order, which states that Dr. Pirouzian obtained “extremely favorable treatment by the criminal justice system” and that the misdemeanor conviction was “not an accurate measure of his wrongdoing.” These statements indicate that the ALJ believed that Dr. Pirouzian had not been sufficiently punished for his actions, and strongly suggest that the ALJ’s disciplinary decision was improperly motivated by a desire to make up for the “[in]accurate” punishment Dr. Pirouzian received from the criminal justice system. This is inconsistent with purposes of a disciplinary proceeding that has as its object “not to punish” the physician. (*Windham, supra*, 104 Cal.App.3d at p. 473.)

For all the foregoing reasons, we conclude that the Board abused its discretion by revoking Dr. Pirouzian’s license without staying the revocation.

DISPOSITION

The petition is granted. The trial court is directed to vacate its order denying Dr. Pirouzian's petition for administrative mandamus and to enter a new order granting the petition and commanding the Board to set aside its order revoking Dr. Pirouzian's license and to determine the discipline to be imposed in light of this opinion.

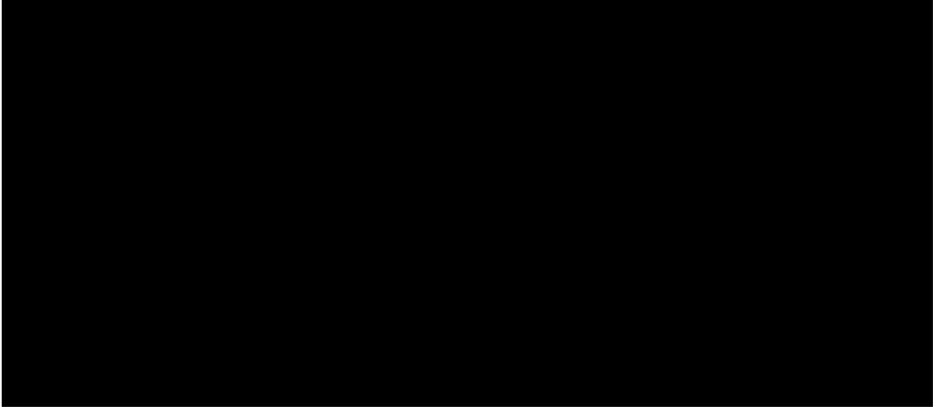
All parties shall bear their own costs.

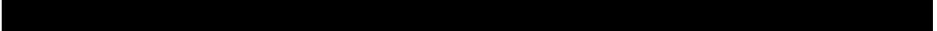
Chaney, J., and Johnson, J., concurred.

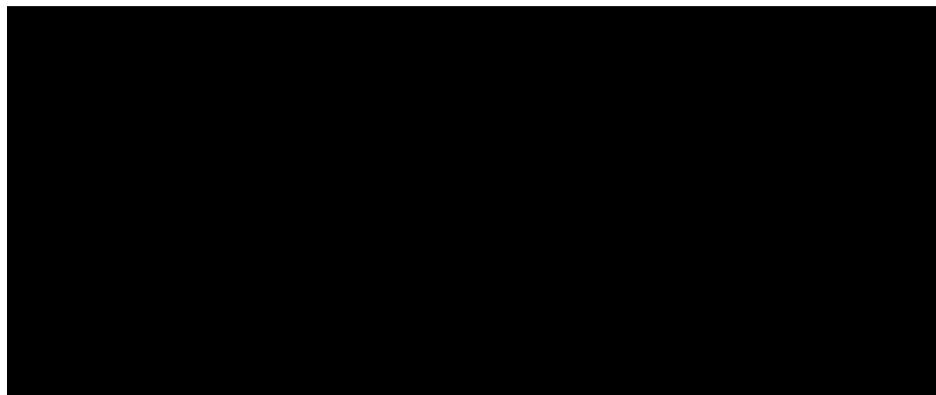
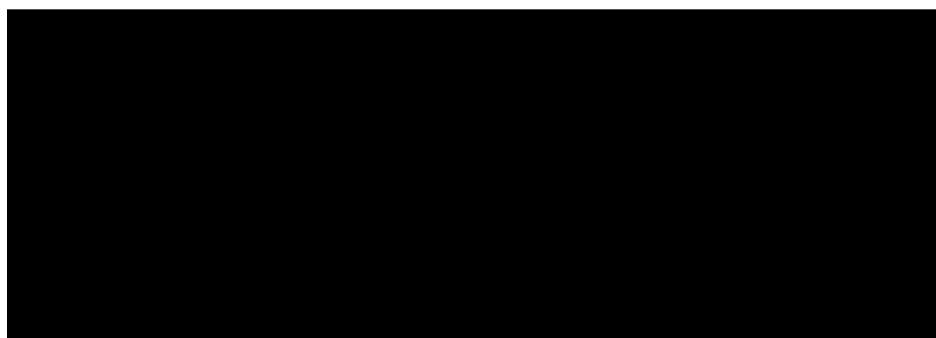
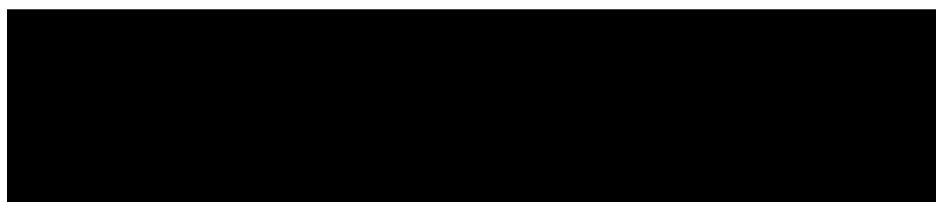
[No. B245131. Second Dist., Div. Five. July 11, 2016.]

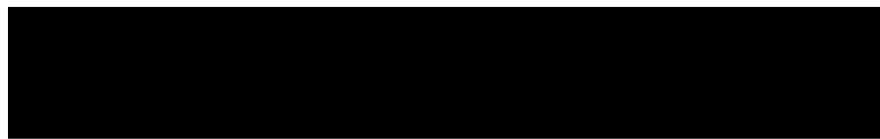
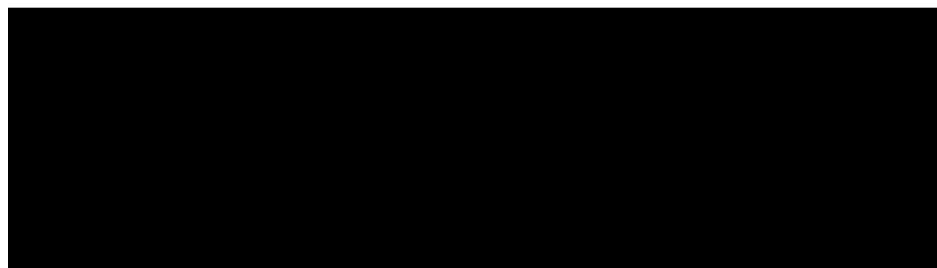
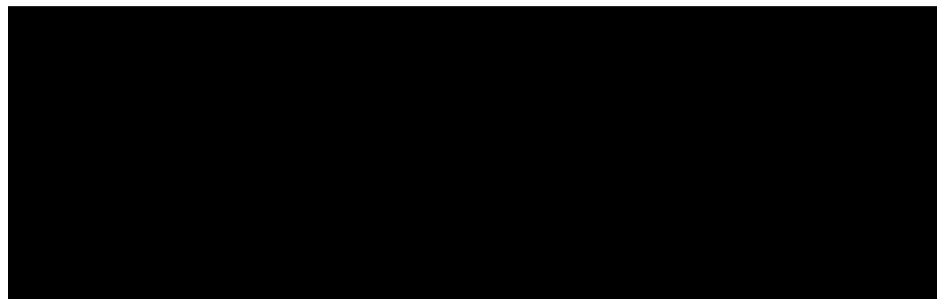
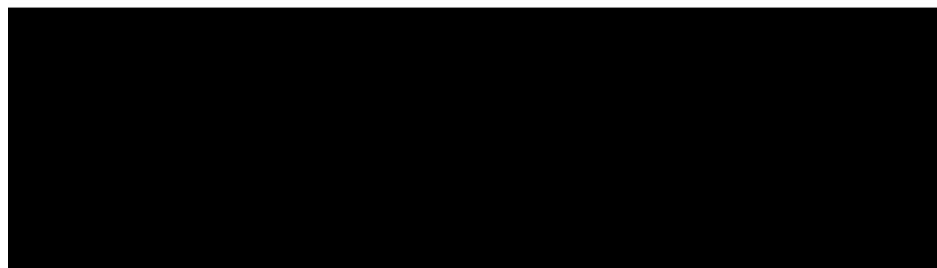
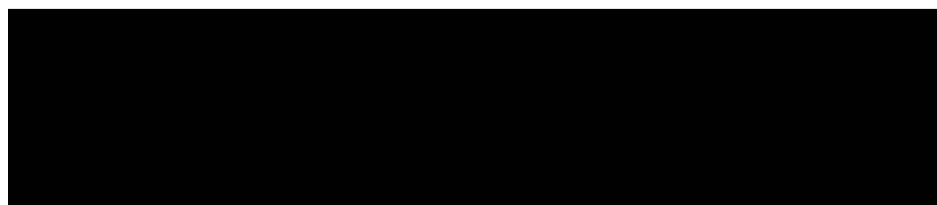
CENTER FOR BIOLOGICAL DIVERSITY et al., Plaintiffs and Respondents, v.
DEPARTMENT OF FISH AND WILDLIFE, Defendant and Appellant;
THE NEWHALL LAND AND FARMING COMPANY, Real Party in Interest and Appellant.











COUNSEL

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Jason Weiner; Chatten-Brown and Carstens, Jan Chatten-Brown and Doug Carstens for Plaintiffs and Respondents Wishtoyo Foundation/Ventura Coastkeeper.

OPINION**TURNER, P. J.—****I. INTRODUCTION**

Defendant, Department of Fish and Wildlife (the department), and real party in interest, The Newhall Land and Farming Company (the developer), appeal from a judgment granting a mandate petition. The judgment, entered October 15, 2012, was granted in favor of plaintiffs Center for Biological Diversity; Friends of the Santa Clara River; Santa Clarita Organization for Planning the Environment; Wishtoyo Foundation/Ventura Coastkeeper; and California Native Plant Society. The litigation and appeal arise from the department's December 3, 2010 certification of the revised final environmental impact statement and impact report; approval of the Newhall Ranch Resource Management and Development Plan (resource management and development plan); the adoption of the Spineflower Conservation Plan and Master Streambed Alteration Agreement (streambed alteration agreement); and issuance of two incidental take permits. We issued an opinion reversing the October 15, 2012 judgment. (*Center for Biological Diversity v.*

Department of Fish & Wildlife (Cal.App.)). Our Supreme Court granted review and, after issuing an opinion, remanded the case to us. (*Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 241 [195 Cal.Rptr.3d 247, 361 P.3d 342] (*Center for Biological Diversity*)).

In the published portion of this opinion, we will discuss the developer's contention, concurred in by the department, that we should supervise compliance with a writ of mandate. As will be noted, the developer and the department argue we should in essence issue our own writ of mandate and then supervise compliance with our orders. This contention is based upon language appearing in Public Resources Code¹ section 21168.9, subdivision (a) and our Supreme Court's opinion. As will be noted, we conclude we do not have that authority since we are reviewing this case on direct appeal. Our disposition is to reverse the judgment in part and affirm it in part.

II.–IV.[†]

* * * * *

V. THE SCOPE OF OUR REMAND ORDER

A. The Parties' Remand Arguments

The trial court ruled that six aspects of the environmental impact report were deficient and entered a stay of any construction on the project site. The trial court ruled the following errors appeared in the environmental impact report: the department failed to prevent the taking of the unarmored threespine stickleback as part of construction of a bridge over the Santa Clara River; the environmental impact report failed to assess the impact of project-related dissolved copper discharge when stormwaters breached the dry gap; the department's analysis of mitigation measures for the San Fernando Valley spineflower was legally impermissible; the department's assessment of the

¹ Future statutory references, unless otherwise stated, are to the Public Resources Code. Future references to "Guidelines" are to the regulatory provisions located in California Code of Regulations, title 14, section 15000 et seq. The Guidelines are promulgated by the Natural Resources Agency to implement the California Environmental Quality Act. (§ 21083, subd. (e); *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 448, fn. 4 [160 Cal.Rptr.3d 1, 304 P.3d 499].)

[†]See footnote, *ante*, page 452.

[REDACTED]

[REDACTED]

project's greenhouse gas emissions were inadequate; the environmental impact reports assessment of the project's impact on Native American cultural resources was not supported by substantial evidence; and the environmental impact report improperly relied upon portions of the specific plan in rejecting alternatives to the project. We reversed in their entirety the trial court's findings as to the effects of dissolved copper runoff on steelhead smolt; the San Fernando Valley spineflower preserves; Native American resources; and reliance upon the specific plan. We have reversed in part the trial court's greenhouse gas emission findings concerning selection of a criterion of significance and its application to a business as usual scenario. We have affirmed the trial court's greenhouse gas findings concerning the absence of substantial evidence to support the no significant impact finding. We have affirmed the trial court's findings disapproving mitigation measures BIO-44 and BIO-46, which arise from the construction of a bridge over the Santa Clara River.

After our Supreme Court issued its opinion, the developer filed a motion regarding remand concerning the scope of our ruling, which is concurred in by the department. Plaintiffs have filed an opposition to some of the developer's arguments. The developer and the department argue our Supreme Court's opinion permits us to retain jurisdiction to supervise the completion of the environmental review process. The developer argues as follows in part: "[T]he superior court judge who heard and decided this case (Hon. Ann I. Jones) is no longer hearing mandate petitions, and this case has been reassigned to the Hon. John A. Torribio. Although Judge Torribio decided the related cases (*Friends of the Santa Clara River v. County of Los Angeles*, No. B256125, and *California Native Plant Society v. County of Los Angeles*, No. B258090, both of which are still pending before the Supreme Court as 'grant and holds' ancillary to this case), Judge Torribio is not familiar with the facts of this case (this case has never been before him.) Accordingly, remand to the superior court would necessarily result in delays that are to be avoided in [California Environmental Quality Act] litigation." In addition, the developer and the department argue that this court is intimately familiar with this case. According to the developer and the department, by retaining jurisdiction, this court's familiarity with the case will ameliorate the potential prejudice caused by the delays to date. The developer concludes: "We ask this [c]ourt to reaffirm its original holding concerning the merits of the steelhead and cultural resources claims; retain jurisdiction of the greenhouse gas and unarmored threespine stickleback issues; and use [the developer's] proposed writ as a guide for this court . . ."

Plaintiffs argue we should *not* retain jurisdiction but issue a remittitur directing the trial court to decide any remaining issues. Plaintiffs argue as

follows in part. A reviewing court has the authority to act as specified in Code of Civil Procedure section 43, which states in part: “[T]he courts of appeal, may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. In giving its decision, if a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case. Its judgment in appealed cases shall be remitted to the court from which the appeal was taken.” (See *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701 [107 Cal.Rptr.2d 149, 23 P.3d 43].) Further, Code of Civil Procedure section 912 states in part, “Upon final determination of an appeal by the reviewing court, the clerk of the court shall remit to the trial court a certified copy of the judgment or order of the reviewing court and of its opinion, if any.” (See *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 774 [98 Cal.Rptr.2d 1, 3 P.3d 286].)

■ The developer and the department argue these statutory provisions which apply to appeals do not apply here. The developer and the department rely upon the general principle that litigation involving an environmental impact report should be promptly concluded. (§ 21167.1, subd. (a); *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 500 [106 Cal.Rptr.3d 858, 227 P.3d 416].) More specifically, the developer and the department rely upon the following portion of section 21168.9, subdivision (a) which states in part, “(a) If a court finds, as a result of a trial, hearing, or remand from an appellate court, that any determination, finding, or decision of a public agency has been made without compliance with this division, the court shall enter an order that includes one or more of the following . . .” (Italics added.) The developer and the department focus upon this italicized language as the basis for its contention concerning our future obligations. Section 21168.9, subdivision (a) then identifies a series of actions that may be taken as a result of a remand from an appellate court.²

² Section 21168.9, subdivision (a) states in its entirety: “(a) If a court finds, as a result of a trial, hearing, or remand from an appellate court, that any determination, finding, or decision of a public agency has been made without compliance with this division, the court shall enter an order that includes one or more of the following: [¶] (1) A mandate that the determination, finding, or decision be voided by the public agency, in whole or in part. [¶] (2) If the court finds that a specific project activity or activities will prejudice the consideration or implementation of particular mitigation measures or alternatives to the project, a mandate that the public agency and any real parties in interest suspend any or all specific project activity or activities, pursuant to the determination, finding, or decision, that could result in an adverse change or alteration to the physical environment, until the public agency has taken any actions that may be necessary to bring the determination, finding, or decision into compliance with this division. [¶] (3) A mandate that the public agency take specific action as may be necessary to bring the determination, finding, or decision into compliance with this division.”

■ Section 21168.9, subdivision (b) limits the authority of a court to “include only those mandates which are necessary” to achieve compliance with the California Environmental Quality Act (§ 21000 et seq.). Section 21168.9, subdivision (b) contains three relevant provisions. The first aspect limits the court’s mandate to those matters necessary to achieve compliance with the California Environmental Quality Act: “Any order pursuant to subdivision (a) shall include only those mandates which are necessary to achieve compliance with this division and only those specific project activities in noncompliance with this division.” (§ 21168.9, subd. (b).) The order shall be made by the issuance of a peremptory writ of mandate specifying what action by the public agency is necessary to comply with this division. The second aspect of section 21168.9, subdivision (b) imposes a three-fold severability requirement if only a limited portion of the proposed project is to be set aside: “However, the order shall be limited to that portion of a determination, finding, or decision or the specific project activity or activities found to be in noncompliance only if a court finds that (1) the portion or specific project activity or activities are severable, (2) severance will not prejudice complete and full compliance with this division, and (3) the court has not found the remainder of the project to be in noncompliance with this division.” (See *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1181 [30 Cal.Rptr.3d 738]; 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed. 2016) § 23.124, pp. 23-140 to 23-141.) The final aspect of section 21168.9, subdivision (b) states a trial court retains jurisdiction by way of a writ of mandate to ensure the public agency has complied with the California Environmental Quality Act: “The trial court shall retain jurisdiction over the public agency’s proceedings by way of a return to the peremptory writ until the court has determined that the public agency has complied with this division.” (See *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 479 [134 Cal.Rptr.3d 194].)

According to the developer and the department, section 21168.9, subdivision (a) vests this court with the power to supervise compliance with our decision. This is because we have acted “as a result of a . . . remand from an appellate court.” (*Ibid.*) In addition, the developer and the department rely upon the following language in our Supreme Court’s opinion: “On remand, the Court of Appeal shall decide whether, in light of our exhaustion holding, the Native American cultural resource and steelhead smolt claims warrant reexamination on the merits. The Court of Appeal shall further decide, or remand for the superior court to decide, the parameters of the writ of mandate to be issued. (See § 21168.9.)” (*Center for Biological Diversity, supra*, 62 Cal.4th at p. 240.) According to the developer and the department,

our Supreme Court's language and section 21168.9, subdivision (a) give us the authority to issue our own writ of mandate and supervise compliance therewith.

B. Standard of Review and the Presence of Ambiguous Statutory Language

■ We are construing the effect of section 21168.9, subdivision (a) on our situation. Our Supreme Court has explained: "When construing a statute, we look first to its words, ‘because they generally provide the most reliable indicator of legislative intent.’ [Citation.] We give the words their usual and ordinary meaning [citation], while construing them in light of the statute as a whole and the statute’s purpose [citation].’ (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 529–530 [120 Cal.Rptr.3d 531, 246 P.3d 612].)" (*In re Ethan C.* (2012) 54 Cal.4th 610, 627 [143 Cal.Rptr.3d 565, 279 P.3d 1052].) According to our Supreme Court: "If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.’ [Citation.] ‘Only when the statute’s language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation.’ [Citation.]” (*Pineda v. Williams-Sonoma Stores, Inc.*, *supra*, 51 Cal.4th at p. 530; see *In re Ethan C.*, *supra*, 54 Cal.4th at p. 627.)

As noted, the developer and the department focus upon the language in section 21168.9, subdivision (a). They rely on the language that "as a result of . . . remand from an appellate court" and argue we may issue a writ of mandate. (*Ibid.*) As noted, section 21168.9, subdivision (a)(1) through (3) specifies potential aspects of the "court['s]" writ of mandate. Hence, they argue, we are the "court" that has the authority to issue the writ of mandate directed at the department. We are satisfied that the term "appellate court" in our context is subject to some ambiguity. (§ 21168.9, subd. (a).) Although the term "appellate court" generally refers to the Court of Appeal or an appellate division, our Supreme Court also decides appeals. And it can be logically argued that when the Supreme Court remands an appeal as it did here, section 21168.9, subdivision (a) permits us to issue a writ of mandate. The developer and the department add to this textual analysis by advertiring to the need for prompt resolution of California Environmental Quality Act litigation. (§ 21167.1, subd. (a) ["In all actions or proceedings brought pursuant to Sections 21167, 21168, and 21168.5, including the hearing of an action or proceeding on appeal from a decision of a lower court, all courts in which the action or proceeding is pending shall give the action or proceeding preference over all other civil actions, in the matter of setting the action or proceeding

for hearing or trial, and in hearing or trying the action or proceeding, so that the action or proceeding shall be quickly heard and determined.”]; *Stockton Citizens for Sensible Planning v. City of Stockton*, *supra*, 48 Cal. 4th 481, 500 [“The Legislature has obviously structured the legal process for a [California Environmental Quality Act] challenge to be speedy, so as to prevent it from degenerating into a guerilla war of attrition by which project opponents wear out project proponents.”].) And the Courts of Appeal do have original mandate jurisdiction. (Cal. Const., art. VI, § 10 [“The . . . courts of appeal . . . and their judges have original jurisdiction in . . . proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition.”]; *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241 [186 Cal.Rptr. 30, 651 P.2d 274] [original proceeding filed in Court of Appeal and transferred to our Supreme Court].) In light of the foregoing, we will evaluate the circumstances leading up to the enactment of section 21168.9, subdivision (a) and its reference to a remand from an appellate court.

C. Limited Legislative History Concerning Section 21168.9

Section 21168.9 was introduced as Senate Bill No. 1079 (1983–1984 Reg. Sess.) (Senate Bill No. 1079). When originally introduced on March 4, 1983, Senate Bill No. 1079 made no reference to the issue of the scope of a writ of mandate to be issued in an environmental case. Rather, when originally introduced, Senate Bill No. 1079 related to costs of suit and attorney fees in environmental litigation involving low- or moderate-income housing projects. (Sen. Bill No. 1079, as introduced Mar. 4, 1983; Sen. Com. on Housing and Urban Affairs, Rep. on Sen. Bill No. 1079, Mar. 4, 1983, p. 1.) Later, while still initially pending in the upper house, Senate Bill No. 1079 was amended to address other zoning and public planning issues and environmental matters.

On July 25, 1983, Robert K. Break of the law firm of Latham & Watkins wrote a letter to Maxine Harris Brookner. Mr. Break’s letter proposed an amendment to the California Environmental Quality Act. Mr. Break’s letter was received while Senate Bill No. 1079 was under consideration in the upper house. Ms. Brookner was a Senate Committee on Housing and Urban Affairs staffer. Mr. Break requested that legislation be adopted providing for greater flexibility when selecting remedies in the case of a California Environmental Quality Act violation. Mr. Break argued the California Environmental Quality Act should be amended to provide more focused remedies other than entirely voiding an environmental decision. Mr. Break wrote to Ms. Brookner: “[G]iven the cost associated with the delay of any public or private works project and the sensitivity of many such projects to any delay, I think it is appropriate to consider some statutory direction to the courts

recognizing there are appropriate situations where the relief granted upon a finding of [a California Environmental Quality Act] violation should be something less drastic than mandated voidance of the decision approving the project. In many situations, an expedited reconsideration of the decision by the lead agency under court supervision could minimize delay while fully meeting the letter and intent of [the California Environmental Quality Act].” Thereafter, Senate Bill No. 1079 passed the upper house. No action was taken at this time on Mr. Break’s letter.

On May 8, 1984, Senate Bill No. 1079, while pending in the Assembly, was amended to propose the adoption of section 21168.9. As it did later upon ultimate passage, the newly drafted Legislative Counsel’s Digest stated in part: “The act specifies procedures and requirements to challenge a determination, finding, or decision of a public agency under the act, including petitions to the court for an order of administrative mandate, as specified. [¶] This bill would require a court, if it finds, as a result of a trial, hearing, or remand from an appellate court that a determination, finding, or decision of a public agency has been made without compliance with the California Environmental Quality Act, to enter an order by the issuance of a peremptory writ of mandate including one or more specified orders specifying what action by the public agency is necessary to comply with the act. . . . [¶] . . . The bill would require the court to retain jurisdiction over the public agency’s proceedings by way of a return to the peremptory writ until the court has determined that the public agency has complied with the act. The bill would also declare that its provisions do not authorize a court to direct any public agency to exercise its discretion in any particular . . . way.” (Italics omitted.) As can be noted, in terms of the remand from an appellate court language, the Legislative Counsel’s Digest endeavors to summarize the text appearing in section 21168.9, subdivision (a). The Assembly adopted the entirely rewritten Senate Bill No. 1079 and returned it to the upper house on May 29, 1983. The Legislative Counsel’s Digest is the only document prepared while the legislation was pending in the Assembly that sheds any light on Legislature’s intentions in enacting Senate Bill No. 1079.

Only one Senate committee report discusses the language of section 21168.9, subdivision (a) after Senate Bill No. 1079 was amended in the Assembly. An unfinished business report prepared by the Senate Democratic Caucus reiterated the language concerning “remand from an appellate court” but shed no light on the subject. (Sen. Democratic Caucus, Analysis of Sen. Bill No. 1079, as amended May 8, 1984, pp. 1–2.) On June 21, 1984, the Senate unanimously refused to concur in the Assembly amendments, which in essence rewrote Senate Bill No. 1079 to propose section 21168.9. (7 Sen. J. (1983–1984 Reg. Sess.) p. 12134.) A conference committee was appointed; it recommended adoption of the Assembly amendments to Senate Bill No. 1079, which proposed enactment of section

21168.9. Both the Senate and Assembly unanimously adopted the conference committee report and both houses unanimously voted to enact section 21168.9. (10 Assem. J. (1983–1984 Reg. Sess.) p. 19010; 8 Sen. J. (1983–1984 Reg. Sess.) p. 14273.) There is little of consequence in the committee reports or other legislative documents that sheds light on the Legislature’s expectations in enacting the remand from an appellate court language. More critically, there is nothing in the Senate Bill No. 1079’s sparse legislative history that alters the normal processing of environmental litigation on direct appeal, as is our case here. Nothing in Senate Bill No. 1079’s legislative documents suggests intermediate appellate courts were granted, in cases on direct appeal, authority to issue their own writs of mandate. And nothing in those papers suggests a legislative intention, when a case is on direct appeal, to grant us the authority to supervise the implementation of a writ of mandate.

D. Other Provisions of the California Environmental Quality Act and Appellate Practice Militate Against Holding That on Direct Appeal We May Issue a Writ of Mandate and Supervise Its Implementation.

1. Other legal provisions concerning trial court jurisdiction over California Environmental Quality Act enforcement and administrative mandate procedure

Other legal and procedural provisions are inconsistent with the legislative intent to permit an appellate court, on direct appeal, to issue a writ of mandate directly to the lead agency. First, we examine California Environmental Quality Act enforcement practice in 1984 when section 21168.9 was enacted. Since 1972, if a litigant desires to challenge an environmental impact report’s certification, the Legislature has required a Code of Civil Procedure section 1094.5 administrative mandate petition be filed. And the practice has always been to file a Code of Civil Procedure section 1094.5 administrative mandate petition in superior court. In 1970, the California Environmental Quality Act was adopted with the enactment of new sections 21000 through 21151. (Stats. 1970, ch. 1433, § 1, pp. 2780–2783.) Former section 21100, subdivision (a) required a “detailed statement by a responsible state official” be written describing a proposed action’s environmental impact. The 1970 legislation made no reference to judicial enforcement of the new environmental legislation. In 1972, sections 21060 through 21172.5 were adopted, which substantially amended the 1970 version of the California Environmental Quality Act. (Stats. 1972, ch. 1154, § 1, pp. 2271–2280.) Former section 21168 required that any action challenging a public agency’s determination under the California Environmental Quality Act must be filed in accordance with Code of Civil Procedure section 1094.5. (Stats. 1972, ch. 1154, § 15, pp. 2276, 2278.)

As it was in effect in 1972, Code of Civil Procedure section 1094.5 had language that was solely consistent with the filing of administrative mandate petitions in the trial court. (Stats.1949, ch. 358, § 1, pp. 638–639.) For example, Code of Civil Procedure former section 1094.5, subdivision (a) required that the petition be heard by “the court sitting without a jury”; referred to the filing of the “respondent’s points and authorities” along with the administrative record (Code Civ. Proc., former § 1094.5, subd. (a)); the entry of judgment (Code Civ. Proc., former § 1094.5, subds. (d)–(e)); the potential entry of an order staying the administrative decision until the filing of a notice of appeal (Code Civ. Proc., former § 1094.5, subd. (f); specifying the duration of the stay by operation of law after the filing of a notice of appeal. (Code Civ. Proc., former § 1094.5, subd. (f).)

And any filing in a trial court would have been the superior court. In 1972, neither the municipal nor justice courts had jurisdiction to hear administrative mandate petitions. As can be noted, this language is inconsistent with the direct filing of a Code of Civil Procedure section 1094.5 administrative mandate petition in an appellate court. (As we will explain later, we do not foreclose that possibility. But our point is that the practice in 1984 when section 21168.9 was enacted was for administrative mandate petitions to be filed in the superior court.)

We now turn to the legislative events in 1984 when section 21168.9, with its “remand from an appellate court” language, was adopted. The 1984 version of Code of Civil Procedure section 1094.5, the enforcement provision for California Environmental Quality Act, continued with the references to a “court sitting without a jury”; “respondent’s points and authorities”; the entry of a judgment; and stays pending appeal. (Code Civ. Proc., former § 1094.5, subds. (a), (e), (f), (g), and (h)(3); Stats. 1982, ch. 812, § 3, pp. 3102–3105.) Code of Civil Procedure section 86 in 1984 specified the jurisdiction of the justice and municipal courts. The 1984 amended version of Code of Civil Procedure section 86 did not vest the municipal or justice courts with jurisdiction over California Environmental Quality Act litigation. Nor did the 1984 version of Code of Civil Procedure section 86 vest those courts with the authority to rule on a Code of Civil Procedure section 1094.5 administrative mandate petition. (Stats. 1984, ch. 1719, § 1.1, pp. 6229–6231.)

No statute explicitly provided for filing a mandate petition to challenge an environmental impact report certification in the Courts of Appeal. Section 21168.6 specified, as it does now, that a mandate petition “against the Public Utilities Commission” involving California Environmental Quality Act compliance must be filed in the Supreme Court. (Stats. 1972, ch. 1154, § 1, pp. 2271, 2278.) Also, in 1984, the Legislature adopted section 21167.6,

subdivisions (a) through (c),³ which imposed time requirements for the filing of the administrative record with the court. The sole exception was for suits against the Public Utilities Commission. (Stats. 1984, ch. 1514, § 12, pp. 5342–5343.) But as adopted in 1984, section 21167.6, subdivision (d) also imposed time limits for the preparation of a clerk’s transcript on appeal. And, section 21167.6, subdivision (d) permitted the use of an appendix on appeal. And section 21167.6, subdivisions (d) through (f) imposed limits on briefing and scheduling requirements *on appeal*. (Stats. 1984, ch. 1514, § 12, pp. 5342, 5343.)⁴ The 1984 legislative record indicates the Legislature was aware, when section 21168.9 was adopted, that the practice was for environmental impact report litigation to be commenced in the superior court.

2. Appellate courts’ powers and practice on direct appeal

■ There is no evidence the Legislature intended when an environmental impact report’s certification was litigated on appeal to alter the established procedures for remitting jurisdiction of the trial court. As noted, now, as in 1984, an appellate court’s authority extended to affirmance or reversal and modification of an appeal from judgment or order. (Code Civ. Proc., § 43.) And after making one of those decisions, affirmance, reversal, modification or any combination thereof, the Courts of Appeal are required to remit the cause

³ As adopted in 1984, section 21167.6, subdivisions (a) through (c), the provisions relating to the filing of the administrative record with the “court,” stated: “Notwithstanding any other provision of law, in all actions brought pursuant to Section 21167, except those involving the Public Utilities Commission: [¶] (a) At the time the action is filed, the petitioner shall file a request that the respondent public agency prepare the record of proceedings relating to the subject of the action. The request, together with the petition, shall be served upon the public agency not later than 10 business days after the action is filed. [¶] (b) The public agency shall prepare and certify the record of proceedings not later than 60 days after the request specified in subdivision (a) is served upon the public agency. The parties shall pay any costs or fees imposed for the preparation of the record of proceedings in conformance with any law or rule of court. The petitioner may elect to prepare the record of proceedings or the parties may agree to an alternative method of preparation of the record of proceedings, subject to the certification of its accuracy by the public agency, within the time limit specified in this subdivision. [¶] (c) The time limit established by subdivision (b) may be extended only upon stipulation of all parties who have been properly served in the action or upon order of the court. Extensions shall be liberally granted by the court when the size of the record of proceedings renders infeasible compliance with the time limit specified in subdivision (b). There is no limit on the number of extensions which may be granted by the court, but no single extension shall exceed 60 days unless the court determines that a longer extension is in the public interest.” (Stats. 1984, ch. 1514, § 12, pp. 5342–5343.)

⁴ As adopted in 1984, section 21167.6, subdivision (d), the provision relating to preparation of the record on *appeal*, stated: “(d) The clerk of the superior court shall prepare and certify the clerk’s transcript on appeal not later than 60 days after the notice designating the papers or records to be included in the clerk’s transcript is filed with the superior court, provided that the party or parties pay any costs or fees for preparation of the clerk’s transcript imposed in conformance with any law or rules of court. Nothing contained in this subdivision shall preclude election to proceed pursuant to Rule 5.1 of the California Rules of Court.”

to court from which the appeal was taken. (*Ibid.*; Code Civ. Proc., § 912; see *Griset v. Fair Political Practices Com.*, *supra*, 25 Cal.4th at p. 701.) These are well-established principles of appellate practice. The Legislature did not expressly change these rules in the case of environmental litigation. When section 21168.9, subdivision (a) was adopted, the Legislature did not expressly grant us the power to issue a writ of mandate.

■ And, there is no basis for *implying* the Legislature intended in enacting section 21168.9 to modify the well-established procedures for appeals digested in the immediately foregoing paragraph. Stated differently, we may not imply a repeal or modification of the Code of Civil Procedure sections 43 and 912 remittitur requirements because of the enactment of section 21168.9. Repeals by implication are disfavored. (*People v. Siko* (1988) 45 Cal.3d 820, 824 [248 Cal.Rptr. 110, 755 P.2d 294] [“As a general rule of statutory construction, of course, repeal by implication is disfavored.”]; *Flores v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 171, 176 [113 Cal.Rptr. 217, 520 P.2d 1033] [“[A]ll presumptions are against a repeal by implication.”].) Our Supreme Court has explained: “Absent an express declaration of legislative intent, we will find an implied repeal ‘only when there is no rational basis for harmonizing the two potentially conflicting statutes [citation], and the statutes are “irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.”’” (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476–477 [66 Cal.Rptr.2d 319, 940 P.2d 906], quoting *In re White* (1969) 1 Cal.3d 207, 212 [81 Cal.Rptr. 780, 460 P.2d 980].)

This presumption against the implied repeal of Code of Civil Procedure sections 43 and 912 is of special emphasis given the historic nature of the structure of the California appellate process. In 1850, the Legislature specified the powers of the Supreme Court and the role of the remittitur: “The Supreme Court may reverse, affirm, or modify, the judgment or order appealed from, and its judgment shall be remitted as soon as practicable, after judgment pronounced, to the Court below, to be enforced according to law.” (Stats. 1850, ch. 14, § 7, p. 57; see *Grogan v. Ruckle* (1850) 1 Cal. 193, 194.) Later in 1850, the Legislature enacted “AN ACT to regulate proceedings in Civil Cases in the District Court, the Superior Court of the City of San Francisco, and Supreme Court” which reiterated the power of the Supreme Court to “reverse, affirm, or modify any judgment, order or determination, appealed from in whole or in part”; directed that the Supreme Court’s judgment or order “be remitted to the District Court”; and required, “When the judgment of the Supreme Court is remitted to the Court below, the clerk of the Supreme Court shall certify the costs of the appeal” (Stats. 1850, ch. 142, §§ 280, 283, pp. 428, 453.) In 1851, the Legislature once again defined the powers of the Supreme Court thusly: “This Court may reverse, affirm, or modify the judgment or order appealed from, in the respect

mentioned in the notice of appeal, as to any and all of the parties, and may set aside, confirm, or modify any or all of the proceedings subsequent to, and dependent upon, such judgment or order; and may, if necessary or proper, order a new trial." (Stats. 1851, ch. 1, § 8, p. 10.)

The Code of Civil Procedure was enacted in 1872. (See *First Nat. Bank v. Kinslow* (1937) 8 Cal.2d 339, 343 [65 P.2d 796]; *Hogoboom v. Superior Court* (1996) 51 Cal.App.4th 653, 660 [59 Cal.Rptr.2d 254].) As enacted in 1872, Code of Civil Procedure section 45 stated: "The Court may reverse, affirm, or modify any order or judgment appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceeding to be had. Its judgment must be remitted to the Court from which the appeal was taken." (1 Ann. Code Civ. Proc., § 45 (1st ed. 1872, Haymond & Burch, commrs.-annotators) p. 49.) In 1880, Code of Civil Procedure former section 45 was moved to section 53. The 1880 version of Code of Civil Procedure former section 45 maintained the "affirm, reverse, or modify" language and concluded, "Its judgment in appealed cases shall be remitted to the Court from which the appeal was taken." (Code Amends. 1880, ch. 35, § 53, p. 25.) In 1933, Code of Civil Procedure former section 53 was amended to clarify that the power "to affirm, reverse, or modify" extended to the Court of Appeal. As in the case of the 1880 version, the 1933 amendment explicitly stated the judgment in an appealed case was to be remitted to the trial court. (Stats. 1933, ch. 743, § 6, p. 1807.) In 1967, Code of Civil Procedure former section 53 was renumbered as section 43 and amended to state as it does now. (Stats. 1967, ch. 17, § 5, p. 827.) Since 1850, the powers of appellate courts have been limited "to affirm, reverse, or modify" judgments or orders and the decision on appeal is to be remitted to the trial court.

Finally, the department and developer argue that we should somehow supervise compliance with any writ of mandate we can issue. Section 21168.9, subdivision (b) explains who retains jurisdiction to supervise a writ of mandate issued to enforce compliance with the California Environmental Quality Act: "The trial court shall retain jurisdiction over the public agency's proceedings by way of a return to the peremptory writ until the court has determined that the public agency has complied with this division." The Legislature has explicitly vested the trial court with the authority to retain jurisdiction to ensure the department has complied with the California Environmental Quality Act. Any suggestion we can retain jurisdiction to supervise any return to the writ of mandate is contradicted by the express language of section 21168.9, subdivision (b).

E. Conclusion

Nothing in the language of 21168.9, subdivision (a), the events leading to its adoption or other provisions of law permit us, *on direct appeal*,

to issue the writ of mandate. That is a matter for a trial court. For the foregoing reasons, we conclude we do not have the authority to issue our own writ of mandate. Rather, our duty is to decide issues pertinent to the writ of mandate's scope, insofar as possible, and then remit the matter to the trial court. And we further conclude our Supreme Court directed us to determine what language should be utilized by the trial court.

■ Nothing we have said herein applies to cases where an original proceeding is initially commenced in the Court of Appeal. (Cal. Const., art. VI, § 10; see *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 340 [276 Cal.Rptr. 326, 801 P.2d 1077].) No original proceeding has been filed with this court. Similarly, we are not discussing specified environmental challenges filed against the Public Utilities Commission, which are filed in our Supreme Court. (§ 21168.6.) Further, nothing we have said applies to cases where a supersedeas petition is filed and conditions are imposed which can lead to an early compliance with environmental requirements. (Cal. Rules of Court, rule 8.112(d)(1) ["The court may issue the writ on any conditions it deems just."]; *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 802–814 [108 Cal.Rptr. 377] [supersedeas petition deemed to be mandate petition and the Court of Appeal issued a writ of mandate ordering preparation of an environmental impact report and limiting ground water pumping].) No supersedeas petition has been filed with us. Finally, in a related supersedeas scenario, nothing we have written applies to issue of injunctions designed to preserve the status quo so as to maintain the jurisdiction of this court. (Code Civ. Proc., § 923 ["The provisions of this chapter shall not limit the power of a reviewing court or of a judge thereof to stay proceedings during the pendency of an appeal or to issue a writ of supersedeas or to suspend or modify an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction."]; *People ex rel. S. F. Bay etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533, 537 [72 Cal.Rptr. 790, 446 P.2d 790] [Supreme Court's inherent powers permit it to issue an injunction in aid of its own jurisdiction and to preserve the status quo]; *County of Inyo v. City of Los Angeles* (1976) 61 Cal.App.3d 91, 100–101 [132 Cal.Rptr. 167] [Court of Appeal uses injunctive order powers to reset an interim pumping rate from the subsurface pool of the Owens Valley Groundwater Basin].) No specific injunctive relief request has been presented to us. This is not merely a case involving an injunction but the certification of an environmental impact; approval of a streambed alteration agreement; approval of the resource management and development plan; adoption of the Spineflower Conservation Plan and streambed alteration agreement; and issuance of two incidental take permits. Our analysis is limited to the argument that, based on section 21168.9, we should issue a writ of mandate and supervise the department's compliance therewith. Section 21168.9 does not empower us to do so.

Upon remittitur issuance, the trial court is to proceed in compliance with section 21168.9. We have reversed the judgment except as to the greenhouse gas emission and BIO-44 and BIO-46 issues. This will entail at a minimum setting aside those two portions of the environmental impact report. But beyond that, we leave further matters in the trial court's good hands. Whether to maintain the injunction against *any* development in effect or partially certify the environmental impact report depends on competing factual issues including section 21168.9, subdivision (b) severance issues. (*LandValue 77, LLC v. Board of Trustees of California State University* (2011) 193 Cal.App.4th 675, 680–683 [122 Cal.Rptr.3d 37]; *Anderson First Coalition v. City of Anderson*, *supra*, 130 Cal.App.4th at pp. 1173–1181.) One of the issues, changing the bridge design over the Santa Clara River so *no* threespine unarmored stickleback are taken, may be a comparatively uncomplicated engineering decision. But the other issue, the greenhouse gas emission question, may be very complicated. (See *Center for Biological Diversity*, *supra*, 62 Cal.4th at pp. 225–231.) It is speculatively injudicious for us to decide these matters and that is why the scope of our remittitur is narrowly drawn.

VI. DISPOSITION

The judgment is affirmed in part and reversed in part. First, the judgment is affirmed as to the finding that mitigation measures BIO-44 and BIO-46 violate Fish and Game Code section 5515. Second, the judgment is reversed as to the finding that the selection of the Health and Safety Code section 38505 greenhouse gas emission reduction goals was an abuse of discretion. Upon remittitur issuance, the trial court shall find the department could select the Health and Safety Code section 38505 greenhouse gas emissions reduction goals as a significance criterion. Third, the judgment is reversed as to the finding that the department could not use a hypothetical business as usual scenario for evaluating greenhouse gas emission impacts. Upon remittitur issuance, the trial court is to enter a finding that the department can use a hypothetical business as usual scenario for evaluating greenhouse gas emission impacts. Fourth, the judgment is affirmed as to the trial court's ruling there is no substantial evidence the project's greenhouse gas emissions will not result in a cumulatively significant environmental impact. Upon remittitur issuance, the trial court is to enter a finding that there is no substantial evidence the project's greenhouse gas emissions will not result in a cumulatively significant environmental impact. Fifth, the trial court's remaining findings concerning Native American resources, San Fernando Valley spine-flower conservation, reliance on the specific plan and steelhead smolt are reversed. Once the remittitur issues, the trial court is to issue its writ of mandate as specified in the unpublished portion of this opinion. Further, the



trial court is to proceed in compliance with Public Resources Code section 21168.9 including fashioning appropriate injunctive orders including any changes to the permits if necessary. All parties are to bear their own costs of appeal.

Kriegler, J., and Baker, J., concurred.

A petition for a rehearing was denied August 10, 2016, and the opinion was modified to read as printed above. The petition of respondent Wishtoyo Foundation/Ventura Coastkeeper for review by the Supreme Court was denied October 12, 2016, S236776.

[No. B266497. Second Dist., Div. Five. July 12, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
MICHAEL GARRETT McCAW, Defendant and Appellant.

THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) October 19, 2016, S236618.

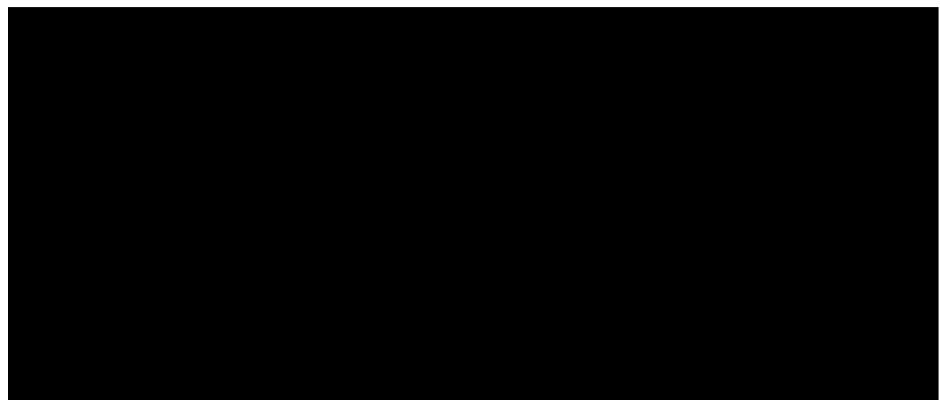
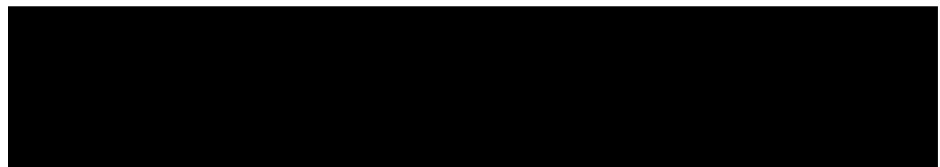
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COUNSEL

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnsen and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

KRIEGLER, J.—In 1999, defendant Michael Garrett McCaw entered into a plea bargain in New York in which he pleaded guilty to attempted third degree robbery. In 2011, defendant was convicted of attempted manslaughter in California. The trial court found that defendant’s 1999 New York conviction for attempted third degree robbery qualified as a serious felony and a strike under California law, and enhanced defendant’s sentence accordingly. We have twice reversed the recidivism findings. In a third trial of the recidivism allegations, the court determined that the plea colloquy in connection with the New York conviction demonstrated that the New York offense qualified as a serious felony and strike under California law.

We again reverse. It is undisputed that the elements of attempted third degree robbery under New York law do not correspond to the elements of robbery as defined in California law. The trial court’s finding in the third recidivism trial that the conduct underlying defendant’s New York conviction would constitute attempted robbery in California constitutes the type of judicial factfinding prohibited under the Supreme Court’s interpretation of the Sixth Amendment in *Descamps v. United States* (2013) 570 U.S. ____ [186 L.Ed.2d 438, 133 S.Ct. 2276] (*Descamps*). After *Descamps*, the trial court “may not under the Sixth Amendment ‘make a disputed’ determination ‘about what the defendant and state judge must have understood as the factual basis of the prior plea.’” (*People v. Saez* (2015) 237 Cal.App.4th 1177, 1207–1208 [189 Cal.Rptr.3d 72] (*Saez*).) “[W]hen a defendant pleads guilty to a crime, he waives his right to a jury determination of only that

offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment.” (*Descamps*, *supra*, 570 U.S. at p. ____ [133 S.Ct. at p. 2288].)

PROCEDURAL BACKGROUND

Defendant was convicted by jury in California in 2011 of attempted voluntary manslaughter (Pen. Code, §§ 192, 664).¹ The jury also found true allegations that defendant used a deadly weapon (§ 12022, subd. (b)(1)) and inflicted great bodily injury (§ 12022.7, subd. (a)). Following a bench trial, the trial court found that defendant's 1999 New York conviction for attempted third degree robbery was a strike under the three strikes law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)) and a prior serious felony conviction (§ 667, subd. (a)).²

The trial court sentenced defendant to 21 years in state prison. The sentence included, *inter alia*, a doubling of the term for attempted voluntary manslaughter due to the strike prior conviction, and a five-year enhancement for the serious felony.

Defendant argued in his first appeal that the evidence was insufficient to support the trial court's initial findings that his 1999 New York conviction for third degree attempted robbery was a serious felony and a strike under California law. The Attorney General conceded the point, because robbery under California law requires that property be “taken from the other person or (his/her) immediate presence” (CALCRIM No. 1600), whereas under New York law it is not required that the person robbed be in equally close physical proximity to the stolen property. We held the evidence was insufficient to support the findings, reversed the recidivism findings, and remanded for a limited retrial of the prior conviction allegations.

The prosecution offered additional evidence at the second trial on the recidivism allegations. Among the items presented was a document signed by Michele Jaworski, which stated that on or about November 3, 1997, defendant grabbed her purse and attempted to take it from her. The trial court found that the document containing Jaworski's statement appeared to be “in the form of a charging document” with the signed affidavit of the victim. The trial court again found the prior conviction allegations true.

In his second appeal to this court, defendant again contended there was insufficient evidence that his New York attempted third degree robbery

¹ Statutory references are to the Penal Code, unless otherwise indicated.

² The trial court also found defendant had served a prior prison term (§ 667.5, subd. (b)), which was unrelated to the New York conviction.

conviction qualified as a serious felony or a strike for purposes of the California sentencing enhancements. He argued that *Descamps*, *supra*, 570 U.S. at page ___ [133 S.Ct. at page 2276], decided subsequent to our remand, prohibited the trial court from examining the entire record of conviction, repudiating our Supreme Court's decision in *People v. Guerrero* (1988) 44 Cal.3d 343 [243 Cal.Rptr. 688, 748 P.2d 1150], and its progeny. Alternatively, defendant asserted that even under current California law, the evidence was insufficient to support the sentence enhancements. The Attorney General argued California's jurisprudence was unaffected by *Descamps*, and that the evidence was sufficient under California law. We agreed with defendant that the evidence was insufficient. We explained that Jaworski's statement appeared to be the basis for reference of the case to the grand jury, which ultimately indicted defendant for a variety of offenses including attempted first degree robbery, to which defendant had pleaded not guilty. The case was resolved by guilty plea to attempted third degree robbery. Jaworski's statement was insufficient to demonstrate the basis for defendant's New York conviction because it did not reliably reflect the facts of the offense to which defendant pleaded guilty. We again reversed the recidivism findings, and remanded for a limited retrial of the prior conviction allegations. Because we were able to resolve the issue on the basis of the insufficiency of the evidence, we did not consider the impact of *Descamps*'s Sixth Amendment analysis on our state's law.

At the third court trial on the recidivism allegations, the prosecution for the first time presented the transcripts of defendant's change of plea and sentencing in the New York case. The New York indictment charged defendant in the first two counts with attempted first degree robbery, and in the third count with attempted second degree robbery. He was charged in the fourth and fifth counts with criminal possession of a weapon in the third degree. The discussion of the case settlement in the New York court reporter's transcript indicates defendant would plead guilty to attempted third degree robbery "[u]nder the third count" and possession of a weapon under the fifth count. The count in dispute in this appeal—the third count—was resolved with a plea to a lesser offense than the charged attempted second degree robbery. The plea colloquy reveals the following:

"The Court: You're charged with an incident that occurred on November 3rd, 1997. It's alleged that on that date . . . you were engaged in criminal conduct. It's alleged you attempted to forcibly steal property from the person of Michele Jaworski, and furthermore in the course of the matter you did, and subsequent to that, you did possess a loaded firearm and that the firearm was possessed at a location not your home or place of business, that being an operable and loaded firearm.

With respect to the allegation you forcibly stole property from another person armed with a loaded and operable firearm, do you now enter a plea of guilty?

“The Defendant: Yes.

“The Court: Do you hereby acknowledge the criminal acts alleged were, in fact, committed by you?

“The Defendant: Yes.

“The Court: Anybody forcing you to make the admissions?

“The Defendant: No.

“The Court: Are you telling me the truth when you say you are guilty of these two crimes, attempted robbery in the third degree and criminal possession of a weapon in the third degree, and do you now freely acknowledge and admit your guilt of those offenses and tell me the truth in acknowledging your guilt?

“The Defendant: Yes.”

Based on this language in the plea colloquy, the trial court for the third time found the recidivism allegations true. It explained that under current case law, the only issue to resolve was whether defendant had admitted to attempting to take property from the victim’s person, and the plea colloquy demonstrated he had done so. The court again sentenced defendant to 21 years in state prison.

Defendant timely appealed.

DISCUSSION

Defendant once more contends insufficient evidence supports the finding that his 1999 conviction in New York for attempted third degree robbery was a prior serious felony conviction and a prior conviction under the three strikes law. He maintains the California Supreme Court’s decision in *People v. McGee* (2006) 38 Cal.4th 682 [42 Cal.Rptr.3d 899, 133 P.3d 1054] (*McGee*), which permits sentencing courts to review the record of the prior criminal proceeding to determine the nature of the prior conviction, is no longer viable following *Descamps*, in which the United States Supreme Court held that the Sixth Amendment prohibits courts from examining evidence beyond the statutory elements of the crime in determining the nature of a

prior conviction if the statute defining the crime is not divisible, leaving all factfinding to the jury. Defendant asserts attempted third degree robbery under New York law is not divisible—a point not challenged by the Attorney General. Defendant argues that because the New York statute is indivisible, the court violated his Sixth Amendment rights by considering the plea colloquy to determine the nature of his prior conviction.

The Attorney General responds that defendant forfeited the issue on appeal by failing to object to admission of the plea colloquy on the basis that it violated his Sixth Amendment rights at the second retrial.³ Alternatively, the Attorney General argues defendant's claim is without merit because this court is bound to follow *McGee, supra*, 38 Cal.4th 682, which was not superseded by *Descamps*.

Descamps

■ *Descamps, supra*, 570 U.S. at page ____ [133 S.Ct. at page 2276], discussed the Sixth Amendment's limitations on judicial factfinding to prove the truth of a prior conviction. Prior to *Descamps*, the court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 at page 490 [147 L.Ed.2d 435, 120 S.Ct. 2348] (*Apprendi*), that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” The *Descamps* court considered whether a guilty plea transcript could be considered as proof of a qualifying prior conviction under 18 U.S.C. § 924, subdivision (e), commonly referred to as the Armed Career Criminal Act of 1984 (ACCA; Pub.L. No. 98-473 (Oct. 12, 1984) 98 Stat. 2185).

Descamps had pleaded guilty to burglary in California. As interpreted by the Supreme Court, breaking and entering was an element of the crime of “generic burglary” under the ACCA. The California statute under which *Descamps* had been convicted defined burglary more broadly than the federal statute, including crimes like shoplifting, in which breaking and entering was not an element. The plea transcript reflected that defendant failed to object when the prosecutor stated the crime “‘ ‘involve[d] the breaking and entering of a grocery store.’ ’ ” (*Descamps, supra*, 570 U.S. at p. ____ [133 S.Ct. at p. 2282].) The district court applied the “modified categorical approach,” and, relying on the evidence in the plea transcript, concluded that the prior conviction was a qualifying prior conviction under the ACCA. The Ninth Circuit affirmed. (*Ibid.*)

³ We reject the forfeiture contention. Defendant's challenge to the sufficiency of the evidence, founded in a violation of the Sixth Amendment, is cognizable on appeal without objection to the evidence in the trial court. (See *People v. Trujillo* (2010) 181 Cal.App.4th 1344, 1350, fn. 3 [105 Cal.Rptr.3d 316] (“[A]n argument that the evidence is insufficient to support a verdict is never waived”].)

The Supreme Court framed the issue as follows: “To determine whether a past conviction is for [a crime that qualifies as a predicate under the ACCA], courts use what has become known as the ‘categorical approach’: They compare the elements of the statute forming the basis of the defendant’s conviction with the elements of the ‘generic’ crime—*i.e.*, the offense as commonly understood. The prior conviction qualifies as an ACCA predicate only if the statute’s elements are the same as, or narrower than, those of the generic offense. [¶] We have previously approved a variant of this method—labeled (not very inventively) the ‘modified categorical approach’—when a prior conviction is for violating a so-called ‘divisible statute.’ That kind of statute sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building *or* an automobile. If one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant’s prior conviction. The court can then do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime. [¶] This case presents the question whether sentencing courts may also consult those additional documents when a defendant was convicted under an ‘indivisible’ statute—*i.e.*, one not containing alternative elements—that criminalizes a broader swath of conduct than the relevant generic offense.” (*Descamps*, *supra*, 570 U.S. at p. ____ [133 S.Ct. at p. 2281].)

The *Descamps* court reversed the Ninth Circuit’s decision, explaining: “[Affirming the Ninth Circuit’s decision] would enable a court to decide, based on information about a case’s underlying facts, that the defendant’s prior conviction qualifies as an ACCA predicate even though the elements of the crime fail to satisfy our categorical test. Because that result would contravene our prior decisions and the principles underlying them, we hold that sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements.” (*Descamps*, *supra*, 570 U.S. at p. ____ [133 S.Ct. at pp. 2281–2282].)

Throughout its decision, the *Descamps* court emphasized that sentencing courts could apply the modified categorical approach only when the statute in question was divisible. “[T]he modified approach serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant’s conviction. So understood, the modified approach cannot convert *Descamps*’ conviction under § 459 into an ACCA predicate, because that state law defines burglary not alternatively, but only

more broadly than the generic offense.” (*Descamps, supra*, 570 U.S. at p. ____ [133 S.Ct. at p. 2283].) The modified categorical approach “merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute. The modified approach thus acts not as an exception, but instead as a tool. It retains the categorical approach’s central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach’s basic method: comparing those elements with the generic offense’s. All the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates ‘several different . . . crimes.’ [Citation.] If at least one, but not all of those crimes matches the generic version, a court needs a way to find out which the defendant was convicted of. That is the job, as we have always understood it, of the modified approach: to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense.” (*Id.* at p. ____ [133 S.Ct. at p. 2285], fn. omitted.)

The Supreme Court went on to discuss the three grounds underlying its establishment of the “elements-centric” “‘formal categorical approach’” in previous cases: (1) the text and history of the ACCA; (2) Sixth Amendment concerns; and (3) “daunting” practical inequities. (*Descamps, supra*, 570 U.S. at p. ____ [133 S.Ct. at pp. 2287–2289].) With respect to the language of the ACCA, the high court explained: “As we have long recognized, ACCA increases the sentence of a defendant who has three ‘previous convictions’ for a violent felony—not a defendant who has thrice committed such a crime. [Citations.] That language shows . . . that ‘Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.’ [Citations.] If Congress had wanted to increase a sentence based on the facts of a prior offense, it presumably would have said so; other statutes, in other contexts, speak in just that way. [Citation.] But in ACCA, . . . Congress made a deliberate decision to treat every conviction of a crime in the same manner.” (*Descamps, supra*, 570 U.S. at p. ____ [133 S.Ct. at p. 2287].) “The Ninth Circuit’s approach runs headlong into that congressional choice. Instead of reviewing documents like an indictment or plea colloquy only to determine ‘which statutory phrase was the basis for the conviction,’ the Ninth Circuit looks to those materials to discover what the defendant actually did. [Citation.]” (*Ibid.*) As a result, “the Ninth Circuit has treated some, but not other, convictions under § 459 as ACCA predicates, based on minor variations in the cases’ plea documents.” (*Descamps, supra*, 570 U.S. at p. ____ [133 S.Ct. at p. 2288].)

With respect to the Sixth Amendment, the high court stated, “We have held that ‘[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.’ *Apprendi*[, *supra*,]

530 U.S. [at p.] 490. Under ACCA, the court’s finding of a predicate offense indisputably increases the maximum penalty. Accordingly, that finding would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction. Those concerns, we recognized in *Shepard* [v. United States (2005) 544 U.S. 13 [161 L.Ed.2d 205, 125 S.Ct. 1254]], counsel against allowing a sentencing court to ‘make a disputed’ determination ‘about what the defendant and state judge must have understood as the factual basis of the prior plea,’ or what the jury in a prior trial must have accepted as the theory of the crime. [*Id.*] at [p.] 25 (plurality opinion); see *id.*, at [p.] 28, (THOMAS, J., concurring in part and concurring in judgment) (stating that such a finding would ‘giv[e] rise to constitutional error, not doubt’). Hence our insistence on the categorical approach.” (*Descamps*, *supra*, 570 U.S. at p. ____ [133 S.Ct. at p. 2288].)

■ The high court continued: “Yet again, the Ninth Circuit’s ruling flouts our reasoning—here, by extending judicial factfinding beyond the recognition of a prior conviction. Our modified categorical approach merely assists the sentencing court in identifying the defendant’s crime of conviction, as we have held the Sixth Amendment permits. But the Ninth Circuit’s reworking authorizes the court to try to discern what a trial showed, or a plea proceeding revealed, about the defendant’s underlying conduct. [Citation.] And there’s the constitutional rub. The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances. [Citation.] Similarly, as *Shepard* indicated, when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense’s elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment. [Citation.] So when the District Court here enhanced *Descamps*’ sentence, based on his supposed acquiescence to a prosecutorial statement (that he ‘broke and entered’) irrelevant to the crime charged, the court did just what we have said it cannot: rely on its own finding about a non-elemental fact to increase a defendant’s maximum sentence.” (*Descamps*, *supra*, 570 U.S. at p. ____ [133 S.Ct. at pp. 2288–2289]; see also *Mathis v. United States* (2016) 579 U.S. ____ [195 L.Ed.2d 604, 136 S.Ct. 2243] [a court determining the truth of a prior opinion under the ACCA “can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of”].)

“Finally, the Ninth Circuit’s decision creates the same ‘daunting’ difficulties and inequities that first encouraged us to adopt the categorical approach. [Citation.] In case after case, sentencing courts following [the Ninth Circuit’s approach] would have to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor

showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense. The meaning of those documents will often be uncertain. And the statements of fact in them may be downright wrong. A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to. At trial, extraneous facts and arguments may confuse the jury. (Indeed, the court may prohibit them for that reason.) And during plea hearings, the defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations. . . . [¶] Still worse, the [Ninth Circuit's] approach will deprive some defendants of the benefits of their negotiated plea deals. Assume (as happens every day) that a defendant surrenders his right to trial in exchange for the government's agreement that he plead guilty to a less serious crime, whose elements do not match an ACCA offense. Under the Ninth Circuit's view, a later sentencing court could still treat the defendant as though he had pleaded to an ACCA predicate, based on legally extraneous statements found in the old record. *Taylor* [v. United States (1990) 495 U.S. 575 [109 L.Ed.2d 607, 110 S.Ct. 2143]] recognized the problem: '[I]f a guilty plea to a lesser, nonburglary offense was the result of a plea bargain,' the Court stated, 'it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty' to generic burglary. [Id.] at [pp.] 601–602. That way of proceeding, on top of everything else, would allow a later sentencing court to rewrite the parties' bargain." (*Descamps*, *supra*, 570 U.S. at p. ____ [133 S.Ct. at p. 2289]).

McGee

Prior to *Descamps*, in *McGee, supra*, 38 Cal.4th at pages 686–687, our Supreme Court held that it was permissible for the trial court, rather than the jury, to examine the record of a prior conviction to determine whether the conviction qualified as a predicate offense for purposes of sentence enhancement. The court explained that the limited examination of the record of a prior conviction allowed under California law did not run afoul of the Sixth Amendment as the Supreme Court interpreted it in *Apprendi*: "With regard to . . . the nature of the inquiry required (and permitted) in this context under California law . . . we observe that the matter presented is not, as the Court of Appeal appears to have assumed, a determination or finding 'about the [defendant's earlier] conduct itself, such as the intent with which a defendant acted.' Instead, it is a determination regarding the nature or basis of the defendant's *prior conviction*—specifically, whether *that conviction* qualified as a conviction of a serious felony. California law specifies that in making this determination, the inquiry is a limited one and must be based upon the record of the prior criminal proceeding, with a focus on the elements of the offense of which the defendant was convicted. If the enumeration of the elements of the offense does not resolve the issue, an examination of the record of the earlier criminal proceeding is required in order to ascertain

whether that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law. (See, e.g., *People v. Woodell* [(1998)] 17 Cal.4th 448, 452–461 [71 Cal.Rptr.2d 241, 950 P.2d 85].) The need for such an inquiry does not contemplate that the court will make an independent determination regarding a disputed issue of fact relating to the defendant's prior conduct (see *id.* at p. 460), but instead that the court simply will examine the record of the prior proceeding to determine whether that record is sufficient to demonstrate that the *conviction* is of the type that subjects the defendant to increased punishment under California law. This is an inquiry that is quite different from the resolution of the issues submitted to a jury, and is one more typically and appropriately undertaken by a court." (*McGee, supra*, 38 Cal.4th at p. 706.) The *McGee* court acknowledged the possibility that the Supreme Court would interpret the Sixth Amendment more broadly, but elected to await further developments in the law by the high court. (*McGee, supra*, at p. 708.)

Application of Descamps to California Recidivism Allegations

Because our Supreme Court has not spoken on the issue subsequent to *McGee*, the extent to which the Sixth Amendment holding of *Descamps* is applicable to prior convictions alleged in California is not fully defined. Even within the federal system, as noted by Justice Kennedy in his concurring opinion in *Descamps, supra*, 570 U.S. at page ___ [133 S. Ct. at page 2293], "the dichotomy between divisible and indivisible state criminal statutes is not all that clear." One court has expressed doubt that the *Descamps* analysis is a good fit with California law, because California's recidivism statutes are largely conduct based, unlike the elements-based ACCA. "In concluding that the Sixth Amendment was violated here, we do not accept [the defendant]'s suggestion that the specific approach described in *Descamps, supra*, 570 U.S. ___ [133 S.Ct. 2276] for establishing prior convictions under the ACCA is necessarily required in determining strikes under California's Three Strikes law. The divisible/indivisible approach discussed in *Descamps* springs in large part from the ACCA's focus on the *elements* of the prior conviction: unlike the Three Strikes law, the ACCA prohibits consideration of the conduct underlying the conviction. (See generally *Descamps*, at p. ___ [133 S.Ct. at pp. 2283–2288].)" (*Saez, supra*, 237 Cal.App.4th at p. 1208, fn. 22.)

Four Court of Appeal decisions have addressed the application of *Descamps* to California recidivism statutes. Three of these four opinions have concluded that our Supreme Court's analysis in *McGee, supra*, 38 Cal.4th 682, is inconsistent with the analysis in *Descamps*, while the fourth found a violation of both state law and the Sixth Amendment. (*People v. Denard* (2015) 242

Cal.App.4th 1012 [195 Cal.Rptr.3d 676] (*Denard*) [Sixth Amendment violated by use of Florida probable cause affidavit to prove out-of-state manslaughter conviction was a strike]; *People v. Marin* (2015) 240 Cal.App.4th 1344 [193 Cal.Rptr.3d 294] (*Marin*) [Sixth Amendment requires jury determination of whether defendant personally inflicted great bodily injury in commission of prior offense]; *Saez, supra*, 237 Cal.App.4th at p. 1207 [“while *Descamps* did not explicitly overrule *McGee*, *Descamps*’ discussion of the Sixth Amendment principles applicable when prior convictions are used to increase criminal sentences is clear and unavoidable and was adopted by eight of the nine justices on the high court”]; *People v. Wilson* (2013) 219 Cal.App.4th 500 [162 Cal.Rptr.3d 43] (*Wilson*)⁴ [both *McGee* and *Descamps* prohibited trial court from resolving the disputed factual issue of whether defendant personally inflicted great bodily injury in prior offense].)

In *Marin*, the Court of Appeal held that, based upon the reasoning in *Descamps*, “it is no longer tenable to draw a distinction, in the words of *McGee*, ‘between the nature of the inquiry and the factfinding involved in the type of sentence enhancements at issue in *Apprendi* and its progeny as compared to the nature of the inquiry involved in examining the record of a prior conviction to determine whether that conviction constitutes a qualifying prior conviction for purposes of a recidivist sentencing statute.’ (*McGee, supra*, 38 Cal.4th at p. 709.) The type of factfinding permitted by *McGee* is virtually indistinguishable from the Ninth Circuit approach that the high court disapproved in *Descamps*. The Ninth Circuit approach permitted an examination of ‘reliable materials’ to determine ‘“what facts” can “confident[ly]” be thought to underlie the defendant’s conviction in light of the “prosecutorial theory of the case” and the “facts put forward by the government.” [Citation.]’ (*Descamps, supra*, 570 U.S. at p. ____ [133 S.Ct. at p. 2286], italics added.) Similarly, *McGee* permits an examination of the record of conviction to determine ‘whether that record reveals whether the conviction *realistically may have been based on conduct* that would not constitute a serious felony under California law.’ (*McGee, supra*, 38 Cal.4th at p. 706, italics added.) The two approaches—one based on facts ‘confidently’ believed to underlie the conviction, the other on facts that ‘realistically’ underlie the conviction—are in all relevant respects indistinguishable. ¶¶ *Descamps* leaves no true room for debate that this type of factfinding violates the Sixth Amendment.” (*Marin, supra*, 240 Cal.App.4th at p. 1362; accord, *Denard, supra*, 242 Cal.App.4th at p. 1034 [“We agree with the conclusions of the courts in *Saez* and *Marin*”].)

⁴ *Wilson* did not expressly address whether *McGee* remains viable after *Descamps*, in light of its holding that the prior conviction at issue was invalid under both *McGee* and the Sixth Amendment.

Application of Descamps and the Court of Appeal Decisions to Defendant's New York Conviction

We need not decide the complex issue of whether *Descamps*'s analysis of the ACCA applies to California's recidivism scheme, because the constitutional principles flowing from *Apprendi*, and running through *Descamps*, dictate the result in this case.

Robbery in California contains an element not required under New York law—that property be taken from the person or immediate presence of the victim. “A person is guilty of robbery in the third degree when he forcibly steals property.” (N.Y. Pen. Law § 160.05 (McKinney).) “A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.” (N.Y. Pen. Law § 110.00 (McKinney).) There is “no requirement that the defendant take the property ‘from the person or in the presence of another’” under the New York robbery statute. (Prac. Com. foll. N.Y. Pen. Law, § 160.00; *People v. Smith* (1992) 79 N.Y.2d 309, 314 [582 N.Y.S.2d 946, 591 N.E.2d 1132].) Unlike the New York statute, section 211 defines robbery in California as “the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” The issue here is whether the trial court’s examination of the New York plea colloquy to determine if defendant took property from the person or immediate presence of Jaworski—an element not required by the New York robbery statute—is permitted by the Sixth Amendment.

■ We hold that the trial court’s reliance on statements in the plea colloquy from defendant’s New York conviction that were not relevant to the crime charged is the type of judicial factfinding prohibited by the Sixth Amendment as interpreted in *Descamps*. While the precise reach of the Sixth Amendment may not be fully defined as to California law, “this much is clear: when the elements of a prior conviction do not necessarily establish that it is a serious or violent felony under California law (and, thus, a strike), the court may not under the Sixth Amendment ‘“make a disputed” determination “about what the defendant and state judge must have understood as the factual basis of the prior plea,” or what the jury in a prior trial must have accepted as the theory of the crime.’ [Citation.]” (*Saez, supra*, 237 Cal.App.4th at pp. 1207–1208.)

The trial court’s reliance on legally superfluous statements in the plea colloquy to supply the missing element that defendant took property from the person of Jaworski runs afoul of several portions of the *Descamps* analysis. First, *Descamps* disapproved of a court trying “to discern what a trial showed, or a plea proceeding revealed, about the defendant’s underlying

conduct. [Citation.] . . . The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances. [Citation.]” (*Descamps, supra*, 570 U.S. at p. ____ [133 S.Ct. at p. 2288].) The trial court plainly went beyond the statutory elements of the New York offense to determine defendant’s underlying conduct.

Second, “when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense’s elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment.” (*Descamps, supra*, 570 U.S. at p. ____ [133 S.Ct. at p. 2288].) Defendant’s plea was to attempted third degree robbery; assuming he acquiesced to other facts beyond that offense, those facts are superfluous under the Sixth Amendment. Defendant never waived his right to have a jury determine facts beyond the elements of attempted third degree robbery.

Third, the Supreme Court cautioned that statements of fact in a plea colloquy “may be downright wrong. A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to. . . . [D]uring plea hearings, the defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations.” (*Descamps, supra*, 570 U.S. at p. ____ [133 S.Ct. at p. 2289].) What occurred during the plea colloquy in the New York court demonstrates the danger the *Descamps* court envisioned.

The plea transcript reflects that the New York court initially misstated the language of the third count of the indictment⁵ in taking defendant’s plea. The third count alleged that defendant “did attempt to forcibly steal property, that being personal property, from Michele Jaworski.” The New York court subtly restated the allegation, advising defendant that “[i]t’s alleged you attempted to forcibly steal property from the person of Michele Jaworski” The subtle change was that the indictment alleged in the statutory language that defendant *attempted to forcibly steal personal property*, but the court advised defendant that the allegation was that he *attempted to forcibly steal property from the person*, which is akin to the language in California’s robbery statute. This illustrates the problem anticipated by *Descamps* with

⁵ The New York indictment stated in full in the third count as follows: “The Grand jury of the county of the Bronx by this indictment, accuses the defendant Michael McCaw of the crime of attempted robbery in the second degree admitted as follows: [¶] The defendant, Michael McCaw, on or about November 3, 1997, in the county of the Bronx, did attempt to forcibly steal property, that being personal property, from Michele Jaworski, and in the course of commission of the crime or in immediate flight therefrom, the defendant displayed what appeared to be a revolver.”

consideration of a plea colloquy as to facts beyond the statutory elements of the offense: the court's initial description of the charge was "downright wrong." (*Descamps, supra*, 570 U.S. at p. ___ [133 S.Ct. at p. 2289].) In the next paragraph, in taking the guilty plea, the New York court misstated the allegation in the New York statute and the indictment: "With respect to the allegation you forcibly stole property from another person armed with a loaded and operable firearm, do you now enter a plea of guilty?"⁶ Defendant answered "Yes" to the court's question, admitting that he forcibly stole property, without admitting the property was taken from the person or immediate presence of Jaworski. Defendant's answer to the New York court's question did not admit conduct satisfying the California robbery statute.

The Attorney General disputes this interpretation of the plea, but even if she is correct that defendant admitted taking property from the person of Jaworski, in the end her argument fails, because *Shepard* does not permit this type of judicial factfinding based upon a plea. *Shepard*, as explained in *Descamps*, permits a court to consider a plea colloquy in determining whether a prior conviction has been shown by the prosecution, but only to the extent the plea agreement *proves the statutory elements of alleged prior offense*. "[A]s *Shepard* indicated, when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment." (*Descamps, supra*, 570 U.S. at p. ___ [133 S.Ct. at pp. 2288–2289].) Defendant agreed to a guilty plea to a lesser offense than that charged in the third count, an offense which did not include all the elements of attempted robbery in California. To sanction consideration of facts not elements of the New York offense "would allow [the] sentencing court to rewrite the parties' bargain." (*Descamps, supra*, 570 U.S. at p. ___ [133 S.Ct. at p. 2289].) This is not permitted by the Sixth Amendment.

We therefore reverse the recidivism findings and remand for a jury trial on the allegations, unless defendant elects to waive his right to a jury trial and either admit the allegations or submit to judicial factfinding. (See *Shepard, supra*, 544 U.S. at p. 26, fn. 5 [defendant "can waive the right to have a jury decide questions about his prior convictions"].)

⁶ The New York court incorrectly stated, and defendant acquiesced, that it was alleged defendant *forcibly stole* property, not that it was alleged defendant *attempted to forcibly steal* property, which further highlights the difficulties involved with parsing the language of the plea colloquy to determine whether a defendant pleaded guilty to the elements of the relevant offense.

DISPOSITION

The trial court's determination that the New York conviction for attempted third degree robbery constitutes a prior serious felony conviction and a strike is reversed. The cause is remanded for a jury trial on the truth of the prior conviction allegations, unless defendant admits the allegations or waives the right to a jury trial. In all other respects, the judgment is affirmed.

Turner, P. J., and Raphael, J.,* concurred.

A petition for a rehearing was denied July 25, 2016, and appellant's petition for review by the Supreme Court was denied October 19, 2016, S236618. Respondent's petition for review by the Supreme Court was granted October, 19, 2016, S236618.

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[No. A146610. First Dist., Div. One. June 15, 2016.]

ANNE H., Plaintiff and Appellant, v.
MICHAEL B., Defendant and Respondent.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

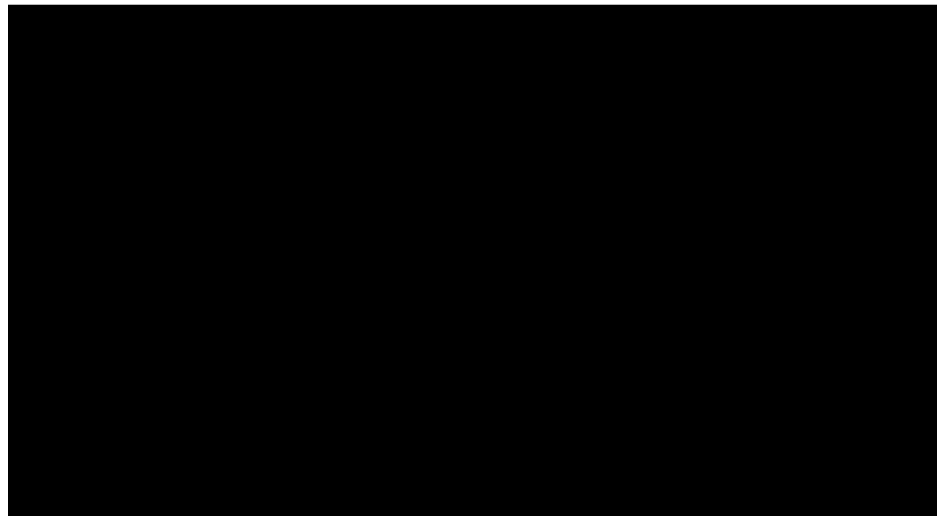
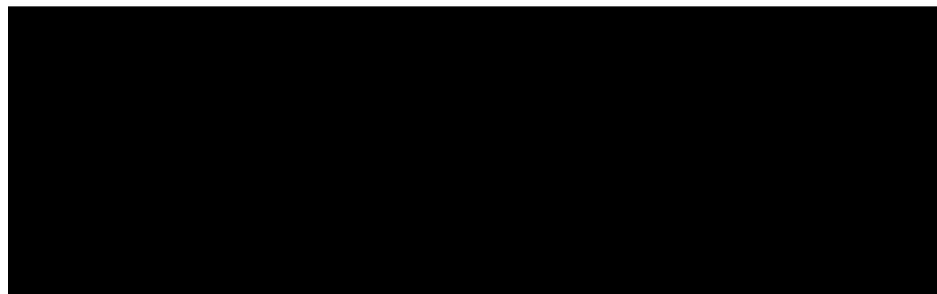
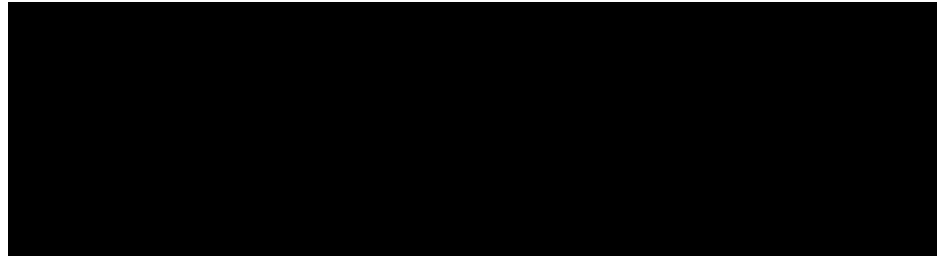
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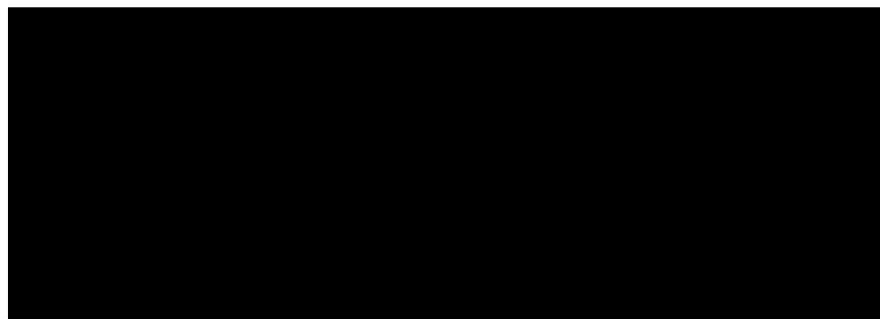
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[REDACTED]





COUNSEL

Leland, Parachini, Steinberg, Matzger & Melnick and Robert A. Roth for Plaintiff and Appellant.

Law Office of Leslie Ellen Shear, Leslie Ellen Shear and Julia C. Shear Kushner for Defendant and Respondent.

OPINION

MARGULIES, J.—In August 2014, the family court entered a permanent custody order granting joint custody of L., the daughter of appellant Anne H. (Mother) and respondent Michael B. (Father). Under the order, Father, a Bay Area resident, was awarded physical custody of L. during the school year, while Mother was awarded physical custody at her home in Virginia during the summers. In making the order, the family court stated that one of the primary considerations in granting Father custody during the school year was the presence of Mother’s family members in the Bay Area, which provided Mother a place to stay while visiting L. and allowed Mother’s family to share in L.’s care. The court’s order noted the relocation of Mother’s family members from the Bay Area, among several other factors, would be changed circumstances “requiring a new analysis of the ongoing custodial timeshare between the parties.”

Less than a year later, Mother filed a request to modify the custody order, claiming her parents had relocated to Virginia and arguing, pursuant to the custody order, the relocation should be regarded as changed circumstances requiring a reexamination of L.’s best interests and a grant to Mother of school-year custody. The request was heard by a different judge than the judge who had entered the custody order. Without explanation, that judge

denied Mother's request to modify the custody order, finding no changed circumstances, and granted sanctions to Father under Family Code section 271 in the amount of \$5,000.

■ Upon Mother's appeal of these rulings, we conclude the statement in the custody order specifying changed circumstances requiring a reconsideration of custody arrangements was not binding on subsequent judges. Finding no abuse of discretion in the second judge's conclusion that Mother had failed to demonstrate changed circumstances, we affirm the denial of her request for modification. We also find no abuse of discretion in the court's award of financial sanctions.

I. BACKGROUND

At the time of L.'s birth in 2009, Mother and Father were unmarried members of the armed services. Within a year after the birth, Father left the service, moved into Mother's home in the Bay Area, where she was attending law school as a member of the military, and began attending graduate school himself. Father eventually finished school and found a job in the Bay Area. During this time, each parent spent occasional, relatively brief periods away from the home, leaving L. in the sole care of the other parent, assisted by members of Mother's family, particularly her parents and sister. In August 2012, after completing law school, Mother was posted to Georgia. Mother and Father agreed that L. would remain with Father on a temporary basis, while they worked toward a more permanent custody arrangement.

Father filed a petition in Santa Clara County Superior Court to gain full custody of L. in February 2013. Mother thereafter filed this paternity action in San Mateo County, and the parties stipulated to dismiss Father's action. Eventually, following a three-day trial, Judge Richard DuBois issued a 20-page statement of decision (custody order) in August 2014, awarding the parents joint custody over L. and requiring her to spend the academic year with Father and the summer months with Mother. In reaching his decision, Judge DuBois found it significant that Mother's parents and sister lived in the Bay Area, which provided Mother a place to stay during visits with L., allowed her more "real time" with L. during visits, and permitted her family members to participate in L.'s life while L. was living with Father. Unlike Mother who had family in the Bay Area, Father had no friends or relatives in the places to which Mother was likely to be posted, making his visits comparatively more difficult and reducing the free time he could spend with L. during visits. The court noted that residence in the Bay Area also "would provide continued stability for" L., since it had always been her home and Father had

a steady job and no plans to relocate, while Mother's future was geographically uncertain, given her service. In the end, the court found the "most significant factor" in determining the custody arrangements to be the presence of Mother's family members in the Bay Area. The court concluded: "Should these circumstances change by [Father] moving out of the Bay Area, or [Mother's] family moving farther from the Bay Area, or [Mother's] family not being allowed or able to have consistent independent contact with [L.], or [Mother] relocating to the Bay Area, such a change would constitute a change of circumstance requiring a new analysis of the ongoing custodial timeshare between the parties." Neither party appealed the custody order.

Less than a year later, in May 2015, Mother filed a request for modification of the custody order (request) to grant her physical custody of L. during the school year. In a declaration filed with the request, Mother stated that since entry of the custody order she had been given a posting in Washington, D.C., that would last for "at least the next 5–6 years." Prior to taking that assignment, Mother would be required to attend a 10-month training course in Charlottesville, Virginia.¹ In addition, Mother stated her parents (grandparents), who had been closely involved in L.'s care prior to the custody dispute, had moved from the Bay Area to northern Virginia. According to Mother's declaration, the grandparents had purchased a home in Virginia located "less than 15 minutes" from her own Virginia home. Attached to the declaration was a grant deed of a parcel of Virginia real estate to the grandparents and Mother's brother. Mother characterized the grandparents' relocation as "a *prima facie* change in circumstances" under the custody order and sought a reevaluation of L.'s best interests.

Mother also contended Father had failed to cooperate with the grandparents in allowing them access to L. in the Bay Area, but she provided no evidentiary support for the claim, other than her conclusory statement, "Despite repeated requests to resume [the grandparents'] independent visits with [L.] when she is in California, [Father] has consistently declined with excuses, or required them to spend time with her in his presence," but she provided no support for the claim. The only documentary evidence submitted in support of this claim did not, in fact, support it, and the portion of her declaration detailing Father's lack of cooperation focused entirely on his relations with Mother and contained no information suggesting Father had prevented the grandparents from spending time with L.²

¹ This aspect of Mother's application did not constitute wholly changed circumstances. Judge DuBois's order anticipated that Mother would spend nearly a year in Charlottesville before assuming a more permanent post. While settling in Washington, D.C., was a possibility at that time, there were other options, including a foreign post.

² In support of her claim of lack of cooperation with the grandparents, Mother submitted a printout of a chain of e-mails dating from the end of September 2014. The chain began with

Father opposed the request. In a declaration, he argued no significant change of circumstances had occurred because the grandparents retained ownership of their home in the Bay Area, Mother's sister continued to live in the Bay Area, and Mother "has other relatives living in [the Bay Area] with whom she stays during her visitation with [L.]." Further, according to Father, the grandparents had chosen to limit their contact with L., failing to visit with her for months despite his open invitation to do so. Father also challenged the genuineness of the grandparents' relocation, pointing out that Mother had listed the Virginia home deeded to the grandparents as her own home in a school application, and L. had stayed with the grandparents in their Bay Area home "[a]s recently as June 2015."³ Father claimed he continued to have only limited opportunities to visit L. when she was in Mother's custody, since he was allowed only 12 days annually of vacation and had no place to stay in Virginia, while Mother's posting permitted much more opportunity for West Coast visits. Her job permitted flexibility of scheduling; she had substantial banked leave time; and she acquired 30 additional days of leave per year. Since the custody order went into effect, Mother had been able to spend two four-day weekends per month visiting L. Further, Father argued, Mother would be required either to move L. to Charlottesville for the duration of the 10-month training course or commute over two hours each way, making it difficult for her to care for L. during that time.

Father's opposition also requested attorney fees in the amount of \$15,867.50 as a sanction under Family Code section 271. His declaration reiterated the procedural history of the proceedings, noting Mother had filed five ex parte applications regarding custody and visitation during the period 2013 to 2014, in addition to the request, while he had filed no pleadings seeking relief other than the initial petition. In ruling on the last of Mother's ex parte applications in December 2014, Judge Susan L. Greenberg had commented with respect to the parties' squabbling: "It's a nightmare. I'm hoping that the parenting coordinator can resolve that for you because

Father politely declining a request by the maternal grandmother to see L. the following weekend, saying he had already made plans, but he offered to make L. available the following month and asked for dates when the grandparents would be free. In responding, the grandmother reiterated her request for the weekend without mentioning October or otherwise acknowledging the substance of Father's e-mail. Father again politely declined and asked for October dates. When Friday arrived, the grandmother sent a third e-mail repeating her request for the weekend without mentioning October. This time, Father offered to make L. available that afternoon but repeated he had plans for the remainder of the weekend and again offered time in October. To the extent this e-mail chain demonstrates a lack of cooperation, it rests with the grandmother.

³ According to Father, Mother enrolled L. in a Virginia kindergarten program without consulting him, in violation of the custody order. In the enrollment application, she listed the home deeded to the grandparents as her own home.

frankly, you guys are adults and you can deal with the stress. But this little girl is going to have a horrible time if you continue to act this way and treat each other this way.” At the time, Judge Greenberg denied without prejudice motions for section 271 sanctions Father had filed, noting: “I don’t believe that they should be ruled on now. I want the parties to . . . use the parenting coordinator to try and resolve their constant and continuous fighting and bickering over every single aspect of the timeshare with this little girl.”

Father’s opposition renewed the earlier sanctions motion. As he argued, Mother was an attorney, and therefore able to assist in the preparation of litigation documents, while he was required to rely on counsel with respect to the proceedings. He concluded, “[Mother’s] refusal to accept the Court’s custody orders and incessant efforts to change the Order have exhausted me not only financially, but physically and emotionally as well.” Father argued Mother had the ability to pay the requested sanctions because she is employed as a judge advocate and had the resources to fund the three-day custody trial and four motions to modify the custody order in the preceding year. The requested award of \$15,867.50 was based primarily on the attorney fees Father incurred in responding to the request.

In a reply declaration, Mother stated that although her sister remained in the Bay Area, the sister lived in a small apartment with her husband, making it difficult for her to support Mother’s visits with L. Mother claimed to have no other relatives or friends in the Bay Area on whom she could rely for “logistical support” in visitation. Mother said she owned her own home in Virginia “approximately 20–30 minutes” from her parents’ home and explained her parents leased their house in the Bay Area to college students during the academic year. Addressing Father’s request for sanctions, Mother denied that she had superior financial means. According to Mother, Father’s parents had financed his side of the custody litigation, while Mother had to finance her representation from her own pocket. Mother contended she had attempted to be conciliatory, but Father’s “hostile and unreasonable behavior” had forced her to seek judicial relief.

At the hearing on the request, conducted by Judge Greenberg, Mother’s attorney stated he had brought with him additional evidence to support the claim that the grandparents had moved, including “their utility bills and the lease of their [Bay Area] home.” Those documents were never offered into evidence, however, and they are not in the appellate record. Counsel for Father argued no move had, in fact, occurred, pointing out that the grandparents had not submitted their own declarations with respect to the claim.

Following argument, Judge Greenberg denied the request, stating without further explanation: “. . . I find that [Mother] has not met that burden to show the change of circumstances.” The judge also awarded \$5,000 in sanctions, again without explanation. Her oral ruling was reflected in a subsequent written order.

II. DISCUSSION

Mother has appealed Judge Greenberg’s denial of the request and grant of sanctions, contending primarily that the denial was inconsistent with the custody order, which noted that a relocation of Mother’s family members would constitute changed circumstances requiring a reconsideration of the custody arrangements.⁴

A. *Mother’s Demonstration of Changed Circumstances*

■ Although Family Code section 3087 states that an order of joint custody may be modified merely upon a showing that the best interest of the child requires the modification, the Supreme Court has imposed an additional requirement when, as here, a permanent custody order has been entered. “Once the trial court has entered a final or permanent custody order reflecting that a particular custodial arrangement is in the best interest of the child, ‘the paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—weigh heavily in favor of maintaining’ that custody arrangement. [Citation.] In recognition of this policy concern, we have articulated a variation on the best interest standard, known as the changed circumstance rule, that the trial court must apply when a parent seeks modification of a final judicial custody determination. [Citation.] Under the changed circumstance rule, custody modification is appropriate only if the parent seeking modification demonstrates ‘a significant change of circumstances’ indicating that a different custody arrangement would be in the child’s best interest. [Citation.] Not only does this serve to protect the weighty interest in stable custody arrangements, but it also fosters judicial economy.” (*In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 956 [38 Cal.Rptr.3d 610, 127 P.3d 28] (*Brown*).) The burden of showing changed circumstances is on the party seeking a modification of the custody order.

⁴ Mother had earlier filed a petition for writ of mandate challenging the family court’s order, docketed as case No. A146235. This court summarily denied the petition in an order dated October 22, 2015. The parties have relied on exhibits submitted with Mother’s writ petition as the primary record in this appeal.

(*Christina L. v. Chauncey B.* (2014) 229 Cal.App.4th 731, 738 [177 Cal.Rptr.3d 178].)

1. *Significance of Judge DuBois's Statement Regarding Changed Circumstances*

Mother argues Judge Greenberg's finding of no changed circumstances must be reversed because it is inconsistent with Judge DuBois's conclusion in the custody order that changed circumstances would result if Mother's family members moved from the Bay Area. The first issue to be resolved is therefore the degree to which Judge DuBois's comment regarding potential changed circumstances controlled Judge Greenberg's consideration of the request. For the reasons discussed below, we conclude the comment was not binding in any manner on Judge Greenberg in her determination of changed circumstances.

■ Mother first argues the comment became preclusive under the doctrines of res judicata and collateral estoppel when Father did not appeal the custody order. The issue of res judicata is conclusively resolved by *In re Marriage of Rabkin* (1986) 179 Cal.App.3d 1071 [225 Cal.Rptr. 219] (*Rabkin*). In ruling on a motion for modification of a spousal support order, the family court in *Rabkin* granted the wife a temporary increase in spousal support when she had difficulty selling the family home, a modification specifically permitted by the couple's marital settlement agreement (MSA). (*Id.* at pp. 1076–1077.) Although the MSA expressly stated sale of the couple's home would not constitute a change in circumstances justifying a further motion to modify the spousal support order, the family court's order granting the temporary increase stated just the opposite, that sale of the residence would be deemed a change in circumstances entitling either party to seek modification of the support order. (*Id.* at p. 1077.) After the house was sold, the family court entered a new order in which it set spousal support below that provided in the MSA. The wife appealed, contending the family court was precluded from modifying her support on the basis of the sale of the home by the language of the MSA. (*Id.* at p. 1078.) The husband contended, in part, that the wife was precluded from arguing sale of the home could not constitute a change in circumstances by the doctrine of res judicata, since she did not appeal the contrary language in the court's modification order. (*Id.* at p. 1082.) In rejecting the application of res judicata, the court noted that the doctrine only applies to issues actually before the court and necessarily decided. (*Ibid.*) As the court explained, the sole issue before the family court at the time of the original modification hearing was whether the wife was entitled to a temporary increase in spousal support under the MSA. This issue, the court held, "had nothing to do with the question of whether

the sale of the residence would constitute a change of circumstances for the purpose of further spousal support proceedings. . . . Thus, the statement . . . characterizing the sale of the marital residence as a change of circumstances justifying a future modification of spousal support was unnecessary to the court's decision and purely gratuitous." (*Id.* at p. 1083.)

Rabkin is directly on point. The only issue before Judge DuBois in the original hearing was current custody arrangements for L. Necessarily, the issue of the circumstances justifying a change in those arrangements was not before Judge DuBois when he entered the custody order. On the contrary, modification of the custody order due to changed circumstances would not be before a court unless and until Mother or Father filed an appropriate motion to modify. Further, the issue of changed circumstances could not even arise until there had been sufficient time after entry of the custody order for circumstances to change. Accordingly, Judge DuBois's comments about a change in circumstances were unnecessary to his decision and, pursuant to *Rabkin*, had no preclusive effect under the doctrine of res judicata.⁵

■ The doctrine of collateral estoppel is inapplicable for essentially the same reason. Collateral estoppel, also known as issue preclusion, "prevents relitigation of previously decided issues. . . . [I]ssue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824–825 [189 Cal.Rptr.3d 809, 352 P.3d 378].) An issue is "'necessarily decided'" by an order if the issue was not "'entirely unnecessary' to the judgment in the initial proceeding." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 342 [272 Cal.Rptr. 767, 795 P.2d 1223]; see *Mega RV Corp. v. HWH Corp.* (2014) 225 Cal.App.4th 1318, 1344 [170 Cal.Rptr.3d 861].) For the reasons discussed above, Judge DuBois's comments about changed circumstances were "entirely unnecessary" to his resolution of the initial custody arrangements, and for that reason those comments have no collateral estoppel effect.

■ Mother argues that even if the comments had no preclusive effect, Judge Greenberg was not permitted to enter a ruling inconsistent with Judge DuBois's order because "one trial court judge may not reconsider and overrule a ruling of another judge." (*Curtin v. Koskey* (1991) 231 Cal.App.3d 873, 876 [282 Cal.Rptr. 706].) As this principle is explained in *In re Alberto* (2002) 102 Cal.App.4th 421 [125 Cal.Rptr.2d 526], an individual trial judge generally has the authority to reconsider and change his or her own interim

⁵ Mother merely distinguishes *Rabkin* by arguing that the circumstances relating to modification of the custody order were different, without acknowledging or addressing the decision's ruling with respect to res judicata.

rulings. “Different policy considerations, however, are operative if the reconsideration is accomplished by a different judge. Accordingly, the general rule is just the opposite: the power of one judge to vacate an order made by another judge is limited. [Citation.] This principle is founded on the inherent difference between a judge and a court and is designed to ensure the orderly administration of justice. ‘If the rule were otherwise, it would be only a matter of days until we would have a rule of man rather than a rule of law. To affirm the action taken in this case would lead directly to forum shopping, since if one judge should deny relief, defendants would try another and another judge until finally they found one who would grant what they were seeking. Such a procedure would instantly breed lack of confidence in the integrity of the courts.’ ” (*Id.* at p. 427.)

While we acknowledge the general principle, we conclude that Judge DuBois’s comments on the issue of changed circumstances do not constitute the type of “ruling” that cannot be altered by a subsequent trial judge.⁶ In deciding the binding scope of Judge DuBois’s ruling, a useful analogy can be made to the law of the case doctrine. Under that doctrine, “ ‘ ‘where, upon an appeal, the [reviewing] court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal and . . . in any subsequent suit for the same cause of action, and this [is true] although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular.’ ’ ” (*People v. Murtishaw* (2011) 51 Cal.4th 574, 589 [121 Cal.Rptr.3d 586, 247 P.3d 941].) As suggested in *Murtishaw*, the binding effect of a prior appellate decision under the law of the case doctrine is limited to issues necessary to the disposition of the appeal. “The discussion or determination of a point not necessary to the disposition of a question that is decisive of the appeal is generally regarded as obiter dictum and not as the law of the case.” (*Stockton Theatres, Inc. v. Palermo* (1956) 47 Cal.2d 469, 474 [304 P.2d 7]; see *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 374, fn. 6 [178 Cal.Rptr.3d 185, 334 P.3d 573] [law of the case applies to rules of law “‘necessary to the decision’ ”].)

■ The law of the case doctrine is not directly applicable to Judge DuBois’s ruling, since the doctrine applies only to matters decided by an appellate court. (*People v. Parker* (2014) 231 Cal.App.4th 1423, 1434, fn. 2 [180 Cal.Rptr.3d 879]; *Harbor Islands Holdings v. Kim* (2003) 107 Cal.App.4th 790, 795 [132 Cal.Rptr.2d 406].) Yet it stands to reason that a

⁶ The general principle is subject to various subtleties and qualifications. (See, e.g., *In re Marriage of Oliverez* (2015) 238 Cal.App.4th 1242, 1247–1249 [190 Cal.Rptr.3d 436].) For purposes of this appeal, it is necessary for us only to accept that a ruling of one trial judge in a case cannot be overturned by a different trial judge.

trial judge's ruling should have no *greater* binding effect on subsequent judges in the same case than a comparable ruling by an appellate court. As noted above, under the law of the case doctrine, a prior appellate ruling is binding only as to issues necessary to the court's decision. "Incidental statements or conclusions not necessary to the decision are not to be regarded as authority." (*Simmons v. Superior Court* (1959) 52 Cal.2d 373, 378 [341 P.2d 13].) By the same logic, a trial court ruling is binding on subsequent judges only as to those aspects of the ruling necessary to decision on the matter before the initial judge. Judge DuBois's ruling decided a petition for a custody determination. For the reasons discussed above, the issue of changed circumstances was wholly unnecessary to such a decision. Accordingly, Judge DuBois's comments about changed circumstances were not binding on subsequent judges. Any later decision by Judge Greenberg that might be inconsistent with those comments did not violate the rule prohibiting a trial judge from reconsidering and overruling an earlier ruling by a different trial judge in the same case.

There are strong policy reasons to limit the binding effect of Judge DuBois's ruling in this manner. In general terms, any other rule would bestow inappropriate authority on the first trial judge on the scene. While it is entirely appropriate to preclude later trial judges from reconsidering an earlier judge's ruling on issues properly presented for decision, there is no reason to require subsequent judges to adhere to an earlier judge's expression of views on issues that were not actually before him or her. Such a rule would grant arbitrary and unnecessary authority to judicial musings, as opposed to judicial decisions. As applicable specifically to custody rulings, there are two additional factors. First, the issue of changed circumstances necessarily must be considered in light of all circumstances prevailing at the time of a request to modify the order. To isolate particular circumstances and declare them determinative, as Judge DuBois did, fails to do justice to the doctrine. Further, there is no way for a family court judge to know in advance whether any particular circumstance deemed important at the time a custody order is entered will remain critical, in light of other changing circumstances over time. Under Mother's argument, Judge DuBois's comments would have remained binding for years, notwithstanding the growth of L. and the changing nature of living arrangements and relationships among her family members. Second, there was no effective appellate review available for Judge DuBois's comments regarding changed circumstances. Because those views had no immediate legal or practical effect, it would be unfair, as well as inefficient, to require a party to seek appellate review merely to prevent their application in later proceedings. In addition, because the comments had nothing to do with the issues involved in the custody decision, it is not clear that judicial review would have been available even if an appeal had been taken. Just as the comments constituted an advisory ruling when they were

written by Judge DuBois, any appellate consideration of the comments would be advisory in the same way. (See, e.g., *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 110 [61 Cal.Rptr.2d 134, 931 P.2d 312] [declining to give an advisory ruling].) For all these reasons, it would be inadvisable to permit a family court judge to render a binding ruling with respect to changed circumstances prior to their occurrence.

2. Judge Greenberg's Finding of No Changed Circumstances

We review a ruling on a request for modification of a custody order for abuse of discretion. (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 14 [123 Cal.Rptr.3d 120].) “Generally, a trial court abuses its discretion if there is no reasonable basis on which the court could conclude its decision advanced the best interests of the child. [Citation.] ‘Under this test, we must uphold the trial court “ruling if it is correct on any basis, regardless of whether such basis was actually invoked.”’” (*Chalmers v. Hirschkop* (2013) 213 Cal.App.4th 289, 299 [152 Cal.Rptr.3d 361].)⁷

Judge Greenberg did not abuse her discretion in concluding Mother had failed to demonstrate “‘a significant change of circumstances’ indicating that a different custody arrangement would be in [L.’s] best interest.” (*Brown, supra*, 37 Cal.4th at p. 956.) First, there was substantial evidence to support a finding that the grandparents had not genuinely relocated. Oddly, the grandparents did not submit their own declarations acknowledging and explaining their purported move. While it seems clear the grandparents (with their son) acquired a home in Virginia, that home was claimed by Mother as her own residence in the school application. Mother provided the court with no address for her own home and described it inconsistently in different declarations as less than 15 minutes from the grandparents’ home and as 20 to 30 minutes from their home. Further, the grandparents continued to own their Bay Area home and were apparently living there at a time after Mother filed the request, since they had received L. there.⁸ All of these factors provide substantial evidence to support a finding the grandparents had not actually changed their residence.

⁷ Father contends we should also apply the doctrine of implied findings because Mother failed to request a statement of decision. (See *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 267 [88 Cal.Rptr.3d 186] [explaining doctrine].) A statement of decision, however, is ordinarily available only after trial, not in connection with a ruling on a motion or special proceeding (*In re Marriage of Fong* (2011) 193 Cal.App.4th 278, 294–296 [123 Cal.Rptr.3d 260]), and Father cites no legal authority suggesting a statement of decision was available in connection with a motion to modify an existing custody order. In any event, we find it unnecessary to invoke the doctrine of implied findings to affirm Judge Greenberg’s orders.

⁸ While Mother’s attorney claimed at the hearing to have a lease of the Bay Area home and Virginia utility bills, these were never provided to the court or offered in evidence, and they are not contained in the appellate record. We therefore cannot consider them.

Second, even assuming the grandparents had relocated, Judge Greenberg would not have abused her discretion in concluding that their relocation, viewed in light of all circumstances, did not constitute substantial changed circumstances requiring a reconsideration of L.'s best interests. Because the two parents continued to be widely geographically separated, the school year/summer split of custody arrived at by Judge DuBois remained the most appropriate solution. Yet nothing in the change of circumstances claimed by Mother caused school year custody with her, rather than Father, to be a clearly preferable situation in furthering L.'s best interests. After the relocation, Mother continued to have family members available in the Bay Area to assist her visitation there, while Father had no comparable family or friends in Virginia. In addition, Mother's job in the service continued to offer considerably more opportunity for visits than Father's limited vacation time at his work. Further, the need for Mother to attend an extended training program meant she would either have to move away from the grandparents or undertake a difficult commute, essentially undercutting any benefit from the requested change. In addition, removing L. from the Bay Area for most of the year would take her away from the place that had been her lifetime home. For that reason, the family court could readily have concluded "the paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker" were not outweighed by the claimed change in circumstances. (*Brown, supra*, 37 Cal.4th at p. 956.)

Mother argues Judge Greenberg abused her discretion because the grandparents were deeply involved in L.'s life and "[L.]'s proximity to her maternal grandparents was a pivotal factor in the custody decision." An examination of the custody order, however, demonstrates it was the presence of both the grandparents and Mother's sister in the Bay Area that was important in the resolution of custody, and their presence was important not only because of the role played by those family members in L.'s life but also because Mother could stay with them when visiting with L. in California. Following the grandparents' relocation, as discussed above, Mother continued to have some family in the Bay Area. In any event, Judge Greenberg did not abuse her discretion in concluding that the grandparents' role in L.'s life was not so important that their voluntary decision to move away from the Bay Area required an adjustment in custody arrangements.

B. *Sanctions**

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*See footnote, *ante*, page 488.

III. DISPOSITION

The family court's orders are affirmed. Father may recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

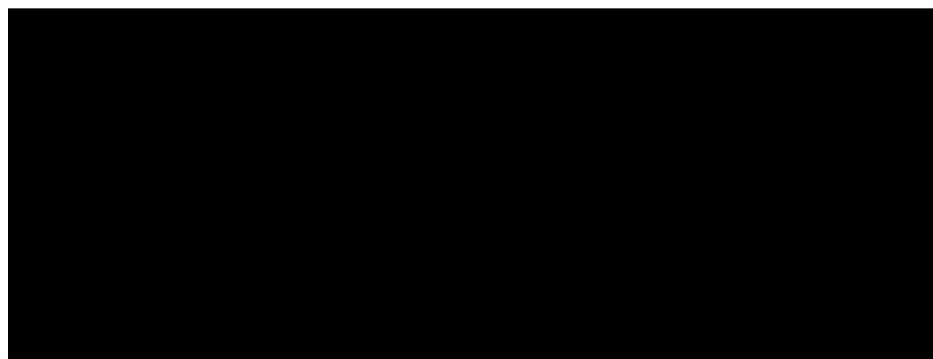
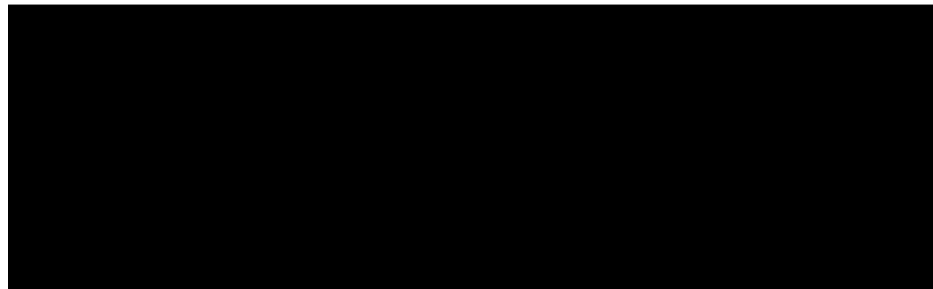
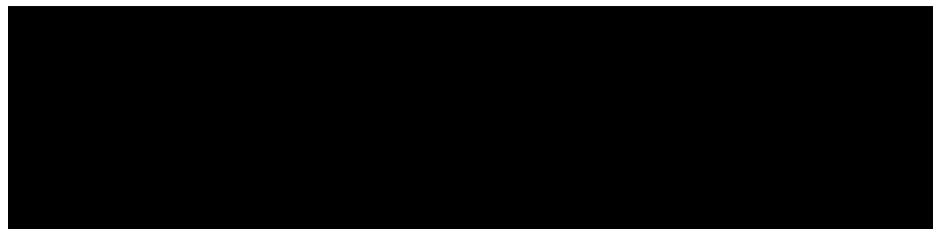
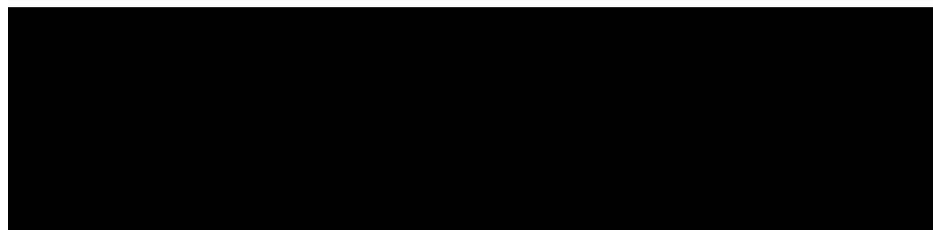
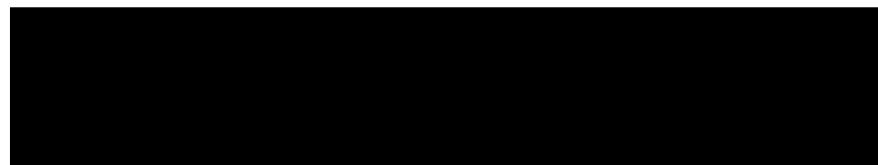
Humes, P. J., and Dondero, J., concurred.

A petition for a rehearing was denied July 12, 2016, and the opinion was modified to read as printed above. Appellant's petition for review by the Supreme Court was denied September 21, 2016, S236121.

[No. D067247. Fourth Dist., Div. One. July 13, 2016.]

JOSE LUIS MORALES et al., Plaintiffs and Appellants, v.
22ND DISTRICT AGRICULTURAL ASSOCIATION OF THE STATE OF
CALIFORNIA, Defendant and Respondent.

[REDACTED]



[REDACTED]

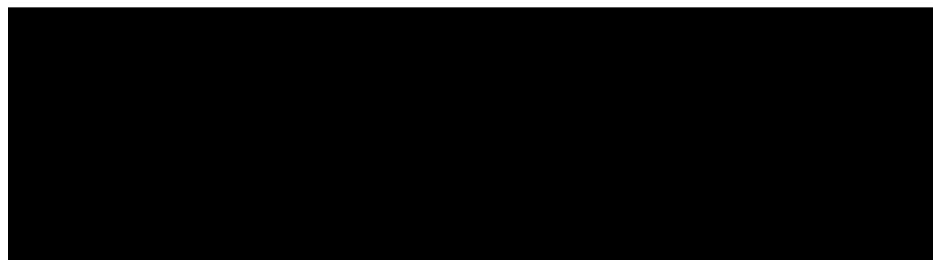
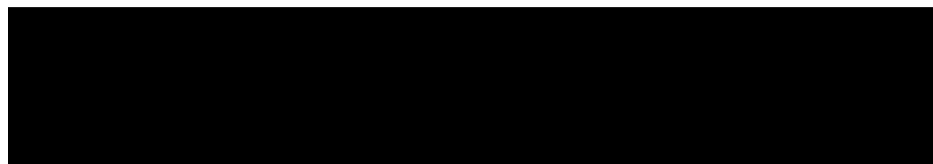
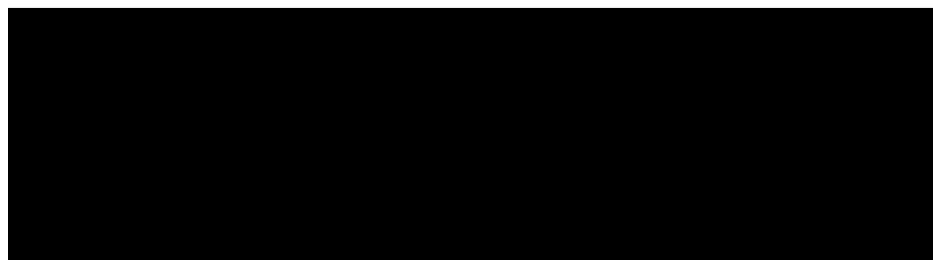
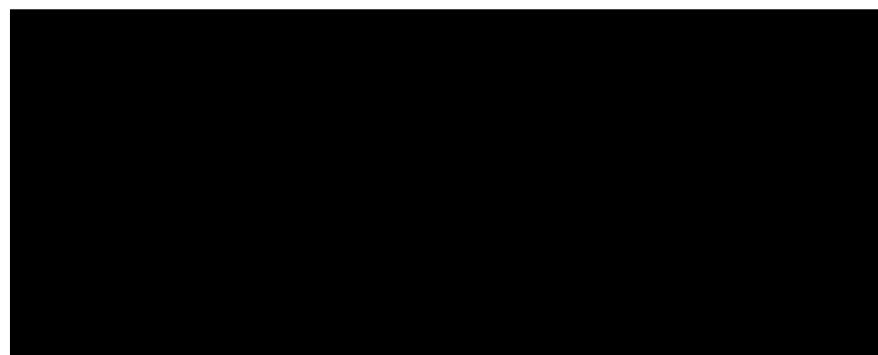
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COUNSEL

Law Offices of David J. Gallo and David J. Gallo for Plaintiffs and Appellants.

Gordon & Rees, James J. McMullen, Matthew G. Kleiner, Autumn Moody and Justin Michitsch for Defendant and Respondent.

OPINION

AARON, J.—This appeal addresses a collective action alleging nonpayment of overtime, as required by state law under Labor Code¹ section 510 and federal law under the Fair Labor Standards Act of 1938 (FLSA; 29 U.S.C. § 201 et seq.). We conclude that the trial court properly entered judgment for defendant on the FLSA claim. Defendant proved the amusement or recreational exemption (29 U.S.C. § 213(a)(3); the amusement exemption) as an affirmative defense and plaintiffs failed to show error in the denial of their nonsuit motion, in the jury instructions, in the verdict form or in the court’s exclusion of witnesses from the courtroom. We also conclude that the trial court properly sustained defendant’s demurrer to the section 510 claim, but further conclude that the court erred in denying leave to amend.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Jose Luis Morales and 177 other similarly situated plaintiffs (collectively appellants) sued their employer, the 22nd District Agricultural Association of the State of California (the DAA), alleging nonpayment of overtime, as required by state law under section 510 and federal law under the FLSA. The DAA is a California agency that owns and manages the Del Mar Fairgrounds (Fairgrounds) and the Del Mar Horsepark (Horsepark). The DAA leases out part of the Fairgrounds property to the Surf & Turf Recreation Golf Center (Recreation Center). Also on the Fairgrounds property is a satellite wagering facility, which is leased to another entity. The Horsepark is located on another parcel of land, located about three miles from the Fairgrounds.

Appellants are seasonal employees of the DAA who assist with amusement and seasonal operations. Appellants are limited to working 119 days in a calendar year and are internally referred to as “119-day employees.” Appellants are not limited as to the number of hours that they may work in those 119 days. Appellants filed a putative class action against the DAA to recover penalties and damages for alleged violations of state and federal overtime laws. The trial court sustained, without leave to amend, the DAA’s demurrer to appellants’ section 510 cause of action. After the trial court conditionally certified the case as a collective action, the DAA answered the complaint, asserting the amusement exemption as an affirmative defense to the remaining federal claim. Under this exemption, an employee of an amusement or recreational establishment is not entitled to overtime compensation if certain criteria are met. (29 U.S.C. § 213(a)(3).)

¹ Undesignated statutory references are to the Labor Code unless otherwise specified.

In response to a court-approved notice, 177 individuals joined the action as additional plaintiffs. The trial court bifurcated the action; the parties stipulated that the first phase of trial would be for the exclusive purpose of adjudicating the DAA's affirmative defense regarding the applicability of the amusement exemption. Any remaining issues would subsequently be tried before a new jury.

After conclusion of the DAA's evidence, the trial court denied appellants' oral motion for nonsuit. The jury rendered a special verdict in favor of the DAA and the court later entered judgment. Thereafter, the parties submitted a stipulation regarding the form of judgment and attached a proposed judgment. The trial court endorsed the parties' stipulation, but did not separately enter the agreed form of judgment. Appellants contend, and the DAA does not contest, that the initial judgment, as modified by the order approving the parties' stipulation, constitutes a final, appealable judgment. Appellants timely appealed from the order sustaining the demurrer and from the judgment.

DISCUSSION

Appellants contend that reversal of the judgment in favor of the DAA on their FLSA claim is required because the trial court (1) improperly denied their nonsuit motion; (2) erred in instructing the jury; (3) provided an erroneous special verdict form; and (4) improperly excluded party witnesses from the courtroom. We address these contentions in part I of this opinion, concluding that appellants have not met their burden to demonstrate reversible error. In part II of the opinion, we conclude that the trial court properly sustained the DAA's demurrer to appellants' section 510 claim, but further conclude that the court erred in denying leave to amend.

I. *FLSA Claim*

A. *Legal and Factual Background*

The FLSA requires that an employer pay overtime wages to employees unless those employees are classified as exempt employees under applicable law. (29 U.S.C. §§ 207, 213.) The FLSA requires overtime pay only if an employee works more than 40 hours per week, regardless of the number of hours worked during any one day. (29 U.S.C. § 207(a)(1).) However, the FLSA provides for a number of exemptions to this general rule. (29 U.S.C. § 213.) One of these exemptions is the amusement exemption that applies to any employee of an establishment whose business is to provide amusement or recreation. (29 U.S.C. § 213(a)(3).)

The amusement exemption states, in relevant part, that it applies to “any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 ½ per centum of its average receipts for the other six months of such year” (29 U.S.C. § 213(a)(3).)²

■ The amusement exemption thus has two main elements: first, the business must qualify as an “amusement or recreational” establishment and second, the establishment must satisfy either the duration test or the receipts test. (29 U.S.C. § 213(a)(3); 29 C.F.R. § 779.385 (2015).) The first element has two subparts: (1) identifying the “establishment” and (2) determining the “amusement or recreational” nature of that establishment. “The logical purpose of the [amusement exemption] is to exempt . . . amusement and recreational enterprises . . . , which by their nature, have very sharp peak and slack seasons. . . . Their particular character may require longer hours in a shorter season, their economic status may make higher wages impractical, or they may offer non-monetary rewards.” (*Brock v. Louvers and Dampers, Inc.* (6th Cir. 1987) 817 F.2d 1255, 1259.)

Appellants contend that they are entitled to overtime wages under the FLSA. As an affirmative defense, the DAA asserted that it is exempt from the FLSA under the amusement exemption. The matter proceeded to trial, at which the DAA presented evidence that it is exempt from the FLSA under the amusement exemption. After the conclusion of the DAA’s evidence, appellants orally moved for nonsuit, asserting that, as a matter of law, the amusement exemption did not apply because the DAA failed to show (1) that it existed to promote youth summer employment, and (2) that the majority of its income was derived from amusement or recreation. The trial court denied the motion, concluding that the evidence could support a finding that the DAA operated as a single establishment, that the nature of that single establishment was amusement or recreational, and that it satisfied the receipts test.

B. *Eligibility for Amusement Exemption*

■ As a preliminary matter before we examine the nonsuit motion, the parties dispute whether eligibility for the amusement exemption turns on (1) the nature of the employer’s revenue producing activities, or (2) the work

² For ease of reference, we refer to subpart (A) of the amusement exemption as the “duration test” and subpart (B) as the “receipts test.”

performed by the employee. As appellants note, this question is of great importance to this appeal because it impacts the order denying nonsuit and some of the challenged jury instructions. The parties have not cited, and we have not found, any California case law addressing this issue. The parties rely on federal case law. While we are not bound to follow federal court precedent, “‘numerous and consistent’” federal decisions may be particularly persuasive when they interpret federal law. (*Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320–321 [93 Cal.Rptr.2d 36, 993 P.2d 366].)

Relying on *Brennan v. Six Flags over Georgia, Ltd.* (5th Cir. 1973) 474 F.2d 18 (*Six Flags*), appellants contend that it is the “nature [or character] of the work” and “not the source of the remuneration, that controls” and “gives rise to the need for [the amusement] exemption.” (*Id.* at p. 19.) About a year after *Six Flags*, however, the Fifth Circuit came to the opposite conclusion, holding that an employer’s “principal activity should be determinative of [its] eligibility for an exemption.” (*Brennan v. Texas City Dike & Marina, Inc.* (5th Cir. 1974) 492 F.2d 1115, 1119 (*Texas City*).) The Fifth Circuit provided no reason in *Texas City* regarding its change in position. (*Ibid.*) The Sixth, First and Tenth Circuits later adopted the Fifth Circuit’s new position that it is the employer’s principal activity that controls. (*Marshall v. New Hampshire Jockey Club, Inc.* (1st Cir. 1977) 562 F.2d 1323, 1331, fn. 4 (*Marshall*); *Brennan v. Southern Productions, Inc.* (6th Cir. 1975) 513 F.2d 740, 746–747; *Hamilton v. Tulsa County Public Facilities Authority* (10th Cir. 1996) 85 F.3d 494, 497; *Chessin v. Keystone Resort Management, Inc.* (10th Cir. 1999) 184 F.3d 1188, 1193–1194 (*Chessin*).)³ We find these “numerous and consistent” federal circuit court decisions to be persuasive on the issue. (*Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 150 [53 Cal.Rptr.2d 336].)

■ Moreover, appellants have not provided a reasonable basis for us to reject these decisions. As one court noted, the plain language of the amusement exemption suggests that the inquiry “turns on the nature of the employer’s business, not on the nature of the employee’s work.” (*Marshall, supra*, 562 F.2d at p. 1331, fn. 4.) Additionally, the applicable federal regulations state that exemptions “depend on the character of the establishment.” (29 C.F.R. § 779.302 (2015).) “[I]f the establishment meets the tests enumerated in these sections, employees ‘employed by’ that establishment are generally exempt” from the FLSA’s overtime provision. (29 C.F.R. § 779.302 (2015).) Finally, a formal opinion letter from the United States Department of Labor (DOL), Wage and Hour Division provides: “Whether or not an establishment has an ‘amusement or recreational’ character for purposes of the section

³ In *Donovan v. S & L Development Co.* (9th Cir. 1981) 647 F.2d 14 (*Donovan*), the Ninth Circuit cited *Six Flags* when addressing whether the FLSA applied to the business at issue. (*Donovan*, at pp. 16–17.) *Donovan*, however, did not address the issue before us—whether a particular exemption applies.

13(a)(3) exemption depends on its principal or primary activity.” (DOL, Wage & Hour Division, opinion letter FLSA No. 2006-39 (DOL 2006-39) <http://www.dol.gov/whd/opinion/FLSA/2006/2006_10_12_39_FLSA.htm> [as of July 13, 2016].) “[I]nterpretations contained in formats such as opinion letters are ‘entitled to respect’” (*Christensen v. Harris County* (2000) 529 U.S. 576, 587 [146 L.Ed.2d 621, 120 S.Ct. 1655].)

■ In summary, we conclude that eligibility for the amusement exemption turns on the nature of the employer’s revenue-producing activities, not on the nature of the work performed by the employee.

C. Nonsuit Motion

Appellants assert that one of the most important issues in this case in the trial court was whether all of the DAA’s business operations, locations, buildings, and departments constitute a single establishment because, if it is deemed to be a single establishment, it would satisfy the receipts test for the claimed exemption. Appellants argued in the trial court that they were entitled to a nonsuit because a required element of the amusement exemption is showing that the employment “plainly and unmistakably” falls within the letter and spirit of the exemption, and the DAA had failed to show that all of its operations constitute a single establishment. The trial court denied the motion, finding that the DAA had presented sufficient evidence from which the jury could find that the DAA operated a single establishment, and that the nature of the establishment was amusement or recreational.

■ The principal purpose in enacting the FLSA was to protect all covered workers from substandard wages and oppressive working hours. (*Barrentine v. Arkansas-Best Freight System* (1981) 450 U.S. 728, 739 [67 L.Ed.2d 641, 101 S.Ct. 1437].) A defendant bears the burden of proof of establishing the applicability of an FLSA exemption as an affirmative defense. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794–795 [85 Cal.Rptr.2d 844, 978 P.2d 2] (*Ramirez*); accord, *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 196–197 [41 L.Ed.2d 1, 94 S.Ct. 2223].) Determining whether an exemption applies is a fact-specific inquiry. (*Vinole v. Countrywide Home Loans, Inc.* (9th Cir. 2009) 571 F.3d 935, 945.)

■ As a general matter, FLSA exemptions “are to be narrowly construed against the employers seeking to assert them and their application [is] limited to those establishments plainly and unmistakably within their terms and spirit.” (*Arnold v. Ben Kanowsky, Inc.* (1960) 361 U.S. 388, 392 [4 L.Ed.2d 393, 80 S.Ct. 453]; see *Guerrero v. Superior Court* (2013) 213 Cal.App.4th 912, 941 [153 Cal.Rptr.3d 315] (*Guerrero*).) Appellants, however, seek to transform this policy statement into a new standard of proof. Appellants have

cited no authority to support their contention, and we reject it. ■ The amusement exemption has two, and only two, elements: first, the business must qualify as an “amusement or recreational” establishment and, second, the establishment must satisfy either the duration test or the receipts test. (29 U.S.C. § 213(a)(3); 29 C.F.R. § 779.385 (2015).)

The parties stipulated that, if the DAA were viewed in the aggregate as a single establishment, it would meet the receipts test of the amusement exemption. Accordingly, we focus on the first element of the amusement exemption and examine whether the trial court properly denied nonsuit because the DAA presented evidence showing (1) that it is a single establishment, and (2) that the nature of its principal or primary activity is amusement or recreational.

■ A party is entitled to a nonsuit when, as a matter of law, the evidence presented by the party opposing the nonsuit is insufficient to allow a jury to find in the opposing party’s favor. (See *Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1541 [50 Cal.Rptr.2d 395].) In ruling on a nonsuit motion the trial court must interpret all of the evidence most favorably to the party opposing the nonsuit and most strongly against the party seeking the nonsuit, and must resolve all presumptions, inferences, conflicts, and doubts in favor of the party opposing the nonsuit. (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 887 [164 Cal.Rptr.3d 811].) We review the ruling on a nonsuit de novo, applying the same standard as the trial court. (*Saunders v. Taylor*, *supra*, 42 Cal.App.4th at pp. 1541–1542.) Thus, the issue before us is whether the evidence presented by the DAA, viewed favorably to its cause, was insufficient as a matter of law to show that the DAA operated a single establishment and that the nature of its principal or primary activity was amusement or recreational.

1. *Single Establishment*

■ Application of the amusement exemption depends on the general character of the establishment/employer. (29 C.F.R. § 779.302 (2015).) The term “establishment” refers to a “‘distinct physical place of business.’” (29 C.F.R. § 779.23 (2015).) An “‘enterprise’” may be “composed of a single establishment.” (29 C.F.R. § 779.303 (2015).) “The term ‘establishment,’ however, is not synonymous with the words ‘business’ or ‘enterprise’ when those terms are used to describe multiunit operations. In such a multiunit operation some of the establishments may qualify for exemption, others may not.” (*Ibid.*) Leased departments in a departmentalized store are generally not considered to be separate establishments for purposes of the exemptions. (29 C.F.R. § 779.306 (2015).)

Both parties cite 29 Code of Federal Regulations part 779.305 (2015), which provides that an establishment should be considered separate under the FLSA if “(a) It is physically separated from the other activities; and (b) it is functionally operated as a separate unit having separate records, and separate bookkeeping; and (c) there is no interchange of employees between the units.”⁴ The trial court instructed the jury with a modified version of this regulation.

■ Title 29 Code of Federal Regulations part 779.305 (2015) describes a three-part test for distinguishing whether “two or more physically separated portions of a business *though located on the same premises . . . may constitute more than one establishment for purposes of exemptions.*” (Italics added.) However, we question whether this test applies where, as here, multiple premises are involved. Significantly, the fact that multiple premises are involved is not fatal to a finding that the multiple premises constitute a single establishment. (*Mitchell v T. F. Taylor Fertilizer Works, Inc.* (5th Cir. 1956) 233 F.2d 284, 285, 287 (*Mitchell*) [fertilizer dry mixing plant and office located on different premises constituted a single establishment for purposes of the retail or service establishments exemption]; *Doe v. Butler Amusements, Inc.* (N.D.Cal. 2014) 71 F.Supp.3d 1125, 1127, 1140–1141 (*Doe*) [cross-motions for summary judgment denied where carnival operating in more than one physical location could constitute a single establishment]; see also *Marshall, supra*, 562 F.2d at p. 1331 [“[W]e think it appropriate to proceed beyond [29 C.F.R. part 779.305] and look more broadly into ‘the integrity of the economic . . . and functional separation between the business units’.”].) As the *Mitchell* court noted, “the suggestion that the right to an

⁴ Title 29 Code of Federal Regulations part 779.305 (2015) provides: “Separate establishments on the same premises. [¶] Although, as stated in the preceding section, two or more departments of a business may constitute a single establishment, two or more physically separated portions of a business though located on the same premises, and even under the same roof in some circumstances may constitute more than one establishment for purposes of exemptions. In order to effect such a result physical separation is a prerequisite. In addition, the physically separated portions of the business also must be engaged in operations which are functionally separated from each other. . . . For retailing and other functionally unrelated activities performed on the same premises to be considered as performed in separate establishments, a distinct physical place of business engaged in each category of activities must be identifiable. The retail portion of the business must be distinct and separate from and unrelated to that portion of the business devoted to other activities. . . . In other words, the retail portion of an establishment would be considered a separate establishment from the unrelated portion for the purpose of the exemption if (a) It is physically separated from the other activities; and (b) it is functionally operated as a separate unit having separate records, and separate bookkeeping; and (c) there is no interchange of employees between the units. The requirement that there be no interchange of employees between the units does not mean that an employee of one unit may not occasionally, when circumstances require it, render some help in the other units or that one employee of one unit may not be transferred to work in the other unit. The requirement has reference to the indiscriminate use of the employee in both units without regard to the segregated functions of such units.”

exemption depends upon such factors as whether part of the business is separated by a partition, or is conducted in an adjoining building, or in a building across the street or five blocks away, does not recommend itself as a rational distinction; furthermore, it does not appear to have been the intent of Congress.” (*Mitchell, supra*, at pp. 285–286.)

■ The *Doe* court examined 29 Code of Federal Regulations part 1620.9 (2014), a regulation issued by the United States Equal Employment Opportunity Commission to interpret the Equal Pay Act of 1963 (Pub.L. No. 88-38 (June 10, 1963) 77 Stat. 56), which is part of the FLSA. (*Doe, supra*, 71 F.Supp.3d at p. 1134 & fn. 5.) The definition of “establishment” is important to Equal Pay Act analysis because the statute prohibits pay discrimination on the basis of sex within an “establishment.” (29 U.S.C. § 206(d)(1).) Title 29 Code of Federal Regulations part 1620.9 (2015) provides that “each physically separate place of business is ordinarily considered a separate establishment,” but in unusual circumstances “two or more portions of a business enterprise, even though located in a single physical place of business, may constitute more than one establishment” or “*two or more distinct physical portions of a business enterprise [could be treated] as a single establishment.* For example, a central administrative unit may hire all employees, set wages, and assign the location of employment; employees may frequently interchange work locations; and daily duties may be virtually identical and performed under similar working conditions.” (29 C.F.R. § 1620.9, subds. (a) & (b) (2015), italics added.) The *Doe* court concluded, and we agree, that this regulation offers guidance as to the meaning of “establishment” in the context of overtime and minimum wage claims. (*Doe, supra*, 71 F.Supp.3d at p. 1134 & fn. 5.)

Accordingly, reliance by the parties and the court on the three-part test of 29 Code of Federal Regulations part 779.305 may be misplaced. Appellants, however, do not claim error on this ground. Thus, we examine the trial court’s ruling on the nonsuit motion utilizing the three-part conjunctive test of 29 Code of Federal Regulations part 779.305 (2015) to determine whether the DAA presented evidence showing that it operates as a single establishment. Under this test, evidence showing physical and functional separation, and no interchange of employees is sufficient to show that an establishment should be considered separate, rather than a single establishment.

The Horsepark is physically separated from the Fairgrounds. Nonetheless, the DAA presented evidence showing that its board of directors oversees the Fairgrounds, the Horsepark and the Recreation Center. The day-to-day operations of the Recreation Center are performed by private companies that run their respective businesses under written leases and operating agreements with the DAA, but the DAA, as the landlord, handles major issues such as

plumbing or electrical problems. The chief financial officer of the DAA testified that the DAA has an organizational chart. Different areas of responsibility are divided into departments, with different department numbers. All departments are “very tightly linked together” and they share employees and resources. A single set of books exists for all of the departments and the departments cannot function separately. The DAA has a single operating bank account for all departments. The Horsepark does not have a separate bank account or accounts payable department.

The department heads for all departments report to the executive management of the DAA. The departments do not have separate executive officers or boards of directors. Additionally, the DAA’s accounting staff is used interchangeably as needed at the Horsepark to track accounts receivables, and the DAA’s employees perform necessary maintenance, recycling, marketing, security and janitorial work for all departments. The Horsepark and the DAA use the same payroll and human resources departments.

■ This constitutes substantial evidence showing that the two separate properties qualify as a single establishment, since they are not functionally operated as separate departments, do not have separate records and separate bookkeeping, and there is an interchange of employees between them. Although appellants may have presented conflicting evidence on this element, conflicting evidence is disregarded when evaluating a motion for nonsuit. (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 27–28 [61 Cal.Rptr.2d 518].)

2. Amusement or Recreational Character of Establishment

■ Appellants next contend that the trial court erred in denying their motion for nonsuit because there was no substantial evidence to support a finding that the DAA derived a majority of its income from amusement or recreation. As appellants note, in determining whether the character of an establishment is primarily amusement or recreational, some courts have utilized an income test to determine the principal activity of the enterprise, under the rationale that the major income source of a business will be the principal activity of the business. (See, e.g., *Texas City, supra*, 492 F.2d at pp. 1119–1120 [the major income source of the business will be its principal activity].) In contrast, another court declined to require that an establishment derive a certain percentage of revenue from strictly recreational activities in order to be considered recreational. (*Chessin, supra*, 184 F.3d at p. 1194.) Instead, the *Chessin* court examined the totality of the circumstances, “including but not limited to the establishment’s primary purpose; activities and services, such as restaurants and shops, that it offers incidental to its recreational facilities; its relationship to land set aside for recreational use; and its revenue sources.” (*Ibid.*)

In DOL 2006-39, the DOL stated “[w]hether or not an establishment has an ‘amusement or recreational’ character for purposes of the [amusement] exemption depends on its principal or primary activity.” After so holding, the DOL noted that, based on the information provided, the principal activity of the establishment (vessels providing overnight vacation cruises) appeared to be selling recreational activities, but that other factors “may weigh” against a finding that the establishment had an amusement or recreational character, noting “if the majority of [the establishment’s] income is derived from food, drink, lodging, concessions, and gifts, rather than from the premium portion of ticket sales paid for the nature-related and sight-related aspects of the excursion and entertainment, that would weigh against [the establishment] having an amusement or recreational character.” (*Ibid.*) Thus, the DOL appears to have adopted a totality of the circumstances test to determine the amusement or recreational nature of an establishment, since it did not require that the establishment derive a certain percentage of revenue from activities that were strictly amusement or recreational, but rather, considered the source of the establishment’s income to be one factor in the overall analysis. We agree with this conclusion. Accordingly, in evaluating whether the trial court properly denied nonsuit on the ground that the DAA established that the nature of its establishment is amusement or recreational, we look to the totality of the circumstances, including the portion of the DAA’s revenue derived from amusement or recreational activities.

The amusement exemption provides that the establishment must be for “amusement” or “recreation[],” but does not define these terms. (29 U.S.C. § 213(a)(3).) A federal regulation provides a somewhat circular definition of amusement or recreational establishments as “establishments frequented by the public for its amusement or recreation.” (29 C.F.R. § 779.385 (2015).) According to the Oxford English Dictionary, “amusement” means “[r]ecreation, relaxation, the pleasurable action upon the mind of anything light and cheerful” and defines “recreation” as “[t]he action or fact of refreshing or entertaining oneself through a pleasurable or interesting pastime, amusement, activity.” (Oxford English Dict. Online (2016) < <http://www.oed.com>> [as of July 13, 2016].) At least one federal circuit court found the phrase “‘[r]ecreational establishment’” to be ambiguous because the words used in the statute do not plainly convey where the boundary for the exemption lies. (*Chao v. Double JJ Resort Ranch* (6th Cir. 2004) 375 F.3d 393, 396–397.) We agree with this assessment.

Because of this ambiguity, in determining whether the exception applies, we may properly consider any legislative history. The Sixth Circuit noted that “[t]he purpose of the seasonal amusement or recreational establishment exemption was not clearly spelled out in the legislative history of either the 1961 or 1966 amendments. However, there is some useful legislative history discussing a proposed 1965 amendment to the FLSA. The House

Committee Report stated that the amusement and recreational establishment exemption would cover ‘such seasonal recreational or amusement activities as amusement parks, carnivals, circuses, sport events, parimut[u]el racing, sport boating or fishing, or other similar or related activities’ [Citation.] Although the proposed amendment was not passed, the legislative history is relevant because the following year Congress enacted a similar amendment including the amusement and recreational exemption.” (*Brock v. Louvers and Dampers, Inc.*, *supra*, 817 F.2d at p. 1258.)

Another court noted that while the legislative history is “skimpy,” it “suggests that the exemption does not cover establishments whose sole or primary activity is selling goods.” (*Texas City*, *supra*, 492 F.2d at p. 1118.) The *Texas City* court noted the Tenth Circuit’s statement that the purpose of the amusement exemption is “‘to allow recreational facilities to employ young people on a seasonal basis and not have to pay the relatively high minimum wages required’ by the FLSA. (*Texas City*, at p. 1118, fn. 6, citing *Brennan v. Yellowstone Park Lines* (10th Cir. 1973) 478 F.2d 285, 288.) The *Texas City* court commented that “[w]hile that appears to be a logical theory, we can find nothing in the legislative history to confirm it. The legislative history simply does not directly address the purpose of the amusement-recreation exemption.” (*Texas City*, *supra*, at p. 1118, fn. 6.)

With this background, we note that the recreational nature of the DAA is established by statute. The statutory purpose of the DAA is to hold “fairs, expositions and exhibitions for the purpose of exhibiting all of the industries and industrial enterprises, resources and products of every kind or nature of the state with a view toward improving, exploiting, encouraging and stimulating them,” and to “[c]onstruct[], maintain[] and operat[e] recreational and cultural facilities of general public interest.” (Food & Agr. Code, § 3951, subds. (a) & (b).) The DAA is statutorily empowered to lease its property. (Food & Agr. Code, § 4051, subd. (12).) Additionally, other courts have concluded that fairgrounds are recreational in nature. (*Hamilton v. Tulsa County Public Facilities Authority*, *supra*, 85 F.3d at pp. 496, 497 [holding public trust that managed fairgrounds to be exempt from the overtime provisions of the FLSA under the amusement or recreational establishment exemption exception]; *Gibbs v. Montgomery County Agricultural Society* (S.D.Ohio 2001) 140 F.Supp.2d 835, 844 [holding the amusement exemption applied because “the uncontested evidence establishes that the Defendant’s principal ‘activities are the management of the Montgomery County Fairgrounds—including leasing it for various recreational and other activities’”]; *Chaney v. Clark County Agricultural Society* (1993) 90 Ohio App.3d 421, 423, 425–426 [629 N.E.2d 513] [noting that the DOL, Wage and Hour Division handbook provides the activities of the usual “‘[s]tate or county fair are analogous to those of an amusement park, carnival, or circus . . . and . . . may

thus qualify for the [29 United States Code section 213](a)(3) exemption if the [operational] tests are met." "].)

■ The evidence that the DAA presented shows that the primary nature of its establishment is amusement and recreational. The mission statement of the DAA is "[t]o manage and promote a world-class, multi-use, public assembly facility with an emphasis on agriculture, education, entertainment and recreation in a fiscally sound and environmentally conscientious manner for the benefit of all." The DAA produces numerous events each year, such as the Del Mar National Horse Show, the San Diego County Fair, the Professional Bull Riding Circuit, the annual Scream Zone and, previously, the Holiday of Lights. The DAA also utilizes its premises to host approximately 300 interim events per year, produced by organizations that rent its facilities, including events such as home and garden shows, bridal bazaars, dog shows, cat shows and private events. The trial court could have rationally concluded that the primary character of these interim events is amusement or recreational.

Appellants represent that the DAA derives about 50 percent of its total income from the fair and 1 percent from its lease to the Del Mar Thoroughbred Club. They claim that the jury could infer that about 49 percent of the DAA's total income came from interim events that are not amusement or recreational in character. However, in light of our conclusion that the trial court could have rationally found that the primary character of the interim events is amusement or recreational, appellants' argument works against them. Despite the lack of authority regarding the meaning of "amusement or recreational," this evidence is sufficient to show that the primary nature of the DAA is to provide amusement or recreation.

In summary, the trial court properly denied appellants' nonsuit motion because the DAA presented sufficient evidence that it is a single establishment that provides amusement or recreation.⁵

D. *Jury Instructions*

1. *General Legal Principles*

■ A party is entitled to request that the jury be correctly instructed on any of the party's theories of the case that is supported by substantial

⁵ Appellants have not challenged the sufficiency of the evidence supporting the jury's fact-specific findings that the DAA operates a single establishment, that the nature of that establishment is amusement or recreational, and that the establishment satisfies the receipts test. (*Vinole v. Countrywide Home Loans, Inc.*, *supra*, 571 F.3d at p. 945.) We deem these arguments forfeited. (*Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1282 [150 Cal.Rptr.3d 673].)

evidence. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 [34 Cal.Rptr.2d 607, 882 P.2d 298] (*Soule*).) An erroneous refusal to instruct the jury is reversible if it is probable that the error prejudicially affected the verdict. (*Id.* at p. 580.) We independently review contentions that the court erred in instructing the jury. (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82 [89 Cal.Rptr.3d 34].) In doing so, and in evaluating any prejudicial impact of the allegedly erroneous instruction, we view the evidence in the light most favorable to the losing party because “we must assume the jury might have believed the evidence upon which the proposed instruction was predicated and might have rendered a verdict in favor of the losing party had a proper instruction been given.” (*Bourgi v. West Covina Motors, Inc.* (2008) 166 Cal.App.4th 1649, 1664 [83 Cal.Rptr.3d 758].) When deciding whether an instructional error was prejudicial, we must consider “insofar as relevant, ‘(1) the degree of conflict in the evidence on critical issues [citations]; (2) whether respondent’s argument to the jury may have contributed to the instruction’s misleading effect [citation]; (3) whether the jury requested a rereading of the erroneous instruction [citation] or of related evidence [citation]; (4) the closeness of the jury’s verdict [citation]; and (5) the effect of other instructions in remedying the error [citations].’ ” (*Soule, supra*, 8 Cal.4th at pp. 570–571.)

2. Analysis

Appellants claim that the trial court erred in refusing nine of their proposed special instructions and in giving one of the DAA’s proposed special instructions. We address each instruction.

a. Appellants’ Proposed Special Jury Instruction No. 2

The proposed instruction provided: “An employee cannot give up his or her overtime compensation even if he or she agrees to do so, or even if he or she volunteers to work overtime hours. An employer must pay overtime compensation to an employee even if the employee[] volunteered and/or agreed to work more than forty (40) hours without receiving overtime compensation.”

Appellants contend that the trial court erred in refusing to give this instruction because it is an accurate statement of the law. Assuming, without deciding, that the instruction accurately states the law, appellants have not explained how the instruction was relevant to deciding the merits of the DAA’s affirmative defense, which was the sole issue before the jury in the first phase of this bifurcated trial. As noted, to establish the amusement or recreational exemption, the DAA was required to prove that it is a single establishment, the nature of the establishment is amusement or recreational

and that it satisfies the duration or receipts test. (See *ante*, pt.I.C.) The trial court properly rejected the proposed instruction because it was not relevant to the issues before the jury during this phase of the trial.

b. *Appellants' Proposed Special Jury Instructions Nos. 3, 7 and 15*

Proposed instruction No. 3 provided: “In order to find that an employee is ‘exempt’ from the benefits of the overtime law, you must find that the employee’s employment is *plainly and unmistakably within the terms and spirit* of the particular exemption claimed by the employer. The exemption claimed by the . . . DAA in this case was designed to facilitate youth summer employment.” (Italics added.)

The trial court refused the instruction, stating that the concept was “nebulous . . . this area of the law is slippery enough. We don’t have to add spirit and terms.” Appellants assert that the failure to provide this instruction denied them the opportunity to place their full case before the jury and constituted a miscarriage of justice. We disagree.

The italicized language in the proposed instruction originates from a United States Supreme Court case and is often cited. (*Arnold v. Ben Kanowsky, Inc.*, *supra*, 361 U.S. at p. 392; e.g., *Guerrero*, *supra*, 213 Cal.App.4th at p. 941.) The snippet in the instruction stating that the exemption is “designed to facilitate youth summer employment” is taken from a federal circuit opinion addressing the legislative history of the exemption. (*Brennan v. Yellowstone Park Lines*, *supra*, 478 F.2d at p. 288.)

■ The mere fact that language in a proposed jury instruction comes from case authority does not qualify it as a proper instruction. “The admonition has been frequently stated that it is dangerous to frame an instruction upon isolated extracts from the opinions of the court.” (*Francis v. City & County of San Francisco* (1955) 44 Cal.2d 335, 341 [282 P.2d 496].) As another court noted, judicial opinions are not written as jury instructions, are notoriously unreliable as such, and may have a confusing effect upon a jury. (*Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 876, fn. 5 [110 Cal.Rptr. 511].) While the first sentence of the proposed instruction might be an accurate statement of law that appellants could argue to the jury, it is not for the court to make argument to the jury in the form of an instruction. Further, the second sentence, stating that the exemption is “designed to facilitate youth summer employment” is arguably misleading in that it suggests that the exemption properly applies only to such an activity. We agree with the trial court’s conclusion that the proposed instruction was inappropriate. Thus, the trial court did not err in refusing appellants’ proposed instruction No. 3.

Proposed instruction No. 7 stated: “In considering whether an establishment qualifies as an amusement establishment and/or a recreational establishment, you are to construe the terms ‘amusement’ and ‘recreation’ narrowly against the . . . DAA and in favor of the Plaintiffs.” While it is undisputed that exemptions “are to be narrowly construed against the employers seeking to assert them” (*Arnold v. Ben Kanowsky, Inc.*, *supra*, 361 U.S. at p. 392; see *Guerrero*, *supra*, 213 Cal.App.4th at p. 941), it does not follow that the terms “amusement” and “recreation” should be construed narrowly against the employer. The proposed instruction is improperly argumentative.

Proposed instruction No. 15 provided: “In order for an establishment to qualify as an amusement or recreation establishment, the majority of the establishment’s income must be generated by amusement or recreational activities, excluding revenues from *food and drink sales, concessions, and gifts.*” (Italics added.)

Appellants assert that the proposed instruction is an accurate, nonargumentative statement of the law derived from DOL 2006-39, as cited in *Mann v. Falk* (11th Cir. 2013) 523 Fed. Appx. 549, 552–553 (*Mann*). They contend that the evidence presented at trial revealed that the fair generates 50 percent of the DAA’s gross revenue, but that only 10 to 13 percent of that amount is from the amusement park and rides, with the remainder of the revenue coming from food and beverage sales, parking, commercial space rentals, corporate sponsorships and merchandising. Appellants argue that this latter income does not qualify as amusement or recreational and that the failure to give the proposed instruction likely impacted the verdict.

In DOL 2006-39, the DOL issued an opinion addressing whether employees of a client who provided overnight vacation excursions of three- to 10-days’ duration on small vessels were exempt as amusement or recreational in nature under the FLSA. The DOL found, based on the information provided, that it appeared “your client’s vessels have an ‘amusement or recreational’ character” since the “primary activities of the vessels include sightseeing, exploring sights and nature, nature-related and sight-related discussions and lectures, group activities and programs, meals, and other similar activities.” (DOL 2006-39.) Citing *Texas City*, *supra*, 492 F.2d at pages 1119–1120, the DOL then cautioned, that the establishment’s primary source of income is examined “in determining the nature of the establishment. Thus, if the majority of your client’s income is derived from food, drink, lodging, concessions, and gifts, rather than from the premium portion of ticket sales paid for the nature-related and sight-related aspects of the excursion and entertainment, that would weigh against your client’s vessels having an amusement or recreational character.” (DOL 2006-39.)

While the *Texas City* court concluded that the principal activity of the establishment was determinative as to its eligibility for an exemption, nowhere in the opinion did the *Texas City* court discuss income derived from food, drink, lodging, concessions and gifts. (*Texas City, supra*, 492 F.2d at p. 1119.) The *Mann* court similarly cited “food, drink, lodging, concessions, and gifts” from DOL 2006-39 for the proposition that the source of the income affected whether the exemption applied, but there is no information in *Mann* concerning where this phrase originated. (*Ibid.*) DOL 2006-39 shows that the phrase originates from the DOL’s field operations handbook in a section specifically addressing “[r]iverboat cruises.” (DOL 2006-39, citing DOL Field Operations Handbook § 25j17 (Apr. 15, 1994) located online at <http://www.dol.gov/whd/FOH/FOH_Ch25.pdf> [as of July 13, 2016].)

We conclude that the trial court did not err in refusing to give proposed instruction No. 15, since there is no authority indicating that it is a correct statement of the law when applied to an entity such as the DAA. Additionally, as noted above, the source of income is but one factor to consider in determining whether an establishment is primarily amusement or recreational in character. (*Ante*, pt. I.C.2.) The source of the DAA’s income was an evidentiary issue more appropriately argued by the parties.⁶

c. Appellants’ Proposed Special Jury Instruction No. 4

This instruction stated: “In this case, the . . . DAA contends that the Plaintiffs’ employment is ‘exempt’ because the . . . DAA assertedly qualifies as an establishment which is an amusement or recreational establishment. Plaintiffs dispute this. Plaintiffs also contend that the . . . DAA actually constitutes multiple establishments for purposes of the exemption law, and Plaintiffs dispute that these assertedly multiple establishments qualify for the claimed exemption.”

Appellants argue that a jury instruction may properly contain a statement of a party’s contentions and that the trial court erred when it refused the instruction. To support their argument, appellants cited *Tesoro del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619 [133 Cal.Rptr.3d 167], in which the appellate court noted: “As part of the jury instructions, the trial court informed the jury about the nature of the dispute and the parties’ contentions” (*Id.* at p. 628.) Nothing in the opinion addresses the propriety of this practice and “[i]t is axiomatic that cases are not authority for propositions not considered.” (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388 [53 Cal.Rptr.2d 81, 916 P.2d 476].)

⁶ The record does not show that appellants ever sought to modify their proposed instruction No. 15 to eliminate this phrase, but retain the concept that the jury could appropriately examine the source of the establishment’s revenue as a factor in determining whether the principal activity of the establishment was amusement or recreational.

Assuming, without deciding, that the trial court erred in refusing to give the proposed instruction, appellants have not shown that they were prejudiced, i.e., they have not shown that it is probable that the assumed error prejudicially affected the verdict. (*Soule, supra*, 8 Cal.4th at p. 580.) “Actual prejudice must be assessed in the context of the individual trial record. . . . Thus, when deciding whether an error of instructional omission was prejudicial, the court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel’s arguments, and (4) any indications by the jury itself that it was misled.” (*Id.* at pp. 580–581, fn. omitted.) Appellants have provided no argument concerning these factors and have not convinced us that failure to give the proposed instruction prejudiced them.

d. *Appellants’ Proposed Special Jury Instruction No. 5*

Proposed jury instruction No. 5 stated: “The . . . DAA has the burden to prove all facts necessary to establish its claim of exemption.”

Appellants assert that the proposed instruction is an accurate, nonargumentative statement of the law and, taken together with proposed instruction No. 4, would have instructed the jury that the DAA had the burden of proof as to whether all of the DAA’s business operations, locations, buildings and departments constitute a single establishment (the “identification-of-establishment” question). Appellants note that the identification-of-establishment question is one of three jury interrogatories presented in the verdict form and claim that they were entitled to an accurate instruction as to the burden of proof. The DAA asserts that the proposed instruction was unnecessary because other jury instructions advised the jury that the DAA had the burden of proof. We agree with the DAA.

A judgment may not be reversed “based upon the failure to give particular instructions if the point is covered adequately by instructions which were given.” (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 343 [13 Cal.Rptr.2d 819].) The court instructed that the DAA claimed it was exempt from paying overtime and that to prevail, the DAA “must prove” that “[t]he nature of the establishment for which Plaintiffs worked, is amusement or recreational” and that the DAA satisfied the receipts test. The court also instructed the jury on the definition of “establishment” and the phrase “amusement or recreational.” Taken together, these instructions adequately conveyed to the jury that the DAA had the burden of proof on all elements of the amusement exemption.

Even assuming that the trial court erred in refusing to give the proposed instruction, appellants have not shown that a miscarriage of justice resulted from the assumed error such that there is a reasonable probability that in the

absence of the error, they would have obtained a more favorable result. (*Soule, supra*, 8 Cal.4th at p. 580.) During the course of the trial, the court commented to the jury that the DAA bore the burden of proof. During closing argument, the DAA stated that it carried the burden of proof in this matter. Appellants' counsel commented at the beginning of his closing argument that the DAA had "the burden of proof on every item in this case." When reviewing the verdict form with the jury, appellants' counsel again reminded the jury that the DAA had the burden of proof on every issue, arguing that the DAA had not met its burden of proving that all of its operations and departments constituted a single establishment. On this record, any assumed error in not giving the proposed instruction was not prejudicial.

e. *Appellants' Proposed Special Jury Instruction No. 8*

Proposed jury instruction No. 8 stated: "In considering whether an employee's employment is by an establishment which qualifies as an amusement establishment and/or a recreational establishment, you may consider whether the work actually performed by the particular employee is 'amusement' and/or 'recreational' in nature."

As discussed above, we have concluded that eligibility for the amusement exemption turns on the nature of the employer's activities, not on the type of work performed by the individual employees. (*Ante*, pt. I.B.) Accordingly, the trial court properly rejected this instruction because it is not a correct statement of law.

f. *Appellants' Proposed Special Jury Instruction No. 9*

This instruction stated: "In order to meet the requirement of actual employment by the establishment claimed to be exempt, an employee, whether performing his [or] her duties inside or outside the establishment, must be employed by his or her employer in the work of the exempt establishment itself in activities within the scope of its exempt business."

Appellants assert that this proposed instruction is a nearly verbatim quotation from 29 Code of Federal Regulations part 779.308.⁷ Appellants maintain that an employee cannot be exempt if he or she is not actually employed by an exempt establishment and that the trial court erred in refusing the proposed instruction, since it prescribes the facts that must be

⁷ Title 29 Code of Federal Regulations part 779.308 (2015) provides: "Employed within scope of exempt business. [¶] In order to meet the requirement of actual employment 'by' the establishment, an employee, whether performing his duties inside or outside the establishment, must be employed by his employer in the work of the exempt establishment itself in activities within the scope of its exempt business." (Citations omitted.)

proven to “meet the requirement of actual employment by the establishment.” As we concluded above, application of the amusement exemption turns on the nature of the employer’s business, not on the nature of the employee’s work. (*Ante*, pt. I.B.) Appellants’ reliance on 29 Code of Federal Regulations part 779.308 is misplaced; this regulation is relevant to determining whether an employee is “employed by” an exempt establishment. It does not address an employer’s entitlement to claim a particular exemption.

g. *Appellants’ Proposed Special Jury Instruction No. 14*

Proposed instruction No. 14 stated: “An employee may be overtime-eligible in one week, but not overtime-eligible in the next week. If an employee does some work for an exempt establishment, and some work for a non-exempt establishment, during the same workweek, that employee must be treated as overtime-eligible for that week. The burden to separate between exempt and non-exempt work as between particular workweeks for a given employee, or as between different groups of employees, is imposed by law upon the employer.”

Appellants state that proposed instruction No. 14 is drawn from 29 Code of Federal Regulations part 776.4.⁸ They claim that the trial court erred in refusing to give the instruction because the evidence presented at trial

⁸ Title 29 Code of Federal Regulations part 776.4 (2015) provides: “(a) The workweek is to be taken as the standard in determining the applicability of the Act. [Footnote omitted.] Thus, if in any workweek an employee is engaged in both covered and noncovered work he is entitled to both the wage and hours benefits of the Act for all the time worked in that week, unless exempted therefrom by some specific provision of the Act. The proportion of his time spent by the employee in each type of work is not material. If he spends any part of the workweek in covered work he will be considered on exactly the same basis as if he had engaged exclusively in such work for the entire period. Accordingly, the total number of hours which he works during the workweek at both types of work must be compensated for in accordance with the minimum wage and overtime pay provisions of the Act.

“(b) It is thus recognized that an employee may be subject to the Act in one workweek and not in the next. It is likewise true that some employees of an employer may be subject to the Act and others not. But the burden of effecting segregation between covered and noncovered work as between particular workweeks for a given employee or as between different groups of employees is upon the employer. Where covered work is being regularly or recurrently performed by his employees, and the employer seeks to segregate such work and thereby relieve himself of his obligations under sections 6 and 7 with respect to particular employees in particular workweeks, he should be prepared to show, and to demonstrate from his records, that such employees in those workweeks did not engage in any activities in interstate or foreign commerce or in the production of goods for such commerce, which would necessarily include a showing that such employees did not handle or work on goods or materials shipped in commerce or used in production of goods for commerce, or engage in any other work closely related and directly essential to production of goods for commerce. [Footnote omitted.] The Division’s experience has indicated that much so-called ‘segregation’ does not satisfy these tests and that many so-called ‘segregated’ employees are in fact engaged in commerce or in the production of goods for commerce.”

supported a finding that they performed substantial work that was not within the scope of the amusement exemption. Appellants further maintain that the commingling of nonexempt work with exempt work would be fatal to any claim of exemption for the workweek in which the commingling occurred. We disagree.

■ Title 29 Code of Federal Regulations part 776.4 is contained in part 776, entitled an “interpretative bulletin on the general coverage of the wage and hours provisions of the” FLSA. (29 C.F.R. subtit. B, ch. V, subch. B, pt. 776 (2015).) As the title explains, the regulations in part 776 pertain to determining coverage under the FLSA. The FLSA defines “covered” employees as those who are “‘engaged in commerce or in the production of goods for commerce.’” (29 C.F.R. § 776.0 (2015).) These regulations do not address whether particular employees, who come under the purview of the FLSA, are subject to an exemption. Thus, the trial court did not err in refusing to give the instruction because it was not relevant to the issues before the jury.

h. *Respondent’s Special Instruction No. 3*

Appellants claim that the trial court erred in instructing the jury with respondent’s special instruction No. 3, and that the error was prejudicial. This instruction stated: “In situations involving an Establishment with more than one department, those departments can still collectively constitute a single ‘Establishment.’ More than one department collectively constitutes a single Establishment unless you find all of the following: [¶] 1. The department is physically separated from the other activities of the Establishment; and [¶] 2. The department is functionally operated separately from the Establishment; and [¶] 3. The department has separate records and separate bookkeeping from the Establishment; and [¶] 4. There is no interchange of employees between the department and the Establishment. [¶] In evaluating whether more than one department constitutes a single Establishment, the critical factors are economic, physical, and functional separation between the departments. No single factor controls, but even when an Establishment has many departments, so long as they are operated as integral parts of the same Establishment, they constitute one single Establishment.”

Appellants concede that this instruction is drawn from 29 Code of Federal Regulations part 779.305, but assert that the instruction is an incomplete statement of the law because it omits important concepts contained within the regulation. Specifically, appellants note that the regulation provides that, in order to support a finding that an employer operates only one establishment, the “interchange” of its employees among its departments must constitute, “*indiscriminate* use of the employee in both units *without*

regard to the segregated functions of such units.” (29 C.F.R., § 779.305 (2015), italics added; see fn. 4, *ante*.) Without this limitation, appellants contend, the instruction was inaccurate and misleading. Assuming, without deciding, that the omission of the word “indiscriminate” rendered the instruction inaccurate and misleading, appellants have failed to address the *Soule* factors, including the state of the evidence, the effect of other instructions, the effect of counsel’s arguments, and whether the jury was misled. (*Soule, supra*, 8 Cal.4th at pp. 580–581.) Thus, they have failed to convince us that the assumed error prejudicially affected the verdict.

E. Verdict Form

1. Background

Appellants submitted a proposed special verdict form that contained eight separate questions. The questions asked the jury to determine whether the DAA had proven that its employees were ineligible to receive overtime compensation based on where they worked (interim events, the Horsepark, the main parcel, Recreation Center or satellite wagering premises) and whether the fair was in session or was not in session. The special verdict form proposed by the DAA contained five questions, some with subparts. The trial court rejected both proposed verdict forms. Instead, the trial court presented the parties with a special verdict form that it had drafted. The three-question special verdict form prepared by the court asked: “1. How many establishments did [the DAA] operate? One [or] Two or more; 2. For each establishment in your answer to question 1 for which Plaintiffs worked, was the nature of the establishment amusement or recreational? Yes [or] No”; and “3. For each establishment in your answer to question 1 for which Plaintiffs worked, was the establishment’s average receipts for any six months of such year no more than 33 ½ per centum of the establishment’s average receipts for the other six months of such year? Yes [or] No.”

The court discussed each question on its proposed verdict form with counsel. Appellants’ counsel expressed no objection to question 1, stating that it was “a good way to start.” Appellants’ counsel had “no problem” with question 2. After discussing question 3 with the court, appellants’ counsel stated that he had “no problem” with question three. When asked whether he had “[a]ny particular objections to the proposed verdict form,” appellants’ counsel responded “no.”

During trial, the court commented that it would ultimately decide whether the amusement exemption applied, based on the jury’s predicate findings. After the jury rendered its verdict, appellants argued that the judgment should identify each plaintiff in the collective action. Appellants further noted that by

agreeing to the form of the judgment, they were not waiving their contention that “there may be one or more issues” that had not been presented to the jury, including whether an employer may utilize the amusement exemption “while loaning out employees to non-exempt outside event promoters, and charging the non-exempt outside event promoters for the employees’ labor, plus a markup.” The DAA responded, stating that it was not aware of any authority requiring that all plaintiffs in a representative action be included in the judgment. The DAA also noted that appellants had argued to the jury that loaning employees to vendors did not fall within the amusement exemption, and that the jury necessarily rejected the argument. The DAA suggested that the appropriate way to address this issue would be by filing a motion for relief from the verdict and judgment. The trial court later entered a judgment in which the court noted that it had read and considered the parties’ respective posttrial briefs. However, the judgment did not explicitly state that, based on the jury’s findings, the court had concluded that the amusement exemption applied to the DAA, and appellants did not bring the omission to the trial court’s attention.

2. Analysis

Appellants contend that the verdict form was fatally defective because it did not allow the jury to resolve every controverted issue. Specifically, they claim that the verdict form failed to ask the jury whether the majority of the DAA’s revenues are derived from activities that are amusement or recreational in nature, so as to satisfy the “principal activity” test. Assuming that the principal activity test was satisfied, they contend that the jury should have been asked whether the exemption applies when (1) the DAA assigns its employees to perform work to support interim events presented by outside promoters in connection with nonamusement, nonrecreational events, and charges the outside promoters for respondent’s employees’ labor (plus a markup); (2) appellants perform work that was neither amusement nor recreational in nature; and (3) appellants perform work that is not within the scope of the DAA’s assertedly exempt business.

The DAA contends that appellants waived any objection to the verdict form by failing to object in the trial court. Appellants dispute this contention, stating that while they found no fault in the three jury interrogatories, they never acquiesced in the trial court’s refusal to present to the jury the question whether the claimed exemption could be properly applied to appellants. We agree with the DAA.

■ An objection to the form of questions in a special verdict must be raised in the trial court or the issue is waived on appeal. (*Orient Handel v. United States Fid. & Guar. Co.* (1987) 192 Cal.App.3d 684, 700 [237

Cal.Rptr. 667].) After the trial court rejected their proposed verdict form, appellants did not attempt to revise their verdict form, nor did they ask the court to revise its proposed verdict form. When specifically asked whether he had “[a]ny particular objections to the proposed verdict form,” appellants’ counsel responded “no,” and did not voice any concerns that the court’s proposed verdict form, while not objectionable, was incomplete. Moreover, after the jury rendered its verdict, appellants did not raise their concern with the trial court, nor did they ask to have the jury correct or clarify the verdict before the court discharged the jury. (Code Civ. Proc., § 619 [“When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out.”].) Finally, appellants did not preserve the issue by raising it in a motion for new trial. (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1220 [228 Cal.Rptr. 736] [challenge to use of verdict forms may be raised for first time in motion for new trial].)

On this record, we conclude that appellants forfeited any claimed defect in the special verdict form. To the extent that appellants claim that, after the jury rendered its verdict, the trial court failed to determine the ultimate question whether the amusement exemption applied, this issue was also forfeited. The record does not show that appellants raised the issue after the jury rendered its verdict. In any event, under the doctrine of implied findings, we presume that the trial court made all factual findings necessary to support the judgment in favor of the DAA. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1271–1272 [78 Cal.Rptr.3d 372].)

F. *Exclusion of Class Members*

1. *Background*

During trial, appellants’ counsel noted that his witnesses were in the hallway and stated, “[b]ecause they filed joinders in a collective action, I believe they’re parties for purposes of [Evidence Code] section 777,” indicating that the witness/parties should be permitted to remain in the courtroom during trial proceedings. Counsel for the DAA objected, stating, “they can have a representative, but I don’t think the witnesses should be here watching other witnesses.” The trial court sustained the DAA’s objection. Appellants’ counsel did not argue the matter further and indicated that his assistant would make sure people were “lined up” outside the courtroom.

2. *Analysis*

Evidence Code section 777 states that “the court may exclude from the courtroom any witness not at the time under examination so that such witness

cannot hear the testimony of other witnesses,” but also provides that “[a] party to the action cannot be excluded under this section.” (*Id.*, subds. (a) & (b).) “The purpose of [a witness exclusion] order is to prevent tailored testimony and aid in the detection of less than candid testimony.” (*People v. Valdez* (1986) 177 Cal.App.3d 680, 687 [223 Cal.Rptr. 149].) We review a ruling on a motion to exclude witnesses for abuse of discretion. (*People v. Griffin* (2004) 33 Cal.4th 536, 574 [15 Cal.Rptr.3d 743, 93 P.3d 344].)

Appellants assert that the trial court erred because they are parties in interest that may not be excluded from the courtroom under Evidence Code section 777. The DAA contends that appellants forfeited this issue by not raising it below, noting that the actual issue before the trial court was whether appellants’ party witnesses could, for the first time beginning on the third day of trial, be present in the courtroom while appellants’ other witnesses testified.

■ The parties have not cited, and we have not found, any case law addressing the application of Evidence Code section 777 to collective actions under the FLSA. We note, however, that even a party does not have an absolute right to attend trial. (*Province v. Center for Women’s Health & Family Birth* (1993) 20 Cal.App.4th 1673, 1686 [25 Cal.Rptr.2d 667].) By sustaining the DAA’s objection, the trial court agreed that class members who were witnesses should not be listening to the testimony of other witnesses. Appellants’ counsel never asked the trial court to rule on whether any of the 177 class members who were not designated as witnesses could be excluded from the courtroom and we decline to infer such a ruling on this limited record. Additionally, appellants’ counsel never pursued the matter by, for example, asking to take witnesses out of order to prevent the exclusion of a party witness from the courtroom or making an offer of proof that counsel required the presence of the excluded party witnesses at counsel table to assist in the prosecution of the case.

On this record, we conclude that the trial court did not err by excluding party witnesses from the courtroom. Additionally, a judgment may not be reversed on appeal unless, after an examination of the entire cause, including the evidence, it appears that the error caused a miscarriage of justice. (Cal. Const., art. VI, § 13.) Even assuming that the trial court erred, appellants have not shown how excluding party witnesses from the courtroom during the testimony of other party witnesses resulted in any prejudice.

II. Demurrer to Section 510 Claim

A. Standard of Review

We review an order sustaining a demurrer without leave to amend de novo (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415 [106 Cal.Rptr.2d 271, 21 P.3d 1189]), assuming the truth of all properly pleaded facts as well as facts inferred from the pleadings, and giving the complaint a reasonable interpretation by reading it as a whole and its parts in context. (*Palacin v. Allstate Ins. Co.* (2004) 119 Cal.App.4th 855, 861 [14 Cal.Rptr.3d 731].) A complaint will be construed “liberally . . . with a view to substantial justice between the parties.” (Code Civ. Proc., § 452.) “[I]f there is a reasonable possibility the defect in the complaint could be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to amend.” (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459 [80 Cal.Rptr.2d 329] (*City of Atascadero*).) A trial court may abuse its discretion in sustaining a demurrer without leave to amend even though the plaintiff never requested leave to amend. (Code Civ. Proc., § 472c, subd. (a); *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746 [68 Cal.Rptr.3d 295, 171 P.3d 20] [“The issue of leave to amend is always open on appeal, even if not raised by the plaintiff.”].) The plaintiff has the burden of demonstrating how the complaint can be amended to state a valid cause of action. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 [6 Cal.Rptr.3d 457, 79 P.3d 569].)

■ “To the extent issues of statutory interpretation are raised, we apply the rules of statutory construction and exercise our independent judgment as to whether the complaint states a cause of action. [Citation.] Our first task in construing a statute is to ascertain the Legislature’s intent in order to carry out the purpose of the law. If the statutory language is clear and unambiguous, no judicial construction is required. If the statute is ambiguous, the words must be construed in context in light of the statutory purpose.” (*Doe v. Doe 1* (2012) 208 Cal.App.4th 1185, 1189 [146 Cal.Rptr.3d 215].)

B. Analysis

Appellants alleged that under section 510, the DAA was required to pay them overtime compensation for any work in excess of eight hours in one workday and any work in excess of 40 hours in any workweek. (§ 510, subd. (a).) The DAA demurred to appellants’ section 510 claim on the ground that section 510 does not apply to public entity employees. Appellants responded to the demurrer, stating that they “expected” that the trial court would sustain the demurrer because the court would be bound to follow *Johnson v. Arvin-Edison Water Storage Dist.* (2009) 174 Cal.App.4th 729 [95

Cal.Rptr.3d 53] (*Johnson*), which held that section 510 does not apply to public entities. Nonetheless, appellants asserted the section 510 claim to preserve this issue for appellate review, stating that the Supreme Court has apparently not decided the question whether nonconstitutionally immune public employers are subject to section 510. We agree that section 510 does not apply to the DAA. Nevertheless, we conclude that the trial court erred in sustaining the demurrer without leave to amend because appellants have shown how they can amend their complaint to allege a potentially valid claim for overtime compensation.

■ California law, codified at section 510, requires overtime compensation for “[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek.” (§ 510, subd. (a).) In interpreting section 510, the *Johnson* court recognized the established rule that public entities are not subject to a general statute unless expressly included. (*Johnson, supra*, 174 Cal.App.4th at p. 736.) The *Johnson* court also recognized an exception to this rule, i.e., that government agencies are excluded from a statute only if their inclusion would result in an infringement upon sovereign governmental powers. (*Id.*, at p. 738.) “A statute infringes upon a public entity’s sovereign powers if the statute affects the entity’s governmental purposes and functions.” (*Ibid.*)

Applying maxims of statutory construction to the Labor Code, the *Johnson* court held that the water district, as a public entity, was exempt from section 510, noting that the Legislature expressly refers to public entities when it intends them to be included. (*Johnson, supra*, 174 Cal.App.4th at pp. 736–738.) Thus, the indicia of legislative intent led the *Johnson* court to conclude that a water district was exempt from section 510, but “[i]n any event, the [water] District [was] also exempt” under the sovereign powers canon of statutory interpretation. (*Johnson*, at p. 738.) Specifically, the *Johnson* court noted that the Water Code granted the water district the statutory power to set employees’ compensation (citing Wat. Code, §§ 39059, 43152, subd. (c)) and concluded that subjecting the water district to section 510 would infringe upon its sovereign powers to set employees’ compensation. (*Johnson, supra*, at p. 739.)

Appellants assert that *Johnson* is distinguishable because the water district had the regulatory power to set employees’ compensation under the Water Code. Appellants note that unlike the water district in *Johnson*, the DAA does not have sovereign power over employee compensation and thus, should be required to comply with section 510. The DAA contends that appellants did not make this argument below and that they have thus forfeited the issue. On the merits, the DAA asserts that applying section 510 would interfere with its sovereign power and its ability to perform its legislative purpose. Because the

question presented is one of law, we exercise our discretion to resolve the issue on the merits. (*UFITEC, S.A. v. Carter* (1977) 20 Cal.3d 238, 249, fn. 2 [142 Cal.Rptr. 279, 571 P.2d 990].)

■ Appellants contend that section 510 applies to “any work” and that this plain language permits no exception. However, whether requiring the DAA to comply with section 510 infringes on the DAA’s sovereign powers (i.e., its governmental purposes and functions) cannot be determined by examining section 510 in isolation. (*Johnson, supra*, 174 Cal.App.4th at p. 738.) Rather, wage and hour claims in California are governed “by two complementary and occasionally overlapping sources of authority”; namely, the Labor Code as enacted by the Legislature and a series of wage orders adopted by the Industrial Welfare Commission (IWC). (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1026 [139 Cal.Rptr.3d 315, 273 P.3d 513] (*Brinker*).) The IWC had constitutional and statutory authority to adopt wage orders prescribing, among other things, maximum hours of employment for employees in California. (Cal. Const., art. XIV, § 1; §§ 70–74, 1171–1204; *Ramirez, supra*, 20 Cal.4th 785, 795.) Section 1173 gives the IWC the statutory authority to regulate the working conditions of employees in California, including setting standards for maximum hours. (*Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289, 304 [120 Cal.Rptr.3d 442] (*Sheppard*)).

■ The first paragraph of section 1173 provides: “It is the continuing duty of the [IWC] . . . to ascertain the wages paid to all employees in this state, to ascertain the hours and conditions of labor and employment in the various occupations, trades, and industries in which employees are employed in this state, and to investigate the health, safety, and welfare of those employees.” Notably, “section 1173 broadly refers to ‘all employees in this state,’ ” which necessarily includes employees working in the public sector. (*Sheppard, supra*, 191 Cal.App.4th at p. 305.)

■ Wage orders are codified at title 8 of the California Code of Regulations. (Cal. Code Regs., tit. 8, § 11000 et seq.)⁹ Wage orders are “quasi-legislative regulations and are construed in the same manner as statutes under the ordinary rules of statutory construction.” (*Securitas Security Services USA, Inc. v. Superior Court* (2011) 197 Cal.App.4th 115, 121 [127 Cal.Rptr.3d 883].) Although the Legislature stopped funding the IWC in 2004, its wage orders remain in full force and effect. (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1009, fn. 2 [118 Cal.Rptr.3d 834].) IWC wage orders are given “extraordinary deference, both

⁹ We grant the DAA’s request for judicial notice of certain wage orders, official notices pertaining to wage notices, and legislative materials pertaining to certain wage orders. (Evid. Code, §§ 452, subd. (b), 459.)

in upholding their validity and in enforcing their specific terms.” (*Martinez v. Combs* (2010) 49 Cal.4th 35, 61 [109 Cal.Rptr.3d 514, 231 P.3d 259].) To the extent a wage order and a statute overlap, we will seek to harmonize them, as with any two statutes. (*Brinker, supra*, 53 Cal.4th at p. 1027.)

■ Similar to the FLSA, the IWC had a wage order regulating the amusement and recreation industry. (Cal. Code Regs., tit. 8, § 11100 (wage order No. 10-2001).) The wage order defines an amusement and recreation industry as “any industry, business, or establishment operated for the purpose of furnishing entertainment or recreation to the public, including but not limited to theaters, dance halls, bowling alleys, billiard parlors, skating rinks, riding academies, racetracks, amusement parks, athletic fields, swimming pools, gymnasiums, golf courses, tennis courts, carnivals, and wired music studios.” (Cal. Code Regs., tit. 8, § 11100, subd. 2(A).) Wage order No. 10-2001 applies to “all persons employed in the amusement and recreation industry” and limits them to an eight-hour workday or 40 hours per workweek. (Cal. Code Regs., tit. 8, § 11100, subds. 1, 3(A)(1).) Wage order No. 10-2001 contains a number of exceptions to this requirement. (Cal. Code Regs., tit. 8, § 11100, subd. 1(C), (D) & (E).) As relevant here, it exempts “any employees directly employed by the State or any political subdivision thereof, including any city, county, or special district.” (Cal. Code Regs., tit. 8, § 11100, subd. 1(C).)

Appellants do not contend that wage order No. 10-2001 does not apply to the DAA, nor could they so argue, since the DAA is a “state institution” (Food & Agr. Code, § 3953) created for the express purposes of “[h]olding fairs, expositions and exhibitions” and “[c]onstructing, maintaining, and operating recreational and cultural facilities of general public interest.” (Food & Agr. Code, § 3951, subds. (a) & (b).)

Notably, a prior version of wage order No. 10-2001 (wage order No. 10-1989) provided that employees in the amusement and recreation industry “shall not be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek” unless paid overtime compensation. Nonetheless, wage order No. 10-1989 exempted from its provisions “employees directly employed by the State or any county, incorporated city or town or other municipal corporation, or to outside salespersons.”

“[In 1999,] the Legislature passed the ‘Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999.’ (Stats. 1999, ch. 134, § 1, p. 1820, adding and amending provisions of Lab. Code, § 500 et seq.) The act amended . . . section 510, which provides that a California employee is entitled to overtime

pay for work in excess of eight hours in one workday or 40 hours in one week. (. . . § 510, subd. (a).)" (*Harris v. Superior Court* (2011) 53 Cal.4th 170, 177–178 [135 Cal.Rptr.3d 247, 266 P.3d 953].) Despite the passage of section 510 in 1999, the current version, wage order No. 10-2001 (eff. Jan. 1, 2001) also provides for overtime compensation, but *continues to exempt* public employees in the amusement and recreation industry from the overtime requirement. (Cal. Code Regs., tit. 8, § 11100, subds. 1(C) & 3(A)(1).)

■ Thus, when it enacted section 510, the Legislature was aware that wage order No. 10-2001 exempted public employees in the amusement and recreation industry from overtime compensation. (*In re Greg F.* (2012) 55 Cal.4th 393, 407 [146 Cal.Rptr.3d 272, 283 P.3d 1160] ["The Legislature is presumed to be aware of all laws in existence when it passes or amends a statute."].) ■ Accordingly, when section 510 and wage order No. 10-2001 are viewed together, the inescapable conclusion is that public employees in the amusement and recreation industry are exempt from state overtime requirements.

To avoid this result, appellants contend that wage order No. 10-2001 does not create an exemption to the statutory requirement for overtime compensation contained in section 510 because wage order No. 10-2001 states, "*the provisions of this order* shall not apply to any employees directly employed by the State or any political subdivision thereof, including any city, county, or special district." (Cal. Code Regs., tit. 8, § 11100, subd. 1(C), italics added.) Appellants claim that wage order No. 10-2001 does not advance the DAA's position because it does not purport to exempt public employees from section 510. We reject appellants' argument. The express language of wage order No. 10-2001 essentially implements section 510. (Cal. Code Regs., tit. 8, § 11100, subd. 3(A)(1) ["employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek" unless paid overtime compensation]; cf., § 510, subd. (a) ["Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek . . ." is entitled to overtime compensation].) Wage order No. 10-2001 then exempts public employees in the amusement or recreation industry from the overtime requirement. (Cal. Code Regs., tit. 8, § 11100, subd. 1(C).)

Moreover, appellants' argument ignores section 1173 (in effect at the time the Legislature enacted § 510), which gives the IWC the statutory authority to set maximum hours and refers to "'all employees in this state,' " which necessarily includes employees working in the public sector. (*Sheppard, supra*, 191 Cal.App.4th at p. 305, italics omitted.) Additionally, section 515, which was enacted along with section 510, provides that "nothing in this section

requires the commission to alter an exemption from provisions regulating hours of work that was contained in a valid wage order in effect in 1997.” (§ 515, subd. (b).) As we previously noted, since 1989, IWC wage orders have continuously exempted public employees in the amusement and recreation industry from overtime requirements, both before and after the enactment of section 510. Thus, the trial court properly sustained the demurrer to the section 510 claim.

C. Leave to Amend

Appellants contend that this court should hold that the DAA is required to comply with section 510 when it loans out its employees to outside promoters to support “interim events,” such as gun shows, bridal bazaars, private parties, weddings, Christmas tree sales, hot tub sales, home and garden shows, and charges the outside promoters the labor costs of employing the employees, plus a markup. They assert that when they are performing work for these outside entities, they are not public employees performing exempt work. Appellants concede that their complaint did not contain any averments regarding the DAA’s loaning of its employees to outside promoters to support interim events, but claim that such averments were not required because the DAA bore the burden of proving the exemption from section 510 as an affirmative defense. To the extent that we disagree with this contention, appellants argue that they should be allowed leave to amend to add averments that conform to the evidence presented at trial.

■ “[A] demurrer based on an affirmative defense will be sustained only where the face of the complaint discloses that the action is necessarily barred by the defense.” (*Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 183 [123 Cal.Rptr.2d 637].) As we have discussed, the trial court properly sustained the DAA’s demurrer because the face of the complaint disclosed that the DAA is exempt from the requirements of section 510. (*Ante*, pt. II.B.) Thus, we next consider whether appellants should be allowed leave to amend their complaint.

■ As we have already noted, it is an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the plaintiff can amend the complaint to cure its defects. (*City of Atascadero, supra*, 68 Cal.App.4th at p. 459.) It is irrelevant that appellants did not seek leave to amend in the trial court, since this issue is always open on appeal. (Code Civ. Proc., § 472c, subd. (a).) Appellants must show in what manner their pleading can be amended and how the amendment changes the legal effect of the pleading. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 [134 Cal.Rptr. 375, 556 P.2d 737].) In this regard, appellants assert that they can

amend the complaint to allege that when they work on interim events, the DAA is a joint employer with the outside promoters and must therefore comply with section 510.

Where joint employment exists, all employers are individually responsible for compliance with the FLSA. (*Bonnette v. California Health & Welfare Agency* (9th Cir. 1983) 704 F.2d 1465, 1469.) Courts examining whether joint employment exists under the FLSA consider a number of factors, including whether the alleged additional employer had the power to hire and fire employees; supervised and controlled employee work schedules or employment conditions; determined the rate and method of payment; maintained employment records; owned the facilities where the employee worked; and made significant investments in equipment and facilities. (*Bonnette v. California Health & Welfare Agency*, *supra*, 704 F.2d at p. 1470.)

Joint employment is also recognized under California law. “Joint employment occurs when two or more persons engage the services of an employee in an enterprise in which the employee is subject to the control of both.” (*In-Home Supportive Services v. Workers’ Comp. Appeals Bd.* (1984) 152 Cal.App.3d 720, 732 [199 Cal.Rptr. 697] [addressing dual employment and dual workers’ compensation liability].) “‘Employ’ means to engage, suffer, or permit to work.” (Cal. Code Regs., tit. 8, § 11100, subd. 2(E).) An “[e]mployee” means any person employed by an employer” and an “[e]mployer” means any person . . . who . . . employs or exercises control over the wages, hours, or working conditions of any person.” (Cal. Code Regs., tit. 8, § 11100, subd. 2(F) & (G).)

In *Guerrero*, *supra*, 213 Cal.App.4th 912, an in-home support services (IHSS) worker brought an action against the program recipient, the county and the county’s IHSS public authority for unpaid wages and overtime under the FLSA and the Labor Code. (*Guerrero*, at pp. 917–919.) The *Guerrero* court concluded that the trial court erred in sustaining a demurrer to the Labor Code claims because the applicable wage order did not expressly exempt public employees from its provisions. (*Id.* at p. 954.) It also concluded that the trial court ignored the “joint employer doctrine,” holding that the plaintiff’s rendering of services to the program recipient did not preclude her from being a dual employee of the program recipient and real parties, the county and the county’s IHSS public authority. (*Id.* at pp. 917, 955.)

We conclude that appellants should be permitted to amend their section 510 claim since they have shown how they can potentially amend their complaint to state a valid claim under the joint employee doctrine. Accordingly, we reverse that part of the order sustaining the demurrer without leave to amend

and direct the trial court to grant appellants leave to amend the complaint. In so doing, we express no view as to the ultimate merits of appellants' section 510 claim.

DISPOSITION

The order sustaining the demurrer to the Labor Code section 510 claim without leave to amend is reversed with directions to grant appellants leave to amend their complaint. The judgment on the FLSA claim is affirmed. In the interests of justice, the parties are to bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

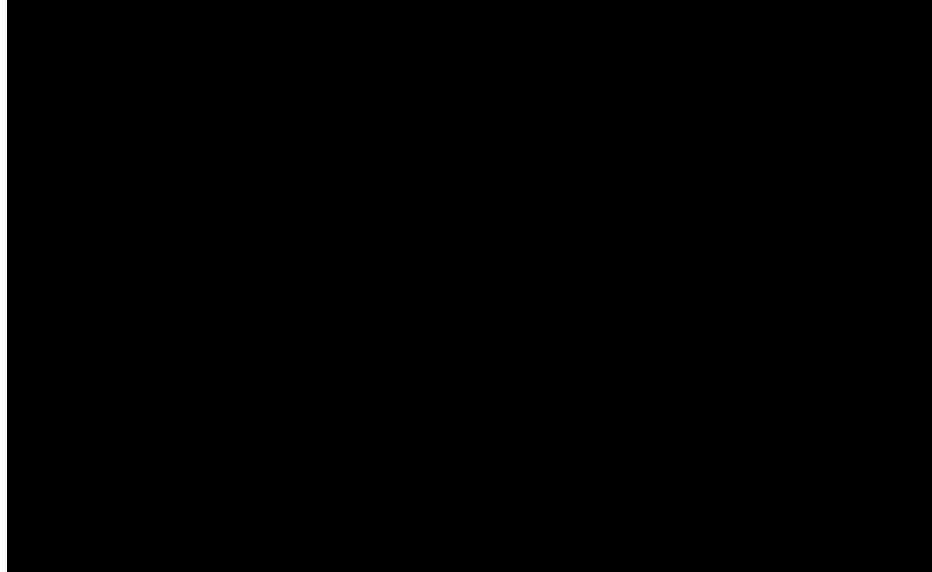
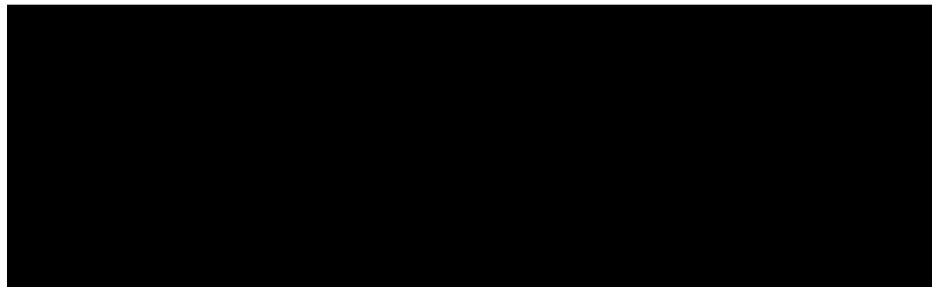
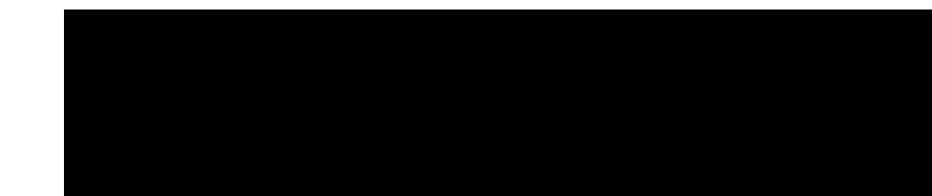
Benke, Acting P. J., and Irion, J., concurred.

Petitions for a rehearing were denied August 5, 2016, and the opinion was modified to read as printed above. Appellants' petition for review by the Supreme Court was denied October 12, 2016, S236550.

[No. A142217. First Dist., Div. Three. June 13, 2016.]

WILLIAM BALDWIN, Plaintiff and Appellant, v.
AAA NORTHERN CALIFORNIA, NEVADA & UTAH INSURANCE
EXCHANGE, Defendant and Respondent.

[REDACTED]



COUNSEL

Day Law Offices and Montie S. Day for Plaintiff and Appellant.

Coddington, Hicks & Danforth, R. Wardell Loveland, Jay C. Patterson, Richard G. Grotch and Min K. Kang for Defendant and Respondent.

OPINION

McGUINESS, P. J.—Plaintiff William Baldwin (Appellant) appeals from the judgment dismissing with prejudice his complaint against defendant AAA Northern California, Nevada & Utah Insurance Exchange (AAA), after AAA's demurrer was sustained without leave to amend. Appellant contends he stated valid causes of action against AAA for breach of contract and bad faith because AAA refused to fully compensate him for collision-related damages to his vehicle as required under his insurance policy and under the insurance policy of a driver involved in the collision. For the reasons set forth below, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

As this is an appeal from an order sustaining AAA's demurrer, in the factual summary that follows we accept as true the facts alleged in the complaint and the attached exhibit. (*Westamerica Bank v. City of Berkeley* (2011) 201 Cal.App.4th 598, 607 [133 Cal.Rptr.3d 883].)

Appellant's almost new Toyota Tundra pickup (pickup) sustained structural damage, while parked, as a result of a collision between the vehicles of defendants Mark Rivera Hollandsworth and Peter Bona Sebastian. Appellant had an insurance policy through AAA covering collision-related damages. Defendant Hollandsworth also had an insurance policy with AAA covering property damage that he caused through negligence.

Once advised of the accident, AAA refused to consider the pickup a "total loss." Instead, it had the vehicle repaired at a reported cost of \$8,196.06, and provided a rental car for Appellant during the interim. As a result of the

collision and following the repairs, the pickup's future resale value was decreased by more than \$17,100.

Appellant filed suit, alleging a first cause of action against defendants Hollandsworth and Sebastian for negligence, and second and third causes of action against AAA for breach of contract and bad faith. Appellant contended that AAA was obligated, under his insurance policy and that of defendant Hollandsworth, either to pay him the entire preaccident value of the pickup or to repair the pickup to its original preaccident condition, and that AAA did neither. After repair work was completed, Appellant contends, the pickup did not match its preaccident condition "with respect to safety, reliability, mechanics, cosmetics and performance" and its future resale value had decreased by \$17,000. The rental vehicle provided him also did not match the pre-accident value of the pickup, and Appellant seeks the difference in value for the period that the pickup was under repair.

AAA demurred to the complaint, contending that Appellant essentially was seeking reimbursement for the lost market value of his pickup, a loss that specifically was excluded under his insurance policy. The trial court agreed and sustained the demurrer to the second and third causes of action against AAA. Appellant did not seek leave to amend the complaint or identify further facts that might be added to an amended complaint. The trial court consequently sustained the demurrer without leave to amend, and ordered a final judgment of dismissal with prejudice for AAA. This appeal followed.

DISCUSSION

A decision to sustain a demurrer is a legal ruling, which we review de novo. (See, e.g., *San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 426 [152 Cal.Rptr.3d 530].) In doing so, we "must assume the truth of the complaint's properly pleaded or implied factual allegations." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 [6 Cal.Rptr.3d 457, 79 P.3d 569].) We "'give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.' . . ." (*Green Valley Landowners Assn. v. City of Vallejo* (2015) 241 Cal.App.4th 425, 432 [194 Cal.Rptr.3d 19].) "We also consider the complaint's exhibits." (*San Mateo Union High School Dist. v. County of San Mateo*, *supra*, 213 Cal.App.4th at p. 425.) Appellant bears the burden of demonstrating that the trial court erred in sustaining the demurrer. (*Brown v. Crandall* (2011) 198 Cal.App.4th 1, 8 [132 Cal.Rptr.3d 388].)

1. Breach of contract

■ "[I]nterpretation of an insurance policy is a question of law." [Citation.] "While insurance contracts have special features, they are still

contracts to which the ordinary rules of contractual interpretation apply.” [Citation.] Thus, “the mutual intention of the parties at the time the contract is formed governs interpretation.” [Citation.] If possible, we infer this intent solely from the written provisions of the insurance policy. [Citation.] If the policy language “is clear and explicit, it governs.”’” (*Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1074 [135 Cal.Rptr.2d 361, 70 P.3d 351].)

In this case, the policy language was clear and explicit. Regarding coverage for car damage, it provided that AAA “*may* pay the loss in money *or* repair . . . damaged . . . property.” (Italics added.) The policy’s use of the term “*may*” suggests AAA had the discretion to choose between the two options. (See, e.g., *Woodbury v. Brown-Dempsey* (2003) 108 Cal.App.4th 421, 433 [134 Cal.Rptr.2d 124] [“‘*May*’ ordinarily ‘connotes a discretionary or permissive act’”].) This suggestion is supported by the statement in the same section of the policy, under “**LIMITS OF LIABILITY**,” that AAA’s coverage responsibility for car damage would “not exceed” “the lesser of” those two options, namely, paying “the actual cash value of the . . . damaged property” or “the amount necessary to repair . . . the property with similar kind and quality.”

Appellant alleges generally that it was not possible to repair his almost new pickup to its original preaccident condition and that AAA’s attempted repairs did not restore the car to that standard. Other than the decline in future resale value, however, Appellant offers no specific factual allegations identifying any unrepainted damage or continuing performance issue with the insured vehicle. He does not allege that the pickup had specific mechanical problems when returned to him, was unsafe in any specific way, or had any specific cosmetic flaws. Indeed, in his opening brief, Appellant indirectly suggests the pickup may have been returned to him in a state arguably qualifying as “normal running condition,” although he vaguely cautions that repaired vehicles generally “may still be dangerous,” and describes anecdotal reports of others (nonparties) who experienced grave postrepair accidents.¹

“Facts alleging a breach,” however, “must be pleaded with specificity.” (*Levy v. State Farm Mutual Automobile Ins. Co.* (2007) 150 Cal.App.4th 1, 6 [58 Cal.Rptr.3d 54].) In reviewing an order sustaining a demurrer, the court does not assume the truth of “contentions, deductions or conclusions of fact or law.” (*Green Valley Landowners Assn. v. City of Vallejo, supra*, 241 Cal.App.4th at p. 432; see, e.g., *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 174 [59 Cal.Rptr.3d 672] “[A]n allegation that a defendant *might have* breached a contract does not state a valid cause of

¹ One of the other described post-repair accidents involved a different make of car. In the other, the type of car involved was unspecified.

[REDACTED]

[REDACTED]

action”].) Appellant’s general allegation that his repaired pickup was not restored to its preaccident condition “with respect to safety, reliability, mechanics, cosmetics and performance” is a mere conclusion unsupported by any specific factual allegations. We thus reject it. (See, e.g., *Ramirez v. Wong* (2010) 188 Cal.App.4th 1480, 1488 [116 Cal.Rptr.3d 412] [affirming order sustaining demurrer because plaintiffs alleged no facts supporting their “conclusory allegation”].)

Appellant relies on case law indicating that an insurer has an obligation to repair a damaged vehicle to its “pre-accident safe, mechanical, and cosmetic condition.” He overlooks significant language from those cases, however, and ineffectively attempts to distinguish the facts in some instances. The cases do not stand for the principle that a plaintiff may rely on general allegations to meet his burden in pleading a claim for breach of contract. To the contrary, one of the decisions he cites affirmed an order sustaining a demurrer, in part because the complaint contained conclusory allegations, failing to specify the manner in which the repaired vehicle differed from its preaccident condition. (*Levy v. State Farm Mutual Automobile Ins. Co.*, *supra*, 150 Cal.App.4th at pp. 8–9.)

Another of the cases that plaintiff cites, *Ray v. Farmers Ins. Exchange* (1988) 200 Cal.App.3d 1411 [246 Cal.Rptr. 593] (*Ray*), more significantly undercuts his position. In that seminal case, as here, the insured alleged breach of contract and bad faith claims based on the insurer’s refusal to compensate him for diminution in market value after repair of his wrecked car. (*Id.* at pp. 1413–1414.) As in this case, the insurance policy “unambiguously gave [the insurer] the right to elect to repair [the insured’s] vehicle” to a similar condition if repair costs would be less than the actual cash value of the vehicle at the time of the loss.² (*Ray*, at p. 1416.) The court cited case law concluding that the insurer’s election to make repairs in such context was conclusive if the repairs placed the vehicle “substantially in its preaccident condition.” (*Id.* at pp. 1416–1417, citing *Owens v. Pyeatt* (1967) 248 Cal.App.2d 840, 849 [57 Cal.Rptr. 100].) It specifically rejected the notion that this meant repairing the vehicle “to both its preaccident condition *and* market value,” reasoning that a vehicle would not qualify as a total loss if it is restored to “‘its normal running condition.’” (*Ray*, *supra*, 200 Cal.App.3d at p. 1417.)

² The policy in *Ray*, *supra*, 200 Cal.App.3d 1411, 1416, obligated the insurer to repair the vehicle to “‘like kind and quality,’ ” while the policy in this case uses the phrase “similar condition and quality,” a semantical difference of no meaningful significance. (See, e.g., *People v. Moreno* (2014) 231 Cal.App.4th 934, 943 [180 Cal.Rptr.3d 522] [using the terms interchangeably]; Webster’s 10th Collegiate Dict. (2001) p. 1091 [defining “similar” to mean “like”].)

“To hold [the insurer] liable for the automobile’s diminution in value,” the court reasoned, “would make [the insurer] an insurer of the automobile’s cash value in virtually all cases and would render essentially meaningless its clear right to elect to repair rather than to pay the actual cash value of the vehicle at the time of loss.” (*Ray, supra*, 200 Cal.App.3d at p. 1417.) “The policy language unambiguously reserves to [the insurer] the right to elect the most economical method of paying claims,” the court concluded, and it declined to rewrite that “unambiguous limitation of collision coverage to provide for a risk not bargained for.” (*Id.* at pp. 1417–1418; see, e.g., *Rosen v. State Farm General Ins. Co., supra*, 30 Cal.4th at p. 1078 [declining to rewrite a standard insurance policy as doing so might compel “‘insurers to give more than they promised and might allow insureds to get more than they paid for’”].)

■ More recently, *Carson v. Mercury Ins. Co.* (2012) 210 Cal.App.4th 409 [148 Cal.Rptr.3d 518] (*Carson*), reached similar conclusions, relying in part on *Ray, supra*, 200 Cal.App.3d 1411. *Carson* observed that repairing a car to its preaccident condition did not mean restoring it to its original condition “when it left the factory or the showroom floor.” (*Carson, supra*, 210 Cal.App.4th at p. 420.) It reasoned that “no repair can ever restore a vehicle to its pristine factory condition,” and applying such a standard would mean “no vehicle could be adequately repaired.” (*Ibid.*) “In California, and the majority of other jurisdictions,” the court observed, “when the insurer elects to repair the car to its preaccident condition, it is not also required to pay for any loss of value to the vehicle, which can occur after a seriously damaged vehicle is fully repaired.” (*Ibid.*)

Significantly, the court observed, the debate on this topic occurred “nearly a decade ago” before insurance policies included express exclusions barring payment for a car’s diminution in value following an accident. (*Carson, supra*, 210 Cal.App.4th at p. 427.) In *Carson*, as in this case, the policy contained such an exclusion and, as in *Carson*, we find the language unambiguous. (*Id.* at p. 413; see, e.g., *Fresh Express Inc. v. Beazley Syndicate 2623/623 at Lloyd’s* (2011) 199 Cal.App.4th 1038, 1053 [131 Cal.Rptr.3d 129] [“‘Whether language in a contract is ambiguous is a question of law’”].) The provision clearly stated that Appellant’s coverage under his policy did not apply to “‘loss’” “caused by diminution in value of your insured car . . . by reason of a loss otherwise covered by this policy” The loss otherwise covered by the policy was the physical damage to the pickup. The policy thus defines AAA’s “‘repair’ obligation as not including ‘diminution in value.’” (*Carson, supra*, 210 Cal.App.4th at p. 427.)

■ Appellant attempts to avoid the effect of the exclusion through several arguments, which we collectively find unpersuasive. He appears to argue that the insurance policy is ambiguous because the exclusion contradicts other

provisions promising to cover loss, and that the policy therefore must be construed to protect his expectation of coverage. (See, e.g., *Sequeira v. Lincoln National Life Ins. Co.* (2015) 239 Cal.App.4th 1438, 1445 [192 Cal.Rptr.3d 127].) An insurance policy provision is only ambiguous, however, “‘when it is capable of two or more constructions both of which are reasonable.’” (*Bay Cities Paving & Grading, Inc. v. Lawyers’ Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867 [21 Cal.Rptr.2d 691, 855 P.2d 1263].) “Courts ‘will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists’” (*North Bay Schools Ins. Authority v. Industrial Indemnity Co.* (1992) 6 Cal.App.4th 1741, 1745 [10 Cal.Rptr.2d 88]), and they must give effect to every part of the policy (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115 [90 Cal.Rptr.2d 647, 988 P.2d 568]). This includes giving effect to exclusions. (See, e.g., *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 759 [27 Cal.Rptr.3d 648, 110 P.3d 903] [Insurance companies may exclude coverage for particular damages]; *Underwriters of Interest Subscribing to Policy Number A15274001 v. ProBuilders Specialty Ins. Co.* (2015) 241 Cal.App.4th 721, 729 [193 Cal.Rptr.3d 898] [The plain language of an exclusion must be respected].) As noted, we do not find the exclusion ambiguous. Nor is it contradictory to the loss provisions. It merely limits their scope.

■ We also do not find persuasive Appellant’s arguments that the exclusion may be disregarded because it was contained in the “fine print” of the insurance policy. Exclusion clauses are subject to two separate tests. First, “‘the limitation must be “conspicuous” with regard to placement and visibility.’” (*Alterra Excess & Surplus Ins. Co. v. Snyder* (2015) 234 Cal.App.4th 1390, 1404 [184 Cal.Rptr.3d 831] (*Alterra*)). Second, the “‘language must be “plain and clear.”’” (*Ibid.*) Whether an exclusion meets these requirements is a question of law. (*Ibid.*) We decide that question of law favorably to AAA.

The exclusion is contained in AAA’s standard policy, in a part specifically covering “**CAR DAMAGE**.” The part includes sections with capitalized and boldfaced headings in simple language addressing, respectively, coverage, definitions, additional payments, exclusions and limitations of liability. The exclusions are stated in numbered paragraphs, with adequate spacing, using the same style and size of print found elsewhere in the policy. These factors satisfy the “‘conspicuous, plain and clear test’” for exclusions, namely, that they “‘be positioned in a place and printed in a form which will attract the reader’s attention.’” [Citations]; see *National Ins. Underwriters v. Carter* (1976) 17 Cal.3d 380, 384 [131 Cal.Rptr. 42, 551 P.2d 362] . . . [exclusion located under a bold-faced heading entitled ‘Exclusions’ and appearing in the same style of print found elsewhere in the policy].” (*Alterra, supra*, 234 Cal.App.4th 1390, 1404.)

Appellant also attempts to argue that the exclusion violates public policy and thus is void. He suggests the exclusion renders AAA's coverage inadequate and that it unreasonably denies him the benefits of the insurance contract in a way that violates public policy reflected in statute and case law. Appellant refers to subdivisions (h)(3) and (h)(5) of Insurance Code section 790.03 as declarative of public policy.³ Those subdivisions declare as unfair claims settlement practices the failure, respectively, to follow "reasonable standards" for promptly investigating and processing claims, or to promptly and fairly settle claims.⁴ Appellant also alludes to case law describing the "special relationship" between insurers and the insured, which confers on insurers a responsibility to take the public interest into account. (See, e.g., *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 820 [169 Cal.Rptr. 691, 620 P.2d 141] [Insurers, as purveyors of a "vital" "quasi-public" service "must take the public's interest seriously"]; *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659 [328 P.2d 198] [In deciding whether to settle a claim, an insurer must give the insured's interest "at least as much consideration" as its own].) Appellant's allegations do not suffice, however, to establish that the exclusion in his insurance policy violated public policy.

Appellant essentially argues that the insurance policy is fundamentally unfair and violates public policy because it allowed AAA the option of restoring his almost new vehicle to normal running condition, after an accident involving structural damage, without also requiring that it compensate him for the decrease in the vehicle's future resale value. His argument is undercut by California Supreme Court case law. In *Julian v. Hartford Underwriters Ins. Co.*, *supra*, 35 Cal.4th 747, for example, the Supreme Court observed that "'[a]n insurance policy may exclude coverage for particular injuries or damages in certain specified circumstances while providing coverage in other circumstances.' [Citation.] It follows that an insurer is not absolutely prohibited from drafting and enforcing policy provisions that provide or leave intact coverage for some, but not all, manifestations of a particular peril. This is, in fact, an everyday practice that normally raises no questions" (*Id.* at p. 759.) Thus, "an insurance policy can provide coverage for weather conditions generally, but exclude coverage for specific

³ Appellant also purports to quote from and rely on subdivision (h)(9) and (10) of Insurance Code section 790.03, although the actual text of those statutory provisions is entirely different than the language he presents.

⁴ Insurance Code section 790.03 provides in pertinent part as follows: "The following are hereby defined as . . . unfair and deceptive acts or practices in the business of insurance. [¶] . . . [¶] (h) Knowingly committing . . . any of the following unfair claims settlement practices: [¶] . . . [¶] (3) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies. [¶] . . . [¶] (5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear. . . ."

weather conditions such as hail, wind, or rain.” (*Ibid.*) Applying the same logic, an insurer may cover the cost of repairing a car damaged in an accident, but exclude coverage for the accompanying decrease in the car’s future resale value.

There is precedent indicating that an insurance policy “clearly establish[ing] a financial incentive to maintain a hazardous condition injurious to the public may well be contrary to public policy.” (*Rosen v. State Farm General Ins. Co., supra*, 30 Cal.4th at p. 1081 (conc. opn. of Moreno, J.), citing, inter alia, *Wildman v. Government Employees Ins. Co.* (1957) 48 Cal.2d 31 [307 P.2d 359] [finding void as contrary to public policy an insurer’s attempt to exclude permissive users from car liability insurance protection]; but see *Rosen v. State Farm General Ins. Co., supra*, 30 Cal.4th at p. 1078 (maj. opn. of Brown, J.) [“‘we do not rewrite any provision of any contract, including the standard policy underlying any individual policy, for any purpose’”].) Appellant appears to argue that the insurance policy here in question gives AAA an incentive to attempt superficial repairs to cars sustaining structural damage, returning unsafe cars to the roads, rather than declare them a total loss and pay out their actual (greater) preaccident cash value. We are not persuaded.

■ As Justice Moreno observed in his concurring opinion in *Rosen v. State Farm General Ins. Co., supra*, 30 Cal.4th 1070, “the judicial power to declare public policy in the context of contract interpretation and enforcement should be exercised with great caution. ‘“‘The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.” [Citation.] . . . “No court ought to refuse its aid to enforce a contract on doubtful and uncertain grounds. The burden is on the [one challenging the contract] to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people.”’”’ (*Id.* at p. 1082.) Appellant does not meet this burden.

“In this case, there is a strong public policy in favor of allowing insurers to enforce unambiguous policy provisions, thereby encouraging stability in the insurance industry and allowing insurers the benefit of the bargain created by such unambiguous language.” (*Rosen v. State Farm General Ins. Co., supra*, 30 Cal.4th at p. 1082 (conc. opn. of Moreno, J.).) On the other hand, the extent of the danger to the public is in doubt. The argument that literal enforcement of the policy at issue will create substantial financial incentives to effect purely cosmetic repairs, returning dangerous vehicles to the roads so as to injure the public, ignores the existence of various countervailing disincentives. These include the likelihood that the insurer would be financially responsible under the same policy for any damages resulting from

future accidents of an insufficiently repaired vehicle. Appellant does not contend that AAA canceled his policy after the accident. Moreover, insurers would be liable for tort damages if, in bad faith, they directed cosmetic or superficial repairs to an insured vehicle. (See *Rattan v. United Services Automobile Assn.* (2000) 84 Cal.App.4th 715, 721 [101 Cal.Rptr.2d 6], citing generally *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 684–685 [254 Cal.Rptr. 211, 765 P.2d 373].)

Nor is this the case that the court posited in *Carson, supra*, 210 Cal.App.4th 409, when it observed that public policy concerns would come into play if an insurer “refused to acknowledge the vehicle was nonrepairable but nevertheless proceeded with a purely cosmetic restoration.” (*Id.* at p. 427.) Although Appellant does allege that AAA refused to acknowledge his pickup was nonrepairable, he does *not* contend that the resulting repairs were purely cosmetic or that the pickup returned to him actually was unsafe. He also does not allege that all vehicles generally, or his particular type of pickup specifically, are incapable of being restored to a safe condition once having sustained structural damage.

■ Instead, Appellant alleges only that the repairs AAA directed did not restore his pickup to its “original” preaccident condition, and his only specific factual allegation on this point is that AAA refused to compensate him for the decline in the pickup’s future resale value. We agree with *Carson, supra*, 210 Cal.App.4th 409 that an insurer’s “failure to take into account the vehicle’s depreciation in value when opting to repair the vehicle cannot be deemed against public policy.” (*Id.* at p. 427.) Accordingly, we reject Appellant’s argument that the exclusion violated public policy and was void. As Appellant’s claim for the difference in value between the rental vehicle AAA provided him and the preaccident value of his pickup appears to rely on the same theory, it fails also.

2. *Bad faith*

We next consider whether Appellant has stated a cause of action for breach of the implied covenant of good faith and fair dealing. Appellant relies for this claim on an implied covenant in his own AAA insurance policy and in defendant Hollandsworth’s AAA insurance policy. For reasons discussed below, we conclude Appellant has failed to state a claim for breach of the implied covenant under either policy.⁵

⁵ We deferred action on the request that AAA filed on April 29, 2015, to augment the record, which we deemed to be a request for judicial notice. The request attached a document apparently signed by Appellant’s counsel seeking the superior court’s dismissal with prejudice of the negligence cause of action against defendant Hollandsworth. The proffered document does not reflect any court action on Appellant’s request. Nor does AAA cite authority for its

■ “There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.” (*Foley v. Interactive Data Corp.*, *supra*, 47 Cal.3d at p. 684, quoting *Comunale v. Traders & General Ins. Co.*, *supra*, 50 Cal.2d at p. 658.) The covenant is read into contracts to “protect the express covenants or promises of the contract.” (*Foley v. Interactive Data Corp.*, *supra*, 47 Cal.3d at p. 690.) When an insurer “‘unreasonably and in bad faith’” withholds the benefits of the agreement, “‘it is subject to liability in tort.’” (*Egan v. Mutual of Omaha Ins. Co.*, *supra*, 24 Cal.3d at p. 818, quoting *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 575 [108 Cal.Rptr. 480, 510 P.2d 1032].) It is “essential” to recovery “that the insurer, in breaching the implied covenant, have acted unreasonably [citations] or without proper cause.” (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 [272 Cal.Rptr. 387].)

In support of his cause of action for breach of the implied covenant of good faith and fair dealing, Appellant repeats the allegations discussed in the previous section. He claims AAA breached the covenant by refusing to either declare his pickup a total loss or repair it to its “original pre-accident condition.” He also alleges AAA failed to reasonably investigate “the practical effect of deciding to repair the vehicle” before deciding to do so. Read in the context of the entire complaint, the latter allegation appears to be a part of Appellant’s general argument that, in exercising its discretion under the insurance policy—repairing the pickup and declining to provide compensation for the decrease in its future resale value—AAA did not adequately consider his interests. These allegations do not suffice to present a cause of action for breach of the implied covenant of good faith and fair dealing because, as discussed in the previous section, AAA’s alleged conduct was consistent with the express provisions of the contract.

Appellant attempts to argue that the express terms of the insurance contract, giving AAA discretion to repair the pickup and excluding coverage for its decreased market value, impermissibly contradicted the implied covenant of good faith and fair dealing. The argument misunderstands the nature of the implied promise. As the California Supreme Court has recognized, it “is aimed at making effective the agreement’s promises.” (*Foley v. Interactive Data Corp.*, *supra*, 47 Cal.3d at p. 683.) It follows that the “performance of

contention that, in seeking dismissal of defendant Hollandsworth, Appellant effectively also was dismissing any claims he had alleged against AAA based on that individual’s insurance policy. As the proffered document is not necessary to our disposition of the case, we deny the request for judicial notice. (See *Piccinini v. California Emergency Management Agency* (2014) 226 Cal.App.4th 685, 690 [172 Cal.Rptr.3d 315].)

an act specifically authorized by the policy cannot, as a matter of law, constitute bad faith.” (*Hibbs v. Allstate Ins. Co.* (2011) 193 Cal.App.4th 809, 821 [123 Cal.Rptr.3d 80]; *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1148 [271 Cal.Rptr. 246] [An insurer “is not required to pay noncovered claims”]; *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374 [6 Cal.Rptr.2d 467, 826 P.2d 710] [In a noninsurance case, observing “We are aware of no reported case in which a court has held the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement”].)

We agree with our colleagues in Division Two, who held, in the insurance context, that “‘courts are not at liberty to imply a covenant directly at odds with a contract’s express grant of discretionary power.’” (*New Hampshire Ins. Co. v. Ridout Roofing Co.* (1998) 68 Cal.App.4th 495, 504–505 [80 Cal.Rptr.2d 286].) The possible exception would be “‘those relatively rare instances when reading the provision literally would, contrary to the parties’ clear intention, result in an unenforceable, illusory agreement.’” (*Id.* at p. 505, quoting *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 808 [48 Cal.Rptr.2d 747].) That does not appear to be the case here. According to Appellant’s own allegations AAA performed as promised under the insurance policy, directing the repair of his pickup following the accident and providing him a rental car during the interim. There is no allegation that AAA unreasonably delayed in doing so. Nor does Appellant allege that the pickup returned to him was defective in any specific way apart from the drop in its future resale value. Accordingly, Appellant has failed to state a cause of action against AAA for breach of the implied covenant under his own insurance policy. (See, e.g., *Carson v. Mercury Ins. Co.*, *supra*, 210 Cal.App.4th at p. 428 [An insurer does not act in bad faith by repairing, as promised in the policy, the insured’s vehicle].)

■ We also follow the holding of *Coleman v. Republic Indemnity Ins. Co.* (2005) 132 Cal.App.4th 403 [33 Cal.Rptr.3d 744] (*Coleman*), in concluding that Appellant cannot state a cause of action for breach of the implied covenant against AAA under the insurance policy of defendant Hollandsworth for unfair settlement practices. Appellant would stand in the position of a third party claimant under that policy. (*Id.* at p. 409.) “In *Moradi-Shalal v. Fireman’s Fund Ins. Companies* (1988) 46 Cal.3d 287 [250 Cal.Rptr. 116, 758 P.2d 58], . . . the Supreme Court held that a third party claimant—an individual who is injured by the alleged negligence of an insured party—does not have a private right of action against the insurer for unfair settlement practices.” (*Coleman, supra*, 132 Cal.App.4th at p. 406.)

In a case of first impression in California, *Coleman, supra*, 132 Cal.App.4th 403, held that this rule applied “where the third party claimant is insured by

the same insurer as the other party.” (*Id.* at p. 406.) It reasoned the “coincidental fact that plaintiffs are insured by the same insurer as the other party does not change plaintiffs’ position as strangers to the other party’s insurance policy and as adversaries to the insurer. Thus, the insurer owes no duty of good faith and fair dealing to plaintiffs in settling their claims against the other party.” (*Id.* at p. 410 [“The majority of other jurisdictions that have dealt with this issue have held that insurers do not owe a duty of good faith and fair dealing to third party claimants whom they also insure”].) We agree and conclude Appellant also cannot state a cause of action for bad faith against AAA based on defendant Hollandsworth’s insurance policy.⁶

3. *Leave to amend*

Finally, Appellant makes a cursory argument that he should be permitted leave to amend the complaint. He would add allegations that the express terms of the insurance policy are ambiguous “considering the implied terms and representation to the public that the insurance policy covers ‘losses’ to the insured’s property.” This statement does not meet the “‘burden of demonstrating a reasonable possibility to cure’” the discussed defects by amendment. (*Green Valley Landowners Assn. v. City of Vallejo, supra*, 241 Cal.App.4th 425, 432.)

“The plaintiff’s ‘burden of demonstrating a reasonable possibility to cure any defect’ [citation] is not pro forma. ‘To satisfy that burden on appeal, a plaintiff ‘must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.’ [Citation.] . . . The plaintiff must clearly and specifically set forth . . . factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary.”” (*Green Valley Landowners Association v. City of Vallejo, supra*, 241 Cal.App.4th at p. 432.) Appellant’s cursory statement, noted above, is neither factual nor specific. As he has failed to offer any specific factual allegations indicating that the repairs to his pickup were deficient, beyond the fact that its future resale value was less than before the accident, he did not meet his burden in seeking leave to amend his complaint.

⁶ As Appellant cannot state a cause of action against AAA for bad faith under either insurance contract, there is no need to consider the appropriate measure of property damages in tort. Accordingly, we deny as irrelevant Appellant’s January 4, 2016, request that we take judicial notice of (1) the decision of the Judicial Council of California, in December 2015, to amend California Civil Jury Instruction Number 3903J, and (2) the amended instruction. (See, e.g., *Stockton Citizens for Sensible Planning v. City of Stockton* (2012) 210 Cal.App.4th 1484, 1488 [149 Cal.Rptr.3d 222] [judicial notice of irrelevant materials denied].)

DISPOSITION

The judgment dismissing the complaint against AAA is affirmed. Appellant shall pay AAA's costs on appeal.

Pollak, J., and Siggins, J., concurred.

On July 13, 2016, the opinion was modified to read as printed above. Appellant's petition for review by the Supreme Court was denied October 12, 2016, S236774.

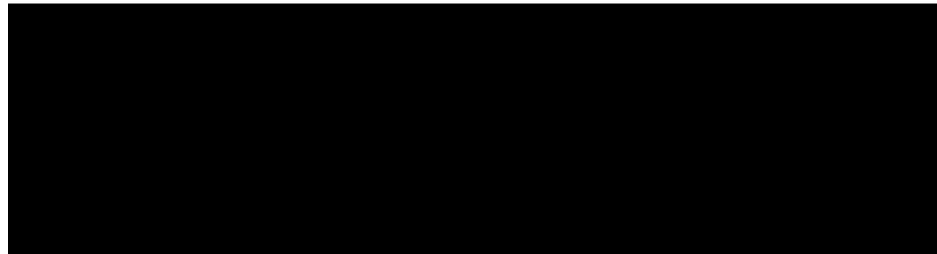
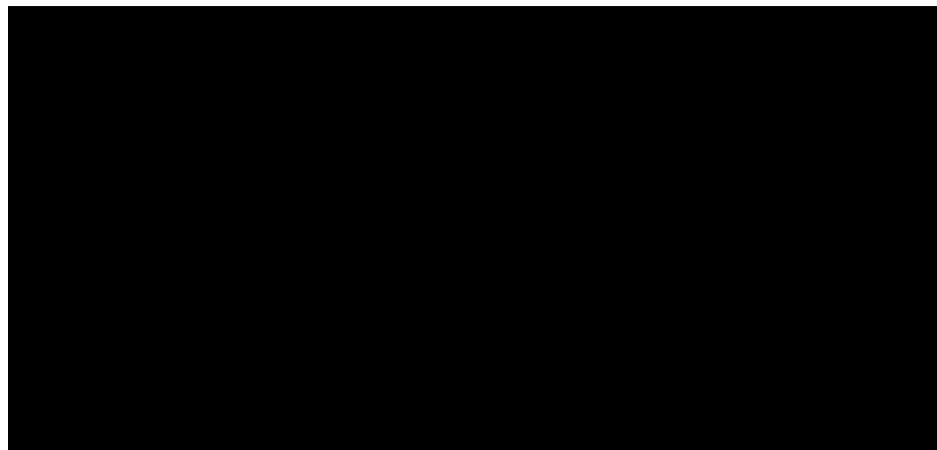
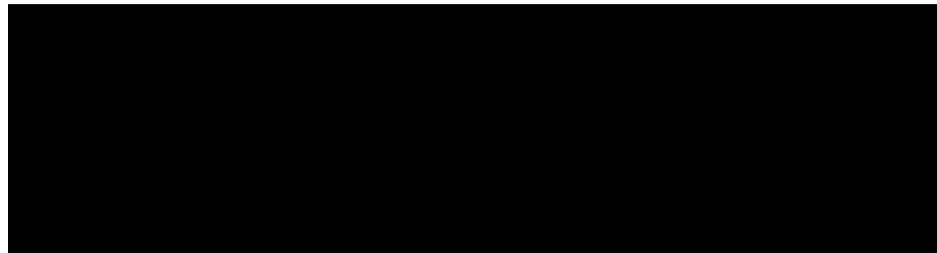
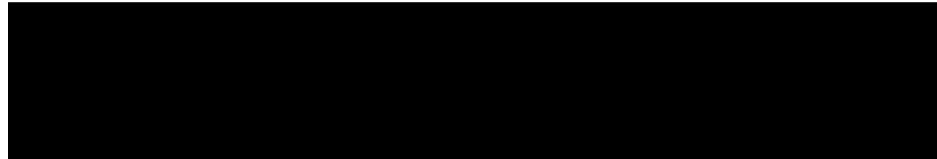
[No. H040663. Sixth Dist. July 13, 2016.]

EDWARD BENNETT GREGGE, Plaintiff and Appellant, v.
MICHAEL HUGILL, as Trustee, etc., Defendant and Respondent.

[REDACTED]

[REDACTED]

[REDACTED]



COUNSEL

Panitz & Kossoff, Kenneth W. Kossoff and Donna M. Klugman for Plaintiff and Appellant.

Reed Smith, Paul D. Fogel, Dennis Peter Maio; Sugai & Sudweeks and Sheri Lynn Sudweeks for Defendant and Respondent.

OPINION

GROVER, J.—Edward Bennett Gregge (Bennett) challenges the dismissal of his Probate Code section 17200 petition to determine the validity of a 2008 amendment to his grandfather’s *inter vivos* trust. The petition alleged that Bennett’s grandfather lacked testamentary capacity and was subject to undue influence when he executed the amendment. We conclude that the trial court abused its discretion when it dismissed Bennett’s petition under Probate Code section 17202 based on a nonparty disclaiming his interest in the trust estate. The court’s acceptance of the disclaimer was contrary to public policies of effectuating a testator’s intent and dissuading elder abuse, and was premised on the erroneous view that the disclaimer effectuated a settlement of the lawsuit. A settlement assumes the consent of the parties; it is not a side deal between the court and a nonlitigant. Bennett had an interest in challenging the validity of the 2008 amendment, and the prosecution of his petition was necessary to protect that interest. Accordingly, we will reverse the judgment.

I. BACKGROUND

William B. Hugill died in 2011. His wife, Janice, had passed away in 1996.¹ In 1990, the couple created an *inter vivos* trust appointing William as trustee. That instrument provided for the establishment of two separate trusts as soon as one spouse died—the decedent’s irrevocable trust, and the survivor’s amendable and revocable trust. The trust further provided that, upon the death of the surviving spouse, both trusts would terminate. After disbursement of certain personal property, 30 percent of the remainder of the survivor’s trust would be distributed in equal shares to William’s four children, Michael, Patrick, Marjorie, and Holly. The other 70 percent would be set aside in a grandchildren’s trust for college educations, with the remainder of that subtrust to be divided among William’s children (30 percent) and grandchildren (70 percent) after the youngest grandchild turned 26. The document contained a no contest provision.

¹ Because this case involves several family members, many sharing the same surname, we will use first names to avoid confusion, intending no familiarity or disrespect.

In 1997, William amended the survivor's trust, designating a fixed \$900,000 to fund the grandchildren's trust, to be distributed as stated in the 1990 trust instrument. He allocated the estate residue among his four children, with 30 percent to be disbursed to Patrick, 30 percent to be disbursed to Marjorie, 5 percent to be disbursed to Michael, and 35 percent to be disbursed to Holly.

In 2000, William amended the survivor's trust by eliminating Michael's 5 percent residual share and increasing Patrick's share to 35 percent. In 2001, William removed Michael's children Kathleen and Cameron as beneficiaries of the grandchildren's trust, but he restored their status one year later. In 2005 William again removed Cameron as a grandchildren's trust beneficiary. He also divided the \$900,000 grandchildren's trust into equal shares for his six other grandchildren, to be distributed—half to the grandchild and half to the grandchild's parent who is William's child—when each grandchild turned 26. As a result, under the 2005 amendment each named grandchild would receive \$75,000 (one half of \$150,000). The trustee was vested with discretion to disburse sums from each grandchild's share to pay for that grandchild's higher education before age 26.

William designated Marjorie as first successor trustee in 1997, with Michael, Holly, and Patrick (in that order) designated as successor trustees in the event Marjorie was unable to serve. William never changed Marjorie's designation as first successor trustee, but he removed Michael from the list of successor trustees in 2001.

William executed a final amendment to the survivor's trust on June 5, 2008, two weeks after he underwent surgery to remove a subdural hematoma. The 2008 amendment restored Michael as a trust beneficiary on equal footing with his siblings, and it restored Cameron as a grandchildren's trust beneficiary on equal footing with his sister and cousins. Under the amendment, Michael was designated to succeed William as trustee, with Marjorie, Holly, and Patrick (in that order) designated as successor trustees. By adding Cameron as a grandchildren's trust beneficiary, the 2008 amendment reduced each grandchild's fixed disbursement under the 2005 amendment from \$75,000 to \$64,286, a difference of \$10,714.

In late 2009, William resigned as trustee and Michael became successor trustee. According to Michael's first account and report filed May 1, 2012, when William died in 2011 the survivor's trust held assets exceeding \$4.2 million.

II. TRIAL COURT PROCEEDING

Following Michael's first accounting, Holly's son Bennett filed a petition under Probate Code section 17200² to determine the validity of the June 5, 2008 amendment to the survivor's trust. Bennett alleged that William lacked testamentary capacity and was unduly influenced by Michael in executing the 2008 amendment, and that Michael unduly benefited from the disposition of the trust estate and from his appointment as successor trustee. The petition alleged further that Michael had deprived William of proper medical care after William fell in 2009, and in 2010 when William contracted pneumonia. The petition sought a determination that the 2008 amendment was void due to lack of testamentary capacity and undue influence.

In preparation for trial, Michael moved in limine to exclude all evidence supporting a challenge to the residue of the survivor's trust estate. Michael argued that Bennett, as a grandchild, was not a beneficiary to the trust residue, and thus had no standing to challenge the residue. Bennett argued that as a beneficiary of the trust, he was entitled to challenge the validity of the 2008 amendment in its entirety under section 17200.

At argument held on the first day of trial, Michael identified Bennett's interest in the 2008 amendment as \$10,700. He argued that Bennett's interest was not an interest in the residuary estate so it did not provide him with standing to challenge the residue, and that if \$10,000 "is what would be holding up the Court in terms of a full dismissal," he was certain the residuary beneficiaries who had formally objected to Bennett's petition³ would pay the difference to Bennett to end the litigation, subject to the right to recover their attorney's fees. Citing section 17202, which authorizes a court to dismiss a section 17200 petition "if it appears that the proceeding is not reasonably necessary for the protection of the interests of the trustee or beneficiary," Michael argued that Bennett should not be allowed to burden the residue with litigation.

The court expressed its view that Bennett could contest the 2008 amendment because that instrument reduced his interest in the grandchildren's subtrust. The court was uncertain whether, if Bennett were to prevail, the remedy would be to invalidate only the grandchildren's subtrust in which Bennett held an interest (resulting in Cameron losing his one-seventh interest in that subtrust) or the entire instrument. At that point Michael told the court that "Cameron will waive his one-seventh interest in the grandchildren's

² Unspecified statutory references are to the Probate Code. Unspecified subdivisions are to section 17200.

³ Patrick and Marjorie filed an objection to the petition, denying that William lacked testamentary capacity or was unduly influenced when he executed the 2008 amendment.

trust” to dispose of the case in its entirety. Bennett rejoined that Michael should not be able to manipulate standing at the time of trial, and that the challenge to the 2008 amendment affected not only Bennett’s own pecuniary interest in the grandchildren’s trust, but the validity of the entire instrument.

Emphasizing that the law disfavors will contests, the trial court stated its intention to dismiss the petition under section 17202 if Cameron would agree to relinquish his interest in the grandchildren’s trust, because that relinquishment would eliminate Bennett’s standing by restoring his interest to what it was before the 2008 amendment. The court explained: “[I]f Cameron gave up his share because he wants to save his family not just the expense but so everybody can get along because that’s the most important thing in a family—and I think that’s why will contests are disfavored, correct, in probate? [¶] . . . [¶] Then there is no harm to vet it and everybody can live in harmony [¶] . . . [¶] So isn’t that what the policy of the law is, if will contests are disfavored?”

Bennett disagreed, arguing “When there’s undue influence and when there’s lack of testamentary capacity, when there is elder abuse, will contests, trust contests and elder abuse complaints are very much favored by the courts and the [L]egislature.” The court countered: “Except that none of the other beneficiaries believe that that is what happened, if they didn’t themselves raise the issue in a petition.” To which Bennett responded: “And you don’t need more than one beneficiary to raise an issue. If you have four beneficiaries . . . [y]ou don’t need two, three or four of four. You don’t need a majority to do a trust or will contest. You need one beneficiary. Bennett is the one beneficiary . . . and he is attacking the instrument that impacted his beneficial interest because he believes it was procured against a 90-plus-year-old man in violation of applicable law.”

The court further described its reasoning: “I just think that the courts should want to do what’s in everybody’s best interest. And we’re an equitable court. And so I think if the family wanted to get this over and done with and defeat standing, that’s their prerogative. [¶] . . . [¶] And if a family can live in harmony and a person doesn’t lose whatever they thought they were going to lose and nobody else in the family objects to the issue, then that should be the end of it. That should be what happens.” The court continued, “You know where I stand in terms of standing”—that “[i]f Cameron’s going [to] come in here and say that he’s given up his interest so that Bennett’s not affected in any negative way, then I would find that there’s no standing because his pecuniary interest is not affected.” The court nonetheless invited briefing on the issue and on whether, if Cameron would not disclaim, Bennett’s challenge would extend to the entire trust, or only to the grandchildren’s trust.

Cameron signed a declaration disclaiming his interest in the grandchildren's trust conditioned on the entry of a final order dismissing the petition, and Michael filed that declaration with a memorandum arguing that the petition should be dismissed in its entirety under section 17202 because Cameron's disclaimer eliminated Bennett's standing to challenge the 2008 amendment. Bennett's memorandum argued that his beneficiary status conferred standing to challenge the 2008 amendment in its entirety, and that section 17202 should not be used to defeat his challenge in light of public policy against undue influence and elder abuse.

When the court reconvened, Bennett pressed that public policy favored a trial on the merits of his undue influence and lack of capacity claims. But the court viewed Cameron's disclaimer as a settlement of the estate resulting in the elimination of Bennett's pecuniary interest in a challenge to the 2008 amendment: "Cameron wants peace in his family. He is even offering to give up his portion so that Bennett's portion of his interest is not in any way impaired. There's a settlement of this matter in that instance." The court found "that Cameron has agreed to give up his portion of whatever he might inherit, so that Bennett's interest in the grandchildren's trust is not negatively affected; therefore 17202 applies." The judgment reflected a dismissal under section 17202.

III. DISCUSSION

A. *Standard of Review*

Section 17202 provides that "[t]he court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the trustee or beneficiary." No court has addressed the proper standard of review of a dismissal under section 17202, although one court has applied the abuse of discretion standard to a dismissal under section 17202's predecessor statute, former section 1138.5. (*Copley v. Copley* (1978) 80 Cal.App.3d 97, 106 [145 Cal.Rptr. 437].) Being permissive and not mandatory, a dismissal under section 17202 invokes the discretion of the trial court. (Cf. *Schwartz v. Labow* (2008) 164 Cal.App.4th 417, 427 [78 Cal.Rptr.3d 838] ["[T]he probate court has wide, express powers to 'make any orders and take any other action necessary or proper to dispose of the matters presented' by the section 17200 petition. (§ 17206.)"].) Accordingly, we will apply the abuse of discretion standard to the trial court's assessment of the interests of the trustee or beneficiary under section 17202. However the interpretation and application of that statute is a matter for our independent review. (*International Alliance of Theatrical Stage Employees, etc. v. Laughon* (2004) 118 Cal.App.4th 1380, 1387 [14 Cal.Rptr.3d 341].)

“ ‘The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown.’ ” (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355 [188 Cal.Rptr. 873, 657 P.2d 365].) “The scope of discretion always resides in the particular law being applied, i.e., in the ‘legal principles governing the subject of [the] action’ Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an ‘abuse’ of discretion.” (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297 [255 Cal.Rptr. 704].)

B. *Standing*

Bennett argues that he has standing to contest the 2008 amendment both as a vested beneficiary of the grandchildren’s trust and as a contingent beneficiary and successor in interest to his mother Holly’s portion of the trust residue. He argues that as a beneficiary section 17200, subdivisions (a) (providing that a trust beneficiary may petition the court “concerning the internal affairs of the trust”), (b)(1) (proceedings to address construction of the trust instrument), (b)(3) (proceedings to determine the validity of a trust provision), (b)(10) (proceedings to appoint or remove a trustee), and (b)(12) (proceedings to redress a breach of trust) give him a statutory right to test the validity of the 2008 amendment.

■ Subdivision (a) provides that “a trustee or beneficiary of a trust may petition the court under this chapter concerning the internal affairs of the trust or to determine the existence of the trust.” Subdivision (b) identifies several types of proceedings “concerning the internal affairs of the trust.” On its face, section 17200 allows Bennett, as a vested beneficiary of the grandchildren’s trust,⁴ to file a petition challenging the validity of the 2008 amendment. (§ 24, subd. (c); see *Estate of Bowles* (2008) 169 Cal.App.4th 684, 699 [87 Cal.Rptr.3d 122].) In our view, the petition falls under subdivision (a) concerning the existence of the trust, and under subdivisions (b)(1), (b)(3), and (b)(13) (approving or directing the modification or termination of the trust).

Bennett’s petition, however, is subject to dismissal under section 17202, “if it appears that the proceeding is not reasonably necessary for the protection of the interests of the trustee or beneficiary.” (§ 17202.) Bennett had a

⁴ We reject Bennett’s argument that he is a contingent beneficiary to Holly’s interest in the trust residue. Holly’s interest in the trust passed to her in its entirety upon William’s death and is now vested. Whatever interest Bennett may or may not have in Holly’s property at the time of her death is not yet known and not governed by the trust.

pecuniary interest in the grandchildren's trust that would have been protected by a successful undue influence or lack of capacity challenge to the 2008 amendment (cf. *Lickter v. Lickter* (2010) 189 Cal.App.4th 712, 728 [118 Cal.Rptr.3d 123] (*Lickter*) [beneficiary challenging testamentary instrument must have an interest "that may be impaired, defeated, or benefited by the proceeding at issue"]; *Jay v. Superior Court* (1970) 10 Cal.App.3d 754, 758 [89 Cal.Rptr. 466] [a beneficiary under a will may contest a later will or codicil "if his pecuniary interest in the devolution of the property would . . . be affected or impaired by the later will or codicil"]) until Cameron's disclaimer eliminated any potential financial impact on Bennett's share of the subtrust. Thus, to determine whether the trial court's dismissal was appropriate, we turn to whether Cameron's disclaimer was properly accepted by the trial court.

C. The Disclaimer and Dismissal

Bennett argues that the trial court's dismissal of his petition was contrary to public policy. According to Bennett, the trial court's deprivation of his standing has shielded Michael from any accountability and essentially sanctioned an estate plan executed by unlawful means. Bennett argues that public policy favors testamentary contests involving credible allegations of undue influence and lack of capacity, compelling courts to adjudicate, not dismiss, those contests. In support of his position that this policy holds true even when a majority of the beneficiaries do not support the contest, Bennett cites *Estate of Lowrie* (2004) 118 Cal.App.4th 220 [12 Cal.Rptr.3d 828] (*Lowrie*). The *Lowrie* court noted that standing under the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.) must be analyzed in a manner that induces protection of the victimized, and must be interpreted to deter, not encourage, such abuse, so that abusers who gain control of an estate cannot use a restrictive interpretation of standing to avoid accountability. (*Lowrie*, at pp. 230–231.) Michael counters Bennett's public policy argument by noting that Bennett had not filed an elder abuse claim, and he lacks standing to do so. Michael refers us to the *Lickter* court's conclusion that a court does not have discretion "to find standing in order to further the public policy in favor of encouraging people to report elder abuse and file elder abuse lawsuits." (*Lickter, supra*, 189 Cal.App.4th at p. 730.)

As we will explain, the trial court's acceptance of Cameron's conditional disclaimer, and the resulting dismissal under section 17202, was contrary to public policy and an abuse of discretion. The trial court was of the view that it could invite Cameron's disclaimer because will contests are disfavored, and that Cameron's disclaimer would amount to a settlement. Neither is correct.

■ The notion that will contests are disfavored is grounded in the same public policies supporting no contest provisions—"the public policies of

discouraging litigation and giving effect to the purposes expressed by the testator.” (*Estate of Black* (1984) 160 Cal.App.3d 582, 586–587 [206 Cal.Rptr. 663]; see also *Estate of Kaila* (2001) 94 Cal.App.4th 1122, 1128 [114 Cal.Rptr.2d 865].) But the public policy disfavoring litigation does not give the trial court the authority or discretion to dismiss a beneficiary’s petition. Our Supreme Court has long recognized that any policy disfavoring will contests is countered by “‘the right of a citizen to have his claim determined by law.’” (*Lobb v. Brown* (1929) 208 Cal. 476, 490–491 [281 P. 1010] (*Lobb*); see also *In re Estate of Hite* (1909) 155 Cal. 436, 439 [101 P. 443] [“Public policy dictates that the courts of the land should be open, upon even terms, to all suitors.”].) In strictly construing a forfeiture clause in an undue influence will contest, the Supreme Court in *Lobb* recognized that “public policy demands that full and complete opportunity should be given to all interested parties to test the validity of such a testamentary document, not only to protect that which may be rightfully and legally theirs, but also to preserve the wishes and desires of the testatrix against designing persons seeking to take advantage of her age and infirmities which are the usual result of advanced years.” (*Lobb*, at pp. 491–492.)

The public policy recognized by the Supreme Court in *Lobb* resonated more recently in a 2007 California Law Revision Commission report examining the enforceability of no contest clauses. The commission reported that no contest clauses can be used to shield fraud or undue influence from judicial review, and it recognized that “the policy of effectuating the transferor’s intentions” would be undercut if a challenge to a testator’s capacity could be thwarted by a no contest clause. (Recommendation: Revision of No Contest Clause Statute (Jan. 2008) 37 Cal. Law Revision Com. Rep. (2007) pp. 362, 370–371.) It recommended enacting a probable cause exception to a no contest clause’s enforceability for undue influence type challenges. (*Id.* at p. 362.)

Here, trial commenced with Bennett, a vested beneficiary having a pecuniary interest in the proceedings, ready to prosecute his undue influence and lack of capacity claims. As the petitioner, Bennett had weighed the risk of a loss (including, as Michael had made clear in his settlement conference statement, a forfeiture challenge to Bennett’s and Holly’s interests in William’s estate) against his right to have a court determine whether his grandfather’s testamentary intent was reflected in the 2008 amendment. In light of long-held policies of effectuating a testator’s intent and dissuading elder abuse, we conclude that the trial court abused its discretion by inviting a dismissal of the action and accepting Cameron’s conditional disclaimer with the stated objective of terminating the litigation.

Further, Cameron's disclaimer was necessarily limited to Cameron's interest in the 2008 amendment. Thus, the trial court's dismissal had the incongruous result of implementing the 2008 amendment with respect to Michael and his siblings but the 2005 amendment with respect to Cameron and to William's other grandchildren.⁵

■ We acknowledge the competing policy supporting will contest settlements "in the interest of the preservation of family ties, the adjustment of equities, and avoiding nonproductive waste of the assets of the estate." (*Estate of Schuster* (1984) 163 Cal.App.3d 337, 342 [209 Cal.Rptr. 289].) However, the trial court's interpretation of Cameron's disclaimer as a *settlement* was incorrect. A settlement is an agreement among adverse parties, and Bennett did not agree to settle the case. The court's acceptance of Cameron's conditional disclaimer did not preserve Bennett's family ties or promote equities vis-à-vis Bennett. By thwarting Bennett's petition, Cameron's \$64,286 disclaimer protected his father's one-quarter interest in the residue, an interest that approximated \$825,000 as of William's death. The disclaimer also shielded Michael from having to defend against allegations affecting his interest in and management of William's estate.⁶

■ Under the facts of this case, the court abused its discretion by dismissing the petition under section 17202 as not reasonably necessary for the protection of Bennett's interest. Setting aside Cameron's disclaimer, Bennett, a vested beneficiary with a pecuniary interest in the proceeding, was deprived of the right to challenge the 2008 amendment on undue influence and lack of capacity grounds. (See *Jay v. Superior Court*, *supra*, 10 Cal.App.3d at p. 758.) We conclude that Bennett was entitled to a trial on his petition, and that the court abused its discretion by promoting a dismissal which deprived him of his interest in a trial. We will remand the matter for the trial court to strike Cameron's disclaimer and resume proceedings on Bennett's claims.

⁵ The trust, as it existed after the 2005 amendment, excluded Michael and Cameron as beneficiaries, and had Marjorie serving as first successor trustee. The 2008 amendment, at issue here, added Michael and Cameron as beneficiaries by reducing the interests of the grandchildren's trust and residuary beneficiaries, and named Michael instead of Marjorie as first successor trustee.

⁶ The parties disagree as to whether Michael would be required to resign as trustee should Bennett prevail on his petition. In postargument letters, Michael argues that his appointment as successor trustee would not be affected by Bennett's petition because he has been serving as trustee under a 2009 successor trustee acceptance executed after William resigned as trustee, and Bennett's petition had not alleged that William's resignation or Michael's acceptance were invalid. Bennett argues that William's resignation did not amend the trust, and that the 2001 amendment would govern the succession of trustees.

[REDACTED]

In light of that disposition, we do not address Bennett's other grounds for reversal, including the alleged error flowing from the court's interlineation on the judgment prepared by Michael's counsel.

IV. DISPOSITION

The judgment is reversed, and the matter is remanded for further proceedings consistent with this opinion.

Appellant is entitled to costs on appeal.

Rushing, P. J., and Márquez, J., concurred.

Respondent's petition for review by the Supreme Court was denied September 21, 2016, S236676.

[No. F072147. Fifth Dist. July 14, 2016.]

CITY OF SELMA, Plaintiff and Appellant, v.
FRESNO COUNTY LOCAL AGENCY FORMATION COMMISSION,
Defendant and Respondent;
CITY OF KINGSBURG, Real Party in Interest and Respondent.

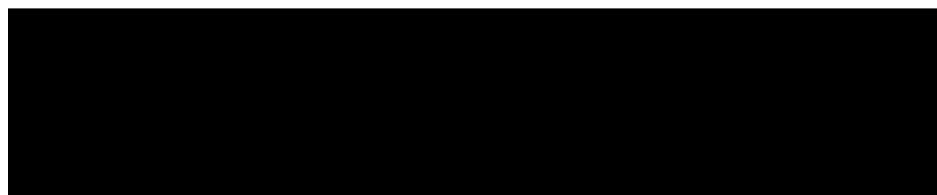
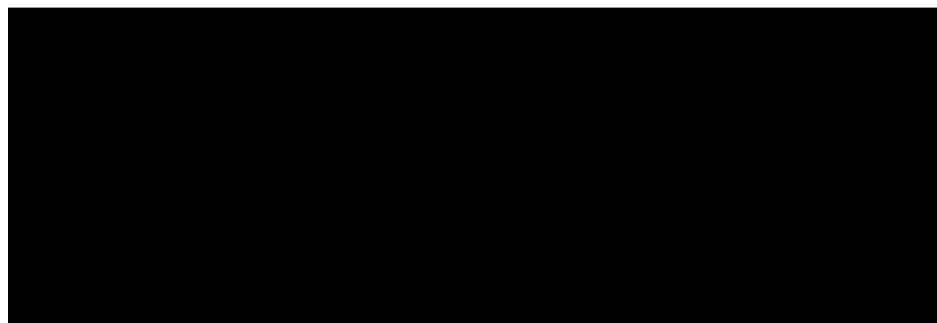
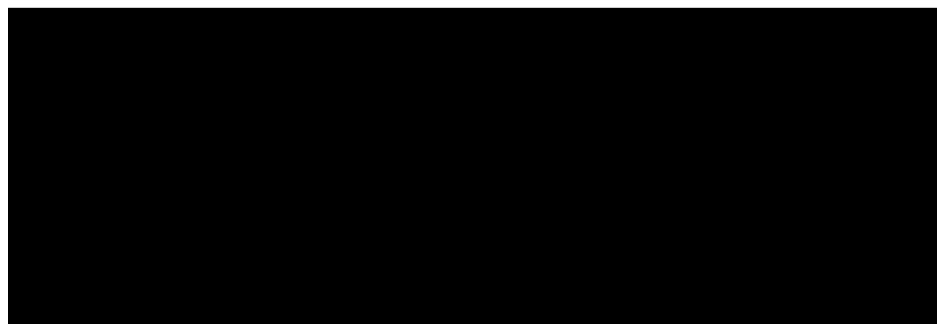
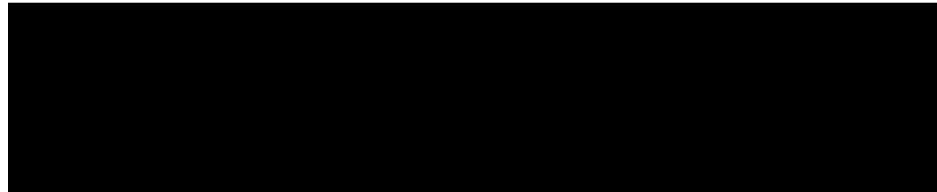
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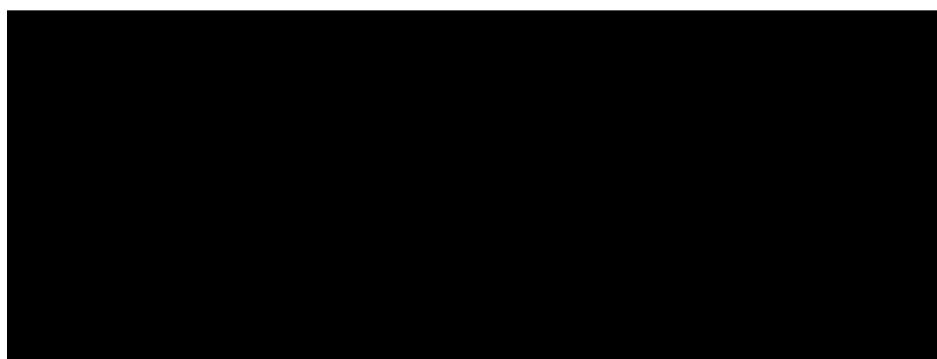
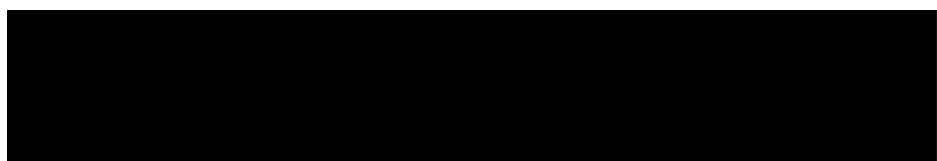
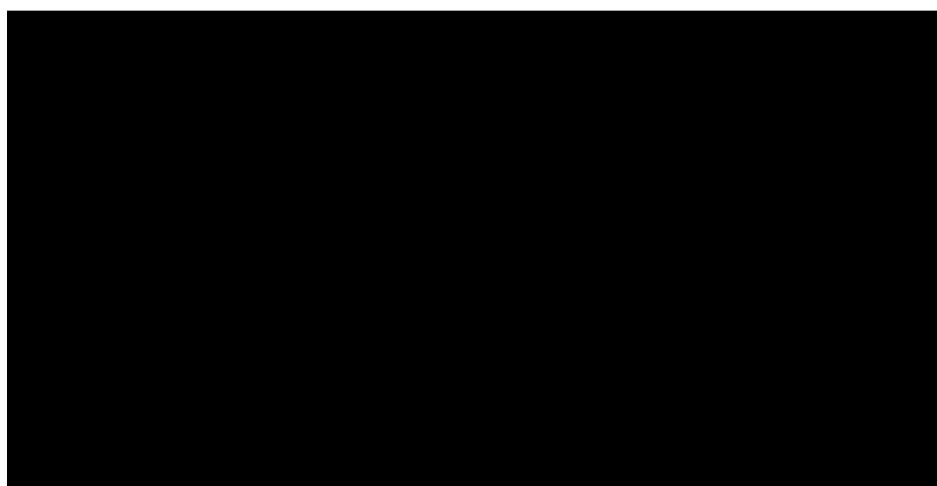
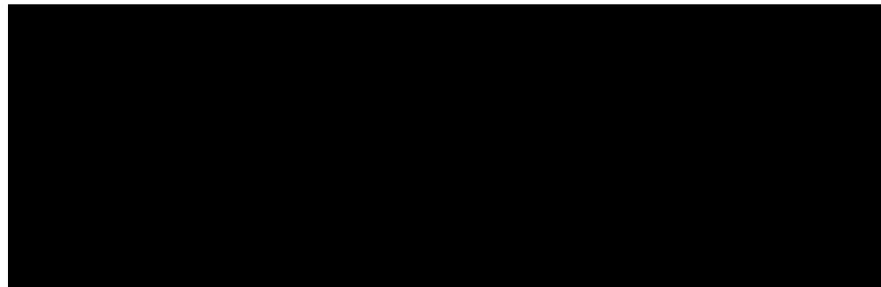
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COUNSEL

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Baker, Manock & Jensen and Kenneth J. Price for Defendant and Respondent.

Kahn, Soares & Conway, Rissa A. Stuart and Michael J. Noland for Real Party in Interest and Respondent.

OPINION

PEÑA, J.—

INTRODUCTION

When a local agency formation commission sets a public hearing on a reorganization proposal and thereafter continues the hearing date beyond the 70-day limitation for continuances under Government Code section 56666, subdivision (a), is the approval of the reorganization proposal by the commission void because it violated a mandatory provision? We conclude the 70-day limitation is a directory rather than a mandatory provision. As a result, we hold the violation of the 70-day limitation in this case did not affect the validity of the commission's actions taken at the continued hearing.

FACTS

1. *The Project*

In 2012, the City of Kingsburg (Kingsburg) studied a proposal to annex approximately 430 acres of land in Fresno County (the Annexation Territory).

The Annexation Territory included 350 acres that had been developed with industrial/commercial uses, 52 undeveloped acres, and approximately 28 acres of street rights-of-way. The Annexation Territory is home to at least three major facilities, including a glass manufacturing plant run by Guardian Industries Corp., a grape processing facility run by Vie-Del Company, and a raisin processing plant run by Sun-Maid Growers of California.

In addition to annexing the land into Kingsburg, the project also involved detaching portions of the Annexation Territory from the Fresno County Fire Protection District (FCFPD), the Consolidated Irrigation District, and the Kings River Conservation District. The project also involved annexing portions of the Annexation Territory into the Selma-Kingsburg-Fowler County Sanitation District. Finally, the project included rezoning approximately 183 acres as “Highway Commercial” and “Light Industrial.”

2. *California Environmental Quality Act¹ Review*

Kingsburg prepared and circulated a combined initial study and mitigated negative declaration for the annexation project (MND). (See Cal. Code Regs., tit. 14, §§ 15365, 15369.5.)² Below, we discuss certain portions of the MND in detail along with the appellate issues to which they pertain.

On September 5, 2012, the Kingsburg City Council certified the MND.

3. *Local Agency Formation Commission Proceedings*

■ Every county in California has a local agency formation commission. (Gov. Code, § 56325.)³ These commissions oversee local agency boundary changes, including municipal annexations, under the auspices of the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (hereafter Reorganization Act). (§ 56000 et seq.; *Placer County Local Agency Formation Com. v. Nevada County Local Agency Formation Com.* (2006) 135 Cal.App.4th 793, 797 [37 Cal.Rptr.3d 729]; see § 56375.)

When Kingsburg certified the MND on September 5, 2012, it also requested that the Fresno County Local Agency Formation Commission (LAFCo)⁴ initiate proceedings to approve the annexation. On October 22, 2012, Kingsburg submitted to LAFCo application materials for approval of the annexation.

¹ Public Resources Code section 21000 et seq. (CEQA).

² The Guidelines for the Implementation of the California Environmental Quality Act (Cal. Code Regs., tit. 14, § 15000 et seq.) will hereinafter be referred to as the “CEQA Guidelines.”

³ All undesignated statutory references are to the Government Code.

⁴ “We shall hereafter refer to that commission, and to such commissions generally, as LAFC[o]; the context will make clear which meaning is intended.” (*City of Santa Cruz v. Local Agency Formation Com.* (1978) 76 Cal.App.3d 381, 386 [142 Cal.Rptr. 873].)

LAFCo rejected the application since it had relied on a previous application from nine years prior. LAFCo requested Kingsburg submit a new application, and Kingsburg did so in November 2012. The application indicated no change was being proposed to the provision of domestic water for the area.

Kingsburg prepared a service plan, describing how certain services would be provided to the Annexation Territory. (See § 56653.) Kingsburg's service plan is dated July 2012. However, in an e-mail correspondence on November 2, 2012, LAFCo staff informed Kingsburg staff that a service plan was required. Kingsburg staff responded by asking what a service plan was, and they were provided an exemplar by LAFCo on November 8, 2012. This information suggests the service plan was not prepared in July 2012, but rather sometime on or after November 8, 2012.

On November 15, 2012, LAFCo's Executive Officer Jeff Witte sent a notice and request for comment to several local agencies. (See § 56663.) The notice indicated: "LAFCo can not [sic] take any further action on this resolution of application for 10 days following this notice and request for comments. [¶] If your agency files a written request for a hearing during this 10-day period, LAFCo must notice and hear this proposal at a public hearing. If no written request is filed by your agency, the Commission may proceed without notice and hearing if all required conditions pursuant to state law have been satisfied (Gov Code Sec 56663 (b))."

On November 21, 2012, the City of Selma (Selma) transmitted through counsel a written demand for notice and hearing "[p]ursuant to . . . § 56663(b)" to Witte. The demand referenced a November 15, 2012, notice from Witte to Selma. Selma's letter demanded LAFCo only make determinations concerning Kingsburg's application after notice and a hearing. The demand also referenced CEQA litigation Selma had initiated against Kingsburg over the annexation project. The demand raised the possibility a court would issue an injunction preventing LAFCo from further processing Kingsburg's application.

On November 28, 2012, LAFCo's counsel provided a written response. The letter indicated Witte believed LAFCo had an obligation to move forward with Kingsburg's application despite the pendency of the CEQA litigation. The letter informed Selma that Witte anticipated Kingsburg's application would be considered by LAFCo during its January 9, 2013, meeting, rather than on December 5, 2012.

On December 4, 2012, LAFCo informed Kingsburg in writing its application was incomplete. The letter indicated that in order for a certificate of

filing (§ 56658, subds. (f)–(g)) to issue and a hearing to be scheduled, Kingsburg needed to provide a “Signed Legal Indemnity” and a letter from the Selma-Kingsburg-Fowler County Sanitation District indicating its willingness and ability to serve the Annexation Territory.

On December 10, 2012, LAFCo requested additional documentation from Kingsburg.

On March 18, 2013, Witte sent a document to Kingsburg with the heading “CERTIFICATE OF FILING.” The body of the document stated:

“This notice certifies that on March 18, 2013, pursuant to Section 56658(g) . . . , the proposed ‘Guardian/Sun-Maid Reorganization’ for the City of Kingsburg was accepted for filing with the Local Agency Formation Commission.

“The time, date and place for the Local Agency Formation Commission’s consideration of the subject proposal is 1:30 p.m., Wednesday, April 10, 2013, in Room 301, Hall of Records, Tulare and ‘M’ Streets, Fresno.”

A notice of public hearing was published in The Business Journal on March 18, 2013. The notice indicated that on April 10, 2013, at 1:30 p.m., LAFCo would be considering Kingsburg’s requested annexation.

In a letter dated April 10, 2013, Guardian Industries Corp. requested LAFCo postpone the hearing on the annexation application. The letter indicated that “[w]hile Guardian has not proposed any specific project on the Guardian Property, to remain competitive in the glass manufacturing business, Guardian from time to time is required to perform modifications to its facility, which usually requires discretionary permits from the applicable local agency. Indeed, [a LAFCo] Staff Report recognizes the strong possibility of future expansion”

That same day, LAFCo continued the hearing on the reorganization “to a date uncertain to allow time for . . . Kingsburg and the [FCFPD] to negotiate a transition agreement consistent with LAFCo Policy 102-04-041.”

A LAFCo executive officer’s report, also dated April 10, 2013, indicated that on “March 29, 2013, [Kingsburg] informed LAFCo Executive Officer that [Kingsburg] intends to provide an addendum to the certified Mitigated Negative Declaration addressing the lack of a fire transition agreement between the [FCFPD] and [Kingsburg].”

The addendum to the MND appears in the administrative record. The addendum contains the text “Draft: 040113” at the top, suggesting it was

being worked on in early April 2013. The addendum references a transition agreement that had been in place between Kingsburg and FCFPD. The addendum indicated the transition agreement—which concerned the transfer of certain general ad valorem real property tax revenue affected by annexations—had expired and no new agreement was in place. The addendum asserts the absence of a transition agreement “did not result in any new or increased impacts to fire protection services for the Territory after annexation. Additionally, the . . . Kingsburg Fire Department has sufficient capacity to service [the] Territory with both fire and emergency services.”

In a document entitled “LAFCo Notes,” Witte commented: “I am concerned that . . . Kingsburg originally said that there were no projects forthcoming for Guardian Industries or Sun Maid, and I am now hearing from some connections in the construction industry that Sun Maid is looking at a major project.”

An executive officer’s report stated the April 10, 2013, hearing had been “continued to a date uncertain (with a target date of June 5, 2013) to allow time” for a transition agreement to be negotiated. However, as of June 5, 2013, the parties were still in negotiations on a transition agreement. According to the agenda for the June 5, 2013, LAFCo meeting, the commission was given an update concerning the Kingsburg annexation matter. The June 5, 2013, executive officer’s report indicated LAFCo staff intended the transition agreement issue, among others, to be “resolved in time for the August 7, 2013 hearing.”

On June 24, 2013, LAFCo published in The Business Journal a notice of a public hearing on the annexation for July 17, 2013.

On July 15, 2013, Selma transmitted a letter to LAFCo objecting to the notice of hearing for the July 17, 2013, meeting. Selma asserted that under section 56666, subdivision (a), LAFCo could not continue the hearing to July 17, 2013, because it was more than 70 days after the originally noticed date of April 10, 2013.

LAFCo’s counsel responded the 70-day limitation in section 56666, subdivision (a) was directory rather than mandatory pursuant to section 56106.

On the date of the hearing, Kingsburg and FCFPD advised LAFCo they were finalizing a transition agreement. After the public hearing, LAFCo then determined the CEQA documents prepared by Kingsburg were legally adequate and that the annexation was consistent with LAFCo’s standards and the Reorganization Act.

LAFCo approved the annexation, subject to several conditions.

On July 24, 2013, LAFCo filed a notice of determination. (Pub. Resources Code, § 21152.)

Selma filed a writ of mandate challenging LAFCo's approval of the annexation. The trial court denied the writ and Selma appeals.

DISCUSSION

I. *The 70-day Time Limit in Section 56666, Subdivision (a) Is Directory, Not Mandatory*

“Issues involving the interpretation and application of statutes are subject to de novo review.” (*Cequel III Communications I, LLC v. Local Agency Formation Com. of Nevada County* (2007) 149 Cal.App.4th 310, 317 [57 Cal.Rptr.3d 32].) Selma presents such an issue by arguing LAFCo violated the Reorganization Act by continuing the public hearing on the annexation for more than 70 days.

Section 56666, subdivision (a) provides: “The hearing shall be held by the commission upon the date and at the time and place specified. The hearing may be continued from time to time but not to exceed 70 days from the date specified in the original notice.”

LAFCo does not dispute the hearing was continued to a date more than 70 days after the date specified in the original notice.⁵ Instead, it contends the 70-day limitation is directory rather than mandatory.

■ “A statutory requirement may impose . . . a duty to act in a particular way, and yet failure to do so may not void the governmental action taken in violation of the duty. [Citations.] This distinction is generally expressed in terms of calling the duty ‘mandatory’ or ‘directory.’ [T]he “directory” or “mandatory” designation does not refer to whether a particular statutory requirement is “permissive” or “obligatory,” but instead simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates.’ ” (*In re Richard S.* (1991) 54 Cal.3d 857, 865 [2 Cal.Rptr.2d 2, 819 P.2d 843].)

⁵ The certificate of filing was issued on March 18, 2013.

A subsequently published notice set the hearing date at April 10, 2013. Thereafter, LAFCo continued the hearing “to a date uncertain to allow time for . . . Kingsburg and the [FCFPD] to negotiate a transition agreement.” Eventually the continued hearing was held on July 17, 2013, more than 70 days after April 10, 2013.

Section 56106⁶ provides: “Any provisions in this division governing the time within which an official or the commission is to act shall in all instances, except for notice requirements and the requirements of subdivision (h) of Section 56658 and subdivision (b) of Section 56895, be deemed directory, rather than mandatory.”

■ The meaning of this statute is clear. If a provision of the Reorganization Act meets three criteria, it is directory. First, the provision must “govern[] the time within which an official or the commission is to act.” (§ 56106.) Second, the provision must not be a “notice requirement[].” (*Ibid.*) Finally, the provision must not be a “requirement[] of subdivision (h) of Section 56658” or “subdivision (b) of Section 56895.” (*Ibid.*) If the provision satisfies these three conditions, it is directory and not mandatory.

A. *The 70-day Limitation Governs the Time Within Which the Commission Is to Act*

■ Section 56666, subdivision (a) “govern[s] the time within which . . . the commission is to act.” (§ 56106.) Specifically, it requires the commission to “act” by holding a continued hearing within 70 days from the date specified in the original notice. (§ 56666, subd. (a).)

■ Selma argues the provision does not govern the time within which LAFCo is to act; instead, it “sets outermost limitations for conducting the hearing.” Selma argues the subject matter of section 56666, subdivision (a) is the same as section 56658, subdivision (h), and neither statute has anything to do with the time in which LAFCo is to take action. But if that were true, why would section 56106 have to say that it applies to “provisions . . . governing the time within which an official or the commission is to act . . . *except for . . . the requirements of subdivision (h) of Section 56658*”? (§ 56106, *italics added.*) If subdivision (h) of section 56658 was not a provision governing the time within which a LAFCo is to act, then there would be no need for this exception. Thus, Selma’s interpretation would render language in section 56106 superfluous and we reject it. (See *Card v. Community Redevelopment Agency* (1976) 61 Cal.App.3d 570, 577 [131 Cal.Rptr. 153] [rejecting interpretation of statute because it rendered language in statute superfluous].)

B. *The 70-day Limitation Is Not a “Notice Requirement”*

■ The Reorganization Act does have several notice requirements. For example, section 56660 requires a LAFCo executive officer to give notice of

⁶ Effective January 1, 2015, section 56106 was amended to reference relettered subdivision (h) of section 56658. (Stats. 2014, ch. 112, § 3.) The parties cite to the current version of section 56106 rather than the version in effect in 2013. We will do the same.

any hearing by publication. Section 56661 requires a LAFCo to make notices available on its Web site if it has one. Section 56155 requires mailed notice to “be sent first class and deposited, postage prepaid, in the United States mails.”

However, section 56666, subdivision (a) is different. In relevant part, it permits continuation of a hearing “not to exceed 70 days from the date specified in the original notice.” (§ 56666, subd. (a).) This is a *scheduling* requirement for continued hearings, not a *notice requirement*.

Admittedly, the provision does contain the word “notice.” However, that mention can hardly be described as a notice *requirement*. The reference to “the original notice” does not articulate any requirement on the notice, but instead is used to describe the *time* requirement being imposed on *the scheduling of continued hearings*. To illustrate, imagine the statute said “the public hearing cannot be continued for more than 70 days from the date an application is filed with the LAFCo.” No one would call that an “application requirement.” Similarly, section 56666, subdivision (a) is not a notice requirement under section 56106.

C. *The 70-day Limitation Is Not a Requirement of Section 56658, Subdivision (h) or Section 56895, Subdivision (b)*

■ The 70-day limitation is not a requirement of either section 56658, subdivision (h) or section 56895, subdivision (b).⁷ Section 56658, subdivision (h) requires the public hearing to be initially scheduled for a date “not more than 90 days after issuance of the certificate of filing or after the application is deemed to have been accepted, whichever is earlier.”

Section 56666, subdivision (a)’s 70-day limitation on continued hearings is nowhere to be found in section 56658, subdivision (h). Selma emphasizes the last sentence of section 56658, subdivision (h), which reads: “Notwithstanding Section 56106, the date for conducting the hearing, as determined pursuant to this subdivision, is mandatory.” But that provision concerns the initial scheduling of the hearing, while an entirely different statute—section 56666, subdivision (a)—deals with scheduling continued hearings. The last sentence of section 56658, subdivision (h) applies, by its own terms, to hearing dates “determined pursuant to this subdivision.” The July 17, 2013, hearing date being challenged here was *not* determined pursuant to that subdivision (i.e., § 56658, subd. (h)). It was determined pursuant to section 56666, subdivision (a).

⁷ Section 56895 concerns written requests for a LAFCo to amend or reconsider its resolutions and is clearly inapplicable. (§ 56895, subd. (a).)

Selma also argues that since the 90-day limitation for initial hearings is mandatory, we should hold the 70-day limitation for continued hearings in section 56666 is also mandatory.⁸ There are several flaws with this reasoning.

First, the fact section 56658, subdivision (h) expressly excepts itself from section 56106 while section 56666, subdivision (a) does not, militates *against* finding the latter mandatory. The Legislature clearly knew how to except a provision from the reach of section 56106. The fact section 56666, subdivision (a) contains no such exception indicates the Legislature did not intend to remove it from the scope of section 56106. (Cf. *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 583 [80 Cal.Rptr.3d 83, 187 P.3d 934] [express exception in one statute shows Legislature knew how to enact exception but chose not do so in another statute].)

Second, Selma argues construing the language of section 56666, subdivision (a) as directory rather than mandatory would render section 56658, subdivision (h) meaningless. Selma observes that if the 70-day limit for continued hearings is directory, then a LAFCo could schedule an initial hearing within the 90-day time limit and then continue the hearing indefinitely into the future. But doing so would violate the statute. Even though section 56666, subdivision (a) is directory, it does not permit a LAFCo to act as described in Selma's hypothetical. “[T]he ‘directory’ or ‘mandatory’ designation does not refer to whether a particular statutory requirement is ‘permissive’ or ‘obligatory,’ but instead simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates.’” (*In re Richard S.*, *supra*, 54 Cal.3d at p. 865.) In other words, acting contrary to a directory statute is still a “‘failure to comply’” (*ibid.*) with the statute. Here, the 70-day limitation on continued hearings is obligatory in the sense that a LAFCo violates the Reorganization Act when it continues a hearing in excess of 70 days from the date specified in the original notice.⁹ We agree the statutory text indicates the Legislature wanted to avoid the “loophole” Selma describes. But “[n]o legislation pursues its purposes at all costs.” (*County of Sonoma v. Cohen* (2015) 235 Cal.App.4th 42, 48 [184 Cal.Rptr.3d 911].) While the Legislature requires a LAFCo to

⁸ In its reply brief, Selma claims it is not contending LAFCo's approval is void because it occurred at a continued hearing set more than 70 days after the original notice of hearing. Selma's primary argument is that no valid continuance occurred and, therefore, the purported July 17, 2013, hearing is governed by section 56658, subdivision (h). But Selma's opening brief also asserts LAFCo's action was void for failing to conform to section 56666, subdivision (a). Even Selma's reply brief goes on to argue that section 56666, subdivision (a) is mandatory.

⁹ In this respect, we disagree with LAFCo's assertion “directory” is synonymous with “discretionary.” We do not hold a LAFCo is permitted to continue a hearing beyond 70 days. Instead, we hold that when a LAFCo does continue a hearing beyond 70 days in violation of section 56666, subdivision (a), the consequence is not reversal of its determinations.

hold continued hearings within a particular time frame, it apparently did not want a failure to comply with that time frame requirement to result in invalidation of the LAFCo's determinations. (See § 56106.)

■ While this conclusion renders the 70-day limit relatively toothless, “[w]e are not free to rewrite the law simply because a literal interpretation may produce results of arguable utility.” (*Steven R. v. Superior Court* (2015) 241 Cal.App.4th 812, 821 [194 Cal.Rptr.3d 183].) We are not concerned with whether a law is toothless, so long as it is intentionally so. (See Code Civ. Proc., § 1858.)

Moreover, even if we agreed it does not make sense to have a *mandatory* 90-day limitation for the initial scheduling of a hearing and a *directory* 70-day limitation on the continuance of hearings, that conclusion would not change our decision. Even when a particular statutory distinction “makes not a whit of sense” (*CSX Transp., Inc. v. Alabama Dept. of Revenue* (2011) 562 U.S. 277, 295 [179 L.Ed.2d 37, 131 S.Ct. 1101]), courts must defer to the fact the Legislature “wrote the statute it wrote” (*Id.* at p. 296.)

D. *Selma’s Contention That No Continuance Occurred Is Unavailing**

* * * * *

II., III.*

* * * * *

DISPOSITION

Affirmed.

Kane, Acting P. J., and Detjen, J., concurring.

A petition for a rehearing was denied August 11, 2016, and the opinion was modified to read as printed above. Appellant’s petition for review by the Supreme Court was denied October 12, 2016, S236575.

*See footnote, *ante*, page 573.

[No. B256913. Second Dist., Div. Three. July 14, 2016.]

JANICE H., Plaintiff and Respondent, v.
696 NORTH ROBERTSON, LLC, Defendant and Appellant.

[REDACTED]

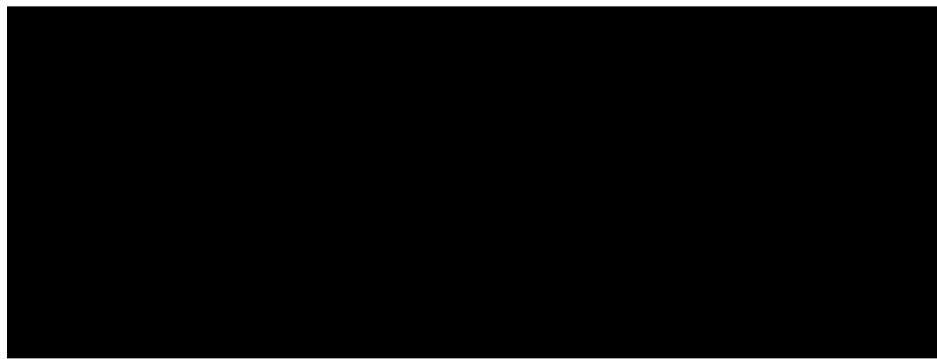
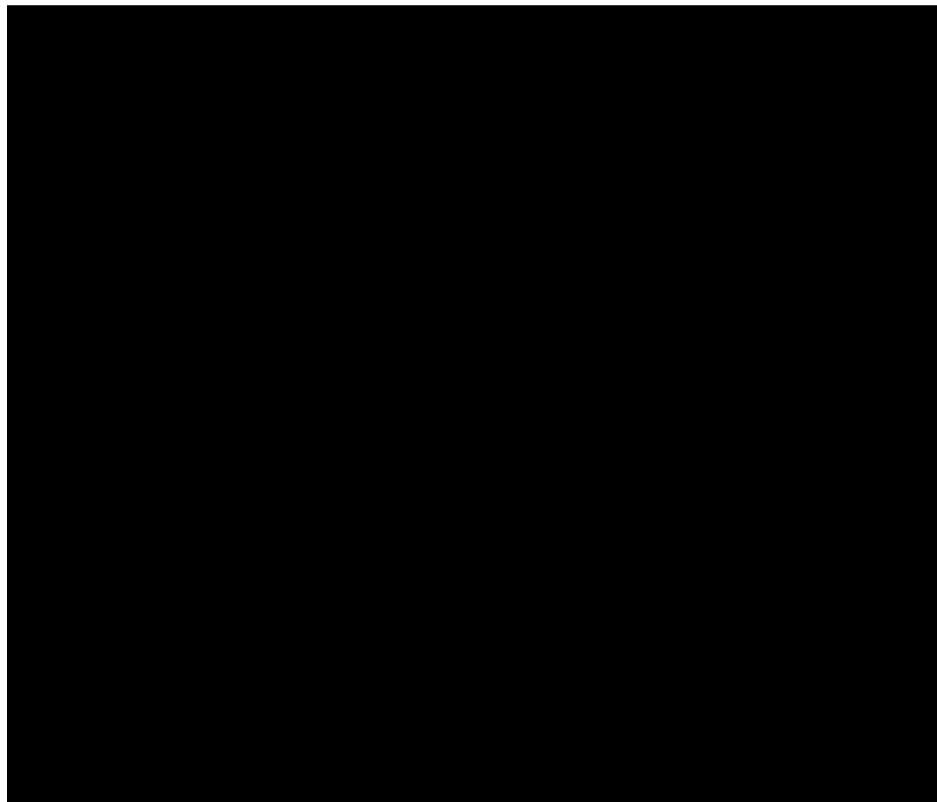
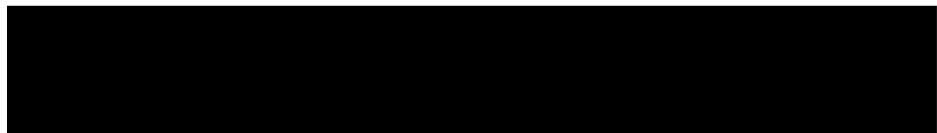
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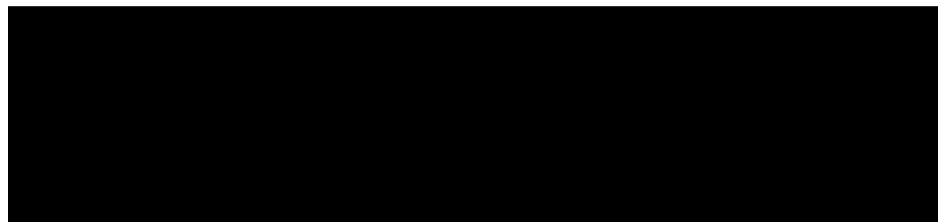
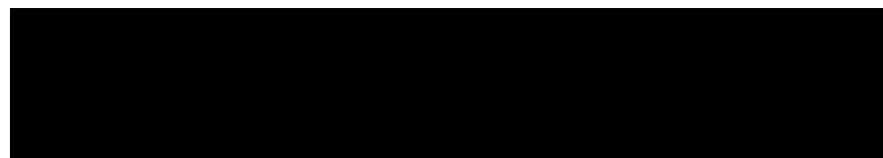
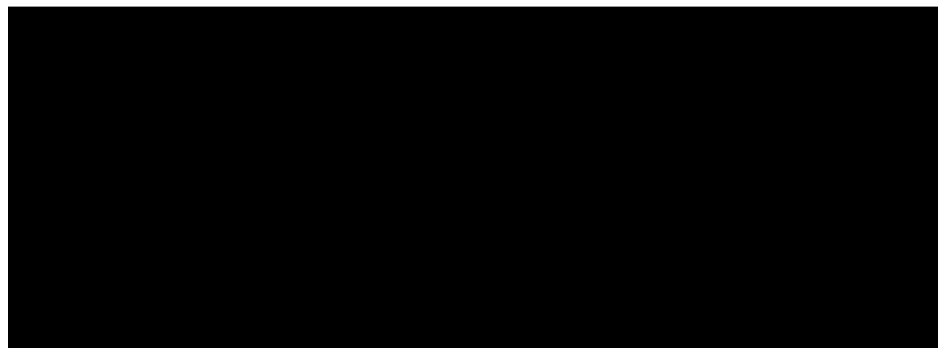
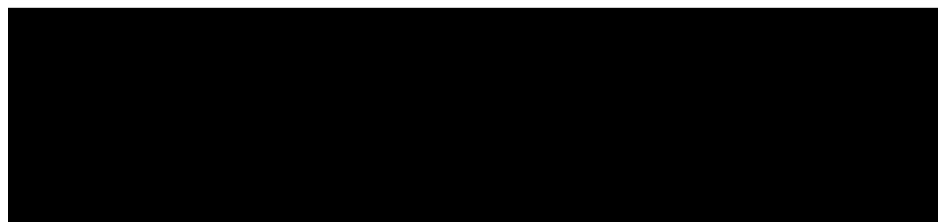
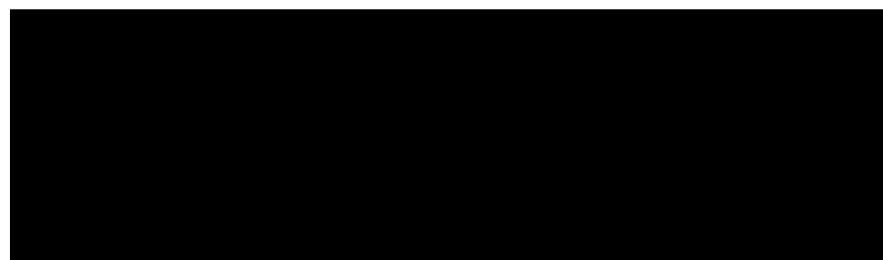
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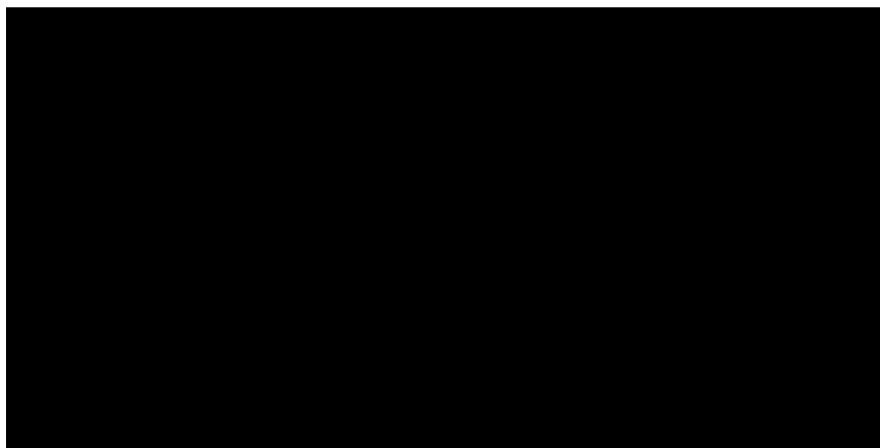
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OPINION**HOGUE, J.*—****INTRODUCTION**

Doing business as Here Lounge, defendant 696 North Robertson, LLC, owns and operates a successful West Hollywood bar and dance club. It appeals from a judgment based on the jury's award of \$5.42 million in compensatory damages to plaintiff Janice H. (Plaintiff) for failing to use reasonable care to protect her from a sexual assault in a unisex bathroom

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

stall. Here Lounge asserts it did not owe or breach a duty to Plaintiff and did not cause Plaintiff's injury. Here Lounge argues that the court abused its discretion by erroneously admitting irrelevant and prejudicial evidence. Lastly, Here Lounge contends that the jury's noneconomic damages award was excessive and punitive in nature. We affirm on all grounds.

FACTS AND PROCEDURAL BACKGROUND

On a Sunday in March 2009, Plaintiff drank with a friend at bars in Pasadena and then in West Hollywood. Towards the end of the night, the two were separated. Because they had talked about going to Here Lounge, Plaintiff went to Here Lounge to wait for her friend. At the time, Here Lounge was a very popular West Hollywood dance club and bar. On Sundays, as many as 500 people patronized the club. To attract customers, Here Lounge hired promoters who used social media to encourage attendance at special events with sexy themes. For example, the theme when Plaintiff visited the bar was "size matters." Here Lounge also fostered a sexually charged atmosphere by permitting bartenders to wear nothing but underwear.

Here Lounge designed the bar to have a common restroom area accessible to both men and women. On busy nights, a long line of patrons waited to use the restrooms. The restroom area included four adjacent lockable unisex restroom stalls, an open area behind the stalls with a urinal trough, and two larger Americans with Disabilities Act of 1990 (ADA; 42 U.S.C. § 12101 et seq.) compliant stalls off to one side. Unlike the four unisex stalls, the ADA stalls had lockable, full-length doors. Though each ADA stall was assigned a gender and the men's ADA stall was adjacent to the urinal trough, patrons treated the ADA stalls as unisex and used them interchangeably.

On a nightly basis, Here Lounge hired as many as 12 security guards to check identification at the door and maintain order in the club. On Sunday nights, it posted eight to 10 guards throughout the club, including one or two stationed on either side of the four adjacent unisex stalls in the restroom area. The restroom area security guards were instructed to prevent more than one patron from entering a single bathroom stall at the same time. If a security guard saw two or more people entering a stall, he would stop them. If more than one person entered a stall before the security guard could intervene, he would knock and demand that they exit. The guards routinely took action to prevent sexual activity, drug use, and conflicts among patrons in the restroom area.

On that Sunday, Plaintiff arrived at around 11:39 p.m. Feeling intoxicated, Plaintiff drank water and sat on the patio. Some 15 to 45 minutes later, Plaintiff went to the restroom area, where no guards were present. Although

the club's policy was to have one or two guards in the restroom area, the guards had discretion to leave their posts in the restroom area and roam the club when there were only a few dozen patrons in the club and very few in the restroom area. While roaming, they periodically checked on the restroom area.

Plaintiff went into an ADA restroom stall and shut the door. As was common among patrons of Here Lounge, Plaintiff did not lock the door. While Plaintiff was turning and sitting down, a man she had never seen before entered the stall. Based on DNA evidence, the man was later identified as Victor Cruz,¹ a busboy at Here Lounge.² When Plaintiff stood up to adjust her clothing, Victor grabbed her shoulders and pushed her against the wall. Victor forced Plaintiff to orally copulate him and forcibly had vaginal intercourse with her.

The assault, which caused Plaintiff to lose her virginity, lasted about five minutes and ended with Victor ejaculating on Plaintiff's dress. Plaintiff, bleeding and shaken, fled the bar and contacted the police with the assistance of a stranger on the street. Although Here Lounge security found a large puddle of blood in an ADA stall, it did not connect it to the sexual assault until days later when police investigated the incident. Victor's DNA sample matched the sample of DNA taken from semen on Plaintiff's dress at the rape treatment center. Plaintiff identified Victor as the rapist from a photo lineup.

Plaintiff sued Here Lounge and Victor, alleging (1) sexual battery, (2) negligence, (3) negligent hiring, supervision, and retention, and (4) violation of the Unruh Civil Rights Act (Civ. Code, § 51 et seq.). Victor defaulted and did not testify at trial. Before trial, the court ruled on several motions in limine. The court granted Plaintiff's motion in limine to exclude evidence of Victor's acquittal on criminal assault charges. The trial court denied Here Lounge's motion to exclude a police interview of Victor videotaped by law enforcement.

Here Lounge moved to exclude evidence that Here Lounge's general manager, Jude Tade, fired Victor's brother, Mario Cruz, for having sex with a woman in the bathroom when they worked at another bar, Fiesta Cantina. After moving to Here Lounge, Tade hired Mario notwithstanding his history, and subsequently hired Mario's brother, Victor. The court denied Here Lounge's motion.

¹ We subsequently refer to him as Victor because we later discuss his brother, who shares his last name.

² Here Lounge busboys regularly passed through the restroom area on their way to the trash and storage rooms at the rear of the club.

At the conclusion of Plaintiff's presentation of evidence at trial, the court granted Here Lounge's motion for directed verdict as to Plaintiff's causes of action for negligent hiring, supervision, and retention of Victor.³ Although the court denied the motion for directed verdict as to negligent supervision of security guards, Plaintiff later withdrew that cause of action. Plaintiff also abandoned her claims for punitive damages and her Unruh Civil Rights Act and Ralph M. Brown Act (Gov. Code, § 54950 et seq.) causes of action, leaving premises liability as the sole cause of action to be decided by the jury. In closing argument, Plaintiff's counsel requested \$7,000 in future economic damages, and suggested \$7.1 million to \$11.2 million for future noneconomic damages.

The jury returned a verdict in favor of Plaintiff and against Here Lounge for negligence and Victor for battery. The jury also found that Here Lounge's negligence was a substantial factor in causing harm to Plaintiff, and that Plaintiff was not comparatively at fault. The jury awarded a total of \$5.42 million in damages (future economic damages of \$70,000, past noneconomic loss in the amount of \$1.25 million, and \$4.1 million in future noneconomic loss). The jury apportioned 40 percent responsibility to Here Lounge and 60 percent to Victor.

Here Lounge filed a motion for new trial and a motion for judgment notwithstanding the verdict. The court rejected Here Lounge's claim of excessive damages, acknowledging the emotional suffering Plaintiff endured in the four to five years between the incident and trial. Considering "the evidence of [P]laintiff's 'emotional resilience' and significant recovery and improvement since the 2009 attack," the court had "difficulty in justifying" the jury's award of future noneconomic damages three times greater than the award for past noneconomic damages, but could not "say . . . the jury clearly should have reached a different result." The court entered judgment in favor of Plaintiff on March 21, 2014, finding Here Lounge and Victor jointly and severally liable for the \$5.42 million in damages.

DISCUSSION

Here Lounge frames the issues as Plaintiff's failure to prove (1) it had a duty to provide security guards in the restroom area, (2) it breached its duty to Plaintiff, and (3) it caused Plaintiff's injuries. Here Lounge also argues unfair prejudice based on the court's admission of testimony regarding

³ Following Plaintiff's opening statement, Here Lounge moved for a nonsuit based on the lack of evidence to support foreseeability, causation, negligent hiring, negligent retention, and negligent supervision of Victor. The court denied the nonsuit motion.

Mario's prior sexual misconduct in another workplace and Victor's videotaped police interview. Lastly, Here Lounge asserts that the noneconomic damages were excessive and punitive in nature. We address each argument in turn.

1. *Here Lounge Owed a Duty to Plaintiff*

■ The question before this court is not whether Here Lounge had a duty to provide security guards. The issue is whether Here Lounge owed a duty to use reasonable care in securing the restrooms for its patrons. (See *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1188 [45 Cal.Rptr.3d 316, 137 P.3d 153] ["To prevail in an action for negligence, the plaintiff must demonstrate that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach proximately caused the plaintiff's injuries."].) Here Lounge asserts it owed no duty of care to Plaintiff because the assault was not foreseeable. The existence of duty is a question of law for the court to determine. (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 124 [211 Cal.Rptr. 356, 695 P.2d 653] (*Isaacs*).) Therefore, unlike the factual issues of breach and causation, which we address later, we review this issue de novo. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 [25 Cal.Rptr.2d 137, 863 P.2d 207], disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5 [113 Cal.Rptr.3d 327, 235 P.3d 988].)

■ To assess the existence and scope of Here Lounge's duty, we balance several factors specified by the Supreme Court in *Rowland v. Christian* (1968) 69 Cal.2d 108 [70 Cal.Rptr. 97, 443 P.2d 561] (*Rowland*): "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Id.* at p. 113, partially superseded by statute on a different issue in *Greenberg v. Superior Court* (2009) 172 Cal.App.4th 1339, 1352, fn. 8 [92 Cal.Rptr.3d 96].) Foreseeability of harm to the plaintiff and the extent of the burden on the defendant are the most important considerations in performing a duty analysis. (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213 [63 Cal.Rptr.3d 99, 162 P.3d 610] (*Castaneda*)).

Foreseeability "is an elastic factor" in the balancing test and the necessary degree of foreseeability to find a duty varies on a case-by-case basis. (*Isaacs, supra*, 38 Cal.3d at p. 125.) Where the burden on the defendant to prevent the harm would be great, there must be a high degree of

foreseeability to impose liability. (*Ibid.*) Conversely, where the burden on the defendant is minimal, a lesser degree of foreseeability is necessary to impose liability. (*Ibid.*; see *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 245 [30 Cal.Rptr.3d 145, 113 P.3d 1159] (*Delgado*) [absence of heightened foreseeability *does not* signify that the defendant owed no duty to the plaintiff; the defendant may still have the duty to take reasonable, relatively simple, minimally burdensome measures].) Foreseeability “includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.” [Citation.] One may be held accountable for creating even “the risk of a slight possibility of injury if a reasonably prudent [person] would not do so.”” (*Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 57 [192 Cal.Rptr. 857, 665 P.2d 947].)

■ To assess the extent of the defendant’s duty, we evaluate whether in the management of its property, the defendant has acted as a reasonable person in view of the probability of injury to others. (*Rowland, supra*, 69 Cal.2d at p. 119.) A possessor of land “owes a duty to an invitee to make the property reasonably safe for the intended use by the intended user.” (*Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 27 [77 Cal.Rptr. 914].) Thus, the property holder only “has a duty to protect against types of crimes of which he has notice and which are likely to recur if the common areas are not secure.” (*O’Hara v. Western Seven Trees Corp.* (1977) 75 Cal.App.3d 798, 802–803 [142 Cal.Rptr. 487] (*O’Hara*).) The court’s focus in determining duty “‘is not to decide whether a particular plaintiff’s injury was reasonably foreseeable in light of a particular defendant’s conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.’” [Citation.]” (*Friedman v. Merck & Co.* (2003) 107 Cal.App.4th 454, 465 [131 Cal.Rptr.2d 885], italics omitted.) As the Supreme Court explained in *Castaneda, supra*, 41 Cal.4th at page 1213, we look to the circumstances of the case to see if the defendant was on notice of facts making the harm at issue foreseeable.

In this case, Here Lounge promoted a sexually charged atmosphere and designed an open restroom area allowing unrestricted entry for men and women. It designed the larger ADA stalls with full-length walls shielding the occupants from view. Here Lounge knew that sexual activity in the restrooms and elsewhere in the club was an ongoing issue. On the night of Plaintiff’s rape, video footage documented two men in a single stall for about 15 minutes. Footage also captured three people entering a single bathroom stall, a male and a female in the same stall, and two couples on the patio straddling each other and kissing. Other footage appeared to show a woman using the men’s urinal trough, conduct that was against the rules and should have been

prevented. There was testimony that sexual activity in the club increased towards the end of the night and tended to occur in the ADA bathroom stalls, like the stall where Plaintiff was raped, because the full-length doors shielded the occupants from view. The owner also admitted that an employee once observed a woman performing oral sex on a man at the club and ignored it.

The owner, the club manager, and the head of security all recognized the danger that sexual conduct behind locked doors in the restroom stalls could easily be or become nonconsensual. The club was also aware that patrons were often intoxicated and neglected to lock the bathroom stall doors. To prevent multiple people from entering a bathroom stall together Here Lounge usually stationed a guard on either side of the four unisex stalls with a clear view of the ADA stalls. When the club was down to a small number of patrons, the posted restroom area guards had discretion to leave their posts and roam the club while periodically checking the restroom area.

This evidence taken together made the risk of harm to intoxicated and vulnerable patrons reasonably foreseeable, regardless whether the club was on notice of a prior similar incident. Knowing the potential serious harm of nonconsensual sex, a reasonable person managing the property would have posted a guard in the restroom area whenever the club was open to the public, even when attendance tapered off. The burden for monitoring the restroom area during business hours was small, requiring only a change in policy to eliminate the guards' individual discretion to leave the restroom area and roam the premises when patronage dwindled.

Here Lounge argues it has no duty unless and until it experiences a similar criminal incident. We disagree. While a property holder generally has a duty to protect against types of crimes of which he is on notice, the absence of previous occurrences does not end the duty inquiry. (*O'Hara, supra*, 75 Cal.App.3d at pp. 802–803.) We look to all of the factual circumstances to assess foreseeability. (See *Isaacs, supra*, 38 Cal.3d at p. 130.) As explained above, Here Lounge's failure to experience an earlier incident must be measured against the level of burden imposed by the duty of care. In this case, the added burden is minimal.

■ Moreover, having elected to employ multiple security guards and station them in the restroom area, Here Lounge assumed a duty of reasonable care with regard to the security guards' deployment. (See *Bloomberg v. Interinsurance Exchange* (1984) 162 Cal.App.3d 571, 575 [207 Cal.Rptr. 853] [“A defendant who enters upon an affirmative course of conduct affecting the interests of another is regarded as assuming a duty to act, and will be liable for negligent acts or omissions [citations], because one who undertakes to do an act must do it with care. [Citations.] . . . ‘Where performance clearly has

begun, there is no doubt that there is a duty of care.’ ”].) The Supreme Court addressed this duty in *Delgado*, where a plaintiff was assaulted in a parking lot ordinarily staffed with a security guard. (*Delgado, supra*, 36 Cal.4th at pp. 230–232.) In that case, the plaintiff’s wife warned an inside guard about a possible fight and the guard suggested plaintiff and his wife leave the bar to avoid a confrontation. The inside guard did not accompany them to their car and, as it happened, the outside guard was not at his post when hostile patrons and their associates beat the plaintiff in the parking lot. (*Id.* at p. 231.) After the plaintiff sued the bar under a premises liability theory and won, the bar “appealed, contending that because there was no evidence of prior similar criminal assaults either on its premises or in the vicinity, the assault upon plaintiff was unforeseeable as a matter of law, and that as a consequence it owed no duty to provide a security guard and thus could not be held liable for plaintiff’s injuries.” (*Id.* at pp. 232–233.)

The Supreme Court held that the lack of a prior similar incident simply meant that there was no “heightened foreseeability,” justifying the imposition of a standard of care requiring *burdensome* security measures. (*Delgado, supra*, 36 Cal.4th at p. 245.) The court explained that “the absence of heightened foreseeability in this case merely signifies that defendant owed no special-relationship-based duty to provide guards or undertake other similarly burdensome preventative measures; it does not signify that defendant owed no other special-relationship-based duty to plaintiff, such as a duty to respond to events unfolding in its presence by undertaking reasonable, relatively simple, and minimally burdensome measures.” (*Ibid.*, italics omitted.) The court concluded the bar owner owed a duty of reasonable care and that guards using reasonable care would have kept the plaintiff and the hostile bar patrons apart in order to avert the assault. (*Id.* at pp. 246–247.) Likewise in this case, the lack of a prior similar incident lessens the foreseeability and militates against imposing a duty of care requiring *particularly burdensome* measures. It does not, however, eliminate the defendant’s duty of reasonable care.

Here Lounge argues that “[i]f a security guard was forced to remain in the [restroom area] at all times, no matter the size of the crowds, patrons in other areas of the club would be deprived of the benefit of a security presence unless Here Lounge hired and paid for additional security guards for the entire night.” Here Lounge cites no evidence supporting this contention. The evidence at trial was that Here Lounge stationed one or two guards in the restroom area most of the time but gave them discretion to leave their posts and roam the club when the crowd thinned out. There is no evidence the guards’ discretion to roam depended on a need for additional security guards

elsewhere in the club. Here Lounge therefore failed to demonstrate that changing the policy to eliminate roaming would be burdensome, let alone unduly burdensome.⁴

■ In sum, Here Lounge's design of the restroom area was intentional and created opportunities for sexual activities concealed behind locked doors. Here Lounge fostered a sexually charged atmosphere and had notice of an obvious pattern of sexual conduct throughout the club and particularly in the restroom area. Here Lounge's managers knew that sexual encounters within a restroom stall could be, or easily become, nonconsensual. Under these circumstances, Here Lounge had a duty to ensure safety by undertaking minimally burdensome security measures, like requiring one of its security guards to remain posted in the restroom area as the club emptied out.

2. Substantial Evidence Supports Breach of the Duty of Care

Here Lounge asserts that there was insufficient evidence that it breached a duty to Plaintiff. "When a party contends insufficient evidence supports a jury verdict, we apply the substantial evidence standard of review." (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188 [87 Cal.Rptr.3d 439] (*Wilson*).) We view the evidence in the light most favorable to the prevailing party and give the benefit of each reasonable inference and resolve all conflicts in the prevailing party's favor. (*Ibid.*) Thus, "raising a claim of insufficiency of the evidence assumes a 'daunting burden.' " (*Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 678 [11 Cal.Rptr.3d 807].)

Breach occurs when the defendant's conduct falls below the standard of care. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 500 [110 Cal.Rptr.2d 370, 28 P.3d 116].) As articulated above, the standard of care involved securing the club's unisex restroom with a security guard during open hours. Testimony at trial established that there was no security guard in the restroom area when Plaintiff entered, although security guards were posted in the restroom area earlier in the night. Thus, substantial evidence supports breach.

Here Lounge's argument to the contrary rests on a supposed lack of evidence establishing the foreseeability of sexual assaults in the restrooms. This argument fails because it does not address breach, but rather goes to duty. As explained above, sexual assaults in the restrooms were reasonably foreseeable.

⁴ We reject Here Lounge's assertions that foreseeability hinged on evidence that Victor, specifically, had the propensity to attack someone. The case, as it was ultimately framed to the jury in the verdict form, was solely about premises liability, not negligent hiring, making Victor's past criminal conduct irrelevant.

3. Substantial Evidence Supports Causation

Here Lounge contends there is no proof of any causal connection between its failure to post a security guard in the restroom area and Plaintiff's rape. As with breach, we apply a substantial evidence standard of review to determine whether there was insufficient evidence of causation. (*Wilson, supra*, 169 Cal.App.4th at p. 1188.) Causation exists where "the defendant's breach of its duty to exercise ordinary care was a substantial factor in bringing about plaintiff's harm." (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205 [114 Cal.Rptr.2d 470, 36 P.3d 11].) "In other words, plaintiff must show some substantial link or nexus between omission and injury." (*Saelzler v. Advanced Group* 400 (2001) 25 Cal.4th 763, 778 [107 Cal.Rptr.2d 617, 23 P.3d 1143] (*Saelzler*)).

We conclude that substantial evidence supports the jury's finding of causation. Based on the evidence presented, it was reasonable to conclude that had a security guard been present in the restroom area when Plaintiff entered, the assault and rape would not have occurred. There was no dispute that security guards stationed in the restroom had a clear view of the ADA stalls and would have seen Victor follow Plaintiff into the bathroom stall. The security guards all testified that if someone followed a patron into a single restroom, the guards would intervene.

Here Lounge nevertheless asserts that despite its policy against more than one person in a single stall, "[t]here was no evidence . . . that the presence of a security guard would have made a difference in this case." Here Lounge first argues that Plaintiff admitted Victor Cruz did not enter the restroom at the same time she did. However, the record does not support this conclusion. Plaintiff testified that she entered the stall and when she turned around to sit down, she looked up and saw somebody standing in the stall with her. Plaintiff testified that Victor entered the stall immediately after she did and she did not see him until she turned around. Moreover, even if he entered the stall a few minutes later, the jury could have reasonably inferred that the guards would have intervened based on testimony that they kept an eye on patrons who neglected to lock stall doors.

Here Lounge's argument that it is "mere speculation" that a guard posted in the restroom area could have prevented the assault is equally unpersuasive. "[I]n a given case, direct or circumstantial evidence may show the assailant took advantage of the defendant's lapse (such as a failure to keep a security gate in repair) in the course of committing his attack, and that the omission was a substantial factor in causing the injury." (*Saelzler, supra*, 25 Cal.4th at p. 779.) Testimony from the security guards established that if they saw more than one person enter a restroom stall, they intervened. The head of security also

testified that a guard should have prevented the co-occupation of stalls on the two other occasions that night caught on videotape. There was testimony at trial that patrons often forgot to lock the stall doors because they were intoxicated or careless and the guards kept an eye on unlocked doors. There was even testimony that patrons waited until the roaming guard passed through the restroom area before sneaking into a stall. Therefore, the jury could reasonably infer that a guard would have taken action to prevent Victor from entering the stall. Evidence about the club's employment practices also supported an inference that the presence of a guard would have deterred Victor's conduct. Here Lounge's owner testified there was a rule against employees having sexual contact with patrons and breaking that rule would result in termination.

The Court of Appeal's analysis regarding reasonable inferences in *Mukthar v. Latin American Security Service* (2006) 139 Cal.App.4th 284 [42 Cal.Rptr.3d 563] (*Mukthar*) supports this conclusion. In *Mukthar*, a convenience store employee blocked the store's exit in an attempt to stop three people from shoplifting; the shoplifters then attacked him. (*Id.* at pp. 286–287.) Although the store had hired a security service to guard the store exit, a guard was not present at the time of the incident. The store employee sued the security service for negligence. (*Id.* at p. 287.) The security service moved for summary judgment, and argued that the store employee could not show that security service's negligence in failing to guard the door caused the assault. (*Id.* at p. 286.) The Court of Appeal reversed the trial court's decision granting summary judgment. (*Ibid.*)

The appellate court focused on whether there was evidence the assault would not have occurred if a guard were present. (*Mukthar, supra*, 139 Cal.App.4th at p. 291.) The appellate court concluded that it was "more likely than not" that a shoplifter would not have struck the employee if an armed guard had been standing next to the doorway. (*Ibid.*) Accordingly, the appellate court stated that it would not be conjecture for a trier of fact to find that the security guard could have prevented the assault, because a reasonable inference could be drawn from the evidence. (*Ibid.*)

As in *Mukthar*, the trier of fact in the instant case could reasonably infer that the presence of a security guard in the restroom area would have deterred Victor's sexual assault, particularly because the security guards worked with Victor, knew who he was, and were aware of the policies against sexual contact with patrons. Like the *Mukthar* court, we are not concluding that this inference is necessarily correct. As in *Mukthar*, we conclude that the jury could reasonably infer such a finding based on the evidence presented.

We therefore conclude substantial evidence supports the jury's finding that Here Lounge's negligence was a substantial factor in causing plaintiff's harm.

4. *Admission of Testimony Regarding Mario's Prior Sexual Misconduct in the Workplace Was Not Error*

Here Lounge argues that the judgment should be reversed because the trial court erred in admitting evidence about Victor's brother, Mario Cruz. "Trial court rulings on the admissibility of evidence, whether in limine or during trial, are generally reviewed for abuse of discretion." (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317 [120 Cal.Rptr.3d 605] (*Pannu*).) If the court erred in admitting the evidence, we would reverse the judgment only if Here Lounge demonstrates a miscarriage of justice, meaning that it could have achieved a more favorable result at trial had the evidence been excluded. (*Ibid.*)

The evidence at issue is testimony that Fiesta Cantina, a neighboring bar, terminated Mario for having sex with a woman in the bar's bathroom. Jude Tade, the Fiesta Cantina manager who fired Mario, went to work as a manager for Here Lounge and hired Mario to work as a Here Lounge busboy despite his history. Tade later hired Victor and assigned Mario to train Victor how to do his job and how to appropriately interact with customers.

In a motion in limine, Here Lounge sought to exclude this evidence as irrelevant and improper character evidence. Mindful that Plaintiff was still pursuing a negligent hiring theory of liability, the court admitted the evidence as "relevant to both [the] hiring practice of defendant as well as their perhaps culture or laxity in the enforcement of their policies against having sex in the bathroom." The trial court offered to give a limiting instruction but Here Lounge never asked for one.

Here Lounge nevertheless argues the court erred in admitting Mario's prior misconduct, citing Evidence Code section 1101, subdivision (a). That statute states: "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) While section 1101 would prohibit Plaintiff from introducing evidence of specific instances of Victor's misconduct to prove that Victor raped Plaintiff, it does not apply to evidence of Mario's misconduct.

Here Lounge also contends that the testimony was unduly prejudicial under Evidence Code section 352 and that it confused the issues and misled the jury. However, the jury could reasonably infer that Victor knew why his brother was terminated at Fiesta Cantina and that Victor had reason to view Mario's rehiring as condoning such conduct. As the trial court pointed out, the evidence speaks to Here Lounge's laxity in enforcing policies for

preventing sexual activity on its premises. The evidence was thus probative of Here Lounge's liability as to both the negligent hiring and the premises liability causes of action. We therefore conclude the admission of this evidence was not an abuse of discretion.

Here Lounge complains that without a limiting instruction "the jury could infer . . . that Victor suffered from the same character defects [as Mario] and would behave similarly. The jury could also infer that Here Lounge should have known this when it hired Victor." The problem is that Here Lounge never requested a limiting instruction even though the court invited one. "Absent a request, the trial court was not required to give instructions limiting the purpose for which the jury could consider the evidence." (*People v. Murtishaw* (2011) 51 Cal.4th 574, 590 [121 Cal.Rptr.3d 586, 247 P.3d 941]; see Evid. Code, § 355.) Here Lounge's failure to ask for the limiting instruction forfeited this argument on appeal. (*Stathos v. Lemich* (1963) 213 Cal.App.2d 52, 57 [28 Cal.Rptr. 462].)

We conclude that the trial court did not abuse its discretion in admitting the evidence because it was relevant to Here Lounge's hiring and supervision practices.

5. *Admission of Victor's Videotaped Interview Was Not Error*

Here Lounge moved in limine to exclude Victor's videotaped police interview on the ground that it was hearsay, inherently unreliable, and prejudicial. Here Lounge argued that Plaintiff's real purpose was to have the jury infer that Victor sexually assaulted her.

In the interview, Victor told the police detective a story about how he refused a woman who propositioned him for sex that night because she was drunk and unattractive. Victor explained that after he refused, the woman followed him into the male ADA stall. Inside the stall, she tried to unbuckle his pants, and then lay down on the floor, pulled up her skirt, and asked him to have sex with her. Victor said he refused because she was bleeding. He told police that he left the stall and never touched the woman. When the detective confronted him with information that his DNA was found on the woman's dress, Victor stated he did not know why it was on her dress, admitted he was drunk that night, and suggested he might have masturbated on the woman.

The court denied Here Lounge's motion in limine on this issue, concluding that the videotape was not hearsay because it was not offered for its truth, but rather to show Victor's state of mind to prove consciousness of guilt. The court gave the jury a limiting instruction that the jury: "cannot use the

statements made during the interview to show that any of the facts remembered or believed actually occurred.” We review the trial court’s ruling for an abuse of discretion. (*Pannu, supra*, 191 Cal.App.4th at p. 1317.)

“ ‘Hearsay evidence’ is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” (Evid. Code, § 1200, subd. (a).) Plaintiff did not offer Victor’s videotaped statements for their truth, as Plaintiff’s theory of the case was that Victor had followed, attacked, and forcibly raped her. Thus, the statements are not hearsay and the court did not abuse its discretion in admitting them.

6. *The Noneconomic Damages Award Does Not Shock the Conscience*

Here Lounge argues that “a dearth of evidence [supports] the jury’s enormous \$5.35 million noneconomic damage award, consisting of \$1.25 million in past noneconomic damages and \$4.1 million in future noneconomic damages.” “The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. They see and hear the witnesses and frequently, as in this case, see the injury and the impairment that has resulted therefrom. . . . The power of the appellate court differs materially from that of the trial court in passing on this question.” (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506–507 [15 Cal.Rptr. 161, 364 P.2d 337] (*Seffert*).) Thus, we “review the jury’s award under the substantial evidence standard and defer to the trial court’s denial of a new trial motion based on excessive damages because of the trial judge’s greater familiarity with the case.” (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 720 [141 Cal.Rptr.3d 553].) We can interfere “only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.” (*Seffert*, at p. 507.)

■ In reviewing a noneconomic damage award, “[t]here are no fixed or absolute standards by which an appellate court can measure in monetary terms the extent of the damages suffered by a plaintiff as a result of the wrongful act of the defendant. The duty of an appellate court is to uphold the jury and trial judge whenever possible. [Citation.] The amount to be awarded is ‘a matter on which there legitimately may be a wide difference of opinion’ [citation]. In considering the contention that the damages are excessive the appellate court must determine every conflict in the evidence in respondent’s favor, and must give him the benefit of every inference reasonably to be drawn from the record [citation]. [¶] . . . Injuries are seldom identical and the amount of pain and suffering involved in similar physical injuries varies widely. These factors must be considered. [Citation.] Basically, the question

that should be decided by the appellate courts is whether or not the verdict is so out of line with reason that it shocks the conscience and necessarily implies that the verdict must have been the result of passion and prejudice.” (*Seffert, supra*, 56 Cal.2d at p. 508.)

The jury heard evidence that the rape was violent, traumatic, and caused Plaintiff to lose her virginity. Plaintiff was further humiliated and embarrassed at the rape treatment center, where she had to remove her clothing, put on a gown, and lie on a table for a two-hour videotaped vaginal examination while still in pain. The exam made Plaintiff feel “gross.” The examining nurse, who had conducted over 1,000 rape exams, testified that Plaintiff’s hymen was significantly torn by the “violent” penetration, and calibrated the severity of her injury as an eight on a scale of one to 10. Plaintiff told the jury she tries to get past what happened to her but it continues to haunt her. Plaintiff has had such difficulty coming to terms with the rape, that she has been unable to discuss it with her mother or her closest friends. She rarely uses public restrooms because of the incident, and she is more frightened for her safety than ever before, even after relocating to a more secure apartment facility.

Plaintiff’s expert psychologist testified that the rape caused psychological trauma. Three years after the incident, Plaintiff continued to think about the sexual assault and to have nightmares about it. She also avoided discussing the incident because it was too upsetting. Plaintiff suffered significant distress, including feelings of disbelief, shock, horror, disgust, and upset. The unfortunate experience still simply overwhelms her. The psychologist diagnosed Plaintiff with severe posttraumatic stress disorder. The psychologist’s testing confirmed Plaintiff developed severe and extreme sensitivity and suspiciousness of others. The expert opined that even assuming Plaintiff received the necessary therapy, she will never return to the position she was in before suffering the rape.

The defense expert psychiatrist agreed that the rape was very upsetting and traumatic for Plaintiff. Plaintiff told him that her social life did not feel the same since the incident, and that she still had crying spells and emotional distress. The defense expert predicted Plaintiff will experience fear, anxiety, humiliation, and embarrassment for the rest of her life. Given this substantial evidence regarding Plaintiff’s extensive emotional distress, we cannot say the jury’s large award of noneconomic damages shocks the conscience.

Here Lounge asserts that the jury’s large award was influenced by impermissible “golden rule” arguments in closing argument. A “golden rule” argument tells the jury “to place themselves in the plaintiff’s shoes and award the amount they would ‘charge’ to undergo equivalent disability, pain and suffering.” (*Nishihama v. City and County of San Francisco* (2001) 93

Cal.App.4th 298, 305 [112 Cal.Rptr.2d 861].) That argument is improper because it asks the jury to place themselves or their loved ones in a plaintiff's position, effectively urging them to become advocates for the plaintiff. (*Horn v. Atchison T. & S. F. Ry. Co.* (1964) 61 Cal.2d 602, 609 [39 Cal.Rptr. 721, 394 P.2d 561] (*Horn*).) We see no evidence of such an argument here. The record shows that Plaintiff's counsel told the jury that the security one expects at a public place varies depending on the environment, and urged the jury to: "[d]iscuss the manner in which you can look at somebody who has been very seriously hurt, very seriously emotionally damaged and having to deal with something over a period of time and how you can grapple with it." Neither comment asked the jurors to become advocates for Plaintiff by placing themselves in her position or invited them to denigrate their oath to decide the issues based on the evidence.

Here Lounge also argues that the jury's "excessive" award was caused by Plaintiff's counsel's inflammatory rhetoric and statements unsupported by evidence. Here Lounge specifically identifies the following comments in closing argument as improper: "Victor Cruz is a sexual predator," Here Lounge "allowed a sexual predator to exist and have free reign of the women within the club," Here Lounge "[doesn't] get a free rape," and Here Lounge's experts were "pay-to-say witnesses."

■ However, Here Lounge only objected to the statement, "Victor Cruz is a sexual predator." This statement was a permissible comment based on evidence adduced at trial that Victor followed Plaintiff into the stall and forcibly raped her. (*McCullough v. Langer* (1937) 23 Cal.App.2d 510, 522 [73 P.2d 649] [“[I]t is the privilege of an attorney to draw any inference with respect to the facts or the credibility of witnesses of which the evidence is reasonably susceptible.”].)

As to the remaining statements, Here Lounge failed to object and is deemed to have forfeited the objections. "Generally a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished. [Citations.] The purpose of the rule requiring the making of timely objections is remedial in nature, and seeks to give the court the opportunity to admonish the jury, instruct counsel and forestall the accumulation of prejudice by repeating improprieties, thus avoiding the necessity of a retrial. 'It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have.' [Citation.] In the absence of a timely objection the offended party is deemed to have waived the claim of error through his participation in the atmosphere which produced the claim of prejudice." (*Horn, supra*, 61 Cal.2d at p. 610.)

Based on the foregoing, we affirm the award of noneconomic damages.

DISPOSITION

The judgment is affirmed on all grounds. Plaintiff Janice H. is awarded her costs on appeal.

Edmon, P. J., and Aldrich, J., concurred.

[No. F072715. Fifth Dist. July 14, 2016.]

In re ARMANDO L., a Person Coming Under the Juvenile Court Law.
MERCED COUNTY HUMAN SERVICES AGENCY, Plaintiff and
Respondent, v.
SANDY M., Defendant and Appellant.

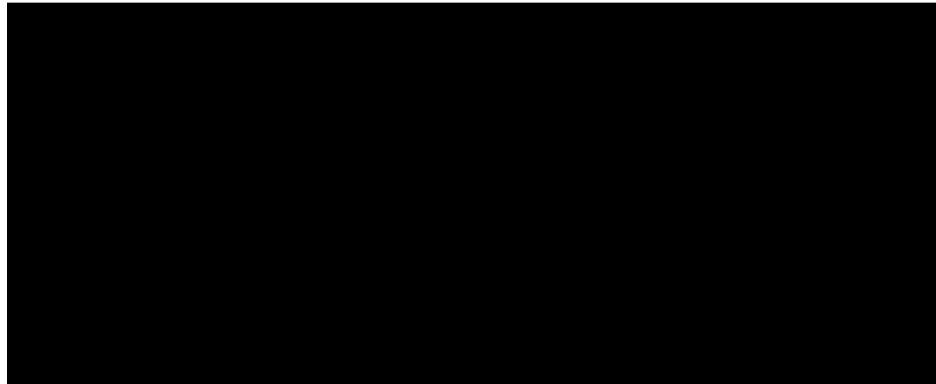
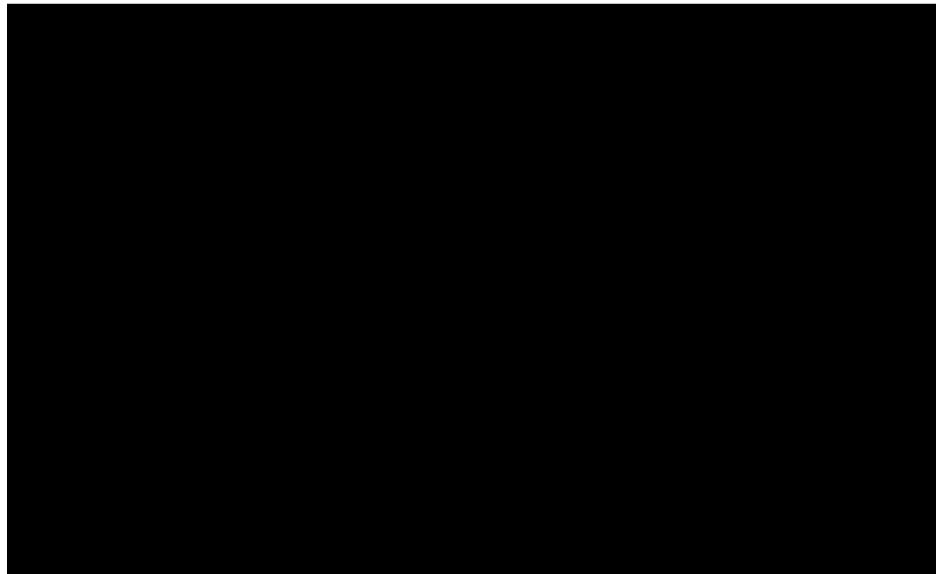
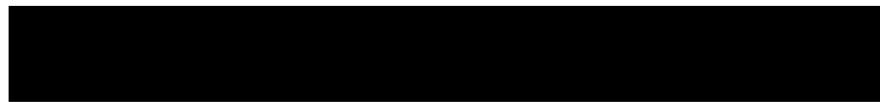
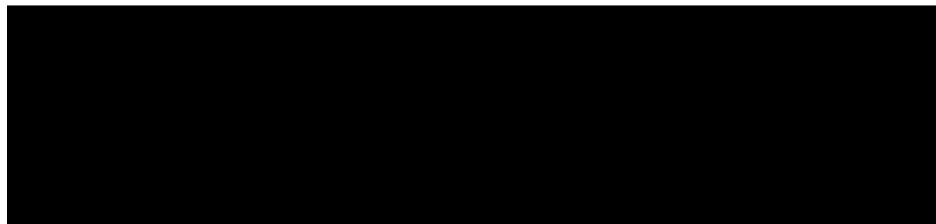
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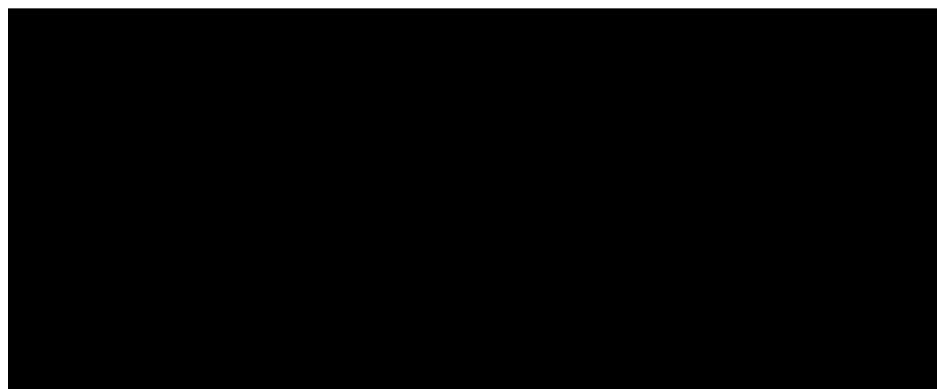
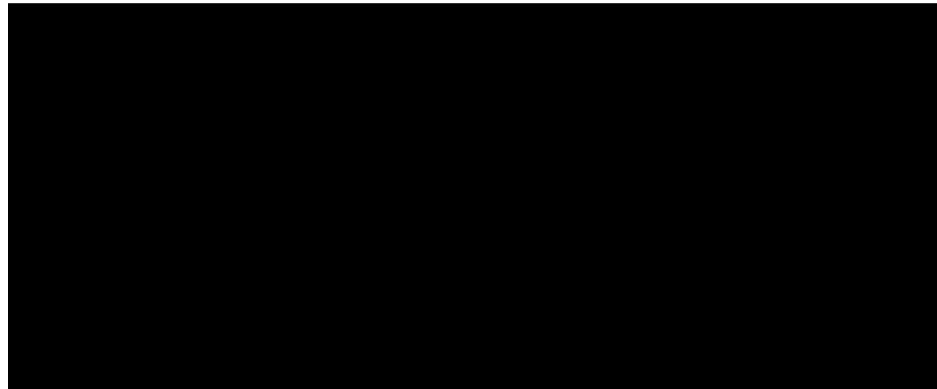
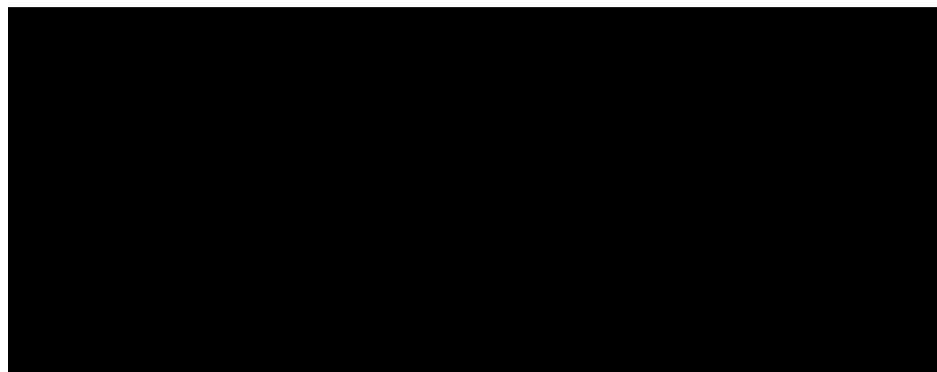
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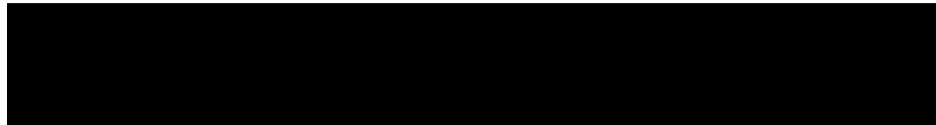
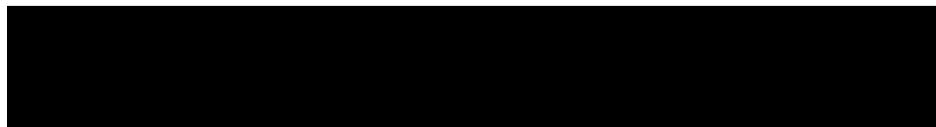
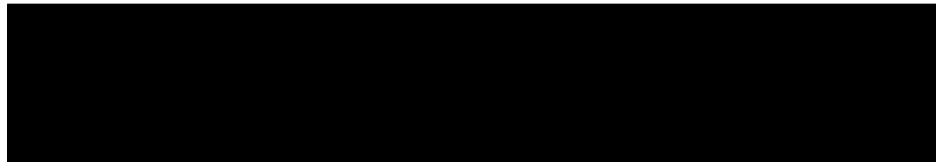
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COUNSEL

Rebekah S. Sass, under appointment by the Court of Appeal, for Defendant and Appellant.

James N. Fincher, County Counsel, and Kimberly R. Helms, Deputy County Counsel, for Plaintiff and Respondent.

OPINION

PEÑA, J.—

INTRODUCTION

At the conclusion of a review hearing pursuant to Welfare and Institutions Code section 364¹ on October 29, 2015, the juvenile court terminated its jurisdiction over 11-year-old Armando L., who had been a dependent of the juvenile court for two years. Armando's mother, Sandy M. (mother), contends the juvenile court improperly denied her an evidentiary hearing on the issues of Armando's custody and whether the court's jurisdiction should have been

¹ Unless otherwise designated, all statutory references are to the Welfare and Institutions Code.

terminated. We agree. In doing so, we reject the arguments of Merced County Human Services Agency (agency) that the juvenile court's denial of an evidentiary hearing was proper because mother's objection was outside the scope of the hearing, the evidence mother wanted to introduce was irrelevant, and any error in the juvenile court's ruling was harmless. Accordingly, the orders of the juvenile court must be reversed.

FACTS AND PROCEEDINGS

Initial Proceedings

On October 30, 2013, a petition was filed pursuant to section 300 alleging Armando, then nine years old, had come to school with bruises on his face caused by his father hitting him. Father hit Armando because he was frustrated at not being able to repair a neighbor's vacuum cleaner and had slapped Armando in the face four times for no reason. Father admitted he "popped" his son in the mouth after Armando talked back to him. Armando had purple bruises on both sides of his cheeks, under his eyes, and both sides of his nose. There was redness on his left cheek with linear lines appearing to be fingerprints.

According to the petition, mother failed to contact the authorities to report the abuse or to take Armando immediately to the doctor. Mother did take photographs of Armando's injuries. Armando reported he was disciplined by father and father's girlfriend by being hit. Mother had legal and physical custody of Armando, but left him in father's care because Armando was diagnosed with ADHD and she had trouble controlling his behavioral problems. In addition, mother had been diagnosed with ADHD and depression and was raising three other children.

Armando was immediately detained after the incident was reported to school authorities on October 28, 2013, and the juvenile court sustained the detention on October 31, 2013. Armando reported to social workers another episode of being hit by his father and explained he did not like staying with his father. Mother told social workers she was concerned about Armando's behaviors and believed she would have an easier time controlling him with services. Mother reported she left Armando's father because there was domestic violence between them. Mother was unaware father was using drugs around their son. Mother denied any domestic violence in her current relationship.

Father reported to social workers Armando had been living with him for about a year. Father admitted he had been in prison off and on since he was 18 years old and denied having any domestic violence in his current

relationship. Father admitted using methamphetamine once or twice a month and claimed he did not buy it but it was given to him at a friend's house. Father said he was prescribed Vicodin and ibuprofen. Drug and hair follicle tests from father right after Armando was detained tested positive for methamphetamine.

The agency recommended mother stabilize her mental health and address the domestic violence of her past. The agency recommended mother receive nurturing classes and have a mental health assessment. The agency recommended family reunification services for father, including parenting classes and programs to address his substance abuse. These would include a drug and alcohol assessment to determine the extent of father's addiction. The agency recommended family maintenance services for mother, with custody of Armando with mother, and family reunification services for father. At the joint jurisdiction/disposition hearing on November 21, 2013, the juvenile court adopted the recommendations of the agency ordering family maintenance services for mother, reunification services for father, and leaving Armando's custody with mother.

Supplemental Petition

The agency filed a supplemental petition pursuant to section 387 on April 4, 2014, seeking to remove Armando from mother's custody. The petition alleged Armando had been diagnosed in February 2014 with a mood disorder and ADHD. Armando was being aggressive, defiant, and sexually inappropriate at school, becoming a danger to himself and others. Although mother and the social worker were working with Aspiranet Wraparound Services, Armando was not responding adequately to interventions and therapeutic work provided by the program. Mother informed the social worker Armando was refusing to take his medication, he had gained a great deal of weight, and he was hoarding food in his bedroom.

The agency sought a change of placement from mother to the agency. Armando was placed in a group home. After continuances, the joint jurisdiction/disposition hearing on the supplemental petition was conducted on June 4, 2014. The agency reported father had made progress in his case plan and had maintained sobriety. Father completed training and had negative drug tests. Mother was also making progress in her case plan services, but Armando was not responding well after receiving those services.

Mother made efforts to provide additional supervision of Armando by staying home full time, but Armando refused to follow his mother's redirection of his aggressive behavior. Armando's physician believed Armando's challenges were not the fault of either parent. The recommendation to place

Armando in a group home was due to the difficulty he presented to adults, including highly educated professionals with years of experience and expertise, in controlling his behavior. The agency recommended Armando remain in his new placement with continuing services to his parents. The juvenile court adopted the recommendations of the agency at the conclusion of the hearing on June 4, 2014, including continuation of Armando's placement in a group home and further services for both parents.

18-month Review Hearing

The status review report prepared by the agency in April 2015 for the 18-month review hearing noted Armando was living with his parents on a trial basis. He was staying with mother during weekdays and with his father on weekends. Father was in compliance with and completed all components of his case plan. Father had also remained drug free. Mother had also completed all of the components of her case plan and understood the programs and training she received.

In June 2015, on a trip to Wal-Mart, mother asked Armando not to be rude and to help her put things in their vehicle. Armando became upset, yelled profanities, and called her a bad mother. He then locked himself in the vehicle and refused to open the door for mother. On the drive home, Armando tried to hit and choke mother as she drove. Mother slapped Armando because she was unable to calm him down. On July 18, 2015, Armando became too aggressive for mother to handle and she called law enforcement. Armando did calm down when law enforcement arrived and he was not detained.

On July 30, 2015, the agency received a referral alleging Armando watched a pornographic video with younger siblings and touched one of them on the breast. The agency found the allegations substantiated. On September 19, 2015, during a weekend visit to mother's home, she could not control or deescalate Armando's behavior and tried using physical punishment. Law enforcement refused to intervene, and a support counselor with the Aspiranet program picked up Armando and brought him to father. On October 21, 2015, the agency decided to place Armando solely in his father's care in order to ensure his own safety as well as that of mother's other children. According to the agency, Armando has done well in his father's care and is less combative.

The agency reported mother believed Armando needs more time with her because father was the original source of Armando's trauma. Father told the agency he wanted Armando in his home because that is where he is safe. Armando said he was "over" what had happened and appeared indifferent. Both parents told the agency they were not interested in having Armando

adopted. The agency concluded father was the most appropriate placement for Armando and noted mother continued to struggle with appropriate or effective discipline techniques necessary to prevent Armando from jeopardizing his safety or that of others. The agency recommended termination of the juvenile court's jurisdiction.

The brief 18-month review hearing was conducted on October 29, 2015. The juvenile court noted the agency was recommending termination of the dependency, custody of Armando to his father, and joint legal custody with visitation to mother as agreed by the parties. Mother's counsel stated his client "vehemently" opposed the recommendation because it was not in Armando's best interests. Mother's counsel told the court he had informed mother she did not have standing to contest that matter at the section 364 hearing and she would have to challenge custody in family court.

The juvenile court informed the parents they had the right to a hearing before a judge on the issue of whether the court should follow the recommendation as set forth in the social worker's report. Elaborating on his earlier statement, mother's counsel stated his client wanted a contested hearing: "It's my understanding that as soon as I ask for a contested hearing, there is going to be an objection that we have no standing to request a contested hearing, but I will on her behalf request a contested hearing on this matter."

Counsel for the agency argued "that the only individual with the authority to contest or oppose an agency's request to dismiss is the minor through minor's counsel." The minor's counsel then objected to mother's request for a contested hearing, arguing mother had no standing to do so. Mother responded she objected to the agency's recommendations "overall." Mother's counsel stated mother objected to the recommendation for placement of the child and to dismissal of the action. Mother's counsel stated mother was concerned Armando needed more services and placement with father would be part of the exit order. Mother believed therefore that dismissal of the action was not in Armando's best interests.

County counsel on behalf of the agency argued that with regard to custody, and because the case was being dismissed, mother did not "have standing to contest the dismissal, then the appropriate forum to challenge the placement and the custody orders [was] in the family law court." The court noted county counsel's objection was based on mother's lack of standing to contest dismissal of the action and the court's award of custody. Minor's counsel concurred with county counsel's argument and the court's observation. The court ruled it was following the agency's recommendations and ordered the case dismissed. As to the exit order regarding Armando's custody, the court found the proper forum was family court. The court ordered Armando's joint custody to both parents with physical custody to father.

DISCUSSION

Introduction

Mother contends she had standing to challenge the trial court's orders dismissing the dependency action, granting father physical custody of Armando, and granting additional services to Armando. Mother further contends she was denied her right to a contested hearing on these issues. According to the agency, mother's request for more services and custody was outside the scope of a section 364 hearing. The agency argues mother's objections were irrelevant to the issue of terminating the juvenile court's jurisdiction at a section 364 hearing. The agency further argues any error in the juvenile court's findings was harmless.

■ We conclude mother had a right to present evidence at the section 364 hearing to challenge dismissal of the dependency action and to present any evidence relevant to the court's exit orders. The juvenile court's denial of an evidentiary hearing on these issues deprived mother of her due process right to present evidence, and the error was not harmless.

Legal Principles

■ When a juvenile court finds a child is a dependent, in appropriate circumstances the dependency can be established without removing the child from his or her parents' home. The juvenile court can order family maintenance services to ameliorate the conditions causing the child to be subject to the court's jurisdiction. After the child is declared a dependent, the juvenile court must review the status of the child every six months. (*In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1154 [194 Cal.Rptr.3d 383]; *Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 302–303 [55 Cal.Rptr.3d 647].) Section 364 provides the standard when the child under the supervision of the juvenile court is not removed from the physical custody of the parent or guardian. (*In re Aurora P.*, *supra*, at p. 1154.) Section 364 also applies in cases where a child has been removed from the physical custody of a parent but is later returned.² (*Aurora P.*, at p. 1154, fn. 9; *In re Shannon M.* (2013) 221 Cal.App.4th 282, 290 [164 Cal.Rptr.3d 199].)

² In *In re Sarah M.* (1991) 233 Cal.App.3d 1486, 1493 [285 Cal.Rptr. 374], disapproved on other grounds in *In re Chantal S.* (1996) 13 Cal.4th 196, 204 [51 Cal.Rptr.2d 866, 913 P.2d 1075], this court held section 364 only applies to cases in which the child has never been removed from the original custodial home. In *Sarah M.*, the allegation was that the minor was physically abused by her mother, remained in the mother's custody for a time after dependency was instituted, and was later transferred to the custody of her father and stepmother. (*In re Sarah M.*, *supra*, at pp. 1491–1492.)

Sarah M. is distinguishable from this case because mother initially kept custody of Armando, he was later temporarily removed from her custody to live in a group home to provide him with services to control his behavior, and then placed back with mother before the

At the section 364 review hearing, the juvenile court is not concerned with reunification, but in determining whether the dependency should be terminated or supervision is necessary. (*In re Aurora P., supra*, 241 Cal.App.4th at p. 1155; *In re Pedro Z.* (2010) 190 Cal.App.4th 12, 20 [117 Cal.Rptr.3d 605].) The juvenile court makes this determination based on the totality of the evidence before it, including reports of the social worker who is required to make a recommendation concerning the necessity of continued supervision. (*In re Aurora P., supra*, at p. 1155.)

■ Section 364, subdivision (c) establishes a statutory presumption in favor of terminating jurisdiction and returning the child to the parents' care without further court supervision. (*In re Aurora P., supra*, 241 Cal.App.4th at p. 1155; *In re Shannon M., supra*, 221 Cal.App.4th at p. 290.) Under the statute, the juvenile court "shall terminate its jurisdiction unless the social worker or his or her department establishes by a preponderance of evidence that the conditions still exist which would justify initial assumption of jurisdiction under Section 300." (§ 364, subd. (c); see *Aurora P., supra*, at p. 1155.)

Although the statute refers to the social worker and the department establishing the basis for continuing jurisdiction, the first sentence of subdivision (c) of section 364 expressly makes clear the parent, guardian, or child may offer evidence on this question. The juvenile court is not bound by the department's or agency's recommendation to terminate jurisdiction if there is a preponderance of evidence to justify the court retaining it and the parent, guardian, child, or social agency has met that burden. (*In re Aurora P., supra*, 241 Cal.App.4th at pp. 1155–1156.)

■ Family maintenance services are designed to provide in-home protective services to prevent or remedy neglect, abuse, or exploitation in order to prevent separation of children from their families. Services may be extended in six-month increments if it can be shown that the objective of the service plan can be achieved within the extended time periods. Unlike family reunification services, nothing in the Welfare and Institutions Code or the California Rules of Court limits the time period for court supervision and services for dependent minors who remain at home. Family maintenance services may be provided until the dependent minor reaches the age of

agency decided to make father Armando's physical custodian. There was never a hearing or court order changing Armando's physical custody from mother to father until the section 364 hearing. Both parents also retained joint legal custody of Armando throughout the proceedings and in the juvenile court's exit order. Under the facts of this case, we find *In re Aurora P.* persuasive on the issue that section 364 proceedings applied to this case and do not apply the holding of *Sarah M.* here. Furthermore, the agency does not challenge the applicability of section 364 to these proceedings, though it does rely on *Sarah M.* on another point discussed, *post*.

majority. (*In re Aurora P.*, *supra*, 241 Cal.App.4th at p. 1154, fn. 8; *In re Joel T.* (1999) 70 Cal.App.4th 263, 267–268 [82 Cal.Rptr.2d 538].)

■ When a juvenile court terminates its jurisdiction over a dependent child, it is empowered to make exit orders regarding custody and visitation. These orders become part of any family court proceeding concerning the same child and will remain in effect until they are modified or terminated by the family court. The power to determine the right and extent of visitation by a noncustodial parent in a dependency case resides with the juvenile court and may not be delegated to nonjudicial officials or private parties, including the parents themselves. (*In re A.C.* (2011) 197 Cal.App.4th 796, 799 [130 Cal.Rptr.3d 271]; *In re T.H.* (2010) 190 Cal.App.4th 1119, 1122–1123 [119 Cal.Rptr.3d 1].) The rule of nondelegation applies to exit orders issued when the dependency jurisdiction is terminated. (*In re Chantal S.*, *supra*, 13 Cal.4th at pp. 213–214; *In re A.C.*, *supra*, at p. 799.)

■ Section 362.4 authorizes a juvenile court to issue a visitation order when it terminates its jurisdiction over a minor. This includes orders tailored for prospective adoptive parents, de facto parents, and grandparents. (*In re J.T.* (2014) 228 Cal.App.4th 953, 959–960 [175 Cal.Rptr.3d 744].) In making its order, the juvenile court is not governed by the Family Code. Due to the separate and distinct purposes of the juvenile and family courts, many Family Code provisions do not apply to dependency proceedings. (*In re J.T.*, at pp. 960–961.) Family Code provisions, for instance, place a limitation on family courts to require parents involved in custody or visitation disputes to participate in counseling for no more than one year. (*In re J.T.*, at p. 961.) It is inconsistent with the purposes of the dependency system’s protection of children who have been abused, abandoned, or neglected to require the juvenile court to apply statutory procedures meant for use in family court. (*Id.* at p. 962.)

Mother’s Standing and the Relevancy of Issues She Raised

Although the agency contends mother has misstated the issue before us as standing, this point is not supported by the record. Multiple times during the brief section 364 hearing, counsel for both the agency and Armando argued mother had no standing to raise the issues of the court’s jurisdiction, Armando’s custody, and continued services for Armando. The agency cannot complain for the first time on appeal that mother’s standing is not a proper issue for her to raise when it was the agency’s primary argument at the section 364 hearing and the juvenile court’s apparent basis for refusing mother an evidentiary hearing. The agency has now shifted its argument to challenge the relevancy of the issues raised to the juvenile court and on appeal.

Mother's counsel initially stated to the court he told mother she had no standing to challenge these issues because the case was being dismissed. Mother's counsel, however, did not waive this point for his client. Mother's counsel specifically argued mother "vehemently" opposed the agency's recommendation because it was not in Armando's best interests. Elaborating on his earlier statement that mother lacked standing, mother's counsel stated it was his understanding that as soon as he requested a contested hearing, the agency would object that mother lacked standing to request a contested hearing.

Mother's counsel expressly stated mother wanted a contested hearing. Mother's counsel further argued mother was challenging the dismissal of the dependency, Armando's placement, and Armando's need for more services. Read in context, the initial statement by counsel to the court was mother's counsel's explanation to mother and the court concerning the *agency's* position. It was not a concession by mother's counsel that his client did not have standing. It is clear from counsel's further statements he and mother sought a contested section 364 hearing in which they could present additional evidence. Mother's counsel attempted, to no avail, to persuade the juvenile court to have a contested evidentiary hearing. Neither mother nor her counsel waived or forfeited these issues for appellate review.

Mother contends she had standing to raise the issues in a contested evidentiary hearing of whether the juvenile court should (1) retain its dependency jurisdiction, (2) grant mother Armando's physical custody, and (3) provide family maintenance services to Armando. *Chantal S.* and *Aurora P.* support mother's contention she has a right to have an evidentiary hearing on these points. Although *Aurora P.* clearly establishes mother's right to challenge the agency's recommendation to dismiss dependency jurisdiction, it further establishes mother bears the burden of proof on that issue because the statutory presumption is for termination of the dependency action. (*In re Aurora P.*, *supra*, 241 Cal.App.4th at pp. 1154–1155, 1158–1163; *In re Chantal S.*, *supra*, 13 Cal.4th 196.)

Chantal S. and *Aurora P.* also stand for the proposition mother can challenge the agency's recommended exit orders. If mother has the right to a hearing on the juvenile court's jurisdiction and the exit orders it issues, she undeniably has standing to raise these matters in a contested section 364 hearing. The agency's position to the contrary rests on a precarious legal foundation.

The agency argues the issues mother raises were outside the scope of a section 364 hearing because mother's challenge on the issue of termination of the dependency action was only a general contention, and her specific contentions challenged the court's exit orders. The agency characterizes

mother's evidentiary contentions as irrelevant to the purpose of the hearing. In support of its argument, the agency relies on an earlier decision interpreting section 364, subdivision (c), *In re Elaine E.* (1990) 221 Cal.App.3d 809, 814 [270 Cal.Rptr. 489] (*Elaine E.*).

In *Elaine E.* a dependency proceeding was brought on behalf of three minors because a father had sexually molested his adopted daughter. Although the mother was awarded physical custody of the children, the father was prohibited from contacting the minors except with probation department supervision. The department recommendation after years of dependency was to have the action dismissed. The father sought an order from the juvenile court permitting him some sort of contact with the children. (*Elaine E., supra*, 221 Cal.App.3d at p. 812.) The juvenile court, however, would not permit a hearing at the section 364 hearing unless the father first brought a petition alleging changed circumstances pursuant to section 388. (*Elaine E.*, at p. 812.) The *Elaine E.* court held the visitation order was outside the scope of section 364, and because the parent failed to present any evidence regarding continued visitation, he was not denied due process of law. (*Elaine E., supra*, at p. 814.)

The agency relies on *Elaine E.* for the proposition that mother's contentions were not properly before the juvenile court. Unlike the father in *Elaine E.* who had no evidentiary showing to make to the court, mother sought to present evidence on all of the issues she raised at the hearing. Another distinguishing procedural difference between this case and *Elaine E.* is that there was a hearing changing custody in *Elaine E.*, whereas here there was no court hearing on the issue of Armando's custody. The agency summarily changed Armando's custody to father and mother never had a judicial determination on this issue.

Other courts have distinguished and declined to follow *Elaine E.*, finding issues related to custody and visitation are relevant to exit orders pursuant to sections 364 and 362.4. (*In re Michael W.* (1997) 54 Cal.App.4th 190, 196 [62 Cal.Rptr.2d 531]; *In re Roger S.* (1992) 4 Cal.App.4th 25, 29–30 [5 Cal.Rptr.2d 208].) The legal premise of *Elaine E.* has been questioned, if not undermined, by subsequent authorities such as *In re Chantal S.* and *In re Aurora P.* *Elaine E.* is procedurally distinguishable from the instant action because the parent there did not seek to present additional evidence, mother sought to have such a hearing here, and there was no prior judicial hearing on the change of custody from mother to father. Even if *Elaine E.* remains viable, its holding is inapplicable to this case.

The agency continues its challenge to the relevancy of mother's contentions, arguing mother's arguments concerning standing misstate the issue. The

agency argues *In re Aurora P.* is not controlling on this court, the juvenile court's ruling did not violate its precepts, and our prior opinion in *In re Sarah M.* rejected a parent's attempt to obtain an exit order for continued conjoint therapy after the juvenile court terminated its jurisdiction under section 364.

In *Sarah M.*, the mother challenged the dismissal of the dependency action because she sought to continue the juvenile court's jurisdiction in order for the parents to receive conjoint therapy through child protective services. (*In re Sarah M., supra*, 233 Cal.App.3d at pp. 1499–1500.) This court noted the issue of conjoint therapy was not a cry for continued supervision by the court through a dependency action, but a plea for financial aid. We rejected this as a basis for the juvenile court continuing its jurisdiction, noting the evidence showed the minor was no longer at risk. (*Id.* at p. 1500.)

■ One holding in *Sarah M.* was that the juvenile court did not have to issue a visitation order. (*In re Sarah M., supra*, 233 Cal.App.3d at pp. 1500–1501.) *Chantal S.* rejected that argument, expressly overruling *Sarah M.* on that point. The Supreme Court in *Chantal S.* further explained sections 362.4 and 364, subdivision (c) “authorize the juvenile court to issue an appropriate protective order conditioning custody or visitation on a parent’s participation in a counseling program.” (*In re Chantal S., supra*, 13 Cal.4th at p. 204.) *Chantal S.* rejected the reasoning in *Sarah M.* that the juvenile court was not required to fashion other exit orders, such as continued counseling by the parents. We therefore reject the agency’s argument *Sarah M.* remains viable on the question of whether a parent is entitled to an evidentiary hearing on exit orders issued by a juvenile court when the court terminates its jurisdiction. Family maintenance services may be provided until the dependent reaches the age of majority. (*In re Aurora P., supra*, 241 Cal.App.4th at p. 1154, fn. 8; *In re Joel T., supra*, 70 Cal.App.4th at pp. 267–268.)

■ Furthermore, as later cases such as *In re J.T., supra*, 228 Cal.App.4th 953 have explained, the statutory scheme of the dependency law differs from family law because juvenile dependency courts are charged with making orders consistent with the best interests of the child. It was error for the juvenile court to effectively punt and delegate to family court the issues concerning Armando’s custody and his need for additional services, services Armando may be entitled to even after the juvenile court terminates its dependency jurisdiction.

Chantal S., *Aurora P.*, and *J.T.*, are well reasoned; we adopt their holdings and apply them here. Contrary to the agency’s argument on appeal, the juvenile court did not follow the precepts of *Aurora P.* In fact, the juvenile

court denied mother *any* evidentiary hearing on the issues she attempted to raise related to the court's jurisdiction and exit orders. This procedure is contrary to those discussed and adopted in *Chantal S.* and *Aurora P.* Also, the change of Armando's custody to father was never considered in any judicial hearing. We agree with mother that implicit in the reasoning of *Aurora P.* is the premise the parties—whether they are the parents, the minor, or the agency—have standing to challenge the juvenile court's jurisdiction. We reject the agency's argument the issues mother attempted to raise by way of an evidentiary hearing were irrelevant to these proceedings. Similarly, the agency's argument to the juvenile court that mother lacked standing to have a hearing on these matters lacks merit.³

Failure to Hold Contested Hearing

The agency finally argues any error in the juvenile court's order is harmless. The agency marshals the evidence in the social workers' reports to support its conclusions. The flaw in the agency's argument is the absence of potential evidence to the contrary that could have been developed only in a contested hearing. Mother sought a contested section 364 hearing and was denied any opportunity to testify or present other evidence on the legally erroneous basis she lacked standing. We cannot discern what evidence mother could have presented at the hearing that may have contradicted or elaborated on evidence in the social workers' reports. What little we can glean from the social workers' reports is mother consistently told social workers father was the wrong parent to have physical custody of Armando because his abuse of Armando was the very cause of Armando's misbehavior. Mother was denied the opportunity to present any evidence to corroborate her concerns.

■ We therefore decline the agency's invitation to review the record for harmless error where there is a void in the evidence created by the juvenile court's failure to have a contested hearing. Due process includes the right to be heard, adduce testimony from witnesses, and to cross-examine and confront witnesses. (*In re Malinda S.* (1990) 51 Cal.3d 368, 383, fn. 18 [272 Cal.Rptr. 787, 795 P.2d 1244].) These procedures were not followed in this section 364 hearing. We are left to guess as to what evidence mother may

³ The agency also sets forth an argument involving statutory interpretation of, and whether the parents are permitted to present evidence based on a motion pursuant to, section 350, subdivision (c) to dismiss a petition based on this court's decision in *In re Eric H.* (1997) 54 Cal.App.4th 955, 968–969 [63 Cal.Rptr.2d 230]. *Eric H.* discussed section 350 as being the equivalent of a statutory nonsuit in a dependency action that is employed when the agency fails to meet its burden of proof. When such a procedure is employed, there is no evidence taken from the parents. (*Eric H.*, at pp. 968–969; see *In re Roberto C.* (2012) 209 Cal.App.4th 1241, 1251–1253 [147 Cal.Rptr.3d 505].) *Eric H.* involved an early stage proceeding totally different from a section 364 final stage hearing, it acts similar to a nonsuit, and it is factually and legally inapposite to the proceedings here.

have presented, an impossible task without a record based on an evidentiary hearing. We are a court of review, not a tribunal of speculation. The juvenile court erred in failing to conduct an evidentiary hearing on the issues mother sought to raise at the section 364 hearing.

DISPOSITION

The orders of the juvenile court dismissing the dependency action as well as denying mother a contested evidentiary hearing on the issues of the juvenile court's jurisdiction, Armando's custody, and further potential services for Armando are reversed. The case is remanded for a contested section 364 evidentiary hearing.

Levy, Acting P. J., and Poochigian, J., concurred.

[No. C070517. Third Dist. July 15, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
EUGENE SCOTT SNYDER, Defendant and Appellant.

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For more information about the study, please contact Dr. Michael J. Hwang at (310) 794-3111 or via email at mhwang@ucla.edu.

the first time in the history of the world, the people of the United States have been called upon to determine whether they will submit to the law of force, or the law of the Constitution. We consider the question to be, whether the Southern Slaveholding States have a right to secede from the Federal Union.

the first time in the history of the world, the people of the United States have been called upon to determine whether they will submit to the law of force, or the law of the Constitution. We consider the question to be, whether the Southern Slaveholding States have a right to secede from the Federal Union; and, if so, whether the Federal Government has a right to suppress them by force. The former question is the more important, because it is the only one which can be decided by the people themselves, without reference to any other power. The latter question is of less importance, because it can only be decided by the Federal Government, and the people have no voice in it. The former question is the more difficult, because it requires a knowledge of the Constitution, and the latter question is the easier, because it requires only a knowledge of the law of force. The former question is the more important, because it affects the rights of the people, and the latter question is of less importance, because it only affects the rights of the Federal Government. The former question is the more difficult, because it requires a knowledge of the Constitution, and the latter question is the easier, because it only requires a knowledge of the law of force. The former question is the more important, because it affects the rights of the people, and the latter question is of less importance, because it only affects the rights of the Federal Government.

Figure 1. The effect of the number of clusters on the classification accuracy of the proposed model. The proposed model is compared with the KNN classifier.

COUNSEL

Robert Navarro, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Sean M. McCoy and Stephanie A. Mitchell, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

NICHOLSON, J.—Defendant Eugene Scott Snyder appeals from a judgment convicting him of nine counts of child molestation and one count of possessing child pornography. He contends (1) insufficient evidence supports one count of committing lewd acts upon a child under the age of 14 and (2) the trial court abused its discretion under Evidence Code section 352 by admitting into evidence nearly 100 images of child pornography confiscated from defendant's residence. We agree with defendant's first contention but disagree with his second. We affirm the judgment except to reverse it as to one count of molestation.

FACTS*Victim L.T.*

L.T. was born in December 1985. She testified at defendant's 2011 trial at the age of 25. Her grandmother raised her.

L.T. met defendant at a Native American pow-wow she and her grandmother attended in the summer before she started eighth grade. She was 13 years old. Defendant was 36 years old.¹ L.T.'s grandmother's car broke down, and defendant agreed to take them home. Defendant and L.T. flirted on the way home.

Defendant began seeing L.T. at her home on a regular basis and became a family friend. When L.T.'s grandmother was there, he treated L.T. like a normal kid, but when she was not there, he treated L.T. like a girlfriend. They held hands and kissed.

They soon began having sex. They had sexual encounters "so many times." We describe the evidence supporting each of the eight counts concerning L.T. as specifically alleged in the information.

Count 1: Summer 1999, "First Time Sexual Intercourse," Penal Code Section 288, Subdivision (a)²

During the summer while she was still 13 years old, L.T. invited defendant into her bedroom. She told him she wanted to have sex. It was their first time. They had intercourse on the bed. When the intercourse became painful, L.T. asked defendant to stop, and he did.

¹ Defendant's probation report lists his birthday as August 3, 1963.

² Undesignated section references are to the Penal Code.

[REDACTED]

Count 2: Summer 1999—December 4, 1999, “Kissing,” Section 288, Subdivision (a)

During that summer and up until L.T.’s 14th birthday, defendant and L.T. kissed frequently and intimately.

Count 3: Summer 1999—December 4, 1999, “Intercourse Between 1st Time & While Menstr[u]ating,” Section 288, Subdivision (a)

While still 13 years old, L.T. skipped school and spent the day with defendant in a motel room. They had intercourse multiple times. Defendant audiotaped them having sex and photographed her orally copulating him. L.T. often skipped school in order to be with defendant.

Counts 4 and 5: October 1999—December 4, 1999, “Sexual Intercourse While Menstruating,” Sections 269, 288, Subdivision (a)

Many times, defendant and L.T. would have sex in his truck while parked in a church parking lot. Defendant had a mattress in his truck bed, and a camper shell covered the bed. Defendant would pick L.T. up around 7:00 a.m., and they would have sex before she went to school.

One time in the fall or winter of 1999, when they were having sex in the truck at the church parking lot, L.T. asked defendant to stop. She had been menstruating at the time. She told defendant she did not want to continue and to get off her, but he continued to orgasm. L.T. began crying; he apologized and drove her to school. L.T. said this incident happened when she was 13 years old, but she could not remember the time of year.

Count 6: Summer 1999—December 4, 1999, “Finger in Vagina,” Section 288, Subdivision (a)

During the summer of 1999, defendant digitally penetrated L.T. while they sat in his truck at Angel Cruz Park. L.T. knew this act happened when she was 13; the penetration hurt her because she and defendant had not had much sexual contact prior to this incident.

Count 7: Summer 1999—December 4, 1999, “Sexual Intercourse @ Grandma’s House After 1st Time,” Section 288, Subdivision (a)

L.T. testified she was 13 years old the second time she and defendant had sex, but she could not remember where the second time occurred. They had sex in many places, including “in my house.” L.T. said it was nighttime the

second time she and defendant had sex at her grandmother's house, but she could not recall the exact month when it occurred.

Count 8: December 5, 1999—December 4, 2000, "Sexual Intercourse While 14 Years Old," Section 288, Subdivision (c)(1)

When L.T. was 13 or 14 years old, defendant obtained permission from L.T.'s grandmother to take her to the movies. Instead, he took her to his house, and they had sex there. L.T. stated the two had sex at defendant's home "[m]any times." She also had sex with him at her grandmother's house when she was 14 "[m]any times."

Once, when L.T. was 14, defendant drove her and her grandmother to visit the family of a man her grandmother was dating. While there, defendant and L.T. had sex in the back of defendant's truck and in the house of one of the relatives. They also had sex on the drive home.

L.T. stopped seeing defendant before her freshman year in high school when she was 15 years old. In 2000, detectives questioned her about defendant. She had been scared and denied anything inappropriate had happened between them. In 2001, she lied in court under oath, claiming she had no sexual contact with defendant.

In 2009, defendant contacted L.T. through MySpace. She responded by confronting him about sexually abusing her when she was a young girl. Defendant responded: "I'm so sorry for hurting you. I just don't know what I was thinking of. I never meant to hurt you in any way. Please forgive me. I'll leave you alone again. I'm so sorry."

Later that year, L.T. met with police and informed them of her past relationship with defendant. The police arranged for L.T. to make a pretext call to defendant. The audiotape of the call was played to the jury. During the call, defendant said he wanted "to say how sorry I am. I know I should of stopped you that first night that you kissed me . . . and that night that you took me by the hand and took me into the bedroom . . . I should of stopped you. And I asked you. But I couldn't help myself. And I did fall in love and I know I shouldn't have."

Defendant stated he remembered the first night they had sex, and he again described how L.T. led him into the bedroom. He also remembered the next day, "when I took you to the motel . . . I knew I was in love. I didn't mean to hurt you." He remembered taking "naked" and "graphic" pictures at the motel, but he had gotten rid of them. When asked why he took the pictures,

[REDACTED]

defendant said he did not know why. He did not look at L.T. as a little girl, but as a woman and his girlfriend. He fell in love with her.

L.T. asked him how many times he thought they had sex. He said he did not know, but “it was quite a bit I know that.” He remembered picking L.T. up at her grandmother’s house, taking her behind the church, and having sex with her there.

L.T. asked defendant if he felt he had taken advantage of her. Defendant thought he probably had, but “[I]like I said you know I was I was in love with you. And and at that I don’t know even now I you know have always think about you on your birthday and how much I miss you just being my friend.” (*Sic.*)

Defendant concluded the conversation by saying: “I never meant to hurt you. Please understand that. And find it someway in in your heart to understand how I feel. But I didn’t mean to hurt you.” (*Sic.*)

A week later, L.T. set up a fake meeting with defendant at a coffee shop. Police saw defendant leave his house near the appointed time and drive to the coffee shop’s parking lot, where he was arrested.

Victim V.G.

V.G. was born in January 1994. When she was five or six years old, her mother started dating defendant, who was roughly 36 years old, and eventually they moved in with him. Defendant was a “father figure” to her, and she called him “Bear.” V.G. slept between her mother and defendant in the same bed.

Three counts in the information alleged defendant molested V.G. We describe the evidence supporting each of the three counts concerning V.G. as specifically alleged in the information.

Count 9: January 15, 2001—January 14, 2003, “First Time Touching Vagina,” Section 288, Subdivision (a)

When she was around seven years old, V.G. was sleeping in bed between her mother and defendant. She awoke to defendant digitally penetrating her underneath her pajama bottoms and underwear. After this incident, V.G.’s mother slept in the middle of the bed.

Count 10: January 15, 2001—January 14, 2003, “Second Time Touching Vagina,” Section 288, Subdivision (a)

When V.G. was seven or eight years old, a similar incident occurred. V.G.’s mother got out of the bed to use the bathroom, and when she returned, she

pushed V.G. next to defendant. V.G. awoke to defendant touching her vagina. She got up, went to the restroom, and upon returning, moved her mother into the middle.

Count 11: January 15, 2001—January 15, 2004, Child Molesting With a Prior, Section 647.6

When V.G. was seven or eight years old, defendant started acting like a boyfriend to her. His kisses changed from a regular, quick kiss on the lips to longer kisses. He told her that she was becoming a “big girl now.” She “started feeling awkward” around defendant.

Child pornography

Count 12: November 2009, Possession of Child Pornography, Section 311.11, Subdivision (a)

Executing a search warrant at defendant’s residence, police found a manila envelope on the nightstand next to the bed. Inside, they found individual photographs and sheets of photographs depicting young girls in sexual poses, in various stages of undress, and engaging in sexual acts with men.

Police seized a laptop computer and a desktop computer from the home. Both computers stored child pornography. Other pornographic images had been altered to include the faces of V.G. and defendant on the photographed adult bodies. Some of the photos found in the manila envelope were also found on the desktop computer.

Defendant’s prior incidents

The prosecution introduced evidence of two prior incidents by defendant. The first involved defendant’s niece, “A.” A. was born in April 1984. She was 27 years old when she testified at trial in 2011. A. and her older sister lived with defendant and his wife when A. was around seven or eight years old. Defendant was roughly 28 years old. At first, defendant was like a father figure to A., but later he started to kiss her on the lips in a way that was “weird” and gave her a “gross feeling.” Defendant had sexual intercourse with A. on one occasion. That day, A. pretended to be sick so she could miss school. Defendant took her into his bedroom, and he told her to disrobe and get on his bed. Defendant removed his clothes and got on top of A. He kissed her and told her, “It’s okay. It’s not gonna hurt. I’m gonna put it in slow.” A. cried while defendant had sexual intercourse with her. Afterward, defendant told her not to tell anyone.

“S.” was born in March 1986. She attended her freshman year of high school at the school where defendant worked as a janitor. S.’s friends gave her balloons for her 15th birthday in March 2001. Either on that day or the day after, defendant, then 37 years old, gave S. a gift and a letter. The letter expressed how defendant wanted someone to love and to love him. It was signed, “Always and forever, Eugene.” S. gave the gift and the letter to her coach. She had no further contact with defendant.

CASE HISTORY

A jury convicted defendant of seven counts of child molestation under section 288, subdivision (a): five counts against L.T. (counts 1, 2, 3, 6, 7), and two counts against V.G. (counts 9, 10). The jury also convicted defendant of one count of child molestation against L.T. under section 288, subdivision (c)(1) (count 8); one count of child molestation with a prior against V.G. under section 647.6 (count 11); and one count of possessing child pornography under section 311.11, subdivision (a) (count 12), a misdemeanor.

The jury found true enhancements under former section 667.61, subdivision (e)(5)³ (indeterminate sentence for child sex offense against more than one victim), as to each of the seven counts under section 288, subdivision (a) (counts 1, 2, 3, 6, 7, 9, 10).

The jury was unable to reach verdicts on counts 4 and 5, and the trial court granted the prosecution’s motion to dismiss those counts.

The court sentenced defendant to a total state prison term of 105 years to life, calculated as follows: seven consecutive terms of 15 years to life on each of the seven counts under section 288, subdivision (a), and former section 667.61, subdivision (e)(5) (counts 1, 2, 3, 6, 7, 9, 10), and concurrent terms of eight months each (one-third the midterm) on counts 8 ($\frac{1}{3}$ of § 288, subd. (c)(1)) and 11 ($\frac{1}{3}$ of 647.6), and one year on count 12 ($\frac{1}{3}$ of § 311.11, subd. (a)).

DISCUSSION

I

*Sufficiency of the Evidence Supporting Count 7**

³ In 2010, the Legislature redesignated former subdivision (e)(5) of section 667.61 as subdivision (e)(4) of the same section. (Stats. 2010, ch. 219, § 16.)

*See footnote, *ante*, page 622.

Admission of Numerous Child Pornography Images

Defendant contends the trial court abused its discretion under Evidence Code section 352 by admitting into evidence approximately 100 images that police had found in defendant's residence. Many were images of child pornography. Defendant claims only a few images were necessary to support the charge of possessing child pornography, and only a few other images were necessary to support his convictions of molesting V.G. He asserts admission of so many photos was unduly prejudicial. We disagree.

A. *Additional background information*

During motions in limine, the prosecutor informed the court he had narrowed the number of images obtained from defendant's residence that depicted child pornography and adult pornography from about 18,000 images down to 100 of the most pertinent and probative images.

Defense counsel asked the court to limit the number of images that could be introduced to 50 or 60, because at some point, he argued, "it just becomes cumulative and repetitive" and "oversaturation." He suggested all the prosecution needed was a police officer to testify how many pictures he saw, and to identify "one, two, maybe 20, maybe 30, maybe 40" as representing what he saw. Counsel argued 100 pictures were "overkill" and "unfairly prejudicial."

The prosecutor stated he intended to introduce 103 pictures. Some of them were "generic child pornography" depicting an unknown child naked or involved in sexual acts. Another group of images was of adult and child pornography, but photos of V.G.'s face had been superimposed on one of the participants in the images. Some of these also had defendant's picture superimposed on one of the participants in the images. The prosecutor argued that all of these images were relevant to prove possession of child pornography, and were relevant to show defendant's obsession with V.G. and with children, to show his motive, and to support V.G.'s testimony.

Defense counsel clarified he was challenging only the admission of 100 images of generic child pornography. The court responded: "I think we've reached a 352 point long before that, but I'm hesitant to try and draw any preconceived lines since I don't know what these pictures look like, and I don't wanna know what they look like until they come into evidence to tell you the truth, but—until they're offering them. But I don't think I can draw any lines here and say it's gonna be this number or this number. [¶] . . . [¶]

[REDACTED]

Clearly, if it has some evidentiary value, then it's gonna come in unless it's unduly, and that's the operative word 'unduly,' prejudicial." The court reserved the matter for later resolution.

Testifying for the prosecution, Stockton Police Detective Jim Krief identified a manila envelope (exhibit 2) he found on defendant's nightstand. He also identified images of child pornography (exhibits 3–7) he found inside the envelope. The prosecutor asked to move the images into evidence. Defense counsel stated: "Submitted pursuant to the objections that I previously noted prior to trial." The court admitted the manila envelope and the images in exhibits 3, 4, 6, and 7.

Detective Krief then identified other individual photos and photo sheets (exhibits 8–17) he found in the manila envelope. These, too, were admitted into evidence, "[s]ubject to the [court's] previous rulings . . ." The detective did not describe these images, but according to the Attorney General, exhibits 10 and 12 through 14 were nonpornographic images of V.G. Exhibits 15 and 17 depicted defendant kissing V.G. on her lips. Exhibit 16 was a photo of defendant and V.G. apparently slow dancing.

Detective Heidi Heim identified numerous images found on defendant's desktop and laptop computers, many of which were pornographic. Defense counsel objected to the images based on authentication and foundation. The court treated his objection as a continuing objection to all of the images based on authentication and foundation, and it overruled the objection. Detective Heim identified, and the court published, exhibits 18 through 58 and 60 through 103. Most of these images were pornography or child pornography.

After the prosecution closed its case, the prosecutor moved to have the exhibits admitted into evidence. As to the exhibits found in the manila envelope (exhibits 2–17), defense counsel objected to admitting exhibits 8 and 12 through 17 on the basis of lack of foundation and relevance. The trial court overruled the objection.

When the prosecutor moved to admit exhibits 18 through 58, images found primarily on defendant's desktop computer, defense counsel objected under Evidence Code section 352. Counsel stated, "I understand [t]he Court's ruling related to my in limine motions at the very beginning and [t]he Court limiting the number of pictures. I would continue to raise my objection and indicate that I believe that the number should be less considering the gravity and the severity of the nature of the pictures. So pursuant to 352, I would raise an objection as to entering these into evidence." The trial court overruled the objection, stating, "[M]y ruling will be the same."

Defense counsel also objected when the prosecutor sought to admit exhibits 60 through 103 into evidence, images taken primarily from defendant's laptop computer. Counsel objected under Evidence Code section 352 based on "the graphic nature of the pictures." The trial court overruled the objection.

According to the Attorney General and appellate counsel, nine of the images taken from defendant's computers were nonpornographic images of V.G. (exhibits 34–35, 37–38, 62, 66, 69, 74, 91). Defendant admits these images were relevant.

Many of the remaining images were pornographic. According to the parties, a number of the images were of "generic" child pornography not depicting V.G. or defendant. Nineteen exhibits depict nude or partially nude young girls, some exposing their genitals (exhibits 19–20, 22, 25–26, 28, 36, 39, 44, 46, 49–53, 55–57, 64); three exhibits depict young girls exposing their genitals or engaging in sexual acts (exhibits 7, 47, 48); and 16 exhibits depict young girls engaged in sex acts with men, including oral copulation and intercourse (exhibits 5–6, 23–24, 29–30, 40–43, 54, 63, 65, 67, 70, 71).

Another group of exhibits contained pornographic images with photographs of V.G., defendant, or both superimposed on the faces of the original models. Some of these altered images were copies of images the court admitted into evidence that had not been altered (exhibits 58, 65, 92, 70, 94, 97). V.G.'s face is superimposed on two exhibits of a developed nude girl (exhibits 72, 88); four exhibits of adult nude or partially nude women (exhibits 75, 80, 83–84); four exhibits of adult women engaged in penetrating themselves with foreign objects (exhibits 73, 78–79, 82); three exhibits of adult women engaged in sex acts with adult males, including intercourse (exhibits 81, 89, 90); and four exhibits of young girls engaged in sex acts with adult males, including intercourse (exhibits 92–95). V.G.'s face is superimposed on three exhibits of adult women engaging in sex acts where defendant's face is also superimposed (exhibits 85–86, 99); five exhibits of young girls engaging in sex acts where defendant's face is superimposed (exhibits 58, 87, 97, 100–101); and one exhibit of a developed girl engaging in a sex act where defendant's face is also superimposed (exhibit 103). V.G.'s face is also superimposed on one exhibit that depicts a girl having sex with a dog (exhibit 98).

B. *Analysis*

■ "Trial courts enjoy 'broad discretion' in deciding whether the probability of a substantial danger of prejudice substantially outweighs probative value. [Citations.] A trial court's exercise of discretion 'will not be

disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10 [82 Cal.Rptr.2d 413, 971 P.2d 618].)" (*People v. Holford* (2012) 203 Cal.App.4th 155, 167–168 [136 Cal.Rptr.3d 713] (*Holford*)).

■ To the extent defendant objected based on there being an evidentiary alternative to the volume of pictures the prosecution sought to introduce, his claim on appeal is forfeited. "[W]hen making a section 352 objection grounded upon the existence of an evidentiary alternative, the requirement in [Evidence Code] section 353, subdivision (a), to state specific reasons for an objection necessarily requires the objecting party to identify the evidentiary alternative with specificity. Otherwise, the trial court will not be fully apprised of the basis on which exclusion is sought; nor can the trial court conduct a balancing analysis which involves weighing the probative value of the alternative." (*Holford, supra*, 203 Cal.App.4th at p. 170.) Failing to do so forfeits the argument on appeal. (*Ibid.*)

At trial, defendant did not identify an evidentiary alternative with specificity. Instead, he suggested different numbers of photos be introduced, without specifying how many or which ones. Defense counsel argued 100 photos were too many, and he asked the trial court at one time to limit the number to 50 or 60, and, a few moments later to limit a police officer to introducing anywhere from 1 to 40 photos representing what the officer saw. In his brief before us, defendant specified how many photographs were "not needed," but does not identify which ones. Defense counsel's failure to specify at trial which exhibits should and should not have been admitted precluded the trial court from weighing the probative and prejudicial values of the exhibits defendant would have agreed to admit against all the exhibits whose admission he would have opposed. As a result, he forfeits his argument here to the extent it is based on the existence of an evidentiary alternative.

Defendant also claimed at trial the exhibits should have been excluded under Evidence Code section 352 because, given their nature, they were cumulative and unfairly prejudicial. No doubt, the images were unpleasant for the jury to view, but their probative value outweighed their prejudicial impact. Defendant testified he never viewed or downloaded child pornography on his computers. However, with their superimposed images of V.G. and himself over the original images, and with other copies of those same images appearing unaltered, the exhibits demonstrated defendant had knowingly possessed the images of child pornography, an element of proving possession. (§ 311.11, subd. (a).) Unlike cases involving the admission of gruesome photographs from a murder scene or autopsy, these photographs *were* the crime, not the aftermath of a crime. (*Holford, supra*, 203 Cal.App.4th at pp. 170–171.)

■ The exhibits were also probative of defendant's molestation crimes. They demonstrated defendant's intent to gratify his prurient desires with children. They also supported L.T. and V.G.'s testimony that defendant in fact committed the lewd acts they testified he had. The prosecutor had chosen these 100 or so images from a collection of some 18,000 found in defendant's home. The pornographic images depicted children and adults in various stages of undress and sexual activity, thereby avoiding being cumulative. They certainly were not more prejudicial than the victims' explicit testimony of defendant's molestations against them. Under these circumstances, we cannot say the number of images admitted was cumulative or unduly prejudicial, or that the trial court acted arbitrarily or capriciously in admitting all of the exhibits.

DISPOSITION

The judgment is affirmed except as to count 7. The judgment on count 7 only is reversed, and the sentence on count 7 is vacated. The trial court is directed to amend the abstract of judgment and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

Raye, P. J., and Murray, J., concurred.

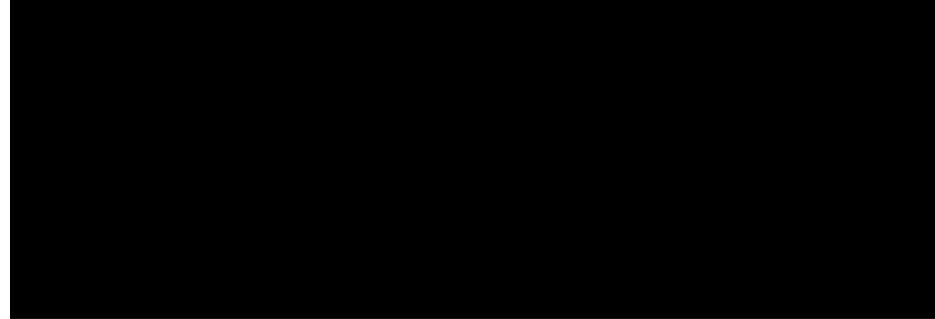
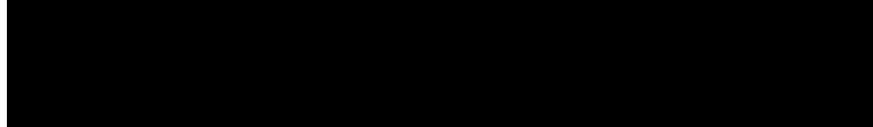
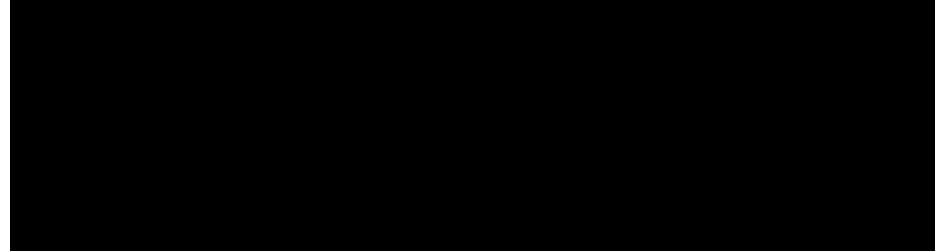
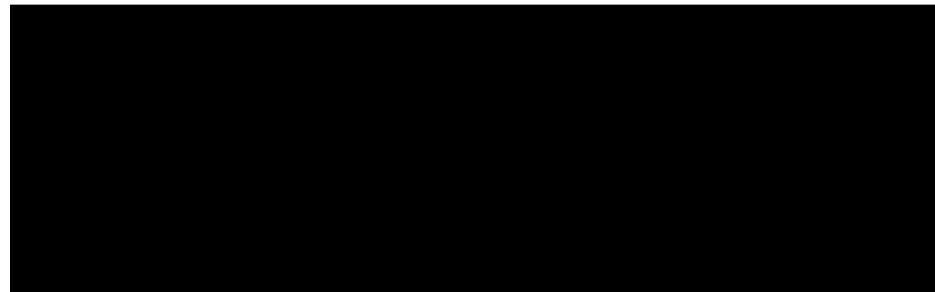
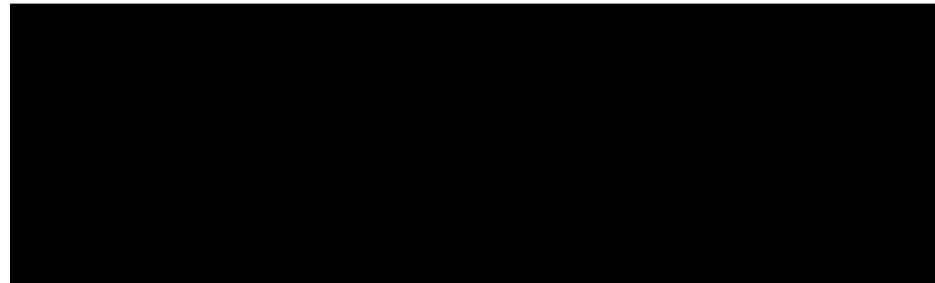
[No. D067917. Fourth Dist., Div. One. June 23, 2016.]

FRED DURAN, Plaintiff and Respondent, v.
OBESITY RESEARCH INSTITUTE, LLC, et al., Defendants and
Respondents;
DeMARIE FERNANDEZ et al., Objectors and Appellants.

[REDACTED]

[REDACTED]

[REDACTED]



COUNSEL

Bursor & Fisher, Scott A. Bursor, L. Timothy Fisher, Annick M. Persinger and Neal J. Deckant for Objectors and Appellants.

Nicholas & Tomasevic, Alex Tomasevic and Craig M. Nicholas for Plaintiff and Respondent.

Newport Trial Group, Scott J. Ferrell, David W. Reid; Gordon & Rees and Richard P. Sybert for Defendant and Respondent Obesity Research Institute, LLC.

Shook, Hardy & Bacon, Frank C. Rothrock, D. Susan Wiens and Paul B. La Scala for Defendant and Respondent Wal-Mart Stores, Inc.

OPINION

NARES, J.—Fred Duran filed a putative class action complaint against Obesity Research Institute, LLC (ORI), and Wal-Mart Stores, Inc. (Wal-Mart) (collectively, defendants). Duran alleges defendants falsely claimed that ORI's products, Lipozene and MetaboUp, have weight loss benefits. The court approved a claims-made settlement providing that class members submitting a claim without proof of purchase would receive \$15, and those submitting receipt(s) would receive one refund of double the unit price paid. The settlement also provided that ORI would cease making certain assertions in product advertising. Defendants also agreed to not oppose a motion seeking \$100,000 in attorney fees to class counsel.

In a class estimated to consist of between 400,000 and 600,000 consumers, 895 claims were submitted, in the total amount of \$31,800. Assuming there were 500,000 class members, less than two-tenths of 1 percent (0.179 percent) submitted claims. Thus, the proposed settlement buys a nationwide release for the price of about six cents (\$0.064) per class member. And for achieving this result, class counsel receive \$100,000 in attorney fees—about 75 percent of the total amount paid.

Objectors, class members DeMarie Fernandez, Alfonso Mendoza, and Brian Horowitz (collectively, objectors) appeal, contending the settlement is

the product of collusion. Objectors assert the class did not receive sufficient notice of settlement, and the settlement is unreasonable and inadequate. They also contend the attorney fee award is excessive.

As we explain, the downloadable online claim form, a part of the class notice of settlement, misrepresents three material terms of the settlement: (1) the amount of payment to class members is misstated; (2) the claim form refers to Hydroxycut products, which are not involved in this case; and (3) a Civil Code section 1542 release was included in the claim form, although at the preliminary approval hearing the court stated it would not approve such a release.

After we called these errors in the claim form to counsel's attention (no one raised this issue in the trial court) and requested supplemental briefing, class counsel and defendants candidly conceded, “[T]he class members were not clearly informed of what the terms of the settlement were, and what benefits they would receive and what claims they would release if they submitted a claim.” Nevertheless, class counsel and defendants contend the trial court's determination that the settlement is fair and reasonable should be affirmed, and the case should be remanded only to decide the “details and logistics” of giving corrected class notice.

Remand cannot be limited to giving a corrected class notice. The judgment must be reversed because the class notice failed in its fundamental purpose—to apprise class members of the terms of the proposed settlement. The erroneous notice injected a fatal flaw into the entire settlement process and undermines the court's analysis of the settlement's fairness. (See *Petrone v. Veritas Software Corp. (In re Veritas Software Corp. Securities Litigation)* (9th Cir. 2007) 496 F.3d 962, 972 (*Veritas*).)

Although reversal on this ground makes it unnecessary to consider other issues objectors raise, in the interests of judicial economy, we also discuss two issues that will likely arise on remand: (1) the manner of giving class notice of settlement, and (2) whether the trial court properly considered the injunctive relief portion of the settlement as “the most important part” in determining its reasonableness.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Duran's Putative Class Action Complaint*

In May 2013 Duran filed a putative class action complaint against ORI and Wal-Mart for alleged violations of the Consumers Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.), unfair competition law (Bus. & Prof.

Code, § 17200 et seq.), false advertising law (Bus. & Prof. Code, § 17500 et seq.) and other state law claims. Duran filed the action on behalf of himself and “[a]ll persons, nationwide” who purchased ORI diet products for personal use “after August 10, 2012 until the date notice is disseminated.”

Duran’s complaint identifies ORI’s products as Lipozene and MetaboUp. He alleged ORI “markets and sells” these products as a “weight-loss breakthrough” that is “clinically proven to help you lose weight and pure body fat” and represents these products “can help you lose weight without a change in lifestyle.” Duran alleged these representations were false and misleading and that “Lipozene is not, in fact, effective for weight control.” He alleged that ORI’s promises and representations that its diet products are “clinically proven and guaranteed weight loss miracle are false and have been used to unfairly deceive millions of consumers into buying” ORI’s products. Duran alleged that Wal-Mart “promotes and disseminates” ORI’s “deceptive advertising claims by carrying and distributing the Lipozene and/or MetaboUp products.”

B. *Motion for Class Certification*

In July 2013 Duran filed a motion for class certification, set for hearing in December 2013. In seeking class certification, class counsel stated, “Lipozene and MetaboUp are not, in fact, ‘clinically proven’ to be weight-loss miracle pills and Defendants have simply swindled consumers out of millions of dollars based on a uniform set of misrepresentations that make up a marketing story.”

C. *The First Motion for Preliminary Approval*

In November 2013—before the class certification motion was heard—Duran and ORI jointly moved for preliminary approval of settlement. The settlement included certification of a settlement class defined as “all persons in the United States who purchased ORI’s products during the Class Period for personal or household use.”

The settlement provided that class members submitting a valid claim without proof of purchase would receive \$15, and those submitting proof of purchase would receive double the unit price paid (between \$28 and \$68), limited to one such refund. The settlement agreement provides that claims will be paid from a “Non-Reversionary Fund.”¹

¹ A “claims-made settlement,” as here, is one that does not have a fixed settlement fund, but rather provides the defendant will pay claims of class members who file them. (Rubenstein, Newberg on Class Actions (5th ed. 2014) § 13:7, p. 287 (Newberg).) Such settlements may promise far more than they deliver because the claiming rate is notoriously low. (See *Sullivan v.*

The settlement also provided that ORI will establish a “Reserved Fund” of \$500,000 to pay the costs of administration, notice, incentive awards and attorney fees. This fund would be retained “internally” by ORI. Any reserved amounts not used to pay these expenses would “cease to be internally reserved by ORI” when the judgment is final.

At the time of this first motion for preliminary approval, the settlement agreement also included a waiver by class members of unknown claims and a waiver of their rights under Civil Code section 1542.²

Additionally, defendants agreed to not oppose a request by class counsel for up to \$100,000 in attorney fees and costs. Class counsel would seek a \$2,500 “incentive award” for Duran as class representative.

The court declined to rule on the motion for preliminary approval, instead raising “several concerns regarding the proposed settlement.” The court’s concerns included: (1) “Is publication on the internet and in one newspaper sufficient?”; (2) “Counsel has not submitted a copy of the claim form”; and (3) “[T]he court will not approve a [Civil Code] section 1542 waiver.”

D. *The Second Motion for Preliminary Approval*

After revising the settlement agreement in an attempt to address the court’s concerns, Duran and ORI filed a second motion for preliminary approval. Class counsel stated the settlement was the result of “arms-length settlement negotiations during a mediation” conducted by a retired superior court judge, Herbert B. Hoffman. Judge Hoffman submitted a declaration stating he “supervised the mediation between the parties in this case” and that “[a]fter

DB Invs., Inc. (3d Cir. 2011) 667 F.3d 273, 329, fn. 60 [claims rates in consumer class settlements “rarely” exceed 7 percent]; *Sylvester v. CIGNA Corp.* (D.Maine 2005) 369 F.Supp.2d 34, 52 [claims-made settlements regularly yield response rates of 10 percent or less].)

In contrast, in a “common fund settlement,” the defendant contributes a fixed settlement amount, which is then distributed to settlement class members directly or through a claims process. (Newberg, *supra*, § 13:7, pp. 287–288.) Depending on the terms of the settlement agreement, if the class does not claim the full amount, unclaimed funds may be distributed pro rata to the claimants, or instead may revert to the defendant, or be distributed to some other person or entity.

The claims-made settlement here is the functional equivalent of a common fund settlement where the unclaimed funds revert to the defendant. (See Newberg, *supra*, § 13:7, p. 288.) Accordingly, calling the fund a nonreversionary fund, as the parties do here, can make the settlement appear to be more beneficial to the class than it really is.

² Civil Code section 1542 provides: “A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.”

many hours of negotiations, the parties were able to reach a resolution that [he] believe[s] is reasonable . . . ”

The monetary recovery for class members and structure of the settlement remained the same as the parties presented in the first motion for preliminary approval: Class members submitting a valid claim form with no proof of purchase would receive \$15. Those submitting a valid claim form with proof(s) of purchase would receive one refund of double the unit price paid.

Claims forms could be obtained by calling a toll-free number established for that purpose, by requesting one by mail, or by downloading the form from a Web site established by the settlement administrator. Completed claim forms could be submitted online or by mail. The parties provided the court with an exemplar claim form, which correctly reflected the settlement payouts.

The parties proposed to give class notice of the settlement in three ways: (1) publication in USA Today; (2) e-mail notice to class members “with known electronic mail addresses”;³ and (3) a settlement Web site.

As revised, the settlement agreement did *not* require claimants to waive rights under Civil Code section 1542.

E. *Class Notice of Settlement*

The court granted this (second) motion for preliminary approval. In August 2014 notice of settlement was published in a Monday edition of USA Today. The published notice directed readers to a Web site, www.oriclassactionlawsuit.com, for additional information on submitting a claim. The settlement Web site contained downloadable versions of the notice of settlement, settlement agreement, and claim form.

ORI sent e-mail notice to 237,334 class members who purchased the products online directly from ORI. The e-mail notice stated, “Lipozene has recently reached a nationwide settlement,” and invited the e-mail recipient to click a link to the settlement Web site for more information.

F. *The Downloadable Claim Form*

Section V of the downloadable claim form is entitled “Proof of Purchase.” The form states, “Do you still have the original Purchase Receipt(s) for the

³ Later, in the motion for final approval, it became clear that “with known electronic mail addresses” meant class members who purchased Lipozene only from ORI’s Web site, and not those who purchased from Wal-Mart’s online store.

ORI Product(s) identified above?" Immediately below an area for a "yes" or a "no" answer, the following instruction appears in uppercase: "IF YOU ANSWERED 'YES', YOU ARE ENTITLED TO A FULL REFUND OF ALL PRODUCTS PURCHASED DURING THE CLASS PERIOD IF YOU SEND IN YOUR PURCHASE RECEIPT(S). IF YOU ANSWERED 'NO', YOU ARE ENTITLED TO A MAXIMUM REIMBURSEMENT OF \$15.00."

Section VI of the downloadable claim form is entitled "Instructions For Making a Claim." The instructions state, "Make sure this form is filled out completely" and "Sign and date the verification below (Section VII)." The instructions also state: "You may submit a claim for full monetary payment for each *Hydroxycut* product you purchased and for which you have an original proof of purchase, up to no limit." (Italics added).

Section VII of the downloadable claim form is entitled "Release and Sworn Verification Statement." It states in part: "I submit this Claim Form to participate in the settlement reached in this Lawsuit, and submit to the jurisdiction of the San Diego County Superior Court with respect to my claim asserted herein, and for purposes of enforcing the release of claims stated in this Claim Form . . . [¶] . . . [¶] *I hereby relinquish any and all rights and benefits that we may have under California Civil Code § 1542 . . .*" (Italics added.)

G. *Claims Submitted*

At the end of the claims filing period, 895 claim forms were submitted, claiming a total of \$31,800. The claims administrator received only two requests for exclusion from the settlement.

H. *Objections to Settlement*

Objectors are plaintiffs in a competing putative class action against ORI, which was filed on May 16, 2013, three days after Duran filed the instant case. The district court stayed that action to avoid "duplicat[ing] the San Diego Superior Court's effort [in Duran] and possibly issu[ing] a conflicting decision." (*Fernandez v. Obesity Research Institute, LLC* (E.D.Cal., Aug. 28, 2013, No. 2:13-cv-00975-MCE-KJN) 2013 U.S. Dist. Lexis 122986.)

Objectors filed a formal objection to class action settlement. They asserted the settlement was the result of collusion between class counsel and ORI and a reverse auction.⁴ As evidence of the alleged collusion, objectors prepared a

⁴ By reverse auction, objectors refer to a situation "when 'the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that

chart comparing allegations in Duran's complaint with a presuit CLRA letter objectors' lawyers sent to ORI in March 2013. Because class counsel could have obtained the objectors' CLRA letter only from ORI, objectors assert the "plagiarism [sic] in the Duran complaint . . . is a smoking gun of collusion between purported adversaries." Objectors also noted that class counsel had previously litigated a case against ORI, which settled for \$90,000 in attorney fees and zero monetary relief to the class.⁵

Objectors argued the court should not approve the settlement because (1) direct notice should have been given to online purchasers of ORI's products from Wal-Mart.com and other retailers, (2) the publication notice was inadequate because it had an estimated "reach" of only 1.06 percent of class members, (3) the settlement is substantively unfair and unreasonable, (4) the parties failed to provide evidence establishing the settlement is reasonable, (5) Duran lacks standing to settle claims involving MetaboUp because he did not purchase that product, and (6) the attorney fees are excessive.

I. Motion for Final Approval

In January 2015 class counsel and ORI's attorneys filed a joint motion for final approval. The motion was supported, in part, by a declaration from Dan Reeves, vice-president of Innotrac Corporation, the claims administrator. Reeves's declaration authenticated and attached a "[t]rue and correct cop[y]" of the downloadable claim form on the settlement Web site. This is the claim form, discussed *ante*, that misstates several terms of the settlement. However, neither the parties nor objectors raised this issue in the trial court.

Objectors opposed the motion for final approval, making the same arguments as asserted in their objections to the proposed settlement.

At the hearing, the court expressed "concern" about "the notice," as indicated by the low response rate. Stating, "I am not particularly happy with it," the court nevertheless approved the settlement. On March 24, 2015, the court entered a final approval order stating, "This Court hereby approves the Settlement set forth in this Judgment . . ." On April 10, 2015, the court entered a separate order awarding class counsel \$100,000 in attorney fees and awarding Duran, as class representative, \$2,500 as an incentive fee. Objectors timely appealed.

the [trial court] will approve a weak settlement that will preclude other claims against the defendant.' " (*Negrete v. Allianz Life Ins. Co.* (9th Cir. 2008) 523 F.3d 1091, 1099.)

⁵ Class counsel and ORI deny there was any collusion. Class counsel contend objectors "plagiarized" *their* complaint in a case that settled against ORI in 2011. Moreover, ORI asserts it tried to settle this lawsuit with objectors' counsel, but negotiations ended when objectors' lawyer demanded \$750,000 in attorney fees for doing essentially nothing to benefit the class. The lawyers on both sides accuse each other of greed and disregarding the class interests. To resolve this appeal, we need not and do not resolve these accusations.

DISCUSSION

I. THE JUDGMENT MUST BE REVERSED BECAUSE THE ONLINE CLAIM FORM MISSTATED MATERIAL SETTLEMENT TERMS

■ “The principal purpose of notice to the class is the protection of the integrity of the class action process” (*Cho v. Seagate Technology Holdings, Inc.* (2009) 177 Cal.App.4th 734, 745 [99 Cal.Rptr.3d 436].) “The notice ‘must fairly apprise the class members of the terms of the proposed compromise and of the options open to the dissenting class members.’ . . .” (*Id.* at p. 746.) A class action settlement notice should present information neutrally, simply, and understandably. The notice should allow class members to evaluate a proposed settlement. Notice should describe the formula or plan for computing individual settlement class member recoveries. (See *Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393 [113 Cal.Rptr.3d 510] [“The aggregate amount available to all claimants was specified and the formula for determining one’s recovery was given. Nothing more specific is needed.”].)

The notice given here was substantially dependent upon information conveyed to class members through the settlement Web site. For example, e-mail notice, sent to 237,334 class members, did not itself contain the settlement’s terms, but instead instructed recipients to click on a link to the settlement Web site to obtain the long form notice and settlement agreement. The notice published in USA Today explained the method of calculating settlement payments and generally described the injunctive relief, but also referred readers to the settlement Web site “[f]or additional information on submitting a claim” The settlement Web site states that submitting a valid claim form is the only way to get a cash payment and contains a link to a downloadable claim form. Thus, the downloadable claim form is an integrated part of the settlement notice given to class members and submitting a valid claim form was essential to receiving settlement money.

The parties and objectors now agree that the downloadable claim form is inconsistent with material settlement terms approved by the court. First and foremost, there is a discrepancy in the settlement amount. The downloadable claim form states class members submitting receipts would receive “a full refund of all products purchased during the class period.” However, under the settlement agreement, class members submitting receipts would receive one refund of double the purchase price.

This discrepancy could overvalue or undervalue a claim, depending on the number of purchases and price paid by the claimant. For example, a class

member who made six purchases at \$30 each would be entitled to \$180 as provided in the downloadable claim form, but only \$60 under the settlement agreement. Conversely, a class member who made one purchase for \$20 would receive \$20 under the payout formula in the claim form, but \$40 under the settlement agreement.

Second, the downloadable claim form states class members would also receive a “full monetary payment for each Hydroxycut product you purchased and for which you have an original proof of purchase, up to no limit.” This is also inconsistent with the court-approved settlement agreement. The settlement class consists of persons who purchased Lipozene, MetaboUp, and MetaboUp Plus during the class period for personal or household use, with some limited exceptions. Duran’s lawsuit does not involve the distinct product, Hydroxycut.

Third, the downloadable claim form contains a waiver of rights under Civil Code section 1542. This apparently is a remnant from an early (November 2013) draft of the settlement agreement, which at that time included such a waiver. However, at the December 2013 hearing on the first motion for preliminary approval, the court stated it would not approve a Civil Code section 1542 waiver. Subsequently, the parties revised the settlement agreement to delete that waiver. Apparently, the downloadable claim form was not revised accordingly.

Although neither objectors nor the parties raised this issue in the trial court, prior to oral argument we notified objectors and the parties that the downloadable claim form appeared to be inconsistent with the settlement and final approval order, and we asked them to submit additional briefing on the point. We have received and considered their letter briefs.

Class counsel and defendants contend that because objectors did not challenge the contents of the claim form in the trial court or in their appellate briefs, the discrepancies between the claim form and the settlement terms are waived or forfeited, and should not be addressed in this appeal.

Class counsel and defendants are correct that, in general, an appellate court will not review an issue that was not raised by some proper method in the trial court. (See *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1519 [161 Cal.Rptr.3d 728].) However, “[i]t is important to remember . . . that the purpose of this general rule is to give the trial court and parties an opportunity to correct an error that *could* be corrected by some means short of an opposite outcome in the trial court.” (*Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 712 [58 Cal.Rptr.3d 102].)

As an exception to the general rule, the appellate court has discretion to consider issues raised for the first time on appeal where the relevant facts are undisputed and could not have been altered by the presentation of additional evidence. (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1341, fn. 6 [67 Cal.Rptr.2d 726].) “It makes no difference that the issue was first raised on appeal by the court rather than the parties, as long as the parties have been given a reasonable opportunity to address it”—which they have, in their supplemental briefs. (*Ibid.*)

The issue involving the inconsistencies between the online claim form and the settlement terms agreed to by the parties (and approved by the court) may be considered on appeal because it involves applying law to undisputed facts. The operative facts—the terms of the court-approved settlement and the content of the online claim form—are undisputed and are fixed. There is nothing the parties could have done in the trial court to alter or vary these facts.

This is also an error the trial court could not have cured, even if the issue had been raised at the final approval hearing. The claims process was over. If objectors had raised this issue below, the trial court could have responded only by requiring class notice of settlement to be redone correctly, and by deferring any ruling on the settlement’s fairness until after notice was given again and the claims process was completed. (*Veritas, supra*, 496 F.3d at p. 968 [“the adequacy of the notice is antecedent to the merits of the settlement”].)⁶

■ Moreover, appellate courts are most likely to consider an issue involving undisputed facts for the first time on appeal where the issue involves important questions of public policy or public concern. (Eisenberg et al., *Cal. Practice Guide: Civil Appeals and Writs* (The Rutter Group 2015) ¶ 8.239, p. 8-170.) In the context of a class action settlement, “‘ ‘ ‘The [trial] court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement.’ ’ ’ ” (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 95 [174 Cal.Rptr.3d 906].) “This reflects concerns that the absent class members, whose rights may not have been considered by the negotiating parties, be adequately protected against fraud and collusion.” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 240 [110 Cal.Rptr.2d 145] (*Wershba*)). The court’s responsibility to protect absent class members further warrants our consideration of this issue.

⁶ The parties have not cited any factually similar California case; that is, a case where class notice of settlement materially misrepresents the court-approved settlement payout. Where there is no relevant California precedent on point, “‘ ‘ ‘California courts may look to federal authority for guidance on matters involving class action procedures.’ ’ ’ ” (*Cellphone Fee Termination Cases, supra*, 186 Cal.App.4th at p. 1392, fn. 18.)

Turning to the merits, class counsel and defendants concede the notice was defective and “defendants need to provide the class members with notice of the actual settlement terms and a proper claim form . . . and the class members need to be provided with another opportunity to submit a claim . . .” However, class counsel and defendants argue the court’s ruling that the settlement is reasonable, fair and adequate should not be reversed. They argue, “[t]he fact that the claim form that was published on the web site does not reflect the terms of the settlement is not relevant to the issue of whether those terms were fair and reasonable in the first place.”

We disagree because the adequacy of class notice of settlement is intertwined with the court’s assessment of the reasonableness of the settlement. In assessing whether a settlement is fair, reasonable, and adequate, the court should consider, among other things, “the amount offered in settlement” and “the reaction of the class members to the proposed settlement.” (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801 [56 Cal.Rptr.2d 483].)

Given the defective notice previously given and the claims-made nature of this settlement, it is impossible to know *now* what “the amount offered in settlement” will be after proper notice is given. It is also impossible to determine “the reaction of the class members to the proposed settlement”—i.e., whether class members will participate in the settlement, object, or opt out—before proper notice is even given.

■ Accordingly, the material inconsistencies between the downloadable claim form and the approved settlement undermines the court’s analysis of the fairness of the settlement and requires the judgment to be reversed. (*Veritas, supra*, 496 F.3d at pp. 971–972 [vacating judgment approving class settlement where notice to the class was misleading].)

For the benefit of the parties on remand, we now address other issues likely to arise on remand.

II. DIRECT NOTICE, PUBLICATION NOTICE, AND INJUNCTIVE RELIEF

A. *Notice Issues*

■ To satisfy due process, notice to class members must be “‘the best practicable, ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’’” (*Consumer Cause, Inc. v. Mrs. Gooch’s Natural Food Markets, Inc.* (2005) 127 Cal.App.4th 387, 399, fn. 9 [25

Cal.Rptr.3d 514].) In determining how to disseminate class notice of settlement—whether by direct mail, e-mail, publication, or something else—the standard “is whether the notice has ‘a reasonable chance of reaching a substantial percentage of the class members.’” (*Wershba, supra*, 91 Cal.App.4th at p. 251.) The trial court has “‘virtually complete discretion’” in determining how that can most practicably be accomplished. (*7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1164 [102 Cal.Rptr.2d 777].) However, “when notice is a person’s due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” (*Mullane v. Cent. Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 315 [94 L.Ed. 865, 70 S.Ct. 652].)

ORI sent notice by e-mail to 237,334 of its customers who purchased Lipozene products from ORI’s Web site. However, by ORI’s own estimate, there are somewhere between another 162,666 to 362,666 class members.⁷ The parties chose to notify these class members by publishing notice of the settlement in USA Today and by establishing a settlement Web site.

Objectors presented evidence showing that online purchasers of Lipozene from Wal-Mart.com must provide a mailing address. Objectors contend direct notice should have been sent to such class members. Objectors also contend the parties should have subpoenaed records from other retailers, such as Amazon, CVS, and Walgreens, to obtain addresses of class members who purchased ORI’s products from those stores.

However, Wal-Mart contends it cannot obtain consumer addresses for those who purchased from its online store because the entity operating Wal-Mart.com—Wal-Mart.com USA, LLC—is not the entity Duran sued, which is Wal-Mart Stores, Inc.

Moreover, ORI’s attorney filed a declaration stating he “reached out” to “several retailers” to obtain customer contact information, but was told that “obtaining such information is illegal, unavailable or improper.”

On remand, class counsel and defendants will have to provide a better foundation to support a ruling that direct notice need not be given. Regarding class members who purchased online from Wal-Mart, there is no evidence that anyone associated with Wal-Mart Stores, Inc., a defendant in this case, even tried to obtain class members’ mailing or e-mail addresses from Wal-Mart.com USA, LLC. The fact that the brick and mortar store is owned by one entity, and the online Wal-Mart store by another, does not by itself establish the requested information is not reasonably obtainable.

⁷ ORI estimated the total class was between 400,000 to 600,000 members.

Moreover, assertions that direct notice should not be ordered because the cost is unreasonable under the circumstances should be supported by declaration based on personal knowledge, not unsworn statements of counsel.⁸ The standard is a notice plan that one would implement if one genuinely wanted to inform someone, all relevant factors considered.⁹

The record made to support not giving direct notice to class members who purchased from Amazon, CVS, Walgreens is also very thin. ORI's counsel filed a declaration stating he "reached out to several retailers" who told him "obtaining such information is illegal, unavailable, or improper." The court could only guess what "reached out to several retailers" really means and what retailers counsel contacted.

We are not suggesting that direct notice *must* be given to class members who only purchased ORI products on Walmart.com, or to class members who purchased the subject products from retailers other than ORI. However, to properly exercise its discretion, the court must be provided evidence addressing factors stated in California Rules of Court, rule 3.766.

B. Publication Notice in USA Today

The parties published notice of class settlement in a USA Today. According to class counsel, USA Today was selected because it is "the number one newspaper in daily circulation in the United States, with a daily weekday circulation of nearly 3.3 million."

Objectors contend this is an insufficient basis upon which the trial court could properly conclude the notice had "'a reasonable chance of reaching a substantial percentage of the class members.'" (*Wershba, supra*, 91 Cal.App.4th at p. 251.) As explained *post*, on this record, we agree with objectors.

⁸ At the hearing, one of ORI's lawyers told the court the cost of direct mail is about one dollar per class member. There was no other evidence on cost.

⁹ Guidance in selecting the appropriate manner of giving notice is provided by California Rules of Court, rule 3.766, which provides in part:

"(e) Manner of giving notice [¶] In determining the manner of the notice, the court must consider: [¶] (1) The interests of the class; [¶] (2) The type of relief requested; [¶] (3) The stake of the individual class members; [¶] (4) The cost of notifying class members; [¶] (5) The resources of the parties; [¶] (6) The possible prejudice to class members who do not receive notice; and [¶] (7) The res judicata effect on class members.

"(f) Court may order means of notice [¶] If personal notification is unreasonably expensive or the stake of individual class members is insubstantial, or if it appears that all members of the class cannot be notified personally, the court may order a means of notice reasonably calculated to apprise the class members of the pendency of the action—for example, publication in a newspaper or magazine; broadcasting on television, radio, or the Internet; or posting or distribution through a trade or professional association, union, or public interest group."

Objectors submitted a declaration from a media expert, Mary Tyrrell, asserting the USA Today notice reached only approximately 1.06 percent of class members. In reaching her conclusion, Tyrrell used “industry-standard research data” of “demographic, lifestyle, product usage and exposure” that is “widely used by companies as the basis for the majority of the media and marketing plans that are written for advertised brands in the U.S.” She calculated the reach of the USA Today notice by using data for audiences targeted with a definition of “Meal/Dietary/Weight Loss Supplements Used For Weight Loss in Last 6 Months.”

The parties offered no evidence disputing Tyrell’s opinion or its foundation. There was also no evidence Lipozene products are even advertised in USA Today. Nor was there evidence the parties made any effort to demographically target print notice to an audience interested in diet, weight loss supplements, or anything else. From what the record shows, the parties chose to print notice in USA Today because approximately three million people nationwide will read it. However, in light of Tyrell’s declaration, about 99 percent of the settlement class members will never even glance at USA Today.

On appeal, ORI contends Tyrell’s opinion is flawed because it fails to consider the reach of e-mail notice to 237,334 class members who purchased from ORI’s Web site, and the reach of the settlement Web site. This argument misses the target entirely. Publication notice is not directed at those who received direct e-mail notice. Rather, publication notice is for the estimated 162,666 to 362,666 class members who were *not* sent e-mail notice. Moreover, providing settlement notice on a Web site is not helpful unless settlement class members are informed to go to the Web site. ORI does not explain how a potential settlement class member who did not receive e-mail notice and who did not read the notice in USA Today would even know to look for a Lipozene settlement Web site.

According to Tyrell’s undisputed and unopposed declaration, USA Today is ill-suited, demographically, to reach the class members here. Yet, the parties concede that class members are supposed to receive the best notice practicable under the circumstances. In the context of publication notice here, this requires a reasonable effort to select publication(s) that class members are likely to read. For example, in *Wershba, supra*, 91 Cal.App.4th at page 251, a class action involving support for Apple computers, notice was published not only in USA Today, but also in MacWorld.

In many cases, courts have approved publication notice based on evidence that the publications chosen target class members—evidence that is completely lacking in this case. (See, e.g., *Gallucci v. Gonzales* (9th Cir. 2015) 603

Fed.Appx. 533, 535–536 [upholding publication notice based on “reliable expert testimony” that notice was “specifically tailored to reach [the defendant’s] customer base”]; *In re Motorsports Merchandise Antitrust Lit.* (N.D.Ga. 2000) 112 F.Supp.2d 1329, 1332 [noting an expert “designed a profile of class-member demographics and media consumption habits so that dissemination of the Summary Notice would target the largest number of class members”]; *Carlough v. Amchem Products, Inc.* (E.D.Pa. 1993) 158 F.R.D. 314, 321–322 [“Before deciding where to advertise, the settling parties determined that, based on various factors, the primary target group for the notice plan would likely be males age 45 or older. Thus the paid advertising plan is weighted towards this group.”]; *In re Domestic Air Transp. Antitrust Litigation* (N.D.Ga. 1992) 141 F.R.D. 534, 551 [“the publication program . . . is geographically broad and designed to reach the maximum number of class members”].)

There was simply no evidence presented to the trial court here to support its implied determination that publishing settlement notice in USA Today had a “reasonable chance of reaching a substantial percentage of the class members.” (*Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974 [124 Cal.Rptr. 376].)

C. *Injunctive Relief*

In addition to providing money, the settlement also requires ORI to change its advertising and some other business practices. The advertising and packaging changes are as follows:

Existing Advertising	Under the Settlement, Is Changed To . . .
“What’s even more amazing is that participants were not asked to change their lifestyle. Just take Lipozene.”	“ ‘What’s even more amazing is that <i>study</i> participants were not asked to change their lifestyle. Just take Lipozene.’ (Italics added.)
“Lipozene has effectively helped millions of people meet their weight loss goals, and it can help you too!”	“Lipozene has effectively helped <i>countless</i> people meet their weight loss goals, and it can help you too!” (Italics added.)
“Lipozene has helped millions of people successfully meet their weight loss goals and lose pure body fat.”	“Lipozene has helped <i>countless</i> people successfully meet their weight loss goals and lose pure body fat.” (Italics added.)

Additionally, ORI agreed to add a disclaimer regarding Lipozene's effectiveness, including links to studies about Glucomannan, an ingredient contained in Lipozene. A statement would also be added stating, "For best results, use in conjunction with reasonable diet and exercise." ORI also agreed to terminate its "Pay-Per-Click" Internet advertising, increase its return policy from 30 to 45 days to claim refund, and use "best efforts" to "eliminate all testimonials created prior to January 1, 2010."

In approving this settlement, the court remarked at the hearing, "The injunctive relief has already been done and that's the most important part of this. The money is, frankly, not." Objectors contend the injunctive relief is illusory and should not have been a factor in determining the settlement's reasonableness. As the record now exists, we agree with objectors on this point.

We fail to see any material difference by adding the word "study" before "participants." Similarly, there is no material difference between stating Lipozene has "effectively helped millions of people" and stating Lipozene has "effectively helped countless people." ORI also agreed to extend its money-back refund from 30 to 45 days. But there is no evidence the extra 15 days offers any material benefit to consumers.

As noted, as part of the injunctive relief, ORI is required to state in its advertising, "For best results, use in conjunction with reasonable diet and exercise." In its brief, ORI states this is the most significant aspect of injunctive relief afforded consumers under the settlement. However, according to class counsel, ORI was *already* prohibited from making misrepresentations about Lipozene and its relationship to diet and exercise. In Duran's motion for class certification, class counsel told the court that in June 2005, ORI entered into a stipulated judgment with the Federal Trade Commission that prohibits ORI from representing that Lipozene or MetaboUp products "[c]ause[s] rapid or substantial weight loss without the need to reduce caloric intake or increase physical activity." Thus, at least in this respect, the injunctive relief simply requires ORI to obey an existing judgment. As such, it is difficult to conceive how this injunctive relief adds value.

III. THE POSTJUDGMENT AWARD OF ATTORNEY FEES AND AWARD TO THE CLASS REPRESENTATIVE IS REVERSED

After entering judgment granting final approval of the settlement, the court entered a separate order awarding class counsel \$100,000 in attorney fees and \$2,500 to Duran as an incentive payment as class representative. Because the judgment granting final approval of the settlement is reversed, the related order awarding attorney fees and \$2,500 incentive to Duran is also reversed.

**IV. THE REQUEST FOR JUDICIAL NOTICE IS
DENIED**

Objectors request this court take judicial notice of: (1) a complaint filed on December 7, 2015, in the Central District of California court against the law firm representing ORI in the trial court, entitled *Natural Immunogenics Corp. v. Newport Trial Group* (No. 8:15-cv-02034); and (2) a complaint the law firm of Nicholas & Tomasevic, LLP, filed on December 31, 2015, in the Superior Court of San Diego County on behalf of Joshua A. Weiss against ORI and others (No. 37-2015-00043385-CU-OE-CTL). Objectors contend each of these lawsuits supports their assertion that the proposed settlement is the product of “collusion between the parties.”

The request for judicial notice is denied. The requested matters are not relevant to the disposition of any issue on appeal. (See fn. 5, *ante*.)

DISPOSITION

The judgment is reversed. The order awarding attorney fees and an incentive payment to Duran is reversed. The request for judicial notice is denied. Objectors DeMarie Fernandez, Alfonso Mendoza, and Brian Horowitz shall recover costs on appeal.

McConnell, P. J., and Irion, J., concurred.

[Nos. A137355, A139872. First Dist., Div. Two. July 15, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
ADAM WADE DISA, Defendant and Appellant.

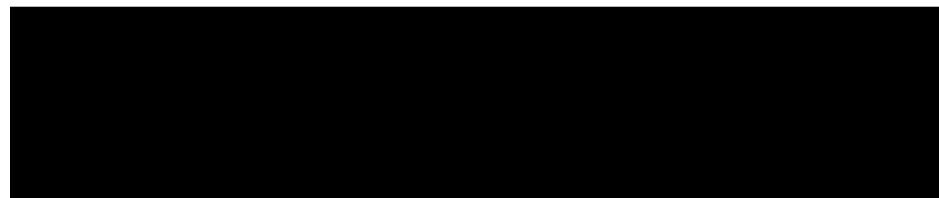
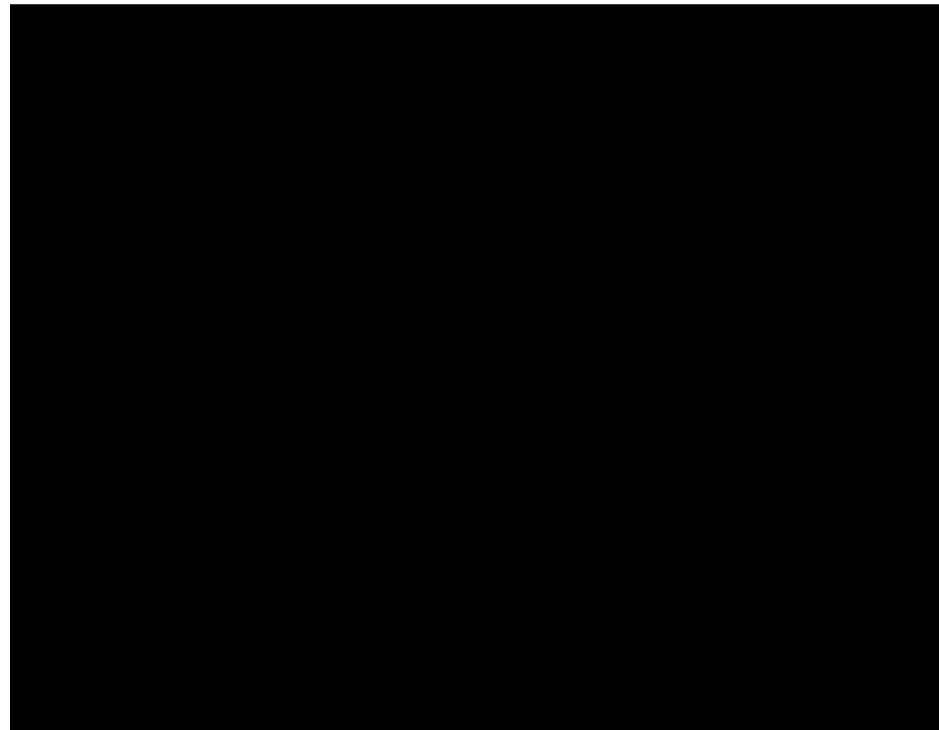
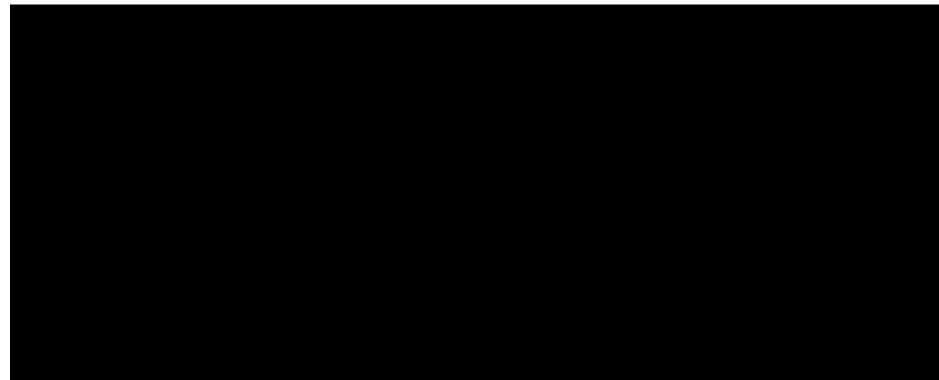
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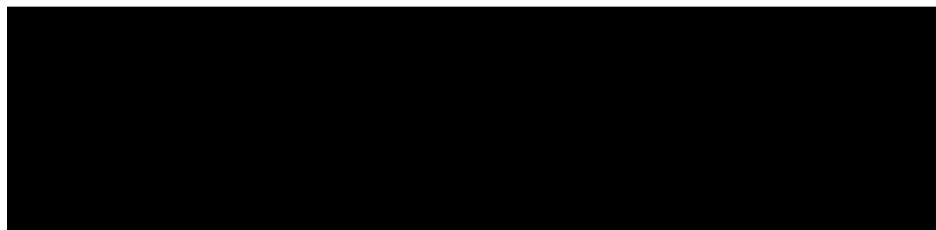
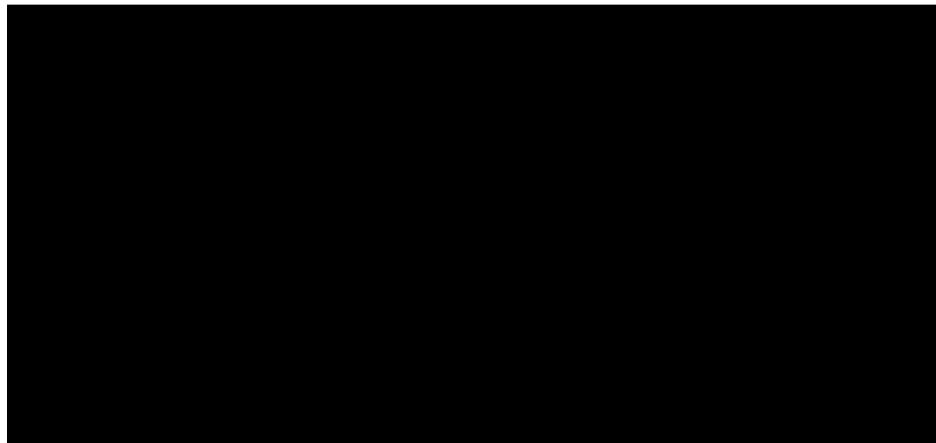
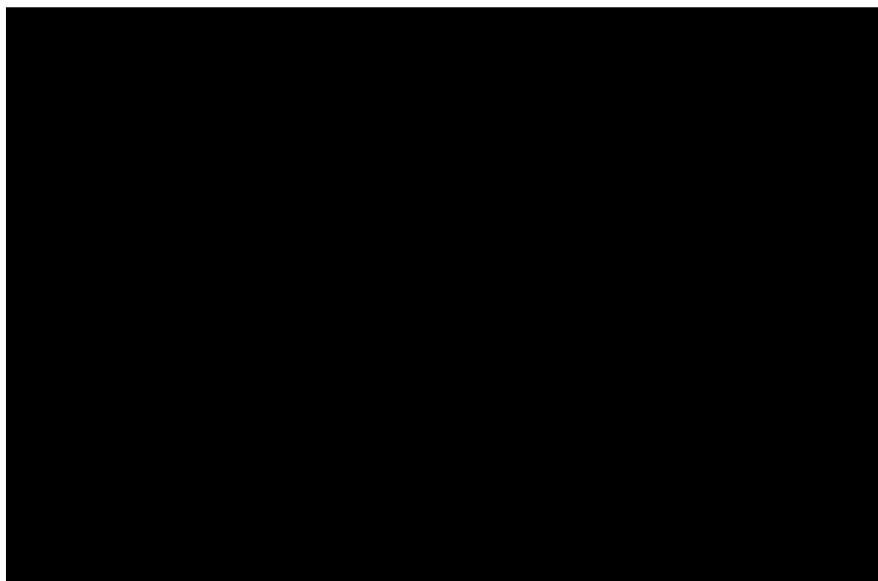
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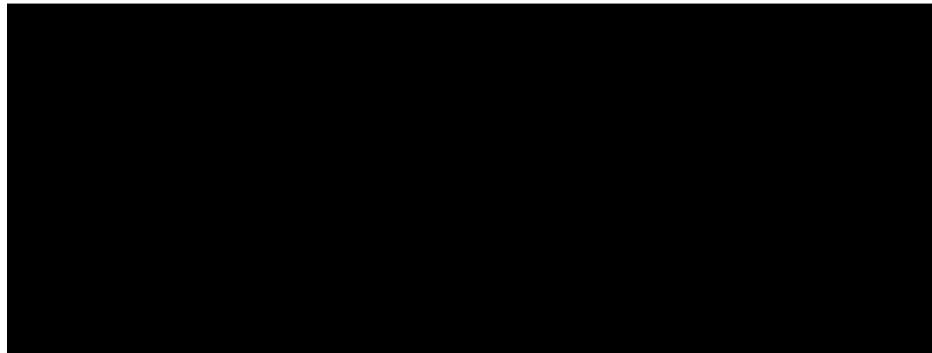
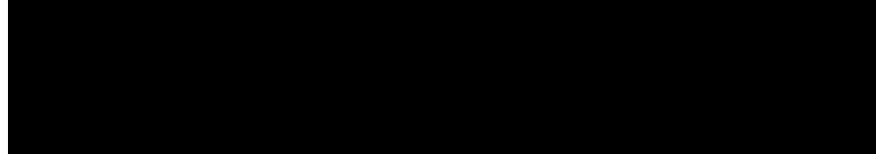
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COUNSEL

Tara Mulay, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gerald A. Engler, Assistant Attorney General, Jeffrey M. Laurence and Aileen Bunney, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

MILLER, J.—Defendant Adam Wade Disa admitted to police that he killed his girlfriend by putting her in a chokehold, but denied he meant to kill her. A jury found him guilty of first degree murder (Pen. Code, § 187).

Defendant contends there was insufficient evidence of premeditation and deliberation, and the trial court erred in admitting evidence of defendant's prior act of domestic violence. We conclude the evidence of premeditation and deliberation—though far from compelling—was sufficient to sustain the first degree murder conviction. Absent error, we would affirm. However, we conclude that it was error to allow the jury to hear extensive evidence of

defendant's past act of domestic violence, which involved planning, hours of waiting, and a bloody knife attack on sleeping victims. Given the relative weakness of the evidence of premeditation and deliberation in the current case, we conclude there is a reasonable probability the improper admission of such vivid and inflammatory evidence of defendant's past conduct affected the verdict. Accordingly, we reverse the first degree murder conviction. We need not reach defendant's remaining arguments.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant and the victim, Katie Gillihan, worked together at Rasputin Music and began dating in late 2009 or early 2010. In September 2010, defendant moved in with Gillihan in her apartment in Benicia.

Michelle Gonzales also worked at Rasputin and knew defendant and Gillihan. Shortly before 2:00 p.m. on Friday, February 11, 2011, Gonzales went to check on Gillihan because both defendant and Gillihan had missed two scheduled work shifts in a row. Gonzales found the front door of Gillihan's apartment unlocked and Gillihan in bed, "like she was just sleeping." Gonzales tried to wake her. Gillihan appeared very still and straight with the sheets pulled up to her chin. There was dried blood under her nose.

Gillihan's mother, Donna Gillihan (Donna), also arrived at Gillihan's apartment around this time. Gonzales told Donna she could not wake Gillihan up. Donna became very upset and instructed Gonzales to call 911.

Paramedics arrived at the apartment, and Gillihan was pronounced dead at 2:25 p.m. Her skin had cooled to the temperature of the room, and there were signs of marbling, lividity, and late-stage rigor mortis, indications that she had been dead for many hours.¹

Defendant was arrested the same day Gillihan's body was discovered. In a videotaped interview with Detectives Rose and Rouse of the Benicia Police Department, he admitted he killed Gillihan using a chokehold.

Defendant was charged with murder (Pen. Code, § 187, subd. (a); count 1) and corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a); count 2). As to count 2, the district attorney alleged defendant personally inflicted great bodily injury under circumstances involving domestic violence. (Pen. Code,

¹ A pathologist later conducted an autopsy on Gillihan and found no trauma or injury and no evidence of natural disease. Toxicology analysis showed no alcohol, prescribed medications, or illicit substances present.

§ 12022.7, subd. (e).) As to both counts, it was alleged defendant had suffered two prior strike convictions (Pen. Code, §§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)), which were also serious felony convictions (Pen. Code, § 667, subd. (a)).

Defendant's Interview

At trial, the prosecution played defendant's videotaped interview for the jury. In the interview, which lasted about two hours, defendant told the officers Gillihan was his girlfriend and they lived together, but he initially acted as though he was unaware of her death. He claimed he did not know where she was because he had not been home.

Defendant reported there were some trust issues in the relationship. He said, in the previous three weeks, Gillihan had spent her days off with a friend, Marty Procaccio.² Defendant suspected Gillihan was cheating on him with Procaccio, but she denied it. He mentioned an incident involving Procaccio that occurred three weeks earlier. Defendant came home and found Procaccio there. Defendant told Gillihan he needed to be informed if there was going to be a man in the house, and Gillihan said Procaccio was just a friend. Asked by the detectives how he felt about this, defendant responded, "I was seeing green. Jealous. Um, suspicious, I guess but."

Defendant said Gillihan was sleeping when he left their apartment Thursday morning, February 10, and he had been staying with his mother since then "to prevent tension" because Gillihan "wants space." Defendant texted Procaccio Thursday night and again that day. He asked Procaccio, who he knew lived in Santa Clara, to check on Gillihan in Benicia because Tuesday night she had been sick.³

About 30 or 40 minutes into the interview, Detective Rouse noted that defendant had not asked why he was being questioned by the police and told him, "I think it's cause you know why you're here." At this point, defendant admitted he killed Gillihan. He said he went home Tuesday night, February 8, and Gillihan "was adamant about [defendant] leaving" the apartment, which

² At trial, Procaccio testified he was "really close friends" with Gillihan, and they had been "off and on lovers." In his videotaped interview, defendant talked about Gillihan's friend "Marty" without providing a last name, but Procaccio's testimony established he was the "Marty" to whom defendant was referring.

³ Procaccio confirmed he received messages from defendant stating that Gillihan was sick. By text message, defendant told Procaccio to check on her. Around noon on Friday, February 11, Procaccio asked defendant for Gillihan's mother's telephone number. Procaccio then left Donna a message and eventually spoke with her. He asked if she had heard from Gillihan in the past couple days and said he was on his way to check on her. Donna told Procaccio there was no need for him to drive up to Benicia, and she would check on Gillihan.

left him "confused." She "was texting somebody that whole night," and "she was angry because [defendant] was there." Defendant did not leave the apartment, and instead took a shower and went to sleep.

Defendant described what happened early Wednesday morning, February 9, as follows: "I think it was probably around 5:30 in the morning that um, she did, woken me up. And um, she was telling me you need to get out. You need to leave. And um, I was like why do I need to leave? And she was like so I can take, you know, in her words, a fucking shower. And um, I was like, well I'm not going anywhere. And then that's when the insults started to happen. Like you're fucking retarded um, what is it? Um, you're fucking stupid. Um, what else? She was, it was just like it wasn't Katie. Like I'm not used to Katie talking to me like that. And I guess she swung at me or something. Oh, before that she said what she was gonna do is she was gonna give herself a black eye and she was gonna tell everybody I like, you know, to have done it. And I mean it was just like one thing after another. It was just like what's this coming from? And I guess she swung at me and I'm half asleep and after that it's, all I remember is um, I guess I had her in a choke hold and um. To be honest, man I thought she was sleeping because while I went to um, you know, she was laying there and then um, I went to work. I came back that same night and she, I guess she wasn't sleeping."

Defendant further stated that he and Gillihan had an argument Tuesday night and again Wednesday morning. She woke him up between 5:30 and 6:00 a.m. Wednesday by turning up the television and holding her phone to his face while "it flashe[d]" or was "buzzing." After Gillihan told him she would give herself a black eye and tell everybody he did it, defendant asked why she would do something like that. Defendant told the officers, "I don't really remember the explanation because after that, it's just—we had the—the incident." He recalled that Gillihan said something like, "'You sicken me.'"

Defendant continued, "I just remember seeing rings going towards my face. And I must have blocked it. And after I blocked it, that's when the choke hold came." He held her in a chokehold "for about a minute or so. Maybe a little bit longer." She was trying to scratch his face, and he said, "I just held on until she—she—stopped trying to, you know, induce any pain towards me. And then I let go." Defendant said he felt Gillihan's body go limp, and then he kept her in the hold "[m]aybe 15 seconds" after she stopped moving.

Defendant described how he was feeling: "I was angry prior to the incident when she was, you know, saying all these bad things. That's what made me angry. But afterwards, it was—I didn't really feel anything afterwards. . . . I remember looking at her and then I got the cigarettes. . . . I just felt a little

relieved, I guess. Just like everything's pretty much, you know, when the fight's over, you know, it's like I'm calming down, relaxing, I guess." His "main emotion when she was throwing insults at [him] . . . was anger." It was "still anger" when he had her in the chokehold, but defendant denied that he intended to kill her. He told the officers he thought he could "knock her out" or "put her to sleep." However, he knew keeping a person in a chokehold for more than a minute could eventually cause death.

Defendant called the hold he used on Gillihan a "figure four or something" and demonstrated the hold. Detective Rose recognized the hold defendant demonstrated was a "carotid restraint hold." Defendant had been studying kung fu for over a year, but he did not learn the hold in kung fu class.⁴ He stated, "Actually I learned this choke hold from a[n] ex of mine. She put me in it." He had "never really used it" himself, but when he was in it, "it was pretty bad." Defendant reported that he and Gillihan had never had any physical confrontation before that day.

After he released her from the hold, defendant laid Gillihan down. Then he went into another room, smoked a couple of cigarettes, and went to sleep. Later Wednesday morning, he got up, ate some jambalaya that was on the stove from the night before, and went to work without checking on her. After work, he went to kung fu class, and returned home around 9:00 p.m. According to defendant, he only then realized Gillihan was dead when he saw her lying in the same position he had left her. He did not call the police because he was "on probation,"⁵ and he did not notify anyone else because, he thought, "it's over for me."

Thursday, February 10, defendant packed food and clothes in a bag and went to his sister's house. He stated, "And then uh, pretty much, you know, [I] came to terms with it's probably time to say goodbye to everybody." He took money from his bank account, which he said was "for my family."⁶ However, he did not talk about the money with anyone, and he left no note.

Defendant said he then tried to commit suicide by putting rat poison in his soda, but it just made him vomit. He also went to a bridge and thought he would jump "to give [himself] a watery grave." He told the officers he had been feeling depressed for the previous three weeks about his relationship with Gillihan, and he told her that he was thinking of committing suicide.

⁴ This was corroborated by defendant's kung fu teacher, who testified he did not teach any type of chokehold. He knew what the carotid hold is, and never taught it to defendant.

⁵ In fact, defendant was on parole, not probation.

⁶ At defendant's sister's house in Vallejo in a room identified as defendant's bedroom, police found approximately \$1,400 in cash, two bank withdrawal statements, defendant's California identification card, his ATM card, and his PIN.

*Other Prosecution Evidence**Jealousy*

Gonzales testified about a party at a coworker's house, during which Gillihan sat and talked with a male guest. Defendant "came over a couple of times and looked very angry that she was having a conversation with him." Gonzales testified there was a "fuming quality" about the way defendant was watching them.

Procaccio recounted three instances of defendant acting jealous. First, in 2010, Gillihan was going to visit Procaccio at his house, and defendant sent him a message on Facebook telling him, "you better behave yourself, bro." Second, at a Halloween party at Procaccio's house in 2010, defendant got drunk and "there was a lot of jealousy, pointing and . . . staring and like evil looks that [defendant] would give to people who were talking to [Gillihan]." The third incident occurred on January 19, three weeks before defendant killed Gillihan. Procaccio was at Gillihan's apartment, and defendant arrived home early. Defendant and Gillihan went upstairs, and Procaccio could hear them arguing and heard his name mentioned a few times.

Prior Domestic Violence

San Jose Police Officer Wendell Martin testified about defendant's prior violent conduct with an ex-girlfriend.⁷ At 3:30 a.m. on April 22, 2004, Martin was dispatched to an apartment in San Jose. Christina Cepeda answered the door. In the living room, defendant was passed out on the floor with severe lacerations on two fingers of his right hand, and another man, Edward Estrella, was covered with blood. In the bedroom, Martin observed "a lot of blood"—blood was splattered on the walls, closet, rug, and bed.

Subsequently, defendant told Martin that he had been dating Cepeda since July 1999, and they had been living together over the prior year. Defendant had known Estrella since seventh grade. Cepeda broke up with defendant on February 16, 2004, and defendant believed it was because she was seeing Estrella behind his back. After they broke up, Cepeda and defendant continued to share their apartment by alternating weeks living there. At the time Martin was dispatched to the apartment, it was Cepeda's week to stay there.

⁷ The trial court ruled evidence of this incident was admissible pursuant to Evidence Code section 1109, subdivision (a)(1). Under this provision, when a defendant is charged with an offense involving domestic violence, evidence of other acts of domestic violence by the defendant is admissible for the purpose of showing a propensity to commit such crimes. (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1232–1233 [121 Cal.Rptr.3d 828]; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1024 [92 Cal.Rptr.2d 208].)

Defendant used his key to enter the apartment on April 21, 2004, while it was empty. Around 3:00 p.m., Cepeda and Estrella came home, and he hid in the closet for about half an hour until they left. Then he came out of the closet, but remained in the apartment and watched television. Around 9:00 p.m., defendant hid in the closet again. Cepeda and Estrella came home around 10:30 p.m. Defendant came out of the closet at 3:30 a.m. and tried to stab Estrella and Cepeda. He stated that he felt betrayed by both of them, and they broke his heart. After defendant stabbed Estrella a few times, the knife slipped, and defendant injured his own hand.

Defendant told Martin he bought the knife he used in the attack while he was still living with Cepeda. He took the knife with him when it was his turn to use the apartment, and had it with him when he hid in the closet. Defendant told Martin he had thought about doing something in the previous week, and he kept going back and forth. He wanted some sort of revenge. Martin asked defendant if he was trying to kill Cepeda and Estrella. Defendant said he did not know if he wanted to kill them, but he "was hoping someone would get hurt."

Carotid Restraint Hold

The pathologist who conducted Gillihan's autopsy testified that, with the "carotid hold," which he also referred to as the "carotid sleeper hold," the person applying the hold places the crook of his arm at the front of the neck of the victim and squeezes his upper arm and forearm, pressing on the blood vessels of the neck, stopping the flow of blood to the brain. When applied correctly, the carotid hold causes unconsciousness very quickly and can render someone dead in a minute. Based on the autopsy and review of defendant's interview, the pathologist concluded the cause of Gillihan's death was "asphyxia due to manual strangulation with the carotid sleeper hold."

At the police academy, Detective Rose received training on the carotid restraint hold in defensive tactics training. He was taught the average person in the hold loses consciousness within about 12 seconds, and the hold should never be applied for longer than 30 seconds.

Phone Records

The last outgoing text message from Gillihan's phone was sent to Procaccio on Wednesday, February 9, at 5:16 a.m. Procaccio testified that he was texting with Gillihan from about 4:00 to 5:15 a.m. Wednesday morning. Gillihan's phone received no calls or texts from defendant after Tuesday, February 8.

Verdict and Sentence

The jury found defendant guilty of first degree murder (count 1) and corporal injury on a cohabitant (count 2), and found true the special allegation that he inflicted great bodily injury under circumstances of domestic violence. In bifurcated proceedings, the trial court found defendant had two prior strike convictions.

Defendant was sentenced to state prison for 50 years to life based on a term of 25 years to life for count 1, doubled due to the prior strike conviction. For count 2, the court imposed the upper term of four years, plus a five-year enhancement for great bodily injury, and stayed the punishment pursuant to Penal Code section 654.

DISCUSSION

I. *Sufficiency of Evidence of Premeditation and Deliberation*

Defendant contends the prosecution presented insufficient evidence of premeditation and deliberation to support the first degree murder verdict. We disagree.

“ ‘When a defendant challenges the sufficiency of the evidence, “ ‘[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ ” [Citation.] ‘The standard of appellate review is the same in cases in which the People rely primarily on circumstantial evidence.’ [Citation.] ‘Although a jury must acquit if it finds the evidence susceptible of a reasonable interpretation favoring innocence, it is the jury rather than the reviewing court that weighs the evidence, resolves conflicting inferences and determines whether the People have established guilt beyond a reasonable doubt.’ [Citation.] ‘ “ ‘If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.’ ”’” (*People v. Casares* (2016) 62 Cal.4th 808, 823–824 [198 Cal.Rptr.3d 167, 364 P.3d 1093].)

■ “ ‘A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. ([Pen. Code,] § 189 [“willful, deliberate and premeditated killing” as first degree murder].) “Deliberation” refers to careful weighing of considerations in forming a course of action; “premeditation” means thought over in advance. [Citations.]’ [Citation.]

“ ‘The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .’ ” (*People v. Casares, supra*, 62 Cal.4th at p. 824.) To prove a killing was “‘deliberate and premeditated,’ ” it is “not . . . necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.” (Pen. Code, § 189.)

■ In *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [73 Cal.Rptr. 550, 447 P.2d 942] (*Anderson*), the California Supreme Court “identified three factors commonly present in cases of premeditated murder: ‘(1) [F]acts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as “planning” activity; (2) facts about the defendant’s *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a “motive” to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of “a pre-existing reflection” and “careful thought and weighing of considerations” rather than “mere unconsidered or rash impulse hastily executed” [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a “preconceived design” to take his victim’s life in a particular way for a “reason” which the jury can reasonably infer from facts of type (1) or (2).’ ” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1081 [119 Cal.Rptr.2d 859, 46 P.3d 335].)

Our high court has cautioned that *Anderson* “‘did not refashion the elements of first degree murder or alter the substantive law of murder in any way.’ [Citation.] In other words, the *Anderson* guidelines are descriptive, not normative. ‘The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive.’ ” (*People v. Koontz, supra*, 27 Cal.4th at p. 1081.) Thus, the *Anderson* “factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation. [Citation.] However, ‘[w]hen the record discloses evidence in all three categories, the verdict generally will be sustained.’ ” (*People v. Stitely* (2005) 35 Cal.4th 514, 543 [26 Cal.Rptr.3d 1, 108 P.3d 182].)

Viewed in the light most favorable to the judgment, the evidence showed Gillihan and defendant were dating and living together, but there were problems and trust issues in their relationship. On Tuesday night, February 8, 2011, Gillihan was not happy to see defendant and told him to leave the apartment, but he would not leave. Very early the next morning, Gillihan texted with Procaccio for over an hour. Defendant was jealous of Gillihan’s

relationship with Procaccio, and he suspected she was cheating on him with Procaccio. Around 5:30 that morning, defendant killed Gillihan by using a carotid restraint hold, which he referred to as a “choke hold” and which he knew was “pretty bad” from personal experience. Defendant recognized the hold he used could lead to death. He kept Gillihan in the carotid restraint hold for 15 seconds after her body went limp, and he laid her in the bed and covered her so that it appeared she was sleeping. After killing Gillihan, defendant smoked two cigarettes, went back to sleep for a few hours, and then went to work. There was no evidence of other physical injury to Gillihan, nor was there any evidence of injury to defendant. At no point did defendant call 911 or seek medical assistance for Gillihan.

While not overwhelming, these facts are sufficient to support a verdict of premeditated and deliberate first degree murder. “[P]lanning activity occurring over a short period of time is sufficient to find premeditation.” (*People v. Sanchez* (1995) 12 Cal.4th 1, 34 [47 Cal.Rptr.2d 843, 906 P.2d 1129], disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [87 Cal.Rptr.3d 209, 198 P.3d 11].) Here, as the Attorney General argues, evidence of planning may be inferred from the fact defendant “deliberately continued to exert pressure on [Gillihan’s] neck even after she went limp.” A rational jury could find that defendant “rapidly and coldly formed the idea to kill” Gillihan after she stopped struggling and before he released her from the carotid restraint hold. (*People v. Brady* (2010) 50 Cal.4th 547, 563 [113 Cal.Rptr.3d 458, 236 P.3d 312] [“premeditation and deliberation can occur in a brief period of time” and “lack of evidence of extensive planning does not negate a finding of premeditation”].)

As to motive, the evidence suggests defendant’s motive for killing Gillihan was jealousy over Gillihan’s relationship with Procaccio, anger because she was trying to kick him out of his own house and was insulting him, and perhaps depression over the apparent ending of their relationship.

As to manner of killing, defendant used a carotid restraint hold, which can render a victim unconscious within a few seconds and dead in a minute. This manner of killing may be viewed as demonstrating “a calculated design to ensure death rather than an unconsidered explosion of violence.”⁸ (*People v. Horning* (2004) 34 Cal.4th 871, 902–903 [22 Cal.Rptr.3d 305, 102 P.3d 228].)

⁸ In closing argument, the prosecutor explained how the manner defendant killed Gillihan could support a finding of deliberation: “[T]his is not a killing by shooting. This is not a killing by knifing. Both of those acts would sometimes be instantaneous. This is a murder by manual strangulation via the carotid hold which took over a minute. What that means is that this type of murder is close and personal. . . . So while he was holding her, he got to feel, he got to watch as she reached and tried to get out of that hold. . . . Then he also got to watch and feel

In addition, the jury could reasonably consider defendant's conduct after the killing in relation to the manner of killing. (*People v. Perez* (1992) 2 Cal.4th 1117, 1128 [9 Cal.Rptr.2d 577, 831 P.2d 1159] (*Perez*).) In *Perez*, after stabbing the victim, the defendant did not immediately flee the scene and instead searched dressers and jewelry boxes and changed a bandage on his bloody hand. Our high court observed the defendant's conduct "would appear to be inconsistent with a state of mind that would have produced a rash, impulsive killing." (*Ibid.*) Likewise in this case, a reasonable jury could take into account defendant's calm behavior after the killing—smoking cigarettes, sleeping, eating leftovers, going to work—and find it inconsistent with a state of mind that would have produced a rash, impulsive killing.⁹

Defendant argues his "extremely limited knowledge of the hold he used" did not support a finding of premeditation and deliberation. But the fact that he incorrectly referred to the carotid restraint hold as a "figure four" does not negate an inference of premeditation and deliberation. Defendant asserts, "the notion that [he] would understand the lethality of a 15-second period of unconsciousness in the carotid hold was pure speculation." We disagree. By his own admission, defendant knew the hold he used was "pretty bad" and would eventually cause death. He also recognized that Gillihan "[p]robably" could not breathe while she was struggling in the hold, but he chose to keep her in a position where she probably could not breathe even after she stopped moving.

People v. Rowland (1982) 134 Cal.App.3d 1 [184 Cal.Rptr. 346], relied on by defendant, is distinguishable. In *Rowland*, the defendant met the victim at a party and took her to his apartment, which he shared with his girlfriend. The victim's body was later discovered on a dirt road; she had died from strangulation with an electrical cord. (*Id.* at pp. 6–8.) The Court of Appeal found minimal evidence of planning and no evidence of motive, and concluded the manner of killing—ligature strangulation—failed to show premeditation and deliberation. (*Id.* at p. 9.) In contrast, here, there was ample evidence of motive, and, further, there was significant additional evidence

as she struggled to breathe. This is not an instantaneous death. And finally he got to feel her go limp in his own arm and he continued to hold her. Was he thinking about what he was doing in that minute[?] Of course he was. One minute. That's a very long time, and I'm sure time slows down even more once she [loses] consciousness."

⁹ Defendant counters that his actions after killing Gillihan indicated that he was in shock and did not understand what he had just done. However, defendant does not defeat the sufficiency of the evidence merely by offering "competing inferences he wishes the jury had drawn." (*People v. Casares, supra*, 62 Cal.4th at p. 827; see *People v. Albillar* (2010) 51 Cal.4th 47, 60 [119 Cal.Rptr.3d 415, 244 P.3d 1062] ["If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding."].)

regarding the manner of killing (defendant's own statement that he kept Gillihan in a chokehold for 15 seconds after she went limp) absent from *Rowland*.

Finally, defendant asserts the prosecutor acknowledged Gillihan provoked defendant by insulting him, threatening to give herself a black eye and say he did it, telling him to get out of the house, and swinging at him. He argues the "conceded" evidence of provocation could support, at most, a conviction of second degree murder. This argument lacks merit. First, the prosecutor did not concede that Gillihan's conduct as described by defendant amounted to provocation. Second, defendant's argument suggests the jury was required to credit defendant's version of events in its entirety simply because the prosecutor assumed some of defendant's statements were true in making his closing argument. But the jury was free to disbelieve defendant's self-serving statements regarding what Gillihan did right before he killed her.¹⁰ (*People v. Silva* (2001) 25 Cal.4th 345, 369 [106 Cal.Rptr.2d 93, 21 P.3d 769] ["A rational trier of fact could disbelieve those portions of defendant's statements that were obviously self-serving . . ."].)

Again, we acknowledge the evidence of premeditation and deliberation in this case was not particularly strong, but "the relevant question on appeal is not whether *we* are convinced beyond a reasonable doubt, but whether *any* rational trier of fact could have been persuaded beyond a reasonable doubt that defendant premeditated the murder." (*Perez, supra*, 2 Cal.4th at p. 1127.) For the reasons we have discussed, we conclude the evidence in this case was sufficient to sustain a finding of premeditation and deliberation.

II. Evidence of Prior Domestic Violence

Defendant contends the trial court abused its discretion under Evidence Code section 352 by admitting evidence of his prior domestic violence under Evidence Code section 1109.¹¹ We conclude that some evidence of defendant's past conduct was admissible under section 1109, but the trial court abused its discretion in admitting evidence of facts showing defendant lay in wait for his victims. This error was then compounded by the ambiguity of the court's evidentiary ruling, which resulted in the prosecutor presenting extensive detail of defendant's past conduct. The admission of this evidence prejudiced defendant.

¹⁰ We note that the trial court at the sentencing hearing stated, "I thought that [defendant's] explanation for how this happened was absolutely preposterous, . . . that he just woke up out of his sleep when he was being assaulted by this woman. This is—I didn't accept this for a minute, and the jury didn't accept this for a minute."

¹¹ Further statutory references are to the Evidence Code unless otherwise noted.

A. *Background*

Before trial, the prosecutor moved to admit evidence of defendant's past act of domestic violence from 2004. He argued the evidence was admissible under section 1109, subdivision (a)(1), and was relevant to counter the defense that the killing was an accident. Defense counsel argued the evidence should be excluded under section 352.

The trial court determined the past conduct and present charged conduct qualified as domestic violence under section 1109. The court then thoughtfully addressed the section 352 issue: "I think the real concern here is whether the Court should find pursuant to 352 that the . . . prejudicial effect outweighs any probative value, and I'm just not prepared to do that. I have had an occasion to review the defendant's statement at this time where he claims that the current killing was either an accident or an incident that arose over an argument that he was having with the victim when she became disrespectful towards him. Evidence of prior domestic violence and a propensity to do violence to a partner or former partner is extremely relevant. This incident is really not that remote, and in fact, the defendant was still on parole for these offenses, the earlier offenses, when he committed this newer offense, and he talks about that in his interview."

"It appears to the Court that this is a case that's not really one in which there's going to be . . . any significant issue as to who committed the acts which led to the death of the victim but rather the circumstances under which these acts were committed and the intent of the defendant in committing the acts, and therefore, I think . . . this prior incident and evidence of this prior incident is extremely relevant. So under [section] 352, I'll find that the probative value does outweigh any prejudicial effect this evidence may have. I'm going to allow this to come in under [section] 1109."

Defense counsel then asked whether there was a way "to sanitize it so it isn't highly prejudicial." He was concerned that the prior incident of domestic violence involved, first, lying in wait and, second, the use of weapon, which made the past conduct "radically different" from the current case. The court indicated that it would consider the issue later.

After trial started and outside the presence of the jury, the parties revisited the issue. The prosecutor stated he intended to present the responding police officer's testimony recounting what defendant told him "regarding why he did what he did and exactly what he did" in connection with the 2004 incident. The prosecutor said the testimony would "address the defense of accident" and was relevant to intent and motive. The trial court rejected any suggestion the evidence was admissible to show a common scheme or premeditation and

deliberation in the present case, stating: “I don’t see the similarity in these offenses frankly. One is a stabbing with a knife and lying in wait. That’s not at all what we have here.” The court further observed, “The acts are totally different.”

The court reaffirmed its ruling that defendant’s past conduct was admissible under section 1109. The court then addressed the prosecutor as follows: “I don’t want you dwelling on the specifics of this earlier offense. You’re going to be allowed to bring this offense in simply to show, if it does, um, the defendant’s propensity to commit domestic violence, so I’m going to allow this. But as I’m going to warn you right now, [prosecutor], that I do not want you delving into each specific detail of this prior incident or emphasizing issues here that have nothing to do with this trial, such as the lying in wait. I will let you bring in the fact that the defendant admitted that—if he did, that he came into the apartment when the victim was not home, waited until she and her new partner were asleep and came out and attacked them. I’ll let you admit that. But we’re not going into the details of this, and you’re not to argue at any time that the lying in wait on this earlier occasion is somehow evidence of his guilt in this matter because it’s not. It’s the . . . violence that he did that shows his propensity in this manner.”

As described above, Officer Martin testified that defendant waited over 12 hours in his former girlfriend’s apartment—including more than six hours spent hiding in a closet—and then attacked her and her new partner in the middle of the night with a knife he had brought to the apartment and kept with him while he waited in the closet. The attack left Estrella covered in blood and the bedroom spattered with blood. Defendant told Martin he had thought about doing something in the previous week, he kept going back and forth, and he wanted some sort of revenge.

B. Applicable Legal Principles

Character or propensity evidence, including evidence of a person’s prior conduct, is generally inadmissible to prove the person’s conduct on a specified occasion. (§ 1101, subd. (a); *People v. Villatoro* (2012) 54 Cal.4th 1152, 1159 [144 Cal.Rptr.3d 401, 281 P.3d 390].) However, “[t]he Legislature has . . . created specific exceptions to the rule against admitting character evidence in cases involving sexual offenses (§ 1108, subd. (a)), and domestic violence, elder or dependent abuse, or child abuse (§ 1109, subd. (a)(1)–(3)).”¹² (*People v. Villatoro*, at p. 1159.)

¹² The provision at issue in this case, section 1109, subdivision (a)(1), generally provides, “in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant’s commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.”

[B]oth sections 1108 and 1109 limit the admissibility of evidence of prior misconduct if its probative value is substantially outweighed by its prejudicial effect. (§§ 352, 1108, subd. (a), 1109, subd. (a).) The specific retention of the power to exclude evidence under section 352, found in both sections 1108 and 1109, provides ‘a realistic safeguard that ensures that the presumption of innocence and other characteristics of due process are not weakened by an unfair use of evidence of past acts.’” (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1334 [92 Cal.Rptr.2d 433].)

Thus, even relevant evidence of past domestic violence may be excluded when its “probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (§ 352.) “Evidence is substantially more prejudicial than probative [citation] [only] if, broadly stated, it poses an intolerable “risk to the fairness of the proceedings or the reliability of the outcome” [citation].” [Citation.] “The prejudice which . . . Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.” [Citations.] “Rather, the statute uses the word in its etymological sense of ‘prejudging’ a person or cause on the basis of extraneous factors.”’ [Citations.]” (*People v. Eubanks* (2011) 53 Cal.4th 110, 144 [134 Cal.Rptr.3d 795, 266 P.3d 301].)

■ In the analogous context of evidence of a defendant’s prior sex offenses governed by section 1108, our Supreme Court has explained how trial courts should evaluate such evidence under section 352: “By reason of section 1108, trial courts may no longer deem ‘propensity’ evidence unduly prejudicial per se, but must engage in a careful weighing process under section 352. Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant’s other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.” (*People v. Falsetta* (1999) 21 Cal.4th 903, 916–917 [89 Cal.Rptr.2d 847, 986 P.2d 182] (*Falsetta*)).

Similarly, section 1108, subdivision (a), provides, “In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.”

We review the trial court's ruling on the admissibility of evidence for abuse of discretion. (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531 [110 Cal.Rptr.3d 515].)

C. Analysis

Here, the trial court determined that, in light of defendant's statements to police suggesting the killing was an "an accident or an incident that arose over an argument," the "[e]vidence of prior domestic violence and a propensity to do violence to a partner or former partner is extremely relevant." After weighing the probative value against the potential prejudice, the court allowed the evidence to come in under section 1109.

Initially, we reject defendant's argument that the trial court was required to exclude the evidence of the prior incident of domestic violence *in its entirety*. There is no question that defendant's prior convictions for assault against his former girlfriend and her new partner qualified under section 1109 as prior incidents of domestic violence. Section 1109 permits the admission of a defendant's other acts of domestic violence for the purpose of showing a propensity to commit such crimes. (*People v. Hoover*, *supra*, 77 Cal.App.4th at p. 1027 ["the use of character evidence in domestic violence cases is more justified than in a murder case or a forgery case"].) As the trial court observed, the issue in this case was not who killed Gillihan, but rather "the circumstances under which" she was killed "and the intent of the defendant in committing the acts" that led to her death. In different contexts, it has been said that a defendant is not entitled to a false aura of veracity. (*People v. Humiston* (1993) 20 Cal.App.4th 460, 474–475 [24 Cal.Rptr.2d 515] [defendant's testimony at suppression hearing may be used for impeachment purposes if trial testimony is inconsistent with prior testimony]; *People v. Castro* (1986) 186 Cal.App.3d 1211, 1217 [231 Cal.Rptr. 269] [defendant's prior convictions may be admissible for purposes of impeachment].) Similarly in this case, defendant was not entitled to a false aura of veracity in respect to his claim that Gillihan's death was an accident or the result of provocation. (Cf. *People v. Cordova* (2015) 62 Cal.4th 104, 134 [194 Cal.Rptr.3d 40, 358 P.3d 518] [prior sex offenses relevant to rebut defense theory that the defendant's sperm entered the victim's body by innocent means].) Accordingly, we see no abuse of discretion in either the trial court's finding that defendant's "propensity to do violence to a partner or former partner [was] extremely relevant," or its concomitant ruling that defendant's past conduct was admissible to some extent to show propensity to commit domestic violence.

■ This does not end the matter, however. The weighing process of section 352 requires the trial court to consider "the availability of less

prejudicial alternatives” such as “excluding irrelevant though inflammatory details surrounding the offense.” (*Falsetta, supra*, 21 Cal.4th at p. 917.) The trial court acknowledged the prior incident involved “totally different” acts, including lying in wait and the use of a knife. Defense counsel asked that the court “sanitize” the evidence to avoid prejudice. Later, the court properly determined the prior incident was admissible to show propensity to commit domestic violence under section 1109, but the facts of the prior incident were *not* admissible to show premeditation and deliberation in the current case. This was an important distinction. The court did not want the prosecutor to “dwell[] on the specifics of this earlier offense” or “delv[e] into each specific detail of this prior incident.” The court further instructed the prosecutor not to argue “the lying in wait on this earlier occasion is somehow evidence of his guilt in this matter because it’s not.” The court’s statements indicate it was well aware of the risk the jury might improperly use the domestic violence evidence to “infer” planning and premeditation in the current case.

■ But when the trial court finally drew the line as to what could be admitted, it allowed evidence that was at odds with its previously expressed concerns as to the prejudicial nature of the evidence. The trial court undercut its own ruling limiting the scope of the evidence by stating that the prosecutor would be able to “bring in the fact that the defendant admitted . . . that he came into the apartment when the victim was not home, waited until she and her new partner were asleep and came out and attacked them.” Although the prosecutor would not be allowed to argue that lying in wait was evidence of guilt, the court’s order did not preclude him from putting on evidence that defendant “waited” until the victims were asleep, and then came out and attacked them. In other words, the prosecutor could bring in the evidence of lying in wait, but not make the argument. Given the serious risk the jury would improperly use the specific facts of defendant’s past conduct to find premeditation and deliberation in the current matter, it was incumbent upon the trial court to exclude evidence of defendant’s extensive planning and waiting in the prior incident.¹³ We thus conclude the trial court abused its discretion in allowing the prosecutor to adduce evidence that defendant

¹³ As we have explained, however, it was not an abuse of discretion to admit *some* evidence of defendant’s prior domestic violence. The trial court reasonably found the prior act of domestic violence highly relevant to defendant’s claims of accident, self-defense, and provocation. The evidence at trial showed that defendant was jealous and suspected Gillihan was cheating on him with Proccacio, that Gillihan did not want defendant staying in her apartment, and that Gillihan wanted to break up with defendant. In light of this evidence, it would not have been an abuse of discretion if the trial court had limited the evidence to the facts of defendant’s prior act of domestic violence under section 1109 such as the victims Cepeda and Estrella were defendant’s former girlfriend and her new partner, defendant thought they had cheated on him before Cepeda broke up with him, defendant attacked them in Cepeda’s bedroom, defendant wanted to hurt them, and he thought they had betrayed him and broken his heart. (Cf. *People v. Cordova, supra*, 62 Cal.4th at pp. 133–134 [prior sex offenses were admissible under § 1108 where they “bore the following commonality”: they were sex offenses

entered his former girlfriend's apartment when the victims were not home, that he lay in wait for many hours (some of the time hidden in a closet), and that the attack occurred when the victims were asleep. This evidence was highly inflammatory and was not specifically relevant to the purpose for which the past incident of domestic violence was admitted, that is, to show a propensity to do violence to a partner or former partner.

The trial court's error was compounded by its ambiguous ruling on the limitations on the evidence. As we have described, the prosecutor took advantage of the ambiguity, eliciting many details of the offense from Officer Martin, almost all without objection from defense counsel. Thus, the jury learned that defendant thought about doing something to his former girlfriend and her new boyfriend the previous week and "kept going back and forth" on the idea, that he brought a knife to the apartment and used it, and that the attack left Estrella covered in blood and Cepeda's bedroom spattered with blood. It is apparent that the trial court believed the prosecutor overstepped the bounds of its evidentiary ruling. In a discussion outside the presence of the jury after Martin's testimony was concluded, the trial court chastised the prosecutor: "You know, when you were going into this testimony, I told you [you] were not to go into the details of how *long this went on, the hiding*, I mean, this—the details of the incident itself. The fact that it occurred is one thing, and you've gotten all of that in. But then you turned right around and tried to bring in the fact, you know, *he took the knife in with him*, all of this, I guess to show premeditation in that incident. . . . [Y]ou're trying to . . . show some kind of similar pattern of which the Court feels there is none. I thought I made it clear to you when you brought that up." (Italics added.) Once again, the trial court correctly recognized the great risk that the jury would misuse this evidence. Unfortunately, its ruling admitting the evidence was contradictory and less than clear.

We further conclude the trial court's error prejudiced defendant. The jury in this case had to decide whether defendant was guilty of first degree murder where the evidence of premeditation—principally, the continued use of a carotid restraint hold for 15 seconds after Gillihan's body went limp—paled in comparison to the evidence defendant previously brought a knife to his former girlfriend's apartment, hid in a closet and lay in wait for hours, and then attacked his former girlfriend and her new boyfriend in the middle of the night in their bed, leaving the new boyfriend and the bedroom covered in blood. We recognize that the jury received limited-use instructions on the prior domestic violence evidence and that the prosecutor did not argue in

committed late at night inside a home against young children]; *People v. Johnson, supra*, 185 Cal.App.4th at pp. 532–533 [acts of domestic violence that occurred more than 10 years earlier were admissible, despite contrary presumption of § 1109, subd. (e), where "common factors" in past conduct strongly suggested the defendant had a problem with anger management when he felt rejected or challenged by an intimate partner].)

closing that the prior incident showed planning or premeditation in this case. But the trial was short (the witness testimony took only three days), Martin's testimony regarding the prior incident was vivid, and the evidence of premeditation and deliberation in the killing of Gillihan was underwhelming. The limited-use instruction could not erase the image of defendant hiding in a closet with a knife waiting for the moment to attack his former girlfriend and her boyfriend, and a jury would not need closing argument to remember it. The evidence at trial supported, but did not compel, a finding of first degree premeditated murder. Under these circumstances, it is reasonably probable the result would have been more favorable to defendant had the jury not heard this extensive, inflammatory evidence of defendant's prior incident of domestic violence. (*People v. Partida* (2005) 37 Cal.4th 428, 439 [35 Cal.Rptr.3d 644, 122 P.3d 765] ["state law error in admitting evidence is subject to the traditional *Watson* test"].)¹⁴

III. *The Prosecutor's Closing Argument*

Defendant argues the prosecutor misstated the law in his closing argument. Because we have concluded the conviction for murder must be reversed, we need not address this issue. For guidance on retrial, we make two observations.

■ First, for heat of passion voluntary manslaughter, "[t]he provocative conduct by the victim may be physical *or verbal*." (*People v. Lee* (1999) 20 Cal.4th 47, 59 [82 Cal.Rptr.2d 625, 971 P.2d 1001], italics added.) Thus, it would be incorrect for a prosecutor to argue that verbal conduct can *never* amount to provocation. Second, "to reduce murder to manslaughter, provocation must be such as would 'render an ordinary person of average disposition "liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment,"'" but it need not "be such as would move an ordinary person to kill." (*People v. Trinh* (2014) 59 Cal.4th 216, 232–233 [173 Cal.Rptr.3d 1, 326 P.3d 939].) Thus, it would be improper to argue that the test for provocation is whether an ordinary person of average disposition would act in *the same way defendant acted in this case*.

¹⁴ Defendant also argues the prosecutor committed misconduct by violating the court's earlier ruling, and that defense counsel was ineffective in failing to object. In light of our holding regarding the trial court's ruling on the evidence, we need not address these arguments.

During the pendency of this appeal, defendant's appellate counsel filed a petition for habeas corpus relief in this court. The petition is also based on trial counsel's alleged ineffectiveness on this and other grounds. We have denied the habeas corpus petition (A142412) by separate order filed this day.

DISPOSITION

The judgment as to count 1 is reversed. The remainder of the judgment is affirmed.

Richman, Acting P. J., and Stewart, J., concurred.

[No. E062479. Fourth Dist., Div. Two. June 15, 2016.]

JOSHUA TREE DOWNTOWN BUSINESS ALLIANCE, Plaintiff and
Appellant, v.
COUNTY OF SAN BERNARDINO, Defendant and Respondent;
DYNAMIC DEVELOPMENT, LLC, Real Party in Interest and Appellant.

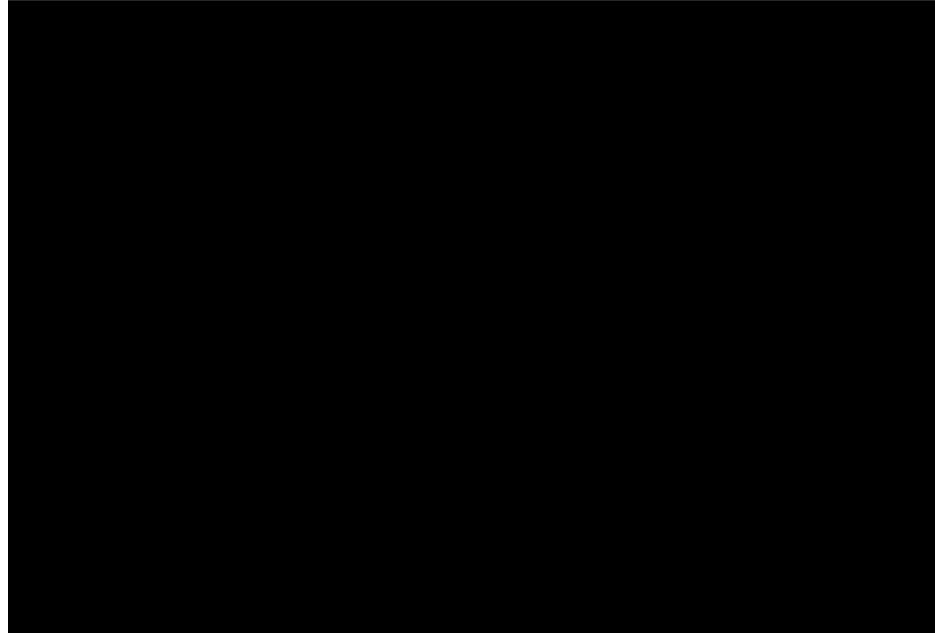
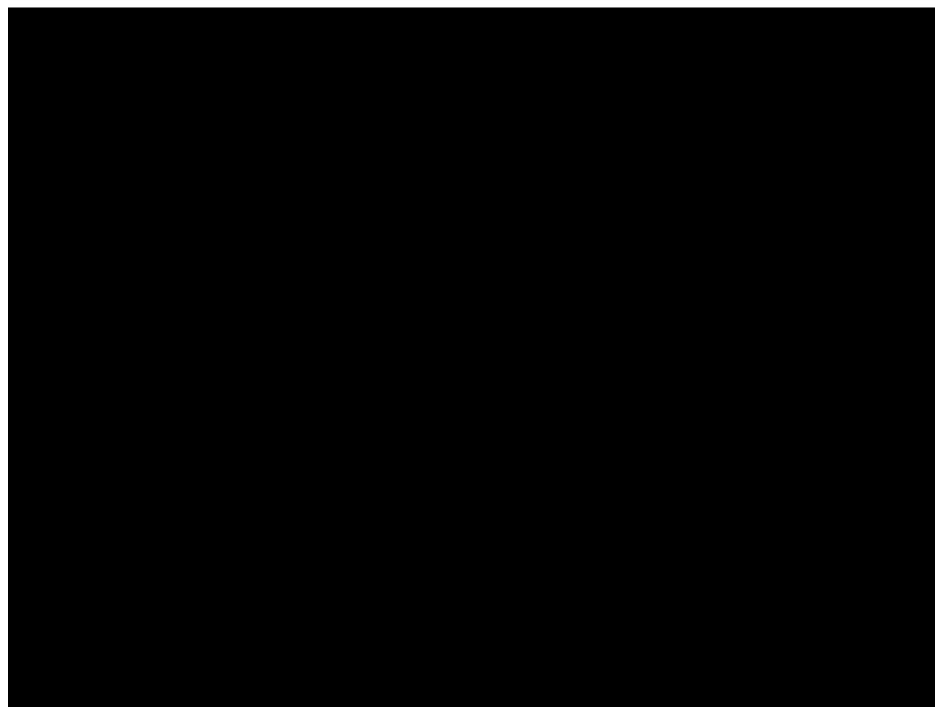
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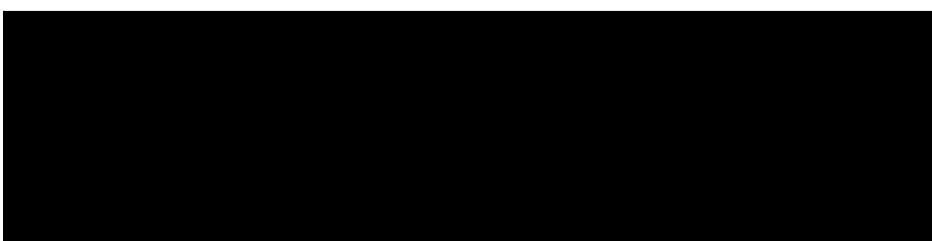
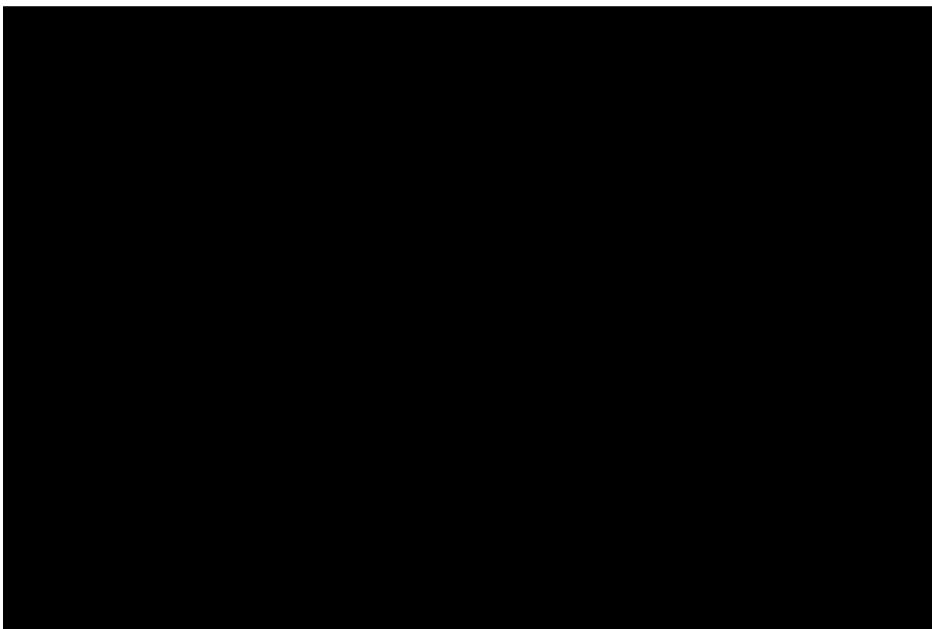
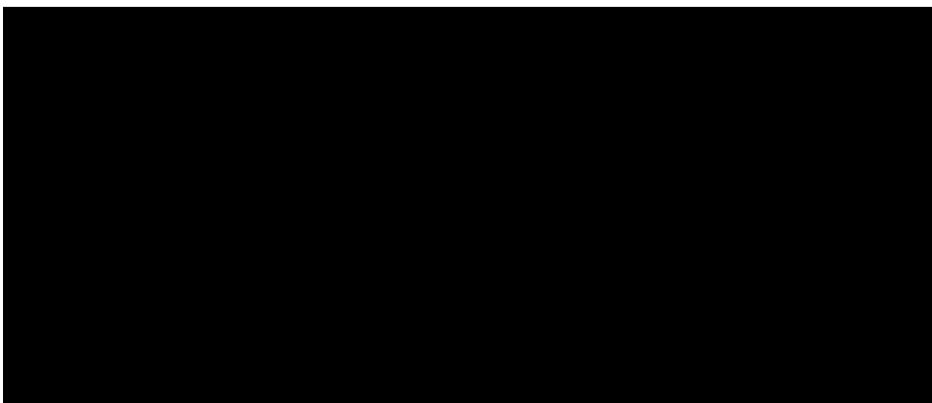
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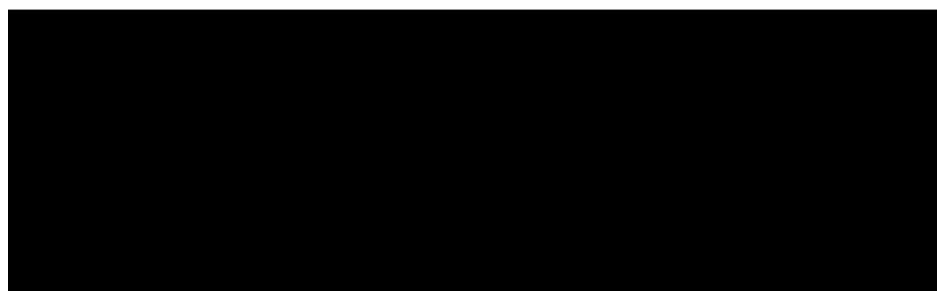
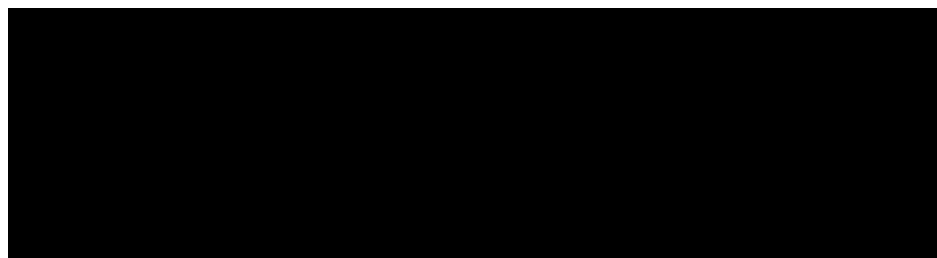
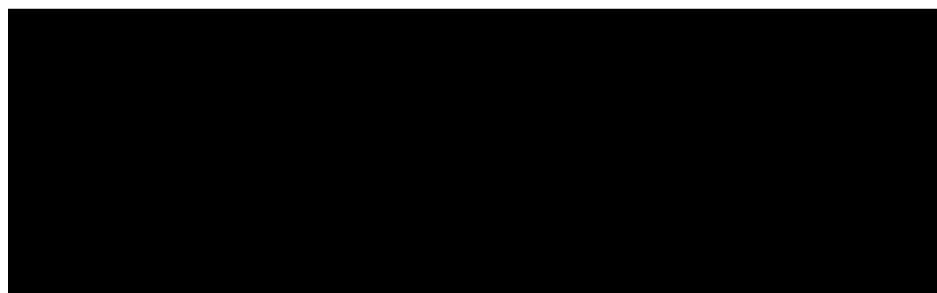
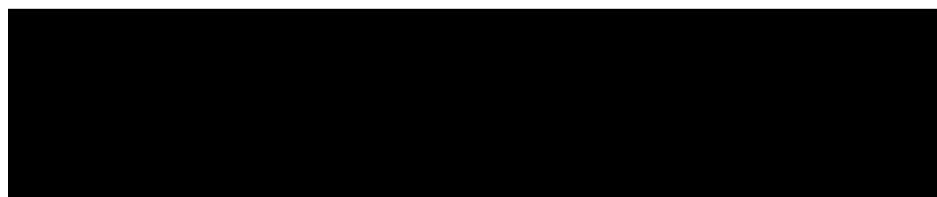
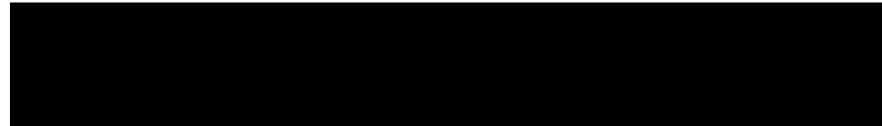
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COUNSEL

Law Office of Babak Naficy and Babak Naficy for Plaintiff and Appellant.

Gresham, Savage, Nolan & Tilden, John C. Nolan and Jonathan E. Shardlow for Real Party in Interest and Appellant.

Bart W. Brizzee, Principal Assistant County Counsel, for Defendant and Respondent.

OPINION

RAMIREZ, P. J.—Dynamic Development, LLC (Dynamic), sought to build a new retail store (Project) in Joshua Tree. Residents of Joshua Tree vociferously opposed the Project. They argued that it would clash with the town’s artistic, independent, and rural character; they also argued that it would cause various adverse environmental impacts, including urban decay. Nevertheless, the County of San Bernardino (County) found that an environmental impact report (EIR) was not required and approved the Project.

The Joshua Tree Downtown Business Alliance (Alliance) then filed this mandate proceeding challenging the County’s approval of the Project. The Alliance contended that:

1. The County did not adequately consider whether the Project had the potential to cause urban decay.
2. An EIR was required because there was substantial evidence to support a fair argument that the Project could cause urban decay.
3. The County improperly attempted to conceal the fact that the intended occupant of the store was Dollar General, a national retail chain.
4. The project was inconsistent with the Joshua Tree Community Plan (Community Plan), which favors small, independent businesses.

The trial court agreed there was substantial evidence to support a fair argument that the Project could cause urban decay; it therefore issued a writ of mandate directing the County to set aside its approval of the Project. Dynamic has appealed. The Alliance has cross-appealed, arguing that the trial court erred by rejecting its other contentions.

We will hold that the Alliance failed to establish any grounds for a writ of mandate. Accordingly, we will reverse.

I

FACTUAL BACKGROUND

Dynamic proposes to build a 9,100 square foot general retail store, with associated improvements such as parking and landscaping, on a 1.45-acre lot in Joshua Tree. In August 2011, it applied for a minor use permit for the Project. The intended occupant of the store was Dollar General.

The County solicited and received comments from owners of nearby properties. These were overwhelmingly negative. A common theme was that the Project would be “out of character and scale with the small business rural desert family-owned [and] operated business community in Joshua Tree.”

In November 2011, at a community meeting, Dynamic, along with Dollar General, gave a presentation regarding the Project. This triggered additional public comments.

In August 2012, the County circulated an initial study and a proposed negative declaration. Based in part on the comments it received, the County decided to revise the initial study and the proposed negative declaration. Among other things, it determined that a conditional use permit (CUP), rather than a minor use permit, was required. It also changed its environmental determination from a negative declaration to a mitigated negative declaration. The revised initial study and mitigated negative declaration were recirculated in November 2012. This produced still more public comments.

In connection with the upcoming public hearing, a County staff report recommended adoption of the mitigated negative declaration and approval of the CUP. The staff report also provided responses to the public comments on the revised initial study.

On January 17, 2013, after a public hearing, the County Planning Commission approved the CUP; it found that the Project did not have the potential to cause significant adverse environmental impacts. It also specifically found that the Project was consistent with the Community Plan.

The Alliance and others appealed to the County Board of Supervisors. In connection with the appeal, yet more comments were submitted. On June 4, 2013, after a public hearing, the County Board of Supervisors denied the appeal and upheld the approval of the CUP.

II**PROCEDURAL BACKGROUND**

The Alliance filed a petition for a writ of administrative mandate. It alleged, among other things, that the County violated the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) (CEQA) by failing to analyze the Project's potential for causing "urban decay and blight" and by failing to prepare an EIR despite substantial evidence to support a fair argument that the project could cause urban decay. It also alleged that the County had "deceptively" described the Project as a general retail store rather than specifically as a dollar store. It further alleged that the Project was inconsistent with the Community Plan.

After considering the parties' briefing and argument, the trial court issued an extensive written ruling. It determined that the County did not fail to consider the possibility of urban decay. However, the County did err by concluding that an EIR was not required; the trial court found substantial evidence to support a fair argument that the Project could cause significant urban decay. Next, it determined that the project description was adequate, even though it described the project as a general retail store rather than as a Dollar General store. Finally, it rejected the Alliance's contention that the Project was inconsistent with the Community Plan.

The trial court therefore entered judgment in favor of the Alliance. It issued a writ of mandate directing the County to set aside its approval of the Project and not to approve the Project without an EIR. Dynamic appealed and the Alliance cross-appealed.

III**EVIDENCE THAT THE PROJECT COULD CAUSE
URBAN DECAY**

The Alliance contends that the County did not adequately consider the possibility of urban decay, and the trial court erred by ruling otherwise. Conversely, Dynamic contends that the trial court erred by ruling that there was substantial evidence to support a fair argument that the Project could cause significant urban decay.

A. General CEQA Principles.

"The fundamental purpose of CEQA is to ensure 'that environmental considerations play a significant role in governmental decision-making' [citation]." (*Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 797 [187 Cal.Rptr. 398, 654 P.2d 168].)

■ “CEQA review procedures can be viewed as a ‘‘three-tiered process.’’ [Citation.] The first tier requires an agency to conduct a preliminary review to determine whether CEQA applies to a proposed project. [Citation.] If CEQA applies, the agency must proceed to the second tier of the process by conducting an initial study of the project. [Citation.] Among the purposes of the initial study is to help ‘to inform the choice between a negative declaration and an environmental impact report (EIR).’ [Citation.] If there is ‘no substantial evidence that the project or any of its aspects may cause a significant effect on the environment,’ the agency prepares a negative declaration. [Citation.] Alternatively, if ‘the initial study identifies potential significant effects on the environment but revisions in the project plans ‘would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur’ and there is no substantial evidence that the project as revised may have a significant effect on the environment, a mitigated negative declaration may be used.’’ [Citation.] Finally, if the initial study uncovers ‘substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment’ [citation], the agency must proceed to the third tier of the review process and prepare a full EIR (environmental impact report). [Citation.]” (*Save Our Big Trees v. City of Santa Cruz* (2015) 241 Cal.App.4th 694, 704–705 [194 Cal.Rptr.3d 169].)

“In reviewing the adoption of [a negative declaration], our task is to determine whether there is substantial evidence in the record supporting a fair argument that the Project will significantly impact the environment; if there is, it was an abuse of discretion not to require an EIR. [Citation.] ‘Whether a fair argument can be made is to be determined by examining the entire record.’’ [Citation.]” (*Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 731 [187 Cal.Rptr.3d 96].) “Although our review is *de novo* and nondeferential, we must give the lead agency the benefit of the doubt on any legitimate, disputed issues of credibility. [Citation.]” (*Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 331 [127 Cal.Rptr.3d 435].)

■ “An EIR is to disclose and analyze the direct and the reasonably foreseeable indirect *environmental* impacts of a proposed project if they are significant. [Citations.] Economic and social impacts of proposed projects, therefore, are outside CEQA’s purview. When there is evidence, however, that economic and social effects caused by a project . . . could result in a reasonably foreseeable indirect environmental impact, such as urban decay or deterioration, then the CEQA lead agency is obligated to assess this indirect environmental impact. [Citations.] An impact ‘which is speculative or unlikely to occur is not reasonably foreseeable.’ [Citation.]” (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1182 [30 Cal.Rptr.3d 738].)

“[C]ourts have recognized that CEQA is not a weapon to be deployed against all possible development ills. For example, although CEQA requires public agencies to evaluate the possible negative environmental effects of constructing big-box retail stores (e.g., air pollution from traffic, noise and light pollution, destruction of open space), the fact that they may drive smaller retailers out of business is not an effect covered by CEQA. [Citation.] Only if the loss of businesses affects the physical environment—for example, by causing or increasing urban decay—will CEQA be engaged. [Citations.]” (*South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604, 1614 [127 Cal.Rptr.3d 636].)

CEQA does not define urban decay. The County, however, used the following definition: “[U]rban decay is defined as, among other characteristics, visible symptoms of physical deterioration that invite vandalism, loitering, and graffiti that is caused by a downward spiral of business closures and multiple long term vacancies. This physical deterioration to properties or structures is so prevalent, substantial, and lasting for a significant period of time that it impairs the proper utilization of the properties and structures, or the health, safety, and welfare of the surrounding community. The manifestations of urban decay include such visible conditions as plywood-boarded doors and windows, parked trucks and long term unauthorized use of the properties and parking lots, extensive gang and other graffiti and offensive words painted on buildings, dumping of refuse on site, overturned dumpsters, broken parking barriers, broken glass littering the site, dead trees and shrubbery together with weeds, lack of building maintenance, abandonment of multiple buildings, homeless encampments, and unsightly and dilapidated fencing.”

The Alliance accepts and endorses this definition. Moreover, this definition is consistent with the law that urban decay requires a significant effect on the physical environment.

B. Additional Factual Background.

The following comments relevant to urban decay were made during the various stages of the environmental review process.

1. *Comments after the November 2011 community meeting.*

Commenter Jonathan Ball stated: “A [Dollar General store] will bring more detriment to the economic viability of other privately owned establishments in that an imbalance toward business competition will not be supported by the small population of the area. A lack of consumer base for existing businesses will be realized in the closure of existing shops and a decline in

local debt payments once existing stores are not able to clear their overhead. An additional general store will spread the consumer field thinner than it already is and create market strains on established businesses not likely to be endured through the coming economic downturn.”

Commenter Mark Cranston owned a vacation rental company and a trucking company. He asked rhetorically: “How many more businesses have to be shut down before we understand that businesses like . . . Dollar General will not support the local economy and bring nothing that we don’t already have? How many times do we have to see a big box store come into a small community [and] force other businesses into bankruptcy to only fail as well?”

2. *Comments on the November 2012 revised initial study and the County’s responses.*

The revised initial study did not specifically discuss urban decay. Several commenters, including Kerri N. Tuttle, pointed this out. Tuttle asserted that, under two specified court decisions, “CEQA review must assess the possibility of urban decay . . . resulting from the economic impacts of the project.”

County staff responded: “[T]he Commenters have provided no evidence to suggest that the Project will contribute to or cause urban decay. There is no factual evidence that development of the subject site with a small retail store would result in the closing of business, resulting in urban decay. The two court decisions referenced by the Commenter were in regard to . . . ‘big-box’ stores and other large retail projects. The proposed Project . . . is not of the size, scope, and scale of . . . ‘big-box’ retail stores; so to compare the economic impact of the Project to the impacts associated with a ‘big-box’ retail store that can be as large as 150,000 square feet plus i[s] not an accurate comparison.”

County staff also reported that there was no evidence that the Project would have a negative economic effect.

3. *Comments in connection with the January 2013 Planning Commission hearing.*

According to commenter Julia G. Buckley: “Studies show that when formula retail puts local stores out of business, blight and urban decay ensue.”

4. *Comments in connection with the Alliance’s appeal.*

Commenter Celeste Doyle identified herself as follows: “I am a member of the . . . Alliance . . . I am a 12-year resident of Joshua Tree, and a business

owner.^[1] I was involved in the . . . Community Plan process and I sat on the Citizen Committee appointed by the County to finalize that Plan. Before moving to Joshua Tree, I worked for several years as an Assistant Attorney General in the Oregon Department of Justice, providing General Counsel services to the state's Land Use, Transportation, and other agencies.”

Doyle listed several local businesses, including Sam’s Market, that had recently made substantial investments in their premises. She then stated: “A low-end retail store in Joshua Tree will not add jobs or sales tax revenues, and may lead to urban blight in our small downtown district.

“A generic, corporate-owned, low-end retail store in Joshua Tree will not ‘encourage and support small independent businesses,’ but rather will take business away from Sam’s Market, our local, independent grocery store, the JT Trading Post and Mike’s Liquor Store, all of which already sell much of what the applicant says the likely tenant will have to offer. The proposed project will also likely affect our three non-profit thrift stores, which benefit the Morongo Hospice, needy and homeless women and children, and the local public hospital.

“A Dollar General store will . . . take sales away from existing, locally-owned businesses and our non-profit [t]hrift stores. This shift will lead some of these local stores and businesses to close: They will no longer pay sales taxes, they will lay-off their employees, and they will empty their buildings. Net retail sales in Joshua Tree will not increase and the net number of jobs in Joshua Tree will not increase, but the number of empty storefronts likely will increase.

“. . . Furthermore, the closed storefronts will likely stand empty for a very long time, degrading the town’s appearance and vitality, inviting vandalism and leading to urban blight.”

Finally, she asserted: “Joshua Tree residents can already purchase much of what the proposed retail store will offer in local markets. What can’t be found in Joshua Tree can be found only 4 miles away on Highway 62 in Yucca Valley. Just a five-minute drive, or a ten-minute bus-ride, gets Joshua Tree residents to the intersection of Hwy 62 and Balsa Ave, where they routinely shop at a large grocery store (Stater Brothers), a Walmart, a Walgreens[,] and a Dollar Tree [s]tore, as well as a J.C. Penn[e]y and several smaller retailers.

¹ At a previous public hearing, Doyle had stated that she owned a “small retail store” that sold camping gear and outdoor clothing and rented camping equipment.

Only another mile down the road, and a few bus stops away, is a large, new Rite-Aid, a Vons [s]upermarket and other retailers.” (Fn. omitted.)²

C. *Failure to Consider Urban Decay.*

1. *The trial court’s ruling.*

The trial court ruled that the County did not “fail[] to consider whether economic impacts would result in urban decay. The County’s conclusion was that the Project would not have a negative economic impact on the environment and it flows from such conclusion that urban decay would not result.”

2. *Discussion.*

■ “[T]he failure of an initial study to disclose the evidence supporting particular findings [is not] necessarily . . . fatal to the resulting negative declaration. There is ‘no authority . . . that an initial study is inadequate unless it amounts to a full-blown EIR based on expert studies of all potential environmental impacts. If this were true, the Legislature would not have provided in CEQA for negative declarations.’ [Citation.]” (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1378 [43 Cal.Rptr.2d 170], fn. omitted.) “[T]he ultimate issue is not the validity of the initial study, but rather the validity of the lead agency’s adoption of a negative declaration.” (*Id.* at p. 1379.)

“In examining the record for . . . substantial evidence, the courts recognize the public agency’s responsibility for creating an adequate record. Deficiencies in the record due to the public agency’s lack of investigation ‘may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.’ [Citation.] However, it remains the appellant’s burden to demonstrate by citation to the record the existence of substantial evidence supporting a fair argument of significant environmental impact. [Citation.]” (*Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1348–1349 [272 Cal.Rptr. 372].) “‘An absence of evidence in the record on a particular issue does not automatically invalidate a negative declaration. ‘The lack of study is hardly evidence that there *will* be a significant impact.’’ [Citation.]” (*Gentry v. City of Murrieta, supra*, 36 Cal.App.4th at p. 1379.)

Here, as the trial court ruled, the County did consider urban decay; it simply concluded that there was no evidence that the Project would have a negative economic impact, and therefore no evidence that it would cause urban decay.

² Doyle had also made some of the same points earlier, in comments on the November 2012 revised initial study.

The County staff report stated: “[E]conomic impacts and urban decay are not among the categories listed within the CEQA Guidelines Appendix G checklist.^[3] Thus, in the absence of any other significant impacts, there are no impacts to be ‘traced’ through a causal relationship to economic changes. [Mitigated negative declarations] may not be prepared for projects with impacts that cannot be mitigated to below a level of significance; this is why economic impact analyses are sometimes seen within EIRs, but not within [mitigated negative declarations].”

The Alliance takes this to mean that the County refused to consider the possibility of urban decay solely because appendix G to California Code of Regulations, title 14, section 15000 et seq. (Appendix G) did not include a checkbox for it. The County’s statement, taken as a whole, however, means that economic impacts, standing alone, are not sufficient to require an EIR, and hence are not reflected in Appendix G; they may require an EIR only if they cause other significant impacts, which *would* be reflected in Appendix G. This is consistent with the law, as discussed in part III.B, *ante*.

The Alliance responds that “Appendix G is only an illustrative checklist, not an exhaustive list of all potentially significant environmental impacts under CEQA.” (See 1 Kostka & Zischke, *supra*, § 13.15, p. 13-16.) Nevertheless, it does include the broad catchall question, “Does the project have environmental effects which will cause substantial adverse effects on human beings, either directly or indirectly?” Thus, the County was correct in concluding that, if the answer to that question was “no,” then the mere fact that the Project might have economic impacts did not require an EIR.

The Alliance also claims that the County refused to consider the possibility of urban decay because it reasoned—incorrectly, in the Alliance’s view—that the Project was not a “big box” store and that only a “big box” store could cause urban decay. Actually, the County staff report stated: “Based on staff’s experience and research, the Project is not a ‘Big Box’ retailer, *and no evidence exists otherwise* to suggest that the development will have a negative economic effect on the community.” (Italics added.) Thus, while the County properly considered the fact that the Project was not a “big box” store, that was not the end of its analysis.

In sum, then, the County did not fail to consider urban decay; it did consider it, but it concluded that there was no evidence that the Project would cause either negative economic impacts or urban decay. We proceed to review this finding.

³ “CEQA Guidelines Appendix G provides an environmental impact checklist form that lead agencies may use in preparing an initial study when deciding whether to adopt a negative declaration or prepare an EIR for a project. [Citation.]” (1 Kostka & Zischke, *Practice Under the Cal. Environmental Quality Act* (2d ed. 2015) § 13.15, p. 13-15.)

[REDACTED]

D. *Evidence Regarding Urban Decay.*

1. *The trial court's ruling.*

The trial court cited, discussed, and relied on Doyle's comments. It concluded: "Given Ms. Doyle's community involvement and knowledge of the downtown business community, the cited discussion about local businesses, the amount of money invested in such businesses, and the surrounding business community presents substantial evidence in the form of facts and reasonable assumptions predicated upon such facts to support a fair argument that the Project may have a significant environmental effect in the form of urban decay. She discusses that general retail needs are being met by existing local retail stores and nearby larger stores. Therefore, this retail sales store will take sales away from existing businesses. A statement regarding downtown store closures is based on this business owner's knowledge of the downtown market and existing demand. In addition, given the level of investment discussed, a reasonable assumption could be made that if these businesses close, they will cause long-term vacancies of retail space resulting in degradation of the town's appearance and blight, which would support a conclusion of a physical deterioration. While Ms. Doyle may not be an expert in a traditional sense, her experience and observations regarding the local business community and retail markets demonstrate[] sufficient relevant personal observations that consist[] of facts and reasonable assumptions predicated upon such facts."

2. *Opinion evidence under CEQA.*

■ "Under CEQA, 'substantial evidence' is 'enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.' [Citation.] . . . [¶] Substantial evidence includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. [Citations.] It does not include '[a]rgument, speculation, unsubstantiated opinion or narrative, [or] evidence which is clearly inaccurate or erroneous . . .' [Citations.]" (*North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 673 [196 Cal.Rptr.3d 559].) "Complaints, fears, and suspicions about a project's potential environmental impact likewise do not constitute substantial evidence. [Citations.]" (1 Kostka & Zischke, *supra*, § 6.42, pp. 6-47 to 6-48.)

"Members of the public may . . . provide opinion evidence where special expertise is not required. [Citations.]" (1 Kostka & Zischke, *supra*, § 6.42, p. 6-46.2.) However, "[i]nterpretation of technical or scientific information requires an expert evaluation. Testimony by members of the public on such

issues does not qualify as substantial evidence. [Citations.]” (*Id.* at p. 6-47.) “[I]n the absence of a specific factual foundation in the record, dire predictions by nonexperts regarding the consequences of a project do not constitute substantial evidence. [Citations.]” (*Gentry v. City of Murrieta, supra*, 36 Cal.App.4th at p. 1417.)

Here, Doyle was not an expert in any relevant area. Indeed, the trial court acknowledged this (in a backhanded way) by conceding that she “may not be an expert in a traditional sense.” She was a business owner and a lawyer. She was not an economist; she did not claim so much as an MBA. Thus, she was not qualified to opine on whether the Project would cause urban decay. In addition, she did not offer any particular factual basis for her opinions. She did not claim that her business or any other business in Joshua Tree had ever actually suffered from competition with a national chain; she had not taken any surveys or done any studies. Thus, whether viewed as lay or expert opinions, her conclusions were speculative.

It might seem to be only a matter of common sense that a new store would reduce the sales of nearby stores selling similar goods. However, it is also possible that a new store would draw more shoppers into the area, and that some of them would make a purchase at an established local store—either instead of or in addition to a purchase at a Dollar General. There are sound reasons why otherwise competing businesses would choose to locate near each other. (See Steif, *Why Do Certain Retail Stores Cluster Together?* (Oct. 24, 2013) Planetizen <<http://www.planetizen.com/node/65765>> [as of June 15, 2016].)

Even more important, the mere fact that a new store might cannibalize part of other stores’ sales does not mean that urban decay would result. Common sense alone tells us nothing about the *magnitude* of this effect. The other stores might be able to continue in business. If worse came to worst and they went out of business, a more efficiently run store of the same type or a different type of store might move in. The property might be turned to an entirely different use, such as office or residential. And even if a handful of properties were to remain permanently vacant, the result would not necessarily be the kind of change to the physical environment that implicates CEQA.

The limited factual observations that Doyle did offer actually cut against her opinions. First, she noted that specific local businesses had recently made substantial physical investments. For example, Sam’s Market was “renovating its building inside and out, including new refrigeration and freezer units, expanded fresh food areas, and a new section of the store offering fresh coffee and other beverages, and hot food-to-go. The project included improvements to the parking lot, too, including resurfacing, new protective

curbs, and striping” This seems inconsistent with a conclusion that Sam’s Market was operating so close to the margin that competition would drive it out of business.

Second, Doyle observed that residents of Joshua Tree could already shop at chain stores some four or five miles away in Yucca Valley, including a Stater Brothers, a Walmart, and a Walgreen’s. This suggests that the businesses in Joshua Tree had already proved able to withstand competition from national chains. In addition, as Dynamic points out, this suggests that local residents are “underserved,” resulting in “leaked demand.” If so, then “the proposed Project could . . . retain revenue within Joshua Tree that would otherwise leak outside the community.”

Finally, as already noted, “we must give the lead agency the benefit of the doubt on any legitimate, disputed issues of credibility. [Citation.]” (*Citizens for Responsible Equitable Environmental Development v. City of Chula Vista*, *supra*, 197 Cal.App.4th at pp. 330–331.) Here, at a minimum, there were legitimate issues regarding the credibility of Doyle’s opinions. Hence, the County could deem them not substantial evidence.

We therefore conclude that the trial court erred by ruling that the County improperly adopted a negative declaration.

IV

DISCLOSURE REGARDING DOLLAR GENERAL*

.....

V

CONSISTENCY WITH THE COMMUNITY PLAN

The Alliance contends that the trial court erred by ruling that the Project was consistent with the Community Plan.

A. *Additional Factual and Procedural Background.*

The Community Plan was part of the County’s general plan. It identified broad “[g]oals” in areas such as land use (“LU”) and economic development (“ED”); each goal was associated with a number of more specific “[p]olicies.”

*See footnote, *ante*, page 677.

In this appeal, the Alliance asserts that the Project was inconsistent with the following goals and policies:

Goal JT/ED 1: “Preserve and protect Joshua Tree’s unique and evolving community atmosphere, artistic base and natural surroundings while providing jobs and improving its tax base.”

Policy JT/ED 1.3: “Encourage and support small independent businesses.”

Policy JT/ED 1.4: “Support commercial development that is of a size and scale that complements the natural setting, is compatible with surrounding development and enhances the rural character by incorporating natural desert landscape elements.”

Goal JT/ED 4: “Commercial uses and commercial zoning districts within the community shall be of small scale as needed to provide goods and services to residents and travelers, and shall not be of regional scale.”

Policy JT/ED 4.1: “Commercial development shall be compatible with the rural environment, and shall protect the quality of residential living.”

When the Planning Commission approved the CUP, it found that:

“The [P]roject, as proposed, is designed to be consistent with the goals of the Joshua Tree Community Plan. Specifically, the Project meets the following goals:

“Goal JT/LU 2: Support development of the existing downtown area of Joshua Tree as a focal point and core activity center within the community.

“Goal JT/LU 3: Enhance commercial development within the plan area that is compatible in type and scale with the rural desert character, is located appropriately, and meets the needs of local residents and visitors.”

B. *The Trial Court’s Ruling.*

The trial court ruled that the Alliance had not shown that the Project was inconsistent with the Community Plan: “[F]air argument is not the standard. [The Alliance] must demonstrate a finding of consistency is not supported by substantial evidence in light of the whole record. To carry its burden it is not sufficient for [the Alliance] to cite only to opposing comments. [The Alliance] was required to demonstrate that based on all relevant evidence, a finding of

consistency could not reasonably be made. [Citation.] ¶ Given the deficiencies in [the Alliance]’s argument, the court denies the writ petition based on inconsistency with the . . . Community Plan.”

C. *The County Properly Found That the Project Was Not Inconsistent with the Community Plan.*

■ ‘Each county is required to adopt a ‘comprehensive, long-term general plan for . . . [its] physical development . . .’ [Citation.] The plan must include, *inter alia*, a statement of policies and nine specified elements: land use, circulation, housing, conservation, open-space, seismic safety, noise, scenic highway, and safety. [Citation.]’ (*Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800, 806 [184 Cal.Rptr. 371].)

We may assume, without deciding, that state law prohibits the County from issuing a CUP for a project unless the project is consistent with the general plan. (Compare *Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1184–1186 [203 Cal.Rptr. 401] [state-law consistency requirement applies to use permit] with *Hawkins v. County of Marin* (1976) 54 Cal.App.3d 586, 594–595 [126 Cal.Rptr. 754] [issuance of use permit does not require consistency review].) Even if not, under the County’s own Development Code, before issuing a CUP, it must find that “[t]he proposed use and manner of development are consistent with the goals, maps, policies, and standards of the General Plan and any applicable community or specific plan.” (San Bernardino County Code (2007) § 85.06.040(a)(4).)

■ “[S]tate law does not require precise conformity of a proposed project with the land use designation for a site, or an exact match between the project and the applicable general plan. [Citations.] Instead, a finding of consistency requires only that the proposed project be “*compatible* with the objectives, policies, general land uses, and programs specified in” the applicable plan. [Citation.] The courts have interpreted this provision as requiring that a project be “‘in agreement or harmony with’” the terms of the applicable plan, not in rigid conformity with every detail thereof. [Citation.]’ [Citation.]’ (*Save Our Heritage Organisation v. City of San Diego* (2015) 237 Cal.App.4th 163, 185–186 [187 Cal.Rptr.3d 754].)

Preliminarily, we must determine the applicable standard of review. The Alliance claims that “[a] Project’s inconsistencies with local plans and policies constitute significant impacts under CEQA.” Thus, it contends that we should treat this as a CEQA issue and review it under the fair argument standard—i.e., if a fair argument can be made that the Project is inconsistent with the Community Plan, then the County erred by adopting a negative declaration and must prepare an EIR.

■ In support of its claim that the fair argument standard applies, the Alliance cites *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903 [21 Cal.Rptr.3d 791]. However, as the leading CEQA treatise states, *Pocket Protectors* stands for the proposition that “[e]vidence that a project is inconsistent with *land use standards adopted to mitigate environmental impacts* can support a fair argument that a project might have a significant adverse effect.” (1 Kostka & Zischke, *supra*, § 6.56, p. 6-60.1, italics added.) “The decision in *Pocket Protectors* should not be interpreted to hold that *any* claim of inconsistency with an applicable land use plan or policy requires an environmental impact report. In *Pocket Protectors*, several factors in combination were important in the court’s holding that there was a fair argument of significant impact based on the land use consistency issues. These factors included (1) that the governing land use standards were adopted in part for the purpose of mitigating environmental impacts, and (2) that the project proposed an entirely different type of housing than was originally envisioned in the development of the land use standards.” (*Ibid.*, italics added.)

Here, the goals and policies on which the Alliance relies were not adopted to mitigate environmental impacts. Rather, they are economic development goals, adopted to preserve the small-town, rural atmosphere that residents of Joshua Tree prefer. Any inconsistency between the Project and these aspects of the Community Plan simply does not implicate CEQA.

The Alliance also cites *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777 [32 Cal.Rptr.3d 177]. However, that case merely held that a county’s approval of a proposed project (which consisted of two area plans and an amendment to a specific plan (*id.* at p. 781)) was invalid because the project was inconsistent with the applicable general plan. (*Id.* at pp. 782–791.) It did not hold that the inconsistency violated CEQA. (See *ibid.*) Moreover, it did not apply the fair argument standard of review. (See *id.* at p. 782.)

■ Finally, the Alliance points out that an EIR must “discuss any inconsistencies between the proposed project and applicable general plans, specific plans and regional plans.” (Cal. Code Regs., tit. 14, § 15125, subd. (d).) However, there is no provision that any such inconsistencies necessarily constitute significant environmental impacts. Moreover, here, the County adopted a negative declaration, not an EIR; there is no similar requirement that applies to a negative declaration.

Accordingly, we do not apply the CEQA fair argument standard of review. Rather, we apply the usual standard that applies to a claim of inconsistency with a land use plan: “[A] governing body’s conclusion that a particular project is consistent with the relevant general plan carries a strong presumption of regularity that can be overcome only by a showing of abuse of

discretion.’ [Citations.] ‘An abuse of discretion is established only if the [governing body] has not proceeded in a manner required by law, its decision is not supported by findings, or the findings are not supported by substantial evidence. [Citation.] We may neither substitute our view for that of the [governing body], nor reweigh conflicting evidence presented to that body. [Citation.]’ [Citation.] This review is highly deferential to the local agency, ‘recognizing that “the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity. [Citations.] Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan’s policies when applying them, and it has broad discretion to construe its policies in light of the plan’s purposes. [Citations.] A reviewing court’s role ‘is simply to decide whether the [local] officials considered the applicable policies and the extent to which the proposed project conforms with those policies.’ ”’ (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 816–817 [65 Cal.Rptr.3d 251].)

“[I]t is important to keep in mind the deferential nature of our review. It is not for us to substitute our judgment for that of a local agency in making a determination of consistency; rather, the agency’s determination ‘comes to this court with a strong presumption of regularity.’ [Citation.] ‘Once a general plan is in place, it is the province of elected [agency] officials to examine the specifics of a proposed project to determine whether it would be “in harmony” with the policies stated in the plan. [Citation.] It is, emphatically, *not* the role of the courts to micromanage these development decisions.’ [Citation.] Thus, as long as the [local agency] reasonably could have made a determination of consistency, [its] decision must be upheld, regardless of whether *we* would have made that determination in the first instance.” (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 638 [91 Cal.Rptr.3d 571].)

“We review the agency’s decision regarding consistency with the general plan ‘directly, and are not bound by the trial court’s conclusions. [Citations.]’ [Citation.] ‘A [local agency]’s findings that the project is consistent with its general plan can be reversed only if it is based on evidence from which no reasonable person could have reached the same conclusion. [Citation.]’ [Citation.] Thus, the party challenging a [local agency]’s determination of general plan consistency has the burden to show why, based on all of the evidence in the record, the determination was unreasonable. [Citation.]” (*Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1563 [135 Cal.Rptr.3d 380].)

In applying these standards, “the nature of the policy and the nature of the inconsistency are critical factors to consider.” (*Families Unafraid to Uphold*

Rural etc. County v. Board of Supervisors (1998) 62 Cal.App.4th 1332, 1341 [74 Cal.Rptr.2d 1].) A “clear” inconsistency with even a single “fundamental, mandatory and specific land use policy” may be “enough to scuttle a project.” (*Id.* at pp. 1341–1342.) By contrast, a local agency has “‘some discretion’” when it comes to a relatively “amorphous” policy (such as a policy of “‘encourag[ing]’ development ‘sensitive to natural land forms, and the natural and built environment.’”). (*Id.* at p. 1341.)

The Alliance argues that the Project is inconsistent with policy JT/ED 1.3 (“[e]ncourage and support small independent businesses”) and policy JT/ED 1.4 (“[s]upport commercial development that is of a size and scale that . . . is compatible with surrounding development”) because it competes with and may harm established local businesses. As we held in part III.D.2, *ante*, however, there was not even sufficient evidence to support a fair argument that the Project would put local competitors out of business. The mere fact that the Project may compete with established local businesses does not make it inconsistent with the Community Plan. The Community Plan establishes a policy of encouraging and supporting small independent businesses; it does not require the County to reject all businesses that are not both small and independent. “Encourage” and “support” are precisely the sort of amorphous policy terms that give a local agency some discretion. (*Families Unafraid to Uphold Rural etc. County v. Board of Supervisors*, *supra*, 62 Cal.App.4th at p. 1341.)

The Alliance also argues that the Project is inconsistent with these policies because, at 9,100 square feet, it would be roughly twice the size of the next largest business in Joshua Tree. Again, however, the Community Plan did not require the County to reject any business that would be larger than existing businesses. Significantly, policy JT/LU 3.6 was to “[d]iscourage regional commercial facilities within Joshua Tree. To avoid ‘big box’ commercial developments that are out of character with the rural desert community” The Project was not a “regional” commercial facility; there were comparable businesses nearby, in Yucca Valley and Twentynine Palms. Moreover, it was not a “big box” store, which, the record shows, is commonly defined as at least 50,000 square feet. Thus, it was not the type of business that the Community Plan affirmatively discouraged.

In determining consistency with the Community Plan, the County could look at the relative size of the building, rather than its absolute square footage. The County’s applicable development standards allowed a building to occupy up to 80 percent of its net lot area; the Project would occupy only 14 percent. The same standards allowed a floor area ratio of 0.5 to one; the Project would have a floor area ratio of 0.14 to one. It had larger setbacks

[REDACTED]

than it was required to have. Thus, the County could reasonably view the Project as not out of scale in light of standards implementing the Community Plan.

The Project was also consistent with goal JT/ED 4, which provided that “[c]ommercial uses . . . shall be of small scale as needed to provide goods and services to residents and travelers, and shall not be of a regional scale,” because, as just mentioned, it was not a regional store. The County could properly conclude that it was no larger than it needed to be to provide goods to residents and travelers.

Finally, the Alliance argues that the Project is inconsistent with policy JT/ED 4.1, which provided, “Commercial development shall be compatible with the rural environment, and shall protect the quality of residential living.” However, it does not cite any evidence that required a finding of inconsistency with this policy. Its claim seems to be based on the fact that this particular commercial development would be operated by a large out-of-town corporation, rather than by locals. Nevertheless, the building was designed so as “to complement the surrounding community and structures with a rural, western ‘Mining Town’ theme.” There was evidence that it did not significantly block any scenic views. One could view the Project as “protect[ing] the quality of residential living” by providing an additional source of useful goods. The County could reasonably conclude that the Project was not inconsistent with this policy.

VI

DISPOSITION

The judgment is reversed. The trial court is directed to enter a new judgment denying the mandate petition. Dynamic and the County are awarded costs on appeal against the Alliance.

Hollenhorst, J., and Codrington, J., concurred.

The petition of appellant Joshua Tree Downtown Business Alliance for review by the Supreme Court was denied October 12, 2016, S236764.

[No. D067616. Fourth Dist., Div. One. June 21, 2016.]

In re M.H., a Person Coming Under the Juvenile Court Law.
THE PEOPLE, Plaintiff and Respondent, v.
M.H., Defendant and Appellant.

[REDACTED]

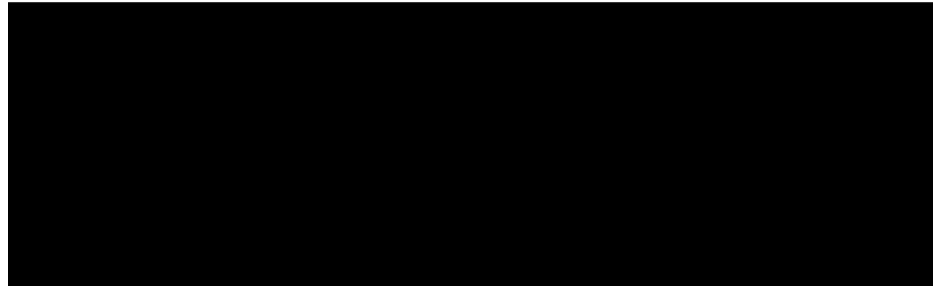
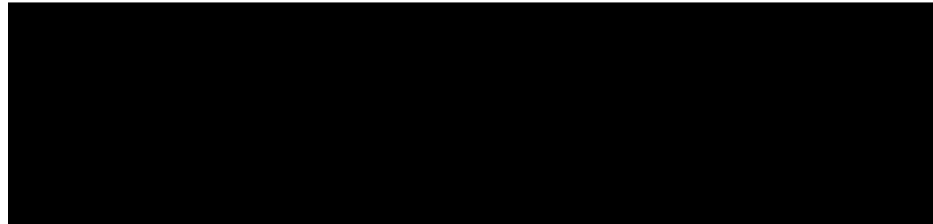
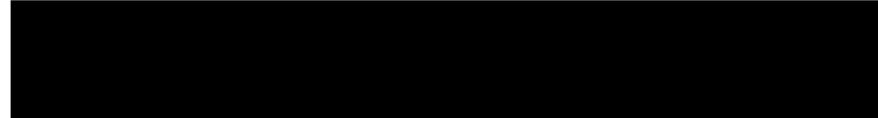
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COUNSEL

Jared G. Coleman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting, Deputy Solicitor General, Eric A. Swenson, Scott C. Taylor and Junichi P. Semitsu, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

NARES, Acting P. J.—Technology advancements have resulted in many high school students carrying smartphones, which have applications to record

and upload videos to social media for immediate viewing by their peers. In this case, 16-year-old M.H. used his smartphone to surreptitiously record a fellow high school student, Matthew B., in a school bathroom stall while Matthew was either masturbating or jokingly pretending to do so. The video, taken inside the bathroom, but about 20 feet away from the bathroom stall, did not show Matthew's face, but did reveal his distinctive socks and shoes, which were visible in the gap between the stall wall and the floor. M.H. uploaded the 10-second video to his Snapchat application with the caption, "I think this dude is jacking off" or some similar title.

M.H. intended the video to be funny and to get a laugh. But tragically, about two weeks later, Matthew took his own life, stating in a suicide note, "I can't handle school anymore and I have no friends."¹

The San Diego County District Attorney's Office filed a juvenile delinquency petition under Welfare and Institutions Code section 602 alleging M.H. engaged in an unauthorized invasion of privacy by means of a cell phone camera in violation of Penal Code² section 647, subdivision (j)(1) (hereafter section 647(j)(1)), a misdemeanor.³

Following a contested adjudication hearing, the court found true the allegation that M.H. violated section 647(j)(1). The court sentenced M.H. to probation on numerous conditions, including several restricting his use of social media. Addressing M.H., the court stated, "We are going to come back in 60 days. I'm going to see how you are doing. If I have any more problems with you, you are going into custody."

On appeal, M.H. first contends no substantial evidence supports the juvenile court's finding that he had the requisite specific intent "to invade Matthew's privacy" as required by section 647(j)(1). Specifically, M.H. contends Matthew had no reasonable expectation of privacy in the bathroom stall because Matthew's distinctive shoes were visible under the stall's wall and Matthew was audibly moaning, which anyone in the bathroom could

¹ Matthew's suicide note also states, "P.S. I've been planning this for months now." The causal relationship, if any, between M.H.'s video and Matthew's suicide is not before us and we express no opinion on that issue.

² All statutory references are to the Penal Code unless otherwise specified.

³ Section 647(j)(1) defines disorderly conduct as occurring when a person commits the following acts: "Any person who looks through a hole or opening, into, or otherwise views, by means of any instrumentality, including, but not limited to, a periscope, telescope, binoculars, camera, motion picture camera, camcorder, or mobile phone, the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside. This subdivision shall not apply to those areas of a private business used to count currency or other negotiable instruments."

have heard. Second, for the first time on appeal, M.H. also contends section 647(j)(1) incorporates by reference the elements of the tort of invasion of privacy, and assuming that to be true, he asserts there is a “newsworthy” defense that immunizes him from criminal liability in this case. Third, and also for the first time on appeal, M.H. contends that, as applied here, section 647(j)(1) violates his First Amendment rights.

We affirm. A student in a high school bathroom stall reasonably expects he will not be videoed and have that video disseminated on social media. Matthew did not forfeit that right merely because his socks and shoes could be seen and his voice could be heard by others in the bathroom. Matthew may have run the risk that people in the bathroom would tell others what they witnessed there. But that is a far cry from expecting his conduct would be electronically recorded and broadcast to the student body. Thus, M.H.’s main appellate argument fails because the right to privacy is not one of total secrecy, but rather the right to control the nature and extent of firsthand dissemination. (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 235 [74 Cal.Rptr.2d 843, 955 P.2d 469] (*Shulman*).) The “‘mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone.”’” (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 291 [97 Cal.Rptr.3d 274, 211 P.3d 1063] (*Hernandez*)).

M.H.’s contention that section 647(j)(1) incorporates the tort elements of invasion of privacy is forfeited because his attorney took the exact opposite position in the juvenile court, asserting, “This is not a tort case. This is a crime.” In any event, even if not forfeited, the argument is unavailing because neither the text nor the legislative history of section 647(j)(1) supports M.H.’s argument. We also conclude M.H. forfeited his claim that section 647(j)(1) violates his First Amendment rights because M.H. did not raise this constitutional issue in the juvenile court. (*People v. Ervine* (2009) 47 Cal.4th 745, 783 [102 Cal.Rptr.3d 786, 220 P.3d 820] [constitutional claim forfeited because appellant did not properly raise it below]; *People v. Clayburg* (2012) 211 Cal.App.4th 86, 93 [149 Cal.Rptr.3d 414] [1st Amend. claim forfeited by failure to raise it below].)

FACTUAL BACKGROUND

In 2013 M.H. and Matthew attended University City High School. At the time, M.H. was in 11th grade, and Matthew was in ninth grade.

On a Friday afternoon, Matthew and Erik J., friends since sixth grade, entered the boys’ restroom. The entrance doors to the bathroom were always kept open to deter vandalism; however, people outside could not see the

bathroom's interior. Inside, the bathroom has a row of five sinks along one wall, and eight urinals and two stalls on the opposite side. Only one of the two stalls, the one farthest from the entrance, has a door. Nevertheless, because of the way the room is configured, someone standing near the urinals or sink could only see the side of the doorless stall.

Upon entering the bathroom, Erik entered the far stall, the one with the door, and closed it. Matthew went into the other stall, the doorless one, and remained standing, with his feet facing the toilet. Matthew began making moaning sounds. Erik did not think Matthew was actually masturbating, but thought it was "a joke" because, as Erik testified, Matthew "was like that. Like, he would just mess around."

M.H. entered the restroom while Erik and Matthew were still inside their respective stalls. M.H. "heard some noises coming from one of the toilet stalls, noises that sounded like somebody was masturbating." While standing near the bathroom sinks, about 16 to 25 feet away from the stalls, M.H. used his smartphone to record a 10-second video of Matthew in the stall, making "easily audible" groaning sounds. M.H. did not make any noise or say anything to indicate he was there, and made no attempt to get anyone's permission to take the video.

The video showed Matthew's distinctive socks and shoes, visible in the gap between the stall wall and the floor. M.H. did not see Matthew's face and he did not know who was in the stall he was recording.

When Erik exited his stall, he did not see anyone in the bathroom except Matthew, who was standing near a sink. Erik and Matthew did not discuss the matter and returned to their respective classes.

After leaving the bathroom, M.H. uploaded the video to his Snapchat "stories" application with the caption, "I think this dude is jacking off" or some similar title. Snapchat is a smartphone application that allows users to send pictures and videos (not to exceed 10 seconds in length) to friends or followers. Unlike other social media applications, videos uploaded to Snapchat stories disappear after 24 hours. M.H. thought the video was funny and he uploaded it to "get a laugh."

While at the high school's football game that Friday evening, M.H. approached Erik and another student, Ezekiel A. M.H. asked Erik if he was "the kid in the rest room?" Erik said he did not know what M.H. was talking about. M.H. logged into his Snapchat application on his smartphone, and showed Erik and Ezekiel the bathroom video. Ezekiel testified the video showed a person's feet in one of the stalls and "a noise, like if someone was

[REDACTED]

masturbating.” Ezekiel recognized Matthew as the person in the stall because “Matt always . . . wore his black shoes with Adidas socks, ankle socks.” Erik also recognized his own shoes in the video in the adjacent stall, and Erik told M.H. that Matthew was the person in the other stall.

Three days later on Monday, Ezekiel told Matthew, “There’s a video of you that shows that you might be masturbating in the rest room.” Matthew replied that he was just joking around and trying to make people laugh.

It is not known how many people saw the video. M.H. told the police he had “a lot” of Snapchat followers, but “[i]t’s not like a million.” Because M.H. posted the video on Snapchat stories, the video disappeared after 24 hours. In M.H.’s dispositional hearing, Matthew’s mother said that when Matthew returned to school that Monday, “everyone was talking about him in the video.”⁴

Approximately two weeks later, Matthew committed suicide. In a handwritten note, Mathew expressed his love for his family and stated, “I have killed myself. I can’t handle school anymore and I have no friends. I don’t like my life.” Matthew’s note also states, “I’ve been planning this for months now.”

On the day of Matthew’s funeral, M.H. confronted Ezekiel and threatened to “kick his ass” if Ezekiel did not stop telling people M.H. took the video. Ezekiel reported the threat to school officials.

Subsequently, the vice-principal, together with M.H.’s basketball coach, and a San Diego Unified School District police officer, met with M.H. and Ezekiel to address the issue of M.H.’s threat. After that issue was apparently resolved and Ezekiel left the room, M.H. confessed he recorded and uploaded the video. M.H. said he made and uploaded the video because he thought it was funny that someone in the stall seemed to be masturbating. M.H. told police “he felt terrible for what had happened,” never intended the video to cause harm, and did not know who was in the stall when he took the video.

M.H. gave police his smartphone and consented to a search of its contents. However, police were unable to recover the video. Later, with Erik’s assistance—Erik saw the video on M.H.’s smartphone at the football game—the district attorney’s office prepared a re-creation of the video, which the court received into evidence without objection.

⁴ Matthew’s mother addressed the court only at the dispositional hearing. She did not testify at the adjudication hearing and her statement quoted in the text is therefore not evidence, but is merely provided here as background context.

DISCUSSION

I. THE COURT'S TRUE FINDING IS SUPPORTED BY SUBSTANTIAL EVIDENCE

M.H. first contends that insufficient evidence supports the juvenile court's finding that he violated section 647(j)(1). We reject this contention.

A. Standard of Review

When assessing a challenge to the sufficiency of the evidence supporting a true finding, we apply the substantial evidence standard of review, under which we view the evidence "in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578 [162 Cal.Rptr. 431, 606 P.2d 738].) We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 [26 Cal.Rptr.2d 23, 864 P.2d 103].)

B. Matthew's Expectation of Privacy

1. Reasonable expectation of privacy in a public restroom stall

■ A violation of section 647(j)(1) occurs only if the actor has the specific intent "to invade the privacy" of someone in a statutorily enumerated place, including a bathroom. M.H. contends no substantial evidence supports the court's finding he violated section 647(j)(1) because M.H. only recorded what Matthew exposed to public view—his feet through the gap between the stall wall and the floor, and the sounds Matthew was making. Citing *Tily B., Inc. v. City of Newport Beach* (1998) 69 Cal.App.4th 1 [81 Cal.Rptr.2d 6] (*Tily B.*), M.H. contends there is no right to privacy in what may be observed from common areas in public restrooms

■ To begin with, article I, section 1 of the California Constitution explicitly deems privacy an inalienable right by stating, "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

The bathroom, including a public bathroom stall, is perhaps the epitome of a private place. Contrary to M.H.'s assertions, for over 50 years California case law has ensured that persons in a public toilet may reasonably expect

they are not being secretly watched. For example, in *Britt v. Superior Court* (1962) 58 Cal.2d 469 [24 Cal.Rptr. 849, 374 P.2d 817] (*Britt*), a police officer stationed himself above the ceiling of a department store's men's room, where he could peer through vents to see two men having sex in the toilet stalls below. Although the stalls were enclosed by partitions and a door, the enclosures stopped approximately 12 inches from the floor. (*Id.* at p. 471.) The Supreme Court held the covert surveillance violated privacy rights, stating, "Man's constitutionally protected right of personal privacy not only abides with him while he is the householder within his own castle but cloaks him when as a member of the public he is temporarily occupying a room—*including a toilet stall*—to the extent that it is offered to the public for private, however transient, individual use." (*Id.* at p. 472, italics added.)

The Supreme Court's subsequent decision in *People v. Triggs* (1973) 8 Cal.3d 884 [106 Cal.Rptr. 408, 506 P.2d 232] (*Triggs*), disapproved on other grounds in *People v. Lilienthal* (1978) 22 Cal.3d 891, 896, footnote 4 [150 Cal.Rptr. 910, 587 P.2d 706], is even more on point because it involved surveillance of conduct inside a public restroom stall with *no door*. The police officers in *Triggs* entered the plumbing access area of a city park men's room and used an overhead vent to observe oral copulation within a doorless stall. (*Triggs*, at p. 888.) Rejecting the argument that a person in a doorless public bathroom stall has no expectation of privacy, the court stated, "The expectation of privacy a person has when he enters a restroom is reasonable and is not diminished or destroyed because the toilet stall being used lacks a door." (*Id.* at p. 891.)

M.H. seeks to distinguish *Britt* and *Triggs* on the grounds that the observations in both those cases were made directly into a bathroom stall, whereas M.H. was viewing Matthew's conduct outside the stall, in the common bathroom area. However, in *Triggs*, the court stated that the reasonable expectation of privacy in a public bathroom stall exists "even if the interior of the stall might have been open to view from areas accessible to the public." (*Triggs, supra*, 8 Cal.3d at p. 892.)

In his reply brief, M.H. cites the following cases as standing for the proposition there is no expectation of privacy when using a doorless public restroom stall: *People v. Crafts* (1970) 13 Cal.App.3d 457 [91 Cal.Rptr. 563]; *People v. Heath* (1968) 266 Cal.App.2d 754 [72 Cal.Rptr. 457]; *People v. Roberts* (1967) 256 Cal.App.2d 488 [64 Cal.Rptr. 70]; *People v. Maldonado* (1966) 240 Cal.App.2d 812 [50 Cal.Rptr. 45]; *People v. Hensel* (1965) 233 Cal.App.2d 834 [43 Cal.Rptr. 865]; *People v. Young* (1963) 214 Cal.App.2d 131 [29 Cal.Rptr. 492]; and *People v. Norton* (1962) 209 Cal.App.2d 173 [25 Cal.Rptr. 676]. However, in *Triggs*, the Supreme Court cited these intermediate appellate court opinions—not with approval, as M.H. suggests—but rather

with disapproval to the extent they incorrectly state that an occupant of a doorless restroom stall has no reasonable expectation of privacy with respect to conduct that could be viewed from a common area in the bathroom. (*Triggs, supra*, 8 Cal.3d at pp. 890–891.)⁵

M.H. also relies on *Tily B.*, *supra*, 69 Cal.App.4th 1, a case involving an adult entertainment business, where a city ordinance required an attendant to be stationed in the restroom “to prevent specified activities.”⁶ (*Tily B.*, at p. 21.) Rejecting an argument that the ordinance violated patrons’ right of privacy, the court in *Tily B.* stated, “Whatever individual sensibilities, there is no constitutional right to privacy in the restrooms of a place of public accommodation” (*Id.* at p. 24.) However, that passage, when read in context, refers to a hypothetical right of patrons to be alone in a public restroom in order to conduct illegal activities, and does not address the very distinct issue here, involving the right to not have one’s solitary activity within a bathroom stall surreptitiously recorded and then disseminated on social media.

M.H.’s reliance on *In re Deborah C.* (1981) 30 Cal.3d 125 [177 Cal.Rptr. 852, 635 P.2d 446] is also unavailing. There, a juvenile took several department store items and a large plastic bag into a closed fitting room. A security officer stationed outside the room saw the defendant stuff merchandise into her bag from the two-foot gap above and below the fitting room door. (*Id.* at p. 130.) The court concluded the defendant had no reasonable expectation of privacy with regard to these events in plain view. However, *Deborah C.* is also off point because it does not involve secretly recording a bathroom video with the intent to disseminate the recording on social media.

2. Privacy expectations can be reasonable, even if they are not absolute

Even if Matthew might otherwise have had a reasonable expectation of privacy in the bathroom stall, M.H. contends Matthew “waived that expectation” by “making loud obscene noises” and by “deliberately attracting public attention by making loud masturbation noises.” We disagree. There are degrees and nuances to expectations of privacy. The possibility of being seen

⁵ M.H.’s reply brief also cites *United States v. Billings* (10th Cir. 1988) 858 F.2d 617, but that case is distinguishable because there police followed a drug courier into an airport restroom, and, once inside the restroom, the officer, standing a few feet away from the stall, saw a drug parcel taped to the courier’s leg. (*Id.* at pp. 617–618.) M.H. did not observe Matthew enter the bathroom, and Matthew’s conduct in no way resembles that of the drug courier in *Billings*.

⁶ In describing those “specified activities,” the court in *Tily B.* only stated, “They are just what you would imagine.” (*Tily B.*, *supra*, 69 Cal.App.4th at p. 21, fn. 17.)

or overheard by others in the bathroom does not render unreasonable a student's expectation that his conduct in a bathroom stall will not be secretly recorded and uploaded to social media.

■ The California Supreme Court has held that a person may have a reasonable expectation of privacy against electronic recording, even if the person expects conduct or conversation to be overheard by others. For example, in *Sanders v. American Broadcasting Companies* (1999) 20 Cal.4th 907 [85 Cal.Rptr.2d 909, 978 P.2d 67] (*Sanders*), the plaintiff was employed as one of many telepsychics who gave readings to customers who telephone the employer's 900 number. Each telepsychic took his or her calls in a three-sided cubicle, of which there were about 100 in the large work area. (*Id.* at pp. 911–912.) The defendant, an investigative reporter with American Broadcasting Company, obtained employment as a telepsychic and secretly videotaped and audiotaped her conversations with coworkers using a small hidden camera and microphone. (*Id.* at p. 912.) The plaintiff in *Sanders* sued for violation of privacy. Much like M.H. argues Matthew could have no reasonable expectation of privacy because his groaning could be heard by others in the bathroom, in *Sanders* the defendant argued there could be no reasonable expectation of privacy because the workplace conversations could be overheard by others in the shared space. (*Id.* at p. 911.) The court rejected that argument because there is a vast distinction between being overheard, and being surreptitiously recorded.

In finding a reasonable expectation of privacy, the Supreme Court in *Sanders* explained, “[P]rivacy . . . is not a binary, all-or-nothing characteristic. There are degrees and nuances to societal recognition of our expectations of privacy: the fact that privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law.” (*Sanders, supra*, 20 Cal.4th at p. 916.)

The *Sanders* court held a person may reasonably expect his or her conversations will not be electronically recorded, even though he or she had no reasonable expectation the conversation would not be overheard when it was made. The court concluded, “In an office or other workplace to which the general public does not have unfettered access, employees may enjoy a limited, but legitimate, expectation that their conversations and other interactions will not be secretly videotaped by undercover television reporters, even though those conversations may not have been completely private from the participants' coworkers.” (*Sanders, supra*, 20 Cal.4th at p. 911.) The court added, “[T]he possibility of being overheard by coworkers does not, as a matter of law, render unreasonable an employee's expectation that his or her interactions within a nonpublic workplace will not be videotaped in secret by a journalist.” (*Id.* at p. 923.) This is because “ ‘secret monitoring denies the

speaker an important aspect of privacy of communication—the right to control the nature and extent of the firsthand dissemination of his statements.”’” (*Id.* at p. 915.)

■ Applying *Sanders*, courts have rejected the all-or-nothing approach to privacy that M.H. advocates in this case—and instead have examined the physical area where the act occurred, as well as the nature of the activities commonly performed in such places to determine the contours of a reasonable expectation of privacy. For example, in *Hernandez, supra*, 47 Cal.4th 272, the Supreme Court considered privacy expectations in a lawsuit where employees sued their employer for installing secret surveillance cameras in offices to monitor unauthorized computer use. Addressing the range of potential intrusions on privacy, the court noted that at one end of the spectrum are places where work or business is “conducted in an open and accessible space, within the sight and hearing not only of coworkers and supervisors, but also of customers, visitors, and the general public.” (*Id.* at p. 290.) Meanwhile, at the other end of the spectrum where employees maintain privacy interests “are areas in the workplace subject to restricted access and limited view, and reserved exclusively for performing bodily functions or other inherently personal acts.” (*Ibid.*)

In *Hernandez*, the court was particularly concerned with the “intrusive effect” of “hidden cameras” in “settings that otherwise seem private.” (*Hernandez, supra*, 47 Cal.4th at p. 291.) The court concluded that such recording “denies the actor a key feature of privacy—the right to control the dissemination of his image and actions. [Citation]. We have made clear that the ‘‘mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone.’’” (*Ibid.*)

Shulman, supra, 18 Cal.4th 200, is also instructive. There, the Supreme Court held that an accident victim could have a reasonable expectation of privacy at the accident scene and in the interior of a rescue helicopter, even though she lacked complete privacy due to the presence of medical professionals. (*Id.* at pp. 237–238.) The court stated, “[T]he last thing an injured accident victim should have to worry about while being pried from her wrecked car is that a television producer may be recording everything she says to medical personnel for the possible edification and entertainment of casual television viewers.” (*Id.* at p. 238.)

Sanders, *Shulman*, and *Hernandez* demonstrate that even if Matthew intended a limited number of people to hear and partially see him in the bathroom, he did not waive or forgo the right to expect he would not be secretly recorded in a video distributed over social media. Adolescence was

difficult enough before there were smartphones and social media. The last thing a high school student in a bathroom stall should have to worry about is that someone may be secretly recording everything done and uttered there for the possible entertainment of fellow students. (See *Shulman, supra*, 18 Cal.4th at p. 238.) As the Supreme Court stated in *Hernandez*, “[T]he ‘unblinking lens’ can be more penetrating than the naked eye with respect to ‘duration, proximity, focus, and vantage point.’” (*Hernandez, supra*, 47 Cal.4th at p. 291.) Thus, while section 647(j)(1) can be violated just by watching with the naked eye, the statute also includes situations like the one here—where privacy intrusions consist of the indignity and embarrassment of being electronically recorded in a bathroom stall. Although anyone present in the bathroom might tell others the sights and sounds observed there, that does not mean Matthew took the risk that what was heard and seen would be disseminated by a recording “‘in full living color’” on social media. (*Sanders, supra*, 20 Cal.4th at p. 915.)

C. Section 647(j)(1) Does Not Incorporate the Tort of Invasion of Privacy

M.H. contends section 647(j)(1) requires “specific intent to commit an invasion of privacy.” From this premise, he argues that section 647(j)(1) incorporates the elements of the *tort* of invasion of privacy, and therefore he claims there is a “newsworthy” defense built into the law. M.H.’s attorney asserts that as a matter of law, M.H. cannot have violated section 647(j)(1) because recording a high school student masturbating, or pretending to masturbate, in a school restroom stall is a newsworthy event of legitimate public interest.

However, M.H. not only failed to make this argument in the juvenile court, his attorney actually argued the contrary position there. When the court asked M.H.’s lawyer whether it was reasonable for a bathroom user to expect not to be videoed, counsel replied, “I think the law of torts covers that, but I don’t think this statute covers that. I definitely think the law of torts encompasses those issues, but we’re talking about a crime here of the Penal Code.” At another point in the hearing, M.H.’s lawyer unequivocally asserted, “This is not a tort case.”

“A fundamental tenet of our system of justice is the well-established principle that a party’s failure to assert error or otherwise preserve an issue at trial ordinarily will result in forfeiture of an appeal of that issue.” (*People v. McKinnon* (2011) 52 Cal.4th 610, 636 [130 Cal.Rptr.3d 590, 259 P.3d 1186].) These ordinary rules of forfeiture take on added significance here, because M.H. is not only attempting to assert an argument for the first time on appeal, but that new argument is inconsistent with the position he took in the

trial court. It is, therefore, particularly inappropriate for M.H. to complain on appeal that the court erred in not adopting tort elements into section 647(j)(1), when M.H.'s lawyer conceded on the record the issue he now disputes.

In any event, even if we were to consider whether section 647(j)(1) incorporates the tort of invasion of privacy, we would reject such a contention.

■ “[T]he proper goal of statutory construction ‘is to ascertain and effectuate legislative intent, giving the words of the statute their usual and ordinary meaning. When the statutory language is clear, we need go no further. If, however, the language supports more than one reasonable interpretation, we look to a variety of extrinsic aids, including the objects to be achieved, the evils to be remedied, legislative history, the statutory scheme of which the statute is a part, contemporaneous administrative construction, and questions of public policy.’ ” (*People v. Ramirez* (2009) 45 Cal.4th 980, 987 [89 Cal.Rptr.3d 586, 201 P.3d 466].)

■ Contrary to M.H.'s assertions, the plain language of section 647(j)(1) does not incorporate by reference the elements of privacy torts. The statute provides that criminal liability does not attach unless the defendant acted “with the intent to invade the privacy of a person or persons inside.” Nothing in those words incorporates by reference an entire body of civil tort law into the criminal statute. As the Attorney General correctly notes, the phrase “invade the privacy” does not connote the tort of invasion of privacy, and many courts have used that phrase when addressing Fourth Amendment claims without ever discussing privacy tort law. (See, e.g., *Blair v. Pitchess* (1971) 5 Cal.3d 258, 273 [96 Cal.Rptr. 42, 486 P.2d 1242] [“the Sheriff cannot invade the privacy of a home without a warrant when the state interest is to prevent crime”], superseded by statute as explained in *Simms v. NPCK Enterprises, Inc.* (2003) 109 Cal.App.4th 233, 242 [134 Cal.Rptr.2d 557]; *People v. Rogers* (1986) 187 Cal.App.3d 1001, 1009 [232 Cal.Rptr. 294] [“The extent of invasion of privacy is not unreasonable in the circumstances.”].)

Moreover, section 647(j)(1) cannot reasonably be construed to incorporate the specific intent to commit the tort of invasion of privacy because that tort is actually an umbrella term for four different common law privacy torts: “(1) intrusion into private matters; (2) public disclosure of private facts; (3) publicity placing a person in a false light; and (4) misappropriation of a person's name or likeness.” (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633]; see 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 658–659, pp. 963–967, §§ 664–665, pp. 973–974, §§ 673–675, pp. 987–992, § 676, pp. 993–994.) If the Legislature intended the phrase “intent to invade the privacy” to be code for

incorporating by reference the various elements and defenses of four common law privacy torts, it could not have chosen a more obscure and obtuse way of doing so.

Additionally, we have examined the legislative history surrounding the 1994 enactment of section 647(j)(1) pursuant to a request for judicial notice the Attorney General filed and M.H. did not oppose.⁷ The bill that led to the enactment of section 647(j)(1) was introduced “to correct a problem in San Diego where a person was caught peeking into the woman’s bathroom through a hole in the wall” at the airport and “the case could not be prosecuted because no law outlawed this activity.” (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 116X (1993–1994 Reg. Sess.) as amended June 28, 1994.) The phrase “with the intent to invade the privacy” (*ibid.*) was inserted in the assembly bill after the American Civil Liberties Union and the California Attorneys for Criminal Justice objected to an earlier version that criminalized the act of loitering “in public areas where people have a right to be” (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 116X (1993–1994 Reg. Sess.) as amended May 9, 1994; Assem. Amends. to Assem. Bill No. 116 (1993–1994 1st Ex. Sess.) May 9, 1994 & June 28, 1994.) There is nothing in the legislative history provided suggesting “with the intent to invade the privacy” was also added to incorporate civil tort privacy defenses into the statute. Despite the discussion of this legislative history in the Attorney General’s brief, M.H.’s opening and reply briefs do not dispute any of these assertions or cite any contrary authority.⁸

II. FIRST AMENDMENT CLAIM FORFEITED

For the first time on appeal, M.H. contends the finding he violated section 647(j)(1) should be vacated because, as applied, the statute violates his right to freedom of expression under the First Amendment of the United States Constitution. However, the Attorney General notes, and M.H. does not dispute, he failed to raise a constitutional challenge to this statute in the juvenile court.⁹ “All issues, even those involving an alleged constitutional violation, are subject to the rule of forfeiture, and a defendant’s failure to raise the issue before the trial court will generally result in the appellate court’s refusal to consider it.” (*People v. Navarro* (2013) 212 Cal.App.4th 1336, 1347, fn. 9 [152 Cal.Rptr.3d 109].) Considering an issue for the first

⁷ On March 22, 2016, we granted the Attorney General’s request for judicial notice.

⁸ Having rejected M.H.’s assertion that section 647(j)(1) incorporates civil tort law, it is unnecessary to consider his related argument that his video of Matthew in the bathroom stall was newsworthy or of public interest.

⁹ M.H.’s reply brief does not address the Attorney General’s argument that the constitutional issue is forfeited. His 31-page reply brief devotes only two short paragraphs to the constitutional issue, in which he “stands on the arguments” made in his opening brief.

time on appeal is often unfair to the trial court, unjust to the opposing party, and contrary to judicial economy because it encourages the embedding of reversible error through silence in the trial court. Nevertheless, courts may exercise discretion to consider constitutional challenges to penal statutes for the first time on appeal where the arguments are legal, based on undisputed facts, and involve review of abstract and generalized legal concepts. (*Ibid.*)

We decline to exercise our discretion to consider M.H.'s new claim of constitutional error in this case because we disagree it raises only a pure question of law. Even M.H.'s own argument makes a fact-based analysis necessary. For example, M.H. argues his recording of Matthew in the bathroom stall was "a matter of concern to his school community," a matter of "public interest," and constituted "news gathering." He contends Matthew was engaged in an unlawful act. Not surprisingly, the Attorney General contends exactly the opposite, stating the evidence does not show Matthew committed any unlawful act, and M.H.'s conduct was designed and intended not to report a crime or other newsworthy event, but rather to invade Matthew's privacy to ridicule, embarrass, and deprive him of dignity in front of his peers. M.H. never reported the bathroom behavior to school authorities or law enforcement until after Matthew committed suicide. In the absence of a complete factual record made in the trial court on such issues, it would be imprudent to decide constitutional issues for the first time on appeal.

DISPOSITION

The order is affirmed.

O'Rourke, J., and Prager, J.,* concurred.

Appellant's petition for review by the Supreme Court was denied October 12, 2016, S236353.

*Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

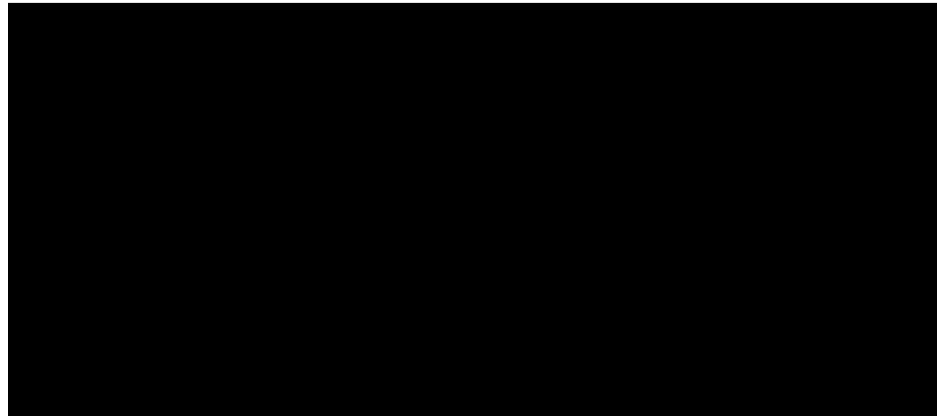
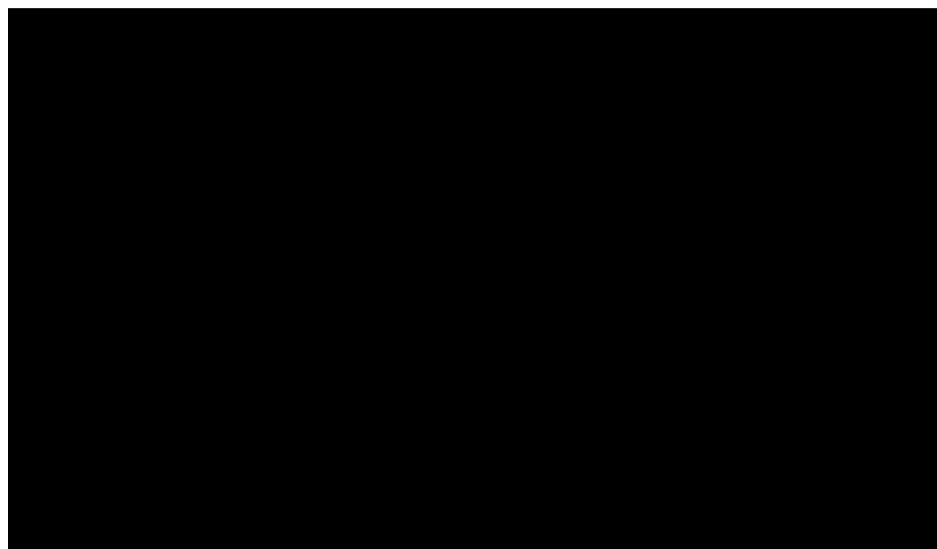
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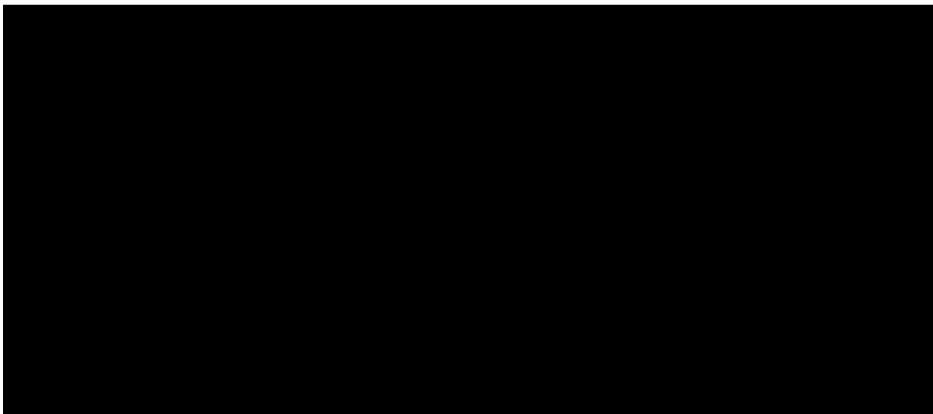
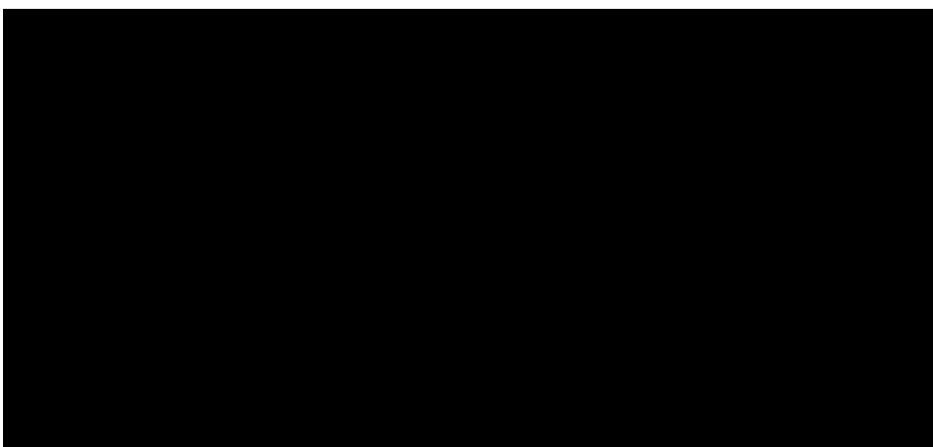
COMMUNITIES FOR A BETTER ENVIRONMENT et al., Plaintiffs and Appellants, v.
BAY AREA AIR QUALITY MANAGEMENT DISTRICT, Defendant and Respondent;
KINDER MORGAN MATERIAL SERVICES, LLC, et al., Real Parties in Interest and Respondents;
TESORO REFINING & MARKETING COMPANY LLC, Intervener and Respondent.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Earthjustice, Kristen L. Boyles and Stacey P. Geis for Plaintiffs and Appellants.

Brian C. Bunger for Defendant and Respondent.

Reed Smith, Paul D. Fogel, John L. Smith and Brian A. Sutherland for Real Parties in Interest and Respondents.

Manatt, Phelps & Phillips, Craig J. de Recat and Benjamin G. Shatz for Intervener and Respondent.

OPINION

HUMES, P. J.—Communities for a Better Environment, Asian Pacific Environmental Network, Sierra Club, and Natural Resources Defense Council (collectively, CBE) filed a petition for writ of mandate and a complaint under the California Environmental Quality Act (Pub. Resources Code, § 21000) (CEQA) after respondent Bay Area Air Quality Management District (BAAQMD) determined that its approval for a Richmond rail-to-truck facility to transload crude oil instead of ethanol was “ministerial” and exempt from CEQA review. The trial court dismissed the petition and complaint without leave to amend, concluding that the suit was time-barred under Public Resources Code¹ section 21167, subdivision (d) (section 21167(d)).

The only issue on appeal is whether CBE can successfully amend its petition and complaint to allege that the action is timely by virtue of the discovery rule. In the typical case, the discovery rule postpones the accrual of an action from the date an injury occurs until the date the plaintiff has actual or constructive notice of the facts constituting the injury. CBE claims that it should be allowed to rely on the discovery rule here because it could not have learned about BAAQMD’s determination any earlier, as BAAQMD gave no “public notice” of it and “the project itself [was] hidden from the public eye.” But an action to challenge such a determination accrues not at the time of the determination but instead on one of three alternative dates set forth in section 21167(d), dates on which the the public is deemed to have constructive notice of the potential CEQA violation. The discovery rule has never been applied to postpone the accrual of an action beyond the date the plaintiff has constructive notice of an injury, and we decline to so apply it here. We therefore affirm.

¹ All further statutory references are to the Public Resources Code unless otherwise noted.

I.

FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts may be summarized briefly.² Respondent Kinder Morgan Material Services, LLC (Kinder Morgan), began operating an ethanol rail-to-truck transloading facility in Richmond around 2009. In February 2013, Kinder Morgan applied to BAAQMD for approval to alter the facility and begin transloading Bakken crude oil. According to CBE, Bakken crude oil is “highly volatile and explosive” and “[t]he range of significant adverse environmental impacts of Kinder Morgan’s operation includes a high risk to public health and safety from derailment, significant increases in toxic air contaminants, potential contamination of California’s precious waterways (that support entire ecosystems), and significant increases in greenhouse gas emissions.”

Upon determining that the project was “ministerial” and not subject to CEQA review, BAAQMD authorized Kinder Morgan to begin transloading crude oil by issuing a permit in July 2013 called an authority to construct. BAAQMD concedes that it did not issue an optional notice of exemption (NOE) that would have publicly announced its determination that the project was exempt from CEQA review. (See §§ 21152, subd. (b), 21167, subd. (d).) Kinder Morgan began transloading crude oil in mid-September 2013.

At Kinder Morgan’s request, BAAQMD later modified two conditions of the authority to construct: in October 2013, it modified the emissions-monitoring requirements, and in December 2013, it required that the crude oil be transloaded to a different type of tanker truck. In February 2014, BAAQMD issued Kinder Morgan a Permit to Operate that incorporated the modified conditions.

On March 27, 2014, CBE filed a petition for writ of mandate against BAAQMD and a complaint for declaratory and injunctive relief against BAAQMD, Kinder Morgan, and Kinder Morgan’s parent company, Kinder Morgan Energy Partners, L.P.³ CBE alleged that (1) BAAQMD’s approval of

² As discussed further below, BAAQMD moved for judgment under Code of Civil Procedure section 1094, which permitted the trial court to consider the administrative record. The remaining respondents filed demurrers, which required the court to assume that CBE’s factual allegations were true. (*Leyte-Vidal v. Semel* (2013) 220 Cal.App.4th 1001, 1007 [163 Cal.Rptr.3d 641].) The facts are drawn from both the operative pleading and the administrative record, as none of the parties suggest we should distinguish between the motion for judgment and the demurrers in determining whether the action was properly dismissed.

³ The trial court granted leave to intervene to Tesoro Refining & Marketing Company LLC, which represented that it “ha[d] an exclusive right to [Kinder Morgan’s] crude oil transloading services” at the Richmond facility.

the operational change at the transloading facility was not ministerial and (2) an environmental impact report (EIR) was required because there was a fair argument that the change would have a significant impact on the environment.

Respondents sought dismissal of the action as time-barred under section 21167(d) because it was filed more than 180 days after “the date of the public agency’s decision to carry out or approve the project”—the July 2013 issuance of the authority to construct. BAAQMD answered the petition for writ of mandate and complaint and moved for judgment under Code of Civil Procedure section 1094, which applies to a petition for peremptory writ of mandate that “presents no triable issue of fact or is based solely on an administrative record,” and the remaining respondents demurred to the complaint.

CBE opposed the motion for judgment and the demurrs. As relevant here, it argued that even if the July 2013 authority to construct would have otherwise triggered the statute of limitations, the trial court should apply the discovery rule to conclude that the limitations period did not begin to run until CBE “first became aware of Kinder Morgan’s operation” on January 31, 2014, when one of CBE’s staff members received an email disclosing that the Richmond facility had begun transloading crude oil.⁴ CBE maintained that it did not learn, and could not with reasonable diligence have learned, of the project any earlier, because BAAQMD “gave the public no notice of Kinder Morgan’s switch to . . . Bakken crude oil” and “Kinder Morgan’s transloading operation is entirely enclosed, making the transported commodity, and any change to it, invisible.”

After a hearing, the trial court granted the motion for judgment and sustained the demurrs without leave to amend. The court first determined that CBE’s pleading was time-barred on its face because the July 2013 authority to construct triggered the statute of limitations despite the later changes in conditions. The court then turned to whether it should grant CBE leave to amend so it could “plead the facts . . . it believes establish that it brought the claim within 180 days of discovering . . . what [it] believe[s] to have been the violations of CEQA.” The court concluded that “there is not a discovery escape provision or exception” to section 21167(d). It reasoned that the Legislature must have “contemplate[d] circumstances where the public wouldn’t know” about the decision to find a project exempt from CEQA, because the filing of an NOE is “entirely optional” and section 21167(d) is not limited to situations “where one by observation [can] tell that the [agency’s] approval has been given” or that a project has commenced. Thus,

⁴ CBE also contended below that the 180-day limitations period began to run when the permit to operate was issued in February 2014, but it abandons that position on appeal.

the court found that CBE could not amend its pleading to avoid the statute of limitations by alleging that it was unaware of the project until January 2014.

II.

DISCUSSION

A. General Legal Standards.

1. The applicable law under CEQA.

■ “CEQA reflects the California state policy that ‘the long-term protection of the environment, consistent with the provision of a decent home and suitable living environment for every Californian, shall be the guiding criterion in public decisions.’ (§ 21001, subd. (d).)” (*Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 776 [166 Cal.Rptr.3d 1].) To determine whether CEQA applies to a proposed activity, a public agency must first assess whether the activity qualifies as a “‘‘project’’ because it “‘may have a significant effect on the environment.’” (*May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1320 [159 Cal.Rptr.3d 310].) The next step is to determine whether any of CEQA’s statutory exemptions apply. (*Ibid.*) Among these exemptions is one for projects subject to an agency’s approval that are deemed “‘[m]inisterial’” because they “involve[] little or no judgment or discretion by the approving official about the wisdom or manner of carrying out the project.” (*Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 512 [106 Cal.Rptr.3d 858, 227 P.3d 416], quoting § 21080, subd. (b)(1).) “If the project is in an exempt category for which there is no exception, ‘‘no further environmental review is necessary.’’” (*Parker Shattuck*, at p. 776.)

■ Where, as here, a local agency has determined that CEQA does not apply to a project because of a statutory exemption, there are three possible dates on which an action to challenge that determination can accrue. (§ 21167(d).) First, if the agency files an NOE under section 21152, subdivision (b), the action must be brought within 35 days of the NOE’s filing. (§ 21167(d).) Second, “[i]f the [NOE] has not been filed,” the action must be brought within 180 days of the “agency’s decision to carry out or approve the project.” (*Ibid.*) Finally, “if a project is undertaken without a formal decision by the . . . agency,” the action must be brought within 180 days of “commencement of the project.” (*Ibid.*)

2. The discovery rule.

■ The “discovery rule” is an exception to the general rule that “a cause of action accrues at ‘the time when the cause of action is complete with all of

its elements.’” (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806–807 [27 Cal.Rptr.3d 661, 110 P.3d 914].) The rule, which “‘may be expressed by the Legislature or implied by the courts’” (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1318 [64 Cal.Rptr.3d 9]), “postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action.” (*Fox*, at p. 807.) “Thus, in actions where the rule applies, the limitations period does not accrue until the aggrieved party has notice,” either actual or constructive, “of the facts constituting the injury.” (*E-Fab*, at p. 1318.)

3. *The standard of review.*

Whether the statute of limitations bars an action, including whether accrual of the action was delayed under the discovery rule, is normally a question of fact. (*E-Fab, Inc. v. Accountants, Inc. Services, supra*, 153 Cal.App.4th at p. 1320.) However, the issue presented here—whether the discovery rule can be applied to delay the accrual of an action under section 21167(d)—is a question of law that we review de novo. (See *International Engine Parts v. Feddersen & Co.* (1995) 9 Cal.4th 606, 611 [38 Cal.Rptr.2d 150, 888 P.2d 1279] [where relevant facts are undisputed, “the application of the statute of limitations may be decided as a question of law”].)

And where, as here, the trial court dismisses an action and denies leave to amend, “‘we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment.’” (*May v. City of Milpitas, supra*, 217 Cal.App.4th at p. 1324.) “The burden is on the plaintiff to show in what manner the pleading could be amended and how the amendment would change the legal effect of the pleading.” (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 861 [99 Cal.Rptr.3d 503].)

B. *The Trial Court Properly Dismissed the Action Without Leave to Amend Because the Discovery Rule Does Not Postpone the Running of the Limitations Periods Under Section 21167(d).*

In arguing that the discovery rule should be applied to delay the triggering of the limitations periods under section 21167(d), CBE focuses on *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929 [231 Cal.Rptr. 748, 727 P.2d 1029] (*Concerned Citizens*). CBE characterizes this decision as “carv[ing] out an exception to [CEQA]’s strict deadlines when there are subsequent revisions to a project that substantially change the scope of the project and its potential impacts.” We conclude that the discovery rule cannot be applied to postpone the running of section 21167(d)’s limitations periods.

In *Concerned Citizens*, the plaintiffs brought suit to challenge a public agency’s failure to file a supplemental EIR after substantial changes were

made to the project, an amphitheater. (*Concerned Citizens, supra*, 42 Cal.3d at pp. 933–934.) The theater was originally slated to be on six acres, have 5,000 fixed seats and additional seating on a lawn, and face away from residential areas, but the agency then authorized an increase in size to 10 acres, an increase to 7,000 fixed seats with 8,000 more seats on the lawn, and a move to face a residential area. (*Ibid.*) Under CEQA, a suit “alleging that a public agency is carrying out or has approved a project that may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment” must be filed, at the latest, within 180 days of “the date of commencement of the project.” (§ 21167, subd. (a).) But the plaintiffs in *Concerned Citizens* filed suit more than 180 days after construction began.

In allowing the suit to proceed, our state Supreme Court determined that although the action would be barred if section 21167, subdivision (a) was “applied literally,” it was more consistent with CEQA’s purpose to interpret “commencement of the project” to mean the commencement of “the project described in the EIR and approved by the agency.” (*Concerned Citizens, supra*, 42 Cal.3d at pp. 937, 939.) The plaintiffs “alleged that they did not know of the changes made in the project . . . , and could not with reasonable diligence have discovered them, within 180 days from the time construction of the theater commenced because the [agency] did not make the changes public and did not give notice that it had determined that these changes did not require a subsequent EIR, if such a determination was in fact made. Thus, when construction began, plaintiffs expected the project approved by the [agency] to be the same one analyzed in the EIR, and they had neither actual nor constructive notice to the contrary” until the first concert was held. (*Id.* at pp. 933, 937.) The court determined that under these circumstances, “an action challenging the agency’s noncompliance with CEQA may be filed within 180 days of the time the plaintiff knew or reasonably should have known that the project under way differs substantially from the one described in the EIR” and that the plaintiffs’ suit therefore should not have been dismissed on statute of limitations grounds. (*Id.* at pp. 939–940.) Thus, under the court’s interpretation, the action did not accrue under section 21167, subdivision (a)’s own terms because the project described in the EIR was never constructed. (*Concerned Citizens*, at p. 939.)

CBE does not argue that the action here was timely under section 21167(d) based on a substantial change in the project like that in *Concerned Citizens, supra*, 42 Cal.3d 929. Stated another way, CBE does not contend that it filed this suit within 180 days of either the date of a “formal decision” by BAAQMD “to carry out or approve the project” or “the date of commencement of the project” (§ 21167(d)) based on an argument that the “project” substantially changed as a result of the imposition of the modified conditions. Indeed, in attempting to analogize to *Concerned Citizens*, CBE characterizes

the relevant change in the “project” as being the switch from ethanol to crude oil, not the modification of conditions. Therefore, we need not resolve the parties’ disputes about which, if any, of BAAQMD’s actions constituted a “formal decision” about the “project” nor determine when “the commencement of the project” occurred, because CBE does not argue that the action was timely under section 21167(d) itself.

■ Instead, CBE relies on *Concerned Citizens*, *supra*, 42 Cal.3d 929 to urge that the discovery rule can be applied to delay the date of the action’s accrual from one of the dates specified in section 21167(d) to the date that CBE “gained actual knowledge of crude oil arriving at Kinder Morgan’s rail terminal” because the public had no way of knowing about the project any earlier.⁵ But in *Concerned Citizens*, our state Supreme Court specifically rejected “as contrary to the Legislature’s intent” the plaintiffs’ position “that their action was timely because it was filed a few days before the expiration of 180 days after the first concert was held at the theater”—that is, that the action accrued when the plaintiffs first had actual or constructive notice that the original project had changed substantially, as opposed to on one of the dates specified by statute. (*Concerned Citizens*, at p. 939.) As the court explained, “By providing . . . that the 180-day limitation period begins to run from the time a project is commenced, the Legislature determined that the initiation of the project provides constructive notice of a possible failure to comply with CEQA.” (*Ibid.*) Thus, *Concerned Citizens* did not apply the discovery rule to postpone the triggering of the limitations period, contrary to CBE’s repeated claims that it did. Instead, the court determined that an action accrues on the date a plaintiff knew or reasonably should have known of the project only if no statutory triggering date has occurred.

The other decision upon which CBE primarily relies also did not apply the discovery rule to override the statutory triggering date. In *Ventura Foothill Neighbors v. County of Ventura* (2014) 232 Cal.App.4th 429 [181 Cal.Rptr.3d 421], the EIR for a building’s construction specified that the building would be 75 feet tall. (*Id.* at pp. 431–432.) Although the planned height was later

⁵ In light of CBE’s phrasing, we emphasize that even if *Concerned Citizens*, *supra*, 42 Cal.3d 929 was otherwise applicable, “the test under *Concerned Citizens* is not confined to actual awareness of the challenged activities. Rather, the relevant inquiry is when the plaintiffs ‘knew or reasonably should have known that the project under way differs substantially’ from the one described in the environmental review documents.” (*Citizens for a Green San Mateo v. San Mateo County Community College Dist.* (2014) 226 Cal.App.4th 1572, 1597 [173 Cal.Rptr.3d 47].) Similarly, the discovery rule postpones the triggering of the limitations period until the plaintiff has actual *or constructive* notice of an injury: “‘A plaintiff is held to her [or his] actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her [or him].’” (*Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522, 1551 [178 Cal.Rptr.3d 897].) Any claim that an action does not accrue under section 21167(d) until a plaintiff has actual knowledge of a potential CEQA violation would be flatly inconsistent with both *Concerned Citizens* and the discovery rule.

increased to 90 feet, neither the notice of determination that the project was subject to CEQA nor an addendum to the EIR mentioned the new height, and the plaintiff organization did not receive actual notice of the new height until one of its members inquired at the construction site. (*Id.* at pp. 432–433.) The Court of Appeal concluded that the action was timely even though section 21167, subdivision (e), the applicable provision, required actions to be filed within 30 days of the notice of determination’s filing. (*Ventura*, at p. 436; § 21167, subd. (e).) The court reasoned that because “[t]he filing of [a notice of determination] triggers a 30-day statute of limitations for all CEQA challenges to *the decision announced in the notice*,” a notice of determination omitting the change in height did not trigger the limitations period. (*Ventura*, at p. 436, italics in original.) Instead, under *Concerned Citizens*, *supra*, 42 Cal.3d 929, the limitations period began to run once the plaintiff knew of the height difference. (*Ventura*, at pp. 436–437.) Thus, as did *Concerned Citizens*, *Ventura* preserved the Legislature’s intent because it interpreted the statute in such a way that the statutory triggering date never actually transpired.

■ Subsequent case law confirms a more general principle suggested by *Concerned Citizens*, *supra*, 42 Cal.3d 929 and conceded by CBE at oral argument: a plaintiff is deemed to have constructive notice of a potential CEQA violation on all three alternative dates of accrual under section 21167(d). In a later decision analyzing that provision, our state Supreme Court addressed whether an action was timely despite being brought more than 35 days after the public agency filed an NOE. (*Stockton Citizens for Sensible Planning v. City of Stockton*, *supra*, 48 Cal.4th at p. 489.) The court observed, “The express statutory language of section 21167(d)—the most reliable indicator of the Legislature’s intent [citation]—strongly confirms that litigation challenging the validity of an agency’s determination to allow a project to proceed under a CEQA exemption must be timely.” (*Stockton Citizens*, at p. 502, italics omitted.) “[T]he shortest applicable period of timeliness is measured from the date on which an NOE setting forth that determination is filed,” but when no NOE is filed, “the limitations period is longer, and its commencement may be delayed until the public has received constructive notice of the action by other means”: that is, through a formal decision to approve the project or the project’s commencement. (*Ibid.*; see also *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 47 [105 Cal.Rptr.3d 181, 224 P.3d 920] [where no public notice filed, “project approval or initiation is deemed constructive notice for potential CEQA claims”].) ■ As CBE has offered no theory under which either of those events occurred less than 180 days before the lawsuit was filed, we must assume that it cannot amend its petition and

[REDACTED]

complaint to allege that it lacked any actual *or constructive* notice in that timeframe. Therefore, applying the discovery rule here would not postpone accrual of the action.

Given the important role of public participation in the CEQA process (*Concerned Citizens, supra*, 42 Cal.3d at pp. 935–936), we acknowledge that if there were any situation in which it would be warranted to delay the triggering of a limitations period in the manner CBE urges, it would be one in which no public notice of the project was given and the project’s commencement was not readily apparent to the public. As the case law establishes, however, we cannot read an exception for such circumstances into section 21167(d) without violating “the Legislature’s clear determination that ‘“the public interest is not served unless CEQA challenges are promptly filed and diligently prosecuted.”’” (*Stockton Citizens for Sensible Planning v. City of Stockton, supra*, 48 Cal.4th at p. 500.) Ultimately, CBE’s arguments about the proper balance between the interests of public participation and of timely litigation are better directed to the Legislature, not this court.

III.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

Margulies, J., and Dondero, J., concurred.

On August 10, 2016, the opinion was modified to read as printed above. Appellants’ petition for review by the Supreme Court was denied October 19, 2016, S236827.

[No. B258353. Second Dist., Div. Three. June 21, 2016.]

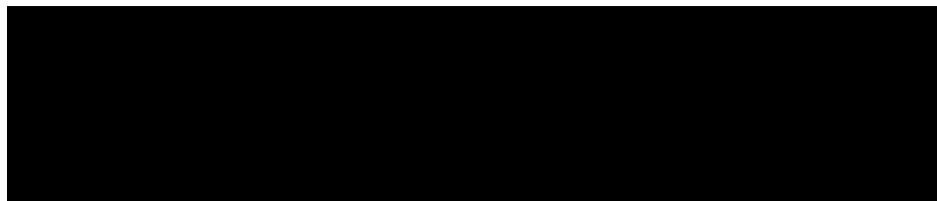
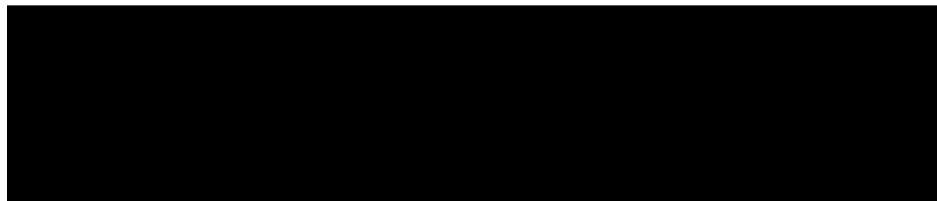
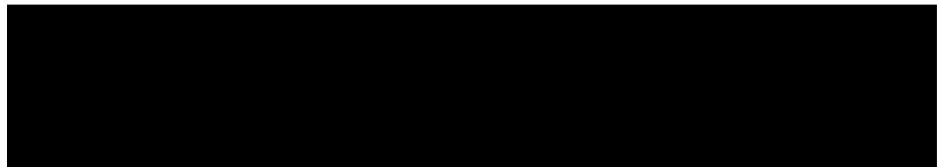
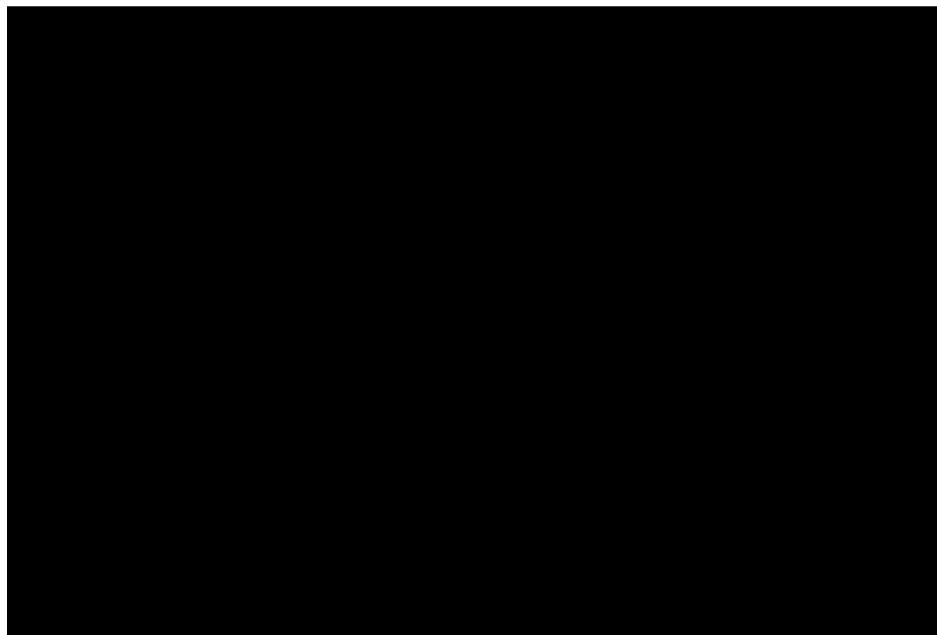
FLINTCO PACIFIC, INC., Plaintiff and Appellant, v.
TEC MANAGEMENT CONSULTANTS, INC., Defendant and Respondent.

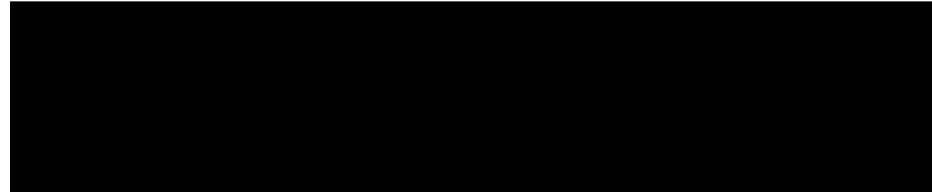
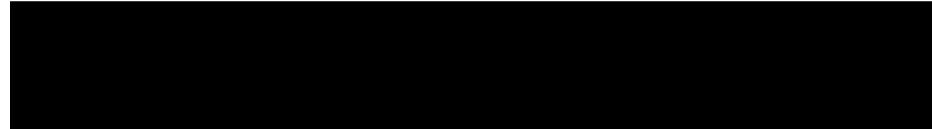
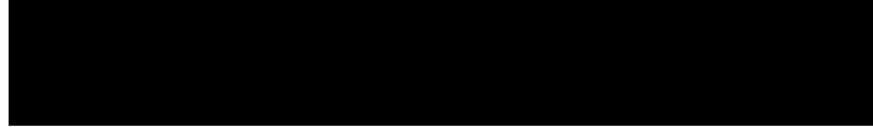
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COUNSEL

Lax & Stevens and Paul A. Lax for Plaintiff and Appellant.

Musick, Peeler & Garrett, Jack W. Fleming and Peter J. Diedrich for Defendant and Respondent.

OPINION

ALDRICH, Acting P. J.—

INTRODUCTION

Defendant and subcontractor TEC Management Consultants, Inc. (TEC), submitted a written bid to plaintiff and general contractor Flintco Pacific, Inc. (Flintco), to perform glazing work for \$1,272,090 on a project to construct a new building at Diablo Valley College in Pleasant Hill, California. The bid contained terms and conditions that affected the bid price. Flintco used TEC's bid price in compiling its own bid to the owner. Flintco was awarded the contract on the building project (the project) and sent TEC a letter of intent to

enter into a subcontract and a standard form subcontract, both of which documents differed materially from TEC's bid. TEC refused to enter into a subcontract. Flintco secured another subcontractor for that scope of work and sued TEC on a theory of promissory estoppel seeking the difference between TEC's bid and the amount Flintco was required to pay the replacement subcontractor. After a bench trial, the court entered judgment in favor of TEC finding that Flintco did not reasonably rely on TEC's bid price without considering the material conditions stated in TEC's bid. The court found that thereafter, the proposed subcontract Flintco sent TEC constituted a counteroffer because it contained material variations from the conditions in TEC's bid. The counteroffer gave TEC the right to withdraw its bid. In its ensuing appeal, Flintco failed to demonstrate that there was no substantial evidence to support the trial court's findings. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Flintco is a California licensed general engineering and general building contractor. It's eight nationwide offices do approximately \$1 billion a year in business. TEC is a California corporation.

On May 17, 2011, TEC submitted a bid to Flintco to perform subcontract work on the project for \$1,272,960. Immediately below the bid price read: "A DEPOSIT OF 35 % IS REQUIRED FOR THIS WORK." The deposit was for security and to enable TEC to lock in a price with its suppliers. Other conditions of TEC's bid were that the bid could be withdrawn if not accepted within 15 days and that the proposed price was "subject to a minimum 3% escalation, per quarter, after 15 days acceptance period." TEC was the lowest bidder for the glazing work. TEC's chief executive officer, Tim Coffey, submitted the bid with the intent that TEC would be listed as the subcontractor and testified it was reasonable for Flintco to rely on TEC's bid if the bid were complete and close to the low number.

Also on May 17, 2011, Flintco submitted its written general contractor's bid to the project owner, Contra Costa Community College District. Flintco incorporated TEC's bid and listed TEC as the curtain wall and glazing subcontractor.

John Stump, Flintco's vice-president of operations, who has worked for Flintco for 13 years, is responsible for overseeing Flintco's operations. He explained that subcontractor bids are usually submitted up to the bid deadline. Typically, after Flintco is awarded the prime contract, it notifies the winning subcontractors. Most often, Flintco gives notice over the telephone. If a subcontractor needs a more formal notice, Flintco will send out a "letter of intent." Generally, Flintco then enters into what it calls the buyout procedure,

during which the project manager goes through all of the bids to determine that they correctly cover the designated scope of work. If a bid raises no question about the scope of work, the project manager will send out a subcontract. If there are questions, the manager will make a call to the winning subcontractor first.

Craig Smart, Flintco's project engineer, testified that, based on his experience at Flintco and elsewhere, upon receipt of the general's standard form subcontract, the subcontractors mark it up and identify changes. This is the negotiation process. Of the 40 subcontractors on the project, Flintco reached agreement with all but TEC.

TEC had notice that it was the winning bidder by July 1, 2011, shortly after Flintco began work on the project, because on that date, Flintco met with TEC and Universal Brass, Inc. (UBI), who was to do the glazing work on the project for TEC. The purpose of the meeting was "to discuss the up coming [sic] project."

On July 5, 2011, Flintco sent its "letter of intent" to TEC. The letter indicated Flintco's "*intent to issue* a Subcontract Agreement to TEC" for the project. (Italics added.) The letter stated that the "*contract award is contingent upon the following terms and conditions*," including (1) a requirement that TEC accept liquidated damages and retention provisions, and (2) agree on a complete scope of work. (Italics added.)

On July 14, 2011, Flintco's project manager, Joshua Frantz, sent Flintco's standard form subcontract with exhibits to TEC. In Coffey's view, the subcontract Flintco sent was a sample but was incomplete because it did not name TEC, identify a scope of work, or list a price. Furthermore, "[a] lot of items that we stated in our May 17th proposal [were] in conflict with a lot of other terms" contained Flintco's standard form subcontract. Upon receipt of the "draft contract" and letter of intent, Coffey called Frantz to explain that the parties had "some major differences that we need to discuss." Among the items they "chatted about" were that (1) TEC would not provide a bond, whereas Flintco required a bond; (2) TEC had not received a scope of work that complied with TEC's contractor's license; (3) TEC would not agree to the liquidated damages clause; and (4) Flintco's version did not acknowledge TEC's deposit requirement, "which is very critical." Coffey also noted that the 15 days TEC's offer would remain open had already lapsed, triggering TEC's escalation clause. Frantz said he would look into the bond problem because he was new to Flintco.

The next conversation between Flintco and TEC occurred shortly thereafter, in late July 2011, but there was no progress in negotiations.

Although Stump was authorized to waive many of the provisions in the Flintco subcontract that deviated from TEC's bid, he never told Coffey that he was willing to exercise that authority.

On August 23, 2011, TEC sent a letter notifying Flintco of its decision not to pursue the contract for the project. Flintco received the notice on August 29, 2011.

Meanwhile, on August 26, 2011, Flintco sent TEC a new subcontract that had not been modified to acknowledge any of the conditions contained in TEC's bid. The new contract contained no provision requiring Flintco to pay a 35 percent deposit. Frantz acknowledged that he never reviewed the conditions in TEC's bid while assisting in the preparation of a subcontract with TEC.

On September 8, 2011, Frantz e-mailed Coffey that Flintco "cannot relieve TEC of their obligation to perform" the work as bid. Frantz's e-mail asked TEC to sign Flintco's subcontract as issued to TEC.

On September 12, 2011, Coffey told Frantz that TEC's bid had expired. Coffey explained that TEC was exercising its right under its proposal to withdraw its bid. Frantz did not indicate that any of the terms or conditions in the Flintco subcontract were negotiable.

Flintco found a new subcontractor to do the glazing work and sued TEC for \$327,050 in a single cause of action alleging promissory estoppel.

At trial to the bench, Jay Washburn, Flintco's project manager, explained that in his experience, bid day is "usually chaotic" because of the sheer volume of paperwork and so it is impossible to negotiate the terms and conditions in a subcontractor's bid that day. Conflicts between bid conditions and contracts are normally resolved and specific terms and conditions are negotiated only after the project contract is awarded. Stump, Washburn, and Frantz testified that it is standard practice for subcontractors to include an extensive number of terms and conditions in their bids. Specific terms and conditions in a subcontractor's bid are not relevant to the scope of work, are typically boilerplate and conflict with Flintco's sub- and prime contracts. Thus on bid day, Flintco disregards all terms and conditions of a subcontractor's bid except for scope of work, price, length of time the bid would remain open, and bonding. The stated "purpose of reviewing the terms and conditions in a subcontractor's bid prior to the bid deadline is to find 'red flags.' The issue, according to Mr. Stump, is whether 'we are going to be fighting about something.'" Hence, Washburn agreed it was fair to say that an unusual term or condition might escape his attention because of the cursory nature of his review of bids on bid day.

Frantz did not look at TEC's terms until after TEC was listed in Flintco's bid. No one at Flintco discussed TEC's requirement for a 35 percent deposit on bid day. Stump may have looked at the conditions of TEC's bid before trial.

The trial court ruled in favor of TEC. It found that Flintco did not satisfy every element of promissory estoppel because its reliance on TEC's bid price only without regard for material conditions that related directly to TEC's bid price was not reasonable. Thereafter, in sending TEC its standard form subcontract, with terms that conflicted with TEC's bid terms, Flintco made a counteroffer that gave TEC the right to withdraw its bid. TEC's withdrawal was caused by Flintco's unwillingness to accept a number of material terms of TEC's bid. No agreement was reached between Flintco and TEC concerning material terms. Flintco's written communications to TEC demonstrate Flintco's "hard ball tactics" or a take-it-or-leave-it attitude. The communications between the two parties distinguished this case from *Drennan v. Star Paving Co.* (1958) 51 Cal.2d 409 [333 P.2d 757] (*Drennan*), the court ruled. Flintco appealed.

CONTENTIONS

Flintco contends that the trial court erred in ruling that Flintco failed to satisfy the elements of promissory estoppel.

DISCUSSION

■ "A general contractor may recover damages incurred as a result of its reasonable reliance on a subcontractor's mistaken bid under the theory of promissory estoppel. ‘‘A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.’’ [Citation.] This principle is applicable to a proposed subcontractor (promisor) who makes a bid (and with it an implied subsidiary promise to keep the bid open for a reasonable time after the awarding of the general contract) to a general contractor (promisee) who in turn bids on a construction contract with a third person in reliance upon the subcontractor's bid (and subsidiary promise) and is the successful bidder.’ [Citations.]’’ (*Diede Construction, Inc. v. Monterey Mechanical Co.* (2004) 125 Cal.App.4th 380, 385 [22 Cal.Rptr.3d 763], quoting *Saliba-Kringlen Corp. v. Allen Engineering Co.*

(1971) 15 Cal.App.3d 95, 100 [92 Cal.Rptr. 799] (*Saliba-Kringlen*); see Rest.2d Contracts, § 90 (1981).)¹

As stated in *Drennan, supra*, 51 Cal.2d 409, the seminal case in this area, the subcontractor's "offer constituted a promise to perform on such conditions as were stated expressly or by implication *therein* or annexed thereto by operation of law. [Citation.] [The subcontractor] had reason to expect that if its bid proved the lowest it would be used by [the general contractor]." (*Id.* at p. 413, italics added.) "Reasonable reliance serves to hold the offeror in lieu of the consideration ordinarily required to make the offer binding." (*Id.* at p. 414.)

■ "The elements of a promissory estoppel claim are '(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.' [Citation.]" (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901 [28 Cal.Rptr.3d 894]; see *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310 [96 Cal.Rptr.2d 747, 1 P.3d 63].) ■ "[T]o prevail on its promissory estoppel claim, [Flintco] was required to prove that it had reasonably relied on [TEC's] bid to its detriment, and that injustice could be avoided only by enforcing [TEC's] promise to perform at the quoted price." (*Diede Construction, Inc. v. Monterey Mechanical Co., supra*, 125 Cal.App.4th at p. 386.)

Although "promissory estoppel is an equitable doctrine [and] courts are given wide discretion in its application" (*US Ecology, Inc. v. State of California, supra*, 129 Cal.App.4th at p. 902, citing *C & K Engineering Contractors v. Amber Steel Co., supra*, 23 Cal.3d at pp. 7–8), "[t]he existence of an estoppel is generally a question of fact for the trial court whose determination is conclusive on appeal unless the opposite conclusion is the *only* one that can be reasonably drawn from the evidence. [Citation.]" (*Driscoll v. Los Angeles* (1967) 67 Cal.2d 297, 305 [61 Cal.Rptr. 661, 431 P.2d 245], italics added.) More particularly, whether the reliance was reasonable is a question of fact unless reasonable minds could reach only one conclusion based on the evidence, in which case the question is one of law. (*Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 187 [104 Cal.Rptr.3d 508], citing *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239 [44 Cal.Rptr.2d 352, 900 P.2d 601].)

¹ Section 90 of the Restatement Second of Contracts has been judicially adopted in California. (*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 6 [151 Cal.Rptr. 323, 587 P.2d 1136].)

Flintco contends that the trial court erred in finding Flintco's reliance was unreasonable. Necessarily, Flintco's argument is that the record lacks substantial evidence to support the court's finding of unreasonable reliance. (See *H. W. Stanfield Constr. Corp. v. Robert McMullan & Son, Inc.* (1971) 14 Cal.App.3d 848, 852 [92 Cal.Rptr. 669] (*Stanfield*).) As evidence of reasonableness, Flintco observes that it had no indication TEC would not honor the bid until August and cites Coffey's testimony that it "would be reasonable for [Flintco] to rely on [TEC's] bid if [TEC's] bid was complete . . . and the [low] number or close to the [low] number."

■ While there may be some evidence of reasonableness, we cannot say as a matter of law that there is no substantial evidence to support the contrary finding. The trial court found that TEC's bid contained conditions that were material to its bid price and which, if omitted, would have considerably increased the price. The court found therefore that Flintco's reliance on the bid price alone was not reasonable. There is substantial evidence in the record to support that finding. The 35 percent deposit requirement was underscored and written in all capital letters directly beneath the bid price and was necessary to lock in TEC's suppliers' costs; TEC would not accept any liability for liquidated damages; TEC's bid contained an exclusion for bonds; and contained a 3 percent per quarter escalation in price if the bid were not accepted by Flintco within the 15-day period the bid was open. Under the circumstances, where Flintco reviewed bids for bonding, length of time the bid would remain open, and "red flags" to avoid problems during negotiations that could cause it to lose the subcontractor, the evidence supports the trial court's finding that Flintco's reliance on the bid price alone while ignoring the material terms and conditions was unreasonable.

Flintco also relies on case law for the proposition, based on custom and practice in the business of lump-sum contracting, that conditions in a bid are irrelevant and so Flintco reasonably relied on the bid price only.² Flintco cites *Saliba-Kringlen, supra*, 15 Cal.App.3d 95 that, "the customary practice in the construction industry is for the general contractor who is awarded a contract to enter into a written contract with the subcontractor, which written contract

² At oral argument, Flintco relied heavily on *Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230 [149 Cal.Rptr.3d 440], to support its contention that it reasonably relied on the bid price only. *Barnhart* is irrelevant as it involved an appeal from an order denying an attorney fee motion and the only issue there was whether the general contractor, who won its promissory estoppel claim below, was the prevailing party "on a contract" such as would entitle it to attorney's fees under Civil Code section 1717. The opinion never addressed the substance of the underlying promissory estoppel claim. " 'Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered.' [Citations.]" (*Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1278 [135 Cal.Rptr.2d 654, 70 P.3d 1067].) *Barnhart* therefore does not support Flintco's reasonable reliance argument.

embraces far more than the price which the subcontractor has bid by telephone. The additional matters would include such things as whether the subcontractor would furnish a bond, who would provide for insurance, how payments would be made and many other matters. Although the provisions other than price are not identical in all subcontracts generally . . . *price is the principal item* as is evident from the fact (as shown by the evidence) that seldom does a general contractor fail to reach an agreement with the subcontractor whose bid is low." (*Id.* at p. 109, italics added.)

■ But, as *Saliba-Kringlen* also stated, "[w]hether a general contractor is entitled to rely upon the bid of a proposed subcontractor must be decided on the basis of the facts involved in the particular case before the court." (*Saliba-Kringlen, supra*, 15 Cal.App.3d at p. 103, italics added.) Here, the court determined that it was unreasonable for Flintco to rely solely on the price in the bid while ignoring terms and conditions stated therein, which were material to the bid's price itself. Custom and practice cannot alter that result. Unlike the cases Flintco cites: *Saliba-Kringlen*, *Drennan*, and *Stanfield*, where the bids were made orally and were comprised of price only, TEC's bid was written and contained terms and conditions that were underscored and material because they affected the price. Nor does TEC claim it made a mistake in the bid. Thus, the justification in *Drennan* for invoking the equitable doctrine of promissory estoppel does not apply here. (*Drennan, supra*, 51 Cal.2d at p. 416 ["the loss resulting from the mistake should fall on the party who caused it"]; *Saliba-Kringlen, supra*, 15 Cal.App.3d at pp. 100–101 [subcontractor claimed mistake in bid]; *Stanfield, supra*, 14 Cal.App.3d at p. 852 [same].)

■ When a general contractor uses a subcontractor's "offer in computing his own bid, he bound himself to perform in reliance on defendant's terms." (*Drennan, supra*, 51 Cal.2d at p. 415.) Hence, "a general contractor is not free to . . . reopen bargaining with the subcontractor and at the same time claim a continuing right to accept the original offer." (*Ibid.*) Flintco's letter of intent, which was expressly made "*contingent upon the following terms and conditions*" that conflicted with TEC's offer, along with Flintco's standard form subcontract, which as the trial court found, varied materially from the terms of TEC's bid, constituted a rejection of TEC's bid and a counteroffer, and terminated Flintco's power to accept TEC's original bid. (*Saliba-Kringlen, supra*, 15 Cal.App.3d at p. 107, fn. 2; Civ. Code, § 1585 ["A qualified acceptance is a new proposal"].) It is irrelevant to the result here that Flintco did, or may have been able to, negotiate the terms of a subcontract with TEC because as soon as Flintco communicated a response to TEC's bid that differed materially from TEC's offer, Flintco lost its power to accept TEC's bid.

DISPOSITION

The judgment is affirmed. Appellant to bear costs on appeal.

Lavin, J., and Hogue, J.,* concurred.

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[No. B264614. Second Dist., Div. Seven. July 19, 2016.]

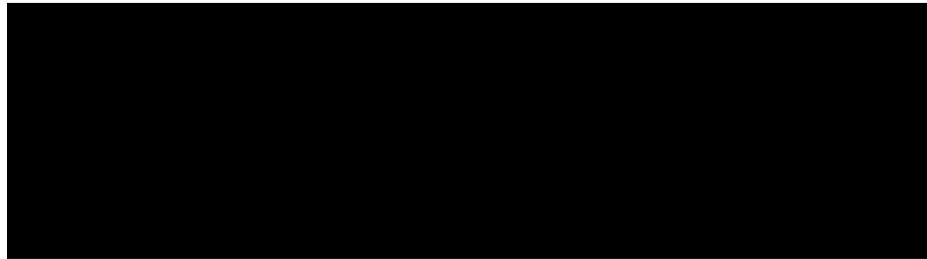
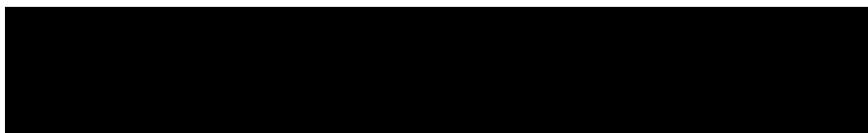
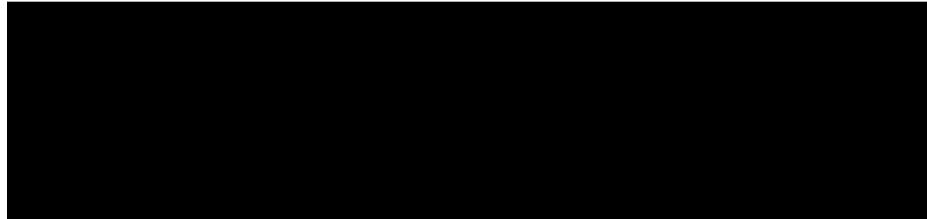
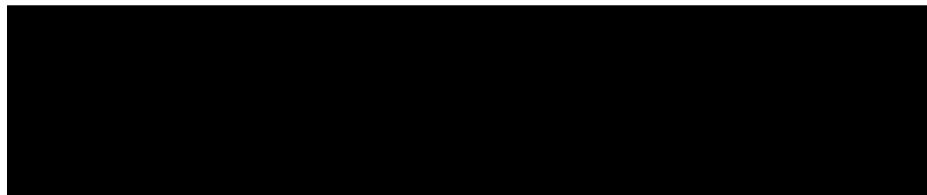
THE PEOPLE, Plaintiff and Respondent, v.
JULIUS FERNANDO SALMORIN, Defendant and Appellant.

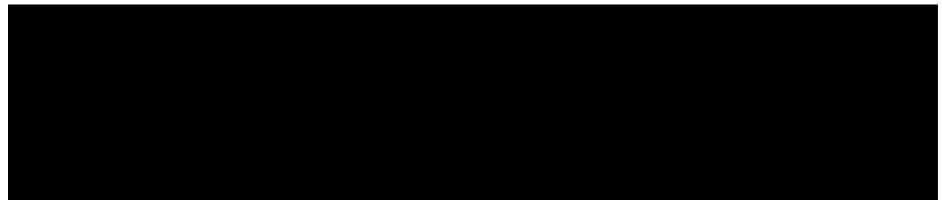
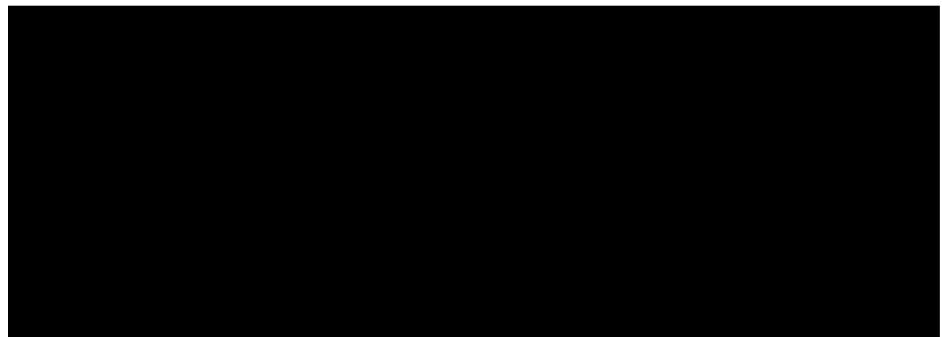
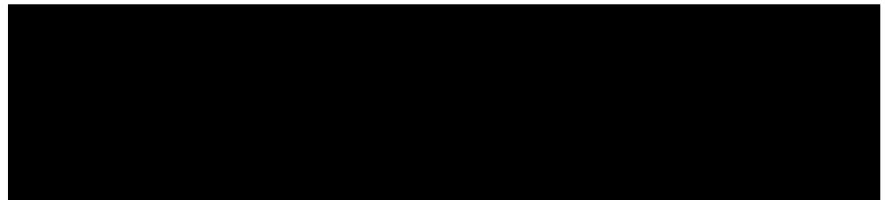
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COUNSEL

Carlos Ramirez, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION**SEGAL, J.—****INTRODUCTION**

After pleading no contest to forgery, Julius Fernando Salmorin petitioned to recall his sentence under Proposition 47, the Safe Neighborhoods and Schools Act (Pen. Code, § 1170.18).¹ The trial court denied the petition, concluding the aggregate value of the checks Salmorin was convicted of forging made him ineligible for resentencing. Because the trial court erred by aggregating the face amounts of the forged checks, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In 2013 the People charged Salmorin and Debra Lynn Spratt with three felonies: forgery (§ 470, subd. (d)),² receiving stolen property (§ 496, subd. (a)), and possession of methamphetamine (Health & Saf. Code, §11377, subd. (a)). Salmorin waived his right to a jury trial and pleaded no contest to the forgery count. Pursuant to a negotiated agreement, the trial court suspended imposition of sentence and placed Salmorin on three years of formal probation. The court dismissed the remaining counts on the People's motion.

In March 2015 Salmorin filed a petition for resentencing under Proposition 47 and checked the preprinted box indicating “[t]he amount in question is not more than \$950.00.” The People opposed the petition, and the court set the matter for a hearing.

At the beginning of the hearing, the trial court stated it did not have the court file, but had reviewed copies of the probation officer's report, the complaint, the arresting officer's report, and photographs of the stolen checks,

¹ Undesignated statutory references are to the Penal Code.

² Section 470, subdivision (d), states in relevant part: “Every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any [check], knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery”

all of which had been provided by counsel. The court received into evidence the police report and photographs without objection.³

The prosecutor summarized the contents of the police report: Salmorin and Spratt received some stolen checks, were told to cash them, and were allowed to keep 10 percent of the proceeds. When arrested, Salmorin and Spratt had five stolen checks in their possession: a blank check, a \$245 check payable to Ralph Tagarao (an assumed name used by Salmorin), an \$880 check payable to another individual, and two checks payable to Spratt, one of which was for \$208. The prosecutor argued that, in the 2013 prosecution, the People had proceeded on the theory that, because Salmorin and Spratt had jointly possessed all of the stolen checks, they had committed the forgeries as a joint venture or criminal enterprise. (See, e.g., *People v. Land* (1994) 30 Cal.App.4th 220, 227–228 [35 Cal.Rptr.2d 544].) The People acknowledged that none of the individual checks had a value greater than \$950, but “proceeded on an aggregate theory” that the total value of the checks exceeded \$950. The People argued that the amounts of the checks “can and should be aggregated for the purpose of determining value” for Proposition 47, and that therefore Salmorin was ineligible for resentencing.

Counsel for Salmorin presented no evidence at the hearing. Relying on the police report, counsel argued that Salmorin was eligible for resentencing because the only check attributable to Salmorin was the \$245 check payable to Salmorin’s assumed name.

The trial court denied the petition. The court found that Salmorin and Spratt had engaged in a joint criminal enterprise, and that the aggregate value of the forged checks exceeded \$950.

DISCUSSION

A. Proposition 47 and Forgery Offenses

■ Proposition 47 makes certain drug-related and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091 [183 Cal.Rptr.3d 362].) “As summarized by the Legislative Analyst, the proposition ‘reduces penalties for certain offenders convicted of nonserious and nonviolent property and drug crimes’ and ‘allows certain offenders who have been previously convicted of such crimes to apply for reduced sentences.’ ” (*People v. Davis* (2016) 246 Cal.App.4th 127, 134 [200 Cal.Rptr.3d 642].)

³ The superior court file was in another court. The probation officer’s report, police report, and attached photographs received into evidence are not part of the record on appeal.

Proposition 47 changed the law regarding the punishment of forgery by adding section 473, subdivision (b), which provides that “any person who is guilty of forgery relating to a check, bond, bank bill, note, cashier’s check, traveler’s check, or money order, where the value of the check, bond, bank bill, note, cashier’s check, traveler’s check, or money order does not exceed nine hundred fifty dollars (\$950), shall be punishable by imprisonment in a county jail for not more than one year.” (§ 473, subd. (b).) “Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person ‘currently serving’ a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. (§ 1170.18, subd. (a).) A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be ‘resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.’” (*People v. Rivera*, *supra*, 233 Cal.App.4th at p. 1092; see *People v. Bush* (2016) 245 Cal.App.4th 992, 1004 [200 Cal.Rptr.3d 190] [Prop. 47 amended § 473 “to reflect eligibility for resentencing” for certain forgery convictions].)

We review the trial court’s construction of Proposition 47 de novo. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879 [191 Cal.Rptr.3d 295].) We review any factual findings in connection with the court’s ruling on the petition for substantial evidence. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136 [197 Cal.Rptr.3d 743]; see *People v. Smith* (2015) 61 Cal.4th 18, 39 [186 Cal.Rptr.3d 550, 347 P.3d 530].)

B. *The Trial Court Did Not Err in Considering the Police Report*

Salmorin argues that the trial court erred by relying on the police report, which was not part of the record of conviction,⁴ to determine the value of the forged checks. In support of his argument, Salmorin cites *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1339–1340 [174 Cal.Rptr.3d 499] (*Bradford*), which held that the trial court must determine whether a petitioner is eligible for resentencing under Proposition 36, the Three Strikes Reform Act of 2012 (§ 1170.126), “based solely on evidence found in the record of conviction.” (*Bradford*, at p. 1331.) Salmorin argues that, because the structures of Proposition 36 and Proposition 47 are similar, the trial court’s determination whether a petitioner is eligible for resentencing under Proposition 47 is also limited to evidence from the record of conviction. The two initiatives, however, are not similar in that respect.

⁴ See *People v. Reed* (1996) 13 Cal.4th 217, 223–229 [52 Cal.Rptr.2d 106, 914 P.2d 184]; *Draeger v. Reed* (1999) 69 Cal.App.4th 1511, 1521 [82 Cal.Rptr.2d 378].

As the court in *People v. Perkins, supra*, 244 Cal.App.4th 129 explained in distinguishing *Bradford*, eligibility for resentencing under Proposition 36 “turns on the nature of the petitioner’s convictions—whether an offender is serving a sentence on a conviction for nonserious, nonviolent offenses and whether he or she has prior disqualifying convictions for certain defined offenses. (§ 1170.126, subd. (e).) By contrast, under Proposition 47, eligibility often turns on the simple factual question of the value of the stolen property. In most such cases, the value of the property was not important at the time of conviction, so the record may not contain sufficient evidence to determine its value. For that reason, and because petitioner bears the burden on the issue (Evid. Code, § 500), we do not believe the *Bradford* court’s reasons for limiting evidence to the record of conviction are applicable in Proposition 47 cases.” (*Perkins, supra*, 244 Cal.App.4th at p. 140, fn. 5.) Moreover, the parties here agreed that the court needed additional facts from the police report to determine whether Salmorin was entitled to relief. Counsel for Salmorin not only agreed to the admission of the police report, she relied on the report to argue that only one check, in the amount of \$245, was attributable to Salmorin. Therefore, the trial court did not err by considering the police report.

C. The Trial Court Erred in Denying Salmorin’s Petition

The trial court found and the People argue on appeal that Salmorin failed to meet his burden to prove the aggregate value of the checks did not exceed \$950 by claiming that only one of the forged checks was attributable to him. (See *People v. Sherow, supra*, 239 Cal.App.4th at pp. 879–880 [petitioner has the initial burden of proving eligibility for resentencing under § 1170.18, subd. (a)].) The trial court’s ruling depended on the resolution of two issues: (1) how the court should determine the value of each check, and (2) whether the court may aggregate the values of the checks. The trial court correctly ruled that the value of each check was the face value of the check, but erred by aggregating the individual checks to reach \$950.

1. The Trial Court Correctly Valued Each Forged Check

■ Citing *People v. Cuellar* (2008) 165 Cal.App.4th 833 [81 Cal.Rptr.3d 252] (*Cuellar*), Salmorin argues that the checks had “an insignificant intrinsic value,” particularly because he made “no attempt . . . to negotiate any of the checks that were recovered during his arrest.”⁵ The trial court correctly ruled,

⁵ In *Cuellar* the defendant was convicted of grand theft after he took what the court described as a “bogus check” from a department store sales clerk. In concluding that the evidence was sufficient to support the conviction, the court in *Cuellar* reasoned that, although “a forged check does not have a value equal to the amount for which it is written,” it “had slight intrinsic value by virtue of the paper it was printed on,” as well as “intrinsic value as a

however, that, for purposes of resentencing under Proposition 47, the value of a forged check is the face value of the check. Under Proposition 47, the market value of any forged instrument listed in section 473, subdivision (b), may or may not correspond to the face value of the instrument, depending on the existence of a secondary market or other evidence of value. In the context of forgery, however, the word “value” as used in section 473, subdivision (b), corresponds to the stated value or face value of the check. ■ The trial court did not err in considering the face value of the forged checks for purposes of determining Salmorin’s eligibility for Proposition 47 resentencing.

2. *The Trial Court Erred in Aggregating the Check Values*

a. *Section 473, subdivision (b), does not permit aggregation*

The trial court erred, however, by using the aggregate value of the checks to determine whether Salmorin was entitled to resentencing under section 473, subdivision (b). As the court concluded in *People v. Hoffman* (2015) 241 Cal.App.4th 1304 [194 Cal.Rptr.3d 658] (*Hoffman*), on which Salmorin places principal reliance, “section 473 does not authorize the trial court to aggregate check values.” (*Id.* at p. 1310.)

The People argue that *Hoffman* is distinguishable because in that case each individual forged check was the basis of a separate count, whereas in this case all of the forged checks were included in the same count. According to the People, section 473, subdivision (b), does not prohibit the trial court from aggregating the value of forged checks where, as here, the checks are the subject of a single charged offense. The language of section 473, subdivision (b), however, does not support the People’s position.

■ “In interpreting a voter initiative . . . we apply the same principles that govern statutory construction. [Citation.] Thus, ‘we turn first to the language of the statute, giving the words their ordinary meaning.’ [Citation.] . . . The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme. [Citation.] When the language is ambiguous, ‘we refer to other indicia of the voters’ intent, particularly the analyses and arguments contained in the official ballot pamphlet.’ [Citation.] If a penal statute is still reasonably susceptible to multiple constructions, then we ordinarily adopt the ‘‘construction which is more favorable to the offender . . .’’” (*People v. Rizo* (2000) 22 Cal.4th 681, 685–686 [94 Cal.Rptr.2d 375, 996 P.2d 27]; accord, *People v. Marks* (2015) 243 Cal.App.4th 331, 334 [196 Cal.Rptr.3d 415]; see *Professional Engineers*

negotiable instrument that, if legally drawn, would entitle its holder to payment on demand.” (*Cuellar, supra*, 165 Cal.App.4th at pp. 838–839.)

in California Government v. Kempton (2007) 40 Cal.4th 1016, 1043 [56 Cal.Rptr.3d 814, 155 P.3d 226] (*Kempton*) “[t]heir role as a reviewing court is to simply ascertain and give effect to the electorate’s intent guided by the same well-settled principles we employ to give effect to the Legislature’s intent when we review enactments by that body”].)

■ We begin then with the “‘usual, ordinary meaning’ ” of the language of the statute. (*People v. Harbison* (2014) 230 Cal.App.4th 975, 980 [179 Cal.Rptr.3d 187].) With exceptions not relevant here, section 473, subdivision (b), provides that “any person who is guilty of forgery relating to a check, . . . where the value of the check . . . does not exceed [\$950], shall be punishable by imprisonment in a county jail for not more than one year.” (§ 473, subd. (b).) In referring to “*a* check” and “the value of *the* check,” the language of the statute distinguishes misdemeanor forgery from felony forgery based on the value of any single check the person is guilty of forging, not the aggregate value of two or more checks. (§ 473, subd. (b), italics added; see *Hoffman, supra*, 241 Cal.App.4th at p. 1310 “[t]he misdemeanor/felony characterization for forgery depends on ‘the value of the check’ or other instrument”.) Nothing in the ordinary meaning of the words of section 473, subdivision (b), supports the People’s distinction between individual checks charged in separate counts and multiple checks charged in a single count. And we may not read that distinction into the statute. (See *Suarez v. City of Corona* (2014) 229 Cal.App.4th 325, 333 [177 Cal.Rptr.3d 244] “[w]e are not free to give the words of a statute a definition “different from the plain and direct import of the terms used,” ” and instead “it is our role to ascertain the meaning of the words used, not to insert what has been omitted or otherwise rewrite the law to conform to an intention that has not been expressed”]; *Arocho v. California Fair Plan Ins. Co.* (2005) 134 Cal.App.4th 461, 466 [36 Cal.Rptr.3d 200] “[w]e are not free to give the words of a statute a definition “different from the plain and direct import of the terms used” ”; *People v. Salazar-Merino* (2001) 89 Cal.App.4th 590, 597 [107 Cal.Rptr.2d 313] “[a] court may not rewrite a law, supply an omission or give words an effect different from the plain and direct import of the terms used” ”].)

“[T]he context of the statute as a whole and the overall statutory scheme” also weigh against the People’s proposed interpretation of section 473, subdivision (b). (*People v. Rizo, supra*, 22 Cal.4th at p. 685; see *People v. Jones* (2001) 25 Cal.4th 98, 111–112 [104 Cal.Rptr.2d 753, 18 P.3d 674] “[s]tatutes may not be construed in isolation, but must be harmonized with reference to the entire scheme of the law of which they are a part”.) In addition to changing the law relating to punishment for forgery, Proposition 47 amended section 476a, subdivision (b), which concerns the penalty for delivering a check with insufficient funds. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, p. 71.) As amended, section 476a,

subdivision (b), provides in relevant part that, “if the total amount of all checks, drafts, or orders that the defendant is charged with and convicted of making, drawing, or uttering does not exceed [\$950], the offense is punishable only by imprisonment in the county jail for not more than one year.” (§ 476a, subd. (b).) Thus, the drafters of the initiative, and presumably the voters (*Kempton, supra*, 40 Cal.4th at p. 1037; *People v. Jackson* (1996) 13 Cal.4th 1164, 1255 [56 Cal.Rptr.2d 49, 920 P.2d 1254]), knew how to use a “‘total amount’ approach” that aggregated the value of multiple checks to determine whether an offense is a misdemeanor, but chose not to use that approach, either to a single charged offense or across multiple charged offenses, in section 473, subdivision (b). (*Hoffman, supra*, 241 Cal.App.4th at p. 1310; see also *Kempton, supra*, 40 Cal.4th at pp. 1043–1044 [references to the “Legislature” in Government Code section added by proposition “demonstrate that the drafters of the initiative were perfectly capable of designating the Legislature by name where they intended to address the impact of the initiative on the Legislature’s authority to regulate private contracting”].)

■ Proposition 47 also included a provision requiring that it “be liberally construed to effectuate its purposes.” (Prop. 47, § 18, eff. Nov. 5, 2014; Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, p. 74; see *People v. Tidwell* (2016) 246 Cal.App.4th 212, 219 [200 Cal.Rptr.3d 567] [“[t]he text of Proposition 47, as enacted by the voters, provides that ‘[t]his act shall be liberally construed to effectuate its purposes’ ”].) One of those purposes is to “[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes.” (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, p. 70.) The People’s proposed interpretation of section 473, subdivision (b), is not a liberal construction of the statute and does not effectuate the purpose of “[r]equir[ing] misdemeanors instead of felonies.” To the contrary, under the People’s proposed interpretation, fewer forgery offenses would qualify as misdemeanors.

Moreover, to the extent there is any ambiguity in the language of section 473, subdivision (b), “‘other indicia of the voters’ intent’ ” do not support the People’s interpretation. (*People v. Marks*, *supra*, 243 Cal.App.4th at p. 334; cf. *People v. Morales* (2016) 63 Cal.4th 399, 406 [203 Cal.Rptr.3d 130, 371 P.3d 592] [“we can [assume] that the voters, or at least some of them, read and were guided by the ballot materials concerning the proposition”]; *Silicon Valley Taxpayers’ Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 444–445 [79 Cal.Rptr.3d 312, 187 P.3d 37] [“if the language is ambiguous, we consider extrinsic evidence in determining voter intent, including the Legislative Analyst’s analysis and ballot arguments for and against the initiative”].) As the Legislative Analyst explained, ‘Under this measure, forging a check worth \$950 or less would always be a misdemeanor,’ unless ‘the offender commits identity theft in connection with

forging a check.’” (*Hoffman, supra*, 241 Cal.App.4th at p. 1310, quoting Voter Information Guide, Gen. Elec., *supra*, analysis of Prop. 47 by Legis. Analyst, p. 35.) The Legislative Analyst’s use of the word “always” strongly suggests voters did not intend the court to disqualify a defendant from relief under Proposition 47 by aggregating the value of multiple forged checks worth \$950 or less even if the People charged the forgeries in a single offense. (See *People v. Harbison, supra*, 230 Cal.App.4th at p. 980 [“[t]he language of the initiative, and the analyses and argument in the official ballot pamphlet reflect the voters’ intent”]; see also *People v. Morales*, at p. 407 [“‘we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less’ ”].)⁶ Nor is the People’s proposed interpretation “‘ ‘more favorable to the offender.’ ’ ” (*People v. Rizo, supra*, 22 Cal.4th at p. 686; see *People v. Beaver* (2010) 186 Cal.App.4th 107, 117 [111 Cal.Rptr.3d 726] [“[w]hen language of a penal provision is reasonably susceptible of two constructions, ordinarily the construction more favorable to the offender is adopted”].)

b. *The Bailey doctrine does not apply*

■ The People’s contention that under section 473, subdivision (b), the court may aggregate multiple forgeries into a single felony offense also violates the rule that a single forgery offense cannot comprise multiple forgeries. (See *People v. Neder* (1971) 16 Cal.App.3d 846, 851–853 [94 Cal.Rptr. 364] (*Neder*).) In *Neder* the court rejected the defendant’s contention that forging three separate sales slips at a department store constituted a single offense of forgery under the doctrine, set forth in *People v. Bailey* (1961) 55 Cal.2d 514 [11 Cal.Rptr. 543, 360 P.2d 39] (*Bailey*), that a theft involving several takings motivated by “‘one intention, one general impulse and one plan’ ” constitutes a single offense of theft.⁷ (*Neder*, at pp. 851–852; see *Bailey*, at p. 519.) The court began by noting, “Normally, separate acts,

⁶ Summarizing Proposition 47 for the voters, the Attorney General stated that Proposition 47 “[r]equires misdemeanor sentence instead of felony for the following crimes when amount involved is \$950 or less: petty theft, receiving stolen property, and forging/writing bad checks.” (Voter Information Guide, Gen. Elec., *supra*, official title and summary prepared by Atty. Gen., p. 34.) We read the phrase “amount involved” not as suggesting aggregation in the case of forgery, but as a phrase meant to be broad enough to cover those crimes where the statutory language provides for aggregation (e.g., writing bad checks) and those where the statutory language does not (e.g., forging checks). In any event, this lone phrase, isolated in a single fragmentary bullet point, does not outweigh other indications in the voter information material that the voters did not contemplate allowing aggregation to deprive an otherwise qualified petitioner of his or her right to resentencing.

⁷ The defendant in *Bailey* made a single fraudulent misrepresentation about her household income that caused her to receive a stream of welfare payments. (*Bailey, supra*, 55 Cal.2d at pp. 515–516.) While each individual payment fell below the felony threshold, the aggregated total constituted grand theft. (*Id.* at p. 518.) The Supreme Court concluded that the payments

whether violating one or more than one statute, are separate offenses, and it makes no difference that the identical statute is violated with the same victim.” (*Neder*, at p. 851.) The court then cited cases holding that “forgery of several documents at the same time and in the course of one transaction constitutes a separate offense for each instrument.” (*Id.* at p. 852.) The court concluded that, even though the defendant probably forged the three sales slips pursuant to one preconceived plan, the *Bailey* doctrine, developed for the crime of theft, should not be extended to forgery. (*Ibid.*) The court explained: “The essential act in all types of theft is taking. If a certain amount of money or property has been taken pursuant to one plan, it is most reasonable to consider the whole plan rather than to differentiate each component part. [Citation.] The real essence of the crime of forgery, however, is not concerned with the end, i.e., what is obtained or taken by the forgery; it has to do with the means, i.e., the act of signing the name of another with intent to defraud and without authority, or of falsely making a document, or of uttering the document with intent to defraud. Theft pursuant to a plan can be viewed as a large total taking accomplished by smaller takings. It is difficult to apply an analogous concept to forgery. The designation of a series of forgeries as one forgery would be a confusing fiction.” (*Id.* at pp. 852–853.)

Courts have continued to recognize that “[t]he rule of one count of forgery per instrument is in accord with the essence of forgery, which is making or passing a false document.” (*People v. Kenefick* (2009) 170 Cal.App.4th 114, 123 [87 Cal.Rptr.3d 773]; see *People v. Martinez* (2008) 161 Cal.App.4th 754, 762 [74 Cal.Rptr.3d 409] [§ 470, subd. (d), “is violated each time a person makes and/or passes a forged item, no matter how many forged signatures are on the item”].) Moreover, courts have consistently followed *Neder* and refused to extend the *Bailey* doctrine to forgery and other nontheft offenses for the reasons articulated by the court in *Neder*. (See *People v. Richardson* (1978) 83 Cal.App.3d 853, 866 [148 Cal.Rptr. 120] [forgery], disapproved on other grounds in *People v. Saddler* (1979) 24 Cal.3d 671, 682, fn. 8 [156 Cal.Rptr. 871, 597 P.2d 130]; see, e.g., *People v. Zanoletti* (2009) 173 Cal.App.4th 547, 559–560 [92 Cal.Rptr.3d 757] [insurance fraud]; *People v. Mitchell* (2008) 164 Cal.App.4th 442, 455–457 [78 Cal.Rptr.3d 855] [use of another’s personal identifying information]; *People v. Johnson* (2007) 150 Cal.App.4th 1467, 1476–1477 [59 Cal.Rptr.3d 405] [corporal injury on a spouse]; *People v. Drake* (1996) 42 Cal.App.4th 592, 596 [49 Cal.Rptr.2d 765] [Medi-Cal fraud]; *People v. Washington* (1996) 50 Cal.App.4th 568, 577 [57 Cal.Rptr.2d 774] [burglary].)⁸

could be aggregated because “the evidence established that there was only one intention, one general impulse, and one plan.” (*Id.* at p. 519.)

⁸ The only exception to the general trend of refusing to extend the *Bailey* doctrine beyond theft cases appears to be vandalism. (See *People v. Carrasco* (2012) 209 Cal.App.4th 715,

Refusing to extend *Bailey* to forgery is consistent with the California Supreme Court's recent decision in *People v. Whitmer, supra*, 59 Cal.4th 733 (*Whitmer*). In *Whitmer*, the defendant was convicted of 20 counts of grand theft for stealing 20 vehicles from a dealership he managed by fraudulently arranging their sale to 20 fictitious buyers on 13 different dates. (*Id.* at p. 741.) The Supreme Court "conclude[d] that a defendant may be convicted of multiple counts of grand theft based on separate and distinct acts of theft, even if committed pursuant to a single overarching scheme." (*Ibid.*) Distinguishing *Bailey*, the court emphasized that the multiple petty thefts in that case could be aggregated into a single count of grand theft because the theft involved a "single misrepresentation" that produced a series of payments. (*Id.* at p. 740.) In contrast, where a defendant engages in "separate and distinct fraudulent acts," aggregation under the *Bailey* doctrine does not apply. (*Ibid.*) The Supreme Court "disapprove[d] of any interpretation of *Bailey* that is inconsistent with this conclusion." (*Id.* at p. 741.)

While narrowing the scope of *Bailey*, the Supreme Court in *Whitmer* did not explain the justification for *Bailey*'s aggregation rule. In his concurring opinion, however, Justice Liu offered a rationale: "Our decision in *Bailey* must be understood as having announced a general rule for determining what conduct, as a definitional matter, constitutes a single theft—not a special equitable rule, unmoored from the statutory definition of theft, that permits multiple small takings, but only small takings, to be aggregated into a single larger theft." (*Whitmer, supra*, 59 Cal.4th at p. 745 (conc. opn. of Liu, J.).) Justice Liu explained that the issue of aggregation raises a "unit of prosecution" question, which is an issue of legislative intent. (*Id.* at p. 744 (conc. opn. of Liu, J.).) As Justice Liu observed, when the Legislature wants to define a crime using aggregation principles, "it knows how to say so." (*Id.* at p. 745; see, e.g., §§ 476a [authorizing aggregation of all checks the defendant is charged with making, drawing, or uttering with insufficient funds to determine if the amount exceeds \$950], 484g, 484h [authorizing aggregation for theft by use of a forged or stolen credit card exceeding \$950 "in any consecutive six-month period"], 487, subd. (b)(3) [theft of property or labor from an employer is grand theft if the property or labor "aggregates [\$950] or more in any 12 consecutive month period"].) In any event, "[a]nsWERING a unit of prosecution question requires courts to determine when 'the actus reus prohibited by the statute—the gravamen of the offense—has been committed more than once.'" (*Whitmer*, at p. 744 (conc. opn. of Liu, J.).) The use of

719–720 [147 Cal.Rptr.3d 383]; *In re Arthur V.* (2008) 166 Cal.App.4th 61, 68–69 [82 Cal.Rptr.3d 148]; but see *People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1518 [180 Cal.Rptr.3d 902] [noting the Supreme Court in *People v. Whitmer* (2014) 59 Cal.4th 733, 740–741 [174 Cal.Rptr.3d 594, 329 P.3d 154] "jettisoned much of [the] earlier precedent" that included *Carrasco* and *Arthur V.*].

aggregation is thus a matter of legislative prerogative rather than prosecutorial discretion. (Cf. *id.* at p. 745 (conc. opn. of Liu, J.) [“*Bailey* was not crafting a novel rule that allows a defendant to be found guilty of a single grand theft in circumstances where the defendant could *also* be found guilty of multiple petty thefts”].)

The Supreme Court’s decision in *Whitmer* confirms the soundness of the court’s reasoning in *Neder*. In distinguishing *Bailey*, the court in *Neder* correctly observed that the actus reus of the crime of forgery is “the act of signing the name of another with intent to defraud and without authority, or of falsely making a document, or of uttering the document with intent to defraud.” (*Neder, supra*, 16 Cal.App.3d at p. 853.) Each time a defendant forges a separate check with the requisite intent, he or she commits a discrete offense of forgery. Thus, a defendant who forges two \$500 checks with fraudulent intent is guilty of two discrete crimes (two misdemeanors), while the same defendant who forges a single check of \$1,000 with fraudulent intent is guilty of a single crime (one felony). (See *People v. Gayle* (1927) 202 Cal. 159, 162–163 [259 P. 750] [“the false making and forging of two separate instruments, although done at the same time, are separate and distinct offenses”]; *People v. Ryan* (2006) 138 Cal.App.4th 360, 371 [41 Cal.Rptr.3d 277] [“the commission of any one or more of the acts enumerated in section 470, *in reference to the same instrument*, constitutes but one offense of forgery” (italics added)].) Although it may be debatable whether this result properly measures the two defendants’ relative culpability, that debate is one of public policy for the Legislature, not the courts. (See *Whitmer, supra*, 59 Cal.4th at p. 747 (conc. opn. of Liu, J.) [“reasonable minds can differ as to whether a defendant who accepts 12 fraudulently obtained payments of \$1,000 per month during a single year from the same victim is 12 times more blameworthy than a defendant who successfully plots for an entire year to steal \$25,000 from the same victim,” but “[w]e have no authority to supplement the statutory scheme with our own policy judgments as to the relative blameworthiness of various theft acts”].)

The principal case on which the People rely, *People v. Hughes* (1980) 112 Cal.App.3d 452 [169 Cal.Rptr. 364] (*Hughes*), does not persuade us that, under the *Bailey* doctrine or otherwise, a single forgery offense may comprise multiple acts of forgery. In *Hughes*, the defendant pleaded no contest to an amended information that consolidated 23 counts of forgery into one count, and the trial court found true a special allegation that, in the course of committing those forgeries, the defendant took property worth more than \$100,000, an amount that at the time qualified for a two-year enhancement

under former section 12022.6, subdivision (b).⁹ (*Hughes, supra*, 112 Cal.App.3d at pp. 455–456.) The trial court sentenced the defendant to two years for the forgery conviction plus two years for the enhancement, for a total of four years. (*Ibid.*)

On appeal, the defendant argued that imposing the two-year enhancement violated section 654,¹⁰ which, as interpreted by the Supreme Court in *Neal v. State of California* (1960) 55 Cal.2d 11 [9 Cal.Rptr. 607, 357 P.2d 839] (*Neal*), prohibited multiple punishment for any act or indivisible course of conduct that violated more than one Penal Code section or the same Penal Code section more than once. (*Hughes, supra*, 112 Cal.App.3d at pp. 455, 460–461; see *Neal*, at pp. 18, fn. 1, 19.)¹¹ The court in *Hughes* rejected the defendant’s argument: “Implicit in the district attorney’s aggregation of 23 transactions into one forgery count is the notion that appellant engaged in an indivisible course of conduct and committed but one offense. Whether this was true is a question of the intent and objective of the actor. [Citation.] This is a question of fact which appellant must be deemed to have waived by his plea. [*Neder*], upon which appellant relies[,] is distinguishable for this reason.” (*Hughes*, at p. 461.)

In a footnote, the court in *Hughes* commented that the court in *Neder* rejected not only the contention that the three forgeries constituted one offense under *Bailey*, but also the contention that under section 654 and *Neal*

⁹ Former section 12022.6 provided in relevant part: “‘Any person who takes, damages or destroys any property in the commission or attempted commission of a felony, with the intent to cause such taking, damage or destruction, and the loss exceeds: [¶] . . . [¶] (b) One hundred thousand dollars (\$100,000), the court shall in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted impose an additional term of two years.’” (*Hughes, supra*, 112 Cal.App.3d at pp. 457–458.)

¹⁰ At the time, section 654 provided in relevant part: “‘An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one.’” (*Hughes, supra*, 112 Cal.App.3d at p. 460.) It now provides in relevant part: “‘An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.’” (§ 654, subd. (a).)

¹¹ In *Neal* the Supreme Court held: “Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*Neal, supra*, 55 Cal.2d at p. 19; see *People v. Correa* (2012) 54 Cal.4th 331, 335 [142 Cal.Rptr.3d 546, 278 P.3d 809] [although § 654 refers to “an act or omission,” the Supreme Court in *Neal* concluded that the relevant question is whether “a defendant’s ‘course of conduct . . . comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654’”].) The Supreme Court has since disapproved its statement in *Neal* that section 654 bars multiple punishment for multiple violations of the same Penal Code section. (See *People v. Correa*, at p. 344.)

the defendant could be punished only once for the offense of forgery because his three forgeries were incident to one objective and thus presented an indivisible course of conduct. (*Ibid.*) The *Hughes* court observed that the *Neder* court found that the objective “‘of taking goods from Sears’ was ‘too broad to tie the separate acts into one transaction.’” (*Hughes, supra*, 112 Cal.App.3d at p. 461, fn. 5.) The *Hughes* court then stated: “We do not read *Neder* as holding that as a matter of law a series of forgeries cannot constitute an indivisible transaction. Defendant there pled not guilty; therefore the appellate court had before it for consideration all of the facts developed at trial. In the case at bench we have a synopsis of facts in the probation report from which it may reasonably be inferred that appellant committed 23 acts which in fact constituted 1 offense. Furthermore, one of the premises of the *Neder* decision no longer exists. In light of the Legislature’s enactment of [former] section 12022.6, it can no longer be said that the crime of forgery ‘is not concerned with the end, i.e., what is obtained or taken by forgery[],’ but only with the means. Therefore were the issue properly presented to us on this appeal we would be inclined to hold that the *Bailey* doctrine may be extended to the crime of forgery. In light of appellant’s plea, however, we decline to reach the issue.” (*Ibid.*)

To the extent this language suggests that multiple forged checks may constitute “but one offense” (*Hughes, supra*, 112 Cal.App.3d at p. 461), we disagree with it. It does not appear that the court in *Hughes* distinguished between the question whether the defendant committed one or more than one offense and the question whether the defendant engaged in an indivisible course of conduct precluding multiple punishments under section 654 and *Neal*. Moreover, the enactment of former section 12022.6 did not undermine the *Neder* court’s reason for recognizing that the *Bailey* doctrine does not extend to forgery. (See *Hughes, supra*, 112 Cal.App.3d at p. 461, fn. 5.) The court in *Neder* refused to extend the *Bailey* doctrine to forgery because the doctrine is incompatible with the nature of the offense. (See *Neder, supra*, 16 Cal.App.3d at pp. 852–853.) Former section 12022.6 did not alter the definition of forgery. Rather, it imposed additional punishment for any felony during the commission (or attempted commission) of which the perpetrator intentionally took, damaged, or destroyed property of a specified value. (*Hughes, supra*, at pp. 457–458.) In fact, former section 12022.6, as originally enacted, did not contain a provision allowing for aggregation. (See *People v. Green* (2011) 197 Cal.App.4th 1485, 1492 [130 Cal.Rptr.3d 290].) Only in 1990 did the Legislature amend the statute to authorize aggregation, providing for an increased penalty if “the aggregate losses to the victims from all felonies exceed the amounts specified in this section and arise from a common scheme or plan.” (Former § 12022.6, subd. (b), as amended by Stats. 1990, ch. 1571, p. 7492; repealed and reenacted by Stats. 2010, ch. 711, § 5, eff. Jan. 1, 2017; see *People v. Green, supra*, 197 Cal.App.4th at p. 1492.) Thus, while current section 12022.6 permits a court to

aggregate the losses sustained from multiple forgeries for purposes of the enhancement, the statute does not redefine the offense of forgery to include an aggregation principle.

DISPOSITION

The trial court's order denying Salmorin's petition for recall of his forgery conviction under section 1170.18 is reversed, and the matter is remanded with directions to resentence Salmorin in accordance with section 1170.18, unless the court, in its discretion, determines that resentencing Salmorin would pose an unreasonable risk of danger to public safety under section 1170.18, subdivision (b).

Perluss, P. J., and Blumenfeld, J.,* concurred.

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

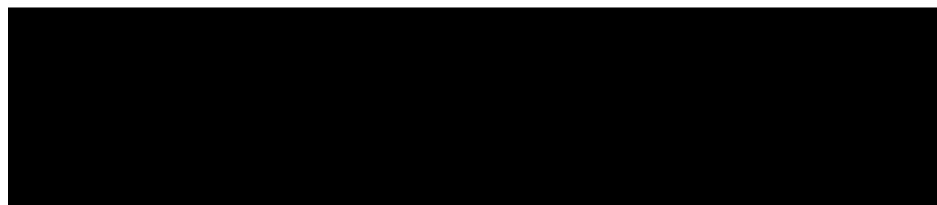
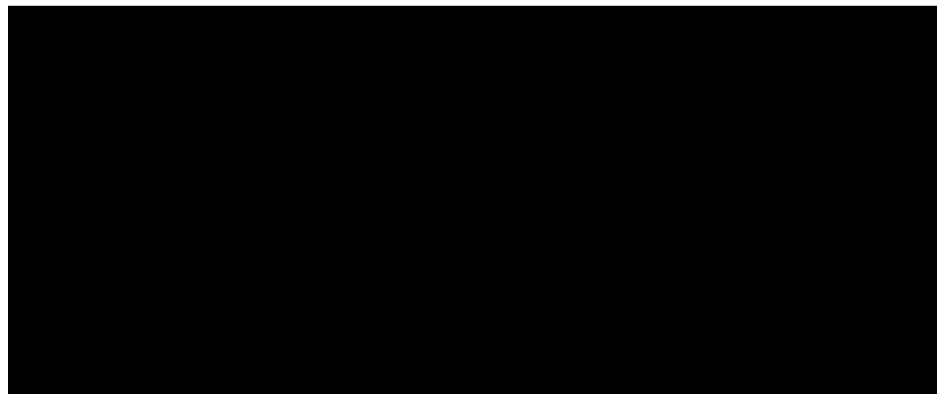
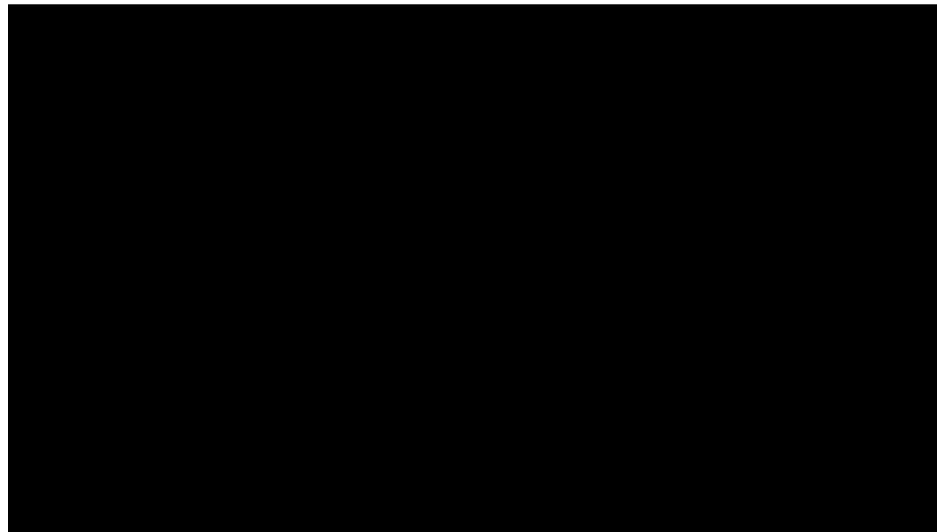
[No. A145701. First Dist., Div. Five. July 19, 2016.]

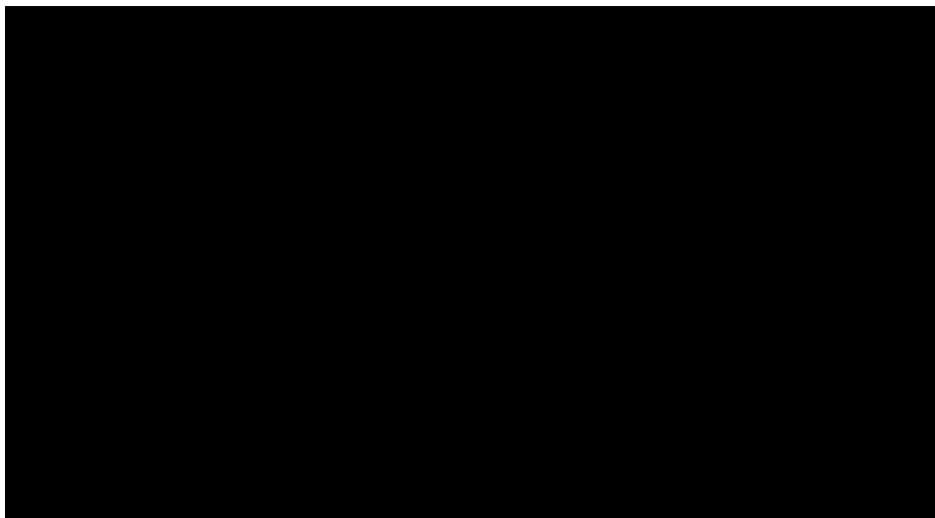
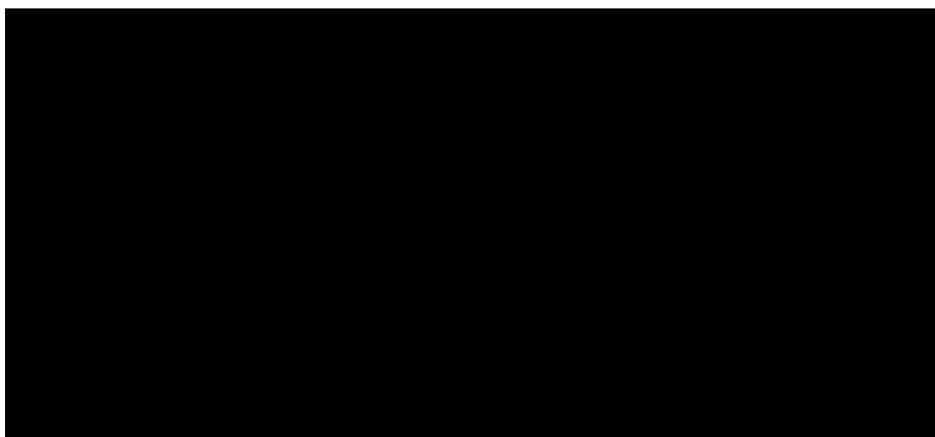
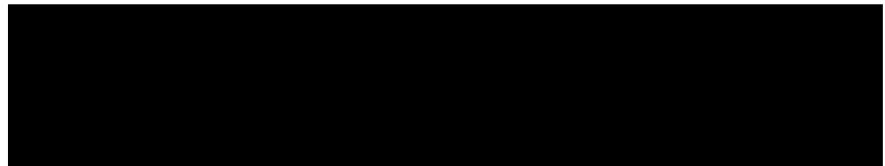
CITY OF EUREKA, Plaintiff and Appellant, v.
THE SUPERIOR COURT OF HUMBOLDT COUNTY, Defendant and
Respondent;
THADEUS GREENSON, Real Party in Interest and Respondent.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Cyndy Day-Wilson, City Attorney, for Plaintiff and Appellant.

Mary Blair Angus, County Counsel, for Defendant and Respondent.

Paul Nicholas Boylan for Real Party in Interest and Respondent.

OPINION

JONES, P. J.—The issue in this case is whether a video of an arrest captured by a patrol car’s dashboard camera is a confidential “personnel record” under Penal Code sections 832.7 or 832.8.¹ On the record before us, the answer is no. We conclude the juvenile court properly determined the arrest video is not a personnel record protected by the *Pitchess* statutes. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 [113 Cal.Rptr. 897, 522 P.2d 305] (*Pitchess*).) We therefore affirm the court’s order requiring the City of Eureka (City) to release a portion of the video to local reporter and real party in interest, Thadeus Greenson.

FACTUAL AND PROCEDURAL BACKGROUND*Arrest, Charges, and Internal Affairs Investigation*

In December 2012, Eureka Police Sergeant Adam Laird and other Eureka police officers arrested H.M. (the minor). Sergeant Laird chased the minor, who “was pushed to the ground, fell to the ground, or just gave up and laid on the ground.” Another police officer arrived “in his patrol vehicle with its in-car video equipment activated.” The patrol car’s mobile audio video (MAV) recording system produced several videos of the arrest.² The prosecution filed a Welfare and Institutions Code section 602 petition against the minor, but later withdrew it.

¹ Unless noted, all further statutory references are to the Penal Code.

² On our own motion, we augmented the record with the unedited video described as “EPD-3C12-10697, MAV 2025, Camera 1 from 12/6/12 23:53:35–23:55:40” (video or arrest video).

A citizen lodged a complaint regarding the officers' "handling of the minor" and the Eureka Police Department conducted an internal affairs investigation. The prosecution charged Sergeant Laird with misdemeanor assault by a police officer without lawful necessity (§ 149) and with making a false report (§ 118.1). Both the prosecution and defense hired experts to review the evidence against Sergeant Laird. After reviewing the evidence—including the arrest video—the experts determined Sergeant Laird did not use excessive force during the arrest. The prosecution dismissed the charges against Sergeant Laird in January 2014.

Greenson's Request for Disclosure of the Arrest Video

In July 2013 and January 2014, Greenson wrote articles in two local newspapers about the arrest and subsequent litigation. In August 2014, Greenson filed a California Public Records Act (Gov. Code, § 6250 et seq.) request with the City seeking disclosure of the arrest video. The City denied the request, "citing discretionary exemptions for personnel records and investigative files."

In November 2014, Greenson filed a request for disclosure (form JV-570) of the arrest video pursuant to Welfare and Institutions Code section 827, which authorizes public disclosure of confidential juvenile records under limited circumstances. Greenson averred the video "formed the basis" for the charges against Sergeant Laird, but the prosecution "later dismissed the charges with little, if any, explanation. [Sergeant] Laird's defense . . . was an allegation that he'd been singled out for arrest by the . . . Police Department for exercising his First Amendment free speech rights and that the [police department] deliberately withheld exculpatory evidence from prosecutors." According to Greenson, "the public has a right to know exactly what happened" during the minor's arrest "to evaluate the performance of both its police officers and prosecutors. The public's only avenue to that knowledge, and the only thing that will allow the public to make that evaluation, is the video [of the] arrest."

The Humboldt County Probation Department (the County) objected, claiming Greenson failed to demonstrate good cause for disclosure under Welfare and Institutions Code section 827. As the County explained, "[p]ublic dissemination of the video is not necessary to facilitate public scrutiny" of Sergeant Laird's conduct because Greenson had "already obtained court records and other public documents describing the events depicted by the video and ha[d] previously published details of the incident . . . Under these circumstances, release of the video would serve only to prejudice the minor

by exposing his image, his actions, and his juvenile record to widespread public scrutiny.” The County also noted Greenson had not served the police department with the disclosure request. The City also urged the court to deny Greenson’s request. It argued the video was a police officer “personnel record” and “[d]isclosure . . . would require a successful *Pitchess* [m]otion,” which Greenson had not filed. The City also claimed disclosing the video could be detrimental to the minor under Welfare and Institutions Code section 827.

At a late January 2015 hearing, the court directed Greenson to serve the police department and the City with the disclosure request and continued the matter to late February 2015. Before the February 2015 hearing, Greenson filed a reply offering additional information about the criminal case against Sergeant Laird and claiming the case “called into question” the conduct of the “entire [police] department.” According to Greenson, the public had “a right to evaluate the conduct of its officers and prosecutors” and needed to know why criminal charges were filed against Sergeant Laird when “experts determined [his] use of force was justified.” Greenson also argued releasing the arrest video would not harm the minor, because he did not oppose disclosure and because the arrest had been “widely reported on.” Finally, Greenson claimed the video was not a personnel record protected by the *Pitchess* statutes.

At a February 2015 hearing, the minor “waive[d] his right to confidentiality” of the arrest video and consented to disclosure. The County and the City, however, continued to oppose the video’s release. As relevant here, the City argued the police department had conducted an internal affairs investigation and the video was “part of that [investigation]” and could not be released “without a successful *Pitchess* motion.” According to the City, a *Pitchess* motion could not be filed because “[t]here are no cases pending, no charges have been filed. Nothing is pending at this point.” The court indicated its inclination to review the video in camera and to determine whether there was a “compelling need . . . for . . . the public to have that . . . information.”

Pursuant to the court’s order, the County provided the court with “an unedited version” of the arrest captured by the MAV “units from the various patrol units involved.” The court reviewed the videos in camera. In a May 2015 written order, the court ordered disclosure of the arrest video. It concluded the video was not a confidential police personnel record protected by the *Pitchess* statutes, explaining the arrest was “both the subject of a delinquency investigation and potentially actions which could result in confidential internal personnel proceedings. [Greenson] is not requesting what

might otherwise be the subject of a *Pitchess* type motion such as confidential citizen complaints and the resulting investigation or outcomes of those investigations. He is requesting only that information which would form the basis of the original criminal complaint against [Sergeant Laird] or delinquency proceedings against the minor.”

As required by Welfare and Institutions Code section 827, the court considered the public interest in disclosure, including “the interest of transparency of juvenile court proceedings,” and the “minor’s consent to disclosure.” The court ordered the City to release the video pursuant to a protective order removing the minor’s name and redacting or blurring his identifying features to conceal his identity. Finally, the court concluded the remainder of the MAV videos were redundant or irrelevant and declined to disclose them; it set a June 2015 hearing to review the redacted video.

The day before the June 2015 hearing, the City filed writ petition seeking to vacate the court’s May 2015 ruling. (*City of Eureka v. Superior Court* (July 7, 2015, A145288).) This court denied the City’s writ petition. The City appealed from the court’s May 2015 order.

DISCUSSION

I.

Welfare and Institutions Code Section 827 and the Pitchess Statutes

■ The City contends the court erred by ordering disclosure of the arrest video, which is part of the minor’s case file. (Welf. & Inst. Code, § 827, subd. (e); see also Hoffstadt, Cal. Criminal Discovery (5th ed. 2015) § 12.13(a)(vii), pp. 332–333 [describing contents of “juvenile ‘case file’ ”].) In general, juvenile court records are confidential. (*In re Keisha T.* (1995) 38 Cal.App.4th 220, 230 [44 Cal.Rptr.2d 822] (*Keisha T.*).) But “this policy of confidentiality is not absolute.” (*Id.* at p. 231.) Welfare and Institutions Code section 827 “governs the release of such records” (*Pack v. Kings County Human Services Agency* (2001) 89 Cal.App.4th 821, 827 [107 Cal.Rptr.2d 594] (*Pack*)) and “enumerates a list of persons who may inspect a juvenile case file without a court order; in addition, a juvenile case file may be inspected by “[a]ny other person who may be designated by court order of the judge of the juvenile court upon filing a petition.”” (*People v. Thurston* (2016) 244 Cal.App.4th 644, 670–671 [198 Cal.Rptr.3d 585], fn. omitted, quoting

Welf. & Inst. Code, § 827, subd. (a)(1)(P.) Under appropriate circumstances, a juvenile court may order the release of juvenile court records to the press. (*Keisha T.*, *supra*, 38 Cal.App.4th at p. 236 [newspaper publisher]; *Pack*, *supra*, 89 Cal.App.4th at p. 828 [newspapers and press representatives].)

“When such a petition is presented, the juvenile court’s duty is to ‘balance the interests of the child and other parties to the juvenile court proceedings, the interests of the petitioner, and the interests of the public.’ [Citation.] To do so, the court ‘must take into account any restrictions on disclosure found in other statutes, the general policies in favor of confidentiality and the nature of any privileges asserted, and compare these factors to the justification offered by the applicant’ in order to determine what information, if any, should be released to the petitioner. [Citation.]” (*People v. Superior Court* (2003) 107 Cal.App.4th 488, 492 [132 Cal.Rptr.2d 144]; see also Cal. Rules of Court, rule 5.552(e).) “The juvenile court has both ‘the sensitivity and expertise’ to make decisions about access to juvenile court records and is in the best position to consider *any other statutes or policies which may militate against access.*” (*Pack*, *supra*, 89 Cal.App.4th at p. 827, italics added, quoting *In re Maria V.* (1985) 167 Cal.App.3d 1099, 1103 [213 Cal.Rptr. 733].)

■ The City contends the *Pitchess* statutes militate against Greenson’s access to the arrest video. According to the City, the video “is a confidential personnel record” protected from disclosure “pursuant to *Pitchess* law” and Welfare and Institutions Code section 827 cannot be used to “circumvent *Pitchess* procedure.” Under *Pitchess*, “‘a criminal defendant may, in some circumstances, compel the discovery of evidence in the arresting law enforcement officer’s personnel file that is relevant to the defendant’s ability to defend against a criminal charge. ‘In 1978, the California Legislature codified the privileges and procedures surrounding what had come to be known as ‘*Pitchess motions*’ . . . through the enactment of . . . sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045.’” [Citation.] ‘Traditionally, *Pitchess* motions seek information about past complaints by third parties of excessive force, violence, dishonesty, or the filing of false police reports contained in the officer’s personnel file.’ [Citation.]’ (*People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, 710 [189 Cal.Rptr.3d 534, 351 P.3d 1023] (*Johnson*).)

■ Section 832.7, subdivision (a) provides that “[p]lacement officer . . . personnel records . . . or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code.” (See *Johnson*, *supra*, 61 Cal.4th at p. 710.) “As employed in the *Pitchess* statutes, the term ‘personnel records’ refers to any file maintained under an individual’s name by his or her employing agency and containing

records related to ‘[e]mployee advancement, appraisal, or discipline,’ ‘[c]omplaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties,’ and ‘[a]ny other information the disclosure of which would constitute an unwarranted invasion of personal privacy.’” (*Pasadena Police Officers Assn. v. Superior Court* (2015) 240 Cal.App.4th 268, 285 [192 Cal.Rptr.3d 486] (*Pasadena*), quoting § 832.8, subds. (d)–(f).)

II.

The Arrest Video Is Not a “Personnel Record” Under Sections 832.7 and 832.8

The court determined the video was not a confidential police personnel record protected by the *Pitchess* statutes. As it explained, Greenson was “not requesting what might otherwise be the subject of a *Pitchess* type motion such as confidential citizen complaints and the resulting investigation or outcomes of those investigations. He is requesting only that information which would form the basis of the original criminal complaint against [Sergeant Laird] or delinquency proceedings against the minor.” We review the court’s construction of sections 832.7 and 832.8 de novo. (*Pasadena, supra*, 240 Cal.App.4th at p. 285.)

■ We need not decide whether Welfare and Institutions Code section 827 would authorize disclosure of *Pitchess* material in a juvenile case file because we conclude the City has not demonstrated the arrest video is a “personnel record” under sections 832.7 and 832.8. The arrest video does not come within section 832.8, subdivision (d), which defines “personnel records” as those relating a police officer’s “advancement, appraisal, or discipline.” *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59 [172 Cal.Rptr.3d 56, 325 P.3d 460] (*Long Beach*) supports our conclusion. There, our high court considered a Public Records Act request for the identities of police officers involved in various shootings. (At p. 71.) The California Supreme Court concluded the information was not covered by the *Pitchess* statutes, explaining: “Although the *Pitchess* statutes limit public access to personnel records [citation], including officer names if they are *linked* to information in personnel records [citation], many records routinely maintained by law enforcement agencies are not personnel records. For example, the information contained in the initial incident reports of an on-duty shooting are typically not ‘personnel records’ as that term is defined in . . . section 832.8. It may be true that such shootings are routinely investigated by the employing agency, resulting eventually in some sort of officer appraisal or discipline. But only the records *generated* in connection with that appraisal or discipline would

come within the statutory definition of personnel records [citation.] We do not read the phrase ‘records relating to . . . ¶ . . . ¶ . . . [e]mployee . . . appraisal[] or discipline’ [citation] so broadly as to include every record that might be *considered* for purposes of an officer’s appraisal or discipline, for such a broad reading of the statute would sweep virtually all law enforcement records into the protected category of ‘personnel records’ [citation].” (*Id.* at pp. 71–72.)

■ Here as in *Long Beach*, the City has not demonstrated the arrest video was “generated in connection” with Sergeant Laird’s appraisal or discipline. The video is simply a visual record of the minor’s arrest. (*Long Beach, supra*, 59 Cal.4th at p. 72.) Adopting the City’s broad reading of section 832.8, subdivision (d) would improperly “sweep virtually all [MAV recordings] into the protected category of ‘personnel records’ [citation].” (*Long Beach, supra*, 59 Cal.4th at p. 72.) We conclude the arrest video is akin to “information contained in the initial incident reports” of an arrest, which “are typically not ‘personnel records’ as that term is defined in . . . section 832.8.” (*Id.* at p. 71.)

At oral argument, the City claimed dashboard camera videos come within section 832.8, subdivision (d) because the police department might eventually use the videos to evaluate whether to initiate disciplinary proceedings against a peace officer. We are not persuaded. That officers involved in an incident might face an internal affairs investigation or discipline at some unspecified point in the future does not transmute arrest videos into disciplinary documentation or confidential personnel information.³

The City suggests the video is a “personnel record” under section 832.8, subdivision (e), which encompasses “‘complaints, or investigations of complaints, concerning an event or transaction in which he . . . participated, or

³ At oral argument, Greenson’s counsel argued the focus of the *Pitchess* statutes is protecting a peace officer’s reasonable expectation of privacy in his personnel records. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1220 [114 Cal.Rptr.2d 482, 36 P.3d 21] [in camera review balances “the accused’s need for disclosure of relevant information with the law enforcement officer’s legitimate expectation of privacy in his . . . personnel records”]; § 832.8, subd. (f) [defining “personnel records” as including “[a]ny other information the disclosure of which would constitute an unwarranted invasion of personal privacy”].) According to Greenson’s counsel, Sergeant Laird had no expectation of privacy in the arrest video because it took place on a public street. We agree. “A peace officer ordinarily has no substantial interest in maintaining the confidentiality of his or her identity or the fact of his or her employment as a peace officer.” (*Ibarra v. Superior Court* (2013) 217 Cal.App.4th 695, 705 [158 Cal.Rptr.3d 751] [peace officer’s official photograph not a personnel record under § 832.8]; *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 297 [64 Cal.Rptr.3d 661, 165 P.3d 462] [the public has a “legitimate interest in the identity and activities of peace officers”].) On the record before us, there is no indication Sergeant Laird “worked undercover or anticipate[d] working undercover in the future [citation], and no reason to believe that the disclosure [of the arrest video] would adversely impact any privacy interest.” (*Ibarra v. Superior Court, supra*, 217 Cal.App.4th at p. 705.)

which he . . . perceived, and pertaining to the manner in which he . . . performed his . . . duties.’’ According to the City, the arrest video comes within section 832.8, subdivision (e) because the police department ‘‘pulled a recording of the incident’’ during the internal affairs investigation and the ‘‘video served as the backbone of the Internal Affairs investigation and was intimately relied upon by the investigating officers.’’

We reject this argument because it is unsupported by evidence in the appellate record. We have carefully reviewed the record and have found no evidence the ‘‘video served as the backbone of the Internal Affairs investigation and was intimately relied upon by the investigating officers.’’ (See *Pasadena, supra*, 240 Cal.App.4th at p. 291 [rejecting a similar ‘‘factually unsupported contention’’].) Even if we assume for the sake of argument the arrest video was considered or relied upon during the internal affairs investigation, it would not transmute the video into confidential personnel information. The arrest video ‘‘was generated independently and in advance of the administrative investigation.’’ (*Id.* at pp. 291, 288 [‘‘records about an incident’’ triggering an internal investigation not protected personnel records under *Pitchess*].)

The City’s reliance on *Berkeley Police Assn. v. City of Berkeley* (2008) 167 Cal.App.4th 385 [84 Cal.Rptr.3d 130] (*Berkeley*) does not alter our conclusion. That case considered whether proceedings conducted by a police review commission fell within section 832.5, which requires law enforcement departments to investigate complaints against their personnel. A division of this court determined the police review commission proceedings ‘‘fit the description of [a] section 832.5’’ proceeding, and the commission’s practice of holding public hearings on citizen complaints against police officers violated section 832.7, subdivision (a) by disclosing confidential police officer personnel information. (*Berkeley*, at pp. 402, 404–405.) *Berkeley* is inapposite. Greenson does not seek disclosure of the investigative materials, reports, or findings made in connection with the police department’s internal affairs investigation. (See, e.g., *Pasadena, supra*, 240 Cal.App.4th at p. 290.) He seeks disclosure of the arrest video, which preceded the citizen complaint and internal affairs investigation. *Berkeley* is inapposite.

■ We express no opinion on whether the arrest video is a public record under the California Public Records Act, nor on the propriety of the court’s ruling under Welfare and Institutions Code section 827 because the City did not raise these arguments on appeal. ‘‘Issues do not have a life of their own: if they are not raised . . . , we consider [them] waived.’’ (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 [31 Cal.Rptr.2d 264].)

DISPOSITION

The court's May 20, 2015 order is affirmed. Thadeus Greenson is entitled to recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

Simons, J., and Needham, J., concurred.

[No. A142994. First Dist., Div. Five. July 19, 2016.]

U.S. BANK NATIONAL ASSOCIATION, as Trustee, etc., Plaintiff and Respondent, v.
STEPHANIE NAIFEH et al., Defendants and Appellants.

[REDACTED]

[REDACTED]

[REDACTED]

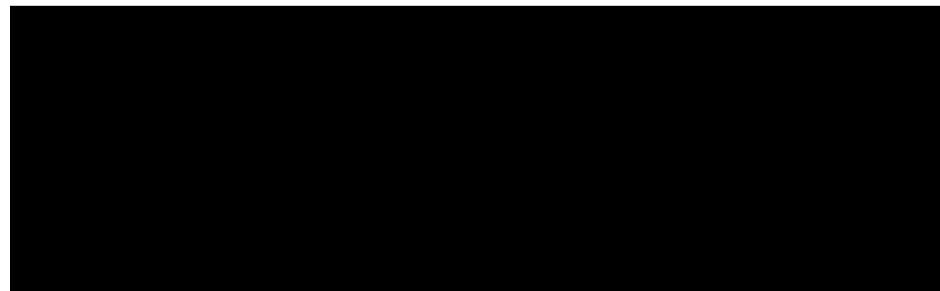
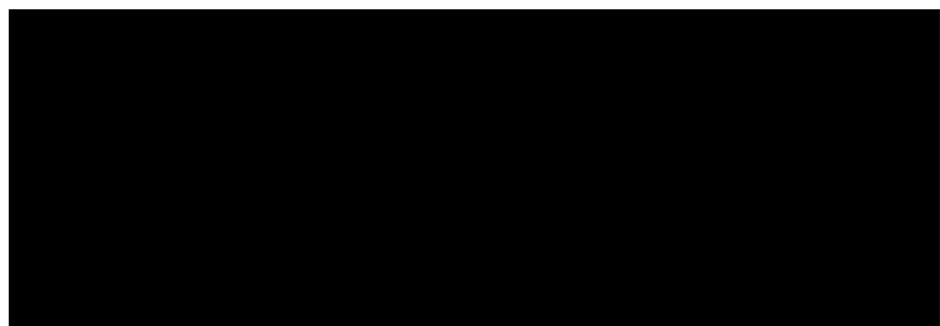
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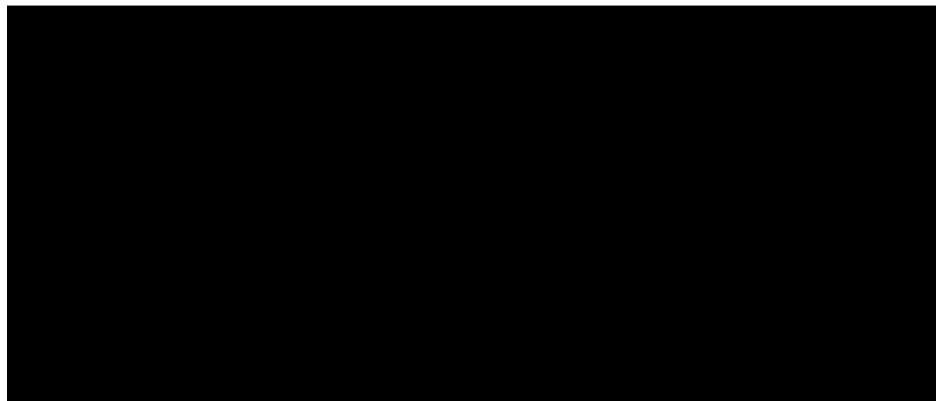
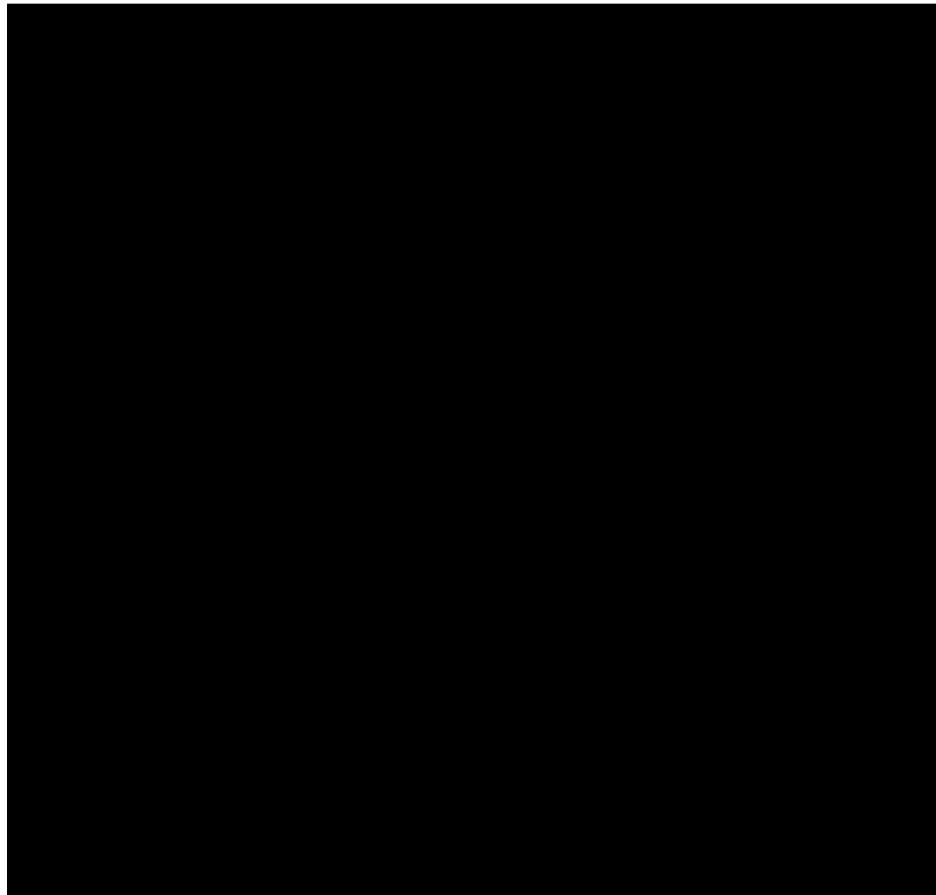
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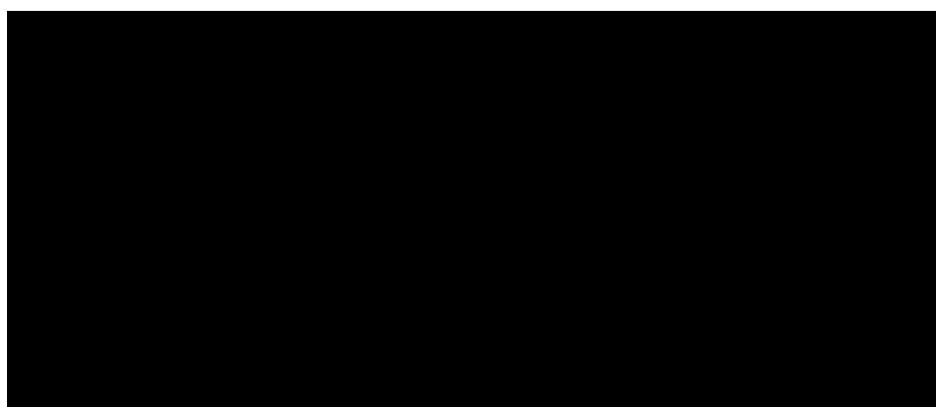
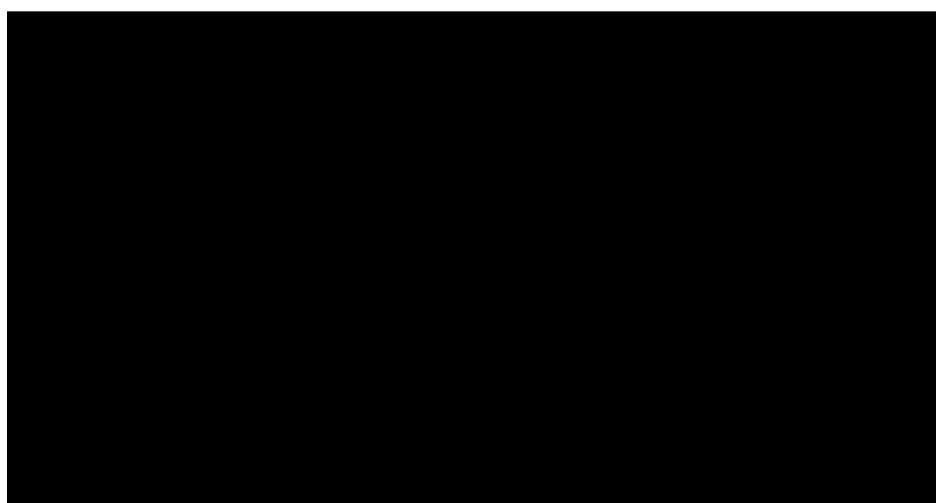
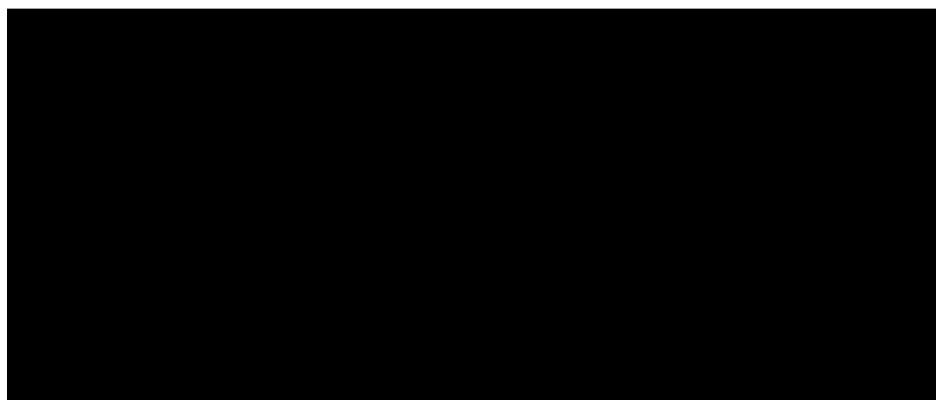
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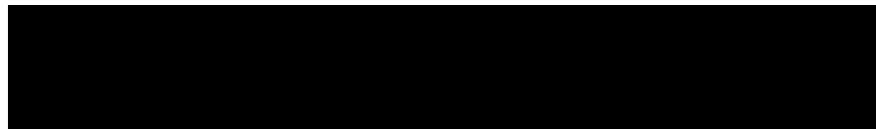
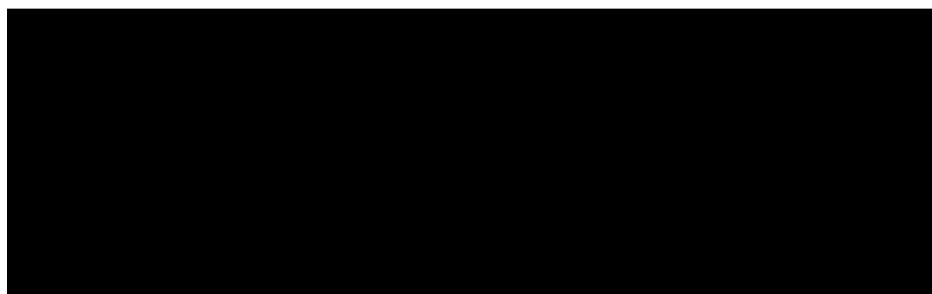
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COUNSEL

Sheik Law, Mani Sheik; Murchison & Cumming, John Podesta and Jennifer K. Letulle for Defendants and Appellants.

Parker Ibrahim & Berg, John M. Sorich, Jenny L. Merris, Heather E. Stern; Alvarado & Smith and Theodore E. Bacon for Plaintiff and Respondent.

OPINION

NEEDHAM, J.—Stephanie Naifeh, Stephen Easterly, and Sam Segall appealed from a judgment entered against them for cancellation of written instruments. (Civ. Code, § 3412.) U.S. Bank National Association (U.S. Bank or respondent) alleged that Naifeh and Segall had fraudulently signed and recorded numerous documents, which purported to divest respondent of title to the real property it had obtained through the foreclosure process after Naifeh defaulted on her loan. Appellants, on the other hand, argued that Naifeh had rescinded the loan transaction pursuant to the Truth in Lending Act (TILA; 15 U.S.C. § 1601 et seq.), the relevant security interest was therefore void, and for this and other reasons respondent had no interest in the property.

Appellants contend (1) the trial court erred in ruling that Naifeh's notice of rescission was insufficient to rescind the loan transaction; (2) respondent should not have been allowed to pursue its cancellation of instruments claims, because even if the court properly allowed an amendment at trial to substitute respondent for its predecessor in interest, respondent omitted a quiet title

claim from its amended pleading; (3) respondent did not have standing to seek cancellation of the instruments because it had no interest in the real property, due to the absence of any timely lawful assignment; and (4) the court made a number of erroneous procedural rulings.

Because of a decision issued by the United States Supreme Court after the trial court's ruling in this case, we will vacate the judgment and remand for further proceedings, including the adjudication of appellants' affirmative defense of rescission.

In the portion of the opinion certified for publication, we conclude that a borrower may rescind the loan transaction under the TILA without filing a lawsuit, but when the rescission is challenged in litigation, the court has authority to decide whether the rescission notice is timely and whether the procedure set forth in the TILA should be modified in light of the facts and circumstances of the case. In the portion of the opinion not certified for publication, we conclude that appellants' remaining arguments lack merit.

I. FACTS AND PROCEDURAL HISTORY

A. *The Loan and Foreclosure*

In March 2007, Naifeh and Dusan Ristic obtained a \$500,000 residential loan (Loan) from Washington Mutual Bank, FA (WaMu), in connection with certain real property in San Francisco (Property). The note was secured by a deed of trust recorded against the Property on April 6, 2007. The deed of trust identified WaMu as the lender and beneficiary, California Reconveyance Company (CRC) as the trustee, and Naifeh and Ristic as the borrowers.

Before the loan closed, WaMu gave Naifeh and Ristic what purported to be a disclosure of the loan terms as required by the TILA. (See 15 U.S.C. § 1635.) As discussed *post*, Naifeh contends the TILA disclosures were deficient.

1. *Chase Becomes the Loan Servicer*

On or about May 1, 2007, WaMu entered into a "Pooling and Servicing Agreement" pursuant to which the Loan (along with other loans) was securitized and, at some point, placed into the "WaMu Mortgage Pass-Through Certificate Series 2007-HY-6 Trust." The pooling and servicing agreement defined WaMu as the servicer of the trust, with authority to foreclose.

By September 25, 2008, the Federal Deposit Insurance Corporation (FDIC) placed WaMu into receivership. On or about that date, JPMorganChase, National Association (Chase) acquired certain assets and liabilities of WaMu from the FDIC, as receiver for WaMu, including WaMu's interest in the Loan. Respondent contends that Chase became the servicer of the Loan, and Chase possessed the records related to the Loan and the original note.

2. Assignment to Bank of America, NA, as Trustee of the HY06 Trust

An "Assignment of Deed of Trust" recorded on March 31, 2009, states that Chase, as successor in interest to WaMu, assigned "all beneficial interest" under the deed of trust to "Bank of America, National Association as successor by merger to 'LaSalle Bank NA as trustee for WaMu Mortgage Pass-Through Certificates Series 2007-HY06 Trust'" (BofA).

3. Naifeh's and Ristic's Default

Meanwhile, Naifeh defaulted on the Loan in 2008 by failing to make payments. A "Notice of Default and Election to Sell Under Deed of Trust" was recorded by trustee CRC on March 31, 2009.

In 2008 and 2009, Naifeh sought a modification of the Loan. WaMu denied the modification request. Chase purportedly offered a modification, but no modification was ultimately agreed upon.

On July 10, 2009, a "Notice of Trustee's Sale" was recorded, stating that the Property would be sold at a public auction later that month. The trustee's sale was postponed to May 2010.

4. Naifeh's Notice of Rescission

After the notice of trustee's sale, Naifeh sent a letter to CRC on July 18, 2009, with copies to the "CFO" of WaMu and the "CFO" of Chase, notifying them that she and Ristic were rescinding the loan pursuant to "Regulation Z" (12 C.F.R. § 226.33(b) (2016)) based on certain deficiencies in the TILA disclosures. A similar letter, dated July 20, 2009, attached a rescission form signed by Naifeh and Ristic. Naifeh contends that WaMu, Chase, and CRC received the rescission notice but took no action.

On December 18, 2009, Naifeh sent another rescission notice to WaMu, Chase, and CRC, purportedly pursuant to the TILA. That same month, she sent a written request to CRC, WaMu, Chase, and others for verification of the debt.

In January 2010, Naifeh learned that the note and deed of trust had purportedly been transferred from Chase to BofA. According to Naifeh, she sent “Bank of America” copies of her rescission notices and debt verification request. The bank acknowledged receipt of the notices and asked Naifeh for the property address, account number, and other identifying information, but then told her it could not find any records related to the property other than old mortgages that had already been paid off.

Naifeh sent follow-up letters to the “CFO” of “Bank of America, NA,” as well as to WaMu, Chase and CRC on January 20, 2010, January 27, 2010, and February 2, 2010. On March 24, 2010, she sent further correspondence to Chase, CRC, and Chase’s attorneys, inquiring about a variety of matters including the location and validity of the note and deed of trust, and proposing to “settle and close this matter.”

5. Naifeh’s Recording of False Documents

Beginning in April 2010—the month before the scheduled foreclosure sale of the Property—Naifeh and a friend (appellant Segall) caused several documents to be recorded with the county recorder, by which Naifeh purported to show she owed nothing on the Loan and was released from the mortgage debt.¹

Specifically, on April 5, 2010, Naifeh recorded a “Substitution of Trustee,” which she signed with the false representation that she was an “authorized representative” of CRC. The document purported to substitute Segall as trustee under the deed of trust, in place of CRC.

On April 20, 2010, Naifeh and Segall recorded a “Modification of Deed of Trust,” which Segall signed as “Authorized Agent, Trustee” and Naifeh signed as “Trustor, Authorized Representative.” The Modification of Deed of Trust, falsely purporting to be an agreement between Naifeh and Chase, stated that the deed of trust had “erroneously set forth the amount of indebtedness secured thereby as being \$500,000,” and modified the deed of trust “to correctly reflect the amount of indebtedness secured thereby to be zero dollars (\$0.00) and to reflect a status of ‘paid as agreed.’ ”²

On April 26, 2010, Naifeh recorded a “Full Reconveyance,” which Segall falsely executed as “Trustee/Authorized Agent,” and which purported to reconvey the deed of trust and reflect satisfaction of Naifeh’s debt.

¹ Ristic conveyed his interest in the Property to Naifeh on April 2, 2010.

² Naifeh testified, and appellants maintain in their opening brief, that she signed and recorded these documents to reflect the rescission that she believed had already transpired. The Modification of Deed of Trust says nothing about any rescission, but instead represents that the deed of trust had misstated the amount secured.

On May 25, 2010, Naifeh recorded another substitution of trustee “to reflect correction of” the substitution of trustee recorded on April 5, 2010. In this document, Naifeh falsely executed the substitution of trustee as “Trustor/Beneficiary” of BofA (that is, “Bank of America, National Association as Successor by Merger to LaSalle Bank NA as Trustee for WAMU Mortgage Pass-Through Certificates Series 2007-HY06”) and appointed Segall as trustee “in place and instead of said” CRC.

6. *Foreclosure Sale*

Naifeh was present at the trustee’s sale on May 24, 2010. She handed out “buyer beware” notices representing that the trustee knew there were contrary claims to title. No one bid on the Property.

A “Trustee’s Deed Upon Sale” was recorded on June 2, 2010, pursuant to which CRC, as trustee under the deed of trust, granted title to the Property to BofA.

7. *Naifeh’s Recording of More False Documents*

On June 11, 2010, Naifeh recorded a document entitled, “Rescission of Trustee’s Deed.” This document did not assert that Naifeh had rescinded the Loan or that the security interest had accordingly become void. Instead, Segall, falsely representing himself to be the trustee under the deed of trust, declared that (1) the Trustee’s Deed Upon Sale to BofA, recorded on June 2, 2010, “is hereby rescinded for the reason that Sale was mistakenly conducted without authorization of Beneficial Interest Holder, reference California UCC File No. 10-7227117967,” and (2) as to the deed of trust recorded on April 6, 2007, Segall (as trustee) “does hereby revoke said deed and declare that henceforth said deed shall not have any further force and effect having been revoked by this instrument, executed, acknowledged, and recorded.” In short, this document purported to eliminate both the deed of sale by which BofA held title and the original deed of trust that secured Naifeh’s indebtedness.

Next, having ostensibly obliterated BofA’s interest in the Property, Naifeh transferred the Property to appellant Easterly. An “Agreement for Sale,” recorded on October 15, 2010, and purportedly entered into by Naifeh and Easterly on October 12, 2010, referenced the sale of the Property from Naifeh (as “Owner/Seller”) to Easterly. Attached as an exhibit was a “Purchase Agreement” signed by Naifeh and Easterly; appellants Adam White and Andrea White signed as witnesses.

Naifeh then executed and recorded a “Warranty Deed” on November 4, 2010, purporting to transfer title to the Property to Easterly for “value

received,” which was specified to be “equivalent to \$407,500 U.S. Dollars.” Adam White and Andrea White signed as witnesses to Naifeh’s signature.

On December 30, 2010, Segall recorded an agreement and “Power of Attorney,” by which Easterly granted Segall a power of attorney. A rental agreement, by which Easterly rented the Property to Adam White, was executed on January 18, 2011.

B. *BofA’s Lawsuit*

On April 4, 2011, BofA filed a verified complaint against Naifeh, Segall, Easterly, Adam White, and Andrea White, asserting eight causes of action for cancellation of instruments, as well as causes of action to quiet title, for declaratory relief, and for injunctive relief.

Easterly, Segall, and Adam White answered the complaint. Naifeh and Andrea White did not respond, and defaults were entered against them. Naifeh moved to set aside the default multiple times, but the motions were denied. However, no default judgment was entered against Naifeh, and she was present at trial and testified as a witness.³

1. *Trial*

A bench trial commenced on January 27, 2014, with BofA as the named plaintiff; after several days of trial, closing arguments were heard on July 1, 2014. The proceedings included the following.

a. *Amendment Adding U.S. Bank and Omitting Quiet Title Claim*

On January 27, 2014, BofA sought leave to amend the complaint to reflect a new trustee of the HY06 trust, replacing BofA with “U.S. Bank National Association, as Trustee, successor in interest to Bank of America, National Association as Trustee as successor by merger to LaSalle Bank, National Association as Trustee for WaMu Mortgage Pass-Through Certificates Series 2007-HY6 Trust.”

Counsel represented that the proposed amended complaint would differ only in the name of the plaintiff, and U.S. Bank would be asking title to be

³ Adam White was dismissed from the action on the first day of trial, leaving Easterly, Segall, and Andrea White as defendants. Neither Adam White nor Andrea White is a party to the appeal. Appellants represent in their opening brief that Segall died after judgment was entered, and the parties have stipulated that Naifeh is Segall’s assignee, successor in interest, and personal representative for purposes of the appeal.

quieted in its favor. The trial court granted leave to amend on March 5, 2014, finding no prejudice to appellants.⁴

The first amended complaint was filed on March 14, 2014. The pleading reflected not only a change in the plaintiff (from BofA to U.S. Bank), but also the omission of the quiet title cause of action. The trial court dismissed the quiet title cause of action as to former plaintiff BofA. (See Code Civ. Proc., § 581, subd. (d).)

Appellants moved to dismiss the action altogether, arguing that the dismissal of the quiet title claim had a res judicata effect and required the dismissal of ancillary claims such as cancellation of instruments. The motion was denied.

b. Respondent U.S. Bank's Contentions at Trial

Respondent U.S. Bank produced evidence that the eight documents recorded by Naifeh and Segall were unauthorized, fraudulent, and void. The documents were not in Chase's files, suggesting they were not executed by or at the direction of Chase. In addition, Naifeh and Segall were not authorized to execute documents on CRC's behalf, and they were neither employed by Chase nor authorized to execute documents on Chase's behalf. And Naifeh was not authorized to execute documents on behalf of BofA.

c. Appellants' Contentions at Trial

Appellants contended, among other things, that respondent was not entitled to prevail based on two affirmative defenses: rescission under the TILA, and lack of standing or unclean hands. Rescission was appropriate, appellants argued, because the TILA disclosures were deficient in several respects: they were not grouped together and segregated from other information; the finance charge and annual percentage rate were not more conspicuous than the other loan terms; there was no disclosure of the creditor; and several key items required for an adjustable rate mortgage (ARM) were not disclosed (including notification of the rate cap, a historical example, and an ARM brochure highlighting the risks of an ARM).⁵ Moreover, appellants maintained, Naifeh's notice of rescission automatically rendered the security interest in the Property void, precluded the foreclosure sale, and precluded respondent from prevailing on the cancellation of instruments claims.

⁴ The parties do not dispute that on January 11, 2011, after BofA purportedly obtained title to the Property, respondent succeeded BofA as trustee of the HY06 Trust.

⁵ Not all of these (if any) were identified in Naifeh's notice of rescission.

2. Trial Court's Statement of Decision

After the trial court issued a "Tentative Statement of Decision" and appellants filed an objection, the court issued its final statement of decision on August 21, 2014.

In its statement of decision, the court found that respondent had standing to pursue the lawsuit, was injured by appellants' recording of the fraudulent documents, and proved its cancellation claims. In addition, the court rejected appellants' affirmative defenses: the notice of rescission sent by Naifeh under the TILA did not effect a rescission, and appellants did not establish an unclean hands defense because U.S. Bank had standing and it was Naifeh and Segall who tried to "wipe out the lien by pretending to be authorized agents or employees of CRC or Bank of America or JPMorgan Chase." The court concluded: "This is not a strong position from which to argue that Plaintiff has unclean hands."

The trial court observed that, although the first amended complaint sought declaratory relief and injunctive relief, respondent's proposed statement of decision did not seek relief on those claims. The court did not address them.

Judgment was entered in favor of respondent. This appeal followed.

II. DISCUSSION

The sole cause of action respondent pursued at trial was for cancellation of instruments, specifically, eight claims for cancellation of instruments, one for each document recorded by Naifeh or Segall.

Under Civil Code section 3412, "[a] written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." To prevail on a claim to cancel an instrument, a plaintiff must prove (1) the instrument is void or voidable due to, for example, fraud, and (2) there is a reasonable apprehension of serious injury including pecuniary loss or the prejudicial alteration of one's position. (See *Turner v. Turner* (1959) 167 Cal.App.2d 636, 641 [334 P.2d 1011].)

Substantial evidence supported the conclusion that the recorded documents were void or voidable due to fraud, in that appellants did not have the authority they claimed to execute and record the documents. Substantial evidence also supported the conclusion that respondent would suffer pecuniary loss and a prejudicial change of position if the fraudulent documents were

not cancelled, since respondent held title to the Property: respondent was successor to BofA, and BofA had obtained title to the Property by the trustee's deed of sale. Furthermore, Naifeh undisputedly failed to pay her obligations under the Loan, Chase had obtained WaMu's interest in the Loan from the FDIC, and BofA had obtained all beneficiary interest under Naifeh's deed of trust (as evinced by the recorded assignment executed by Chase), providing a basis for the foreclosure proceeding against Naifeh and the trustee's deed of sale to BofA. The fraudulent documents that appellants recorded prejudiced respondent, since the documents they recorded before the trustee's sale affected the amounts recovered on the Loan, and the documents they recorded after the trustee's sale deprived respondent of clear title to the Property.

Appellants contend, however, that the judgment in favor of respondent should nonetheless be reversed because (1) Naifeh rescinded the Loan; (2) the omission of the quiet title claim precluded the cancellation of instruments claims; (3) respondent lacked standing because it actually had no interest in the Property; and (4) the trial court made procedural errors. We address each contention in turn.

A. *Naifeh's Rescission Notice*

As an affirmative defense to respondent's cancellation of instruments claims, appellants asserted that Naifeh rescinded the Loan on July 18, 2009, and BofA's security interest in the Property automatically became void under the TILA. As a result, appellants argue, the foreclosure sale was void, and respondent, whose interest derived from BofA, had no standing to complain about Naifeh's post-rescission fraudulent recordings.

Appellants insist this result is compelled by the United States Supreme Court's decision in *Jesinoski v. Countrywide Home Loans, Inc.* (2015) 574 U.S. ____ [190 L.Ed.2d 650, 135 S.Ct. 790] (*Jesinoski*). We summarize relevant provisions of the TILA, consider *Jesinoski* and other cases, and conclude we must remand for the trial court's further consideration.

1. *Rescission Under the TILA*

■ The TILA protects a consumer from fraud, deception, and abuse by requiring the creditor to disclose to the consumer certain information about the subject financing. (15 U.S.C. § 1601; see, e.g., 12 C.F.R. §§ 1026.17–1026.23 (2016).)⁶ It generally entitles a consumer who has

⁶ Except where otherwise indicated, all statutory references in this part II.A. are to title 15 of the United States Code.

secured a credit transaction with a lien on the consumer’s principal dwelling (including the refinancing of an existing mortgage) to rescind a loan transaction within three business days. (§ 1635(a).) Moreover, the rescission period is extended to “three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first,” if the TILA disclosures (including notice of the right to rescind) are not provided. (§ 1635(f); see 12 C.F.R. § 1026.23(a)(3)(i) (2016).)

To exercise the right of rescission, the consumer must notify the creditor of his or her intention to rescind “by mail, telegram or other means of written communication.” (12 C.F.R. § 1026.3(a)(2) (2016).) Notice is “considered given when mailed . . . to the creditor’s designated place of business.” (*Ibid.*; see § 1635(a).)

■ The TILA sets forth a specific procedure for undoing the transaction in section 1635(b). When the consumer exercises the right to rescind, the consumer is “not liable for any finance or other charge, and *any security interest given by the obligor . . . becomes void upon such a rescission.*” (§ 1635(b), italics added.) “Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction.” (§ 1635(b); see 12 C.F.R. § 226.23 (2016).) “Upon the performance of the creditor’s obligations under this section,” the consumer “shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the [consumer] shall tender its reasonable value.” (§ 1635(b).)

Thus, as with any rescission remedy, the intent is to return the parties to the status quo ante. Unlike rescission at common law, however, the procedure set forth in section 1635(b) does not require the borrower to tender first, thus giving leverage to consumers and exposing lenders to situations in which the borrower has no funds to return the principal while the debt is no longer secured. (See *Merritt v. Countrywide Financial Corp.* (9th Cir. 2014) 759 F.3d 1023, 1030 (*Merritt*)).

Furthermore, a creditor’s failure to comply with the requirements of section 1635 subjects it to actual and statutory damages, attorney’s fees, and costs. (§ 1640.) And if the consumer tenders the property to the creditor, the creditor must take possession of it within 20 days or “ownership of the property vests in the [consumer] without obligation on [the consumer’s] part to pay for it.” (§ 1635(b).)

■ However, after setting forth the rescission procedures we have just described, Congress added the following proviso: “The procedures prescribed

by this subsection shall apply *except when otherwise ordered by a court.*" (§ 1635(b), italics added; see 12 C.F.R. § 226.23 (2016).) By turning to the court, a lender may change its fortunes in at least two ways. First, it may challenge the validity of the rescission—that is, whether there was a failure to disclose information, such that the time for rescission under the TILA was extended to three years. Second, whether or not the lender agrees that the rescission was timely and valid, it may request that a different procedure be used to effectuate the rescission remedy; thus, courts have sometimes required the borrower to tender the loan proceeds *first*, before the creditor must give up its security interest. (See, e.g., *Yamamoto v. Bank of New York* (9th Cir. 2003) 329 F.3d 1167, 1170–1173 (*Yamamoto*).

2. *The Trial Court's Decision*

As mentioned, the trial court in this case rejected appellants' rescission defense on two grounds. First, recognizing a split in authority but siding with the Ninth and Tenth Circuit Courts of Appeals, the court concluded that a notice of rescission is not, in itself, sufficient to rescind, and that an actual lawsuit must be filed within the three-year period: "Naifeh did not file a lawsuit to enforce whatever rescission rights she had in a timely way, and the Promissory Note and Deed of Trust were never rescinded."

Second, the court ruled, even if a mere notice of rescission could suffice, in this case "the evidence does not support [appellants'] position that the rescission was self-executing and sufficient to justify recording the Substitution of Trustee and subsequent documents executed and/or recorded by [appellants]." The court concluded that "the mere sending of the notices did not have the automatic effect of rescinding the transaction." And it rejected Naifeh's proposition that rescission was automatic because respondent (or its predecessors) had acquiesced in it, since the evidence did not show an acquiescence and, in fact, they were foreclosing on the Property.

Appellants contend the court erred in light of *Jesinoski, supra*, 574 U.S. ____ [135 S.Ct. 790].

3. *Jesinoski*

The United States Supreme Court issued its decision in *Jesinoski* several months after the trial court's decision. In *Jesinoski*, the borrowers had sent a rescission letter three years after refinancing their home, and the lender's successor did not acknowledge its validity. (*Jesinoski, supra*, 574 U.S. at p. ____ [135 S.Ct. at p. 791].) About a year later—four years after the transaction originating the loan—the borrowers filed a lawsuit seeking to enforce the rescission. (*Ibid.*) Like the trial court here, the federal district

court and the Eighth Circuit Court of Appeals concluded there had been no rescission because the borrowers had not filed a lawsuit within three years of the date of the loan's consummation. (*Ibid.*)

■ The Supreme Court reversed, holding that the borrower need only send the notice of rescission, not file a lawsuit, within the three-year period. The court explained that section 1635(a) sets forth unequivocally how the right to rescind is to be exercised: "It provides that a borrower 'shall have the right to rescind . . . by notifying the creditor, in accordance with regulations of the Board, of his intention to do so' (emphasis added). The language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. It follows that, so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely. The statute does not also require him to sue within three years." (*Jesinoski, supra*, 574 U.S. at p. ___ [135 S.Ct. at p. 792].)

4. *Impact of Jesinoski on Naifeh's Rescission Notice*

a. *Timeliness of Naifeh's Rescission Notice*

Naifeh's notice of rescission occurred within the three-year period, since her loan originated on March 14, 2007, and she sent her rescission notice on July 18, 2009. Under *Jesinoski*, the fact that Naifeh did not file a lawsuit within the three-year period does not render the notice untimely.

b. *Effect of Naifeh's Rescission Notice*

Respondents urge, however, that the trial court correctly concluded that Naifeh's rescission notice did not have the automatic effect of rescinding the transaction (that is, without respondent's acquiescence or a court approving the rescission), and nothing in *Jesinoski* suggests otherwise. On this point, the parties each rely on cases that ostensibly support their respective positions.

Appellants argue, and several cases remark, that rescission *is* automatic upon the consumer's notice under the procedure set forth in section 1635(b). (See, e.g., *Merritt, supra*, 759 F.3d at p. 1030 [under the procedure set forth in § 1635(b), "'all that the consumer need do is notify the creditor of his intent to rescind,''" and the "'agreement is then automatically rescinded'"]; *Sherzer v. Homestar Mortgage Services* (3d Cir. 2013) 707 F.3d 255, 258 ["rescission occurs automatically when the obligor validly exercises his right to rescind," as opposed to having to file a lawsuit]; *Williams v. Homestake Mortgage Co.* (11th Cir. 1992) 968 F.2d 1137, 1140 [agreement "automatically rescinded" when consumer notifies the creditor of his intent to rescind]; see *Lippner v. Deutsche Bank National Trust Co.* (N.D.Ill. 2008)

544 F.Supp.2d 695, 702 [where creditor conceded it had violated the TILA and the consumer had timely exercised her right to rescind, the creditor was obligated under § 1635 to honor the rescission demand, and the failure to do so was a further TILA violation].) And the court stated in *Jesinoski, supra*, 574 U.S. at p. ____ [135 S.Ct. at p. 792], “rescission is effected when the borrower notifies the creditor of his intention to rescind.”

On the other hand, respondent points us to *Yamamoto, supra*, 329 F.3d 1167, on which the trial court relied. In *Yamamoto*, the borrowers sent the lender a notice of rescission and then sued, seeking damages and rescission. The district court ruled that the borrowers had to tender the loan proceeds; when they were unable to do so, the court dismissed their lawsuit. Noting that section 1635(b) expressly permits a court to modify the procedures set forth in that section, the Ninth Circuit Court of Appeals held that the trial judge had the discretion to “condition” rescission on the borrower’s tender. If the lender had *acquiesced*, the transaction would have been rescinded automatically; but because the lender *contested* the rescission notice and produced evidence about the sufficiency of the disclosures, it “cannot be that the security interest vanishes immediately upon the giving of notice.” (*Yamamoto, supra*, 329 F.3d at p. 1172.) The court explained: “Otherwise, a borrower could get out from under a secured loan simply by *claiming* TILA violations, whether or not the lender had actually committed any. Rather, under the statute and the regulation, the security interest ‘becomes void’ only when the consumer ‘rescinds’ the transaction. In a contested case, this happens when the right to rescind is determined in the borrower’s favor.” (*Ibid.*)⁷

Yamamoto continued: “Thus, a court may impose conditions on rescission that assure that the borrower meets her obligations once the creditor has performed its obligations. Our precedent is consistent with the statutory and regulatory regime of leaving courts free to exercise equitable discretion to modify rescission procedures. This also comports with congressional intent that ‘the courts, at any time during the rescission process, may impose equitable conditions to insure that the consumer meets his obligations after

⁷ *Yamamoto* (and the trial court in this case) quoted *Large v. Conseco Finance Servicing Corp.* (1st Cir. 2002) 292 F.3d 49, 54–55, which observed: “[N]either the statute nor the regulation establishes that a borrower’s mere assertion of the right of rescission has the automatic effect of voiding the contract.” [Citation.] Instead, the ‘natural reading’ of the language of § 1635(b) ‘is that the security interest becomes void when the obligor exercises a right to rescind that is available in the particular case, either because the creditor acknowledges that the right of rescission is available, or because the appropriate decision maker has so determined Until such decision is made, the [borrowers] have only advanced a claim seeking rescission.’” (*Yamamoto, supra*, 329 F.3d at p. 1172.) This suggests that no rescission occurs until the lender or a court says so; as such, it is a broader concept than the one at the heart of *Yamamoto* and on which we rely: that Congress has given courts authority to change the procedural order of the rescission process by requiring the borrower to tender first in the appropriate case.

the creditor has performed his obligations as required by the act.' S.Rep. No. 368, 96th Cong., 2d Sess. 29 (1980), *reprinted in* 1980 U.S.C.C.A.N. 236, 265." (*Yamamoto, supra*, 329 F.3d at p. 1173.)⁸

■ *Yamamoto* is readily harmonized with the cases finding automatic rescission. A timely notice of rescission automatically renders the security interest void under section 1635(b), where the creditor *acquiesces* in the rescission or *ignores* it. However, once the creditor *contests* the notice of rescission, the court may alter the procedure otherwise dictated by the TILA, determine whether there were inadequate disclosures that would extend the rescission period to three years, and decide whether equity compels a requirement that the borrower tender the loan proceeds before the lender returns the amounts paid and releases its security interest. This accomplishes the legislative goals of protecting the borrower from nondisclosures, motivating the lender to respond to the borrower's concerns, and returning the parties to the status quo ante in a manner consistent with the facts and equities of the particular situation.

Indeed, even those federal appellate cases on which appellants rely for the proposition that rescission is "automatic" expressly recognize the authority of courts to condition the voiding of the security interest for equitable reasons. (E.g., *Merritt, supra*, 759 F.3d at pp. 1030–1032; *Sherzer v. Homestar Mortgage Services, supra*, 707 F.3d at p. 260 ["if either the obligor or the creditor sues after the obligor sends notice of rescission, the court has the discretion to modify the order in which the obligor and creditor are required to exchange property or disclaim security interests"]; *Williams v. Homestake Mortgage Co., supra*, 968 F.2d at pp. 1141–1142 [to effect a "realistic recognition of the full scope of the statutory scheme," "we hold that a court may impose conditions that run with the voiding of a creditor's security interest upon terms that would be equitable and just to the parties in view of all surrounding circumstances," including "conditioning the voiding of [the lender's] security interest"].)

⁸ Appellants urge that *Yamamoto* is inconsistent with *Merritt* and *Jesinoski*. To the contrary, *Merritt* fully embraced *Yamamoto* and confirmed its premise that courts have authority to modify the statutory rescission process; *Merritt* merely held that the court could not dismiss an action at the *pleading* stage for the plaintiff's failure to tender before filing suit (as opposed to the summary judgment stage at issue in *Yamamoto*), because the creditor had not yet produced evidence regarding compliance with the disclosure requirements and the court could not evaluate the relevant equitable considerations. (*Merritt, supra*, 759 F.3d at pp. 1030–1032.) *Jesinoski* ruled that the TILA's language "leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind." (*Jesinoski, supra*, 574 U.S. at p. ____ [135 S.Ct. at p. 792].) But *Jesinoski* dealt with the means by which the right to rescind is initially effected, not the manner in which the procedural requirements for the rescission remedy may be reordered by a court to reflect the equities of the situation.

■ Moreover, the plain language of the statute compels the conclusion that a court is empowered to facilitate equity in implementing a rescission under the TILA. Section 1635(b) provides that “[t]he procedures prescribed by *this subsection* shall apply except when otherwise ordered by a court.” (Italics added.) Those procedures include the voiding of the security interest, the termination of the obligor’s liability, and the process for restoring the parties to the status quo. The unequivocal expression of legislative intent is that the court may modify any or all of these matters to assure that the rescissionary remedy is imposed equitably in a given case.

5. *Implications for This Case*

In light of *Jesinoski*, appellants urge that Naifeh’s notice of rescission divested BofA of its security interest in the Property, renders the foreclosure sale void, and deprived respondent of standing to pursue its claims for cancellation of instruments.

■ But those conclusions are premature. Appellants raised the rescission issue as an affirmative defense in this case. They therefore placed at issue whether there was, in fact, a timely rescission, which requires proof that the disclosures required by the TILA were not provided, so as to extend the rescission period to three years. That issue has not yet been decided by the trial court.

If the TILA disclosures were *not* deficient, Naifeh’s rescission notice under the TILA was to no avail (since it was sent beyond the three-day period), appellants’ affirmative defense fails, and the security interest in the Property was not void. In that instance, respondent would be entitled to judgment on its cancellation claims.

On the other hand, if the TILA disclosures *were* deficient, Naifeh’s notice of rescission was timely because it was sent within the extended three-year period, and the trial court may, under section 1635(b), determine what procedure to impose to return the parties to the status quo ante, including whether Naifeh should be required to tender. (Although Naifeh proposed resolving her dispute with respondent’s predecessors, we are not pointed to any indication in the record that she actually made a valid tender of full and unconditional performance, or demonstrated the willingness and ability to pay back the loan proceeds she received in the financing transaction.) If a tender is required and not made, Naifeh will not have met the requirements for a rescissionary remedy, and therefore may not use rescission as an affirmative

defense. But if the rescissionary remedy is completed, the security interest in the Property is void, the foreclosure sale is void, and the trial court must reevaluate respondent's standing and the merits concerning respondent's claims for cancellation of instruments.⁹

We will therefore vacate the judgment in this case and remand to the trial court for further proceedings with respect to appellants' affirmative defense of rescission. We nevertheless address appellants' remaining arguments in the unpublished portion of this opinion, both to complete our analysis and to guide the court and parties upon remand.

B.-D.*

* * * * *

III. DISPOSITION

The judgment is vacated. On remand, the trial court shall determine whether the disclosures provided to Naifeh and Ristic regarding their loan were in compliance with the TILA. If so, the judgment shall be reinstated. If not, the trial court shall consider the procedure by which the rescission

⁹ At oral argument, appellants contended the trial court lacks authority to decide whether the rescission notice was valid, because U.S. Bank did not contest the notice within 20 days of receipt. They base this on the TILA's procedure requiring lenders to return funds and take steps to reflect the security interest's termination within 20 days after receiving the notice. (See also *Paatalo v. JPMorgan Chase Bank* (D.Or. 2015) 146 F.Supp.3d 1239, 1245 [lender must unwind the loan or file a lawsuit within the "TILA statute of limitations"].) However, the TILA does not specify that a lender in fact loses its right to challenge the rescission, or a court loses its statutory authority to modify the rescission procedures, merely because the lender did not contest the rescission notice within 20 days. Indeed, the 20-day response period is part of the procedure the TILA explicitly states a court *may* modify. (We also note that U.S. Bank's predecessors may not have seen a reason to challenge Naifeh's notice of rescission because, before *Jesinoski*, the Ninth Circuit law was that no rescission was effected unless the borrower had actually filed a lawsuit.) In addition, U.S. Bank countered at oral argument that appellants cannot pursue the rescission theory at all, because the foreclosure sale has already occurred—arguing implicitly that a borrower must enforce the rescission and obtain an injunction precluding the sale. (See *Mikels v. Estep* (N.D.Cal., Apr. 19, 2016, No.12-cv-00056-EMC) 2016 U.S. Dist. Lexis 52450, p. *3 [TILA rescission provision no longer applies once the property is sold, even if a valid notice of rescission was sent before the sale]; see also *Jacques v. Chase Bank USA, N.A.* (D.Del., Feb. 3, 2016, No.15-548-RGA) 2016 U.S. Dist. Lexis 12522, p. *29 & fn. 10 [under federal law, borrower's TILA claim against lender was time-barred, because there is a one-year statute of limitations for violations of § 1635(b), which runs from 20 days after borrower provides notice of rescission].) We need not and do not decide these issues, because the trial court did not decide them, and the parties did not fully brief them in this appeal. And in this case, appellants were the ones who placed the rescission at issue.

*See footnote, *ante*, page 767.

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remedy shall be finalized, rule on appellants' affirmative defense of rescission, conduct such further proceedings as may be consistent with this opinion, and enter judgment accordingly. Appellants shall recover their costs in this appeal from respondent.

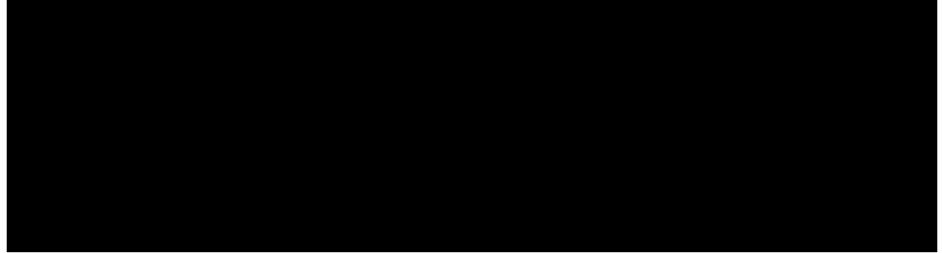
Jones, P. J., and Bruiniers, J., concurred.

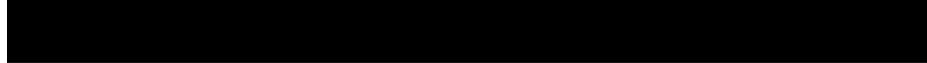
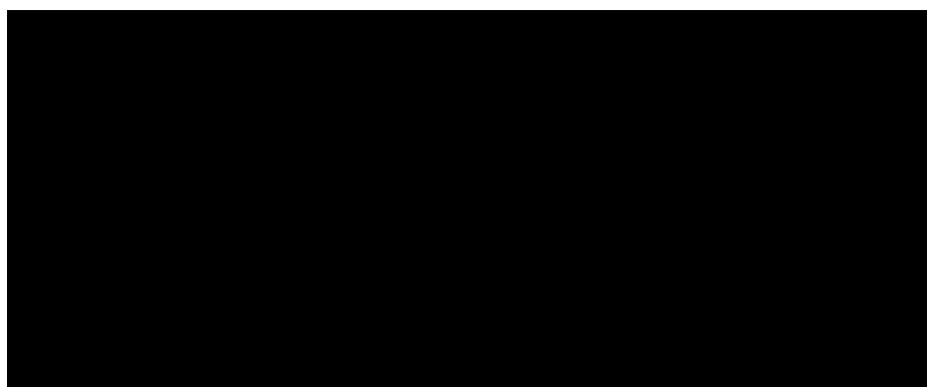
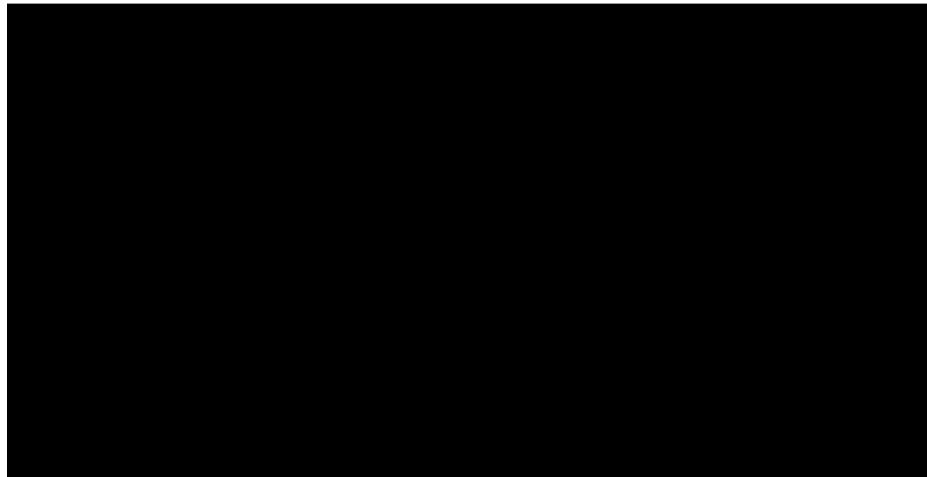
A petition for a rehearing was denied August 17, 2016, and the opinion was modified to read as printed above. Appellants' petition for review by the Supreme Court was denied November 9, 2016, S236902. Chin, J., did not participate therein.

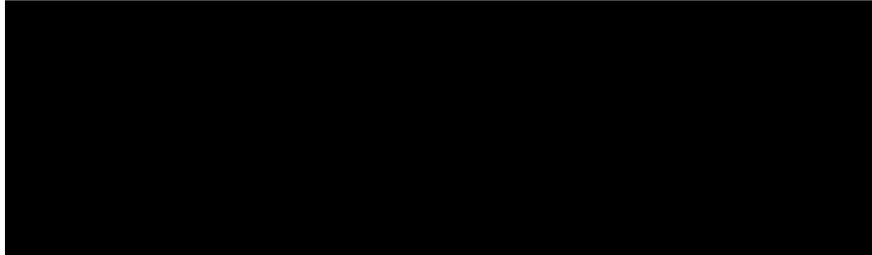
[No. B260774. Second Dist., Div. Four. July 20, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
JAMES BELTON FRIERSON, Defendant and Appellant.

THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) October 19, 2016, S236728.







COUNSEL

Richard B. Lennon and Suzan E. Hier, under appointments by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

EPSTEIN, P. J.—This is a defendant's appeal from the trial court decision rejecting his petition for resentencing under Penal Code section 1170.126, enacted by Proposition 36, the Three Strikes Reform Act of 2012. (All further code citations are to the Penal Code unless otherwise indicated.) That initiative measure allows inmates serving an indefinite life term under the "Three Strikes" law (§§ 667, subds. (b)–(i), 1170.12) to petition the court for resentencing where the third strike conviction was for a felony not classified as a serious or dangerous crime. The initiative also disqualifies inmates serving a sentence imposed pursuant to section 667, subdivision (e)(2)(C)(i)–(iii). The last of these, subdivision (iii), applies where “[d]uring the commission of the current offense, the defendant . . . intended to cause great bodily injury to another person.”

FACTUAL AND PROCEDURAL SUMMARY

The current offense in this case was for stalking, a violation of section 646.9. Under the Three Strikes law, that offense along with defendant's two prior “strikes” resulted in a term of 25 years to life. Pursuant to Proposition 36, defendant petitioned for recall of his sentence and resentencing. Following a hearing, the petition was denied. The trial court ruled that defendant

was ineligible because the third strike offense was committed with intent to inflict great bodily injury to the victim.

The stalking conviction was based on letters from defendant, sent to his wife from prison after she had informed him that she intended to end their relationship. In these letters defendant said he would “track her down,” that she should not and that he would not allow her to have another man, that because she had hurt him he would “hurt” her and that he would kill her for causing him so much pain. Later, after receiving divorce papers, defendant wrote her stating that he would do something bad to her because he could not live without her, that she was his wife and he would “get” her for hurting him so badly. He wrote that he was not going to hit her but only talk to her about restarting the relationship, but he also wrote that he could not let her leave and let someone else take her and that he was going to fight for her; and do something “real bad” to her.

He called her attention to a news story about a woman who killed her husband and then herself, and said that he would “get [her] for hurting [him] like this. Mark my word . . .”

Following a hearing, based on these statements, the court ruled that defendant was ineligible for recall of the sentence he was serving or for resentencing because of his expressed intent to inflict great bodily injury on his wife. This appeal followed.

DISCUSSION

■ Section 1170.126, enacted by Proposition 36, provides in subdivision (e)(2), that an inmate is eligible for resentencing if his or her current sentence was not imposed for an offense appearing in (among other provisions) section 667, subdivision (e)(2)(C)(iii); where, during commission of the offense, defendant “intended to cause great bodily injury to another person.” On appeal defendant argues that while he wrote the letters we have discussed, they do not show he intended to inflict great bodily injury on his wife. He reasons that the basis of the trial court’s ruling was the fact of defendant’s conviction for stalking, a crime that does not require intent to carry out the threatened acts. It is true that the conviction was based on defendant’s threats.

I

■ In determining an inmate’s eligibility for recall and resentencing under Proposition 36, the trial court may examine all relevant, reliable and admissible material in the record to determine the existence of a disqualifying factor. (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048, 1051 [171

Cal.Rptr.3d 70]; see *People v. Guerrero* (1988) 44 Cal.3d 343, 355 [243 Cal.Rptr. 688, 748 P.2d 1150] (*Guerrero*).) That is what the trial court did in this case. It is reasonable to infer, as the trial court did, that when defendant told his wife that he was going to get her, hit her, hurt her, and do something “real bad” to her to avenge what he perceived she had done to him, he meant what he said. (6 Wigmore Evidence (Chadbourn rev. ed. 1976) § 1715 and generally 1 Witkin, Cal. Evidence (5th ed. 2012) Hearsay, § 40, p. 833.) Put plainly, the trial court was entitled to infer, as it did, that defendant meant to do what he said he would do.

Citing *Guerrero* and other cases, defendant argues that in ruling on a motion for resentencing under Proposition 36, the trial court is limited to a determination of “the narrow issue of whether the *conviction* was for qualifying conduct,” and that in ruling on the motion the trial court is not permitted “to simply review a transcript and, based on testimony, find the fact.” Instead, defendant argues, “to determine whether a conviction encompasses relevant conduct, the court inquiry is limited to identifying ‘the basis of the crime of which defendant was *convicted*.’” (Quoting *People v. McGee* (2006) 38 Cal.4th 682, 691 [42 Cal.Rptr.3d 899, 133 P.3d 1054].) He argues, essentially, that the trial court must restrict its decision to those facts and circumstances necessarily decided in the underlying conviction.

We do not agree that the trial court is so restricted. *Guerrero* itself involved a determination that went beyond what necessarily had been decided in the prior conviction. The issue in that case was whether a prior conviction qualified as a “serious felony” under the residential burglary provisions of sections 667 and 1192.7, subdivision (c), since the burglary statute in force when that crime was committed did not differentiate between residential and other burglary. (*Guerrero, supra*, 44 Cal.3d at p. 346.) A previous decision, *People v. Alfaro* (1986) 42 Cal.3d 627 [230 Cal.Rptr. 129, 724 P.2d 1154], had held the trial court could not decide that issue because the residential character of the burglary was not an element of the underlying crime. Overruling *Alfaro* on this issue, the Supreme Court held that in deciding whether the prior burglary was of a residence, the court could “look to the record of the conviction—but no further” in making its decision. (*Guerrero*, at p. 355.)

Later decisions clarified that the “record of conviction” did not extend to such matters as the defendant’s post-conviction admission to a probation officer that he had used a knife in committing the underlying crime (*People v. Trujillo* (2006) 40 Cal.4th 165, 179 [51 Cal.Rptr.3d 718, 146 P.3d 1259]), or to factual allegations in charges dismissed in a plea bargain (*People v. Berry* (2015) 235 Cal.App.4th 1417, 1425 [186 Cal.Rptr.3d 89]). But the term does include material which is part of the record, such as excerpts from preliminary hearing transcripts. (*People v. Reed* (1996) 13 Cal.4th 217, 223 [52 Cal.Rptr.2d 106, 914 P.2d 184].)

■ If anything, *Guerrero* is a fortiori to this case, since it deals with evidence bearing on an *increase* in punishment, such as whether a prior conviction was for a “serious felony.” In a Proposition 36 proceeding, the court does not consider an increase in punishment, but only whether the convicted defendant is entitled to the reduction in punishment afforded by that law. If he or she is ineligible, the result is that punishment is not reduced; it cannot be increased. That is why there is no right to a jury trial on issues going to the defendant’s entitlement to a sentence reduction, or, as we next discuss, to the enhanced burden of proof required to prove facts that would increase punishment.

II

In a supplemental brief defendant cites to a recent case, *People v. Arevalo* (2016) 244 Cal.App.4th 836 [198 Cal.Rptr.3d 343] (*Arevalo*), to argue that the burden of proof in ruling on an application for recall under Proposition 36 is with the prosecution, and that burden is proof beyond a reasonable doubt.

■ The initiative provides that the trial court shall determine eligibility of the defendant for relief under its provisions. We understand the correct allocation of the burden to be that it is for the defendant, as petitioner, to make a *prima facie* showing that the third strike conviction in his or her case was for a felony that qualifies under the initiative. But where the prosecutor claims that strike or some other circumstance disqualifies the defendant for such relief, it is the prosecutor’s burden to prove that disqualification. (See *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1301 [155 Cal.Rptr.3d 856].) The issue then becomes: what is the applicable standard for that proof? *Kaulick* holds that it is proof by a preponderance of the evidence. (*Ibid.*) And this appears to be the generally accepted rule. (See *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040 [171 Cal.Rptr.3d 55].) Relying on a concurring opinion in *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1344 [174 Cal.Rptr.3d 499] (by the author of the court’s opinion in that case), the *Arevalo* court concludes that the standard must be greater than preponderance. The concurring opinion in *Bradford* suggested that the clear and convincing evidence standard be used. (*Id.* at p. 1350 (conc. opn. of Raye, J.).)

Arevalo, supra, 244 Cal.App.4th 836 finds this insufficient and concludes the prosecution must prove *ineligibility* beyond a reasonable doubt. (*Id.* at p. 852.) It does so in light of the substantial amount of prison time at stake for the defendant, the risk of error because of the “summary and retrospective nature of the adjudication,” and the “slight countervailing governmental interest given the People’s opportunity to provide new evidence” at the hearing. (*Ibid.*) And, concern that with a lesser standard “nothing would

prevent the trial court from disqualifying a defendant from resentencing eligibility consideration by completely revisiting an earlier trial, and turning acquittals . . . into their opposites.” (*Id.* at p. 853.)

We are not convinced. Preponderance is the general standard under California law, and there is no showing that trial courts will be unable to apply it fairly and with due consideration. Nor is there a showing that they have failed to do so. We do not believe that a higher standard, let alone proof beyond a reasonable doubt, the highest standard possible, is constitutionally required.

DISPOSITION

The judgment (order denying relief) is affirmed.

Willhite, J., and Collins, J., concurred.

A petition for a rehearing was denied August 5, 2016, and the opinion was modified to read as printed above. Appellant’s petition for review by the Supreme Court was granted October 19, 2016, S236728.

[No. A145399. First Dist., Div. Four. July 20, 2016.]

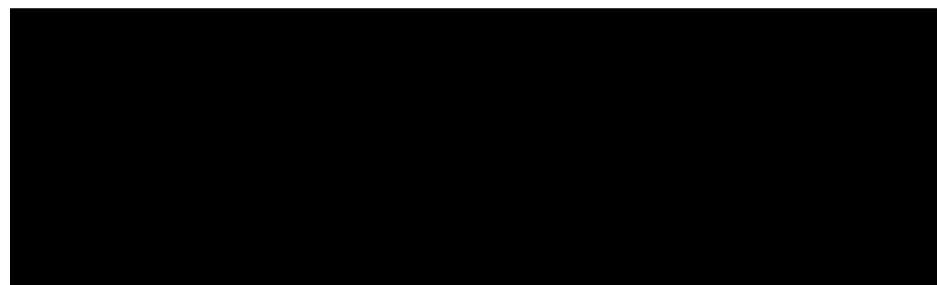
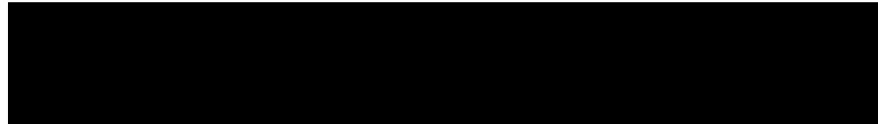
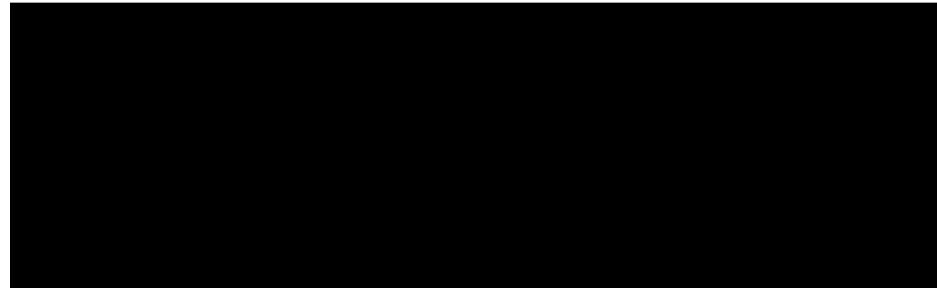
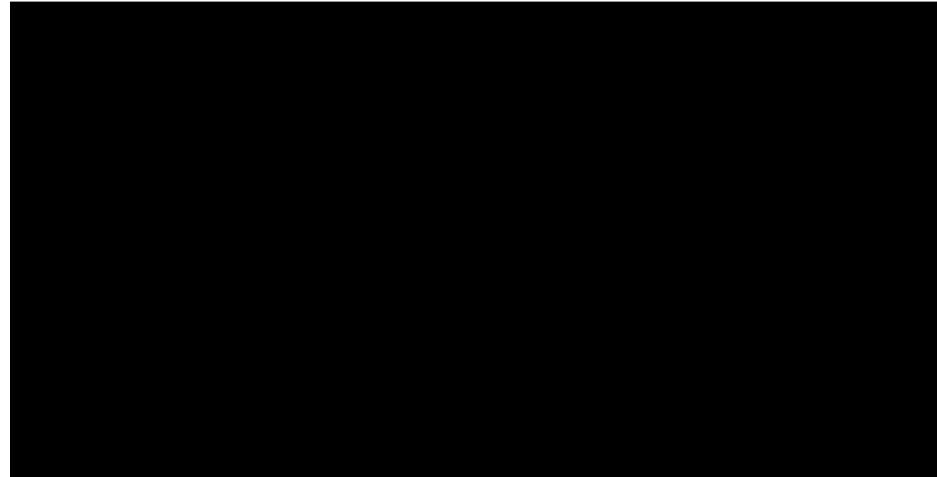
In re J.E., a Person Coming Under the Juvenile Court Law.
THE PEOPLE, Plaintiff and Respondent, v.
J.E., Defendant and Appellant.

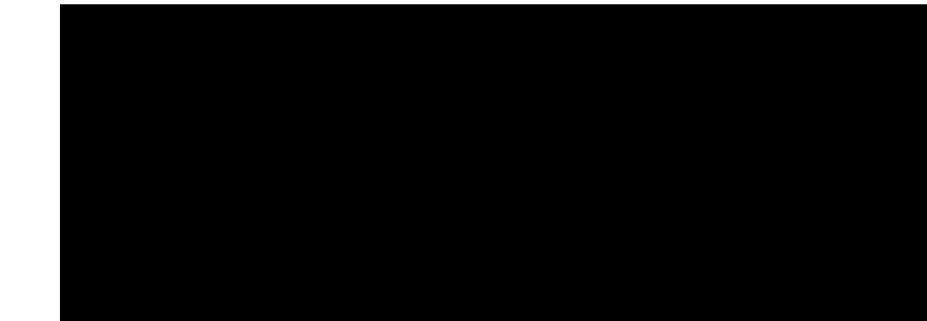
THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) October 12, 2016, S236628.

[REDACTED]

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COUNSEL

Sejal H. Patel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Assistant Attorney General, Donna M. Provenzano and Hanna Chung, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

RIVERA, J.—J.E. (Minor) appeals from a post-dispositional order denying his motion to remove an electronic search probation condition imposed upon his plea to misdemeanor second degree burglary (Pen. Code,¹ § 459). Minor contends the probation condition requiring him to submit his electronic devices to search upon the request of a probation officer or peace officer is invalid under *People v. Lent* (1975) 15 Cal.3d 481 [124 Cal.Rptr. 905, 541 P.2d 545] (*Lent*). He also contends the condition is unconstitutionally overbroad and that it risks violating California's Invasion of Privacy Act (§ 632). We affirm.

I. FACTUAL BACKGROUND²

The underlying factual basis for the plea stemmed from Minor's involvement in a burglary with two of his friends. They entered an Oakland home

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

² The statement of facts is taken from police reports and the dispositional report.

through a back window and rear door and took a watch, a camera, and loose change from a large jar. A neighbor reported the burglary, and Minor and his friends were apprehended a few blocks away. Upon his arrest, the police found approximately \$50 in loose change in Minor's backpack.

The dispositional hearing was held on March 19, 2015. The dispositional report noted that Minor had a "difficult" relationship with his mother after previously residing with his grandmother and that Minor admitted he had experimented with drugs and alcohol in the past; Minor began smoking marijuana when he was nine years old and had begun smoking it almost daily, including the date of his arrest.³ He began drinking alcohol approximately a year earlier, but reported his last drink had been on Christmas 2014. Minor also experimented with Xanax and "syrup," a mixture of codeine cough syrup, soda, and Jolly Ranchers, in summer of 2014. Minor denied involvement in gangs, but said he associated with members of the Norteños gang a year prior to his arrest.

Additionally, the dispositional report showed Minor was in danger of failing most of his middle school classes. Minor did not turn in classwork or attend his classes regularly. He also had various suspensions and reprimands for behavioral issues, including refusing to go to his workshops after class, cursing at the school principal and his staff, taking a knife and other contraband to school, and having gang-related graffiti in his locker; matching graffiti was also found on the wall around the corner from Minor's locker.

The juvenile court placed Minor under the supervision of the probation department and imposed various probation conditions, including a 6:00 p.m. curfew, a no-contact order as to the victim and Minor's co-offenders, and conditions that Minor be on time and attend school on a regular basis, complete his schoolwork, remain drug free, submit to regular drug testing, and submit to a search of his person, residence, vehicles, containers, and "electronics, including passwords, at the request of a Probation Officer or peace officer." Counsel for Minor objected to the electronic search condition and indicated that she would file a motion on the issue.

On April 3, 2015, Minor filed a motion to delete the electronic search condition. He argued the condition was invalid because "there is absolutely no evidence in the record to support the conclusion that the minor's use of an electronic device and/or social media account was either one of the reasons that the minor committed the instant offense, or that requiring the minor to submit to a warrantless search of the minor's electronic devices and/or social media accounts would in any way prevent the minor from committing an offense in the future."

³ Minor failed a drug test while released on probation before the hearing on his objection to the electronic search condition.

On April 28, 2015, the juvenile court held a hearing to address Minor's progress. The court expressed concerns over Minor testing positive for THC, as well as Minor's failing grades in school.

On May 29, 2015, the court denied Minor's motion to delete the electronic search condition. The court reasoned that Minor was "a classic case of why the electronic [search] condition is a necessity [because], as was basically alluded to, he has some fairly substantial drug issues." The court further stated, "The Court is very well aware, from experience, that our minors typically communicate much more with their electronics than they do face-to-face. In fact, it's very typical to see minors sitting at a table together, and they're on their electronics. . . . So, clearly their main method of communication is through the electronics."

"[I]f we can . . . supervise the minor, we need to use the electronics to make sure we can monitor the purchase, or sales, usage [of drugs]. There's a lot of minors who like to put the photographs of themselves on the internet, showing themselves with marijuana, with paraphernalia, smoking marijuana, smoking drugs, using other drugs. [¶] So, this is a really critical element in our ability to supervise our minors, and this is from the Court's experience with minors, experience with adult[s], but more particularly with minors. [¶] If we're going to, at all, ever be able to supervise the minor appropriately with drug conditions, we need to be able to have access to their electronics, including their passwords, and any—and other internet source of communication that they use."

II. DISCUSSION

A. Validity Under Lent

■ The juvenile court has broad discretion in imposing probation conditions it determines are "fitting and proper to the end that justice may be done and the reformation and rehabilitation of the [minor] enhanced." (Welf. & Inst. Code, § 730, subd. (b); see *In re Victor L.* (2010) 182 Cal.App.4th 902, 910 [106 Cal.Rptr.3d 584].) A probation condition is invalid if it "'(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.' " (*Lent, supra*, 15 Cal.3d at p. 486; *In re Baback S.* (1993) 18 Cal.App.4th 1077, 1084 [22 Cal.Rptr.2d 893].) Thus, a probation condition forbidding conduct which is not itself criminal is valid only if that conduct is reasonably related either to the crime which the minor committed or to the minor's future criminality. (*In re Baback S.*, at p. 1084.) We review probation conditions for abuse of discretion. (*In re J.B.* (2015) 242 Cal.App.4th 749, 754 [195 Cal.Rptr.3d 589].)

The issue of whether an electronic search probation condition may be imposed upon a juvenile when that condition has no relationship to the crimes committed is currently pending before our Supreme Court.⁴ Electronic search conditions nearly identical to those imposed here were also challenged in several cases within this appellate district. The condition was stricken as invalid under *Lent* by Division Two in *In re Erica R.* (2015) 240 Cal.App.4th 907 [192 Cal.Rptr.3d 919] (*Erica R.*) after the court found no reasonable connection between the search condition and the juvenile's future criminality. Division Three, in *In re J.B., supra*, 242 Cal.App.4th 749, struck the condition as invalid under *Lent* and constitutionally overbroad, and, in *In re Malik J.* (2015) 240 Cal.App.4th 896, 901–903 [193 Cal.Rptr.3d 370], found the condition valid under *Lent*, but modified it to alleviate its overbreadth. Division One, in *In re P.O.* (2016) 246 Cal.App.4th 288 [200 Cal.Rptr.3d 841] (*P.O.*), likewise found the condition valid under *Lent* and modified the condition to address its overbreadth.

Here, Minor argues the juvenile court erred in imposing the electronic search condition because the condition is not related to the underlying burglary offense, regulates conduct that is not illegal, and is not reasonably related to his future criminality. The Attorney General concedes the condition is not related to the underlying offense and that the regulated conduct is not criminal, but argues the condition is reasonably related to deterring Minor's future criminality because it allows probation officers to monitor Minor's adherence to his other probation conditions. We agree.

People v. Olguin (2008) 45 Cal.4th 375 [87 Cal.Rptr.3d 199, 198 P.3d 1] (*Olguin*) and *People v. Ebertowski* (2014) 228 Cal.App.4th 1170 [176 Cal.Rptr.3d 413] (*Ebertowski*) are instructive. In *Olguin*, our Supreme Court upheld a probation condition requiring the defendant to inform his probation officer of any pets in his residence. The defendant challenged the condition as invalid under *Lent*, arguing that pet ownership was not reasonably related to his crime or his future criminality. (*Olguin*, at p. 380.) Our high court disagreed, explaining that “[p]robation officers are charged with supervising probationers' compliance with the specific terms of their probation to ensure the safety of the public and the rehabilitation of probationers. Pets residing

⁴ *In re Ricardo P.* (2015) 241 Cal.App.4th 676 [193 Cal.Rptr.3d 883], review granted February 17, 2016, S230923; *In re Patrick F.* (2015) 242 Cal.App.4th 104 [194 Cal.Rptr.3d 847], review granted February 17, 2016, S231428; *In re Alejandro R.* (2015) 243 Cal.App.4th 556 [196 Cal.Rptr.3d 651], review granted March 9, 2016, S232240; *In re J.R.* (Dec. 28, 2015, A143163) (nonpub. opn.), review granted March 16, 2016, S232287; *In re Mark C.* (2016) 244 Cal.App.4th 520 [197 Cal.Rptr.3d 865], review granted April 13, 2016, S232849; *In re A.S.* (2016) 245 Cal.App.4th 758 [200 Cal.Rptr.3d 100], review granted May 25, 2016, S233932; and *In re A.D.* (April 26, 2016, A146136) (nonpub. opn.), review granted June 29, 2016, S234829; see *People v. Vasquez* (March 7, 2016, H039956) (nonpub. opn.), review granted May 25, 2016, S233855.

with probationers have the potential to distract, impede, and endanger probation officers in the exercise of their supervisory duties. By mandating that probation officers be kept informed of the presence of [pets], this notification condition facilitates the effective supervision of probationers and, as such, is reasonably related to deterring future criminality.” (*Id.* at p. 378.)

In *Ebertowski, supra*, 228 Cal.App.4th 1170, our colleagues in the Sixth Appellate District applied similar reasoning in the context of electronic search conditions. The defendant there pleaded no contest to making criminal threats and was placed on probation with terms including that he submit various electronic devices for search, provide the devices’ passwords, and turn over his passwords to his social media sites. (*Id.* at p. 1172.) The appellate court rejected the defendant’s claim that the conditions failed under *Lent*, holding that because the electronic search conditions facilitated the effective supervision of the defendant’s other undisputed terms, including that he discontinue his gang affiliation, the electronic search conditions were reasonably related to his future criminality. (*Id.* at p. 1177.) The court reasoned, “The only way that defendant could be allowed to remain in the community on probation without posing [a risk] to public safety was to closely monitor his gang associations and activities. The password conditions permitted the probation officer to do so. Consequently, the password conditions were reasonable under the circumstances” (*Ibid.*)

The same reasoning is applicable here. At the time Minor was placed on probation, Minor had a constellation of issues requiring intensive supervision: he had incurred multiple tardies and absences at school, received school reprimands and suspensions, admitted to being involved with members of the Norteño gang, and admitted to what the juvenile court described as a “pretty deep drug issue.” In denying Minor’s motion to strike the electronic search condition, the court expressed serious concern about Minor’s burglary and prior behavioral issues, including the extent of Minor’s use of marijuana, Xanax, alcohol, and “syrup.” The juvenile court then noted the electronic search condition would help the probation department “supervise the minor . . . [and] monitor the purchase, or sales, [or] usage” of drugs, calling the condition “*critical*” for Minor’s rehabilitation. (Italics added.) In light of this record, it was within the juvenile court’s discretion to impose the search condition as a means of effectively supervising Minor for his compliance with his drug conditions, as well as the rest of his undisputed probation conditions.⁵

Erica R., supra, 240 Cal.App.4th 907, and *In re J.B., supra*, 242 Cal.App.4th 749, both cited by defendant, are inapposite. In *Erica R.*,

⁵ The juvenile court’s need to closely supervise Minor was reinforced by Minor’s positive test for THC.

Division Two of this district struck down a similar electronic search probation condition that was imposed after the minor admitted to misdemeanor possession of Ecstasy. (*Erica R., supra*, at p. 910.) The minor's attorney objected to the condition, arguing that there were no issues with the minor's social media and that she did not have a phone. (*Ibid.*) Our colleagues struck the condition as invalid under *Lent*, finding that the record there—which does not reflect the array of criminal and social issues found in the case at hand—did not support the conclusion that the electronic search condition was related to the juvenile's future criminality. (*Id.* at p. 913.)

Similarly, in *In re J.B., supra*, 242 Cal.App.4th 749, the minor was placed on probation with terms including an electronic search condition upon his admission to petty theft. (*Id.* at p. 752.) The minor there had admitted to smoking marijuana for two years and his school records showed he had poor attendance and very poor grades. (*Id.* at p. 753.) Relying on *Erica R.*, Division Three struck down the condition as invalid under *Lent* and, further, as overbroad. The court reasoned that the record there, like the record in *Erica R.*, “[did] not support a conclusion that the electronic search condition [was] reasonably related to [the minor's] future criminal activity” and would instead serve only to “facilitate general oversight of the [minor's] activities.” (*In re J.B., supra*, at pp. 755, 758.)

The facts in both cases, however, are distinguishable from Minor's unique set of circumstances. Our colleagues recognized that whether a probation condition is reasonably related to a specific minor's future criminality is necessarily intertwined with the facts and circumstances surrounding the minor in question. (*Erica R., supra*, 240 Cal.App.4th at p. 914 [“Our holding is narrow. Of course, there can be cases where, based on a defendant's history and circumstances, an electronic search condition bears a reasonable connection to the risk of future criminality”]; *In re J.B., supra*, 242 Cal.App.4th at p. 754 [“[t]he reasonableness and propriety of the imposed condition is measured . . . by the circumstances of the current offense [and] the minor's entire social history”]; see *In re Binh L.* (1992) 5 Cal.App.4th 194, 203 [6 Cal.Rptr.2d 678] [“every juvenile probation condition must be made to fit the circumstances and the minor”].) As we have explained, Minor's deep-seated issues with drugs, including marijuana, Xanax, alcohol, and “syrup”; struggle with school attendance and grades; suspensions and reprimands for behavioral issues, including bringing a weapon to school, having gang graffiti inside his locker and elsewhere in its vicinity, and swearing at his school's principal and staff; prior association with Norteño gang members; and unstable home life all support the juvenile court's conclusion that the electronic search condition would “‘serve the rehabilitative function of precluding [Minor] from any future criminal acts.’” (*Erica R.*, at p. 913.)

Because the electronic search condition was reasonably related to Minor's future criminality, the juvenile court did not abuse its discretion in imposing it.

B. Overbreadth

Minor also contends the electronic search condition is overbroad because it is not narrowly tailored to limit its impact on his privacy rights.

■ “A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 [55 Cal.Rptr.3d 716, 153 P.3d 282].) “The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant’s constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.” (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153 [115 Cal.Rptr.3d 869].) We review constitutional challenges to probation conditions de novo. (*In re J.B., supra*, 242 Cal.App.4th at p. 754.)

We first address the Attorney General’s argument that Minor forfeited his constitutional challenge to the electronic search condition by failing to object on that basis below. Constitutional issues involving more than “‘pure questions of law[, i.e., issues] that can be resolved without reference to the particular sentencing record developed in the trial court,’” may generally not be raised for the first time on appeal. (*In re Sheena K., supra*, 40 Cal.4th at p. 889.) While it is true that Minor did not object on overbreadth grounds below, we believe he nevertheless preserved the issue by objecting to the imposition of the condition by reference to his Fourth Amendment rights and the purported “[lack of] evidence in the record” to support the juvenile court’s conclusion that the electronic search condition would rehabilitate him—essentially a contention that the condition was not narrowly tailored to Minor and unnecessarily infringed on his constitutional rights. Regardless of Minor’s purported forfeiture, we will consider the merits of his contention in the interest of justice as well as to obviate any claim that his trial counsel was ineffective in not interposing an objection. (*In re Luis F.* (2009) 177 Cal.App.4th 176, 183–184 [99 Cal.Rptr.3d 174] [appellate court has discretion to excuse a failure to object where error affects fundamental constitutional right].)

Citing *Riley v. California* (2014) 573 U.S. ___ [189 L.Ed.2d 430, 134 S.Ct. 2473] (*Riley*), Minor argues the electronic search condition implicates serious privacy concerns regarding “nearly every aspect” of his life and is therefore

overbroad. In *Riley*, the Supreme Court held that the warrantless search of a suspect's cell phone implicated and violated the suspect's Fourth Amendment rights. (*Riley, supra*, 573 U.S. at p. ____ [134 S.Ct. at p. 2493].) In so holding, the court rejected the government's argument that the search of a suspect's cell phone was "‘materially indistinguishable’" from the search of an arrestee or items such as wallets, explaining that modern cell phones, which may have the capacity to be used as mini-computers, can potentially contain sensitive information about a number of areas of a person's life. (*Id.* at p. ____ [134 S.Ct. at pp. 2488–2489].) The court reversed and remanded the case, but emphasized that its holding was only that cell phone data is subject to Fourth Amendment protection, "not that the information on a cell phone is immune from search." (*Id.* at p. ____ [134 S.Ct. at p. 2493].)

■ *Riley*, however, did not involve probation conditions and, as a result, is inapposite in this context.⁶ Unlike the defendant in *Riley*, who at the time of the search had not been convicted of a crime and was still protected by the presumption of innocence, Minor is a probationer. "Inherent in the very nature of probation is that probationers ‘do not enjoy “the absolute liberty to which every citizen is entitled.”’ [Citations.] Just as other punishments for criminal convictions curtail an offender’s freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." (*United States v. Knights* (2001)

⁶ At oral argument, Minor argued that the fact that his search condition includes electronics made it significantly different from other types of search conditions because electronics are a "bottomless pit" that could potentially disclose a large amount of personal information. However, courts have historically allowed parole and probation officers significant access to other types of searches, including home searches, where a large amount of personal information—from medical prescriptions, banking information, and mortgage documents to love letters, photographs, or even a private note on the refrigerator—could presumably be found and read. (See *People v. Balestra* (1999) 76 Cal.App.4th 57, 62, 65–68 [90 Cal.Rptr.2d 77] [upholding probationer’s broad home search condition]; *In re Binh L.*, *supra*, 5 Cal.App.4th 194, 198, 203–205 [upholding search conducted pursuant to juvenile probationer’s broad search condition]; *People v. Medina* (2007) 158 Cal.App.4th 1571, 1575–1580 [70 Cal.Rptr.3d 413] [upholding search conducted pursuant to probationer’s broad home search condition]; *People v. Reyes* (1998) 19 Cal.4th 743, 746, 754 [80 Cal.Rptr.2d 734, 968 P.2d 445] [upholding search conducted pursuant to parole condition requiring defendant to submit his residence and property under his control to search by law enforcement].) In cases involving probation or parole house search conditions, we have found no instances in which courts have carved out exceptions for the same type of information Minor argues could potentially be on his electronics. (But see *People v. Appleton* (2016) 245 Cal.App.4th 717, 725 [199 Cal.Rptr.3d 637] [remanding for narrowing adult probationer’s electronic search condition when electronics would be subject to forensic analysis].) Nor can we find any evidence in the record that Minor keeps medical, banking, financial, or otherwise intensely private information on his electronics. Even if that were the case, "[t]here is no reason to believe the probation department has the resources to retrieve cell phone records and scrutinize them line by line to detect potentially prohibited contacts [or activities]." (*In re Victor L.*, *supra*, 182 Cal.App.4th at p. 922.) Finally, although electronic devices might potentially contain more data than a home, there is nothing in the record suggesting this is true here.

534 U.S. 112, 119 [151 L.Ed.2d 497, 122 S.Ct. 587].) For purposes of privacy, a search condition diminishes, albeit does not entirely preclude, a probationer's reasonable expectation of privacy. (*In re Binh L.*, *supra*, 5 Cal.App.4th at pp. 203–205.) Moreover, as a juvenile, Minor is “deemed to be more in need of guidance and supervision than adults, and . . . [his] constitutional rights are more circumscribed. The state, when it asserts jurisdiction over a minor, stands in the shoes of the parents . . . [and] may ‘curtail a child’s exercise of . . . constitutional rights.’” (*In re Antonio R.* (2000) 78 Cal.App.4th 937, 941 [93 Cal.Rptr.2d 212].) Accordingly, although we agree with Minor that his right to privacy is implicated by the electronic search condition (*People v. Appleton*, *supra*, 245 Cal.App.4th at p. 724 [“individuals retain a constitutionally protected expectation of privacy in the contents of their own [electronics]”]), we nevertheless disagree with his contention that the challenged condition is unconstitutionally overbroad.⁷

Ebertowski, *supra*, 228 Cal.App.4th 1170 is, again, instructive. The defendant in *Ebertowski* was a violent criminal street gang member who made threats to armed police officers, physically resisted police officers, and promoted his gang on social media. (*Id.* at p. 1175.) On appeal, he argued that his nearly identical electronic search condition and, in particular, the condition that he turn over passwords to his devices and social media, was unconstitutionally overbroad. The appellate court rejected the defendant's claim. (*Ibid.*) Instead, the court reasoned that the “minimal invasion” into the defendant's privacy resulting from enforcement of the electronic search condition, including the password condition, was outweighed by the government's interest in protecting the public by ensuring that the defendant complied with his anti-gang probation conditions. (*Id.* at p. 1176.) The court further stated, “The evident purpose of the password conditions was to permit the probation officer to implement the search, association, and gang insignia conditions Access to all of defendant's devices and social media accounts is the only way to see if defendant is ridding himself of his gang associations and activities, as required by the terms of his probation” (*Id.* at p. 1175.)

The same is true here. Like the defendant in *Ebertowski*, Minor requires intensive supervision to ensure his compliance with his probation conditions.

⁷ Minor's reliance on *United States v. Jones* (2012) 565 U.S. 400 [181 L.Ed.2d 911, 132 S.Ct. 945], a case involving the warrantless installation of a GPS on a suspect's vehicle, is misplaced for the same reason. *Jones* did not involve a probationer and thus concluded that the defendant's reasonable expectation of privacy was higher than that which is afforded to juveniles and/or probationers. (See *In re Binh L.*, *supra*, 5 Cal.App.4th at pp. 203–205; *In re Antonio R.*, *supra*, 78 Cal.App.4th at p. 941.) Moreover, there is no indication in the record that the juvenile court or probation department intended to install any sort of tracking device or software on Minor's electronics.

Minor is chronically truant and has serious behavioral and educational issues, a difficult family life, and a significant drug and alcohol problem. Minor also already tested positive for THC while on probation. These collective circumstances justify the juvenile court's imposition of a broad electronic search condition as a means of adequately supervising Minor's compliance with his probation conditions and protect the public, as well as Minor, from Minor's future criminality. Moreover, given Minor's limited reasonable expectation of privacy, the intrusion into Minor's right to privacy is outweighed by the state's interest in ensuring his rehabilitation. (See *In re George F.* (2016) 248 Cal.App.4th 734 [203 Cal.Rptr.3d 607] [upholding probation condition requiring juvenile to submit his electronic devices and Internet sites or social media accounts, including all passwords, pass codes, and decryption information, for inspection by law enforcement]; *In re Victor L.*, *supra*, 182 Cal.App.4th at pp. 920–921 [probation condition banning possession of cell phones and pagers was not overbroad as it was narrowly tailored to prevent future criminal gang activity]; *In re Charles G.* (2004) 115 Cal.App.4th 608, 615 [9 Cal.Rptr.3d 503] ["the juvenile court has statutory authority to order delinquent wards to receive 'care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances' "].)

We further note that the record here does not support Minor's assertions that the electronic search condition actually intrudes into his privacy or "nearly every aspect" of his life. Nothing in the record shows Minor even has a cell phone or any electronic devices, and Minor does not point us to anything in the record showing any actual harms stemming from their inspection.⁸ Thus, rather than speculate on how Minor's privacy might be impacted by the search condition, we leave Minor to exercise his remedy in the juvenile court should he have specific concerns about how the electronic search condition impacts his privacy. (See § 1203.3, subd. (a) [defendant may file motion to modify probation condition].)

In so holding, we recognize that our colleagues in *P.O.* concluded that a nearly identical electronic search condition was overbroad as to the minor in

⁸ At oral argument, Minor suggested that the onus should be on the juvenile court to inquire into whether Minor had specific electronics or social media accounts in order to identify each item or account to be inspected by the probation department and avoid intrusion into those items it determined were personal in nature. We reject this contention. The court has a duty to closely tailor a probation condition to a Minor's needs. (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.) It does not, however, have the burden of conducting a line-by-line inventory and analysis of a probationer's potential objections to a probation condition. Minor here had the opportunity to support his objections to the electronic search condition by placing specific facts on the record, but chose not to do so.

question there, who admitted to misdemeanor public intoxication. (*P.O., supra*, 246 Cal.App.4th at p. 298.) The *P.O.* court, however, emphasized that the condition “[was] not sufficiently tailored because P.O.’s needs [were] less severe and the condition’s purpose [was] accordingly less expansive.” (*Ibid.*) That is not so here. As we have already explained, Minor’s circumstances and needs are numerous and fairly severe. A broad electronic search condition is appropriate for the level of supervision Minor requires.

In re White (1979) 97 Cal.App.3d 141 [158 Cal.Rptr. 562], cited by Minor, is also distinguishable. In *White*, the defendant was convicted of prostitution and placed on probation conditions, including that she not be present within specific designated prostitution areas, including where she used to live and where her friends and family resided. (*Id.* at p. 144.) She contended the condition was overbroad and violated her right to travel. The court agreed and remanded the matter to the trial court to modify the condition to pass constitutional muster or strike it. (*Ibid.*) Here, we are not dealing with a restriction on Minor’s right to travel but a search condition that is tailored to allow Minor’s adequate supervision while he is on probation. Accordingly, *White* is inapposite.

C. Section 632

Finally, Minor argues that the electronic search condition poses a risk of illegal eavesdropping under section 632.

Section 632, subdivision (a) provides: “Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, [is subject to a fine, incarceration, or both].”

■ By failing to raise this issue below at the hearing or in his written motion on the electronic search condition, Minor has forfeited this claim. (*People v. Scott* (1994) 9 Cal.4th 331, 351–354 [36 Cal.Rptr.2d 627, 885 P.2d 1040].) Moreover, Minor’s argument is premised on alleged harms to third parties whose rights he is not entitled to assert. (*B. C. Cotton, Inc. v. Voss* (1995) 33 Cal.App.4th 929, 947–948 [39 Cal.Rptr.2d 484] [“[C]ourts will not consider issues tendered by a person whose rights and interests are not affected”].)

III. DISPOSITION

The juvenile court's order is affirmed.

Ruvolo, P. J., and Reardon, J., concurred

Appellant's petition for review by the Supreme Court was granted October 12, 2016, S236628.

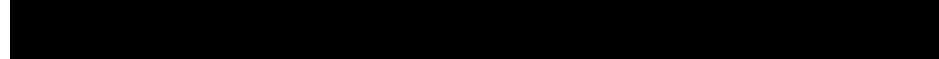
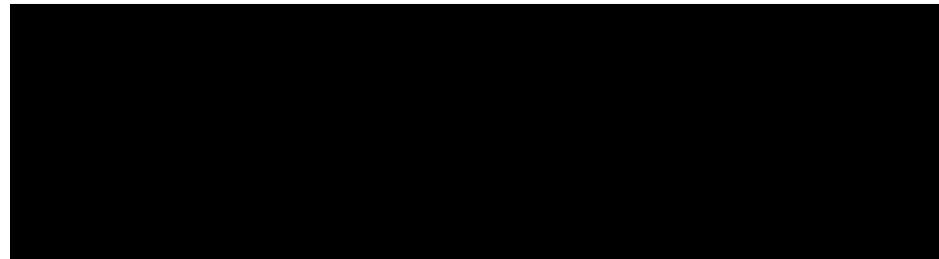
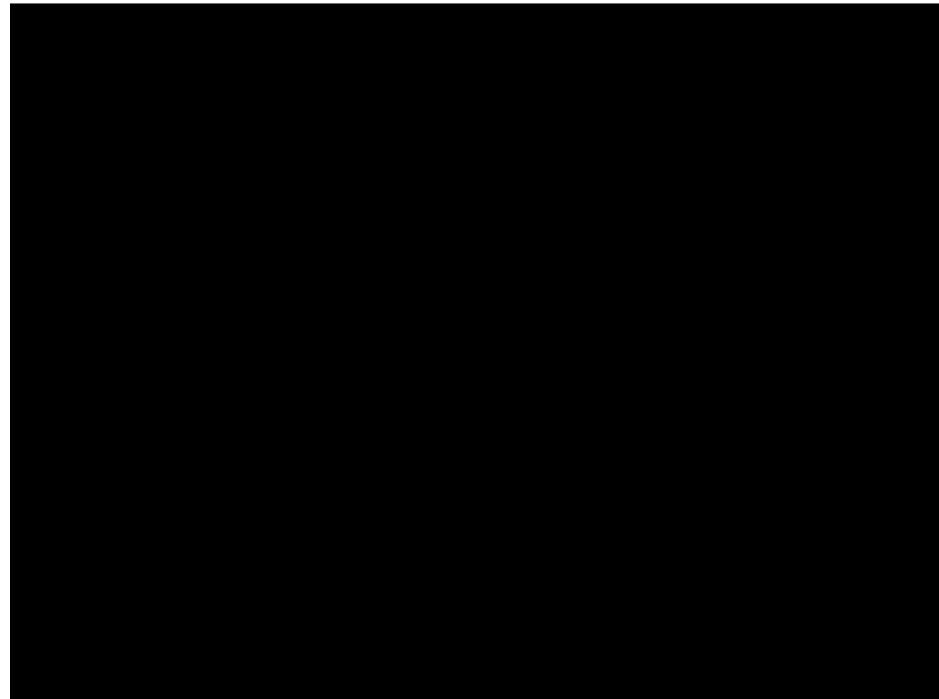
[No. B258638. Second Dist., Div. Six. July 21, 2016.]

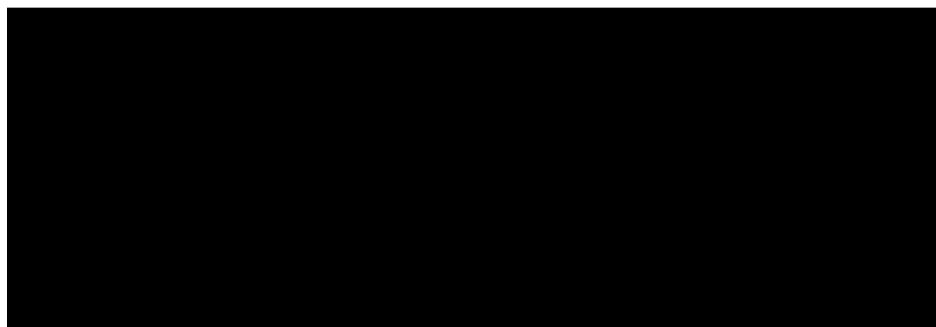
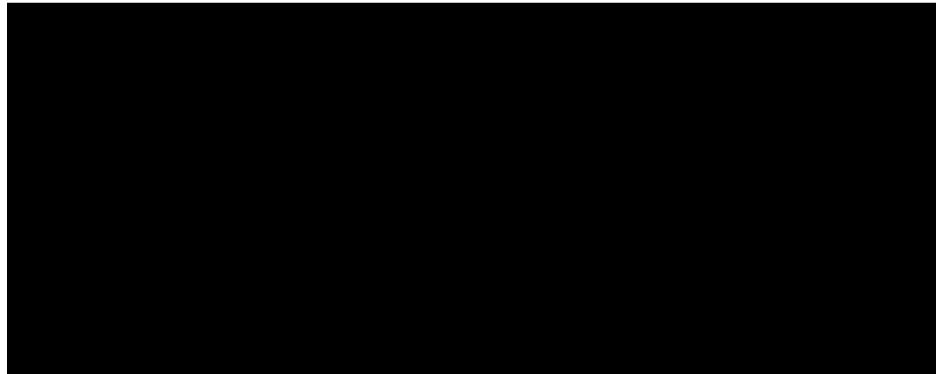
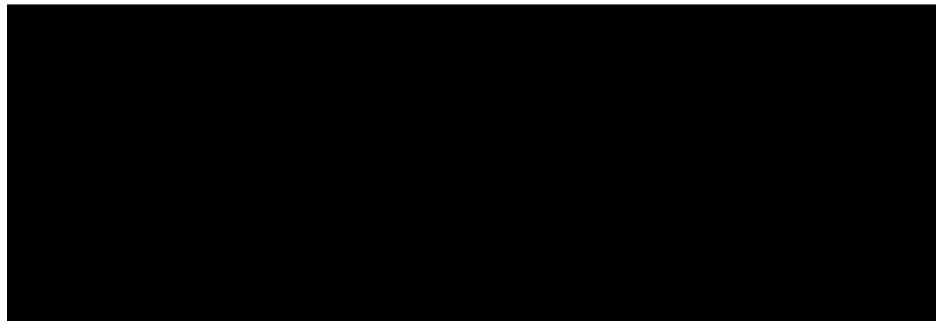
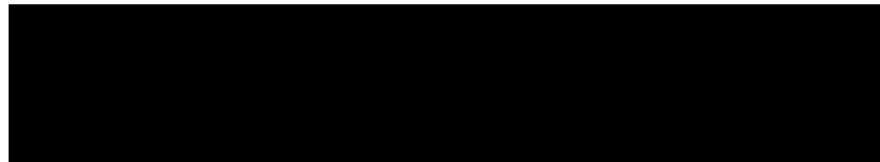
STEVEN WALTERS et al., Plaintiffs and Appellants, v.
CITY OF REDONDO BEACH et al., Defendants and Respondents;
REDONDO AUTO SPA et al., Real Parties in Interest and Respondents.

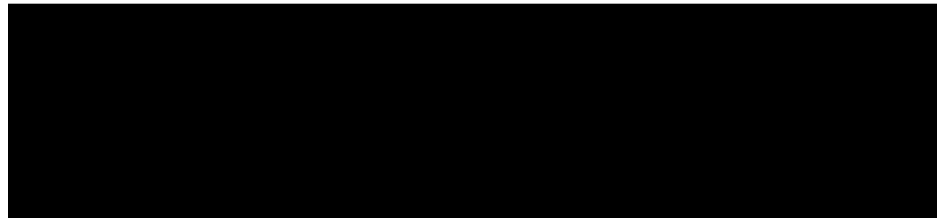
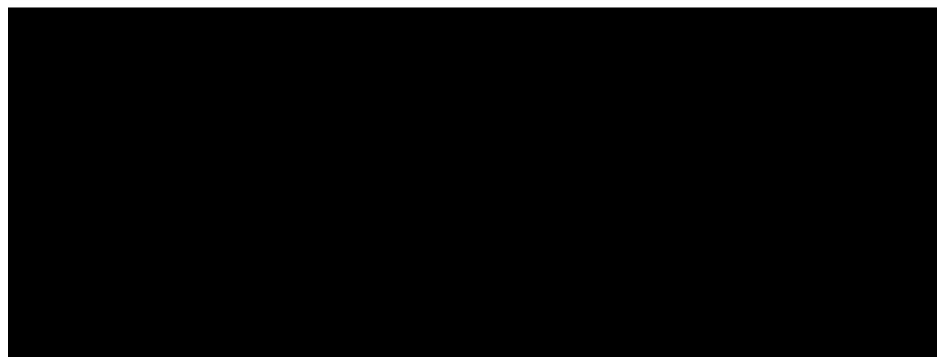
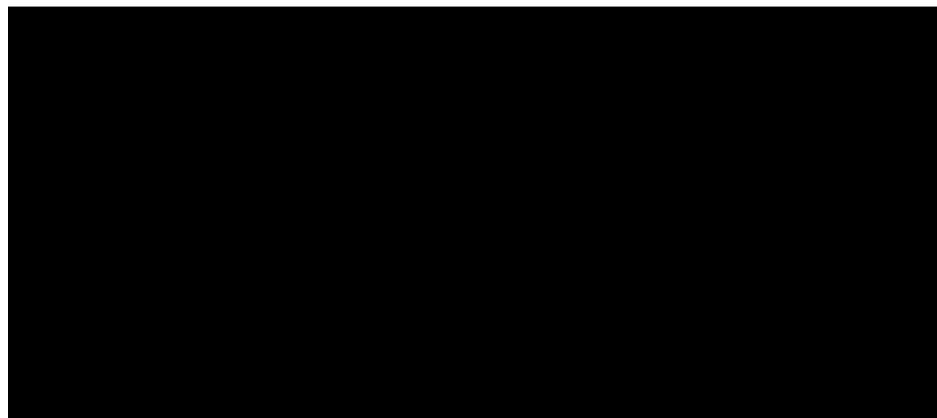
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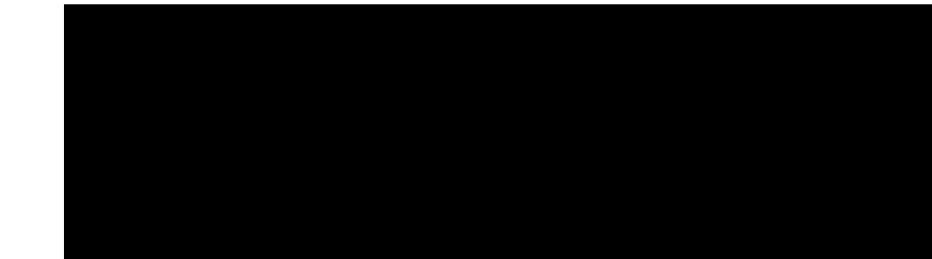
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COUNSEL

Buchalter Nemer and Robert M. Dato for Plaintiffs and Appellants.

Brian P. Barrow for Amicus Curiae on behalf of Plaintiffs and Appellants.

The Sohagi Law Group, Margaret M. Sohagi and R. Tyson Sohagi for Defendants and Respondents.

Tucker Ellis, Carmen A. Trutanich, Matthew I. Kaplan and Rebecca A. Lefler for Real Parties in Interest and Respondents.

OPINION

PERREN, J.—Respondent City of Redondo Beach (City) approved a conditional use permit (CUP) for construction of a combination car wash and coffee shop on a vacant lot adjacent to homes owned by appellants Steven Walters, Mark Kleiman, Rick Son, Krishna Gorripati and John Moore. In issuing the permit, the City found the project was categorically exempt from the requirements of the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.; CEQA)¹ because it involves the development of “new, small facilities or structures [and] installation of small new equipment and facilities in small structures.” (Guidelines, § 15303.)

¹ All further statutory references are to the Public Resources Code, unless otherwise indicated. The CEQA implementing guidelines appear at California Code of Regulations, title 14, section 15000 et seq., and will be referred to as the “Guidelines.”

Appellants filed a petition for writ of mandate challenging the City's decision. The trial court denied the petition, agreeing with the City that the project is categorically exempt from CEQA under Guidelines section 15303, subdivision (c) and that no exception to the exemption applies. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Respondents and real parties in interest Redondo Auto Spa and Chris McKenna (collectively Auto Spa) propose to build a full-service car wash and small coffee shop on a 25,000-square-foot lot at the northwest corner of Torrance Boulevard and South Irena Avenue in Redondo Beach. The property is located within a commercial (C-3) zone. The structure will consist of a 90-foot car wash tunnel and attached coffee shop that together will total 4,080 square feet. The remainder of the site will include 17 parking spaces for employees and coffee shop patrons, an area for drying cars, landscaping and a water feature. Entry to the car wash is from the residential street, just beyond the corner of the major street.

In 1965, the City approved a CUP for a car wash and snack bar at the same location. That car wash, which occupied 5,138 square feet of the parcel, operated until approximately June 2001. The property fell into disrepair. About five years later, appellants' homes on the abutting property lines were constructed. In 2012, the property was found to be a blight on the area and the City prosecuted the owner for nuisance and other charges. Auto Spa responded by demolishing the remaining structure and proposing to rebuild the car wash as an "express wash" model, in which patrons would vacuum their own cars and drive through the car wash tunnel. The City's planning commission (Commission) did not approve the plan. Among other things, it determined that the proposed use would have an adverse impact on abutting properties and that the site was not adequate in size and shape to accommodate the express wash project. Rather than appeal that decision, Auto Spa proposed a self-described "high end," full-service car wash and coffee shop.

The Commission granted a CUP for the full-service car wash and found that it was categorically exempt from CEQA under Guidelines section 15303, subdivision (c). The notice of exemption states that "[t]he project consists of the construction of a new car wash facility and coffee shop of 4,080-square feet in size on commercially zoned property. As such, it is consistent with the classes of projects described in CEQA Guidelines Section 15303(c) that states, in part, that commercial buildings not exceeding 10,000 square feet in floor area on sites zoned for such use if not involving the use of significant amounts of hazardous substances where all necessary public services and facilities are available and the surrounding area is not environmentally sensitive are considered exempt from further CEQA review. No potentially significant environmental impacts will result from the project."

The Commission added certain restrictions to the project, requiring that the equipment not exceed the Redondo Beach Municipal Code (Municipal Code) noise limit, that no detailing equipment be used that is audible or discernable at the property line from the other on-site equipment, and that operating hours be limited. The Commission further required that the number of vehicles washed be limited to 20 vehicles per hour and to no more than 200 vehicles per day (referred to as Condition 24). Coffee shop hours were set at 7:00 a.m. to 8:00 p.m. seven days a week. Walters and Kleiman appealed the decision to the City Council.

Auto Spa provided a traffic study, conducted by Gibson Transportation Consulting (Gibson), which concluded that the proposed car wash would not change the level of service at the intersection from its present "A" status, even at peak operating times. It also commissioned a noise study by Davy & Associates (Davy), which determined that the only significant noise source would be the blower/dryer systems inside the car wash tunnel. Davy concluded that noise would largely be contained by the design and materials to be used in constructing the facility.

Before the hearing on the appeal, Auto Spa requested removal of Condition 24. It claimed that 200 cars per day would not be profitable for the car wash. The City Council approved the project subject to certain conditions, including compliance with the City's noise ordinance (Condition 20), a vehicle limit of 10,000 cars per month and limitations on the car wash's operating hours.² Condition 20 requires that compliance with the noise standards be tested and documented prior to the final inspection and opening of the car wash.

With these and other conditions in place, the City Council determined (1) the building site is adequate in size to accommodate the proposed use; (2) the proposed use has adequate street access and will not have a significant impact on traffic; (3) the proposed use will have no adverse effect on abutting properties; (4) the noise that will be generated by the car wash blowers and vacuum drops does not exceed the permitted interior and exterior limits; (5) the project is exempt from CEQA under Guidelines section 15303, subdivision (c); and (6) the project will not have a significant effect on the environment.

Appellants filed a petition for writ of mandate challenging the CEQA exemption and the City's issuance of a CUP. After briefing and a hearing, the trial court denied the writ petition, concluding that the project is categorically

² The permitted hours of operation for the car wash are from 8:00 a.m. to 6:00 p.m. during daylight savings time and 8:00 a.m. to 5:00 p.m. during standard time, except on Sundays, where the hours are from 9:00 a.m. to 4:00 p.m.

exempt under Guidelines section 15303, subdivision (c), and that the CUP was properly issued. This appeal followed.³

DISCUSSION

A. CEQA Overview

“CEQA and its implementing administrative regulations [Guidelines] establish a three-tier process to ensure that public agencies inform their decisions with environmental considerations. [Citation.] The first tier is jurisdictional, requiring that an agency conduct a preliminary review to determine whether an activity is subject to CEQA.” (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 379–380 [60 Cal.Rptr.3d 247, 160 P.3d 116], fn. omitted (*Muzzy Ranch*).) “CEQA applies if the activity is a ‘project’ under the statutory definition, unless the project is exempt. [Citations.]” (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1373 [44 Cal.Rptr.3d 128].)

“The second tier concerns exemptions from CEQA review,” which include “categorical exemptions or ‘classes of projects’ that the . . . agency has determined to be exempt per se because they do not have a significant effect on the environment. [Citations.] [¶] . . . [¶] If a public agency properly finds that a project is exempt from CEQA, no further environmental review is necessary. [Citation.] The agency need only prepare and file a notice of exemption [citations], citing the relevant statute or section of the CEQA Guidelines and including a brief statement of reasons to support the finding of exemption [citation].” (*Muzzy Ranch, supra*, 41 Cal.4th at p. 380.) The “third tier applies if the agency determines substantial evidence exists that an aspect of the project may cause a significant effect on the environment.” (*Id.* at p. 381.)

Here, it is undisputed that the proposed car wash qualifies as a “project” under CEQA. The issues on appeal concern the second tier of the CEQA analysis, i.e., whether the City erred in finding that the car wash project is categorically exempt from CEQA and that there are no unusual circumstances creating a reasonable possibility the activity will have a significant effect on the environment. (See Guidelines, §§ 15303, subd. (c), 15300.2, subd. (c).)

“In considering a petition for a writ of mandate in a CEQA case, ‘[o]ur task on appeal is “the same as the trial court’s.”’ [Citation.] Thus, we conduct

³ With our permission, Building Better Redondo, Inc. (BBR), filed an amicus curiae brief supporting appellants’ position. We have considered its arguments in addition to those raised by the parties.

our review independent of the trial court's findings.' [Citation.] Accordingly, we examine the City's decision, not the trial court's." (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 257 [42 Cal.Rptr.3d 537].)

B. Application of Categorical Exemption

The City determined that the car wash project fell within class 3 of the CEQA categorical exemptions. Appellants argue this determination was incorrect as a matter of law. To the extent this argument "turns only on an interpretation of the language of the Guidelines or the scope of a particular CEQA exemption, this presents 'a question of law, subject to de novo review by this court.'" (*Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 693 [46 Cal.Rptr.3d 387].) But "[w]here the record contains evidence bearing on the question whether the project qualifies for the exemption, such as reports or other information submitted in connection with the project, and the agency makes factual determinations as to whether the project fits within an exemption category, we determine whether the record contains substantial evidence to support the agency's decision." (*Id.* at p. 694.)

■ The relevant class 3 exemption involves "[1] construction and location of limited numbers of new, small facilities or structures" and "[2] installation of small new equipment and facilities in small structures." (Guidelines, § 15303.) This exemption typically applies "when the project consists of a small construction project and the utility and electrical work necessary to service that project." (*Voices for Rural Living v. El Dorado Irrigation Dist.* (2012) 209 Cal.App.4th 1096, 1109 [147 Cal.Rptr.3d 480] (*Voices*).) "Examples of this exemption include *but are not limited to*: [¶] . . . [¶] (c) A store, motel, office, restaurant or similar structure not involving the use of significant amounts of hazardous substances, and not exceeding 2500 square feet in floor area. In urbanized areas, the exemption also applies to up to four such commercial buildings not exceeding 10,000 square feet in floor area on sites zoned for such use if not involving the use of significant amounts of hazardous substances where all necessary public services and facilities are available and the surrounding area is not environmentally sensitive." (Guidelines, § 15303, subd. (c), italics added.)

The parties do not dispute that the proposed car wash project is located in an urbanized area. Their dispute centers on whether a car wash generally fits within the definition of commercial buildings in Guidelines section 15303, subdivision (c), and whether the car wash at issue here, at 4,080 square feet, is within that section's size restrictions. Appellants acknowledge the Guidelines exempt a "store, motel, office, restaurant or similar structure," but

contend there is nothing in the exemption that would indicate it was intended to cover the installation of industrial equipment. They argue that the types of equipment installed at a car wash, such as blowers, vacuums, air nozzles and waste treatment, are not anticipated by Guidelines section 15303, subdivision (c). We disagree.

■ First, the Guidelines themselves say it is not limited to the listed examples of a store, motel, office or restaurant. It also includes “similar structure[s].” (Guidelines, § 15303, subd. (c).) Car washes are similar to stores, motels, offices and restaurants in that they are commercial businesses that serve consumers, require the parking of consumers’ vehicles, contain equipment and often are located in or near residential areas. Moreover, the proposed car wash includes a coffee shop, which qualifies as a restaurant. Appellants cite no case authority suggesting that a car wash and coffee shop combination cannot qualify for the exemption under section 15303, subdivision (c).

In addition, we reject appellants’ contention that the equipment intended to be used at a car wash is substantially different from the types of equipment associated with a store, motel, office or restaurant that is up to 10,000 square feet in size. As Auto Spa points out, these types of buildings typically have centralized heating, ventilation and air conditioning plants with chillers, cooling towers, commercial laundry facilities and commercial kitchens with ventilation systems.

■ Nor are we persuaded by appellants’ argument that Guidelines section 15303, subdivision (c) does not apply to a *single* commercial building in excess of 2,500 square feet. This argument was rejected by *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243 [89 Cal.Rptr.2d 233] (*Fairbank*), which held “[t]he most plausible reading of . . . Guidelines section 15303(c), as amended in October 1998, is that a commercial project to be built in an urbanized area may be found to be exempt if it involves the construction of one, two, three, or four commercial buildings on a parcel zoned for such use, so long as the total floor area of the building(s) does not exceed 10,000 square feet. . . . [I]t does not make sense to interpret the exemption as applicable to the construction of *four* 2,500-square-foot buildings on a given parcel, but not to *one* building of 10,000 square feet or less on the same parcel.” (*Id.* at p. 1258.)

■ There is no dispute that the proposed car wash and coffee shop is a commercial structure of less than 10,000 square feet that is to be built in an urbanized area zoned for commercial use. There also is no dispute that “all necessary public services and facilities are available” and that the surrounding area is not considered “environmentally sensitive.” (Guidelines, § 15303,

subd. (c.) The City properly determined, therefore, that the car wash and coffee shop project satisfies the categorical exemption requirements of Guidelines section 15303, subdivision (c).

Appellants argue that even if the exemption could apply to a car wash and coffee shop in some instances, it does not apply here because the proposed project will be utilizing hazardous chemicals. While it is true that the exemption in Guidelines section 15303, subdivision (c) applies only to commercial buildings that do “not involv[e] the use of significant amounts of hazardous substances,” appellants have not offered any evidence suggesting that the soaps or detergents to be used at the proposed car wash are hazardous, or that any significant amount of hazardous substances will be used. To the contrary, they offer documents that state that the soaps are biodegradable and are “verified nonhazardous per [the Occupational Safety and Health Administration].” Appellants’ speculation that the car wash operation might include hazardous substances is not supported by the administrative record.

C. Unusual Circumstances Exception to Categorical Exemption

Appellants contend that even if Guidelines section 15303, subdivision (c) does apply to the proposed car wash and coffee shop, several factors inherent in the project preclude the use of a categorical exemption because “there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” (Guidelines, § 15300.2, subd. (c.) As we shall explain, the record does not support application of this “unusual circumstances” exception to the exemption.

1. Analytical Framework and Standards of Review

■ In assessing whether the unusual circumstances exception applies, we engage in two alternative analyses, as delineated by our Supreme Court in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1105 [184 Cal.Rptr.3d 643, 343 P.3d 834] (*Berkeley Hillside*). “In the first alternative, . . . a challenger must prove both unusual circumstances and a significant environmental effect that is due to those circumstances. In this method of proof, the unusual circumstances relate to some feature of the project that distinguishes the project from other features in the exempt class.” (*Citizens for Environmental Responsibility v. State ex rel. 14th Dist. Ag. Assn.* (2015) 242 Cal.App.4th 555, 574 [195 Cal.Rptr.3d 168] (*Citizens*)).⁴ “Once

⁴ At the time of briefing in this appeal, *Citizens* had not been decided. At our request, the parties provided supplemental briefing discussing the impact of that case on the standard of review and other issues pending before us.

an unusual circumstance is proved under this method, then the ‘party need only show a *reasonable possibility* of a significant effect due to that unusual circumstance.’” (*Ibid.*)

Whether the project presents unusual circumstances under this alternative is a factual inquiry subject to the traditional substantial evidence standard of review. (*Berkeley Hillside, supra*, 60 Cal.4th at p. 1114.) This standard requires that we “‘resolv[e] all evidentiary conflicts in the agency’s favor and indulg[e] in all legitimate and reasonable inferences to uphold the agency’s finding.’” (*Citizens, supra*, 242 Cal.App.4th at p. 575.)

■ If unusual circumstances are found under this first alternative, “agencies . . . apply the fair argument standard in determining whether ‘there is a reasonable possibility [of] a significant effect on the environment due to unusual circumstances.’” (*Berkeley Hillside, supra*, 60 Cal.4th at p. 1115, quoting Guidelines, § 15300.2, subd. (c).) Under this standard, “‘an agency is merely supposed to look to see if the record shows substantial evidence of a fair argument that there may be a significant effect. [Citations.] In other words, the agency is not to weigh the evidence to come to its own conclusion about whether there will be a significant effect. It is merely supposed to inquire, as a matter of law, whether the record reveals a fair argument. . . .’” (*Berkeley Hillside*, at p. 1104, italics omitted.)

■ In the second alternative under *Berkeley Hillside*, a challenger “may establish an unusual circumstance with evidence that the project *will have* a significant environmental effect.” (*Berkeley Hillside, supra*, 60 Cal.4th at p. 1105, italics added.) “When it is shown ‘that a project otherwise covered by a categorical exemption will have a significant environmental effect, it necessarily follows that the project presents unusual circumstances.’” (*Id.* at pp. 1105–1106, italics omitted.) “But a challenger must establish more than just a fair argument that the project will have a significant environmental effect. [Citation.] A party challenging the exemption, must show that the project *will have* a significant environmental impact.” (*Citizens, supra*, 242 Cal.App.4th at p. 576.) “In other words, a showing by substantial evidence that a project *will have* a significant effect on the environment satisfies both prongs of the unusual circumstances exception under the second method of establishing the exception.” (*Ibid.*)

2. First Alternative—Features of the Project as Unusual Circumstances

■ The Guidelines do not define “unusual circumstances.” (See *Voices, supra*, 209 Cal.App.4th at p. 1109; *San Francisco Beautiful v. City and County of San Francisco* (2014) 226 Cal.App.4th 1012, 1023 [172 Cal.Rptr.3d 134].)

Berkeley Hillside clarified that a party can show an unusual circumstance by demonstrating that the project has some characteristic or feature that distinguishes it from others in the exempt class, such as its size or location. (*Berkeley Hillside*, *supra*, 60 Cal.4th at p. 1105; *Citizens*, *supra*, 242 Cal.App.4th at p. 576.) But “[t]he presence of comparable facilities in the immediate area adequately supports [an] implied finding that there were no ‘unusual circumstances’ precluding a categorical exemption.” (*Bloom v. McGurk* (1994) 26 Cal.App.4th 1307, 1316 [31 Cal.Rptr.2d 914] (*Bloom*); see *San Francisco Beautiful*, at p. 1025 [“There is no basis to conclude the addition of 726 additional utility cabinets would be ‘unusual’ in the context of the City’s urban environment, which is already replete with facilities mounted on the public rights-of-way”]; *City of Pasadena v. State of California* (1993) 14 Cal.App.4th 810, 826–827 [17 Cal.Rptr.2d 766] [“We conclude that the lease of the Walnut Street site for use as a parole office does not constitute an ‘unusual circumstance’ within the meaning of CEQA in light of the presence of the other custodial and criminal justice facilities in the immediate area”], disapproved on other grounds as stated in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570, fn. 2 [38 Cal.Rptr.2d 139, 888 P.2d 1268].)

As previously discussed, there is nothing particularly unusual about the proposed car wash and coffee shop. The evidence establishes that there are many other car washes in the surrounding area, including a car wash within a minute’s drive from the project site, five car washes within two miles and 12 car washes within a 10-minute drive. Indeed, the site itself was a car wash and snack bar for nearly 40 years, strongly suggesting that the circumstances are not the least bit unusual.

Appellants contend that the presence of “large air blowers and other outdoor activities that are conducted outside of the ‘structures’ seven days a week” makes the car wash “unusual.” As Auto Spa observes, however, the examples in the Guidelines are not qualitatively different from a car wash. Restaurants and stores generally are open seven days a week; indeed, fast food restaurants and convenience stores are often open 24 hours a day. Restaurants and stores routinely have outside activities such as sidewalk displays, outdoor seating for customers or drive-through windows. Motels are necessarily 24-hour operations with parking lots and perhaps pools or other outdoor recreation areas and related equipment.

The general effects of an operating business, such as noise, parking and traffic, cannot serve as unusual circumstances in and of themselves. In *Fairbank*, *supra*, 75 Cal.App.4th 1243, the trial court concluded there was nothing unusual about traffic and parking problems relating to a 5,855-square-foot commercial retail/office building. The court explained that challengers to

the project had to show some feature “that distinguishes it from any other small, run-of-the-mill commercial building or use. Otherwise, no project that satisfies the criteria set forth in Guidelines section 15303(c) could ever be found to be exempt. There is nothing about the proposed 5,855-square-foot retail/office building that sets it apart from any other small commercial structure to be built in an urbanized area, without the use of hazardous substances and without any showing of environmental sensitivity.” (*Id.* at p. 1260; see also *Bloom, supra*, 26 Cal.App.4th at p. 1316 [area zoned for facility precluded finding use was unusual]; *Association for Protection etc. Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, 734–736 [3 Cal.Rptr.2d 488] [objections to a single-family home based on height, view, privacy and water runoff are “normal and common considerations in the construction of a single-family residence and are in no way due to ‘unusual circumstances’ ”].)

■ Appellants cite *Lewis v. Seventeenth Dist. Agricultural Assn.* (1985) 165 Cal.App.3d 823 [211 Cal.Rptr. 884] for the proposition that the proximity to residences is itself an unusual circumstance, arguing that the noise and dust generated by the stock-car racing track at issue there is similar to the issues presented by the car wash project here. But the unusual circumstances prong of the exception was neither disputed nor analyzed in *Lewis*. (*Citizens, supra*, 242 Cal.App.4th at p. 585 [“It does not appear that the unusual circumstances prong of the exception was a matter of active dispute in *Lewis* as there was substantive analysis only on the significant effect prong”].) “[C]ases are not authority for propositions not considered.” (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388 [53 Cal.Rptr.2d 81, 916 P.2d 476].) Moreover, it is axiomatic that a car racetrack is far more unusual next to a residential neighborhood than the continuation of a long-standing car wash on the corner of a busy intersection near residential properties. (See *Citizens*, at pp. 584–585.)

We conclude appellants have not identified substantial evidence supporting a finding of unusual circumstances based on the features of the car wash and coffee shop project. To the contrary, we conclude the City’s findings on this issue are supported by substantial evidence.⁵ (*Berkeley Hillside, supra*, 60 Cal.4th at p. 1114.)

⁵ Because we conclude appellants have not met their burden of showing unusual circumstances based on the features of the project, we need not address whether there is a *reasonable possibility* of a significant environmental impact as a result of unusual circumstances. (*Citizens, supra*, 242 Cal.App.4th at p. 588, fn. 24 [“A negative answer as to the question of whether there are unusual circumstances means the exception [under the first alternative] does not apply”].)

3. Second Alternative—Significant Effect on the Environment as an Unusual Circumstance

■ The next question is whether appellants have established unusual circumstances under the alternative method of showing that the project *will have* a significant environmental effect. As discussed above, the reason for this alternative method is that “evidence that the project *will* have a significant effect *does* tend to prove that some circumstance of the project is unusual.” (*Berkeley Hillside, supra*, 60 Cal.4th at p. 1105.) “Thus, a challenger seeking to prove unusual circumstances based on an environmental effect must provide or identify substantial evidence indicating (1) the project will actually have an effect on the environment and (2) that effect will be significant.” (*Citizens, supra*, 242 Cal.App.4th at p. 589.) “A significant effect on the environment” is “a substantial adverse change in the physical conditions which exist in the area affected by the proposed project.” (Guidelines, § 15002, subd. (g).)

As in *Citizens*, appellants’ focus before the City and the trial court was not on whether the project actually will have a significant effect on the environment, but rather on whether there is a reasonable possibility that the project may have a significant environmental impact. (See *Citizens, supra*, 242 Cal.App.4th at p. 589.) Appellants claimed there is a fair argument that the car wash and coffee shop may have significant adverse noise and traffic effects in the area. “However, the evidence they rely upon and their arguments fall well short of establishing that the . . . project *will have* a significant environmental effect on the [area].” (*Ibid.*)

a. Noise

Appellants contend their noise expert, Evro Wee Sit, demonstrated that the operation of the car wash would violate the City’s interior and exterior noise limits at the abutting property line. This is not possible, however, because approval of the project is conditioned upon Auto Spa’s adherence to the City’s interior and exterior noise limits. Condition 20 states “the owner/operator shall be responsible to install and maintain all equipment on the property so as ‘to reduce noise levels’ to meet the standards stated in the City’s Noise Ordinance, specifically that there shall be no noise that exceeds 65 dBA as measured at the north property line for a period of thirty (30) minutes or more per hour, and that there shall also be compliance with the interior noise standards as stated in Section 4-24.401 as measured for 5 minutes, unless the residents of the adjacent residences deny access to their units for the purpose of measuring the interior noise standards. *Compliance with these requirements shall be tested and documented prior to the final inspection and opening of the car wash operation.*” (Italics added.)

Appellants and BBR argue Condition 20 violates CEQA's fundamental rule that environmental impacts, if any, must be reviewed and mitigated before approval of the land use project. We are not persuaded. After considering the parties' expert evidence, the City found that "the noise generated by the car wash blowers and vacuum drops does not exceed the permitted interior and exterior limits," and that "the project will not have a significant effect on the environment, subject to the modifications of the design review and conditions of approval." Hence, the City concluded that the project, as approved, complies with the noise ordinance requirements, but took a "belt and suspenders" approach by requiring Auto Spa to prove that those requirements are satisfied. If Auto Spa fails to do so, it will not be permitted to operate until needed modifications are made. As the trial court observed, appellants' "argument that the City does not have the necessary measuring equipment at present to test compliance with its noise standards is interesting but remediable in any number of ways—and not a reason to deny the CUP."

Furthermore, *Berkeley Hillside* clarified that "a finding of environmental impacts must be based on the proposed project as actually approved . . ." (*Berkeley Hillside, supra*, 60 Cal.4th at p. 1119.) If the project cannot be built as approved, the applicant must apply for approval of a different project. (*Ibid.*) Auto Spa concedes, therefore, that if it cannot construct a car wash that complies with the interior and exterior noise ordinance, it will have to apply for and obtain approval for a different project.

Auto Spa further concedes that Condition 20 contains a typographical error in that it states "there shall be no noise that exceeds 65 dBA as measured at the north property line for a period of thirty (30) minutes or more per hour . . ." The actual ordinance specifies a maximum limit of 60 dBA (decibel A-weighting). Auto Spa judicially admits that it must satisfy the 60 dBA exterior noise limit reflected in the ordinance.

In sum, the City found that the project will operate within the noise limitations but, by imposing Condition 20, the City has ensured that any violation of the noise ordinance will be corrected before the car wash and coffee shop are permitted to operate. Condition 20 also requires Auto Spa to continue to "maintain all equipment on the property so as 'to reduce noise levels' to meet the standards stated in the City's Noise Ordinance." Given these assurances, appellants have not met their burden of showing that the noise generated by the project actually will have a significant environmental effect. (See *Citizens, supra*, 242 Cal.App.4th at p. 589.)

b. *Traffic*

Appellants assert that their traffic expert, Arthur Kassan, demonstrated that the proposed car wash and coffee shop would adversely impact local traffic and pose public safety concerns around the immediate area due to the small lot size, site congestion, traffic bottlenecks and other issues. This assertion is contradicted by appellants' expert (Gibson), which provided significant evidence that the intersection currently operates at level A, the highest level of service, and would continue to operate at that level even at peak operating times for the car wash and coffee shop. According to the standards of the City's circulation element,⁶ the car wash and coffee shop will not "significant[ly] impact" traffic in the area, will not require a new traffic signal at the intersection and will generate less traffic than alternate land uses. Indeed, Auto Spa's expert testified that "the City of Redondo Beach's criteria for a significant impact says that a project can't have a significant impact until the intersections are up and running at level [of] service C or worse. So we're at A, and we have no impact."

Appellants concede the project will not result in any significant impacts under the City's circulation element traffic significance thresholds. They focus instead on the internal efficiency of the project. They argue that the design of the car wash and coffee shop is inefficient and will cause backups within the project property. This argument not only is speculative, but it also is contradicted by Gibson's report and by the City's finding that any such backups could be avoided by managing the flow of cars through the car wash.

Appellants also cite no authority suggesting that parking issues or the movement of cars on the property may be considered "traffic" as defined by CEQA. The Guidelines and case law clarify that traffic impacts for CEQA purposes relate to the flow of vehicles in public spaces. (See *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 782 [166 Cal.Rptr.3d 1] ["In general, CEQA does not regulate environmental changes that do not affect the public at large"].) The movement of cars on the property affects only those persons on the property, not the general public.

At best, appellants point to evidence suggesting that the project possibly could have a periodic negative effect on traffic. This is insufficient to meet their burden of identifying evidence that the project actually *will have* a significant impact on the environment by causing "a substantial adverse

⁶ Trip generation rates for the project were created using rates derived from the Institute of Transportation Engineers Trip Generation Manual (9th ed.), which contains an industry-standard methodology for calculating trip generation based upon the square footage of the proposed structure and its use. (See *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 910 [98 Cal.Rptr.3d 137].)

change in the physical conditions which exist in the area.” (Guidelines, § 15002, subd. (g); see *Citizens, supra*, 242 Cal.App.4th at p. 589.) As the trial court aptly summarized, “Gibson prepared a video that pictorially illustrated [its] conclusion that various traffic loads do not reduce the ‘level of service’ below [level of service] A, the highest level of service. It is clear that approval by the City Council of the change to a higher, monthly limit in August 2013 was motivated in significant part by the content of that video which was played at that meeting and which illustrated the capacity of the intersection, etc., to absorb at least the traffic level ultimately approved—and still have a ‘level of service’ of the highest rating, ‘A.’ [¶] . . . Level of Service ‘A’ is the highest traffic category possible and there is not a fair argument that the traffic level will fall below that with the change adopted by the Council”

4. Conclusion

Since appellants have failed to establish unusual circumstances under either *Berkeley Hillside* alternative, the exception does not preclude application of the class 3 categorical exemption for “new, small facilities or structures [and] installation of small new equipment and facilities in small structures.” (Guidelines, § 15303.) We conclude the City properly determined the car wash and coffee shop project is categorically exempt under the CEQA Guidelines.

D. Compliance with Municipal Code

Appellants argue that the City erred in issuing the CUP. They contend the City violated the Municipal Code in three respects. First, they argue that the lot has an inadequate size and shape to accommodate the car wash. This argument lacks merit given that the lot successfully accommodated a car wash and snack bar for decades. Indeed, the record reflects that the old car wash tunnel was in a similar location to the new tunnel.

Second, appellants argue that the noise will disrupt health, safety and welfare, particularly with respect to noise and traffic. As discussed above, the project, as approved, requires strict compliance with the City’s noise ordinance, and substantial evidence establishes that it will not significantly impact traffic flow in the area.

Finally, appellants contend that “all potential adverse impacts that may be created by a proposed project must be addressed, which may include additional light, glare, noise, vibrations, odors, air or water pollution, traffic, parking, and other potentially undesirable impacts.” The record reflects that the City did address these impacts. It expressly found that “[t]he design of the

project considers the impact and needs of the user in respect to circulation, parking, traffic, utilities, public services, noise and odor, privacy, private and common open spaces, trash collection, security and crime deterrence, energy consumption, physical barriers, and other design concerns.” Appellants offer no reliable authority or legal support demonstrating that the City’s findings were not supported by substantial evidence or that they should be reversed. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1066, 1078 [123 Cal.Rptr.2d 278].)

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

Gilbert, P. J., and Yegan, J., concurred.

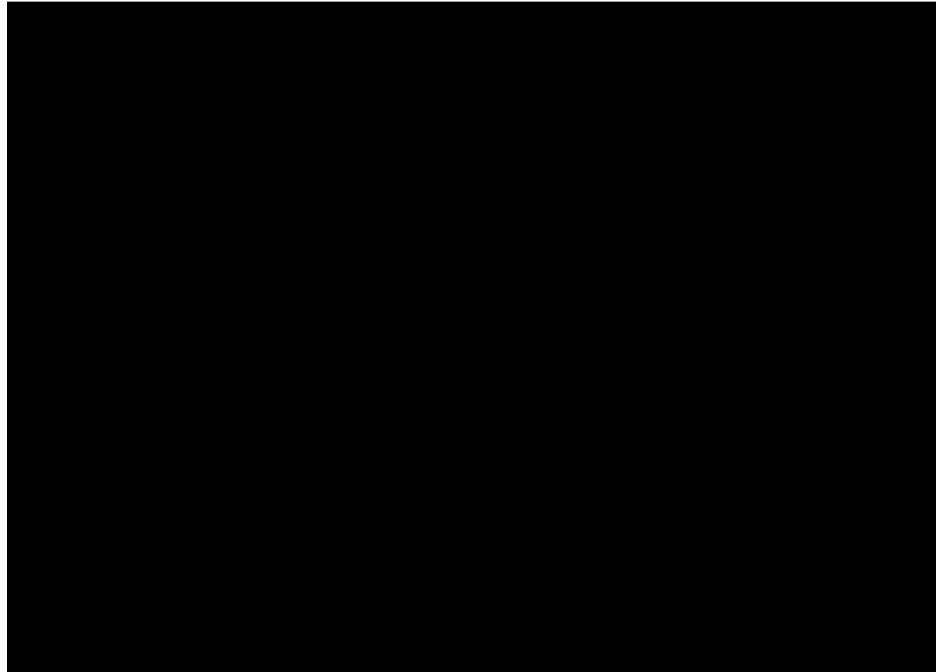
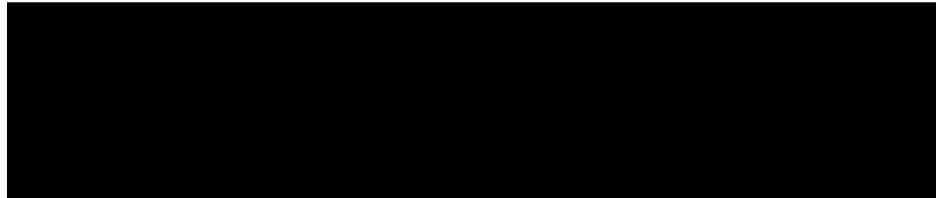
[No. D069936. Fourth Dist., Div. One. July 21, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
MOURIS M. GHIPRIEL, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]



COUNSEL

Steven A. Brody, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Anthony DaSilva, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

BENKE, Acting P. J.—False imprisonment that involves no more in the way of force or menace than is needed to restrain the victim is a misdemeanor. Felony or aggravated false imprisonment requires proof of force greater than is needed to restrain the victim. Here, the evidence showed defendant Mouris M. Ghiprieli, who weighs 240 pounds, kept one of his employees, who weighs approximately 100 pounds, in a very small office and sexually assaulted her. We reject Ghiprieli's contention this record does not support his three felony false imprisonment convictions. We also reject Ghiprieli's contention the trial court erred in admitting testimony from the victim with respect to his attempt to digitally penetrate her.

Accordingly, we affirm Ghiprieli's convictions.

FACTUAL AND PROCEDURAL BACKGROUND**A. Doe's Employment at Ghiprieli's Restaurant**

In March 2011, Jane Doe was 19 years old and had just graduated from high school. Doe was five feet tall and weighed 100 pounds. At that point in time, Doe began working for Ghiprieli at a steak house he owned and operated in Hemet, California. Ghiprieli was 54 years old, five feet eight inches tall, and weighed 240 pounds.

Doe began working as a dishwasher at Ghiprieli's restaurant. While washing dishes, Ghiprieli would occasionally rub Doe's shoulders or walk by and grab her by her hip. In May 2011, Doe was promoted from dishwashing to a position as a hostess, where she stood behind a small podium. On one occasion while Doe was standing at the podium, Ghiprieli walked up behind her, put his hand under her V-neck shirt, reached across her chest and grabbed her left breast. Doe ducked down so that she could get Ghiprieli's hand out of her shirt, told Ghiprieli to stop and walked away.

Over the next several weeks, Ghipriel made a continuing series of sexually suggestive advances, of varying levels of crudeness, on Doe. As Ghipriel would walk by Doe at the podium when she was bending down to wipe menus or a counter, he would graze her buttocks with his hand; he would do the same as she was standing at different places in the restaurant. In response, Doe would give Ghipriel a dirty look and tell him to stop. On another occasion, after discussing his plan to convert part of the restaurant to a hookah bar and have Doe manage it, Ghipriel went to the bar, had some drinks, came back to the hostess podium and kissed the corner of Doe's mouth, leaving saliva on it.

When Doe asked to be promoted to a server's position where she could earn tips, Ghipriel told her she would have "to do stuff" with him, which she interpreted as sex acts. By way of hand gestures on one occasion and later by way of an express request, Ghipriel asked Doe to perform oral sex on him.

B. *False Imprisonment and Sexual Assaults*

While Doe was working as a hostess, Ghipriel regularly called her back to meet him in his very small office. At most only two or three people, including Ghipriel, could fit in the office at any given time, and many employees either stood or sat outside the office when talking to Ghipriel while he was in the office.

When called to the office, Doe would try to simply stand in the doorway, but, on a number of occasions, Ghipriel would grab Doe's wrist, pull her into the office and lock the door. Doe recalled five occasions in which, with the door to his office closed, Ghipriel cornered her in the office with his much larger body, touched her breasts underneath her brassiere, touched her buttocks and attempted to kiss her.

On three occasions, while Ghipriel had Doe pinned against the wall of his office, he exposed his penis and began masturbating; on two of those occasions he ejaculated, once on Doe's shoe and once on the floor. On one occasion, Ghipriel pulled up Doe's shirt and touched her stomach with his penis.

The last occasion on which Ghipriel called Doe into his office occurred on October 31, 2011. After Ghipriel maneuvered Doe against the wall and after trying to pull her pants down, he put his hand down her pants, under her panties and touched the lips of her vagina. According to Doe, Ghipriel was unable to get his hands into her vagina because she pushed him away.

For a number of months, Doe had been telling her friend and her roommate about Ghipriel's sexual assaults. Doe testified that she repeatedly went to

Ghipriels office and endured his sexual conduct because she did not want to get fired. However, following the October 31, 2011 assault, Doe left the restaurant before her shift was over and did not return to work. On November 5, 2011, she went to the local police department and reported what had occurred. After conducting an investigation, police arrested Ghipriels.

C. Trial Court Proceedings

Ghipriels was convicted of three counts of sexual battery (Pen. Code,¹ § 243.4, subd. (a)), three counts of felony false imprisonment (§§ 236, 237, subd. (a)), three counts of indecent exposure (§ 314, subd. 1), one count of assault with intent to penetrate (§ 220, subd. (a)), and two counts of battery for purposes of sexual arousal (§ 243, subd. (e)(1)). The trial court sentenced Ghipriels to a term of eight years in state prison.

Ghipriels filed a timely notice of appeal.

DISCUSSION

I

In his first argument on appeal, Ghipriels contends none of his false imprisonment convictions were aggravated, and, hence, each false imprisonment conviction should be reduced to a misdemeanor. We reject these contentions.

A. Sufficiency of the Evidence

“When a jury’s verdict is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the jury. It is of no consequence that the jury believing other evidence, or drawing different inferences, might have reached a contrary conclusion.” (*People v. Brown* (1984) 150 Cal.App.3d 968, 970 [198 Cal.Rptr. 260].)

B. False Imprisonment

Section 236 provides: “False imprisonment is the unlawful violation of the personal liberty of another.” Section 237, subdivision (a) provides: “False

¹ All further statutory references are to the Penal Code.

imprisonment is punishable by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail for not more than one year, or by both that fine and imprisonment. [Misdemeanor false imprisonment.] If the false imprisonment be effected by violence, menace, fraud, or deceit, it shall be punishable by imprisonment [in the state prison]. [Felony false imprisonment.]”

■ “Force is an element of both felony and misdemeanor false imprisonment. Misdemeanor false imprisonment becomes a felony only where the force used is greater than that reasonably necessary to effect the restraint. In such circumstances the force is defined as ‘violence’ with the false imprisonment effected by such violence a felony.” (*People v. Hendrix* (1992) 8 Cal.App.4th 1458, 1462 [10 Cal.Rptr.2d 922].)

Like Ghiprieh, the appellant in *People v. Castro* (2006) 138 Cal.App.4th 137 [41 Cal.Rptr.3d 190] (*Castro*) relied on the holding and reasoning of *People v. Matian* (1995) 35 Cal.App.4th 480, 485–487 [41 Cal.Rptr.2d 459] (*Matian*), in arguing that there was insufficient evidence he used the additional force or menace required to establish felony false imprisonment. In *Matian*, the defendant initially sexually abused his victim and, in particular, squeezed her breast with enough force to cause her pain and possible bruising; he then, by way of grabbing her and glaring at her, kept her from leaving the vicinity of his office. The court in *Matian* found these circumstances did not constitute felony false imprisonment because they did not involve the use of a deadly weapon or any express threat of harm. (*Id.* at pp. 486–487.)

In disagreeing with *Matian*, the court in *Castro* stated: “We have trouble understanding the conclusion the Court of Appeal reached in *Matian*. While the opinion does not discuss the underlying sexual crimes, it is clear that the false imprisonment followed immediately after the forcible sexual assaults during which appellant squeezed the victim’s breast so hard as to cause her pain and possibly even bruising. Thereafter, the perpetrator yelled at the victim ‘nothing happened,’ attempting to intimidate her into not reporting the incident. He then told her to wash her face and she took a seat nearby, within view of the perpetrator who was in his office. When the victim attempted to leave, the perpetrator glared at her and got out of his chair as if he was going to approach her. Given the immediately preceding sexual assaults, and the command to her that ‘nothing happened,’ it is reasonable to conclude the victim was intimidated by the perpetrator. In fact, she testified that she was afraid and did not want him to touch her again. We have no problem with concluding the evidence addressed in the published portion of the opinion supported the conviction for felony false imprisonment by menace, if not violence. Thus, we do not agree with the result in *Matian*, or with appellant’s

argument that comparison with the facts in *Matian* requires reversal of his conviction for felony false imprisonment.” (*Castro, supra*, 138 Cal.App.4th at p. 143.)

In *Castro*, the victim was walking to a bus stop on her way to school when the defendant grabbed her by the arm, turned her around and pulled her toward his car. In finding that this was sufficient to establish felony false imprisonment, the court stated: “In the present case, appellant grabbed the victim and turned her around. If that is all that had happened, we would agree with appellant that his conduct amounted only to misdemeanor false imprisonment. But appellant pulled her toward his car, an act more than what was required to stop her and keep her where she was located. . . . [T]he evidence that appellant used force to pull the victim toward his car was sufficient to establish force above that required for misdemeanor false imprisonment.” (*Castro, supra*, 138 Cal.App.4th at p. 143.)²

C. Analysis

■ We agree with the court’s opinion in *Castro*. The additional force required for felony false imprisonment, as opposed to misdemeanor false imprisonment, may come in the form, as in *Castro*, of simply pulling a victim toward a location when the victim’s liberty has already been violated. (*Castro, supra*, 138 Cal.App.4th at p. 143.) However, as the court in *Castro* also indicated, such additional and unnecessary force may also arise from sexual assaults suffered by the victim during the course of the defendant’s contact with the victim. (*Ibid.*) In this regard, like the court in *Castro*, as well as the courts that decided *People v. Islas, supra*, 210 Cal.App.4th at pages 125–126, *People v. Wardell, supra*, 162 Cal.App.4th at page 1491 and *People v. Aispuro, supra*, 157 Cal.App.4th at page 1513, we disagree with the reasoning and result in *Matian*.

■ Here, a host of circumstances demonstrate that Ghipriél’s sexual assaults and conduct support each of his three felony false imprisonment convictions. Plainly, touching Doe’s breasts, masturbating in front of her, rubbing his penis on her stomach, and putting his hands down her pants and touching the lips of vagina, were not needed to restrain or otherwise violate Doe’s liberty. Importantly, Doe was vulnerable in a number of respects: she

² In addition to *Castro*, the *Matian* opinion has been the subject of criticism and disagreement by the courts in *People v. Islas* (2012) 210 Cal.App.4th 116, 125–126 [147 Cal.Rptr.3d 872], *People v. Wardell* (2008) 162 Cal.App.4th 1484, 1491 [77 Cal.Rptr.3d 77], and *People v. Aispuro* (2007) 157 Cal.App.4th 1509, 1513 [69 Cal.Rptr.3d 585]. “An express or implied threat of harm does not require the use of a deadly weapon or an express verbal threat to do additional harm. Threats can be exhibited in a myriad number of ways, verbally and by conduct.” (*People v. Aispuro, supra*, at p. 1513.)

was less than half his age, she weighed less than half of Ghipriel's 240 pounds, she was trapped in his small office, and he was her employer at a job she was afraid of losing. In addition to the fact that on at least three separate occasions the sex acts Ghipriel committed involved actual physical contact and Doe in no way consented to them, all the acts were profoundly degrading and demeaning. Given the character of the acts and Doe's vulnerability on so many levels, Ghipriel's sexual conduct no doubt played a material role in maintaining control over her. Thus, in light of all these circumstances, a jury could reasonably conclude that in each instance charged as felony false imprisonment, Ghipriel used force beyond that needed to restrain Doe and hence effected the violation of her liberty by violence within the meaning of section 236.

II

In his second argument on appeal, Ghipriel argues the trial court erred in permitting Doe to testify with respect to his intention when he put his hands down her pants and touched the lips of her vagina. We find no error.

A. *Doe's Testimony*

As we have discussed, at trial Doe testified without objection that on October 31, 2011, Ghipriel called her into his office, trapped her against a wall, and put his hands down her pants and touched the lips of her vagina. Doe testified that when Ghipriel kept sticking his hands down her pants and trying to unbutton her pants, at least twice she told him to stop. The prosecutor then asked Doe: "So was he able, from what you feel, to get his hands inside your vagina?" Doe replied in the negative, and Ghipriel's counsel objected on the grounds the question assumed facts not in evidence. The trial court overruled the objection, and Doe testified Ghipriel was unable to put his hand inside her vagina because she was able to push him away with her arms, though she was scared.

B. *Analysis*

On appeal, Ghipriel argues the prosecutor's question was improper because it assumed there was evidence he intended to put his hand or fingers in Doe's vagina and that further error occurred when Doe was permitted to testify that she was able to prevent him from doing so.

We find no error. We agree that in describing what occurred both the prosecutor and Doe assumed that Ghipriel intended to digitally penetrate her vagina. However, their assumption was supported by substantial circumstantial evidence in the record. At the time Ghipriel put his hands down Doe's

[REDACTED]

pants, he had trapped his 20-year-old employee in his office, where he had previously subjected her to multiple sexual assaults and advances, including ejaculating on her shoe. In putting his hands down her pants and trying to unbutton them, Ghipriel plainly escalated his conduct and desire for gratification. A fairly reasonable inference to be drawn from the totality of circumstances was that, at that point, Ghipriel intended to digitally penetrate Doe and that he was only prevented from doing because she was able to push him away.³

DISCUSSION

The judgment of conviction is affirmed.

McDonald, J., and O'Rourke, J., concurred.

A petition for a rehearing was denied August 4, 2016, and appellant's petition for review by the Supreme Court was denied October 26, 2016, S236554.

³ Because admission of Doe's testimony with respect to Ghipriel's attempt to penetrate her was proper, counsel's failure to make a more detailed and renewed objection to the testimony did not prejudice Ghipriel and will not give rise to a claim of ineffective assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668, 695 [80 L.Ed.2d 674, 104 S.Ct. 2052].)

[No. B256043. Second Dist., Div. Six. July 21, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
JAMES ALLEN HYDRICK, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

GILBERT, P. J.—The Welfare and Institutions Code provides procedures the state must follow before a prisoner may be committed as a sexually violent predator (SVP).¹ For “good cause” a prisoner may be held beyond the prisoner’s release date for 45 days to complete a full evaluation to determine whether the prisoner qualifies as an SVP.

We conclude that “a full evaluation” includes the prosecuting attorney’s decision to file a petition.

A jury found James Allen Hydrick to be an SVP. (§ 6600 et seq.) We affirm.

FACTS

Hydrick was convicted of various sexual offenses.

[]*
.....

PROCEDURAL FACTS AND DISCUSSION

I

Hydrick contends the SVP commitment petition was not timely.²

Hydrick’s scheduled release date from his prison sentence was September 10, 2008.

On March 5, 2008, the Department of Corrections and Rehabilitation (CDCR) sent a memorandum to the Board of Parole Hearings (Board)

¹ All statutory references are to the Welfare and Institutions Code unless otherwise stated.

^{*}See footnote, *ante*, page 837.

² We grant Hydrick’s motion for judicial notice filed April 7, 2015, concerning various levels of screening for SVP’s.

requesting further documentation because it did not have sufficient information to determine whether Hydrick qualified as an SVP. On August 11, 2008, the Board responded with a letter to the State Department of Mental Health (DMH), stating that Hydrick met the first level SVP criteria. On August 20, a level 2 evaluation was completed, finding that a level 3 evaluation was required. On August 26, Hydrick was interviewed by Doctors Jesus Padilla and Robert Owen as part of the level 3 SVP evaluation. By September 3, Padilla and Owen had submitted lengthy reports concluding that Hydrick met the SVP criteria.

On September 9, 2008, the day before Hydrick's scheduled release date from prison, the Board issued a 45-day hold pursuant to section 6601.3.

On September 10, 2008, the DMH sent a letter to the San Luis Obispo County District Attorney, referring Hydrick for SVP commitment proceedings. On October 8, the district attorney filed an SVP commitment petition.

■ An SVP petition may be filed while the defendant is in lawful custody, including a 45-day hold placed pursuant to section 6601.3. (§ 6601, subd. (a)(2).) In 2008, section 6601.3 provided that, upon a "showing of good cause," the Board may order a person determined by the CDCR to be an SVP to "remain in custody for no more than 45 days beyond the person's scheduled release date for full evaluation pursuant to subdivisions (c) to (i), inclusive, of Section 6601."

In 2008, the "good cause" required to satisfy a 45-day hold was defined in the California Code of Regulations as "[s]ome evidence" that the person has a qualifying conviction and is "likely to engage in sexually violent predatory criminal behavior." (Cal. Code Regs., tit. 15, former § 2600.1, subd. (d)(2).)

This "good cause" requirement was short-lived. In 2012, our Supreme Court decided *In re Lucas* (2012) 53 Cal.4th 839 [137 Cal.Rptr.3d 595, 269 P.3d 1160]. The court held the definition of "good cause" in the California Code of Regulations was invalid because it linked good cause to showing that the person is likely to be an SVP, rather than showing justification for the delay in filing the petition. (*Id.* at pp. 849–851.) Nevertheless, the court found reliance on the regulation was excusable as a good faith mistake of law. (*Id.* at p. 852.)

■ Hydrick argues that the 45-day hold was not permitted in this case because by the time the 45-day hold was imposed, full evaluations had already been completed. Section 6601.3, however, allows a 45-day hold for full evaluations "pursuant to subdivision (c) to (i), inclusive, of Section 6601." (*Id.*, subd. (a).) Section 6601, subdivision (i) includes, within the ambit

[REDACTED]

of a full evaluation, the district attorney's decision to file a petition. Because the district attorney's evaluation had not been completed at the time the 45-day hold was imposed, the petition was timely.³

Hydrick attempts to distinguish *Lucas*. There, the hold was imposed before the evaluations by two psychologists were completed. But nothing in *Lucas* suggests that its decision was based on whether the hold was imposed during or after the evaluations were completed.

Hydrick's reliance on *People v. Superior Court (Small)* (2008) 159 Cal.App.4th 301 [71 Cal.Rptr.3d 462] is misplaced. There the SVP petition was not filed until one day after the 45-day hold period had expired. The court held that the untimely filing was not due to a good faith mistake of law, and upheld the trial court's dismissal of the petition. Here the petition was filed within the 45-day hold period. The trial court properly refused to dismiss the petition.

II, III

[REDACTED]

.....

The judgment is affirmed.

Yegan, J., and Perren, J., concurred.

Appellant's petition for review by the Supreme Court was denied October 19, 2016, S236615.

³ Section 6601, subdivision (i) provides: "If the county's designated counsel concurs with the recommendation, a petition for commitment shall be filed in the superior court of the county in which the person was convicted of the offense for which he or she was committed to the jurisdiction of the Department of Corrections and Rehabilitation. The petition shall be filed, and the proceedings shall be handled, by either the district attorney or the county counsel of that county. The county board of supervisors shall designate either the district attorney or the county counsel to assume responsibility for proceedings under this article."

*See footnote, *ante*, page 837.

[No. H042481. Sixth Dist. July 21, 2016.]

CITY OF SAN JOSE, Plaintiff, Cross-defendant, and Respondent, v.
MEDIMARTS, INC., et al., Defendants, Cross-complainants, and
Appellants.

[REDACTED]

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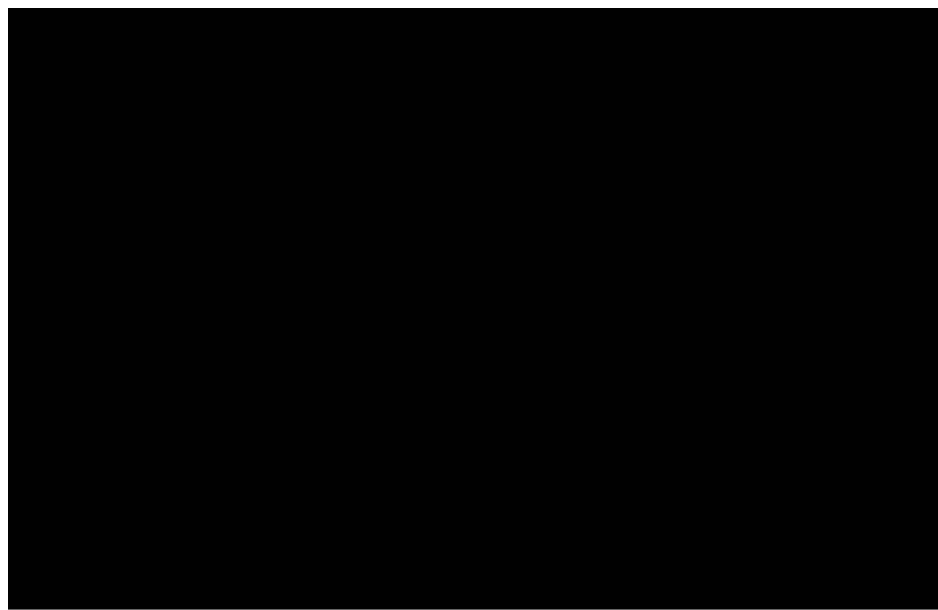
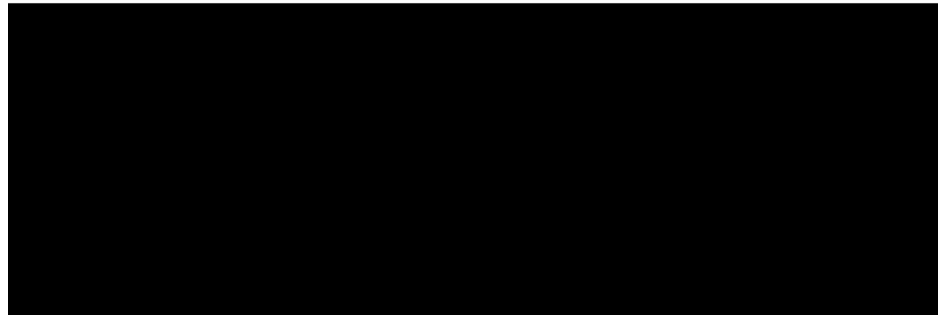
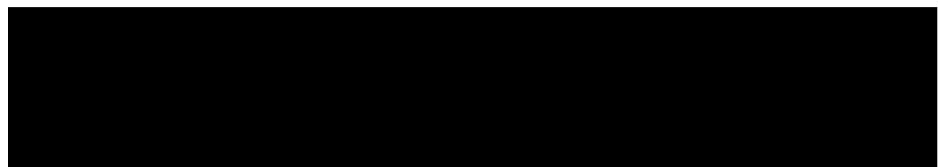
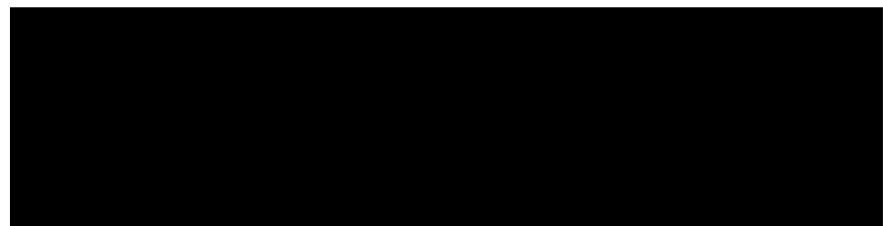
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COUNSEL

Gates Eisenhart Dawson and Nicholas G. Emanuel for Defendants, Cross-complainants and Appellants

Richard Doyle, City Attorney, Nora Frimann, Assistant City Attorney, Margo Laskowska, Kendra E. McGee-Davies and Mark J. Vanni, Deputy City Attorney, for Plaintiff and Cross-defendant and Respondent.

OPINION

ELIA, Acting P. J.—The City of San Jose (City) brought this action to collect unpaid business taxes from defendants MediMarts, Inc., and its president, David Armstrong. In the course of the proceedings defendants sought a preliminary injunction against the City’s attempts to stop them from operating their medical marijuana collective. On appeal, defendants contend that payment of the marijuana business tax (San Jose Mun. Code, § 4.66.010 et seq.) would force Armstrong to incriminate himself in violation of his Fifth Amendment privilege by admitting criminal liability for violating federal drug laws. We conclude that the privilege against self-incrimination has no application in these circumstances. We must therefore affirm the order.

Background

MediMarts was established in 2009 as a nonprofit collective under the name Bay Pacific Care, Inc. Bay Pacific Care paid the marijuana business tax (hereafter, MBT) from March 2011 through July 2011. In August 2011 the collective changed its name to MediMarts, and it continued paying the tax through April 2012. In May of 2012, however, MediMarts discontinued paying the MBT, instead submitting tax returns showing no money due. The City began sending tax assessments and overdue notices, while Armstrong maintained that the tax itself was illegal under federal law. After a hearing before the Acting Director of Finance, MediMarts was found to owe \$58,788.53 as of August 24, 2012, along with the future accrual of penalties and interest. Armstrong continued to protest the assessments to Wendy J. Sollazzi, a revenue management division manager in the City’s finance department. Another hearing took place on November 15, 2013. On July 11, 2014, the Director of Finance found that MediMarts owed \$215,111.17 as of the November 2013 hearing date.

The City then brought this action against Armstrong and MediMarts to collect the unpaid business taxes due under the MBT, chapter 4.66 of the San Jose Municipal Code (hereafter, Code). In its first amended complaint, filed December 3, 2014, it alleged that defendants were subject to the MBT and that by failing to pay the tax they had incurred collection costs, interest, and penalties. The complaint specifically alleged that Armstrong “was an agent of [MediMarts] acting in the scope of such agency and with the permission and consent of [MediMarts].” Together the taxes, interest, and penalties claimed by the City totaled \$767,058.60 as of October 10, 2014.

Defendants answered the complaint and filed a cross-complaint under 42 United States Code sections 1983 and 1988. In this pleading they alleged that payment of the MBT “would subject [d]efendants to self incrimination,”

because the law “forces [defendants] to admit to the sale or possession for sale of marijuana.” The tax also violated defendants’ due process rights by failing to provide for notice or a hearing before declaring MediMarts a nuisance and by forcing it to cease operations. Armstrong specifically was denied due process because he was not afforded a hearing “on whether he should be personally liable for the taxes of [MediMarts].” Finally, the cross-complaint alleged a violation of defendants’ equal protection rights under the Fourteenth Amendment, because the MBT “unjustly treats collectives and medical marijuana patients differently from other similarly situated individuals and organizations.” Defendants sought damages as well as a “judicial determination as to whether: [(J1) the MBT is due and payable; [and] [(J2) . . . the MBT violates Cross-Complainants[’] constitutional rights.”

Defendants then applied for a preliminary injunction to restrain the City from taking any action to shut down the collective or declare it a nuisance, to compel the City to reinstate MediMarts’ business registration, and to require the City to remove its classification of MediMarts as a nuisance *per se* during the pendency of the action. Defendants cited the same grounds as in their cross-complaint and predicted “great and irreparable injury” from the closing of MediMarts, not only to the collective but also to the patient members who needed the medical marijuana to cope with their illnesses. MediMarts as well as Armstrong could assert the Fifth Amendment here, they argued, because it functioned “only to serve its member-patients”; that is, it existed not merely as an organization, but as a collective of members who were all acting in their own personal interest and on behalf of all members. Like the other members, Armstrong himself could assert the Fifth Amendment because he was “not acting solely as a representative [of MediMarts]” but was “always acting in a partially personal capacity.” Defendants also argued that the MBT was unconstitutionally vague and overbroad.

The superior court was not persuaded. Applying the “collective entity rule,” the court determined that neither MediMarts nor Armstrong was entitled to assert the Fifth Amendment to resist the tax. (See *Braswell v. United States* (1988) 487 U.S. 99, 104–113 [101 L.Ed.2d 98, 108 S.Ct. 2284] (*Braswell*).) The court rejected the argument as to MediMarts that it existed “only to serve its member-patients”; it was nonetheless a separate incorporated legal entity “with all the powers, benefits and responsibilities accorded to it by law.” Armstrong’s claim that he could invoke the Fifth Amendment because he was not acting solely as a representative of the collective was also deemed unavailing. From the court’s June 15, 2015 order, defendants filed this timely appeal.

*Discussion*1. *Legislative Framework*

■ The Compassionate Use Act of 1996 (CUA; Health & Saf. Code, § 11362.5), passed by Proposition 215 in November 1996, added section 11362.5 to the Health and Safety Code. It provides a defense to prosecution for possession and cultivation of marijuana, which are otherwise prohibited by sections 11357 and 11358, respectively, of that code. In 2004 the Medical Marijuana Program (MMP) (Stats. 2003, ch. 875, § 2, p. 6424) took effect, providing additional protection from specified criminal statutes for qualified patients, persons holding authorized identification cards, and primary caregivers. (Health & Saf. Code, § 11362.765.) Section 11362.775 of the MMP exempts from the same criminal statutes “qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate cannabis for medical purposes.” (Stats. 2003, ch. 875, § 2, p. 6424; see amendment in Stats. 2015, ch. 689, § 6, eff. Jan. 1, 2016.) MediMarts operates as such a collective exempt from prosecution under the MMP.

Federal law, however, continues to prohibit possession, cultivation, and distribution of marijuana notwithstanding modifications of drug laws in individual states. Under the Controlled Substances Act (CSA; 21 U.S.C. § 801 et seq.), title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 801 et seq.), it remains unlawful to manufacture, distribute, dispense, or possess any controlled substance except as authorized by the CSA. (21 U.S.C. §§ 841(a)(1), 844(a); see *Gonzales v. Raich* (2005) 545 U.S. 1, 12 [162 L.Ed.2d 1, 125 S.Ct. 2195] (*Gonzales*).) Marijuana is listed as a schedule 1 controlled substance. (21 U.S.C. § 812(c)(10).) There is no exception under federal law for medical use. (21 U.S.C. §§ 812, 844(a)); see *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 491–495 [149 L.Ed.2d 722, 121 S.Ct. 1711] [medical necessity defense unavailable under the CSA]; *Gonzales, supra*, at pp. 27–29 [Congress may, under the commerce clause, regulate cultivation and use of marijuana authorized by the CUA].)¹

¹ In recent years the stringency of the CSA has been mitigated with respect to medical marijuana by section 538 of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub.L. No. 113-235 (Dec. 16, 2014) 128 Stat. 2130) and section 542 of the Consolidated Appropriations Act, 2016 (Pub.L. No. 114-113 (Dec. 18, 2015) 129 Stat. 2242). Under sections 538 and 542, funds made available to the Department of Justice may not be used to prevent named states (including California) from “implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.” (Pub.L. No. 113-235.) Notwithstanding this policy, section 809 of each legislative act clarifies that federal funds

The CSA has not, however, been held to preempt the CUA. Indeed, both Congress and the United States Supreme Court have indicated otherwise, as have our state's appellate courts. (See 21 U.S.C. § 903; see *Gonzales v. Oregon* (2006) 546 U.S. 243, 251 [163 L.Ed.2d 748, 126 S.Ct. 904] [preemption provision of the CSA, 21 U.S.C. § 903,² "explicitly contemplates a role for the States in regulating controlled substances"]; see also *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, 383–385 [68 Cal.Rptr.3d 656] [CUA does not undermine the stated objectives of the CSA and is not preempted by it]; *Kirby v. County of Fresno* (2015) 242 Cal.App.4th 940, 963 [195 Cal.Rptr.3d 815] [neither conflict preemption nor obstacle preemption precludes application of the CUA and MMP through the CSA, citing rejection of preemption arguments in *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 757–763 [115 Cal.Rptr.3d 89]]; accord, *City of Palm Springs v. Luna Crest Inc.* (2016) 245 Cal.App.4th 879, 884–886 [200 Cal.Rptr.3d 128] [city's issuance of permits for medical marijuana dispensaries is not a regulation preempted by federal drug laws].)

■ San Jose began taxing marijuana businesses following the adoption of Measure U in the November 2, 2010 election. Measure U authorized the enactment of chapter 4.66 of the Code, thereby establishing the MBT. The chapter requires anyone engaged in a marijuana business³ to pay up to 10 percent of its gross receipts to the City. (Code, § 4.66.250.) The Code's section 4.66.010 states that the purpose of the provision is "solely" to raise revenue for the City "and is not intended for regulation." A person who fails to pay the tax when due incurs a 25 percent penalty, with an additional 25 percent penalty imposed after one month's delinquency. (Code, § 4.66.300.) Operation of a marijuana business without a business tax certificate is deemed unlawful, and the certificate will not be issued unless the tax has been paid. (Code, § 4.66.210.B.) The Code also imposes personal liability for the tax, penalties, and interest on any person (including an officer or employee of a corporation) who is required to "collect, truthfully account for, and pay over any tax imposed by this code," but who willfully fails to do so or attempts

authorized by the act may not be used to legalize or reduce penalties associated with possession, use, or distribution of schedule 1 substances proscribed by the CSA.

² Title 21 United States Code section 903 states: "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together."

³ A marijuana business is defined to encompass the activities of "planting, cultivation, harvesting, transporting, manufacturing, compounding, converting, processing, preparing, storing, packaging, wholesale, and/or retail sales of marijuana and any ancillary products in the city, whether or not carried on for gain or profit." (Code, § 4.66.110.)

“to evade or defeat any such tax or payment thereof.”⁴ (Code, § 1.08.015.5.A.) The City cited this provision both in its complaint and in its opposition to defendants’ injunction request.

2. *The Preliminary Injunction*

When presented with defendants’ application for a preliminary injunction, the superior court had two factors to consider: (1) the likelihood that defendants would ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 441–442 [261 Cal.Rptr. 574, 777 P.2d 610].) Because the decision whether to grant a preliminary injunction rests in the sound discretion of the trial court, we generally review that decision for abuse of discretion. (*In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1495 [93 Cal.Rptr.3d 723], quoting *Salazar v. Eastin* (1995) 9 Cal.4th 836, 849–850 [39 Cal.Rptr.2d 21, 890 P.2d 43].) It is defendants’ burden to make a clear showing of such abuse. (*Ryland Mews Homeowners Assn. v. Munoz* (2015) 234 Cal.App.4th 705, 711 [184 Cal.Rptr.3d 163].) However, to the extent that a trial court’s grant or denial of a preliminary injunction and its assessment of the likelihood of success on the merits depend on legal rather than factual questions, we review that decision independently. (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 408 [58 Cal.Rptr.3d 527]; *O’Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1463 [47 Cal.Rptr.3d 147].)

3. *Viability of Armstrong’s Defense to Payment of the MBT*

Recognizing that MediMarts, a corporate entity, has no constitutional right against self-incrimination, in seeking reversal defendants assert the Fifth Amendment only as to Armstrong. (See *Hale v. Henkel* (1906) 201 U.S. 43, 75 [50 L.Ed. 652, 26 S.Ct. 370] (*Hale*) [corporation is not a “person” for purposes of the privilege against self-incrimination], overruled in part on other grounds in *Murphy v. Waterfront Comm’n* (1964) 378 U.S. 52 [12 L.Ed.2d 678, 84 S.Ct. 1594]; *United States v. White* (1944) 322 U.S. 694, 699 [88 L.Ed. 1542, 64 S.Ct. 1248] [“Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation.”].) This constitutional provision declares that “[n]o person . . . shall be compelled in any criminal case to be

⁴ This section states: “In addition to all other remedies provided by law, any person required to collect, truthfully account for, and pay over any tax imposed by this [C]ode who willfully fails to collect such tax, or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat any such tax or payment thereof, shall be personally liable for the total amount of the unpaid tax and interest and penalties on the unpaid tax evaded or not collected or not accounted for and paid over to the city.” (SJMC § 1.08.015.5.A.)

a witness against himself.’” (*Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.* (2004) 542 U.S. 177, 189 [159 L.Ed.2d 292, 124 S.Ct. 2451].) As the text has been interpreted, “a communication must be testimonial, incriminating, and compelled.” (*Ibid.*) In particular, “[t]he word ‘witness’ in the constitutional text limits the relevant category of compelled incriminating communications to those that are ‘testimonial’ in character.” (*United States v. Hubbell* (2000) 530 U.S. 27, 34 [147 L.Ed.2d 24, 120 S.Ct. 2037]; see also *Hale, supra*, at p. 67 [the “interdiction of the Fifth Amendment operates only where a witness is asked to . . . give testimony which may possibly expose him to a criminal charge”].) The act of filing a tax return has not been considered testimonial. (See *Hubbell, supra*, at p. 35; *United States v. Sullivan* (1927) 274 U.S. 259, 263 [71 L.Ed. 1037, 47 S.Ct. 607] [5th Amend. did not exempt defendant from paying taxes or filing a return for income derived from unlawful business].)

■ The City did not focus on the testimonial aspect of the privilege, but relied primarily on the “collective entity” doctrine, which was also the primary basis of the superior court’s order. The underlying principle of this doctrine, as repeatedly explained by the United States Supreme Court, is that a corporate officer may not rely on the Fifth Amendment when required to produce the records of the corporation. For example, in *Hale, supra*, 201 U.S. at page 76, the United States Supreme Court rejected a corporate officer’s reliance on the Fifth Amendment when, though given personal immunity, he was required by a grand jury to answer questions and produce material demanded in a subpoena. In *Wilson v. United States* (1911) 221 U.S. 361 [55 L.Ed. 771, 31 S.Ct. 538] the president of a corporation unsuccessfully challenged a contempt order after he refused to produce subpoenaed corporate records. The president “could assert no *personal* right to retain the corporate books against any demand of government which the corporation was bound to recognize.” (*Id.* at p. 385, italics added; see also *Dreier v. United States* (1911) 221 U.S. 394, 400 [55 L.Ed. 784, 31 S.Ct. 550] [corporate secretary properly found in contempt for refusing demand for corporate documents, notwithstanding his claim that those papers would tend to incriminate him].)

As the high court subsequently made clear, “representatives of a collective entity act as agents, and the official records of the organization that are held by them in a representative rather than a personal capacity cannot be the subject of their personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally . . . Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation, which possesses no such privilege.” (*Braswell, supra*, 487 U.S. at pp. 99–100.) Thus, while business records of a sole proprietor or practitioner may be protected from release by the Fifth Amendment, an individual “cannot rely upon the privilege to avoid

producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally.” (*Bellis v. United States* (1974) 417 U.S. 85, 88, 93–101 [40 L.Ed.2d 678, 94 S.Ct. 2179] (*Bellis*).)

Defendants maintain that the collective entity doctrine is inapplicable to divest Armstrong of his own Fifth Amendment rights. They seek to avoid the corporate-individual distinction by characterizing the issue without regard to MediMarts’ corporate identity, asserting that “a person cannot be compelled to provide evidence of their [*sic*] own illegal conduct.” Defendants refer to the tax as one “imposed on the money *he* [i.e., Armstrong] received each month from the sale of marijuana.” (Italics added.) But the tax is not the obligation of Armstrong; it belongs to MediMarts. It makes no difference that the complaint accuses both defendants of failing to pay the MBT; it is MediMarts that owed the tax. Armstrong’s duty to collect and turn over the tax inhered in his *representative* capacity as president of the collective. His signature on the tax returns that were filed in 2011 and 2012 properly reflected that duty, as he signed on behalf of MediMarts, not himself.

Nor can defendants escape the core principle of the collective entity doctrine by pointing out that the cases illustrating it pertained to production of subpoenaed documents. The point to be drawn from this abundant precedent is that a corporate officer, even a president (such as Armstrong), cannot avoid an obligation imposed by the government *on the entity* by asserting the Fifth Amendment on his own behalf.

■ Defendants’ production of an excerpt from *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704 [88 Cal.Rptr.3d 590, 199 P.3d 1125] does not advance their position. In *Spielbauer*, a deputy public defender was being investigated by his county employer over allegations that he had made deceptive statements to the court while representing a criminal defendant. When interviewed by the supervising attorney, Spielbauer was informed that his refusal to cooperate would be deemed insubordination which could subject him to termination, but he was assured that his answers could not be used in a criminal proceeding. Spielbauer, however, invoked his privilege against self-incrimination and was thereafter terminated by the county for failing to answer the questions posed by the investigator. Our Supreme Court upheld the termination. It explained that the protection afforded the individual by the Fifth Amendment is not against a nonpenal use, but against only the government’s use in a criminal proceeding. (*Spielbauer, supra*, at p. 715.) Thus, “the right against self-incrimination is not itself violated until statements obtained by compulsion are *used* in criminal proceedings against the person from whom the statements were obtained.” (*Id.* at p. 727.) The employer was entitled to discipline or even dismiss the employee who refuses

to answer job-related questions, “so long as the employee is not required, as a condition of remaining in the job, to *surrender* his or her right against criminal use of the statements thus obtained.” (*Id.* at p. 725.) Only if compelled statements are used in criminal proceedings against the person from whom the admissions of wrongdoing are elicited does the Fifth Amendment come into play. (*Spielbauer*, at p. 727.)

None of the decisions applying the Fifth Amendment to tax payments is helpful either. Each of the cited cases involved an *individual* who successfully obtained reversal of his conviction for tax evasion, where his defense was that payment of the tax would expose him to prosecution for illegal “wagering.” (See *Marchetti v. United States* (1968) 390 U.S. 39 [19 L.Ed.2d 889, 88 S.Ct. 697] (*Marchetti*) [evasion of occupational tax in business of accepting wagers]; *Grosso v. United States* (1968) 390 U.S. 62 [19 L.Ed.2d 906, 88 S.Ct. 709] (*Grosso*) [failure to pay excise and occupational taxes on wagering proceeds]; see also *Leary v. United States* (1969) 395 U.S. 6, 29 [23 L.Ed.2d 57, 89 S.Ct. 1532] [transportation of marijuana without paying transfer tax].) Moreover, in each case it appeared that the challenged tax was directed to a group suspected of criminal activity. (Cf. *Marchetti*, *supra*, at p. 57 [tax directed at “‘selective group inherently suspect of criminal activities’”]; *Grosso*, *supra*, at pp. 65–67 [same]; *Leary v. United States*, *supra*, at p. 18 [same].) In this case, by contrast, it is a corporation, not an individual, that is required to pay the tax; the tax is imposed on legitimate businesses, not on those engaged in activity prohibited by the state or City; and it is not directed at a “‘selective’ and ‘suspect’ group” but is a *noncriminal* measure with an express purpose solely of raising revenue. (*Leary*, *supra*, at p. 18.) Filing the tax return itself is no more offensive to the Fifth Amendment than requiring a motorist involved in an accident to stop and provide his or her name and address (Veh. Code, § 20002, subd. (a)(1)); such requirements, too, have essentially regulatory, noncriminal purposes, and compliance is neither testimonial nor, by itself, incriminating. (*California v. Byers* (1971) 402 U.S. 424 [29 L.Ed.2d 9, 91 S.Ct. 1535].) Even viewing defendants’ business as potentially liable under *federal* law such as the CSA, any assumption that Armstrong will be subject to prosecution would be speculative and premature, as no criminal proceeding has yet been initiated for his privilege to come to the foreground. (Nor is it likely to, given Congress’s recently repeated admonition to the Justice Department not to interfere with states’ authorization of medical marijuana.⁵)

■ We thus conclude, as did the superior court, that there is no likelihood that defendants will ultimately prevail in the City’s action against them or on their cross-complaint. Were we to endorse Armstrong’s position, we would only compromise the firm stance of our courts that “an individual acting in

⁵ See footnote 1, *ante*.

his official capacity on behalf of [an] organization may . . . not take advantage of his personal privilege. In view of the inescapable fact that an artificial entity can only act to produce its records [or pay its taxes] through its individual officers or agents, recognition of the individual's claim of privilege . . . would substantially undermine the unchallenged rule that the organization itself is not entitled to claim any Fifth Amendment privilege, and largely frustrate legitimate governmental regulation of such organizations." (*Bellis, supra*, 417 U.S. at p. 90; see *Braswell, supra*, 487 U.S. at pp. 108–112 [5th Amend. objection to subpoena of corporate records unavailable to custodian even if producing them may prove personally incriminating].)

Finally, even if we were to agree with defendants that paying the MBT would encroach on Armstrong's Fifth Amendment privilege against self-incrimination, it would not afford defendants the relief they seek. The injunction application sought to prevent the City from shutting down the operation of MediMarts, disqualifying MediMarts from renewing its registration, and declaring it a public nuisance. Defendants also asked the court to require the City, while the action was pending, to reinstate MediMarts' business registration and remove its classification of MediMarts as a nuisance per se. As discussed above, neither the assertion of Armstrong's constitutional rights nor the accommodation of them would abate *MediMarts'* duty to pay the tax under SJMC chapter 4.66. The superior court properly denied the application for a preliminary injunction.

Disposition

The order is affirmed.

Bamattre-Manoukian, J., and Mihara, J., concurred.

A petition for a rehearing was denied August 10, 2016, and the petition of appellant David Armstrong for review by the Supreme Court was denied October 26, 2016, S236904.

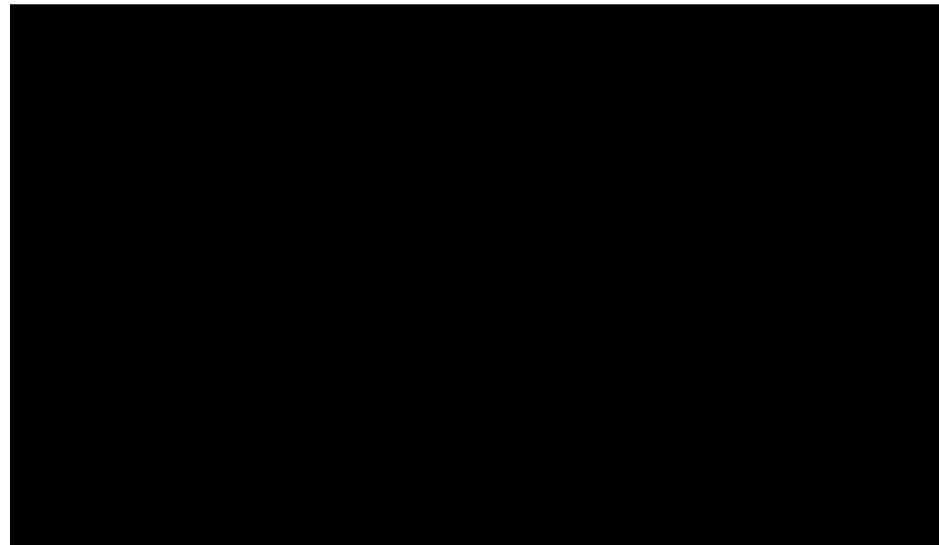
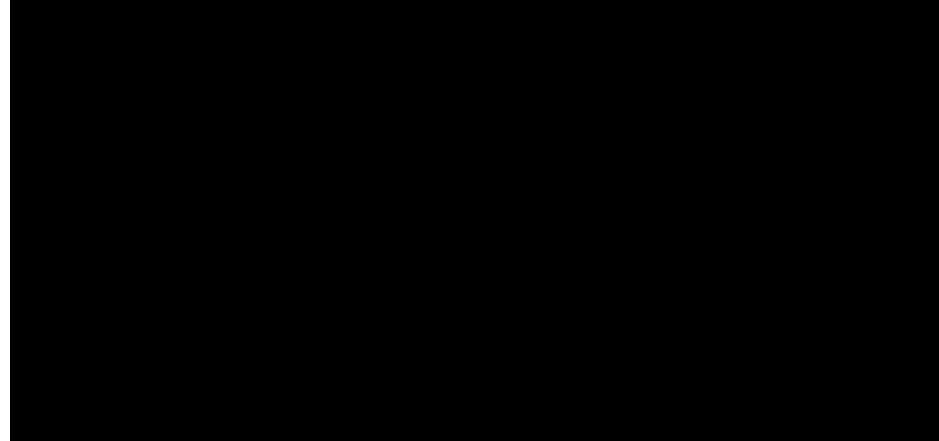
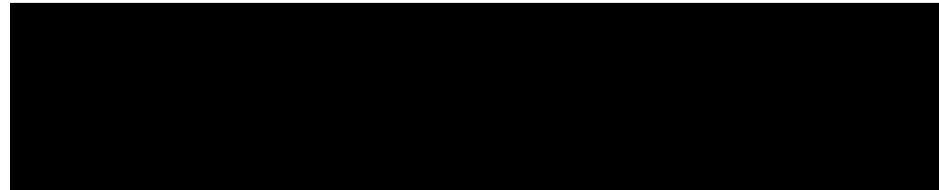
[No. C080870. Third Dist. July 22, 2016.]

ERNEST L. COX, Petitioner, v.
THE SUPERIOR COURT OF AMADOR COUNTY, Respondent;
SCOTT KERNAN, as Secretary, etc., et al., Real Parties in Interest.

[REDACTED]

[REDACTED]

[REDACTED]



COUNSEL

Ernest L. Cox, in pro. per., for Petitioner.

No appearance for Respondent.

Kamala D. Harris, Attorney General, Jennifer A. Neill, Assistant Attorney General, Jessica N. Blonien and Yun Hwa Harper, Deputy Attorneys General, for Real Parties in Interest.

OPINION

NICHOLSON, Acting P. J.—Petitioner Ernest L. Cox is incarcerated at Mule Creek State Prison. He filed a civil complaint against real parties in interest, officials and employees of the Department of Corrections and Rehabilitation (CDCR), seeking monetary damages. Simultaneously, he filed a petition for relief from the government claims filing requirement. Respondent superior court deemed the civil complaint to be a petition for writ of habeas corpus, which the court then denied. Petitioner filed a petition for writ of mandate in this court, asserting respondent superior court erred in deeming the civil complaint to be a habeas corpus petition and that the court must consider his petition for relief from the government claims filing requirement on its merits. Real parties in interest concede respondent superior court erred. We agree, and order the issuance of a peremptory writ of mandate.

BACKGROUND

Petitioner filed a civil complaint against officials and employees of CDCR. The complaint is not a model of clarity, but in general alleges claims of sexual harassment, intentional infliction of emotional distress, and violation of due process. The complaint seeks compensatory and punitive damages; injunctive relief, including directing CDCR to develop training regarding sexual harassment, and dismissing prison discipline imposed on petitioner; and a judicial declaration that a prison regulation regarding unlawful influence is vague and uncertain. Simultaneously, petitioner filed a petition for relief from the government claims filing requirement of Government Code section 945.4,¹ pursuant to Government Code section 946.6, subdivision (a).²

¹ Government Code section 945.4 provides: “Except as provided in Sections 946.4 and 946.6, no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board, in accordance with Chapters 1 and 2 of Part 3 of this division.”

² Government Code section 946.6, subdivision (a) provides in pertinent part: “If an application for leave to present a claim is denied or deemed to be denied pursuant to Section

On September 17, 2015, respondent superior court struck the civil complaint and ordered it refiled as a habeas corpus petition. On October 26, 2015, respondent superior court denied the habeas corpus petition.

Petitioner filed a petition for writ of mandate in this court, seeking to compel respondent superior court to reverse its orders striking his civil complaint and denying the putative habeas corpus petition. We issued an order to show cause. Having received the return of real parties in interest, we order the issuance of a peremptory writ.

DISCUSSION

■ Petitioner contends respondent superior court had a ministerial duty to consider his petition for relief on the merits, and erred in deeming the civil complaint to be a habeas corpus petition. Real parties in interest agree. As do we.

At the outset, we note respondent superior court's order striking petitioner's civil complaint was signed by the judge and filed, and had the effect of dismissing the action against the individually named defendants, and thus constitutes an appealable judgment. (Code Civ. Proc., § 581d; *Muller v. Tanner* (1969) 2 Cal.App.3d 438, 440 [82 Cal.Rptr. 734] [signed and filed minute order “[s]triking” a case].) However, the order denying the habeas corpus petition is not appealable. (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7 [21 Cal.Rptr.2d 509, 855 P.2d 729].) Given this procedural quagmire, appeal is not an adequate remedy. We exercise our discretion to resolve this matter by this extraordinary writ proceeding. Further, our issuance of the order to show cause established the inadequacy of the appellate remedy. (Cf. *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205 [211 Cal.Rptr. 398, 695 P.2d 695] [“this court necessarily determined that appeal was not an adequate remedy when it issued the alternative writ”].)

■ A court has authority to treat one type of writ petition as another type when it is procedurally appropriate to do so. (*People v. Picklesimer* (2010) 48 Cal.4th 330, 340–341 [106 Cal.Rptr.3d 239, 226 P.3d 348].) In this case, respondent superior court identified what are arguably laudable reasons for deeming the civil complaint to be a habeas corpus petition, i.e., the court expressed its view that doing so would not alter the merits of the action or prejudice either party, and would save petitioner from complying with the technical requirements for a civil complaint. But a court may not treat one petition as another type when the effect is to limit the petitioner's legal remedies.

911.6, a petition may be made to the court for an order relieving the petitioner from Section 945.4. The proper court for filing the petition is a superior court that would be a proper court for the trial of an action on the cause of action to which the claim relates.”

“The label given a petition, action or other pleading is not determinative; rather, the true nature of a petition or cause of action is based on the facts alleged and remedy sought in that pleading. [Citations.]” (*Escamilla v. Department of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 511 [46 Cal.Rptr.3d 408].) Accordingly, in *Escamilla*, the court treated a petition for writ of habeas corpus as a petition for writ of mandate seeking recovery of personal property or its value. (*Id.* at pp. 509, 511–512; see also *People v. Picklesimer, supra*, 48 Cal.4th at p. 340 [“Assuming the pleading that has been filed meets or can be amended to meet the prerequisites for a petition for writ of mandate, a court in its discretion may treat a motion or a petition for a different writ as a mislabeled petition for writ of mandate”]; *In re Cregler* (1961) 56 Cal.2d 308, 309 [14 Cal.Rptr. 289, 363 P.2d 305] [stipulation to construe petition for writ of prohibition as habeas corpus petition]; *In re Stier* (2007) 152 Cal.App.4th 63, 83 [61 Cal.Rptr.3d 181] [acknowledging authority of court to treat habeas corpus petition as petition for writ of mandate]; *Fuller v. Superior Court* (2004) 125 Cal.App.4th 623, 625 [23 Cal.Rptr.3d 204] [deeming habeas corpus petition to be petition for writ of prohibition]; cf. *Villery v. Department of Corrections & Rehabilitation* (2016) 246 Cal.App.4th 407 [200 Cal.Rptr.3d 896] [trial court erred in sustaining demur-rer to inmate’s petition for writ of mandate on ground habeas corpus was a more appropriate remedy].)

But, “[h]abeas corpus is not an appropriate or available remedy for damages claims,” which can instead be pursued by a prisoner by means of a civil action. (*Wolff v. McDonnell* (1974) 418 U.S. 539, 554 [41 L.Ed.2d 935, 949–950, 94 S.Ct. 2963].) “From time immemorial our law has recognized differences between criminal proceedings and civil proceedings. [¶] The fact that a man is held to be entitled to release on habeas corpus does not mean that his custodian must answer in damages for the previous detention. [¶] Generally speaking, the right to release from custody is determined by the rules of criminal law while the right to recover damages for false imprison-ment depends on the rules of civil law.” (*Vallindras v. Massachusetts etc. Ins. Co.* (1954) 42 Cal.2d 149, 151–152 [265 P.2d 907]; see also *Shoemaker v. Harris* (2013) 214 Cal.App.4th 1210, 1220, fn. 13 [155 Cal.Rptr.3d 76] [“State law habeas corpus procedures . . . limit remedies that might be available in a civil action brought under 42 United States Code section 1983 (such as attorney fees and punitive damages)”]; *Younan v. Caruso* (1996) 51 Cal.App.4th 401, 413 [59 Cal.Rptr.2d 103] [“[T]he purposes of a habeas proceeding based on ineffective assistance of counsel and legal malpractice action based on the same alleged conduct differ greatly. The former seeks to obtain the petitioner’s freedom while the latter seeks money damages”]; *In re Lacy* (1947) 82 Cal.App.2d 794 [187 P.2d 73] [habeas corpus is not proper remedy to determine property rights].) In contrast, the purpose of habeas corpus is to challenge unlawful imprisonment or restraint, including vindicating rights

to which a prisoner is entitled while in confinement. (Pen. Code, § 1473, subd. (a); *In re Jordan* (1972) 7 Cal.3d 930, 932 [103 Cal.Rptr. 849, 500 P.2d 873].)

■ Further, a California felony prisoner has a statutory right to initiate civil actions while incarcerated. (Pen. Code, § 2601, subd. (d).)³ “In the case of an indigent prisoner initiating a bona fide civil action, this statutory right carries with it a right of meaningful access to the courts to prosecute the action. [Citation.]” (*Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 792 [39 Cal.Rptr.2d 47].)⁴ To be sure, “[m]eaningful access to the courts by an indigent prisoner ‘does not necessarily mandate a particular remedy’ to secure access. (*Payne v. Superior Court*[(1976)] 17 Cal.3d [908,] 923 [132 Cal.Rptr. 405, 553 P.2d 565].)” (*Wantuch v. Davis, supra*, 32 Cal.App.4th at p. 792.) Accordingly, the trial court has discretion in choosing among remedies to secure the prisoner’s access to court, including deferring the action until the prisoner is released, appointing counsel for the prisoner, transferring the prisoner to court, using depositions in lieu of personal appearances, holding trial in prison, conducting certain proceedings by telephone, using written discovery, using electronic media, and using “other innovative, imaginative procedures.” (*Id.* at pp. 792–793.) But deeming a civil complaint to be a habeas corpus petition is not an appropriate remedy to ensure a prisoner’s access to court when the civil complaint seeks damages which are inappropriate or unavailable in a habeas corpus proceeding.

DISPOSITION

Let a peremptory writ of mandate issue directing respondent superior court to (a) vacate its order of September 17, 2015, striking the civil complaint and directing the civil complaint refiled as a habeas corpus petition, entered in Amador County Superior Court case No. 15 CV 9354; (b) vacate its order of October 26, 2015, denying the habeas corpus petition, entered in Amador County Superior Court case No. 15 HC 1760; and (c) consider on its merits the “Notice of Hearing and Petition for Relief from Claim Requirement” filed

³ Penal Code section 2601 provides in pertinent part: “Subject only to the provisions of that section, each person described in Section 2600 [state prisoner or county jail prisoner for felony conviction] shall have the following civil rights: [¶] . . . [¶] (d) [t]o initiate civil actions, subject to a three dollar (\$3) filing fee to be collected by the Department of Corrections, in addition to any other filing fee authorized by law, and subject to Title 3a (commencing with Section 391) of the Code of Civil Procedure.”

⁴ We express no opinion as to whether petitioner’s civil action constitutes a “bona fide” action. Civil procedures such as demurrer, summary adjudication, and summary judgment are available for real parties in interest to challenge the legitimacy of petitioner’s action.

by petitioner on July 30, 2015, in Amador County Superior Court case No. 15 CV 9354. Costs are awarded to petitioner. (Cal. Rules of Court, rule 8.493.)

Robie, J., and Murray, J., concurred.

[No. D067929. Fourth Dist., Div. One. July 22, 2016.]

MARIA DELALUZ SANTOS, Plaintiff and Respondent, v.
KISCO SENIOR LIVING, LLC, et al., Defendants and Appellants.

[REDACTED]

[REDACTED]

[REDACTED]

OPINION**AARON, J.—****I.****INTRODUCTION**

After a series of thefts from residents at a residential community for the elderly called Cypress Court, police advised Cypress Court's management to install video cameras and place bait money in some of the residents' apartments, in an attempt to catch the thief. After doing so, on July 18, 2012, Cypress Court's resident relations director, defendant Tamara Gutierrez, determined that bait money that had been planted in a box in an elderly person's apartment had been removed. That same day, Gutierrez and Cypress Court's executive director, appellant Ricky Lansford, reviewed surveillance video that potentially implicated respondent Maria Delaluz Santos, who worked at Cypress Court as a resident assistant. Lansford and Gutierrez decided to call police.

Within a couple of hours, police arrived at Cypress Court and reviewed the video. After viewing the video, the police interviewed and searched Santos. Santos denied committing the theft and was not found to be in possession of the bait money. While the police were at Cypress Court, Lansford signed a form provided to him by a police officer, which effectuated a citizen's arrest of Santos. The officer gave Santos a notice to appear on the charge of petty theft and escorted her from the facility. The district attorney subsequently filed a criminal complaint against Santos, but, in December 2012, the charges were dismissed.

Santos filed this action in July 2013 against Gutierrez, Lansford, and two entities that either partially owned or managed Cypress Court, appellants Kisco Senior Living, LLC, and KRC ESC Corp. (collectively Kisco), alleging numerous causes of action, including assault and battery, defamation, malicious prosecution, negligence, false arrest and intentional infliction of emotional distress. After the close of evidence, defendants moved for nonsuit and a directed verdict with respect to all of Santos's claims. The trial court granted the motion for nonsuit with respect to all of the claims asserted against Gutierrez, and all of the claims against the remaining defendants with the exception of the false arrest and intentional infliction of emotional distress claims. The jury returned a verdict against Kisco and Lansford (collectively appellants) on the false arrest claim and in favor of appellants on the

intentional infliction of emotional distress claim.¹ The jury awarded Santos \$65,965 in damages, and the trial court entered a judgment in accordance with the jury's verdict.

Appellants filed a motion for judgment notwithstanding the verdict (JNOV) in which they claimed that they were absolutely immune from Santos's false arrest claim pursuant to an immunity provision (Welf. & Inst. Code, § 15634)² in the Elder Abuse and Dependent Adult Civil Protection Act (the Act) (§ 15600 et seq.). Appellants argued that the undisputed evidence established that Lansford was a mandated reporter under the Act, that Santos's claim was based on Lansford's "action of furthering the investigation [into elder abuse] by signing the citizen's arrest form," and that section 15634 prevents mandated reporters from being held liable for acts that "stem[] from [the] duty to report suspected financial abuse of an elder." The trial court denied the motion, stating that the court was "not persuaded . . . that the mandated reporter immunity . . . bar[s] the false arrest claim"

On appeal, among other contentions, appellants claim that the undisputed facts establish that they are absolutely immune from Santos's false arrest claim and that the trial court erred in denying their motion for JNOV on this ground.³ We agree. The sole published appellate case applying section 15634 concludes that the immunity provided in the statute is "sweeping in its breadth." (*Easton v. Sutter Coast Hospital* (2000) 80 Cal.App.4th 485, 491 [95 Cal.Rptr.2d 316] (*Easton*).) Further, in reviewing cases construing a nearly identical immunity provision for mandated reporters in the context of child abuse (Pen. Code, § 11172), this court has stated, "Without exception, our appellate courts have concluded that immunity is a key ingredient in maintaining the Act's integrity and thus have rejected efforts aimed at narrowing its protection." (*Stecks v. Young* (1995) 38 Cal.App.4th 365, 375 [45 Cal.Rptr.2d 475].) For example, courts have concluded that mandated reporters may not be sued either for "conduct committed in furtherance of diagnosing whether abuse occurred," (*Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455, 1492 [150 Cal.Rptr.3d 735] (*Arce*)), or for "communications between the reporter and the public authorities responsible

¹ The record indicates that the sole theory of liability upon which the jury rendered its verdict against Kisco was that Kisco was vicariously liable for Lansford's conduct. The trial court instructed the jury, "If you find that Ricky Lansford's false arrest and/or intentional infliction of emotional distress on [Santos], then you must decide whether [Kisco] are [sic] responsible for her harm."

² Unless otherwise specified, all subsequent statutory references are to the Welfare and Institutions Code.

³ While this appeal was pending, we granted the California Assisted Living Association's (CALA) application to file an amicus curiae brief in support of appellants. We also provided all parties with the opportunity to file an answer to CALA's brief. None of the parties timely filed an answer. We denied Santos's request to file an untimely answer.

for investigating or prosecuting . . . abuse" (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 679 [38 Cal.Rptr.2d 534] (*Robbins*)).

■ We conclude that section 15634 similarly protects mandated reporters from liability for conduct that is integrally related to a report of suspected elder abuse, and further conclude that the undisputed evidence establishes that Lansford's acts in this case constituted such conduct. Accordingly, we reverse the judgment and the trial court's order denying appellants' motion for JNOV and remand the matter to the trial court with directions to grant appellants' motion and enter judgment in favor of appellants.⁴

II.

FACTUAL BACKGROUND⁵

A. *Thefts at Cypress Court*

Beginning in March 2012, there was a large increase in the number of thefts at Cypress Court.⁶ Between March and July of that year, residents or their family members reported nine instances of theft to Gutierrez.

On June 25, 2012, a resident, Mr. N., together with a family member, reported a series of thefts to Gutierrez that they believed had been occurring over a period of approximately a month. They told Gutierrez that \$250 was missing from a lockbox in Mr. N.'s room and \$45 was missing from his wallet. Cuff links and a wedding ring were also missing. The police investigated the thefts.

While investigating one of the thefts, police advised Gutierrez to speak with Detective Thompson of the Escondido Police Department concerning possible actions that Cypress Court could take concerning the thefts. Gutierrez and Lansford met with Detective Thompson. According to Gutierrez,

⁴ In light of our disposition, we need not consider appellants' other arguments in support of reversal of the judgment and/or the court's order denying appellants' motion for JNOV. Specifically, we need not consider appellants' arguments that they may not be liable for the tort of false arrest because a police officer requested that Lansford sign the citizen's arrest form, it would have been a misdemeanor for Lansford to refuse to assist the police, and there is insufficient evidence that Lansford had the requisite intent to commit the tort. In addition, we need not consider appellants' claim that the trial court erred in instructing the jury on the tort of false arrest.

⁵ In light of the procedural posture of the case, we state the facts in the light most favorable to the verdict. (See pt. III.A., *post*.)

⁶ Santos was hired by Cypress Court on March 13, 2012.

Detective Thompson recommended that Cypress Court purchase video cameras and “set up some bait money,” in an attempt to catch the thief. Gutierrez installed video cameras in some of the resident’s apartments, including in Mr. N.’s.

B. *Gutierrez and Lansford suspect that Santos is responsible for the thefts*

On July 17, 2012, Gutierrez placed bait money inside an unlocked box in Mr. N.’s apartment. The following morning, Gutierrez went to Mr. N.’s apartment. Gutierrez looked inside the box and discovered that \$40 was missing. Gutierrez then reviewed a video recording that “showed [Santos] near the [box] and touching the [box].”

Gutierrez explained that the video camera from which the recording was taken was motion activated, that she had watched all of the recordings between the time the bait money was placed in the box and the time the money was discovered missing, and that Santos was the only person near the box during this time. Gutierrez acknowledged, however, that the camera did not detect all motions in the room. Although she was not certain that Santos had taken anything out of the box, Gutierrez considered Santos’s behavior on the video to be “suspicious,” and felt that it “was necessary to report this to the police because [Gutierrez is] a mandated reporter.”

Gutierrez asked Lansford to review the video clip of Santos that Gutierrez considered suspicious. Gutierrez and Lansford reviewed the video recording together. After doing so, Gutierrez and Lansford agreed that they should call the police. Gutierrez placed the call.

C. *The police investigation*

At some point later that same day, Christi Torres, an employee in the human resources department at Cypress Court, went to a room in which Santos was working, directed Santos to come with her, walked Santos down to the lobby, and told Santos to wait in a chair in the lobby. Torres then went into Lansford’s office, which was next to the lobby. Santos waited in the lobby as directed by Torres. After approximately two hours, Santos saw police officers arrive at Cypress Court.

Santos’s supervisor brought her into Lansford’s office. The supervisor, Lansford, Torres, and some police officers were in the room. The officers asked Santos whether she had been in Mr. N.’s room. Santos acknowledged that she had been in Mr. N.’s room in order to get him out of bed, clean his room, and send him to breakfast. The officers asked Santos whether she had taken anything from Mr. N.’s room. Santos denied having taken anything.

The officers then instructed Santos to empty her pockets, which she did. Santos took a cookie wrapper, a phone, some gloves, a pager and a radio out of her pockets. After the search, everyone left Lansford's office, except for Santos and one police officer. Santos asked the officer what she was being accused of. The officer responded, "They have nothing on you."

A male police officer told Santos that they were going to have a female officer search her. Santos responded that she had \$30 in her sock.⁷ The serial numbers on the bills taken from Santos's sock did not match the serial numbers of the bait money. A female officer arrived and searched Santos. During the search, the officer touched Santos's breast area and waist area in a manner that Santos found offensive. None of the bait money was recovered during either of the searches, nor at any other time.

D. *Santos is arrested and charged with a crime, but charges are later dismissed*

At some point while the police were at Cypress Court,⁸ Lansford signed a form that effectuated a citizen's arrest of Santos.⁹ The citizen's arrest form is part of a July 18 arrest report that appears to be entitled, "San Diego Regional County Arrest/Juvenile Contact Report."¹⁰ The first page of the two pages of the report that are in the record is written by Officer Lewis Shaver. The report states that the arrest occurred at 1:45 p.m. on July 18, 2012, lists Santos as the "arrestee," states the charge "PC 488 petty theft," and states that the victim of the offense is "Cypress Court Retirement."

The second of the two pages of the report contains a box labeled "Citizen Arrest." The box states, "I have arrested _____. " Santos's name is handwritten on the line. Immediately below the line is the following:

⁷ Santos explained that she occasionally kept money in her sock while at work after having previously lost money at work while carrying it in her pocket.

⁸ It is not clear from the record when exactly this arrest occurred in relation to the remainder of the interrogation and search. Santos asserts that the arrest occurred *after* the interrogation and search, but does not cite to any portion of the reporter's transcript that demonstrates the timing of the arrest in relation to the interrogation and search. However, the precise timing of the arrest is not material to our resolution of the appeal.

⁹ The citizen's arrest form is contained in the appellants' appendix as an attachment in Santos's opposition to appellants' motion for JNOV. In addition, a two-page document, labeled court's exhibit 114, containing two pages of a July 18, 2012 arrest report, including the citizen's arrest form, is attached to CALA's amicus curiae brief. Although it is not clear from the record whether court's exhibit 114 was offered in evidence at trial, it does appear that the same two pages of the July 18, 2012 arrest report were admitted in evidence as court's exhibit 1. Neither party contends that the two pages of the July 18, 2012 arrest report containing the citizen's arrest form is not properly in the record. Accordingly, we conclude that the two pages of the July 18, 2012 arrest report attached to CALA's amicus curiae brief are properly before this court since they are identical to court's exhibit 1.

¹⁰ A portion of the title of the document in the record is obscured.

-
- “ For a public offense committed or attempted in my presence.
- “ When the person arrested has committed a felony, although not in my presence.
- “ When a felony has been in fact committed, and I have reasonable cause for believing the person arrested to have committed it.”

None of the boxes next to the three options listed in the text above is checked. Lansford signed this portion of the form. The second of the two pages of the report was also written by Officer Shaver, with the exception of Lansford’s signature. Lansford signed that portion of the form, thereby effectuating a citizen’s arrest of Santos.

Officer Shaver issued Santos a misdemeanor citation for petty theft. The citation stated that the violation occurred at 1:45 p.m. on July 18 and directed Santos to appear in court on or before September 4, 2012.

The district attorney subsequently filed a misdemeanor criminal complaint against Santos charging her with petty theft. The charges were dismissed in December 2012.

Santos suffered depression and anxiety as a result of the incident. In addition, she suffered a loss of income, incurred debt for the payment of attorney fees, and was unable to find similar employment.

III.

DISCUSSION

The trial court erred in denying appellants’ motion for JNOV on the ground that appellants were not immune from Santos’s false arrest claim

Appellants claim that the trial court erred in denying their motion for JNOV. In support of this claim, appellants argue that the undisputed facts presented at trial establish that they are immune from liability for Santos’s false arrest claim.

A. *General principles of law governing a motion for JNOV and the applicable standard of review*

A trial court must grant a motion for JNOV whenever a motion for a directed verdict for the aggrieved party should have been granted. (Code Civ.

Proc., § 629.) “‘[T]he power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit.’ [Citation.] ‘A motion for a directed verdict ‘is in the nature of a demurrer to the evidence, and is governed by practically the same rules, and concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom.’’’’ (*Baker v. American Horticulture Supply, Inc.* (2010) 186 Cal.App.4th 1059, 1072 [111 Cal.Rptr.3d 695].)

Ordinarily, when reviewing a ruling on a motion for JNOV, “an appellate court will use the same standard the trial court uses in ruling on the motion, by determining whether it appears from the record, viewed most favorably to the party securing the verdict, that any substantial evidence supports the verdict. ‘‘‘If there is any substantial evidence, or reasonable inferences to be drawn therefrom in support of the verdict, the motion should be denied.’’’’ (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 284 [73 Cal.Rptr.2d 596].)

Whether, in light of the facts viewed in the light most favorable to Santos, appellants are immune from Santos’s false arrest claim presents a question of law that we review de novo. (See *King v. State of California* (2015) 242 Cal.App.4th 265, 289 [195 Cal.Rptr.3d 286] [“‘The availability of . . . immunity after a trial is a legal question informed by the jury’s findings of fact, but ultimately committed to the court’s judgment’”]; *Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68 [104 Cal.Rptr.2d 602, 18 P.3d 29] [stating that where an appeal from the denial of a motion for JNOV raises a legal issue, an appellate court reviews the question de novo].)

B. Relevant law

1. The Act

The Act “represents the Legislature’s response to the problem of unreported elder abuse which came to its attention in the early 1980’s.” (*Easton, supra*, 80 Cal.App.4th at p. 490.) “The focus of the Act has always been to encourage reporting of abuse or neglect.” (*Id.* at p. 491.)

Under the Act, “[a]ny person who has assumed full or intermittent responsibility for the care or custody of an elder or dependent adult . . . is a mandated reporter.” (§ 15630, subd. (a).) Mandated reporters are statutorily required to report suspected instances of abuse, including financial abuse, of the elderly: “Any mandated reporter who, in his or her professional capacity, or within the scope of his or her employment, has observed or has knowledge of an incident that reasonably appears to be . . . financial abuse . . . or reasonably suspects that abuse, shall report the known or suspected instance

of abuse . . . as soon as practicably possible.” (*Id.*, subd. (b)(1).) Pursuant to section 15610.30, “‘Financial abuse’ of an elder . . . occurs when a person or entity does any of the following: [¶] . . . Takes . . . personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.” (*Id.*, subd. (a)(1).) A report of suspected financial abuse of an elder may be made to “[a] local law enforcement agency,” among other entities. (§ 15630, subd. (b)(1)(A).) Section 15658, subdivision (b)(7) specifies that “[t]he name of the individuals believed to be responsible for the incident and their connection to the victim,” is among the information to be provided on the statutorily authorized “written abuse report” (*id.*, subd. (a)) required by the Act.

The Act contemplates that the appropriate authorities will undertake an investigation into such reports in order to protect the elderly person. For example, the Act provides that, “it is the intent of the Legislature in enacting this chapter to provide that . . . local law enforcement agencies shall receive referrals . . . from any mandated reporter submitting reports . . . and *shall take any actions considered necessary to protect the elder or dependent adult and correct the situation and ensure the individual’s safety.*” (§ 15600, subd. (i), italics added; see *People v. Davis* (2005) 126 Cal.App.4th 1416, 1435 [25 Cal.Rptr.3d 92] (*Davis*) [“The enactment of such a comprehensive statutory scheme, which not only requires designated professionals to report known or suspected abuse but also sets up a system of outside agencies mandated to investigate reports of such abuse, amply demonstrates the scope and severity of the problem of elder and dependent adult abuse as perceived by the Legislature”]; *Easton, supra*, 80 Cal.App.4th at p. 493 [“The focus of the statutory scheme is to encourage prompt reports *so as to protect the victim of the suspected abuse*” (italics added)].)

Section 15630 provides criminal sanctions for those mandated reporters who either fail to report abuse, including financial abuse, or who “imped[e] or inhibit[] a report” of such abuse. (*Id.*, subd. (h) [“Failure to report, or impeding or inhibiting a report of . . . financial abuse, or neglect of an elder or dependent adult, in violation of this section, is a misdemeanor”].) In addition, in order to further the statute’s purpose of fostering “the broadest possible reporting of incidents of known and suspected abuse of elder and dependent adults,” section 15630 has been construed to impose “criminal liability for failure to report, without regard to intent or negligence.” (*Davis, supra*, 126 Cal.App.4th at p. 1437.)

In order to further ensure that mandated reporters comply with their reporting obligations, section 15634, subdivision (a) “create[s] an absolute privilege in those individuals required to make such reports.” (*Easton, supra*, 80 Cal.App.4th at pp. 489, 494 [“Immunity from reporting suspected

abuse is crucial to ensure compliance with the reporting obligation”].) Section 15634’s immunity provision provides in relevant part: “No care custodian . . . who reports a known or suspected instance of abuse of an elder or dependent adult shall be civilly or criminally liable for any report required or authorized by this article.” (*Id.*, subd. (a).)

In *Easton*, the court was “called upon to construe the breadth of the immunity from civil liability conferred by . . . section 15634.” (*Easton, supra*, 80 Cal.App.4th at p. 488.) In that case, a physician made a report to sheriff’s deputies based on information that the physician had received from a nurse who had unsuccessfully attempted to persuade the plaintiff to take his mother to the hospital. (*Id.* at p. 489.) Authorities acted on the report by removing the plaintiff’s mother from his home and taking her to the hospital. (*Ibid.*) The *Easton* court considered whether the physician and the nurse were immune from liability for trespass, false imprisonment and emotional distress claims premised upon the report and the seizure of the elderly woman. (*Id.* at pp. 489–490.) At the time of the incident, former section 15630, subdivision (b) provided that a mandated reporter who “‘has observed an incident that reasonably appears to be physical abuse,’ ” was required to report such abuse. (*Easton, supra*, at p. 491, italics added, quoting former § 15630, subd. (b).)

The *Easton* court first concluded that the immunity provided in section 15634 to mandated reporters was absolute, rather than qualified. The *Easton* court reasoned: “Based upon the purpose of the immunity provision and upon the Legislature’s drafting of section 15634, we conclude that the privilege created by the section is absolute rather than qualified. The language of section 15634 distinguishes between mandated reporters of abuse who make required or authorized reports and nonmandated reporters. As to those who must report, the rule is sweeping in its breadth—no health practitioner who reports shall be civilly liable for any report. However, the section goes on to create only a qualified privilege for ‘[a]ny other person reporting.’ Such nonmandated reporters ‘shall not incur civil or criminal liability as a result of any report authorized by this article, unless it can be proven that a false report was made and the person knew that the report was false.’ (§ 15634, subd. (a).) The plain meaning of the statutory language is that for mandated reporters the truth or falsity of the report is of no moment—the privilege is absolute.” (*Easton, supra*, 80 Cal.App.4th at pp. 491–492.)

The *Easton* court then considered whether the physician and the nurse were entitled to immunity, notwithstanding that they had failed to “comply with the reporting method described in [former] section 15630” (*Easton, supra*, 80 Cal.App.4th at p. 492), in that the nurse had not personally called law enforcement, but instead had relayed information concerning the abuse to the physician, who called law enforcement. The *Easton* court “reject[ed] a

strict reading of the reporting condition—namely that reports be made by one who ‘has observed’ a reportable incident—as inconsistent with either the letter or the spirit of the statutory scheme.” (*Id.* at p. 493.) The *Easton* court reasoned that while a physician’s reliance on a nurse’s report of suspected abuse “was not expressly envisioned by the statutory scheme in effect as of [the time of the incident] the Legislature had in fact already taken action to amend the statute so that such reliance would be expressly permitted.” (*Id.* at p. 494 [referring to an amendment to the statute requiring a mandated reporter who “‘has observed *or has knowledge of* an incident,’” to report such incident, quoting § 15630, subd. (b)(1), as amended by Stats. 1998, ch. 980, § 1, p. 7525].) The *Easton* court continued, “Clearly the purpose of the statutory scheme of which section 15630 is a part and the precise language of the 1998 version of the section, would not be advanced by denying immunity to either [the nurse] or [the physician].” (*Easton, supra*, at p. 494.)

2. *Mandated reporter immunity in the child abuse context*

In interpreting and applying section 15634, we may consider its “predecessor statutes, which created reporting requirements and immunity for mandated reporters of child abuse.” (*Easton, supra*, 80 Cal.App.4th at p. 492.) Such case law is highly relevant in light of the similarity of the two immunity provisions. (Compare Welf. & Inst. Code, § 15634 [“No care custodian . . . who reports a known or suspected instance of abuse of an elder or dependent adult shall be civilly or criminally liable for any report required or authorized by this article”] with Pen. Code, § 11172 [“No mandated reporter shall be civilly or criminally liable for any report required or authorized by this article”].)

Courts have repeatedly recognized the breadth of the immunity provision contained in Penal Code section 11172. (See, e.g., *B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 193 [195 Cal.Rptr.3d 220, 361 P.3d 319] [“The Legislature . . . grant[ed] . . . broad immunities for those mandated reporters who report suspected instances of child abuse”]; *Thomas v. Chadwick* (1990) 224 Cal.App.3d 813, 821 [274 Cal.Rptr. 128] (*Thomas*) [“To encourage reporting, the Legislature granted reporters broad immunities to obviate the chilling effect the spectre of civil lawsuits would have upon a reporter’s willingness to become involved”].) “In order to promote the purpose of the act to protect abused children, [Penal Code] section 11172 provides that mandated reporters of child abuse are absolutely immune from liability.” (*Robbins, supra*, 32 Cal.App.4th at p. 679; see also *Arce, supra*, 211 Cal.App.4th at p. 1485 [“The immunity extends even to negligent, knowingly false, or malicious reports of abuse”].)

Further, courts have broadly *interpreted* the immunity provided in Penal Code section 11172 beyond its literal text in order to effectuate this purpose.

For example, in *Storch v. Silverman* (1986) 186 Cal.App.3d 671, 677 [231 Cal.Rptr. 27] (*Storch*), despite the fact that the version of the statute applicable in the case was limited to persons “‘who report[] a known or suspected instance of child abuse’” (*id.* at p. 675, fn. 3, italics added, quoting former Pen. Code, § 11172, subd. (a)), the court concluded that the statute covered “those mandated reporters who are involved in the identification of an instance of child abuse but do not personally report it to the authorities.” (*Storch, supra*, at p. 681, italics added.) In reaching this conclusion, the court reasoned: “Team immunity is consistent with the purpose and intent of the Legislature in promoting the reporting of child abuse. Limitation of immunity to the person making the telephone call to the agency or signing the report would defeat that purpose.” (*Ibid.*)

In addition, and of particular relevance to this case, courts have broadly interpreted the child abuse mandated reporter immunity provision to apply to certain *conduct* related to a reporting event. For example, in *Krikorian v. Barry* (1987) 196 Cal.App.3d 1211 [242 Cal.Rptr. 312] (*Krikorian*), the court considered whether “mandatory reporters [are] completely immune from liability for professional services rendered in connection with the identification or diagnosis of suspected cases of child abuse, or just for the act of reporting.” (*Id.* at p. 1222.) The *Krikorian* court rejected the argument that mandated reporter immunity extended only to the “act of reporting” (*ibid.*), reasoning in part: “[L]imiting immunity to the protection of professionals against lawsuits resulting from the *act of reporting* would defeat the Legislature’s goal of promoting increased reporting of child abuse. The Legislature has identified the fear of civil liability for allegedly false reports as a major deterrent to the reporting of suspected cases of child abuse by professionals. Recent revisions to the Child Abuse Reporting Act have been largely directed at reducing or eliminating, to the extent possible, professional[s’] fear of litigation resulting from required reports. A law conferring ‘absolute’ immunity for the act of reporting suspected child abuse, but *not* for professional activities contributing to its identification, would not likely allay the fear of a prospective reporter that an angry parent might initiate litigation for damages, following a report which is subsequently proven to be mistaken” (*id.* at pp. 1222–1223). Ultimately, the *Krikorian* court held, “Insofar as liability for damages to a person falsely accused of child abuse is concerned, we conclude that [Penal Code] section 11172 was intended to provide absolute immunity to professionals for conduct giving rise to the obligation to report, such as the collection of data, or the observation, examination, or treatment of the suspected victim or perpetrator of child abuse, performed in a professional capacity or within the scope of employment, as well as for the act of reporting.” (*Id.* at p. 1223.)

In *Arce, supra*, 211 Cal.App.4th 1455, the Court of Appeal applied *Krikorian*, among other cases, in concluding that a hospital’s social worker

(Wilson) and the hospital for which she worked were immune from claims for intentional infliction of emotional distress, invasion of privacy, and stalking premised on allegedly harassing phone calls that Wilson made to the parents concerning a bruise on their child's ankle. (*Id.* at pp. 1491–1492.) According to the plaintiffs, when the father questioned Wilson about inconsistent statements that Wilson had made to the parents concerning her involvement in the case, Wilson “‘began to laugh at and antagonize the [p]laintiffs, and made the threat that [the parents’] children would again be taken away.’” (*Id.* at p. 1492.) The plaintiffs claimed that the trial court had erred in concluding that the defendants were immune from claims premised on such conduct, arguing, “Wilson’s conduct did not involve the act of reporting child abuse within the meaning of Penal Code section 11172 and therefore was not protected under the statute.” (*Ibid.*) The *Arce* court rejected this argument, noting, “Cases analyzing Penal Code section 11172 have concluded that the statute provides immunity to claims predicated on false and malicious reports of abuse as well as conduct committed in furtherance of diagnosing whether abuse occurred.” (*Ibid.*) Thus, even though the plaintiffs argued that Wilson’s conduct was “‘harassing, antagonizing, and threatening’” (*id.* at p. 1496), the *Arce* court concluded that the trial court had properly determined that “[t]he conduct alleged against Wilson falls within [Penal Code] section 11172” (*ibid.*, italics omitted).

Courts have also concluded that immunity under Penal Code section 11172 may “cloak[] the mandated reporter with immunity for activity [occurring] after the report of suspected child abuse . . . is made.” (*Ferraro v. Chadwick* (1990) 221 Cal.App.3d 86, 92 [270 Cal.Rptr. 379] (*Ferraro*).) In *Ferraro*, the court noted that Penal Code section 11172 extends immunity “not only to ‘required’ or mandated reporting but to another distinct category of reporting[,] that which is ‘authorized’ by the Act.” (*Ferraro, supra*, at p. 93, quoting Pen. Code, § 11172, subd. (a); see also § 15634 [providing immunity “for any report required or *authorized* by this article” (italics added)].) The *Ferraro* court concluded that “communications by a mandated reporter to . . . law enforcement agencies that are statutorily entitled to receive and investigate reports of child abuse are ‘*authorized*’ communications or reports under the [Child Abuse and Neglect Reporting Act], and, therefore, [a]re protected by the immunity of [Penal Code] section 11172, subdivision (a).” (*Ferraro*, at p. 95, italics added; see *Thomas, supra*, 224 Cal.App.3d at p. 822 [“It would be anomalous to conclude that the reporter’s ‘required’ report of suspected child abuse is privileged, but that the legislatively contemplated subsequent communications concerning the incident would expose the reporter to potential civil liability”].) The *Ferraro* court reasoned in part: “Certainly, it is reasonable to infer the Legislature (1) anticipated that in the course of an investigation into suspected child abuse, the reporter . . . is going to be contacted and interviewed by the agency conducting the investigation and (2)

sanctioned such communication between the reporter and the investigating agency. It is also reasonable to infer the Legislature foresaw the possibility of the reporter being contacted by the district attorney with respect to criminal investigations.” (*Ferraro*, at pp. 94–95.)

C. Appellants are immune from Santos’s false arrest claim because the claim was premised on a mandated reporter’s conduct that was integrally related to a report of suspected elder abuse

It is undisputed both that Lansford was a mandated reporter under the Act and that Gutierrez’s July 18 call to the police constituted a report required under the Act.¹¹ Thus, it is clear that appellants are immune from liability for any claims based on Gutierrez’s call to the police. (See § 15634, subd. (a) [providing immunity for “any report required or authorized by this article”].) Santos does not dispute this.

The more difficult question is whether Lansford’s acts on July 18 taken in connection with the police investigation that day, in response to Gutierrez’s call, are similarly protected. In light of the case law discussed above and the particular circumstances of this case, we conclude that Lansford is immune from Santos’s claim because his conduct was integrally related to a report of suspected elder abuse and thus constituted “authorized” activity within the meaning of section 15634.

At the outset, we must specifically identify the conduct on which Santos’s false arrest claim is based. Santos suggests that her false arrest claim is premised on the search, interrogation and arrest that occurred on July 18, as well as the ensuing prosecution. Her brief states the following: “Ms. Santos concedes that reporting is appropriate. It was the further act of arresting Ms. Santos after performing an illegal strip-search and questioning, and subjecting her to prosecution even upon discovery that she had no[t] stolen property that is problematic.”¹²

To the extent that Santos contends that the jury’s verdict on her false arrest claim is supported by evidence of Lansford’s purported conduct in searching, interrogating, or prosecuting Santos, we disagree. There is no evidence that

¹¹ Lansford and Santos both testified that Lansford was a mandated reporter of elder abuse, and there was no contrary testimony. In her brief, Santos concedes that Gutierrez’s initial report to the police was “appropriate.”

¹² Santos also referred to the interrogation, search, and arrest in the false arrest claim in her complaint.

Lansford participated in either the search or questioning conducted by the police on July 18. Santos testified that police officers interrogated and searched her.¹³ Detective Shaver testified that he questioned Santos and informed her that a female officer would be arriving at the scene to search her. Lansford testified that he was not in the room during the interrogation and search. Further, there also is no evidence that Lansford participated in the prosecution of Santos's criminal case.¹⁴

Thus, we are left to consider whether Lansford's act in signing a form that effectuated a citizen's arrest of Santos constitutes conduct protected by the immunity afforded by section 15634. In considering this issue, we begin by rejecting Santos's assertion that "[m]andated reporter immunity only extends to reporting and *does not extend to conduct.*" (Capitalization & boldface omitted, italics added.) As noted above, courts have concluded that mandated reporters in the child abuse context may not be held liable for "*conduct committed in furtherance of diagnosing whether abuse occurred.*" (*Arce, supra*, 211 Cal.App.4th at p. 1492, italics added). We see no reason why this same principle should not apply when interpreting the nearly identical immunity provision in the Act.¹⁵ For the same reason, we conclude that case law in the child abuse context providing that mandated reporters are immune for communications with law enforcement that occur *after* an initial report of abuse that are related to abuse (see *Ferraro, supra*, 221 Cal.App.3d at pp. 92, 95), should apply with equal force in interpreting section 15634.

This case falls within the intersection of these two lines of cases. Further, the undisputed evidence discussed below establishes that Lansford's act in signing a citizen's arrest form constituted activity that was so integrally related to a report of elder abuse that it constituted conduct that falls within

¹³ At one point in her testimony, Santos stated that Lansford and the police officers were in a room and that "they" asked her questions concerning whether she had been in Mr. N.'s room. Shortly thereafter, Santos stated, "They said for me to bring out anything that I had in my pockets." Defense counsel then asked, "Okay. Now, who is they?" Santos responded, "The police officers." Santos did not specifically state that Lansford had participated in the interrogation.

¹⁴ The deputy district attorney who was assigned to prosecute Santos's criminal case testified at trial. Neither his testimony, nor any other evidence in the record demonstrates that Lansford had any role in the prosecution of Santos's criminal case.

¹⁵ We are not persuaded by Santos's argument that no mandated reporter immunity may lie because "[s]igning a citizen's arrest form is an act." In support of this contention, Santos cites *Kesmodel v. Rand* (2004) 119 Cal.App.4th 1128, 1136 [15 Cal.Rptr.3d 118] (*Kesmodel*), which she contends is "directly on point." *Kesmodel* did not concern the scope of mandated reporter immunity, but rather, addressed whether a citizen's arrest constituted communication protected by the litigation privilege in Civil Code section 47, subdivision (b). (*Kesmodel, supra*, at pp. 1134–1140.) The case is inapposite because unlike mandated reporter immunity, the litigation privilege "protects only communications or broadcasts." (*Id.* at p. 1137.)

the “sweeping . . . breadth” of the immunity afforded in section 15634. (*Easton, supra*, 80 Cal.App.4th at p. 491.)

To begin with, we consider the nature of Lansford’s act as to which liability is sought. Lansford’s conduct in this case—signing a form to effectuate a citizen’s arrest—was far more similar to an act of “reporting” than other conduct to which courts have determined immunity extends. (See *Arce, supra*, 211 Cal.App.4th at pp. 1491–1492 [making harassing telephone calls]; *McMartin v. Children’s Institute International* (1989) 212 Cal.App.3d 1393, 1401 [261 Cal.Rptr. 437] [interviewing children]; *Krikorian, supra*, 196 Cal.App.3d at pp. 1213, 1222–1223 [providing psychotherapeutic services]; *Storch, supra*, 186 Cal.App.3d at p. 674 & fn. 2 [conducting medical examinations and a pathology analysis].) As amicus curiae CALA argues, “[I]t is not apparent that signing a citizen’s arrest form should be construed as something other than ‘reporting’ even in the literal sense of the word.”

In addition, it is clear that Lansford’s conduct was undertaken in connection with an official investigation into suspected elder abuse occasioned by Lansford and Gutierrez’s mandated report of such suspected abuse. We are not persuaded by Santos’s argument that Lansford’s conduct was undertaken in order to protect *Cypress Court’s* property (i.e., the bait money placed in Mr. N.’s room), and thus, the arrest was unconnected to a report of *elder* abuse. Clearly, Lansford’s conduct would not have been protected by section 15634 if Lansford had suspected Santos of stealing money from his office and effectuated a citizen’s arrest of her. But, in this case, the undisputed evidence demonstrates that Gutierrez’s initial call to the police was made because Gutierrez and Lansford suspected that Santos had been stealing property belonging to the elderly residents at Cypress Court, i.e., committing financial abuse of the elderly.¹⁶ That evidence includes undisputed evidence of prior thefts of elderly residents’ property, prior reports to the police concerning those thefts, police instruction to management to place video cameras and bait money at the facility in attempt to catch the thief, and Gutierrez’s discovery of missing bait money and video potentially implicating Santos as the thief. In light of this evidence, we reject Santos’s assertion that “[t]his is not a case where the arrest at issue was performed in furtherance of a report to law enforcement.”

This case stands in sharp contrast to *James W. v. Superior Court* (1993) 17 Cal.App.4th 246 [21 Cal.Rptr.2d 169] (*James W.*), in which this court

¹⁶As noted previously, Santos concedes that Gutierrez’s initial report to the police was “appropriate.” We agree that it is clear that Gutierrez called the police because she and Lansford suspected *elder* abuse. Gutierrez’s conduct in calling the police would *not* have been entitled to immunity if she were merely calling to report a theft of Cypress Court’s property.

concluded that mandated reporter immunity did not apply to the conduct of a family counselor and foster parent who, for two and one-half years after a report of sexual abuse, allegedly coerced a child into falsely naming her father as the perpetrator of the abuse. (*Id.* at pp. 258–259.)¹⁷ The *James W.* court concluded that the defendants, who had “[not] identified or reported child abuse,”¹⁸ were not entitled to immunity because they “voluntarily assumed roles of those who, having received the report and determined the identity of the perpetrator, search for corroboration and/or attempt to pressure a witness to get a conviction.” (*James W.*, at p. 256.)

Unlike in *James W.*, Lansford’s conduct occurred both while law enforcement officers were physically present at the scene conducting an investigation, and in close temporal proximity to the initial report of abuse.¹⁹ Further, even viewing the facts in the light most favorable to Santos, as is required (see pt. III.A., *ante*), there is no evidence that Lansford “usurped the function” of the authorities (*Robbins, supra*, 32 Cal.App.4th at p. 680, discussing *James W.*) such that he would not be entitled to mandated reporter immunity under *James W.* (See also *Jones v. County of Los Angeles* (9th Cir. 2015) 802 F.3d 990, 1008 [applying *James W.* to conclude that doctor who “usurped DCFS’s authority under California law to take a child into temporary custody,” was not entitled to child abuse mandated reporter immunity].)

In light of the case law interpreting the broad mandated reporter immunity provided in the elder and child abuse context, the nature of Lansford’s conduct, and its close relationship to an official investigation into suspected elder abuse, we conclude that Lansford is immune from Santos’s false arrest claim as a matter of law. Accordingly, we conclude that the trial court erred in denying appellants’ motion for JNOV.²⁰

¹⁷ The complaint in *James W.* alleged that the defendants participated in “a campaign that included concealing evidence and inducing confessions and accusations by fraud, coercion, and perjury.” (*James W., supra*, 17 Cal.App.4th at p. 249.)

¹⁸ The *James W.* court explained that “hospital staff” had reported the abuse and that the defendants “came onto the scene after the fact—after child abuse had been positively identified and reported.” (*James W., supra*, 17 Cal.App.4th at p. 256.)

¹⁹ Lansford’s conduct was far closer in time to the initial reporting event than has been true in other cases in which mandated reports have been determined to be immune. (See, e.g., *Ferraro, supra*, 221 Cal.App.3d at p. 92 [stating that immunity may apply “*after* the report of suspected . . . abuse . . . is made,” and concluding that defendants were immune for statements made more than two years after initial reporting event]; *Thomas, supra*, 224 Cal.App.3d at pp. 816–817 [doctor and hospital immune from suit for letter sent to district attorney approximately one month after initial report of child abuse “urging the district attorney to take action to remove appellants’ other child . . . from her parents’ home”].)

²⁰ In light of our conclusion that Lansford is immune from Santos’s false arrest claim, we necessarily conclude that Kisco also may not be held vicariously liable for such claim.

IV.

DISPOSITION

The judgment and the trial court's order denying appellants' motion for JNOV are reversed. The matter is remanded to the trial court with directions to grant appellants' motion for JNOV and enter judgment in favor of appellants. In the interests of justice, each party to bear its own costs on appeal.

Benke, Acting P. J., and Irion, J., concurred.

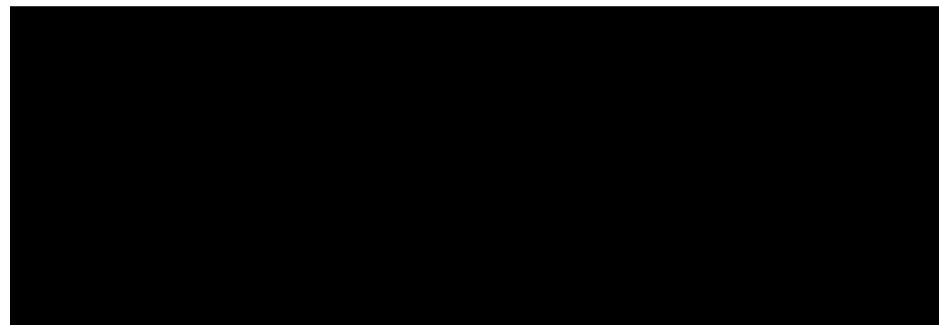
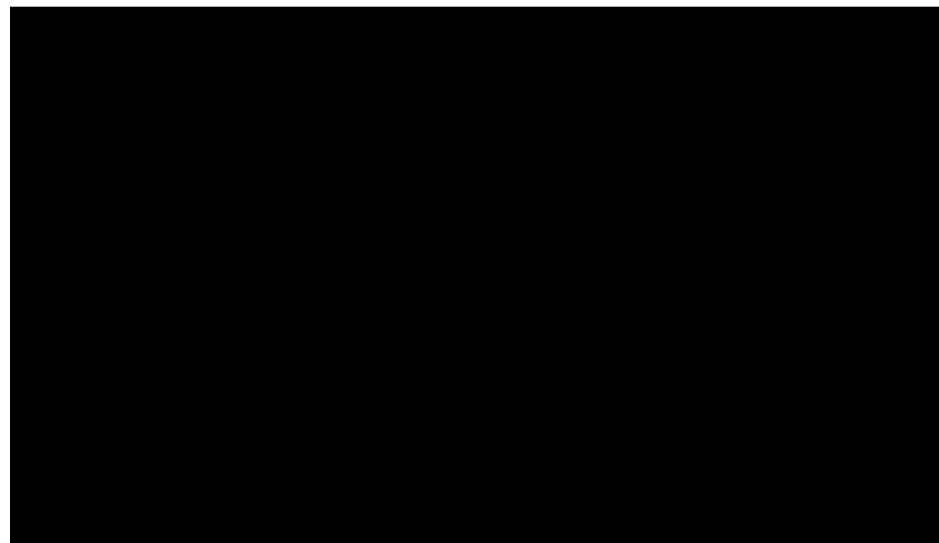
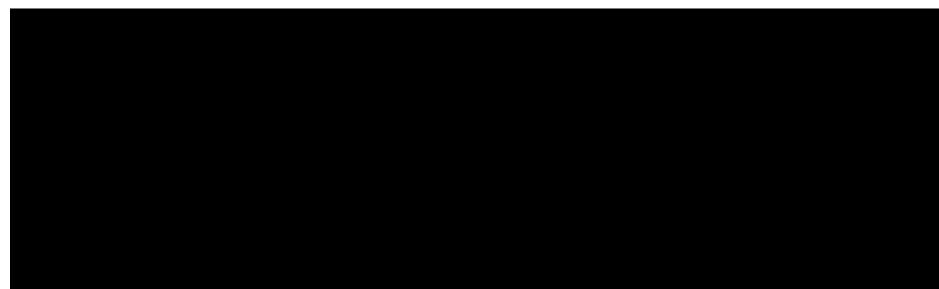
[No. E063943. Fourth Dist., Div. Two. July 22, 2016.]

JIM DALE DAVIS, Petitioner, v.
THE SUPERIOR COURT OF RIVERSIDE COUNTY, Respondent;
THE PEOPLE, Real Party in Interest.

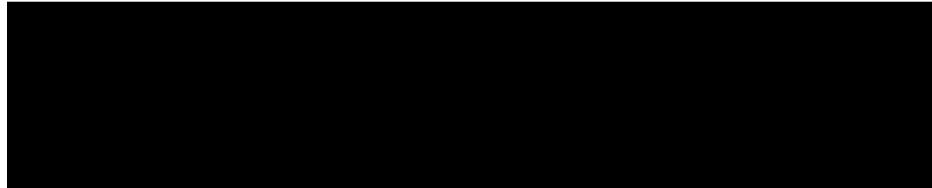
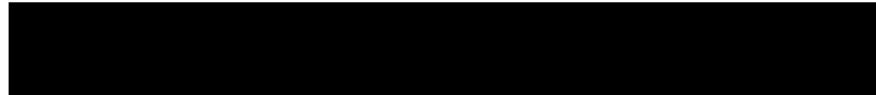
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[REDACTED]







COUNSEL

Jim Dale Davis, in pro. per.; and Edward J. Haggerty, under appointment by the Court of Appeal, for Petitioner.

No appearance for Respondent.

Michael A. Hestrin, District Attorney, Emily R. Hanks, Deputy District Attorney, for Real Party in Interest.

OPINION

McKINSTER, J.—In this matter, we have reviewed the petition, the informal response by real party in interest, a letter filed by real party in interest on November 3, 2015, and a subsequent letter from petitioner. Having determined that petitioner may have established a right to relief, we set an order to show cause. For the reasons we set forth *post*, we conclude a writ must issue to require the trial court to at least partially grant petitioner's request for postconviction discovery. (Pen. Code,¹ § 1054.9.)

FACTUAL AND PROCEDURAL BACKGROUND

A jury convicted petitioner of three counts of first degree murder with enhancements. (*People v. Brown* (Oct. 6, 1998, E018586) [nonpub. opn.].) The trial court sentenced petitioner to multiple terms of life without the possibility of parole.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Toward the end of 2011, petitioner notified the trial court that he sought postconviction discovery under section 1054.9. On January 26, 2012, the trial court held a hearing on petitioner's request. It ordered petitioner and real party in interest to informally resolve the issues of what discovery materials petitioner would receive but informed petitioner he would need to pay for copies before anything would be released. The parties subsequently exchanged several letters on this topic.

On March 4, 2015, petitioner once again wrote the trial court about receiving postconviction discovery. He indicated that, in correspondence with real party in interest, he had narrowed the list of items he wanted to six items, including police reports, the "Murder book," all suspects questioned, all fingerprints collected, all DNA collected, and all witness statements. He also argued he could not be forced to pay for copies of discovery because he was indigent and could not be treated differently from wealthier defendants.

Real party in interest filed a written opposition to petitioner's March 4, 2015 request. It contended petitioner's discovery requests were vague and/or overbroad and asserted petitioner could not evade paying for copies of postconviction discovery.

On April 22, 2015, the court issued a minute order regarding petitioner's March 4, 2015 request under section 1054.9. It flatly denied the request for postconviction discovery without explanation.

The instant petition followed. After we set an order to show cause, real party in interest opted to stand on its informal response instead of filing a return. Real party in interest did, however, file a letter on November 3, 2015, indicating that Paula Mitchell, an attorney from the Innocence Project at Loyola Law School in Los Angeles (Innocence Project), had contacted its office and offered to pay the costs of producing the discovery petitioner requested. A declaration attached to that letter attests that Alan D. Tate, an attorney in the office of real party in interest, mailed a disk containing "electronic copies of the documentary and photographic discovery" contained in the file from the prosecution of petitioner to Mitchell. Tate also indicated he offered to make copies of audio and video recordings available at a cost. The November 3, 2015 letter suggests this matter is now moot.

Petitioner, acting in propria persona as he had when he filed the petition, filed a letter² in which he asserted that the Innocence Project represented him in a different matter, but not in this one. In this document, petitioner objected that Tate had stated in earlier correspondence that there were 19 boxes of

² We deemed the letter a traverse due to the timing of our receipt of the document.

[REDACTED]

[REDACTED]

discoverable evidence, but that he told Mitchell that he only had approximately one box of materials to produce. Petitioner acknowledged that Mitchell had received a “disk and audio and video recordings from Santa Clara Innocence Project”³ but complained that neither one of them had possession of “the sheriff department investigation files” (which he called the Murder book), investigative reports from the Indio and Palm Desert Police Departments, or “the grand jury reports.”

Having determined there may be merit to petitioner’s contentions, we set an order to show cause. We also appointed counsel for petitioner.

DISCUSSION

In his petition for writ of mandate, petitioner argues “the question . . . is whether an[indigent] inmate is afforded the same rights as a wealthy inmate who can afford to pay for his discovery.” A writ must issue for reasons we explain *post*.

1. *This matter is not moot*

At the outset, we dispel the notion that this matter is moot because real party in interest has provided all relevant materials to petitioner by mailing a disk to Mitchell. The traverse disputes that real party in interest has produced all of the discovery items petitioner requested. The trial court has not been asked to make findings in this regard, and we will not do so in the first instance. As we discuss *post*, we remand this matter to the trial court for attempts at informal resolution of the dispute the petition presents or, should those fail, further orders in keeping with this opinion. The extent to which real party in interest may have already complied with its obligations under section 1054.9 is one of the issues the trial court is to consider when undertaking these tasks.

2. *Petitioner’s entitlement to postconviction discovery*

■ Section 1054.9 allows inmates facing sentences of life or life without the possibility of parole who are prosecuting a writ of habeas corpus or a motion to vacate the judgment to demand the production of postconviction discovery. (§ 1054.9, subd. (a).) If such an inmate makes “a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful,” the trial court “shall” order that “discovery materials” be made available to the inmate. (§ 1054.9, subd. (a).) In essence, “[a]

³ According to the Tate declaration appended to real party in interest’s November 3, 2015 letter, this entity represents one of petitioner’s codefendants.

showing [that defendant sought discovery from his or her trial counsel, but unsuccessfully] is made, the defendant is entitled to discovery.” (*Catlin v. Superior Court* (2011) 51 Cal.4th 300, 305 [120 Cal.Rptr.3d 135, 245 P.3d 860], citing § 1054.9, subd. (a).)

■ In the context of a section 1054.9 request, “‘discovery materials’ means materials in the possession of the prosecution and law enforcement authorities to which the . . . defendant would have been entitled at time of trial.” (§ 1054.9, subd. (b).) More specifically, an inmate who can show unsuccessful efforts to obtain items from trial counsel is entitled to receive discovery materials that “either (1) the prosecution did provide at time of trial but have since become lost to the defendant; (2) the prosecution should have provided at time of trial because they came within the scope of a discovery order the trial court actually issued at that time, a statutory duty to provide discovery, or the constitutional duty to disclose exculpatory evidence; (3) the prosecution should have provided at time of trial because the defense specifically requested them at that time and was entitled to receive them; or (4) the prosecution had no obligation to provide at time of trial absent a specific defense request, but to which the defendant would have been entitled at time of trial had the defendant specifically requested them.” (*In re Steele* (2004) 32 Cal.4th 682, 697 [10 Cal.Rptr.3d 536, 85 P.3d 444].)

■ In most instances, an inmate requesting postconviction discovery under section 1054.9 need only demonstrate a reasonable belief that the items he or she requests actually exist; he or she need not also prove the items’ materiality before being able to receive the discovery. (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 899–900 [114 Cal.Rptr.3d 576, 237 P.3d 980] (*Barnett*).) However, an inmate seeking access to physical evidence must show “that there is good cause to believe that access to physical evidence is reasonably necessary to the defendant’s effort to obtain relief.” (§ 1054.9, subd. (c).) Similarly, an inmate must use the procedures described by section 1405, not section 1054.9, to obtain postconviction DNA testing. (§ 1054.9, subd. (c).)

In this case, and as we described *ante*, petitioner requested six categories of discovery he was seeking.⁴ Subdivision (c) of section 1054.9 bars petitioner from obtaining new DNA testing without complying with section 1405. Since petitioner has made no attempt to show that he meets these standards,

⁴ The traverse appears to add a new category, namely, “the grand jury reports.” As we see no indication that the trial court was ever asked to assess the discoverability of such documents, and because real party in interest has not had a chance to respond to the suggestion that they are discoverable, we will not now analyze whether grand jury reports, should they in fact exist, are subject to production by real party in interest pursuant to section 1054.9. Instead, we trust the trial court will exercise discretion in deciding whether petitioner has made a proper request for items related to a grand jury and, if so, whether any such items are discoverable.

which include a requirement that he “explain how the DNA testing is relevant to his . . . assertion of innocence” (§ 1405, subd. (b)), we agree with the informal response that this evidence is unavailable to petitioner in response to his March 4, 2015 request under section 1054.9. In addition, petitioner is only entitled to access physical evidence regarding fingerprints if he shows good cause to think that it “is reasonably necessary to [his] effort to obtain relief.”⁵ (§ 1054.9, subd. (c).) We again agree with real party in interest that petitioner has attempted no such showing.

In contrast, petitioner’s requests for police reports,⁶ the Murder book, information about suspects questioned, and all witness statements are specific, and they are sufficiently tailored to the facts of the case that petitioner has met his threshold burden of demonstrating a reasonable belief that the documents exist. We conclude petitioner is entitled to at least some of these items.

Still, we do not now attempt to tell the trial court exactly what order it should make regarding the discovery items to which petitioner is entitled. This is because we cannot tell from the minute order denying the motion whether the trial court denied the motion after deciding that none of petitioner’s categories of discovery was appropriate, or whether it issued a flat denial because petitioner failed to pay for copies. If the trial court did not exercise any discretion in determining what specific items of postconviction discovery petitioner is eligible to receive, we may not and will not, at this juncture, specify what order it must make. Instead, we remand this matter to the trial court so it can exercise discretion regarding which specific items of discovery, excluding new DNA testing and physical evidence such as fingerprints, petitioner is entitled to receive.

3. Payment of costs associated with production of postconviction discovery

Subdivision (d) of section 1054.9 reads: “The actual costs of examination or copying pursuant to this section shall be borne or reimbursed by the defendant.” Petitioner asserts he cannot be forced to pay for copies of discovery in advance because he is indigent and asserts he has been denied the postconviction discovery rights possessed by inmates who are not indigent. After framing the issue slightly differently, we agree with petitioner in part.

⁵ On the other hand, we see no reason why petitioner would not be entitled to documents or other discovery *regarding* fingerprint evidence, as long as obtaining such discovery does not involve obtaining access to “physical evidence” within the meaning of section 1054.9, subdivision (c).

⁶ The requests for reports from particular police departments that were contained in the traverse falls under this category of items petitioner requested from the trial court.

As a threshold matter, real party in interest contends petitioner failed to prove his alleged indigence. (Cf. *Schaffer v. Superior Court* (2010) 185 Cal.App.4th 1235, 1245 [111 Cal.Rptr.3d 245] (*Schaffer*) [writ petition arguing unconstitutionality of requiring criminal defendants to pay costs of copying pretrial discovery denied because the petitioner “did not contend or demonstrate that he was indigent or otherwise entitled to have the county pay for the costs associated with his defense”].) We do not agree that the petitioner in this case failed to demonstrate his inability to pay discovery costs. At the January 26, 2012 hearing, the trial court informed petitioner that he would need to pay for copies of any discovery he planned to receive. The issue of payment surfaced throughout the parties’ informal communications. For these reasons, real party in interest was on notice that petitioner claimed indigence. In fact, at the hearing on January 26, 2012, an attorney in the office of real party in interest told petitioner he would provide copies of a limited number of items for free after petitioner stated he could not pay. The trial court is free to further examine whether petitioner has any assets that could be used to pay for discovery, but we will not deny the writ petition on this ground alone.

Petitioner asserts that forcing him to pay for copies of postconviction discovery violates his right to equal protection under the law because it places him on different footing from wealthier inmates who can afford to pay for the discovery they request. Real party in interest counters that the Legislature reasonably shifted the cost of postconviction discovery to the inmates seeking it in order to curb abuse of section 1054.9. As the record in this court contains no statistics or other evidence regarding the possible cost to the state should we hold that real party in interest must provide all section 1054.9 discovery at no cost to inmates like petitioner, we would have difficulty engaging in a thorough equal protection analysis were we forced to do so. (Cf. *M. L. B. v. S. L. J.* (1996) 519 U.S. 102, 122 [136 L.Ed.2d 473, 117 S.Ct. 555] [analyzing data regarding the number of a particular type of appeal filed in the State of Mississippi and concluding no undue burden would result].) In addition, we once again cannot tell from the minute order denying the motion without explanation whether the trial court reasoned that petitioner could not be entitled to any postconviction discovery without paying for it or whether it instead concluded that petitioner was not entitled to any of the material he requested.

■ In this case, we need not reach the constitutional issue petitioner raises because we are mindful that “a court, when faced with an ambiguous statute that raises serious constitutional questions, should endeavor to construe the statute in a manner which *avoids any doubt concerning its validity.*” (*Carlos v. Superior Court* (1983) 35 Cal.3d 131, 147 [197 Cal.Rptr. 79, 672 P.2d 862], fn. omitted, overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104 [240 Cal.Rptr. 585, 742 P.2d 1306].) As we now

explain, interpretation of section 1054.9 leads us to our holding without consideration of constitutional principles.

■ Quite simply, section 1054.9 does not require an inmate seeking postconviction discovery to pay in advance for copies of discovery. Instead, it requires such an inmate to either bear or “reimburse[]” those costs. (§ 1054.9, subd. (d).) “Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.” (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22 [56 Cal.Rptr.2d 706, 923 P.2d 1].) If we required any costs of discovery under section 1054.9 to be “borne” in the sense of paid in advance, we would eliminate the words “or reimbursed” from the statute. (§ 1054.9, subd. (d).)

Still, we do not and will not instruct the trial court as to exactly how to address the payment of costs by petitioner, as there are many ways in which an inmate may receive postconviction discovery without paying the copying costs in advance. For example, the parties might agree that petitioner can pay costs over time using his prison wages or other funds to which he has access. (See *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1376–1377 [34 Cal.Rptr.2d 37] [trial courts may use prison wages to determine an inmate’s ability to pay a restitution fine].) Such an arrangement would be not unlike the system by which trial courts recoup filing fees over time by having them deducted from an inmate’s account at a prison. (Gov. Code, § 68635.) The parties might also agree that real party in interest will make discovery available to petitioner’s counsel to view without taking or paying for any copies. (See *Schaffer, supra*, 185 Cal.App.4th at p. 1245 [“In the event a defendant or his counsel chooses not to pay reasonable duplication fees, the district attorney must make reasonable accommodations for the defense to view the discoverable items in a manner that will protect attorney-client privileges and work product.”].) We stress that these two suggestions are in no manner an exhaustive list of ways in which the parties might be able to ensure that petitioner receives the discovery to which he is entitled. Rather, “We assume the parties and their counsel will conduct themselves according to the high standards the legal profession demands. Should any dispute arise over the accommodations, we are confident the trial court will know how to resolve it.” (*Ibid.*) Today, we hold only that real party in interest may not completely prohibit petitioner from receiving postconviction discovery without first paying for copies of what he receives.

4. *Our plea to the Legislature*

We close by suggesting that at least some of the issues the trial court faced in ruling on the motion that is the subject of this writ petition could have been avoided, or at least ameliorated, if section 1054.9 allowed for the

appointment of counsel for purposes of presenting a request for postconviction discovery to the trial court. We note any “indigent convicted person may request appointment of counsel in order to prepare a motion” for postconviction DNA testing. (§ 1405, subd. (b)(1).) In contrast, section 1054.9 offers no such relief.

As indicated in the factual summary we provided above, petitioner, multiple attorneys involved in this case, and two courts have now spent a good amount of time attempting to decipher who may or may not have turned over what to whom, what might still need to be produced, and how production should occur. At oral argument in this court, however, counsel for both petitioner and real party in interest agreed that the parties were able to agree upon a way to produce all relevant discovery at very low cost after we appointed counsel for petitioner. Section 1054.9 appears to attempt to strike a balance between ensuring the availability of discovery materials to those inmates serving very long sentences while still conserving judicial and financial resources by requiring a good faith attempt to obtain the discovery materials from trial counsel before seeking judicial intervention (§ 1054.9, subd. (a)) and placing the burden of payment or reimbursement for discovery costs on the defendant (§ 1054.9, subd. (d)). We suggest this balance would be struck better, and with significantly more convenience to courts and parties alike, if the Legislature provided for the right to counsel in preparation for filing a motion for postconviction discovery under section 1054.9.

DISPOSITION

“We believe the instant discovery dispute[, including the issue of petitioner’s reimbursement of the costs of discovery,] is best resolved by remanding the matter back to the trial court, where the parties can try to settle it informally consistent with the views expressed in this opinion. If informal efforts fail, the trial court can issue a new order consistent with this opinion.” (*Barnett, supra*, 50 Cal.4th at p. 906.)

Let a peremptory writ of mandate issue, directing the Superior Court of Riverside County to vacate the order denying petitioner’s request for postconviction discovery under section 1054.9. Absent an agreement between the parties, the superior court is to consider petitioner’s discovery requests in keeping with this opinion and order disclosure of those materials to which petitioner has demonstrated entitlement. Should the parties fail to agree on a reimbursement plan for any copying costs that are or will be incurred, the trial court is authorized to make an order on that issue that is consistent with this opinion.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

Ramirez, P. J., and Codrington, J., concurred.

[No. G052932. Fourth Dist., Div. Three. July 25, 2016.]

THE PEOPLE, Petitioner, v.
THE SUPERIOR COURT OF ORANGE COUNTY, Respondent;
RITO TEJEDA, Real Party in Interest.

[REDACTED]

[REDACTED]

[REDACTED]

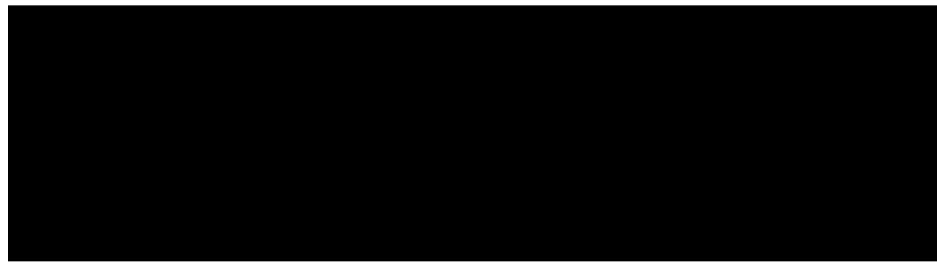
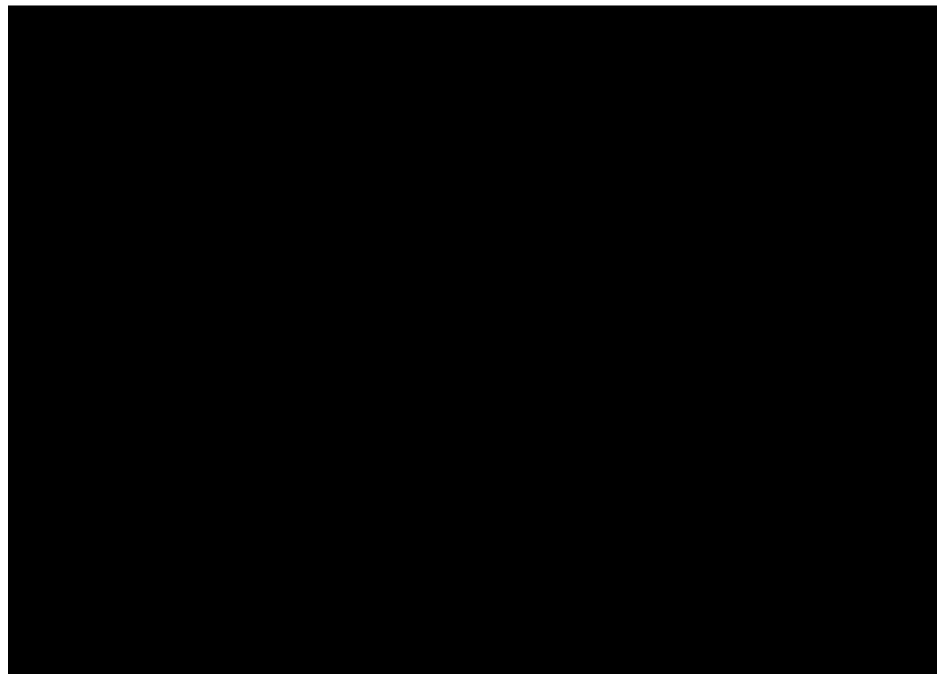
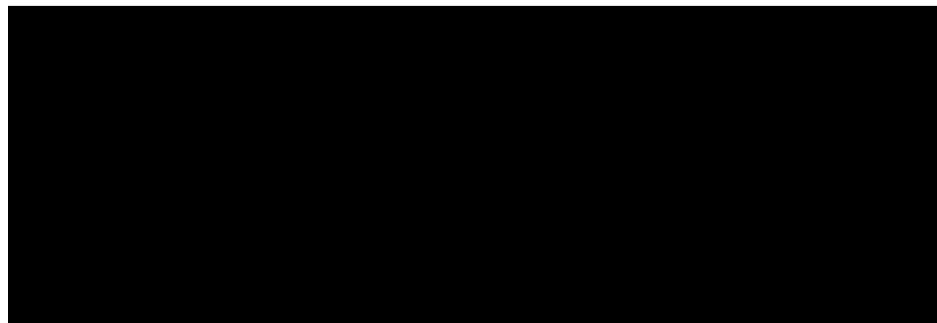
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COUNSEL

Tony Rackauckas, District Attorney, Stephan Sauer and Brian F. Fitzpatrick, Deputy District Attorneys, for Petitioner.

Schonbrun Seplow Harris & Hoffman, Paul L. Hoffman; and Erwin Chemerinsky for Respondent.

Sharon Petrosino, Public Defender, and David Dworakowski, Assistant Public Defender, for Real Party in Interest.

OPINION

O'LEARY, P. J.—Nearly 40 years ago, our Supreme Court reaffirmed “that Code of Civil Procedure section 170.6, which provides for the disqualification of trial judges on motion supported by an affidavit of prejudice, does not violate the doctrine of the separation of powers or impair the independence of the judiciary.”¹ (*Solberg v. Superior Court* (1977) 19 Cal.3d 182, 186–187 [137 Cal.Rptr. 460, 561 P.2d 1148] (*Solberg*).) It did so after considering “experience with the statute [in the preceding] decades and as applied . . . in a criminal context.” (*Id.* at p. 187.) The *Solberg* court reasoned, “to the extent that abuses persist in the utilization of section 170.6 they do not, in our judgment, ‘substantially impair’ or ‘practically defeat’ the exercise of the constitutional jurisdiction of the trial courts. Rather, it may be helpful to view them as a relatively inconsequential price to be paid for the efficient and discreet procedure provided in section 170.6. The statute thus remains a reasonable—and hence valid—accommodation of the competing interests of bench, bar, and public on the subject of judicial disqualification. We do not doubt that should future adjustments to this sensitive balance become necessary or desirable, the Legislature will act with due regard for the rights of all concerned.” (*Solberg, supra*, 19 Cal.3d at p. 204.)

¹ All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

Although we question the wisdom of the *Solberg* holding in light of the complexities of modern court administration, we are bound to follow Supreme Court authority. For reasons we explain anon, we urge the Supreme Court to revisit the issue of blanket “papering” to determine whether the impact of an abusive use of Code of Civil Procedure section 170.6, such as demonstrated in this record, can be viewed as inconsequential on a trial court in the performance of its duty to administer justice.

No fundamental adjustments to this balance have been made by either the Legislature or the Supreme Court in the ensuing 39 years. Respondent Superior Court of Orange County (respondent court), however, refused to grant a section 170.6 motion filed on behalf of petitioner, the People of the State of California, because the Orange County District Attorney (district attorney) invoked an improper blanket challenge to a particular judge that substantially disrupted the respondent court’s operations. As interpreted by respondent court, *Solberg* did not foreclose a separation of powers challenge to the executive branch’s apparent abuse of section 170.6 under the circumstances of this case.

In our view, however, *Solberg* anticipated circumstances very similar to those faced here. Rightly or wrongly, the *Solberg* court concluded the peremptory challenge at issue would not constitute a separation of powers violation. Because we are bound by the reasoning in *Solberg*, we must grant the petition for writ of mandate.

PROCEDURAL HISTORY

In December 2014, real party in interest Rito Tejeda was charged with murder. (Pen. Code, § 187, subd. (a).) On December 3, 2015, respondent court assigned Tejeda’s case to Judge Thomas Goethals for all purposes and set the matter for a pretrial hearing in Judge Goethal’s courtroom. That same day, petitioner moved to disqualify Judge Goethals pursuant to section 170.6. The motion was supported by a declaration executed under penalty of perjury by an attorney with the district attorney’s office. The declaration represented that Judge Goethals “is prejudiced against the party or the party’s attorney, or the interest of the party or party’s attorney, such that the declarant cannot, or believes that he/she cannot, have a fair and impartial trial or hearing before the judicial officer.”

Later that day, respondent court denied the motion to disqualify Judge Goethals, “without prejudice to the People’s or the defendant’s right to seek reconsideration of this order, should they choose to do so.” Notice of entry of the order was served by mail.

[REDACTED]

On December 17, 2015, petitioner sought writ relief from this court. (§ 170.3, subd. (d).) This court issued an order to show cause on February 11, 2016, and subsequently set the matter for oral argument.

FACTUAL RECORD DEVELOPED BY RESPONDENT COURT

The factual record in this matter is unusual. Petitioner did not submit evidence (other than the standard form § 170.6 declaration) with its motion. Tejeda did not oppose the motion, with evidence or otherwise. Instead, respondent court took judicial notice of facts and events outside the scope of this particular case in supporting its conclusions (1) the district attorney's office was engaged in improper "blanket papering" of Judge Goethals in murder cases, and (2) the effect of the blanket challenge was to "substantially disrupt[] the orderly administration of criminal justice in Orange County." We summarize the lengthy recitation of facts from respondent court's order.

Judge Goethals practiced criminal law for more than 20 years, both as a member of the district attorney's office and as a private attorney representing criminal defendants. Since his appointment to the bench in 2003, Judge Goethals has presided over exclusively criminal matters, including "long cause cases" (the most complicated murder cases). "Judge Goethals has prosecuted capital cases, defended capital cases, and . . . presided over capital cases"

In January 2012, Judge Goethals was assigned the long cause case of *People v. Dekraai* (Super. Ct. Orange County, 2012, No. 12ZF0128). In January 2013, Judge Goethals granted a defense discovery request pertaining to an inmate informant to whom defendant Dekraai had allegedly made incriminating statements. After receiving discovery materials, the defense filed three motions in January and February 2014 (to dismiss the death penalty allegations, to disqualify the district attorney's office based on an alleged conflict of interest, and to exclude from evidence any statements made by Dekraai to the informant). These motions were based on defense allegations that members of the district attorney's office and law enforcement officers had engaged in misconduct (perjury, subornation of perjury, intentional violation of criminal defendants' constitutional rights, and obstruction of justice) in connection with the use of informants. Judge Goethals refused the prosecution's request to deny the motions without an evidentiary hearing.

Judge Goethals began hearing evidence on all three motions on March 18, 2014. On August 4, 2014, Judge Goethals made factual findings that (1) law enforcement officers intentionally moved informants at the jail in an attempt to obtain incriminating statements, and (2) prosecutors had committed negligent violations of *Brady v. Maryland* (1963) 373 U.S. 83 [10 L.Ed.2d 215,

83 S.Ct. 1194]. Judge Goethals ruled that Dekraai's statements should be excluded from evidence, but denied the other two motions.² However, after new evidence was presented by the defense pertaining to the existence of a computerized system for handling informants, Judge Goethals granted the motion to disqualify the district attorney's office on March 12, 2015.

In the wake of these rulings, the district attorney's use of peremptory challenges against Judge Goethals changed dramatically. The raw numbers are stark. "For over three years, from December 7, 2010 through February 24, 2014, Judge Goethals was assigned 35 murder cases for trial and was disqualified once by the People. From February 25, 2014 through September, 2015, a period of [18] months, Judge Goethals was assigned 49 murder cases for trial and was disqualified 46 times by the People." (Italics omitted.) The pattern continued with this case and others assigned to Judge Goethals in December 2015.

Respondent court's order then turned to the consequences of the district attorney's repeated disqualification of Judge Goethals. "Six months after the People began disqualifying Judge Goethals, the negative impact became readily apparent: the four other long cause judges had significantly more murder cases than Judge Goethals. This raised concerns because . . . Penal Code section 1050 requires the judiciary to have courts available for trial at the earliest time possible. Furthermore, . . . the purpose of having a long cause judge—one with a low-enough caseload to allow a seasoned judge to give sufficient time to a murder trial—was being defeated."

Respondent court's multiple efforts to reassign murder cases to Judge Goethals were all rebuffed by section 170.6 challenges from the district attorney's office. "By April, 2015, [respondent court] was in a crisis. New murder cases were being added to its inventory, which included unresolved murder cases. In addition, a backlog of hundreds of other felony cases was becoming a significant problem. Short cause judges were unavailable to try the shorter felony cases because they were presiding over two-to-three-week murder trials. To solve this problem, long cause judges were assigned short cause cases, taking away the time necessary to be devoted to long cause murder cases."

Assignments were shuffled between the various judicial officers at respondent court, in the hope that the blanket challenge phenomenon would be temporary. But it continued unabated through the autumn of 2015.

"[T]he effect of the People's 'blanket' disqualification of Judge Goethals has caused murder cases and other felony cases to languish unnecessarily. It

² In two other cases, Judge Goethals found *Brady* violations and disqualified one specific deputy district attorney by rulings announced in February and March 2014.

has caused strain in misdemeanor operations. As a result, the court's responsibility to ensure the orderly administration of justice has been severely impacted."

The court observed that it could simply reassign Judge Goethals, but declined to do so: "The very thought of this option is offensive. To allow a party to manipulate the court into removing a judge from hearing certain criminal cases—when that judge, in the performance of his judicial duties, has conducted a hearing which exposed that same party's misconduct—not only goes against the very cornerstone of our society: the rule of law, but would be a concession against judicial independence." (Italics omitted.)

DISCUSSION

Peremptory Challenges Under Section 170.6

■ "[S]ection 170.6 provides that no superior court judge shall try any civil or criminal action involving a contested issue of law or fact when it is established that the judge is prejudiced against any party or attorney appearing in the action." (*The Home Ins. Co. v. Superior Court* (2005) 34 Cal.4th 1025, 1031 [22 Cal.Rptr.3d 885, 103 P.3d 283] (*Home Ins. Co.*); see § 170.6, subd. (a)(1).) Of course, "actual prejudice is not a prerequisite to invoking the statute." (*Solberg, supra*, 19 Cal.3d at p. 193.) Instead, section 170.6 allows for the disqualification of judges based upon the mere "belief of a litigant" that he cannot have a fair trial before the assigned judge." (*Solberg, supra*, 19 Cal.3d at p. 193; see § 170.6, subd. (a)(2).)

Peremptory challenges under section 170.6 "are presented in the form of a motion, but they fall outside the usual law and motion procedural rules, and are not [in the typical case] subject to a judicial hearing." (*Frisk v. Superior Court* (2011) 200 Cal.App.4th 402, 408 [132 Cal.Rptr.3d 602].) Within its circumscribed limits, section 170.6 authorizes parties (or their attorneys), rather than courts, to unilaterally decide whether a judge is "prejudiced." (*Home Ins. Co., supra*, 34 Cal.4th at p. 1032 [§ 170.6 permits party to obtain disqualification of judge for prejudice based solely upon sworn statement without having to establish prejudice as matter of fact to satisfaction of court].) Courts must honor procedurally sufficient, timely presented section 170.6 motions. (§ 170.6, subd. (a)(4) ["If the motion is duly presented, and the affidavit or declaration . . . is duly filed . . . , thereupon and without any further act or proof, the judge supervising the master calendar . . . shall assign some other judge . . . to try the cause or hear the matter"]; see *Stephens v. Superior Court* (2002) 96 Cal.App.4th 54, 59 [116 Cal.Rptr.2d 616].)

The atypical power conferred upon parties (and their attorneys) by section 170.6 is not "an unconstitutional delegation of legislative and judicial powers

to litigants and their attorneys”; nor is it “an unwarranted interference with the powers of the courts.” (*Johnson v. Superior Court* (1958) 50 Cal.2d 693, 696 [329 P.2d 5] (*Johnson*) [affirming facial constitutionality of § 170.6, which applied only to civil cases at the time].)

Appellate Court Review of Order Denying Peremptory Challenge

■ “An order denying a peremptory challenge is not an appealable order and may be reviewed only by way of a petition for writ of mandate.” (*Daniel V. v. Superior Court* (2006) 139 Cal.App.4th 28, 39 [42 Cal.Rptr.3d 471]; see § 170.3, subd. (d).) Hence, there is no adequate remedy at law for rejected section 170.6 motions—filing a writ petition is “the exclusive means of appellate review of an unsuccessful peremptory challenge motion.” (*People v. Hull* (1991) 1 Cal.4th 266, 276 [2 Cal.Rptr.2d 526, 820 P.2d 1036]; see § 1086 [writ of mandate appropriate “where there is not a plain, speedy, and adequate remedy, in the ordinary course of law”].) Even assuming petitioner is required to establish irreparable harm in bringing this statutory writ petition,³ such harm is obvious in the context of judicial disqualification. (§ 170.6, subd. (a)(1) [“A judge . . . shall not try a . . . criminal action . . . of any kind . . . when it is established as provided in this section that the judge . . . is prejudiced”].) As explained above, a party can disqualify a judge by executing a sworn statement indicating a belief that the party cannot have a fair trial before the assigned judge. Section 170.6 would ring hollow if the moving party were required to prove in a writ petition that the disqualification motion would actually make a difference in the outcome of the case (an inherently speculative enterprise) or that the moving party could not successfully move to disqualify the trial judge for cause under section 170.3 (a showing that would undermine § 170.6 by requiring the party to disclose the specific reason for believing the judge was not fair and impartial and to explain why evidence could not be marshaled to disqualify the judge for cause).

³ “Some courts may be more inclined to grant a statutory writ without requiring a factual showing of ‘inadequate legal remedy’ and ‘irreparable harm’ [citation] . . . on the theory the Legislature has in effect determined these questions in the petitioner’s favor by authorizing the writ relief. But this approach is not uniformly adopted. Other courts require the petitioner to affirmatively establish these two prerequisites in all cases, notwithstanding statutory authority for the writ.” (Eisenberg et al., *Cal. Practice Guide: Civil Appeals and Writs* (The Rutter Group 2015) ¶ 15:87, p. 15-46.) Published cases holding that courts have wrongly denied section 170.6 motions do not include an explicit analysis of whether the petitioners in those cases would be irreparably harmed by a failure to provide relief. (See, e.g., *Manuel C. v. Superior Court* (2010) 181 Cal.App.4th 382 [104 Cal.Rptr.3d 787]; *First Federal Bank of California v. Superior Court* (2006) 143 Cal.App.4th 310 [49 Cal.Rptr.3d 296]; *Pandazos v. Superior Court* (1997) 60 Cal.App.4th 324 [70 Cal.Rptr.2d 669].) This suggests that irreparable harm is either presumed or considered to be unnecessary in section 170.6 writ petitions.

It has often been stated that courts review an order denying a section 170.6 motion for an abuse of discretion. (E.g., *Grant v. Superior Court* (2001) 90 Cal.App.4th 518, 523 [108 Cal.Rptr.2d 825].) This standard of review has meaning in some cases, when there are factual questions that must be sorted out by trial courts before the motion can be granted or denied. For instance, section 170.6, subdivision (a)(4), limits “each side” of a case to one peremptory challenge. It may be unclear in some cases whether “joined parties (e.g., codefendants) are on the same side.” (*Orion Communications, Inc. v. Superior Court* (2014) 226 Cal.App.4th 152, 159 [171 Cal.Rptr.3d 596].)

■ But a trial court has no discretion to refrain from following binding Supreme Court authority. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455–456 [20 Cal.Rptr. 321, 369 P.2d 937]; *People v. Franc* (1990) 218 Cal.App.3d 588, 593 [267 Cal.Rptr. 109] [“Although stare decisis doctrine retains some flexibility, it permits only the California Supreme Court, not a lower court, to depart from Supreme Court precedent”].) As acknowledged in respondent court’s order, the paramount legal question in this case is the reach of *Solberg*, *supra*, 19 Cal.3d 182: “As a decision of the state’s highest court, the holding in *Solberg* must be followed by all inferior California courts. [Citations.] [¶] But is *Solberg*’s holding so broad that it requires all trial courts to grant all timely blanket challenges regardless of the circumstances?” Our review is *de novo* with regard to the question of whether *Solberg* precludes an inquiry by respondent court into the district attorney’s use of section 170.6.

In our view, petitioner is entitled to writ relief because *Solberg* cannot be “fairly distinguished” (*Trope v. Katz* (1995) 11 Cal.4th 274, 287 [45 Cal.Rptr.2d 241, 902 P.2d 259]) from the factual scenario presented here. Under these circumstances, we conclude *Solberg* precluded respondent court from assessing the motivations and weighing the consequences of the district attorney’s peremptory challenges as a basis for denying a section 170.6 motion on separation of powers grounds.

Solberg—Factual and Procedural Context

The factual and procedural context of *Solberg*, *supra*, 19 Cal.3d 182, is complicated, with a technical wrinkle that potentially bears on its authoritative power. In four prostitution matters, the deputy district attorney exercised his section 170.6 right to disqualify the assigned municipal court judge prior to hearings scheduled to entertain dismissal motions. The municipal court judge declined to disqualify herself. (*Solberg*, *supra*, 19 Cal.3d at pp. 187–188.) At superior court writ proceedings initiated by the district attorney, counsel for the municipal court offered to prove that the disqualification motions “were ‘blanket challenges’ motivated by prosecutorial discontent with [the municipal court judge’s] prior rulings of law.” (*Id.* at p. 188.)

The superior court judge “denied the offer as immaterial” and “quashed subpoenas issued against the district attorney and his staff for the purpose of eliciting such proof.” (*Ibid.*) The superior court judge issued writ relief compelling disqualification of the municipal court judge. This judgment was appealed and the California Supreme Court later granted review. (*Id.* at pp. 188–189.)

Before the superior court judge issued his writ of mandate, two of the four real parties in interest (i.e., the defendants accused of prostitution) filed section 170.6 motions to disqualify the superior court judge. (*Solberg, supra*, 19 Cal.3d at p. 188.) The superior court judge denied the motions on two grounds: (1) he was acting as an appellate judge in the matter at issue and (2) the challenges were filed by real parties in interest (not true parties). (*Id.* at p. 189.) Real parties filed a writ petition with the Court of Appeal to challenge the superior court judge’s denial of their section 170.6 motions; “that proceeding [was brought before the Supreme Court] on an alternative writ issued by the Court of Appeal.” (*Solberg, supra*, 19 Cal.3d at p. 189.)

Thus, the *Solberg* court had before it two distinct but related matters—the judgment (a writ of mandate compelling the disqualification of the municipal court judge), and a writ proceeding (seeking a writ of mandate compelling the disqualification of the superior court judge). The *Solberg* opinion disposed of both disputes.

As to the writ proceeding, the Supreme Court rejected the superior court judge’s grounds for refusing to honor section 170.6 motions filed by real parties. (*Solberg, supra*, 19 Cal.3d at pp. 189–190.) “A writ of mandate will therefore lie to compel [the superior court judge] to vacate his order denying the motion for disqualification. [¶] All orders made thereafter by [the superior court judge] in these proceedings are likewise void, including the judgment directing issuance of a peremptory writ commanding [the municipal court judge] to disqualify herself in the criminal matters.” (*Id.* at p. 190.) The last paragraph of the opinion ordered with regard to the writ proceeding: “[L]et a peremptory writ of mandate issue as prayed.” (*Id.* at p. 204.)

Having determined the superior court judge’s orders were void, including the writ of mandate compelling the disqualification of the municipal court judge, the *Solberg* court was not obligated to review the merits of the judgment. Indeed, the disposition of the appeal in the last paragraph of the opinion was the following: “the appeal is *dismissed*.” (*Solberg, supra*, 19 Cal.3d at p. 204, italics added.) There was no need to affirm or reverse the

judgment; there was no longer any judgment to review. The opinion could have ended on its fifth page.⁴

Instead, the majority opinion continued for 14 additional pages, composed of an in-depth review of the constitutionality of section 170.6. The court explained, “the issues presented by the appeal from that judgment will doubtless arise on remand, and we therefore proceed to address their merits.” (*Solberg, supra*, 19 Cal.3d at p. 190.)

It is the 14 pages of, strictly speaking, unnecessary analysis that pertains to the separation of powers issue raised in this case. Is this portion of *Solberg* composed solely of dicta? Can it be deemed a holding, despite the fact that it was not necessary to the disposition of the appeal?

■ “Only statements necessary to the decision are binding precedents” [Citation.] “The doctrine of precedent, or stare decisis, extends only to the ratio decidendi of a decision, not to supplementary or explanatory comments which might be included in an opinion.” (*Gogri v. Jack in the Box Inc.* (2008) 166 Cal.App.4th 255, 272 [82 Cal.Rptr.3d 629] [declining to follow dicta of California Supreme Court].) Of course, “it is often difficult to draw hard lines between holdings and dicta.” (*United Steelworkers of America v. Board of Education* (1984) 162 Cal.App.3d 823, 834 [209 Cal.Rptr. 16] (*United Steelworkers*).) In *United Steelworkers*, the appellate court treated a prior Supreme Court’s “broad answers to the questions raised by all parties” for guidance “on remand” as a holding. (*Ibid.*) Similarly, in *Solberg* the court intended to instruct the lower court on remand and provided a full account of its reasoning in providing those instructions.

Moreover, “[e]ven if properly characterized as dictum, statements of the Supreme Court should be considered persuasive. [Citation.]’ [Citation.]” (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169 [78 Cal.Rptr.2d 819].) “When the Supreme Court has conducted a thorough analysis of the issues and such analysis reflects compelling logic, its dictum should be followed.” (*Hubbard v. Superior Court, supra*, at p. 1169.)

⁴ A contrary argument made by the district attorney at oral argument is that the remainder of the opinion was necessary to the court’s decision to issue the writ commanding the superior court judge to recuse himself. Before indicating a writ would issue, the court stated: “No question is raised as to either the timeliness or the formal sufficiency of the affidavit of disqualification filed by the real parties in interest; and as hereinafter appears, we have concluded that the statute is constitutional.” (*Solberg, supra*, 19 Cal.3d at p. 190, italics added.) But nothing in the *Solberg* opinion suggests that the constitutionality of section 170.6 was before it in the writ proceeding. And the court’s explanation of why it decided to address the merits of the appeal—because “the issues presented . . . will doubtless arise on remand” (*ibid.*)—was unnecessary if the constitutional analysis was necessary to the decision on the writ.

In sum and on balance, we are bound by *Solberg* in our examination of the separation of powers issue presented. Even if rightly considered dicta, the 14 pages of analysis included in *Solberg* on the separation of powers issue cannot simply be discarded by an inferior court. We need not decide whether the unusual procedural features of *Solberg* would affect our Supreme Court's application of stare decisis principles should it choose to review the instant case.

Solberg's Separation of Powers Analysis

As presented to the Supreme Court, the *Solberg* appellants' principal contention was "that section 170.6 is unconstitutional because it violates the doctrine of separation of powers [citation] and impairs the independence of the judiciary [citation]." By not requiring any reasons for disqualification to be stated, "the statute in effect delegates . . . the judicial power to determine whether [a ground for disqualification] exists in the particular case in which it is invoked." (*Solberg, supra*, 19 Cal.3d at pp. 190–191.)

Solberg rejected appellants' contentions, reaffirming the continuing vitality and applicability to criminal cases of *Johnson, supra*, 50 Cal.2d 693, which held 19 years earlier that section 170.6 was constitutional. Point by point, *Solberg* rejected critiques of section 170.6 and *Johnson*. (*Solberg, supra*, 19 Cal.3d at pp. 191–193.) After stating actual prejudice is not required to invoke section 170.6, *Solberg* characterized section 170.6 as "'an extraordinary right to disqualify a judge.'" (*Solberg, supra*, 19 Cal.3d at p. 193.) Much of the initial analysis discussed asserted abuses of section 170.6 that had only become known after *Johnson*, e.g., judge-shopping (including to avoid a judge whose legal views are not helpful to one's case), use for tactical advantage (including to delay a case, particularly in single-judge courtrooms or single-judge specialty courts), and false swearing of affidavits. (*Solberg, supra*, 19 Cal.3d at pp. 194–200.)

The appeal was not limited to generalities. It was contended "that the case at bar [was] an example of" the abuses engaged in by counsel. The municipal court judge had "dismissed a number of prostitution cases after ruling that the defendants therein were the victims of discriminatory law enforcement practices based on the suspect classification of sex because in each instance only the female prostitute, and not her male customer, was arrested and prosecuted. . . . [P]rostitution charges against the individual real parties in interest herein came before [the municipal court judge] for the purpose of setting a date to hear their motions to dismiss on the same ground. The People moved to disqualify her under section 170.6 allegedly because of a perceived inability to have a fair trial 'in cases of these kinds in this court' [citation]. Appellants assert that the circumstances and wording of the motion

show it was primarily based on the People's dissatisfaction with [the municipal court judge's] prior legal ruling on discriminatory law enforcement." (*Solberg, supra*, 19 Cal.3d at p. 194, fn. 11.)

The *Solberg* court assumed the charges of abuses were true. It did "not condone such practices, nor [did it] underestimate their effect on the operation of our trial courts." (*Solberg, supra*, 19 Cal.3d at p. 195.) But the existence of abuses did not result in the court's declaring section 170.6 to be unconstitutional, either in general or as applied to the specific case before it. (*Solberg, supra*, 19 Cal.3d at pp. 192–200.)

In addressing the appellants' challenge to the statute, the court did not indicate whether it viewed the challenge to be a "facial" or an "as applied" challenge. Reviewing the discussion, we conclude the court considered it as both. Reliance on *Johnson, supra*, 50 Cal.2d 693, suggests a facial challenge analysis. The court also recognized the significant delay in a single-judge court and the inevitable delay in even a multi-judge court that will result from the filing of an affidavit. (*Solberg, supra*, 19 Cal.3d at p. 195.) It acknowledged that in multi-branch courts, a disqualification may also result in a desired change in the place as well as the date of trial and "in courts with specialized departments—such as a psychiatric or juvenile department—the statute has been used to remove the judge regularly sitting in that department in the hope of benefiting from the substitution of a less experienced judge." (*Ibid.*) And lastly, the court recognized the statute could be "invoked to intimidate judges generally and in certain cases even to influence the outcome of judicial election campaigns [citation]." (*Ibid.*) After consideration of these various potential abuses, the court concluded it would not hold the statute invalid as applied. (*Ibid.*)

Most pertinent to the petition before us is *Solberg*'s analysis of the contention that *Johnson* was distinguishable because it was a civil case. "The argument is that in all criminal actions the plaintiff and its attorney remain the same, i.e., the People of the State of California represented by the district attorney; the defendant is different in each case, but in most instances is represented by the same counsel, the public defender. This uniformity of either party or counsel assertedly permits the 'institutionalization' of many of the abuses discussed herein, and in particular the abuse known as the 'blanket challenge.' The practice occurs when as a matter of office policy a district attorney or a public defender instructs his deputies to disqualify a certain disfavored judge in all criminal cases of a particular nature . . . or in all criminal cases to which he is assigned. The former policy will prevent the judge from hearing any cases of that type, while the latter policy will force his removal from the criminal bench and his reassignment to a civil department." (*Solberg, supra*, 19 Cal.3d at pp. 201–202, fn. omitted.)

Solberg flatly rejected the notion that the concerns particular to criminal law made any difference. “[T]his contention is different not in kind but only in degree from the arguments rejected in *Johnson*, and . . . the difference does not warrant a contrary result.” (*Solberg, supra*, 19 Cal.3d at p. 202.) “[T]he possibility of the filing of ‘blanket challenges’ does not distinguish the present criminal proceeding from *Johnson*, and the reasoning of that decision is equally applicable to the current version of the statute, governing both civil and criminal cases.” (*Id.* at p. 204.)

Solberg rested its analysis regarding blanket challenges on two supports. First, it recalled the “self-limiting aspects of abuse of section 170.6”—i.e., both the technical limits in the statute itself (only one challenge is available to a party and it must be used in a timely fashion) and the offsetting practical concerns of district attorneys (not antagonizing the bench and not delaying the administration of justice and the real possibility the substitute judge who entered the case may be even less satisfactory to the lawyer or his client than the judge whom they disqualify). (*Solberg, supra*, 19 Cal.3d at p. 202.) Second, *Solberg* described its prior analysis of blanket challenges in a judicial misconduct opinion (*McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512 [116 Cal.Rptr. 260, 526 P.2d 268] (*McCartney*), overruled on other grounds in *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 799 & fn. 18 [119 Cal.Rptr. 841, 532 P.2d 1209]). In *McCartney*, the court was critical of blanket challenges but did not indicate that such an abuse “vitiates” section 170.6. (*Solberg, supra*, 19 Cal.3d at p. 203.)⁵

■ In a footnote, *Solberg* specifically addressed the prospect of a blanket challenge forcing a court to remove a judge from a criminal assignment. *Solberg* held that even “this radical consequence” is still distinguishable from cases outside the section 170.6 context in which separation of powers violations were found. (*Solberg, supra*, 19 Cal.3d at p. 202, fn. 22.) “The effect of [section 170.6] is at most to remove the individual *judge* assigned to

⁵ *McCartney* observed in a footnote: “The blanket nature of these filings . . . in itself reflects a measure of impropriety. As the objective of a verification is to insure good faith in the averments of a party [citation], the provision in . . . section 170.6 for the showing of prejudice by affidavit requires a *good faith* belief in the judge’s prejudice on the part of the individual party or counsel filing the affidavit in *each* particular case. [Citations.] The ‘blanket’ nature of the written directive issued by the public defender arguably contravened this requirement of *good faith* by withdrawing from each deputy the individual decision whether or not to appear before [a particular judge]. To phrase it another way, the office policy predetermined that prejudice would be claimed by each deputy without regard to the facts in each case handled by the office, thereby transforming the representations in each affidavit into bad faith claims of prejudice.” (*McCartney, supra*, 12 Cal.3d at p. 538, fn. 13.) But in the text of the opinion, *McCartney* observed, “the Legislature clearly foresaw that the peremptory challenge procedure would be open to such abuses but intended that the affidavits be honored notwithstanding misuse.” (*Id.* at p. 538.)

the case or the department, but not to deprive the *court* of the power to hear such cases by assignment of another judge.” (*Solberg, supra*, 19 Cal.3d at p. 202, fn. 22.)

Nothing in *Solberg* indicates that its analysis was limited to circumstances in which only four challenges were at issue (or that if the *Solberg* appellants had proven that the municipal court judge had been excluded 50 times and that this undermined court operations, such a showing would have been sufficient). Indeed, nothing in *Solberg* leaves room for the consideration of evidence or a different result if the evidence is substantial enough.

Instead, *Solberg* rejected the separation of powers challenge, concluding that abuses committed under the authority of the statute were an “inconsequential price to be paid for the efficient and discreet procedure provided in section 170.6.” (*Solberg, supra*, 19 Cal.3d at p. 204.) *Solberg* also denied a motion to appoint a referee to take evidence concerning abuses of section 170.6; such evidence “is not material to the disposition” of the appeal because the court assumed the abuses it described were true. These abuses did not render the statute “invalid as applied.” (*Solberg, supra*, 19 Cal.3d at p. 195 & fn. 12.) *Solberg* implicitly, if not explicitly, suggests that courts should not conduct evidentiary hearings (or otherwise marshal evidence on their own, as happened here) to determine the extent of the abuses committed by parties utilizing section 170.6 challenges. Instead, courts should grin and bear this “reasonable—and hence valid—accommodation of the competing interests of bench, bar, and public on the subject of judicial disqualification.” (*Solberg, supra*, 19 Cal.3d at p. 204.) Any adjustments to this balance should be made by the Legislature. (*Ibid.*)

■ *Solberg* is binding authority. *Solberg* anticipated the circumstances presented here, and its reasoning, as described above, prevents respondent court or this court from entertaining the argument the district attorney’s use of peremptory challenges resulted in a separation of powers violation. A writ of mandate must issue compelling respondent court to vacate its order and to assign this case to a different judge.

The Supreme Court Should Revisit Solberg

After considering “experience with the statute [in the preceding] decades and as applied . . . in a criminal context” (*Solberg, supra*, 19 Cal.3d at p. 187), the *Solberg* court determined the statute did not “‘substantially impair’ or ‘practically defeat’ the exercise of the constitutional jurisdiction of the trial courts.” (*Id.* at p. 204.) But the court acknowledged future adjustments to this sensitive balance of the competing interests of bench, bar, and public on the subject of judicial disqualification may become necessary or desirable. (*Ibid.*)

Circumstances within our justice system have changed dramatically in the nearly four decades since *Solberg* was decided. Public safety and the constitutional rights of the accused remain primary concerns as courts grapple with increased caseloads, a steady stream of statutory changes, and reduced funding. Examples of statutory changes that have had major impacts on court operations include the Safe Neighborhoods and Schools Act of 2014, the California Criminal Realignment Act of 2011, and the Gang Violence and Juvenile Crime Prevention Act of 1998.

Solberg may be “good law,” in the sense that it is a binding case that has not been abrogated or reversed, but we question its efficacy in the context of the current reality of the justice system.⁶ Broadly speaking, *Solberg* leaves no room to remedy extraordinary abuses like those apparently perpetrated in the instant case. The holding in *Solberg* (i.e., the exercise of a peremptory challenge under § 170.6 never results in a separation of powers violation, regardless of the extent of the abuse) arguably conflicts with the direction of its separation of powers jurisprudence. (See *Steen v. Appellate Division of Superior Court* (2014) 59 Cal.4th 1045, 1053 [175 Cal.Rptr.3d 760, 331 P.3d 136] [one branch may not “defeat or materially impair the inherent functions of another”]; Carillo and Chou, *California Constitutional Law: Separation of Powers* (2011) 45 U.S.F. L.Rev. 655, 678–681 [California Supreme Court generally approaches separation of powers issues by determining if a core power has been materially impaired].) We posit that the judiciary’s core power “‘to control its order of business’” and safeguard “‘the rights of all suitors’” (*Lorraine v. McComb* (1934) 220 Cal. 753, 756 [32 P.2d 960]) can be materially impaired if a blanket challenge goes too far.

Case law from another type of constitutional claim shows that the provisions of section 170.6 are not absolute. A section 170.6 challenge made on the basis of the judge’s race is subject to an equal protection claim. (See *People v. Superior Court (Williams)* (1992) 8 Cal.App.4th 688 [10 Cal.Rptr.2d 873] (*Williams*)).

In *Williams, supra*, 8 Cal.App.4th at page 695, a criminal defendant alleged that the prosecutor had exercised a peremptory challenge against the (black male) judge based on group bias against blacks. The *Williams* trial judge denied the section 170.6 challenge. (*Williams, supra*, 8 Cal.App.4th at p. 695.) The appellate court issued writ relief requiring the disqualification of

⁶ We confine our analysis in this section to the question of whether *Solberg* overreached in its separation of powers analysis with regard to the specific problem of blanket challenges in criminal law cases. We do not take issue with the facial constitutionality of section 170.6 or the desirability in general of section 170.6 as a matter of policy. (Cf. Burg, *Meeting the Challenge: Rethinking Judicial Disqualification* (1981) 69 Cal. L.Rev. 1445 [advancing thesis that peremptory challenges are an undesirable solution to problems of judicial disqualification].)

the trial judge because the petitioner complied with the “procedural requisites.” (*Id.* at pp. 698–699 [“peremptory challenge was thus timely and in proper form, and recusal of [judge] was mandatory”].) But in doing so, *Williams* expressed the view that “[s]ection 170.6 cannot be employed to disqualify a judge on account of the judge’s race. A fortiori, section 170.6 cannot be implemented in such a way as to preclude inquiry into whether the statute has been employed to disqualify a judge on account of race.” (*Williams, supra*, 8 Cal.App.4th at p. 707.) Section 170.6 challenges based on group bias, a violation of the equal protection clause of the United States Constitution, cannot reasonably be grouped in among the abuses deemed to be mere nuisances in *Solberg, supra*, 19 Cal.3d 182. (*Williams, supra*, 8 Cal.App.4th at pp. 706–707.) “[A]ny party charging that his adversary has used a section 170.6 challenge in a manner violating equal protection bears the burden of proving purposeful discrimination. [Citation.]” (*Williams, supra*, 8 Cal.App.4th at p. 708.) A prima facie showing of purposeful discrimination was not made in *Williams*. (*Id.* at p. 711.)

If the procedural approach offered by *Williams*, or something similar, were to be adopted in separation of powers cases, only a prima facie showing of improper blanket challenges by a governmental entity would result in the governmental entity’s being required to justify its use of section 170.6. Respondent court’s order reflects that approach to some extent, by offering petitioner the opportunity to present evidence at a hearing in which respondent court would reconsider its denial of the section 170.6 motion. Other states similarly have declined to make peremptory challenge rights absolute when blanket papering becomes a threat to judicial independence. (See *State v. City Court of City of Tucson* (1986) 150 Ariz. 99 [722 P.2d 267]; *People ex rel. Baricevic v. Wharton* (1990) 136 Ill.2d 423 [144 Ill.Dec. 786, 556 N.E.2d 253]; *State v. Erickson* (Minn. 1999) 589 N.W.2d 481.)

In addition to the rigid rule it laid down, we also find fault with the specific analysis of the *Solberg* court pertaining to blanket challenges. First, the *Solberg* court was convinced that “the self-limiting aspects of abuse of section 170.6” would come into play before a blanket challenge became a dire threat to the operation of courts. (*Solberg, supra*, 19 Cal.3d at p. 202.) But the experience of this case disproves the Supreme Court’s deductive logic. For whatever reason, the district attorney appears to be unconcerned with blowback from the blizzard of affidavits filed by the People.

Second, the reasoning employed in *Solberg* is offensive to the judiciary. *Solberg* suggests that “unwarranted ‘blanket challenges’ . . . may well . . . antagonize the remaining judges of the court” (*Solberg, supra*, 19 Cal.3d at p. 202.) This line of thought implies judges will violate their ethical duties, including the duty to “perform the duties of judicial office impartially.” (Cal.

Code Jud. Ethics, canon 3.) It seems absurd to justify absolute deference to a statute presuming the good faith of attorneys in filing section 170.6 motions by assuming judges will react in bad faith to overuse of the statute.

Third, as to blanket challenges, *Solberg* can fairly be characterized as double dictum. As explained above in this opinion, the entire 14 pages of separation of powers analysis in *Solberg* is arguably dicta. Within the section of the opinion dealing specifically with blanket challenges, *Solberg* placed great stock in the prior analysis of section 170.6 in a *judicial ethics* opinion, *McCartney, supra*, 12 Cal.3d 512, not an opinion procedurally situated to assess a separation of powers challenge to the use of a blanket challenge. (*Solberg, supra*, 19 Cal.3d at p. 202 [deeming its discussion of *McCartney* to be the “more important[]” of its two lines of argument].) As noted by respondent court in this case, “the broad pronouncement in *McCartney*, on which *Solberg* relied, is, at best, *dictum*.¹⁰”

In sum, we agree with the dissenting view of Justice Tibriner: “the use of ‘blanket’ challenges under section 170.6 to disqualify a judge because of his judicial philosophy or his prior rulings on questions of law seriously undermines the principle of judicial independence and distorts the appearance, if not the reality, of judicial impartiality. . . . [W]e do not believe that the judiciary [should be] helpless to prevent such an abuse of the section 170.6 disqualification procedure, particularly in a case—such as the present one—in which the improper basis of the disqualification motion clearly appears on the face of the record.” (*Solberg, supra*, 19 Cal.3d at p. 205 (dis. opn. of Tibriner, J.).)

As described by respondent court, the disruption to the operations of that court is not an “‘inconsequential price to be paid for the efficient and discreet procedure provided in section 170.6.’” Years of budget cuts to the California trial courts have taken their toll on all court operations. The chaos that has resulted from the abuse of section 170.6 affidavits is all the more troubling because of the judicial branch’s current funding reality. Like all trial courts, the Orange County Superior Court struggles to perform its constitutional and statutorily mandated functions. As courts work to keep doors open and to provide timely and meaningful access to justice to the public, the extraordinary abuse of section 170.6 is a barrier to justice and its cost to a court should be reconsidered. Like at least one court before us (*Autoland, Inc. v. Superior Court* (1988) 205 Cal.App.3d 857, 861–862 [252 Cal.Rptr. 662]), we call on our Supreme Court to reexamine *Solberg*.

DISPOSITION

Let a peremptory writ of mandate issue directing respondent court (1) to vacate its order denying petitioner’s section 170.6 motion and (2) to issue a

[REDACTED]

new and different order assigning this case to a judge other than Judge Goethals. The order to show cause is discharged.

Aronson, J., concurred.

ARONSON, J., Concurring.—As an intermediate appellate court we must follow Supreme Court precedent. This axiom is often misunderstood by the general public, which may assume we are free to decide each case based on our innate sense of what is “right” or what we believe the law should be. In reality, the outcome of many appeals depends on whether an earlier Supreme Court decision covers the matter before us or fairly may be distinguished. Because I conclude the Supreme Court’s opinion in *Solberg v. Superior Court* (1977) 19 Cal.3d 182 [137 Cal.Rptr. 460, 561 P.2d 1148] (*Solberg*) resolves the issues raised here, I join Justice O’Leary’s opinion that *Solberg* compels us to grant the petition by the People of the State of California (petitioner) for a peremptory writ of mandate directing respondent Superior Court of Orange County (respondent court) to vacate its order denying petitioner’s disqualification motion under Code of Civil Procedure section 170.6.¹

Respondent court denied petitioner’s section 170.6 motion because it concluded the motion was part of the Orange County District Attorney’s (district attorney) coordinated campaign to “blanket paper” Judge Thomas Goethals to prevent him from hearing murder trials in retaliation for Judge Goethals’s rulings in three earlier murder cases. As described more fully in both the majority and dissenting opinions, Judge Goethals found the district attorney’s office repeatedly engaged in misconduct in violation of the defendants’ constitutional rights, and in one of the cases he found the misconduct created a conflict of interest requiring the office’s recusal. Respondent court found the campaign to prevent Judge Goethals from hearing long cause murder trials substantially interfered with the court’s ability to administer criminal justice in Orange County, and thereby violated the separation of powers doctrine.

In *Solberg*, however, the Supreme Court concluded blanket papering does not constitute a violation of the separation of powers doctrine even if the widespread misuse of section 170.6 prevents a judge from hearing all or certain types of cases. (*Solberg, supra*, 19 Cal.3d at pp. 201–204.) In particular, *Solberg* established the validity of section 170.6 “as applied . . . in a criminal context,” despite the fact that institutional parties like the district attorney or public defender may engage in blanket papering. (*Solberg*, at p. 187.)

¹ All statutory references are to the Code of Civil Procedure.

Although I reach a different result, I agree with several observations Justice Thompson makes in his dissent. For example, I agree *Solberg* did not inoculate section 170.6 against all conceivable separation of powers challenges, but rather left room for future as applied challenges. The nature of every as applied challenge is that it must be evaluated on its own merits. I also agree substantial evidence supports respondent court's conclusion the district attorney engaged in blanket papering of Judge Goethals and did so to retaliate and punish a widely respected and experienced jurist whom the district attorney had previously accepted on a routine basis. Nonetheless, I cannot agree with the dissent's conclusion *Solberg* does not control the outcome here.

The dissent views *Solberg* as dealing only with a facial challenge to section 170.6, but acknowledges “[e]ven if *Solberg* implied section 170.6 was constitutional as applied to the facts of that case, it is only binding precedent with reference to those facts.” (Dis. opn., *post*, at p. 926, fn. 2.) The dissent also distinguishes the “character and magnitude” of the blanket challenges here from the four challenges lodged in *Solberg*. (Dis. opn., *post*, at pp. 929–931.) I read *Solberg* differently. *Solberg* found that a quantitative difference in the number of challenges did not violate the separation of powers doctrine, and its broad discussion of blanket challenges shows the Supreme Court did not intend to limit the precedential value of its decision to cases involving few challenges. *Solberg* acknowledged blanket challenges by the district attorney or public defender might “force” the judge’s removal from the criminal bench, presumably because the number of challenges would interfere with the court’s operations by diverting more cases to other judges (*Solberg, supra*, 19 Cal.3d at p. 202), but *Solberg* concluded this posed no separation of powers violation because reassignment did not deprive the court of the power to hear the case (*id.* at p. 202, fn. 22). Nor did *Solberg* see blanket challenges as a threat to judicial independence, even if “invoked to intimidate judges generally” or used “to influence the outcome of judicial election campaigns.” (*Id.* at p. 195.)

In sum, Justice Thompson’s analysis may have formed the basis for our decision if we were writing on a clean slate. *Solberg*, however, anticipated the circumstances we face in this case and found that blanket challenges under section 170.6 did not violate the separation of powers doctrine.² As explained in the majority opinion, *Solberg* is binding on this court, and therefore compels us

² The dissent and respondent court distinguish *Solberg* on the ground it involved a separation of powers conflict between the legislative and judicial branches of government, but the district attorney’s blanket use of section 170.6 in this case involves a conflict between the executive and judicial branches. I disagree.

Respondent court does not challenge the district attorney’s use or exercise of any executive power. Rather, the power or right at issue is one the Legislature created and delegated not only to the district attorney, but to all litigants and attorneys in any civil or criminal action. Absent section 170.6, the district attorney has no inherent executive right or power to

to grant the petition because respondent court abused its discretion in failing to follow *Solberg*'s dictates. (See *People v. Superior Court (Brim)* (2011) 193 Cal.App.4th 989, 991 [122 Cal.Rptr.3d 625] ['Failure to follow the applicable law is an abuse of discretion'].)

Not only do I agree with Justice O'Leary's conclusion *Solberg* compels us to grant the petition, I also agree with her criticism of *Solberg*'s analysis. I write separately to discuss my further reservations about *Solberg*'s reasoning. Because *Solberg* defined blanket challenges as nothing more than "'bad faith claims of prejudice'" under section 170.6, I question how *Solberg* nevertheless could conclude blanket papering by a district attorney passes constitutional muster. (*Solberg, supra*, 19 Cal.3d at p. 203.) Not only is *Solberg* internally inconsistent in ratifying bad faith prejudice claims barred by section 170.6, it also conflicts with the Supreme Court's earlier jurisprudence on the constitutionality of statutes allowing peremptory challenges to individual judges. Based on the district attorney's use of blanket papering in this case and similar tactics in other jurisdictions, this may be an opportune time for the Supreme Court to clarify the constitutional analysis in evaluating whether institutionalized blanket challenges violate the separation of powers doctrine.

The Predecessor Statute and the Court's Earlier Judicial Disqualification Decisions

California law long has allowed a party to disqualify the judge assigned to hear a case based on an evidentiary showing and independent judicial determination of bias, prejudice, interest, or other disqualifying characteristic. (*Johnson v. Superior Court* (1958) 50 Cal.2d 693, 696–697 [329 P.2d 5] (*Johnson*); *Austin v. Lambert* (1938) 11 Cal.2d 73, 75–76 [77 P.2d 849] (*Austin*)). In 1937, however, the California Legislature enacted former section 170.5 allowing a party to remove a judge from a case without establishing a disqualifying characteristic or an independent judicial determination. Section 170.5 required the presiding judge to assign a new judge to hear a case when

disqualify a judge based solely on a suspicion the judge would be biased. It is the express terms of the statute that create the potential for undermining court functions.

Respondent court concluded the unconstitutional interference with its powers arose from the scope and basis for the district attorney's challenges, not from the fact that it was the district attorney making the challenges. Although the public defender is not a member of the executive branch, it too potentially could interfere with the court's powers in the same manner by lodging blanket challenges to a particular judge. Indeed, even a single law firm specializing in an area of civil law potentially could interfere with the court's powers by exercising a blanket challenge to the only judge hearing cases involving that area of the law.

The separation of powers conflict at issue therefore arises between the legislative and judicial branches. Nonetheless, regardless how one views the separation of powers conflict, *Solberg* anticipated the circumstances presented in the present case and found blanket challenges by a district attorney would not create a separation of powers violation.

a litigant simply filed a written “peremptory challenge” to the assigned judge. The statute did not require the litigant to state the ground for his or her challenge or to declare under oath that any disqualifying characteristic existed. (*Austin*, at pp. 74–75.) As *Austin* noted, “Nothing is said in the new section about bias, prejudice, interest or any other recognized ground for disqualification.” (*Id.* at p. 76.)

In *Austin*, the Supreme Court held former section 170.5 unconstitutional as an “unwarranted and unlawful interference with the constitutional and orderly processes of the courts” because it made “the exercise of judicial power, duty and responsibility subject to the whim and caprice of a lawyer or litigant.” (*Austin, supra*, 11 Cal.2d at pp. 79, 76.) Although it acknowledged the Legislature’s authority to establish reasonable regulations concerning the disqualification of a judge (*id.* at pp. 75–76), the Supreme Court nonetheless explained that placing “in the hands of a litigant uncontrolled power to dislodge without reason or for an undisclosed reason, an admittedly qualified judge from the trial of a case in which forsooth the only real objection to him might be that he would be fair and impartial in the trial of the case would be to characterize the statute not as a regulation but as a concealed weapon to be used to the manifest detriment of the proper conduct of the judicial department” (*id.* at p. 79). The court explained this crossed constitutional boundaries because a judge takes an oath to discharge the duties of his office, including the obligation to “determine causes presented to him.” (*Id.* at p. 75.) A judge must discharge that duty absent “good cause.” (*Ibid.*)

Austin recognized that several other states had upheld the constitutionality of statutes that allowed a “so-called ‘peremptory challenge’ ” to a judge, but it distinguished those statutes on the ground they uniformly required the party to file a declaration under oath asserting the judge was biased or prejudiced against the party, even though many of the statutes did not allow judicial inquiry into the basis for that assertion. (*Austin, supra*, 11 Cal.2d at p. 76.) As the Supreme Court explained, “Such an *ex parte* proceeding has been upheld on the ground that the charge of bias or prejudice under oath is at least an imputation of such disqualification sufficient to save the statute from successful attack on constitutional grounds.” (*Id.* at p. 76.)

Nearly 20 years later, the California Legislature enacted section 170.6 modeled after the statutes from other states discussed in *Austin*. (*Solberg, supra*, 19 Cal.3d at p. 195.) As originally enacted, section 170.6 only applied to civil actions, but otherwise allowed a party to disqualify a judge in the same manner as the current statute—by filing a declaration under oath asserting the “‘party or attorney cannot or believes that he cannot have a fair and impartial trial or hearing before such judge.’ ” (*Johnson, supra*, 50 Cal.2d at p. 701; see *id.* at pp. 695–696.)

Just a year after the statute's enactment, the Supreme Court upheld the facial constitutionality of section 170.6, rejecting a claim the statute violated the separation of powers doctrine and impermissibly interfered with core judicial functions by allowing a litigant or attorney to disqualify a judge for prejudice without requiring a statement identifying the reasons the litigant or attorney believed the judge was prejudiced, without proof of prejudice, and without a judicial determination of the judge's prejudice. (*Johnson, supra*, 50 Cal.2d at pp. 695–696.) *Johnson* explained the Legislature has the authority to establish reasonable regulations concerning judicial disqualification, and bias or prejudice long has been a recognized ground for disqualification. *Johnson* also concluded section 170.6 established a permissible means of disqualifying a judge for prejudice, explaining the Legislature's decision to give litigants an opportunity to disqualify a judge solely based on a sworn statement professing the litigant's belief in the judge's prejudice was necessary to ensure confidence in the judiciary and avoid the suspicion that might arise in cases where it may be difficult or impossible for the litigant to establish actual prejudice to the satisfaction of a judicial body. (*Johnson*, at p. 697.)

Because section 170.6 does not require proof of prejudice, the Supreme Court recognized a litigant may abuse the statute by disqualifying a judge to obtain a perceived litigation benefit, such as a trial continuance while a new judge is assigned or the assignment of a new judge the litigant believes may be more favorable. *Johnson* concluded this potential for abuse did not render the statute unconstitutional because the Legislature determined the statute's benefits outweighed the potential problems caused by these abuses, and the Legislature also included several safeguards in the statute to minimize its abuse, including a requirement the party or its attorney show good faith by declaring under oath that the judge is prejudiced.³ The Supreme Court found this good faith requirement to be an effective safeguard because the court could not "assume that there will be a wholesale making of false statements under oath." (*Johnson, supra*, 50 Cal.2d at p. 697.) Later, the Supreme Court explained *Johnson* "relied heavily" on these statutory safeguards in upholding section 170.6's constitutionality. (*McClenney v. Superior Court* (1964) 60 Cal.2d 677, 685–686 [36 Cal.Rptr. 459, 388 P.2d 691].)

One year after *Johnson*, the Legislature amended the statute so that it also would apply to criminal actions. (See *Solberg, supra*, 19 Cal.3d at p. 201, fn. 20.)

³ Other safeguards in section 170.6 include limiting each side in a case to one challenge, placing strict time limits on when to assert a challenge, limiting continuances based upon a request to disqualify a judge, and requiring prompt assignment of a new judge. (*Johnson, supra*, 50 Cal.2d at p. 697.)

Solberg's Analysis of Section 170.6

In *Solberg*, the Supreme Court revisited section 170.6's constitutionality, and again affirmed the statute's validity. (*Solberg, supra*, 19 Cal.3d at p. 187.) As in *Johnson*, the court concluded section 170.6 did not violate the separation of powers doctrine or impair the judiciary's independence because the statute and the declaration procedure it established was a reasonable exercise of the Legislature's authority to regulate the disqualification of judges. *Solberg* emphasized the declaration under section 170.6 did not establish actual prejudice, nor was actual prejudice required to disqualify a judge under the statute. Rather, section 170.6 merely required the litigant to hold a good faith belief in the judge's prejudice, and the good faith of that belief was established by the litigant declaring the belief under oath. (*Solberg*, at p. 193; *id.* at p. 200 [“we have repeatedly held that the [section 170.6] motion . . . ‘requires a *good faith* belief in the judge’s prejudice,’ ” and that good faith is established by declaring that belief under oath because “‘the objective of a verification is to insure good faith in the averments of a party’ ”].)

Solberg also considered the courts' experience with section 170.6 during the two decades following *Johnson* to determine whether the statute's actual operation rendered it unconstitutional as applied based on various abuses. (*Solberg, supra*, 19 Cal.3d at p. 194.) The Supreme Court acknowledged this experience revealed litigants had invoked section 170.6 for a wide variety of reasons *other than* disqualifying a judge they believed was prejudiced, including removing a judge solely based on the judge's views on the law, delaying a hearing or trial, changing venue, obtaining a less experienced judge, intimidating judges, and even influencing judicial election campaigns. The court also acknowledged these abuses impacted the operation of California's trial courts as they rescheduled and reassigned cases to accommodate the parties' right to have a new judge assigned. (*Solberg*, at pp. 194–195.)

Nonetheless, *Solberg* concluded the impact of these abuses on the courts did not render section 170.6 unconstitutional as applied for two reasons. First, the Supreme Court was aware of these abuses when it first upheld the statute's constitutionality in *Johnson*, and the experience with section 170.6 in the decades following *Johnson* merely “added quantitatively but not qualitatively to [the court's] understanding of the problem.” (*Solberg, supra*, 19 Cal.3d at p. 196.) As the court had explained in *Johnson*, the Legislature considered these potential abuses of the statute when it enacted section 170.6 and concluded the statute's benefits outweighed the potential problems these abuses posed to the courts. Second, as *Johnson* also explained, the Legislature included safeguards in section 170.6 to minimize these abuses, including requiring the litigant or attorney to show good faith by declaring under oath

that the judge is prejudiced. (*Solberg*, at pp. 196–197.) The Supreme Court again observed it would not “assume that there will be a wholesale making of false statements under oath.” (*Id.* at p. 197.)

Of particular relevance to this case, *Solberg* also considered the constitutionality of section 170.6 as applied in a criminal context and an abuse of the statute unique to criminal cases: the “‘blanket challenge.’” (*Solberg, supra*, 19 Cal.3d at p. 202.) As defined by *Solberg*, a blanket challenge “occurs when as a matter of office policy a district attorney or a public defender instructs his deputies to disqualify a certain disfavored judge in all criminal cases of a particular nature—such as those involving prostitution or illegal narcotics—or in all criminal cases to which he is assigned.” (*Ibid.*) Because the district attorney is the counsel for the plaintiff in all criminal cases and the public defender is the counsel for the defendant in many criminal cases, a blanket challenge can have a much broader impact than other potential abuses under section 170.6 by preventing a judge from hearing any cases of a certain type or even causing the judge’s removal from the criminal bench if the district attorney or public defender challenges the judge in nearly every case. (*Solberg*, at pp. 201–202.)

Quoting from an earlier judicial misconduct case involving a judge’s intemperate reaction to the public defender’s policy challenging the judge in every case, *Solberg* explained a blanket challenge lacks the good faith belief in prejudice that section 170.6 requires in each individual case: “‘The “blanket” nature of the written directive issued by the public defender arguably contravened this requirement of *good faith* by withdrawing from each deputy the individual decision whether or not to appear before [Judge McCartney]. To phrase it another way, the office policy predetermined that prejudice would be claimed by each deputy without regard to the facts in each case handled by the office, thereby transforming the representations in each affidavit into bad faith claims of prejudice.’” (*Solberg, supra*, 19 Cal.3d at p. 203, quoting *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 538, fn. 13 [116 Cal.Rptr. 260, 526 P.2d 268], disapproved on other grounds in *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 799, fn. 18 [119 Cal.Rptr. 841, 532 P.2d 1209].)

Although *Solberg* recognized entirely removing a judge from the criminal bench was a “radical consequence” of a blanket challenge, the court concluded the impact of a blanket challenge “is different not in kind but only in degree” from the abuses considered in *Johnson*, “and that difference does not warrant a contrary result.” (*Solberg, supra*, 19 Cal.3d at p. 202 & fn. 22.) The Supreme Court condemned blanket challenges, but nonetheless concluded that abuse of section 170.6 did not “vitiate[] the statute” because “‘the Legislature clearly foresaw that the peremptory challenge procedure would be

open to such abuses but intended that the affidavits be honored notwithstanding misuse. [Citation.]’ In short, the possibility of the filing of ‘blanket challenges’ does not distinguish the present criminal proceeding from *Johnson*, and the reasoning of that decision is equally applicable to the current version of the statute, governing both civil and criminal cases.” (*Solberg*, at pp. 203–204, fn. omitted.)

Finally, *Solberg* suggested that the potential for misuse of section 170.6 in the criminal context was limited by the nature of the district attorney’s and public defender’s practice. Because the district attorney’s and public defender’s entire practice is concentrated before the same criminal judges, they must “realize that . . . if [they or their] deputies file unwarranted ‘blanket challenges’ against a particular judge the effect may well be to antagonize the remaining judges of the court, one of whom will be assigned to replace their unseated colleague, and the presiding judge, who will make that assignment.”⁴ (*Solberg, supra*, 19 Cal.3d at p. 202.)

Solberg’s Inconsistencies

Solberg concluded there was no meaningful distinction between the abuses of section 170.6 considered in *Johnson* and the abuse created by institutionalized blanket challenges in criminal cases, and therefore *Johnson*’s analysis regarding section 170.6’s constitutionality compelled the conclusion the statute also was constitutional as applied to a blanket challenge. (*Solberg, supra*, 19 Cal.3d at p. 202.) The court’s earlier analysis in *Johnson* and *Solberg*’s definition of a blanket challenge as a bad faith claim of prejudice appear at odds with *Solberg*’s conclusion that blanket challenges in criminal cases do not violate the doctrine of separation of powers.

As explained above, *Johnson* and *Solberg* found section 170.6 constitutional because the Legislature may establish reasonable regulations concerning the disqualification of judges, prejudice or bias is a permissible ground for disqualifying a judge, and section 170.6 establishes a reasonable procedure for disqualifying a judge based on prejudice because the statute requires the litigant or attorney to show a good faith belief in the judge’s prejudice by stating that belief under oath. (*Solberg, supra*, 19 Cal.3d at pp. 191–193.)

In *Austin*, the Supreme Court found the predecessor to section 170.6 unconstitutional because it allowed a party to disqualify a judge without

⁴ I share Justice O’Leary’s concern about the court’s conclusion that wholesale misuse of section 170.6 would not occur because of the threat judges would retaliate against any attorney or office that misuses the statute. The constitutionality of a statute designed to minimize even the appearance of bias or prejudice cannot turn on the willingness of judges to violate their ethical duty to act impartially.

specifying a recognized basis for disqualification or making a showing of any kind. (*Austin, supra*, 11 Cal.2d at pp. 75–76, 79.) Providing the Legislature with a roadmap to the elements of a constitutional statute, the *Austin* court explained that peremptory disqualification statutes in other states survived constitutional attack because requiring the party to allege bias or prejudice under oath at least imputed a recognized and well-accepted ground for disqualification. (*Id.* at pp. 76–78.)

Solberg defined a blanket challenge as a bad faith claim of prejudice because the claim is made based on a general policy determination by the district attorney or public defender rather than a good faith belief the judge is prejudiced in any particular case.⁵ (*Solberg, supra*, 19 Cal.3d at p. 203.) Under that definition, a blanket challenge to a judge lacks the good faith belief required by section 170.6 and the statute is unconstitutional as applied to that challenge. (See *School Dist. of Okaloosa County v. Superior Court* (1997) 58 Cal.App.4th 1126, 1136–1137 [68 Cal.Rptr.2d 612] [*Solberg*'s analysis suggests showing of bad faith invalidates § 170.6 motion].) Indeed, if a section 170.6 challenge is made in bad faith, then the statute as applied to that challenge is no different than the statute *Austin* found unconstitutional because the statute permits a litigant or attorney to disqualify an otherwise qualified judge for a reason other than the judge's bias, the only statutorily recognized ground for disqualification. (See *Austin, supra*, 11 Cal.2d at p. 79; *Autoland, Inc. v. Superior Court* (1988) 205 Cal.App.3d 857, 861–862 [252 Cal.Rptr. 662] [§ 170.6 “is nothing more nor less than the old unconstitutional statute recycled with an empty pretension of a sworn statement”].) Nonetheless, current law requires a court to accept an affidavit of prejudice under section 170.6 even if the attorney lodging the challenge admits to the court the filing is a sham. (See *School Dist. of Okaloosa County*, at pp. 1136–1137.)

Moreover, in both *Solberg* and *Johnson*, the Supreme Court rejected the challenges to section 170.6 based on the many forms of abuse other than a blanket challenge by stating the court would not assume “‘there will be a

⁵ The Supreme Court's imputation of bad faith to blanket challenges may be overinclusive because under certain circumstances a blanket challenge to a judge could be brought in good faith if the district attorney or public defender reasonably believes the challenged judge is prejudiced against the entire office. That is not the case here, however. As explained above, substantial evidence supports respondent court's finding that the district attorney asserted its blanket challenge to Judge Goethals in retaliation for his legal conclusion in earlier cases that the district attorney had engaged in misconduct or prosecutorial error under *Brady v. Maryland* (1963) 373 U.S. 83 [10 L.Ed.2d 215, 83 S.Ct. 1194] and *Massiah v. United States* (1964) 377 U.S. 201 [12 L.Ed.2d 246, 84 S.Ct. 1199]. Before those rulings, the district attorney routinely accepted Judge Goethals without question.

wholesale making of false statements under oath.’ ”⁶ (*Solberg, supra*, 19 Cal.3d at p. 197; see *Johnson, supra*, 50 Cal.2d at p. 697.) But under *Solberg*’s definition of a blanket challenge, the wholesale making of false statements under oath occurs by definition.

Conclusion

The statutory scheme under section 170.6 prohibits a trial court from exploring the reasons a party filed a challenge to a particular judge. A court must accept the challenge, even if the court harbors a reasonable suspicion a party misused the procedure for an impermissible reason. (*Solberg, supra*, 19 Cal.3d at p. 198.) As *Solberg* explains, sound reasons support the Legislature’s decision to prohibit hearings based on suspicion alone. (*Id.* at pp. 198–200.) But where substantial evidence, rather than reasonable suspicion, exists showing bad faith blanket challenges by the district attorney or public defender, a limited inquiry nonetheless may be warranted. I believe the important issues raised by this case deserve further scrutiny by the Supreme Court, the Legislature, or both.

THOMPSON, J., Dissenting.—I respectfully dissent. The court’s decision today transforms Code of Civil Procedure section 170.6 (section 170.6) into “a concealed weapon to be used to the manifest detriment of the proper conduct of the judicial department.” (*Austin v. Lambert* (1938) 11 Cal.2d 73, 79 [77 P.2d 849].) ‘“We cannot permit a device intended for spare and protective use to be converted into a weapon of offense and thereby to become an obstruction to efficient judicial administration.’ [Citation.]” (*Solberg v. Superior Court* (1977) 19 Cal.3d 182, 198 [137 Cal.Rptr. 460, 561 P.2d 1148] (*Solberg*)).

Judge King did not abuse his discretion by denying the district attorney’s motion to disqualify Judge Goethals under section 170.6. Judge King found the motion ensued from Judge Goethals’ misconduct rulings against the district attorney’s office. Judge King concluded the motion violated the separation of powers doctrine and undermined the independence of the judiciary. Judge King’s factual findings are supported by substantial evidence, his legal conclusion is correct, and his ruling was not arbitrary or capricious.

⁶ *Solberg* and *Johnson* also rejected the argument that the various abuses of section 170.6 unconstitutionally disrupted court operations, explaining the Legislature considered the abuses and associated problems in enacting the statute and concluded the statute’s benefits outweighed those problems. (*Solberg, supra*, 19 Cal.3d at pp. 196, 203–204; *Johnson, supra*, 50 Cal.2d at p. 697.) Whether the Legislature considered these abuses and problems, however, should not be the governing standard for evaluating a separation of powers challenge. Rather, as *Solberg* recognizes, the appropriate inquiry is whether the statute on its face or in its application substantially impairs the constitutional powers of the courts or practically defeats their exercise. (*Solberg*, at p. 192.)

Solberg does not compel a different conclusion. *Solberg* held section 170.6 is constitutional on its face, despite the potential for various types of abuses, including blanket challenge abuses. *Solberg* did not hold the statute was constitutional as applied, or that a district attorney's blanket challenge abuse of the statute cannot violate the separation of powers doctrine. And in any event, *Solberg* can be fairly distinguished from this case, both legally and factually.

STANDARD OF REVIEW

We review an order denying a section 170.6 peremptory challenge for abuse of discretion. (*Grant v. Superior Court* (2001) 90 Cal.App.4th 518, 523 [108 Cal.Rptr.2d 825].) “The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court’s ruling under review. The trial court’s findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed *de novo*, and its application of the law to the facts is reversible only if arbitrary and capricious.” (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711–712 [76 Cal.Rptr.3d 250, 182 P.3d 579], fns. omitted.)

DISCUSSION

1. *Judge King Did Not Abuse His Discretion by Denying the District Attorney’s Motion.*

Judge King’s factual findings are supported by substantial evidence, his legal conclusion is correct, and his application of the law to the facts was not arbitrary or capricious. Accordingly, Judge King did not abuse his discretion by denying the district attorney’s motion to disqualify Judge Goethals.

a. *Judge King’s Factual Findings Are Supported by Substantial Evidence.*

Judge King found: (1) the disparity between the district attorney’s disqualifications of Judge Goethals before and after February 24, 2014, was not coincidental; and (2) the disparity ensued from Judge Goethals’s rulings that prosecutors and police officers had committed misconduct. These factual findings are supported by substantial evidence, as set out below.

The evidence is undisputed.¹ In more than three years before February 24, 2014, Judge Goethals was assigned 35 murder cases and the district attorney

¹ The evidence consists of facts in the case files and other records of respondent court, or facts that are not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. Judge King properly

disqualified him just once under section 170.6. In roughly 18 months after February 24, 2014, Judge Goethals was assigned 58 murder cases and the district attorney disqualified him 55 times under section 170.6.

This dramatic change in the district attorney's disqualifications of Judge Goethals under section 170.6 coincided with his misconduct rulings against them in three other cases. On February 24, 2014, in two "Mexican Mafia" cases, Judge Goethals found a deputy district attorney intentionally failed to comply with his discovery obligations under *Brady v. Maryland* (1963) 373 U.S. 83 [10 L.Ed.2d 215, 83 S.Ct. 1194] (*Brady*), and announced a tentative decision to recuse that deputy district attorney from both cases as a discovery sanction.

Beginning in March 2014 and continuing through March 2015, Judge Goethals conducted a series of extraordinary hearings on defense motions in *People v. Dekraai* (Super. Ct. Orange County, 2012, No. 12ZF0128). The motions alleged several deputy district attorneys and members of law enforcement conspired to commit perjury, suborn perjury, obstruct justice, and intentionally violate the defendant's constitutional rights under *Brady* and *Massiah v. United States* (1964) 377 U.S. 201 [12 L.Ed.2d 246, 84 S.Ct. 1199].

The district attorney conceded the *Massiah* claims and Judge Goethals concluded substantial evidence supported the *Brady* claims. He found two jail deputies either lied or willfully withheld material information. Furthermore, he found the district attorney had an actual conflict of interest, which had deprived the defendant of due process. Consequently, Judge Goethals excluded statements the defendant made to the jailhouse informant and recused the district attorney's office in *Dekraai*.

On February 25, 2014—the day after Judge Goethals issued his tentative ruling in the Mexican Mafia cases—the district attorney disqualified him for the first time in a gang murder case. Since then, the district attorney has disqualified him in every gang murder case assigned to him. Likewise, shortly after the *Dekraai* hearings began, the district attorney started disqualifying Judge Goethals in nongang murder cases too. The district attorney has since disqualified him in all but three nongang murder cases.

took judicial notice of these facts. (Evid. Code, § 452, subds. (d) & (h); *People v. Thomas* (1972) 8 Cal.3d 518, 520, fn. 2 [105 Cal.Rptr. 366, 503 P.2d 1374].)

b. *Judge King's Legal Conclusion Is Correct.*

Judge King concluded a district attorney's abuse of section 170.6 can violate the separation of powers and independence of the judiciary clauses of the California Constitution. That is correct, based on basic constitutional principles.

"The California Constitution is 'the supreme law of our state' [citation], subject only to the supremacy of the United States Constitution. (Cal. Const., art. III, § 1.)" (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 250 [73 Cal.Rptr.3d 825].) It is axiomatic that all statutes, including section 170.6, must be applied in a manner which is consistent with the California and United States Constitutions.

The separation of powers clause of the California Constitution divides the powers of the state government into three branches, and dictates that "[p]ersons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.) This clause "is violated when the actions of one branch defeat or materially impair the inherent functions of another." (*Steen v. Appellate Division of Superior Court* (2014) 59 Cal.4th 1045, 1053 [175 Cal.Rptr.3d 760, 331 P.3d 136].)

"The focus in questions of separation of powers is 'the degree to which [the] governmental arrangements comport with, or threaten to undermine, either the *independence and integrity* of one of the branches . . . or the ability of each to fulfill its mission in checking the others so as to preserve the *interdependence* without which independence can become domination.' [Citation.]" (*City of Sacramento v. California State Legislature* (1986) 187 Cal.App.3d 393, 398–399 [231 Cal.Rptr. 686].)

The independence of the judiciary clause (Cal. Const., art. VI, § 1) vests the judicial power of this state in the courts. "One of the powers which has always been recognized as inherent in courts, which are protected in their existence, their powers and jurisdiction by constitutional provisions, has been the right to control its order of business and to so conduct the same that the rights of all suitors before them may be safeguarded." (*Lorraine v. McComb* (1934) 220 Cal. 753, 756 [32 P.2d 960].)

Taken together, these basic constitutional principles compel the conclusion that the separation of powers clause prohibits the district attorney (an executive branch agency) from abusing section 170.6 in any manner which materially impairs the inherent powers of the judicial branch. (Cf. *Solberg, supra*, 19 Cal.3d at pp. 191–192 [powers of court "can in nowise be

trenched upon, lessened or limited by the legislature' "].) This conclusion is consistent with the rule that a district attorney cannot take any action under section 170.6 which violates any provision of the Constitution. (Cf. *People v. Superior Court (Williams)* (1992) 8 Cal.App.4th 688 [10 Cal.Rptr.2d 873].) It is also consistent with the rule that the authority granted under section 170.6 " ‘is not absolute and unlimited.’ " (*People v. Superior Court (Williams)*, at p. 698.)

c. *Judge King's Ruling Was Not Arbitrary or Capricious.*

Judge King denied the district attorney's motion. He explained: "Due to the nature and the extent of this executive action, this Court has determined that the prosecution's consistent filing of section 170.6 motions in murder cases for more than 18 months is a substantial and serious intrusion into the province of the judiciary. It constitutes a threat to the independence of the Orange County judiciary and a violation of the Separation of Powers provision of the California Constitution."

Judge King's ruling applied the law to the facts. It was not arbitrary or capricious. It did not exceed the bounds of reason, all of the circumstances being considered, and it did not result in any miscarriage of justice. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 [86 Cal.Rptr. 65, 468 P.2d 193].) It was not an abuse of discretion.

2. *Solberg Held Section 170.6 Is Constitutional on Its Face.*

In *Solberg*, the court reaffirmed in a criminal context, its earlier decision in *Johnson v. Superior Court* (1958) 50 Cal.2d 693 [329 P.2d 5] (*Johnson*), which held in a civil context, that section 170.6 is constitutional on its face.

Solberg was a consolidated proceeding which considered a petition for writ of mandate and an appeal. The court granted the petition and issued a writ of mandate on grounds not relevant to this proceeding. (*Solberg, supra*, 19 Cal.3d at pp. 189–190, 204.) As a result, the appeal became moot, and the court ultimately dismissed it. (*Id.* at p. 204.) Nevertheless, because the issues raised by the appeal would "doubtless arise on remand," the court addressed them on their merits. (*Id.* at p. 190.)

The underlying facts in *Solberg* were undisputed. "[A] criminal complaint charging Tina Peoples with soliciting an act of prostitution . . . came before Judge Ollie Marie-Victoire Defense counsel filed a motion to dismiss the charge At that point Deputy District Attorney Edward Rudloff . . . asked to be sworn and made an oral motion to disqualify Judge Marie-Victoire pursuant to . . . section 170.6. The judge declined to disqualify herself" (*Solberg, supra*, 19 Cal.3d at p. 187, citation & fn. omitted.)

“On the same day criminal complaints charging Diana Solberg, Constance Black, and Javette Rollins with soliciting an act of prostitution also came before Judge Marie-Victoire. In each, defense counsel moved to dismiss; the judge set the matter for hearing in her own department . . . ; Rudloff summarily renewed his motion to disqualify; and the judge summarily denied it.” (*Solberg, supra*, 19 Cal.3d at p. 187.)

“On the following day . . . Rudloff filed a formal written motion under section 170.6 to disqualify Judge Marie-Victoire from hearing the foregoing four pending matters. The motion was supported by his declaration under penalty of perjury substantially in the form prescribed by the statute. Judge Marie-Victoire denied the written motion on the same ground as she had rejected the oral motions.” (*Solberg, supra*, 19 Cal.3d at p. 188, fn. omitted.)

On appeal the appellants “principally contend[ed] that section 170.6 is unconstitutional because it violates the doctrine of separation of powers (Cal. Const., art. III, § 3) and impairs the independence of the judiciary (*Id.*, art. VI, § 1).” (*Solberg, supra*, 19 Cal.3d at pp. 190–191.) The *Solberg* court responded: “In [*Johnson*], we rejected these identical arguments in sustaining the constitutionality of the statute. We have reviewed the decision in the light of the points raised in the present appeal, and we are convinced the opinion of Chief Justice Gibson therein, properly understood, remains sound law. For the guidance of bench and bar, however, we undertake to restate his reasoning and relate it to the concerns now urged upon us.” (*Id.* at p. 191, fn. omitted.)

A lengthy discussion followed. At the outset, the *Solberg* court reiterated the basic principle of government underlying the decision in *Johnson*: “To put the matter affirmatively and more simply, the Legislature may regulate the exercise of the jurisdiction of the courts by all reasonable means.” (*Solberg, supra*, 19 Cal.3d at p. 192.) It then observed, “Applying the foregoing principle in *Johnson*, we held that the disqualification of trial judges is an aspect of the judicial system which is subject to reasonable legislative regulation” (*Ibid.*)

Next the *Solberg* court addressed the contention “that the experience of the courts with the actual operation of the statute during the past two decades reveals such widespread and persistent abuses thereof as to warrant reconsideration of the question and a holding that section 170.6 is now unconstitutional as applied.” (*Solberg, supra*, 19 Cal.3d at p. 194.) The court described two principal categories of abuse. ‘First, section 170.6 has assertedly been invoked for the purpose of ‘judge-shopping,’ i.e., of removing the assigned judge from the case on grounds other than a belief that he is personally prejudiced within the meaning of the statute.’” (*Ibid.*) “Second, section 170.6 is said to have been invoked for a variety of purely tactical advantages.” (*Id.* at p. 195.)

Solberg then declared: “We need not lengthen this recital by recounting further examples of asserted abuse of section 170.6 . . . For present purposes we assume the charges are true. We do not condone such practices, nor do we underestimate their effect on the operation of our trial courts. Nevertheless for a number of reasons we are not persuaded that we should reconsider *Johnson* on this ground and hold the statute invalid as applied.” (*Solberg, supra*, 19 Cal.3d at p. 195.) The court explained “it is inaccurate to assert that we did not know of these abuses when we decided *Johnson*. ” (*Ibid.*) “Although we did not pause to catalog the various misuses of the statute, the practices now complained of were clearly within the contemplation of the court. The experience of the ensuing years has added quantitatively but not qualitatively to our understanding of the problem.” (*Id.* at p. 196.)

Solberg held: “[T]o the extent that abuses persist in the utilization of section 170.6 they do not, in our judgment, ‘substantially impair’ or ‘practically defeat’ the exercise of the constitutional jurisdiction of the trial courts. Rather, it may be helpful to view them as a relatively inconsequential price to be paid for the efficient and discreet procedure provided in section 170.6. The statute thus remains a reasonable—and hence valid—accommodation of the competing interests of bench, bar, and public on the subject of judicial disqualification.” (*Solberg, supra*, 19 Cal.3d at p. 204.)

3. Solberg Did Not Hold Section 170.6 Was Constitutional as Applied.

Solberg did not hold section 170.6 was constitutional as applied to the facts in that case. It is true the court used the words “as applied” three times. Yet a careful review reveals those words were not used in the sense they are relevant here.²

First *Solberg* stated: “In these consolidated proceedings we are called upon to reconsider [*Johnson*] in light of the experience with the statute during the intervening two decades and *as applied* here in a criminal context.” (*Solberg, supra*, 19 Cal.3d at p. 187, italics added.) In this instance, the words “as applied” related to the fact that after *Johnson*, section 170.6 was amended to apply to both criminal and civil cases.

Later *Solberg* said: “It is earnestly contended, however, that *Johnson* is distinguishable [and] . . . that the experience of the courts with the actual operation of the statute during the past two decades reveals such widespread and persistent abuses thereof as to warrant reconsideration of [*Johnson*] and a

² Even if *Solberg* implied section 170.6 was constitutional as applied to the facts of that case, it is only binding precedent with reference to those facts. (*Western Landscape Construction v. Bank of America* (1997) 58 Cal.App.4th 57, 61 [67 Cal.Rptr.2d 868].)

holding that section 170.6 is now unconstitutional *as applied.*" (*Solberg, supra*, 19 Cal.3d at p. 194, italics added.) Here the court was merely summarizing a contention.

Then *Solberg* rejected that contention. Specifically, the court held: "We do not condone such practices, nor do we underestimate their effect on the operation of our trial courts. Nevertheless for a number of reasons we are not persuaded that we should reconsider *Johnson* on this ground and hold the statute invalid *as applied.*" (*Solberg, supra*, 19 Cal.3d at p. 195, fn. omitted, italics added.)

Thus, the court in *Solberg* used the words "as applied" only in reference to events and experiences which occurred after *Johnson*, and only in the process of reconsidering the holding of *Johnson*—that section 170.6 is constitutional on its face—and concluding it "should be reaffirmed." (*Solberg, supra*, 19 Cal.3d at p. 187.)

4. Solberg Did Not Hold Blanket Challenges Cannot Violate the Separation of Powers.

Solberg did not hold a district attorney's blanket challenge abuse of section 170.6 cannot violate the separation of powers doctrine (as between the executive branch and the judicial branch) and undermine the independence of the judiciary to such an extent that the statute is unconstitutional as applied. Nor could this ever be true. Again all statutes, including section 170.6, must be applied in a manner which is constitutional. So I do not agree with the conclusion that *Solberg* controls the outcome here.

Solberg only discussed blanket challenge abuses in rejecting the claim "that *Johnson* is distinguishable because it ruled on the constitutionality of section 170.6 only in a civil setting, and that in a criminal context the statute should be declared invalid primarily because of an asserted difference in the nature of the parties and their counsel." (*Solberg, supra*, 19 Cal.3d at p. 201.) To understand this aspect of *Solberg*, we must look at the case it mainly relied upon, *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512 [116 Cal.Rptr. 260, 526 P.2d 268], disapproved on other grounds in *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 799, footnote 18 [119 Cal.Rptr. 841, 532 P.2d 1209] (*McCartney*).

McCartney considered a recommendation that a judge be removed, rather than censured, for various acts of misconduct. "One of those acts was to engage in angry and excited dialogues with deputy public defenders who filed affidavits of prejudice against him under section 170.6. [Citation.] Among the judge's proffered defenses was a claim that the affidavits were filed pursuant

to a policy of the public defender's office to prevent him from presiding over criminal trials." (*Solberg, supra*, 19 Cal.3d at p. 203.)

McCartney said: "We find this 'defense' to be a slim reed [¶] [D]isrespect on the part of the public defender cannot serve to justify petitioner's injudicious response. As previously indicated, the Legislature clearly foresaw that the peremptory challenge procedure would be open to such abuses but intended that the affidavits be honored notwithstanding misuse. [Citations.]" (*McCartney, supra*, 12 Cal.3d at pp. 537–538, citing, *inter alia*, *Johnson, supra*, 50 Cal.2d at p. 697.)

At this point, *McCartney* recited in a footnote: "The blanket nature of these filings, however, in itself reflects a measure of impropriety. As the objective of a verification is to insure good faith in the averments of a party [citation], the provision in . . . section 170.6 for the showing of prejudice by affidavit requires a *good faith* belief in the judge's prejudice on the part of the individual party or counsel filing the affidavit in *each* particular case. [Citations.] The 'blanket' nature of the written directive issued by the public defender arguably contravened this requirement of *good faith* . . ." (*McCartney, supra*, 12 Cal.3d at p. 538, fn. 13.)

This footnote in *McCartney* became a subject of disagreement in *Solberg*. (Compare *Solberg, supra*, 19 Cal.3d at pp. 203–204 (maj. opn. of Mosk, J.), with *id.* at pp. 206–207 (conc. & dis. opn. of Tobriner, J.).) Regardless of what one thinks about that disagreement in *Solberg*, the constitutionality of blanket challenges was not an issue in *McCartney*, so at most the *McCartney* court's statements about them are persuasive dicta, not binding rulings. (See *Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169 [78 Cal.Rptr.2d 819].) Further, to the extent that *McCartney* said anything about the constitutionality of section 170.6, it merely reiterated the holding of *Johnson*—the statute, as enacted by the Legislature, is constitutional on its face, despite the potential for this type of abuse.

With these thoughts in mind, consider what *Solberg* actually said: "The argument is that in all criminal actions the plaintiff and its attorney remain the same This uniformity . . . permits the 'institutionalization' of many of the abuses discussed herein, and in particular the abuse known as the 'blanket challenge.' " (*Solberg, supra*, 19 Cal.3d at pp. 201–202, fns. omitted.) The court continued, "Upon close analysis we conclude this contention is different not in kind but only in degree from the arguments rejected in *Johnson*, and that the difference does not warrant a contrary result. To begin with, we do not believe the self-limiting aspects of abuse of section 170.6 discussed hereinabove are inoperative in the criminal context." (*Id.* at p. 202.) "More importantly, the issue of 'blanket challenges' is not new to this court." (*Ibid.*)

Then *Solberg* commented on the blanket challenge discussion in *McCartney*. “We acknowledged [citation] that ‘the entire policy itself may have been an affront to the court’s dignity if it stemmed from public defenders’ dissatisfaction with [Judge McCartney’s] “hard line” performance as a district attorney rather than a good faith belief in prejudice.’ (Italics deleted.) [¶] . . . We felt compelled, nevertheless, to speak to the ‘blanket’ nature of these filings.” (*Solberg, supra*, 19 Cal.3d at p. 203.)

Solberg concluded, “There is thus no doubt that in *McCartney* we strongly disapproved of the practice of ‘blanket challenges,’ and we reaffirm that position herein. But it is also manifest from *McCartney* that we do not believe the practice vitiates the statute In short, the possibility of the filing of ‘blanket challenges’ does not distinguish the present criminal proceeding from *Johnson*, and the reasoning of that decision is equally applicable to the current version of the statute, governing both civil and criminal cases. [Citation.]” (*Solberg, supra*, 19 Cal.3d at pp. 203–204.)

I see nothing in this discussion of blanket challenges which supports the lead opinion’s conclusion that *Solberg* “prevents respondent court or this court from entertaining the argument that the district attorney’s use of peremptory challenges resulted in a separation of powers violation.” (*Ante*, at p. 907.) That the practice does not vitiate the statute on its face does not mean it cannot result in a separation of powers violation as applied.

5. Solberg Can Be Fairly Distinguished from This Case, Both Legally and Factually.

Unlike my colleagues, I believe *Solberg* can be “fairly distinguished” (*Trope v. Katz* (1995) 11 Cal.4th 274, 287 [45 Cal.Rptr.2d 241, 902 P.2d 259]) from this case, both legally and factually. The analysis and comparison below reveals the separation of powers issues are different, and the character and magnitude of the blanket challenge abuses are different. These legal and factual differences warrant a different result, because the ratio decidendi of *Solberg* simply does not encompass the legal issue or the facts presented in this case. As a result, *Solberg* has little or no force as controlling precedent here. (See generally 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 509, p. 572.)

a. The Separation of Powers Issues Are Different.

Solberg concerned the separation of powers between the legislative branch and the judicial branch. The question was: Did the Legislature violate the separation of powers doctrine when it enacted section 170.6 to regulate the judiciary? On this question *Solberg* reaffirmed the holding of *Johnson* that

the statute, as enacted by the Legislature, did not violate the separation of powers doctrine, despite the potential for various types of abuses, including blanket challenges. (*Solberg, supra*, 19 Cal.3d at pp. 186–187.)

This case concerns the separation of powers between the executive branch and the judicial branch. The question is: Did the district attorney violate the separation of powers clause when it used section 170.6 to retaliate against a judge? *Solberg* did not consider this question. Again it only considered similar abuses in deciding they do not “vitiate[] the statute” as enacted by the Legislature. (*Solberg, supra*, 19 Cal.3d at p. 203.)

Hence, I cannot agree with the lead opinion conclusion that “In sum and on balance, we are bound by *Solberg* in our examination of the separation of powers issue presented.” (*Ante*, at p. 904.) While the constitutional provisions at issue here and in *Solberg* are the same (Cal. Const., art. III, § 3, art. VI, § 1), the separation of powers questions are not.

b. *The Character of the Blanket Challenge Abuses Is Different.*

In *Solberg*, “the People’s motions to disqualify Judge Marie-Victoire in the criminal actions were ‘blanket challenges’ motivated by prosecutorial discontent with her prior rulings of law.” (*Solberg, supra*, 19 Cal.3d at p. 188.) They disagreed with her “views on the legal issue relating to the discriminatory enforcement of prostitution laws.” (*Id.* at p. 206.)

Here Judge King found the district attorney’s motions to disqualify Judge Goethals were motivated by their discontent with his misconduct rulings against them. They were based on the fact he called them out on their misconduct, and they had “the appearance of attempting to intimidate, punish, and/or silence Judge Goethals, and to send a warning to the other local judges that similar rulings will produce a similar fate.”

In short, the district attorney’s disqualification motions were not “premised on the fact that ‘the People don’t feel that [they] can get a fair trial *in cases of these kinds* in [Judge Goethals’] court.’ ” (*Solberg, supra*, 19 Cal.3d at p. 206.) This is important because, as the court said in *Solberg*, “section 170.6 explicitly recognizes such belief as a sufficient ground for disqualification” (*Id.* at p. 193.) It does not recognize the desire to intimidate, punish or silence as a sufficient ground for disqualification.

c. *The Magnitude of the Blanket Challenge Abuses Is Different.*

In *Solberg* the district attorney disqualified Judge Marie-Victoire in four prostitution cases. Here the district attorney disqualified Judge Goethals in 55

[REDACTED]

murder cases. This is noteworthy because while the small number of disqualifications in *Solberg* can be viewed “as a relatively inconsequential price to be paid for the efficient and discreet procedure provided in section 170.6” (*Solberg, supra*, 19 Cal.3d at p. 204), the same cannot be said of the comparatively large number of disqualifications here.

CONCLUSION

The district attorney’s systematic abuse of section 170.6 undermined the principle of judicial independence and violated the separation of powers doctrine. We are not powerless to stop it. The petition should be denied.

A petition for a rehearing was denied August 5, 2016, and the petitions of respondent and real party in interest for review by the Supreme Court were denied November 30, 2016, S236991. Werdegar, J., Liu, J., and Cuéllar, J., were of the opinion that the petition should be granted.

[No. F069487. Fifth Dist. July 26, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
ARMANDO T. LOYA, Defendant and Appellant.

[REDACTED]

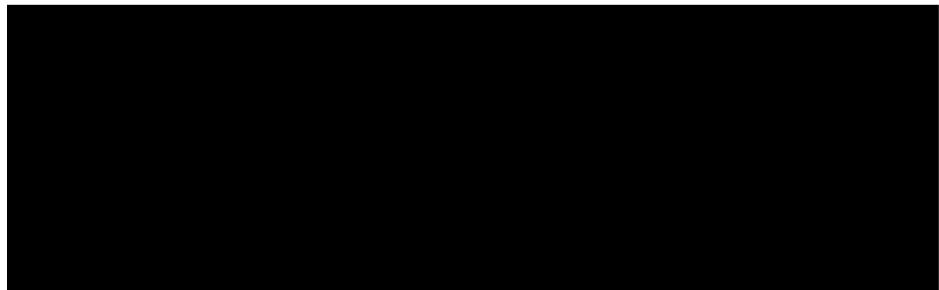
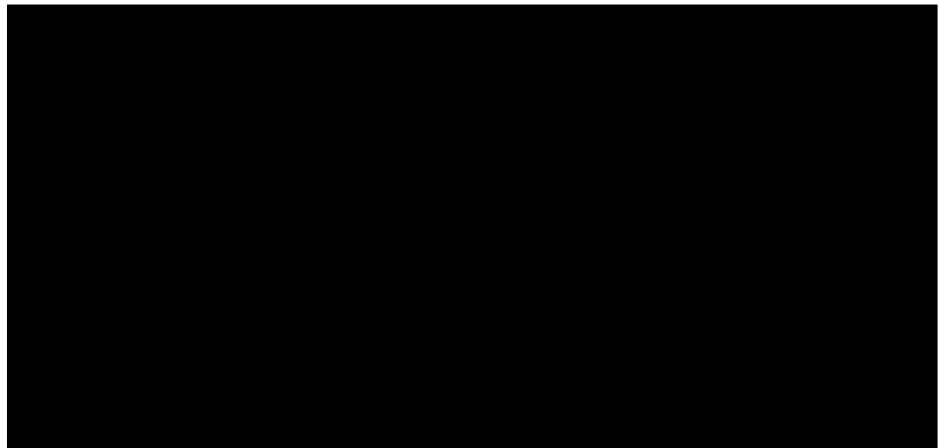
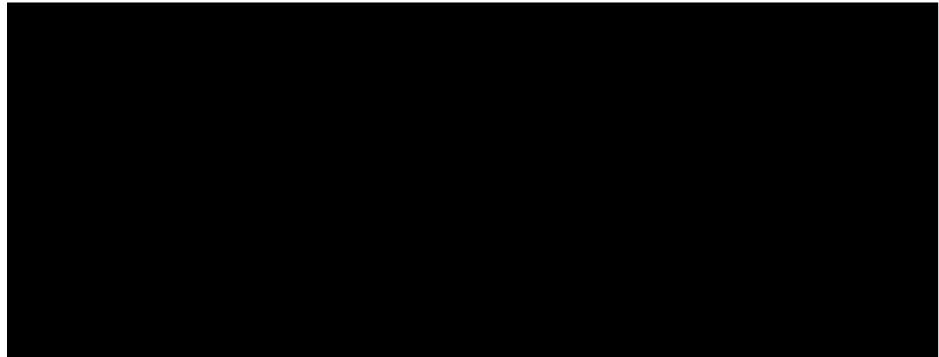
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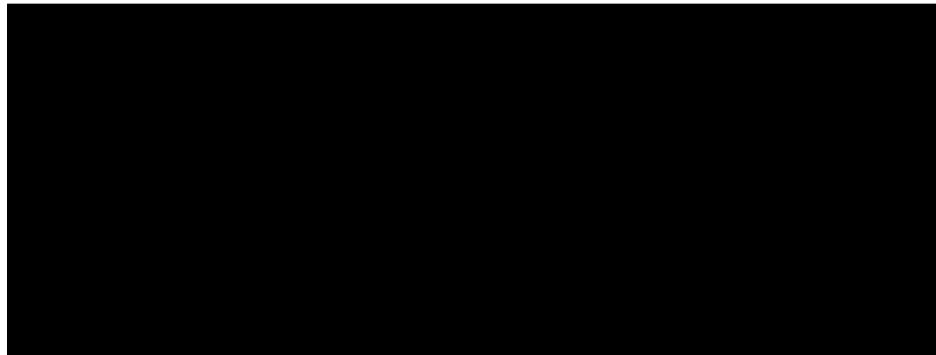
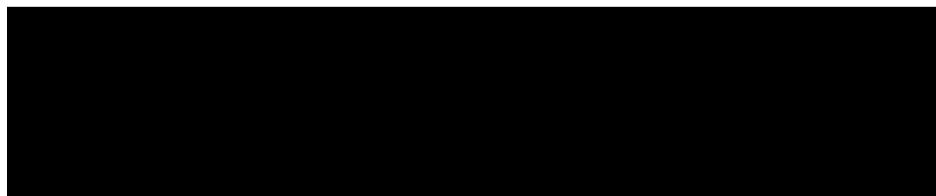
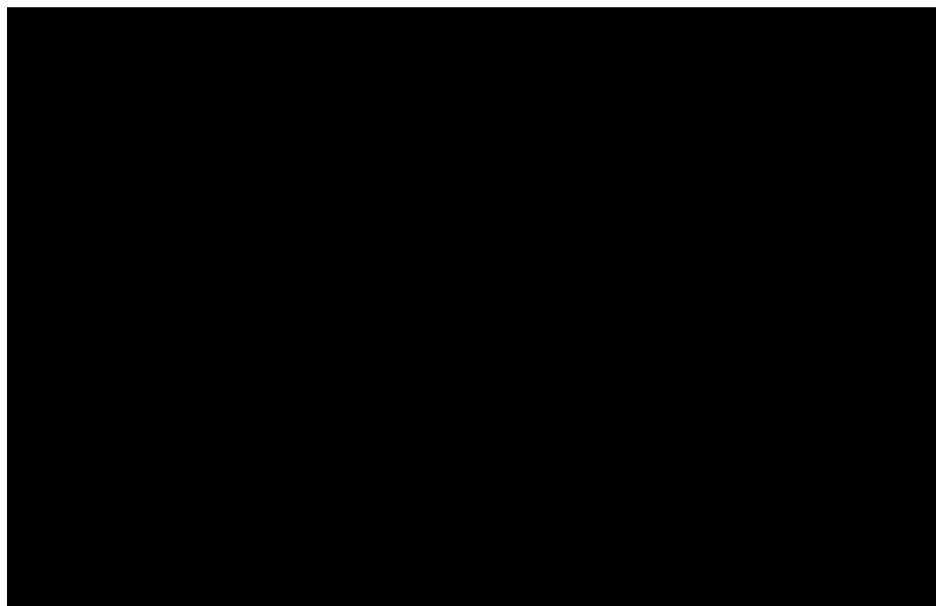
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COUNSEL

C. Matthew Missakian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Marcia A. Fay, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

KANE, J.—

INTRODUCTION

On the day set for jury trial, appellant Armando T. Loya contemplated a plea agreement negotiated with the prosecution for a principal four-year prison term that involved disposition of both cases summarized below. He entered into a protracted and mutually frustrating discussion with the trial judge, who asked multiple times if appellant wanted to plead or proceed to trial. Appellant, however, principally questioned why he could not enter a plea of not guilty by reason of insanity (NGI), which was a question he had raised on previous occasions. Without stating any reason, and just after appellant indicated his desire to take the plea agreement, the court said it would not approve the plea and withdrew it from further consideration. Trial commenced.

In Bakersfield Superior Court case No. BF151668A¹ (the present matter), a jury convicted appellant of reckless evasion of a peace officer (Veh. Code, § 2800.2; count 1); hit and run resulting in property damage (Veh. Code, § 20002, subd. (a); count 2); driving under the influence of a drug (Veh. Code, § 23152, former subd. (a); count 3); being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a); count 4); resisting or delaying a peace officer (Pen. Code, § 148, subd. (a)(1); count 6); and driving with a suspended license (Veh. Code, § 14601.1, subd. (a); count 7). The jury found him not guilty of vandalism (Pen. Code, § 594, subd. (b)(2)(A); count 5). The trial court found true that appellant had suffered a prior strike and four prior prison terms. Appellant was sentenced to an aggregate term of 10 years in state prison.

¹ Further references to case numbers are to Bakersfield Superior Court case numbers unless otherwise indicated.

In companion case No. BF144483A, appellant was found in violation of probation and was sentenced to six years in state prison, to be served concurrently with the 10 years imposed in the case above.

On appeal, appellant raises four issues. We find merit to his claim that the trial court abused its discretion in rejecting the plea bargain in the absence of any stated justification. We reverse the judgment and remand for further proceedings consistent with this opinion. However, due to a lack of prejudice, we reject appellant's contentions that he was denied his statutory right to plead NGI or that the trial court abused its discretion in denying two motions pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 [84 Cal.Rptr. 156, 465 P.2d 44] (*Marsden*). Finally, in light of the remand, we do not reach appellant's last issue that he was denied the effective assistance of counsel and due process.

BACKGROUND

I. *Trial facts from the present matter*

Appellant did not present any evidence. The prosecution established the following relevant facts.

On November 9, 2013, appellant drove through a stop sign in Bakersfield, and then failed to yield when police officers pursued him in marked police vehicles with flashing emergency lights and sirens. During the pursuit, appellant drove through four red lights, travelled 60 to 70 miles per hour, and swerved around other vehicles. Officers observed appellant "bouncing up and down" on his driver's seat, and he was gesturing with his hands as if he was waving at the pursuing officers. When the chase entered a residential neighborhood, officers cancelled the high-speed pursuit, turned off their lights and sirens, and reduced their speeds. They continued to follow appellant at a safe speed. Appellant initially pulled away, but then began to slow down. During a turn, appellant lost control of his vehicle and struck a chainlink fence. He ran from his vehicle.

Officers chased appellant on foot. He ignored officers' commands to stop and continued to flee. At one point, appellant looked back at an officer after the officer yelled for him to stop, but appellant continued to run away. Officers lost sight of appellant after he jumped a fence. Law enforcement established a perimeter. About 30 to 40 minutes later, officers located appellant hiding in a parked car in a nearby apartment complex. He was lying on the floorboard on his chest and side, trying to be as low as possible between the back passenger seat and the front seats. He was hiding under articles of clothing. He failed to comply with officers' commands and resisted

efforts to be arrested. After a brief struggle, appellant was removed from the vehicle and handcuffed. After he was restrained, appellant's face began to appear pale and he was sweating profusely. He became unresponsive and was transported to a hospital.

A physician determined appellant was unresponsive due to a methamphetamine coma. A blood test confirmed that appellant was impaired due to this drug in his system.

After his arrest, appellant placed a telephone call from county jail to an acquaintance. The call was recorded and played for the jury. Appellant said he fled from police because he had "shit" in his car.

II. Procedural history of the present matter

Given the importance to the issues on appeal, we set out in some detail the procedural history.

A. Competency questions arise

On November 26, 2013, criminal proceedings were suspended for the purpose of determining if appellant was competent to stand trial and cooperate with defense counsel. On January 3, 2014, the court found appellant competent and criminal proceedings were reinstated.

B. The Marsden hearings

Four *Marsden* hearings occurred prior to trial. Each is summarized below as relevant to the issues raised in the present appeal.

1. The first hearing

The first *Marsden* hearing occurred on November 26, 2013 (on the same day defense counsel requested a competency evaluation). Appellant raised claims regarding his appointed counsel that are not relevant to the present appeal. The court found no basis to substitute counsel and denied appellant's motion.

2. *The second hearing*

The second *Marsden* hearing occurred on January 3, 2014, during which defense counsel said appellant had been diagnosed with paranoid schizophrenia and bipolar disorder, and had been previously found incompetent and sent to Patton State Hospital during his previous case.² Defense counsel stated:

“[Appellant] also told me he wanted to plea [NGI] at the prelim, and I told him I wouldn’t—I didn’t want to do that at the prelim because I didn’t think it would be—I didn’t think it would change the prelim, that would be a call the trial attorney would have to make.

“But that, combined with him telling me he had paranoid schizophrenia issues combined with him believing that I lied to him when I don’t believe I ever lied to him, and his not wanting to communicate with me, made me believe that there was enough information to declare a doubt.”

After hearing further comments, the court denied the *Marsden* motion.

3. *The third hearing*

On January 16, 2014, a third *Marsden* hearing took place. During the hearing, defense counsel stated the following: “[Appellant] also told me that he was schizophrenic which when I interviewed him before the first setting of the case, at which time I—it seemed that we could have communication and he seemed lucid and I didn’t think I needed to do a [Penal Code section] 1368 [motion]. But he told me he wanted to plead NGI after the *Marsden* and because he seemed irrational and I had doubts about—if—I began to have doubts about his ability to help—to help—to help with his representation and I spoke with my supervisor and I thought that I should [file a Penal Code section 1368 motion for] him at that time.”

After hearing further comments, the court granted the *Marsden* motion, finding that the attorney-client relationship had broken down.

4. *The fourth hearing*

On April 16, 2014, the matter was transferred from the presiding department to the trial court. At approximately 10:13 a.m., appellant’s fourth

² In companion case No. BF144483A, appellant was found incompetent to stand trial or cooperate with counsel and, on or about December 19, 2012, he was committed to Patton State Hospital. On May 31, 2013, he was found competent to stand trial and able to cooperate with counsel. Criminal proceedings were reinstated. After his competency was deemed restored, his appointed counsel asked for an additional evaluation pursuant to Penal Code section 1368, which was denied.

Marsden hearing commenced. Appellant made the following comments: "I asked [my new defense counsel] about an NGI plea. He told me there's no way he would change my plea to an NGI plea because a judge wouldn't accept it, which isn't right, because that's a plea—you can change your plea to that anytime because there's four pleas, and he lied to me about that."

The court later informed appellant that defense counsel's statement that the judge would not accept an NGI plea at this time was true. The following exchange occurred:

"[APPELLANT]: So you're telling me that I cannot change my plea to an NGI plea, never, because I went to Patton State Hospital, and they taught us that there's four pleas. They told us that we could change our plea at any time to an NGI. You're telling me that Patton State Hospital—I went there—that they lied to me and they told me a lie, then, because we went there—I went there so they could teach me about the court; right? They taught me who the judge is, who my attorney is, and about the four pleas. So you're telling me that they lied to me?

"THE COURT: I'm not telling you—I'm not telling you anything about what they told you. I'm telling you that [defense counsel]—

"[APPELLANT]: That's what he taught me—

"THE COURT: [Appellant]. [Appellant].

"[APPELLANT]:—when I was at Patton State Hospital for a [Penal Code section] 1368; so then they're reteaching me all this stuff. I don't understand.

"THE COURT: [Appellant], you're going to have to be quiet for a second. When I'm talking, you don't talk. The young lady before me is tasked with writing down everything that's said in court. She can't do it if two of us are talking at the same time. [¶] Do you understand that? Do you understand that?

"[APPELLANT]: If I say I understand, are you going to—are you going to listen to me, are you going to tell me bullshit? Are you a fake judge or a real judge? Because everything is fake in this court. Every court I been to is fake, it's been fake stuff.

"THE COURT: [Appellant], listen. I'm trying to be as patient as possible with you.

"[APPELLANT]: You know, when I'm the only innocent one in this courtroom.

“THE COURT: Okay.

“[APPELLANT]: And I don’t care. I don’t care what you do. I don’t care what these bailiffs do. I don’t care what she does. I don’t care. It don’t reflect on me, you know what I mean? I’m my own man, you’re your own man, she’s her own woman.

“THE COURT: [Appellant], are you done?

“[APPELLANT]: No. I’m trying to explain to you.

“THE COURT: I understand it. Are you done?

“[APPELLANT]: And then I got these motherfuckers right here, these people against me.

“THE COURT: [Appellant,] we’re going to take a brief break. I’m going to order you [to] leave the courtroom until you’re ready to behave appropriately in this courtroom. We’ll be in recess five minutes.”

After a recess, appellant’s counsel explained why he believed appellant was confused, and defense counsel indicated a possible plea agreement had been discussed with the prosecution. Appellant had counteroffered a four-year prison term on the felony evasion charge, concurrent time for the misdemeanors, and the four years would be served concurrently with the six-year probation revocation case. The prosecution had accepted that offer, but then appellant had concerns regarding how the time would be served and how his credits in the underlying revocation matter would be applied.

The following relevant comments occurred:

“[DEFENSE COUNSEL]: Your Honor, [appellant’s] charged with a variety of offenses. I would suggest that perhaps Count 1 there may be a legal basis for an NGI plea if he were, at the time of the alleged incident, unable to form the intent to evade or avoid the police or elude capture.

“The context of this request, however, was—it initiated—originated when I had a conversation with [appellant] at the county jail, and he was seeking potential ways to prolong or delay the conclusion of this case.

“He has expressed to me on repeated occasions that he does not wish to go to prison and he would do anything he can to avoid going to prison. Then he suggested to changing his plea to [NGI].

“I explained to him that that does not apply to all these charges, and I’m not even certain it would apply to Count 1, although there may be a plausible legal theory that he could not have formed the intent at the time. But many of these charges are simply general intent charges, it would not be an applicable plea. I also did not believe that that would be a genuine legal strategy to deliberately attempt to delay the proceedings in this court by manipulating the process and changing the plea on one or two charges to NGI for that stated purpose.”

Appellant countered that a psychiatrist, and not his defense counsel, had to make the determination of his mental state. Appellant noted he had a mental health history and stated he had a mental illness.

The judge spoke with appellant at length regarding the mechanics of the pending plea offer and whether appellant was interested in accepting it. Appellant indicated a willingness to accept it. The court concluded that defense counsel had reasonably represented appellant and would continue to do so during the proceedings. The court determined that defense counsel was ready and able to proceed with trial, appellant was responsible for any breakdown in communication, and appellant could still be represented effectively by his defense counsel. The court found that appellant’s stated dissatisfactions with his counsel’s performance had not met the required burden of proof. The court denied the *Marsden* motion.

C. The April 16, 2014, open court proceeding

Upon conclusion of the fourth *Marsden* hearing, and at approximately 10:56 a.m., appellant and counsel were present in open court, and a possible change of plea was discussed. A brief recess was taken to allow defense counsel and appellant to discuss that further. At approximately 11:37 a.m., appellant and counsel were again present in open court.

Appellant complained that defense counsel was lying to him about custody credits. Defense counsel explained the custody credit issues to the court, and the court tried to explain the calculations. When those discussions ended, appellant, through his counsel, asked the court for an indication whether it would strike a prior strike, which the court declined to do. The court, however, stated it would entertain a formal *Romero*³ motion. Appellant asked if his prison priors would be used against him if he went to trial and lost. The court stated that the prosecution would likely prove all of the prison priors alleged, and the judge would consider them at sentencing. The following relevant exchange then occurred:

³ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 [53 Cal.Rptr.2d 789, 917 P.2d 628] (*Romero*).

[REDACTED]

"[APPELLANT]: Why can't I change my plea to NGI?

"THE COURT: It wouldn't help you at all with those allegations. The Court would require more than just the plea. Procedurally—

"[APPELLANT]: I want to change my plea to NGI, and I would like to go to trial, that's what I would like to do, but he's telling me that I can't. That's why I wanted to fire my attorney.

"THE COURT: [Appellant]—

"[APPELLANT]: Other than that, I have to sign this deal and—

"THE COURT: [Appellant], if you want to go to trial, we can go to trial.

"[APPELLANT]: But I want to change my plea to an NGI plea.

"THE COURT: That's not going to happen. Procedurally it would be a different format, for one; and two, the Court would require more—

"[APPELLANT]: Why do they teach you that in Patton about NGI? Why do they [t]each you that at Patton, NGI?

"THE COURT: [Appellant], I'm going to ask you one time. You've had a quite a bit of time to consider whether to plea in this case or not. You've certainly asked [defense counsel] questions involving a negotiated disposition, you've also asked the Court on the record questions involving the potential disposition; so I'm going to ask you this one time. Do you want a plea in this case?

"[APPELLANT]: I want to plea NGI.

"THE COURT: All right. Do you want to take the deal that you have counteroffered in this case?

"[APPELLANT]: If I can't plead NGI—I mean, I want to plead NGI, really, that's the plea that I want to give, an NGI plea, but since I don't got a crooked smile and I can't spit right now 'cause, you know, that's what everybody wants, I'm going to spit or do a crooked smile, I mean, somebody behind me is telling me what to say, you know—

"THE COURT: [Appellant], I'm asking you, do you want to sign the paperwork—

[REDACTED]

"[APPELLANT]: I thought you were the judge. I thought this was your courtroom, you know.

"THE COURT: It is. [] Do you want to plea in this case and resolve the case or do you not?

"[APPELLANT]: If I have to. I mean, I can't plead NGI. I'm trying to plead NGI. I mean, that's why—

"THE COURT: [Appellant], not guilty by reason of insanity is not before me at this time.

"[APPELLANT]: But it's a plea. It's a plea. It says on the thing I can change my plea at any time. That's like a not guilty plea because it's not guilty by insanity, isn't it? Can you explain that for me? I'm already done signing it. Look, I'm initialing it right now, but I feel that—I feel that—

"THE COURT: [Appellant], it's up to you as to whether you want to plea in this case.

"[APPELLANT]: I feel that I'm not getting the—

"THE COURT: If you don't want to plea in this case, that's your right, you don't have to. You can go to jury trial, that is an absolute right you have. No one will hold it against you. Do you want to go to jury trial? It's up to you and only you.

"[APPELLANT]: How does an NGI work, though? Why can't I plead that, though?

"THE COURT: NGI is not before me. I'm not discussing that with you.

"[APPELLANT]: What do you mean it's not before you?

"THE COURT: That is not an issue before me right now. This matter was sent here for jury trial; so we are either going to have a jury trial or you're going to plea. If you're not going to plea—

"[APPELLANT]: That is a plea, though.

"THE COURT: Yeah, okay. [Appellant], I can appreciate—

"[APPELLANT]: Here, I'll sign.

“THE COURT: I can appreciate your efforts. The Court’s not going to accept the plea in this case, counsel, we’re going to go forward with trial.

“[APPELLANT]: I already filled it out, look.

“THE COURT: [Appellant], part of that plea negotiation is the Court has to accept it. I’m not going to accept it. We’re done.

“[APPELLANT]: I want to take it. I mean, I’m signing for it right now.

“THE COURT: Too bad. [¶] Counsel, I’ll see you both back at 1:30.”

After the lunch recess and back on the record, defense counsel indicated appellant wanted to accept the plea bargain and was prepared to address the court regarding his conduct just prior to the court rejecting the plea bargain. The judge responded that the plea had been “taken off the table. We’re going to go forward with a trial.” Appellant attempted to speak, but the court admonished him to speak to his defense counsel if he wished to be heard. The proceeding continued with a discussion on motions in limine.

DISCUSSION

I. *Prejudice Did Not Result From Appellant’s Inability To Plead NGI**

.....

II. *Prejudice did not result from the denial of the Marsden motions*

Appellant argues the trial court abused its discretion when it failed to grant two of his requested *Marsden* motions to appoint new counsel after counsel refused to allow an NGI plea. He contends the error was prejudicial, requiring reversal.

A. *Standard of review*

The denial of a *Marsden* motion is reviewed on appeal for an abuse of discretion. (*People v. Streeter* (2012) 54 Cal.4th 205, 230 [142 Cal.Rptr.3d 481, 278 P.3d 754] (*Streeter*).) In this context, an abuse of discretion does not exist unless the defendant’s right to assistance of counsel was substantially impaired from the failure to replace the defendant’s attorney. (*Ibid.*)

*See footnote, *ante*, page 932.

The standard for prejudice regarding a denied *Marsden* motion is under *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824]. (*People v. Solorzano* (2005) 126 Cal.App.4th 1063, 1071 [24 Cal.Rptr.3d 735].) Under that standard, we must ask whether the denial was harmless beyond a reasonable doubt. (*Ibid.*)

B. Analysis

When a defendant seeks to discharge appointed counsel pursuant to *Marsden*, the trial court must permit an opportunity for the defendant to explain the reasons and provide specific instances of inadequate performance. (*Streeter, supra*, 54 Cal.4th at p. 230.) The requested relief should be granted if appointed counsel is not providing adequate representation. Relief should also be granted if the defendant and counsel have an irreconcilable conflict so that ineffective representation is likely to occur. (*Ibid.*) A trial court should substitute new counsel upon learning in a *Marsden* hearing that defense counsel refuses to allow a defendant to exercise his or her right to enter an NGI plea. (*People v. Henning* (2009) 178 Cal.App.4th 388, 404 [100 Cal.Rptr.3d 419] (*Henning*)).

Appellant asserts his *Marsden* motions in the second and fourth hearings should have been granted because his attorneys would not permit an NGI plea. He argues the record does not demonstrate that his counsel consulted with experts or otherwise investigated his sanity at the time of this crime. He maintains it cannot be determined that the trial court's denial of his *Marsden* motions was harmless beyond a reasonable doubt in light of his history of diagnosed mental illness, his strange behavior during the proceedings, and his conduct during the crime's commission. He relies upon *Henning, supra*, 178 Cal.App.4th 388, to establish prejudice.

Respondent contends the trial court did not abuse its discretion in denying the two challenged *Marsden* motions, also citing *Henning, supra*, 178 Cal.App.4th 388. Respondent asserts neither counsel in both disputed *Marsden* hearings "refused to allow appellant to enter an NGI [plea] over his unequivocal request." Respondent notes that defense counsel raised concerns in the fourth *Marsden* hearing that appellant sought the plea only to delay the proceedings and the merits of that defense were unclear. In the alternative, respondent maintains no prejudice resulted even if error occurred.

We need not resolve the parties' dispute regarding whether or not an abuse of discretion occurred in the trial court's denial of the two challenged *Marsden* hearings. Even when we presume, without so deciding, that error occurred in one or both hearings, this record does not establish prejudice. As discussed in the unpublished portion, appellant was unable to use an insanity

defense in the probation revocation proceedings in companion case No. BF144483A. (*People v. Harrison* (1988) 199 Cal.App.3d 803, 809–810 [245 Cal.Rptr. 204].) Further, his actions during the commission of this crime showed a strategic effort to avoid capture. His subsequent telephone call confirmed he knowingly fled from police.

Henning does not alter our conclusion. In *Henning*, the Court of Appeal found error when the trial court failed to replace appointed counsel following a *Marsden* hearing. Counsel refused to allow an NGI plea despite the defendant's wish to do so. (*Henning, supra*, 178 Cal.App.4th at pp. 397–398.) However, the *Henning* court determined the record did not establish a credible basis for an insanity defense. (*Id.* at p. 401.) The defendant's behavior during the crime established he understood his actions were wrong, and the record did not demonstrate any evidence of a mental defect or condition rendering him unable to appreciate the wrongfulness of his conduct. Defense counsel consulted with multiple experts, all of whom concluded the defendant was not insane at the time of the offense. (*Ibid.*) As such, the trial court's error was deemed harmless. (*Id.* at p. 402.)

Here, although this record does not reflect that appellant's counsel pursued an NGI defense, appellant's behavior and postarrest statement establish he was capable of distinguishing right from wrong, and knew or understood the nature of his actions. It is beyond a reasonable doubt that any presumed error associated with the *Marsden* hearings was harmless. Accordingly, appellant's convictions will not be reversed for this claim of error.

III. *The trial court abused its discretion when it rejected the proposed plea bargain in the absence of any justification*

Appellant asserts the trial court abused its discretion when it refused to accept the plea bargain. He contends the court's refusal was not based on any disagreement about the substance of the plea deal, but over frustration with his equivocating.

A. *Standard of review*

Without citing any specific authority, both parties take the position that an abuse of discretion standard is appropriate in analyzing this claim. We agree because a deferential abuse of discretion standard is used to analyze whether a trial court properly accepted a conditional plea of guilty or no contest pursuant to Penal Code section 1192.5. (*People v. Holmes* (2004) 32 Cal.4th 432, 443 [9 Cal.Rptr.3d 678, 84 P.3d 366].) Similarly, and by analogy, a deferential abuse of discretion standard is also used to review a trial court's ruling denying a mistrial. (*People v. Bolden* (2002) 29 Cal.4th 515, 555 [127

Cal.Rptr.2d 802, 58 P.3d 931].) An abuse of discretion is present when a court's ruling is "‘outside the bounds of reason.’" (*People v. Ochoa* (1998) 19 Cal.4th 353, 408 [79 Cal.Rptr.2d 408, 966 P.2d 442].)

B. Analysis

Appellant argues the court initially intended to approve the plea bargain because it discussed the plea agreement with appellant during the fourth *Marsden* hearing, and the court gave appellant and defense counsel additional time to confer about it. Following that recess, the court responded to appellant's inquiries about time credits and about whether the court would consider a *Romero* motion, and the court confirmed with the prosecution that the People were still in agreement with the pending offer. Appellant contends the trial court's abrupt decision to reverse itself and refuse the plea bargain was an abuse of discretion. He maintains the court's refusal did not arise over concerns of the bargain's terms or because the plea interfered with a court policy, but rather over "exasperation" regarding appellant's "incessant questions about pleading NGI."

Respondent contends neither appellant nor the trial court accepted the plea bargain, and the court did not withdraw the plea from consideration because of prejudice against appellant. Instead, respondent asserts the court withdrew the offer because appellant continued to equivocate regarding its acceptance. Respondent maintains that "appellant's issues with the plea bargain had nothing to do with an NGI plea, but rather pertained to custody credits and whether the court would strike his strike and prison priors." We find merit to appellant's concerns and reject respondent's contentions.

■ Plea negotiations and agreements are an integral, essential and accepted component of our criminal justice system. (*People v. Segura* (2008) 44 Cal.4th 921, 929 [80 Cal.Rptr.3d 715, 188 P.3d 649] (*Segura*).) Such agreements promote speed, economy and the finality of judgments. (*Ibid.*) The process involves an agreement negotiated by the People and the defendant, which requires judicial approval as an essential condition precedent to the bargain's effectiveness. (*Id.* at pp. 929–930.)

A court may set a deadline in the pretrial process for the acceptance of a plea bargain to facilitate effective calendar management. (*People v. Cobb* (1983) 139 Cal.App.3d 578, 581 [188 Cal.Rptr. 712].) A "trial court may decide not to approve the terms of a plea agreement negotiated by the parties." (*Segura, supra*, 44 Cal.4th at p. 931.) If the court believes the agreed-upon disposition is not fair, it may reject the bargain, but it cannot change the agreement without the consent of the parties. (*Ibid.*) "[Penal Code] section 1192.5 impliedly vests a court with 'broad discretion to withdraw its

prior approval of a negotiated plea.’” (*People v. Stringham* (1988) 206 Cal.App.3d 184, 199 [253 Cal.Rptr. 484].)

“ ‘Judicial discretion’ ” in this context has been described by our Courts of Appeal as a power exercised to award justice based upon reason and law. (*People v. Stringham, supra*, 206 Cal.App.3d at p. 199.) When either law or a fixed rule is lacking, a judge is to decide a question with a view of expediency, or in the interests of equity and justice. “The term implies absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound judicial discretion enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy or warped by prejudice or moved by any kind of influence save alone the overwhelming passion to do that which is just.” (*Id.* at p. 200.)

■ Our Supreme Court has stated that trial courts, when exercising discretion to approve or reject proposed plea bargains, are charged to protect and promote the public’s interest in protecting victims of crimes, vigorous prosecution of the accused, and imposing an appropriate punishment. (*In re Alvernaz* (1992) 2 Cal.4th 924, 941 [8 Cal.Rptr.2d 713, 830 P.2d 747] (*Alvernaz*).) As a result, “a trial court’s approval of a proposed plea bargain must represent an informed decision in furtherance of the interests of society [citation]; as recognized by both the Legislature and the judiciary, the trial court may not arbitrarily abdicate that responsibility.” (*Ibid.*)

Here, appellant made it clear he was accepting the plea agreement. First, appellant stated “I’ll sign” before the court said it was not going to accept the plea. After the court’s statement, appellant said he had already filled out the change of plea form, and said, “I want to take it. I mean, I’m signing for it right now.” The court responded, “Too bad.”

Second, after the lunch recess, appellant stated through defense counsel that he sincerely desired to take advantage of the plea bargain. The court said “that option has been taken off the table. We’re going to go forward with a trial.”

■ At no point did the trial court state that appellant’s negotiated plea agreement was unfair or contrary to the public interest. The trial court did not indicate why the plea bargain was unacceptable. According to the record, the jury pool was not present in the courtroom that day until approximately 3:59 p.m., after the parties concluded motions in limine. This record shows an arbitrary rejection of the plea agreement and a failure to exercise the required

judicial discretion. (*Alvernaz, supra*, 2 Cal.4th at p. 941.) Accordingly, the trial court abused its discretion. We now turn to the subject of the appropriate remedy.

Appellant requests a remand so he can decide whether to accept the previously negotiated agreement and, if he accepts it, the trial court should impose that sentence unless a finding is made that the disposition is unacceptable based on legitimate grounds. If he does not wish to accept the plea bargain, or if the court declines to approve it for valid reasons, his conviction should be entirely vacated and the proceedings restored to the original status quo. He asserts that the probation case should be incorporated within this remedy as the negotiated disposition included both cases. He cites *People v. Kaanehe* (1977) 19 Cal.3d 1, 13 [136 Cal.Rptr. 409, 559 P.2d 1028] (*Kaanehe*) to support his approach.

Respondent contends specific performance of the plea bargain is not an appropriate remedy even if error occurred. Respondent generally cites *Alvernaz, supra*, 2 Cal.4th 924. Although neither party's Supreme Court case is on point, we take guidance from these opinions as they discuss how and under what circumstances a previous plea agreement should be enforced.

In *Kaanehe*, the defendant appealed from a judgment entered upon negotiated pleas of guilty. The Supreme Court determined that the prosecution breached the plea bargain agreement and concluded that the defendant was entitled to be rearraigned for resentencing or, at his option, to withdraw his guilty pleas and be arraigned again on all charges. (*Kaanehe, supra*, 19 Cal.3d at pp. 5–6.) The breach occurred when the prosecutor made recommendations to the trial court regarding the imposition of a prison sentence despite agreeing to give up that right. (*Id.* at pp. 11–13.)

■ Both the People and a defendant may seek specific enforcement. The remedy depends on the nature of the breach and which party seeks to enforce it. When the prosecutor refuses to comply with the agreement, specific enforcement would be an order directing the prosecutor to fulfill the bargain. When the trial court refuses to sentence according to the agreement, specific enforcement would direct the judge to resentence the defendant according to the plea bargain. “The effect is to limit the remedy to an order directing fulfillment of the bargain. In such instances, the defendant is not allowed to withdraw his guilty plea.” (*Kaanehe, supra*, 19 Cal.3d at p. 13.)

Kaanehe cautioned “that a defendant should not be entitled to enforce an agreement between himself and the prosecutor calling for a particular disposition against the trial court absent very special circumstances.” (*Kaanehe, supra*, 19 Cal.3d at p. 13.) Instead, the preferred remedy is to allow a

defendant to withdraw the plea and restore the proceedings to the status quo. (*Id.* at pp. 13–14.) “Specific enforcement of a particular agreed upon disposition must be strictly limited because it is not intended that a defendant and prosecutor be able to bind a trial court which is required to weigh the presentence report and exercise its customary sentencing discretion.” (*Id.* at p. 14.)

Kaanehe determined specific enforcement was inappropriate because a substantial possibility existed that the remedy would not completely repair the harm caused by the prosecutor’s breach, and the breach was done willfully and deliberately. The Supreme Court held that, because the breach was so glaring, the defendant needed the option of either “rearraignment” for sentencing with the prosecutor’s previous communications stricken from the record, or the right to withdraw his guilty pleas with the restoration of all charges and resumption of trial proceedings. (*Kaanehe, supra*, 19 Cal.3d at pp. 14–15.) Further proceedings had to occur before a new judge. (*Id.* at p. 15.)

In *Alvernaz*, the Supreme Court decided under what circumstances a criminal defendant could challenge a conviction and sentence when claiming a pretrial plea bargain was rejected due to ineffective assistance of counsel. (*Alvernaz, supra*, 2 Cal.4th at p. 928.) *Alvernaz* held a Sixth Amendment violation is present when a defendant demonstrates that ineffective representation at the pretrial stage of a criminal proceeding caused the defendant to proceed to trial even if a fair trial resulted. When such a constitutional violation occurs, the judgment must either be modified consistent with the terms of the offered plea bargain, or a new trial is required with resumption of the plea negotiation process. (*Alvernaz, supra*, at p. 928.) To establish prejudice, a defendant must prove he or she would have accepted the plea bargain, and it would have been approved by the trial court. (*Id.* at pp. 940–941.)

■ It was noted in *Alvernaz* that the remedy of specific enforcement of a failed plea bargain is generally disfavored when it will limit the judge’s sentencing discretion in light of changed circumstances between the acceptance of the plea and sentencing. “Specific enforcement of a failed plea bargain is not a remedy required by the federal Constitution.” (*Alvernaz, supra*, 2 Cal.4th at p. 942.) As a result, *Alvernaz* held that specific enforcement of a plea offer following trial and conviction is neither constitutionally required nor consistent with the trial court’s broad discretion in determining the appropriate sentence for a defendant’s criminal conduct where ineffective assistance of counsel causes a defendant to reject the pretrial plea bargain. (*Id.* at p. 943.) Moreover, the Supreme Court noted that mandatory reinstatement of the plea bargain would be inconsistent with the legitimate exercise of the

prosecutorial discretion involved in the negotiation and withdrawal of offered plea bargains. The prosecution could view the case very differently following a fair trial and conviction. The sentencing contemplated in the pretrial plea offer could no longer be consistent with the public interest and a prosecutor should not be locked into the proposed pretrial disposition. (*Ibid.*) (7) Accordingly, “the appropriate remedy for ineffective assistance of counsel that has resulted in a defendant’s decision to reject an offered plea bargain (and to proceed to trial) is as follows: After the granting of relief by the trial court (on a motion for new trial or in a habeas corpus proceeding) or by an appellate court, the district attorney shall submit the previously offered plea bargain to the trial court for its approval, unless the district attorney within 30 days elects to retry the defendant and resume the plea negotiation process. If the plea bargain is submitted to and approved by the trial court, the judgment shall be modified consistent with the terms of the plea bargain.” (*Id.* at p. 944.) If plea negotiations are resumed, “the prosecution has acquired as substantial bargaining leverage the circumstance of having obtained a conviction of the defendant following a trial. The right to a new trial, however, does not leave the defendant with an ‘empty’ remedy. A defendant is in a better position, in preparing for a new trial following trial and conviction, to evaluate the strengths and weaknesses of both the prosecution’s case and the defense’s case. Furthermore, such a defendant is restored the bargaining leverage often afforded by the prosecutor’s desire to avoid the time and expense of a new trial and the accompanying uncertainty as to the outcome of the proceedings.” (*Ibid.*)

Here, consistent with the reasoning in these opinions, it is apparent we cannot divest the trial court of its sentencing discretion. (*Alvernaz, supra*, 2 Cal.4th at p. 942; *Kaanehe, supra*, 19 Cal.3d at p. 14.) Although the present matter does not involve a finding of ineffective assistance of counsel, the remedy discussed in *Alvernaz* appears appropriate as it implements the dual concerns of protecting appellant’s rights while also providing prosecutorial discretion. (*Alvernaz, supra*, at p. 943.)

Accordingly, upon remand, the district attorney shall submit the previously negotiated plea bargain to the trial court for its approval, unless the district attorney within 30 days elects to retry appellant and resume the plea negotiation process. Because the previously offered plea bargain included both cases, we agree with appellant that the probation case should be included within this remedy. If the plea bargain is submitted to and approved by the trial court, the judgment shall be modified consistent with the terms of

[REDACTED]

the plea bargain. (*Alvernaz, supra*, 2 Cal.4th at p. 944.) If the plea bargain is either not submitted to the trial court or is not approved, then appellant shall be retried.⁴

DISPOSITION

The judgment is reversed. The sentences in both cases (case No. BF151668A & case No. BF144483A) are vacated. These matters are remanded to the trial court for further proceedings. The district attorney shall submit the previously negotiated plea bargain to the trial court for its approval, unless the district attorney within 30 days elects to retry appellant and resume the negotiation process. If the previously negotiated plea bargain is submitted and approved by the trial court, judgment shall be entered consistent with the terms of the plea bargain. If the previously negotiated plea bargain is either not submitted to the trial court or not approved, then appellant shall be retried.

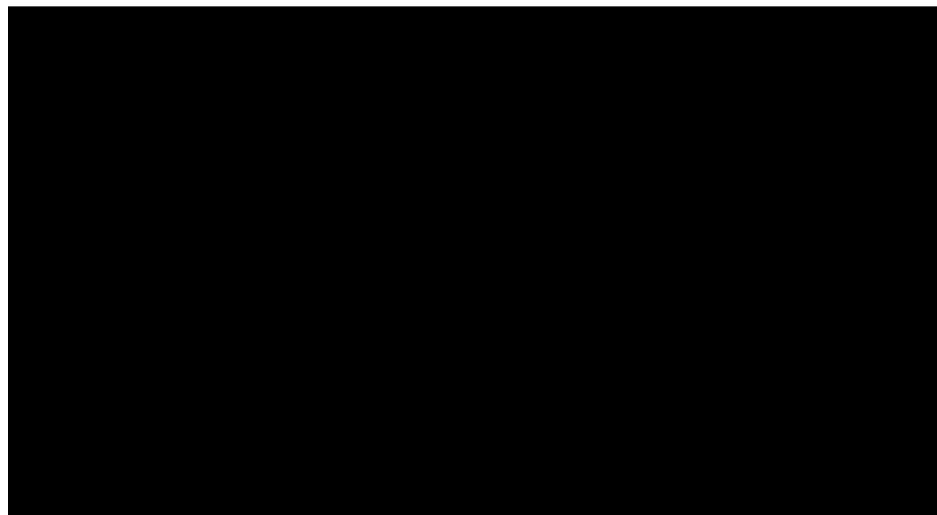
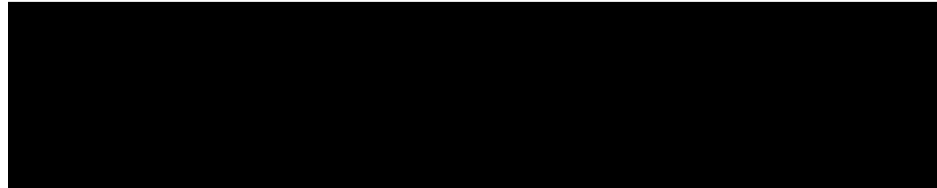
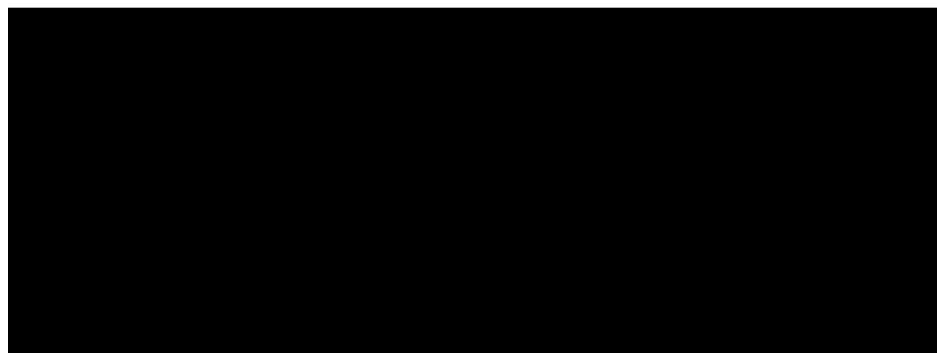
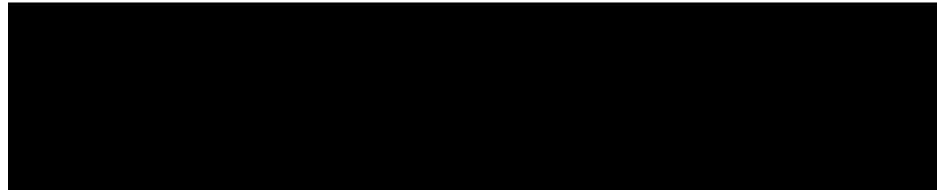
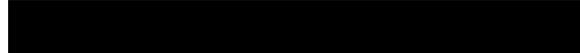
Hill, P. J., and Gomes, J., concurred.

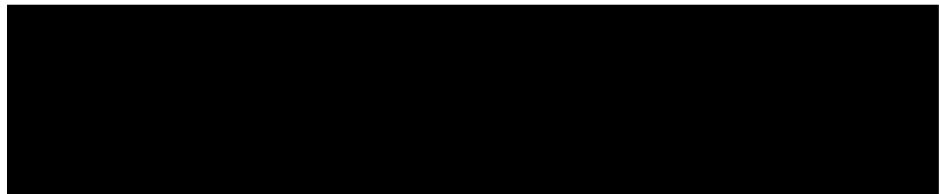
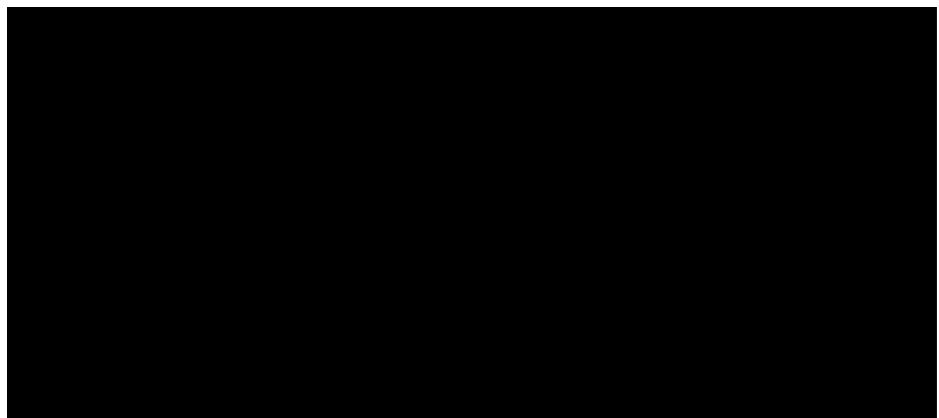
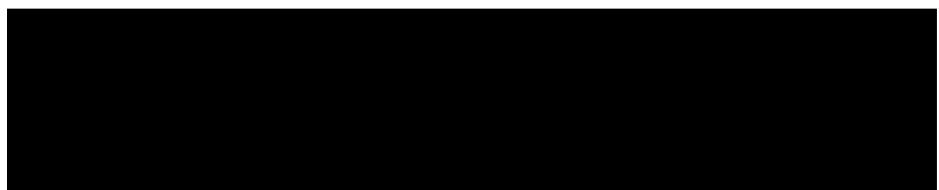
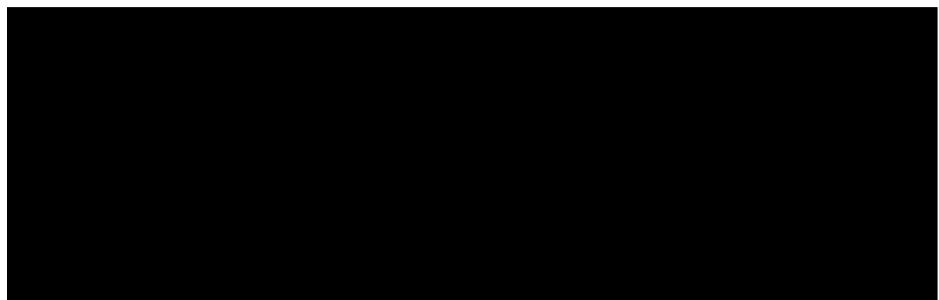
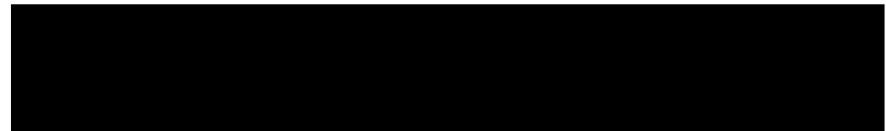
⁴ In light of the remand, we will not address appellant's final contention that he was denied his constitutional right to effective assistance of counsel and due process. We take no position regarding the merits of appellant entering an NGI plea if appellant is retried.

[No. D068384. Fourth Dist., Div. One. July 26, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
BRANDEN JOHNSON, Defendant and Appellant.









COUNSEL

Jill Kent, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Anthony Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

IRION, J.—Branden Johnson appeals from an order of the superior court denying his petition to recall his felony sentence for receiving stolen property and to resentence him to a misdemeanor, as allowed in Penal Code section 1170.18, subdivision (a), which was enacted as part of Proposition 47.¹ On appeal, Johnson argues that the trial court erred in ruling that he, not the People, had the burden of establishing eligibility for Proposition 47 relief. We disagree and will affirm the order. The affirmance is without prejudice, in the event Johnson wants to file a new petition in which he may attempt to meet his *initial* burden of demonstrating entitlement to relief under Proposition 47.

I.

FACTUAL AND PROCEDURAL BACKGROUND²

In a January 2013 complaint, the district attorney charged Johnson (and a codefendant) with one count of receiving stolen property in violation of

¹ “A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section (‘this act’) had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with . . . [section] 496 . . . of the Penal Code, as th[at] section[] ha[s] been amended . . . by this act.” (Pen. Code, § 1170.18, subd. (a); further undesignated statutory references are to the Penal Code.)

² The trial court indicated that it had before it Johnson’s “file,” stating that one of the issues was whether the court could consider anything other than the “record of conviction.” The court did not indicate what it considered to be part of the record of conviction.

For purposes of the factual recitation in this opinion, we have considered the following documents from the record on appeal: the January 2013 complaint; the August 2013 written

section 496, former subdivision (a). (Stats. 2011, ch. 15, § 372.) In August 2013, pursuant to a negotiated plea agreement, Johnson pleaded guilty; the factual basis for the plea was that he “unlawfully [and] knowingly possessed stolen property.” In November 2013, the court denied probation (due to Johnson’s prior convictions) and ordered Johnson to serve a three-year split sentence—two years in county jail and one year suspended with mandatory supervision.

On November 4, 2014, California voters approved Proposition 47, the Safe Neighborhoods and Schools Act; under the California Constitution (art. II, § 10, subd. (a)), it became effective the following day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 [183 Cal.Rptr.3d 362] (*Rivera*).) “Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors).” (*Rivera*, at p. 1091.) As relevant to the issue on appeal, Proposition 47 allows a defendant to be resentenced and the felony conviction for receiving stolen property to be deemed a misdemeanor upon a showing that the value of the stolen property did not exceed \$950. (§§ 1170.18, subds. (a) & (b), 496, subd. (a).)

On April 2, 2015, the court revoked mandatory supervision for Johnson and ordered him to serve the remaining 295 days of his sentence in custody.

Approximately one week later, Johnson filed a form petition signed by his attorney, requesting that Johnson’s felony sentence be recalled and that he be resentenced under section 1170.18, subdivisions (b) and (d). The one-page check-the-box petition contained only the date of conviction (“11/07/13,” which was the date of sentencing, not conviction); the crime of which Johnson was convicted (“PC496(a)’’); the sentence (“3 years confinement’’); and the request for resentencing. The case was assigned to the original sentencing judge (§ 1170.18, subd. (l)), who requested briefing from both sides and placed the matter on the court’s calendar for hearing.

In May 2015, the People filed points and authorities in opposition to Johnson’s petition, arguing in relevant part that Johnson did not meet his

plea; the August 2013 reporter’s transcript from the hearing on the change of plea; the November 2013 reporter’s transcript from the sentencing hearing; the November 2013 (sentencing) order granting mandatory probation supervision; the November 2013 felony abstract of judgment; and the April 2015 reporter’s transcript from the hearing at which probation was revoked. We have not considered as evidence the various probation reports or the police arrest report, since the trial court did not consider them (on the basis they are not part of Johnson’s record of conviction), and they contain multiple layers of hearsay.

burden of presenting evidence that established his entitlement to relief under Proposition 47. More specifically, the People argued that Johnson did not establish from the record of conviction that the offense of which he was convicted involved a theft of property valued at less than \$950. In support, the People submitted copies of some of the text of Proposition 47 and an August 2013 probation report that was prepared in anticipation of Johnson's original sentence on the felony conviction following his negotiated guilty plea.

Johnson filed points and authorities, contending that because his original petition contained a *prima facie* showing that he was eligible for Proposition 47 relief,³ the burden shifted to the prosecution to establish that he was not entitled to relief—a burden, he argued, the prosecution did not meet by relying on the probation report, which is not part of the record of conviction. More specifically, Johnson contended that because the record of conviction was silent as to the value of the stolen property, the court could “only find the least adjudicated offense under the record,” which Johnson argued was a misdemeanor. In support, Johnson submitted a copy of the eight-page police report in which the arresting officer filled out a form and attached a narrative report of the arrest. Johnson argued that statements in the arrest report established that the value of the stolen property in his possession that formed the basis of his conviction was less than \$950 and should be admissible because the report was like a preliminary hearing transcript, which is part of the record of conviction.⁴

The People filed a reply, emphasizing that the burden of proof was *on Johnson* and arguing that, by submitting a barebones check-the-box form petition that contained no evidence regarding the stolen property in his possession, the petition should be denied for lack of a *prima facie* showing of eligibility to Proposition 47 relief. Alternatively, the People argued that if the court determines Johnson to have made a sufficient showing of eligibility, then the petition still should be denied because Johnson did not present any actual *evidence* that the value of the stolen property did not exceed \$950.

At the June 3, 2015 hearing, the court denied Johnson's petition. The court explained: In attempting to establish the value of the stolen property, “the

³ Johnson's petition did not mention the value of the stolen property in his possession, and in his written submission Johnson did not explain why he believed he had made a *prima facie* showing for relief based on merely his felony conviction, the date of his sentencing and the term of his sentence.

⁴ Inconsistently, elsewhere in his points and authorities, Johnson cited two cases in support of the position that “police reports are not part of the record of conviction” and urged the court not to consider the police report (or the probation report).

parties need necessarily to be confined to the record of conviction”; Johnson had the burden of proof to establish “through the record of conviction” that the value of the stolen property did not exceed \$950 (in order to qualify for Prop. 47 relief); and Johnson did not meet his burden of proof.

Johnson timely appealed.

II.

DISCUSSION

In determining whether the trial court properly applied section 1170.18, subdivision (a), we must decide, first, who had the burden of establishing the value of the stolen property that formed the basis of Johnson’s felony conviction and, second, whether that party met the required burden. All that is at issue in this appeal is the burden at the time the trial court determines the petitioning defendant’s *initial* eligibility “[u]pon receiving a petition under subdivision (a).” (§ 1170.18, subd. (b).) As we explain, the initial burden of establishing eligibility was on Johnson, who did not meet it.

A. Proposition 47

As relevant to this appeal, Proposition 47 amended section 496. (*Rivera, supra*, 233 Cal.App.4th at p. 1091.) In part, recently amended section 496, subdivision (a) provides: “Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. However, if the value of the property does not exceed nine hundred fifty dollars (\$950), the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year”⁵ (Italics added; Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 9, p. 72 amending § 496, subd. (a).)

⁵ Prior to Proposition 47, which includes the time of Johnson’s felony conviction, the last quoted sentence provided: “However, if the district attorney or the grand jury determines that this action would be in the interests of justice, the district attorney or the grand jury, as the case may be, may, if the value of the property does not exceed nine hundred fifty dollars (\$950), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year.” (§ 496, former subd. (a) as amended by Stats. 2011, ch. 15, § 372.)

■ Proposition 47 also created a procedure whereby a person who is serving a felony sentence for an offense that became a misdemeanor under Proposition 47 may petition for a recall of that sentence and request resentencing under the applicable statute that was added or amended by Proposition 47. (§ 1170.18, subd. (a); *Rivera, supra*, 233 Cal.App.4th at p. 1092.) Pursuant to this procedure, Johnson applied to the trial court to recall his felony sentence for receiving stolen property and to be resentenced under section 496, subdivision (a), as amended by Proposition 47.

B. Standards on Appeal

■ In interpreting a ballot initiative measure, we apply the same principles we use in construing a statute enacted by the Legislature. (*People v. Arroyo* (2016) 62 Cal.4th 589, 593 [197 Cal.Rptr.3d 122, 364 P.3d 168] (*Arroyo*) [Prop. 21, which “expanded prosecutorial authority to file charges against minors in adult court”].) We begin by considering the actual language of the initiative, giving its words their usual and ordinary meaning. (*Arroyo*, at p. 593.) We construe the words of an initiative as a whole and within the overall statutory scheme to effectuate the voters’ intent. (*Ibid.*) If the language is ambiguous, we look to other indicia of the intent of the electorate, including the analyses and arguments in the voter information guide. (*Ibid.*) We will not interpret ambiguities in initiative language so as to create an absurd result or to be inconsistent with the voters’ intent. (See *People v. Cruz* (1996) 13 Cal.4th 764, 782–783 [55 Cal.Rptr.2d 117, 919 P.2d 731].)

Where an appeal involves the interpretation of a statute enacted as part of a voter initiative, the issue on appeal is a legal one, which we review de novo. (*Arroyo, supra*, 62 Cal.4th at p. 593.) Where the trial court applies disputed facts to such a statute, we review the factual findings for substantial evidence and the application of those facts to the statute de novo. (*Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 548–549 [103 Cal.Rptr.2d 447].) “[A]n order is presumed correct; all intendments are indulged in to support it on matters as to which the record is silent, and error must be affirmatively shown.” (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1046 [90 Cal.Rptr.2d 607, 988 P.2d 531].) In addition, we must “view the record in the light most favorable to the trial court’s ruling.” (*Ibid.*)

C. Analysis

The first sentence of section 496, subdivision (a) defines the crime of receiving stolen property: “Every person who buys or receives any property

that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170.” The second sentence of section 496, subdivision (a)—i.e., the language at issue in this appeal—deals with the value of the stolen property received and provides in part: “However, if the value of the property does not exceed nine hundred fifty dollars (\$950), the offense shall be a misdemeanor . . .” (Italics added.)

In support of his original petition, Johnson presented no evidence as to how he “would have been guilty of a misdemeanor under [Proposition 47] had this act been in effect at the time of the offense,” as required by section 1170.18, subdivision (a). In response to the court’s request for briefing, Johnson submitted an unsigned copy of his arrest report, which contained the arresting officer’s summary of events surrounding Johnson’s January 18, 2013 arrest for receiving stolen property and for possession of tear gas. In relevant part, the officer wrote that he interviewed a witness (the potential purchaser of the stolen property), the codefendant and Johnson—each of whom provided certain information to the officer with regard to the value of the stolen property. In the information provided by these three people, the stolen property was described as a laptop computer that was to be sold for between \$350 and \$400.

Section 1170.18, subdivision (a) is silent as to who has the *initial* burden of establishing whether a petitioning defendant is eligible for resentencing. (See fn. 1, *ante*.) At the time Johnson filed his petition in April 2015, section 1170.18 had been in effect for less than six months, and even by June 2015 when the trial court denied Johnson’s petition there were no appellate opinions to provide guidance on this issue.

Within the last year, at least four final appellate opinions have interpreted and applied section 1170.18, subdivision (a)—each holding that this initial burden is borne by the petitioning defendant. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879 [191 Cal.Rptr.3d 295] (*Sherow*) [“‘petitioner will have the initial burden of establishing eligibility for resentencing under section 1170.18[, subdivision](a)’ ”]; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449–450 [193 Cal.Rptr.3d 651] (*Rivas-Colon*); *People v. Perkins* (2016) 244 Cal.App.4th 129, 136–137 [197 Cal.Rptr.3d 743] (*Perkins*); *People v. Bush* (2016) 245 Cal.App.4th 992, 1007 [200 Cal.Rptr.3d 190] (*Bush*).)

On appeal, contrary to *Sherow*, *Rivas-Colon*, *Perkins* and *Bush*, Johnson does not mention a requirement that he make (and does not argue that he made) the initial showing of eligibility for Proposition 47 relief in his petition. Rather, he contends that in response to his petition the trial court was limited to consideration of the record of conviction (without suggesting what comprises the record of conviction), and because the record of conviction in this case does not disclose the value of the stolen property, *the prosecution* cannot prove that *Johnson* is *ineligible* for Proposition 47 relief. In so doing, Johnson argues that *Sherow* is not controlling on two basic grounds: (1) Unlike *Sherow*, in which the petitioning defendant had been found guilty of felony burglary following a trial with a complete record of the underlying theft, here Johnson pleaded guilty to felony receipt of stolen property following the filing of a complaint with little or no record of the underlying theft; and, alternatively, (2) *Sherow* was wrongly decided.⁶

We disagree. As we explain, the petitioning defendant, not the prosecution, has the *initial* burden of establishing eligibility for resentencing, and the trial court is not limited to consideration of the record of conviction. This burden includes presenting *evidence* that the petitioning defendant “would have been guilty of a misdemeanor under [Proposition 47] had [Proposition 47] been in effect at the time of the offense” (§ 1170.18, subd. (a)), which as applicable in this case means *evidence* that “the value of the property does not exceed nine hundred fifty dollars (\$950)” (§ 496, subd. (a)). Johnson did not meet his initial burden here.

1. *Johnson Had the Initial Burden of Establishing Eligibility for Resentencing Under Proposition 47 from Sources Not Limited to the Record of Conviction*

Johnson contends on appeal that the trial court properly limited its consideration of evidence to the record of conviction, and the People do not argue otherwise. Johnson bases his position solely on a citation to *People v. Bradford* (2014) 227 Cal.App.4th 1322 [174 Cal.Rptr.3d 499] (*Bradford*), the authority on which the trial court relied in ruling that the parties were confined to the record of conviction. In part, *Bradford* held that in response to a petition for resentencing under *Proposition 36* (§ 1170.126, titled the Three Strikes Reform Act of 2012), “the trial court must determine the facts needed

⁶ Johnson does not mention *Rivas-Colon*, *supra*, 241 Cal.App.4th 444, let alone attempt to argue that it is not controlling. *Perkins*, *supra*, 244 Cal.App.4th 129, and *Bush*, *supra*, 245 Cal.App.4th 992, were filed after Johnson filed his reply brief in this appeal.

to adjudicate eligibility based on evidence obtained solely from the record of conviction.”⁷ (*Bradford*, at pp. 1327, 1338.)

Johnson posits that (1) because Proposition 36 and Proposition 47 both decrease existing sentences and use similar language to describe the procedure to seek resentencing based on certain eligibility criteria (compare § 1170.126, subds. (b), (f) [Prop. 36] with § 1170.18, subds. (a), (b) [Prop. 47]) and (2) because neither proposition identifies what evidence a court may consider in determining eligibility, when the trial court makes its initial determination whether the petition satisfies the criteria for resentencing under Proposition 47, the court should be limited to the record of conviction the same as it is under Proposition 36. “‘When legislation has been judicially construed and a subsequent statute on a similar subject uses identical or substantially similar language, the usual presumption is that the Legislature [or the voters] intended the same construction, unless a contrary intent clearly appears.’” (*Rivera, supra*, 233 Cal.App.4th at p. 1100.)

We agree with Johnson that the two propositions employ similar procedures for resentencing. We disagree, however, with his suggestions both (1) that the prosecution has the initial burden to establish a petitioning defendant’s *ineligibility* for resentencing,⁸ and (2) that the trial court is limited to consideration of the record of conviction for this purpose. Rather, under both Proposition 36 and Proposition 47, the petitioning defendant has the *initial* burden of establishing eligibility, and if that burden is met, then the prosecution has the opportunity to establish *ineligibility* on other grounds. With regard to the evidence the court may consider, neither proposition indicates that the voters intended to limit the court’s consideration to the record of conviction. The *Bradford* court observed that Proposition 36 did not prescribe any “particular statutory procedure . . . [as to] how the trial court is to go about making the eligibility determination” (*Bradford, supra*, 227 Cal.App.4th at p. 1337), ultimately concluding that such a determination under Proposition 36 should be based solely on the record of conviction (*Bradford*, at pp. 1327,

⁷ Without suggesting what documents comprise the record of conviction, the *Bradford* court described the required evidence as “facts attendant to commission of the actual offense.” (*Bradford, supra*, 227 Cal.App.4th at p. 1332 [Prop. 36; § 1170.126].)

⁸ As a preliminary matter, we reject Johnson’s suggestion that, because the initial showing under Proposition 47 requires evidence of “guilt[] of a misdemeanor” (§ 1170.18, subd. (a)), the prosecution has the burden of proof *beyond a reasonable doubt*. Section 1170.18 deals with *resentencing* a petitioning defendant whose commission of a felony has already been proven beyond a reasonable doubt. If successful, the petitioning process results in the recall of the felony sentence and the resentencing, not in the *conviction* of a new or different crime. (*Id.*, subd. (b).) Only *after* the resentencing has taken place—i.e., *after* the court has determined that the petitioning defendant “would have been guilty of a misdemeanor under [Proposition 47] had [Proposition 47] been in effect at the time of the offense” (*id.*, subd. (a)) and is not otherwise ineligible for relief—is the conviction “considered a misdemeanor for all purposes” (*id.*, subd. (k)).

1338). However, as we explain, such a limitation under Proposition 47 would result in an insurmountable obstacle in many cases for obtaining relief to which a petitioning defendant would be entitled under a consideration of evidence from other sources—a result the voters could not have intended when passing Proposition 47.

a. *Initial Burden*

In comparing Proposition 36 with Proposition 47, Johnson first suggests that under both propositions the prosecution has the initial burden of establishing that a petitioning defendant is *ineligible* for resentencing. We disagree; under both propositions, the petitioning defendant has an initial burden of establishing eligibility.

Under Proposition 36, a defendant who has two or more prior serious or violent felonies, known as “strikes,” is no longer necessarily subject to an enhanced sentence on a conviction for a third strike offense, if the third conviction is not for a serious or violent felony. (*Bradford, supra*, 227 Cal.App.4th at pp. 1327–1328; see § 1170.126, subds. (a), (e).) In enacting section 1170.126 as part of Proposition 36, the voters did not intend to benefit all third strike offenders whose third strike was not for a serious or violent felony, but only those who were perceived as nondangerous or posing little or no risk to the public. (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1057 [171 Cal.Rptr.3d 70].)

Under Proposition 36, a person serving an indeterminate term of life imprisonment imposed under section 667, subdivision (e)(2), or section 1170.12, subdivision (c)(2), for a conviction of a felony that is not defined as serious or violent by section 667.5, subdivision (c), or section 1192.7, subdivision (c), may petition for resentencing. (§ 1170.126, subds. (b), (e)(1).) The petitioning defendant has an *initial burden of establishing eligibility*—at a minimum, the requisite conviction and sentence set forth in section 1170.126, subdivision (e)(1).⁹ (See § 1170.126, subds. (b), (f).) The prosecution then has the opportunity to oppose the petition by establishing that the petitioning defendant is *ineligible* for resentencing on various

⁹ “An inmate is eligible for resentencing if: [¶] (1) The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7. [¶] (2) The inmate’s current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12. [¶] (3) The inmate has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section

grounds.¹⁰ (See § 1170.126, subd. (e); *Bradford, supra*, 227 Cal.App.4th at p. 1337, citing *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1299, fn. 21 [155 Cal.Rptr.3d 856]; see also *Kaulick*, at p. 1298 [“the prosecution’s due process rights include the right to a full adversarial proceeding, in which it may present evidence, as well as argument”]; Couzens & Bigelow, The Amendment of the Three Strikes Sentencing Law (May 2016) §§ IV.B.4.(c), IV.C.3., pp. 63, 67 <<http://www.courts.ca.gov/documents/Three-Strikes-Amendment-Couzens-Bigelow.pdf>> [as of July 26, 2016].)

Under Proposition 47, a person serving a sentence for a conviction of a felony “who would have been guilty of a misdemeanor under [Proposition 47] had [Proposition 47] been in effect at the time of the offense” may petition for resentencing. (§ 1170.18, subd. (a).) By this language, the voters did not intend to benefit all offenders serving a sentence for a felony theft or drug conviction, but only those who would have been guilty of a misdemeanor under the various statutes that were added or amended by Proposition 47. Like Proposition 36, Proposition 47 requires the petitioning defendant to establish *initial eligibility* for relief—which, under Proposition 47, is “guilt[] of a misdemeanor.” (§ 1170.18, subd. (a).) Also like Proposition 36, Proposition 47 then allows the prosecution the opportunity to oppose the petition by attempting to establish that the petitioning defendant is *ineligible* for resentencing. (See Couzens & Bigelow, Proposition 47 “The Safe Neighborhoods and Schools Act” (May 2016) § VI.B.3., p. 41 <<http://www.courts.ca.gov/documents/Prop-47-Information.pdf>> [as of July 26, 2016].) This may be accomplished either (1) by rebutting the petitioning defendant’s evidence, thereby demonstrating that the petitioning defendant would *not* have been guilty of a misdemeanor had Proposition 47 been in effect at the time of the offense (§ 1170.18, subd. (a)), or (2) by demonstrating that the petitioning defendant suffered a conviction of one or more of the offenses specified in section 1170.18, subdivision (i).¹¹

1170.12.” (§ 1170.126, subd. (e).)

We express no opinion as to who has the initial burden of establishing the eligibility requirements under section 1170.126, subdivision (e)(2) or (3).

¹⁰ In addition, the court may still deny relief to an otherwise eligible petitioning defendant if the court determines, based on evidence from any source, that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).)

¹¹ Finally, as in Proposition 36, under Proposition 47 the court may still deny relief to an otherwise eligible petitioning defendant if the court determines, based on evidence from any source, that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b).)

This appeal (like *Sherow, Rivas-Colon, Perkins and Bush*) involves only the initial burden to establish *eligibility* for resentencing. Accordingly, we express no view as to who has either the ultimate burden or the standard of proof for *entitlement* to resentencing under Proposition 47.

b. *Record of Conviction*

In comparing Proposition 36 with Proposition 47, Johnson further suggests that when determining a petitioning defendant's initial eligibility for resentencing, the trial court is limited to consideration of the record of conviction.¹² Again, we disagree.

In support of his position, Johnson suggests that because *Bradford* limits the evidence of eligibility for resentencing to what is found in a record of conviction that preceded the Proposition 36 resentencing proceedings (*Bradford, supra*, 227 Cal.App.4th at pp. 1327, 1338), the same limitation should apply in Proposition 47 resentencing proceedings. However, under Proposition 36, in order to determine eligibility (whether initially or otherwise), the resentencing court need consider only the petitioning defendant's *existing prior convictions*. Ultimate eligibility for resentencing is set forth at section 1170.126, subdivision (e) and requires showings that: the defendant is serving an indeterminate term of life imprisonment imposed pursuant to section 667, subdivision (e)(2) or section 1170.12, subdivision (c)(2) for a conviction of a felony that is not defined as serious and/or violent by section 667.5, subdivision (c) or section 1192.7, subdivision (c) (§ 1170.126, subd. (e)(1)); the defendant's sentence was not based on offenses in section 667, subdivision (e)(2)(C)(i)–(iii) or section 1170.12, subdivision (c)(2)(C)(i)–(iii) (§ 1170.126, subd. (e)(2)); and the defendant has no prior convictions for any of the offenses in section 667, subdivision (e)(2)(C)(iv) or section 1170.12, subdivision (c)(2)(C)(iv) (§ 1170.126, subd. (e)(3)). The evidentiary limitation in *Bradford* is arguably reasonable, given that the requirements for establishing eligibility (or ineligibility) under Proposition 36 are based on the defendant's convictions *in existence at the time of the resentencing petition* and, thus, may be reliably ascertained by a review of the record(s) of conviction in most situations.

In contrast, under Proposition 47 the relevant inquiry for purposes of establishing a petitioning defendant's initial eligibility is "guilt[] of a misdemeanor" (§ 1170.18, subd. (a))—which often cannot be established merely from the record of conviction of the felony. This is because, prior to

¹² The parties have not cited, and our own research has not disclosed, any authority that explicitly lists or describes the documents that comprise the record of conviction. That said, we are guided by our high court's explanation that a "'record of conviction'" consists of documents in the record that reliably "'reflect[] the facts of the offense for which the defendant was convicted'" and appears to be limited to proceedings at and before the adjudication of guilt, whether by plea or verdict (*People v. Trujillo* (2006) 40 Cal.4th 165, 177, 179 [51 Cal.Rptr.3d 718, 146 P.3d 1259] ["Three Strikes" law; § 667, subds. (b)–(i)]), plus any appellate court opinion (see *People v. Guilford* (2014) 228 Cal.App.4th 651, 660 [175 Cal.Rptr.3d 640] [Prop. 36]).

Proposition 47, where a defendant was convicted of certain drug- or theft-related felonies, the facts necessary to establish that the petitioning defendant was guilty either of a misdemeanor added by Proposition 47 or of a felony reduced to a misdemeanor by Proposition 47 likely would have been irrelevant in charging the defendant with the pre-Proposition 47 felony.¹³ Stated differently, since Proposition 47 created misdemeanors either that did not exist previously (e.g., § 459.5 [shoplifting]) or that were felony offenses with different showings required (e.g., § 496, subd. (a) [receiving stolen property]), there is no reason to believe that the electorate intended to limit the resentencing court's review to the petitioning defendant's record of conviction. (See Couzens & Bigelow, Proposition 47 "The Safe Neighborhoods and Schools Act," *supra*, § VI.B.2., p. 39 <<http://www.courts.ca.gov/documents/Prop-47-Information.pdf>> [as of July 26, 2016] ["there may be circumstances in which additional facts will be required"].) As applicable in the present case involving receipt of stolen property, "[f]or example, it may not be possible from a review of the record [of conviction] alone to determine the value of property taken." (*Ibid.*)

Under Proposition 36 the showing required for eligibility for resentencing is evidence of the *existence or nonexistence of specified convictions* that *Bradford* says may be determined from a review of a petitioning defendant's record(s) of conviction. In contrast, under Proposition 47 the initial showing required for resentencing must include evidence of facts that would support a *conviction either of a misdemeanor that was added by Proposition 47 or of a felony reduced to a misdemeanor by Proposition 47*, which may well require evidence outside of the record of conviction. As such, the trial court is not limited to the record of conviction in its consideration of the evidence to adjudicate eligibility for resentencing under Proposition 47.¹⁴

¹³ In the case of receiving stolen property, for example, the *only* fact necessary—indeed, the only fact available—to establish that a petitioning defendant would have been guilty of a misdemeanor under Proposition 47 is that the value of the stolen property did not exceed \$950. (§ 496, subd. (a).) Prior to Proposition 47, however, the value of the property was not at issue where the defendant was charged with a felony. (§ 496, former subd. (a).)

¹⁴ We also reject Johnson's suggestion that, because the record of Johnson's conviction does not contain evidence as to the value of the stolen property, we must presume the conviction was for the least punishable offense. In support of his position, Johnson relies on *People v. Guerrero* (1988) 44 Cal.3d 343 [243 Cal.Rptr. 688, 748 P.2d 1150]. *Guerrero* holds that, for purposes of a sentence enhancement based on a prior conviction of a "serious felony" within the meaning of sections 667 and 1192.7, subdivision (c), where the facts of the prior offense are not ascertainable from a review of the record of the prior conviction, "the court will presume that the prior conviction was for the least offense punishable under the . . . law." (*Guerrero*, at p. 352.) However, *Guerrero* is factually and procedurally inapposite and, therefore, inapplicable, since in *Guerrero*, the court addressed only the prosecution's burden to show that a prior conviction qualified as a serious felony for the purpose of imposing a sentence enhancement. (*Ibid.*) In addition, unlike *Guerrero*, as we have just concluded *ante*, the

■ While the petitioning and resentencing procedures under Proposition 36 and Proposition 47 appear similar (compare § 1170.126 with § 1170.18), *what must be shown initially in support of the petition* under each proposition is not. Thus, the potential sources of evidence to support the petition under each proposition are not the same. For this initial burden under Proposition 47, a petitioning defendant is entitled to present evidence of facts *from any source* to establish the guilt of the Proposition 47-sanctioned misdemeanor. (*Perkins, supra*, 244 Cal.App.4th at p. 140 [any probative evidence]; *Sherow, supra*, 239 Cal.App.4th at p. 880 [petitioning defendant's testimony].)

Accordingly, the trial court here erred in ruling that, in establishing the value of the stolen property, “as concluded in *Bradford*, the parties need necessarily to be confined to the record of conviction.”¹⁵ However, Johnson is not entitled to a reversal of the order denying his petition on this basis. The record on appeal does not contain *evidence from any source* as to the value of the stolen property—i.e., evidence from which the court could have made the initial determination whether Johnson would have been guilty of a misdemeanor under section 496, subdivision (a) and thus eligible for resentencing under section 1170.18, subdivision (b).¹⁶ Accordingly, given this record on appeal, because there is no reasonable probability that Johnson would have achieved a more favorable result had the court considered evidence from sources other than the record of conviction, the trial court’s error is harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243] [reversal only if defendant can establish prejudice from trial court’s error].)

resentencing provisions of Proposition 47 do not limit the parties and court to evidence from the petitioning defendant’s record of conviction.

¹⁵ By our ruling, we conclude only that the language in *Bradford, supra*, 227 Cal.App.4th 1322, which limits the resentencing court’s consideration to the record of conviction for purposes of determining eligibility *under Proposition 36* may not reasonably be extended to a determination of initial eligibility under Proposition 47. We express no opinion whether *Bradford* was properly decided or whether there may be exceptions to the limitation expressed in *Bradford*.

¹⁶ In support of his petition, Johnson submitted only his attorney’s statements of the crime of which Johnson was convicted, the date of the sentencing, the sentence imposed and the request for resentencing—none of which is sufficient as a matter of law to establish the value of the stolen property in Johnson’s possession. In opposition, the People submitted some of the text of Proposition 47 and an August 2013 probation report following Johnson’s conviction for felony receipt of stolen property. The text does not contain evidence of the value of the stolen property, and “a probation report . . . is not evidence” (*People v. Overton* (1961) 190 Cal.App.2d 369, 372 [11 Cal.Rptr. 885]). In response, Johnson submitted an unsigned copy of the police report following his arrest, but it does not contain admissible evidence; the report lacks authentication, and its statements of value of the stolen property contain multiple levels of hearsay.

c. *Summary*

As applicable here, therefore, Johnson had the initial burden of demonstrating eligibility for resentencing under Proposition 47 from any source of admissible evidence.

2. *Johnson Did Not Meet His Initial Burden of Establishing Eligibility for Resentencing Under Proposition 47*

For purposes of deciding who has the initial burden of proof under section 1170.18, subdivision (a), we see no distinction between *Sherow* and the present appeal. In each, the petitioning defendant failed to present *evidence* that he “would have been guilty of a misdemeanor” (§ 1170.18, subd. (a))—namely, that the value of the stolen property did not exceed \$950.¹⁷ (*Sherow, supra*, 239 Cal.App.4th at p. 877.)

In *Sherow*, after holding that the petitioning defendant has the initial burden of establishing eligibility for resentencing under Proposition 47, we commented that a “proper petition” could have “contain[ed] at least [the petitioning defendant]’s testimony about the nature of the items taken.” (*Sherow, supra*, 239 Cal.App.4th at p. 880.) From this, Johnson attempts to distinguish *Sherow* on the basis that, because the petitioning defendant in *Sherow* was convicted after trial (*ibid.*), he had a reporter’s transcript that could have been presented to the trial court. In contrast, Johnson’s argument continues, because Johnson pleaded guilty here, he has no trial transcript to present.

Johnson reads *Sherow* too narrowly. There is nothing in *Sherow* to suggest that the petitioning defendant’s “testimony about the nature of the items taken” (*Sherow, supra*, 239 Cal.App.4th at p. 880) must come from a trial transcript. To the contrary, the trial record in *Sherow*, which included transcripts, did not contain any evidence of the value of the stolen property. (*Ibid.*) Moreover, the express language of the statute allows for the filing of a petition for resentencing of a conviction “whether by trial or plea, of a felony” (§ 1170.18, subd. (a), italics added)—without any distinction between the showing required for a conviction following a trial or a plea.

¹⁷ In *Sherow*, the defendant was convicted of felony second degree burglary (§ 459) from offenses in 2007, and he petitioned in 2014 to be resentenced according to section 459.5, subdivision (a), which was added by Proposition 47. (*Sherow, supra*, 239 Cal.App.4th at p. 877.) Here, Johnson was convicted of felony possession of stolen property (§ 496, former subd. (a); see fn. 5), and he petitioned to be resentenced according to section 496, subdivision (a), which was amended as part of Proposition 47. In both cases, to establish that the petitioning defendant “would have been guilty of a misdemeanor” for purposes of section 1170.18, subdivision (a), the applicable substantive statute required proof that the value of the stolen property was less than \$950. (§§ 459.5, subd. (a), 496, subd. (a).)

Our comment in *Sherow* regarding the petitioning defendant's "testimony about the nature of the items taken" suggests, for example, that a declaration from the person who "knows what kind of items he took" would be adequate. (*Sherow, supra*, 239 Cal.App.4th at p. 880.) Moreover, as indicated in *Perkins*, there is no limitation to the sources of evidence that can be presented as part of the petitioning defendant's initial burden under section 1170.18, subdivision (a): *As part of the petition*, the petitioning defendant "should describe the stolen property and attach some evidence, whether a declaration, court documents, record citations, or other probative evidence showing he is eligible for relief." (*Perkins, supra*, 244 Cal.App.4th at p. 140.)

■ For these reasons, we reject Johnson's suggestion that *Sherow*—and, by implication, *Rivas-Colon*, *Perkins* and *Bush*—were wrongly decided, and we will apply them here. Because Johnson did not present any evidence as to the value of the stolen property (see fn. 16, *ante*), Johnson did not meet his initial burden in the trial court and, accordingly, his burden on appeal of establishing trial court error.

D. *Affirmance Without Prejudice*

In *Perkins, supra*, 244 Cal.App.4th 129, our colleagues in Division Two affirmed the trial court's order denying the defendant's section 1170.18, subdivision (a) petition on the basis that the defendant did not meet his burden of providing evidence of his eligibility for Proposition 47 relief—in particular, evidence that the value of the property at issue did not exceed \$950—on his felony conviction for receiving stolen property under section 496, former subdivision (a). (*Perkins*, at pp. 134–135, 137.) Like *Sherow*, however, the affirmance was without prejudice to the petitioning defendant filing a new petition that offered evidence of his eligibility. (*Perkins*, at p. 142; see *Sherow, supra*, 239 Cal.App.4th at p. 881.) The *Perkins* court reasoned that Proposition 47 is silent as to the burdens associated with petitioning for relief, and neither at the time the petitioning defendant filed his petition nor at the time the trial court ruled on the petition had any appellate court provided guidance to the trial courts or the litigants as to the burden of establishing eligibility. (*Perkins*, at p. 142.)

As these two authorities advise, a proper petition from Johnson "could certainly contain at least [his] testimony about the nature of the [stolen property]" (*Sherow, supra*, 239 Cal.App.4th at p. 880) and "should describe the stolen property and attach some evidence, whether a declaration, court documents, record citations, or other probative evidence showing he is eligible for relief" (*Perkins, supra*, 244 Cal.App.4th at p. 140).

We agree with the reasoning in *Perkins* and the results reached in *Sherow* and *Perkins*. Accordingly, our affirmance of the order denying Johnson's

section 1170.18, subdivision (a) petition is without prejudice to the superior court's consideration of a subsequent petition that contains *evidence*—not limited to the record of conviction—of Johnson's eligibility for relief under Proposition 47.¹⁸

DISPOSITION

We affirm the June 3, 2015 order denying Johnson's petition to recall the sentence on his felony conviction for receiving stolen property and to resentence him under Proposition 47. This affirmance is without prejudice to the superior court's consideration of a subsequent petition by Johnson that offers evidence of his eligibility for the requested relief.

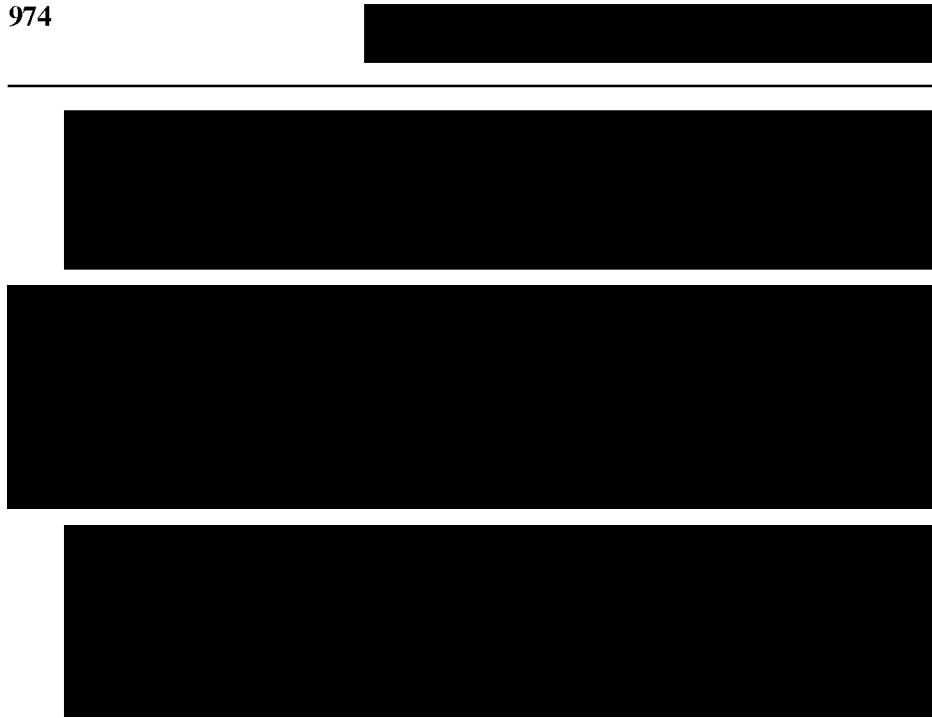
McDonald, Acting P. J., and Aaron, J., concurred.

¹⁸ We express no opinion as to what specific evidence Johnson might rely on, how the People might respond, or whether such a petition might be successful.

[No. B262455. Second Dist., Div. Six. July 27, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
STEPHEN DEBOUVER, Defendant and Appellant.

[REDACTED]



COUNSEL

David L. Annicchiarico, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle, Eric J. Kohm and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

YEGAN, Acting P. J.—Stephen Debouver, a career criminal with 26 different aliases, knows his way around a police station. He also knows his way around a courtroom. This time, he was convicted by jury of first degree residential burglary with a “person present” finding. (Pen. Code, §§ 459, 667.5, subd. (c)(21).)¹ In a bifurcated proceeding, the trial court found that appellant had suffered a prior strike conviction (§§ 667, subd. (d), 1170.12, subd. (b)), a prior serious felony conviction (§ 1192.7, subd. (c)(18)), and six prior separate prison terms (§ 667.5, subd. (b)). Appellant was sentenced to state prison for 13 years. He appeals and contends, among other things, that the burglary *person present* finding is not supported by the evidence. We affirm.

¹ All statutory references are to the Penal Code.

Facts and Procedural History

On January 22, 2014, at approximately 3:00 a.m., Elyahu Feiner awoke to the sound of car alarms in the apartment complex which he managed and where he lived. Feiner went into the secured subterranean garage and saw appellant leaning into a black Jeep that had a smashed window. Feiner asked if he lived there. Appellant said “yes” and walked away with a metal tool in his hand. Appellant got on a red bike and rode off with a backpack. Feiner called the police.

Los Angeles police responded to the 911 call and found three vehicles with smashed windows. The Jeep was ransacked. A Ford Escape and a black Audi were also ransacked and had smashed windows. Fresh blood was inside the Jeep and Ford Escape.

At 4:00 a.m., Detective Eduardo Martinez stopped appellant on a red bike about eight blocks from the apartment complex. Appellant fit the description of the burglary suspect and was carrying a backpack. Inside the backpack were six pairs of ear buds, an iPad, an iPhone, a flashlight, a pocket knife, charger plugs for Apple products, a Samsung car adapter/charger, and a nylon case with tools. Detective Martinez searched the area where appellant was stopped and found a screwdriver.

After Feiner identified appellant in a field show-up, appellant was arrested and transported to the police station. Appellant had a cut on his right finger and said that he had been drinking. Waiving his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602]), appellant told Officer Tony Im and Detective Raul Lopez that he broke into the apartment complex garage and vehicles with the screwdriver. Appellant was not the registered owner of the iPhone in the backpack. One of the iPhone chargers, which was taken from the Ford Escape, had blood on it. It was later determined that the blood inside the damaged vehicles matched appellant’s DNA.

Appellant was charged with first degree residential burglary. Appellant made a *Fareta* (*Fareta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562, 95 S.Ct. 2525]) request to represent himself which was granted. A month later, appellant requested advisory counsel. The trial court denied the request. It noted that appellant was competent to represent himself and that standby counsel had been appointed. Thereafter, appellant brought a motion to exclude his *Miranda* statement, which was denied.

At trial, appellant stated that he was drunk and blacked out after consuming alcohol and prescription medication. He did not remember what happened

or even recall speaking to the police. On cross-examination, appellant was questioned about his “*Miranda* statement” in which he said that he “jimmied [his] way” into the apartment complex with the screwdriver. During the police interview, appellant admitted that he broke into several cars and cut his finger. Appellant acknowledged that he fled on his bike after Feiner entered the garage and confronted him.

Advisory Counsel

Appellant argues that the trial court undermined his Sixth Amendment right to represent himself when it denied his request for advisory counsel. The request was made several weeks after the court granted appellant’s *Farella* motion.

■ It is settled that a defendant who elects to represent himself has no constitutional right to advisory counsel or any other form of hybrid representation. (*People v. Moore* (2011) 51 Cal.4th 1104, 1120 [127 Cal.Rptr.3d 2, 253 P.3d 1153]; *People v. Garcia* (2000) 78 Cal.App.4th 1422, 1430 [93 Cal.Rptr.2d 796].) The decision to grant or deny a request for advisory counsel is discretionary and will not be set aside absent a showing the ruling is arbitrary, capricious, or whimsical. (*People v. Crandell* (1988) 46 Cal.3d 833, 863 [251 Cal.Rptr. 227, 760 P.2d 423].) In ruling on such a request, the trial court may consider defendant’s demonstrated legal abilities and reasons for seeking the appointment of advisory counsel, including evidence of any manipulative purpose. (*Id.*, at pp. 863–864.) Other factors include the seriousness of the charges, the complexity of the issues, and defendant’s education and familiarity with the justice system. (*Ibid.*; *People v. Bigelow* (1984) 37 Cal.3d 731, 743–744 [209 Cal.Rptr. 328, 691 P.2d 994].) “[T]he right to the assistance of counsel, guaranteed by the state and federal Constitutions, has never been held to include a right to the appointment of advisory counsel to assist a defendant who voluntarily and knowingly elects self-representation. [Citation.]” (*People v. Crandell, supra*, 46 Cal.3d at p. 864.)

The trial court ruled that it was not required to appoint advisory counsel but acknowledged that courts may do so. This is not a case in which the trial court failed to exercise its discretion or believed there is no such thing as advisory counsel. (See e.g., *People v. Crandell, supra*, 46 Cal.3d at p. 862; *People v. Bigelow, supra*, 37 Cal.3d at p. 743.) Substantial evidence supported the finding that appellant was capable of representing himself without advisory counsel. He had represented himself in a prior case and demonstrated that he could competently represent himself in the present case. Appellant brought a motion for propria persona funds, hired a private investigator, sought discovery, retained an expert, and brought motions to disqualify the trial judge and to exclude evidence. He makes no showing that

the trial court erred in not appointing advisory counsel or that appellant was prejudiced by the ruling. (*People v. Crandell, supra*, 46 Cal.3d at pp. 862–866.)

Appellant argues that he could have presented a more convincing defense had the trial court appointed advisory counsel. Appellant testified that he consumed so much alcohol and medication that he could not remember what happened. The jury did not believe him. Appellant claims that advisory counsel, if appointed, would have requested a jury instruction on voluntary intoxication. But those instructions were given. The trial court instructed on voluntary intoxication and how it may affect appellant's ability to form the requisite specific intent to commit a burglary. (CALJIC Nos. 4.21, 4.22.)

Appellant also argues that advisory counsel could have advised appellant to hire an expert to explain the effects of alcohol and prescription medication. Appellant was and is no stranger to the criminal justice system.² He was and is trial savvy. He hired an expert on confessions without the assistance of counsel. One can only speculate on whether appellant would have listened to advisory counsel and hired another expert. “Trying to assess prejudice in this setting would amount to ‘speculation running riot.’ [Citation.]” (*People v. Bigelow, supra*, 37 Cal.3d at pp. 745–746.)

■ Appellant argues that advisory counsel could have warned him about the perils of testifying and how it would subject him to impeachment. A defendant’s decision to testify is personal and must be honored even when the defendant is represented by counsel and counsel does not want to call the defendant as a witness. (*People v. Lucas* (1995) 12 Cal.4th 415, 444 [48 Cal.Rptr.2d 525, 907 P.2d 373].) Had appellant not testified, the jury would have heard the same damning evidence: testimony that the apartment manager caught appellant in the garage, that appellant cut his finger and bled inside the vehicles, that the blood DNA match was conclusive, that the police found the screwdriver, and that stolen property was in appellant’s backpack. It is not reasonably probable that he would have obtained more favorable result had advisory counsel been appointed. (*People v. Goodwillie* (2007) 147 Cal.App.4th 695, 716 [54 Cal.Rptr.3d 601] [applying *People v. Watson* (1956) 46 Cal.2d 818 [299 P.2d 243] harmless error analysis].)

Miranda Statement

Appellant claims that his statements were the product of police coercion. Appellant forfeited the issue by not raising it at trial. (*People v. Kennedy*

² Since achieving majority, appellant has accumulated quite a rap sheet. Since 1978, he has, in addition to 20 other offenses, 14 theft-related cases, bringing to mind John Steinbeck’s phrase: “He rejected the theory of private ownership of removable property almost from birth.” (Steinbeck, *Sweet Thursday* (Penguin Books, 1996) p. 11.)

(2005) 36 Cal.4th 595, 611–612 [31 Cal.Rptr.3d 160, 115 P.3d 472] [failure to object on a coercion theory forfeited claim that coerced testimony was erroneously admitted], overruled on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 458–459 [111 Cal.Rptr.3d 589, 233 P.3d 1000].)

■ Appellant argued that he was too intoxicated to waive his *Miranda* rights. Officer Im testified that appellant had been drinking but voluntarily and knowingly waived his *Miranda* rights and provided an oral and written statement. Appellant testified that he “blacked out,” that “my will was overborne,” and “I was not in the right state of mind to give the confession.” Discrediting appellant’s testimony, the trial court found that appellant was sober enough to flee on a bike and waive his *Miranda* rights. The court reasonably concluded that appellant’s intoxication did not render his statements involuntary.³ Our Supreme Court “has repeatedly rejected claims of incapacity or incompetence to waive *Miranda* rights premised upon voluntary intoxication or ingestion of drugs, where, as in this case, there is nothing in the record to indicate that the defendant did not understand his rights and the questions posed to him. [Citation.]” (*People v. Clark* (1993) 5 Cal.4th 950, 988 [22 Cal.Rptr.2d 689, 857 P.2d 1099], disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [87 Cal.Rptr.3d 209, 198 P.3d 11]; *People v. Breaux* (1991) 1 Cal.4th 281, 301 [3 Cal.Rptr.2d 81, 821 P.2d 585].) Intoxication alone does not render a confession involuntary. (*People v. Maury* (2003) 30 Cal.4th 342, 411 [133 Cal.Rptr.2d 561, 68 P.3d 1].) Appellant makes no showing that any false promises of leniency were made or that he suffered from a physical, mental or alcohol/drug impairment that was exploited by the police to coerce a confession.

Appellant was familiar with law enforcement and had been in and out of the criminal justice system as an adult since 1978. He not only signed the *Miranda* waiver form but agreed to provide, and did provide, a written statement. His answers were responsive to the questions asked and support the finding that he voluntarily and knowingly waived his *Miranda* rights. (See e.g., *People v. Whitson* (1998) 17 Cal.4th 229, 247–248 [70 Cal.Rptr.2d 321, 949 P.2d 18] [defendant’s decision to answer questions after indicating he understood his *Miranda* rights supported a finding of implied waiver].)

³ Appellant argues that the trial court erred in not listening to the audio recording of the *Miranda* interview. Appellant did not specifically ask the trial court to play the recording but did say “I’d like to hear the audio.” The trial court agreed that it “would shed some light on your sobriety that night” but noted that Officer Im had already testified that appellant appeared to be drunk. Appellant did not press for a ruling on his request when asked whether there was any other evidence or testimony he wanted to present. Appellant responded “No, sir.”

The audio recording, which was received into evidence, has been transmitted to this court for our review. (Cal. Rules of Court, rule 8.320(e); *People v. Linton* (2013) 56 Cal.4th 1146, 1176–1177 [158 Cal.Rptr.3d 521, 302 P.3d 927].) We have listened to the recording. We note that appellant had a bad cold, a runny nose, and sounded groggy. But, he was responsive to the officers’ questions.

Appellant argues that he blacked out and that the alcohol and prescription drugs in his system made him vulnerable to police coercion. Detective Lopez, who sat in on the interview, did not believe that appellant was under the influence of drugs or alcohol. Appellant coughed and sneezed and appeared to have a bad cold, but wanted to talk. This is reflected in the audio recording. Appellant can be heard joking with the officers and loudly writing out his confession on a metal table as he discusses the case with the officers.

Assuming, arguendo, that the trial court erred in not excluding the statements, any error was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306–309 [113 L.Ed.2d 302, 111 S.Ct. 1246]; *People v. Samayoa* (1997) 15 Cal.4th 795, 831 [64 Cal.Rptr.2d 400, 938 P.2d 2].) The prosecution presented evidence, independent of his statements that showed that appellant broke into the garage and vehicles and cut his finger. Feiner saw appellant reach through the broken window of the Jeep. Appellant fled on a bike with his backpack containing stolen items from the ransacked Ford Escape. After the police stopped appellant 30 to 45 minutes later, Feiner identified appellant in a field show up. Most damaging was the blood in the vehicles which matched appellant's blood. The DNA match was remarkable: one in 30 quadrillion (3 followed by 16 zeroes). The evidence of guilt was overwhelming. His inculpatory statements were merely incidental and were only used to impeach appellant. Any alleged error was harmless beyond a reasonable doubt. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 60 [17 Cal.Rptr.3d 710, 96 P.3d 30].)

Prosecutorial Misconduct

Appellant argues that the prosecution committed prejudicial misconduct in using his statements for impeachment purposes. During the trial, appellant stated there was an issue with a defense expert who was supposed to testify on the subject of confessions. The trial court asked whether Detective Lopez would testify about appellant's statements. The prosecution stated that it would not "be eliciting anything from [Detective Lopez] regarding the statement that was made by . . . [appellant]." Appellant was asked not to refer to his recorded *Miranda* statement because the People "are not seeking to have that statement admitted."

At the close of the prosecution's case-in-chief, appellant took the stand and testified that he had no recollection of what happened and could not even recall speaking to the police. Citing *People v. Quartermain* (1997) 16 Cal.4th 600 [66 Cal.Rptr.2d 609, 941 P.2d 788], appellant claims that the prosecution engaged in misconduct when it used the *Miranda* statement for impeachment. In *Quartermain* defendant gave up his right to remain silent and testified after the prosecution promised that defendant's statement to the police would not

be used in court. (*Id.*, at pp. 616–617.) Unlike *Quartermain*, no promise was made to induce appellant to testify. The prosecution said that Detective Lopez would not be asked about the *Miranda* interview, which is what happened. Thereafter, appellant decided to testify and said he had no recollection of the events. Portions of the recorded *Miranda* interview were played for impeachment purposes only.

■ Appellant argues that it violated his due process rights and that it is misconduct for the prosecution to withhold damaging material evidence until rebuttal. (See e.g., *People v. Hoyos* (2007) 41 Cal.4th 872, 923–924 [63 Cal.Rptr.3d 1, 162 P.3d 528].) Appellant forfeited the issue by not objecting on those grounds. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072 [25 Cal.Rptr.2d 867, 864 P.2d 40].) When a confession is elicited in violation of *Miranda*, the confession may be used for impeachment purposes where the defendant's testimony conflicts with his earlier statements. (*Harris v. New York* (1971) 401 U.S. 222, 225–226 [28 L.Ed.2d 1, 91 S.Ct. 643].) “The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.” (*Ibid.*; see *People v. May* (1988) 44 Cal.3d 309, 319 [243 Cal.Rptr. 369, 748 P.2d 307].)

That is the case here. Appellant insisted on testifying and had no due process right to a false aura of veracity. Appellant's statements were admissible to impeach his testimony that “I don't remember being in the garage” or how “I got into the building at all.” Excerpts of appellant's recorded statement were properly received to show that appellant told the police a much different story. Appellant said that he “jimmied” his way into the apartment building with the screwdriver and broke into the vehicles, cutting himself while doing so.

■ Citing *People v. Sam* (1969) 71 Cal.2d 194 [77 Cal.Rptr. 804, 454 P.2d 700], appellant argues that a prior inconsistent statement is not admissible if the witness does not remember what he or she said on a prior occasion. Our courts do not apply the rule in a mechanical fashion. When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. (*People v. Green* (1971) 3 Cal.3d 981, 988 [92 Cal.Rptr. 494, 479 P.2d 998].) “As long as there is a reasonable basis in the record for concluding that the witness's ‘I don't remember’ statements are evasive and untruthful, admission of [the witness's] prior statements is proper. [Citation.]” (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219–1220 [14 Cal.Rptr.2d 702, 842 P.2d 1]; see *People v. Ervin* (2000) 22 Cal.4th 48, 84–85 [91 Cal.Rptr.2d 623, 990 P.2d 506].) A prior inconsistent statement is admissible where the witness professes to have no recollection of the underlying events or of even having made the statements. (*People v. O'Quinn* (1980) 109 Cal.App.3d 219, 226

[167 Cal.Rptr. 141].) The jury was so instructed: “If you disbelieve a witness’ testimony that he or she no longer remembers a certain event, that testimony is inconsistent with a prior statement or statements by him or her describing that event.” (CALJIC No. 2.13.)

In any event, we conclude that the use of appellant’s statements for impeachment purposes was harmless in light of the eye witness identification, the physical evidence, and the DNA test results. (*Arizona v. Fulminante, supra*, 499 U.S. at p. 310; *People v. Thomas* (2011) 51 Cal.4th 449, 498 [121 Cal.Rptr.3d 521, 247 P.3d 886].)

Burglary Person Present Finding

■ Appellant argues that the evidence does not support the special finding that another person was in the “residence” when the burglary was committed. Section 667.5 provides that the trial court may enhance the sentence where the offense is a violent felony as specified in 667.5, subdivision (c). Subdivision (c)(21) defines violent felony to mean “[a]ny burglary of the first degree . . . wherein it is charged and proved that another person, other than an accomplice, *was present in the residence during the commission of the burglary.*” (Italics added.)

Appellant concedes the apartment manager was present when the vehicles were broken into but argues that an underground garage is not a “residence” within the meaning of section 667.5, subdivision (c)(21). Appellant’s reliance on *People v. Singleton* (2007) 155 Cal.App.4th 1332 [66 Cal.Rptr.3d 738] is misplaced. There, the defendant burglarized an apartment while the victim was outside the apartment in an exterior common area. (*Id.*, at p. 1338.) The court held that the evidence did not support the person present finding. “Section 667.5, subdivision (c)(21) is plain on its face, and it requires a person, other than an accomplice, be ‘*present in the residence* during the commission of the burglary.’ (Italics added) . . . Certainly, it would not comport with the ordinary and plain usage to consider someone standing outside, around the corner, and down the hall from an apartment to be present in that apartment.” (*Id.*, at pp. 1337–1338.)

Here the apartment units and the secured underground garage shared a common roof and were an integrated part of the apartment complex. “[A] structure is part of a[] . . . dwelling . . . ‘functionally interconnected with and immediately contiguous to other portions of the house.’ ” (*People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1107 [92 Cal.Rptr.2d 236].) In *People v. Harris* (2014) 224 Cal.App.4th 86 [168 Cal.Rptr.3d 305], the victims were in their house when defendant burglarized an attached garage that was converted into a guestroom. The Court of Appeal held that defendant’s entry into a garage

supported the “person-present” finding because the garage was physically attached to the main residence and shared the same roof. (*Id.*, at pp. 90–91.)

■ The same analysis applies here. It is uncontested that the secured garage was an integrated part of the apartment complex and shared the same roof. Feiner caught appellant red-handed in the garage and confronted him before appellant fled with the stolen property. The burglary qualifies as a violent felony due to the increased risk of harm to Feiner who was actually present during the commission of the burglary. “The risks arising from burglary are greater when a resident is present, as here, justifying the additional sanctions found in section 667.5, subdivision (c)(21).” (*People v. Harris, supra*, 224 Cal.App.4th at p. 91.)

Special Instruction on Person Present Finding

Appellant asserts that the special instruction on the person present finding is defective because it does not require the jury to find that the garage is part of a residence or an inhabited dwelling.⁴ But that element is set forth in the burglary instruction which states that an apartment complex garage is “part of an inhabited dwelling if it is functionally interconnected with and immediately contiguous to other portions of the dwelling house. [¶] ‘Functionally interconnected’ means used in related or complementary ways. ‘Contiguous’ means adjacent, adjoining, and in actual close contact. It is not necessary that there be interconnecting doors.” (CALJIC No. 14.52.) This is a correct statement of the law. (*People v. Fox* (1997) 58 Cal.App.4th 1041, 1047 [68 Cal.Rptr.2d 424]; *People v. Moreno* (1984) 158 Cal.App.3d 109, 112 [204 Cal.Rptr. 17].)

Appellant did not object to the person present instruction or ask for an amplifying instruction, thereby waiving the alleged error. Waiver aside, the alleged instructional error was harmless by any standard of review. By its terms, the person present instruction only applied if the jury returned a guilty verdict on count 1 for first degree burglary, which required the jury to find that the subterranean garage was part of an inhabited dwelling. Any failure to instruct on this allegation is harmless where the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. (*People v. Flood* (1998) 18 Cal.4th 470, 484

⁴ The jury was instructed: “It is alleged in Count One that at the time of the offense, a person or persons were present at or in the apartment complex, residence/structure. [¶] If you find the defendant guilty of burglary, and you find that the burglary was of the first degree you must determine if a person or persons was/were present at the time of the commission of the offense. [¶] The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true you must find it to be not true. [¶] Include a special finding on that question in your verdict, using a form that will be supplied for that purpose.”

[76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Stewart* (1976) 16 Cal.3d 133, 141 [127 Cal.Rptr. 117, 544 P.2d 1317].)

Conclusion

Appellant makes no showing that the purported errors, whether considered individually or collectively, deprived him of a fair trial. He had a fair trial. The case was fact driven and the uncontested facts point, unerringly, to guilt.

The judgment is affirmed.

Perren, J., and Tangeman, J., concurred.

A petition for a rehearing was denied August 17, 2016, and appellant's petition for review by the Supreme Court was denied November 9, 2016, S237063.

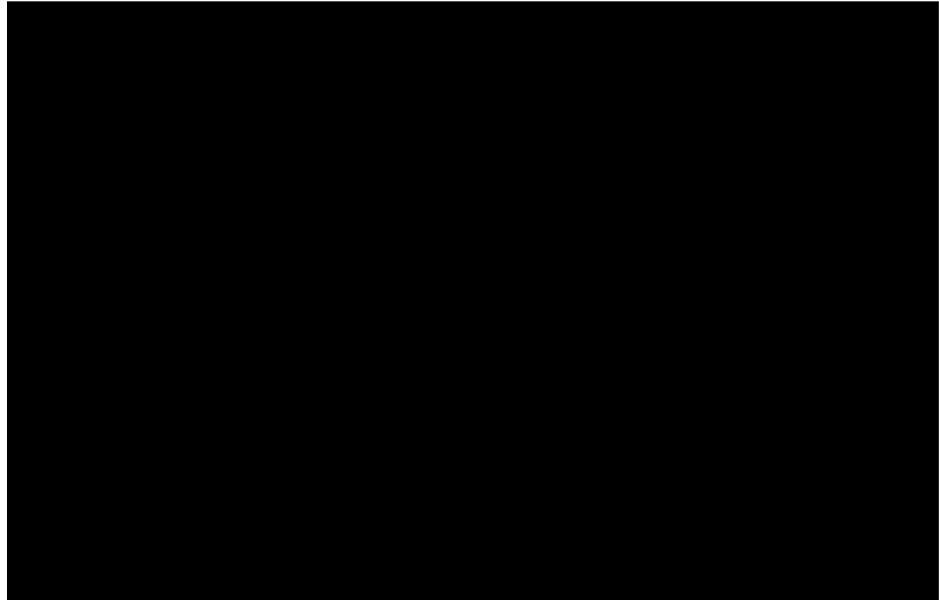
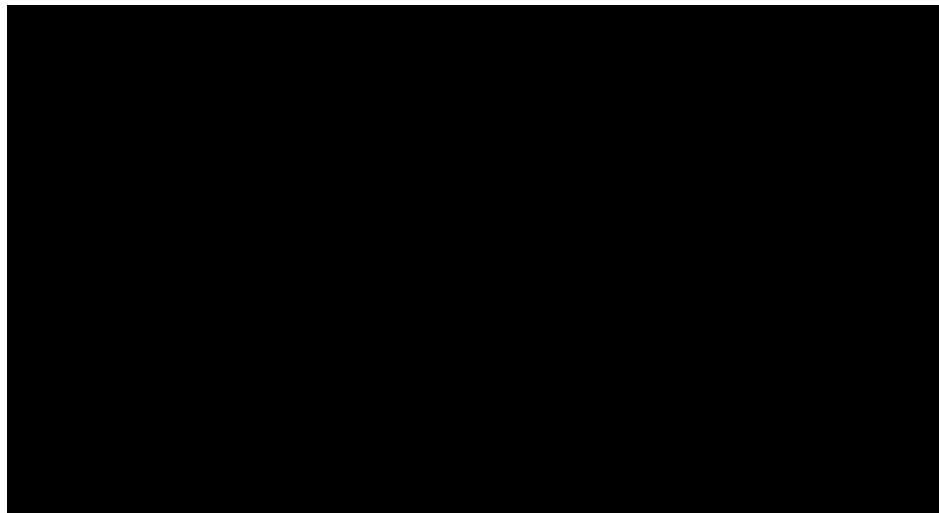
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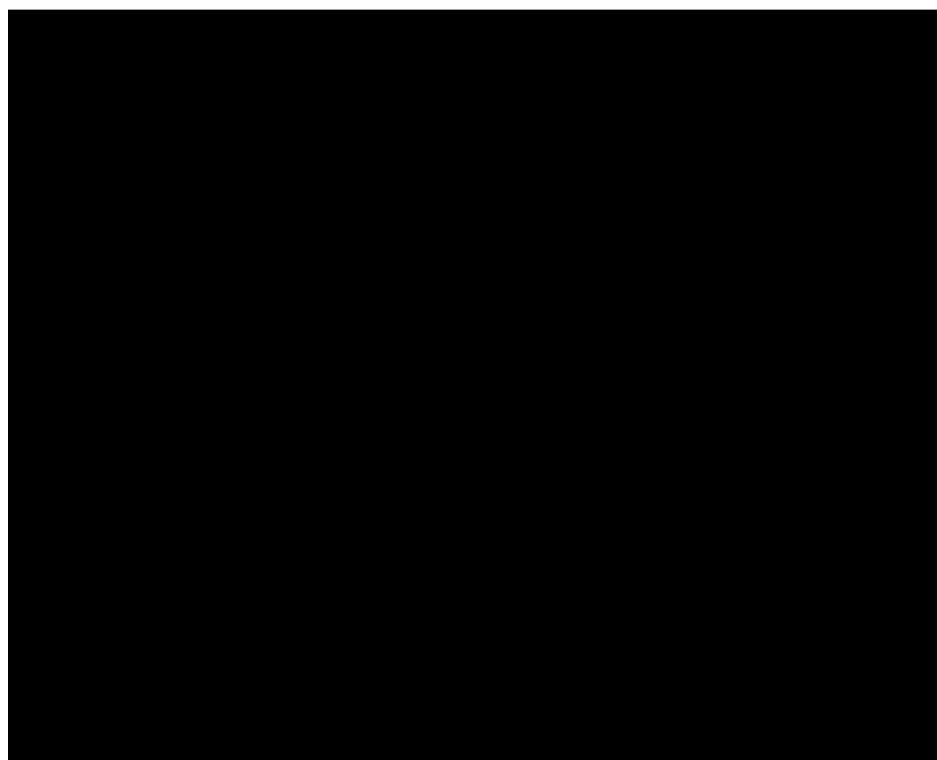
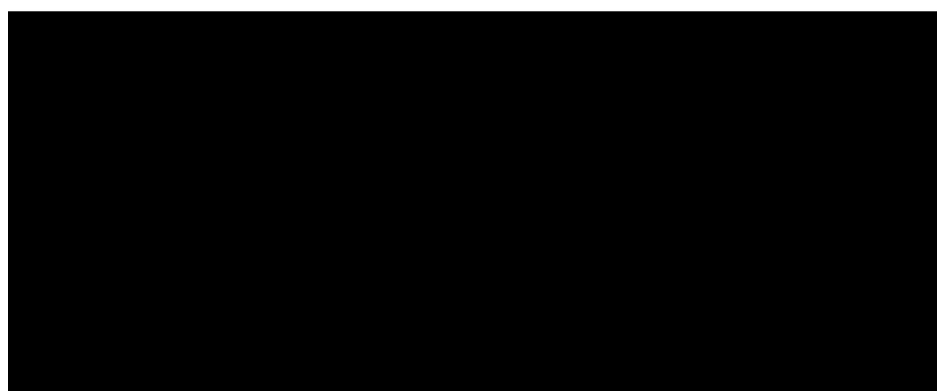
JAMS, INC., et al., Petitioners, v.
THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent;
KEVIN J. KINSELLA, Real Party in Interest.

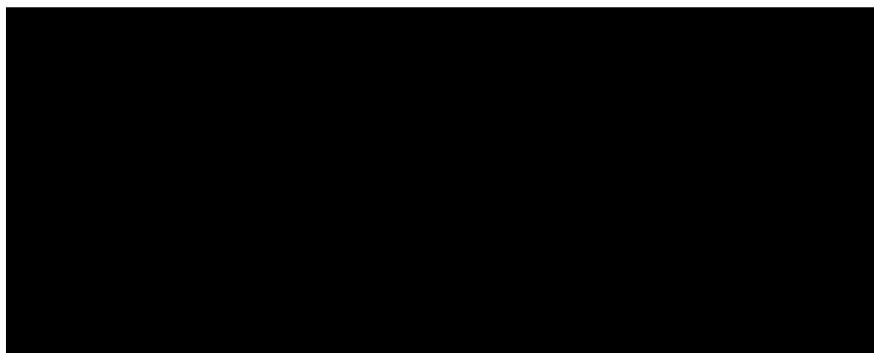
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COUNSEL

Long & Levit, Joseph P. McMonigle, Jessica R. MacGregor, Jonathan Rizzardi; Reed Smith, Paul D. Fogel and Dennis P. Maio for Petitioners.

No appearance for Respondent.

Bravo Law Group, Gregory L. Cartwright; Goode Hemme & Peterson, Jerry D. Hemme; Jenkins and Erik C. Jenkins for Real Party in Interest.

OPINION

McCONNELL, P. J.—

INTRODUCTION

This action arises from representations made on the JAMS, Inc. (JAMS), Web site regarding the background of the Honorable Sheila Prell Sonenshine (Retired), and JAMS's operations in offering alternative dispute resolution (ADR) services. Kevin J. Kinsella alleges he relied upon certain representations made on the Web site when he agreed to stipulate to hire Sonenshine as a privately compensated judge to resolve issues related to his marital dissolution case and later discovered the representations were either untrue or misleading.

JAMS and Sonenshine filed an anti-SLAPP (Code Civ. Proc., § 425.16)¹ motion to strike Kinsella's complaint. The court found the action exempt from the anti-SLAPP procedure under the commercial speech exemption of section 425.17, subdivision (c). JAMS and Sonenshine filed a petition for writ of mandate or other relief. We stayed the proceedings and issued an order to show cause why relief should not be granted to allow us the opportunity to consider the issues raised in the petition related to the scope of the commercial speech exemption of section 425.17, subdivision (c). (See *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273 [258 Cal.Rptr. 66] [writ review appropriate to decide issues of widespread interest].) Having now considered the matter, we agree the commercial speech exemption applies and precludes the use of the anti-SLAPP procedure in this case. The petition is denied.

BACKGROUND

A

JAMS provides private ADR services by promoting, arranging and handling the hiring of neutral individuals, such as retired judges, to assist with resolution of disputes. Kinsella alleges: "JAMS acts as the 'promoter' and as the 'booking' agent for its neutrals, procuring engagements for them through the use of advertising and marketing. The neutrals are independent contractors, with JAMS collecting a fee from the neutrals for the services it provides in connection with the advertising, marketing, promotion, and 'booking' services. JAMS, in fact, collects the fees from the consumers who pay for the services of the neutrals and JAMS in turn pays the neutrals."

JAMS allegedly "directs and controls the publication of the JAMS [Web site] and the statements made on that site." JAMS provides biographies of its neutrals on its Web site and represents its family law neutrals are "trusted experts." According to the complaint, the JAMS Web site stated "[JAMS ensures] the highest ethical standards' and '[e]verything we do and say will reflect the highest ethical and moral standards. We are dedicated to neutrality, integrity, honesty, accountability, and mutual respect in all our interactions.'"

Sonenshine is on JAMS's panel of neutrals. According to the complaint, she is a "former California Superior Court judge and a retired California

¹ "Code of Civil Procedure section 425.16 provides a procedure for the early dismissal of what are commonly known as SLAPP suits (strategic lawsuits against public participation)—litigation of a harassing nature, brought to challenge the exercise of protected free speech rights. The section is thus informally labeled the anti-SLAPP statute, and a motion to dismiss filed under its authority is denominated an anti-SLAPP motion." (*Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 665, fn. 3 [168 Cal.Rptr.3d 165, 318 P.3d 833].)

Further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[Fourth] District Court of Appeal[] justice. She is held out by JAMS as a neutral available for selection as a mediator, arbitrator, referee, and [privately compensated temporary judge].”

B

Kinsella agreed to hire Sonenshine through JAMS to adjudicate his pending marital dissolution action, involving assets he states were “valued somewhere north of eight figures.” These included assets from venture capital partnerships founded and managed by Kinsella. At the suggestion of his wife’s attorney, Kinsella reviewed the JAMS Web site and Sonenshine’s credentials. He alleged he did so carefully because he understood “the importance of selecting someone he could respect and trust to rule on the life-changing decisions” in his marital dissolution case and he wanted to “assure himself he was selecting someone who satisfied his need to have confidence in the jurist and, specifically, a person who would understand principles of business ventures and private equity funding.”

He alleged, based on the JAMS representations, he expected he could rely on the “honesty and integrity” of Sonenshine’s biography, which he stated “was impressive.” Kinsella alleged Sonenshine “was claiming experience that evidenced sufficient business acumen to understand his separate property holdings and private venture capital funds.”

The stipulation and order appointing Sonenshine as the privately compensated temporary judge for Kinsella’s marital dissolution case gave Sonenshine authority “to make all orders necessary and proper to bring [the] case to judgment.” After Sonenshine began conducting hearings, Kinsella alleged he “became alarmed by what he saw and doubted that she possessed the business accomplishments her resume led him to believe she possessed.” He began to look into her background “to determine whether her [biography] accurately reflected her career achievements, especially as they concerned her business ventures.” He concluded her biography “omitted key information” causing him to question her integrity.

C

Kinsella filed a complaint alleging Sonenshine’s biography on the JAMS Web site was dishonest in two respects: (1) it “proclaimed business success surrounding the co-founding and management of [EquiCo and RSM EquiCo]” when “the history of those two ventures is full of adverse and unfavorable accusations” against Sonenshine and her son in a class action lawsuit for fraud, and (2) it “proclaimed she was the founder of the [Escher Fund], an equity fund that focused on growth-state, women-owned, and

women-led businesses” when “the equity fund existed in name only as it never raised any equity capital and was, therefore, never funded” and never operated “as a functioning investment entity.”

The complaint alleged Sonenshine omitted information about the class action lawsuit because it would injure her reputation, reflect poorly on her background or discourage consumers from selecting her as a neutral. It further alleged Sonenshine knew her biography was misleading in implying “the Escher Fund was an actual operating fund, one that had successfully raised equity capital, when it never was either.”

As to JAMS, the complaint alleged, “[b]y representing Sonenshine to be a person of the highest ethical standards, JAMS misrepresented the nature of her qualifications as a neutral to be hired from its [Web site]. [¶] . . . By ‘ensuring’ that its neutrals conduct themselves with the highest ethical standards, JAMS accredited the deception committed by Sonenshine.” (Some capitalization omitted.)

The complaint set forth four causes of action: (1) violation of the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.) based on “deceptive representations” made on Sonenshine’s biography posted on the JAMS Web site and based on “deceptive representations” made by JAMS; (2) fraud based on (a) Sonenshine’s false representation she was the founder of the Escher Fund, “yet that fund never existed inasmuch as it was never funded,” (b) JAMS’s false representation that its neutrals act with “highest ethical standards” and JAMS acts with “integrity, honesty, accountability, and mutual respect in all our interactions,” and (c) defendants’ concealment regarding Sonenshine’s involvement with EquiCo and RSM EquiCo and the accusation of impropriety; (3) negligent misrepresentation; and (4) violation of Business and Professions Code sections 17200 and 17500.

The complaint stated “all allegations of wrongdoing relate to information Kinsella specifically viewed on defendant JAMS’ [Web site] before he agreed to select Sonenshine as the [privately compensated temporary judge].” (Some capitalization omitted.) Kinsella sought injunctive relief, actual damages exceeding \$250,000, punitive damages, prejudgment interest, disgorgement, and restitution.

D

JAMS and Sonenshine filed an anti-SLAPP motion contending Kinsella’s action arose from protected activity because the statements in Sonenshine’s biography and on the JAMS Web site were made in connection with an issue under consideration by a judicial body. They also contended Kinsella would

be unable to show a probability of prevailing because Sonenshine had no duty to disclose the facts she purportedly omitted and, if she did, judicial immunity and/or litigation privilege bars the claim.

Kinsella moved for an order determining the allegations in the complaint are exempt from the anti-SLAPP statute under the commercial speech exemption of section 425.17, subdivision (c). JAMS and Sonenshine opposed the motion contending the statements on the JAMS Web site and in Sonenshine's online biography did not fall within the commercial speech exemption of section 425.17, subdivision (c), because (1) the exemption applies to "representations of fact" not to omissions or nonfactual representations such as puffery, and (2) Sonenshine's biography was not purely commercial speech because it was also used for noncommercial purposes such as for litigants to evaluate potential conflicts of interest or for dissemination to bar groups for noncommercial events.

The court determined the commercial speech exemption of section 425.17, subdivision (c), applies to this case and precludes use of the anti-SLAPP special motion to strike. The court noted "JAMS and Sonenshine are engaged in the business of selling ADR services, including private judging services, to the public. The alleged statements that form the basis of [Kinsella's] claims were posted on the JAMS[] [Web site] for the purpose of promoting and securing sales or commercial transactions in defendants' ADR services. The intended audience was [Kinsella], a party involved in dissolution litigation, who actually engaged the services of JAMS and Sonenshine."

The court determined statements on the JAMS Web site, which promotes ADR services and "allegedly describe[] its neutrals as having the 'highest ethical and moral standards' and [state] they are 'dedicated to neutrality, integrity, honesty,' " were not mere puffery, but were statements that "can be provably false factual assertions." The court concluded "JAMS is a for-profit enterprise. [Its] statements regarding the trustworthiness, integrity and honesty of its enterprise as well as its neutrals [are] purely commercial speech. The resume is included on the [Web site] for commercial purposes . . . to sell ADR services."

DISCUSSION

I

General Principles

■ SLAPP lawsuits, " ‘ ‘ masquerade as ordinary lawsuits . . . [but] are generally meritless suits brought primarily to chill the exercise of free speech

or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right.”” (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21 [109 Cal.Rptr.3d 329, 230 P.3d 1117] (*Simpson*).) “In 1992, out of concern over ‘a disturbing increase’ in these types of lawsuits, the Legislature enacted section 425.16” and “authorized the filing of a special motion to strike to expedite the early dismissal of these unmeritorious claims.” (*Ibid.*) “A special motion to strike involves a two-step process. First, the defendant must make a *prima facie* showing that the plaintiff’s ‘cause of action . . . aris[es] from’ an act by the defendant ‘in furtherance of the [defendant’s] right of petition or free speech . . . in connection with a public issue.’ [Citation.] If a defendant meets this threshold showing, the cause of action shall be stricken unless the plaintiff can establish ‘a probability that the plaintiff will prevail on the claim.’” (*Ibid.*, fn. omitted.) The anti-SLAPP statute states it “shall be construed broadly.” (§ 425.16, subd. (a).)

■ “In 2003, concerned about the ‘disturbing abuse’ of the anti-SLAPP statute, the Legislature enacted section 425.17 to exempt certain actions from it.” (*Simpson, supra*, 49 Cal.4th at p. 21.) One such exemption is for commercial speech. Section 425.17, subdivision (c), exempts “from the anti-SLAPP law a cause of action arising from commercial speech when (1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services; (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person’s or a business competitor’s business operations, goods, or services; (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person’s goods or services or in the course of delivering the person’s goods or services; and (4) the intended audience for the statement or conduct meets the definition set forth in section 425.17[, subdivision,](c)(2).” (*Simpson*, at p. 30.)

“The commercial speech exemption . . . ‘is a statutory exception to section 425.16’ and ‘should be narrowly construed.’” (*Simpson, supra*, 49 Cal.4th at p. 22.) “[T]he party seeking the benefit of the commercial speech exemption . . . [has] the burden of proof on each element.” (*L.A. Taxi Cooperative, Inc. v. The Independent Taxi Owners Assn. of Los Angeles* (2015) 239 Cal.App.4th 918, 931 [191 Cal.Rptr.3d 579].) “We review the applicability of the commercial speech exemption independently.” (*Simpson*, at p. 26.)

II

Analysis

JAMS and Sonenshine contend the commercial speech exemption is not applicable for two reasons. First, they contend the statements about which Kinsella complains are not “representations of fact” involving positive assertions of past or present conditions or events, but are omissions or nonactionable opinions. Second, they contend the statements from which the causes of action arise were not made for purely commercial purposes. We are not persuaded by either contention.

A

■ We do not agree the commercial speech exemption is limited to exclude from the anti-SLAPP statute only causes of action arising from positive assertions of facts. This contention is not supported by either the plain language of the statute or its legislative history.

Section 425.17, subdivision (c), states in pertinent part: “Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services . . . *arising from any statement or conduct by that person* if both of the following conditions exist: [¶] (1) The statement or conduct consists of representations of fact about that person’s or a business competitor’s business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person’s goods or services, or the statement or conduct was made in the course of delivering the person’s goods or services. [¶] (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer” (Italics added.)

■ “Under the two-pronged test of section 425.16, whether a section 425.17 exemption applies is a first prong determination.” (*Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294, 308 [175 Cal.Rptr.3d 131] (*Demetriades*).) We do not consider whether the plaintiff has a reasonable likelihood of prevailing on the merits of his or her claims, which is the second prong of a section 425.16 analysis. (*Id.* at p. 312.) A conclusion about whether the plaintiff’s claims “are the *kind* of claims the Legislature intended to exempt from the scope of the anti-SLAPP statute when it adopted section 425.17 . . . is entirely independent of any evaluation of the merits of those claims, or even the adequacy of [the] . . . pleadings.” (*The Inland Oversight Committee v. County of San Bernardino* (2015) 239 Cal.App.4th 671, 678 [190 Cal.Rptr.3d 884].)

“The legislative history indicates this legislation is aimed squarely at false advertising claims and is designed to permit them to proceed without having to undergo scrutiny under the anti-SLAPP statute. Proponents of the legislation argued that corporations were improperly using the anti-SLAPP statute to burden plaintiffs who were pursuing unfair competition or false advertising claims” and were being encouraged to use anti-SLAPP motions as a “‘litigation weapon to slow down and perhaps even get out of [unfair competition] litigation.’” (*Demetriades, supra*, 228 Cal.App.4th at p. 309.)

■ Responding to concerns an exemption would impact the free speech rights of businesses, the legislative history of section 425.17 indicates it was drafted to track constitutional principles governing regulation of commercial speech based upon guidelines discussed in *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939 [119 Cal.Rptr.2d 296, 45 P.3d 243] (*Kasky*).² (See Assem. Com. on Judiciary, Analysis of Sen. Bill No. 515 (2003–2004 Reg. Sess.) as amended June 27, 2003, p. 8.) In doing so, it followed “*Kasky’s* guidelines on commercial speech, focusing on the speaker, the content of the message, and the intended audience.” (*Id.* at p. 10, italics added.) Commercial speech usually involves a “*speaker* [who] is likely to be someone engaged in commerce—that is, generally, the production, distribution, or sale of goods or services—or someone acting on behalf of a person so engaged, and the *intended audience* is likely to be actual or potential buyers or customers of the speaker’s goods or services, or persons acting for actual or potential buyers or customers.” (*Kasky, supra*, at p. 960.) Additionally, “the factual content of the message should be commercial in character. In the context of regulation of false or misleading advertising, this typically means that the speech consists of representations of fact about the business operations, products, or services of the speaker . . . made for the purpose of promoting sales of, or other commercial transactions in, the speaker’s products or services.” (*Id.* at p. 961.) The language of section 425.16, subdivision (c)(1), closely tracks *Kasky’s* discussion about the content of commercial speech.

² “[T]he [federal] Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression.” (*Kasky, supra*, 27 Cal.4th at p. 952.) The court noted several reasons for “withholding First Amendment protection from commercial speech that is false or actually or inherently misleading” such as (1) “[t]he truth of commercial speech . . . may be *more easily verifiable by its disseminator* . . . in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else,” (2) “commercial speech is *hardier* than noncommercial speech in the sense that commercial speakers, because they act from a profit motive, are less likely to experience a chilling effect from speech regulation,” and (3) “governmental authority to regulate commercial transactions to prevent commercial harms justifies a power to regulate speech that is ‘linked inextricably’ to those transactions.” (*Id.* at pp. 954–955.)

Neither the *Kasky* decision nor the legislative history indicates the content of commercial speech must be an affirmative or positive representation, as opposed to an omission or half-truth. What matters for purposes of the commercial versus noncommercial speech analysis is whether the speech at issue is about the speaker's product or service or about a competitor's product or service, whether the speech is intended to induce a commercial transaction, and whether the intended audience includes an actual or potential buyer for the goods or services. Indeed, *Kasky, supra*, 27 Cal.4th at page 951 recognized the unfair competition law (Bus. & Prof. Code, § 17200 et seq.) and false advertising law (Bus. & Prof. Code, § 17500 et seq.) "prohibit 'not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.' "

Here, Kinsella's causes of action against JAMS and Sonenshine arise from statements posted on the JAMS Web site regarding Sonenshine's background and qualifications to provide ADR services as well as general statements about how JAMS conducts its business in providing ADR services. These statements fit comfortably within the commercial speech exemption of section 425.17, subdivision (c).

The representations made in Sonenshine's biography are representations of fact. Whether those facts are true or whether she should have included additional facts to ensure the representations were not misleading goes to the issue of whether or not Kinsella can prevail on his claim, not to whether the statements qualify as commercial speech subject to the exemption of section 425.17, subdivision (c).

The statements that JAMS ensured "'the highest ethical standards,' " that "'[e]verything we do and say will reflect the highest ethical and moral standards'" and that JAMS is "'dedicated to neutrality, integrity, honesty, accountability, and mutual respect in all our interactions'" are also representations of fact for purposes of analyzing the commercial nature of the speech. Although using words of emphasis, they are specific statements representing how JAMS conducts its operations with neutrality, integrity, honesty and accountability. They are certainly intended to be relied upon by customers of its services, otherwise they would serve no legitimate purpose. (*Demetriades, supra*, 228 Cal.App.4th at pp. 311–312.) As the trial court commented, "After all, it is the violation of these types of standards and qualities that cause Bar members to be disciplined by the State Bar." It is also worth noting the posting of Sonenshine's biography in conjunction with these statements may have implicitly represented JAMS adopted her representations about her

credentials and ratified them as reflecting “integrity, honesty, [and] accountability.” Again, we do not reach the issue of whether these statements are true, false, or otherwise nonactionable. Such a determination would be part of a prong-two analysis under section 425.16 regarding the merits of the claim, but is irrelevant to the commercial speech analysis required under section 425.17, subdivision (c).

The cases upon which JAMS and Sonenshine rely do not assist them. In *Simpson, supra*, 49 Cal.4th 12, the court concluded an attorney’s representations about a product in an advertisement to recruit potential plaintiffs for a class action suit did not fall within section 425.17’s commercial speech exemption because the statements were not representations of fact about *the attorney’s business operations, goods or services*. Since the statements were neither about the attorney’s services nor those of a competitor, the plain language of commercial speech exemption did not apply. (*Simpson*, at p. 30.) The court also rejected a contention the advertisement’s statement “‘an attorney’ will ‘investigate whether you have a potential claim’” qualified as commercial speech. The causes of action in that case arose from the advertisement’s implication the product was defective, not a representation an attorney would investigate the claim. (*Id.* at pp. 30–31.) In dicta, the court commented “[i]n addition, a promise of what an attorney will do if the reader were to respond to the advertisement ‘is not a representation of fact, but an agreement to take certain actions in the future.’” (*Id.* at p. 31, quoting *Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 841 [36 Cal.Rptr.3d 385] (*Navarro*).)

In *Navarro*, the court held section 425.17 did not apply to allegedly false promises, made in the context of settling a lawsuit, to handle matters “‘without undue delay.’” (*Navarro, supra*, 134 Cal.App.4th at pp. 840–841.) In reaching this holding, the court commented “[a] promise is not a representation of fact, but an agreement to take certain actions in the future.” (*Id.* at p. 841.) More to the point, however, the court concluded the statement was not made as part of a commercial transaction or to induce a commercial transaction, but rather as part of a settlement negotiation to protect its own interests. (*Ibid.*)

■ The statements about JAMS are not mere promises, but representations of fact about the neutrals it employs and how it conducts its business. These representations published on a Web site to induce litigants to engage in ADR services offered by JAMS were commercial speech for purposes of section 425.17, subdivision (c).

It bears emphasizing again our conclusion here that Kinsella's claims are the kind the Legislature intended to exempt from the scope of the anti-SLAPP statute, is separate and distinct from any evaluation of the merits of his claims, the applicability of any defenses such as judicial immunity, or even the adequacy of the pleadings. (*The Inland Oversight Committee v. County of San Bernardino, supra*, 239 Cal.App.4th at p. 678.)

B

JAMS and Sonenshine also contend the commercial speech exemption does not apply because the statements on the JAMS Web site might be used for multiple purposes, such as to comply with Sonenshine's judicial duty of disclosure, or because the causes of action arise from postretention conduct, not commercial speech. We do not agree.

Taheri Law Group v. Evans (2008) 160 Cal.App.4th 482 [72 Cal.Rptr.3d 847] (*Taheri*) held the commercial speech exemption does not apply to a lawsuit filed by a law firm against another attorney for intentional interference with prospective economic advantage and intentional interference with business relations for soliciting the law firm's client. The court concluded "a cause of action arising from a lawyer's conduct, when the conduct includes advice to a prospective client on pending litigation, does not fall within the statutory exemption to the anti-SLAPP statute." (*Id.* at pp. 485, 490.) The court commented the legislative history of the commercial speech exemption confirmed "the Legislature's intent to except from anti-SLAPP coverage disputes that were purely commercial." (*Id.* at p. 491.)

We do not understand the comment in *Taheri* to mean a statement giving rise to a cause of action must be purely commercial and have no other use to fall within the commercial speech exemption. The *Taheri* court noted "[a] dispute involving a lawyer's advice to a prospective client on pending litigation . . . while it may include an element of commerce or commercial speech, is fundamentally different from the 'commercial disputes' the Legislature intended to exempt from the anti-SLAPP statute." (*Taheri, supra*, 160 Cal.App.4th at p. 491.) The court acknowledged "lawyers engage in 'commercial speech' when they advertise their services" and stated "we can envisage circumstances—such as a 'massive advertising campaign' divorced from individualized legal advice—under which the commercial speech exemption to the anti-SLAPP statute conceivably might apply to a lawyer's conduct." (*Id.* at pp. 491–492.)

The issue is whether or not the statement or conduct from which the causes of action arise is speech used to induce a commercial transaction. The *Taheri* court concluded the "'statement or conduct'" from which the causes of

action arose “constituted much more than ‘commercial speech’; the conduct was in essence advice by a lawyer on a pending legal matter.” (*Taheri, supra*, 160 Cal.App.4th at p. 491.) This weighing of purposes indicates it is not an all-or-nothing proposition, as JAMS and Sonenshine contend.

JAMS and Sonenshine are engaged in the business of selling ADR services. Kinsella’s causes of action arise from statements posted on the JAMS Web site about both Sonenshine’s background and experience and about JAMS’s operations. It is apparent all of the statements about which Kinsella complains were placed on the JAMS Web site to be viewed by actual or potential ADR buyers or customers, or attorneys representing actual or potential buyers or customers of ADR services. According to the complaint, Kinsella reviewed the JAMS Web site and agreed to use Sonenshine as a privately compensated temporary judge based on the statements. (*Simpson, supra*, 49 Cal.4th at p. 30.) Therefore, the statements or conduct from which Kinsella’s causes of action arise is more “commercial speech” than anything else. Whether or not the statements may be used for other purposes does not change the analysis.

Finally, we do not agree that Kinsella’s references to postretention statements by Sonenshine preclude application of the commercial speech exemption. Each of the causes of action focuses on the statements regarding Sonenshine’s background and how JAMS operates its business. Although the complaint includes information about how Kinsella discovered problems with the information and Sonenshine’s subsequent response to his challenges, he alleges each cause of action arises from the representations made on the JAMS Web site. According to Kinsella, he “does not sue for any actions taken by Sonenshine in any adjudicative capacity nor for any acts, [omissions] or defalcations committed . . . from the time Kinsella agreed . . . to allow Sonenshine to serve as the jointly retained [privately compensated temporary judge], sometime in late January 2013, after he was induced into that agreement by the false representations In fact, all allegations of wrongdoing relate to information Kinsella specifically viewed on defendant JAMS’ [Web site] before he agreed to select Sonenshine as the [privately compensated temporary judge].” Whether his causes of action, and the damages he seeks, are as limited as he asserts are matters beyond the issue relevant in this writ petition.

DISPOSITION

For all of the reasons expressed herein, the commercial speech exemption of section 425.17, subdivision (c), applies to this action and precludes

consideration of the anti-SLAPP motion. The petition is denied. The stay issued on March 7, 2016, is vacated. Kinsella is entitled to costs in this proceeding. (Cal. Rules of Court, rule 8.493(a)(1)(A).)

Huffman, J., and Haller, J., concurred.

[No. B265769. Second Dist., Div. Four. July 27, 2016.]

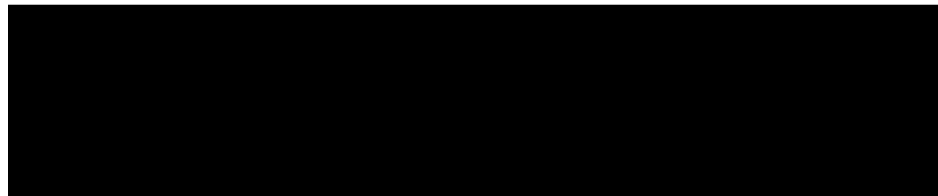
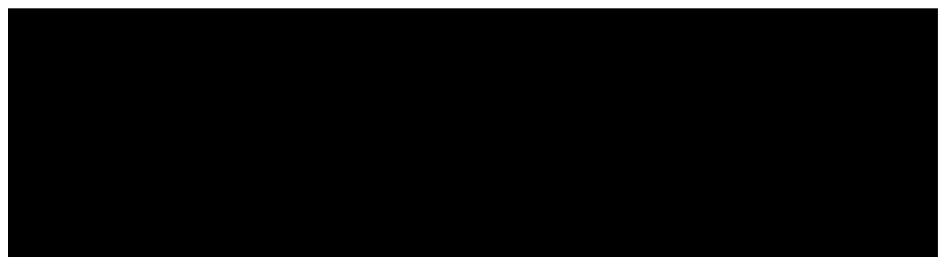
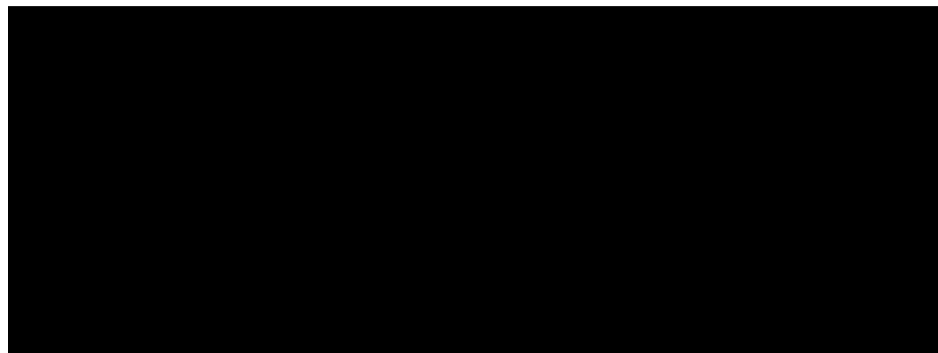
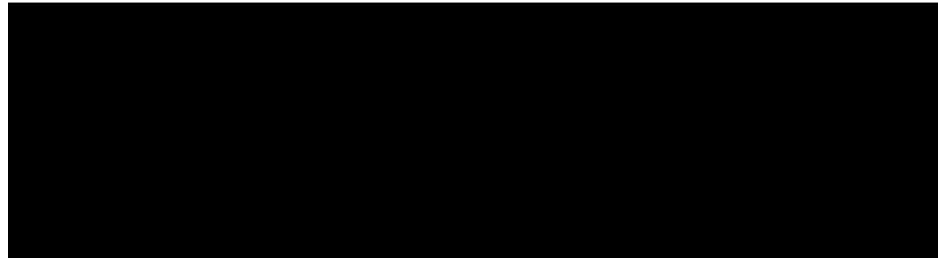
REGINALD MITCHELL, Plaintiff and Appellant, v.
STATE DEPARTMENT OF PUBLIC HEALTH, Defendant and Respondent.

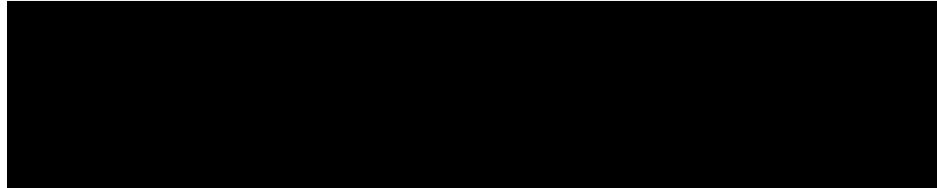
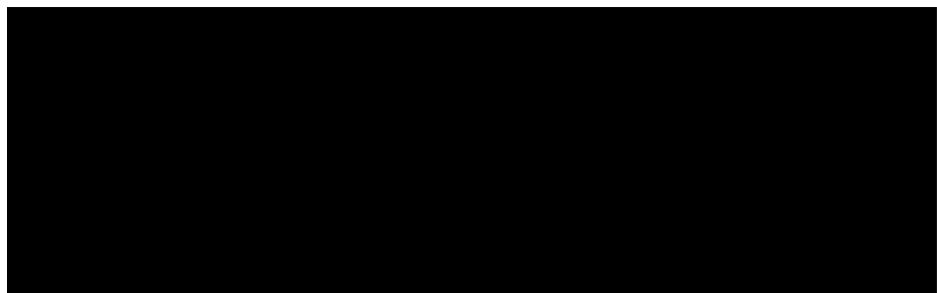
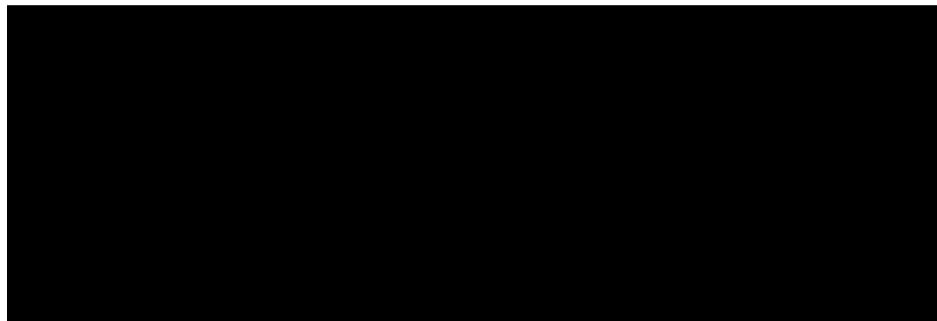
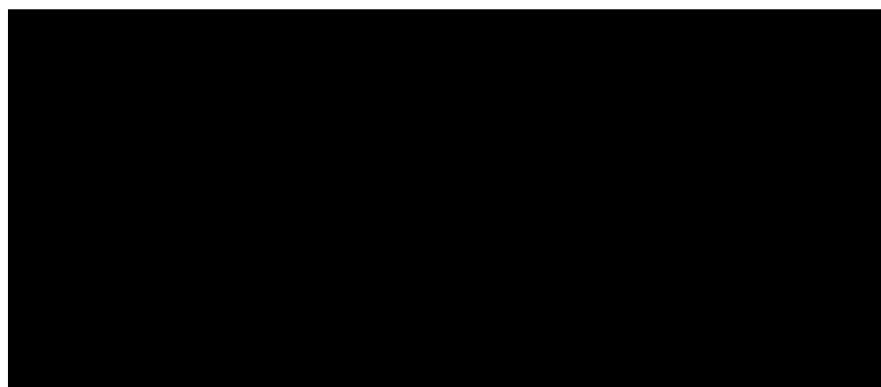
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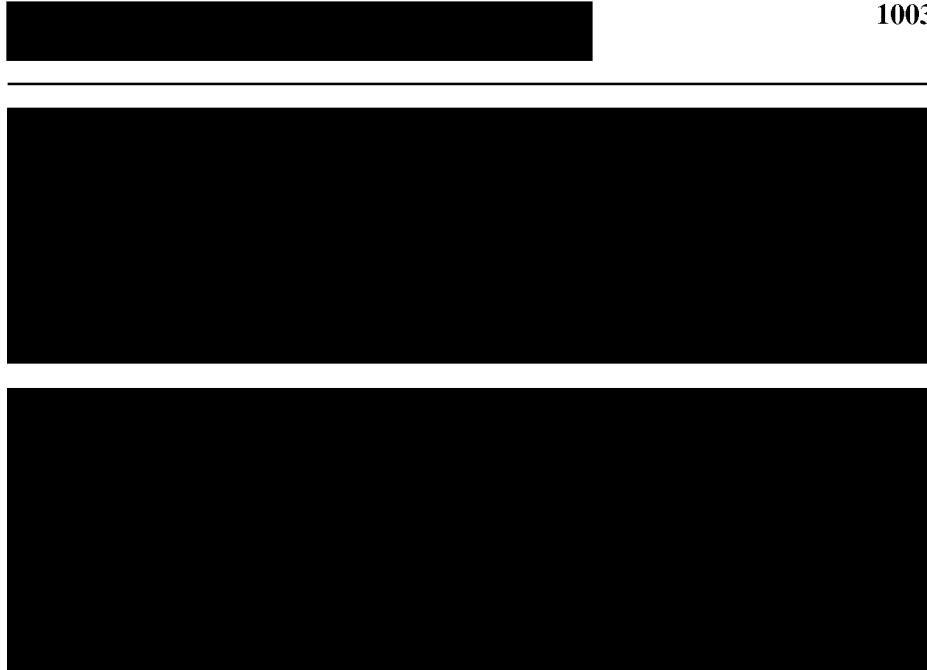
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COUNSEL

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Kamala D. Harris, Attorney General, Chris A. Knudsen, Assistant Attorney General, Gary S. Balekjian and Mark Schreiber, Deputy Attorneys General, for Defendant and Respondent.

OPINION

EPSTEIN, P. J.—Appellant Reginald Mitchell sued his former employer, respondent State Department of Public Health (the Department), for racial discrimination in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.).¹ The trial court dismissed the complaint after sustaining a demurrer on the statute of limitations ground. In this appeal from the judgment of dismissal, we find the allegations of the complaint are sufficient to establish a claim of equitable tolling, and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Mitchell was employed by the Department as a health facilities investigator. He was the only non-White employee in his division. Mitchell resigned

¹ All further undesignated statutory references are to the Government Code.

from the Department in 2011 after complaining to his employer that he was being discriminated against because of his race (African-American). He filed his original complaint with the United States Equal Employment Opportunity Commission (EEOC). Pursuant to a work sharing agreement between the Department of Fair Employment and Housing (DFEH) and EEOC, EEOC automatically lodged a copy of the complaint with DFEH. DFEH issued a right-to-sue notice and deferred investigation of the charges to EEOC.

The September 9, 2011 right-to-sue notice issued by DFEH stated in relevant part that “EEOC will be responsible for the processing of this complaint. DFEH will not be conducting an investigation into this matter. EEOC should be contacted directly for any discussion of the charge. DFEH is closing its case on the basis of ‘processing waived to another agency.’ [¶] NOTICE TO COMPLAINANT OF RIGHT-TO-SUE [¶] Since DFEH will not be issuing an accusation, this letter is also your right-to-sue notice. According to Government Code section 12965, subdivision (b), you may bring a civil action under the provisions of the [FEHA] against the person, employer, labor organization or employment agency named in the above-referenced complaint. The lawsuit may be filed in a State of California Superior Court. Government Code section 12965, subdivision (b), provides that such a civil action must be brought within one year from the date of this notice. Pursuant to Government Code section 12965, subdivision (d)(1),^[2] this one-year period will be tolled during the pendency of the EEOC’s investigation of your complaint. You should consult an attorney to determine with accuracy the date by which a civil action must be filed. This right to file a civil action may be waived in the event a settlement agreement is signed. Questions about the right to file under federal law should be referred to the EEOC. [¶] The DFEH does not retain case records beyond three years after complaint is filed. [¶] Remember: This Right-To-Sue Notice allows you to file a private lawsuit in State court.”

EEOC issued its letter of determination on September 30, 2013, stating there was “reasonable cause” to believe Mitchell had suffered racial discrimination in violation of title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.; Title VII). After conciliation efforts failed, the Department of Justice issued a federal right-to-sue notice, which Mitchell received on March 21, 2014.

² Subdivision (d)(1) of section 12965 provides: “Notwithstanding subdivision (b), the one-year statute of limitations, commencing from the date of the right-to-sue notice by the [DFEH], to the person claiming to be aggrieved, shall be tolled when all of the following requirements have been met: [¶] (A) A charge of discrimination or harassment is timely filed concurrently with the [EEOC] and the [DFEH]. [¶] (B) The investigation of the charge is deferred by the [DFEH] to the [EEOC]. [¶] (C) A right-to-sue notice is issued to the person claiming to be aggrieved upon deferral of the charge by the [DFEH] to the [EEOC].”

Mitchell filed his FEHA civil action for racial discrimination on July 8, 2014. This was 19 days beyond the 90-day federal right-to-sue period, which, as we shall explain, is the basis for the Department's statute of limitations defense. In anticipation of that defense, the complaint and first amended complaint (FAC) alleged that:

—DFEH provided its right-to-sue notice (exhibit A to the FAC) on September 9, 2011, deferred investigation of the charges to the EEOC, and stated that Mitchell would have one year from the date of the notice to file a FEHA action, which "will be tolled during the pendency of the EEOC's investigation of your complaint."

—EEOC issued a letter of determination on September 30, 2013 (exhibit B to the FAC), which stated there was "reasonable cause" to believe he had suffered racial discrimination in violation of Title VII.

—The complaint was filed on July 8, 2014, within one year of the EEOC's letter of determination.

The Department demurred to the FAC on the ground that the complaint was not filed within the federal right-to-sue period. Judicial notice was taken of the date on which Mitchell received the federal right-to-sue notice (Mar. 21, 2014), and the date when the federal right-to-sue period expired (June 19, 2014). These events are summarized in the following timeline:

— <u>September 9, 2011</u>	<u>DFEH's Right-to-Sue Notice Issued</u> DFEH advised Mitchell that he had "one year from the date of this notice" to file a FEHA action, and "this one-year period will be tolled during the pendency of the EEOC's investigation of your complaint."
— <u>September 30, 2013</u>	<u>EEOC's Letter of Determination</u> EEOC informed Mitchell there was "reasonable cause" to believe he had suffered racial discrimination in violation of Title VII, and that conciliation efforts would begin.
— <u>March 21, 2014</u>	<u>Federal Right-to-Sue Letter Received by Mitchell</u> 90-day federal right-to-sue period commenced.
— <u>June 19, 2014</u>	<u>Federal Right-to-Sue Period Ended</u>
— <u>July 8, 2014</u>	<u>Mitchell's FEHA Complaint Was Filed</u> Complaint was filed within one year of EEOC's letter of determination, but 19 days beyond federal right-to-sue period.

Mitchell argued the one-year limitation period of the FEHA was equitably tolled throughout EEOC's investigation, and did not expire until September 30, 2014, one year from the date of EEOC's letter of determination. Mitchell cited *Downs v. Department of Water & Power* (1997) 58 Cal.App.4th 1093, 1102 [68 Cal.Rptr.2d 590] (*Downs*), which held the one-year FEHA statute was tolled "until the EEOC completes its determination," and *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 111, 110 [84 Cal.Rptr.3d 734, 194 P.3d 1026] (*McDonald*), which held that FEHA does not preclude equitable tolling during "voluntary pursuit of internal administrative remedies" and "the Legislature accepts equitable tolling under the FEHA, including during the period when an aggrieved party's claims are being addressed in an alternate forum."

The trial court overruled the Department's demurrer.³ In its February 10, 2015 order, the trial court, citing *Downs*'s holding that all of the necessary factors for equitable tolling—timely notice to defendant, lack of prejudice to defendant, and reasonable conduct by plaintiff—were present, stated: "Here, with a delay of not even two full weeks, a reasonable good faith explanation for the delay, a seemingly valid claim for racial discrimination, and no prejudice caused to Defendant, there is no good reason not to permit equitable principles to toll the statute of limitations ever so slightly."

The Department challenged the February 10, 2015 order in a petition for writ of mandate. (*Department of Public Health v. Superior Court* (May 27, 2015, B262452), petn. den.) We issued an alternative writ of mandate, directing the trial court to vacate its order overruling the demurrer and enter a new and different order sustaining the demurrer in its entirety, or to show cause why a peremptory writ of mandate should not issue. (Citing § 12965, subd. (d)(2); *Downs, supra*, 58 Cal.App.4th 1093; *Hall v. Goodwill Industries of Southern California* (2011) 193 Cal.App.4th 718, 721, 730 [123 Cal.Rptr.3d 274].)

In compliance with our alternative writ, the trial court held a noticed hearing, vacated its February 10, 2015 order, and entered a new order sustaining the demurrer without leave to amend. Mitchell moved for reconsideration, which was denied. Upon being informed of the trial court's new ruling, we dismissed the petition for writ of mandate in the B262452 proceeding as moot, and discharged the alternative writ.

The trial court entered an order of dismissal based on its new order sustaining the demurrer without leave to amend. Mitchell timely appealed.

³ The court overruled the demurrer based on the statute of limitations defense, but sustained it as to the fifth cause of action for constructive discharge.

DISCUSSION

Mitchell contends the order sustaining the demurrer must be reversed because the complaint sufficiently alleges that the FEHA one-year limitations period was equitably tolled during the period of the EEOC investigation. We agree.

I

■ A “demurrer tests the pleading alone, and not the evidence or the facts alleged. Thus, a demurrer will be sustained only where the pleading is defective on its face.” (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459 [80 Cal.Rptr.2d 329].) We treat the demurrer as admitting all material facts properly pleaded but not contentions, deductions or conclusions of fact or law. We accept the factual allegations of the complaint as true and also consider matters which may be judicially noticed. (*First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1662 [15 Cal.Rptr.2d 173].)

■ The statute of limitations defense “‘may be asserted by general demurrer if the complaint shows on its face that the statute bars the action.’ (1 Schwing, *Cal. Affirmative Defenses* (2007) Statute of Limitations, § 25:78, p. 1609, fns. omitted; see *Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 550 [305 P.2d 20].) There is an important qualification, however: ‘In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows merely that the action may be barred.’ (*McMahon v. Republic Van & Storage Co., Inc.* (1963) 59 Cal.2d 871, 874 [31 Cal.Rptr. 603, 382 P.2d 875]; see also, e.g., *Geneva Towers Ltd. Partnership v. City and County of San Francisco* (2003) 29 Cal.4th 769, 781 [129 Cal.Rptr.2d 107, 60 P.3d 692].) ‘The ultimate question for review is whether the complaint showed *on its face* that the action was barred by a statute of limitations, for only then may a general demurrer be sustained and a judgment of dismissal be entered thereon.’ (*Moseley v. Abrams* (1985) 170 Cal.App.3d 355, 358 [216 Cal.Rptr. 40].)” (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315–1316 [64 Cal.Rptr.3d 9].)

II

EEOC and DFEH have a work-sharing agreement that has resulted in a common fact pattern: an employee files his or her original complaint with the EEOC; the EEOC automatically files a copy of the complaint with the DFEH, following which the DFEH, without investigating, summarily issues a right-to-sue letter and defers investigation of the complaint to the EEOC.

■ Normally, the employee must file his or her civil action under FEHA within one year of the DFEH's right-to-sue notice. (§ 12965, subd. (b).) But the FEHA limitation period may be equitably tolled during the period of the EEOC investigation. (*Downs, supra*, 58 Cal.App.4th 1093, 1102.) (4) Equitable tolling is a judicially created doctrine that requires "a showing of three elements: 'timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff.' [Citations.]" (*McDonald, supra*, 45 Cal.4th at p. 102.)

Tolling the FEHA limitation period while the employee awaits the outcome of an EEOC investigation furthers several policy objectives: (1) the defendant receives timely notice of the claim; (2) the plaintiff is relieved of the obligation of pursuing simultaneous actions on the same set of facts; and (3) the costs of duplicate proceedings often are avoided or reduced. (*Downs, supra*, 58 Cal.App.4th at pp. 1100–1101.)

In *Downs*, the leading case, the statute of limitations was equitably tolled from March 15, 1993, the date of the DFEH's right-to-sue notice, to September 29, 1995, the date of the EEOC's right-to-sue notice. (*Downs, supra*, 58 Cal.App.4th at pp. 1097–1098.) Tolling was appropriate in that case because the plaintiff "promptly" filed the FEHA action within three months of receiving the federal right-to-sue letter. (*Downs*, at p. 1102.)

■ According to *Downs*, "[w]hen a charge of discrimination or harassment is timely filed concurrently with the EEOC and the DFEH, the investigation of the charge is deferred by the DFEH to the EEOC under a work-sharing agreement, and the DFEH issues a right-to-sue letter upon deferral, then the one-year period to bring a FEHA action is equitably tolled during the pendency of the EEOC investigation until a right-to-sue letter from the EEOC is received." (*Downs, supra*, 58 Cal.App.4th at p. 1102, italics added.)

In *Salgado v. Atlantic Richfield Co.* (9th Cir. 1987) 823 F.2d 1322, cited with approval in *Downs*, the plaintiff filed his FEHA action within four months of the federal right-to-sue letter, but more than one year after the DFEH's right-to-sue letter. (*Salgado*, at pp. 1325, 1326.) Because the FEHA one-year limitation statute was equitably tolled until the federal right-to-sue letter was issued, the complaint was timely. (*Salgado*, at p. 1325.) Tolling was appropriate in that case because the plaintiff "was simply awaiting the outcome [of the EEOC investigation]. If there is an established administrative mechanism in place to give notice to employers charged with a violation and to undertake efforts at conciliation, it would be anomalous indeed to hold that a claimant, whose use of this mechanism put him outside the relevant time period, could not have that period equitably tolled. Under these circumstances, we think the tolling of the one-year statute of limitations found in

§ 12965(b) is consistent with the specific purposes of that time period.” (823 F.2d at pp. 1326–1327; see *EEOC v. Farmer Bros. Co.* (9th Cir. 1994) 31 F.3d 891, 902–903 [reaffirming *Salgado* and holding that as a result of equitable tolling during EEOC’s investigation, plaintiff’s FEHA action was timely even though filed more than four years after DFEH’s right-to-sue notice].)⁴

III

The Legislature adopted the holding in *Downs*. Subdivision (d) of section 12965 (added by Stats. 2002, ch. 294, p. 1176) “is intended to codify the holding in *Downs*[, *supra*.] 58 Cal.App.4th 1093.” (§ 12965, subd. (d)(3); see also *McDonald*, *supra*, 45 Cal.4th at pp. 109–110 [Legislature expressly adopted equitable tolling rule of *Downs*].)

■ Subdivision (d)(1) of section 12965 tolls FEHA’s one-year limitation statute when all of the following requirements are met: (1) concurrent charges of discrimination or harassment are filed with EEOC and DFEH; (2) DFEH defers investigation of the charges to EEOC; and (3) DFEH issues a right-to-sue notice upon deferral of the charges to the EEOC. Under subdivision (d)(2), “[t]he time for commencing an action for which the statute of limitations is tolled under paragraph (1) expires when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the [DFEH], whichever is later.”

■ Read together, these provisions toll the FEHA limitations period if the FEHA action is filed within the federal right-to-sue period. Thus, subdivision (d)(2) grants the plaintiff who complies with the federal right-to-sue period the benefit of statutory tolling without having to meet the equitable tolling requirement of reasonable and good faith conduct (see *McDonald*, *supra*, 45 Cal.4th at p. 102).

■ Although Mitchell did not file his complaint within the federal right-to-sue period, and hence is not entitled statutory tolling under subdivision (d)(2) of section 12965, he is eligible for equitable tolling under *Downs*.⁵

⁴ Although federal district court rulings are not binding on this court, California courts “frequently turn to federal authorities interpreting Title VII of the Civil Rights Act of 1964 . . . for assistance in interpreting the FEHA.” (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 463 [30 Cal.Rptr.3d 797, 115 P.3d 77].)

⁵ After filing our opinion, we received a timely petition for rehearing from the Department. Its main argument is that our opinion “does not account for the legislative history and intent of Government Code section 12965.” The Department provided several documents—described as legislative history materials—not found in the record, which purportedly demonstrate a legislative intent to preclude equitable tolling of the FEHA limitations period beyond the federal right-to-sue period. None of these is cited by the Department in its briefing. It does not seek to have us take judicial notice of these extrinsic materials, nor does it claim the statute is ambiguous. (See *Coso Energy Developers v. County of Inyo* (2004) 122 Cal.App.4th 1512, 1524 [19 Cal.Rptr.3d 669] [a court may consider legislative

IV

The Department argues that Mitchell is not entitled to equitable tolling because he did not pursue an alternate remedy after the federal right-to-sue notice was issued.⁶ It contends that equitable tolling “generally requires a showing that the plaintiff is seeking an alternate remedy in an established procedural context. [Citations.]” (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1416 [159 Cal.Rptr.3d 749].) But Mitchell *did* pursue an alternate remedy with EEOC. Because *Acuna* involved a different fact pattern—concurrent charges were not filed with DFEH and EEOC, and DFEH did not defer the investigation to EEOC upon issuing its right-to-sue letter—it is not applicable to this case.

Wagner v. Wal-Mart Stores, Inc. (N.D. Cal., Oct. 16, 2013, No. 13-cv-03475-NJV) 2013 WL 5645169 fits the fact pattern of this case. In *Wagner*, the plaintiff filed a FEHA action within one year of receiving the federal right-to-sue notice, but one week past the federal right-to-sue period. The defense moved to dismiss (Fed. Rules Civ. Proc., rule 12(b)(6)), arguing that under subdivision (d)(2) of section 12965, failure to file within the federal right-to-sue period rendered the FEHA action untimely as a matter of law. The plaintiff raised equitable tolling and cited the right-to-sue notice from DFEH, which stated: “Pursuant to Government Code section 12965, subdivision (d)(1), this one-year period will be tolled during the pendency of the EEOC’s investigation of your complaint.” The district court granted the motion to dismiss without prejudice so that the plaintiff could file an amended complaint. The court agreed with the plaintiff that FEHA actions are subject to equitable tolling, but held that even if two of the requirements for equitable tolling were satisfied (timely notice and lack of prejudice to defendants), the third (good faith and reasonable conduct by plaintiffs) was not: “At the hearing, the only explanation Plaintiff’s counsel offered for the delay was that he did not see the right to sue notice until he received the file. He did not explain what his client did upon receiving the notice or what actions his client took in reliance upon the notice.”

history if a statute is ambiguous.) Even were we to consider them, the documents would not alter our analysis. The statutory language, which is the most reliable indicator of legislative intent (*ibid.*), is not ambiguous and does not support the Department’s position.

⁶ The Department also raises a claim of forfeiture based on Mitchell’s purported lack of written opposition to the trial court’s proposed decision (in response to our alternative writ of mandate) to vacate its February 10, 2015 order. The cases cited by the Department are distinguishable. In *Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1602 [277 Cal.Rptr. 583], for example, the motions “to preclude opt outs” were never opposed in the trial court, and because appellants “failed to appear at the hearing, either to contest the opt-out issue or to argue that the court should consider their untimely written opposition,” they were granted without opposition. Similarly, in *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117 [95 Cal.Rptr.2d 113], appellant tried to raise issues for the first time on appeal that were “never raised in the trial court below.” That is not the situation here, and the doctrine of forfeiture is inapplicable to these facts.

The right-to-sue notice by DFEH in this case is similar. It also stated that the “one-year period *will be tolled* during the pendency of the EEOC’s investigation of your complaint.” (Italics added.) Although the DFEH notice warned Mitchell to seek legal advice in order to “determine with accuracy the date by which a civil action must be filed,” we conclude that admonition, by itself, is insufficient to eliminate application of the equitable tolling doctrine.

■ The term “tolled” in the context of the statute of limitations is commonly understood to mean “suspended” or “stopped.” As our Supreme Court has explained, when a statute of limitation is tolled, “the limitations period *stops running* during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred.” (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370–371 [2 Cal.Rptr.3d 655, 73 P.3d 517].)

■ The complaint alleges sufficient facts to plead the third requirement of equitable tolling—reasonable and good faith conduct by the plaintiff. In this regard, the “FEHA itself requires that we interpret its terms liberally in order to accomplish the stated legislative purpose. (Gov. Code, § 12993, subd. (a)) In order to carry out the purpose of FEHA to safeguard the employee’s right to hold employment without experiencing discrimination, the limitations period set out in the FEHA should be interpreted so as to promote the resolution of potentially meritorious claims on the merits.” (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 493–494 [59 Cal.Rptr.2d 20, 926 P.2d 1114].) EEOC’s finding of “reasonable cause” is a significant factor in favor of reaching the merits, particularly in light of a lack of prejudice to the Department, which had timely notice of administrative charges based on the same set of facts.

Further, at the pleading stage, the allegation that DFEH—the agency responsible for enforcing the FEHA—issued a right-to-sue notice containing a statement that the “one-year period *will be tolled* during the pendency of the EEOC’s investigation of your complaint” (italics added), is sufficient to support an inference of the employee’s reasonable and good faith reliance upon that statement. Whether this inference is disproven at a later date is an issue of fact; we deal here with an issue of pleading.

Because the complaint alleges sufficient facts to support the initial application of the doctrine of equitable tolling, the order sustaining the demurrer must be reversed. (See *E-Fab, Inc. v. Accountants, Inc. Services, supra*, 153 Cal.App.4th at pp. 1315–1316.)

DISPOSITION

The judgment of dismissal is reversed. The first amended complaint is reinstated. Mitchell is entitled to costs on appeal.

Willhite, J., and Manella, J., concurred.

A petition for a rehearing was denied August 22, 2016, and the opinion was modified to read as printed above.

[Nos. B249841, B251814. Second Dist., Div. One. July 27, 2016.]

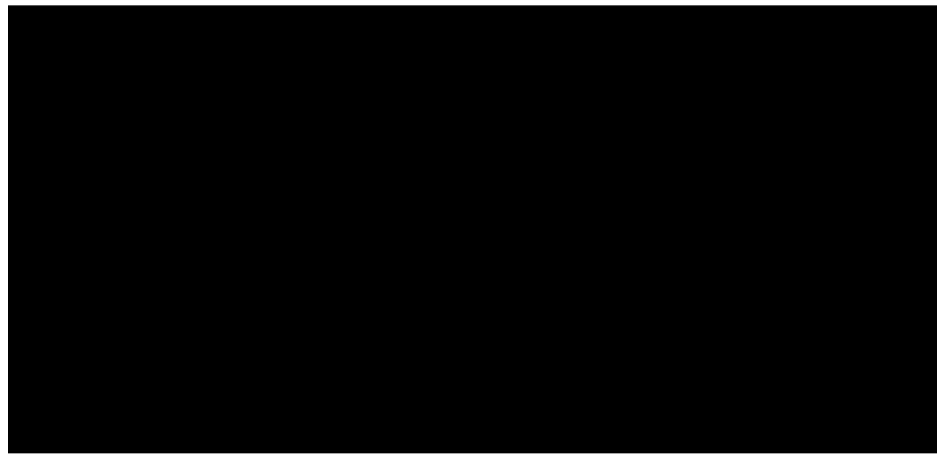
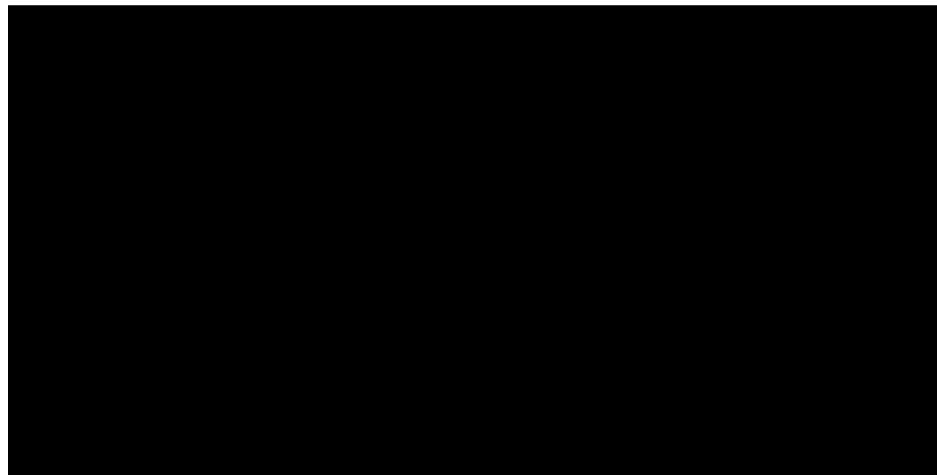
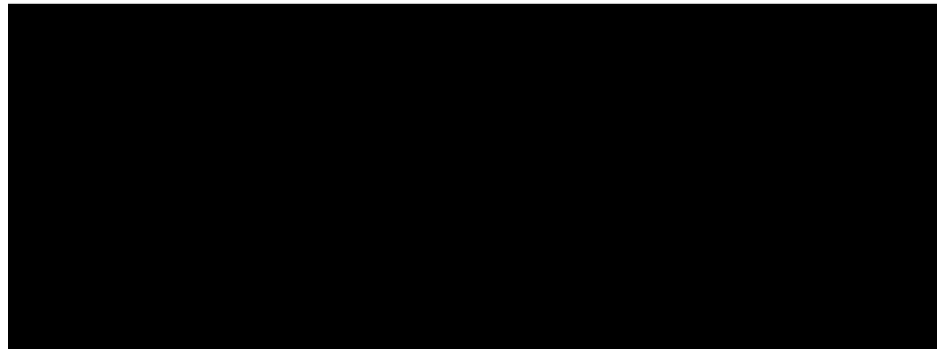
FRIENDS OF THE HASTAIN TRAIL et al., Plaintiffs and Respondents, v.
COLDWATER DEVELOPMENT LLC et al., Defendants and Appellants;
MOUNTAINS RECREATION AND CONSERVATION AUTHORITY,
Intervener and Respondent.

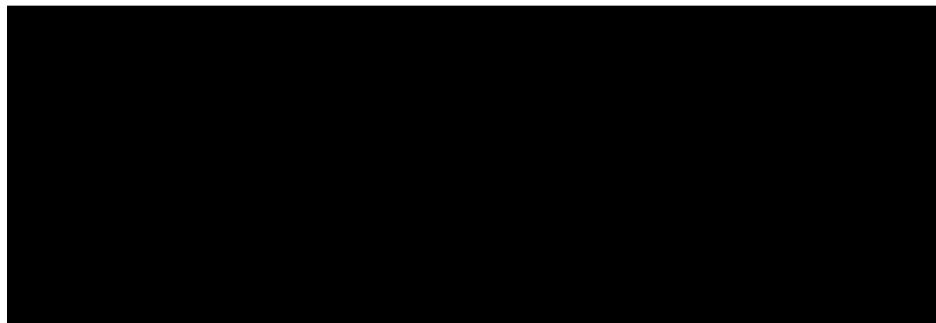
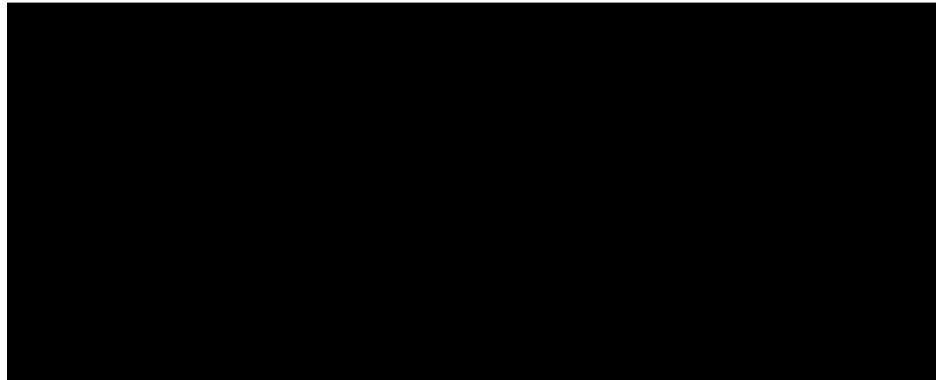
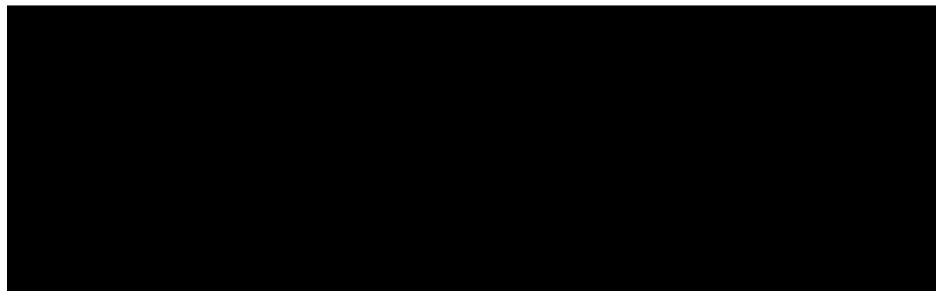
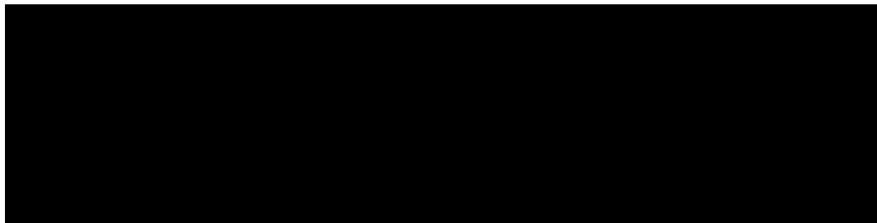
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COUNSEL

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup, Sheldon H. Sloan, Wesley G. Beverlin and Raymond R. Barrera for Defendants and Appellants.

Overton, Lyman & Prince and Stephen L. Jones for Plaintiffs and Respondents.

Blank Rome; Finestone & Richter; Law Offices of Eric F. Edmunds, Jr., and Eric F. Edmunds, Jr., for Intervener and Respondent.

OPINION

CHANAY, J.—Defendants Lydda Lud, LLC (Lydda Lud), and Coldwater Development LLC (Coldwater) appeal from a judgment declaring a public trail easement was established by public dedication through defendants' property for hiking, jogging, and dog walking. Defendants contend the trial court erred in finding a public dedication of such an easement. We conclude no substantial evidence supports the court's finding that the public acquired an easement through defendants' property by implied dedication as provided for under *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29 [84 Cal.Rptr. 162, 465 P.2d 50] (*Gion*) (consolidated with *Dietz v. King*). We therefore reverse the judgment and the subsequent award of attorney fees to plaintiffs.

FACTUAL AND PROCEDURAL SUMMARY**A. The Peak Trail**

In the early part of the last century, the Beverly Hills and Los Angeles fire departments constructed and maintained fire roads in the cities' wilderness areas to facilitate prevention and suppression of wildfires. In mountainous

areas the fire roads were originally situated atop ridgelines, but by 1940 new roads had been constructed at lower elevations for ease of use and to mitigate erosion. The new fire roads ran near to and roughly parallel with the ridgelines, and the original roads were abandoned.

This litigation involves two parallel fire roads, an older one and its newer replacement. The older road climbed to and ran along an approximately 400-foot-long ridgeline running roughly north and south in a steep, narrow, canyon-type area of chaparral and oakwood in Los Angeles, approximately half a mile west of Coldwater Canyon Drive and a mile east of Lake Drive. By 1940, this road had been abandoned in favor of a new fire road that ran immediately to the west of the ridgeline and roughly parallel to it, but at a lesser elevation. Some hikers continued to use the abandoned road, and it came to be called the “Peak Trail” by some because it led to a high point in the terrain that afforded a 360 degree view of Los Angeles. A permanent survey marker was installed at the summit of the Peak Trail in 1952, becoming a hiking destination. The Peak Trail was situated wholly on private property.

B. The Hastain/Coldwater Trail

By 1940, the older fire road had been replaced by the “Hastain Fire Road,” which began at Coldwater Canyon Drive and ran south southwest for a time before meandering generally west to Lake Drive, like a backwards lazy L. The northeastern half of the Hastain Fire Road ran through undeveloped private property, some of it owned by defendants’ predecessors, and the southwestern half ran through Franklin Canyon Park, which is public property.

The Hastain Fire Road was used by hikers, bicyclists, equestrians and dog walkers, some of whom called it the “Hastain Trail” and some the “Coldwater Trail.” These users could access the road either from the northeast at Coldwater Canyon Drive or southwest at Lake Drive.

Before 2004, a hiker on the Hastain Trail could transition to the roughly parallel Peak Trail by climbing a moderately steep embankment. In 2004, grading reduced this climb, making the Peak Trail more accessible.

C. Development Along the Trails

In the early 1990’s, residential construction began where the Hastain Fire Road started at Coldwater Canyon Drive and moved southward, roughly following the road. By the time of trial, approximately 17 private residences existed in a gated community along the road, and that portion of it taken over

by the development was rededicated as Beverly Ridge Terrace, a private road. This development also eliminated the Peak Trail north of its summit, such that by the time of trial both the Hastain Fire Road and Peak Trail were roughly half their original lengths, their northern halves having been either rededicated or eliminated. Both now began independently at the southern border of the Beverly Ridge community, proceeded in parallel roughly southwestward, and “joined” (via an embankment) after roughly 230 feet, after which the Hastain Fire Road continued generally southwestward to Franklin Canyon Park and on to Lake Drive.

The next four lots running south from the Beverly Ridge community were purchased by Coldwater in 2011, and the two south from those were purchased by Lydda Lud in 2006. Franklin Canyon Park begins after the southernmost of these six lots, which remain undeveloped except for the previously mentioned 2004 grading. The Hastain Fire Road runs through these lots and through Franklin Canyon Park to Lake Drive, with a momentary emergence from the park into a noncontiguous lot owned by Lydda Lud. Mohamed Hadid, the managing member of both Coldwater and Lydda Lud, planned to build large homes on the parcels, believing this development too would result in relocation and rededication of a portion of the Hastain Fire Road. Hadid obtained the required permits and, in 2011, recommenced grading.

D. *Litigation*

Plaintiff Ellen Scott, who often used the Hastain Trail, observed the 2011 grading activity on defendants’ property and organized six or seven fellow users into an association called the “Friends of the Hastain Trail,” the purpose of which was to prove the trail had been dedicated to the public by operation of law as a result of its use by the public for a prescriptive period of at least five continuous years prior to March 1972.¹ Scott created a Web site and sent e-mails and distributed fliers seeking “legacy hikers,” i.e., those who had hiked the trail prior to 1972.

In September 2011, Scott and the Friends of the Hastain Trail filed a complaint to quiet title to a public recreational trail easement through defendants’ property. They alleged the Hastain Trail had been impliedly dedicated to the public as a result of 50 years of public use, including five years of open and continuous use immediately prior to March 1972. Plaintiffs sought injunctive relief preventing defendants from blocking or eliminating the trail.

In April 2012, the Mountains Recreation and Conservation Authority (the MRCA), a partnership between the Santa Monica Mountains Conservancy

¹ As will be discussed, *post*, the prescriptive period runs from March 1967 to March 1972.

and two park districts, joined the litigation by filing a complaint in intervention. We will refer to Scott, the Friends of the Hastain Trail and the MRCA as “plaintiffs.”

Defendants answered the complaints and asserted affirmative defenses, including laches, unclean hands, waiver, and the “Lack of a Basis for Injunctive Relief.” According to defendants, the Hastain Trail was actually a fire road of the sort that is routinely relocated or rededicated to accommodate land development. Defendants disputed the existence of the Peak Trail entirely, and alleged the easement plaintiffs sought would render their property “undevelopable” and “utterly useless.”

A court trial took place over eight days, at the outset of which the trial judge, counsel for both sides, Hadid, and two park rangers walked and drove the length of the trail from Franklin Canyon Park to the survey marker at the summit of the Peak Trail.

1. Plaintiffs’ Evidence

a. The Trails

Plaintiffs showed the area surrounding the Hastain and Peak Trails is unimproved and scenic, and has long been used by hikers and others. At trial, Brian Bradshaw, plaintiffs’ expert on aerial photography, testified aerial photos taken from 1960 to 1971 showed the trails to be well established. Bradshaw testified, “the main trail is the Hastain Trail which has also been referred to as a fire road.” Paul Edelman, who worked for MRCA, testified MRCA patrolled and maintained the resources inside Franklin Canyon Park, which he described as “world-class.” He characterized the Hastain Trail as one of the park’s main trails. Although the summit (with its survey marker) was on private land (and not on the park map), Edelman believed it was a key resource because it allowed for a longer hike to a higher elevation with a good view. MRCA’s rangers patrolled the trails, and MRCA felt obligated to protect the summit, which hikers had long visited. Edelman had been on all parts of the trails at various times, including in the fall of 1972, and remembered yellow posts at the Hastain Trail trailhead connected by a chain or cable to keep cars out. He thought the barrier had been installed by the fire department and indicated the trail was a public fire road. In 2011, he became aware that Hadid had fenced off the trail.

b. Hastain Trail Legacy Hikers

Plaintiffs identified the prescriptive time frame as March 1967 to March 1972, during which the Hastain Trail was used by seven legacy hikers who

testified at trial: James Goller, Larry Harrow, Joan Carl, Frederic Harris, Carole Hemingway, Cynthia Foran, and Richard Saul.²

Goller testified he hiked the Hastain Trail on Sundays approximately 40 times per year from 1967 (and prior), when he was 10 years old, to 1972 (and beyond), at first with his father, then six times with his 12-member Cub Scout den, and later, as a teenager, with friends.

Harrow hiked the trail from approximately 1963 to recently. During the prescriptive period, he hiked the trail approximately every other weekend in 1967 and 1968, and from 1970 to 1972, sometimes with friends and sometimes by himself.

Carl, a sculptor, testified she hiked the trail with her dog in the mornings or late afternoons from October to April beginning in 1968. She would start from Coldwater Canyon Drive and hike southward, usually turning around after passing the peak, using the trail “[s]ometimes twice a week, sometimes twice a month. Sometimes maybe not at all.” She eschewed hiking from May to September to avoid heat and rattlesnakes. Carl believed the trail was public property because it was “totally open,” with a garbage can for dog waste. Until shortly before trial she thought it was called the “Coldwater Trail.”

Harris and Hemingway hiked the trail together four or five times a week in the late afternoon or early evening during the summers of 1970 and 1971, plus an occasional Thanksgiving or Christmas holiday during those years.³ Harris would park his car at the trailhead on Lake Drive (west of defendants’ property) and hike a circuit of the trail in two different directions. He testified the Hastain Trail “dumped out” on Coldwater Canyon Drive (north and east of defendants’ property). An average hike lasted from one to two hours.

Foran hiked the trail six or seven times in 1971, when she was 11 years old, half the time with an older brother and the other half with some friends.

Saul hiked the trail once in 1971, alone.

The legacy hikers saw others on the Hastain Trail. Goller testified he saw eight to 20 people over the course of each of his hikes. Harrow saw between two and 12 people on the trail every time he was on it. Carl occasionally saw

² An eighth legacy hiker, Keith Lehrer, testified he used the Hastain Trail with his friend and the friend’s father about 15 times in 1965, which the trial court found to be before the relevant time period. He sometimes went to the peak. He always saw four to six other people on the trail.

³ Harris and Hemingway also hiked the trail in the summer of 1972, which is after the relevant time period.

others in one's and two's, sometimes in groups of two to four, including equestrians and dog walkers. Harris and Hemingway always saw six to 12 cars parked at the trailhead on Lake Drive, and between six and 20 people on the trail during their hikes. Foran would see one or two other hikers during each of her seven hikes. Saul saw no one else during his one time on the trail.

Plaintiffs estimated the trail took about two hours to hike. Assuming a hiking day is six hours long (because most people do not hike in the midday sun), plaintiffs calculated that approximately 12 people used the trail per day, which amounted to approximately 4,000 people per year.

c. *Peak Trail Legacy Hikers*

Only Goller, Harris, Hemingway and Foran testified they used the Peak Trail during the relevant time period. Goller used it approximately 40 Sundays a year from 1967 to 1972 (and before and after that time), Harris and Hemingway used the trail once or twice a week in the summers of 1970 and 1971, and Foran used it seven times in 1971.

Goller testified the Peak Trail was "really steep," "very narrow," "arduous," and a "challenge." Harris testified the trail was "pretty treacherous," and Hemingway said it was "steep, had cliffs on both sides," and Harris had to "push" her to climb it. Foran testified the Peak Trail could not be reached on a minibike because the embankment between it and the Hastain Trail was too steep.

No one testified to seeing anyone else specifically on the Peak Trail. Harris testified he saw people "all over the trail," which could mean both the Hastain and Peak Trails, but the context indicates he meant the "trail" from Lake Drive to Coldwater Canyon, which is the Hastain Trail. He testified about the Peak Trail separately, and never said he saw anyone on it.

Only Harris testified to using either of the trails on any weekday, always accompanied by Hemingway.

d. *Extrapolated Usage*

Because the legacy hikers testified they almost always saw others on the Hastain Trail, from two to possibly a dozen or more each time, the trial court inferred many more must also have used both the Hastain and Peak Trails. "The average was about three to four other hikers," the court found, which "[w]hen extrapolated over the hours of the day and days of the year [amounted] to thousands of hikers over the relevant period."

2. Defendants' Evidence

For the defense, Robert Pope, an expert on aerial photography, testified he had examined three-dimensional photographs depicting the Hastain Fire Road and its surrounding area beginning in the mid-1920's, but found no definitive evidence the Peak Trail ever existed. He did not dispute, however, that a variety of people could have hiked to the peak between 1967 and 1972. Frank Haselton, a viewshed analysis expert, testified the Hastain Trail was visible from some public vantage points but not from others. Ken Shank, a surveying and grading expert who had prepared defendants' building plans, testified homes could not be constructed on defendants' lots if the requested public easement was established, but it might be possible to reroute the Hastain Trail to make room for the construction. He testified defendants' building plans called for relocation of the Hastain Fire Road.

Hadid testified he had been a global real estate developer for 40 years. He first visited the subject property in 2001 or 2002 and was aware that a fire road passed through it but believed it could be relocated and rededicated. Before buying the property, Hadid inspected the land and performed a title check to discover if any easement or right-of-way existed, finding none. If there had been an easement or restriction, he would not have purchased the property.

3. Statement of Decision and Judgment

In October 2012, the trial court issued a tentative decision and judgment in favor of plaintiffs. Plaintiffs thereafter filed a proposed statement of decision, to which defendants objected on the grounds, among others, that it failed to address (1) "whether the court made an equitable balancing of the hardship on the Property Owners that would be imposed by granting the proposed implied easement on Defendants' property" and (2) "whether the court is required to or even attempted to fashion the proposed easement as narrowly as possible to avoid prejudice to the [Defendants] with regards to the scope and location of the proposed easement on Defendants' property relative to the Property Owner's ability to develop his property as planned and to evaluate any hardship and/or balancing hardships between the parties." In support of the objections, Shank, the surveying and grading expert, proposed that an alternative easement be created, one that allowed for residential development of the area while preserving the public's hiking experience.

On April 17, 2013, the court overruled most of defendants' objections and filed its judgment and amended statement of decision.

The judgment created an easement designated as the Hastain Trail but which we will call the "Judgment Trail" to distinguish it from the historical

Hastain Trail. The Judgment Trail is set out in three segments. The first, tracking the Peak Trail, begins at the summit and proceeds southwestward for 233.72 feet, where it meets the Hastain Fire Road, and thence atop the fire road for 620.86 feet to the border between Coldwater Canyon's and Lydda Lud's parcels. The easement is described in metes and bounds, as follows: "COMMENCING AT THE NORTHWEST CORNER OF [LOT 1; defendants' northernmost parcel], THENCE ALONG THE NORTHERLY LINE OF LOT 1, SOUTH 88°22'30 EAST, 674.66 FEET TO THE POINT OF BEGINNING, SAID POINT BEING THE CENTERLINE OF A 5.00 FOOT WIDE TRAIL, KNOWN AS THE HASTAIN TRAIL, THENCE ALONG THE HASTAIN TRAIL BEING 5.00 FEET WIDE AND LYING 2.50 FEET ON EACH SIDE OF THE FOLLOWING DESCRIBED CENTERLINE THE FOLLOWING COURSES:

"1ST SOUTH 0.4°53'25" WEST, 16.24 FEET THENCE;

"2ND SOUTH 0.3°15'56" EAST, 19.22 FEET THENCE;

"3RD SOUTH 16°29'43" WEST, 71.72 FEET THENCE;

"4TH SOUTH 20°21'13" WEST, 71.72 FEET THENCE;

"5TH SOUTH 11°45'02" WEST, 54.82 FEET TO A POINT, SAID POINT HERINAFTER REFERRED TO AS POINT 'A'. SAID POINT BEING THE TERMINATION OF THE 5.00 FOOT WIDE TRAIL AND THE BEGINNING OF THE 15.00 FOOT WIDE TRAIL;

"THENCE, CONTINUING ALONG HASTAIN TRAIL BEING 15.00 FEET WIDE AND LYING 7.50 FEET ON EACH SIDE OF THE FOLLOWING DESCRIBED CENTERLINE THE FOLLOWING COURSES:

"6TH SOUTH 1.5°46'35" WEST, 138.25 FEET THENCE;

"7TH SOUTH 31°07'10" EAST, 99.68 FEET THENCE;

"8TH SOUTH 38°04'10" WEST, 98.16 FEET THENCE;

"9TH SOUTH 46°45'46" WEST, 92.28 FEET THENCE;

"10TH SOUTH 49°09'09" WEST, 15.98 FEET THENCE;

"11TH SOUTH 18°57'00" WEST, 15.45 FEET THENCE;

"12TH SOUTH 08°44'01" EAST, 59.10 FEET THENCE;

“13TH SOUTH 03°49’45” EAST, 95.96 FEET THENCE.”

The second segment begins at the border between Franklin Canyon Park and Lydda Lud’s southernmost parcel and proceeds 740.79 feet northeastward until it meets up with the first segment. This segment is described in metes and bounds also, for example as follows:

“COMMENCING AT THE NORTHWEST CORNER OF [LYDDA LUD’S LOT 6], THENCE SOUTH 00°16’16” WEST, A DISTANCE OF 278.89 FEET TO THE TRUE POINT OF BEGINNING;

“THENCE . . . ALONG SAID HASTAIN TRAIL BEING 15.00 FEET WIDE AND LYING 7.50 FEET ON EACH SIDE OF THE FOLLOWING DESCRIBED CENTERLINE THE FOLLOWING COURSES:

“1ST SOUTH 70°00’33” EAST, 13.62 FEET THENCE;

“2ND NORTH 82°49’32” EAST, 40.82 FEET THENCE; [¶] . . . [¶]

“11TH NORTH 40°19’01” EAST, 62.00 FEET TO A POINT THAT IS DISTANT SOUTH 79°51’34” EAST, 383.30 FEET FROM THE NORTHWEST CORNER OF [LYDDA LUD’S LOT 5].”

The third segment of the easement describes, also in metes and bounds, a 158.68 inverted “U” where a portion of the Hastain Fire Road departs from Franklin Canyon Park into Lydda Lud’s property but quickly returns to the park.

The judgment is silent as to that portion of the Hastain Trail running north from the junction with the Peak Trail to the Beverly Ridge community. The judgment is also silent as to those portions of the Hastain and Peak Trails that were either rededicated in or eliminated by the Beverly Ridge development.

In its statement of decision, the trial court found the Judgment Trail was “an old fire road leading from Lake Drive up the hill until very near the peak. At that point, the Trail veers east from the fire road up to the peak.” The “general public knew of and used the trail for five continuous years prior to March 4, 1972.” The public’s use was “substantial,” i.e., by more than a limited and definable number of persons. The court found “the public used the trail without objection and as if it were a public trail,” and no user was told he or she was on private property or warned not to hike the trail, and no fences or signs impeded hiking. The public use was open and obvious, and the then owners had either actual or constructive notice of it. Further, most of the hikers testified they saw other hikers throughout the length of the trail,

from two to a dozen or more, and “a substantial number of the other hikers were hiking to the peak” during the relevant period. The court found that photographs and testimony demonstrated the public used the Hastain Fire Road to get to the Peak Trail, and used the Peak Trail to get to the summit. In 2011, grading had slightly modified the junction of the two trails, but the court found this modification too insubstantial to affect the easement. In sum, the court found defendants’ predecessors had impliedly dedicated an easement for “public recreational uses of hiking, jogging, and dog-walking.” The easement is five feet wide on the Peak Trail portion and 15 feet wide on the Hastain Trail portion.

The judgment provides that defendants “hold no legal or equitable right, title, estate, lien or interest in and to the Trail” and have no obligation to maintain it, and enjoins defendants from interfering with public recreational uses and reasonable maintenance of the trail and orders them to remove from it all items they own or control.

Regarding defendants’ objections, the court stated defendants’ inability to develop the property was “irrelevant. When Defendants acquired the property, they took subject to whatever easements and encumbrances had been created by prior owners.” In response to the argument that the court should fashion the easement so as to avoid prejudice to defendants’ right to develop the property, the court stated that it “fashioned nothing. The easement is as described in the surveys attached to the pleadings and stipulated at trial.” The court also refused to “balance the equities . . . because Defendants’ claim of hardship and balancing the equities is not an element of an implied dedication at law for public recreational purposes.” Moreover, the court stated, there was no “hardship” to defendants because they “acquired their property interests decades after the public had already [become] vested in its right to use the Trail.” Finally, the court stated that defendants “are simply not in an equitable position,” because “the due diligence [Hadid] performed on the property was inadequate and insufficient.” Hadid, the court explained, ignored evidence of the public’s use of the trail, and the testimony of his belief that all claims must be recorded was not credible.

4. *Posttrial Motions*

In motions for new trial and to vacate the judgment, defendants renewed their arguments that the court should consider the hardship to them and “balance the equities in determining the scope or location of the [easement].” Defendants’ proposed an “Alternative Trail Easement” that they represented provided “panoramic views that are far superior to the view available at the top of the ‘Peak Trail’ portion of the [easement defined in the judgment] which has an impaired view looking north due to a fence built by the owner

of the property to the north and his placement of tall trees along the fence line.” The Alternative Trail Easement would also connect to other trails managed by MRCA, and be safer and longer than the Judgment Trail. Hadid represented he would grade the Alternative Trail Easement and add a viewing deck and other related improvements for the benefit of the hiking public so as to make the Alternative Trail Easement a better hiking experience than that afforded by the Judgment Trail. Hadid stated he offered the plans so the court under its equitable powers could “consider and balance the equities of an alternative location for placement of the public trail for hiking purposes and for entry of a new judgment.”

In their opposition to defendants’ motion to vacate the judgment, plaintiffs argued the court had previously addressed and rejected defendants’ arguments. They did not, however, dispute Hadid’s presentation about the benefits of the proposed Alternative Trail Easement.

In denying the motions for new trial and to vacate the judgment, the court rejected defendants’ arguments by referencing its statement of decision.

Defendants filed a timely appeal. The trial court thereafter granted Scott’s and Friends of the Hastain Trail’s motion for attorney fees, awarding \$330,696.60. Defendants filed a timely appeal from the fee award as well. We consolidated the two appeals. After oral argument, we requested further briefing on issues discussed in this opinion, which both sides provided. Defendants submitted along with their letter brief requests for judicial notice of a title report, a 1936 deed, certain portions of the 2013 California Fire Code (Cal. Code Regs., tit. 24, pt. 9), a document published by the Los Angeles Fire Department, a publication issued by the United States government, and portions of the Los Angeles Municipal Code. Defendants’ requests for judicial notice are denied because the documents are either irrelevant, lack foundation, or attempt to introduce new evidence.

DISCUSSION

Defendants argue the trial court applied the wrong law; the judgment is unsupported by substantial evidence; the Judgment Trail is not the same as was used by the public during the prescriptive period; the trial court should have relocated the trail to serve equity; and the judgment improperly granted the public a fee interest in the easement.

I. *The Trial Court Properly Applied Gion.*

Defendants argue the doctrine of implied dedication set forth in *Gion* applies only to beachfront or shoreline property and roads, not to inland wilderness property or recreational hiking trails. We disagree.

■ A “dedication” is an uncompensated transfer of an interest in private property to the public, and “may occur pursuant to statute or the common law.” (*Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 820 [93 Cal.Rptr.2d 193] (*Blasius*).) “‘Dedication has been defined as an appropriation of land for some public use, made by the fee owner, and accepted by the public. By virtue of this offer which the fee owner has made, he is precluded from reasserting an exclusive right over the land now used for public purposes. American courts have freely applied this common law doctrine, not only to streets, parks, squares, and commons, but to other places subject to public use. California has been no exception to the general approach of wide application of the doctrine.’” (*Id.* at p. 820.)

■ “Express dedication arises where the owner’s intent to dedicate is manifested in the overt acts of the owner, e.g., by execution of a deed. An implied dedication arises when the evidence supports an attribution of intent to dedicate without the presence of such acts,” such as “when the public use is *adverse* and exceeds the period for prescription.” (*Blasius, supra*, 78 Cal.App.4th at p. 821; see *Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235, 243 [267 P.2d 10], abrogated in part on other grounds by Sts. & Hy. Code, §§ 941, 1806 [intent on the part of the owner to dedicate land to the public may be shown expressly or by implication].) An owner’s offer to dedicate can thus be inferred from factual circumstances in the same general manner as prescriptive rights are established, i.e., circumstances that show “the public has used the land ‘for a period of more than five years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by anyone.’” [Citation.] . . . [T]he question is whether the public has engaged in ‘long-continued adverse use’ of the land sufficient to raise the ‘conclusive and undisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere license.’ (*Gion, supra*, 2 Cal.3d at p. 38.)

■ “What must be shown is that persons used the property believing the public had a right to such use.” (*Gion, supra*, 2 Cal.3d at p. 39.) A litigant claiming implied dedication must establish “that persons have used the land as they would have used public land,” in the case of a beach or shoreline, “as if it were a public recreation area,” and if “a road is involved, the litigants must show that it was used as if it were a public road.” (*Ibid.*; see *Bess v. County of Humboldt* (1992) 3 Cal.App.4th 1544, 1550, 1551 [5 Cal.Rptr.2d 399].) The evidence must also demonstrate that “various groups of persons,” not a “limited and definable number of persons,” have used the land “‘when they wished to do so without asking permission and without protest from the land owners.’” (*Gion, supra*, at pp. 39, 40.) The “‘issue is ordinarily one of fact, giving consideration to all the circumstances and the inferences that may be drawn therefrom. The use may be such that the trier of fact is justified in inferring an adverse claim and user and imputing constructive knowledge

thereof to the owner.’ ” (*Id.* at pp. 40–41, quoting *O'Banion v. Borba* (1948) 32 Cal.2d 145, 148–149 [195 P.2d 10].) Each inquiry depends on “‘the facts and circumstances attending the use.’ ” (*County of Los Angeles v. Berk* (1980) 26 Cal.3d 201, 214 [161 Cal.Rptr. 742, 605 P.2d 381], citations omitted (*Berk*); see *Mulch v. Nagle* (1921) 51 Cal.App. 559, 567 [197 P. 421] [“Whether a particular strip of land has been dedicated or abandoned to the public for highway purposes depends upon the circumstances of each case”].)

An owner may avoid dedication by affirmatively proving the public was granted a license to use the property. (*Gion, supra*, 2 Cal.3d at p. 41.) Even if the present fee owners make it clear that they do not approve of the public use of the property, “[p]revious owners . . . by ignoring the wide-spread public use of the land for more than five years [may] have impliedly dedicated the property to the public.” (*Id.* at p. 44.) For example, in *Gion*, our Supreme Court concluded that an implied dedication of private land (three parcels of land on a shoreline, and a beach and the road leading to it) for public use occurred when the public had made use of the land for more than five years without objection by the owners. (*Ibid.*)

The *Gion* decision resulted in “soaring sales of chain link fences,” a “spate” of critical legal commentary, and the Legislature’s enactment of Civil Code section 1009. (*County of Orange v. Chandler-Sherman Corp.* (1976) 54 Cal.App.3d 561, 564 [126 Cal.Rptr. 765]; see 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 249, p. 303.) The statute, enacted on March 4, 1972, provides that “no use of [private real property] by the public after the effective date of this section shall ever ripen to confer upon the public . . . a vested right to continue to make such use permanently” without an express dedication by the owner. (Civ. Code, § 1009, subd. (b); see *Blasius, supra*, 78 Cal.App.4th at p. 823.) Civil Code section 1009 abrogated the *Gion* decision, but only prospectively, affecting no rights that had vested prior to its enactment. (*Blasius*, at p. 823.)

Defendants argue *Gion* does not apply here because their property consists of inland wildlands, not beachfront or shoreline property or a road. In *Gion*, however, the court explained no different rules exist for roadways or other areas, noting that prior cases had found implied dedication in parkland, beaches and athletic fields. (*Gion, supra*, 2 Cal.3d at pp. 41–42.)

Defendants argue we should follow *Richmond Ramblers Motorcycle Club v. Western Title Guaranty Co.* (1975) 47 Cal.App.3d 747 [121 Cal.Rptr. 308], in which the majority stated in dicta that the rules and rationale of *Gion* apply only to roads, beaches, and shoreline areas, not remote wilderness areas. (*Id.* at pp. 754, 758–759.) But the Supreme Court later disavowed such a limitation in *Berk*, reiterating *Gion*’s holding that the doctrine of implied

public dedication is not limited to any specific kind of real property. (*Berk, supra*, 26 Cal.3d at pp. 214–215; see *Burch v. Gombos* (2000) 82 Cal.App.4th 352, 355, 356–358 [98 Cal.Rptr.2d 119] [upholding a finding of implied public dedication of a one-lane dirt road in the Santa Cruz Mountains]; *Blasius, supra*, 78 Cal.App.4th at pp. 822, 824 [“there is no difference between dedication of shoreline property and other property”; “Well within the ancient reach of the common law of dedication is the establishment of a public footway”]; *County of Orange v. Chandler-Sherman Corp., supra*, 54 Cal.App.3d at p. 564 [*Gion* applies to noncoastal property “such as roads, passageways and paths”].)

We conclude the trial court correctly applied *Gion* to plaintiffs’ implied dedication claim. Although it “may require more circumstances to establish” dedication in the case of uncultivated and unenclosed land, “the test is ultimately the same.” (*O’Banion v. Borba, supra*, 32 Cal.2d at p. 150; see *Union Transp. Co. v. Sacramento County, supra*, 42 Cal.2d at pp. 240–241 [“Whether the user was adverse is a question of fact to be determined from all of the circumstances of a case”]; *Hays v. Vanek* (1989) 217 Cal.App.3d 271, 282 [266 Cal.Rptr. 856] [“Whether an owner has made an offer is a question of fact requiring an examination of all the pertinent circumstances”].)

II. *No Substantial Evidence Supports the Implied Dedication of a Public Trail Easement.*

Having concluded the trial court applied the proper legal test, we must determine whether substantial evidence supports the finding of an implied-in-law dedication. In doing so, we accept as true all evidence tending to establish the correctness of the trial court’s findings, take into account all reasonable inferences that could lead to the same conclusion, and resolve every substantial conflict in the evidence in favor of the findings. (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 501 [61 Cal.Rptr.3d 754].)

There is little if any evidence in the record about who owned the subject property during the prescriptive period or whether the owners actually knew hikers were using their land. The issue is therefore whether, under all the circumstances, public use of the subject property between 1967 and 1972 sufficed to put defendants’ predecessors on constructive notice that their property was in danger of public dedication. Plaintiffs must show the public “used the land as they would have used public land,” and in the case of a road, “as if it were a public road.” (*Gion, supra*, 2 Cal.3d at p. 39.)

A. *Use of a Fire Road Easement Does Not Constitute Use of, or Grant Prescriptive Rights to, the Servient Tenement*

■ Use sufficient for implied public dedication must “clearly indicate to the owner that his property is in danger of being dedicated.” (*County of*

Orange v. Chandler-Sherman Corp., *supra*, 54 Cal.App.3d at p. 565.) No public use of the Hastain Fire Road could have put defendants' predecessors on actual or constructive notice that *their property* was in danger of public dedication because the fire road was not their property, it was a public easement *on* their property, and once granted, the scope of a public easement cannot be materially changed without notice. (Civ. Code, § 806 [“The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired”].)

The Public Resources Code instructs the State Board of Forestry and Fire Protection to adopt regulations implementing minimum fire safety standards applicable to lands for which the state bears responsibility, including regulations pertaining to fire roads. (Pub. Resources Code, §§ 4002, 4290.) The purpose of a fire road is to “provide for safe access for emergency wildland fire equipment and civilian evacuation concurrently, and . . . provide unobstructed traffic circulation during a wildfire emergency.” (Cal. Code Regs., tit. 14, § 1273.00.) The Los Angeles Municipal Code authorizes the Los Angeles Fire Chief to enforce fire regulations adopted by the state. (L.A. Mun. Code, § 57.103.1.4.) For example, Los Angeles Municipal Code section 57.4908.3 authorizes the fire chief “to construct fire roads and firebreaks in or upon any undeveloped lands in any mountain or hill area, whether or not such lands are public or private, with the consent of the owner thereof, and to maintain the same on a permanent basis when the Chief determines that such fire roads and firebreak are necessary for the protection of life and property against fire or panic.” Where such fire roads exist, they are “granted to the City without cost as easements from a public street or alley to the required terminal point.” (*Id.*, § 57.503.1.6, italics added.) The fire department has the right to pass over fire roads by easement, license, city ownership, “or otherwise.” (*Id.*, § 57.4908.3.1.) The right of an agency to use a fire road is a “reserved easement.” (*Walsh v. Macaire* (1951) 102 Cal.App.2d 435, 436 [227 P.2d 517].) A fire road may also become a public easement by the implied dedication process. (See, e.g., *Brumbaugh v. County of Imperial* (1982) 134 Cal.App.3d 556, 563 [184 Cal.Rptr. 11].)

A wilderness fire road is thus a conditional, temporary public easement, existing only for so long as and to the extent needed to help protect against fire. (See *Jones v. Deeter* (1984) 152 Cal.App.3d 798, 802 [199 Cal.Rptr. 825] [“A dedication is legally equivalent to the granting of an easement”]; *Walsh v. Macaire*, *supra*, 102 Cal.App.2d at p. 436.) When land burdened by a fire road easement is developed, the road is replaced with an approved fire apparatus access road extending to within 150 feet of all portions of the exterior walls of the first story of every building. (See L.A. Mun. Code, § 57.503, adopting the Internat. Fire Code, § 503.1.1; see also Cal. Code Regs., tit. 24, § 503.1.1 [California Fire Code].) These access roads are commonly public and private streets.

An easement is an interest in the land of another that entitles the owner of the easement to limited use or enjoyment of the servient tenement. (*City of Long Beach v. Daugherty* (1977) 75 Cal.App.3d 972, 977 [142 Cal.Rptr. 593].) The circumstances existing at the time of and giving rise to the conveyance determine the nature and extent of the easement. (Civ. Code, § 806; *Southern Pacific Co. v. San Francisco* (1964) 62 Cal.2d 50, 54 [41 Cal.Rptr. 79, 396 P.2d 383]; *Burch v. Gombos, supra*, 82 Cal.App.4th at p. 362.) The use may change or increase, but only so long as the change does not materially increase the burden on the servient tenement. (*Rye v. Tahoe Truckee Sierra Disposal Co., Inc.* (2013) 222 Cal.App.4th 84, 92 [170 Cal.Rptr.3d 275].) Any permissible change would be limited “to such uses as the facts and circumstances show were within the reasonable contemplation of the parties at the time of the conveyance.” (*Fristoe v. Drapeau* (1950) 35 Cal.2d 5, 10 [215 P.2d 729]; see *Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, 866–867 [274 Cal.Rptr. 678, 799 P.2d 758].)

Here, it was undisputed the Hastain Trail ran atop the Hastain Fire Road. Maps from the 1920’s to the present showed and labeled the fire road, lawyers from both sides described it as a fire road during the site visit, experts from both sides stated the trail ran atop the fire road, several hikers identified it as a “road,” and the judgment itself refers to it as a fire road and states the “Fire Road is that portion of the survey, attached as Exhibits A and B, of the Trail which is 15 feet wide,” which includes all of the Hastain Trail.

At the time the Hastain Fire Road was created the property owners and public could reasonably contemplate it would be used by hikers and, as such would not materially increase the burden on the servient tenement. “Road easements can be used for all reasonable purposes.” (6 Miller & Starr, Cal. Real Estate (4th ed. 2015) § 15:59, p. 15-212.) But the parties could not reasonably contemplate the hikers’ use would become permanent, because transforming a temporary, mutable easement into one that is permanent and immovable would substantially increase the burden on the servient tenement by restricting its future development. In “ascertaining whether a particular use is permissible under an easement created by prescription, the needs which result from a normal evolution in the use of the dominant tenement and the extent to which the satisfaction of those needs increases the burden on the servient tenement must be considered. The increase must be a normal development, reasonably foretold, and consistent with the pattern formed by the adverse use by which the prescriptive easement was created.” (*Applegate v. Ota* (1983) 146 Cal.App.3d 702, 711 [194 Cal.Rptr. 331].) Permissible use by the public of an easement the public already owns would not foretell a drastically expanded use, inconsistent with the pattern under which the easement was created, much less that the servient tenement would itself be in danger of permanent, unconditional public dedication, as occurred here.

The trial court implicitly recognized these principles, finding that “[w]hen Defendants acquired the property, they took subject to whatever easements and encumbrances had been created by prior owners. . . . [T]he public easement must be respected.” But the court failed to recognize that the same was true as to the public itself, which likewise took the fire road subject to the preexisting easement.

■ “If a landowner’s intent to dedicate property to public use is to be implied, that purpose must clearly appear from the surrounding circumstances. [Citations.] The rationale underlying the strict requirements which must be satisfied to establish a dedication is to avoid potential detriment to persons who, through inattention to legal detail or motivated by decency permit others to use their land.” (*Hays v. Vanek, supra*, 217 Cal.App.3d at pp. 281–282.) The “idea of a dedication to the public of a use of land for a public road, must rest on the clear assent of the owner, in some way, to such dedication.” (*Harding & Loftin v. Jasper* (1860) 14 Cal. 642, 649.) The “bare fact that a farmer opens a lane through his farm, and allows the public to use it for fifteen years, does not authorize the inference of a dedication to the public. The intent to dedicate must be obvious. . . . ‘Persons who have, from mere kindness, suffered others to enjoy privileges in their lands, have been eventually coerced into parting with them entirely, without compensation, and to yield up as rights what they had previously suffered or allowed as favors, and the simple expression of an intention, has often been distorted into a positive promise, and occasionally to those who have no distinct interest in its performance. Our title to our lands is too important to be lightly lost, upon slight presumptions. Before the owner should be deprived of his property, his intention to part with it should be clearly and unequivocally expressed.’ ” (*Id.* at pp. 648–649, citation omitted.)

■ The trial court erred in establishing a permanent and fixed public easement that drastically expanded on the existing temporary and mutable public easement. The judgment gave the public rights not only to use the fire road for so long as its existence was necessary for fire protection, but also to burden the underlying fee estate in perpetuity, as set forth in the metes and bounds description of the new easement. Those rights were neither conditional nor temporary, as was the fire road easement itself, but unlimited and permanent. But “[n]othing can be clearer than that if the grant is made for a specified, limited and defined purpose, the subject of the grant cannot be used for another, and the grantor retains still such an interest therein as entitles him, in a court of equity, to insist upon the execution of the trust as originally declared and accepted.” (*Marshall v. Standard Oil Co.* (1936) 17 Cal.App.2d 19, 27 [61 P.2d 520].) It is a “‘universally accepted rule of law that land which has been dedicated for a definite and specific purpose must be used in conformity with the terms of the dedication, and not diverted to any other purpose or use.’ ” (*Ibid.*; see *Roberts v. Palos Verdes Estates* (1949) 93

Cal.App.2d 545, 547 [209 P.2d 7] [“where a grant deed is for a specified, limited and definite purpose, the subject of the grant cannot be used for another and different purpose”].)

Blasius, upon which plaintiffs chiefly rely and the facts of which are somewhat analogous to those here, is not to the contrary. There, the public had for many years used a canal road alongside the Rattlesnake Canal—which together (road and canal) comprised an easement owned by the Nevada Irrigation District over property owned by private landowners—for walking, jogging, riding bicycles or horses, and fishing, as well as a means to get from one place to another. Based on this use, the trial court recognized the landowners had impliedly dedicated to the public an easement consisting of “‘the width of the Rattlesnake Canal plus its westerly berm, which is nine feet wide, more or less.’” (*Blasius, supra*, 78 Cal.App.4th at p. 819.) The appellate court affirmed the finding. In dicta the court also stated that “a long history of continued passage by a diverse group of occasional hikers across a well defined privately owned trail segment leading to a network of trails, say on a public wilderness area, might suffice” for implied public dedication. (*Id.* at p. 826, fn. 7.)

The instant facts are distinguishable from those both existing and hypothesized in *Blasius*. There, the trial court identified a dedicated trail easement in relation to the preexisting public easement it overlapped, the Rattlesnake Canal, not, as here, in a metes and bounds legal description of the subservient tenement. As such, the overlapping easement in *Blasius* was bound to the underlying easement, and if the latter were to change course or disappear altogether, the former would follow. Here, as plaintiffs admitted in their letter brief, the Judgment Trail is independent of and would survive relocation or removal of the Hastain Fire Road. It may well be, as the *Blasius* court stated in dictum, that continued passage by a diverse group of occasional hikers across a well-defined privately owned trail segment will suffice for public dedication of the *trail segment*, but passage across a contingent and temporary road does not suffice for permanent dedication of the privately owned *subservient tenement*.

Plaintiffs argue no evidence was adduced at trial that the fire department had an actual easement, license, or any right at all to use the Hastain Fire Road.

To the contrary, the only reasonable inference from maps admitted at trial, multiple witness statements, plaintiffs’ repeated admissions, and the judgment itself—all indicating the Hastain Trail was indeed a fire road—was that the fire department at least had a right to use it, if not an easement or license. In any event the point is irrelevant, as we do not hold that a preexisting fire

road—whether an easement or not—cannot be publicly dedicated so long as the dedication is limited to the *fire road*. But here, the trial court found the servient tenement, not the fire road, was dedicated to the public. As we discussed, nothing about public use of a fire road as a hiking trail would put a reasonable owner on notice that the servient tenement was in danger of dedication.

Plaintiffs have identified no authority from any jurisdiction holding that use of a fire road (or anything similar) by a private party or the public may result in either a prescriptive easement or public dedication burdening the servient tenement and outlasting the road itself, and we have discovered none.⁴ Some of the cases hold an owner cannot restrict use of a dedicated road running over his property, but none holds the owner cannot remove the road altogether. In the case of a fire road, an owner can remove it when it is no longer needed for fire protection. Under these circumstances, no reasonable owner could anticipate that a fire road running over his or her property might become a permanent hiking trail.

The judgment here grants permanent rights to the servient tenement, land burdened by a preexisting, conditional, temporary public easement, notwithstanding temporal limitations on the easement itself. No such rights could have ripened by way of public dedication no matter how extensive the public use of the Hastain Fire Road because the owner could not have known more than the temporary road itself was at risk.

B. *No Substantial Use of the Peak Trail*

The same cannot be said of the Peak Trail, because the fire road beneath it had been abandoned by the 1940's, and any public rights to it were therefore extinguished long before the prescriptive period. (Civ. Code, § 811, subd. 4 [a]

⁴ *Burch v. Gombos*, upon which the dissent relies, is not dispositive. There, property owners sued a logging company to enjoin use of a fire road running across their property for transporting logs. (*Burch v. Gombos, supra*, 82 Cal.App.4th at p. 355.) The trial court found the road had been impliedly dedicated to the public as a result of longtime public recreational use, and further found the owners could not restrict the logging company's use of what now amounted to a public road. (*Id.* at p. 363.) Although the appellate court affirmed these findings, the property owners on appeal made "no real argument" regarding the prior public dedication, but argued only that the evidence did not support expansion of the dedication to logging purposes. (*Id.* at p. 362, fn. 14.) The court therefore had no occasion to discuss whether public recreational use of a fire road suffices to convey notice to the owner that even the road is in danger of public dedication, much less, as here, that the subservient tenement is. A case is no authority for a proposition not discussed. (*People v. Barragan* (2004) 32 Cal.4th 236, 243 [9 Cal.Rptr.3d 76, 83 P.3d 480].)

servitude is extinguished by disuse].) But under even the most generous view of the evidence, public use of the Peak Trail was minuscule.

Under *Gion*, a plaintiff asserting implied public dedication must present evidence that “the public has engaged in ‘long-continued adverse use’ ” that “‘negatives the idea of a mere license’ ” or neighborly accommodation. (*Gion, supra*, 2 Cal.3d at p. 38; see *Blasius, supra*, 78 Cal.App.4th at p. 825 [the question is “whether the use in issue should be characterized as prescriptive or attributed to neighborly accommodation”]; *Aptos Seascapes Corp. v. County of Santa Cruz* (1982) 138 Cal.App.3d 484, 501 [188 Cal.Rptr. 191].)⁵ To counter the idea of license a plaintiff must show open, substantial use of private property. (*Gion*, at p. 39.) In *Gion*, which found a public dedication, members of the public had for decades “made continuous and uninterrupted use” of beachfront property “in substantial numbers,” with full knowledge of the owners, for fishing, swimming, picnicking, and viewing the ocean. (*Id.* at pp. 34, 35, 36.)

Here, the trial court’s finding that “[s]everal of the legacy hikers hiked the Trail during each of the years from 1962 to 1972” is unsupported in the record. The only legacy hiker to have used either the Hastain or Peak Trail every pertinent year—1967 to 1972—was Goller, who used the trails only on Sundays, beginning when he was 10 years old and continuing until he was approximately 15. Further, the trial court’s findings that “[m]ost of the legacy hikers regularly hiked from the bottom of the Trail at Lake Drive all the way to the peak,” that “the peak, with its survey marker, is the logical and obvious destination for any hiker on the Trail,” and that “a substantial number of the other hikers were hiking to the peak too” are all unsupported. Of the seven legacy hikers who used the trails in the relevant time period, only four testified they ever hiked to the peak, and only one, Goller, testified he did so regularly (on Sundays). Harris and Hemingway, who hiked the Hastain Trail four to five times a week in the summers of 1970 and 1971, hiked to the peak only once or twice a week in those two summers. Foran went to the peak a

⁵ The “idea of license” is the idea that owners of wildlands might permit occasional hikers to enter their property with no thought on either side that sparse, harmless use will ripen into prescriptive rights or public dedication. (See *Boyden v. Achenbach* (1878) 79 N.C. 539, 541 [footpaths “are understood to be used by leave, and they are closed when the owners of the lands desire to put them under cultivation or to enclose them”]; *Behrens v. Richards* (1905) 2 Ch. 614 at 620 (Eng.) [“In permitting persons to stray along the cliff edge or wander down the cliff face or stroll along the foreshore the owner of the land was permitting that which was no injury to him and whose refusal would have been a churlish and unreasonable act on his part. From such user nothing . . . is to be inferred”]; *Schwinge v. Dowell* (1862) 175 Eng.Rep. 1314 [permission to travel at will in an ancient forest does not show a right to the footpath]; Natural England The Countryside Code [“Leave gates and property as you find them and follow paths unless wider access is available”].) This is not a presumption, but a burden of proof. (See *Berk, supra*, 26 Cal.3d at p. 215 [cases are “to be decided not from the standpoint of presumptions but from that of ‘the sufficiency of the evidence’ ”].)

total of six or seven times in 1971. The trial court's finding that "most of the hikers" saw other hikers "throughout the length of the trail" is also unsupported. None of the legacy hikers testified he or she ever saw anyone else on the Peak Trail. Five of the six legacy hikers who saw others testified only that they saw them on "the trail," which in context meant the Hastain Trail, not the Peak Trail. Only Harris testified he saw people "all over the trail," which could be taken to mean also on the Peak Trail, but in context he was speaking of the trail from Lake Boulevard to Coldwater Canyon, which is the Hastain Trail. Harris testified about the Peak Trail separately, and did not say he ever saw anyone else on it.

Thus in 1967, 1968, 1969 and 1972, and most of 1970 and 1971, the only legacy hiker on the Peak Trail was Goller, who hiked only on Sundays. The trial court could not fairly infer solely from his example that others used the Peak Trail any other day.⁶

Even were we to assume Goller, Harris, Hemingway and Foran saw others on the Peak Trail, their own use was so sparse—Sundays for Goller, one or two days a week during two summers for Harris and Hemingway, and six or seven trips in 1971 for Foran—that their experience does not reasonably imply a substantial number of other hikers used the trail at other times or on other days. Therefore, no reasonable owner could have been put on notice that the Peak Trail was in danger of public dedication. The court found additional evidence of substantial use of the Peak Trail from the fact it had not become overgrown, which it would if unused. But no evidence suggested how much or what kind of use was necessary to prevent the trail from becoming overgrown. For all we know, the Sunday use by Goller and his friends would have sufficed. The issue is not whether the trail was used enough to retain its character as a trail, but whether the use was substantial enough to indicate to the owner that his property was in danger of being dedicated.

⁶ For a statistical inference from a sample (the legacy hikers) to a population (a substantial number of hikers) to be justified, the "sample must be sufficiently large to provide reliable information about the larger group. 'How many cases need to be sampled? This depends in large part on the variability of the population. The more diverse the population, the larger the sample must be in order to reflect the population accurately.' " (*Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 42 [172 Cal.Rptr.3d 371, 325 P.3d 916].) "Sampling is a methodology based on inferential statistics and probability theory. 'The essence of the science of inferential statistics is that one may confidently draw inferences about the whole from a representative sample of the whole.' [Citation.] Whether such inferences are supportable, however, depends on how representative the sample is. '[I]nferences from the part to the whole are justified [only] when the sample is representative.' " (*Id.* at p. 38.) Here, Goller is a sample of one.

III. Defendants' Other Arguments

In light of our conclusion that the Judgment Trail was improperly dedicated, we need not address defendants' arguments concerning the scope of the trail, the equities involved in relocating it, or the extent of the interest dedicated.

IV. Attorney Fees

Defendants appealed from the order awarding attorney fees to Scott and the Friends of the Hastain Trail. Because the judgment is reversed, the award of fees is also reversed. (*Samples v. Brown* (2007) 146 Cal.App.4th 787, 811 [53 Cal.Rptr.3d 216].)

DISPOSITION

The judgment and attorney fee award are reversed. The trial court is ordered to enter a new judgment in favor of defendants consistent with this opinion. Costs on appeal are awarded to defendants and appellants.

Rothschild, P. J., concurred.

ROTHSCHILD, P. J., Concurring.—I would make one further point. Although defendants may have raised equitable arguments and proposed their “Alternative Trail Easement” too late in the proceedings below, the court was mistaken when it expressed its belief that it did not have the power to consider equitable arguments in deciding where to locate the easement. Because the causes of action and relief plaintiffs prayed for were equitable, the court had the power to consider an equitable resolution—defendants’ proposed Alternative Trail Easement.

In determining whether an action is legal or equitable, we look at the substance of the complaint, “i.e., to the nature of the right involved and the remedy sought.” (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 123, p. 202.) Here, plaintiffs alleged causes of action for quiet title and requested injunctive relief. In particular, they sought a judicial determination that defendants’ predecessors had impliedly dedicated a trail for public recreational use, “as well as a determination of the location and dimensions of the public easement.” They also sought injunctive relief to prevent defendants from interfering with the public’s use of the trail. Plaintiffs did not seek damages.

The claims and remedies are entirely equitable in nature. (See *Aguayo v. Amaro* (2013) 213 Cal.App.4th 1102, 1109 [153 Cal.Rptr.3d 52] [quiet title is

ordinarily equitable]; *Sherwood v. Ahart* (1917) 35 Cal.App. 84, 87 [169 P. 240] [claim for an implied-in-law dedication of land for public use as a road was “not an action at law but one in equity”]; *Mesa Shopping Center-East, LLC v. O’Hill* (2014) 232 Cal.App.4th 890, 901 [181 Cal.Rptr.3d 791] [injunctive relief is an equitable remedy, not a cause of action].) Therefore, these claims are governed by equitable principles, and the court had the power to consider defendants’ proposed Alternative Trail Easement.

In addition to considering the equities between the parties, a court may also consider the public policy favoring the productive use of land. (See, e.g., *Daywalt v. Walker* (1963) 217 Cal.App.2d 669, 672 [31 Cal.Rptr. 899] [referring to the “sound public policy that lands should not be rendered unfit for occupancy”].) Here, the property was zoned for housing, and defendants had obtained permits to proceed with the project.

Where a fee owner can make a showing that an alternative route will result in an equal or better hiking trail and at the same time allow productive use of the remaining land, it makes no sense not to consider the claim. Precluding such consideration not only deprives a fee owner of the most economically viable use of the land but also deprives future, prospective homeowners of the opportunity to enjoy a home on that land. An alternative trail, on the other hand, which meets the criteria I describe, would accommodate the interests of both the current fee owner and future homeowners, as well as the public’s interest in a trail; a win-win situation.

Nothing in *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29 [84 Cal.Rptr. 162, 465 P.2d 50] or its progeny precludes a court’s evaluation of equitable considerations in deciding issues concerning implied dedication and the location of an implied easement. Indeed, in *County of Los Angeles v. Berk* (1980) 26 Cal.3d 201 [161 Cal.Rptr. 742, 605 P.2d 381], the defendant property owners asserted equitable arguments—estoppel and laches—as defenses to the plaintiffs’ implied dedication claims. Both the trial court and the Supreme Court considered these defenses on the merits. (*Id.* at pp. 221–222.) Although the owners’ arguments were rejected, the Supreme Court did not hold or suggest that equitable defenses had no place in an implied dedication case or that the trial court was powerless to consider an equitable resolution. Likewise, nothing in the court’s opinion in this case should be construed as precluding courts from considering such an equitable resolution.

CHANEY, J., Concurring.—I concur with the opinion in order to express an individual view on two issues.

First, even if substantial use of a fire road could ripen into public dedication of the servient tenement, no substantial evidence supports the trial court’s finding that the “Hastain Fire Road” experienced such use.

“[W]here an intent to dedicate is implied as a legal fiction from the nature of public usage, the caselaw requires a high standard of usage, lest private property rights be too easily diminished.” (*Hanshaw v. Long Valley Road Assn.* (2004) 116 Cal.App.4th 471, 482 [11 Cal.Rptr.3d 357].) “The use must be substantial, diverse, and sufficient, considering all the circumstances, to convey to the owner notice that the public is using the passage as if it had a right so to do.” (*Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 826, fn. 7 [93 Cal.Rptr.2d 193].) Factors to consider include the nature of the property, its physical condition, the owner’s knowledge (actual or imputed) of public use of the property, and the frequency and nature of the use. (See, e.g., *Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235, 241 [267 P.2d 10] [“general appearance, location and evident purpose of” property, the nature of the public’s use of it, and the owners’ knowledge of the use are considered when determining whether dedication occurred].)

Here, the only legacy hiker to have used the “Hastain Trail” every pertinent year was Goller, beginning when he was 10 years old, who used the trails only on Sundays. Harrow used the trail during only four of the five prescriptive years, having been away at college in 1969. Carl used the trail only after October 1968, and never hiked during the summer months. Harris and Hemingway hiked only six months, in the summers of 1970 and 1971. And Foran and Saul used the trail eight times between them in 1971. Thus for 21 months of the prescriptive period, from March 1967 to September 1968 and from January to March 1972, only Goller and Harrow used the Hastain Trail, and only on weekends. Carl began hiking the trail in October 1968, using it between zero and eight days per month for seven months out of the year. In 1969, Harrow went off to college, leaving Goller as the only hiker (and only on Sundays) from May to September 1969, joined by Carl during the other seven months. In 1970, Harrow returned, and Harris and Hemmingway began hiking in the summer, when Carl was absent. In 1971, with the addition of Foran and Saul, all seven legacy hikers used the trails.

I recognize the real issue is not how much the legacy hikers used the trail but how much usage may fairly be inferred from their observations while using it. (E.g., *Burch v. Gombos* (2000) 82 Cal.App.4th 352, 357 [98 Cal.Rptr.2d 119] [three legacy users testified about other users].) Here, Goller testified he observed eight to 20 people over the course of each of his hikes, and Harrow saw between two and 12 people each day he was on the trail. Carl’s experience was similar, as she occasionally saw groups of two to four on the trail. And this roughly matches the experiences of Harris and Hemingway, who saw between six and 20 people during their hikes, and to a lesser extent Foran, who would see one or two others. (Saul saw no one else.)

These observations support the trial court’s finding that the legacy hikers saw an average of “about three to four other hikers” on the Hastain Trail.

When it extrapolated the legacy hikers' experience "over the hours of the day and days of the year" to conclude that "thousands"¹ of hikers used the Hastain Trail during the prescriptive period, the court drew at least two reasonable inferences from the legacy hikers' observations. First, the court reasonably inferred use of the trail was basically uniform over the hiking hours of any given day. Because the legacy hikers testified to using the trail for one or two hours per trip and to seeing other hikers each trip,² it is reasonable to infer that others used the trail at other times on those days. The alternative hypothesis—that on every trip those encountered on the trail were the trail's only other users that day—would be highly unlikely. In a similar vein, it was also reasonable, with an exception we will discuss below, for the court to assume that usage was basically uniform from one day to the next. Legacy hikers used the Hastain Trail approximately one day out of three. That other users were encountered on each trip suggests even more hikers were there on days no legacy hiker went. Again, the alternative hypothesis, that visitors used the trail only on the days they were encountered by legacy hikers, is unlikely.

But the court could not reasonably infer from the legacy hikers' observations that the Hastain Trail saw substantial weekday use throughout the year, because for 54 out of 60 prescriptive months there is no evidence any legacy hiker used the trail on any weekday. Goller and Harrow used it only on weekends, and neither Carl, Foran nor Saul specified which days they hiked. Even taking into account the experience of Harris and Hemingway, the summer weekday hikers, there would still be no reason to infer several individuals used the trail on any nonsummer weekday. The alternative hypothesis, that the trail was *not* much used during weekdays in the nonsummer months, is reasonable, because days are shorter and people have jobs and school.

True, plaintiffs were not required to prove the public used the Hastain Trail every day, as the standard is only that the use be substantial. The "'thing of significance is that whoever wanted to use [the land] did so . . . when they wished to do so without asking permission and without protest from the land owners.'" (*Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29, 40 [84 Cal.Rptr. 162, 465 P.2d 50], quoting *Seaway Co. v. Attorney General* (Tex.Civ.App. 1964) 375 S.W.2d 923, 936.) But the use here does not qualify as substantial. It necessarily follows from the legacy hikers' experience of encountering "three to four" others on the trail that a reasonable owner on the trail would have a similar experience, and would be put on notice that the property was

¹ "[T]housands" of hikers over the prescriptive period is not necessarily substantial. Because the prescriptive period contained 1,827 days, "thousands" could mean as few as one to two users per day. We assume the trial court used the term in its nonspecific sense.

² I discount Saul's experience as an outlier.

used only by a handful of persons on weekends, and perhaps also on summer weekdays. This use can be described only as casual, exactly the sort an owner would permit because it does no harm and to refuse would be churlish and unreasonable. Such limited use would not put the owner on notice that the land was in danger of public dedication. Plaintiffs therefore made no showing that contradicted the idea of license, and therefore failed to satisfy *Gion*.

I would also hold that as a matter of law use of the “Peak Trail” by minors neither demonstrated a reasonable belief by the public that it had a right to use the property nor put defendants on notice the property was subject to public dedication.

Public dedication requires that “the public demonstrate through its actions that its members believed that they had a right to use the property.” (*County of Los Angeles v. Berk* (1980) 26 Cal.3d 201, 216 [161 Cal.Rptr. 742, 605 P.2d 381].) The belief must be reasonable. (*Ibid.*) But minors generally have a limited understanding of the rights attendant to ownership of real property and restrictions on its use by non-owners, and are as likely to believe they may enter any property at will. They are born trespassers, and it would be unreasonable for an adult to believe a minor’s entering onto private property reflects even the minor’s right to do so, much less a public right. Therefore, use of private property by children neither demonstrates the public’s reasonable belief that it has a right to use the property nor affords notice to the owner that the property is subject to dedication to the public.

Here, the only users of the Peak Trail for four of the five prescriptive years, 1967, 1968, 1969 and 1972, and the nonsummer months of 1970 and 1971, were Goller and his companions. Most of the time these users were minors. Goller went with his father when he was 10 years old and with his Cub Scout den—with an adult leader—when he was 11, but when he was 12, 13, 14, and perhaps 15, he visited the Peak Trail exclusively with his friends, who presumably were minors like him. Foran, another user in 1971, was also a minor. Neither testified to seeing anyone else specifically on the Peak Trail.

This use of the Peak Trail was insufficient to support a finding of public dedication.

JOHNSON, J., Dissenting.—I respectfully dissent.

The majority opinion not only distorts but also changes the law of implied dedication to reverse the trial court’s judgment in favor of Friends of the Hasting Trail and Mountains Recreation and Conservation Authority (MRCA) (collectively, Friends). The opinion bases its conclusions on factual assumptions not supported by the record, decides issues Coldwater Development

LLC and Lydda Lud, LLC (collectively, Hadid), did not raise at trial or on appeal, and gets our standard of review backward, all to reach a result precluded by proper application of established law and unsupported by the trial court's findings of fact. The result of the majority's revisionist approach to this case is that much of the "Hastain Trail," which has been used by the public for more than 50 years and which I believe the trial court correctly found was impliedly dedicated to the public at least 44 years ago, will now be lost forever to public use.

In *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29 [84 Cal.Rptr. 162, 465 P.2d 50] (*Gion*), the California Supreme Court concluded that an implied dedication of private land (three parcels of land on a shoreline, and a beach and the road leading to it) for public use occurred when the public had made use of the land for more than five years without objection by the owners. "[U]se by the public for the prescriptive period without asking or receiving permission from the fee owner [and] no evidence that the respective fee owners attempted to prevent or halt this use" meant "as a matter of law that a dedication to the public took place." (*Id.* at p. 44.) "What must be shown is that persons used the property believing the public had a right to such use. This public use may not be 'adverse' to the interests of the owner in the sense that the word is used in adverse possession cases. If a trial court finds that the public has used land without objection or interference for more than five years, it need not make a separate finding of 'adversity' to support a declaration of implied dedication." (*Id.* at p. 39.) "Litigants . . . seeking to show that land has been dedicated to the public need only produce evidence that persons have used the land as they would have used public land," in the case of a beach or shoreline, "as if it were a public recreation area," and if a road, "as if it were a public road." (*Ibid.*) The evidence must demonstrate that various groups of persons, not "a limited and definable number of persons," have used the land "when they wished to do so without asking permission and without protest from the land owners." (*Id.* at pp. 39–40.) "If the fee owner proves that use of the land fluctuated seasonally, on the other hand, such a showing does not negate evidence of adverse user." (*Id.* at p. 40.)

"For a fee owner [during the five-year prescriptive period] to negate a finding of intent to dedicate based on uninterrupted public use for more than five years . . . he must either affirmatively prove that he has granted the public a license to use his property or demonstrate that he has made a bona fide attempt to prevent public use. Whether an owner's efforts to halt public use are adequate in a particular case will turn on the means the owner uses in relation to the character of the property and the extent of public use. Although 'No Trespassing' signs may be sufficient when only an occasional hiker traverses an isolated property, the same action cannot reasonably be expected to halt a continuous influx of beach users to an attractive seashore property. . . . If the owner has not attempted to halt public use in any significant

way, however, it will be held as a matter of law that he intended to dedicate the property or an easement therein to the public, and evidence that the public used the property for the prescriptive period is sufficient to establish dedication.” (*Gion, supra*, 2 Cal.3d at p. 41.)

“Most of the case law involving dedication in this state has concerned roads and land bordering roads. [Citations.] This emphasis on roadways arises from the ease with which one can define a road, the frequent need for roadways through private property, and perhaps also the relative frequency with which express dedications of roadways are made.” (*Gion, supra*, 2 Cal.3d at p. 41.) Implied dedication rules apply with equal force, however, to purposes other than a roadway, such as parkland, athletic fields, and beaches. (*Ibid.*) “This court has in the past been less receptive to arguments of implied dedication when open beach lands were involved than it has [been] when well-defined roadways are at issue,” but increased urbanization, the intensification of land use, and the public policy in favor of expanding public access to shoreline areas “leads us to the conclusion that the courts of this state must be as receptive to a finding of implied dedication of shoreline areas as they are to a finding of implied dedication of roadways.” (*Id.* at p. 43.)

“The present fee owners of the lands in question have of course made it clear that they do not approve of the public use of the property. Previous owners, however, by ignoring the wide-spread public use of the land for more than five years have impliedly dedicated the property to the public. Nothing can be done by the present owners to take back that which was previously given away. In each case the trial court found the elements necessary to implied dedication were present—use by the public for the prescriptive period without asking or receiving permission from the fee owner. There is no evidence that the respective fee owners attempted to prevent or halt this use. It follows as a matter of law that a dedication to the public took place.” (*Gion, supra*, 2 Cal.3d at p. 44.)

After its partial abrogation by the enactment of Civil Code section 1009, *Gion, supra*, 2 Cal.3d 29 continues to apply to implied dedication claims preceding March 4, 1972. (*Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 822 [93 Cal.Rptr.2d 193] (*Blasius*)).

The majority opinion purports to follow *Gion, supra*, 2 Cal.3d 29, but in reversing the trial court’s judgment in favor of judgment in favor of Friends the majority reinvents the law of implied dedication.

I. No “fire road” easement prevents implied dedication.

The majority concludes that the lower portion of the Hastain Trail (Trail) runs over a fire road (the intended meaning of that term is undefined in the

record),¹ and therefore that portion of the Trail cannot be subject to implied dedication to the public. (Maj. opn., *ante*, at pp. 1033–1034.) But “[m]ost of the case law involving dedication in this state has concerned roads and land bordering roads.” (*Gion, supra*, 2 Cal.3d at p. 41.) In *Burch v. Gombos* (2000) 82 Cal.App.4th 352 [98 Cal.Rptr.2d 119], the trial court found implied dedication to the public of a one-lane dirt fire road constructed in the 1930’s under licenses between the original landowners and the Department of Forestry (which stopped maintaining the fire road sometime in the early 1970’s) based on three witnesses’ testimony of public recreational use of the fire road before 1972. (*Id.* at pp. 356, 358.) The landowners at the time of trial appealed, arguing that the trial court erred in admitting evidence of the public use of the fire road, and contending that the evidence did not support dedication sufficient to permit the respondent’s logging operations. (*Id.* at p. 355.) The appellate court applied *Gion, supra*, 2 Cal.3d 29, concluded “substantial evidence supports the finding of an implied dedication,” and remanded to the trial court to determine whether logging operations were within the scope of the resulting public easement over the fire road. (*Burch*, at p. 355; see *id.* at pp. 361–363.) An existing fire road—even one that was under license with a public agency during the dedication period—is not an obstacle to establishing implied dedication, and public recreational use of a fire road may result in dedication to the public outlasting the fire road itself.

Further, the majority’s factual statement gives the existence of a fire road unjustified prominence and a certainty unsupported by any substantial evidence in the record. Throughout the trial, witnesses (including the legacy hikers and experts on aerial photography) described the Trail as running in large part on a fire road with no definition of the term. Some witnesses used the terms fire road and Hastain Trail interchangeably. Where the Trail coincided with a fire road, the wider path meant better defined images of that portion of the Trail on aerial photographs. Additional testimony focused on a narrower peak Trail that ran from the lower portion of the trail to a medallion at the summit. The trial court’s statement of decision includes these factual findings: “The Trail consists of an old fire road leading from Lake Drive up the hill until very near the peak. At that point, the Trail veers east from the fire road up to the peak. The fire road is to the west of the peak. To avoid confusion, the term ‘Trail’ shall refer to the entire trail from Lake Drive to the peak. The term ‘Fire Road’ shall refer to that portion of the Trail which is the old fire road. The Fire Road is that portion of the survey, attached as exhibits A and B, of the Trail which is 15 feet wide.” (I will use the terms “Trail,” “Fire Road,” and “Peak Trail” as did the trial court.) The Fire Road was constructed by 1940 to replace a fire road or fire break that went over the peaks of several hills and was abandoned, becoming overgrown where not

¹ As I explain below, nothing in the record indicates when or if the road has been under the auspices or control of any public agency.

used by hikers. The court found: “[T]he public use of the Trail was open and obvious. The existence of the Fire Road by itself across the properties should have put any prudent owner or purchaser on inquiry as to the use of the Fire Road, and any reasonable inquiry or observation would have disclosed the public use of the Trail.” “Near the summit, the Peak Trail branches off east from the Fire Road. Based on the aerial photographs and the testimony of the legacy hikers, it is clear that the public hiked to the peak along the Peak Trail and therefore had to use the Fire Road to get there.” Hadid’s 2004 grading created a slight modification to the Peak Trail which meant “hikers must now travel a little further up along the Fire Road” to access the Peak Trail.

The majority makes unsupported appellate findings of fact regarding the Fire Road. “Absent exceptional circumstances, no such findings should be made. [Citation.] There are no exceptional circumstances in the instant case.” (*Tyrone v. Kelley* (1973) 9 Cal.3d 1, 13 [106 Cal.Rptr. 761, 507 P.2d 65].) The record does not contain any legal description of the Fire Road, any recorded easement related to the Fire Road, or any testimony from a fire department or from an expert on fire roads. No evidence whatsoever establishes which fire department created the Fire Road, or the status of the Fire Road during the five-year implied dedication period from March 1967 to March 1972. Hadid had the burden to present evidence at trial of any preexisting easement on the Hasting Trail that would defend against implied dedication, but he presented none. Hadid did not request factual findings regarding the Fire Road or argue at trial or on appeal that the presence of the Fire Road was dispositive of the status of the Trail. When invited to submit supplemental briefing on the issue, Hadid provided no evidence suitable for judicial notice regarding the Fire Road. Just as there is no evidence that there was a fire road easement in place on the Fire Road during the dedication period, there is no evidence regarding if and when any such easement was created or abandoned.

Despite this complete dearth of evidence, the majority inexplicably concludes that there was a “public easement” on the Fire Road throughout the five-year implied dedication period and therefore the legacy hikers’ use of the Fire Road could not have put the property owners on notice of possible dedication of the Trail to the public for recreational use. This edict must be seen and highlighted for what it is—judicial fiat; it is legally wrong and unsupported by facts in the record.

The majority cites Los Angeles Municipal Code (Mun. Code) sections providing that the fire chief can create and maintain fire roads when necessary to protect life and property, and such roads are “granted to the City without cost as easements from a public street or alley to the required terminal point.” (Mun. Code, § 57.503.1.6.; see maj. opn., *ante*, at p. 1030.) The majority can point to no evidence that the Fire Road was created pursuant to the Municipal Code,

or that the Fire Road continued to be such a fire road during the dedication period. Even if such evidence existed, by the terms of the Municipal Code any resulting easement would have been granted *to the city*, not to the general public, for the purpose of allowing the city access to fight fires. The majority also errs in stating, without factual or legal support, that a fire road easement granted to the city would allow the underlying property owners to reasonably contemplate that the general public would use the fire road for hiking and dog walking. (Maj. opn., *ante*, at p. 1031.) As far as I can tell, there is no basis for this conclusion other than the mere prestidigitation of a justice's pen. There was no testimony to this effect. Consistent passage by hikers on a fire road would serve as notice to a landowner that the road was being used as a hiking trail, and as I explain more fully below, would be adverse to the private landowner for the purposes of implied dedication. (See *Burch v. Gombos*, *supra*, 82 Cal.App.4th at p. 355.)

Even if the record contained evidence that the city had been granted an easement over the Fire Road that was in place during the five-year dedication period, the hikers' use of the Fire Road was adverse to the owners of the private property underlying the Fire Road and continuous use would have given the owners notice that the Fire Road was being used as a hiking trail.² "It is established law that one, while recognizing a superior title or right in a governmental entity, may nevertheless adversely possess land as against others," including those holding the private fee interest underlying a government easement. (*Abar v. Rogers* (1972) 23 Cal.App.3d 506, 513 [100 Cal.Rptr. 344].) And as any easement for fire control purposes would be the city's, not the general public's, the use the legacy hikers and others made of the Trail could not and did not constitute increased use by the holder (a public agency or public entity) of a fire road easement.

In *Blasius, supra*, 78 Cal.App.4th 810, private landowners appealed from a judgment concluding that under *Gion, supra*, 2 Cal.3d 29 the public acquired by implied dedication an easement on a road for "'walking, jogging, riding bicycles and horses, and fishing in the Rattlesnake Canal,'" subordinate to an existing written easement of record in favor of the Nevada Irrigation District, which maintained and operated the canal area for irrigation purposes. (*Blasius*, at p. 819.) The canal consisted of a ditch 16 feet wide and an adjacent berm. Atop the berm was a nine-foot-wide road used and maintained by the irrigation district for canal access, maintenance, and repair. The landowners holding the underlying fee interest blocked the canal road with a locked gate at each end of the section of the road on their land, allowing access only to themselves and the irrigation district, and Friends of the Trails filed a

² No fire department is a party, and there is no evidence of any public entity seeking to prevent the public from hiking on the fire road. The two legacy hikers asked whether they ever saw fire vehicles on the fire road testified that they saw none.

complaint against the landowners and the district to quiet title to a public easement for recreational purposes. At trial, witnesses testified that “‘various people, young and old’” used the canal road from the 1940’s to 1971 for jogging, walking, riding bicycles or horses, fishing, and walking to and from school and other places, all believing (as did the hikers in this case) that it was a public right of way. (*Blasius*, at pp. 817–819.) The appellate court approved the trial court’s application of *Gion* to a claim of implied public “dedication of rights-of-way for pedestrian, equestrian, and bicycle travel” on the road, as “[w]ell within the . . . reach of the common law of dedication is the establishment of a public footway. [Citations.] There is no principled basis for not applying the rule of implied dedication to any ‘highway,’ within the generic usage of that term, to all sorts of public ways, e.g., to a bridle way, bicycle path, or any combination of such use as a right-of-way.” (*Blasius*, at p. 824.) Characterizing “‘adversity’” in implied dedication cases as “whether ‘persons have used the land as they would have used public land,’ ” *Blasius* concluded that *Gion* “plainly contemplates that ‘adversity’ for purposes of implied dedication may arise as to recreational pedestrians in rural areas.” (*Blasius*, at pp. 824–825.) While “‘an occasional hiker travers[ing] an isolated property’” might not be sufficient for implied dedication, “a long history of continued passage by a diverse group of occasional hikers across a well defined privately owned trail segment leading to a network of trails, say on a public wilderness area, might suffice.” (*Id.* at pp. 825–826 & fn. 7.) The court also rejected the argument that a public easement established by implied dedication was precluded by the preexisting easement in a public entity (the irrigation district), as the district did not show the easements were incompatible. (*Id.* at p. 826.)

Blasius, supra, 78 Cal.App.4th 810 affirmed a judgment finding implied dedication to the public for recreational purposes over privately owned property, on an access road governed by a written easement belonging to a public entity that used and maintained the road for the purpose of repairing and maintaining an adjacent canal. Even if the evidence had shown an existing easement on the Fire Road belonging to a public entity who maintained the road for fire control purposes, the long history of use of the well-defined Fire Road by a diverse group of hikers entering and leaving a network of trails on a public wilderness area would be sufficiently adverse to establish a public trail easement by implied dedication.³ As I explain below, substantial evidence established that public easement over the entire trail.

³ The majority’s conclusion that *Blasius, supra*, 78 Cal.App.4th 810 does not apply because the description of the Hastain Trail easement (as stipulated to by the parties) in an exhibit to the judgment included the metes and bounds is puzzling. (Maj. opn., *ante*, at p. 1033.) A metes and bounds description in a judgment does not change the nature of the easement, but rather determines the exact contours of the public right of way. In *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 307 [130 Cal.Rptr.2d 436], the court affirmed the trial court’s finding of a historical public road on private property, but remanded for a determination

Contrary to the majority's assertion (maj. opn., *ante*, at p. 1033), we are aware of no case (and the majority cites none) which holds that an owner can remove a road that has been impliedly dedicated to the public. This dualism is another example of the arbitrariness of the majority decision. No principled basis exists for the majority's conclusion that no matter how substantial the public use of the Trail during the dedication period, the existence of the Fire Road prevents implied dedication to the public of the lower portion of the Trail. This conclusion is a glaring departure from existing precedent.

II. *Substantial evidence supports public dedication of the Peak Trail.*

To conclude that the use of the Peak Trail was "minuscule" and therefore insufficient to establish implied dedication, the majority states: "The issue is not whether the trail was used enough to retain its character as a trail, but whether the use was substantial enough to indicate to the owner that his property was in danger of being dedicated." (Maj. opn., *ante*, at pp. 1035, 1036.) The majority requires more of respondents and the trial court than the law demands. As *Gion*, *supra*, 2 Cal.3d 29 explained, litigants seeking to show implied dedication must show only that the public has used the land as they would have used public land *for the use the litigants seek to establish*, in the case of a beach or shoreline, "as if it were a public recreation area," and in the case of a road, "as if it were a public road." (*Id.* at p. 39.) Friends needed to show that the public used the Peak Trail as if it were a public hiking trail, not, as the majority would require, that the use met some otherwise unspecified standard. Testimony established that during the dedication period hikers regularly traversed the Peak Trail as if it were a public hiking trail, and historical aerial photographs showed the hikers' use made the Peak Trail visible. Under the majority's standard, even if (as here) a trail was used sufficiently "to retain its character as a trail" (maj. opn., *ante*, at p. 1036), that use could not establish public dedication. As *Blasius*, *supra*, 78 Cal.App.4th 810 pointed out, the inference of public use is available "as to recreational pedestrians in rural areas," including when the evidence shows hiking on an isolated property: "'No Trespassing' signs may be sufficient [to demonstrate a bona fide attempt by the landowner to prevent public use] when only an occasional hiker traverses an isolated property"

of the metes and bounds to establish the exact route and width of the public road "as . . . necessary to define the public road now running" through the private property. The majority's conclusion is also speculative. The appellate opinion in *Blasius* does not include the entire judgment, which very well may have included a precise description of the easement in metes and bounds. (*Blasius*, *supra*, 78 Cal.App.4th at pp. 819–820.)

Further, if the irrigation district in *Blasius* constructed another canal elsewhere, there is no reason why the public could not continue to use the impliedly dedicated public easement on the road adjacent to the former canal after the district no longer maintained the road.

(*Gion-Dietz, supra*, 2 Cal.3d at p. 41.) The owner would have no occasion to rebut the finding of ‘adverse’ public use unless that inference were available.” (*Blasius*, at p. 825.)

The majority’s conclusion that sufficient evidence did not establish use of the Peak Trail also violates the fundamental substantial evidence rule. When an appellant attacks a court’s finding as not sustained by the evidence, “the power of an appellate court begins and ends with the determination whether there is any substantial evidence, contradicted or uncontradicted, which will support the verdict. Questions of credibility must be resolved in favor of the factfinder’s determination, and when two or more inferences can reasonably be drawn from the evidence, a reviewing court may not substitute its deductions for those of the trier of fact. If on any material point the evidence is in conflict, it must be assumed that the court . . . resolved the conflict in favor of the prevailing party.” (*Abar v. Rogers, supra*, 23 Cal.App.3d at p. 510.) By analogy, where the law of implied dedication would only require proof that for the prescriptive period various sandlot baseball games occurred regularly and frequently on private property, the majority seemingly requires proof of team rosters (with a full team of at least nine players on each side), uniform colors, and evidence of games year-round with no off-season and no rain outs.

At every turn, the majority construes the evidence against Friends, the prevailing party, belittles and minimizes the uncontradicted testimony of the legacy hikers, and fails to mention other evidence in the record supporting the trial court’s findings. I begin with the majority’s statement that a number of the trial court’s specific findings are unsupported in the record. (Maj. opn., *ante*, at p. 1035.) To the contrary, each of the findings is supported by substantial evidence.

First, the trial court found: “Several of the legacy hikers hiked the Trail during each of the years from 1962 to 1972.” The majority asserts that this is wrong because only one legacy hiker testified he hiked the Trail *every* year from 1967 to 1972. (The relevant time period is Mar. 4, 1967, to Mar. 4, 1972.) The trial court stated only that in *each* year, several hikers hiked the Trail, not that several hikers hiked the Trail *every* year.

Second, the trial court found: “Most of the legacy hikers regularly hiked from the bottom of the Trail at Lake Drive all the way to the peak.” Four legacy hikers testified they regularly hiked all the way to the peak. James Goller stated he and his father “[just about] all the time” went up to the medallion at the peak, and when he hiked with the Cub Scouts they would go all the way to the top too. Frederic Harris and Carole Hemingway hiked to the peak once or twice a week in the summers of 1971 and 1972. Cynthia

Foran hiked to the medallion at the peak in 1971 six or seven times with her brothers and with friends. The trial court's conclusion is amply supported by the testimony of four of the seven legacy hikers.

Third, the trial court found: "From the testimony and the court's own observation of the Trail, the peak, with its survey marker, is the logical and obvious destination for any hiker on the Trail." It is undisputed that at the time of the trial court's visit to the site of the Trail and during the years from 1967 to 1972, a medallion marked the top of the Peak Trail. Harris testified that there was a marker at the peak of the trail. Hemingway testified that she and Harris often hiked up to the medallion, and the medallion was "a place where we would say, okay, let's go back down again." Goller testified he remembered finding the medallion unusual and asking his father about it, and reaching the medallion was the challenge of hiking the trail. Foran testified that at the highest point of the trail there was a medallion in the ground. Paul Edelman, who worked as chief of natural resources and planning for the Santa Monica Mountains Conservancy and also worked for the MRCA, testified that the peak of the Trail was a "key resource[]" of Franklin Canyon Park because it allowed the public to hike up high enough to get the view. Keith Lehrer, who hiked the trail in 1965, testified that he, his friend, and his friend's father would hike all the way up for the 360-degree view at the medallion, which his friend's father "jokingly referred to it as something from the space aliens . . . [¶] . . . [¶] It was a big event when we went to the space marker." A marker at the peak of a trail is a logical and obvious destination for hikers, as it was for the majority of the legacy hikers testifying at trial.

Fourth, the trial court found: "Most legacy hikers testified . . . that the other hikers were seen throughout the trail," and "a substantial number of the other hikers were hiking to the peak too." Harris testified that he saw half a dozen to a dozen people when he hiked the Trail, and he saw the same number of people on the Peak Trail. Hemingway testified she consistently encountered between a dozen to 15 or 20 other people on the Trail (including groups with a leader) on the course of her entire hike and "going all the way up." Goller testified he almost always saw eight to 20 people on his entire trip going up and down, including groups of six people. On direct and cross-examination, Foran testified she saw "two to four" others on the entire area of the Trail each time she hiked.

Additional substantial evidence supported travel over the Peak Trail. The trial court concluded that Friends' aerial photography expert, Brian Bradshaw, was credible when he testified that aerial photography during the implied dedication period showed a trail leaving the Fire Road and heading north to the peak and that the lack of vegetation showed usage of the Peak Trail. The

majority's complaint that "no evidence suggested how much or what kind of use was necessary to prevent the trail from becoming overgrown" (maj. opn., *ante*, at p. 1036) refuses to credit the trial court's factual finding because *Hadid* did not meet his burden to challenge it. Although Robert Pope, Hadid's aerial photography expert, testified that he did not see a defined trail, I defer as I must to the trial court's finding that Bradshaw was credible, and the trial court was entitled to resolve conflicts in the evidence. Even Pope did not dispute that a variety of people could have hiked up to the peak and the medallion in 1968 to 1971 or thereabouts.

The majority opinion misapplies the law, jettisons its obligation to construe the evidence in favor of the prevailing party, and misconstrues the record. Strong precedent and sufficient evidence support the trial court's findings regarding the Peak Trail.

III. *Substantial evidence supported the public dedication of the Fire Road.*

Justice Chaney's concurrence requires evidence of uniform use of the Fire Road, in direct conflict with *Gion*, *supra*, 2 Cal.3d 29. The concurrence admits that it was reasonable for the trial court to infer substantial use of the Fire Road on the weekends, but concludes that the court could not infer similar use during the week. (Conc. opn. of Chaney, J., *ante*, at p. 1040.) This approach would require that testimony establish that the same number of hikers were on the Fire Road every day of the year regardless of the season. Evidence of uniform and uninterrupted use by the public is not required to establish implied dedication. In *Gion*, the court described evidence showing large numbers of people on Navarro Beach "at times," and visits by schoolchildren "during good weather," and expressly rejected the concurrence's approach: "If the fee owner proves that use of the land fluctuated seasonally, on the other hand, such a showing does not negate evidence of adverse user. '[The] thing of significance is that whoever wanted to use [the land] did so . . . when they wished to do so without asking permission and without protest from the land owners.' " (*Gion*, at pp. 37, 40.) While Justice Chaney admits that weekday use of the Trail would naturally be lower, the concurrence errs in drawing that inference *against* the trial court's finding. (Conc. opn. of Chaney, J., *ante*, at p. 1040.) A landowner may have constructive notice of public use of his or her property when that public use ebbs and flows with the rhythms of daily life and the seasons, and the evidence need not establish that the amount of use never varied.

Blasius, *supra*, 78 Cal.App.4th 810 described testimony by witnesses that the canal access road was used "by various people, young and old, families and single persons, friends, guests, visitors and strangers" including school age children, without specifying days of the week, time of day, seasons, or

the number of people on the road. (*Id.* at p. 819.) Similarly, the Fire Road was hiked by various people, young and old, families and single persons, friends, guests from out of town, and visitors, including Cub Scouts and children hiking with their siblings and with parents. *Blasius* explained that “[t]he central question concerns ‘adversity’—whether ‘persons have used the land as they would have used public land.’” (*Id.* at p. 824.) The testimony here showed that the hikers used the Fire Road as they would have used a public trail, for hiking and dog walking. In reviewing the landowners’ argument that “there is not sufficient evidence to satisfy the *Gion-Dietz*[, *supra*, 2 Cal.3d 29] criteria,” the *Blasius* court explained: “[T]he critical question of fact [is] whether the use shown to have been made of the property by the public is ‘such that the trier of fact is justified in inferring an adverse claim and user and imputing constructive knowledge thereof to the owner.’” (*Blasius*, at pp. 824–825.) Emphasizing that the testimony showed (as it did in this case) that the public used the road in the belief they had the right to do so, the court observed: “While the anecdotal evidence of such use is inherently difficult to reduce to a precise traffic count, the testimony of the witnesses of their use and observation of others’ use affords an inference that such use was far from rare; in the words of the trial court it was ‘continuous, regular and open use.’” (*Id.* at p. 825.) Here, no precise traffic count must be calculated from the hikers’ testimony to conclude that the trial court could infer the hikers’ use of the Fire Road was “open, visible, and notorious.”

Blasius, *supra*, 78 Cal.App.4th 810 also cautioned that “fact patterns are myriad and the question often imbued with overtones of local norms, customs, and expectations. That is one reason why such cases, unless clearly outside the range of discretion, generally warrant deference to the local finder of fact. [¶] The *Gion-Dietz*[, *supra*, 2 Cal.3d 29] opinion plainly contemplates that ‘adversity’ for purposes of implied dedication may arise as to recreational pedestrians in rural areas.” (*Blasius*, at p. 825, italics added.) Testimony established “a long history of continued passage by a diverse group of occasional hikers across a well defined privately owned trail segment,” the Fire Road. (*Id.* at p. 826, fn. 7.) As in *Blasius*, the trial court herein did not abuse its discretion when it found that the level of use was sufficient to convey to the landowners during the relevant time that the use was adverse within the meaning of *Gion*. (*Blasius*, at pp. 825–826.)

The concurrence also misapplies the rule of substantial evidence. “[W]e ‘must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is . . . to be resolved in favor of the finding.’” (*Hanshaw v. Long Valley Road Assn.* (2004) 116 Cal.App.4th 471, 481 [11 Cal.Rptr.3d 357].) Justice Chaney minimizes the hikers’ testimony and makes every inference against the finding of the trial court that use

of the Fire Road was sufficient for implied dedication. Goller testified that he hiked the Trail on Sunday mornings with his father, and he also testified that he hiked the Trail six times with the Cub Scouts and later, when he was in his early teens, he hiked the Trail many times in the afternoons with friends. The reasonable inference is that Goller did not hike only on Sundays, and the trial court could infer that he hiked the Trail during the week. Justice Chaney acknowledges that Harris and Hemingway hiked during the week, but states that Joan Carl, Foran, and Richard Saul did not specify which days they hiked, and then infers that they did *not* use the Trail on weekdays, making an impermissible inference *against* the trial court's findings. (Conc. opn. of Chaney, J., *ante*, at p. 1040.) Justice Chaney fails to mention that that on weekdays Harris and Hemingway saw between six to 12 parked cars at the trailhead and that Foran also saw cars parked at the bottom, as the trial court noted in its statement of decision.

Finally, Justice Chaney discounts the testimony of the hikers regarding their experiences as minors, because minors are "born trespassers" and would not have a reasonable belief that they had a right to walk on the Peak Trail. (Conc. opn. of Chaney, J., *ante*, at p. 1041.) This is an unsupported assumption, and ignores that the hikers who hiked the Trail when they were minors testified that they believed the Trail was public property and that they had a right to hike it. Evidence of use by minors is relevant to establish implied dedication. In *Burch v. Gombos*, *supra*, 82 Cal.App.4th 352, one of the three witnesses who testified used the fire road only as a teenager. (*Id.* at p. 357.) Testimony of use by children also was in evidence in *Gion*, *supra*, 2 Cal.3d at page 37 and in *Blasius*, *supra*, 78 Cal.App.4th at page 819. On behalf of all young people, I object to this dismissive and broad characterization. Clearly, if our courts have determined that minors may be competent witnesses in the most sensitive of cases, it is reasonable to assume that they can possess the awareness to form an opinion as to whether they have a right to occupy a particular space. Make no mistake, Justice Chaney's concurrence would make a new credibility finding—contrary to that of the trial court—based solely upon a stereotype having no basis in the record or the law. That is not the province of appellate review.

IV. *The trial court did not have the power to relocate the trail easement.*

Presiding Justice Rothschild's conclusion that the trial court had the power to consider an equitable relocation of the Trail has no support in California law or evidence in the record. (Conc. opn. of Rothschild, P. J., *ante*, at p. 1037.) The trial court properly recognized that under our Supreme Court precedent, once the Trail was established by implied dedication, the court had no power or obligation to allow Hadid not to respect the easement established by implied dedication. Further, Hadid did not request relocation of the Trail

during trial, and no evidence at trial supported relocation of the Trail easement. As the trial court explained in its statement of decision: “Defendants . . . request a finding as to whether the easement would ‘deprive Defendants [of] the ability to develop [the property].’ That is not an element of a cause of action for implied dedication and is irrelevant. When Defendants acquired the property, they took subject to whatever easements and encumbrances had been created by prior owners. The court makes no ruling on Defendants’ development plans, except that the public easement must be respected.” The court addressed the merits of Hadid’s affirmative defense of laches (the only affirmative defense for which he presented evidence), and after thoughtful discussion, rejected it. The trial court continued: “Even if Defendants had alleged the equitable affirmative defenses (and assuming the defenses apply in the implied public dedication context), Defendants are simply not in an equitable position. Defendants’ alleged ‘hardship’ did not arise until the 21st century. Plaintiffs’ rights to a public recreational easement accrued in 1972. Defendants’ claim is 40 years too late. As stated in *Gion*, *supra*, [2 Cal.3d] at [page] 44: ‘Nothing can be done by the present owners to take back that which was previously given away.’ Nor is compensation part of the analysis,” which in this case was not required by equity.

The trial court was correct. Our Supreme Court has not hesitated to apply *Gion*, *supra*, 2 Cal.3d 29 even when implied dedication to the public deprived the owners of any possibility of developing the property. In *County of Los Angeles v. Berk* (1980) 26 Cal.3d 201 [161 Cal.Rptr. 742, 605 P.2d 381] (*Berk*), quoted by the trial court, the county and the City of Torrance brought separate actions to establish a “‘public beach recreation easement’” on oceanfront property owned by Oscar and Shirley Berk. (*Id.* at p. 206.) After Berk drew up plans for an apartment complex, the cities of Torrance and Redondo Beach each advised him that his plan would require no variances. Berk purchased the property, and with a permit from Redondo Beach, he began construction in February 1971. When he applied for a building permit in Torrance, however, the city filed an action to quiet title to public recreational easements, and the county filed its own action regarding the Redondo Beach portion of the property. (*Id.* at pp. 208–209.) *Gion* had been filed more than six months before he opened escrow on the property, but Berk learned of it only after escrow had closed, and no one in either city had advised him of the decision or its effect. (*Berk*, at pp. 209–210.)

The trial court found an easement arising out of implied dedication for public recreational purposes over the entire property, rejected the affirmative defenses of laches and estoppel, and denied Berk’s cross-complaint for damages. (*Berk*, *supra*, 26 Cal.3d at pp. 210–211). Before the California Supreme Court, Berk argued (among other arguments) that fundamental fairness (including laches and estoppel) barred the result reached in the trial court. (*Id.* at p. 212.) In rejecting the application of estoppel and laches, the

court explained: “[A]ny reliance by the Berks on the actions of the governmental entities here involved was clearly unreasonable. It simply cannot be maintained that an existing or prospective property owner, upon being advised by planning and building officials that a given project complies with applicable local codes, thereby gains the right to proceed with that project regardless of the rights of third parties or the public in the property on which it is proposed to be built.” (*Id.* at p. 221.) Further, “the owner of property or one proposing to acquire it cannot justify his ignorance of the true state of the facts and the law affecting it by pointing to similar ignorance in government bodies. Negligence . . . cannot be so easily excused in one whose interest is focused upon a particular piece of property.” (*Ibid.*)

“[A]s prospective purchasers of the subject property, [the Berks] had at their disposal ample means of informing themselves of all of the considerations, legal and otherwise, which might have had an effect on the wisdom of their decision. Rather than availing themselves of the full range of these means, however, they apparently chose to limit their inquiry to those considerations relating to the feasibility of proceeding with their plans in light of applicable zoning and building codes. In so doing they wholly neglected to inform themselves on the current state of the common law and its possible effect on the property they proposed to purchase.” (*Berk, supra*, 26 Cal.3d at p. 223.) Like Berk, Hadid had ample means of informing himself of all the considerations relevant to his purchase of the property, but limited his inquiry to examining the title and making physical inspection of the property. Hadid stated that until this lawsuit, he had never heard of a public recreational easement, thus showing that he neglected to inform himself on the common law’s possible effect on the property.

In *Gion, supra*, 2 Cal.3d 29, as in this case, “[t]he present fee owners of the lands in question have of course made it clear that they do not approve of the public use of the property. *Previous* owners, however, by ignoring the wide-spread public use of the land for more than five years have impliedly dedicated the property to the public. Nothing can be done by the present owners to take back that which was previously given away.” (*Id.* at p. 44, italics added.) “Nothing” means the trial court could not move the Trail to suit Hadid, just as the trial court would be without power to move the Trail to make the route better for hikers. *Berk, supra*, 26 Cal.3d 201 makes clear that prospective purchasers must inform themselves not only of what appears on recorded instruments and in local codes but also of the possible effect of the common law.

Presiding Justice Rothschild’s suggestion that public policy favors development of the land is irrelevant, and flies in the face of the entire history of implied dedication to the public. (Conc. opn. of Rothschild, P. J., *ante*, at

p. 1038.) I take exception to Presiding Justice Rothschild's contention that an alternative trail combined with home development would be a "win-win situation" for all parties. (Conc. opn. of Rothschild, P. J., *ante*, at p. 1038.) Under her scenario, the public would still lose the extant historical Trail. The equities in this case do not balance equally. The interests of a few buyers of Hadid-constructed homes⁴ and of Hadid himself are not equivalent to the public's interest in preserving the historical Trail for future use by generations to come.

As Presiding Justice Rothschild concedes, no evidence supported a relocation of the Trail. (Conc. opn. of Rothschild, P. J., *ante*, at p. 1037.) Hadid did not allege a hardship defense, and offered no evidence at trial regarding the relocation of the Trail. Hadid did not testify that he could not develop his land if the Trail remained, and did not testify regarding any other hardship or relocation.

Contrary to the majority's assertion on page 1022, *ante*, the defense expert in surveying and grading, Ken Shank, testified that he had never been asked by Hadid to reroute the Trail, and even if it were rerouted "there's really no practical place to put it if you're going to develop land over in this area." The only evidence at trial was that the Trail *could not* be relocated to minimize its effect on development. Hadid first raised the issue of relocation in his objections to the court's proposed statement of decision, attaching a declaration from Shank proposing an alternative easement (and contradicting Shank's trial testimony that no alternate route was practical). The trial court sustained Friends' objection to the declaration. After entry of judgment, Hadid's declaration attached to his motion for new trial stated that he had proposed an alternative easement to Friends during settlement discussions. The evidence of a settlement offer was inadmissible in the trial court under Evidence Code section 1152, subdivision (b). Just as the record contains no competent evidence regarding the status or provenance of the Fire Road, the record contains no competent evidence supporting relocation of the Trail. Moreover, Presiding Justice Rothschild's insistence that the trial court had the power to alter a trail whose public dedication vested more than 44 years ago reflects a troubling disregard for the permanence of public dedication once it has occurred. There are no do-overs 44 years later. Mohamed Hadid no more had a leg to stand on when he belatedly requested equitable rerouting of the Trail than the trial court had the legal basis to contemplate such relief, once it had determined that implied dedication had vested by 1972.

⁴ Mohamed Hadid testified that he had been a developer worldwide for 40 years, and after moving to Southern California in 1991 he had developed commercial buildings and megamansions (homes from 15,000 to 60,000 square feet).

The majority and the concurrences have done for Mohamed Hadid what he and his lawyers could not do in the trial court, by minimizing and disregarding the detailed and credible testimony of civic-minded citizens who knew and enjoyed the Trail at least three decades before Hadid saw the land as ripe for development and profit, and by disregarding settled precedent and creating new law.

CONCLUSION

The late Senator and statesman from New York, Daniel Patrick Moynihan, frequently observed: “[Y]ou are entitled to your own opinion, but you are not entitled to your own facts.” (Penny, *Facts Are Facts* (Sept. 4, 2003) National Review, at p. 1.) I would humbly add to that: And not your own law either.

This axiom, which applies equally to kitchen table discussions, academic and political discourse, and appellate review, is part of our societal fabric and underlies our faith in the judicial process.

I, therefore, must respectfully dissent. I would affirm the judgment and the order awarding attorney fees to Friends of the Hastain Trail and Mountains Recreation and Conservation Authority.

A petition for a rehearing was denied August 24, 2016. Johnson, J., was of the opinion that the petition should be granted. The petitions of all respondents for review by the Supreme Court were denied October 12, 2016, S237073.

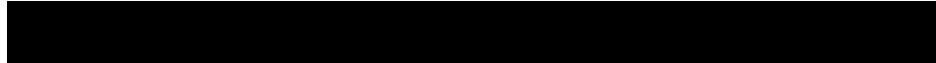
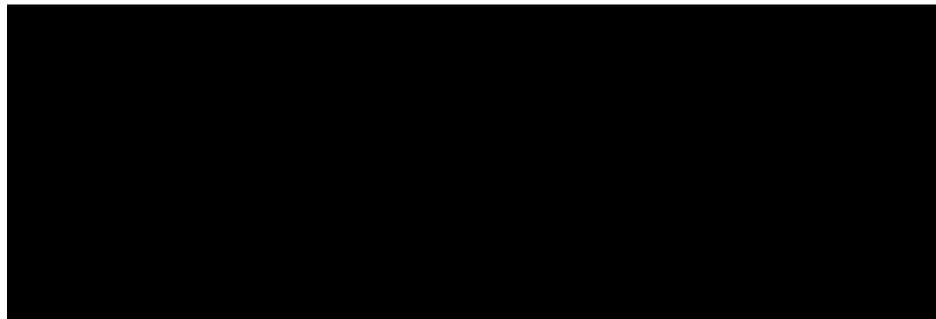
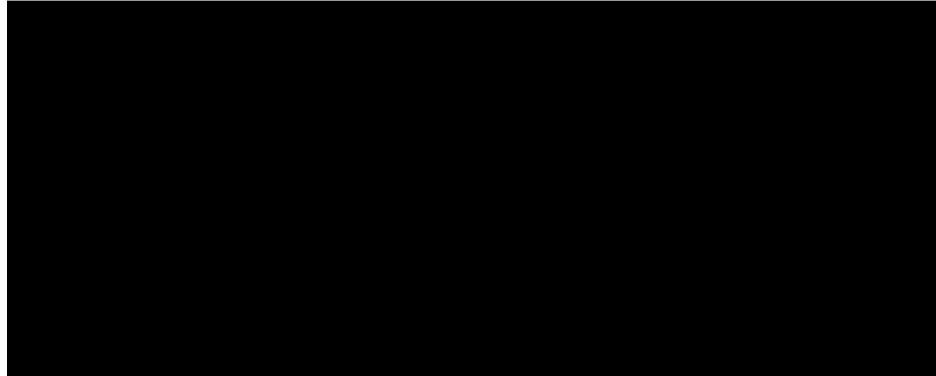
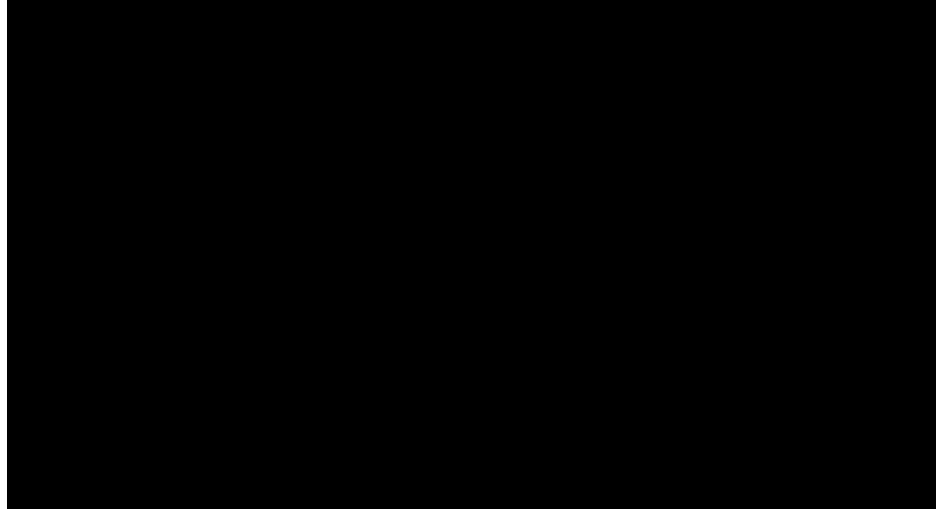
[No. A142012. First Dist., Div. One. July 27, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
THOMAS EARL PUTNEY, Defendant and Appellant.

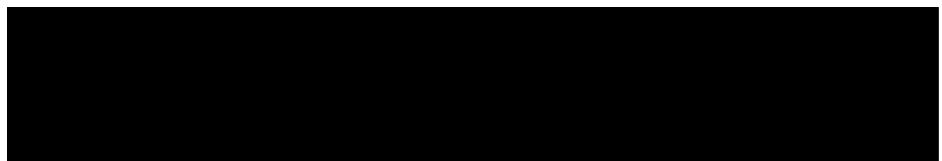
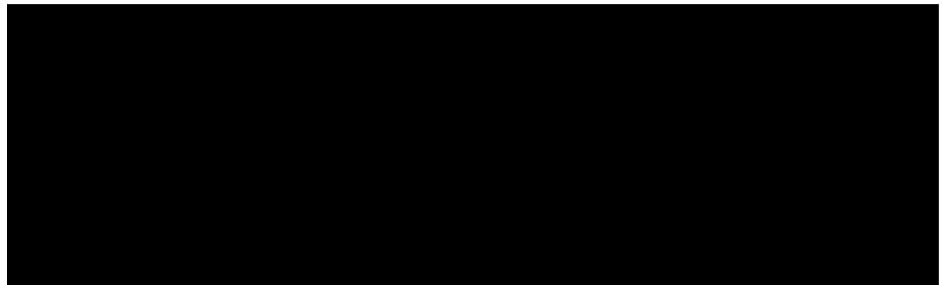
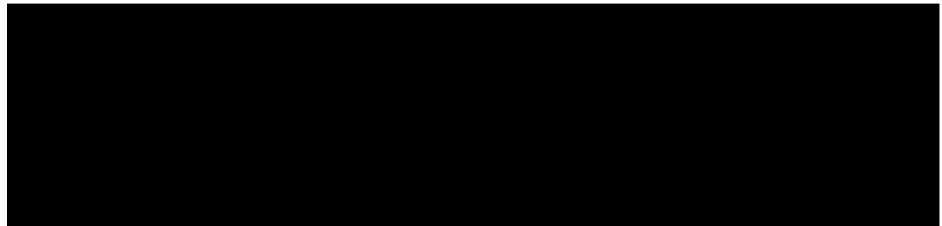
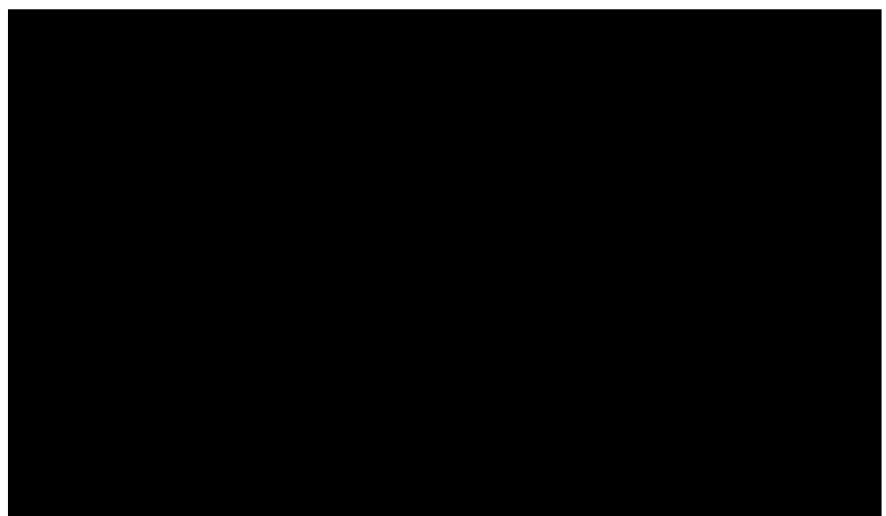
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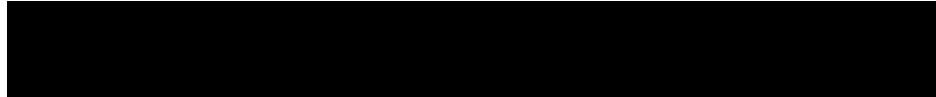
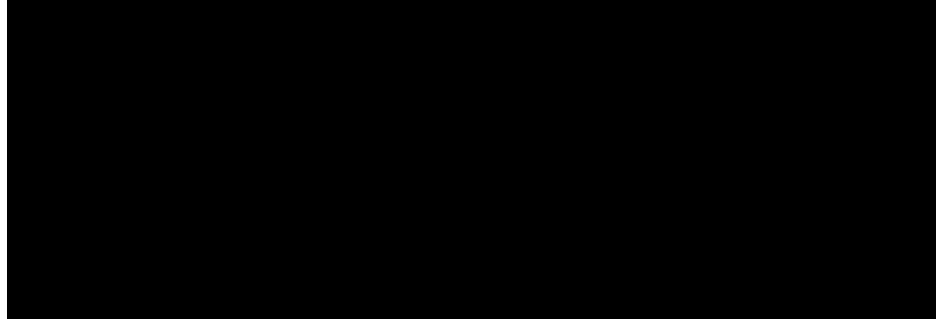
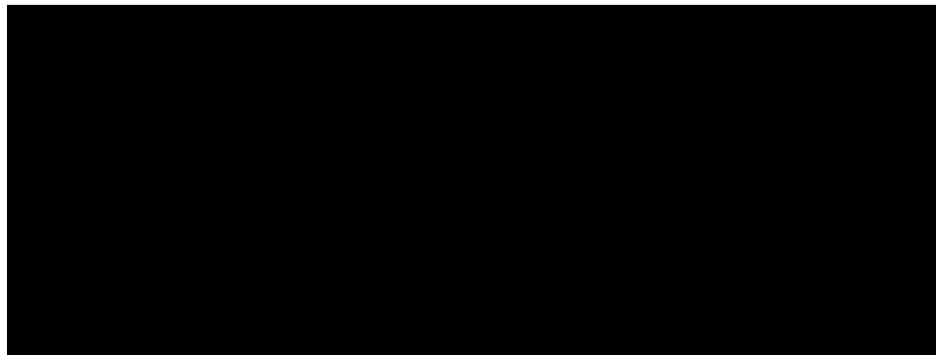
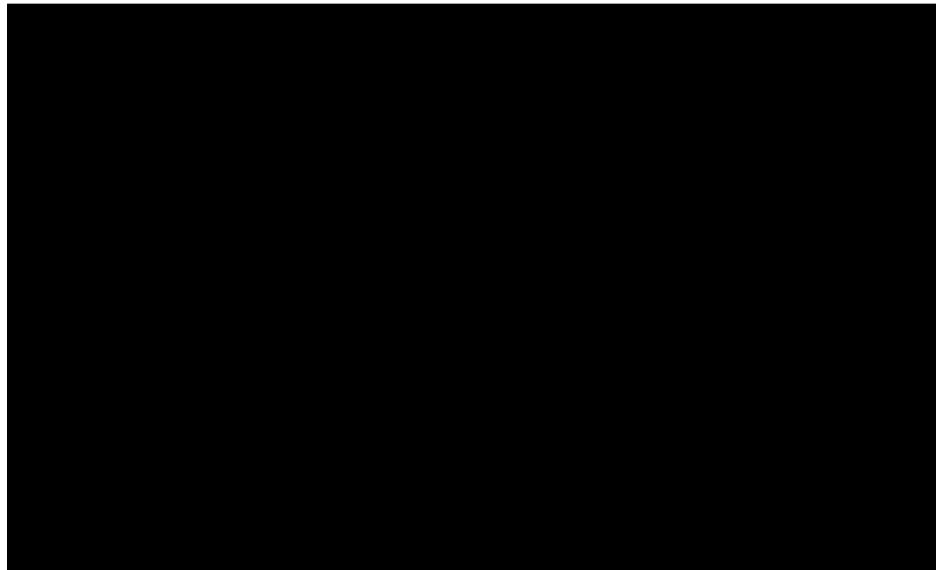
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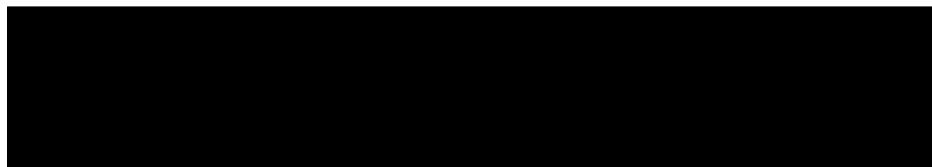
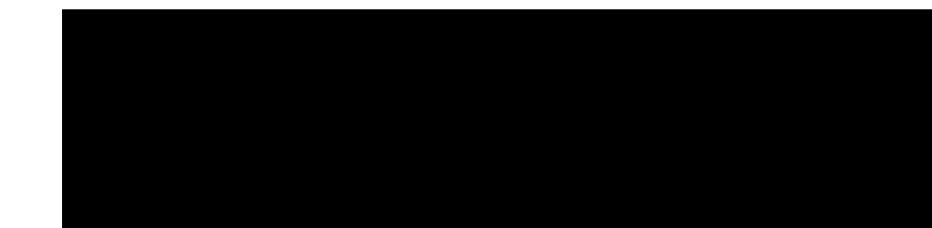
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COUNSEL

Ronald R. Boyer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Laurence K. Sullivan and Bridget Billeter, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

HUMES, P. J.—Thomas Earl Putney appeals from an order recommitting him to the State Department of State Hospitals (SDSH) for an indeterminate term after a jury found him to be a sexually violent predator (SVP) within the meaning of the Sexually Violent Predators Act (SVPA).¹ During the pendency of the SVP proceeding, Putney was sentenced to 25 years to life in prison for an intervening criminal offense. We conclude that the trial court lacked authority to recommit Putney as an SVP once his sentence for the intervening criminal conviction became final, and we therefore reverse the order with directions to dismiss the recommitment petition.

¹ Welfare and Institutions Code section 6600 et seq. Unless otherwise noted, all further statutory references are to the Welfare and Institutions Code.

I.

FACTUAL AND PROCEDURAL BACKGROUND

During the summer of 1990, Putney sexually molested his two- and four-year-old cousins, with whom he lived at the time, and a nine-year-old neighbor. The following year, he pleaded no contest to three felony counts of lewd acts on a child under age 14 based on his offenses against the four- and nine-year-old, and he was sentenced to 10 years in prison.²

In October 2002, shortly before Putney was due to be released on parole, the People filed a petition seeking his commitment to a state hospital as an SVP.³ He admitted to the petition's allegations, and in February 2003 the trial court committed him to Atascadero State Hospital for two years. At the end of the two-year term, the People did not seek to recommit Putney as an SVP, and he was released on parole in February 2005. He moved several times due to public outcry about his presence, became suicidal, and sought help from his parole officer. Putney returned to prison in approximately August 2005 after no other facility would accept him, and his parole was revoked "based upon [the] psychiatric return."

In September 2005, about a month before Putney was due to be released, the People filed a second petition seeking his commitment to a state hospital as an SVP. He did not contest the petition, and the following month the trial court committed him to Atascadero for another two-year term. The People filed the instant petition to recommit Putney as an SVP in July 2007, a few months before the expiration of that two-year term. In February 2008, the trial court found that the petition established probable cause to believe that Putney was an SVP, and a jury trial was set for later that spring.

The SVP trial was continued many times and ultimately did not begin until April 2014, almost seven years after the recommitment petition was filed. Only one of the many reasons for the delay is relevant to the resolution of this appeal: in November 2010, Putney was charged with a felony count of possession of a dirk and dagger based on an incident at Coalinga State Hospital, where he was then housed. (*People v. Putney* (July 2, 2012, F062165) [nonpub. opn.].)⁴ He pleaded no contest to the charge and admitted

² Putney was convicted under Penal Code section 288, subdivision (a).

³ Putney served an additional two years after he was convicted of possessing a weapon while in prison under Penal Code section 4502.

⁴ On our own motion, we take judicial notice of the Fifth District Court of Appeal's unpublished opinion in the appeal of Putney's criminal case. (See *People v. Hill* (1998) 17 Cal.4th 800, 847 [72 Cal.Rptr.2d 656, 952 P.2d 673] [taking judicial notice of unpublished decision in separate case].) In doing so, we take judicial notice of the prior case's procedural history but not the

three prior convictions for a serious or violent felony (strikes). (*Putney, supra*, F062165.) A Fresno County trial court sentenced him to 25 years to life in prison in late January 2011. (*Ibid.*) The Fifth District Court of Appeal affirmed the criminal judgment on July 2, 2012, and, after our state Supreme Court denied review, the remittitur issued on September 27, 2012. (Cal. Courts, Appellate Courts Case Information <http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=5&doc_id=1975541&doc_no=F062165> [as of July 27, 2016].)

Although our record does not contain any reporter's transcripts from the hearings that occurred in this proceeding while the criminal case was pending, the minute orders make clear that the trial court was aware of that case. The same day that Putney committed the weapons possession offense, the court vacated the then-scheduled SVP trial date. Minute orders entered in December 2010 noted that Putney was in Fresno County Jail, and a minute order entered the week after he was sentenced in the criminal case the following month noted that he was "in custody in another county (25 years to life)." Finally, while Putney's criminal appeal was pending, the court continued this case for an update on the "appeal or writ on Fresno County case." While the record thus reveals that the court was aware of the criminal case, it does not reflect that the parties and court ever discussed the propriety of proceeding to trial despite the criminal case's disposition.

At trial, two psychologists, Drs. Jack Vognsen and Harry Goldberg, testified as experts for the People. Both diagnosed Putney with pedophilia, and both identified other disorders contributing to his impaired ability to control his behavior, including antisocial personality disorder and substance abuse disorder. They concluded that Putney was substantially likely to reoffend if released from custody, although both acknowledged that due to his criminal sentence he would not be released for many years. Two other psychologists, Drs. Robert Halon and Jay Adams, testified as experts for the defense and concluded that Putney did not have pedophilia because there was no evidence he was currently attracted to children. The jury found that Putney was an SVP, and the trial court committed him to Coalinga for an indeterminate term.⁵

truth of any facts involving the underlying charge. (See *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564–1565 [8 Cal.Rptr.2d 552].) We also take judicial notice of the Fifth District docket. (Cal. Courts, Appellate Courts Case Information <http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=5&doc_id=1975541&doc_no=F062165> [as of July 27, 2016]; see *Epic Communications, Inc. v. Richwave Technology, Inc.* (2015) 237 Cal.App.4th 1342, 1347 & fn. 3 [188 Cal.Rptr.3d 844] [taking judicial notice of Court of Appeal docket].)

⁵ Putney testified at trial that he was then housed in the California Medical Facility (CMF), which, unlike Coalinga, is under the jurisdiction of the Department of Corrections and

II.

DISCUSSION

We requested supplemental briefing from the parties on whether Putney was properly recommitted as an SVP despite having a decades-long prison term left to serve. We conclude that the trial court should have dismissed this action after the criminal sentence became final. Although Putney joins the Attorney General in contending that the sentence did not prevent his recommitment, we decline to accept this concession because it is completely at odds with the SVPA's language and purposes and would send a faulty message that trial courts may commit criminal defendants under the SVPA years before their sentences of incarceration are set to end.⁶ (See *People v. Sanders* (2012) 55 Cal.4th 731, 740 [149 Cal.Rptr.3d 26, 288 P.3d 83].)

A. *The SVPA.*

Under the SVPA, an offender who is determined to be an SVP is subject to involuntary civil commitment for an indeterminate term “immediately upon release from prison.” (*People v. Yartz* (2005) 37 Cal.4th 529, 534 [36 Cal.Rptr.3d 328, 123 P.3d 604]; § 6604.) To establish that an offender is an SVP, the People must prove beyond a reasonable doubt that the offender (1) has been convicted of a sexually violent offense against at least one victim and (2) “has a diagnosed mental disorder that makes [him or her] a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.” (§§ 6600, subd. (a)(1), 6604.) The SVPA is designed “to provide ‘treatment’ to mentally disordered individuals who cannot control sexually violent criminal behavior” and to keep them confined until they no longer pose a threat to the public. (*People v. McKee* (2010) 47 Cal.4th 1172, 1194 [104 Cal.Rptr.3d 427, 223 P.3d 566].) Thus, “[t]he SVPA is not punitive in purpose or effect,” and proceedings under it are “‘special proceedings of a civil nature.’” (*Yartz*, at pp. 535–536.)

Originally, the SVPA provided for a two-year term of commitment (former § 6604), and any extension required the People to file a petition for recommitment for another two-year term. (Former §§ 6604, 6604.1, subd. (a);

Rehabilitation. (Pen. Code, § 5003, subd. (f); see also *People v. Watson* (2007) 42 Cal.4th 822, 828–829 [68 Cal.Rptr.3d 769, 171 P.3d 1101].) According to his appellate counsel, Putney is still at CMF, and it is unclear whether he was ever transferred to Coalinga or whether his placement there was ever determined to be inappropriate. (See § 6600.05, subd. (a) [an SVP must be placed at Coalinga “unless there are unique circumstances that would preclude the placement of a person at that facility”].)

⁶ In light of our holding, we need not rule on the numerous claims Putney raises in this appeal.

Moore v. Superior Court (2010) 50 Cal.4th 802, 817 [114 Cal.Rptr.3d 199, 237 P.3d 530].) On November 7, 2006, California voters passed Proposition 83, which amended the SVPA effective the following day. (*People v. McKee, supra*, 47 Cal.4th at p. 1186.) Among other changes, Proposition 83 altered “an SVP commitment from a two-year term to an indefinite commitment.” (*McKee*, at p. 1186.) Under the previous scheme, a subsequent petition to extend an offender’s commitment required a new trial to prove that the offender was an SVP. (*Id.* at p. 1194; former § 6604.) But “[a]fter Proposition 83, once a person is committed as an SVP, he [or she] remains in custody until he [or she] successfully bears the burden of proving he [or she] is no longer an SVP”—through a petition for unconditional discharge under section 6605 or conditional release under section 6608—“or the [SDSH] determines he [or she] no longer meets the definition of an SVP.” (*Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1287 [68 Cal.Rptr.3d 142] (*Bourquez*)). “The purpose of the change was ‘to protect the civil rights of those persons committed as [SVPs] while at the same time [to] protect society and the system from unnecessary or frivolous jury trial actions where there is no competent evidence to suggest a change in the committed person.’ [Citation.] The change also served to reduce costs for SVP evaluations and court testimony.” (*Ibid.*)

■ As amended by Proposition 83, “the SVPA no longer contains any express statutory provision authorizing recommitment of a person previously committed . . . for treatment as an SVP.” (*People v. Castillo* (2010) 49 Cal.4th 145, 150 [109 Cal.Rptr.3d 346, 230 P.3d 1132].) Despite this, trial courts retain jurisdiction to consider a petition for recommitment for an indeterminate term that, like the petition here, was filed after Proposition 83 became effective. (*People v. Whaley* (2008) 160 Cal.App.4th 779, 798–799 [73 Cal.Rptr.3d 133]; *Bourquez, supra*, 156 Cal.App.4th at p. 1280; *People v. Shields* (2007) 155 Cal.App.4th 559, 561, 564 [65 Cal.Rptr.3d 922].) In such circumstances, an offender previously committed for a two-year term is entitled to another trial at which the People must prove the offender is an SVP. (*Whaley*, at p. 803.)

B. *The Petition Should Have Been Dismissed After Putney’s Criminal Sentence Became Final.*

The parties contend that nothing in the SVPA prevented Putney from being recommitted as an SVP despite his “Three Strikes” sentence remaining to be served. We disagree and conclude the trial court acted in excess of its jurisdiction by entering the recommitment order.

■ “Essentially, jurisdictional errors are of two types. ‘Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power

to hear or determine the case, an absence of authority over the subject matter or the parties.’ [Citation.] When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and ‘thus vulnerable to direct or collateral attack at any time.’ [Citation.] [¶] However, ‘in its ordinary usage the phrase “lack of jurisdiction” is not limited to these fundamental situations.’ [Citation.] It may also ‘be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no “jurisdiction” (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.’ [Citation.] ‘ “[W]hen a statute authorizes [a] prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction.” ’ [Citation.]’ (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660–661 [16 Cal.Rptr.3d 76, 93 P.3d 1020].) Thus, as relevant here, “when a statute establishes prerequisites for maintenance of a civil commitment procedure, a . . . court’s jurisdiction or power to enter an order of commitment depends on compliance with those prerequisites.” (*People v. Superior Court (Whitley)* (1999) 68 Cal.App.4th 1383, 1387–1388 [81 Cal.Rptr.2d 189].)

We begin by accepting that the petition seeking Putney’s recommitment for an indeterminate term was proper when filed in July 2007. As we have said, it is settled that such petitions filed after Proposition 83 became effective are authorized. (See *People v. Whaley, supra*, 160 Cal.App.4th at pp. 798–799, 803; *Bourquez, supra*, 156 Cal.App.4th at p. 1280; *People v. Shields, supra*, 155 Cal.App.4th at pp. 561, 564.) The People filed the petition before the expiration of Putney’s previous two-year term, as required, and there is no other issue involving the trial court’s jurisdiction to consider the petition initially. (See *Whaley*, at p. 804 [normally the “only act that may deprive a court of jurisdiction is the People’s failure to file a petition for recommitment before the expiration of the prior commitment”].)

■ Because we accept that Putney’s petition was proper when it was filed, we have no quibble with the parties’ position that section 6601, subdivision (a) did not prevent the commencement of this proceeding. Under that provision, “[w]henever the Secretary of the Department of Corrections and Rehabilitation determines that an individual who is in custody under the jurisdiction of the Department of Corrections and Rehabilitation, and who is either serving a determinate prison sentence or whose parole has been revoked, may be a sexually violent predator, the secretary shall, at least six months prior to that individual’s scheduled date for release from prison, refer the person for evaluation in accordance with this section. . . . [¶] A petition may be filed under this section if the individual was in custody pursuant to his or her determinate prison term, parole revocation term, or a hold placed pursuant to Section 6601.3, at the time the petition is filed.” (§ 6601, subd. (a)(1)–(2).) Although section 6601, subdivision (a) thus does not cover

offenders already committed as SVPs, based on the previously cited authorities the statute does not bar post-Proposition 83 recommitment petitions.

■ It was also proper for the trial court to continue this proceeding while the criminal case was pending. “[O]nce a petition is filed, there is no additional time limit on the time in which the allegations of the petition must be tried.” (*People v. Superior Court (Preciado*) (2001) 87 Cal.App.4th 1122, 1127 [105 Cal.Rptr.2d 159].) A delay in bringing an alleged SVP to trial that is “based upon the state’s failure to allocate sufficient resources to provide a timely trial” may constitute a denial of due process, requiring dismissal of the petition. (*People v. Castillo*, *supra*, 49 Cal.4th at pp. 166–169, discussing *People v. Litmon* (2008) 162 Cal.App.4th 383 [76 Cal.Rptr.3d 122].) Here, however, Putney has not sought relief on such grounds despite the almost seven-year delay between the petition’s filing and the beginning of trial. And we see no error in the court’s delaying the proceeding until the criminal case was adjudicated. Generally speaking, criminal proceedings take precedence over civil matters (see Pen. Code, § 1050), and the court’s decision to continue this case is consistent with our ultimate conclusion that a person serving a long prison term cannot simultaneously be committed as an SVP.

In short, the trial court had fundamental jurisdiction over the recommitment petition and retained jurisdiction after the criminal case was initiated. As we now explain, however, once the criminal sentence became final, the court “lack[ed] . . . authority under the law to grant the particular relief requested” in the petition. (*In re Stier* (2007) 152 Cal.App.4th 63, 77 [61 Cal.Rptr.3d 181].)⁷

■ The main reason the trial court lacked authority is because, contrary to the parties’ position, an offender who has no prospect of being released

⁷ Neither of the primary consequences of a judgment’s being voidable because it was in excess of jurisdiction, as opposed to being void for want of fundamental jurisdiction, is implicated here. First, although “[a trial] court’s act in excess of its jurisdiction is valid until set aside, and a party *may* be precluded from setting it aside, due to waiver, estoppel or the passage of time” (*In re Stier*, *supra*, 152 Cal.App.4th at p. 77, italics added), nothing *prevents* us from considering for the first time on appeal “‘a pure question of law which is presented by undisputed facts,’” particularly a question, like the one presented here, that “fundamentally affects the validity of the judgment.” (*De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890, 908, 907 [114 Cal.Rptr.2d 708]; see also *In re Stier*, at pp. 74–81.) Second, merely voidable judgments “should be challenged directly, for example by motion to vacate the judgment, or on appeal, and are generally not subject to collateral attack once the judgment is final,” but this distinction has no effect in a direct appeal. (*People v. American Contractors Indemnity Co.*, *supra*, 33 Cal.4th at p. 661.)

from custody for many years does *not* meet the definition of an SVP since the offender poses no danger to the public. Under section 6600, subdivision (a)(1), “[s]exually violent predator” means a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.” As the SVPA makes clear, “others” refers to members of the public, not prison staff or fellow inmates: the issue for both the judge to decide at the probable cause hearing and the fact finder to decide at trial is whether the person is likely to engage in sexually violent behavior “*upon his or her release* from the jurisdiction of the Department of Corrections and Rehabilitation or other secure facility.” (§ 6602, subd. (a), italics added; see also CALCRIM No. 3454 [“A person is likely to engage in sexually violent predatory criminal behavior if there is a substantial danger, that is, a serious and well-founded risk that the person will engage in such conduct if released into the community”].) Indeed, as the Legislature stated in enacting the SVPA, the statute’s “primary purpose is to protect *the public* from ‘a small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders [that] can be identified while they are incarcerated.’” (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1192 [124 Cal.Rptr.2d 186, 52 P.3d 116], italics added; see also Stats. 1995, ch. 763, § 1, p. 5921 [SVPs “are not safe to be at large” and are “a continuing threat to society”].) Consistent with this statutory language and purpose, numerous decisions have characterized SVPs as those who pose a danger if released into the community. (E.g., *People v. Roberge* (2003) 29 Cal.4th 979, 988 [129 Cal.Rptr.2d 861, 62 P.3d 97]; *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 922 [119 Cal.Rptr.2d 1, 44 P.3d 949]; see also *People v. Buffington* (1999) 74 Cal.App.4th 1149, 1162 [88 Cal.Rptr.2d 696] [SVPA “deal[s] exclusively with prison inmates who have completed their sentences and who may be subject to involuntary confinement for mental health treatment”].) ■ Thus, the SVPA does not contemplate the commitment of people, like Putney, who pose no danger to the public because they have long prison terms left to serve.

■ Moreover, the commitment of such people is flatly inconsistent with other provisions of the SVPA involving the possibility of release. The statute provides that an SVP’s mental condition is to be evaluated annually to permit the director of the SDSH to determine whether “the person’s condition has so changed that the person no longer meets the definition of [an SVP] and should, therefore, be considered for unconditional discharge” or whether “conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community.” (§ 6604.9, subds. (a)–(b), (d).) If either is true, the director must

authorize the person to file in the trial court a petition for the appropriate form of relief. (§ 6604.9, subd. (d).) Even if the director does not recommend unconditional discharge or conditional release, an SVP is entitled to petition for conditional release. (§ 6608, subd. (a).) After Proposition 83, these procedures provide “an expedient means for those whose mental condition has improved to obtain either conditional or unconditional release from confinement in a locked facility” despite their indeterminate commitment. (*People v. Smith* (2013) 212 Cal.App.4th 1394, 1403 [152 Cal.Rptr.3d 142].)

■ A person who has a long prison term left to serve, however, has no possibility of being either conditionally or unconditionally released from custody, and the statute does not provide any mechanism for reviewing such a person’s SVP status. Thus, even if the SVPA could be interpreted to include such a person in the definition of an SVP, the statute provides no means of revisiting that determination and would therefore fail “to ensure that the committed person does not ‘remain confined any longer than he [or she] suffers from a mental abnormality rendering him [or her] unable to control his [or her] dangerousness.’” (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1177 [81 Cal.Rptr.2d 492, 969 P.2d 584]; see *Smith*, at pp. 1398–1399.)

■ The parties also claim that the SVPA does not explicitly require “the dismissal of a recommitment petition . . . based upon [a] person’s conviction and sentencing on a new felony,” but this omission does not prevent a trial court from dismissing a petition on such grounds. Our state Supreme Court has recognized that the fact that “[t]he SVPA contains no express provision for judicial review” of a particular legal issue does not necessarily bar a court from considering it. (*People v. Superior Court (Ghilotti)*, *supra*, 27 Cal.4th at p. 910.) Given the SVPA’s unambiguous purpose of protecting the public, and the resulting lack of *any* indication that the statute was intended to allow civil commitment of offenders with long prison terms left to serve, we find it of little significance that the statute does not expressly permit a petition to be dismissed based on an intervening conviction. (See *People v. Superior Court (Ghilotti)*, *supra*, 27 Cal.4th at p. 910 [conclusion that trial court had authority to review an issue despite SVPA’s failure to expressly confer that authority was “inherent in the statutory scheme, and in the nature of the judicial power”].)

For similar reasons, we are also unpersuaded by the parties’ suggestion that the recommitment petition could be adjudicated despite Putney’s intervening conviction because, at least as far as provisions for an offender’s custodial location and treatment, “[t]here is no statutory impediment to being a dual committee under both the Penal Code and the Welfare and Institutions Code.” Even if Putney could be placed at CMF, for example, as either a prisoner

serving a Three Strikes sentence or as an SVP, this does not establish that he can have both statuses at once. Again, the SVPA's language and overarching purpose prevent such a conclusion.

■ Certainly, such a dual commitment is not necessary to vindicate "a secondary objective" of the SVPA, to provide mental health treatment. (*People v. Hurtado, supra*, 28 Cal.4th at p. 1192.) Any "mentally ill, mentally deficient, or insane person confined in a state prison" may be treated "at any one of the state hospitals under the jurisdiction of the [SDSH]" if such treatment would further the person's "rehabilitation." (Pen. Code, § 2684, subd. (a).) "Unlike a person committed to a state hospital as a mentally disordered offender or [SVP], a prisoner who is transferred pursuant to [Penal Code] section 2684 still is serving a sentence of a term of years in state prison and is confined pursuant to a judgment committing him or her to confinement in the state prison." (*People v. Watson, supra*, 42 Cal.4th at p. 829.) Thus, Putney's recommitment as an SVP is not justified as a means of ensuring that he receives mental health treatment while incarcerated.

Finally, we note that the maintenance of this proceeding undermined Proposition 83's purpose of saving time and money by preventing unnecessary trials. (*Bourquez, supra*, 156 Cal.App.4th at p. 1287.) Even if we were able to conclude that the SVPA does not technically bar the recommitment of offenders with long prison terms left to serve, we fail to perceive any practical purpose that justified the time, imposition on the jury, and cost required to conduct the trial here, not to mention the additional resources spent prosecuting and resolving this appeal. As testimony from the People's expert witnesses suggested, the trial was aimed at resolving the theoretical question of whether Putney was too dangerous for an imminent release he had virtually no possibility of obtaining. We cannot approve such a pointless exercise.

■ In concluding that the trial court lacked authority to recommit Putney as an SVP once his criminal sentence became final, we do not suggest that, assuming the relevant law remains the same, the People would be barred from filing a new petition if and when Putney is set to be released from custody. We hold only that at the time the court recommitted him as an SVP, it lacked authority to do so in light of the prison term he had left to serve. We agree with the Attorney General that the consequences of our reversal on this ground are that Putney is "subject only to his prison commitment" and cannot be retried on this petition. (See *People v. Garcia* (2005) 127 Cal.App.4th 558, 567–568 [25 Cal.Rptr.3d 660].)

III.

DISPOSITION

The order recommitting Putney as an SVP for an indeterminate term is reversed, and the trial court is directed to dismiss the recommitment petition.

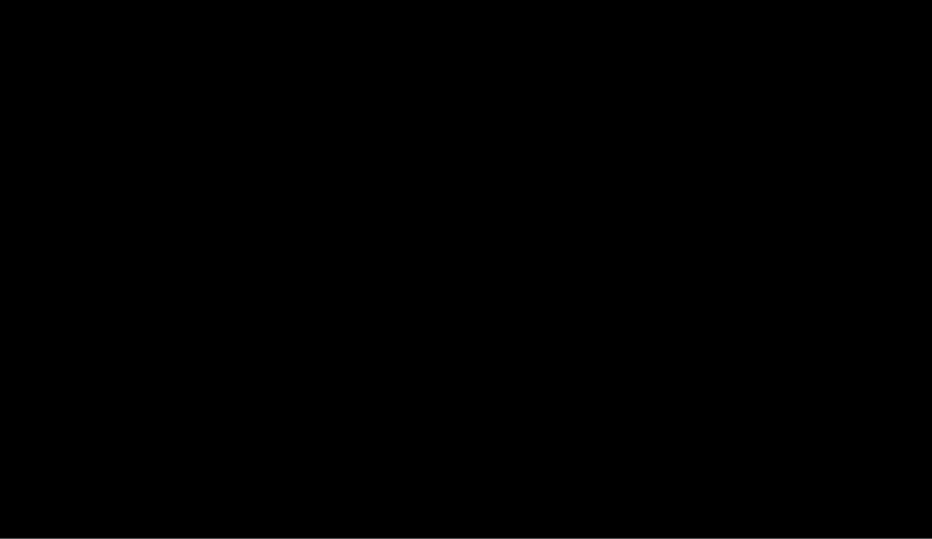
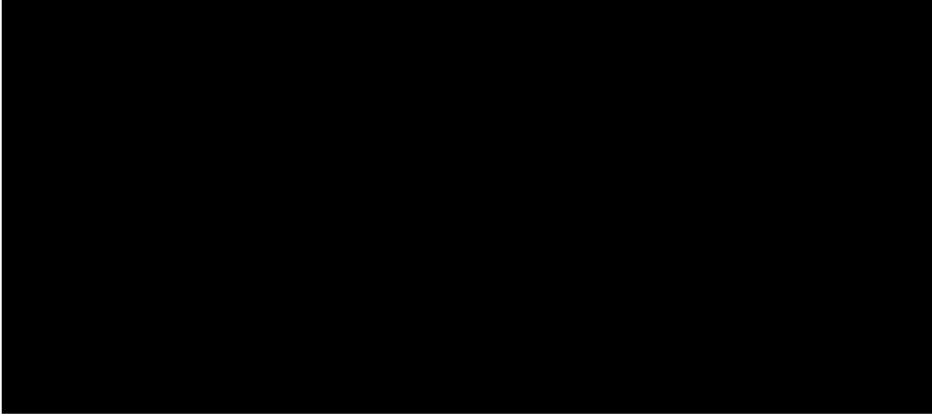
Margulies, J., and Dondero, J., concurred.

[No. A145922. First Dist., Div. Two. July 28, 2016.]

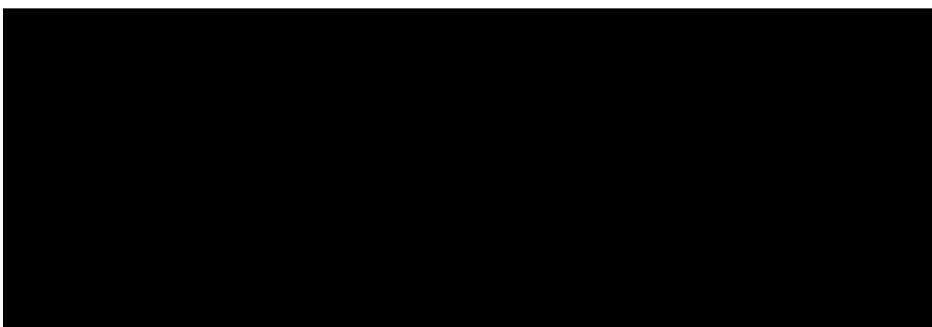
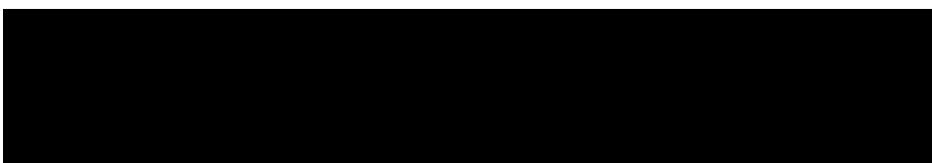
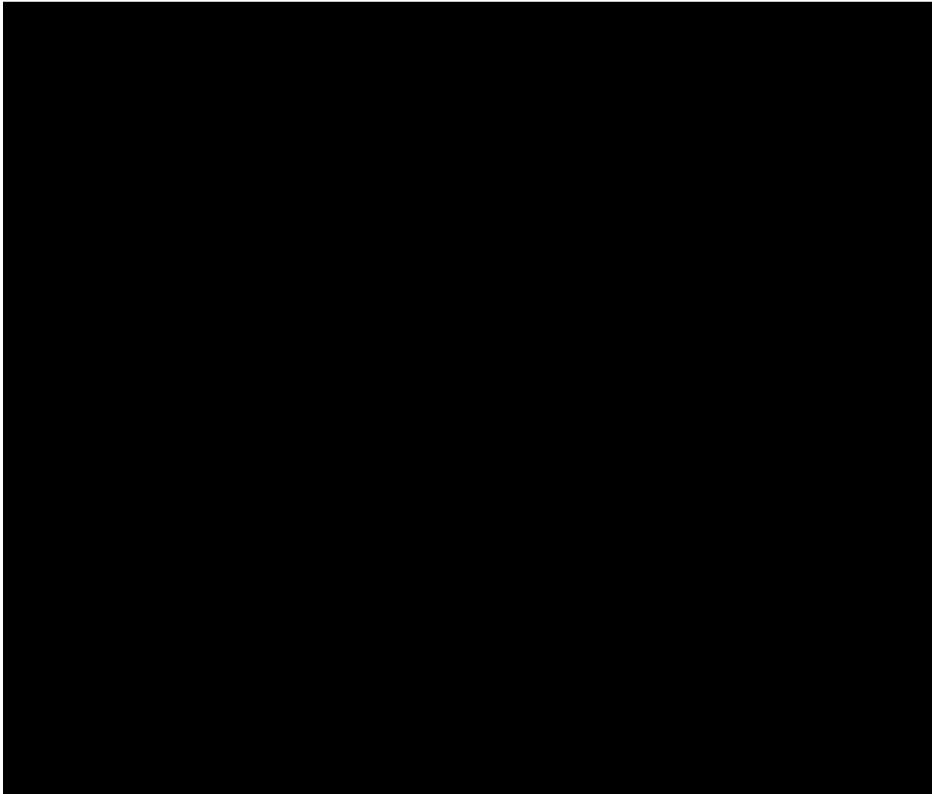
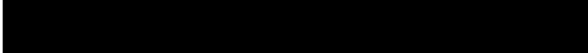
THE PEOPLE, Plaintiff and Respondent, v.
LATISHA CURRY, Defendant and Appellant.

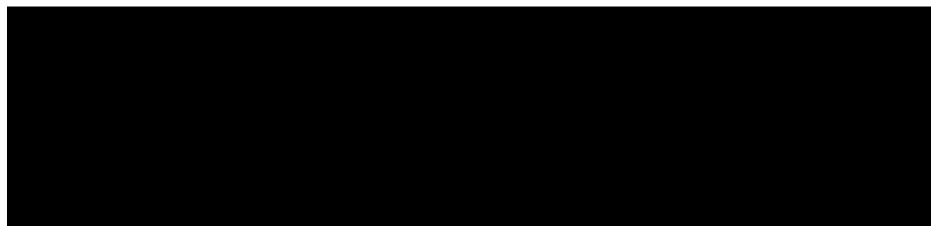
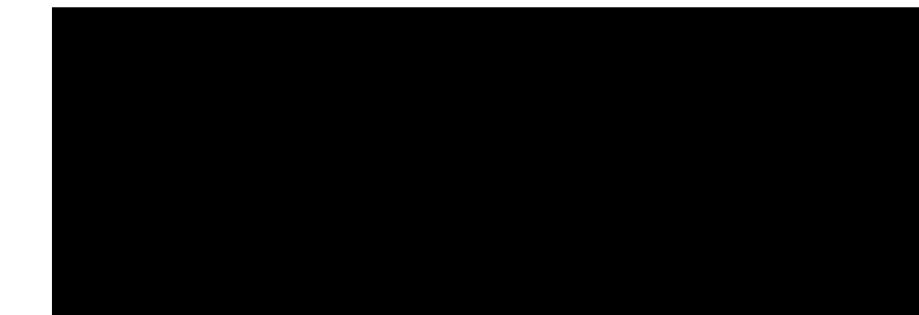
THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) November 9, 2016, S237037.

[REDACTED]



1074





COUNSEL

Brendon D. Woods, State Public Defender, and Michael S. McCormick, Assistant Public Defender, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Assistant Attorney General, Catherine A. Rivlin and Bruce M. Slavin, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

RICHMAN, J.—It is the rare initiative that does not have at least one ambiguity, or omission, or some other difficulty that only emerges following passage by the voters and courts begin to wrestle with its actual implementation. Even so, Proposition 47 must win some sort of prize for taking a single subject and proving such a fertile engine of sustained controversy and evolving confusion fully 18 months after its enactment. Its influence has even clouded the scope and operation of Proposition 36, a measure adopted two years earlier.

So it may seem odd in a case presenting a novel issue under Proposition 47 to invoke the canon of statutory construction that “Words used in a statute or constitutional provision should be given the meaning they bear in ordinary use. . . . [And] [i]f the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters).” (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].) Yet this is one of the rare Proposition 47 cases when all we need is the plain statutory language, specifically, the language in the proposition that a “petition for a recall of sentence” by a probationer, or a former probationer, is to be filed with the “trial court that entered the judgment of conviction.” (Pen. Code, § 1170.18, subds. (a), (f).)¹

BACKGROUND

On July 27, 2012, in the Napa County Superior Court and pursuant to a negotiated disposition, defendant Latisha Curry entered a plea of no contest to a charge of second degree burglary, in exchange for which the other count, a felony charge of petty theft with a prior (§ 666, subd. (a)), was dismissed.² The court suspended imposition of sentence and admitted defendant to three years’ probation upon specified conditions, one of which was that she spend 60 days in the Napa County jail. At the time of sentencing, the Napa probation officer advised the court that by reason of a felony conviction in Alameda County, “defendant is currently on Post Release Community Supervision (PRCS) in Alameda County . . . [A]nd the term is set to expire on January 27, 2015.” For this reason, and because defendant was a resident of Alameda County, the Napa probation officer moved to have supervision of her probation transferred to Alameda County in accordance with section 1203.9. The Napa County Superior Court granted the motion on February 26, 2013, and Alameda County accepted the transfer on March 6, 2013.

On July 2, 2015, almost eight months after passage of Proposition 47 in November 2014—and the same day the Alameda County Superior Court

¹ Statutory references are to the Penal Code.

² In point of fact, it was alleged that defendant had misdemeanor theft convictions for violating section 484 in 2004 and 2005, and a 2007 felony conviction for receiving stolen property (§ 496). Defendant also had another second degree burglary conviction in 2007, which was known to the Napa probation officer, but which was not mentioned in the Napa information. The probation officer advised the court that “defendant’s previous probation grants have been unsuccessful and she has been sentenced to State Prison two (2) times and had one (1) documented violation of parole. The defendant is on Post Release Community Supervision and was when she committed the instant offense.” Perhaps because of this history, defendant was told the court would not entertain a motion to treat the burglary conviction as a misdemeanor.

summarily revoked her probation—defendant filed a petition in that court seeking to have her Napa burglary conviction reduced to a misdemeanor “pursuant to . . . § 1170.18.”³ The petition was on Judicial Council form CRM-050, adopted by the Alameda County Superior Court for “mandatory use,” which was captioned “Petition for Resentencing/Reduction to Misdemeanor—Response and Order (Penal Code § 1170.18).” (Some capitalization omitted.) That same day the Alameda court conducted a brief hearing on the petition, and denied it on the ground that defendant had to seek relief in Napa County because that was where she received the sentence she was now petitioning to have reduced.⁴ That ruling was reiterated when defendant made an oral motion for reconsideration on July 15, claiming she was entitled to resentencing under the rule of leniency from *In re Estrada* (1965) 63 Cal.2d 740 [48 Cal.Rptr. 172, 408 P.2d 948] (*Estrada*) without reference to Proposition 47, because it “does not apply to probationers in the first place.”⁵ On this timely appeal from both denials, defendant contends in effect that she is entitled to the benefit of Proposition 47 without complying with any of its burdens.

DISCUSSION

■ Proposition 47 specified a number of theft- and drug-related felonies that would be reclassified as misdemeanors. As relevant here, it restricted the scope of second degree burglary by creating the new crime of shoplifting, which was defined as “entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars Shoplifting shall be punished as a misdemeanor [¶] . . . No person who is charged with shoplifting may also be charged with burglary or theft of the same property.” (Prop. 47, § 5, italics omitted, adding § 459.5, subds. (a)–(b).)

Proposition 47 also established a procedure for persons convicted of the former felonies to obtain relief: “A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section (‘this act’)

³ The revocation was for another theft arrest that was virtually identical to the Napa burglary—defendant went into an Alameda County Walmart store and left without paying for cans of baby formula hidden on her person. According to the limited record on appeal, no dollar value was ever placed on the material taken from the Napa Walmart.

⁴ The court did reduce defendant’s June 2013 Alameda conviction for second degree burglary to “a misdemeanor violation of Penal Code section 459.5.”

⁵ The oral motion is treated as a second petition. (See *People v. Amaya* (2015) 242 Cal.App.4th 972, 974–975 [196 Cal.Rptr.3d 556].) Following denial of her renewed petition, defendant admitted violating probation, whereupon she was readmitted to probation on pretty much the same conditions.

had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing . . .” (§ 1170.18, subd. (a).) A petition may also be filed by “[a] person who has completed his or her sentence for a conviction, whether by trial or plea,” also “before the trial court that entered the judgment of conviction in his or her case.” (*Id.*, subd. (f).) “Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner’s felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” (*Id.*, subd. (b).)

Relief is not automatic. Petitions can only be filed by persons convicted of the offenses downgraded by Proposition 47 (“under the act that added this section”), and relief will be denied if they also have convictions for serious, violent, or specified sex-related felonies. (§ 1170.18, subd. (i).) Even then, the court has the discretionary power to deny a petition if “resentencing the petitioner would pose an unreasonable risk of danger to public safety,” a conclusion the court may draw from the petitioner’s “criminal conviction history,” “disciplinary record and record of rehabilitation while incarcerated,” and “[a]ny other evidence the court . . . determines to be relevant.” (*Id.*, subd. (b).) One felony disability is not lifted: “resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm.” (*Id.*, subd. (k).)

Defendant first contends that *Estrada*, by itself, and without consideration of any other substantive or procedural restrictions of Proposition 47, requires reduction of her felony burglary conviction to a misdemeanor theft conviction. The principle of *Estrada* has been summarized by our Supreme Court as follows: “‘When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute’s operative date.’” (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1195–1196 [171 Cal.Rptr.3d 234, 324 P.3d 88], italics added.) Defendant then points to decisions establishing that when imposition of sentence is suspended, an order of probation is not, save for the limited purpose of appeal, treated as either a sentence or a final judgment. (*People v. Scott* (2014) 58 Cal.4th 1415, 1423–1424 [171 Cal.Rptr.3d 638, 324 P.3d 827]; *People v. Howard* (1997) 16 Cal.4th 1081, 1087 [68 Cal.Rptr.2d 870, 946 P.2d 828]; *People v. Daniels* (2003) 106 Cal.App.4th 736, 742 [130 Cal.Rptr.2d 887]; § 1203.2a.) But, defendant continues, relief under Proposition 47 is predicated upon the existence of a “sentence” that is either being served, and thus can be “recalled,” or has been completed, and thus is a “judgment of conviction.”

(§ 1170.18, subds. (a), (b), (d) & (f).) And, because she was never sentenced and there is no judgment, much less a final judgment, defendant concludes the *Estrada* leniency principle applies to her.

Next, and in a related argument, defendant argues she need not conform to any substantive or procedural restrictions of Proposition 47 because that measure does not apply to her as a probationer, who was never sentenced to state prison or actually served time in a state prison pursuant to such a sentence. As she summarizes: “Penal Code section 1170.18 clearly contemplates application of its resentencing provisions **only** to persons who are currently serving a sentence, or have served a sentence, **in prison** for conviction of a felony that may be reduced to a misdemeanor pursuant to Proposition 47. The statute does not contemplate application to persons who currently are, or have been, on probation for such a conviction.”

Defendant’s reasoning supporting these two contentions is subtle, wide-ranging—and, at points, intriguing. One of the intriguing points is that defendant originally applied for resentencing on the express authority of Proposition 47, and used a Judicial Council form plainly basing her “Petition for Resentencing/Reduction to Misdemeanor” on section 1170.18, yet she now insists in her brief and at oral argument that she is not obliged to comply with any part of Proposition 47. (Cf. *People v. Conley* (2016) 63 Cal.4th 646, 652, 655–656, 661 [203 Cal.Rptr.3d 622, 373 P.3d 435] [“defendants who were sentenced under the Three Strikes law” “are not entitled to automatic resentencing, but instead may seek resentencing by petitioning for recall of sentence under section 1170.126” of Three Strikes Reform Act of 2012; rejecting argument that defendants who were sentenced under the Three Strikes law “are entitled to *automatic* resentencing . . . without the need to file a recall petition”; “voters intended for previously sentenced defendants to seek relief under section 1170.126”].) In that petition defendant expressly conceded: “By signing below, defendant acknowledges that s/he understands that s/he may not use, own or possess firearms, even if this Petition is granted.”⁶ Another mystifying feature is how one can petition for *resentencing* while denying there was ever a sentence in the first place. Similarly, by filing her petition, was not defendant implicitly conceding that there was in fact a “judgment of conviction”?

Logically, however, defendant appears to have talked herself out of court. If it is *Estrada*, not Proposition 47, that defendant views as delivering her from status as a convicted felon, why did she not employ the mechanism employed in *Estrada*, namely a petition for relief in habeas corpus? The superior court cannot be expected, on its own initiative, to comb through its

⁶ And a position she has clearly reconsidered.

files to discover all convictions for the former felonies reclassified by Proposition 47. Far more sensible to make it the burden of each defendant who might be benefited by Proposition 47 to petition the superior court for relief. In short, defendant used a mechanism she says has no application to her, and yet has never used the mechanism she tacitly acknowledges is the appropriate one. We note this inconsistency, but do not base our decision on it.

We also note, for present purposes, that we would have a hard time accepting defendant's position that the ameliorative procedures of Proposition 47 have absolutely nothing to do with persons in her situation, that is, persons on probation for whom sentence was never imposed, if for no other reason than it is the source of the reduced sentence she so desires.⁷ And we would have an even harder time accepting the categorical exclusion of such a large number of persons for whom the benefits of Proposition 47 would appear so obviously intended.

■ Defendant's final contention is based on language in section 1203.9, which says that subject to specified exceptions, once a probation case is transferred "[i]n all other aspects, . . . the court of the receiving county shall have full jurisdiction over the matter upon transfer." (*Id.*, subd. (a)(3).) Based on this, defendant argues that her petitions were erroneously denied for improper venue, and she is not to be required to return to Napa County for resentencing. What she desires from this appeal is that "this Court should reverse the orders denying [her] request for reduction of her felony conviction . . . , and should remand the cause with directions [to the Alameda court] to consider that request on the merits."

Although the issue appears to be one of first impression, it is not difficult to resolve.

■ The references in subdivisions (a) and (f) of section 1170.18, as added by section 14 of Proposition 47 to resentencing petitions being presented to "the trial court that entered the judgment of conviction in his or her case" have the obvious purpose of having the petitions decided by the

⁷ Defendant cites no authority that either the Legislature or the electorate cannot condition the acceptance of benefits with a mandatory procedure for obtaining those benefits. Such an exchange has become common since institution of the workers' compensation scheme. (See *Lenane v. Continental Maritime of San Diego, Inc.* (1998) 61 Cal.App.4th 1073, 1081–1082 [72 Cal.Rptr.2d 121]; see also, e.g., *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 423 [121 Cal.Rptr.2d 844, 49 P.3d 194] [California Public Records Act (Gov. Code, § 6250 et seq.)]; *People v. Carlucci* (1979) 23 Cal.3d 249, 257 [152 Cal.Rptr. 439, 590 P.2d 15] [traffic infractions]; *Superior Wheeler C. Corp. v. Superior Court* (1928) 203 Cal. 384, 387 [264 P. 488] [small claims court]; cf. *City of New York v. U.S.* (2d Cir. 1999) 179 F.3d 29, 35 ["Congress may condition federal funding on state compliance with a federal regulatory scheme"].)

judge with a presumed knowledge of the underlying circumstances.⁸ (Cf. *People v. Contreras* (2015) 237 Cal.App.4th 868, 892 [188 Cal.Rptr.3d 698] [“The trial court’s decision on a section 1170.18 petition is inherently factual.”] Clearly, the judge who presided over a petitioner’s trial, or who took the guilty plea found to have a factual basis, would be best placed to decide whether “resentencing the petitioner would pose an unreasonable risk of danger to public safety.” (§ 1170.18, subd. (b); see *People v. Contreras*, *supra*, at p. 892 [risk “determination must be made in the first instance by the trial court”].) At two points the electorate decreed that Proposition 47 was to be “broadly” and “liberally” construed to accomplish and effectuate its purposes. (Prop. 47, §§ 15, 18.) There is nothing in the ballot summaries or arguments suggesting that the voters did not intend that the plain language of subdivisions (a) and (f) of section 1170.18, as added by section 14 of Proposition 47 subject to the qualification now claimed by defendant. This undoubtedly accounts for the obligatory references in the reported decisions. (See *People v. Marks* (2015) 243 Cal.App.4th 331, 335 [196 Cal.Rptr.3d 415] [defendant sentenced in Los Angeles County not entitled to relief in Riverside County; “defendant was *required* to file his petition ‘before the trial court that entered the judgment of conviction,’ the Superior Court of Los Angeles County” (italics added)]; *People v. Shabazz* (2015) 237 Cal.App.4th 303, 314 [187 Cal.Rptr.3d 828] [“Defendant is limited to the statutory remedy set forth in section 1170.18 He *must* file an application in the trial court” (italics added)].) Just as a defendant cannot get resentencing from an appellate court (e.g., *People v. Awad* (2015) 238 Cal.App.4th 215, 221–222 [189 Cal.Rptr.3d 404]; *People v. Shabazz*, *supra*, 237 Cal.App.4th at p. 311), relief under Proposition 47 must be sought in the correct trial court.

As an initiative, Proposition 47 is to be construed to effectuate its purpose, not to conform to the unwritten intent to exempt section 1203.9 from its operation. (E.g., *People v. Arroyo* (2016) 62 Cal.4th 589, 593 [197 Cal.Rptr.3d 122, 364 P.3d 168]; *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 570 [107 Cal.Rptr.3d 265, 227 P.3d 858].) The language used in subdivisions (a) and (f) of section 1170.18, as added by section 14 of Proposition 47 is not ambiguous. It did not employ language of technical or specialized meanings, but used words of common meaning. (See *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901–902 [135 Cal.Rptr.2d 30, 69 P.3d 951].) The construction urged by defendant would have petitions ruled on by judges who have no connection to, or memory of, the details of the underlying conviction. Although such might not be an absurd result (see § 1170.18, subd. (l), quoted at fn. 8, *ante*), it is one clearly inconsistent with the voters’ plain language and obvious intent. (E.g., *People v. Garcia* (1999) 21 Cal.4th 1, 14 [87 Cal.Rptr.2d 114, 980 P.2d 829]; *People v. Cruz* (1996) 13 Cal.4th 764, 782–783 [55 Cal.Rptr.2d

⁸ Proposition 47 does have a fallback position: “If the court that originally sentenced the petitioner is not available, the presiding judge shall designate another judge to rule on the petition or application.” (§ 1170.18, subd. (l).)

117, 919 P.2d 731].) All doubts must be resolved in favor of the initiative. (See *Legislature v. Eu* (1991) 54 Cal.3d 492, 512 [286 Cal.Rptr. 283, 816 P.2d 1309].) “[W]e may not properly interpret [Proposition 47] in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.” (*People v. Park* (2013) 56 Cal.4th 782, 796 [156 Cal.Rptr.3d 307, 299 P.3d 1263].) Defendant’s position that the Alameda court could serve the function intended by subdivisions (a) and (f) cannot be accepted because it would nullify the utility of those provisions with respect to probationers.

Defendant’s counsel has drawn our attention to a publication by the authors of the leading treatise on sentencing, but he erroneously sees it as supporting his position. Judge Couzens and Justice Bigelow draw a crucial distinction between different categories of probation:

“Probation cases and cases where the defendant is serving a period of mandatory supervision under section 1170(h) may be transferred to the defendant’s county of residence under section 1203.9. A defendant whose case has been transferred who requests relief under section 1170.18 likely will be required to file the petition in the receiving county. When a case is transferred, ‘[t]he court of the receiving county shall accept the entire jurisdiction over the case.’ (§ 1203.9(b).) Because the receiving county has exclusive jurisdiction over the case, the original sentencing judge is no longer available as a matter of law. The request for relief may be handled by any judge appointed by the presiding judge. (§ 1170.18(l).)

“The rule is different for persons on PRCS [postrelease community supervision] whose supervision is transferred under section 3460. Section 3460(b) provides that ‘[u]pon verification of permanent residency, the receiving supervising agency shall accept jurisdiction and supervision of the person on postrelease supervision.’ There is a qualitative difference between the transfer of the case for purposes of supervision, as in section 3460, and transfer of the ‘entire jurisdiction over the case’ between courts, as in section 1203.9. Likely the petition for resentencing of a person on PRCS must be filed in the original sentencing county.” (Couzens & Bigelow, Proposition 47: “The Safe Neighborhoods and Schools Act” (May 2016), p. 86, italics added, at <<http://www.courts.ca.gov/documents/prop-47-Information.pdf>> [as of July 28, 2016].)⁹ As noted, defendant was already on PRCS when her case was transferred from Napa County to Alameda County.

⁹ Parenthetically, we note that Judge Couzens and Justice Bigelow appear to reject defendant’s theory that, as a probationer, she is outside Proposition 47. (Couzens & Bigelow, Proposition 47: “The Safe Neighborhoods and Schools Act,” *supra*, at pp. 34–35, quoting *People v. Garcia* (2016) 245 Cal.App.4th 555, 558 [199 Cal.Rptr.3d 396], at <<http://www.courts.ca.gov/documents/prop-47-Information.pdf>> [as of July 28, 2016].) We note further that the Judicial Council’s Criminal Law Advisory Committee, which is chaired by

■ Thus, according to defendant's own authority, the Alameda court properly recognized that the correct court to consider defendant's petition was the Napa court. Whether that requires retransference back to Napa is an issue neither presented nor decided on this appeal.

At oral argument, defendant's counsel described the Catch-22 situation he and other defense attorneys confront: if the petition for reduction is made to the court that transferred the probationer's case, counsel is reminded of section 1203.9's "entire jurisdiction" language and told to go to the court that accepted the transfer, but if, as here, the petition is presented to the transferee court, counsel is read Proposition 47's language requiring the petition to be filed "before the trial court that entered the judgment of conviction" and told to go to the court that made the transfer. We have no reason to doubt the accuracy of this representation, particularly when considered with the Alameda court stating "if the Court of Appeal would be kind enough to give us some guidance I would appreciate it." We publish this opinion to provide that guidance.

DISPOSITION

The orders are affirmed.

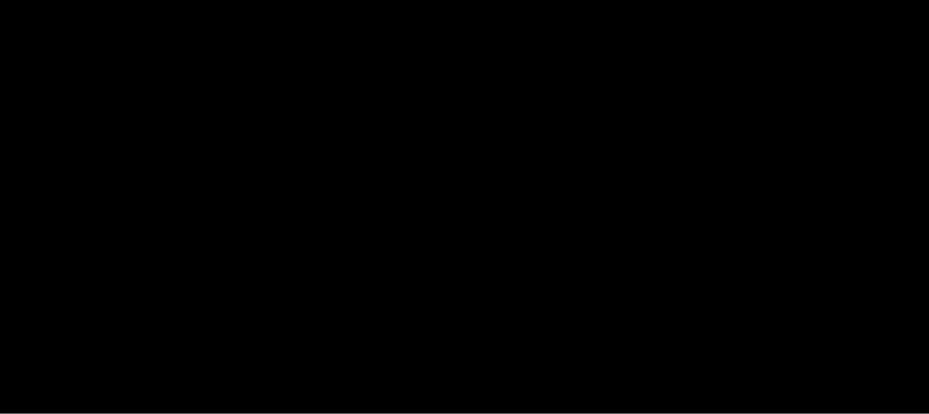
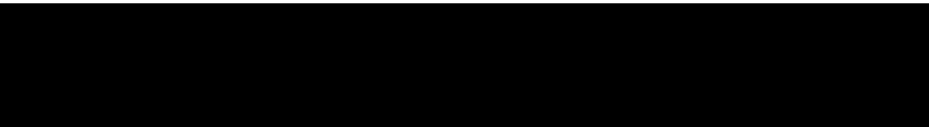
Kline, P. J., and Stewart, J., concurred.

A petition for a rehearing was denied August 17, 2016, and appellant's petition for review by the Supreme Court was granted November 9, 2016, S237037.

Justice Bigelow, has proposed that section 1203.9 be amended to allow "transferring a case back to the transferring court for a limited purpose . . . Examples of this include . . . re-sentencing." (Criminal Law Advisory Com., Judicial Council of Cal., Invitation to Comment, LEG16-06 (2016) Background, pp. 1–2, at <<http://www.courts.ca.gov/documents/LEG16-06.pdf>> [as of July 28, 2016].)

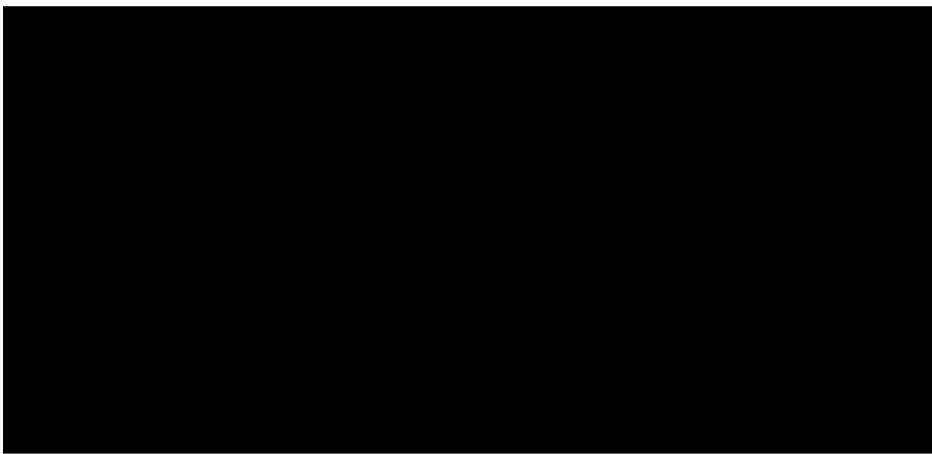
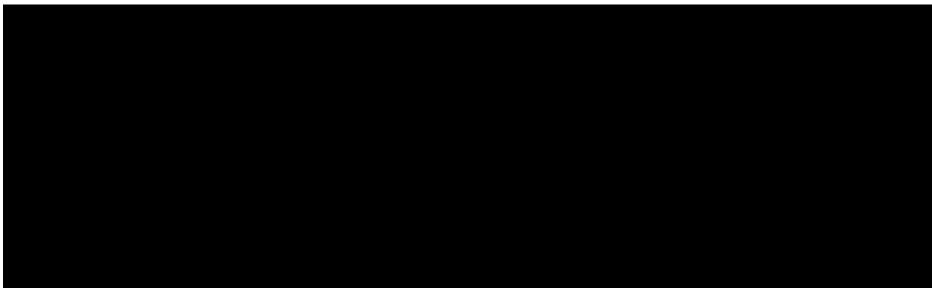
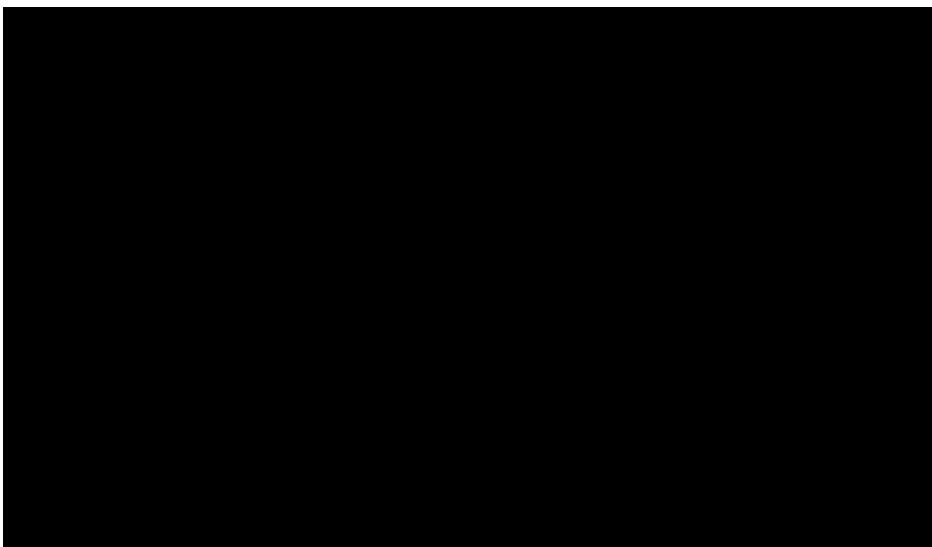
[No. B264284. Second Dist., Div. Two. July 28, 2016.]

SANTA CLARITA ORGANIZATION FOR PLANNING AND THE
ENVIRONMENT, Plaintiff and Appellant, v.
CASTAIC LAKE WATER AGENCY et al., Defendants and Respondents.

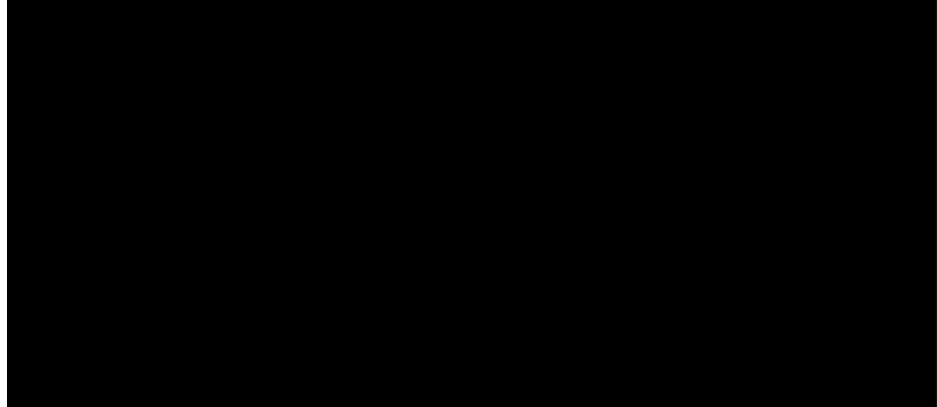
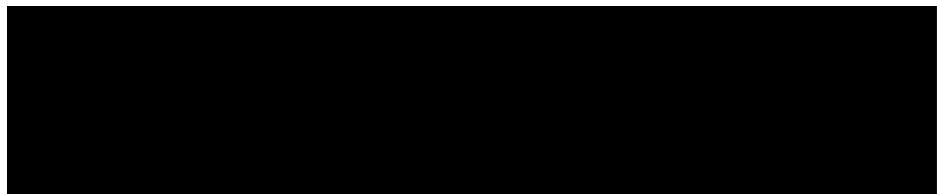
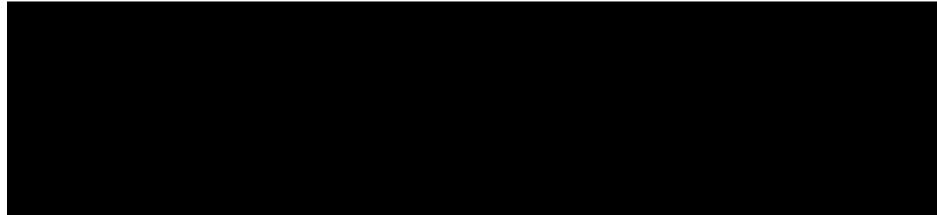
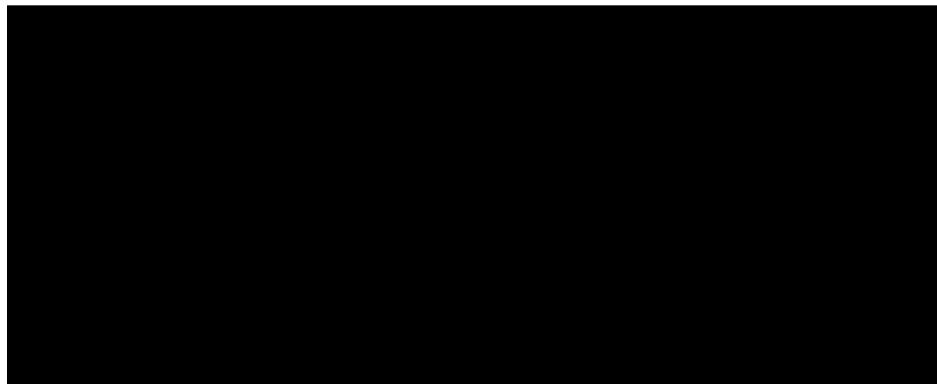




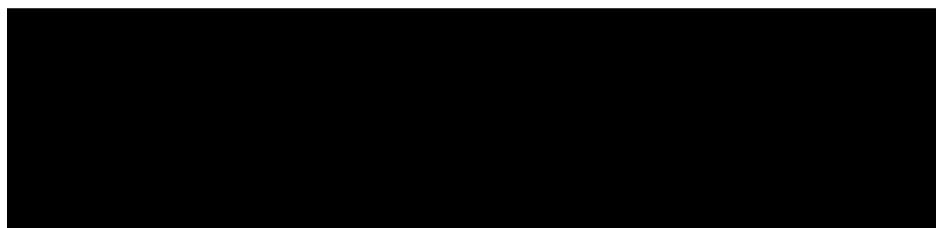
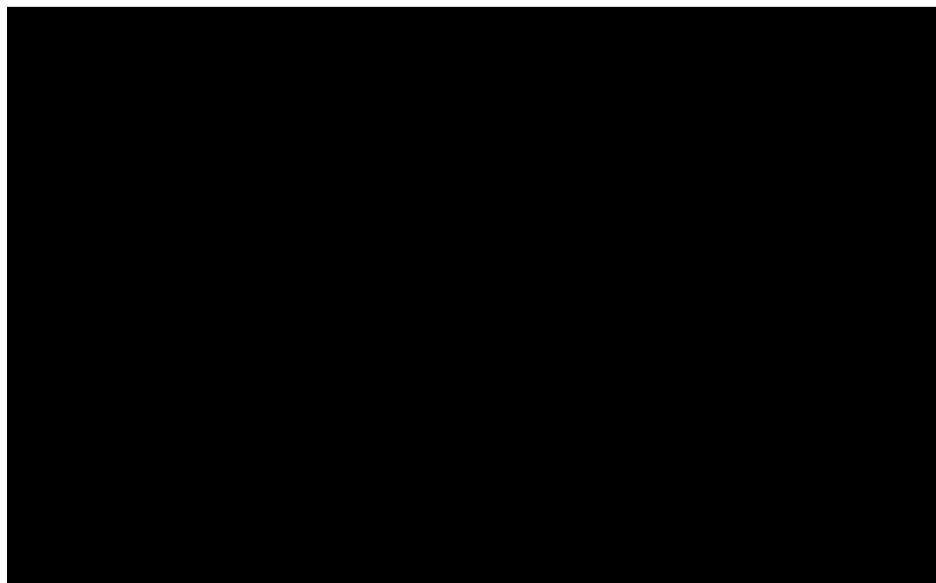
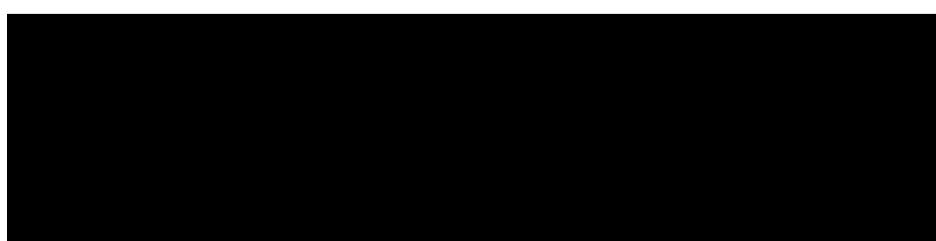
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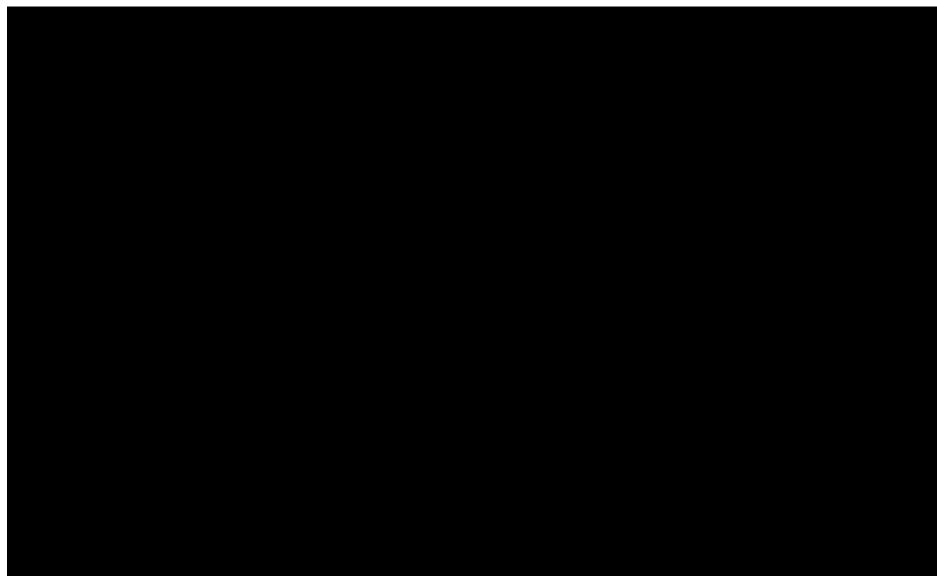
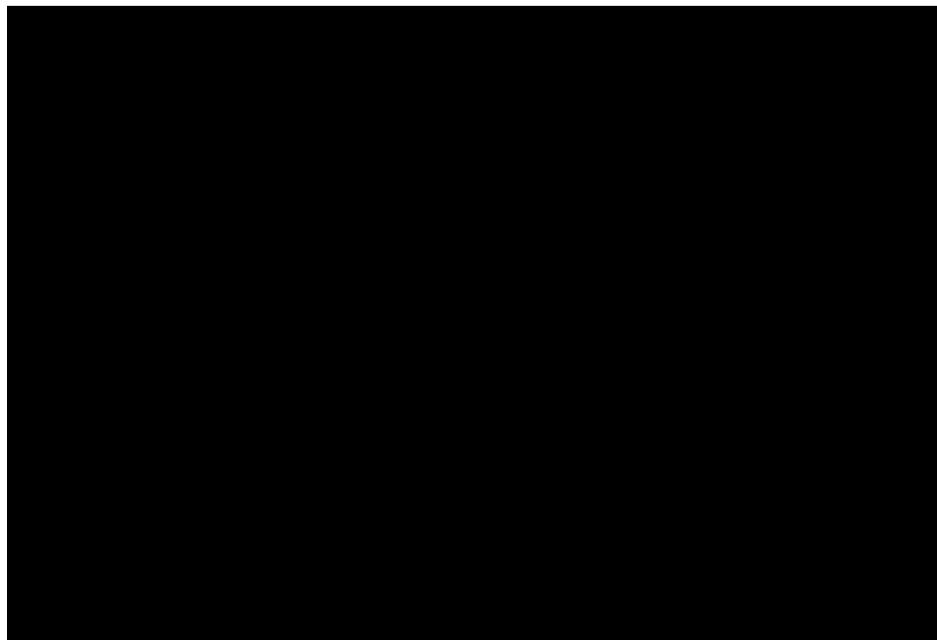
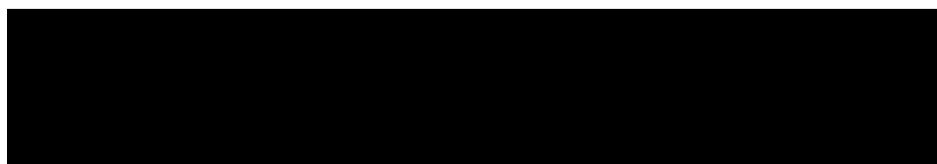
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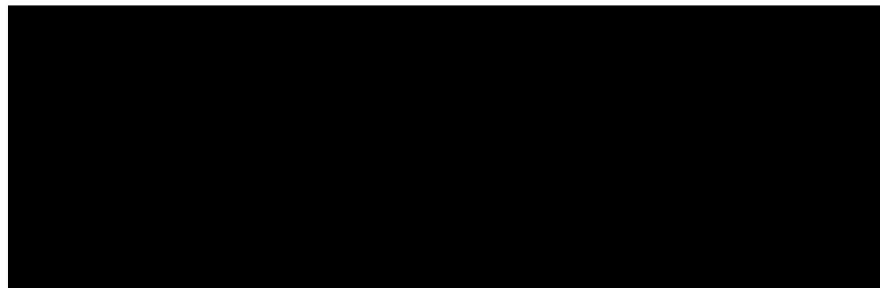
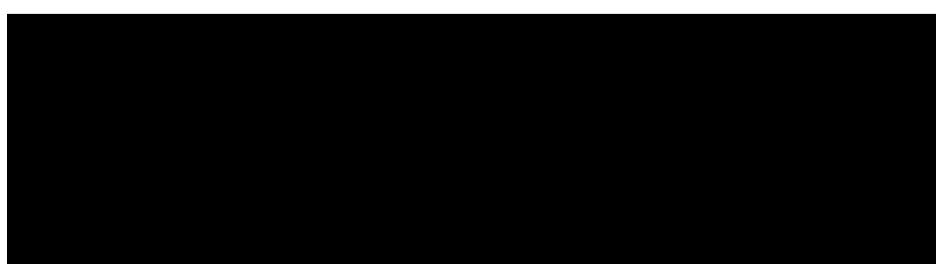
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COUNSEL

Advocates for the Environment and Dean Wallraff for Plaintiff and Appellant.

Kronick, Moskovitz, Tiedemann & Girard, Eric N. Robinson, Hanspeter Walter; Morrison & Foerster and Miriam A. Vogel for Defendants and Respondents Newhall Land and Farming Company and Stevenson Ranch Venture, LLC.

Ferguson Case Orr Paterson and Neal P. Maguire for Defendant and Respondent Valencia Water Company.

Best, Best & Krieger, Jeffrey V. Dunn, Russell G. Behrens; Greines, Martin, Stein & Richland and Timothy T. Coates for Defendant and Respondent Castaic Lake Water Agency.

OPINION

HOFFSTADT, J.—This is a lawsuit to unwind a public water agency's acquisition of all of the stock of a retail water purveyor within its territory. On appeal of the trial court's order refusing to unwind the transaction, we confront three questions: (1) must we dismiss the appeal as untimely under the streamlined procedures available for validating certain acts of public agencies (Code Civ. Proc., § 860 et seq.) when those procedures were invoked below, but invoked improperly because the underlying acts fall outside the reach of the validation statutes?; (2) has the purveyor become the agency's alter ego by virtue of the agency's ownership of all of its stock and its appointment of a majority of the purveyor's directors, such that the agency is now engaged in the retail sale of water in violation of Water Code section 12944.7?; and (3) does the agency's ownership of the purveyor's stock violate article XVI, section 17 of the California Constitution, which precludes a public agency from "loan[ing] its credit," and from "subscrib[ing] to, or be[ing] interested in the stock of any company, association, or corporation" *except* the "shares of . . . [a] mutual water company or corporation" acquired to "furnish[] a supply of water for public, municipal or governmental purposes"?

We conclude that the answer to all three questions is no. The validation procedures invoke a court's *in rem* jurisdiction, and that subject matter jurisdiction attaches only if there is a statutory basis for invoking those procedures and proper notice; because that basis is absent here and because estoppel does not apply to subject matter jurisdiction, the validation procedures' accelerated time line for appeal is inapplicable. There is substantial evidence to support the trial court's factual finding that the purveyor did not become the agency's alter ego in this case. The agency did not violate article XVI, section 17 of the California Constitution for two reasons—namely, the provision reaches only stock acquisitions that extend credit and the provision's exception for stock ownership applies to any "mutual water company"

and any other “corporation” (whether or not it is a mutual water company). Thus, the fact that the corporate purveyor in this case was not a mutual water company is of no significance.

We accordingly affirm.

FACTS AND PROCEDURAL BACKGROUND

I. *Facts*

Respondent Castaic Lake Water Agency (Agency) is charged with “acquiring [ing] water and water rights” in order to “provide, sell, and deliver that water at wholesale, for municipal, industrial, domestic, and other purposes” within its territory. (Stats. 1989, ch. 910, § 1, p. 3132, Deering’s Ann. Wat.—Uncod. Acts (2008 ed.) Act 130, § 15, p. 197.)¹ Its territory encompasses most of the Santa Clarita Valley. (Stats. 1975, ch. 1252, § 3, p. 3232, Deering’s Ann. Wat.—Uncod. Acts, *supra*, Act 130, § 2, p. 188.) Initially, the Agency sold its water wholesale to four retail “purveyors”—Santa Clarita Water Division, respondent Valencia Water Company (Valencia), Newhall County Water District, and Los Angeles County Waterworks District No. 36. In 1999, the Agency acquired the stock of the Santa Clarita Water Division and absorbed the division into its own operations. (*Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 991–992 [109 Cal.Rptr.2d 454] (*Klajic I*); *Klajic v. Castiac Lake Water Agency* (2004) 121 Cal.App.4th 5, 11 [16 Cal.Rptr.3d 746] (*Klajic II*).) The California Legislature passed Assembly Bill No. 134 (2001–2002 Reg. Sess.) to allow the Agency *itself* to act as a retail purveyor of water in the territory where the Santa Clarita Water Division used to operate. (Stats. 2001, ch. 929, § 3, p. 7476, Deering’s Ann. Wat.—Uncod. Acts, *supra*, Act 130, § 15.1; *Klajic II*, at pp. 9–13.)

In 2011, respondent Newhall Land and Farming Company (Newhall) owned 100 percent of the stock in Valencia, and offered to sell that stock to the Agency. At that time, Valencia was a private corporation regulated by the Public Utilities Commission. The Agency was interested in Newhall’s offer because acquiring Valencia would give the Agency control over 84 percent of the retail connections within its territory, which was consistent with the Agency’s “One Valley One Water” mission statement and would enable the Agency to “realize economies of scale and synergies associated with [an] integrated [Santa Clarita Water Division]/[Valencia] retail entity.” Agency staff began negotiating with Newhall on a strictly confidential basis. On December 10, 2012, Agency staff informed the Agency’s board of directors

¹ Uncodified water agency enactments are collected in appendices of the annotated Water Codes, and are assigned numerical designations by the publisher.

(board) that the Agency and Newhall had reached a proposed agreement for the Agency to acquire Valencia's stock for \$73.8 million.

On December 12, 2012, the Agency held a special meeting at which its board adopted two resolutions. Resolution No. 2890 was a resolution of necessity declaring that “[t]he public interest and necessity require the acquisition of all issued and outstanding shares of [Valencia].” This acquisition, the resolution stated, would enable the Agency to “maintain[] and enhanc[e] the reliability of retail and wholesale water service within the Agency’s boundaries,” to “develop[] more uniform water service policies within the Santa Clarita Valley,” to “better coordinat[e] groundwater management activities and enhanc[e] Valley wide conjunctive use of all [Valley resources] of supply,” and to “provid[e] potential future opportunities for operational efficiencies and capital improvement economies of scale.” The resolution specifically ratified the prior negotiations of Agency staff with Newhall concerning Valencia and authorized the Agency to file an eminent domain lawsuit to acquire the stock. Resolution No. 2893, adopted in closed session, authorized Agency staff to enter into a settlement agreement of \$73.8 million.

The next day, the Agency filed its eminent domain lawsuit. Five days later, it filed its settlement agreement with Newhall. Under that agreement, the Agency was to purchase all outstanding shares of Valencia's stock for \$73.8 million. Except that all of Valencia's directors were required to resign, the Agency was to continue operating Valencia under Public Utilities Commission supervision and without altering Valencia's water rights or its personnel for the later of 75 days or the conclusion of any litigation challenging the acquisition. The Agency also agreed that *should* it or Valencia decide to merge Valencia into the Agency, the Agency would forestall implementation for 75 days after any board resolution authorizing such an action.

The trial court approved the settlement and entered judgment on the eminent domain action on December 18, 2012. The next day, on December 19, 2012, the Agency held another meeting. At that meeting, the Agency's staff recommended five persons to be appointed to Valencia's five-member board; three of them were Agency employees.

II. *Procedural History*

The Santa Clarita Organization for Planning and the Environment (SCOPE) sued the Agency and its board; Valencia and its board of directors; Newhall; Stevenson Ranch Venture LLC (Stevenson Ranch), a company affiliated with Newhall; and Keith Abercrombie (Abercrombie), Valencia's general manager and a member of the Agency's board during the negotiations

between Agency staff and Newhall. In the operative first amended petition, SCOPE brought claims (1) for inverse validation (Code Civ. Proc., § 863); (2) for writ of mandate (*id.*, § 1085); (3) for violations of the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.); (4) for illegal expenditure of taxpayer funds (Code Civ. Proc., § 526a); and (5) for conflict of interest (Gov. Code, §§ 1090, 87100). To perfect its invocation of the validation procedures underlying the first count, SCOPE sought and obtained court permission to give constructive notice in one of the local newspapers, and thereafter filed proof of serving that notice.

The trial court subsequently sustained a demurrer with leave to amend on SCOPE's CEQA claim due to untimeliness, and granted judgment on the pleadings to Abercrombie on the sole claim against him for conflict of interest.²

In March 2015, the trial court issued a written ruling on SCOPE's remaining claims.

The trial court denied SCOPE's claims for invalidation and for a writ of mandate. In so doing, the court rejected SCOPE's argument that Valencia had become the Agency's alter ego, finding that the Agency's ownership of all of Valencia's stock and its appointment of a majority of its directors did not constitute sufficient evidence of merger or fraud. In reaching this conclusion, the court refused to consider a videotape and uncertified transcript, prepared by SCOPE, of the December 12 and December 19 Agency board meetings because they had a "very weak foundation." The court further concluded that the Agency did not violate article XVI, section 17 of the California Constitution in acquiring Valencia's stock. The court reasoned that the provision's exception for owning stock in a "mutual water company or corporation" for the purpose of furnishing water for the public "indicates that there is more than one category of entities in which the state can obtain capital stock. One category is a mutual water company. The other is a corporation, without any limitations as to form or composition." The court rejected SCOPE's argument that the phrase meant "mutual water company or *mutual water corporation*" because doing so "would render the word 'corporation' meaningless because, by definition, a mutual water company includes a corporation providing water to its members at cost." The court found the legislative history of the provision unhelpful because it did "not answer the question of why the word[s] 'or corporation' [were] inserted into the actual amendment."

The court also rejected SCOPE's claim based on the improper use of taxpayer funds.

² We affirmed the ruling as to Abercrombie in *Santa Clarita Organization for Planning & the Environment v. Abercrombie* (2015) 240 Cal.App.4th 300 [192 Cal.Rptr.3d 469].

The trial court entered judgment on all of SCOPE's claims, including the validation claim, on April 8, 2015. SCOPE was served with notice of this judgment on April 13, 2015.

Thirty-eight days later, on May 21, 2015, SCOPE filed its notice of appeal.

DISCUSSION

SCOPE does not appeal the trial court's rulings on its claims alleging taxpayer waste, conflict of interest or violations of CEQA. Instead, it contends that the court erred in denying its writ of mandate claim because the Agency's acquisition of Valencia is unlawful no matter what: If Valencia is the Agency's alter ego, the Agency is violating Water Code section 12944.7 by engaging in the retail sale of water; and if Valencia is not the Agency's alter ego, the Agency's purchase, ownership of its stock, and operation of Valencia as a wholly owned subsidiary is violating article XVI, section 17 of the California Constitution. The first question requires us to evaluate the court's factual finding that Valencia is not the Agency's alter ego, and we review that finding for substantial evidence. (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1248 [1 Cal.Rptr.2d 301] (*Las Palmas Associates*); *Klajic I*, *supra*, 90 Cal.App.4th at p. 1001.) The second question requires us to interpret the language of article XVI, section 17, which is a question of law we review de novo. (*Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 287 [109 Cal.Rptr.3d 620, 231 P.3d 350]; *Rubalcava v. Martinez* (2007) 158 Cal.App.4th 563, 570 [70 Cal.Rptr.3d 225].)

Before reaching these issues, we confront a threshold procedural question raised by Newhall, Stevenson Ranch, Valencia and the Agency (collectively, respondents) in a motion to dismiss this appeal: Is this appeal timely?

I. Appellate Jurisdiction

Respondents contend that SCOPE's appeal is untimely. SCOPE filed its notice of appeal 38 days after it was served with notice of the judgment. Although this is timely under the general, 60-day window for filing notices of appeal (Cal. Rules of Court, rule 8.104(a)(1)(A)), respondents assert that the 30-day window applicable to validation proceedings governs (Code Civ. Proc., § 870, subd. (b)). Respondents make two arguments in this regard: (1) that SCOPE's lawsuit is a validation proceeding because the validation statutes (*id.*, § 860 et seq.) reach SCOPE's challenge to the Agency's actions, or (2) even if they do not, SCOPE treated its lawsuit as a validation proceeding before the trial court and is precluded from changing its position now.

A. *Is SCOPE's lawsuit a validation proceeding?*

■ Validation proceedings are a procedural “vehicle” for obtaining an expedited but definitive ruling regarding the validity or invalidity of certain actions taken by public agencies. (Code Civ. Proc., § 860 et seq.; *Fontana Redevelopment Agency v. Torres* (2007) 153 Cal.App.4th 902, 911 [62 Cal.Rptr.3d 875] (*Fontana*).) They are expedited because they require validation proceedings to be filed within 60 days of the public agency’s action (Code Civ. Proc., §§ 860, 863); they are “given preference over all other civil actions” (*id.*, § 867); and, most pertinent here, any appeal must be filed within 30 days after notice of entry of judgment (*id.*, § 870, subd. (b)). They are definitive because they are in rem proceedings that, once proper constructive notice is given (*id.*, §§ 861, 862), result in a judgment that is “binding . . . against the world” (*Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 921 [100 Cal.Rptr.2d 173]; see *Bonander v. Town of Tiburon* (2009) 46 Cal.4th 646, 659 [94 Cal.Rptr.3d 403, 208 P.3d 146] (*Bonander*)), and cannot be collaterally attacked, even on constitutional grounds (*Colonies Partners, L.P. v. Superior Court* (2015) 239 Cal.App.4th 689, 694 [191 Cal.Rptr.3d 45] (*Colonies Partners*); *Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 846 [73 Cal.Rptr.2d 427] (*Friedland*)). By providing a protocol for obtaining a “prompt[]” “settle-[ment]” of “‘‘all questions about the validity of its action’’,” (*California Commerce Casino, Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1421 [53 Cal.Rptr.3d 626] (*California Commerce Casino*), quoting *Friedland*, at p. 843)), validation proceedings provide much-needed certainty to the agency itself as well as to all third parties who would be hesitant to contract with or provide financing to the agency absent that certainty (*Hills for Everyone v. Local Agency Formation Com.* (1980) 105 Cal.App.3d 461, 467 [164 Cal.Rptr. 420] (*Hills for Everyone*) [noting how agency needs to “settle . . . questions”]; *Macy v. City of Fontana* (2016) 244 Cal.App.4th 1421, 1433 [198 Cal.Rptr.3d 867] [same]; *Kaatz v. City of Seaside* (2006) 143 Cal.App.4th 13, 47 [49 Cal.Rptr.3d 95] (*Kaatz*) [validation removes impediments to third parties contracting with agencies]; *Friedland*, at p. 843 [validation “facilitate[s] a public agency’s financial transactions with third parties by quickly affirming their legality”]).

■ Validation proceedings can be initiated by the public agency itself (Code Civ. Proc., § 860), or by “any interested person” in a so-called “inverse” or “reverse” validation proceeding (*id.*, § 863). Although reverse validation proceedings appear at first blush to be optional (*ibid.* [providing that “any interested person *may* bring an action” (italics added)]), they are not: Code of Civil Procedure section 869 “‘says [the interested person] *must*’” bring the inverse validation action “‘or be forever barred from contesting the validity of the agency’s action in a court of law’” (*Kaatz, supra*, 143 Cal.App.4th at p. 30, quoting *City of Ontario v. Superior Court*

(1970) 2 Cal.3d 335, 341 [85 Cal.Rptr. 149, 466 P.2d 693] (*City of Ontario*); see *Friedland, supra*, 62 Cal.App.4th at pp. 846–847 [“as to matters which have been or which could have been adjudicated in a validation action, such matters—including constitutional challenges—must be raised within the statutory limitations period . . . or they are waived”]; Code Civ. Proc., § 869 [“[n]o contest except by the public agency or its officer or agent of any thing or matter under this chapter shall be made other than within the time and the manner herein specified”]). As a result, “‘an agency may indirectly but effectively “validate” its action by *doing nothing to validate it.*’” (*California Commerce Casino, supra*, 146 Cal.App.4th at p. 1420, quoting *City of Ontario*, at pp. 341–342.)

■ Of course, “not all actions of a public agency are subject to validation.” (*Kaatz, supra*, 143 Cal.App.4th at p. 19.) The statutes defining validation proceedings do not specify the types of public agency action to which they apply; instead, they “establish[] a uniform system that other statutory schemes must activate by reference.” (*Bonander, supra*, 46 Cal.4th at p. 656; see Code Civ. Proc., § 860 [“[a] public agency may upon the existence of any matter *which under any other law is authorized to be determined pursuant to this chapter . . . bring an action*” (italics added)].) At last count, more than 200 statutes scattered throughout the California codes are subject to validation in validation proceedings. (*Kaatz, supra*, 143 Cal.App.4th at p. 31, fn. 19.)

Under most of the statutes declaring certain acts of public agencies subject to validation proceedings, what matters is the “nature of the governmental action being challenged.” (*Hills for Everyone, supra*, 105 Cal.App.3d at p. 468; see *McLeod v. Vista Unified School Dist.* (2008) 158 Cal.App.4th 1156, 1165 [71 Cal.Rptr.3d 109] (*McLeod*) [looking to “[t]he gravamen of a complaint”].) The applicability of validation proceedings does not turn on the type of relief demanded. (*McLeod*, at p. 1165.) Nor does it turn on the “‘form of the action.’” (*Ibid.*) Thus, where a certain type of action is subject to validation proceedings, a third party cannot sidestep those proceedings by purporting to invoke a different procedural vehicle, such as a writ of mandate (Code Civ. Proc., § 1085) or a taxpayer suit (*id.*, § 526a). (See *Millbrae School Dist. v. Superior Court* (1989) 209 Cal.App.3d 1494, 1499 [261 Cal.Rptr. 409] [suit seeking a writ of mandate subject to validation proceedings]; *Protect Agricultural Land v. Stanislaus County Local Agency Formation Com.* (2014) 223 Cal.App.4th 550, 558 [167 Cal.Rptr.3d 343] [same]; *McLeod*, at pp. 1166–1167 [suit seeking relief under Code Civ. Proc., § 526a subject to validation proceedings]; *Regus v. City of Baldwin Park* (1977) 70 Cal.App.3d 968, 972 [139 Cal.Rptr. 196] [same]; *Plunkett v. City of Lakewood* (1975) 44 Cal.App.3d 344, 346–347 [116 Cal.Rptr. 885] [same].) Any other rule would render the certainty attaching to validation proceedings meaningless. (See *Millbrae School Dist.*, at p. 1499.) Whether the substantive basis of the

challenge to the public agency's action matters seems to turn on whether the statute invoking the validation proceedings conditions that invocation on the nature of the challenge. (Compare *Hills for Everyone*, at p. 468 [“the basis for the challenge” does not matter] with *McLeod*, at p. 1165 [“‘the nature of the right sued upon’ ” does matter].)

In this case, SCOPE's operative complaint alleged that three statutes made the Agency's acquisition of Valencia subject to validation proceedings: (1) section 19 of the Agency's enabling act (Stats. 1988, ch. 1181, § 8, p. 3791, Deering's Ann. Wat.—Uncod. Acts, *supra*, Act 130, § 19, p. 203); (2) section 16.1 of the Agency's enabling act (Stats. 2001, ch. 929, § 4, p. 7479, Deering's Ann. Wat.—Uncod. Acts, *supra*, Act 130, § 16.1, p. 203); and (3) Government Code section 53511. No others have been offered on appeal, so we focus on those three. We conclude that none of them applies to the Agency's acts in filing its eminent domain action against Newhall or in resolving that action through a settlement agreement.

Section 19 of the Agency's enabling act applies to “[a]n action to determine the validity of any bonds, warrants, promissory notes, contracts, or other evidences of indebtedness of the kinds authorized by subdivision (h), (i), (o), (p), (r), or (s) of Section 15.” (Stats. 1988, ch. 1181, § 8, p. 3791, Deering's Ann. Wat.—Uncod. Acts, *supra*, Act 130, § 19.) The Agency's acts here rest upon its power to sue and to exercise the power of eminent domain, as well as its power to enter into contracts to acquire “a waterworks system, water rights, waters, [and] lands” (Stats. 1989, ch. 910, § 1, p. 3132, Deering's Ann. Wat.—Uncod. Acts, *supra*, Act 130, § 15, subd. (e), p. 197); these powers are authorized by subdivisions (b), (g), and (e) of section 15, respectively. The subdivisions of section 15 covered by section 19 deal with issuing bonds and borrowing money (Stats. 1989, ch. 910, § 1, p. 3132, Deering's Ann. Wat.—Uncod. Acts, *supra*, Act 130, § 15, subd. (h), p. 197); issuing promissory notes (Stats. 1989, ch. 910, § 1, p. 3132, Deering's Ann. Wat.—Uncod. Acts, *supra*, Act 130, subd. (i), p. 197); joining with other public agencies or private corporations “for the purpose of financing . . . acquisitions, constructions, and operations” (Stats. 1989, ch. 910, § 1, p. 3132, Deering's Ann. Wat.—Uncod. Acts, *supra*, Act 130, subd. (o), p. 198); issuing bonds for payments to the state (Stats. 1989, ch. 910, § 1, p. 3132, Deering's Ann. Wat.—Uncod. Acts, *supra*, Act 130, subd. (p), p. 199); “construct[ing], operat[ing] or maintain[ing] works to develop hydroelectric energy” (Stats. 1989, ch. 910, § 1, p. 3132, Deering's Ann. Wat.—Uncod. Acts, *supra*, Act 130, subd. (r), p. 199); and “contract[ing] . . . for the sale of the right to use falling water for electric energy purposes” (Stats. 1989, ch. 910, § 1, p. 3132, Deering's Ann. Wat.—Uncod. Acts, *supra*, Act 130, subd. (s), p. 199). The Agency's acts in this case do not deal with these subdivisions, and thus fall outside of section's 19 reference to validation proceedings.

Section 16.1 of the Agency’s enabling act provides that the Agency’s retail sale of water within the area once serviced by the Santa Clarita Water Division is governed by division 12 of the Water Code (2001 ch. 929, § 4, p. 7479, Deering’s Ann. Wat.—Uncod. Acts, *supra*, Act 130, § 16.1, p. 203), and division 12 makes validation proceedings applicable “to determine the validity of an assessment, or of warrants, contracts, obligations, or evidences of indebtedness” (Wat. Code, § 30066). Because the parties in this case have specifically stipulated that Valencia operates outside the boundaries of the Santa Clarita Water Division, section 16.1 by its terms does not apply to the Agency’s acquisition of Valencia.

■ Government Code section 53511 makes validation proceedings available “to determine the validity of [a local agency’s] bonds, warrants, *contracts*, obligations or evidences of indebtedness.” (Gov. Code, § 53511, subd. (a), italics added.) Although “contracts” could be read to reach *all* contracts, the courts have defined it by reference to the clause in which it has been used, and thus to reach only those contracts “that are in the nature of, or directly relate to a public agency’s bonds, warrants or other evidences of indebtedness.” (*Kaatz, supra*, 143 Cal.App.4th at pp. 40, 42; see *Friedland, supra*, 62 Cal.App.4th at p. 843 [“[t]he ‘contracts’ in this statute do not refer generally to all public agency contracts, but rather to contracts involving financing and financial obligations”]; *Meaney v. Sacramento Housing & Redevelopment Agency* (1993) 13 Cal.App.4th 566, 577 [16 Cal.Rptr.2d 589]; see generally *City of Ontario, supra*, 2 Cal.3d at pp. 343–345 [setting forth this reasoning, but declining to adopt it definitively]; accord, *Phillips v. Seely* (1974) 43 Cal.App.3d 104, 109–111 [117 Cal.Rptr. 863] [declining to apply Gov. Code, § 53511 to contract for legal services]; *Walters v. County of Plumas* (1976) 61 Cal.App.3d 460, 468–469 [132 Cal.Rptr. 174] [declining to apply § 53511 to franchise contract].) At times, courts have read section 53511 also to reach contracts that are “inextricably bound up” with an agency’s bonds, warrants or other evidence of indebtedness, even if those contracts do not directly deal with those topics. (*California Commerce Casino, supra*, 146 Cal.App.4th at p. 1430; *McLeod, supra*, 158 Cal.App.4th at p. 1169; see *Graydon v. Pasadena Redevelopment Agency* (1980) 104 Cal.App.3d 631, 645–646 [164 Cal.Rptr. 56].) In this case, the Agency’s settlement contract to acquire Valencia’s stock did not deal with bonds, warrants or other evidence of indebtedness and was not inextricably bound up with other contracts that did; instead, the Agency purchased Valencia’s stock using “cash on hand.”

SCOPE’s action was therefore not subject to validation proceedings.

B. *Is SCOPE precluded from contesting the applicability of the validation procedures because it invoked them below?*

Respondents assert that it is too late for SCOPE to disavow that the validation proceedings' deadlines apply here because (1) collateral attacks on validation proceedings are not permitted, and (2) the doctrine of judicial estoppel applies.³ We are unpersuaded.

1. *Is this appeal a collateral attack?*

■ Although, as noted above, a final validation judgment cannot be collaterally attacked (*Colonies Partners, supra*, 239 Cal.App.4th at p. 694), the propriety of validation proceedings may be challenged on direct appeal (*Fontana, supra*, 153 Cal.App.4th at pp. 908–909). Newhall suggests that the applicability of the validation statutes can only be contested on direct appeal if the appeal challenging them was filed in accordance with the validation statutes, but that precise argument was rejected in *Kaatz, supra*, 143 Cal.App.4th at page 26.

2. *Does judicial estoppel apply?*

■ The doctrine of judicial estoppel prevents a party from taking inconsistent positions during litigation. (*AP-Colton LLC v. Ohaeri* (2015) 240 Cal.App.4th 500, 507 [192 Cal.Rptr.3d 754]; *Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics* (1998) 61 Cal.App.4th 672, 678–679 [71 Cal.Rptr.2d 771].) A party's prior position cannot preclude it from contesting a trial court's subject matter jurisdiction, but can preclude a party from arguing that the court is acting "in excess of [its] jurisdiction." (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 584 [80 Cal.Rptr.3d 83, 187 P.3d 934]; see *Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 307, fn. 9 [63 Cal.Rptr.2d 74, 935 P.2d 781].) Because SCOPE indisputably invoked the validation statutes by pleading them in its complaint, by seeking the trial court's permission to publish the requisite constructive notice required by those statutes, and by informing the court that it gave that notice, whether SCOPE is estopped from contesting the applicability of the validation statutes comes down to whether that contest amounts to a dispute over the court's subject matter jurisdiction.

■ The validation statutes confer *in rem* jurisdiction upon a court. (Code Civ. Proc., § 860.) As our Supreme Court held over 125 years ago, *in rem*

³ Respondents cite several cases regarding how a party's consent to a judgment precludes a later challenge (e.g., *Browand v. Scott Lumber Co.* (1954) 125 Cal.App.2d 68, 72–73 [269 P.2d 891]; *Dietrichson v. Western Loan & Bldg. Co.* (1932) 123 Cal.App. 358, 361–362 [11 P.2d 64]), but the doctrine of consent is irrelevant because SCOPE did not consent to the entry of judgment against it.

jurisdiction attaches only if (1) the court “ha[s] the authority to determine the subject-matter of the controversy” and (2) the court “ha[s] jurisdiction over the *thing* proceeded against as a defendant.” (*Kearney v. Kearney* (1887) 72 Cal. 591, 594 [15 P. 769] (*Kearney*).) The first prerequisite looks to a court’s statutory authority to act (*ibid.*), while the second looks to the propriety of the notice (*id.* at p. 595). Courts have applied this same framework to *in rem* jurisdiction under the validation statutes: There is subject matter jurisdiction to entertain a validation proceeding only if there is a statutory basis for that jurisdiction *and* if the party seeking to invoke the validation procedures subsequently perfects that jurisdiction by providing the proper type of constructive notice. (*San Diegans for Open Government v. City of San Diego* (2015) 242 Cal.App.4th 416, 428 [195 Cal.Rptr.3d 133] [“[f]ailure to publish a summons in accordance with the statutory requirements deprives the court of jurisdiction over “all interested parties” [citation], which deprives the court of the power to rule upon the matter”]; *Katz v. Campbell Union High School Dist.* (2006) 144 Cal.App.4th 1024, 1032 [50 Cal.Rptr.3d 839] [“[t]he only way for the court to acquire jurisdiction over the matter is to ensure that notice is given to all interested persons so that the resulting judgment can be conclusive as against them”]; cf. *Arnold v. Newhall County Water Dist.* (1970) 11 Cal.App.3d 794, 799–800 [96 Cal.Rptr. 894] [improper constructive notice; court lacks subject matter jurisdiction]; accord, *Bayle-Lacoste & Co. v. Superior Court* (1941) 46 Cal.App.2d 636, 642 [116 P.2d 458] [in an *in rem* condemnation action, notice “vest[s]” jurisdiction].) Constructive notice alone is not enough to confer subject matter jurisdiction. If it were, a party could compel a court to issue a validation ruling merely by giving constructive notice of its complaint, even if its complaint fell outside of any validation statute; such rogue “validation” actions would eviscerate the Legislature’s careful effort to specifically delimit when these proceedings are applicable.

Newhall and Valencia counter that allowing SCOPE to retreat from its initial position will empower it to do an “end run” around the validation statutes. We disagree. To be sure, SCOPE is still able to challenge the Agency’s actions in this case through a writ of mandate. But this does not offend the validation statutes because (1) the validation statutes by their terms do not apply, and (2) a writ of mandate relies upon the court’s *in personam* jurisdiction (*Hills for Everyone, supra*, 105 Cal.App.3d at p. 467), not its *in rem* jurisdiction (see *Kearney, supra*, 72 Cal. at p. 594), and thus any judgment from the *in personam* writ of mandate binds only the parties to the litigation, not the world.

Consequently, we conclude that the validation statutes’ shorter deadline to file a notice of appeal does not apply, and that SCOPE’s notice of appeal is timely.

II. *Merits*

A. *Is the Agency violating Water Code section 12944.7 and its enabling act?*

■ Under Water Code section 12944.7, a public agency that is limited by its enabling act “to the wholesale distribution of water” may sell water at retail only if (1) its enabling act otherwise permits, or (2) the agency has a “written contract” with a water retailer that is either a “public entity water purveyor” or a “water corporation” regulated by the Public Utilities Commission. (Wat. Code, § 12944.7, subd. (b).) Here, the Agency’s enabling act limits the agency to “provid[ing], sell[ing], and deliver[ing] . . . water *at wholesale only.*” (Stats. 1989, ch. 910, § 1, p. 3132, Deering’s Ann. Wat.—Uncod. Acts, *supra*, Act 130, § 15, p. 197, italics added.) What is more, the parties stipulated below that the exception in the Agency’s enabling act for selling water at retail (in the territory once serviced by Santa Clarita Water Division) does not apply here, and that the Agency has no written contracts with Valencia that would fit within Water Code section 12944.7’s second exception. Consequently, whether the Agency is currently violating section 12944.7 depends entirely on whether *Valencia* is selling water at retail or whether the Agency is doing so using Valencia as its alter ego. The trial court found that Valencia was not the Agency’s alter ego, and our task, as noted above, is to review that finding for substantial evidence. (*Las Palmas Associates, supra*, 235 Cal.App.3d at p. 1248.)

1. *Did the trial court properly refuse to consider extra-record evidence?*

Before undertaking substantial evidence review, we first address SCOPE’s argument that our analysis should include four items of evidence that the trial court refused to consider—namely, the raw videotapes and uncertified transcripts, prepared by SCOPE members, from the Agency’s board’s December 12 and December 19 meetings. We conclude that the court’s refusal to consider this evidence was appropriate for two reasons.

■ First, the trial court properly refused to consider this evidence because it is outside the administrative record. Agency actions can fall into one of two broad categories: (1) “quasi-judicial” actions, where the agency settles the rights of the parties before it as to past transactions; and (2) “quasi-legislative” actions, where the agency exercises its “discretion governed by considerations of the public welfare” as to prospective events or actions. (*Wilson v. Hidden Valley Municipal Water Dist.* (1967) 256 Cal.App.2d 271, 279–280 [63 Cal.Rptr. 889].) A public agency’s decision to initiate eminent domain proceedings and to settle those proceedings in a settlement agreement are quasi-legislative because they require the agency to consider and balance policy concerns. (See *Redevelopment Agency v. Rados Bros.* (2001) 95

Cal.App.4th 309, 316 [115 Cal.Rptr.2d 234] [eminent domain reviewed under standard of review for quasi-legislative actions]; Code Civ. Proc., § 1245.245, subd. (a)(3) [resolution of necessity that precedes eminent domain action must be based on considerations of the “public interest”]; *Joint Council of Interns & Residents v. Board of Supervisors* (1989) 210 Cal.App.3d 1202, 1211 [258 Cal.Rptr. 762] [contracting “requires an exercise of discretion”].) Judicial review of quasi-legislative agency actions is generally confined to the record that was before the agency. (*Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 233 [1 Cal.Rptr.2d 818] (*Shapell*); see *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573 [38 Cal.Rptr.2d 139, 888 P.2d 1268] [“a court generally may consider only the administrative record in determining whether a quasi-legislative decision was supported by substantial evidence”]; cf. *Hothem v. City* (1986) 186 Cal.App.3d 702, 705 [231 Cal.Rptr. 70] [allowing for remand for consideration of extra-record evidence in a quasi-judicial proceeding].) This rule is consistent with substantial evidence review generally, and ensures that courts appropriately defer to the agency’s expertise and its role as part of the separate and coequal executive branch. (*Western States Petroleum*, at pp. 569–573.) The only exceptions, when extra-record evidence will be admitted, are when that evidence “provide[s] background information regarding the quasi-legislative agency decision, . . . establishe[s] whether the agency fulfilled its duties in making the decision, or . . . assist[s] the trial court in understanding the agency’s decision.” (*Outfitter Properties, LLC v. Wildlife Conservation Bd.* (2012) 207 Cal.App.4th 237, 251 [143 Cal.Rptr.3d 312] (*Outfitter Properties*)).

■ SCOPE offers three reasons why, in its view, the general rule against the consideration of extra-record evidence does not apply here. SCOPE argues that the general rule does not apply when a party is challenging an agency’s action as ultra vires (that is, beyond its statutory authority), but the law is to the contrary because courts will limit themselves to record evidence even when confronted with challenges that an agency “acting in its quasi-legislative capacity has exceeded its authority.” (*Shapell, supra*, 1 Cal.App.4th at p. 233.) SCOPE next argues that *Outfitter Properties, supra*, 207 Cal.App.4th 237 supports its position, but the exceptions detailed above in *Outfitter Properties* do not make “extra-record evidence . . . admissible to contradict evidence upon which the administrative agency relied in making its quasi-legislative decision.” (*Id.* at p. 251.) SCOPE lastly asserts for the first time at oral argument on appeal that it is attacking not only the Agency’s initial acquisition of Valencia, but also its ongoing operation of Valencia as its alter ego. SCOPE urges that the latter challenge is not subject to the general rule against resort to extra-record evidence. Even if we assume SCOPE is correct, ignore that SCOPE has forfeited this argument by waiting until oral argument on appeal to raise it (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 232, fn. 6 [45 Cal.Rptr.3d 207,

902 P.2d 225]), and overlook that SCOPE's operative complaint primarily attacks the Agency's acquisition of Valencia, SCOPE's newly minted argument does it little good because the trial court had an independent basis for excluding the extra-record evidence, as we discuss next.⁴

■ Second, even if the trial court could have considered this extra-record evidence, the court acted within its discretion in deciding not to admit the incomplete videotapes and their uncertified transcripts. We review a trial court's decision to exclude evidence for an abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 207 [58 Cal.Rptr.2d 385, 926 P.2d 365].) In deciding whether a party has laid an adequate foundation for a recording, a court is to look to whether the recording is "accurate and complete." (E.g., *People v. Patton* (1976) 63 Cal.App.3d 211, 220 [133 Cal.Rptr. 533]; see Evid. Code, §§ 1401, 1413; *People v. Williams* (1997) 16 Cal.4th 635, 662 [66 Cal.Rptr.2d 573, 941 P.2d 752].) ■ In admitting a transcript, a court is to look to its accuracy and whether it is certified. (*Kuehn v. Carlos* (1939) 32 Cal.App.2d 295, 298 [89 P.2d 672].) In this case, the court had evidence that at least one of the videotapes was incomplete, and that both transcripts were uncertified. This is a sufficient basis for refusing to admit them.

SCOPE argues that the Agency did not comply with its discovery obligations before the trial court, did not properly respond to a California Public Records Act request (Gov. Code, § 6250 et seq.), and did not inform SCOPE that its board's secretary regularly videotaped meetings to use in preparing official minutes. However, these arguments have no bearing on the propriety or admissibility of SCOPE's extra-record evidence and accordingly do not alter our analysis.

2. Does substantial evidence support the trial court's finding that Valencia is not the Agency's alter ego?

■ "It is fundamental that a corporation is a legal entity that is distinct from its shareholders." (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108 [72 Cal.Rptr.3d 129, 175 P.3d 1184].) Part and parcel of this general principle is that "a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." (*United States v. Bestfoods* (1998) 524 U.S. 51, 61 [141 L.Ed.2d 43, 118 S.Ct. 1876].) ■ However, where a parent corporation (or, for that matter, anyone) that owns all of a subsidiary's stock operates that subsidiary in a manner that renders the subsidiary merely an alter ego of its parent (and a

⁴ To the extent that SCOPE at oral argument on appeal requested a reversal and remand so that it can propound discovery and obtain new extra-record evidence to prove that the Agency is now operating Valencia as its alter ego, we deny that request as untimely and as wholly inconsistent with an earlier stipulation not to "propound any further request for discovery in this matter." SCOPE asserts that it had tactical reasons for entering into this stipulation, but its motives do not negate the effect of its acts.

ghost of its former, independent self), courts can pierce the so-called “ ‘corporate veil’ ” and treat the two as one. (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538 [99 Cal.Rptr.2d 824] (*Sonora Diamond*).)

In assessing whether to treat a subsidiary as the alter ego of its parent corporation (or its individual owner(s)), courts must assess whether (1) there is “ ‘such unity of interest and ownership that the separate personalities of the [subsidiary] corporation and [its parent corporation or individual owner] no longer exist’ ” and (2) “ ‘if the acts are treated as those of the [subsidiary] alone, an inequitable result will follow.’ ” (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300 [216 Cal.Rptr. 443, 702 P.2d 601]; see *CADC/RADC Venture 2011-1 LLC v. Bradley* (2015) 235 Cal.App.4th 775, 788–789 [185 Cal.Rptr.3d 684] (CADC/RADC).) An inequitable result follows when the corporate form is used “to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose.” (*Sonora Diamond*, *supra*, 83 Cal.App.4th at p. 538.) “To put it in other terms, the plaintiff must show ‘specific manipulative conduct’ by the parent toward the subsidiary which ‘relegate[s] the latter to the status of merely an instrumentality, agency, conduit or adjunct of the former’ ” (*Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 742 [80 Cal.Rptr.2d 454], quoting *Institute of Veterinary Pathology, Inc. v. California Health Laboratories, Inc.* (1981) 116 Cal.App.3d 111, 119–120 [172 Cal.Rptr. 74]; see *Las Palmas Associates*, *supra*, 235 Cal.App.3d at p. 1249.) As these definitions indicate, treating one corporation as the alter ego of another is “ ‘an extreme remedy, [to be] sparingly used’ ” (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 155 [173 Cal.Rptr.3d 356] (*Hasso*)) and is to be “approached with caution” (*Las Palmas Associates*, at p. 1249). This heavy burden rests on the shoulders of the party seeking to pierce the corporate veil. (*Mid-Century Ins. Co. v. Gardner* (1992) 9 Cal.App.4th 1205, 1212–1213 [11 Cal.Rptr.2d 918].)

■ In evaluating the two requirements of the alter ego doctrine, courts look to the totality of the circumstances bearing on the relationship between the parent and its subsidiary. (*Hasso*, *supra*, 227 Cal.App.4th at p. 155; *Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 513 [121 Cal.Rptr.3d 118]; *Sonora Diamond*, *supra*, 83 Cal.App.4th at p. 539.) Those circumstances include, but are not limited to (1) whether the parent and subsidiary commingle funds and other assets, (2) whether the parent has represented to third parties that it is liable for the subsidiary’s debts, (3) whether the parent owns 100 percent of the subsidiary’s stock, (4) whether the parent and subsidiary use the same offices and same employees, (5) whether the subsidiary is used as the “ ‘mere shell or conduit’ ” for the affairs of the parent, (6) whether the subsidiary is inadequately capitalized, (7) whether the parent or subsidiary disregards corporate formalities such as holding board meetings, keeping corporate records, and acting through votes of the corporate board, (8) whether the parent and subsidiary commingle their corporate records, (9)

whether the parent and subsidiary have “‘identical directors and officers,’” and (10) whether the parent has diverted the subsidiary’s assets to the parent’s uses. (*Hasso*, at p. 155; see *Greenspan*, at pp. 512–513.)

■ The trial court found that the Agency was not operating Valencia as its alter ego because the Agency’s ownership of all of Valencia’s stock and its appointment of three Agency employees to Valencia’s five-member board of directors was insufficient to prove that the Agency was treating Valencia as a mere conduit or instrumentality. Substantial evidence supports this finding. In evaluating whether evidence is substantial, we ask whether a “‘rational trier of fact could find [the evidence] to be reasonable, credible, and of solid value’” and do so while “‘view[ing] the evidence in the light most favorable to the [decision].’” (*San Diegans for Open Government v. City of San Diego* (2016) 245 Cal.App.4th 736, 740 [199 Cal.Rptr.3d 782].) The Agency’s ownership of Valencia’s stock is of no moment. ■ That is because, under California law, a parent corporation or an individual’s ownership of a subsidiary is *necessary* for application of the alter ego doctrine (*CADC/RADC, supra*, 235 Cal.App.4th at p. 789), but it is not *sufficient* (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 415 [125 Cal.Rptr.3d 56]; *Meadows v. Emett & Chandler* (1950) 99 Cal.App.2d 496, 499 [222 P.2d 145]; *Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, Inc.* (1932) 217 Cal. 124, 129 [17 P.2d 709]; *Erkenbrecher v. Grant* (1921) 187 Cal. 7, 11 [200 P. 641]). And although three of Valencia’s five directors are Agency employees, this falls far short of showing the two corporations have “identical directors and officers.” ■ At most, it shows “some common personnel,” which is not enough. (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1285 [31 Cal.Rptr.2d 433]; cf. *Borun Bros. v. Department of Alcohol Beverage Control* (1963) 215 Cal.App.2d 503, 508–509 [30 Cal.Rptr. 175] [alter ego applies where two corporations have “interlocking directorships”]; *Thomson v. L. C. Roney & Co.* (1952) 112 Cal.App.2d 420, 428–429 [246 P.2d 1017] [same].) None of the other factors is present.⁵

■ SCOPE levels three attacks at the trial court’s analysis. First, SCOPE argues that the settlement agreement contemplates a future merger between the Agency and Valencia, which in SCOPE’s view indicates a wrongful intent. We disagree. The agreement places a 75-day moratorium on implementing any resolution to absorb Valencia into the Agency “*should*” the Agency’s board authorize such a merger. Although the agreement does not forever declare any and all mergers to be impossible, it also does not dictate a

⁵ Valencia, Newhall, and Stevenson Ranch urge us to examine, as part of our alter ego analysis, whether the parent has “taken over performance of the subsidiary’s day-to-day operations” (*Sonora Diamond, supra*, 83 Cal.App.4th at p. 542, italics omitted), but that test is relevant to whether the subsidiary is the *agent* of the parent (*id.* at pp. 540–542). The question of agency is distinct from the question of alter ego. (*Id.* at p. 540 [noting that “the two concepts are different and must be evaluated independently”].)

merger; this provision addresses at most a possible contingency. Second, SCOPE cites several cases in which courts have applied the alter ego doctrine. (See *Las Palmas Associates*, *supra*, 235 Cal.App.3d 1220; *H. A. S. Loan Service, Inc. v. McColgan* (1943) 21 Cal.2d 518 [133 P.2d 391]; *Say & Say, Inc. v. Ebershoff* (1993) 20 Cal.App.4th 1759 [25 Cal.Rptr.2d 703].) But, as even *H. A. S. Loan Service* acknowledges, “each case must rest upon its special facts, and such determination is peculiarly within the province of the trier of fact.” (*H. A .S. Loan Service*, at p. 523.) The cases SCOPE cites involve very different facts from those present here. (*Las Palmas Associates*, at pp. 1249–1251 [affirming finding that two sister corporations liable were alter egos of one another based on undercapitalization and guarantees by one corporation for the other]; *H. A. S. Loan Service*, at pp. 521–523 [affirming finding of alter ego when two corporations worked in tandem to make loans that circumvented the fees charged to national banks for such loans]; *Say & Say*, at pp. 1767–1769 [affirming finding that law firm was alter ego of attorney for purposes of evading vexatious litigant status].) More importantly, the appellate courts in those three cases *affirmed* the trial courts’ findings of alter ego after viewing the evidence in the light most favorable to those findings; here, we do the same in affirming the trial court’s finding against alter ego. Lastly, SCOPE asserts that the Agency’s acquisition of Valencia is enabling it to achieve an inequitable result because it is now able to “circumvent a statute”—namely, Water Code section 12944.7 and its restrictions on the retail sale of water. Even if we assume for the sake of argument that a transaction that avoids application of a statute amounts, without more, to an attempt to “circumvent” it, this consideration is just one of many that, for the reasons noted above, does not undercut the substantial evidence that the Agency and Valencia have maintained separate corporate identities.

B. *Is the Agency violating article XVI, section 17 of the California Constitution by owning Valencia’s stock?*

Article XVI, section 17 of the California Constitution provides, in pertinent part, that “[t]he State shall not in any manner loan its credit, nor shall it subscribe to, or be interested in the stock of any company, association, or corporation, except that the State and each political subdivision, district, municipality, and public agency thereof is hereby authorized to acquire and hold shares of the capital stock of any mutual water company or corporation when the stock is so acquired or held for the purpose of furnishing a supply of water for public, municipal or governmental purposes; and the holding of the stock shall entitle the holder thereof to all of the rights, powers and privileges, and shall subject the holder to the obligations and liabilities

conferred or imposed by law upon other holders of stock in the mutual water company or corporation in which the stock is so held.” (Cal. Const., art. XVI, § 17 (section 17).)⁶

SCOPE argues that this provision prohibits the Agency from acquiring and owning Valencia’s stock because Valencia is not a “mutual water company or corporation.” This argument requires us to answer two questions: (1) does section 17’s general prohibition apply when the public agency’s ownership of stock does not amount to an extension of credit? and (2) because it is undisputed that Valencia is a corporation but not a “mutual water company,” does section 17’s exception for ownership of stock in any “mutual water company or corporation” apply only to a corporation that is a “mutual water company” or instead to *any* “corporation”?

These questions require us to construe section 17. “In doing so, ‘‘our fundamental task is ‘to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.’’’” (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1232 [191 Cal.Rptr.3d 536, 354 P.3d 334]; see *Riverside County Sheriff’s Dept. v. Stiglitz* (2014) 60 Cal.4th 624, 630 [181 Cal.Rptr.3d 1, 339 P.3d 295] [“[i]n answering this question of statutory interpretation, our goal is to effectuate the Legislature’s intent”].) Our starting place is the provision’s text because it is “‘‘generally . . . the most reliable indicator of legislative intent’’” (*Lee*, at p. 1232), although “‘‘[w]e may reject a literal construction’’” if it is “‘‘contrary to the legislative intent apparent in the statute’’” (*Stiglitz*, at p. 630; see *Provigo Corp. v. Alcoholic Beverage Control Appeals Bd.* (1994) 7 Cal.4th 561, 566–567 [28 Cal.Rptr.2d 638, 869 P.2d 1163] [“‘the “plain meaning” rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose’”]; *Santa Ana Unified School Dist. v. Orange County Development Agency* (2001) 90 Cal.App.4th 404, 410 [108 Cal.Rptr.2d 770] (*Santa Ana Unified School Dist.*) [“‘[t]he legislative purpose will not be sacrificed to a literal construction of any part of the statute’”].) If the text is unambiguous and comports with the statute’s purpose, we stop there. (*Lee*, at pp. 1232–1233.) However, if the statute’s text “permits more than one interpretation . . . , we ‘may consider other aids, such as the statute’s purpose, legislative history, and public policy’” (*Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1184 [199 Cal.Rptr.3d 743, 366 P.3d 996], quoting *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737 [21 Cal.Rptr.3d 676, 101 P.3d 563]) as well as the general canons of statutory construction (*Stiglitz*, at p. 630). These rules of construction apply to provisions of our Constitution as well as statutes (e.g., *Provigo*, at p. 567), and in that context, we may look to ballot pamphlets underlying adoption of

⁶ This provision has additional language dealing with “public pension or retirement system[s],” but this language is not relevant to the issues presented in this case. (§ 17.)

those constitutional provisions as part of the provision's legislative history (*People ex rel. Feuer v. Nestdrop, LLC* (2016) 245 Cal.App.4th 664, 677 [199 Cal.Rptr.3d 871]).

■ At the outset, Valencia asserts that we need not determine whether section 17 prohibits the Agency from owning stock in a retail water purveyor because that question was already resolved in *Klajic I, supra*, 90 Cal.App.4th 987. Although the Court of Appeal in *Klajic I* noted that it did "not disagree with the Agency that it was lawfully empowered to acquire the [Santa Clarita] Water Company (Cal. Const., art. XVI, § 17)" (*Klajic I*, at p. 1000), the question presented in *Klajic I* was whether the Agency's absorption of the Santa Clarita Water Division meant that the Agency and the District had become "alter ego[s]" of one another (*id.* at pp. 1000–1001). The constitutional question we face in this case was neither squarely presented nor analyzed. Because "'cases are not authority for propositions not considered'" (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 127 [92 Cal.Rptr.3d 595, 205 P.3d 1047], quoting *In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388 [53 Cal.Rptr.2d 81, 916 P.2d 476]), *Klajic I* did not resolve the issue and we proceed to do so.

1. Does section 17's general prohibition apply?

■ Section 17 prohibits "[t]he State . . . in any manner [from] loan[ing] its credit" or "subscrib[ing] to, or bei[ng] interested in the stock of any company, association, or corporation." (§ 17, italics added.) Although the italicized language, standing alone, would seem to prohibit any and all stock ownership by the state, Valencia argues that it must be read in the context of the whole sentence—which is aimed at the far narrower evil of the state loaning its good name and credit to private companies. Because "a word takes its meaning from the company it keeps" (*Blue Shield of California Life & Health Ins. Co. v. Superior Court* (2011) 192 Cal.App.4th 727, 740 [120 Cal.Rptr.3d 713]; see *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 960 [32 Cal.Rptr.3d 5, 116 P.3d 479] [describing the canon of statutory construction known as *noscitur a sociis*]), Valencia contends that section 17's prohibition does not apply when the state has purchased *all* of a private company's stock and is therefore no longer lending its credit to a private entity.

For support, Valencia cites *Engineering etc. Co. v. East Bay M. U. Dist.* (1932) 126 Cal.App. 349 [14 P.2d 828] (*General Engineering*). There, a utility district bought all of a water company's stock and then levied a tax to recoup the cost of doing so. (*Id.* at pp. 352–357.) Several unhappy taxpayers challenged the tax, in part on the ground that acquisition was unconstitutional under section 17's predecessor, which provided in pertinent part that "'[t]he

legislature shall have no power . . . to authorize the giving or lending of the credit . . . subdivision of the State' " and "'shall not have power to authorize the State, or any political subdivision thereof, to subscribe for stock, or to become a stockholder in any corporation whatever.' " (*General Engineering*, at p. 357, quoting Cal. Const., art. IV, former § 31.) The Court of Appeal rejected the constitutional challenge. The court reasoned: "Where there is such an admitted situation of 'purchase' and 'sole ownership', there is no 'giving or lending of credit' within the meaning of any such prohibitory provisions. The situation contemplated by the prohibitory measure is not present; for the 'purchase of all the property' and the 'sole ownership' of all the property preclude the conclusion that there has been any joinder with another as an interested party or aided party or that what was done was done in the interest or for the benefit of anyone other than the 'purchaser' and 'owner'. " (*General Engineering*, at p. 358; see also *Carpenter v. Pacific Mut. Life Ins. Co.* (1937) 10 Cal.2d 307, 339–340 [74 P.2d 761] [§ 17's predecessor does not apply when state, acting as conservator, acquires stock].)

■ *General Engineering* appears to be directly on point. Although, as we discuss below, section 17 has evolved over the decades, its prohibition of stock ownership has always been—and continues to be—married to its prohibition against the lending of credit. Where, as here, the state (or its agency) has acquired all of the stock in a company, association or corporation, it is not lending its credit to the corporation or the corporation's other owners; the state *owns* it. In such instances, section 17's prohibition does not apply.

SCOPE resists the force of this analysis with three arguments. First, it contends that *General Engineering* is factually distinguishable because the public agency in that case acquired not only the water company's stock, but also its assets and debts. This is true (*General Engineering*, *supra*, 126 Cal.App. at p. 357), but was not germane to the court's reasoning or result, which turn on the public agency's purchase and ownership of the water company's stock (*id.* at p. 358). Second, SCOPE asserts that *General Engineering* is legally distinguishable (a) because it interprets article IV, former section 31 of the California Constitution, which deals with limits on the Legislature's power to authorize the state to acquire stock, (b) because the voters amended former section 31 by adding former section 31b to article IV of the California Constitution a few weeks after *General Engineering* was decided, and (c) because former section 31b "could have been a reaction" to *General Engineering*. As described more fully below, the legislative history refutes SCOPE's assertions. Former section 31 of article IV is one of two provisions from which the current version of section 17 is derived, and the enactment of former section 31b by the voters soon after *General Engineering* was handed down was entirely consistent with *General Engineering* because it created a further exception to former section 31's near absolute bar on

stock ownership. Lastly, SCOPE argues that the link *General Engineering* forges between the prohibition on stock ownership and the prohibition of lending credit is refuted by an excerpt from the 1880 floor debate about the predecessor to former section 31; in that debate, the proponent explains that the provision “prevents [the state] owning stock in a corporation” and from “pledging . . . credit . . . [i]n aid of any corporation.” (1 Debates and Proceedings of the Constitutional Convention (Nov. 16, 1878) p. 443 at <<https://babel.hathitrust.org/cgi/pt?id=hvd.li12jq;view=1up;seq=447;size=150>> [as of July 28, 2016].) We may consider this exchange as part of the provision’s legislative history (*Henson v. C. Overaa & Co.* (2015) 238 Cal.App.4th 184, 198 [189 Cal.Rptr.3d 115]), but disagree with SCOPE that it is inconsistent with *General Engineering*’s reasoning or holding. In sum, SCOPE’s arguments do not persuade us that section 17’s stock ownership bar applies to a public agency’s acquisition of *all* of the stock of a company, association or corporation.

2. *Does section 17’s exception allowing for ownership of stock in a “mutual water company or corporation” apply?*

Even if section 17’s bar on stock ownership applied, section 17 excepts stock ownership in “any mutual water company or corporation when the stock is so acquired or held for the purpose of furnishing a supply of water for public, municipal or governmental purposes.” (Cal. Const., art. XVI, § 17.) A “mutual water company” is a company organized to deliver water, at cost, to its shareholders and *only* its shareholders. (Pub. Util. Code, § 2725; Corp. Code, § 14300.) Because Valencia is not a “mutual water company,” whether the Agency can avail itself of this exception turns on whether “any mutual water company or corporation” means “any mutual water company or *mutual water corporation*” or “any mutual water company or *any corporation*.” SCOPE urges the former interpretation; respondents urge the latter. In resolving this dispute, we examine the text of the provision as well as its legislative history and purpose.

a. *Text*

■ The text of section 17’s exception points to the conclusion that a state may own stock in “any corporation” as long as it is doing so, as the section mandates, “for the purpose of furnishing a supply of water for public, municipal or governmental purposes.” (Cal. Const., art. XVI, § 17.) A “mutual water company” is statutorily defined to include all types of companies, including corporations. (Pub. Util. Code, § 2725 [defining “mutual water company” to include “any private corporation or association” otherwise meeting the definition]; Corp. Code, § 14300 [defining “mutual water company” to include “[a]ny corporation” otherwise meeting the definition].)

Because “mutual water company” already means “mutual water corporation,” section 17’s inclusion of the additional words “or corporation” must mean “or *any* corporation”; otherwise, those additional words serve no function and are unnecessary surplusage. ■■■ “Constitutional provision[s] should be interpreted so as to eliminate surplusage.” (*Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 772 [35 Cal.Rptr.2d 814, 884 P.2d 645].)

SCOPE offers five arguments against this construction of section 17’s text. First, SCOPE contends that the drafters used the words “company or corporation” to ensure that the exception reached unincorporated associations. This contention overlooks that the word “company” already includes unincorporated associations. (E.g., *Law v. Crist* (1940) 41 Cal.App.2d 862, 865 [107 P.2d 953] [“[t]he term [association] is often used as synonymous with ‘company’ or ‘society’ . . .”]; Pub. Util. Code, § 2725 [“mutual water company” reaches “any private . . . association” otherwise qualifying].) This contention also fails to explain why “or corporation” would be added.

Second, SCOPE argues that if we construe “corporation” in section 17 to mean “*any* corporation,” then we would render the phrase “mutual water company” unnecessary surplusage because some “corporations” are “mutual water companies.” This argument ignores that the phrase “mutual water company” also includes unincorporated associations; the phrase “mutual water company” is accordingly not surplusage because it assures that stock ownership in mutual water *associations* is exempt.

Third, SCOPE contends that we must construe the terms “company” and “corporation” as being synonymous because section 17’s general prohibition uses the two terms synonymously when it prohibits a public agency from having an “interest[] in the stock of any company, association, or corporation” (Cal. Const., art. XVI, § 17), and because the words must be given the same synonymous meaning when they are part of section 17’s exception. We disagree. As we discuss above, section 17’s exception uses the phrase “mutual water company or corporation,” and “mutual water company” as a longstanding term of art that specifically includes corporations. By contrast, section 17’s general prohibition just uses the word “company” alone, as part of the phrase “company, association, or corporation.” Whether or not the generic term “company” is synonymous with the generic term “corporation” does not shed any light on the overlap of the two words when one of them (“company”) is used as part of a phrase (“mutual water company”) that incorporates, and thereby invokes, a well-defined term of art.

Fourth, SCOPE asserts that the phrase “company or corporation” is just a generic catch-all phrase used in a variety of different statutes to mean

“company, which may be a corporation”;⁷ what is more, says SCOPE, that phrase is often unnecessary surplusage in those other statutes because those statutes list “person,” “company” or “corporation” together,⁸ and the term “person” usually includes “companies” and “corporations” (e.g., Civ. Code, § 14; Evid. Code, § 175). However, the use of “company or corporation” in other contexts is beside the point. Those three words are only *part* of the phrase we are tasked with construing here; whether those three words are unnecessary in other contexts is thus irrelevant.

Lastly, SCOPE argues that we must construe the phrase “company or corporation” in section 17 in *pari materia* with Government Code section 7513.6 and Insurance Code section 1241.2. “‘‘It is an established rule of statutory construction that similar statutes should be construed in light of one another [citations], and that when statutes are *in pari materia* similar phrases appearing in each should be given like meanings.’’” (*People v. Tran* (2015) 61 Cal.4th 1160, 1167–1168 [191 Cal.Rptr.3d 251, 354 P.3d 148], quoting *People v. Lamas* (2007) 42 Cal.4th 516, 525 [67 Cal.Rptr.3d 179, 169 P.3d 102].) Government Code section 7513.6 addresses investments in the Sudan and Insurance Code section 1241.2 addresses investments in Iran. They have nothing to do with investments in mutual water companies or the concerns underlying section 17. They are not in *pari materia*, and are irrelevant.

b. *Legislative history*

Section 17 traces its lineage back to the 1880 version of our Constitution. At that time, the bar against state ownership of stock was lodged in two different provisions: Article IV, former section 31 limited our Legislature’s power by providing that “[t]he Legislature . . . shall not have power to authorize the State, or any political subdivision thereof, to subscribe for stock, or to become a stockholder in any corporation whatever” (Cal. Const., art. IV, § 31 (1880)), and article XII, section 13 directly prohibited such ownership by providing that “[t]he State shall not in any manner loan its credit, nor shall it subscribe to, or be interested in the stock of any company, association, or corporation” (art. XII, § 13 (1880)).⁹

⁷ (See Pub. Resources Code, § 7303.5; Veh. Code, § 9805; Pen. Code, §§ 30715, subd. (a)(1), 30720, subd. (a); Rev. & Tax Code, § 24359, subd. (d); Ed. Code, § 69980, subd. (i); Bus. & Prof. Code, § 3109; Civ. Code, §§ 798.37, 800.47, 1747.03, subd. (b); Food & Agr. Code, § 41551; Sts. & Hy. Code, §§ 30106, 30107.)

⁸ (See Pub. Resources Code, § 7303.5; Pen. Code, §§ 30715, subd. (a)(1), 30720, subd. (a); Bus. & Prof. Code, § 3109; Civ. Code, §§ 798.37, 800.47, 1747.03, subd. (b); Food & Agr. Code, § 41551.)

⁹ SCOPE requested that we take judicial notice of the legislative history of section 17. We grant that motion. (Evid. Code, §§ 452, 459.)

Over the next century, the voters enacted five exceptions to the direct prohibition. In 1914, the voters amended article IV, former section 31 to directly authorize irrigation districts to acquire stock in “any foreign corporation which is the owner of” an “international water system” if doing so was “for the purpose of acquiring the control of [that] . . . system necessary for its use and purposes.” (Cal. Const., art. IV, former § 31 [amended 1914].) In 1932, the voters adopted a new article IV, former section 31b, which directly authorized the City of Escondido to acquire the stock of “any mutual water company or corporation, when such stock is so acquired or held for the purpose of furnishing a supply of water for public or municipal purposes or for the use of the inhabitants of the city.” (Art. IV, former § 31b [adopted 1932].) The associated ballot pamphlet explained that “[t]he purpose of this amendment is to allow the City of Escondido to own stock in a mutual water company.” Two years later, the voters added article IV, section 31c and expanded the exception for the City of Escondido to any and all cities “of the fifth or sixth class.” (Art. IV, § 31c.) In 1940, the voters enacted article IV, section 31d to expand the exception further to “the State.” (Art. IV, § 31d.) The ballot pamphlet explained that the state was facing a “serious shortage of water supply” and that “[f]requently the most feasible means for securing the necessary water is and will be to acquire stock in a mutual water company.” Finally, in 1956, the voters further expanded the exceptions recognized in sections 31b, 31c, and 31d of article IV to reach any public agency in the state; moved this consolidated exception to article XII, section 13, which was the provision that directly regulated stock ownership by public agencies; and then repealed sections 31b, 31c and 31d of article IV. The ballot pamphlet explained that this provision would “create an exception to [the general bar of stock ownership] insofar as mutual water companies are concerned.” This provision was later moved to section 17 without any substantive modification.¹⁰

¹⁰ The provision prohibiting the Legislature from authorizing public ownership of corporate stock remained intact, and was moved to article XVI, section 6 in 1974. (Cal. Const., art. XVI, § 6.) For the first time in its reply brief on appeal, SCOPE argues that the Agency’s acquisition of Valencia’s stock would have violated this provision had our Legislature tried to authorize it. This argument is procedurally improper, irrelevant and wrong. It is not properly before us because SCOPE never mentioned section 6 before the trial court or in its opening brief on appeal; to allow SCOPE to raise it at this late stage, when the Agency and Valencia have no further opportunity to respond, is patently unfair. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1218–1219 [200 Cal.Rptr.3d 265, 367 P.3d 649].) It is irrelevant because the factual predicate for the relevance of this provision—namely, that the Legislature authorized the stock acquisition in this case—never happened. And it is wrong because the limits on legislative power set forth in section 6 do not apply to stock ownership specifically authorized by article XVI, section 17; to hold otherwise is to abrogate section 17. Our job is to give effect to all provisions of our Constitution, not to nullify them. (See *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 627 [155 Cal.Rptr.3d 817, 300 P.3d 886] [courts have a “duty to harmonize constitutional provisions where possible”].)

We draw three conclusions from this legislative history. First, this history shows a steady expansion in the circumstances under which public agencies can acquire stock in companies in order to provide water to the public they serve. Second, this expansion has focused primarily—but not exclusively—on allowing public agencies to acquire stock in mutual water companies; although most of the exceptions have dealt with mutual water companies, the very first exception reached *any* foreign corporation. Third, the history is silent on why the phrase “or corporation” was added to the phrase “mutual water company or corporation.”

c. *Purpose*

The reason for section 17’s exception appears both in its text and its legislative history. The text permits public agencies to own stock in a “mutual water company or corporation,” but only if that ownership “is . . . for the purpose of furnishing a supply of water for public, municipal or governmental purposes.” (Cal. Const., art. XVI, § 17.) The legislative history reinforces that the function of this exception is providing “the most feasible means for securing” the “water” “necessary” to provide for constituents during a “serious shortage of water supply.”

■ Although it is a close question, we conclude that section 17 permits a public agency to acquire stock in *any* corporation for the purpose of furnishing a supply of water. We so conclude for two reasons. First, this interpretation better furthers the purpose of section 17’s exception—namely, to provide a ready means for public agencies to secure water for the public they serve. (*Santa Ana Unified School Dist.*, *supra*, 90 Cal.App.4th at p. 410 [“[w]here a statute is reasonably susceptible to two interpretations, we must embrace the one that best effectuates the legislative purpose”].) If we limited public agencies to acquiring the stock of mutual water companies, we would be cutting off a viable supply of water. Although a public agency would, under the narrower construction, still be able to buy water from a corporation that was not a mutual water company, being a customer is not an adequate substitute for being a stockholder given the economies of scale and potential for control and coordination that come with acquisition but not with purchase.

Second, because section 17’s exception is limited by its plain terms to corporations that supply water, our conclusion that section 17 permits stock ownership in “any” corporation means only that the exception reaches nonmutual water corporations as well as “mutual water companies.” This is

of little consequence because what differentiates the two is how they are regulated. Mutual water companies are not regulated by the Public Utilities Commission. (Pub. Util. Code, § 2705; *Yucaipa Water Co. v. Public Utilities Com.* (1960) 54 Cal.2d 823, 826, 828–829 [9 Cal.Rptr. 239, 357 P.2d 295]; *J.M. Howell Co. v. Corning Irrigation Co.* (1918) 177 Cal. 513, 519 [171 P. 100].) That is because they are self-regulated: The only people who receive their water are their shareholders, and those shareholders are viewed as having ample legal remedies available to them and their ability to engage in such self-help renders agency oversight unnecessary. (*Erwin v. Gage Canal Co.* (1964) 226 Cal.App.2d 189, 195 [37 Cal.Rptr. 901]; *Crescent Canal Co. v. Kings County Development Co.* (1941) 43 Cal.App.2d 370, 376–377 [110 P.2d 1006]; *Yucaipa Water Co.*, at p. 830; *Consolidated Peoples Ditch Co. v. Foothill Ditch Co.* (1928) 205 Cal. 54, 63 [269 P. 915]; *Miller v. Imperial Water Co., No. 8* (1909) 156 Cal. 27, 29–30 [103 P. 227].) Nonmutual water companies are either regulated by the Public Utilities Commission (Pub. Util. Code, §§ 701, 2703), or by the public agency itself if the company is wholly owned by that agency (Cal. Const., art. XII, § 3). Who is regulating a water company would seem to have no bearing on whether a public agency should be able to own its stock; this is particularly so here, where the Agency’s acquisition of Valencia moved Valencia from oversight by one public agency (the Public Utilities Commission) to another (the Agency).

SCOPE argues that our conclusion has been rejected by the Attorney General and by the Public Utilities Commission. In a 1960 opinion, the Attorney General opined that municipal water districts could own stock in a mutual water company. (36 Ops.Cal.Atty.Gen. 141 (1960).) This opinion does not speak to whether the exception in section 17 or its predecessor reaches corporations that are not mutual water companies. In 2014, the Public Utilities Commission concluded that Valencia was no longer subject to its regulation. In the course of its opinion, however, the Commission undertook an analysis into whether the Agency’s acquisition of Valencia was valid under section 17. The Commission opined that the acquisition may be unconstitutional because, in its view, section 17 only reached stock ownership in corporations that were also “mutual water companies.” In reaching this holding, the Commission determined that the text of section 17’s exception was ambiguous, and never examined the purpose behind that exception. As noted above, we have come to different conclusions. Because, and as the Commission acknowledged, its opinion is only persuasive authority (*Greene v. Marin County Flood Control & Water Conversation Dist.* (2010) 49 Cal.4th 277, 290–291 [109 Cal.Rptr.3d 620, 231 P.3d 350]), we may conclude that its reasoning is unpersuasive.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

Ashmann-Gerst, Acting P. J., and Chavez, J., concurred.

A petition for a rehearing was denied August 16, 2016, and the opinion was modified to read as printed above. Appellant's petition for review by the Supreme Court was denied November 16, 2016, S237031.

[No. B262043. Second Dist., Div. Four. July 28, 2016.]

REBECCA OSBORNE, Plaintiff and Appellant, v.
BRUCE YASMEH et al., Defendants and Respondents.

[No. B265530. Second Dist., Div. Four. July 28, 2016.]

KODY MESSMER et al., Plaintiffs and Appellants, v.
BRUCE YASMEH et al., Defendants and Respondents.

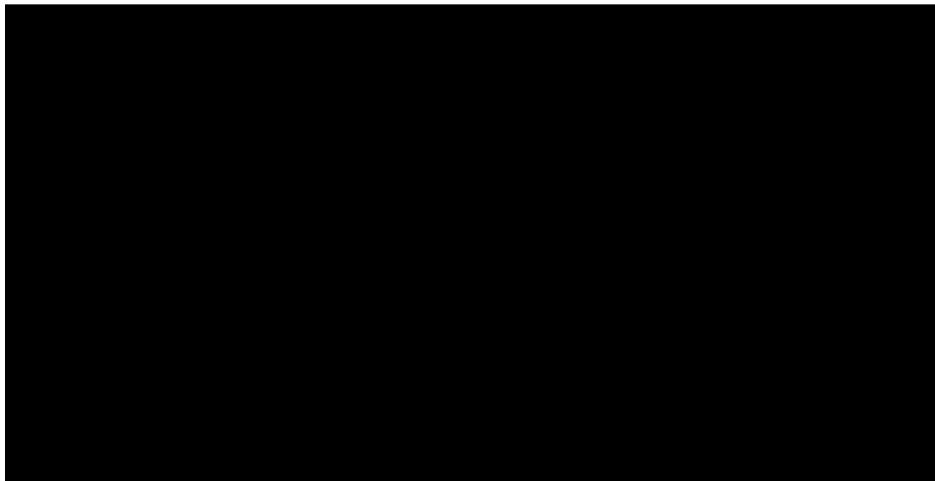
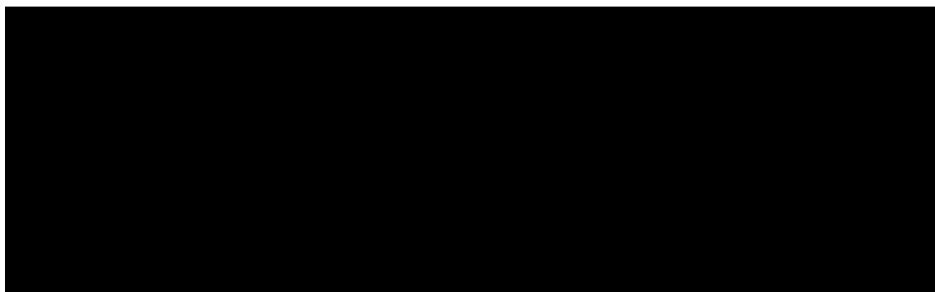
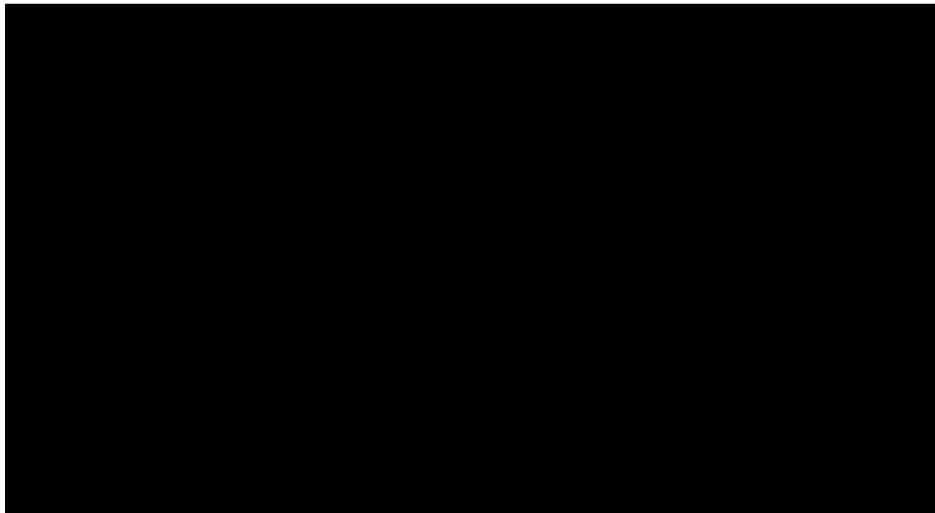
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COUNSEL

Glenn A. Murphy for Plaintiffs and Appellants.

Courtney M. Coates for Defendants and Respondents.

OPINION

COLLINS, J.—

INTRODUCTION

Plaintiffs John Flowers, Rebecca Osborne, Seth Messmer, and Kody Messmer (collectively, plaintiffs) allege that they visited a hotel owned and managed by defendants Bruce Yasmeh, Alfred Yasmeh, American Property Management, and INE Capital Holdings.¹ Flowers is paraplegic and employs the use of a service dog. Osborne is Flowers's wife, and the Messmers are Flowers's stepsons. Plaintiffs allege that they visited defendants' hotel, but management refused to rent them a room unless they first paid a nonrefundable cleaning fee relating to the dog. They allege that the charge for the room was \$80, and the nonrefundable cleaning fee was \$300. Plaintiffs left the hotel without paying the fee or checking in as guests.

Plaintiffs sued defendants in two separate lawsuits, one brought by Osborne and one brought by Flowers and the Messmers. In both actions, plaintiffs alleged violations of the Unruh Civil Rights Act (Civ. Code, § 51)² and intentional infliction of emotional distress. Defendants argued that plaintiffs' pleadings could not establish standing due to a "bright-line rule" articulated in *Surrey v. TrueBeginnings, LLC* (2008) 168 Cal.App.4th 414, 416 [85 Cal.Rptr.3d 443] (*Surrey*), that under the Unruh Civil Rights Act, "a person must tender the purchase price for a business's services or products in order to have standing to sue it for alleged discriminatory practices relating thereto." Because plaintiffs left the hotel without paying the fee, defendants argued, they did not have standing to assert an Unruh Civil Rights Act cause of action. The trial court sustained defendants' demurrers without leave to amend. Plaintiffs appealed from the judgments entered in their two separate cases. We consolidated the cases for purposes of oral argument and decision.

■ While we agree with the result in *Surrey*, we find that its bright-line rule is not applicable to the facts of this case. Section 52, which provides

¹ Defendant INE Capital Holdings is not listed as a defendant in the Flowers/Messmer complaint.

² All further statutory references are to the Civil Code unless otherwise indicated.

remedies for violations of the Unruh Civil Rights Act, states that any person aggrieved by conduct that violates the Unruh Civil Rights Act may bring a civil action. (§ 52, subd. (c).) When a disabled person such as Flowers alleges that he presented himself to a business establishment and was required to pay a fee relating to his disability before accessing the products or services offered, he has stated facts sufficient to establish that he is a person aggrieved as defined in section 52, subdivision (c), and he has therefore alleged facts sufficient to demonstrate standing to sue under the Unruh Civil Rights Act. A plaintiff is not required to pay a discriminatory fee to establish standing to sue under the Unruh Civil Rights Act, as long as the plaintiff alleges facts showing that he or she has directly experienced a denial of rights as defined in sections 51 and 52. In addition, when a disabled individual has standing to sue under section 52, subdivision (c), any person “associated with” that individual (§ 51.5, subd. (a)) has standing if the associated person has also directly experienced the discriminatory conduct. We therefore reverse the judgments below and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Rebecca Osborne³ filed her complaint on November 8, 2013, alleging a violation of the Unruh Civil Rights Act and section 51.5.⁴ Osborne alleged that in July 2013, she was “associated with a disabled person who uses an assistance animal to manage a disability,” and that she was denied accommodation at defendants’ hotel as a result. She alleged, “Defendants insisted the lodging offered to the general public could not be offered to Plaintiff unless a non-refundable cleaning fee deposit of \$300 was paid, in addition to the regular room fee of approximately \$80 normally charged to all other members of the general public, since Plaintiff was associated with and was using an assistance animal.” Osborne sought injunctive relief, a \$4,000 statutory penalty (§ 52, subd. (a)), and attorney fees. Osborne’s case was assigned to superior court department 15, before Judge Richard Fruin.

In July 2014, shortly before trial, defendants moved for judgment on the pleadings. Defendants argued that according to the rule articulated in *Surrey*, where a plaintiff alleges a defendant charged a discriminatory fee, the plaintiff must “tender the purchase price for a business’s services or products” in order to establish standing under the Unruh Civil Rights Act. (*Surrey, supra*, 168 Cal.App.4th at p. 416.) Because Osborne did not allege that she paid the fee and rented a hotel room, defendants argued, she did not establish standing.

³ Osborne is listed as “Becky Ozborn” in the complaint. Plaintiffs explained that the use of Osborne’s nickname and the misspelling of her last name was erroneous.

⁴ Section 51.5, subdivision (a) states that “[n]o business establishment of any kind whatsoever shall discriminate against . . . any person . . . because the person is associated with a person who has, or is perceived to have” a disability.

Before defendants' motion was heard, plaintiffs Flowers and the Messmers filed a complaint on August 4, 2014. Like Osborne, Flowers and the Messmers alleged that they visited defendants' hotel in July 2013. They alleged that Flowers was refused a room because he was a disabled person who used a licensed service dog, and the Messmers were refused a room for being associated with Flowers. They alleged that "Defendants insisted the lodging offered to the general public could not be offered to Plaintiff unless a non-refundable cleaning fee deposit of \$300 was paid, in addition to the regular room fee of approximately \$80 normally charged to all other members of the general public." Flowers and the Messmers asserted a cause of action for violation of the Unruh Civil Rights Act and section 51.5, and a cause of action for intentional infliction of emotional distress.

When they filed their complaint, Flowers and the Messmers also filed a notice of related cases, alerting the superior court to the pending Osborne case. For reasons unclear to us, the trial court deemed the cases not related,⁵ and the Flowers/Messmer case was assigned to superior court department 69 before Judge William F. Fahey.

In Osborne's case, Judge Fruin granted defendants' motion for judgment on the pleadings in August 2014. Judge Fruin held that under *Surrey*, Osborne was required to allege that she paid the fee to establish standing. The court granted Osborne leave to amend her complaint.

Osborne filed a first amended complaint on August 18, 2014. She added an allegation that "Plaintiff, through a family member, offered to pay the deposit, but it was refused since the hotel did not want a dog in the hotel and the hotel manager claimed the hotel had a right of refusal." She also alleged that "Defendant's managing agent was told, and clearly understood since it was obvious, that the husband of Plaintiff was disabled in a wheelchair and had with him a service dog to assist in managing his disability." Osborne also alleged that they were refused service not only because of the cleaning fee, but also because no dogs were allowed at the hotel. She alleged that defendants' managing agent "spoke loud enough so that the other guests could clearly hear and understand that Plaintiffs were being ejected, and this conduct was intentionally done to embarrass and publicly humiliate Plaintiffs and their family. . ." She added that the "supposed requirement for a deposit was a trick and subterfuge and used by Defendants as a way of refusing a

⁵ "A pending civil case is related to another pending civil case [¶] . . . if the cases: [¶] (1) Involve the same parties and are based on the same or similar claims; [¶] (2) Arise from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact; [¶] (3) Involve claims against, title to, possession of, or damages to the same property; or [¶] (4) Are likely for other reasons to require substantial duplication of judicial resources if heard by different judges." (Cal. Rules of Court, rule 3.300(a).)

room to Plaintiff and getting her and her family to leave with the dog.” Osborne alleged a cause of action for violation of the Unruh Civil Rights Act and section 51.5, and added a cause of action for intentional infliction of emotional distress, incorporating the allegations from the Unruh Civil Rights Act cause of action.

Defendants moved for summary judgment and demurred to Osborne’s first amended complaint. Because the motion for summary judgment was deemed moot when the trial court sustained defendants’ demurrer without leave to amend, we focus on the demurrer. In their demurrer, defendants again argued that Osborne lacked standing due to the *Surrey* rule that a plaintiff must pay the allegedly discriminatory fee to establish standing under the Unruh Civil Rights Act, and the expanded allegation that a family member attempted to pay the fee was insufficient to meet this requirement. Defendants also argued that the first amended complaint was a sham pleading. They argued that Osborne changed her allegations, maintaining in the amended complaint that defendants refused to provide her with a hotel room not because of the cleaning fee, as previously alleged, but simply because they did not want dogs in the hotel. Referencing Osborne’s deposition testimony, discovery responses, and other documents, defendants argued that Osborne made clear that she never attempted to pay the alleged additional fee, and the amended complaint therefore “directly contradicts judicial admissions made in the original complaint, deposition testimony, and prior sworn admissions.” Osborne opposed the demurrer.

On December 5, 2014, Judge Fruin sustained defendants’ demurrer to Osborne’s amended complaint without leave to amend. The court held that Osborne’s new allegations did not cure the defect in the original complaint, because *Surrey* requires a plaintiff to pay the discriminatory fee to establish standing. The court considered Osborne’s previous complaint and statements in her deposition that the family was refused accommodation at the hotel because of the cleaning fee, and contrasted these allegations with her allegations in the first amended complaint that the hotel simply did not want dogs in the hotel. The court also held that because Osborne’s allegations and statements in discovery focused on the fee rather than an outright refusal to allow dogs, the new factual allegations in the first amended complaint were “clearly sham pleading.” The court did not address Osborne’s cause of action for intentional infliction of emotional distress.

A week later, on December 12, 2014, defendants demurred to the Flowers/Messmer complaint.⁶ Defendants argued that plaintiffs did not have standing under the Unruh Civil Rights Act pursuant to *Surrey*. In addition,

⁶ There is no explanation in the record for the unconventional timing of the demurrer, and plaintiffs did not argue that the demurrer was untimely. (Code Civ. Proc., § 430.40, subd. (a).)

defendants requested judicial notice of court documents and evidence from the Osborne case and other cases filed by plaintiffs' counsel, and argued that the doctrine of res judicata barred plaintiffs from asserting their claims against defendants. Defendants also argued that the cause of action for intentional infliction of emotional distress was derivative of the Unruh Civil Rights Act cause of action, and therefore was meritless. Flowers and the Messmers opposed the demurrer and request for judicial notice, arguing that payment of the fee was irrelevant because this was not a discriminatory pricing case, and the trial court's order in Osborne was not precedential. Judge Fahey sustained the demurrer, stating only, "The demurrer is well-taken and sustained. Because neither the opposition nor counsel at the hearing proffered new facts to overcome the demurrer, leave to amend is not granted." The order did not state whether the court took judicial notice of the documents submitted by defendants.

Judgment was entered following each demurrer order. Plaintiffs timely appealed each judgment. On our own motion, we consolidated the cases for purposes of oral argument and decision.

STANDARD OF REVIEW

" 'We independently review the sustaining of a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense.' " (*Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1271 [188 Cal.Rptr.3d 668].) " 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187].)" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].) Where a plaintiff has standing to bring the action, and each count in the complaint sufficiently states a cause of action, a general demurrer should be overruled. (*TracFone Wireless, Inc. v. County of Los Angeles* (2008) 163 Cal.App.4th 1359, 1368 [78 Cal.Rptr.3d 466].)

■ "As a general principle, standing to invoke the judicial process requires an actual justiciable controversy as to which the complainant has a real interest in the ultimate adjudication because he or she has either suffered or is about to suffer an injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented to the adjudicator." (*Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297, 314–315 [109 Cal.Rptr.2d 154].) "The prerequisites for standing to assert statutorily based causes of action are determined from the statutory language,

as well as the underlying legislative intent and the purpose of the statute.” (*Boorstein v. CBS Interactive, Inc.* (2013) 222 Cal.App.4th 456, 466 [165 Cal.Rptr.3d 669].)

DISCUSSION

A. Plaintiffs have established standing under the Unruh Civil Rights Act in both actions

The Unruh Civil Rights Act states, “All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” (§ 51, subd. (b).)

■ In California, “[t]wo overlapping laws, the Unruh Civil Rights Act (§ 51) and the Disabled Persons Act (§§ 54–55.3), are the principal sources of state disability access protection.” (*Jankey v. Lee* (2012) 55 Cal.4th 1038, 1044 [150 Cal.Rptr.3d 191, 290 P.3d 187] (*Jankey*).)⁷ “The Unruh Civil Rights Act broadly outlaws arbitrary discrimination in public accommodations and includes disability as one among many prohibited bases. (§ 51, subd. (b).) As part of the 1992 reformation of state disability law, the Legislature amended the Unruh Civil Rights Act to incorporate by reference the ADA [the Americans with Disabilities Act of 1990], making violations of the ADA per se violations of the Unruh Civil Rights Act. (§ 51, subd. (f); *Munson v. Del Taco, Inc.*, *supra*, 46 Cal.4th at pp. 668–669.) This amendment was intended to extend to disabled individuals aggrieved by an ADA violation the full panoply of Unruh Civil Rights Act remedies. (*Munson*, at p. 673.) These include injunctive relief, actual damages (and in some cases as much as treble damages), and a minimum statutory award of \$4,000 per violation. (§ 52, subds. (a), (c)(3); *Turner v. Association of American Medical Colleges* (2011) 193 Cal.App.4th 1047, 1058, [123 Cal.Rptr.3d 395].)” (*Jankey, supra*, 55 Cal.4th at p. 1044.) “The Act is to be given a liberal construction with a view to effectuating its purposes.” (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 28 [219 Cal.Rptr. 133, 707 P.2d 195] (*Koire*)).

Section 51.5, while not technically part of the Unruh Civil Rights Act (*Semler v. General Electric Capital Corp.* (2011) 196 Cal.App.4th 1380, 1404

⁷ “Part 2.5 of division 1 of the Civil Code, currently consisting of sections 54 to 55.3, is commonly referred to as the ‘Disabled Persons Act,’ although it has no official title.” (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 674, fn. 8 [94 Cal.Rptr.3d 685, 208 P.3d 623] (*Munson*)).

[127 Cal.Rptr.3d 794]), provides similar protections to those “associated with” persons described in the Unruh Civil Rights Act: “No business establishment of any kind whatsoever shall discriminate against . . . any person . . . because the person is associated with a person who has, or is perceived to have” a disability. (§ 51.5, subd. (a).)

■ Standing under the Unruh Civil Rights Act is broad. When “any person or group of persons is engaged in conduct of resistance to the full enjoyment of any of the rights described in this section . . . any person aggrieved by the conduct may bring a civil action” (§ 52, subd. (c).) As the Supreme Court stated, “[A]n individual plaintiff has standing under the [Unruh Civil Rights] Act if he or she has been the victim of the defendant’s discriminatory act.” (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175 [59 Cal.Rptr.3d 142, 158 P.3d 718] (*Angelucci*).) “The prerequisites for standing to assert statutorily based causes of action are to be determined from the statutory language, as well as the underlying legislative intent and the purpose of the statute.” (*Surrey, supra*, 168 Cal.App.4th at pp. 417–418.) “The focus of the standing inquiry is on the plaintiff, not on the issues he or she seeks to have determined; he or she must have a special interest that is greater than the interest of the public at large and that is concrete and actual rather than conjectural or hypothetical.” (*Id.* at p. 417.)

The parties discuss the two principal cases that address standing under the Unruh Civil Rights Act, *Angelucci* and *Surrey*. The Supreme Court in *Angelucci* primarily focused on what constituted discrimination under the Unruh Civil Rights Act. In that case, the male plaintiffs alleged they visited a nightclub on several occasions and were charged admission fees higher than the fees charged to women. (*Angelucci, supra*, 41 Cal.4th at p. 165.) The defendant argued that because the plaintiffs never asked to be charged the same rates as women, they could not recover under the Unruh Civil Rights Act. (*Angelucci*, at p. 165.) The Supreme Court held that a plaintiff instituting an Unruh Civil Rights Act lawsuit was not required to establish as a condition “that the defendant[s] have been given notice and an opportunity to correct the asserted violation.” (*Angelucci*, at p. 168.) The court also briefly touched on standing in the opinion, stating, “According to their allegations, each of the plaintiffs was subjected to, and paid, defendant’s gender-based price differential. Accepting plaintiffs’ factual allegations as true, as we are required to do in reviewing a judgment entered on the pleadings, plaintiffs must be considered ‘person[s] denied the rights provided in Section 51.’ (§ 52(a).)” (*Id.* at pp. 175–176.)

The Court of Appeal expanded on *Angelucci* in *Surrey, supra*, 168 Cal.App.4th 414. In that case, the plaintiff visited a matchmaking website with the intent of using its services. (*Id.* at p. 416.) When he discovered that

the website charged men for certain services that were offered to women without charge, the plaintiff chose not to subscribe. He sued the defendant alleging violations of the Unruh Civil Rights Act. (*Surrey*, at p. 416.) The trial court granted summary judgment and the Court of Appeal affirmed, because the plaintiff never subscribed to the website's services and therefore never personally experienced any discrimination. (*Id.* at pp. 418–419.) The court “adopt[ed] a bright-line rule that a person must tender the purchase price for a business's services or products in order to have standing to sue it for alleged discriminatory practices relating thereto.” (*Surrey, supra*, at p. 416.) The reasoning in the *Surrey* opinion is discussed more fully below.

Defendants argue that under *Angelucci* and the bright-line rule articulated in *Surrey*, plaintiffs did not establish standing under the Unruh Civil Rights Act: “Plaintiffs lack standing to sue because they do not and cannot allege that they actually paid the alleged discriminatory fee for the Defendants' hotel room and registered as . . . guest[s].” We think this argument takes *Surrey*'s bright-line rule too far and contradicts California's established antidiscrimination case law.

California has long barred discrimination based on physical characteristics. Early common law decisions created a duty to serve all customers on reasonable terms without discrimination. (See *In re Cox* (1970) 3 Cal.3d 205, 212 [90 Cal.Rptr. 24, 474 P.2d 992] (*Cox*).) “The California Legislature, in 1897, enacted these common law doctrines into the statutory predecessor of the present Unruh Civil Rights Act [also codified as Civil Code section 51]. (See Klein, *The California Equal Rights Statutes in Practice* (1958) 10 Stan.L.Rev. 253, 255–258.) The 1897 act provided: ‘That all citizens within the jurisdiction of this State shall be entitled to the full and equal accommodations, advantages, facilities, privileges of inns, restaurants, hotels, eating-houses, barber-shops, bath-houses, theaters, skating-rinks, and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens.’ (Stats. 1897, ch. 108, p. 137, § 1.) A 1919 amendment broadened the act to encompass public conveyances. (Stats. 1919, ch. 210, p. 309, § 1.) In 1923 the Legislature extended the act's coverage to ‘places where ice cream or soft drinks of any kind are sold for consumption on the premises. . . .’ (Stats. 1923, ch. 235, p. 485, § 1.)” (*Cox, supra*, 3 Cal.3d at p. 213.) Former section 52 provided that anyone who denied the rights provided in section 51 was liable for damages. (*Cox*, at p. 214, fn. 6.)

The application of section 51 has not historically turned on whether a plaintiff has paid a fee, or, as *Surrey* stated, “tender[ed] the purchase price for a business's services or products.” (*Surrey, supra*, 168 Cal.App.4th at p. 416.) In *Hutson v. Owl Drug Co.* (1926) 79 Cal.App. 390 [249 P. 524], for

example, the plaintiff, “an American citizen and a negro,” went into the defendant’s business and sat at the soda fountain. (*Id.* at p. 392.) An employee, Mr. Tucker, took her order; another employee served the order, but placed it “amongst dirty dishes on the counter.” (*Ibid.*) Tucker then said loudly, “‘What did you serve the nigger for? I wouldn’t have served her; she could have set there until tomorrow.’” (*Ibid.*) Tucker hit the plaintiff on the face and threw a cup of coffee at her chest. The plaintiff sued under section 51, and was awarded damages of \$500. The Court of Appeal affirmed, stating, “[T]he damages allowed were allowed as damages sustained because respondent was not accorded the same accommodations, advantages, facilities, and privileges, applicable alike to persons of the white race.” (*Hutson*, at p. 393.) There was no discussion about whether the plaintiff paid for her order before Tucker attacked her, and there is no indication that the plaintiff’s standing to assert a cause of action depended on whether she paid the defendant for her meal at the time the discrimination occurred.

In *Evans v. Fong Poy* (1941) 42 Cal.App.2d 320 [108 P.2d 942], a couple went into a café and ordered drinks and sandwiches, but they were refused service. (*Id.* at 321.) “The testimony introduced by plaintiffs showed that they were told by the bartender and the floor manager that they could not be served at the bar because they were colored people.” (*Id.* at p. 321.) The Court of Appeal affirmed the judgment in favor of the plaintiffs, and held that the action properly fell under sections 51 and 52. (*Evans*, at p. 321.) The fact that the plaintiffs were refused service suggests that their standing to assert a violation of section 51 did not turn on whether they purchased a meal or otherwise paid for the defendant’s products or services.

In *Stone v. Board of Directors* (1941) 47 Cal.App.2d 749 [118 P.2d 866], the petitioners, who were “members of the Negro race, citizens, residents and qualified electors of the city of Pasadena,” sought a writ of mandamus under section 51 to require various managing bodies to admit them to the “municipal bath houses and swimming pool, commonly known as Brookside Park Plunge.” (*Stone*, at p. 750.) The pool was available to the petitioners only at limited times, and the petitioners argued that “their exclusion on account of their race and color from the municipal plunge in Brookside Park at all times when it is open to the public, except on one day of each week, sufficiently alleges a cause of action.” (*Id.* at p. 751.) The Court of Appeal agreed that “the acts here complained of are expressly enjoined by the provisions of section 51 of the Civil Code.” (*Id.* at p. 752.) While the court noted that “certain controverted issues” remained to be determined by the trial court, there was no indication that the petitioners were required to pay the entrance fee at the Brookside Park Plunge before establishing standing to assert their rights under section 51. (*Stone*, at p. 754.)

In 1951, the Supreme Court considered a case involving the revocation of the plaintiff's restaurant liquor license, where the state Board of Equalization "found that plaintiff 'kept and permitted his licensed premises to be used as a disorderly house in that . . . persons of known homosexual tendencies patronized said premises and used said premises as a meeting place.' " (*Stoumen v. Reilly* (1951) 37 Cal.2d 713, 715 [234 P.2d 969].) The Supreme Court held that use of the premises as a meeting place for legal activity was not a valid basis for revoking a liquor license, and noted that under the Unruh Civil Rights Act, the plaintiff would be barred from discriminating against such patrons: "Members of the public of lawful age have a right to patronize a public restaurant and bar so long as they are acting properly and are not committing illegal or immoral acts; the proprietor has no right to exclude or eject a patron 'except for good cause,' and if he does so without good cause he is liable in damages. (See Civ. Code, §§ 51, 52.)" (*Stoumen*, at p. 716.) The Supreme Court later noted, "[I]n *Stoumen* . . . this court clearly established that the Civil Rights Act prohibited all arbitrary discrimination in public accommodations" (*Cox, supra*, 3 Cal.3d at p. 214), suggesting that historically the statute has been applied broadly.

In the 1950s, a string of cases held that certain businesses, such as a cemetery, a dentist's office, and a private school, were not "places of public accommodation or amusement," and therefore were not subject to the provisions of sections 51 and 52. (*Long v. Mountain View Cemetery Assn.* (1955) 130 Cal.App.2d 328, 329 [278 P.2d 945] [cemetery]; see *Coleman v. Middlestaff* (1957) 147 Cal.App.2d Supp. 833 [305 P.2d 1020] [dentist's office]; *Reed v. Hollywood Professional School* (1959) 169 Cal.App.2d Supp. 887 [338 P.2d 633] [private school].) Sections 51 and 52 were therefore expanded in 1959 to become the modern Unruh Civil Rights Act, which prohibited discrimination on the basis of race, color, religion, ancestry, or national origin. (See Horowitz, *The 1959 California Equal Rights in "Business Establishments" Statute—A Problem in Statutory Application* (1960) 33 So.Cal. L.Rev. 260, 265.)

Following the change in the law, the Supreme Court decided *Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463 [20 Cal.Rptr. 609, 370 P.2d 313], in which the plaintiffs alleged that the "[d]efendants maintained a policy and practice of refusing to sell housing in the tract to Negroes and, because of plaintiffs' race and color, defendants refused to sell any house in the tract to plaintiffs upon conditions offered to non-Negroes." (*Id.* at p. 468.) The Supreme Court held that the plaintiffs had stated a cause of action under the Unruh Civil Rights Act, and offered no suggestion that the plaintiffs were required to purchase a house at a higher price or otherwise show monetary damages in order to establish standing. (*Burks*, at p. 471.) The same day, the Supreme Court also held that a demurrer was improperly sustained where a "plaintiff requested defendants to procure possession of the premises for him

upon the offered terms, and defendants refused to rent to plaintiff solely because of his race.” (*Lee v. O’Hara* (1962) 57 Cal.2d 476, 477 [20 Cal.Rptr. 617, 370 P.2d 321].) The court said, “A broker who, in disregard of his agreement with the owner to rent to any member of the public, refuses to rent to a particular prospective tenant is obviously denying services to that person.” (*Id.* at p. 478.) The court did not suggest that the plaintiffs were required to show monetary harm to establish damages.

In the habeas corpus proceeding in *Cox*, the petitioner stopped in a shopping center parking lot to chat with his friend, a “young man, who wore long hair and dressed in an unconventional manner.” (*Cox, supra*, 3 Cal.3d at p. 210.) The shopping center security officer asked the men to leave. They refused, stating their intent to make a purchase, but the security officer called police and they were arrested. (*Id.* at p. 210.) The Supreme Court considered whether the petitioner’s ejection from the premises ran afoul of the Unruh Civil Rights Act. The court held that the act was not limited to racial discrimination; “both its history and its language disclose a clear and large design to interdict all arbitrary discrimination by a business enterprise. That the act specifies particular kinds of discrimination—color, race, religion, ancestry, and national origin—serves as illustrative, rather than restrictive, indicia of the type of conduct condemned.” (*Cox*, at p. 212.) The court noted that a “business establishment may, of course, promulgate reasonable deportment regulations that are rationally related to the services performed and the facilities provided.” (*Id.* at p. 217.) However, “a business generally open to the public may not arbitrarily exclude a would-be customer from its premises and, upon the customer’s refusal to leave, subject him to criminal conviction.” (*Id.* at p. 216.) Although the petitioner in *Cox* made a purchase on the premises before being arrested, the Supreme Court gave no indication that his rights under the Unruh Civil Rights Act attached as a result of that purchase.

In 1985, the Supreme Court considered whether the Unruh Civil Rights Act prohibited sex-based discounts in *Koire, supra*, 40 Cal.3d 24. There, a male plaintiff visited nightclubs and car washes that offered discounts to women on certain days. The plaintiff requested the same discounts offered to women and the defendants refused. The plaintiff sued. The defendants argued “that the Unruh Act prohibits only the *exclusion* of a member of a protected class from a business establishment.” (*Id.* at p. 29.) Because the plaintiff was not excluded, but charged only different prices at certain times, the defendants argued that the Unruh Civil Rights Act did not apply. The Supreme Court rejected this argument: “The Act guarantees ‘full and equal accommodations, advantages, facilities, privileges, or services . . .’ (§ 51.) The scope of the statute clearly is not limited to exclusionary practices. The Legislature’s choice of terms evidences concern not only with access to business establishments, but with equal treatment of patrons in all aspects of the business.” (*Koire*, at p. 29.) The court also stated, “The Act’s proscription is broad

enough to include within its scope discrimination in the form of sex-based price discounts.” (*Id.* at p. 30.) The court concluded, “The express language of the Unruh Act provides a clear and objective standard by which to determine the legality of the practices at issue. The Legislature has clearly stated that business establishments must provide ‘equal . . . advantages . . . [and] privileges’ to all customers ‘no matter what their sex.’ (§ 51.)” (*Id.* at p. 39.) The Supreme Court did not clearly state whether the plaintiff purchased car washes at higher prices or paid the higher entry fee to the nightclub. The court gave no indication that the plaintiff’s standing required a showing that he had paid the higher price.

The first case to directly examine standing under the Unruh Civil Rights Act appears to be *Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377 [271 Cal.Rptr. 99] (*Midpeninsula*). In that case, Midpeninsula Citizens for Fair Housing (MCFH), “a nonprofit corporation which works to eliminate discriminatory housing practices and to secure equal housing opportunities for all people,” sued the owners and managers of an apartment complex called the Westwood. (*Id.* at p. 1380.) MCFH alleged that the Westwood’s one-person-per-bedroom policy violated the Unruh Civil Rights Act because it discriminated against families with multiple children, and it had a discriminatory impact on certain minority groups who tend to have larger families. (*Midpeninsula*, at p. 1381.) MCFH argued that it had standing to sue under the Unruh Civil Rights Act because it was “aggrieved” after spending time and resources investigating discrimination at the Westwood: “Westwood’s rental policy caused a drain on its limited resources, thus diverting needed funds from important educational and counseling services.” (*Midpeninsula*, at p. 1382.) The Court of Appeal noted that “the state Legislature has specifically conferred standing to sue under the Unruh Act upon the victims of the discriminatory practices and certain designated others, i.e., district or city attorneys or the Attorney General. [Citations.]” (*Id.* at p. 1386.) The court concluded, “[W]e reject MCFH’s contention that the Legislature intended, by adding the language ‘a person aggrieved by the pattern or practice,’ to confer standing upon an expanded class of plaintiffs whose civil rights had not been personally violated.” (*Id.* at p. 1384.)

In 2007 the Supreme Court discussed the *Koire* holding in *Angelucci*, discussed above. In *Koire* the plaintiff specifically requested, and was denied, the sex-based discounted prices. In *Angelucci*, the male nightclub patrons did not establish that they had requested that the women’s discounted nightclub prices be extended to them. The court clarified that the plaintiffs were not required to demand lower admission fees and be refused in order to establish an Unruh Civil Rights Act violation: “[T]he Act does not contain express language requiring that before a legal action may be filed, the victim of the asserted discrimination must have demanded equal treatment and have been

refused. Unlike some other remedy statutes, the Act, and specifically section 52(a), does not establish as a condition of instituting a lawsuit that the defendant have been given notice and an opportunity to correct the asserted violation.” (*Angelucci, supra*, 41 Cal.4th at p. 168.)

The Court of Appeal relied on *Angelucci* in *Surrey*, also discussed above. The plaintiff in *Surrey* alleged that sex-based discounts for an online dating service were discriminatory. The court noted that the plaintiff’s request for injunctive relief was moot because the discount program had already terminated. (*Surrey, supra*, 168 Cal.App.4th at p. 417.) In determining the plaintiff’s standing for his remaining claims, the court noted, “The focus of the standing inquiry is on the plaintiff, not on the issues he or she seeks to have determined; he or she must have a special interest that is greater than the interest of the public at large and that is concrete and actual rather than conjectural or hypothetical.” (*Id.* at p. 417.) The court said, “The mere fact that Surrey became aware TrueBeginnings was offering a discount policy for women subscribers at the time he accessed its [website] did not constitute a denial of his antidiscrimination rights under those statutes.” (*Id.* at p. 418.) The court specifically considered the holding in *Angelucci*: “[T]he California Supreme Court’s acknowledgement in *Angelucci* that ‘‘a plaintiff cannot sue for discrimination in the abstract, but must actually suffer the discriminatory conduct’’ is fatal to Surrey’s position here. (*Angelucci, supra*, 41 Cal.4th at pp. 165, 175.) Because he did not attempt to or actually subscribe to TrueBeginnings’s services, Surrey did not suffer discrimination in any sense other than ‘in the abstract.’ Thus, in accordance with *Angelucci* itself, he lacks standing to seek relief (whether damages or injunctive relief) for violations of the Act” (*Id.* at p. 420.)

We agree with the reasoning in *Surrey* and *Midpeninsula* that a plaintiff who only learns about the defendant’s allegedly discriminatory conduct, but has not personally experienced it, cannot establish standing. Neither MCFH in *Midpeninsula* nor the plaintiff in *Surrey* experienced the denial of full and equal treatment by the defendants in those cases. Moreover, because the discount program in *Surrey* already had terminated, the plaintiff was not in a position to seek injunctive relief.

We do, however, find that the articulated bright-line rule in *Surrey* is not appropriate on the facts before us. *Surrey* stated that “a person must tender the purchase price for a business’s services or products in order to have standing to sue it for alleged discriminatory practices relating thereto.” (*Surrey, supra*, 168 Cal.App.4th at p. 416.) Neither the language of the Unruh Civil Rights Act nor its history supports application of this bright-line rule here. The history of the Unruh Civil Rights Act and the cases interpreting it make clear that when a person presents himself or herself to a business

establishment, and is personally discriminated against based on one of the characteristics articulated in section 51, he or she has suffered a discriminatory act and therefore has standing under the Unruh Civil Rights Act. And when such discrimination occurs, a person has standing under section 51.5 if he or she is “associated with” the disabled person and has also personally experienced the discrimination. (*Id.*, subd. (a).)

This holding comports with the history and intention of the Unruh Civil Rights Act. The cases discussing discrimination under sections 51 and 52 do not focus on whether patrons who were personally discriminated against have alleged or proved that they paid a fee or were subject to unfair pricing before bringing a lawsuit. Indeed, much of the legal history surrounding sections 51 and 52 involve plaintiffs who—like Flowers and his family—were refused services, thereby making a purchase impossible. To hold that plaintiffs here lacked standing would contradict both the language and the intent of the Unruh Civil Rights Act.

■ Moreover, this case involves accommodation for a disability. As we noted last year in a case also involving Flowers, “denying a disabled person access to a public accommodation due to that person’s service dog constitutes a potential violation of the ADA.”⁸ (*Flowers v. Prasad* (2015) 238 Cal.App.4th 930, 937 [190 Cal.Rptr.3d 33].) “In 1992 . . . the Legislature amended section 51 to, among other changes, add the paragraph that became subdivision (f), specifying that ‘[a] violation of the right of any individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section.’ (Stats. 1992, ch. 913, § 3, pp. 4283, 4284; see Stats. 2000, ch. 1049, § 2 [adding subdivision designations].)” (*Munson, supra*, 46 Cal.4th at p. 668.) “The general intent of the legislation was expressed in an uncodified section: ‘It is the intent of the Legislature in enacting this act to strengthen California law in areas where it is weaker than the Americans with Disabilities Act of 1990 (Public Law 101-336) and to retain California law when it provides more protection for individuals with disabilities than the Americans with Disabilities Act of 1990.’ (Stats. 1992, ch. 913, § 1, p. 4282.)” (*Id.* at p. 669.) Requiring disabled

⁸ Americans with Disabilities Act of 1990 (ADA; 42 U.S.C. § 12101 et seq.) regulations define a service animal as follows: “Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. . . . The work or tasks performed by a service animal must be directly related to the individual’s disability.” (28 C.F.R. §§ 35.104, 36.104 (2016).) ADA regulations state that “[i]ndividuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity’s facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go.” (28 C.F.R. § 35.136(g) (2016).) In addition, “[a] public entity shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets.” (28 C.F.R. § 35.136(h) (2016).)

persons to pay a discriminatory fee to establish standing when they have been personally denied equal access does not comport with the legislative intent to provide broad protections for ADA violations under the Unruh Civil Rights Act.

■ We therefore depart from *Surrey*'s bright-line rule and hold that tender of payment of a discriminatory fee is not required to establish standing under the Unruh Civil Rights Act where a disabled individual has personally experienced discriminatory treatment at a business establishment. Plaintiffs were therefore not required to allege that they tendered the fee relating to Flowers's service dog to establish standing under the Unruh Civil Rights Act and section 51.5.⁹

B., C.*

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DISPOSITION

The trial court judgments are reversed and the matters are remanded with directions to vacate the orders sustaining the demurrs and enter new orders overruling the demurrs. Appellants shall recover their costs on appeal.

Epstein, P. J., and Willhite, J., concurred.

⁹ Plaintiffs also argue that section 54.2, which is part of the Disabled Persons Act, provides standing to sue under the Unruh Civil Rights Act. Because we find that plaintiffs were not required to pay the fee to establish standing under the Unruh Civil Rights Act, we do not reach plaintiffs' argument that the intersection of these two statutory schemes may also provide standing under the Unruh Civil Rights Act. We also do not address defendants' argument that Osborne and the Messmers do not have standing under the Disabled Persons Act, because they did not allege such a cause of action.

*See footnote, *ante*, page 1118.

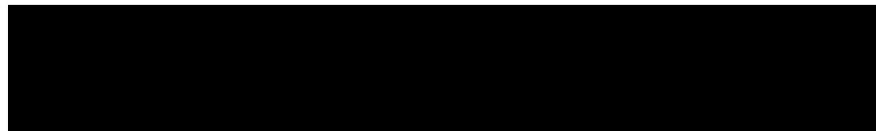
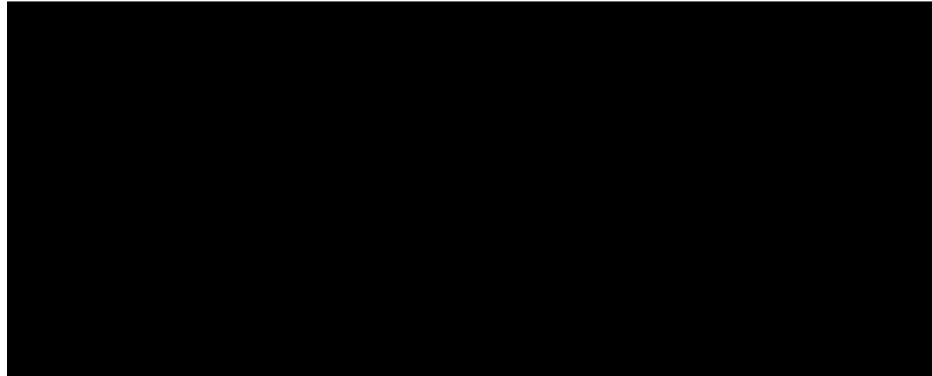
[No. H040047. Sixth Dist. July 28, 2016.]

NO TOXIC AIR, INC., Plaintiff and Respondent, v.
LEHIGH SOUTHWEST CEMENT COMPANY et al., Defendants and
Appellants.

[REDACTED]

[REDACTED]

[REDACTED]



COUNSEL

Harrison, Temblador, Hungerford & Johnson, Mark D. Harrison, Sean K. Hungerford and Adam K. Guernsey for Defendants and Appellants.

Law Offices of Stuart M. Flashman and Stuart M. Flashman for Plaintiff and Respondent.

OPINION

RUSHING, P. J.—The Permanente Quarry (Quarry) is a 3,510-acre surface mining operation producing limestone and aggregate for the manufacture of cement, and is located in an unincorporated area of Santa Clara County. The Quarry has been in existence since 1903, and is currently owned by Lehigh Southwest Cement Company and Hanson Permanente Cement (collectively “Lehigh”).

At issue in this case is the 2011 resolution of the Santa Clara County Board of Supervisors (County) finding that the Quarry’s surface mining operations are a legal nonconforming use.

No Toxic Air, Inc. (No Toxic Air), is a nonprofit organization that represents residents of Santa Clara County. No Toxic Air filed a petition for

peremptory writ of mandate challenging the County's March 1, 2011 resolution granting Lehigh legal nonconforming use status.

The trial court denied No Toxic Air's writ petition, affirming the County's resolution. No Toxic Air appealed the denial of the petition, arguing that the County's determination that the Quarry's surface mining rights were vested, and therefore eligible for legal nonconforming use status, was not supported by the evidence in the administrative record. We affirmed the decision of the trial court in *No Toxic Air, Inc. v. Lehigh Southwest Cement Company* (July 28, 2016, H039547) (nonpub. opn.).

In this appeal, Lehigh challenges the trial court's grant in part of No Toxic Air's motion to tax costs associated with the preparation of the administrative record in the mandate proceedings. Lehigh asserts that as the prevailing party in the mandate proceedings, it is entitled to recoup costs associated with the preparation of the administrative record, including labor costs of paralegals and attorneys to assemble the record. We reverse the decision of the trial court.

STATEMENT OF FACTS

The Quarry is located at the end of Permanente Road, which is the continuation of Stevens Creek Road in unincorporated Santa Clara County near the western border of the City of Cupertino. Since 1903, the Quarry has been conducting a surface mining operation producing limestone and aggregate.

In 1939, the Permanente Corporation (Permanente) purchased the Quarry property, which at that time consisted of approximately 1,300 acres. In the same year, Permanente received a use permit from the County to construct and operate a cement factory next to the Quarry, using limestone produced from the Quarry. This use permit remains in effect.

From the date of the original purchase in 1939, Permanente expanded the Quarry's operations, opening new mining areas on the property, and acquiring adjacent parcels. At the time of the County's vesting determination in 2011, the Quarry had grown to 3,510 acres consisting of 19 separate parcels.

In January 1948, Santa Clara County zoning ordinances went into effect that required use permits for mining operations such as those conducted at the Quarry. By this time, the Quarry was running large-scale operations on the

property such as mineral extraction, overburden¹ disposal and storage, conveyor systems operations and material processing. During the period between 1948 and 2011, when the County made its vesting determination, Permanente did not seek a use permit for its Quarry operations, and the County did not enforce the zoning ordinances to require the Quarry to acquire a permit.

In fall of 2010, Lehigh, which had become a subsequent owner of the Quarry, applied to the County for a declaration that the mining operations at the Quarry qualified as a legal nonconforming use. In response to the application, the County conducted an investigation of the history of mining operations at the Quarry. The County held a public hearing on February 8, 2011, where it considered records supplied by County staff and Lehigh, and heard comments from the public. At the end of the hearing, the County concluded that the mining activities at the Quarry qualified as a legal nonconforming use.

The County's decision was finalized in a resolution issued on March 1, 2011. In determining vesting of areas of the Quarry, the County used a mapping system that divided the land into 19 parcels. The County concluded that vested rights to conduct surface mining operations existed as to 13 of the 19 total parcels that make up the Quarry; the County found that there were no vested rights as to the five parcels numbered 4, 10, 13, 18 and 19. In addition, the County found that January 28, 1948, was the first date that the County could have required Permanente to secure a conditional use permit under zoning ordinances in place at that time. Finally, the County also found that Permanente Road was not a public street within the meaning of the original zoning ordinance adopted in 1937, because the road was closed to public traffic in 1935, and surface mining operations began on Quarry property before 1937.

In May 2011, No Toxic Air filed a petition for a peremptory writ of mandate pursuant to Code of Civil Procedure section 1094.5, challenging the Board's March 1, 2011 resolution. The court denied the writ, and entered judgment in favor of the County and Lehigh. On April 22, 2013, No Toxic Air filed a notice of appeal.

Following the trial court's denial of No Toxic Air's petition for peremptory writ of mandate, Lehigh filed a memorandum of costs, seeking to recoup its

¹ Overburden in mining is the "material overlying a deposit of useful geological materials or bedrock." (Webster's 10th New Collegiate Dict. (2001) p. 826.)

labor costs for using attorneys and paralegals to assemble the administrative record. The costs did not include attorney fees for the litigation of the writ petition.

No Toxic Air filed a motion to tax costs seeking to strike the labor costs for Lehigh's attorneys and paralegals. No Toxic Air argued that Lehigh's labor costs were impermissible attorney fees, and were not recoverable pursuant Code of Civil Procedure section 1033.5. Lehigh asserted that the labor costs were expenses associated with preparation of the administrative record, and as a result, were properly recoverable under Code of Civil Procedure section 1094.5, subdivision (a).

The court granted No Toxic Air's motion to tax costs with respect to Lehigh's labor costs of its paralegal and attorneys to assemble and organize the administrative record. The court denied the motion on all other grounds. The court stated: "In this particular case, I think the fees were reasonable. I think they were necessary and essential. I just couldn't find an appellate decision that would support me."

Lehigh filed a notice of appeal following the trial court's grant of No Toxic Air's motion to tax costs.

DISCUSSION

Lehigh asserts that the trial court erred in granting No Toxic Air's motion to tax costs to strike the attorney and paralegal expenses Lehigh incurred to prepare the administrative record for the writ of mandate proceedings. Code of Civil Procedure section 1094.5, subdivision (a) provides, in relevant part, "If the expense of preparing all of any part of the record has been borne by the prevailing party, the expense shall be taxable as costs." (Code Civ. Proc., § 1094.5, subd. (a).)

"Whether a particular cost to prepare an administrative record was necessary and reasonable is an issue for the sound discretion of the trial court. [Citations.] Discretion is abused only when, in its exercise, the court 'exceeds the bounds of reason, all of the circumstances being considered.' [Citation.] The appellant has the burden of establishing an abuse of discretion." (*River Valley Preservation Project v. Metropolitan Transit Development Bd.* (1995) 37 Cal.App.4th 154, 181 [43 Cal.Rptr.2d 501] (*River Valley*).) Where "the determination of whether costs should be awarded is an issue of law on undisputed facts, we exercise de novo review." (*City of Long Beach v.*

Stevedoring Services of America (2007) 157 Cal.App.4th 672, 678 [68 Cal.Rptr.3d 779].)

Here, the trial court specifically found that the labor costs for the attorneys and paralegals were reasonable, and necessary for the compilation of the large administrative record. However, the court decided not to award the fees, because it was constrained by the lack of an appellate decision allowing such an award. The court noted: “I want to say that as far as the attorney’s fees that were charged for this extraordinarily large record, I don’t understand how either party could really adequately prepare a transcript without legal—without having the attorneys be part of that. It would not have been possible. I think it was not just necessary, it was essential. It is only the caution of having no appellate decision. [¶] In this particular case, I think the fees were reasonable. I think they were necessary and essential. I just couldn’t find an appellate decision that would support me.”

Lehigh notes that parallel California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.) case law supports its interpretation of Code of Civil Procedure section 1094.5, subdivision (a) allowing the recovery of costs associated with the production of the administrative record. Specifically, Lehigh notes that under the CEQA provision found in Public Resources Code section 21167.6, subdivision (b)(1), courts awarded labor costs to the prevailing party in an administrative action (see, e.g., *River Valley, supra*, 37 Cal.App.4th 154, 181 [allowing recovery of labor costs of paralegal and engineer to prepare an administrative record]; see also *California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 294–295 [115 Cal.Rptr.3d 631] [implying that the labor costs of attorneys may also be recoverable]; *Wagner Farms, Inc. v. Modesto Irrigation Dist.* (2006) 145 Cal.App.4th 765, 778–779 [52 Cal.Rptr.3d 683] [discussing the cost of labor to assemble and organize the record of proceedings as costs].)

Since the filing of the briefs in this case, the Fourth District Court of Appeal has definitively ruled on the issue of the recovery of the labor costs of attorneys and paralegals in the creation of the administrative record in *The Otay Ranch, L.P. v. County of San Diego* (2014) 230 Cal.App.4th 60 [178 Cal.Rptr.3d 346] (*Otay Ranch*). In *Otay Ranch*, the county undertook to prepare the administrative record in a CEQA action. Initially, it sought the help of experienced paralegals, document clerks and an electronic record vendor to complete the task. However, as the project progressed, the county found that the complexity of the documents necessitated the assistance of

attorneys to review and organize the final complete record. (*Otay Ranch*, at p. 65.)

At the conclusion of the case, the county submitted a memorandum of costs requesting reimbursement of the labor costs for attorneys and paralegals to prepare the administrative record. *Otay Ranch* filed a motion to tax costs as to the attorney and paralegal expenses, arguing that these were attorney fees not authorized by contract, statute or other law. The trial court denied the motion to tax costs, finding that the labor costs were reasonably incurred for the production of the record, and that because labor costs are otherwise recoverable, the same result should apply to costs for attorneys. The Court of Appeal affirmed the trial court, stating: “[W]e see no reason to differentiate between those actual labor costs and actual labor costs for agency staff and document clerks to prepare an administrative record. Nor do we see a reason to differentiate between labor costs incurred by individuals directly employed by a public agency and those incurred by individuals employed by a private law firm retained by the agency, so long as the trial court determines, as it did here, the labor costs were reasonably and necessarily incurred for preparation of the administrative record. To hold otherwise would undermine the statutory policy of shifting the costs and expenses of preparing an administrative record away from the public and to the private individual or entity bringing the lawsuit. (Code Civ. Proc., §§ 1094.5, subd. (a), 1094.6, subd. (c); see *River Valley*, *supra*, 37 Cal.App.4th at p. 182.)” (*Otay Ranch*, *supra*, 230 Cal.App.4th at pp. 70–71.)

Although *Otay Ranch* is a CEQA action, the rationale for the recovery of attorney labor costs is equally applicable to the present case. Here, Lehigh argues, as did *Otay Ranch*, that the costs associated with attorney labor are not recoverable because they are attorney fees not covered by contract, statute or other law. However, the labor costs for attorneys and paralegals should be considered the same as other labor costs incurred to create the administrative record. Moreover, here, the trial court found that the attorney and paralegal labor costs were reasonable and appropriate for the complexity and size of the record.

■ Here, the trial court granted No Toxic Air’s motion to tax costs only because it found that there was no appellate authority allowing the recovery of attorney labor costs. Following the rationale of *Otay Ranch*, we hold that labor costs for attorneys and paralegals to prepare the administrative record are recoverable as expenses under Code Civil Procedure section 1094.5, subdivision (a).

DISPOSITION

We reverse the order of the trial court granting No Toxic Air's motion to tax costs.

Costs are awarded to Lehigh.

Premo, J., and Elia, J., concurred.

[No. H041573. Sixth Dist. July 28, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
LEXINGTON NATIONAL INSURANCE CORPORATION, Defendant and
Appellant.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

ANSWER The answer is (A). The first two digits of the number 1234567890 are 12.

Page 1

the first time in the history of the world, the people of the United States have been called upon to determine whether they will submit to the law of force, or the law of the Constitution. We consider the question to be, whether the Southern Slaveholding States have a right to secede from the Federal Union.

For more information about the study, please contact Dr. John Smith at (555) 123-4567 or via email at john.smith@researchinstitute.org.

For more information about the study, please contact Dr. Michael J. Hwang at (310) 206-6500 or via email at mhwang@ucla.edu.

For more information about the study, please contact Dr. John Smith at (555) 123-4567 or via email at john.smith@researchinstitute.org.

For more information about the study, please contact Dr. John Smith at (555) 123-4567 or via email at john.smith@researchinstitute.org.

ANSWER The answer is (A) $\frac{1}{2}$. The area of the shaded region is $\frac{1}{2} \pi r^2 = \frac{1}{2} \pi (1)^2 = \frac{1}{2} \pi$.

COUNSEL

Robert M. Rorabaugh and Robert T. White for Defendant and Appellant.

Orry P. Korb, County Counsel, and Sara J. Ponzio, Deputy County Counsel, for Plaintiff and Respondent.

OPINION

RUSHING, P. J.—Lexington National Insurance Corporation (Lexington) appeals a judgment entered following the trial court's denial of its request for relief from bail forfeiture. On appeal, Lexington argues that the court lacked jurisdiction to declare the bail forfeited, because the defendant in the case, Natalie Duffy, was not required to attend the hearing at which she failed to appear.

STATEMENT OF THE CASE

Duffy was charged with misdemeanor child endangerment (Pen. Code, § 273a, subd. (b)), and resisting arrest (Pen. Code, § 148, subd. (a)(1)). On August 23, 2013, Lexington posted a \$50,000 bail bond for Duffy's release from custody. Duffy appeared in court on August 29, 2013, at which time the court set a pretrial hearing for October 1, 2013. The court ordered Duffy to appear at the next hearing as follows:

“The Court: Number 8, Natalie Duffy. Yes.

“Mr. Cummins: She's present. Tom Cummins with the public defender's office on her behalf. Your Honor, in this case we are requesting to waive time and continue it four or six weeks for investigation.

“The Court: All right. You have a right, Ms. Duffy, to a trial within 45 days from when you were arraigned last week. Do you understand and give this right up?

“The Defendant: Yes.

“The Court: Yes. Looks like the case was sent here because of the time not waived posture.

“Mr. Cummins: We can put it back in 87, your Honor.

“The Court: I will put it back to 87. And how about the 1st of October?

“Mr. Cummins: Yes, your Honor.

“The Court: You are ordered to go back to Department 87 up on the second floor, Ms. Duffy, October 1st, 9:00 a.m. for your pretrial. Thank you.”

Defendant failed to appear at the hearing on October 1, 2013. The following exchange occurred at the October 1, 2013 hearing:

“The Court: All right. Line 3 is People versus Duffy.

“Mr. Cummins: Your Honor, she is not present. [¶] Tom Cummins of the Public Defender’s Office on her behalf.

“I have no information for Ms. Duffy.”

The court ordered Duffy’s \$50,000 bail forfeited. Lexington brought a motion to vacate forfeiture and reinstate the bond pursuant to Penal Code section 1305. The court denied the motion, and entered judgment against Lexington.

DISCUSSION

Lexington asserts that the trial court lacked jurisdiction to forfeit bail, because Duffy was not required to appear at the pretrial hearing at which the court ordered bail forfeited.

■ The purpose of bail and its forfeiture is to ensure a criminal defendant’s appearance in court and adherence to court orders. (*People v. Fairmont Specialty Group* (2009) 173 Cal.App.4th 146, 151 [92 Cal.Rptr.3d 516].) A bail bond is a contract between the court and a surety whereby the surety promises that a defendant released from custody will appear in court when ordered. If the defendant fails to appear, the surety becomes a debtor for the bond amount. (*Ibid.*) Bail is forfeited when a defendant fails to appear as ordered before judgment is pronounced. (Pen. Code, § 1305, subd. (a).)

■ “While it is true that the law disfavors forfeitures, including forfeitures of bail under the bail provisions of the Penal Code, it is the burden of the surety to show that a forfeiture of its bail should be set aside. [Citation.]” (*People v. American Surety Ins. Co.* (2001) 88 Cal.App.4th 762, 768 [106 Cal.Rptr.2d 235].) An order denying a motion to set aside a bail forfeiture is reviewed under the abuse of discretion standard. (*People v. Legion Ins. Co.* (2002) 102 Cal.App.4th 1192, 1195 [126 Cal.Rptr.2d 172].) Under this standard, the trial court’s decision will be affirmed on appeal unless it “ ‘ ‘exceeds the bounds of reason, all circumstances being considered. [Citation.]’ ’ [Citation.]” (*People v. Ranger Ins. Co.* (2000) 81 Cal.App.4th 676, 679–680 [96 Cal.Rptr.2d 892], quoting *People v. Froehlig* (1991) 1 Cal.App.4th 260, 265 [1 Cal.Rptr.2d 858].)

■ “The statutory scheme governing bail forfeitures is found in Penal Code section 1305 et seq. These provisions must be carefully followed by the trial court, or its acts will be considered without or in excess of its

jurisdiction. [Citation.]” (*People v. Aegis Security Ins. Co.* (2005) 130 Cal.App.4th 1071, 1074 [30 Cal.Rptr.3d 686], fn. omitted.)

■ The trial court must declare bail forfeited if, without sufficient excuse, a defendant fails to appear at arraignment, trial, judgment, or “[a]ny other occasion prior to the pronouncement of judgment if the defendant’s presence in court is lawfully required.” (Pen. Code, § 1305, subd. (a)(4).) In addition, Penal Code section 977, subdivision (a)(1) provides: “In all cases in which the accused is charged with a misdemeanor only, he or she may appear by counsel only, except as provided in paragraphs (2) and (3). If the accused agrees, the initial court appearance, arraignment, and plea may be by video, as provided by subdivision (c).”

Lexington argues that because Duffy was charged with a misdemeanor in this case, she was not lawfully required to appear in court for the pretrial conference and was entitled to have counsel appear for her under Penal Code section 977, subdivision (a)(1). Lexington contends that because Duffy’s counsel appeared for the pretrial conference, the court should not have ordered bail forfeited.

Our Supreme Court recently published its decision in *People v. Safety National Casualty Corp.* (2016) 62 Cal.4th 703 [199 Cal.Rptr.3d 272, 366 P.3d 57] (*Safety National*), and we are satisfied it controls here. In *Safety National*, the defendant was released on bond and appeared at several hearings. At his arraignment hearing, the trial court entered the defendant’s plea of not guilty, and also set a pretrial conference date. The defendant appeared at the pretrial conference, where the parties “‘agreed to put the case over’” to a new date, and the trial court stated “‘bail will stand.’” When the defendant did not appear at the agreed-upon date, the court ordered bail forfeited. (*Id.* at p. 708.) The *Safety National* court, after noting that the defendant had received notice of the pretrial hearing and failed to appear without sufficient excuse, concluded, “[The defendant’s] absence at this scheduled pretrial hearing constituted a basis on which to forfeit bail under [Penal Code] section 1305.” (*Id.* at p. 717.)

Lexington argues that *Safety National* is inapplicable to the present case, because there, the court only addressed Penal Code section 977, subdivision (b)(1), and whether an order that a *felony* defendant personally appear means that “defendant’s presence in court is lawfully required,” for the purpose of bail forfeiture. (Pen. Code, § 1305, subd. (a)(4).) Lexington asserts that the rationale in *Safety National* should not apply here, where Duffy was charged with a *misdemeanor*. According to Lexington, since Penal Code section 977, subdivision (a)(1) provides that a defendant may have her attorney appear for her, the court’s order requiring Duffy to personally appear in court was not

binding, and her failure to appear could not be the basis to forfeit bail under Penal Code section 1305, subdivision (a)(4). By Lexington's logic, at least for the purpose of bail forfeiture, a court is powerless to order a misdemeanor defendant to personally appear in court.

While *Safety National* involved a defendant charged with a felony, the court's rationale that a defendant is lawfully required to appear when specifically ordered to do so is equally applicable to a misdemeanor case. We hold that when a court orders a defendant charged with *either* a felony or a misdemeanor to personally appear in court, his or her "presence in court is lawfully required," within the meaning of Penal Code section 1305, subdivision (a)(4), and a court may order bail forfeited if that defendant fails to appear.

Here, the court specifically ordered Duffy to appear at the October 1, 2013 pretrial conference by stating: "You are ordered to go back to Department 87 up on the second floor, Ms. Duffy, October 1st, 9:00 a.m. for your pretrial. Thank you." As a result, Duffy was "'lawfully required'" to appear at the pretrial conference, and when she failed to do so, the court properly ordered bail forfeited. (*Safety National, supra*, 62 Cal.4th at p. 716; Pen. Code § 1305, subd. (a)(4).)

■ Here, as in *Safety National*, Duffy was commanded to appear for a pretrial conference, and failed to personally appear without sufficient excuse. Accordingly, under *Safety National*, Duffy's nonappearance provided an adequate basis for the court's order forfeiting the bond.

DISPOSITION

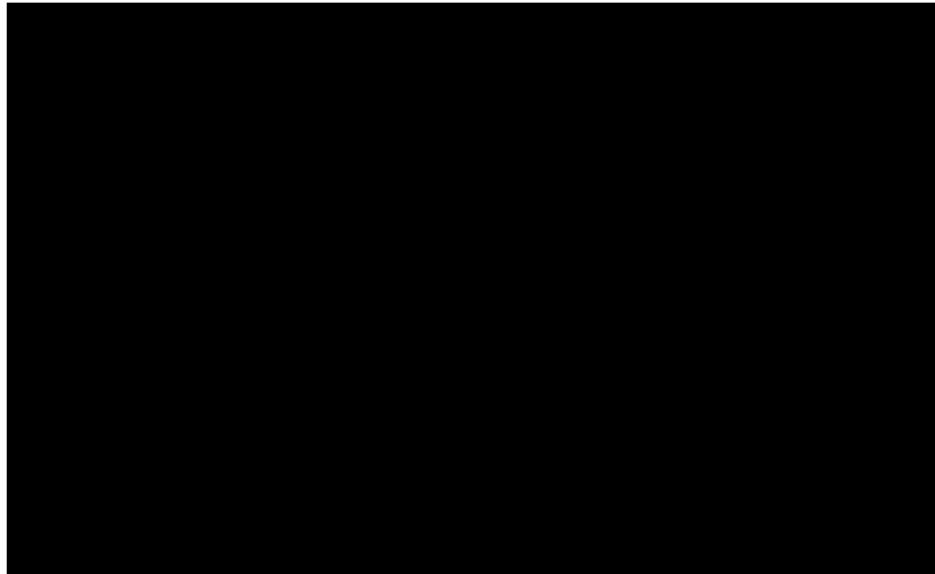
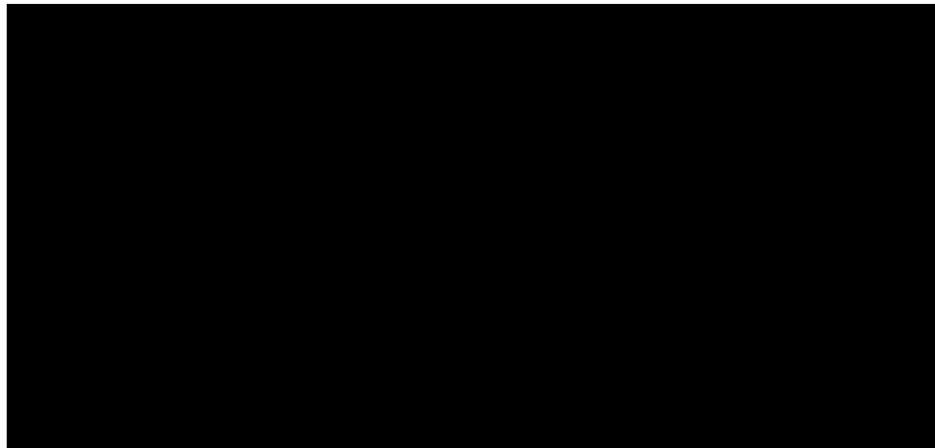
The judgment is affirmed.

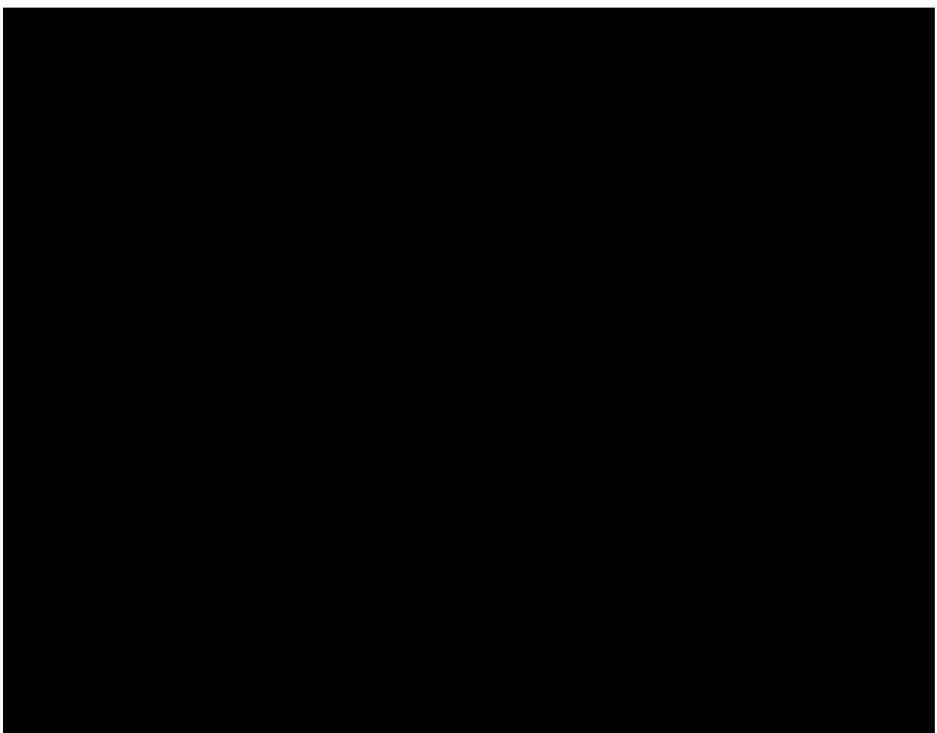
Premo, J., and Grover, J., concurred.

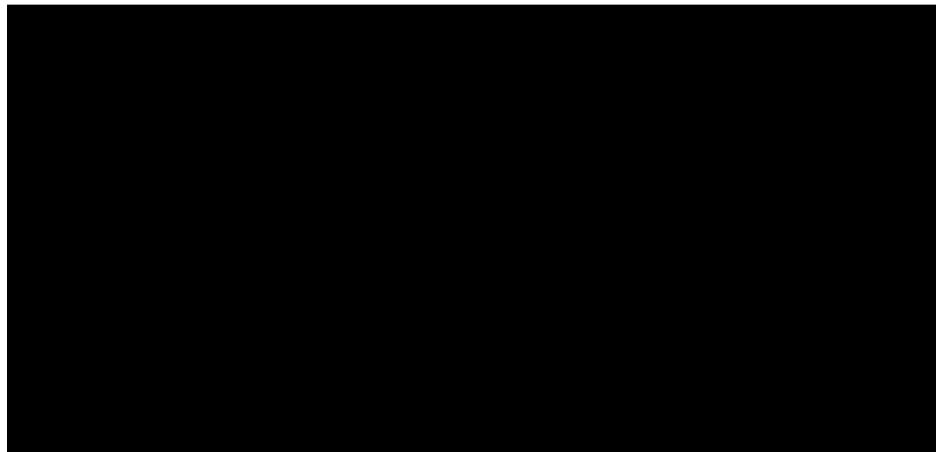
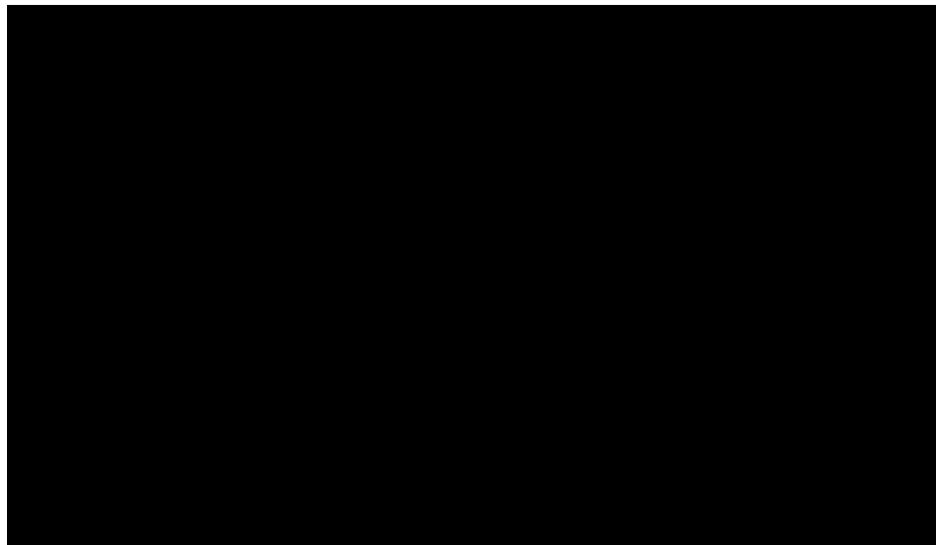
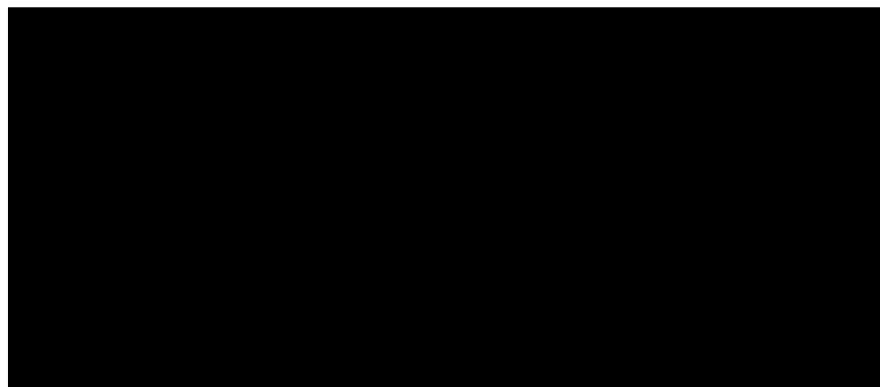
Appellant's petition for review by the Supreme Court was denied November 16, 2016, S237048.

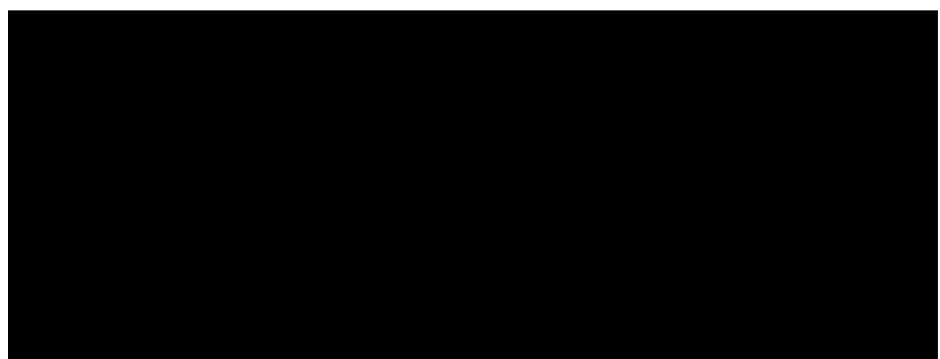
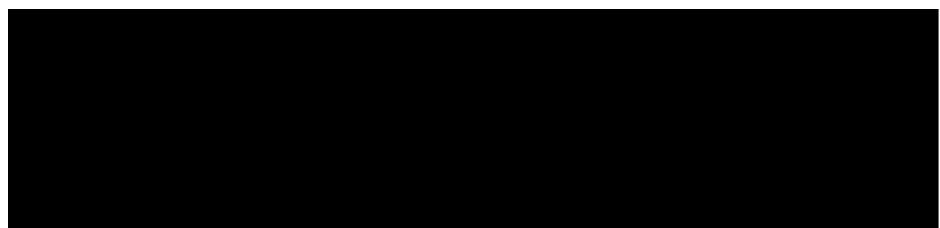
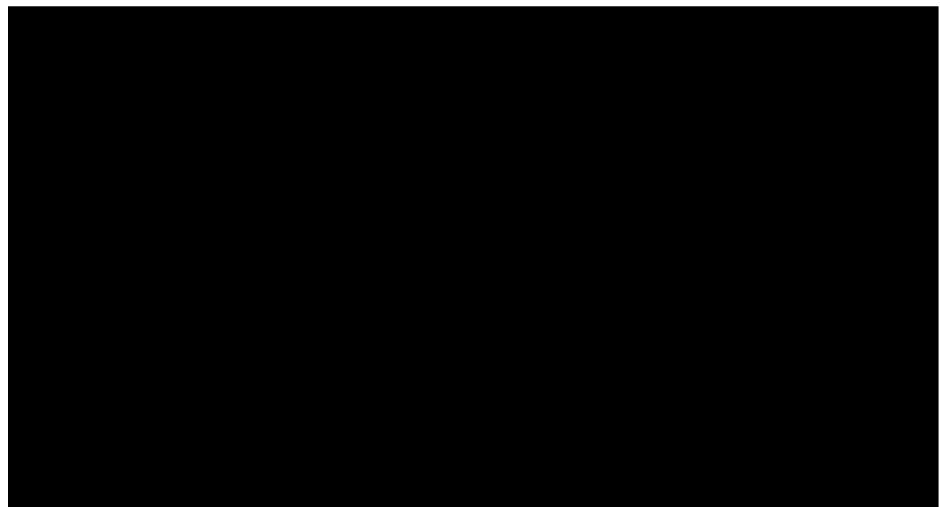
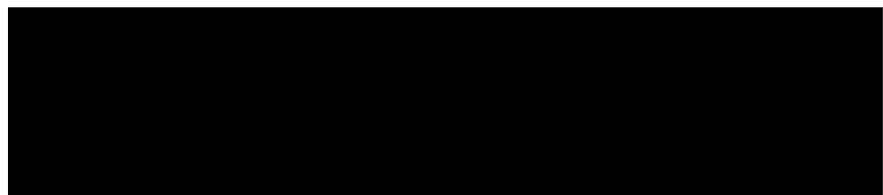
[No. B263933. Second Dist., Div. One. July 28, 2016.]

HEIDI S., Plaintiff and Appellant, v.
DAVID H., Defendant and Respondent.









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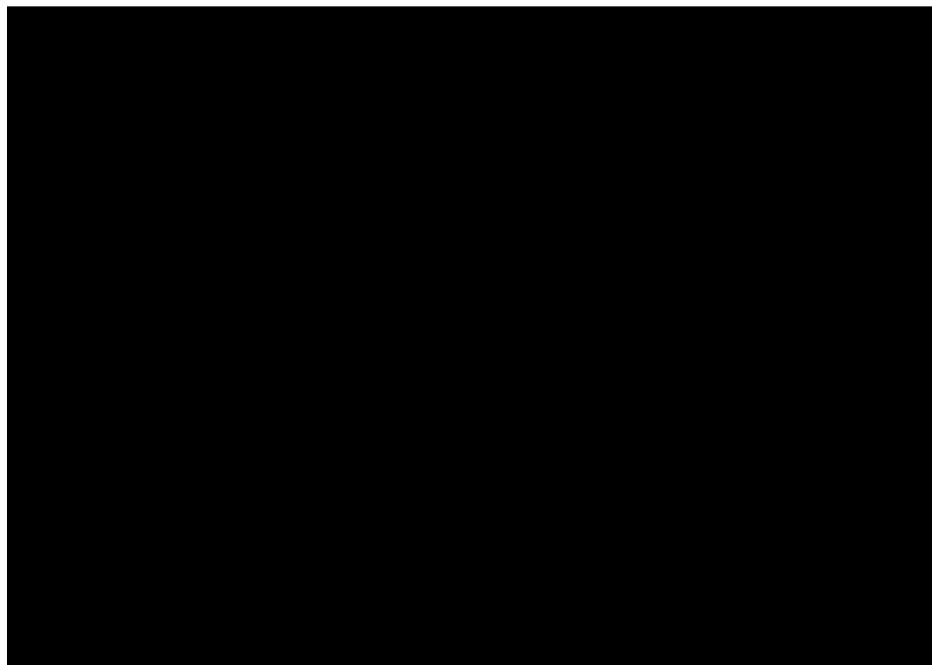
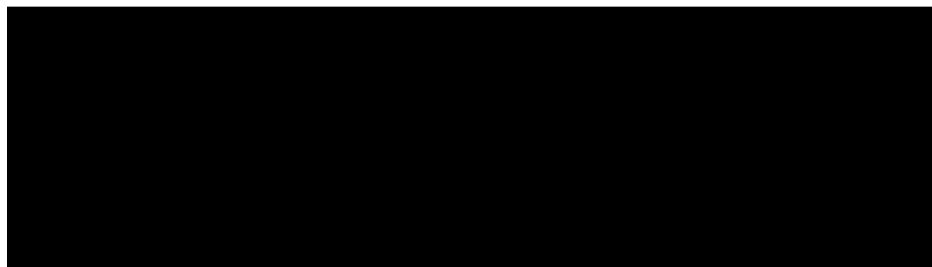
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COUNSEL

Opri & Associates and Debra A. Opri for Plaintiff and Appellant.

Kearney | Baker and Gary W. Kearney for Defendant and Respondent.

OPINION

JOHNSON, J.—On November 5, 2012, police discovered Heidi S. (mother) in a public park under the influence of alcohol and controlled substances; mother was holding her 17-month-old son (the child) in her arms. On March 4, 2014, following an investigation by the Los Angeles County Department of Children and Family Services (DCFS) and a dependency court proceeding, the juvenile court awarded David H. (father) sole legal and physical custody of the child, granted mother limited visitation with the child under the supervision of a monitor, and terminated jurisdiction over the child (Exit Order).

On May 29, 2014, less than three months later, on the basis of allegedly changed circumstances since the issuance of the Exit Order, mother filed in the family court a request to modify the Exit Order. Mother requested joint legal custody, sole physical custody, and unmonitored visitation.

On March 3, 2015, Judge B. Scott Silverman of the family court found a significant change of circumstances that warranted modification of the Exit Order to permit mother increased monitored visitation and, for the first time, to permit mother unmonitored visitation (Custody Order). Nevertheless, due to continuing concerns about mother that had not been sufficiently resolved—e.g., mother’s unexplained seizures and the risk that mother might relapse into drug or alcohol abuse—the family court ordered that sole legal and physical custody of the child would remain with father. The Custody Order also required that mother submit to additional testing for the illegal use of controlled substances and for the use of alcohol as a condition to further visitation.

Mother appeals, contending that the family court abused its discretion under Welfare and Institutions Code section 302, subdivision (d), in refusing to grant her request for custody and for visitation in its entirety. She also contends that the family court violated Family Code section 3041.5 with respect to its imposition of new testing requirements for controlled substances and for alcohol; she further contends that this alleged violation constitutes a denial of due process. Her arguments concerning Family Code section 3041.5 present issues of first impression.

We affirm the family court's rulings on all issues.

BACKGROUND

I. *Relevant statutory provisions*

Welfare and Institutions Code section 302, subdivision (d) provides as follows: "Any custody or visitation order issued by the juvenile court at the time the juvenile court terminates its jurisdiction pursuant to Section 362.4 regarding a child who has been previously adjudged to be a dependent child of the juvenile court shall be a final judgment and shall remain in effect after that jurisdiction is terminated. The order shall not be modified in a proceeding or action described in Section 3021 of the Family Code unless the court finds that there has been a significant change of circumstances since the juvenile court issued the order and modification of the order is in the best interests of the child."

Family Code section 3041.5 provides the following: "In any custody or visitation proceeding brought under this part, as described in Section 3021, or any guardianship proceeding brought under the Probate Code, the court may order any person who is seeking custody of, or visitation with, a child who is the subject of the proceeding to undergo testing for the illegal use of controlled substances and the use of alcohol if there is a judicial determination based upon a preponderance of evidence that there is the habitual, frequent, or continual illegal use of controlled substances or the habitual or continual abuse of alcohol by the parent This evidence may include, but may not be limited to, a conviction within the last five years for the illegal use or possession of a controlled substance. The court shall order the least intrusive method of testing for the illegal use of controlled substances or the habitual or continual abuse of alcohol The parent . . . who has undergone drug testing shall have the right to a hearing, if requested, to challenge a positive test result. A positive test result, even if challenged and upheld, shall not, by itself, constitute grounds for an adverse custody or guardianship decision. Determining the best interests of the child requires weighing all relevant factors. . . . The results of the testing may not be used for any purpose, including any criminal, civil, or administrative proceeding, except to assist the court in determining, for purposes of the proceeding, the best interest of the child pursuant to Section 3011 and the content of the order or judgment determining custody or visitation. The court may order either party, or both parties, to pay the costs of the drug or alcohol testing ordered pursuant to this section."

II. *Facts of the case*

On November 5, 2012, the Los Angeles police received several phone calls from concerned citizens reporting that they had seen a woman in a public park with a baby and that she had almost dropped the baby several times. After arriving at the park and finding mother, the police administered two breathalyzer tests to determine mother's blood-alcohol level; the tests revealed that mother had a blood-alcohol level of 0.11 or 0.12. Mother told the police that earlier in the day she had consumed "two beers" and two pills containing Norco, a pain reliever, within a two-hour period. The police arrested mother for child endangerment.

On the same day, after her arrest, during an interview with the DCFS social worker assigned to investigate the incident, mother stated that she had consumed beer and a Norco pill earlier that day and that the night before she had ingested a medication called Seroquel.

On November 6, 2012, mother told the same DCFS social worker that before going to the park the previous day, she had intended to ingest a Norco pill but she had mistakenly consumed a pill containing Ambien, a sedative. Mother stated that she could not remember any of the events that occurred on November 5, 2012, after she had taken the Ambien pill, including traveling to the park with her son and being arrested by the police.

Shortly after DCFS's interviews with mother, DCFS filed a petition in the juvenile court asking the court to open a case concerning the child and requesting that the police or a social worker remove the child from mother's care. On or about November 14, 2012, in case No. CK96444, the juvenile court held the first detention hearing, pursuant to section 319 of the Welfare and Institutions Code, in the matter concerning the child. On March 4, 2014, following a dependency proceeding,¹ the juvenile court issued the Exit Order, awarding father sole legal and physical custody of the child. The Exit Order permitted mother supervised visitation with the child for "2 hours 3 times per week." The Exit Order stated that mother's visitations with the child "must be supervised" by a monitor, that the selection of the monitor must be "agreed upon by the parties," and that "[i]f there is no agreement, then father may choose monitor, or mother to use professional monitor, paid for by mother." The Exit Order also required mother to complete a "drug abuse treatment program with random testing" and to "continue counseling and psychiatrist care." The juvenile court terminated jurisdiction over the child and held that any request to modify the Exit Order must be brought in the family court.

¹ The appellate record is silent on the subsequent events leading up to the juvenile court's Exit Order.

III. *Procedural history*

On May 29, 2014, not even a full three months after the issuance of the Exit Order, in case No. BF044161, mother filed in the family court a request to modify the Exit Order. In the request, mother sought joint legal custody, sole physical custody, and visitation described as “50% custodial arrangement with the respondent [father] based upon work schedules and flexibility.” (Capitalization omitted.)

With the request, mother filed a declaration asserting that a material change of circumstances had occurred since the juvenile court issued its Exit Order and that the requested modification of the Exit Order would be in the child’s best interests. First, mother asserted that she had completed the “Social Services case plan, and in fact, ha[d] successfully gone above and beyond what was required.” Since December 2013, she had consistently attended individual counseling and therapy sessions with a clinical psychologist, Dr. Lester Summerfield; in addition, a psychiatrist had treated mother once every three weeks. She had completed 18 months of DCFS-monitored drug testing with negative results from December 2012 to March 4, 2014;² after that interval, she continued to submit to drug testing on her own volition, including testing based on urine, blood, and hair follicle samples—all with negative results. She also attended an outpatient drug and alcohol treatment program from April 3, 2013, to May 30, 2013, successfully completed that program, attended 20 Alcoholics Anonymous meetings, and completed a parenting course. Further, mother’s declaration claimed that mother’s monitored visits with the child have proceeded “extremely well.” On August 13, 2014, mother filed a supplemental declaration attaching clinical psychologist Dr. Marlene W. Valter’s psychological evaluation of mother.

On August 11, 2014, in opposition to mother’s request to modify the Exit Order, father filed his own declaration explaining his concerns about mother’s ability to care for the child. He first cited an Evidence Code section 730 evaluation ordered by the dependency court: in that evaluation, the court-ordered expert concluded that mother is a “‘very disturbed person’” with “‘psychopathic tendencies,’” that she “‘suffers from a “[m]ixed [p]ersonality [d]isorder with [a]ntisocial and [n]arcissistic traits,’” that she “‘is a serious and dangerous risk to her young son,’” and that she “‘has a potential for homicide of the child.’” (Boldface omitted.)

Father’s declaration then reminded the family court that the court-ordered expert had requested a Department of Justice (DOJ) report concerning

² There are only 15 months between December 2012 to March 4, 2014; mother does not explain this discrepancy in her briefs.

mother, which revealed that mother had been “doctor shopping.” (Boldface omitted.) Mother had received treatment from six different physicians and received medication from at least four different pharmacies at the same time, including Ambien, Lunesta, Codeine, Promethazine, Vicodin, Olonazepam, Ativan, Xanax, and Ritalin; she had filled a prescription as recently as September 4, 2013. The DOJ report therefore expressed concern about the validity of mother’s negative results from drug testing taken during the same period that she had been receiving prescriptions for at least nine different medicines; the report suggested that mother may have been altering the results of her drug testing. Father’s declaration then cited the witness statement by mother’s childhood friend Timothy Sanchez; Mr. Sanchez stated that he had observed mother purchase synthetic urine in order to pass a drug test, seemingly confirming the concerns related to altered drug testing results expressed in the DOJ report.

In the declaration, father also cited a letter from Dr. Lawrence Genen, one of mother’s four psychiatrists during the time that mother had been “doctor shopping.” Dr. Genen had treated mother since her arrest on November 5, 2012. Although Dr. Genen initially supported mother during the dependency court proceeding, on September 23, 2013, Dr. Genen informed DCFS that he had terminated his treatment of mother because “she is abusing prescription controlled substances.” (Boldface omitted.) He also reported to DCFS that he “would not recommend unsupervised visitation with her son.” (Boldface omitted.)

Further, father’s declaration asserted that the parenting course relied on by mother was an online course; the only in-person parenting course that mother attended was the court-mandated one. During the court-mandated parenting course, reports described mother as “walking off balance, holding onto the walls for support, disoriented, and hav[ing] slur[red] speech.” (Boldface omitted.) The representative of the court-mandated parenting course stated that she did not recommend permitting mother to have unmonitored visits with the child.

Finally, father expressed concerns about the credibility of the clinical psychologist, Dr. Summerfield, whose January 24, 2014 recommendation letter mother relied on in her declaration to the family court; father asserted that Dr. Summerfield had provided false information to the dependency court during the earlier proceeding.³ Further, because mother relied on the same seven-month-old letter of recommendation previously filed in the dependency

³ Dr. Summerfield’s letter claimed that mother had survived a plane crash causing the death of her friend and the pilot and that he had diagnosed mother with chronic posttraumatic stress disorder. When asked during the dependency proceeding for more evidence supporting the occurrence of the plane crash, Dr. Summerfield cited a lawsuit based on mother’s claim that a

proceeding, father also questioned whether Dr. Summerfield's opinion constituted new evidence describing events that occurred after the issuance of the Exit Order.

On November 4, 2014, the family court began the hearing on mother's request to modify the Exit Order. Mother presented the testimony of clinical psychologists Dr. Valter and Dr. Summerfield; the family court then continued the matter to the next day. On November 5, 2014, mother presented the testimony of Phyllis Block, the monitor who supervised mother's visitations with the child; mother also testified; then the family court continued the matter to later in the month.

On November 21, 2014, after mother completed her testimony, father presented the testimony of the nanny for the child; father also testified. The family court continued the matter to the next month. On December 12, 2014, father completed his testimony and then presented the testimony of the following witnesses: Ann Rosato, the DCFS social worker who handled the DCFS investigation during the dependency proceeding; Nils Grevillius, the private investigator whom father hired to investigate the alleged existence of three coworkers who had written recommendation letters supporting mother in the dependency matter; and mother. The family court continued the matter to the next year. On February 4, 2015, father presented the testimony of Mr. Sanchez, mother's childhood friend; the family court then continued the matter another month.

On March 3, 2015, nearly a year after the juvenile court issued the Exit Order, the family court heard closing arguments from the parties and then stated on the record its findings of fact, its conclusions of law, and its ruling on mother's request to modify the Exit Order.⁴

Consistent with the family court's oral rulings at the hearing, the Custody Order made no modification to the Exit Order's award of sole legal and physical custody to father. However, the Custody Order modified the visitation schedule by creating a three-tiered system in order to phase out gradually the monitored visitation and to phase in unmonitored visitation.

In the first tier, from March 14, 2015 to July 3, 2015,⁵ mother had monitored visitation on alternating weekends from 9:00 a.m. Saturday

liquid had injured mother's head when she had boarded a gated plane. Dr. Summerfield later admitted that he had made an error in his letter when he claimed that mother had been in a plane accident.

⁴ We present a more detailed summary of the family court's statements during the hearing in the Discussion section below.

⁵ At oral argument, counsel represented to this court that during the pendency of this appeal the Custody Order's three-tiered plan has been in effect.

through 6:00 p.m. Sunday, with a monitor present on both days from 9:00 a.m. to 6:00 p.m.; on the weeks without a weekend visitation, mother had a monitored visit on Friday from 3:00 p.m. to 6:00 p.m. The order required mother to submit to four random tests per month for the illegal use of controlled substances and for the use of alcohol; the order required mother to pay for those tests. The order further stated: "If mother misses one test or receives a positive drug test, then visitation shall resume back to the monitored schedule of six hours per week."⁶

Following successful completion of the first tier, in the second tier from July 4, 2015, to October 9, 2015, mother had *unmonitored* visitation on alternating weekends from 9:00 a.m. Saturday through 6:00 p.m. Sunday; on the weeks without a weekend visitation, mother had a monitored visit on Friday from 3:00 p.m. to 6:00 p.m. The order increased the random drug and alcohol testing to six tests per month "continuing indefinitely." Again, the order mandated that mother pay for those tests; further, "[i]f mother misses one test or receives a positive drug/alcohol test, then visitation shall resume back to the monitored schedule of six hours per week."

After completion of the second tier, in the third tier starting on October 10, 2015 and requiring an open-ended period, mother has *unmonitored* visitation on alternating weekends from 9:00 a.m. Saturday through 6:00 p.m. Sunday and every Wednesday "from after school to 7:00 pm." The testing for controlled substances and for alcohol that began in the second tier remained in effect. The Custody Order also implemented a schedule for holidays, for attendance at school functions and at school activities, and for telephonic contact with the child when the child is in the other parent's custodial care.

Mother filed an appeal from the Custody Order; father did not appeal the order.

DISCUSSION

I. *The family court did not abuse its discretion in refusing to grant mother's request for custody and for visitation in its entirety.*

A. *Standard of review*

As trial courts have broad powers and have the widest discretion to fashion a custody and visitation plan that is in the child's best interest, we employ the deferential abuse of discretion standard of review on a trial court's ruling on

⁶ We presume that the family court intended that a positive result from an alcohol test would also lead to a return to the monitored visitation schedule of six hours per week.

custody and on visitation. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32 [51 Cal.Rptr.2d 444, 913 P.2d 473].) “‘The trial judge, having heard the evidence, observed the witnesses, their demeanor, attitude, candor or lack of candor, is best qualified to pass upon and determine the factual issues presented by their testimony.’” (*In re Marriage of Lewin* (1986) 186 Cal.App.3d 1482, 1492 [231 Cal.Rptr. 433].) An abuse of discretion occurs when the trial court exceeds the bounds of reason; even if we disagree with the trial court’s determination, we uphold the determination so long as it is reasonable. (*Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 864 [112 Cal.Rptr.2d 239].) We do not reverse unless a trial court’s determination is arbitrary, capricious, or patently absurd.

B. *Finding a significant change of circumstances since the juvenile court issued the Exit Order, the family court modified the Exit Order.*

In order to modify a juvenile court’s exit order, the family court must first make a finding that “there has been a significant change of circumstances since the juvenile court issued the order and modification of the order is in the best interests of the child.” (Welf. & Inst. Code, § 302, subd. (d).) As a threshold matter, the parties dispute whether the family court even made a “significant change of circumstances” finding and as a consequence whether the family court did or did not modify the Exit Order pursuant to Welfare and Institutions Code section 302, subdivision (d).

Mother asserts that the family court did make express factual findings of substantially changed circumstances, citing the family court’s statements during the hearing discussing the monitor’s favorable reports of mother’s visitations with the child, the negative results from mother’s drug and alcohol testing, and the supporting opinions of her clinical psychologists, Dr. Valter and Dr. Summerfield, which all occurred after the issuance of the Exit Order. Further, mother asserts that the family court did modify the Exit Order, for example, in increasing the frequency and the length of her visitations with the child, and that the family court expressly stated so: “The Court modifies the current visitation schedule.”

Father disagrees, citing the family court’s statements at the hearing that although it found evidence warranting a change in the visitation schedule, it had remaining concerns regarding mother that prohibited it from granting her request to change the custody arrangement. In other words, father appears to argue that a finding of substantially changed circumstances is not a prerequisite to modifying a visitation schedule, and that only a modification to a custody arrangement requires such a finding. He also appears to argue that if the family court had found substantially changed circumstances, it would

have modified the custody arrangement, but the absence of any change in the custody award signifies that the family court made no finding of changed circumstances.

Father incorrectly relies on the general rule applicable in family court that the family court can modify a visitation order, but not a custody order, without first finding a substantial change of circumstances since the prior order. (*In re Marriage of Lucio* (2008) 161 Cal.App.4th 1068, 1072, 1077 [74 Cal.Rptr.3d 803].) In fact, the relevant statutory provision, Welfare and Institutions Code section 302, subdivision (d), imposes a greater burden when a family court modifies a juvenile court's exit order, requiring that for modifications to *either* a "custody or visitation order" the family court must first find a significant change of circumstances since the juvenile court's issuance of the exit order. (Welf. & Inst. Code, § 302, subd. (d); *In re Marriage of David & Martha M.* (2006) 140 Cal.App.4th 96, 98, 101–103 [44 Cal.Rptr.3d 388].) Thus, before modifying the visitation schedule set forth in the exit order, the family court must find a significant change of circumstances that warrants that modification.

In this case, during the March 3, 2015 hearing, the family court addressed at length the post-Exit Order changed circumstances that had occurred, including the favorable reports by the monitor who oversaw the weekly visits between mother and the child, the numerous and consistent drug and alcohol testing with negative results, the favorable opinion of the psychologist who counseled mother every week for the majority of the past year, mother's continued employment stability, and the absence of any further incident by mother with law enforcement. After acknowledging the standard requiring substantially changed circumstances as a precondition for modification of the Exit Order, the family court stated that "there [has] been sufficient evidence in the Block reports and the history of testing to warrant this court, at this point in time, a year after . . . the conclusion of the dependency proceedings, to consider altering the visitation arrangement that is currently in place." The family court then described the new visitation schedule at length. Further, the court order that issued on the same day expressly stated that the "Court modifies the current visitation schedule." Indeed, by substantially increasing mother's monitored visitation with the child and by permitting her unmonitored visitation with the child for the first time, the Custody Order unequivocally modified the visitation schedule.

For the foregoing reasons, we easily reject father's argument on this issue.

C. *The family court did not abuse its discretion in refusing to grant mother's request for custody and for visitation in its entirety.*

Mother asserts on appeal that by relying too heavily on the events occurring before the juvenile court issued the Exit Order and by not relying sufficiently on the changed circumstances after the Exit Order issued, the family court abused its discretion in not permitting a greater increase in her visitation with the child and in making no change to the Exit Order's award of exclusive custody of the child to father.

■ We briefly summarize the respective roles of the juvenile court and the family court with regard to an exit order. When a child is a dependent of the juvenile court, that court resolves all custody issues regarding the child (Welf. & Inst. Code, § 304) and provides "a forum to 'restrict parental behavior regarding' " the child and a forum to remove the child from the custody of the parents. (*In re Chantal S.* (1996) 13 Cal.4th 196, 201 [51 Cal.Rptr.2d 866, 913 P.2d 1075].) When the juvenile court terminates its jurisdiction, it issues an exit order "determining the custody of, or visitation with, the child" that becomes part of an existing family law case or the basis for opening a family law file (Welf. & Inst. Code, § 362.4); the exit order "shall be a final judgment and shall remain in effect after [the juvenile court's] jurisdiction is terminated." (Welf. & Inst. Code, § 302, subd. (d).)

Once an exit order is in place, "'the paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—weigh heavily in favor of maintaining' that custody arrangement." (*In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 956 [38 Cal.Rptr.3d 610, 127 P.3d 28].) The family court may modify the exit order only if "the court finds that there has been a significant change of circumstances since the juvenile court issued the order and modification of the order is in the best interests of the child." (Welf. & Inst. Code, § 302, subd. (d).) Therefore, the moving party has a twofold burden, to show a significant change of circumstances since the juvenile court issued the exit order and to show why the requested modification would be in the child's best interests.

In this case, the juvenile court's Exit Order awarded father sole legal and physical custody of the child and permitted mother very limited visitation of only two hours three times a week, conditioned upon a monitor's presence during the visitation; further, the Exit Order required mother to submit to a drug abuse treatment program with random drug testing as well as continued counseling and psychiatrist care. The Exit Order therefore reflected the juvenile court's clear concerns about mother's substance abuse problems, her mental and emotional states, and the effect on the child's well-being.

Failing to appeal that order, mother chose to request a modification of that order only a few months later; the family court appropriately expressed concerns that mother had improperly sought a reconsideration of the juvenile court's Exit Order. Due to multiple continuances of the modification hearing, however, by the end of the hearing, the parties had presented to the family court nearly a year's worth of data concerning mother's behavior since the issuance of the Exit Order.

At the end of the hearing, the family court provided a lengthy analysis of the events since the Exit Order issued and of how the family court weighed those factors in making its final determination on mother's request to modify the Exit Order. The court acknowledged mother's improved behavior since the issuance of the Exit Order, including the favorable reports by the monitor who oversaw the weekly visits between mother and the child, the numerous and consistently negative results from mother's drug and alcohol testing, the favorable opinion of the psychologist who counseled mother every week for the majority of the previous year, mother's continued employment stability, and the absence of any incident with law enforcement.

Nevertheless, the court determined that three serious concerns remained unresolved and that mother had failed to address these concerns to the court's satisfaction. First, having observed mother's testimony at trial, the court maintained a substantial concern about mother's lack of credibility.⁷ Second, the court had a concern about "assur[ing] the child's safety" in light of mother's unexplained seizures and whether mother could anticipate or control those seizures when the child was in her care without a monitor's supervision. Finally, the court expressed "continuing concern" that mother might relapse, that is, return to her use of illegally consuming controlled substances or to her abuse of alcohol.

The court summarized its ruling: "There [has] been sufficient evidence in the Block reports and the history of testing to warrant this court, at this point in time, a year after . . . the conclusion of the dependency proceedings, to consider altering the visitation arrangement that is currently in place. There [are], however, significant concerns that I articulated . . . for me to conclude, one, that the court is not entertaining in any respect a change of primary custody in this case, and that substantially different evidence would be necessary. . . . [¶] Second, the court is not prepared to entertain a shared custody arrangement at this point. And at least at this point, frankly, that is

⁷ We agree with the family court's consideration of mother's lack of credibility at the hearing as a valid factor to inform its ruling. However, we do not go so far as the family court in determining that a parent's seeming lack of veracity or a parent's failure to acknowledge her drug and alcohol addiction are themselves bases to determine whether mother can enjoy visitation with, or custody of, her own child.

the most ambition that I think either mother should aspire to someday or father should recognize is possible someday, is some shared custody arrangement. But . . . we're, again, far from that point. [¶] . . . I think it's appropriate to have significantly more hours for mother. The question is how I do that and assure the child's safety because of my concern about the . . . seizure incidents, which there had been at least one, and my continuing concern about the petitioner's risk of relapse unless she is under continued strict controls with respect to drug and alcohol abuse." The court then described the new three-tier visitation schedule.

Exercising reasonable judgment, the family court struck an appropriate balance in acknowledging that changed circumstances warranted modification of the visitation schedule but also determining that those changes did not justify the full remedy requested by mother, particularly her request for custody. That determination fell squarely within the broad discretion of the family court.

We find nothing in the family court's ruling to be arbitrary, capricious, or patently absurd.

Although mother asserts on appeal that the family court placed too much emphasis on the events occurring before the issuance of the Exit Order, the family court had a statutory obligation to consider the circumstances at the time the Exit Order issued in order to determine whether those circumstances had substantially changed to warrant a modification of the Exit Order. Mother's briefs effectively have urged that this reviewing court re-weigh the evidence before the family court and make a determination more favorable to her; this we may not do.

Mother also asserts on appeal that the family court failed to consider the best interests of the child. Contrary to her assertion, the record shows that the family court properly considered the child's safety, as expressly explained by the family court at the hearing. The final ruling is consistent with the best interest of the child because it maintains continuity and stability by keeping the child in the sole physical custody of father. In light of the serious concerns stemming from mother's unexplained seizures and her risk of relapse, father's maintaining sole responsibility for decisions relating to the health, education, and welfare of the child⁸ also serves the best interest of the child. Thus, we find no abuse of discretion regarding the family court's ruling on this point.

⁸ " 'Sole legal custody' means that one parent shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child." (Fam. Code, § 3006.)

II. *The family court complied with Family Code section 3041.5.*

Mother contends that by requiring her to submit to drug testing indefinitely as a condition to further visitation and by ordering that a positive drug test result would immediately trigger a return to the reduced visitation schedule imposed by the Exit Order, the family court violated Family Code section 3041.5.

A. *The family court must comply with Family Code section 3041.5 when modifying a juvenile court's exit order.*

As a threshold matter, father argues that because the family court merely continues, extends, refines, and adjusts the Exit Order issued by the juvenile court, the family court need not comply with Family Code section 3041.5 and need only comply with the statutory requirements imposed upon the juvenile court, not the family court. Father cites no case law to support his argument. Instead, he argues that Family Code section 3041.5 only applies to custody or visitation proceedings brought under Family Code section 3021 but “[t]he proceedings which are the subject of this appeal were . . . brought . . . under the special provision of the *Welfare and Institutions Code*.” As we shall explain, father’s argument is without merit.

Family Code section 3041.5 applies to “any custody or visitation proceeding brought under this part, as described in Section 3021.” Family Code section 3021 provides that “[t]his part applies in any of the following: (a) A proceeding for dissolution of marriage. [¶] (b) A proceeding for nullity of marriage. [¶] (c) A proceeding for legal separation of the parties. [¶] (d) An action for exclusive custody pursuant to Section 3120. [¶] (e) A proceeding to determine physical or legal custody or for visitation in a proceeding pursuant to the Domestic Violence Prevention Act (Division 10 (commencing with Section 6200)). [¶] . . . [¶] (f) A proceeding to determine physical or legal custody or visitation in an action pursuant to the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12). [¶] (g) A proceeding to determine physical or legal custody or visitation in an action brought by the district attorney pursuant to Section 17404.”

The parties do not argue that this family court proceeding (case No. BF044161) falls outside of Family Code section 3021. Father admits that this action began when mother filed it shortly after the birth of the child “in order to establish parental relations” between the child and father. Though the appellate record is sparse on the events occurring in the family court proceeding before mother’s request to modify the Exit Order, the record does contain the family court’s judgment for paternity, child custody, and visitation dated June 8, 2012, which issued before the November 5, 2012 incident in the

public park that triggered the juvenile court proceeding. Father's admission and the June 8, 2012 judgment show that the family court case (case No. BF044161) began before the juvenile court case (case No. CK96444) and that the two cases are separate proceedings.

■ Welfare and Institutions Code section 362.4 requires that the "order of the juvenile court shall be filed in the proceeding for nullity, dissolution, or legal separation, or in the proceeding to establish paternity, at the time the juvenile court terminates its jurisdiction over the minor, *and shall become a part thereof.*" (Italics added.) Thus, once the juvenile court issued the Exit Order and its jurisdiction ended, the family court had the responsibility to enforce the Exit Order. But the family court proceeding remained a separate proceeding from the juvenile court proceeding. The family court's Custody Order is a new and separate court order from the Exit Order; the superior court ruling that we review in this appeal is the family court's Custody Order, not the juvenile court's Exit Order. The mere fact that Welfare and Institutions Code section 362.4 and section 302, subdivision (d) (defining the changed circumstances standard that the family court applies in modifying a juvenile court's exit order) are set forth in the Welfare and Institutions Code does not convert the family court proceeding into a juvenile court proceeding. Therefore, father's assertion that "[t]he proceedings which are the subject of this appeal were brought . . . under the special provision of the *Welfare and Institutions Code*" is incorrect.

■ Our Supreme Court has explained that the juvenile court and the family court have different purposes and that different rules and statutes govern each court. (*In re Chantal S., supra*, 13 Cal.4th at pp. 206, 208, 210.) In *Chantal S.*, the Supreme Court held that the juvenile court had the authority to issue an exit order indefinitely requiring the parent to participate in a counseling program even though the matter subsequently proceeded to the family court, which only had the authority to require counseling limited to one year. (*Id.* at pp. 200, 208.) Relevant to this case, the Supreme Court explained, "Courts are often placed in the position of enforcing orders of other courts, even though the enforcing court *could not have made the order in the first instance, or would not have present authority to issue the precise order.* [Citations.] If, as we conclude, the order was one that a juvenile court could properly make on termination of its dependency jurisdiction, the fact that the family court would be precluded from making that same order does not render the order unenforceable in the family court." (*Id.* at pp. 208–209, italics added.)

Thus, contrary to father's assertion, the juvenile court and the family court each have specific statutory authority; the family court cannot "borrow" the authority of the juvenile court—whose jurisdiction over the child has already

ended—under the guise of “modifying” the previous order. Any other ruling would expand the family court’s power beyond its statutory grant. Once the juvenile court’s jurisdiction has ended, although the family court can enforce the exit order, the family court must rely on its own statutory authority to issue new orders, including orders modifying exit orders issued by the juvenile court.

In this case, mother completed the drug testing requirements imposed by the juvenile court’s Exit Order, which only required completion of a “drug abuse treatment program with random testing.” Yet the family court’s subsequent Custody Order created new drug testing requirements not tied to any drug abuse treatment program, contrary to father’s assertion that the Custody Order merely “refined” or “adjusted” the drug testing requirements imposed by the Exit Order.

This case is a clear example of the boundary between the juvenile court’s authority and the family court’s authority. Thus, before ordering mother to submit to new drug testing, the family court had to comply with the requirements in Family Code section 3041.5. We discuss in the following parts whether the family court, in fact, did so.

B. *The family court properly made the judicial determination required by Family Code section 3041.5.*

Family Code section 3041.5 provides the following: “[T]he court may order any person who is seeking custody of, or visitation with, a child who is the subject of the proceeding to undergo testing for the illegal use of controlled substances and the use of alcohol if there is a judicial determination based upon a preponderance of evidence that there is the habitual, frequent, or continual illegal use of controlled substances or the habitual or continual abuse of alcohol by the parent This evidence may include, but may not be limited to, a conviction within the last five years for the illegal use or possession of a controlled substance.”

Mother argues that the family court failed to make any judicial determination that mother exhibited the habitual, frequent, or continual illegal use of controlled substances or the habitual or continual abuse of alcohol as required by Family Code section 3041.5. We disagree.

At the hearing, discussing first the incident on November 5, 2012, the family court found that mother had a drug and alcohol problem that caused her arrest. Next, relying on the opinion of Dr. Genen, the family court found that mother had an addiction to, and a pattern of abusing, prescription drugs. Finally, before ordering mother to submit to drug testing, the family court

expressly found a “continuing concern about the petitioner’s risk of relapse unless she is under continued strict controls with respect to drug and alcohol abuse.”

The foregoing findings by the family court constitute a “judicial determination based upon a preponderance of evidence that there is the habitual, frequent, or continual illegal use of controlled substances or the habitual or continual abuse of alcohol by the parent” pursuant to Family Code section 3041.5.

Further, mother alleges that Family Code section 3041.5 limits the family court to considering only evidence of a party’s drug use and alcohol abuse occurring *after* a party’s request to modify an exit order, and that therefore the family court erred in making the judicial determination that she exhibited “habitual, frequent, or continual illegal use of controlled substances” or “habitual or continual abuse of alcohol.” (Fam. Code, § 3041.5.) She contends that Family Code section 3041.5 limits the family court to consider only evidence that “at the time of the hearing” or “at the time its order was made” she was under the influence of controlled substances or of alcohol. (Boldface omitted.)

■ The statute contains no such temporal limitation on the evidence that the family court can consider; indeed, such a limitation is nonsensical. There may be very little time that passes between the party’s request to modify the exit order and the family court’s ruling on that request. In many cases, the evidence showing the parent’s illegal use of controlled substances or abuse of alcohol concerns events that occurred before or during the dependency proceeding. A habitual, frequent, or continual user of controlled substances or of alcohol would almost always avoid application of this statute if it limited the family court to such a narrow time window as proposed by mother.

Contrary to mother’s assertion, a party’s request to modify an exit order does not create a blank slate; the court will not put blinders on and ignore the party’s history. There is no bright line that distinguishes when a habitual, frequent, or continual abuser of controlled substances or alcohol is no longer one. Common sense dictates that the family court look to the totality of the circumstances to ascertain whether the risk of relapse in a particular case requires close scrutiny of a party.

Importantly, the statute even expressly authorizes the family court to consider “a conviction within the last five years for the illegal use or possession of a controlled substance.” (Fam. Code, § 3041.5.) Thus, the Legislature undoubtedly contemplated a retrospective approach to this determination.

■ Citing no authority to support her position, mother appears to be relying on a forced reading of the “significant change of circumstances” standard in Welfare and Institutions Code section 302, subdivision (d), which requires a showing of a significant change of circumstances since issuance of the exit order as a precondition to the family court modifying that exit order. But that code section requires that, in determining whether circumstances have significantly changed, the family court must consider the events after the juvenile court issued its exit order, not after the party’s request to modify the exit order. (Welf. & Inst. Code, § 302, subd. (d).) Moreover, that code section contains no blanket prohibition precluding the family court from considering evidence before or during the dependency proceeding. In fact, the very task of the family court is to consider the events that occurred before the exit order in order to identify what concerns about the requesting party the juvenile court identified in the exit order; this is the only means by which the family court can determine whether the requesting party has successfully addressed those concerns.

■ Thus, we reject mother’s contention that the family court must consider only evidence of events after a party’s request to modify an exit order in order to determine whether there is habitual, frequent, or continual illegal use of controlled substances or habitual or continual abuse of alcohol by the party as required by Family Code section 3041.5.

■ Here, the police arrested mother for child endangerment because she was under the influence of controlled substances and of alcohol in a public park; mother admitted that she had consumed controlled substances and alcohol earlier that day. Further, evidence from Dr. Genen showed that mother was “doctor shopping” and that she was ingesting at least nine prescription medications as recently as the end of 2013. Both her arrest and her doctor shopping occurred only one to two years prior to the issuance of the Custody Order. Therefore, the family court did not err in finding “the habitual, frequent, or continual illegal use of controlled substances or the habitual or continual abuse of alcohol” by mother that warranted additional drug and alcohol testing as a condition for increased visitation.

C. *The family court has the authority to order drug testing to continue indefinitely as a condition to further visitation.*

Mother contends that because Family Code section 3041.5 does not expressly state that the family court can order drug testing to continue “indefinitely,” the family court erred in ordering mother to submit to open-ended drug testing as a condition to the new visitation schedule. For the following reasons, we reject her argument.

■ A court’s “fundamental task in construing a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. [Citation.] We begin by examining the statutory language, giving the words their usual and ordinary meaning. [Citation.] If there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs.” (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [105 Cal.Rptr.2d 457, 19 P.3d 1196].)

■ The plain language of Family Code section 3041.5 permits the family court to “order any person who is seeking custody of, or visitation with, a child who is the subject of the proceeding to undergo testing for the illegal use of controlled substances and the use of alcohol” The language is unambiguous. Nothing in the statute limits the family court to ordering drug testing for a fixed period of time. In contrast, other statutory provisions of the Family Code contain temporal limitations on the family court’s authority; for example, Family Code section 3190, subdivision (a) imposes a one-year limitation when the family court orders a parent to participate in outpatient counseling with a licensed mental health professional. (See, e.g., *In re Chantal S.*, *supra*, 13 Cal.4th at p. 205.) Thus, if the Legislature had wanted to impose a temporal limitation on the authority granted to the family court by Family Code section 3041.5 to order drug and alcohol testing, it would have.

Certainly, the Legislature had procedural safeguards in mind when it implemented this statutory provision, as it included requirements that the court order the least intrusive method of testing, that confidentiality of the test results be maintained by imposing civil sanctions for any breach of confidentiality, and that testing be conformed to specific federal standards. (*Deborah M. v. Superior Court* (2005) 128 Cal.App.4th 1181, 1189–1191 [27 Cal.Rptr.3d 757].) Yet the Legislature imposed no temporal limitations on when any drug testing requirement must end. Again, if the Legislature had wanted to include such a temporal limitation in this section, it could have; clearly, it did not.

■ The plain and unambiguous meaning of the statute binds us; we “will not read into the statute a limitation that is not there.” (*People v. Oakley* (2013) 216 Cal.App.4th 1241, 1246 [157 Cal.Rptr.3d 143]; see *Utility Consumers’ Action Network v. Public Utilities Com.* (2004) 120 Cal.App.4th 644, 658 [15 Cal.Rptr.3d 597] [“Words that are not there should not be read into a statute”].) ■ Accordingly, we hold that Family Code section 3041.5 grants the family court sufficient power to authorize open-ended drug testing as a condition to further visitation or custody. Of course, the family court can subsequently modify any order for “indefinite” drug testing based on a change of circumstances.

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- D. *The family court has the authority to order that a positive drug test result would immediately trigger a reduced visitation schedule.*

Mother contends that the family court's condition that a positive drug test result would immediately trigger a return to the reduced visitation schedule set forth in the Exit Order violated Family Code section 3041.5. We find no merit in this argument.

■ Family Code section 3041.5 provides the following: "The parent . . . who has undergone drug testing shall have the right to a hearing, if requested, to challenge a positive test result. A positive test result, even if challenged and upheld, shall not, by itself, constitute grounds for an adverse custody or guardianship decision." The statute only precludes adverse action on a "custody or guardianship decision" as the consequence of a positive test result. In this case, the Custody Order specifies that a positive test result would affect the *visitation* schedule—nothing else.

■ "When one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning." (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 73 [109 Cal.Rptr.2d 1, 26 P.3d 332].) ■ Elsewhere, Family Code section 3041.5 distinguishes between an order determining custody and an order determining visitation. For example, the first sentence of the statutory provision explains that "the court may order any person who is seeking custody of, or visitation with, a child . . . to undergo testing for the illegal use of controlled substances and the use of alcohol." And the statutory provision mandates that use of the results from the drug and alcohol testing is only for the purpose of assisting the court in determining "the content of the order or judgment determining custody or visitation." Thus, the Legislature knows the difference between the two types of orders and chose to provide an extra shield insulating custody and guardianship decisions from frequent changes.

■ This is not a semantic distinction. A change in custody is not equivalent to a change in visitation, due to the weighty interest in protecting stable custody arrangements for a child. An alteration in a visitation schedule is less likely to cause a disruption in established patterns of care and emotional bonds with the primary caretaker or destabilize the sole physical custody arrangement, particularly in this case where the effect is a reduction in the visitation schedule of the noncustodial parent, not a loss of all visitation. Therefore, we apply the plain and unambiguous language of the statute as written: a family court can order that a positive result from a drug test will trigger a change in the *visitation* schedule. (See *In re Miller* (1947) 31

Cal.2d 191, 199 [187 P.2d 722] (“Words may not be inserted in a statute under the guise of interpretation”].)

■ Mother also argues that the Custody Order deprived her of the statutory right to a hearing to challenge a positive test result. Family Code section 3041.5 expressly grants a party the right to such a hearing, if requested. “[W]e apply the general rule “that a trial court is presumed to have been aware of and followed the applicable law.”’” (*In re Julian R.* (2009) 47 Cal.4th 487, 499 [97 Cal.Rptr.3d 790, 213 P.3d 125]; see *People v. Montano* (1992) 6 Cal.App.4th 118, 122 [8 Cal.Rptr.2d 136].) We interpret the family court’s order in the context of the applicable statute, which we presume the family court was fully aware of and followed. Based on the record, it appears reasonable to conclude that the family court had no intention to abrogate the statute. The reasonable interpretation of the Custody Order is that the reduction in visitation would follow only a final determination on the validity of a positive test result, including a hearing if requested by a party. Thus, nothing in the Custody Order precludes mother from seeking a hearing to challenge a positive test result.

DISPOSITION

The order is affirmed. Costs are awarded to David H.

Rothschild, P. J., and Chaney, J., concurred.

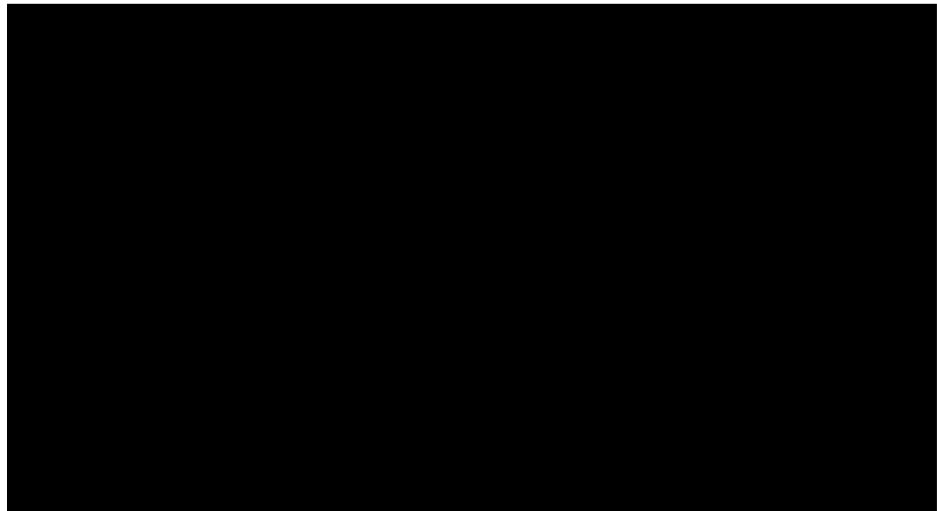
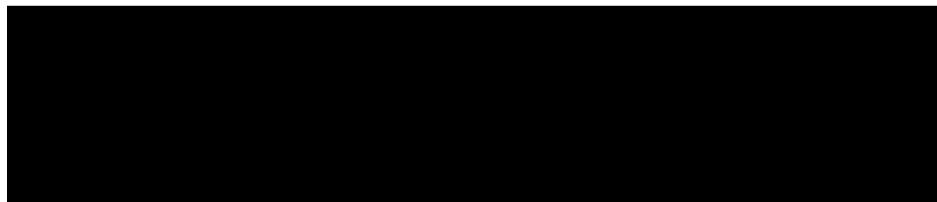
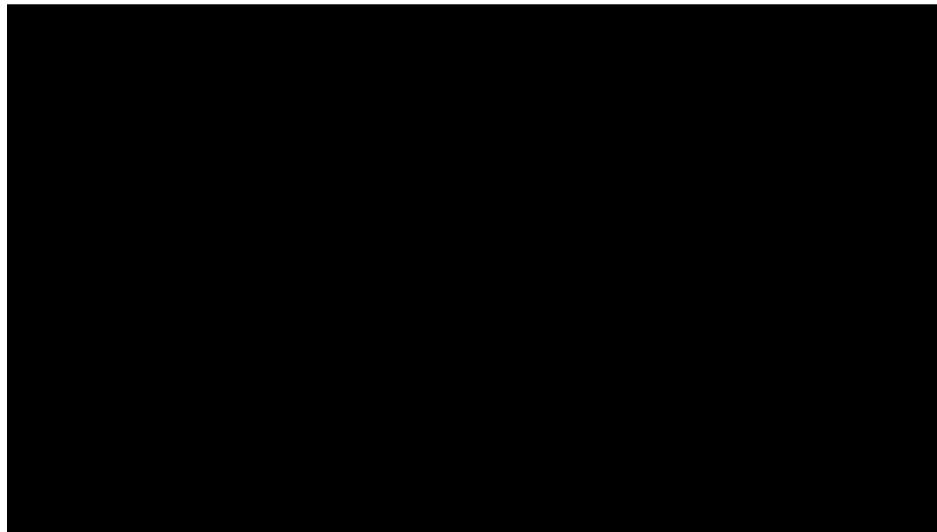
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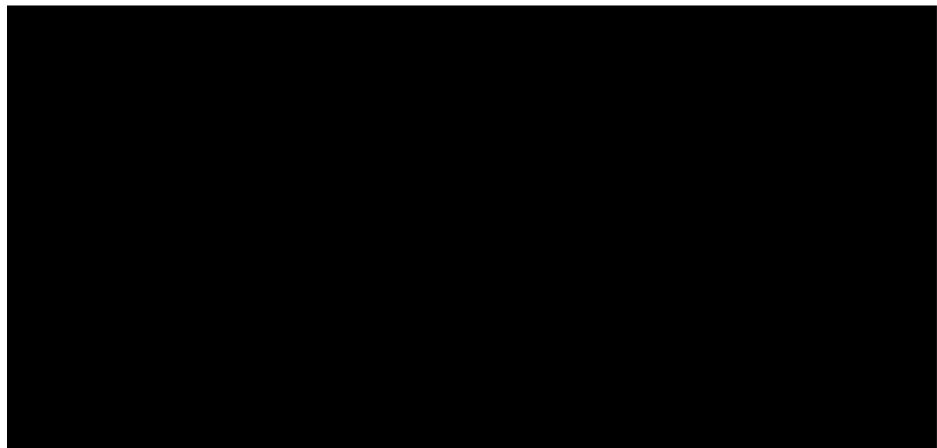
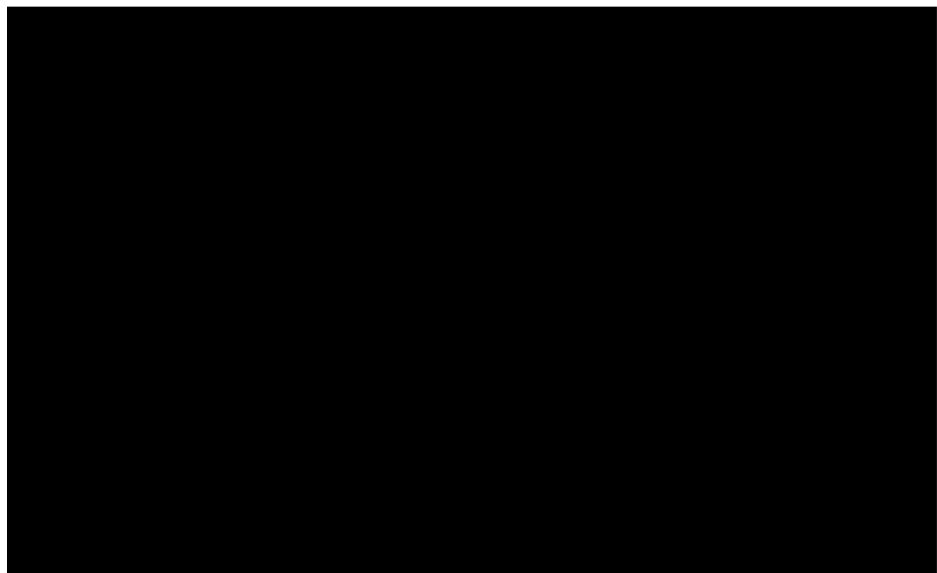
UN HUI NAM, Plaintiff and Respondent, v.
REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and
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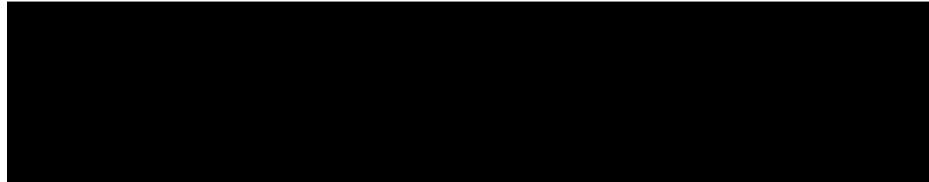
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COUNSEL

Gordon & Rees, George A. Acero; Sedgwick, Robert D. Eassa and Delia A. Isvoranu for Defendant and Appellant.

Bohm Law Group, Lawrence A. Bohm and Maria E. Minney for Plaintiff and Respondent.

OPINION

RAYE, P. J.—The California anti-SLAPP statute was intended to counter the “disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” (Code Civ. Proc., § 425.16, subd. (a).) It has been suggested that “[t]he cure has become the disease—SLAPP motions are now just the latest form of abusive litigation.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 96 [124 Cal.Rptr.2d 530, 52 P.3d 703] (dis. opn. of Brown, J.) (*Navellier*).) And the disease would become fatal for most harassment, discrimination, and retaliation actions against public employers if we were to accept the Regents of the University of California’s (University) misguided reading of the anti-SLAPP law and reverse the trial court’s denial of its motion to strike. We agree with plaintiff Un Hui Nam that defendant did not sustain its burden to demonstrate that the gravamen of her claims for sexual harassment and retaliation arose from defendant’s protected First Amendment activity. The trial court’s order therefore is affirmed.

FACTS

The facts as alleged in the complaint and in plaintiff’s declaration in opposition to the motion to strike are not at all clear. By all accounts,

plaintiff, a new resident in the anesthesiology department at UC Davis Medical Center, got off to a rocky start in July of 2009. Ultimately, a judge or jury will have to determine if her missteps were trivial and if defendant, a teaching institution, responded appropriately. Suffice it to say, there appears to have been some tension and misunderstandings right from the beginning of her residency. What occurred thereafter and why is the subject of the underlying lawsuit.

In hindsight, plaintiff traces what she labels “retaliation” to an e-mail she drafted on September 1, 2009. One week earlier she had received an excellent evaluation of her performance. One evaluator included such favorable remarks as: “Impressed with the way Dr. Nam worked at level of training”; “She was well organized—showed good skills. Interacted effectively with others”; “She was instructive to medical student”; and “Anesthetic record neat thorough and complete.” Her strengths included “attentive to patient needs” and “receptive to feedback.”

In her e-mail of September 1 she asked for clarification whether residents were allowed to intubate patients. She expressed her disagreement with any policy that would compel the residents in an emergency to wait for the on-call team rather than independently intubating a patient. She wrote passionately: “I certainly do appreciate the concept of resident supervision and attending liability, but I remain completely flabbergasted that this rumoured restriction of anesthesia residents rotating through the service not being able to intubate in the MICU may be erroneously passed on by previous and upper level anesthesia colleagues without it being an actual policy or least [*sic*], without explanation. It would seem irrational that we, with our specialized training in establishing and maintaining the airway, would be prohibited from using our critical skills in high acuity, life-threatening situations but instead have to contact and then wait for our esteemed anesthesia colleagues on call while we helplessly watch our patients decompensate. In the meantime, we can only busy ourselves doing other things which in my mind are in direct contradiction of the universal policy of the ABCs—Airway, Breathing, and everything else. If our current understanding of the policy is true, without understanding why it is implemented, it would seem to directly contribute to the morbidity and mortality of our patients. Time is, brain, heart, liver, kidneys and I’m fairly confident that our patients and their loved ones would appreciate that the life-saving skills of their resident physicians, even if they were attained in a previous life, i.e. residency training, were optimized rather than thwarted just because of what rotation we’re on.”

Plaintiff copied all of the residents. Some of these residents thereafter informed her that she should expect retaliation for sending it.

Defendant, however, insists the e-mail excited no such reaction. Rather, plaintiff's problems were of her own making and not her supervisors' efforts to retaliate. Before the e-mail was sent, an operating room service director had complained that plaintiff was resistant to performing an assignment, wore improper attire, ate and flossed on the job, and frequently disappeared from the intensive care unit. Thus, defendant's version consists of a series of complaints, warnings, investigations, and leaves of absence necessitated by plaintiff's shortcomings over a three-year period and culminating in her ultimate dismissal. Because our resolution of this appeal rests on the first prong of the requisite anti-SLAPP analysis, we need not recite the minutiae of all that occurred during those three years. We will, however, provide a few pertinent highlights.

On September 22, 2009, Dr. Brian Pitts, the residency program director, sent plaintiff a "Letter of Expectation." In this letter, he detailed "a pattern of unprofessional behavior that requires immediate corrective action." Plaintiff's mentor responded critically to the letter. On October 2 he acknowledged that plaintiff had made a few minor mistakes due to her inexperience, but he expressed his concern that the manner in which they were being handled could seriously damage the residency program. He wrote, "We must ensure absolutely that Dr. Nam is not being singled out nor that she has been or will be the victim of bullying, harassment or retaliation.

"It is imperative that a professional environment is maintained at all times to avoid compromise in patient safety. Dr. Nam must be able to work and learn in an atmosphere that is free of fear and unprofessional behavior of all involved."

By December of 2009 Dr. Pitts had been replaced by Dr. Amrik Singh. Although hopeful that the change of director would allow her the opportunity for a new start, those hopes were dashed at a holiday party in December. In her declaration in opposition to the motion to strike, she asserts that Dr. Singh stopped her on the way to the restroom, told her how beautiful she was while staring at her chest, and signaled that she should follow him into the men's restroom. She was intimidated but ignored his advances. She believes the rebuff triggered further retaliation.

Five months later, Dr. Singh wrote plaintiff a "Letter of Warning." As in the Letter of Expectation, Dr. Singh chronicled examples of plaintiff's unprofessional conduct, including tardiness, an inability to get along with her coresidents, and irresponsibility in handling controlled substances.

In June 2010 the residency competency committee would not give plaintiff a passing grade for her past six months of clinical training because, in

addition to the Letter of Expectation and Letter of Warning, she did not score within the requisite 40th percentile on a standardized test. Because other residents who failed the test suffered no adverse consequences and were allowed to pass their clinical training, she believes she was “singled out” and “retaliated” against.

The record is replete with both complaints and testimonials about plaintiff’s performance. Apparently she had a particularly good rapport with nurses. Defendant built a paper trail of warnings for unprofessional conduct and an inability to get along with other doctors. But many of defendant’s allegations were not substantiated during the internal investigations that ensued, and the anesthesiology department was criticized repeatedly for what it did, and did not do, to teach plaintiff the clinical and interpersonal skills needed to succeed in the program.

For example, following a 14-day leave ordered by Dr. Singh in June of 2010, the investigation committee concluded there was no evidence there were any defects in plaintiff’s clinical performance. To the contrary, she was a strong resident who did a good job. The committee did recognize, however, what it characterized as “interpersonal conflicts” involving personalities and teaching styles. Plaintiff had her fans and her detractors. The committee’s report was dated July 22, 2010.

A year later, following an incident with Dr. Hong Liu, an attending physician, defendant again placed plaintiff on an investigatory leave for what turned out to be two and a half months. And again plaintiff was exonerated as to the primary accusation, that she had physically threatened others in the program.

Plaintiff returned to work, but the complaints followed. She alleges that defendant solicited the complaints. On December 8, 2011, the residency competency committee decided to dismiss her. Dr. Singh concurred with the decision. Plaintiff received a letter on December 28, 2011, notifying her of defendant’s intent to dismiss her. Plaintiff appealed her dismissal. The “Step II” response to her appeal upheld the decision because of plaintiff’s tardiness and mishandling of controlled substances.

The investigator, however, was equally critical of the anesthesiology department. She castigated the department for singling out plaintiff for unique treatment from the beginning of her residency in July of 2009. And she detailed examples where defendant showed a lack of interest in training plaintiff. “For example, early in her residency, where one attending wrote a letter stating that this trainee ‘chipped’ a tooth of what would seem an easy intubation on a patient. They had ‘heard’ she had had two such events before.

This letter stated that this Attending would not allow this student to intubate any other of this Attending's patients. This appears to be an extreme response in a teaching institution. From my personal perspective, I would have been equally concerned about a faculty response such as this as I would have been about the ability of my resident. More appropriate responses could have been[:] to make sure this resident got appropriate instruction if needed, to document if this resident had more dental issues than the rest of the trainees, and/or to assign this trainee to research dental issues in the general field and at UC Davis in particular. Instead this stands in her file as one Attending's condemnation of an anesthesia resident's skill. Another example is the evaluations of Dr. Lui in her first year of training. He gave her failing marks in the Cardiothoracic Anesthesia rotation two months in a row. There was no comment written and none was sought from this faculty. When I asked about this, the Anesthesia residency director, seemed to be unaware that most other residency programs expect an extensive explanation from faculty for failing a resident.

"Another example of concerning use of disciplinary action instead of other teaching modalities was the use of investigatory leave in June 2010 to evaluate conduct regarding resident only arguments. If there was no danger to patients as a result of this argument, then it seems unusual to use investigatory leave to evaluate disputes where no threats or violence took place. Another concerning aspect of this leave was that none of the other participants in these events were put on leave. If one were going to use this investigative tool to determine the facts of the situation and then putting only one party on leave that action suggests an assignment of [guilt] even before the investigation has begun. At the conclusion of the leave the 'guilt' was not assigned to her as a result of the investigation. However, the use of the words 'unprofessional conduct' was continued with reference to this episode in her subsequent disciplinary letters. She received a disciplinary action in May, June and July of 2010. The July letter using a Letter of Instruction is also something not commonly used but seems to assign 'blame' for events that were cleared up by the previous investigation. Each of the above three letters was about something different but in some way was referring to the previous issues. During this period there was no time for the trainee to actually address these issues and make any progress.

"By the time September 2011 arrived and she returned from an extended investigatory leave that was done to evaluate multiple complaints given by her fellow residents with regard to the use of either verbally [or] physically threatening behavior. These allegations were sincerely felt by many residents but were not substantiated during the almost 3 month investigation period. When she returned to the work in September 2011, despite this fact that none of the complaints were substantiated the environment she returned to was

very difficult. I have never seen the volume of minutia [sic] documented in the multiple letters that were attached to the Letter of Intent to Dismiss.”

Plaintiff requested, without success, a formal hearing to contest the termination. In January 2013 she filed her complaint for retaliation, discrimination, sexual harassment, wrongful termination, violations of the Business and Professions Code, and breach of contract. Defendant filed a motion to strike pursuant to section 425.16 of the Code of Civil Procedure, alleging that plaintiff’s complaint constituted a SLAPP (strategic lawsuit against public participation) and arose from written complaints made in connection with an official proceeding. Defendant argued that the investigations and corrective action were protected conduct.

The trial court disagreed and denied the motion. In its tentative ruling, the court explained: “‘An anti-SLAPP motion is brought against a “cause of action” or “claim” alleged to arise from protected activity. (See § 425.16, subds. (b)(1), (3) & (c)(2).) The question is what is pled—not what is proven.’ (*Comstock v. Aber* (2012) 212 Cal.App.4th 931, 942 [151 Cal.Rptr.3d 589].) Plaintiff alleges that she was sexually harassed by Dr. Singh. She alleges that Dr. Singh thereafter retaliated against her by refusing to roll[]over vacation, issuing an unwarranted disciplinary letter, altering her personnel file, threatening to terminate her and placing her on investigatory leave. Plaintiff further alleges that she was retaliated against because she complained about the clinical behavior of another doctor and serious patient care and safety issues. As currently alleged, the adverse actions were not taken as a result of complaints regarding Plaintiff’s performance or the investigations, but rather due to Plaintiff’s rebuffing Dr. Singh’s [sic] advances or her complaints regarding patient care.

“Accordingly, the Court finds that Defendant has fail [sic] to satisfy its initial burden of demonstrating that Plaintiff’s action ‘arises from’ a protected activity.”

In response to oral argument, the court was more direct. “I don’t think you can parse through these words. When an employee complains about improper sexual advances, discrimination and harassment on the job due to a superior’s conduct, that is not protected speech which is protected by a SLAPP motion.

“. . . You can’t hide that kind of conduct behind the concept that this is protected speech because ultimately in every employment situation the only way someone does anything is if they speak.” The court reached the poignant conclusion, “Now, what was said during these hearings isn’t the basis of her claim.”

Defendant University appeals the denial of its motion to strike.

DISCUSSION

The victim of abusive litigation designed to chill the exercise of rights under the First Amendment to the United States Constitution can bring a special motion to strike the so-called SLAPP pursuant to section 425.16 of the Code of Civil Procedure. (*People ex rel. Fire Ins. Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 821 [150 Cal.Rptr.3d 224].) The anti-SLAPP statute provides: “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (Code Civ. Proc., § 425.16, subd. (b)(1).)

By including an attorney fee provision (Code Civ. Proc., § 425.16, subd. (c)(1)) and admonishing the courts to construe the statute broadly (Code Civ. Proc., § 425.16, subd. (a)), the Legislature provides a strong incentive for a defendant to seek a very early dismissal under the anti-SLAPP measure rather than by lodging a traditional motion for summary judgment. Over time, however, the Legislature recognized that the anti-SLAPP statute had as much potential for abuse as the litigation it was designed to thwart. “The Legislature finds and declares that there has been a disturbing abuse of [Code of Civil Procedure] Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16.” (Code Civ. Proc., § 425.17, subd. (a).) This case illustrates the potential danger of abusing the anti-SLAPP law.

Our de novo review of the trial court’s denial of a motion to strike requires us to resolve the threshold inquiry whether defendant made a prima facie showing that the cause of action “arise[s] from” protected activity. (*Lee v. Fick* (2005) 135 Cal.App.4th 89, 95–96 [37 Cal.Rptr.3d 375]; see *Olaes v. Nationwide Mutual Ins. Co.* (2006) 135 Cal.App.4th 1501, 1504–1505 [38 Cal.Rptr.3d 467].) If defendant fails to meet its burden, we need not assess plaintiff’s likelihood of prevailing on the merits. (*Freeman v. Schack* (2007) 154 Cal.App.4th 719, 733 [64 Cal.Rptr.3d 867] (*Freeman*)).

■ “The courts have struggled to refine the boundaries of a cause of action that arises from protected activity. In *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 [124 Cal.Rptr.2d 519, 52 P.3d 695] (*Cotati*), the court explained that ‘the statutory phrase “cause of action . . . arising from” means simply that the defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether *the*

plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech.' (Second italics added.) In *Navellier*, the court cautioned that the 'anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' (*Navellier, supra*, 29 Cal.4th at p. 92.) Accordingly, the 'arising from' prong encompasses any action *based on* protected speech or petitioning activity as defined in the statute (*Id.*, at pp. 89–95), regardless of whether the plaintiff's lawsuit was *intended* to chill (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th [53.] 58 [124 Cal.Rptr.2d 507, 52 P.3d 685]) or *actually* chilled (*Cotati, supra*, 29 Cal.4th at p. 75) the defendant's protected conduct." (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 186–187 [6 Cal.Rptr.3d 494] (*Martinez*); see *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 465 [137 Cal.Rptr.3d 455].)

Defendant contends that plaintiff's complaint is based on the oral and written complaints it received about her performance, the various written warnings it provided her, the results of the ensuing investigations, and her written notice of termination. In defendant's view, each of the causes of action is based on a protected act as defined in Code of Civil Procedure section 425.16, subdivision (e), which provides in pertinent part: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, [or] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law"

By stitching together a number of disparate legal principles extracted from cases with very different facts, *ignoring the fundamental question whether the lawsuit is indeed a SLAPP*, and divorcing the analysis from the purpose of the anti-SLAPP law, defendant constructs an argument that, in effect, would subject most harassment and retaliation claims against public entities to an anti-SLAPP motion to strike. Defendant's logic is built on the following legal principles.

■ The entire disciplinary process, commencing with the receipt of complaints about an employee and proceeding through the investigation and disposition, constitutes an "official proceeding authorized by law." In *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 198 [46 Cal.Rptr.3d 41, 138 P.3d 193], a unanimous Supreme Court held that a hospital's peer review, compelled by statute, qualifies as "'any other proceeding authorized by law'" identified in the anti-SLAPP statute, and

therefore, a lawsuit arising out of a peer review proceeding is subject to a motion to strike the SLAPP suit. We extended the *Kibler* rationale to the grievance policies and procedures adopted by the University in *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1396 [53 Cal.Rptr.3d 647], reasoning that they, like the peer review process, have the force and effect of a statute and thus fell within the anti-SLAPP statute's "'any other official proceeding authorized by law.' " (*Id.* at p. 1395.) Plaintiff does not suggest otherwise.

■ Defendant therefore insists that all of its conduct involving plaintiff was protected and plaintiff's lawsuit was designed to chill the exercise of its right to petition, that is, its right to handle the complaints. But plaintiff counters that the gravamen of her complaint is not defendant's investigation of complaints, but its harassment and retaliation. Here, defendant's response falters. Defendant insists that motive is irrelevant in assessing the merits of an anti-SLAPP motion to strike. It is true the Supreme Court, honoring the legislative mandate to broadly construe the anti-SLAPP statute in order to curtail abusive SLAPP's, instructs lower courts to focus on whether the gravamen of the action is based on protected conduct and to ignore the question whether the SLAPPer subjectively intended to chill the protected conduct. (*Navellier, supra*, 29 Cal.4th at p. 94; *Equilon, supra*, 29 Cal.4th at pp. 58–59.) In other words, the victim of a SLAPP has no burden to prove either that the SLAPPer intended to chill the exercise of its constitutional rights or that the exercise of the protected acts actually was chilled. And it is also true that defendant's argument finds some support in *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 268–269 [131 Cal.Rptr.3d 63] (*Tuszynska*) and *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510, 1520 [165 Cal.Rptr.3d 123] (*Hunter*), wherein the Courts of Appeal translated subjective intent to mean motive and the mens rea of the SLAPPer to mean the mens rea of the defendant employer. But equating a SLAPPer's subjective intent in filing the litigation to an employer's *motive* in subjecting an employee to a retaliatory grievance procedure is a mistake and does violence to the purpose of both the anti-SLAPP and antiretaliation laws.

Tuszynska appears to have initiated the motive immunity in an alleged discrimination case. The plaintiff, a female attorney, claimed that a prepaid legal services plan would not refer cases to her and stopped funding the cases she had been previously assigned "because she is a woman." (*Tuszynska, supra*, 199 Cal.App.4th at p. 268.) The trial court denied the legal services plan's anti-SLAPP motion, allowing the plaintiff the opportunity to prove gender discrimination. (*Ibid.* at p. 272.)

The court explained: "Plaintiff and the trial court thus drew a critical distinction between plaintiff's claim that she was not getting cases *because* she was a woman, on the one hand, and the communications defendants made

in connection with making their attorney selection and funding decisions, on the other. This distinction conflates defendants' alleged injury-producing conduct—their failure to assign new cases to plaintiff and their refusal to continue funding cases previously assigned to her—with the unlawful, gender-based discriminatory *motive* plaintiff was ascribing to defendants' conduct—that plaintiff was not receiving new assignments or continued funding *because* she was a woman.

"This type of distinction is untenable in the anti-SLAPP context because it is at odds with the language and purpose of the anti-SLAPP statute. The statute applies to claims 'based on' or 'arising from' statements or writings made in connection with protected speech or petitioning activities, regardless of any motive the defendant may have had in undertaking its activities, or the motive the plaintiff may be ascribing to the defendant's activities. (*Navellier, supra*, 29 Cal.4th at pp. 89–90; [Code Civ. Proc.,] § 425.16, subds. (b)(1), (e).)

"... Whether defendants had a gender-based discriminatory motive in not assigning new cases to plaintiff or in defunding her existing cases is a question that is entirely separate and distinct from whether, under the anti-SLAPP statute, plaintiff's gender discrimination claims are *based on* defendants' selection and funding decisions. Courts must be careful not to conflate such separate and distinct questions." (*Tuszynska, supra*, 199 Cal.App.4th at pp. 268–269.)

Hunter employed the same analysis. The *Hunter* plaintiff filed a complaint against CBS alleging age and gender discrimination for not hiring him as a weather news anchor. (*Hunter, supra*, 221 Cal.App.4th at p. 1513.) As in *Tuszynska*, the plaintiff argued that the conduct underlying his causes of action was not CBS's selection of weather anchors, but the decision to use discriminatory criteria in the selection process. (*Hunter*, at pp. 1521–1522.) Relying on *Navellier* and *Tuszynska*, the Court of Appeal concluded: "This case cannot be meaningfully distinguished from *Tuszynska*. Hunter's employment discrimination claims assert that CBS did not hire him to serve as a weather anchor because of his age and gender. As in *Tuszynska*, his claims are thus based squarely on CBS's decisions regarding its choice of a weather anchor, which were acts in furtherance of its First Amendment rights. Whether CBS had a gender- or age-based discriminatory motive in not selecting Hunter to serve as a weather anchor is an entirely separate inquiry from whether, under [Code of Civil Procedure] section 425.16, Hunter's discrimination claims are based on CBS's employment decisions." (*Hunter, supra*, 221 Cal.App.4th at p. 1523.)

■ Both the *Tuszynska* and *Hunter* courts purportedly based their conclusions that the employer's motive to discriminate was irrelevant in determining

whether the defendant met its threshold burden to prove the conduct arose from protected activity on the Supreme Court's holding in *Navellier*. *Navellier*, however, did not involve harassment, discrimination, or retaliation. Nor did the Supreme Court address the defendant's subjective intent. Quite to the contrary, the Supreme Court determined that the SLAPPer's, not the defendant's, intent was irrelevant. Thus, in our view, *Navellier* does not require us to ignore the defendant's alleged motive in a harassment, discrimination, or retaliation case.

To conclude otherwise would subject most, if not all, harassment, discrimination, and retaliation cases to motions to strike. Any employer that initiates an investigation of an employee, whether for lawful or unlawful motives, would be at liberty to claim that its conduct was protected and thereby shift the burden of proof to the employee, who, without the benefit of discovery and with the threat of attorney fees looming, would be obligated to demonstrate the likelihood of prevailing on the merits. Such a result is at odds with the purpose of the anti-SLAPP law, which was designed to ferret out meritless lawsuits intended to quell the free exercise of First Amendment rights, not to burden victims of discrimination and retaliation with an earlier and heavier burden of proof than other civil litigants and dissuade the exercise of their right to petition for fear of an onerous attorney fee award.

Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC (2007) 154 Cal.App.4th 1273 [65 Cal.Rptr.3d 469] (*Alta Loma*) and *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611 [130 Cal.Rptr.3d 410] (*Martin*) provide more apt analyses of anti-SLAPP motions in discrimination and retaliation cases. In *Alta Loma*, a landlord removed a disabled tenant through unlawful detainer proceedings despite the fact she had notified him of her disability and was entitled to a year to find alternate housing before being evicted. The Department of Fair Employment and Housing (DFEH) filed a complaint against the landlord for disability discrimination. The trial court denied the landlord's motion to strike portions of the complaint as a SLAPP, "finding the gravamen of the complaint was for disability discrimination and for this reason the suit did not arise out of the landlord's petition to governmental authorities and protected communications it made in connection with removing its residential units from the rental market." (*Alta Loma*, at p. 1276.)

The Court of Appeal affirmed. Having reviewed the parties' pleadings and affidavits, as it must, the court agreed with the trial court that the gravamen of the lawsuit was disability discrimination. The court explained: "Contrary to Alta Loma's argument, the communications and the actual eviction itself were not the acts attacked in DFEH's complaint. Instead, the allegations of wrongdoing in DFEH's complaint arose from Alta Loma's alleged acts of

failing to accommodate [the tenant's] disability. The letters, e-mail and filing of unlawful detainer actions constituted DFEH's *evidence* of Alta Loma's alleged disability discrimination." (*Alta Loma, supra*, 154 Cal.App.4th at pp. 1284–1285.)

Similarly, in *Martin*, the plaintiff, an African-American, refused his supervisor's request to take punitive action against one of his employees, another African-American, who had filed a racial discrimination claim. The supervisor, a Caucasian, took a variety of measures to undermine the plaintiff's authority, restructured his division, disgraced him, gave him a poor performance review, and persuaded the agency's board of directors to order the plaintiff to continue to report to him. The employer brought an anti-SLAPP motion. The Court of Appeal agreed with the trial court's finding. " 'This is an action for retaliation and wrongful termination filed by plaintiff . . . against his former employer . . . and . . . Supervisor . . .' As the court observed, 'the gist of this action is clearly not only defamation.' 'Moreover, if this kind of suit could be considered a SLAPP, then [employers] could discriminate . . . with impunity knowing any subsequent suit for . . . discrimination would be subject to a motion to strike and dismissal.' [Citation.] As the lower court in [*Alta Loma, supra*, 154 Cal.App.4th 1273] stated: ' "I just feel like to rule for the defendant in this case would be to say that [Code of Civil Procedure] section 425.16 provides a safe harbor for discriminatory conduct and I don't think that's what it's intended to do." ' [Citation.]' (*Martin, supra*, 198 Cal.App.4th at p. 625.)

■ We agree. Neither the rental property removal process or the unlawful detainer proceedings in *Alta Loma* nor the board hearing in *Martin* inoculated the defendants against discrimination claims. In those cases, the courts did not consider the defendants' motives at all. Rather, they looked to the allegations of wrongdoing and determined that in both cases the gravamen of the complaint was discrimination or retaliation. The mere fact that the discrimination or retaliation triggered protected activity does not mean that it arose from the protected activity. (*Cotati, supra*, 29 Cal.4th at pp. 76–77; *Equilon, supra*, 29 Cal.4th at p. 66.) In other words, " 'the mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.' " (*City of Alhambra v. D'Ausilio* (2011) 193 Cal.App.4th 1301, 1307 [123 Cal.Rptr.3d 142].) Nor does protected activity that is incidental to a cause of action justify an anti-SLAPP dismissal. (*Freeman, supra*, 154 Cal.App.4th at p. 733; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672 [35 Cal.Rptr.3d 31].) In short, we conclude the anti-SLAPP statute was not intended to allow an employer to use a protected activity as the means to discriminate or retaliate and thereafter capitalize on the subterfuge by bringing an anti-SLAPP motion to strike the complaint. In

that case, the conduct giving rise to the claim is discrimination and does not arise from the exercise of free speech or petition.

Yet another example of an employer's unsuccessful attempt to strike causes of action for retaliation and wrongful termination appears in *McConnell v. Innovative Artists Talent & Literary Agency, Inc.* (2009) 175 Cal.App.4th 169 [96 Cal.Rptr.3d 1] (*McConnell*). Two talent agents, believing that provisions in their contracts were unlawful, filed declaratory relief actions against a talent agency (Innovative) requesting declarations that they had the right to terminate their agreements at will. (*Id.* at p. 172.) The following day, Innovative had the agents escorted off the premises, gave them letters modifying their job duties, and instructed them not to come onto the premises, use company e-mail, attend client or industry functions, or have any communication with clients or other employees. (*Ibid.*) Two days later they were formally terminated. (*Ibid.*) The agents amended their complaints to add causes of action for retaliation and wrongful termination. (*Ibid.*)

Innovative moved to strike the retaliation and wrongful termination causes of action, asserting that the agents' claims arose from protected First Amendment activity. (*McConnell, supra*, 175 Cal.App.4th at p. 172.) Innovative argued that the letters written by Scott Harris, Innovative's president, and delivered to the agents modifying their job duties after their lawsuits were filed were written communications "made in connection with an issue under consideration or review" in the lawsuits. (Code Civ. Proc., § 425.16, subd. (e)(2); see *McConnell*, at p. 176.) The trial court denied the motions and the Court of Appeal affirmed. (*McConnell*, at p. 173.)

■ The Court of Appeal rejected the notion that the gravamen of the agents' complaints was the letters modifying their job duties. Rather, "the acts underlying [plaintiff] McConnell's claims of retaliation and wrongful termination consisted of a course of conduct by Innovative on August 28 that prevented McConnell and [plaintiff] Press from performing their work as talent agents. McConnell's claims do not arise from Harris's letter, but from Harris's action 'temporarily modif[ying]' McConnell's and Press's job duties, effectively precluding them from engaging in any of the ordinary activities of a talent agent. The fact that these 'modifications' to McConnell's job duties were reduced to writing does not convert them from conduct affecting the conditions of employment to protected free speech activity. We look to the gravamen of a plaintiff's complaint to see if it is based on a defendant's protected First Amendment activity. (See *Martinez*[, *supra*], 113 Cal.App.4th [at p.] 188 ['it is the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies . . .'].) Here, McConnell's causes of action for retaliation and wrongful termination were based on Innovative's conduct effectively eliminating all the normal job

duties of a talent agent—as reflected both in Harris’s letter and in Innovative’s other conduct described in the amended complaints: escorting McConnell and Press from the office, deactivating their e-mail and computer access, and so on.” (*McConnell, supra*, 175 Cal.App.4th at pp. 176–177.)

Similarly, defendant points to plaintiff’s allegations referencing its Letter of Expectation, Letter of Warning, and other written communications notifying her she would be put on leave, terminated, etc., and argues, as the talent agency did in *McConnell*, that these writings were all protected activity. Here, unlike in *McConnell*, there was no pending litigation at the time defendant gave plaintiff the various notices she alleged in her complaint. But the underlying principle remains the same. The gravamen of plaintiff’s and McConnell’s and Press’s complaints was based on their employers’ conduct in retaliation. For plaintiff those retaliatory acts included, but were not limited to, “subjecting her to increased and disparate scrutiny, soliciting complaints about her from others, removing [her] from the workplace, refusing to permit her to return, refusing to give her credit towards the completion of her residency, failing to honor promises made regarding her treatment, and ultimately terminating her on February 2, 2012.” Following the lead of our colleagues in *McConnell*, we reject defendant’s characterization of its retaliatory conduct as protected First Amendment activity.

Nevertheless, it is important to emphasize the murkiness of the factual allegations before us. If, as defendant portrays the facts, it had been deluged with complaints about plaintiff’s performance and it had merely proceeded to discipline her in a manner commensurate with her shortcomings in the absence of evidence of retaliation, its acts might be characterized as protected. But plaintiff alleges that the discipline that was meted out, including the ultimate termination, was all in retaliation for her public challenge of department policies and her rejection of Dr. Singh’s inappropriate overtures. The timeline is compressed and ambiguous. According to plaintiff, she received an exemplary review at the end of August 2009, on September 1 she e-mailed her inquiry about the purported policy that residents were not allowed to intubate patients, she received a Letter of Expectation on September 22, Dr. Singh harassed her in December, and all that followed was in retaliation for her candor and her dismissal of his advances. According to defendant, plaintiff exhibited unprofessional conduct shortly after she started the program in July of 2009, thus triggering its constitutional right, indeed its duty, to investigate the complaints and discipline her accordingly.

Given that defendant’s own internal investigations criticized and exonerated both plaintiff for unprofessional conduct and defendant for “singling” out plaintiff and falling abysmally short of its teaching and mentoring responsibilities, it is far too premature to exonerate defendant for engaging in

protected conduct. As early as October of 2009 plaintiff's own mentor cautioned the department to ensure that plaintiff was "not being singled out nor that she has been or will be the victim of bullying, harassment or retaliation." Plaintiff's complaint and declaration make perfectly clear that the basis of her claim, as in *Alta Loma and Martin*, was defendant's retaliation—punishing her for rebuffing Dr. Singh and calling attention to problems with the department's policies and procedures. In an anti-SLAPP analysis, we must accept as true the plaintiff's pleaded facts. (*Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35, 54 [148 Cal.Rptr.3d 119].) "We do not resolve the merits of the overall dispute, but rather identify whether its pleaded facts fall within the statutory purpose." (*Ibid.*) ■ Thus, the trial court properly denied defendant's anti-SLAPP motion because the alleged wrongdoing did not arise out of protected conduct.

Moreover, we question whether plaintiff's lawsuit for harassment and retaliation should be characterized as a SLAPP. The quintessential SLAPP is filed by an economic powerhouse to dissuade its opponent from exercising its constitutional right to free speech or to petition. The objective of the litigation is not to prevail but to exact enough financial pain to induce forbearance. As its name suggests, it is a strategic lawsuit designed to stifle dissent or public participation. It is hard to imagine that a resident's complaint alleging retaliatory conduct was designed to, or could, stifle the University from investigating and disciplining doctors who endanger public health and safety. The underlying lawsuit may or may not have merit that can be tested by summary judgment, but it is quite a stretch to consider it a SLAPP merely because a public university commences an investigation.

DISPOSITION

The trial court's denial of the University's special motion to strike is affirmed. Plaintiff shall recover her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

Nicholson, J., and Butz, J., concurred.

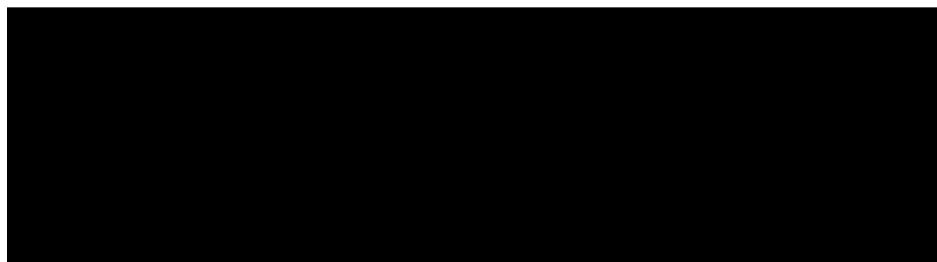
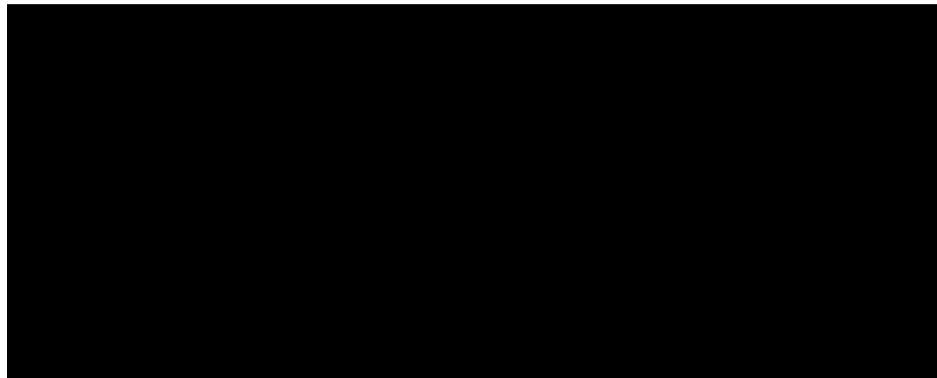
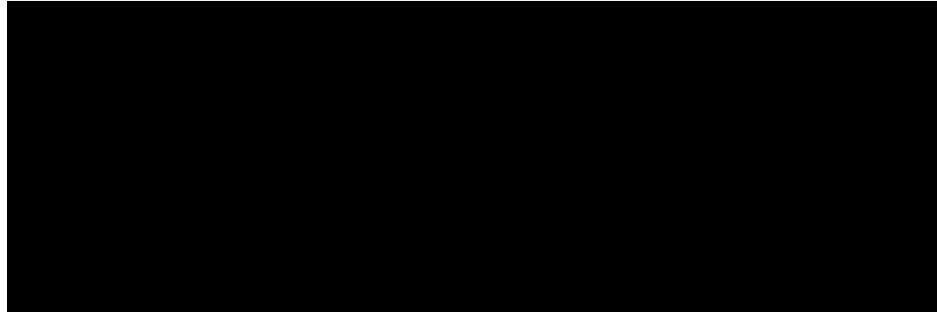
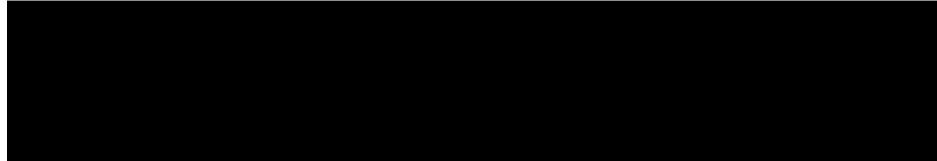
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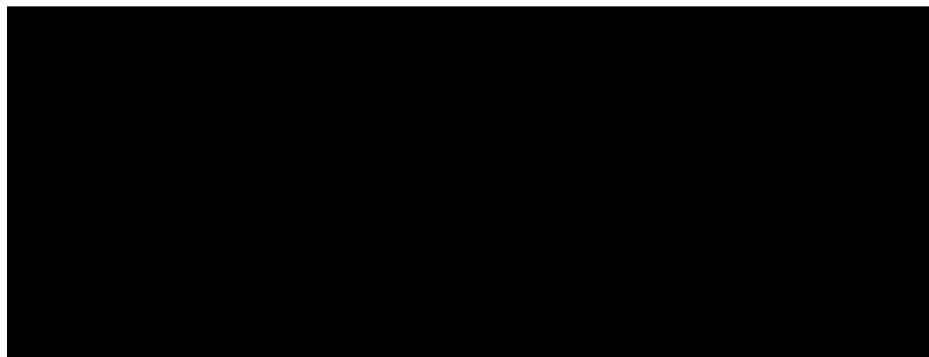
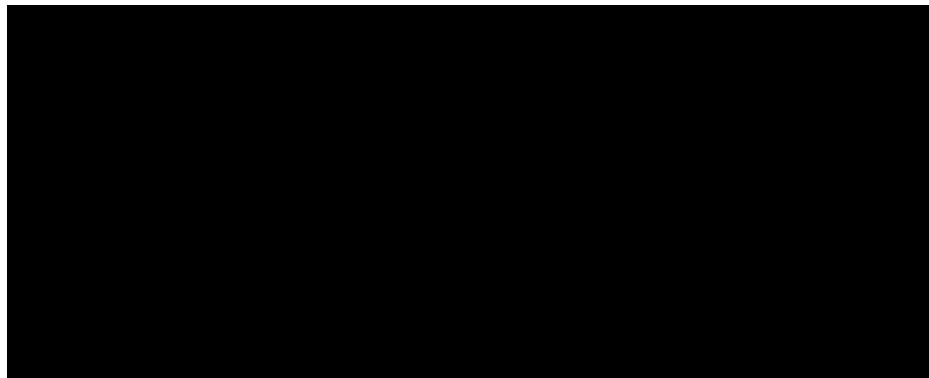
ROBERT FINDLETON, Plaintiff and Appellant, v.
COYOTE VALLEY BAND OF POMO INDIANS, Defendant and
Respondent.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Timothy W. Pemberton for Plaintiff and Appellant.

Rapport and Marston and Lester J. Marston for Defendant and Respondent.

OPINION

STEWART, J.—This appeal requires us to determine whether a Native American tribe known as the Coyote Valley Band of Pomo Indians (the Tribe) validly waived its sovereign immunity for purposes of the enforcement by construction contractor Robert Findleton (Findleton) of arbitration provisions in contracts between them. Findleton claims the Tribe waived its sovereign

immunity when its Tribal Council entered into, and then amended, contracts with Findleton containing arbitration clauses and also adopted a resolution expressly waiving sovereign immunity to allow arbitration of disputes under the contracts. The Tribe disagrees, arguing the Tribal Council lacked authority to waive the Tribe's immunity and therefore any such waivers were invalid, because the power to waive the Tribe's immunity had not been properly delegated to the Tribal Council in accordance with the procedures specified by the Tribe's Constitution. The superior court agreed with the Tribe and held that it lacked jurisdiction over Findleton's claims because there had been no valid waiver of the Tribe's sovereign immunity. Findleton appealed.

■ The issue is one of law, which we review *de novo*. We disagree with the trial court and conclude that the Tribal Council was authorized to, and did, waive the Tribe's sovereign immunity for purposes of arbitrating disputes arising under the Tribe's contracts with Findleton. We therefore reverse.

I.

FACTUAL BACKGROUND¹

The Tribe's governance is carried out by two bodies: the General Council of the Tribe (General Council), which its Constitution establishes as “[t]he governing body of the Band” and consists of all tribal members 18 years of age or older, and the Tribal Council, an elective body consisting of seven members of the General Council whose powers are more narrowly circumscribed than those of the General Council. The Tribe's Constitution does not permit the Tribal Council to waive the Tribe's sovereign immunity without the General Council's “consent” and “prior approval.” This appeal requires us to decide whether the General Council validly delegated its authority to waive the Tribe's immunity to the Tribal Council.

A. *Resolution 07-01*

The first of the delegations of authority in question was adopted on June 2, 2007, at a special meeting of the General Council of the Tribe, when the Council adopted a resolution entitled, General Council Delegation of Authority to the Tribal Council to Waive on a Limited Basis the Sovereign Immunity of the Tribe. The resolution, known as resolution 07-01 (Resolution 07-01), had been placed on the agenda and raised to the floor for a vote by the tribal chief (Tribal Chief). It contained a series of prefatory recitals,

¹ The recitation of the facts is derived from the record and appellant Findleton's opening brief. Respondent the Tribe has not provided any statement of facts or challenged any of the facts recited here in its brief.

which identified the Tribe's Constitution and stated that the Constitution provided that the General Council was the Tribe's governing body, and conferred on the Tribal Council various powers, including the power to negotiate contracts and conclude agreements on behalf of the Tribe, to borrow money and secure debt with tribal assets, to engage in business activities and projects to promote the economic well-being of the Tribe and its members, and to take actions necessary to carry out those powers. The resolution further acknowledged that the Constitution reserved to the General Council the power to waive the tribe's sovereign immunity from suit but that it also authorized the General Council to delegate that power to the Tribal Council.

With regard to the specific circumstances, the resolution recited that the Tribal Council had authorized development of a new gaming and resort facility and related infrastructure to support the gaming facility and the tribal community (the Project), that the Project consisted of a casino and hotel complex within the Tribe's reservation, that the Project would require financing and hiring of architects, consultants and contractors to construct the Project, and that "[c]ontractual transactions favorable to the Tribe generally require that the Tribe waive on a limited basis its sovereign immunity in order to attract other individuals and entities to do business with the Tribe." Because it was "impractical for the General Council to meet and approve individual waivers of the sovereign immunity of the Tribe as each contract related to financing and development of the Project is entered into," the General Council had "determined . . . that it is necessary and in the best interests of the Tribe for the General Council to delegate to the Tribal Council its authority to waive the sovereign immunity of the Tribe in connection with contracts related to the financing and development of the Project."

As relevant here, the General Council therefore resolved in Resolution 07-01 that it "hereby delegates to the Tribal Council authority to waive on a limited basis the sovereign immunity of the Tribe in contracts of the Tribe approved by the Tribal Council . . . as determined necessary by the Tribal Council for the financing and development of the Project."²

B. *The Construction and On-site Rental Agreements*

In October 2007, the Tribe entered into an agreement with Terre Construction, a "doing business as" name of Findleton's, to construct improvements on the Tribe's reservation in Mendocino County, California, in preparation for construction of a new gaming facility (the Construction Agreement). The

² The General Council also resolved that "any limited waiver of sovereign immunity shall: 1) provide for arbitration of disputes; 2) avoid dispute resolution in state courts; 3) limit recourse solely to casino assets; and 4) shall not allow recourse to assets owned by individual members of the Tribe." These provisions are not at issue on appeal.

Construction Agreement, which was prepared by the Tribe, was a form agreement for construction projects issued by the American Institute of Architects (AIA) with various modifications. It was signed by Findleton as contractor and by the Tribe's chairman, John Feliz, Jr., on behalf of the Tribe.

The Construction Agreement contained provisions regarding "Claims and Disputes," which provided among other things that "[a]rbitration shall be held in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise." It provided that "[t]he foregoing agreement to arbitrate . . . shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof," and that "[t]he award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." Immediately following the arbitration provisions was a section stating: "No term or provision in this Agreement shall be construed as a waiver of the sovereign immunity of the Coyote Valley Band of Pomo Indians. The Parties specifically agree that the sovereign immunity of Coyote Valley Band of Pomo Indians shall not be waived for disputes or other matters related to this Agreement." Under the heading "Miscellaneous Provisions," the Construction Agreement contained a choice-of-law provision stating that it "shall be governed by the law of the Coyote Valley Band of Pomo Indians," that "[i]f a particular issue is not covered by such law, federal law shall govern" and that "[t]he Contractor agrees to the jurisdiction of the Coyote Valley Band of Pomo Indians."

In view of the choice-of-law provision, before entering the agreement Findleton requested that the Tribe "produce any documents, any laws or regulations that might be in place."³ The members of the Tribe with whom he negotiated told him that "if there were any laws and codes, that they would be produced." The Tribe members did not provide him any tribal codes or laws despite his asking "several times," which led him to understand that there were none "in effect at that time and, therefore, the federal or other contractual agreements, arbitration and so forth, would apply." Initially, when he asked, they told him they were "‘checking on that,’" but later he "was specifically told that they . . . had gotten rid of most of their laws and ordinances and that there wasn't something in place at that time."

In November 2007, the Tribe and Findleton, under the doing business as name of On-Site Equipment, entered into a second agreement entitled On-Site Equipment Master Rental Contract, which was "an abstraction of

³ Findleton testified that the agreement originally referred only to the Tribe's laws, but at his request it was clarified to state that if no tribal law covered an issue it would be governed by federal law.

our standard master rental contract” that was prepared by “the Tribe and the Tribe’s attorney” (the Rental Contract). The Tribe had proposed this agreement so that it could require all contractors doing work on the project to rent their equipment from Findleton on the reservation because by doing so those contractors would avoid state sales taxes.

The Rental Contract, like the Construction Agreement, contained an arbitration clause stating that “[c]laims, disputes or other matters in question between the parties to this Agreement arising out of or relating to this Agreement or breach thereof shall be subject to and decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise.” The Rental Contract similarly provided for specific enforcement of the agreement to arbitrate “in accordance with applicable law in any court having jurisdiction thereof,” and stated the arbitrator’s award would be final and similarly enforceable in court. And it stated that “[t]he Parties specifically agree that the sovereign immunity of Coyote Valley Band of Pomo Indians shall not be waived for disputes or other matters related to this Agreement.”

The scope of work under the original Construction Agreement was approximately \$1.6 million, but the parties twice agreed to increase the scope of work, first in November 2007 (to \$3.6 million) and then in January 2008 (to \$4.8 million).

C. *Resolution 08-01*

Thereafter, a second delegation of authority to waive sovereign immunity was adopted, on March 1, 2008, when the General Council held a special meeting and adopted resolution 08-01 (Resolution 08-01), entitled General Council Delegation of Authority to the Tribal Council to Waive on a Limited Basis the Sovereign Immunity of the Tribe.

Resolution 08-01 contained the same recitals and resolutions as Resolution 07-01. In addition, it contained a recital stating: “It has been determined by the General Council that it is necessary and in the best interests of the Tribe to ratify the Tribe’s waiver of sovereign immunity in connection with its existing contracts and to reconfirm the Tribal Council’s, and otherwise delegate to the Tribal Council, authority to waive the Tribe’s sovereign immunity in connection with contracts negotiated and concluded by the Tribal Council in furtherance of the Project.” It resolved among other things that “the General Council hereby ratifies, confirms, approves and adopts all existing contracts of the Tribe related to the development, financing, and operation of the Project, and specifically ratifies, confirms, approves and adopts all waivers of sovereign immunity of the Tribe in such contracts.”

and that “the General Council, for clarification purposes, hereby reconfirms the authority of, and otherwise delegates authority to, the Tribal Council, to be exercised by the majority vote of all members of the Tribal Council as evidenced by an appropriate Tribal Council resolution, to waive the Tribe’s sovereign immunity in contracts of the Tribe approved by the Tribal Council, as determined necessary in the discretion of the Tribal Council, upon advice of counsel, and in furtherance of the best interests of the Tribe.”⁴

D. Suspension of Construction, Amendment of Agreements and Adoption of Tribal Council Resolution.

In August 2008, 10 months after the Tribe and Findleton entered into the Construction Agreement, the Tribe gave Findleton notice it was suspending construction of the Project because the financial meltdown had adversely affected its ability to secure financing. The notices assured Findleton and other contractors that “[u]pon securing sufficient Project financing, the Tribe intends to pay all contractors, subcontractors, design professionals, and other services providers involved in the Project all outstanding fees and expenses” and that the Tribe would endeavor to obtain additional financing sufficient to complete the casino project. The notice letter requested Findleton’s and other contractors’ “patience in this matter.”

Shortly after the Tribe’s suspension of construction, Findleton met with four tribe members, including the tribal treasurer, tribal administrator and acting construction manager. After the meeting, he sent a letter to the Tribal Chairman summarizing the meeting and a proposal he had made to the Tribe under which he would continue to provide services for the next three months (from August through October 2008). Per that proposal, Terre Construction would perform additional work in the amount of approximately \$527,000, the Tribe would execute a third amendment to the Agreement to include that work, Findleton would defer payment for that work until 2009, the Tribe would make payments in 2009 with interest at 6.5 percent, and the Tribe would issue a resolution accepting these terms and also including a limited waiver of sovereign immunity.⁵ Findleton included a document entitled “Third Amendment to Agreement” with the proposal. It recited the terms of

⁴ The copy of Resolution 08-01 offered by Findleton, like Resolution 07-01, contains a “Certification” stating that a special meeting of the General Council was “duly called, noticed and convened” on the relevant date, that “a quorum was present,” and that “this resolution was adopted by a vote of: ___ for, ___ against, 0 abstaining.” In 07-01, the numbers of votes for and against are listed; in 08-01, the spaces for those numbers are left blank. Both resolutions are signed by Jaime Naredo as Tribal Chief and John Feliz, Jr. as tribal chairman (Tribal Chairman).

⁵ Findleton asked about, and the Tribe members explained, the process they had to follow to obtain immunity, including that General Council Resolution 08-01 authorized the Tribal Council to waive immunity by Tribal Council resolution.

the existing Construction Agreement and prior amendments, and described the additional work and its costs.

Findleton was told by tribe members that the proposal (with the third amendment) was presented to and approved by the Tribal Council. Findleton was also told that the proposal would be (and later that it had been) presented to the General Council. The chairman, John Feliz, Jr., signed the third amendment on August 20, 2008.

That same day, the Tribal Council adopted resolution No. CV-08-20-08-03 (Tribal Council Resolution) by a unanimous vote. That resolution stated that pursuant to the previously adopted General Council Resolution 08-01 authorizing the Tribal Council to waive the Tribe's sovereign immunity on a limited basis in contracts related to development and financing of a new gaming and resort facility and related infrastructure and utilities, the Tribal Council was waiving sovereign immunity as between the Tribe and Terre Construction. The waiver was limited to arbitration of disputes in order to avoid litigation in state court, and recourse was limited to casino assets and not to assets owned by individual members of the Tribe.

Findleton was presented with the Tribal Council Resolution as the limited sovereign immunity waiver he had requested, which resolution referred to General Council Resolution 08-01. He was told that 08-01 provided the authority for the Tribal Council to waive the Tribe's sovereign immunity.

E. Findleton's Performance, the Tribe's Nonpayment and the Ensuing Dispute

After receiving the Tribal Council Resolution, Findleton performed the work called for in the third amendment. The Tribe failed to pay Findleton for this work (and apparently for some prior work) in 2009 or thereafter. However, tribal officials repeatedly acknowledged the Tribe's obligation to pay and promised it would pay him once it had the ability to do so. Subsequently, though, the Tribe (through counsel) advised Findleton the Tribe would not pay, for various reasons. After making some additional efforts to get paid, Findleton eventually served the Tribe with a request for mediation and demands for arbitration pursuant to the construction and on-site rental agreements. The Tribe did not respond to either.

II.

PROCEDURAL HISTORY

On March 23, 2012, Findleton filed a petition to compel mediation and arbitration seeking to enforce the mediation and arbitration clauses in the

Construction Agreement and the Rental Contract. The petition attached the agreements and alleged that the Tribe had failed to pay Findleton \$831,483.53 owed under the Construction Agreement and \$94,712.23 under the Rental Contract, exclusive of interest, that Findleton had requested mediation under the agreements as a condition to arbitration and that the Tribe had refused to proceed with mediation or arbitration. It sought an order compelling mediation and directing the parties to submit their disputes to arbitration if they were unable to resolve them through mediation.

On April 20, 2012, the Tribe filed a motion to quash service of the summons and to dismiss for lack of subject matter jurisdiction on the grounds that the Tribe had not waived its sovereign immunity or consented to suit in the state court and that Findleton's failure to exhaust his tribal administrative remedies deprived the court of jurisdiction.

The Tribe argued that although the agreements between Findleton and the Tribe contained arbitration clauses, the chairman of the Tribal Council who had signed the agreements lacked authority to enter into them on behalf of the Tribe, or to waive the Tribe's sovereign immunity. It also argued that Findleton had failed to comply with a claims ordinance because he had not submitted the claim within 180 days of when the Tribe had failed to pay him for his work under the amended agreement in 2009. In its reply brief, the Tribe argued as relevant here that the General Council Resolution (07-01) purporting to delegate the power to waive the Tribe's immunity was not effective because the Tribe's Constitution required that any waiver of immunity had to be accomplished through the initiative or referendum process, and that the resolution did not satisfy that requirement. Because the Tribal Council therefore lacked authority to waive immunity, it could not have waived immunity by entering into agreements with arbitration clauses.

Extensive discovery then ensued regarding these topics, followed by additional briefing.

Eventually, the trial court heard the motion on March 14, 2014. The court issued a written ruling granting the motion to quash and dismiss on May 19, 2014. The court overruled certain evidentiary objections. It held the arbitration clauses in the agreements did not waive the Tribe's sovereign immunity because of the language in the agreements stating that the Tribe does not waive immunity. It held that the Tribe did not waive its immunity through the series of resolutions or amendments to the agreements either. General Council Resolution 07-01 was not a waiver, the court held, for three reasons: First, it "purports to be a limited waiver of sovereign immunity for purposes of obtaining financing for the casino project only." Second, it "was adopted prior to the Band contracting with Plaintiff and would have no force and effect as

to Plaintiff's contract." Third, "[t]here was deposition testimony from both the Tribal Chair and the current Chief that this resolution was not adopted in accordance with the initiative/election provisions set forth in the Constitution." General Council Resolution 08-01 was "insufficient evidence of a valid waiver" because, first, "[t]his resolution . . . lacks sufficient information regarding the vote count," and second, "[a]gain there was testimony that this Resolution was not adopted in accordance with the initiative/election provisions set forth in the Constitution." The court found the Tribal Council Resolution was adopted at a duly convened meeting of the Tribal Council and that the third amendment to the agreement was signed by the parties. These did not constitute a waiver because, again, "[a]ccording to testimony, the resolutions adopted by the General Council admittedly were not done in accordance with the provisions set forth in the Constitution," which the court read as requiring the use of the initiative process by the General Council. As a result, there was no valid delegation to the Tribal Council and its waiver in the Tribal Resolution was thus "done without the requisite authority." Given its holding on the waiver issue, the court found it unnecessary to reach the Tribe's argument that Findleton failed to exhaust administrative remedies under the Tribe's claims ordinance. An order granting the motion was filed on June 19, 2014. On July 22, 2014, Findleton filed a timely notice of appeal.

III.

ANALYSIS

A. Legal Principles Governing Waiver of Tribal Sovereign Immunity

■ Indian tribes enjoy sovereign immunity "from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." (*Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 760 [140 L.Ed.2d 981, 118 S.Ct. 1700] (*Kiowa*).) "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its [sovereign] immunity." (*Id.* at p. 754.) "[T]o relinquish its immunity, a tribe's waiver must be 'clear.'" (*C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.* (2001) 532 U.S. 411, 418 [149 L.Ed.2d 623, 121 S.Ct. 1589] (*C&L*).)⁶ For a waiver to be effective, it "must be made by a person or entity authorized to do so." (*Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel* (2011) 201 Cal.App.4th 190, 206 [135 Cal.Rptr.3d 42]

⁶ "It must be recognized that 'sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation.' " (*Warburton/Buttner v. Superior Court* (2002) 103 Cal.App.4th 1170, 1182 [127 Cal.Rptr.2d 706] (*Warburton*)). "Rather, it presents a pure jurisdictional question." (*Ibid.*)

(*Yavapai*.) A party claiming a tribe has waived its sovereign immunity bears the burden of proof on the issue. (*Id.* at p. 205.)

■ “Generally speaking, the issue of whether a court has subject matter jurisdiction over an action against an Indian tribe is a question of law subject to *de novo* review.” (*Warburton, supra*, 103 Cal.App.4th at p. 1180.) In interpreting tribal laws, and determining “whether a waiver of sovereign immunity [has been] effected by one with the authority to do so,” we apply federal law. (*Id.* at p. 1188; see *Smith v. Hopland Band of Pomo Indians* (2002) 95 Cal.App.4th 1, 10, fn. 9 [115 Cal.Rptr.2d 455]; *California Parking Services, Inc. v. Soboba Band of Luiseño Indians* (2011) 197 Cal.App.4th 814, 820 [128 Cal.Rptr.3d 560] (*California Parking*); *Kiowa, supra*, 523 U.S. at p. 756 [“tribal immunity is a matter of federal law and is not subject to diminution by the States”].) “[T]he interpretation and construction of a written instrument . . . may be conducted *de novo* where ‘(a) the trial court’s contractual interpretation is based solely upon the terms of the written instrument without the aid of extrinsic evidence; (b) there is no conflict in the properly admitted extrinsic evidence; or (c) the trial court’s determination was made on the basis of improperly admitted incompetent evidence.’” (*Warburton*, at p. 1180.) “With regard to the contractual type of waiver, the courts will look for the expressed intent of the parties, under an objective standard.” (*Yavapai, supra*, 201 Cal.App.4th at p. 209.)

B. *Findleton’s Factual Showing*

Appellant Findleton, who bore the burden of proof in this case, demonstrated that the General Council, by majority vote at a special meeting, adopted Resolution 07-01, delegating to the Tribal Council the authority to waive the Tribe’s sovereign immunity prior to the time the parties executed the construction and on-site rental agreements. He offered the agreements, which contained arbitration clauses but also language indicating there was no waiver of sovereign immunity. He offered Resolution 08-01, in which the Tribe reconfirmed its delegation to the Tribal Council of the authority to waive the Tribe’s immunity after the agreements were executed, ratified all existing contracts of the Tribe related to the development of the Project (which would include the construction and on-site rental agreements), and ratified all waivers of sovereign immunity of the Tribe in such contracts.

Besides the Construction Agreements and General Council resolutions, Findleton also offered evidence of his meeting, after suspension of work on the Project, with tribal officials, at least some of whom were members of the Tribal Council; his proposal to them, as discussed at the meeting, for him to continue certain work on the Project and to defer payment on that work, including his request for a tribal resolution accepting the proposal and

including a waiver of sovereign immunity; the Tribal Chairman’s signing of the proposed amendment submitted with the proposal; and the Tribal Council’s adoption of the Tribal Council Resolution accepting Findleton’s proposal, approving the amendment and consenting to a waiver of the Tribe’s sovereign immunity including provisions for arbitration of disputes, avoiding dispute resolution in state courts, limiting recourse to casino assets and not allowing recourse to assets owned by individual members of the Tribe.

C. Preliminary Issues

Preliminarily, we address several aspects of the trial court’s written ruling regarding Resolutions 07-01 and 08-01 with which we disagree. First, as already indicated, the trial court characterized Resolution 07-01 as “purport[ing] to be a limited waiver of sovereign immunity for purposes of obtaining financing for the casino project only.” This is inaccurate in three respects. The resolution does not limit the delegation of authority to waive immunity to the purpose of “obtaining financing.” Rather, as Findleton points out, it delegates authority to waive immunity “in contracts of the Tribe approved by the Tribal Council . . . for the financing *and development* of the Project” and acknowledges the need for the Tribe to hire, among others, “general contractors to construct the Project.” (Italics added.) Second, the authority is not limited to the “casino.” The resolution defines the Project as “the development of a new gaming and resort facility *and related infrastructure and utilities to support the new gaming facility and the Tribal community.*” (Italics added.) Third, the resolution does not “purport[] to be a limited waiver of sovereign immunity”; rather, it purports to “*delegate[]* to the Tribal Council authority to waive” immunity in the future. (Italics added.)

The trial court also opined that Resolution 07-01 did not affect the contracts between Findleton and the Tribe because it “was adopted prior to the Band contracting with Plaintiff.” The trial court failed to explain, and we are at a loss to understand, why the Tribe could not prospectively either waive immunity, or more accurately, delegate the authority to waive immunity.

We also have difficulties with the trial court’s treatment of Resolution 08-01, including its conclusion that this resolution “is insufficient evidence of a valid waiver” in part because of “the lack of any recordation of a vote count” on the certification portion of the document. As with Resolution 07-01, Findleton did not contend that Resolution 08-01 was a waiver; rather, he argued that it (and Resolution 07-01) was a *delegation* of the authority to waive sovereign immunity to the Tribal Council. In any event, the blank spaces for a vote count are irrelevant. The document contains a “Certification,” signed by both the Tribal Chief and Tribal Chairman four days after the

meeting at which it was considered, attesting to the fact that the resolution was “adopted” by a vote at a duly noticed meeting of the General Council “where a quorum was present.” Their certification that it was “adopted” is circumstantial evidence it had garnered the necessary majority vote. Direct evidence of the actual vote count was not necessary. Moreover, the Tribal Council Resolution, which the Tribe conceded was authentic and adopted, specifically describes General Council Resolution 08-01 as a resolution through which “the General Council *authorized* the Tribal Council to waive the Tribe’s Sovereign Immunity on a limited basis.” (Italics added.) Taken together, this evidence is sufficient to provide *prima facie* proof of those facts. The Tribe made no effort to rebut this showing: none of its declarations—including that of Tribal Chairman Feliz, who signed the document, that of the tribal secretary or that of the Tribe’s counsel—so much as addresses Resolution 08-01, much less denies its authenticity or that it was adopted.⁷ Findleton thus provided evidence sufficient to establish that Resolution 08-01 was authentic and adopted by the General Council.⁸

D. *The Tribal Constitutional Mechanism for Delegating Authority to Waive Tribal Sovereign Immunity*

■ The primary dispute between the parties lies not in the existence or nature of the resolutions but in the meaning of the tribal Constitution.⁹ There is no dispute the Tribal Council could not validly waive the Tribe’s sovereign

⁷ A declaration of the Tribe’s counsel, Marston, submitted with the original reply papers in support of the Tribe’s earlier filed motion, stated that the reference to Resolution 08-01 in the Tribal Council Resolution was a “typographical error,” that it should have been to 07-01 and that “[t]here is no 08-01 General Council Resolution.” This apparently was prior to the production of that resolution at the deposition of Richard Campbell. In the declaration of Marston submitted with the renominated motion, there is no mention of either resolution.

⁸ Findleton invokes Evidence Code section 622 and argues that facts recited in an instrument are conclusively presumed true as between parties to the instrument. Findleton has not provided a basis for the application of this state statute, and as set forth above federal law generally governs whether there was a waiver of tribal sovereign immunity. We thus agree with the Tribe’s argument in its brief and at oral argument that state law does not govern here. Further, the Construction Agreement’s choice-of-law provision states that absent tribal law on the subject (which neither party claims exists), federal law applies. In any event, we need not go so far as to invoke state law or apply a conclusive presumption. We hold only that Findleton established a *prima facie* case that the resolution was adopted, and that the Tribe did not rebut it.

⁹ The Tribe initially provided and authenticated an undated document with a 2007 footer as its Constitution. However, the Constitution on which the Tribe ultimately relied in the trial court and which both parties on appeal accept as the Constitution actually adopted by the Tribe is the one attached to the declaration of Tribal Secretary Candace Lowe, enacted by the Tribe’s General Council in October 1980. Findleton objected to admission of the 1980 Constitution and questioned its authenticity below, but on appeal he does not challenge the trial court’s admission of and reliance on that document. We will refer to that document, which bears the title of *The Document Embodying the Laws, Customs and Traditions of the Coyote Valley Band of Pomo Indians*, as “the Constitution.” All citations to articles are to the Constitution.

immunity from suit without a delegation of authority from the General Council. The provisions of the Tribe's Constitution addressing the powers of those bodies unambiguously require the Tribal Council to secure the General Council's "consent" (art. V, § 6, subd. (c)(6)) and "prior approval" (art. VII, § 1, subd. (q)) to waive the Tribe's immunity. The question is *by what means*.

Findleton asserts that the Constitution allowed the General Council to delegate authority to the Tribal Council to waive the Tribe's sovereign immunity through the measures the Tribe employed here; that is, that the General Council did so for development contracts relating to the Project by adopting Resolutions 07-01 and 08-01, and the Tribal Council waived the Tribe's immunity for purposes of the agreements with Findleton both by providing arbitration clauses in those agreements and by adopting the Tribal Council Resolution expressly waiving the Tribe's immunity with respect to Findleton's proposal to amend the agreements.

The Tribe's current interpretation is based on article V, section 6, subdivision (b) of the Constitution, which provides that "[t]he General Council shall exercise its powers of self-government through the initiative, referendum, repeal and recall powers as set forth in Articles XI, XII, and XIII, of this Document." The Tribe's position is that this provision required the General Council, in delegating to the Tribal Council the power to waive the Tribe's immunity, to use the initiative, referendum, repeal or recall process, and that in purporting to delegate such authority in General Council Resolutions 07-01 and 08-01 the General Council acted without constitutional authority. Therefore, according to the Tribe, the Tribal Council Resolution purporting to waive immunity as to Findleton was unauthorized as well.

■ The trial court agreed with the Tribe, but we review the issue *de novo*. In interpreting the tribal Constitution, we consider its particular provisions, but do so in the context of the whole document. (*McCulloch v. Maryland* (1819) 17 U.S. 316, 406 [4 L.Ed. 579] [interpretation of constitution "depend[s] on a fair construction of the whole instrument"]; *K Mart Corp. v. Cartier, Inc.* (1988) 486 U.S. 281, 291 [100 L.Ed.2d 313, 108 S.Ct. 1811] [in ascertaining plain meaning of statute, court must "look to the particular statutory language at issue, as well as the language and design of the statute as a whole"].)

We begin with the procedures the Tribe contends were required for a valid delegation. These appear to us to be inapplicable on their face. As said, article V, section 6, subdivision (b) states that "[t]he General Council shall exercise its powers of self-government through the initiative, referendum, repeal and recall powers as set forth in Articles XI, XII, and XIII, of this Document." Articles XI, XII and XIII govern the procedures for Removal and Recall,

Referendum and Repeal and Initiative, respectively. None provides a mechanism for the General Council to “consent” or give its “prior approval” to the Tribal Council’s waiver of the Tribe’s sovereign immunity.

Article XI solely concerns the procedures to remove or recall a member of the Tribal Council from office, which has no relevance to the issue of delegation. Article XII, addressing the power of referendum and recall, concerns the procedures by which members of the General Council (i.e., the members of the tribe eligible to vote and participate in its self-governance) may demand a referendum or a repeal of “any proposed or enacted tribal law or any action undertaken *by the Tribal Council*.” (Italics added.) That section, too, is not a mechanism by which the General Council itself may “consent” or give “prior approval” to a Tribal Council action.

Article XIII, which provides the power of initiative, also does not apply. It governs the procedure by which tribal members may raise “[a]ny matter of concern to the Band not previously or previously [sic] considered or acted upon *by the Tribal Council* may be presented to the Tribal Council for action or to the General Council, for a vote” and requires that the petition be filed with the Secretary of the Tribal Council. (Italics added.) But a delegation of authority by the General Council to the Tribal Council to waive sovereign immunity is not something the Tribal Council would “consider[]” or “act[] upon.” The procedures set forth in article XIII for conducting an initiative further confirm that the initiative power is not intended as a means for the General Council to delegate any power to the Tribal Council. Article XIII specifies that such a matter “may be presented to the Tribal Council for action or to the General Council, for a vote” by means of a petition signed by the requisite number of people (specifically, 20 percent of the members of the General Council) and filed with the Secretary of *the Tribal Council*, but it then directs that “[t]he Tribal Council shall consider the matter presented in the petition at its next regular or special meeting.” (Italics added.) Only if the Tribal Council “fails to act upon or disapproves the matter within 30 days” is the petition submitted to the General Council. The Tribe’s current interpretation would mean the Tribal Council could delegate to itself the General Council’s authority to waive the Tribe’s immunity, which cannot be squared with the articles of the tribal Constitution requiring the *General Council’s* “consent” and “prior approval” before the Tribal Council may waive sovereign immunity. Finally, article XIII concludes by specifying that after the General Council votes on the matter, its majority vote “shall be conclusive and binding upon the Tribal Council.” It makes no sense to specify that a delegation of authority from the General Council to the Tribal Council is binding *on the Tribal Council*.

In short, the initiative power of article XIII appears to be a means solely by which tribe members can *bypass* the *Tribal Council’s* ordinary procedures for

considering and acting on matters *within its purview*, and for tribe members to bring those matters to the Tribal Council's attention and require it to act on them, and, only if it fails to act in the manner proposed in the petition, to bring the matter to the General Council. We see no textual basis for concluding that any of these provisions urged by the Tribe apply to waivers of the Tribe's sovereign immunity.

On the other hand, the Constitution plainly contemplates that not all actions taken by the General Council will involve the initiative, referendum, repeal or recall processes, and that some actions will be taken by a vote at meetings of the General Council. That delegation of authority to waive immunity is one such action is apparent from review of a number of the Constitution's provisions. Article V, section 1 states that “[a]ll tribal members . . . shall be eligible to vote in all tribal elections, referenda, recalls, repeals and at all meetings of the General Council.” (Art. V, § 1, italics added.) Section 2 of the same article goes on to describe the procedures for holding meetings of the General Council, including requiring that such meetings be “open to all tribal members,” shall be held “at least four times each year,” shall be preceded by notice mailed to each member and shall have a quorum present consisting of 20 percent of the total voting membership of the Tribe. (*Id.*, § 2, subd. (a).) It further states: “Each voting member of the General Council has one vote on all matters, and *all matters to be acted on at a General Council meeting* shall be approved or disapproved by a majority vote of those present and voting unless otherwise specified in this Document.” (*Id.*, § 2, subd. (a)(4), italics added.) It goes on to provide that an elected tribal “President” or “Chief” shall “preside over the meetings of the General Council,” “vote on all issues before the General Council,” “call special meetings of the General Council”¹⁰ and “prepare and cause to be published at least five days before the meeting, an agenda for each General Council meeting.” (*Id.*, § 4, subds. (a), (b), (d).) There would be no point in holding quarterly General Council meetings, with a required forum, and submitting issues to a vote at such meetings if the General Council could act only by means of the powers of initiative, referendum and repeal, removal and recall.

Moreover article IV, section 3, like the article (art. V, § 6, subd. (b)) on which the Tribe relies, specifies that the General Council shall exercise “all powers of self-government” by initiative, referendum, recall or repeal. Immediately preceding article V, section 6, subdivision (b) the Constitution states that “[a]ll powers of the Band shall be vested in the General Council, including those powers delegated to the Tribal Council and any other such powers as may in the future be granted or delegated to the Band by federal

¹⁰ The Constitution also allows the Tribal Council or 10 members of the General Council to call for a special meeting. (Art. V, § 5.)

law.” (*Id.*, § 6, subd. (a).) This suggests that the phrase “powers of self-government” means something narrower than all the powers of the Tribe. The Constitution does not provide a definition for either the Tribe’s general powers or its “powers of self-government.”

The Constitution goes on to provide that certain “powers shall be exclusively reserved to the General Council” and that no exercise of such powers “by the Tribal Council or by any other agency or officer of the Band shall be effective unless the General Council has given *its consent* to such action in accordance with Article VII of this Document.” (Italics added.) Included, among other powers, is “[t]he power to waive the Band’s immunity from suit.” (Art. V, § 6, subd. (c).)

Article VII, in turn, enumerates the powers of the Tribal Council. Among other things, those powers include managing tribal business affairs, administering tribal funds, levying taxes, managing tribal lands, establishing corporations and businesses, and, as most relevant here, promoting economic development by, among other things, “engag[ing] in business activities and projects” that “promote the economic well-being of the Band and its members.” The Tribal Council’s powers also include enacting laws, statutes and codes, and establishing tribal courts. And, as noted, the Tribal Council is authorized to defend lawsuits against the Tribe and in the course of doing so to assert the defense of sovereign immunity “except that no waiver of sovereign immunity can be made by the Tribal Council without *prior approval* of the General Council.” (Italics added.)

A number of powers conferred by the Constitution on the Tribal Council require some approval by the General Council. Some, such as defending lawsuits and waiving sovereign immunity, or condemnation of assignments of tribal land by the Tribal Council, require “approval of the General Council.” (Art. VII, § 1, subds. (l), (q).) Others require approval by a supermajority vote and/or vote with a specified quorum by the General Council. (See *id.*, §§ 3 [transfer of tribal land out of tribal ownership must be “approved by” vote of two-thirds of General Council with quorum of 100 persons entitled to vote], 4 [encumbrance of tribal land must be “approved by” vote of majority of General Council with quorum of 50 persons entitled to vote], 5 [development of natural resources of tribe for commercial or industrial purposes requires “consent” of majority vote of General Council with quorum of 50 persons entitled to vote].) Laws passed by the Tribal Council must “be presented to the (President) of the General Council for his or her approval within five (5) days following the date of . . . passage by the Tribal Council,” and laws passed by the Tribal Council on an override of a presidential veto must be “presented to the General Council, at a duly convened special meeting, for approval within fifteen (15) days following the date that the

Tribal Council overrides the veto of the (President)" and become effective "[i]f the General Council approves the enactment by a majority vote, providing a quorum is present." (Art. VIII, §§ 1, 2.)

The Constitution thus uses the terms "consent" and "approve" (specifically, "approved" and "approval") to refer to votes by the General Council. In at least two instances, it uses the phrase "approval of the General Council" without specifying the mechanism for such approval. Where the Constitution does spell out that the mechanism is a vote of the General Council, it does so with the specification that a supermajority vote is required and/or that a higher than 20 percent quorum is required, or, finally, that the vote must take place within a certain window of time. The terms "consent" and "approve" in clauses that do not specify the method for providing consent or approval logically must be understood as meaning a vote of the General Council without any supermajority vote or higher than usual quorum requirement.

■ In short, when read as a whole, the Constitution supports the interpretation advanced by Findleton: that the "consent" the General Council must give for the Tribal Council to exercise the power to waive the Tribe's sovereign immunity under article V, section 6, subdivision (c)(6), and the counterpart reference to the "prior approval of the General Council" required for the Tribal Council to waive the Tribe's immunity under article VII, section 1, subdivision (q), can be obtained by a majority vote of the General Council—which the Tribe concedes occurred when it adopted Resolution 07-01, and the undisputed evidence demonstrates also occurred with respect to Resolution 08-01.

The Tribe's position that these terms require an *initiative* is not a reasonable interpretation, even based upon the text of the Constitution alone. But there is more. Strong indicia of the meaning of the relevant provisions may also be found in the Tribe's prelitigation words and deeds. The General Council voted twice, to approve resolutions expressly exercising that body's authority under article V, section 6, subdivision (c)(6) [requiring General Council consent for Tribal Council to exercise power to waive sovereign immunity] and article VII, section 1, subdivisions (q) and (w) [delegating to Tribal Council power to defend Tribe against lawsuits while requiring General Council's approval to waive immunity, and to "take all actions" necessary for exercise of constitutionally delegated powers] "to delegate to the Tribal Council its authority to waive the Tribe's immunity from suit." The Tribal Council unanimously approved, and Chairman John Feliz, Jr., and Secretary Candace Lowe signed, the Tribal Council Resolution stating that "by passage of General Council Resolution 08-01, the General Council authorized the Tribal Council to waive the Tribe's Sovereign Immunity on a limited basis" for purposes of contracts related to the new gaming facility

and, pursuant to that authority, expressly consented to such a waiver as requested by Findleton. The Tribe's and its officials' prelitigation conduct speaks louder than their postlitigation words when it comes to the proper interpretation of the tribal Constitution. Together, the Constitution read as a whole, coupled with the Tribe's repeated interpretations of it as allowing the General Council to delegate its waiver authority by majority vote, are compelling.

The Tribe argues nonetheless that we must defer to its interpretation of its own Constitution. But the question this argument begs is *which* of its interpretations we should defer to: the interpretation its legislative bodies acted in accordance with before the dispute with Findleton arose, or the opposite interpretation its attorney and officials advanced as the Tribe's litigation position after the dispute arose?

■ The Tribe cites decisions of the Interior Board of Indian Appeals (IBIA) and federal courts addressing intertribal disputes and the relationship between the federal and tribal governments and expressing a policy of deferring to tribal interpretations of tribal law. We need not determine whether cases involving relations between tribes and between a tribe and the federal government are analogous to this one, as the Tribe contends. That is because there are cases that, like this one, address disputes between Indian tribes and third parties that apply principles similar to those applied in the IBIA cases cited by the Tribe. The latter cases, like the IBIA cases, are based on Congress's commitment to a "policy of supporting tribal self-government and self-determination." (See *National Farmers Union Ins. Cos. v. Crow Tribe* (1984) 471 U.S. 845, 856 [85 L.Ed.2d 818, 105 S.Ct. 2447].) "Consistent with this policy," the cases hold that "'tribal courts are best qualified to interpret and apply tribal law.' " (*Prescott v. Little Six, Inc.* (8th Cir. 2004) 387 F.3d 753, 756.) Thus, where a tribal court has interpreted a tribal Constitution or statute, the federal courts accord significant deference to such interpretations, and so should we. (See *id.* at pp. 757–758; *Attorney's Process & Investigation Service, Inc. v. Sac & Fox Tribe* (8th Cir. 2010) 609 F.3d 927, 943 [federal courts do not conduct de novo review over tribal court rulings under tribal law].) For the same reasons, federal courts generally recognize and enforce tribal judgments (*Wilson v. Marchington* (9th Cir. 1997) 127 F.3d 805, 810) and refrain from interfering with ongoing tribal court proceedings to determine tribal court jurisdiction. (*National Farmers*, at p. 857.) Moreover, federal courts do not "readjudicate questions—whether of federal, state or tribal law—already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason." (*AT&T Corp. v. Coeur d'Alene Tribe* (9th Cir. 2002) 295 F.3d 899, 904.)

Here, however, the Tribe does not ask us to defer to a tribal court interpretation of its Constitution. Rather, it asks us to defer to its current interpretation of its Constitution, which conflicts with the prior interpretations of its own governing bodies. None of the cases cited by the tribe—and none we are aware of—stands for the proposition that a tribe’s *litigation position* regarding the meaning of tribal law must necessarily be respected regardless of whether it is reasonable or consistent with prior official interpretations by the tribe.¹¹ The cases cited by the Tribe and those discussed above advance the principle of respect for Indian sovereignty and self-government by deferring to the interpretation of a tribal law adopted by the tribe’s own governing bodies, such as a tribal court or tribal legislature. Here, two of the Tribe’s governing bodies—the General Council twice, and the Tribal Council once—adopted resolutions interpreting the Constitution to permit the General Council to delegate the authority to the Tribal Council to waive sovereign immunity by resolution. It is those governing bodies of the Tribe whose interpretations are entitled to deference, at least in the absence of any contradictory tribal court interpretation. For these reasons, we defer to the interpretation of the Constitution adopted by its General Council and Tribal Council, and not to the Tribe’s current position in its briefing, which is not an “interpretation” as contemplated by these authorities but a position undertaken in litigation. Thus, we conclude that the General Council validly delegated its authority to waive tribal sovereign immunity to the Tribal Council when it adopted Resolutions 07-01 and 08-01.

E. *The Tribal Council’s Actions and Waiver of Sovereign Immunity*

The question remains whether, once the General Council delegated the authority to the Tribal Council to waive sovereign immunity, the Tribal Council did so either through entering contracts with Findleton containing arbitration clauses or by enacting the Tribal Council Resolution.

¹¹ One example of the cases the Tribe cites is *Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director* (1995) 27 IBIA 163. In holding the Secretary of the Interior was required to defer to the tribe’s “reasonable interpretation of its own Constitution and laws,” the IBIA was addressing an interpretation *reflected by an ordinance enacted by the tribe*. The question was whether the tribe’s ordinance was consistent with its Constitution. Because the court concluded the interpretation reflected by the tribe’s ordinance was reasonable, it deferred to that interpretation. (*Id.* at pp. 168–169, 171–172.) Another example is *Brady v. Acting Phoenix Area Director* (1997) 30 IBIA 294, in which the IBIA held it was error for the BIA to interpret the tribe’s Constitution without considering whether the tribe “had arrived at an interpretation of its own” because there were allegations indicating the Tribal Council had previously acted as a forum for similar disputes and may have interpreted the tribal law in question. (See *id.* at p. 299.) In these cases, the deference was owed not merely to an interpretation advanced as the litigation position of the tribe, but to an interpretation adopted by the tribe’s own governing body either in the form of an legislative enactment or quasi-judicial proceeding prior to the litigation.

We have some doubt about the former, although the issue is by no means simple. The agreements contain arbitration clauses, to be sure, and there is ample authority that such clauses, if executed on behalf of a tribe by a person or body authorized by the tribe to do so, may have the effect of waiving the tribe's sovereign immunity. (See, e.g., *C&L, supra*, 532 U.S. 411; *Smith v. Hopland Band of Pomo Indians, supra*, 95 Cal.App.4th 1.) These authorities were in existence well before the Tribe executed the agreements with Findleton that included the arbitration clauses. On the other hand, a waiver must be clear (*C&L*, at p. 418), and at least one California court has declined to find a waiver of immunity from suit in state or federal court for purposes of enforcing an arbitration clause or award where the intent to allow suit for such purposes was unclear. (*California Parking, supra*, 197 Cal.App.4th at pp. 818–819 [agreement's explicit exclusion of rule 48(c) of American Arbitration Association rules, granting consent to allow federal or state court to enter judgment on award, precluded finding of waiver of sovereign immunity].)

Here, the arbitration clauses were clear enough, providing for arbitration “in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect,” without exception. They provided that the “agreement to arbitrate . . . shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof” and “[t]he award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.” Complicating the task of interpretation is not the arbitration clauses but rather the provisions immediately following those clauses, which state “[n]o term or provision in this Agreement shall be construed as a waiver of the sovereign immunity of the [Tribe]” and “[t]he Parties specifically agree that the sovereign immunity of [the Tribe] shall not be waived for disputes or other matters related to this Agreement.” These disclaimers render the meaning of the agreements in regard to waiving sovereign immunity ambiguous.

On the one hand, the United States Supreme Court has indicated that in an appropriate case it would “apply ‘the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it.’” (*C&L, supra*, 532 U.S. at p. 423.) On the other hand, the court has held that a waiver must be “clear” and did not apply the above mentioned rule of construction in *C&L* because it found the contract unambiguous. (*Ibid.*) Here, it is difficult to reconcile the arbitration clauses of the Construction and Rental agreements with the clauses in these same agreements that disclaim a waiver of immunity. This is especially so given

the language in the arbitration clauses authorizing *judicial* enforcement.¹² Indeed, not even the Tribe has suggested any way to harmonize the conflicting clauses.¹³ But there is also tension between the Supreme Court's rule that "a tribe's waiver must be 'clear'" and its statement in *C&L* that ambiguous language should be construed against the party who drafted the contract, at least in cases such as *C&L* and this case where the drafting party was the tribe. (See *C&L, supra*, 532 U.S. at p. 423.)

In light of the complexity the arbitration clause issue presents, we will turn first to the question whether the Tribe waived immunity by adopting the Tribal Council Resolution. If it did, the question whether it previously waived immunity by entering into the Construction and Rental agreements is immaterial. The question regarding the Tribal Council Resolution is simply whether it constitutes an express and clear waiver.

Findleton asserts that the Tribal Council waived the Tribe's immunity by adopting the Tribal Council Resolution and that the surrounding circumstances support that determination. We agree.

In the proposal presented by Findleton to tribal officials, including members of the Tribal Council, Findleton offered to complete work on certain infrastructure improvements that were included in the scope of the contract already ("currently under contract") for which there were outstanding balances totaling about \$231,000, to perform additional work that the Tribe had "previously approved" but that was "not currently under contract" for which the cost would be about \$296,000, and to defer payment until 2009. In exchange, he sought four commitments from the Tribe: that it would (a) amend the contract to include the new scopes of work, (b) agree to pay interest "to help offset the costs of carrying the outstanding balance," (c) make payment in 2009 on an installment schedule, and (d) issue a tribal resolution accepting these terms and conditions and including a limited waiver of sovereign immunity.

The day after Findleton conveyed this proposal to the Tribe, the Tribal Council convened a meeting at which it approved the Tribal Council Resolution. That resolution, among other things, acknowledged that Findleton had made the August 19, 2008 proposal, that he had "requested a limited waiver

¹² It was unclear from the record, but we were informed at oral argument that the Tribe had no functioning tribal court at the time these agreements were executed.

¹³ Federal common law governing contract interpretation includes the "cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other." (*Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, 63 [131 L.Ed.2d 76, 115 S.Ct. 1212].)

of Sovereign Immunity from the Tribe in connection with this proposal,” and that “by passage of General Council Resolution 08-01, the General Council [had authorized it] to waive the Tribe’s Sovereign Immunity on a limited basis in contracts related to the development and financing of a new gaming and resort facility and related infrastructure and utilities to support the new gaming facility and the Tribal community.” The Tribal Council Resolution stated that the Tribal Council accepted the terms and conditions outlined in Findleton’s August 19, 2008 proposal, approved the third amendment to the agreement and “consent[ed] to a limited waiver of Sovereign Immunity of the Tribe, which is limited to 1.) provide for arbitration of disputes; 2.) avoid dispute resolution in state courts; 3.) limit recourse solely to casino assets; and 4.) shall not allow recourse to assets owned by individual members of the Tribe.”

These acts effected an express waiver of the Tribe’s sovereign immunity that was clear and unequivocal, and limited to Findleton’s agreements with the Tribe, as amended by the proposal and the third amendment. Whatever ambiguity the disclaimer clauses created was eliminated by the Tribal Council’s acceptance of Findleton’s proposal and its adoption of the resolution expressly waiving sovereign immunity. The waiver was limited to arbitration of disputes regarding those agreements and to recourse against certain assets of the Tribe. The waiver extended to judicial enforcement of the right to arbitrate and of any arbitration award, as indicated by the arbitration provisions of the agreements, the language in Findleton’s proposal and the Tribe’s express acceptance of that proposal.

In view of our holding that the Tribe waived its sovereign immunity to this extent, we need not reach Findleton’s arguments that the General Council’s adoption of Resolutions 07-01 and 08-01, tribal officials’ statements to him, and the Tribal Council’s adoption of the Tribal Council Resolution estop the Tribe from claiming it did not waive its immunity.

DISPOSITION

The Superior Court, after holding that the Tribe had not waived its sovereign immunity, declined to reach the Tribe’s second defense asserting that Findleton’s claims are barred by his failure to exhaust tribal administrative remedies. Neither party has briefed that issue or asked us to resolve it in the first instance on appeal. Nor have the parties briefed the question whether the exhaustion issue is within the scope of their agreement to arbitrate and therefore to be decided by the arbitrators. We therefore do not address these

[REDACTED]

issues. The superior court's order granting the Tribe's motion to quash service of summons and dismissing the case is reversed. We remand the case to the superior court for further proceedings consistent with this opinion. Appellant shall be entitled to costs on appeal.

Kline, P. J., and Richman, J., concurred.

[No. C077269. Third Dist. July 29, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
DYWON LEVELL BYRD, Defendant and Appellant.

[REDACTED]

[REDACTED]

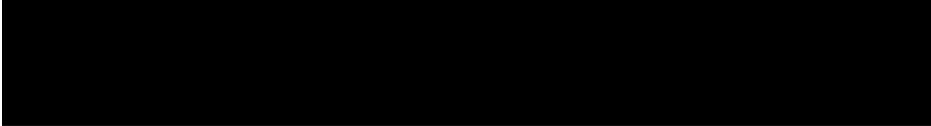
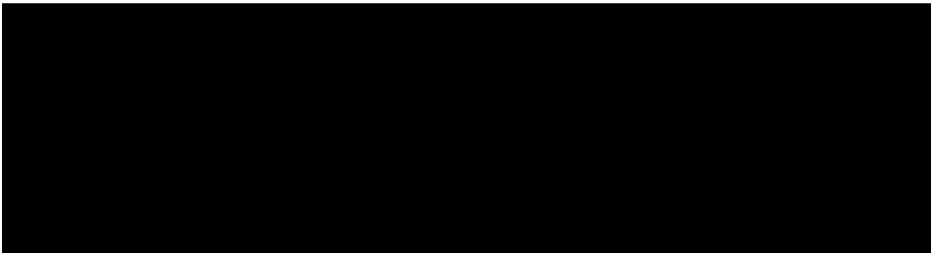
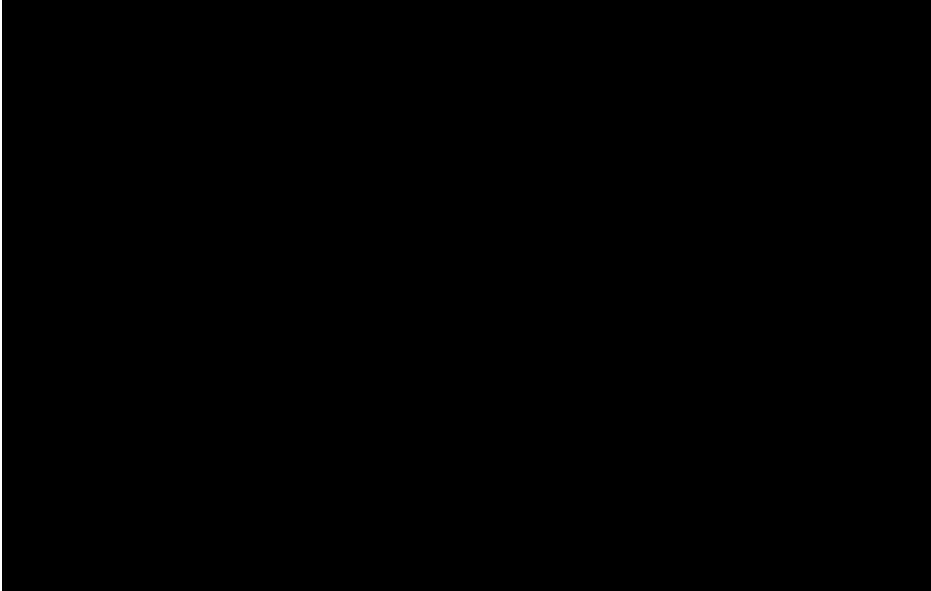
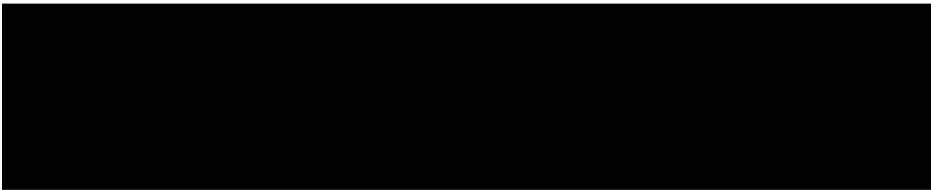
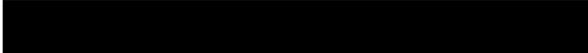
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COUNSEL

Steven Schorr, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Marcia A. Fay, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

DUARTE, J.—A jury found defendant Dywon Levell Byrd guilty of first degree murder (Pen. Code, § 187, subd. (a); count 1) and driving in willful or wanton disregard for the safety of persons or property while fleeing from a pursuing police officer (Veh. Code, § 2800.2, subd. (a); count 3).¹ The jury found true the special allegation that defendant used a firearm in committing first degree murder. (Pen. Code, former § 12022.53, subd. (b).)² The trial court sentenced defendant to 25 years to life for first degree murder, a consecutive 25-years-to-life sentence on the firearm allegation, plus a consecutive two-year sentence for driving in willful or wanton disregard for the safety of persons or property while fleeing from a pursuing police officer.

On appeal, defendant contends the trial court erred in instructing the jury with the last bracketed paragraph of CALCRIM No. 226. He further contends that his conviction for violating section 2800.2 is not supported by substantial evidence because there was no proof that either of the pursuing officers wore a distinctive uniform. As we will explain in the published portion of our opinion, we agree with the latter contention. We will reverse count 3 (§ 2800.2, subd. (a)) and order it dismissed. We affirm the judgment in all other respects.

BACKGROUND

At around midnight on December 7, 2011, Sacramento Police Officer Robert Hamm was dispatched to a residence on Samos Way in response to a report of a shooting. When he arrived at the residence, he observed two

¹ Further undesignated statutory references are to the Vehicle Code.

² The jury acquitted defendant of count 2, attempted murder.

vehicles parked in the driveway, one of which had its engine running. Inside that vehicle was the victim, who had been shot in the neck.

On the same night at approximately 12:10 a.m., Sacramento Police Officers Carl Chan and David DeLeon were on patrol in a fully marked traditional black-and-white police car near Samos Way when they observed a silver sport utility vehicle (SUV) driving without its headlights on. The SUV did a “burn out” and accelerated at a high rate of speed away from the officers. Officer DeLeon activated the patrol car’s emergency overhead red and blue lights and attempted to initiate a traffic stop. The SUV initially slowed and started to yield but then suddenly accelerated and drove off. Officer DeLeon activated the patrol car’s siren and a high-speed pursuit ensued, ending when the driver, later determined to be defendant, stopped his vehicle and fled on foot. A perimeter was established by law enforcement officers, and defendant was apprehended and arrested several hours later. We will supply the relevant details of the evading conviction in part II of the Discussion, *post*.

DISCUSSION

I

*CALCRIM No. 226**

.....

II

Sufficiency of the Evidence

Defendant contends that his conviction for violating section 2800.2 is not supported by substantial evidence because there was no proof that either of the pursuing officers wore a distinctive uniform. We agree, because *no* evidence was presented, by either party, to support this essential element of the offense.

Applicable Law

A person violates section 2800.2 if he “flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property.” (§ 2800.2, subd. (a).) Section 2800.1 provides that a person

*See footnote, *ante*, page 1219.

operating a motor vehicle is guilty of fleeing or attempting to elude a pursuing peace officer's motor vehicle if all of the following conditions exist: (1) the peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp; (2) the peace officer's motor vehicle is sounding a siren as may be reasonably necessary; (3) the peace officer's motor vehicle is distinctively marked; and (4) the peace officer's motor vehicle is operated by a peace officer, *and that peace officer is wearing a distinctive uniform.* (§ 2800.1, subd. (a), italics added.) “Thus, the statute requires four distinct elements, each of which must be present: (1) a red light, (2) a siren, (3) a distinctively marked vehicle, and (4) a peace officer in a distinctive uniform.” (*People v. Hudson* (2006) 38 Cal.4th 1002, 1008 [44 Cal.Rptr.3d 632, 136 P.3d 168] (*Hudson*).) The prosecution must prove each element beyond a reasonable doubt. (*People v. Acevedo* (2003) 105 Cal.App.4th 195, 197–198 [129 Cal.Rptr.2d 270].)

■ For purposes of section 2800.2, “a law enforcement officer’s ‘distinctive uniform’ is the clothing prescribed for or adopted by a law enforcement agency which serves to identify or distinguish members of its force.” (*People v. Mathews* (1998) 64 Cal.App.4th 485, 490 [75 Cal.Rptr.2d 289].) “The statute does not require that the uniform be of any particular level of formality or that it be complete.” (*People v. Estrella* (1995) 31 Cal.App.4th 716, 724 [37 Cal.Rptr.2d 383].) Nor does the statute require that the person eluding capture actually see that the police officer is wearing a distinctive uniform. (*Ibid.*)

To assess the sufficiency of the evidence, we review the whole record to determine whether it discloses substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Maury* (2003) 30 Cal.4th 342, 396 [133 Cal.Rptr.2d 561, 68 P.3d 1].) “The standard is the same, regardless of whether the prosecution relies mainly on direct or circumstantial evidence. [Citation.]” (*People v. Vazquez* (2009) 178 Cal.App.4th 347, 352 [100 Cal.Rptr.3d 351].) In applying the standard, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. (*People v. Boyer* (2006) 38 Cal.4th 412, 480 [42 Cal.Rptr.3d 677, 133 P.3d 581].) “[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.’ [Citation.] We do not reweigh evidence or reevaluate a witness’s credibility. [Citation.]” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129 [40 Cal.Rptr.3d 118, 129 P.3d 321].)

The officers testified that they were assigned to the patrol unit of the Sacramento Police Department, which involved basic patrol duties such as responding to calls for service and performing proactive policing. The officers were on patrol in a fully marked traditional black-and-white police car, and the car's siren and emergency overhead red and blue lights were activated during the pursuit of defendant. At trial, defendant admitted that he saw the patrol car behind him with its lights on, and that he made a conscious decision to flee from the police. However, no direct evidence was presented at trial demonstrating that either officer was wearing a distinctive uniform. None of the witnesses at trial testified as to the officers' attire, nor is there any other evidence in the record about the officers' attire.

The People cursorily argue only that the jury could have reasonably inferred that the officers wore a distinctive uniform because they were assigned to the patrol unit and were on patrol in a marked police vehicle at the time of the pursuit, and because defendant admitted to knowing the police were chasing him. However, they point to no actual evidence that either officer wore a distinctive uniform within the meaning of section 2800.1. We see no such evidence in the record. Nor do they cite any authority for the argument that such an inference is even potentially proper.

The fact that the officers were assigned to the patrol unit and were in a patrol car at the time of the pursuit is not sufficient to prove that either officer was wearing a police uniform or other distinctive police attire. To infer evidence of a distinctive uniform rather than plainclothes or another less-than-distinctive outfit from the evidence in the record before us would be pure speculation. (See *People v. Shakhvaladyan* (2004) 117 Cal.App.4th 232, 238 [11 Cal.Rptr.3d 590] [reversing conviction under § 2800.2 because the record “did not include any reference to the fact that . . . [the officer] wore a distinctive uniform”], disapproved on other grounds in *Hudson*, *supra*, 38 Cal.4th at pp. 1009–1011, fn. 3.)

■ The People do not provide any authority in support of their brief argument that we should look to proof introduced to satisfy the other elements (that these were peace officers on patrol in a marked car) as a substitute for proof satisfying the distinctive uniform requirement, and we are aware of none. In *Hudson*, our Supreme Court concluded that, in order for a peace officer's vehicle to be distinctively marked within the meaning of section 2800.1, its outward appearance during the pursuit must include, in addition to the separate statutory requirements of a red light and a siren, one or more features that are reasonably visible to other drivers and distinguish it from vehicles not used for law enforcement so as to give notice to the person being pursued that the pursuit is by the police. (*Hudson*, *supra*, 38 Cal.4th at pp. 1010–1011.) In so concluding, *Hudson* disapproved *People v. Chicanti*

(1999) 71 Cal.App.4th 956 [84 Cal.Rptr.2d 1], and *People v. Shakhvaladyan, supra*, 117 Cal.App.4th 232, both of which held that a red light and a siren could be considered along with the totality of the circumstances in determining whether a pursuing police vehicle is distinctively marked. (*Hudson*, at pp. 1009–1011, fn. 3.) The court explained, “[I]n determining whether the pursuing police vehicle is distinctively marked, a jury may consider *only* the distinguishing features of the vehicle itself that are reasonably visible to other drivers and serve to distinguish the vehicle from vehicles not used in law enforcement.” (*Id.* at p. 1014.)

Similarly, in the instant case—like the cases disapproved by *Hudson*—the People ask us to conclude that the proof supporting the unrelated elements of evading was sufficient to support the element requiring them to prove at least one of the officers wore a distinctive uniform. This we cannot do. Nor may we conclude, as does our dissenting colleague, that defendant admitted to evading the police as defined by sections 2800.1 and 2800.2 from his testimony on the witness stand that he knew the police were following him. The statute does not require that *either* defendant actually knew of the police officers’ presence in pursuit *or* that the pursuit met the requirements listed in section 2800.1. Rather, “the statute requires four distinct elements, each of which *must* be present: (1) a red light, (2) a siren, (3) a distinctively marked vehicle, and (4) a peace officer in a distinctive uniform.” (*Hudson, supra*, 38 Cal.4th at p. 1008, italics added.) Whether we consider it reasonable or not, if the pursuing officers were for any reason wearing plainclothes and belt badges, defendant would not be in violation of section 2800.2 regardless of his admissions on the witness stand. (See *People v. Mathews, supra*, 64 Cal.App.4th at p. 491 [plainclothes officer wearing badge not in a distinctive uniform as required by § 2800.1; § 2800.2 conviction accordingly reversed].) Here, we simply do not know what the police officers were wearing.

We thus are compelled to conclude that despite defendant’s admission under oath of actual knowledge as to the identity of his pursuers as law enforcement officers, because the prosecutor neglected to ask a single, simple question to elicit evidence of the officers’ attire and there is no evidence otherwise in the record that the officers were wearing distinctive uniforms, defendant’s conviction cannot stand. Although our conclusion may seem bewildering to some, any remedy lies “‘on the other side of Tenth Street, in the halls of the Legislature.’” (*Siskiyou County Farm Bureau v. Department of Fish & Wildlife* (2014) 237 Cal.App.4th 411, 420–421 [188 Cal.Rptr.3d 141].)

Given the complete lack of evidence regarding the officers' attire during the pursuit or even at any point during the relevant time period, we conclude that the prosecution failed to meet its burden of proof on the distinctive uniform element.⁴

DISPOSITION

The judgment of conviction for count 3 (§ 2800.2) is reversed and count 3 is ordered dismissed. The judgment is affirmed in all other respects. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy thereof to the Department of Corrections and Rehabilitation.

Nicholson, Acting P. J., concurred.

HULL, J., Concurring and Dissenting.—I concur in part I of the majority opinion. As to part II, I dissent.

As the majority opinion sets forth, defendant was charged with and found guilty of first degree murder in violation of Penal Code section 187, subdivision (a) and driving in willful or wanton disregard for the safety of persons or property while fleeing from a pursuing police officer in violation of Vehicle Code section 2800.2. The majority reverses the section 2800.2 conviction due to a lack of evidence that the pursuing police officers in this matter were wearing distinctive uniforms during the pursuit.

Defendant testified at trial and, regarding the police pursuit, said on direct examination:

“Q. And what do you do at that intersection of Brookefield and Bluebrook?

“A. I stopped and made a right turn.

“Q. What happens next?

“A. Police got behind me.

⁴ Although we disagree with the dissent's conclusion that defense counsel effectively conceded that his client was guilty of evading, certainly to the degree that would permit the People to secure defendant's conviction despite having failed to prove an essential element of the crime they themselves chose to charge, we cannot help but agree that many balls were dropped here, by both the prosecutor and defense counsel. Both appear to have completely forgotten about the evading charge at trial. This lack of care at earlier stages of this case has resulted in the expenditure of time and resources on appeal that would not have been necessary had the parties paid more attention to *all* aspects of this case at trial.

“Q. What were you doing at that point?

“A. I was smoking. I was smoking and I looked in the rear view mirror *police was behind me with their lights on.* So I told KB *police behind us* put that down. He said drive.” (Italics added.)

On cross-examination, defendant testified:

“Q. But then Mr. Northam asked you what you were doing *as the police were coming on to you*, you said you were smoking?

“A. I was. And I looked up in my rear view mirror and *I saw the police behind me with their lights on.*”

“Q. Now when you came up to Brookfield you had your headlight[s] out; right?

“A. No, I had them on.

“Q. But *the police* were going to pull you over; right?

“A. Yeah. They had their lights on me.

“Q. Now, how is it—or why is it that you—you didn’t pull over and just *stop for the police*?

“A. Because I had crack and the pipe in the car.” (Italics added.)

“Q. Okay, when you start driving the speed that you were driving on that chase—?

“A. Uh-huh.

“Q. —do you think you’re going to go to jail for that?

“A. Yes, *that’s why I ran.*

“Q. *So when you were going you knew [that] it was the police behind you that entire time; right?*

“A. Uh-huh.

“Q. Is that yes?

“A. Yes.” (Italics added.)

On redirect examination, defendant testified:

“Q. Now, Mr. Smith asked you about your thought process for the pursuit. Do you know what you were thinking *when you were fleeing from the cops*? ”

“A. No.

“Q. Were you having—

“A. *Just to get away.*

“Q. Now you testified on cross-exam that cops are assholes?

“A. Yes.

“Q. And in your experience, in your life have you had positive interactions with law enforcement?

“A. Getting slammed against the car, getting beat up, yes.

“Q. So when you say, quote, ‘I don’t fuck with the police’ end quote, what does that mean?

“A. That means I don’t fuck with the police, they’re assholes.

“Q. So you don’t mess with them?

“A. No, I do not.” (Italics added.)

And finally, on recross-examination, defendant testified:

“Q. So what crime did KB commit in your mind?

“A. *Running from the police, like I was.*

“Q. So the only crime that KB did was run from the police?

“A. Yes.

“Q. But he’s a passenger *in your car you were driving, right?*

“A. Yes.” (Italics added.)

During closing arguments, as to this charge, the People merely invited the jury to review the police car's dash camera video taken during the chase. Defendant's attorney did not speak to the charge at all. Curiously, although the jury was properly instructed on all of the elements of the offense and were instructed that there had to be proof beyond a reasonable doubt that the pursuing officers were in distinctive uniforms, the jury found defendant guilty of violating Vehicle Code section 2800.2 as charged. It is apparent the judge, jury and counsel were focused on the far more serious charge of murder and paid little attention to the evading charge, especially given the video and defendant's admissions that he knew he was fleeing from the police.

The majority finds defendant's numerous admissions that he knew he was fleeing from the police insufficient to prove the Vehicle Code section 2800.2 charge because defendant did not specifically admit the pursuing officers were wearing distinctive uniforms.

The majority and I have different views of the crime that was committed here. The majority sees the crime as flight from a pursuing police officer who is in a distinctive uniform and who is in a distinctively marked motor vehicle exhibiting at least one lighted red lamp visible from the front and who is sounding the motor vehicle's siren as reasonably necessary. But the essence of the crime and the dangerous conduct the Legislature sought to prevent by enacting this statute is knowingly fleeing from a police officer.

I recognize that the statute specifically states the conditions necessary to the crime and that *People v. Hudson* (2006) 38 Cal.4th 1002, 1008 [44 Cal.Rptr.3d 632, 136 P.3d 168] (*Hudson*) holds that there are "four distinct elements" to the crime, a red light, a siren, a distinctively marked vehicle and a peace officer in a distinctive uniform. The Legislature set forth these conditions no doubt so that a person being pursued by another vehicle is reasonably put on notice that the pursuit is by a law enforcement officer and not by someone who is merely posing as one. Parenthetically, I note that defendant, as he was being pursued here by a police vehicle at night that was behind him with its headlights on could not have seen, in any event, whether the officer or officers pursuing him were in a distinctive uniform. But that is of no moment under Vehicle Code section 2800.1. The statute says what it says.

I have no quarrel with *Hudson* or with the many cases that are consistent with its holding. But they should not be dispositive here because, neither in *Hudson* nor in any of the other cases that I have found that are consistent with its holding, did the defendant testify that he knew he was fleeing from and attempting to evade law enforcement officers.

In *People v. Peters* (1950) 96 Cal.App.2d 671 [216 P.2d 145] (*Peters*), the defendant was charged with manslaughter. On appeal, he claimed there was insufficient evidence of the corpus delicti because there was no evidence that the decedent died from the knife wound inflicted by the defendant. But his claim at trial was that he acted in self-defense or that the killing was an accident. The only evidence presented at trial regarding the cause of decedent's death was that the decedent died sometime between the assault and the filing of the information nearly a month later. No evidence was presented that the deceased met his death at the hands of the defendant, i.e., that the defendant's acts were the cause of the decedent's death, a necessary *element* of any homicide.

As to this lack of evidence of this element of the crime the court said:

"It is elementary that in a homicide case the fact that the deceased met his death through the act or agency of the defendant must be proved. It may, of course, be proved by circumstantial evidence. (*People v. Spencer*, 58 Cal.App. 197 [208 P. 380].) Obviously, here, the cause of death was not proved by evidence. However, the cause of death is a fact, which, like every other fact, need not be proved, even in a criminal case, if admitted or conceded by defendant. While there was no direct proof of the cause of death, *the conduct and attitude of defendant at the trial*, as disclosed by the record, constituted at least an indirect concession of the fact.

"The situation in this case is unique and probably will never occur in another case. It is not a matter of failure of proof (in spite of the fact that the district attorney offered no evidence of the cause or time of death), but of assumption by all concerned in the trial,—judge, jury, prosecution and defense,—that deceased died from the knife wound inflicted by defendant, and that so far as the cause of death was concerned, it really was not an issue in the case. The only issue was whether defendant could be excused from the stabbing of his friend, under the claim of self-defense, or under the claim of accident. The claim of self-defense to a charge of manslaughter necessarily is an admission that the victim died because of an act of the defendant. If he had not so died, the act could not be manslaughter and hence there would be no necessity to show that the act was justified. However, in the usual case the mere use by the defendant of such a claim does not relieve the prosecution of its burden of proving that the death was so caused, as the defendant may sit back and require the prosecution to prove its case and then, and only then, be required to set up his defense, which may be (1) that defendant's act did not cause death, or (2) that if it did, defendant was justifiably acting in self-defense, or (3) that the defendant's act was accidental. Defendant may avail himself of any or all of these defenses. But here, defendant did not avail himself of the fact that when the prosecution closed its case, it had not proved

the cause of death, nor did the defendant avail himself of the defense numbered (1) above. By his conduct he conceded that the death resulted from the knife wound and relied solely and wholly on his claims of self-defense and accident.

"In a criminal case a defendant is not called upon to make explanation, to deny issues expressly (his plea of not guilty does that for him), nor is he required to point out to the prosecution its failure to make a case against him or to prove any link in the required chain of guilt. On the other hand, he cannot mislead the court and jury by seeming to take a position as to the issues in the case and then on appeal attempt to repudiate that position. A reading of the proceedings at the trial, including defendant's statement at the opening of his case and his argument to the jury at the end of the case, clearly shows that at no time was he questioning either that the knife wound caused Cole's death, or that that fact had not been established or was an issue to be resolved by the jury. It also shows that defendant was conceding the cause of death.

"As evidence of the assumption by all at the trial of the cause of death, appears the following: Defendant, on cross-examination, was asked to show how he was holding the knife and how with knife in hand he pushed Cole. At the end of several questions and answers on this subject and about four demonstrations, defendant said, 'I pushed him like that. (Demonstrating) I meant to push him with my hand.' Thereupon the district attorney said, 'And you stuck this rather dull knife into him, sufficiently deep to kill him.' No objection was made by defendant to this statement. [¶] . . . [¶]

"It is well settled that 'An admission of a fact made at the trial in open Court by the prisoner or his counsel may be properly considered by the jury.' (*People v. Garcia*, 25 Cal. 531, 534.) In *People v. Hammond*, 26 Cal.App.2d 145 [78 P.2d 1172], defendant's counsel in open court admitted the details of the crime. It was held: 'A defendant is bound by the admission of his counsel made in open court.' (P. 150.)

"In *State v. Whiteaker*, 118 Ore. 656 [247 P. 1077], defendant was convicted of violating Oregon's 'Blue Sky Law' in that he sold certain securities without having obtained the necessary permit. On appeal, defendant contended that his lack of permit was not proved. After considering certain testimony on the subject, the court said (p. 1080 [247 P.]): 'Furthermore, defendants never contended that any license or permit had been issued to them. In the opening statement to the jury counsel for appellant, in response to the inquiry from the court, "Do you claim to have had a permit from the Corporation department to sell these (referring to "securities")?" answered, "No; your Honor, I claim this, that I drew up a receipt which, according to

my notions, conformed with the Blue Sky Law, did not conflict with it.” It was not necessary for the prosecution to prove that which was admitted in open court. 16 C.J. 891. Such admissions are conclusive . . .’ [¶] . . . [¶]

“It would be a miscarriage of justice to set aside a verdict found by the jury on all issues which defendant at the trial believed necessary to be submitted to the jury. *After all, a criminal case or court proceeding is not a game in which participants may be misled by a defendant’s attitude and conduct at the trial, and then the verdict be set aside on appeal, because defendant contends there was no proof of a fact which he had conceded, not by express word, but by conduct.*

“In the instructions which defendant requested, no hint is given that he was not conceding the cause of death. He offered several instructions on homicide, using the words ‘homicide’ and ‘killing,’ some of which the court gave, and he offered no instruction even remotely indicating that the cause of death was an issue. In defendant’s instruction 13, given by the court, defendant used the words ‘that at the time the knife was wielded which resulted in the death of’ Cole. In his instruction 15 he used the language, ‘The mere fact that an unfortunate and *fatal* accident happened . . .’ (Emphasis added.) Defendant closed his argument to the jury in this language: ‘. . . it is only justice, both for the State and for this defendant, that he be freed, because Mr. Peters’ actions, *although resulting in disaster to his friend as we have all admitted*, were in defense of his life and that of his friend.’ (Emphasis added.) [¶] . . . [¶]

“A defendant in a criminal case, of course, is entitled to the benefit of every reasonable doubt, but the record shows that by the conduct of defendant and all other participants at the trial, no doubt was raised that defendant was conceding the cause of death.” (*People v. Peters, supra*, 96 Cal.App.2d at pages 675–678, italics added.)

Peters is still good law, no doubt because it makes eminent good sense. The court’s holding in *Peters* should show us the way here.

I recognize that defendant here did not expressly admit that the pursuing officers were wearing distinctive uniforms. But he did admit that he knew he was fleeing from law enforcement officers, whatever they were wearing. The defendant in *Peters* did not, after all, specifically admit that he was the cause of his victim’s death but was deemed to have admitted that fact by his conduct at trial.

I also recognize that a defendant has an absolute right to depend on the prosecution’s failure to present sufficient evidence to support each element of

the offense with which he is charged. But, in my view, he does not have a right to repeatedly admit his guilt of the crime with which he is charged and then claim on appeal his admissions do not count because the prosecution failed to produce evidence of one of the elements of the crime.

While admittedly there was no evidence presented at trial that the pursuing law enforcement officers wore a distinctive uniform, even though that is an element of the offense, not holding defendant to his plain, unambiguous and repeated admissions that he knew he was fleeing from police officers and leading them on a dangerous chase distorts the criminal justice system. I would affirm the judgment.

Appellant's petition for review by the Supreme Court was denied October 26, 2016, S236688.

[No. B259918. Second Dist., Div. One. July 29, 2016.]

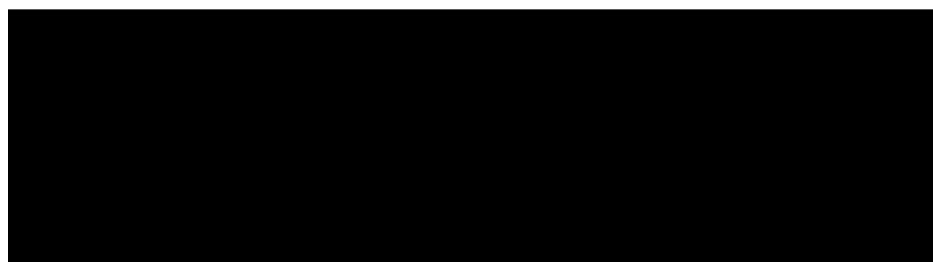
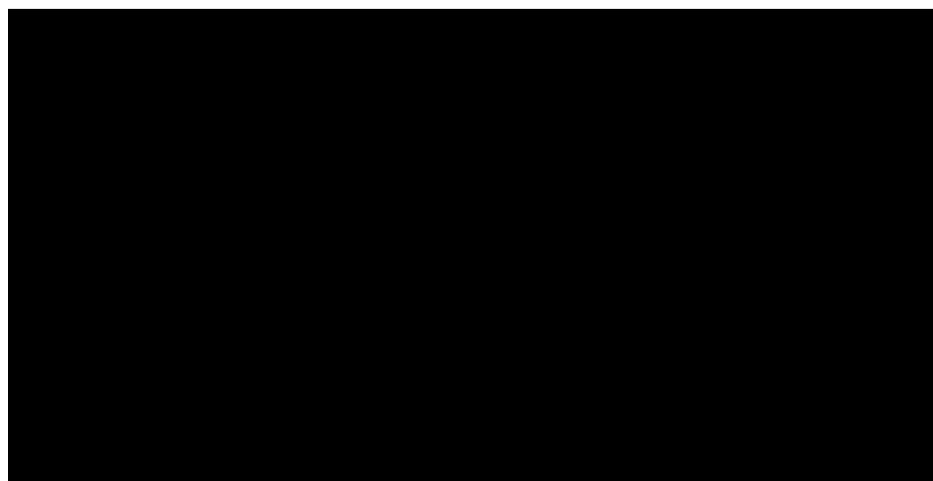
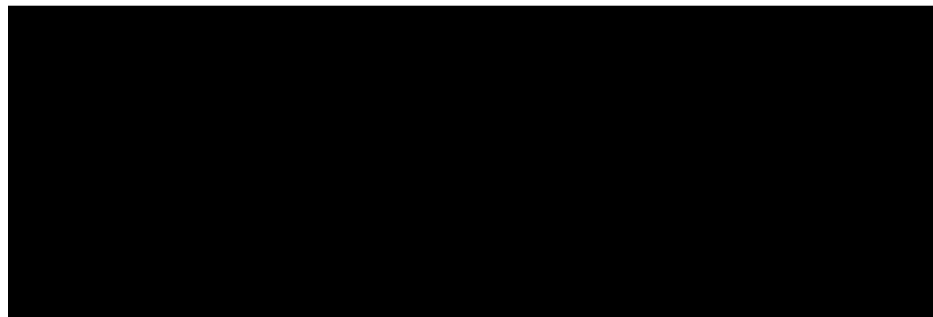
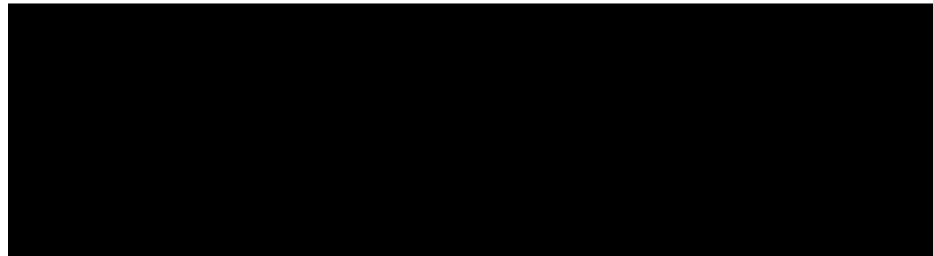
THE PEOPLE, Plaintiff and Respondent, v.
NOAESE FALANIKO, Defendant and Appellant.

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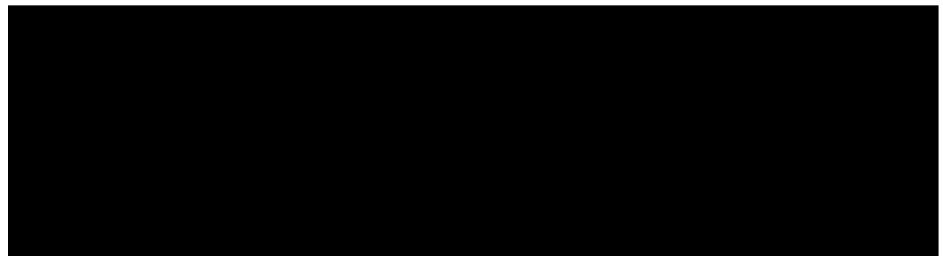
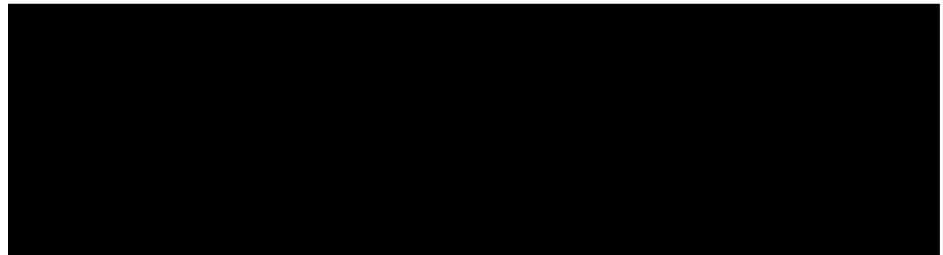
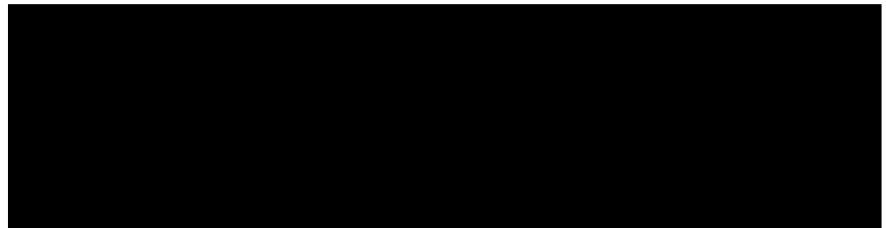
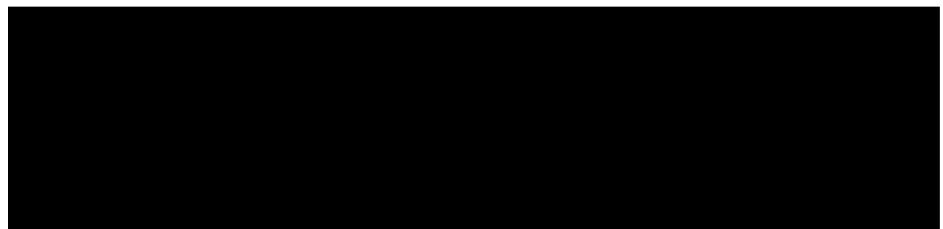
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COUNSEL

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

LUI, J.—Noaese Falaniko challenges his convictions arising out of three separate shooting incidents for one count of first degree murder (Pen. Code,¹ § 187, subd. (a); count 1), seven counts of attempted murder (§§ 664, 187, subd. (a); counts 2, 3, 4, 6, 7, 9, 10), and one count each of shooting at an occupied motor vehicle and at an inhabited dwelling² (§ 246; counts 5 & 8). The trial court sentenced appellant to an aggregate term of 330 years to life in state prison,³ and imposed restitution and parole revocation fines on each count of conviction.

¹ Undesignated statutory references are to the Penal Code.

² The jury also found true all of the firearm, great bodily injury, and gang enhancement allegations.

³ The sentence consisted of 25 years to life on the murder conviction (count 1) plus a consecutive 25 years to life for the section 12022.53, subdivision (d) enhancement on that count; 15 years to life, plus 25 years to life for the section 12022.53, subdivision (d) enhancement on each of the seven attempted murder convictions (counts 2, 3, 4, 6, 7, 9, 10); and stayed terms on the section 246 convictions under section 654 (counts 5 and 8).

Appellant contends (1) his convictions on all counts of attempted murder must be reversed because the use of the disjunctive “or” in the attempted murder instruction permitted the jury to convict without finding specific intent as to each victim; (2) the erroneous inclusion of a reference to the natural and probable consequences theory of aiding and abetting liability requires reversal of all counts of conviction; (3) appellant’s convictions should be reversed due to cumulative error; (4) the erroneous admission of appellant’s involuntary statements to police, which were based on promises of leniency, mandates reversal; and (5) the trial court’s failure to instruct the jury *sua sponte* on self-defense or imperfect self-defense requires reversal of the attempted murder convictions on counts 6 and 7.

We affirm appellant’s convictions for murder in count 1, attempted murder in counts 4, 9 and 10, and shooting at an occupied motor vehicle and at an inhabited dwelling in counts 5 and 8. Instructional error compels us, however, to reverse and remand appellant’s attempted murder convictions in counts 2, 3, 6, and 7. In addition, as appellant further contends and the Attorney General concedes, the trial court erred in imposing restitution and parole revocation fines on each count of conviction. We therefore reverse the trial court’s restitution and parole revocation orders.

FACTUAL BACKGROUND

The South Street Shooting—Counts 8, 9, and 10

On April 17, 2012, Edward Coral was with his brothers-in-law, Brandon and Ryan Alaimalo, on the front porch of the Alaimalo home on South Street in Long Beach. About 10:30 p.m., three men in black hoodies standing in the middle of the street started shooting at them. Police recovered seven .45-caliber shell casings and twenty-seven .762-caliber shell casings, consistent with an AK-47 rifle, at the scene.⁴

Coral was shot in the leg and hip, and suffered considerable nerve damage. Brandon was shot in the arm and chest. Ryan was not injured. The stucco and trim of the house showed several bullet strikes, and there were multiple bullet holes in the security screen and inside the house.

In recorded interviews with police following his arrest, appellant stated that he had been associated with the Crips gang, Westside Sons of Samoa (SOS), for three or four years, and was known within the gang as “Junior.” Appellant

⁴ At trial Coral could not identify any of the shooters, nor could he recall how many shooters there were. But immediately after the incident, he told police there were three men, and he was “50 to 75 percent sure” that the shooter with the AK-47 rifle was a six-foot-one-inch light-skinned African-American known as “Day-Day,” whose real name was Gary Ford.

told police that in April 2012, he agreed to help a fellow Westside SOS member known as “Sonic” retaliate against members of a rival Bloods gang, the Westside Pirus, for shooting at Sonic’s house. Appellant knew Ryan Alaimalo and thought he was a member of the Westside Pirus gang.

Appellant told police that when he and Sonic arrived at the Alaimalo house there were four or five people outside, all wearing red flannel and red shoes, which confirmed appellant’s belief that they were Westside Pirus.⁵ Appellant and Sonic stood in the middle of the street about 15 to 20 feet away from the rival gang members and opened fire. Appellant fired about 30 rounds from an AK-47 with a 32-round magazine that he had purchased that day. He told police he stopped shooting because he was scared and later regretted what he had done.

The Cherry Park Shooting—Counts 1 through 5

The night of July 21, 2012, Meki Siafega, Esther Vaafuti, Joe Foster, Branson Foster (BJ), and BJ’s wife, Kelly Kese, gathered at Cherry Park in Long Beach for a family barbecue. The group arrived at the park about 5:00 p.m. just as another group, dressed mostly in red, was leaving.

About 11:30 p.m., Siafega heard a sound like firecrackers. A bullet struck him in the shoulder, and he ducked under a bench. Another bullet hit the side of his leg, and as he tried to crawl away, a third bullet struck the back of his leg.⁶ Siafega saw two male shooters, one with long hair, the other with his hair in a bun. He could clearly see sparks from both guns, and they sounded like large caliber firearms. After the shooting had stopped, Siafega saw BJ lying motionless on the ground 30 to 50 feet away. BJ died as a result of multiple gunshot wounds, including fatal wounds to his head and abdomen.

Vaafuti was sitting on a bench when she heard what she thought were fireworks. Suddenly she felt a sharp pain as a bullet grazed her head, and she fell to the ground. The head wound required seven stitches, and she experienced migraine headaches every day after the incident.

Kese, who was eight and a half months pregnant, had gone to her car to charge her cell phone. She was sitting in the front seat of the car when two young men passed by on the sidewalk. Kese heard loud popping noises that sounded like firecrackers and turned to see the two young men who had passed her car standing on the sidewalk with guns in their hands, shooting at

⁵ Bloods gangs, including Westside Pirus, identify with the color red and wear red clothing, while Crips gangs such as SOS use the color blue to distinguish themselves.

⁶ Siafega lost 60 percent of his right lung as a result of a fragmented bullet that pierced the lung, causing it to fill with blood.

her family. As the two men were walking past Kese's car after the shooting, one of them fired his gun directly at Kese. The bullet missed Kese but struck the back door of her car. The shooters then ran away.

Police collected 14 expended nine-millimeter shell casings, one expended .45-caliber shell casing, and one .45-caliber live round from the scene. There was one bullet hole in Kese's car door, and police recovered a .45-caliber bullet from the vehicle.

Arlene Crisostomo was dating appellant in July 2012. On the day of the shooting, appellant and Crisostomo drove past Cherry Park, which was about four houses down the street from Crisostomo's home. Crisostomo noticed people in the park wearing red clothes whom she believed to be from a Bloods gang flash gang signs in their direction. It appeared to Crisostomo that appellant also saw the people throwing gang signs.

That night, Crisostomo and appellant were hanging out at Crisostomo's house. Approximately 10:45 p.m. appellant told Crisostomo he was going out with friends and she should pick him up when he called. Crisostomo left about 15 minutes later to go to a party in Orange County. Appellant called Crisostomo at 11:45 p.m. and asked her to pick him up in Long Beach. Crisostomo did as appellant asked, and they drove back to the party in Orange County. Appellant told Crisostomo he had been at Cherry Park when his friend, "Infant," shot at a group of people in the park. Appellant said he was just there to watch and provide backup.

Appellant was arrested in November 2012. During a conversation recorded when Crisostomo visited appellant in jail, Crisostomo agreed to give the police a false alibi and say that appellant was with Crisostomo at the party at the time of the Cherry Park shooting. Appellant said that he had told the police "the polyma clip" belonged to "Steven," whom he described as "half Black half Samoan with a fade." He added, "if they question you that's the . . . Steven I was talking about," and explained, "I can't [have] . . . the falima clip coming back to me, hell no I'm straight. I'm trying to throw that shit off of me. I already got like gang of shit coming back to me."

Crisostomo gave the false alibi to police, but when they accused her of lying, she revealed she had gone to the party alone and picked appellant up later. When appellant offered the alibi to police, he told them he had learned from another jail inmate that a Samoan had been shot at Cherry Park. He also told police he had later overheard two SOS gang members, "Infant Widdit" and "Blackeye," admit to committing the Cherry Park shooting. But appellant subsequently bragged to Crisostomo that he had "made up a nigga named Blackeye" when he spoke to the police about the Cherry Park shooting.

The Shooting at the Fantasy Gold Club—Counts 6 and 7

On November 3, 2012, Thomas Sablan was working as a deejay at the Fantasy Gold Club in Harbor City. Around midnight, a man wearing a hoodie entered the club and motioned for Sablan to go outside. Sablan did not know the person and stayed inside. Sablan then heard about six gunshots. As he attempted to escape the gunfire, a bullet struck the bottom of his left calf and he chipped a tooth on a table. Uchenna Ojinna, who was working security in the club that night, suffered gunshot wounds to his leg and abdomen. Surveillance video from the club showed the shooter firing into the building.

In his interview with police, appellant explained that “a while back” before the Fantasy Gold Club shooting, some members of the Westside Pirus gang had chased him and beat him up. Appellant went to the club and heard two Samoans “saying Blood and stuff,” which meant they were Westside Pirus. Wanting to scare them, appellant called them outside. When they came out, appellant fired his gun three times.⁷

DISCUSSION

I. *The Attempted Murder Instruction*

The trial court instructed the jury with CALCRIM No. 600 on attempted murder, which it modified to apply to all seven counts of attempted murder and included a “kill zone” theory of liability:

“The defendant is charged in Counts 2, 3, 4, 6, 7, 9 and 10 with attempted murder.

“To prove that the defendant is guilty of attempted murder, the People must prove that:

“1. The defendant took at least one direct but ineffective step toward killing another person;

“AND

“2. The defendant intended to kill a person. [¶] . . . [¶]

⁷ The transcript of the interview reflects that appellant stated that the two Samoans “came out and opened fire.” But in the audio recording of the interview played for the jury, appellant can be heard to say, “They came out and *I just* opened fire.” The trial court admonished the jury that the audio recording was controlling, not the transcript.

“A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or ‘kill zone.’

“In order to convict the defendant of the attempted murder of Meki Siafega as charged in count 2, Esther Vaafuti as charged in count 3, and Kelly Kese as charged in count 4, the People must prove that the defendant not only intended to kill a person, but also either intended to kill Meki Siafega, Esther Vaafuti *and/or* Kelly Kese, *and/or* intended to kill everyone within the kill zone.

“In order to convict the defendant of the attempted murder of Uchenna Ojinna as charged in count 6 and Thomas Sablan as charged in count 7, the People must prove that the defendant not only intended to kill a person, but also either intended to kill Uchenna Ojinna *and/or* Thomas Sablan *and/or* intended to kill everyone within the kill zone.

“In order to convict the defendant of the attempted murder of Edward Coral as charged in count 9 and Brandon Alaimalo as charged in count 10, the People must prove that the defendant not only intended to kill a person, but also either intended to kill Edward Coral *and/or* Brandon Alaimalo *and/or* intended to kill everyone within the kill zone.

“If you have a reasonable doubt whether the defendant intended to kill a person or intended to kill a person by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Meki Siafega, Esther Vaafuti and Kelly Kese; and/or Edward Coral and Brandon Alaimalo; and/or Uchenna Ojinna and Thomas Sablan.” (Italics added.)

Appellant challenges the instruction on the ground that the use of the disjunctive “or” (italicized above) permitted the jury to convict for attempted murder without finding appellant had the requisite intent to kill each victim. We agree, and find the error prejudicial beyond a reasonable doubt as to counts 2, 3, 6, and 7.⁸

A. *Instructional Error*

■ “Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.”

⁸ Respondent contends that appellant forfeited any claim of error with regard to the attempted murder instruction because he did not request that the court modify or amplify the instruction. The assertion lacks merit. Appellant argued the instruction was overly broad and would permit conviction for attempted murder on a theory of transferred intent, just as he argues on appeal. The trial court then gave the instruction over appellant’s objection. A clearer preservation of the issue for appeal would be difficult to imagine.

(*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 7 [58 Cal.Rptr.3d 421, 157 P.3d 1017].) Our Supreme Court has described the critical distinction between the mental states required for attempted murder and murder: “Attempted murder requires express malice, i.e., intent to kill. Implied malice—a conscious disregard for life—suffices for murder but not attempted murder.” (*People v. Stone* (2009) 46 Cal.4th 131, 139–140 [92 Cal.Rptr.3d 362, 205 P.3d 272] (*Stone*); see *People v. Bland* (2002) 28 Cal.4th 313, 327–328 [121 Cal.Rptr.2d 546, 48 P.3d 1107] (*Bland*); *People v. Cardona* (2016) 246 Cal.App.4th 608, 613 [201 Cal.Rptr.3d 189].)

■ Two distinct doctrines may come into play when a defendant attacks multiple victims, depending on whether the crimes charged are murder or attempted murder. Under the theory of transferred intent, “a person who intends to kill is guilty of the murder of everyone actually killed, whether or not the person intended to kill each one.” (*Stone, supra*, 46 Cal.4th at p. 136; see *Bland, supra*, 28 Cal.4th at pp. 323–324.) But because “[t]he crime of attempt sanctions what the person intended to do but did not accomplish, not unintended and unaccomplished potential consequences,” the shooter who fails to kill the unintended victim cannot be convicted of attempted murder under a theory of transferred intent. (*Bland, supra*, at p. 327; see *Stone, supra*, at p. 136.)

■ The defendant who targets a specific person by firing a flurry of bullets into a crowd may nevertheless be convicted of attempted murder if the evidence shows he intended to kill everyone in the victim’s vicinity in order to kill the intended victim. In such a scenario, the defendant is liable for attempted murder under a “kill zone” or “concurrent intent” theory rather than transferred intent. (See *Bland, supra*, 28 Cal.4th at pp. 329, 330–331; *People v. Cardona, supra*, 246 Cal.App.4th at pp. 613–614.) The Supreme Court has also held the kill zone theory to apply even if the defendant has no specific target in mind but shoots to kill everyone in a defined area, reasoning that “[a]n indiscriminate would-be killer is just as culpable as one who targets a specific person.” (*Stone, supra*, 46 Cal.4th at p. 140.) The kill zone theory is not a one-size-fits-all shortcut to establishing the requisite mental state for attempted murder, however. Indeed, the Supreme Court has emphasized that the theory is not a legal doctrine requiring special jury instructions at all, but rather, “is simply a reasonable inference the jury may draw in a given case.”⁹ (*Bland, supra*, 28 Cal.4th at p. 331, fn. 6; see *People v. McCloud, supra*, 211 Cal.App.4th at pp. 802–803.)

⁹ For this reason, “the Supreme Court has repeatedly explained that jury instructions on the kill zone theory are *never* required. (*Stone, supra*, 46 Cal.4th at pp. 137–138; [*People v. Smith* [(2005)] 37 Cal.4th [733.] 746 [37 Cal.Rptr.3d 163, 124 P.3d 730]; *Bland, supra*, 28 Cal.4th at p. 331, fn. 6]” (*People v. McCloud* (2012) 211 Cal.App.4th 788, 802–803 [149 Cal.Rptr.3d 902].)

■ A conviction for attempted murder under a kill zone theory requires evidence that the defendant created a kill zone; that is, while targeting a specific person he attempted to kill everyone in the victim's vicinity, or he indiscriminately sought to kill everyone in a particular area without having any primary target. (*People v. McCloud, supra*, 211 Cal.App.4th at p. 798.) In addition, before a defendant may be convicted of attempted murder under a kill zone theory, the evidence must establish that all the victims were actually in the kill zone.

■ The trial court in this case gave only one attempted murder instruction, which permitted the jury to convict on all seven attempted murder charges based on a kill zone theory of liability. But substantial evidence did not support conviction under the kill zone theory on counts 4, 6, or 7. Specifically, as to counts 6 and 7—the Fantasy Gold Club shooting—there was no evidence that appellant created a “kill zone,” much less that he intended to kill everyone who might have been in it. Thus, while the surveillance video showed the shooter firing into the building, there was no evidence from which the jury could reasonably infer that appellant specifically intended to kill every single person in the area, or any evidence that Sablan and Ojinna were both in the “kill zone” when they were shot. As to count 4, the charge of attempted murder of Kese in the Cherry Park shooting, while there was evidence that appellant and his cohort created a kill zone in the park, the evidence also established that Kese—who was sitting in her car some distance away—was clearly not in it. A court errs when it instructs on a theory which has no application to the facts of the case. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129 [17 Cal.Rptr.2d 365, 847 P.2d 45].) Because the record in this case lacks substantial evidence to support application of the kill zone theory to counts 4, 6, and 7, we conclude the trial court erred in so instructing the jury as to these charges.¹⁰

■ The instruction also misstated the law. Even if the jury rejected the kill zone inference, the court’s modification of the instruction with the disjunctive “or” permitted the jury to convict on all charges of attempted murder in each of the three shooting incidents without finding specific intent as to each victim individually. “ “[G]uilt of attempted murder must be judged separately as to each alleged victim.” ’ [Citation.] ‘[T]his is true whether the alleged victim was particularly targeted or randomly chosen.’ ” (*People v. Perez* (2010) 50 Cal.4th 222, 230 [112 Cal.Rptr.3d 310, 234 P.3d 557].) Accordingly, if the jury rejected the inference supplied by the kill zone theory, it would then have to find appellant specifically intended to kill each person individually in order to convict on all charges of attempted murder. But the instruction given here does not require a finding of specific intent as

¹⁰ Our conclusion in this regard pertains solely to the sufficiency of the evidence to support instruction on the kill zone theory in counts 4, 6, and 7.

to each victim. Instead, grouping the victims by the three separate shooting incidents, the instruction included the disjunctive “or” between the names of the individuals, thereby permitting the jury to convict on all charges of attempted murder in each shooting incident based on a finding of intent to kill only one of the victims in the incident. The trial court erred in giving the instruction as modified.

B. *Prejudice*

■ The question remains whether the errors require reversal on all counts of attempted murder. “Instructional error regarding the elements of the offense requires reversal of the judgment unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict.” (*People v. Chun* (2009) 45 Cal.4th 1172, 1201 [91 Cal.Rptr.3d 106, 203 P.3d 425]; see *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824].) On the other hand, to the extent the court erred in instructing on a theory unsupported by the evidence, the error is one of state law, “subject to the reasonable probability standard of harmless error under *People v. Watson* (1956) 46 Cal.2d 818, 836–837 [299 P.2d 243].” (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 214 [79 Cal.Rptr.3d 125, 186 P.3d 496]; see *People v. Debose* (2014) 59 Cal.4th 177, 205–206 [172 Cal.Rptr.3d 606, 326 P.3d 213] [error of instructing on inapplicable theory subject to *Watson* review].)

As set forth above, the evidence did not support instruction on a kill zone theory as to the attempted murder of Kese in count 4. We therefore review the court’s erroneous inclusion of count 4 in the kill zone instruction under the *Watson* harmless error standard. Uncontroverted evidence that appellant or his cohort fired directly at Kese supports a finding of specific intent to kill her. Accordingly, because any reasonable jury would have convicted on the charge of attempted murder in count 4 without reliance on a kill zone theory, we conclude that the instructional error as to count 4 was harmless. (*People v. Watson, supra*, 46 Cal.2d at pp. 836–837.)

To the extent the instruction misstated the law regarding the intent element of the attempted murder charges, however, we must reverse unless we conclude beyond a reasonable doubt that the error did not contribute to the verdicts. (*People v. Chun, supra*, 45 Cal.4th at p. 1201.) And as to counts 2 and 3 arising from the Cherry Park shooting, and counts 6 and 7 based on the Fantasy Gold Club shooting, we cannot conclude that the use of the disjunctive in instructing on the requisite intent for attempted murder was harmless beyond a reasonable doubt.

The disjunctive wording of the instruction permitted conviction for the attempted murders of all three victims of the Cherry Park shootings with a

finding of specific intent to kill only one of those victims. Thus, if the jury disregarded the kill zone portion of the instruction, and found a specific intent to kill Kese, it could have convicted for the attempted murders of Siafega (count 2) and/or Vaafuti (count 3) without separate findings that appellant intended to kill each of them. Given this clear path to improper attempted murder convictions on counts 2 and 3 arising from the Cherry Park shootings, we cannot conclude that “the guilty verdict actually rendered in *this* trial was surely unattributable to the error.” (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [124 L.Ed.2d 182, 113 S.Ct. 2078].)

With regard to the Fantasy Gold Club shooting, as discussed above, there was scant evidence to support attempted murder convictions as to both victims under a kill zone theory. Thus, while the evidence did not support an inference of intent based on a kill zone, the disjunctive wording of the instruction nevertheless permitted conviction for attempted murder without a separate finding of intent as to each of the victims. Under these circumstances, we cannot find beyond a reasonable doubt that the erroneous instruction did not contribute to the attempted murder verdicts in counts 6 and 7.

The South Street shooting is a different matter. The evidence as to that shooting, which represents a classic kill zone scenario, was undisputed and overwhelming. Appellant confessed to his participation in this incident, wherein men in black hoodies stood in the middle of the street in front of the Alaimalo home and opened fire. Thirty-four shell casings were recovered, and two of the three victims were seriously injured. It could not be determined which of the victims, if any, was the primary target. Even though the instruction’s use of the disjunctive as to each of the victims was erroneous, we conclude the error was harmless beyond a reasonable doubt as to the South Street shooting because the jury could properly convict under the kill zone theory.

II. *Reference to the Natural and Probable Consequences Theory of Aiding and Abetting Liability*

Appellant contends the trial court’s inclusion of bracketed language from CALCRIM No. 400, referring to the natural and probable consequences doctrine, mandates reversal of his convictions because the instruction did not require the prosecution to prove that the nontarget offenses were reasonably foreseeable. We conclude that the court’s error in including this language was harmless.

The prosecution relied in part on the theory that appellant aided and abetted other individuals in the commission of the South Street and Cherry

Park shootings. Accordingly, the trial court instructed the jury on the general principles of criminal liability based on aiding and abetting, and included the optional bracketed material from the form instruction: “Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime.”¹¹ (CALCRIM No. 400.)

The bench notes to CALCRIM No. 400 state that the court should instruct with the bracketed language if the prosecution relies on a theory that any of the charged offenses were committed as a natural and probable consequence of a target offense. (See *People v. Chiu* (2014) 59 Cal.4th 155, 161 [172 Cal.Rptr.3d 438, 325 P.3d 972] [“ ‘A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime’ ”].)

■ The prosecution here did not rely on the natural and probable consequences doctrine, nor was there any evidence in this case that the perpetrator committed another crime that was a natural and probable consequence of the intended offense. The additional language thus amounted to “‘an ‘abstract’ instruction, i.e., ‘one which is correct in law but irrelevant.’ ’ [Citations.] Giving an instruction that is correct as to the law but irrelevant or inapplicable is error. [Citation.] Nonetheless, giving an irrelevant or inapplicable instruction is generally ‘only a technical error which does not constitute ground for reversal.’ ” (*People v. Cross* (2008) 45 Cal.4th 58, 67 [82 Cal.Rptr.3d 373, 190 P.3d 706].) Such error does not implicate the defendant’s constitutional rights and is subject to harmless error review under *People v. Watson*, *supra*, 46 Cal.2d at page 837.

Appellant fails to demonstrate any possible prejudice that could have resulted from the court’s error. He neglects to specify any nontarget offense that the perpetrator actually committed for which appellant was found guilty as an aider and abettor. Nor does he identify any specific circumstances under which the jury might have convicted appellant for aiding and abetting “other crimes that occurred during the commission of the first crime.” Instead, he asserts reversal is required “because the prosecutor failed to establish either that appellant was the actual shooter or that appellant intended to kill each and every one of the named victims.” He also cites the jury’s request for the definition of “proximate cause” in count 1 as evidence “that at least some

¹¹ The court also instructed the jury with CALCRIM No. 401 (Aiding and Abetting: Intended Crimes), but did not give CALCRIM No. 402 (Natural and Probable Consequences Doctrine (Target and Non-Target Offenses Charged)) or CALCRIM No. 403 (Natural and Probable Consequences (Only Non-Target Offense Charged)), as recommended when instructing on the natural and probable consequences doctrine.

jurors were struggling with the fact that the prosecutor failed to prove that appellant . . . fired the fatal shot." And he claims that the instructional error permitted the jury to convict solely on the basis of "a finding that appellant aided and abetted someone else in the commission of a gang offense."

None of these contentions persuades us that the error allowed the jury to convict appellant under the natural and probable consequences theory of aiding and abetting or any incorrect legal theory.¹² We therefore conclude, as did Justice Mosk in his concurring opinion in *People v. Prettyman*, that "[t]he instruction on the [natural-and-probable-consequence] rule must have been understood, and dismissed, by the jury as mere surplusage. [Citation.] It cannot be held to have resulted in a 'miscarriage of justice.' (Cal. Const., art. VI, § 13.) It was too insignificant to have affected the outcome within a 'reasonable probabilit[y],' as required by *People v. Watson*[, *supra*.] 46 Cal.2d 818, 837." (*People v. Prettyman* (1996) 14 Cal.4th 248, 280 [58 Cal.Rptr.2d 827, 926 P.2d 1013] (conc. opn. of Mosk, J.).)

III. Appellant's Statements to the Police

Appellant contends that promises of leniency rendered his statements to police involuntary, and the erroneous admission of those statements requires reversal. We disagree.

Appellant had several interviews with police, two of which were recorded. In unrecorded sessions, appellant spoke with Officers Calvert and Lyon from the Long Beach gang detail, and Detective Goodman from the Long Beach homicide unit. Subsequently, appellant spoke with Detective Goodman and Officer Calvert in a recorded interview in which he acknowledged he had been advised of his *Miranda*¹³ rights, understood them, and had signed a written waiver.¹⁴ In the recorded interview, appellant acknowledged that after he had signed the waiver, he had spoken with police about a shooting in his area and a homicide at Cherry Park. Appellant then gave the police his account of his whereabouts on the day of the Cherry Park shooting and how he had learned the details of that shooting. Appellant also described his participation in the South Street shooting, admitting he had fired some 30 rounds from his own AK-47 to help a fellow gang member settle a score with a rival Bloods gang. At the end of that interview, appellant confirmed that the

¹² Because we conclude that the jury did not convict under a natural and probable consequences theory, we also reject appellant's contention that his first degree murder conviction must be reversed and reduced to second degree under *People v. Chiu*, *supra*, 59 Cal.4th 155.

¹³ *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602] (*Miranda*).

¹⁴ According to Detective Goodman, the recorded interview was a repeat of the unrecorded conversation.

police had made no promises or threats to him, and that all the detectives and officers with whom he had spoken had been respectful toward him and had treated him fairly.

Officer Hayes from the Los Angeles Police Department Harbor Gang Division conducted the second recorded interview of appellant with Officer Calvert. Officer Hayes asked appellant a series of background questions, and then stated, “The reason you’re here is because you’ve been identified in a crime.” He added, “[Officer] Calvert said you were nothing but cooperative with him yesterday. From my experience, it’s in your best interest to be cooperative with us today here, okay?” After reading appellant his *Miranda* rights, Officer Hayes said, “Remember, I told you it’s in your best interest to be cooperative, all right?” Shortly thereafter, Officer Hayes told appellant, “You were identified in a shooting in Harbor City. Do you want to tell me anything that you may have been involved in?” Appellant replied that he saw “some stuff,” to which the officer responded, “I have a feeling you know what I’m talking about, and I’m just hoping that you’ll be honest with me, because it shows that you’re being cooperative with our investigation. And with everything you got going on, the judge is going to look at that and say, you know, that you’re being cooperative.” Officer Calvert added that they wanted appellant to be “honest about exactly what happened,” but they were not going to tell him what to say.

The officers questioned appellant about the Fantasy Gold Club shooting. Appellant gave them his account of the shooting and told the officers how he had obtained the gun. Officer Calvert replied, “You sure? You remember the whole honesty thing? I mean, if that’s the God’s honest truth then it is, but if it’s not the God’s honest truth, don’t start doing that. You got to tell the truth, for real for real.” Near the end of the interview, Officer Hayes told appellant, “I appreciate your honesty,” and, “You’ve been honest with [Officer Calvert]. And I’d just like to say thank you for being honest.”

Ruling on the motion to exclude the interviews, the court found that the officers thoroughly advised appellant of his rights and noted that appellant had confirmed he had been treated fairly and had received no promises of leniency. The court denied the motion to suppress appellant’s statements to police, concluding they had been voluntarily made.

■ “An involuntary confession may not be introduced into evidence at trial. (*Lego v. Twomey* (1972) 404 U.S. 477, 483 [30 L.Ed.2d 618, 92 S.Ct. 619].) The prosecution has the burden of establishing by a preponderance of the evidence that a defendant’s confession was voluntarily made. (*Id.* at p. 489; *People v. Williams* (1997) 16 Cal.4th 635, 659 [66 Cal.Rptr.2d 573, 941 P.2d 752].) In determining whether a confession was voluntary, ‘ “[t]he

question is whether defendant's choice to confess was not 'essentially free' because his [or her] will was overborne." '(*People v. Massie* (1998) 19 Cal.4th 550, 576 [79 Cal.Rptr.2d 816, 967 P.2d 29].) Whether the confession was voluntary depends upon the totality of the circumstances. (*Withrow v. Williams* (1993) 507 U.S. 680, 693–694 [123 L.Ed.2d 407, 113 S.Ct. 1745]; *People v. Massie*, *supra*, 19 Cal.4th at p. 576.)" (*People v. Carrington* (2009) 47 Cal.4th 145, 169 [97 Cal.Rptr.3d 117, 211 P.3d 617].) We review the trial court's finding of voluntariness independently, while accepting the trial court's findings with respect to the circumstances surrounding the confession if supported by substantial evidence. (*Ibid.*)

■ "It is well settled that a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied." [Citation.] 'In terms of assessing inducements assertedly offered to a suspect, "'[w]hen the benefit pointed out by the police . . . is merely that which flows naturally from a truthful and honest course of conduct,' the subsequent statement will not be considered involuntarily made.'" '(*People v. Tully* (2012) 54 Cal.4th 952, 993 [145 Cal.Rptr.3d 146, 282 P.3d 173]; see also *People v. Hill* (1967) 66 Cal.2d 536, 549–550 [58 Cal.Rptr. 340, 426 P.2d 908] [no implicit promise of leniency in officer's urging accused to "help himself" by confessing].)

■ Courts have made clear that investigating officers may freely encourage honesty and lawfully discuss any "'naturally accrue[ing]' " benefit, advantage or other consequence of the suspect's truthful statement. (*People v. Ray* (1996) 13 Cal.4th 313, 340 [52 Cal.Rptr.2d 296, 914 P.2d 846]; see *People v. Williams* (2010) 49 Cal.4th 405, 444 [111 Cal.Rptr.3d 589, 233 P.3d 1000] ["Absent improper threats or promises, law enforcement officers are permitted to urge that it would be better to tell the truth"]; *People v. Boyde* (1988) 46 Cal.3d 212, 238 [250 Cal.Rptr. 83, 758 P.2d 25] ["Mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or a promise, does not . . . make a subsequent confession involuntary"].)

■ In *People v. Vance* (2010) 188 Cal.App.4th 1182 [116 Cal.Rptr.3d 98], officers told the defendant, "'[w]e are here to listen and then to help you out'" and "'the court . . . wants to know what the real story is and you're the only one that can provide that.'" (*Id.* at p. 1212.) The court found the only benefit promised was the peace of mind from doing the right thing and characterized the officers' statements as "brief and bland references" which do not rise to the level of coercion or promises of leniency. (*Ibid.*) Similarly, courts have found no promises of leniency where police offer to tell the prosecutor about a defendant's cooperation, which will benefit him in the judicial process. (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1200 [18

Cal.Rptr.3d 167]; *People v. Higareda* (1994) 24 Cal.App.4th 1399, 1409 [29 Cal.Rptr.2d 763]; see also *U.S. v. Coleman* (9th Cir. 2000) 208 F.3d 786, 791 [agents' statement to induce defendant's cooperation, that if he knew anything he should tell them and they would ask "the prosecutor to give [him] little or no time," was insufficient to establish involuntariness of confession].)

We find no implicit threats or promises of leniency in the officers' exhortations for honesty and cooperation from appellant in this case. Nor do we view the statement that the judge would consider appellant's cooperation with the investigation as any promise of leniency. In short, such "brief and bland references upon which [appellant] has seized do not push this case over the forbidden line of promised threats or vowed leniency," which would render appellant's confessions to police involuntary. (*People v. Vance, supra*, 188 Cal.App.4th at p. 1212.)

DISPOSITION

The judgment on counts 2, 3, 6, and 7 is reversed and the matter is remanded to the trial court for retrial. The order imposing a restitution fine and a parole revocation fine as to each count of conviction is reversed. In all other respects, the judgment is affirmed.

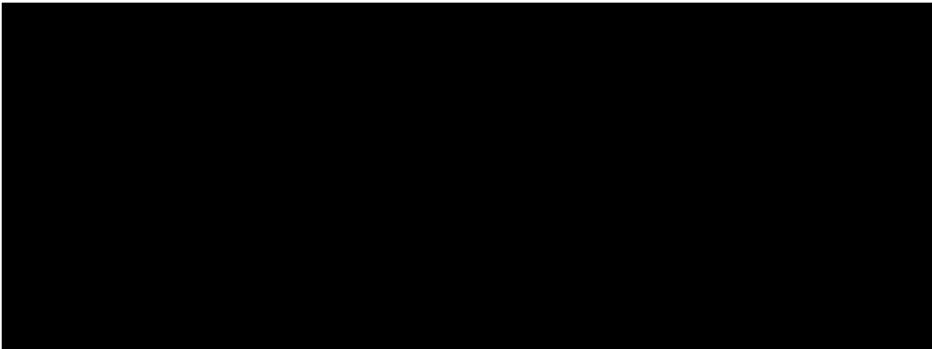
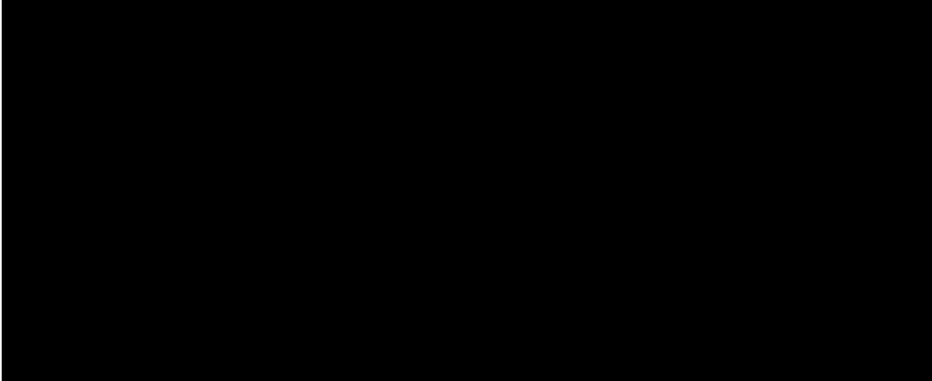
Rothschild, P. J., and Chaney, J., concurred.

Appellant's petition for review by the Supreme Court was denied October 26, 2016, S237084.

[No. B262509. Second Dist., Div. One. July 29, 2016.]

MOSHE YHUDAI, Plaintiff and Appellant, v.
IMPAC FUNDING CORPORATION et al., Defendants and Respondents.

[REDACTED]



ANSWER The answer is 1000. The first two digits of the number are 10, so the answer is 1000.

Page 1

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For more information about the study, please contact Dr. John D. Cacioppo at (773) 704-7895 or via e-mail at cacioppo@uic.edu.

As a result, the first step in the process of creating a new model is to identify the variables that are likely to influence the outcome. This can be done through a variety of methods, such as reviewing existing literature, consulting with experts in the field, or conducting surveys and interviews with potential users. Once the variables have been identified, they can be used to develop a conceptual model that describes the relationships between them. This model can then be refined through iterative testing and validation, until it accurately represents the real-world system being modeled.

COUNSEL

Richard L. Antognini for Plaintiff and Appellant.

Reed Smith, Michael Gerst, Kasey J. Curtis and Elena Gekker for Defendants and Respondents.

OPINION

ROTHSCHILD, P. J.—Appellant Moshe Yhudai sued his lender and other parties alleging causes of action arising from the nonjudicial foreclosure sale of his residence. The trial court sustained the respondents’ demurrer to Yhudai’s second amended complaint without leave to amend and entered a judgment dismissing the case with prejudice.¹ Yhudai appealed. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

Yhudai owned a residence in Los Angeles. In February 2007 he borrowed \$1,802,500 from Impac Funding, and secured the loan with a deed of trust against the residence. Impac Funding is named as the “lender” and MERS as the “beneficiary.” The deed of trust provides that (1) MERS “is acting solely as a nominee for Lender and Lender’s successors and assigns” and (2) Yhudai’s promissory note, together with the deed of trust, “can be sold one or more times without prior notice to [Yhudai].”

On March 29, 2007, Impac Funding sold Yhudai’s promissory note and other promissory notes to a certain securitized investment trust (the ISA Trust). Deutsche Bank is the trustee of the ISA Trust, which was formed under New York law pursuant to a pooling and service agreement (PSA).² Under the PSA, in order for a loan to be included in the ISA Trust, it must be transferred into the trust by the closing date of March 29, 2007.

More than two years after the ISA Trust’s closing date, MERS, as nominee for Impac Funding, recorded an “Assignment of Deed of Trust,” purporting to assign to Deutsche Bank, as trustee of the ISA Trust, “[a]ll beneficial interest” under the deed of trust “together with the Promissory Note secured by said Deed of Trust” (the 2009 assignment). The 2009 assignment is dated August 31, 2009, was signed on October 15, 2009, and was recorded in Los Angeles County on October 22, 2009.

¹ Respondents are IMPAC Funding Corporation (Impac Funding), Mortgage Electronic Registration Systems, Inc. (MERS), Deutsche Bank National Trust Company (Deutsche Bank), as Trustee Under the PSA Relating to IMPAC Secured Assets Corp., Mortgage Pass-Through Certificates, Series 2007-02, and Bank of America, N.A.

² A securitized investment trust is created by pooling the loans into a trust and selling to investors the right to receive the mortgage interest and principal payments. (*Yanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 930, fn. 5 [199 Cal.Rptr.3d 66, 365 P.3d 845] (*Yanova*).) Terms of the trust and the rights and obligations of the parties are set forth in a pooling and service agreement. (*Ibid.*)

On February 22, 2012, Deutsche Bank, as trustee for the ISA Trust, recorded a substitution of trustee naming ReconTrust Company, N.A. (ReconTrust), the trustee under the deed of trust. The same day, ReconTrust recorded a notice of default and election to sell the property pursuant to the deed of trust. About three months later, ReconTrust recorded a notice of trustee's sale. On June 15, 2012, ReconTrust conducted a trustee's sale and sold the property to Deutsche Bank, as trustee for the ISA Trust.

In his second amended complaint, Yhudai alleged that the 2009 assignment is void because it occurred after the ISA Trust's closing date, and that Deutsche Bank's and ReconTrust's actions, including the trustee's sale, are void because they are derived from the void 2009 assignment.³ He asserted causes of action for (1) negligent misrepresentation; (2) slander of title; (3) fraud; (4) quiet title; (5) declaratory and injunctive relief; and (6) violation of Business and Professions Code section 17200. Yhudai sought damages and equitable relief, including orders nullifying and rescinding the foreclosure sale, cancellation of the notice of default and notice of trustee's sale, and a judgment quieting his title to the property. The trial court sustained the respondents' demurrer to the entire pleading without leave to amend, and thereafter entered a judgment of dismissal. Yhudai appealed.

DISCUSSION

I. Standard of Review

On appeal from a judgment after the court sustains a general demurrer without leave to amend, "we determine whether the complaint states facts sufficient to constitute a cause of action." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].) "'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]'" (*Ibid.*) When the demurrer is sustained without leave to amend, we reverse if "there is a reasonable possibility that the defect can be cured by amendment." (*Ibid.*)

³ Yhudai also alleged that the person who signed the 2009 assignment on behalf of MERS was actually an employee of Bank of America, and that the February 2012 substitution of trustee was forged or "robo-sign[ed]," and therefore invalid. He further alleged that respondents violated the terms of an agreement, or "Consent Judgment," entered into with the United States requiring respondents to offer and facilitate loan modifications to avoid foreclosure, and that respondents failed to comply with that agreement. On appeal, however, Yhudai makes no argument concerning these allegations and represents that his claims depend upon his allegation that the 2009 assignment is void. Based on that representation and the absence of relevant arguments, we do not consider these additional allegations.

II. *Yhudai's Contention That the 2009 Assignment Is Void.*

In Yhudai's opening brief on appeal, he acknowledged that the viability of his claims, as well as a proposed new cause of action for "wrongful foreclosure," "turns on his ability to challenge" the 2009 assignment. This challenge is based solely on the premise that the 2009 assignment is void because it occurred after the ISA Trust's closing date, as established in the PSA.

Our Supreme Court addressed a similar contention in *Yanova*, *supra*, 62 Cal.4th 919.⁴ In that case, the plaintiff secured a loan with a deed of trust against her property. As in the present case, the loan was sold to Deutsche Bank, as trustee for an investment trust. (*Id.* at pp. 925–926.) Under the terms of that trust, the closing date for the transfer of loans and trust deeds into the trust was January 27, 2007. (*Id.* at p. 925.) Almost five years after that date, in December 2011, the plaintiff’s lender executed an assignment of the deed of trust to Deutsche Bank, as trustee of the investment trust. Deutsche Bank then caused the plaintiff’s property to be sold at a foreclosure sale. (*Id.* at pp. 924–925.)

■ The plaintiff in *Yvanova* alleged that the assignment of her deed of trust into the investment trust was void because it occurred after the investment trust's closing date. (*Yvanova, supra*, 62 Cal.4th at p. 925.) The trial court sustained a demurrer to the complaint, and this court affirmed. The Supreme Court reversed, and held that the plaintiff could state a cause of action for wrongful foreclosure if the assignment of the deed of trust "was void, and not merely voidable at the behest of the parties to the assignment." (*Id.* at p. 923.) The court explained that "only the entity holding the beneficial interest under the deed of trust—the original lender, its assignee, or an agent of one of these—may instruct the trustee to commence and complete a nonjudicial foreclosure. [Citations.] If a purported assignment necessary to the chain by which the foreclosing entity claims that power is absolutely void, meaning of no legal force or effect whatsoever [citations], the foreclosing entity has acted without legal authority by pursuing a trustee's sale, and such an unauthorized sale constitutes a wrongful foreclosure." (*Id.* at p. 935; see *Sciarratta v. U.S. Bank National Assn.* (2016) 247 Cal.App.4th 552, 564 [201 Cal.Rptr.3d 218].)

An assignment that is merely *voidable*, by contrast, does not support a wrongful foreclosure action. “California law,” the *Yanova* court explained, “does not give a party personal standing to assert rights or interests belonging

⁴ *Iyanova* was decided after the respondents filed their initial brief on appeal. Yhudai discusses and relies on *Iyanova* in his reply brief. We gave respondents the opportunity to address the effect of *Iyanova* on this case and they filed a supplemental brief in response.

solely to others. [Citations.] When an assignment is merely voidable, the power to ratify or avoid the transaction lies solely with the parties to the assignment; the transaction is not void unless and until one of the parties takes steps to make it so. A borrower who challenges a foreclosure on the ground that an assignment to the foreclosing party bore defects rendering it voidable could thus be said to assert an interest belonging solely to the parties to the assignment rather than to herself.” (*Yanova, supra*, 62 Cal.4th at p. 936; see also *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1094–1095 [160 Cal.Rptr.3d 449] (*Glaski*).) Yhudai is such a borrower.

Significantly, *Yanova* did not consider or decide whether the assignment of plaintiff’s deed of trust to the investment trust after the trust’s closing date rendered the assignment void, and not merely voidable; that question was a matter to be determined after remand. (*Yanova, supra*, 62 Cal.4th at pp. 936, 942.)

■ In his second amended complaint, Yhudai alleged that the 2009 assignment is void under New York law (which he alleged governs the ISA Trust) because it occurred after the closing date specified in the PSA. He asserts that, under *Yanova*, this allegation is enough to survive the demurrer. We disagree. Although we must accept the truth of Yhudai’s *factual* allegations when reviewing the ruling on a demurrer, we are not required to accept the truth of his legal conclusions. (See *Yanova, supra*, 62 Cal.4th at p. 925; *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 [119 Cal.Rptr.2d 709, 45 P.3d 1171].)

In opposition to the demurrer, Yhudai relied on *Glaski, supra*, 218 Cal.App.4th 1079, to support his assertion that the 2009 assignment is void. In *Glaski*, the plaintiff’s loan was pooled with other loans and transferred to an investment trust formed under New York law. (*Id.* at pp. 1083–1084.) Like Yhudai, the plaintiff alleged that a purported assignment of his note and deed of trust to the investment trust was ineffective because the assignment was made after the trust’s closing date. (*Id.* at p. 1084.) To determine whether there was “a legal basis for concluding that the trustee’s attempt to accept a loan after the closing date would be void as an act in contravention of the trust document” (*id.* at p. 1096), the Court of Appeal looked to a New York statute, which provides: “‘If the trust is expressed in an instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust . . . is void.’” (*Ibid.*, quoting N.Y. Estate Powers & Trusts Law, § 7-2.4.) In applying this statute, the court relied on a then-recent decision by a New York trial court, *Wells Fargo Bank, N.A. v. Erobobo* (N.Y.Sup.Ct., Apr. 29, 2013, No. 31648/2009) 2013 WL 1831799 (*Erobobo I*), which involved a mortgage that had been transferred to an investment trust after the trust closing date. The *Erobobo I* court stated that “‘the acceptance

of the note and mortgage by the trustee after the date the trust closed, would be void.’ [Citations.]’ (*Glaski, supra*, at p. 1097, quoting *Erobobo I, supra*, 2013 WL 1831799 at p. *8.)

Based on *Erobobo I* and a bankruptcy court decision that followed *Erobobo I* (*In re Saldivar* (Bankr. S.D.Tex., June 5, 2013, No. 11-10689) 2013 WL 2452699 (*Saldivar*)), *Glaski* concluded that the plaintiff’s “factual allegations regarding [the] postclosing date attempts to transfer his deed of trust into the [investment trust] are sufficient to state a basis for concluding the attempted transfers were void.” (*Glaski, supra*, 218 Cal.App.4th at p. 1097.)

After *Glaski* was decided, a New York intermediate appellate court reversed *Erobobo I*. (*Wells Fargo Bank, N.A. v. Erobobo* (N.Y.App.Div. 2015) 127 A.D.3d 1176, 1178 [9 N.Y.S.3d 312] (*Erobobo II*)). In rejecting the trial court’s view of New York law, the higher court explained that the borrower in that case, “as a mortgagor whose loan is owned by a trust, does not have standing to challenge the [mortgage assignee’s] possession or status as assignee of the note and mortgage based on purported noncompliance with certain provisions of the [trust’s PSA].” (*Ibid.*) The trustee of the investment trust in that case was thus entitled to summary judgment on its action to foreclose the mortgage. (*Ibid.*)

Subsequent cases have consistently rejected *Erobobo I*. (See, e.g., *In re Jepson* (7th Cir. 2016) 816 F.3d 942, 947 (“New York courts consistently have held that an assignment that fails to comply with the terms of a trust agreement merely is voidable and *not void*”); *Cocroft v. HSBC Bank USA, N.A.* (7th Cir. 2015) 796 F.3d 680, 690 (*Cocroft*) [rejecting borrower’s reliance on *Erobobo I* in light of reversal in *Erobobo II*]; *Ferguson v. Bank of New York Mellon Corp.* (5th Cir. 2015) 802 F.3d 777, 782–783 [based on *Erobobo II*, court construed New York law such that violation of a PSA would render challenged assignment of deed of trust “at most voidable but not void”]; *Rajamin v. Deutsche Bank National Trust Co.* (2d Cir. 2014) 757 F.3d 79, 90 (*Rajamin*) [under New York law, unauthorized acts of trustee of investment trust were “not void but voidable”]; *Butler v. Deutsche Bank Trust Co. Americas* (1st Cir. 2014) 748 F.3d 28, 37, fn. 8 [even before *Erobobo II*, “the vast majority of courts to consider the issue have rejected *Erobobo*[] [I’s] reasoning, determining that . . . the acts of a trustee in contravention of a trust may be ratified, and are thus voidable”].) *Saldivar*, the bankruptcy court case *Glaski* cited, has received similar negative treatment. (See *Berezovskaya v. Deutsche Bank Nat. Trust Co.* (E.D.N.Y., Aug. 1, 2014, No. 12 CV 6055(KAM)) 2014 WL 4471560, pp. *6–*7; *Koufos v. U.S. Bank, N.A.* (D.Mass. 2013) 939 F.Supp.2d 40, 57, fn. 2; *In re Stanworth* (Bankr. E.D.Va. 2016) 543 B.R. 760, 777.)

The rejection of *Erobobo I* is based on sound reasoning. Under New York law, unauthorized acts by trustees may generally be approved, or ratified, by the trust beneficiaries. (*Rajamin, supra*, 757 F.3d at p. 88; *Mooney v. Madden* (N.Y.App.Div. 1993) 193 A.D.2d 933, 934 [597 N.Y.S.2d 775].) Under *Erobobo I*, however, a stranger to the trust would have standing to assert that the unauthorized transaction is void, thereby giving “the stranger . . . the power to interfere with the beneficiaries’ right of ratification.” (*Rajamin, supra*, at p. 89.) The stranger’s right (under *Erobobo I*) to declare a transaction void would thus conflict directly with the beneficiaries’ right to ratify the transaction. This conflict is avoided by rejecting *Erobobo I*: Because a trust beneficiary under New York law “retains the authority to ratify a trustee’s *ultra vires* act, such as a late transfer[,] . . . the act . . . must not be void; it must merely be voidable.” (*Cocroft, supra*, 796 F.3d at p. 689.)

Because the decision upon which *Glaski* relied for its understanding of New York law has not only been reversed, but soundly and overwhelmingly rejected, we decline to follow *Glaski* on this point. (See *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 815, fn. 5 [199 Cal.Rptr.3d 790] (*Saterbak*) [rejecting *Glaski* because “the New York case upon which *Glaski* relied has been overturned”].)⁵ Yhudai offers no other authority for his contention. Based on the authorities cited above, a postclosing assignment of a loan to an investment trust that violates the terms of the trust renders the assignment voidable, not void, under New York law. (See also *Morgan v. Aurora Loan Services, LLC* (9th Cir., Mar. 28, 2016, No. 14-55203) 2016 WL 1179733, p. *2 [“an act in violation of a trust agreement is voidable—not void—under New York law”].)

The reversal of *Erobobo I* and the judicial response to it occurred after Yhudai filed his second amended complaint and his opposition to the demurrer. Yhudai now contends that New York law is “irrelevant” and “has no role in this case.” He points to a choice of law clause in the deed of trust, which provides that the deed of trust is “governed by federal law and the law of the jurisdiction where the property is located,” i.e., California.⁶ Even if this clause governed the question whether the assignment is void, Yhudai offered

⁵ Our Supreme Court’s decision in *Yanova* approved of *Glaski*’s holding that a plaintiff has standing to assert a cause of action for wrongful foreclosure when “a purported assignment necessary to the chain by which the foreclosing entity claims that power is absolutely void.” (*Yanova, supra*, 62 Cal.4th at p. 935.) The court stated, however, that *Glaski*’s further holding that the assignment of a deed of trust to an investment trust was void because it occurred after the investment trust’s closing date was “not before” the court, and it “express[ed] no opinion as to *Glaski*’s correctness on the point.” (*Id.* at pp. 931 & 941.)

⁶ California law does not support Yhudai’s claim. As *Yanova* stated, “[t]he deed of trust . . . is inseparable from the note it secures, and follows it even without a separate assignment.” (*Yanova, supra*, 62 Cal.4th at p. 927; see Civ. Code, § 2936 [“The assignment of a debt secured by mortgage carries with it the security”].) Thus, if the note was timely conveyed to the ISA Trust, as Yhudai alleged, so was the deed of trust. Although the conveyance of the

no citation to federal or California authority (other than *Glaski*) to support his assertion that the 2009 assignment is void because it was made after the ISA Trust's closing date. We therefore reject it. (See *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 [124 Cal.Rptr.3d 78] [arguments made without "reasoned argument and citations to authority" may be treated as waived].)

Yhudai also contends that he should not have to prove that the 2009 assignment is void; the respondents, he argues, should bear the burden of proving the validity of the 2009 assignment. He cites to cases in which a plaintiff purporting to be the assignee of a contract right had the burden of proving it actually held the contractual right it was suing to enforce. (See, e.g., *Cockerell v. Title Ins. & Trust Co.* (1954) 42 Cal.2d 284, 292 [267 P.2d 16]; *Neptune Society Corp. v. Longanecker* (1987) 194 Cal.App.3d 1233, 1242 [240 Cal.Rptr. 117].) Here, however, Deutsche Bank has sued no one. Yhudai, as the plaintiff challenging a nonjudicial foreclosure, has the burden to prove it was wrongful. (See *Saterbak, supra*, 245 Cal.App.4th at pp. 813–814; *Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1258 [26 Cal.Rptr.3d 413]; *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 270 [129 Cal.Rptr.3d 467], disapproved on another point in *Ivanova, supra*, 62 Cal.4th at p. 939, fn. 13.)

Yhudai further contends that language in the deed of trust confers upon him, as the borrower, the right to sue "to assert the non-existence of a default or any other defense . . . to acceleration and sale." Yhudai has not, however, asserted the nonexistence of a default, and his only purported "defense" to foreclosure is that the 2009 assignment is void. As explained above, we reject his legal conclusion that the assignment is void. Even if language in the deed of trust might have provided Yhudai with standing to assert a defense to prevent a foreclosure, it does not help him here. (See *Saterbak, supra*, 245 Cal.App.4th at pp. 816–817.)

Yhudai also argues that the deed of trust is an adhesion contract that "does not use conspicuous and clear language to warn [him] that he has no power to challenge an invalid assignment of [his] loan." The problem with Yhudai's claims, however, is not that the deed of trust precludes him from alleging an invalid assignment, but that he has not sufficiently alleged an invalid assignment.

note may have been separated in time from the execution, recording, and physical transfer of the instrument reflecting the assignment of the deed of trust, that gap does not alter the legal fact that the deed of trust and the right to foreclose was, as a matter of law, transferred along with the note. (See *U.S. v. Thornburg* (9th Cir. 1996) 82 F.3d 886, 892 [even if party holding the deed of trust instrument fails "to hand [it] over" to the note holder, the note holder has the right to foreclose].) Under California law, therefore, there is no basis for Yhudai's allegation that the deed of trust was assigned to Deutsche Bank after Deutsche Bank acquired the note.

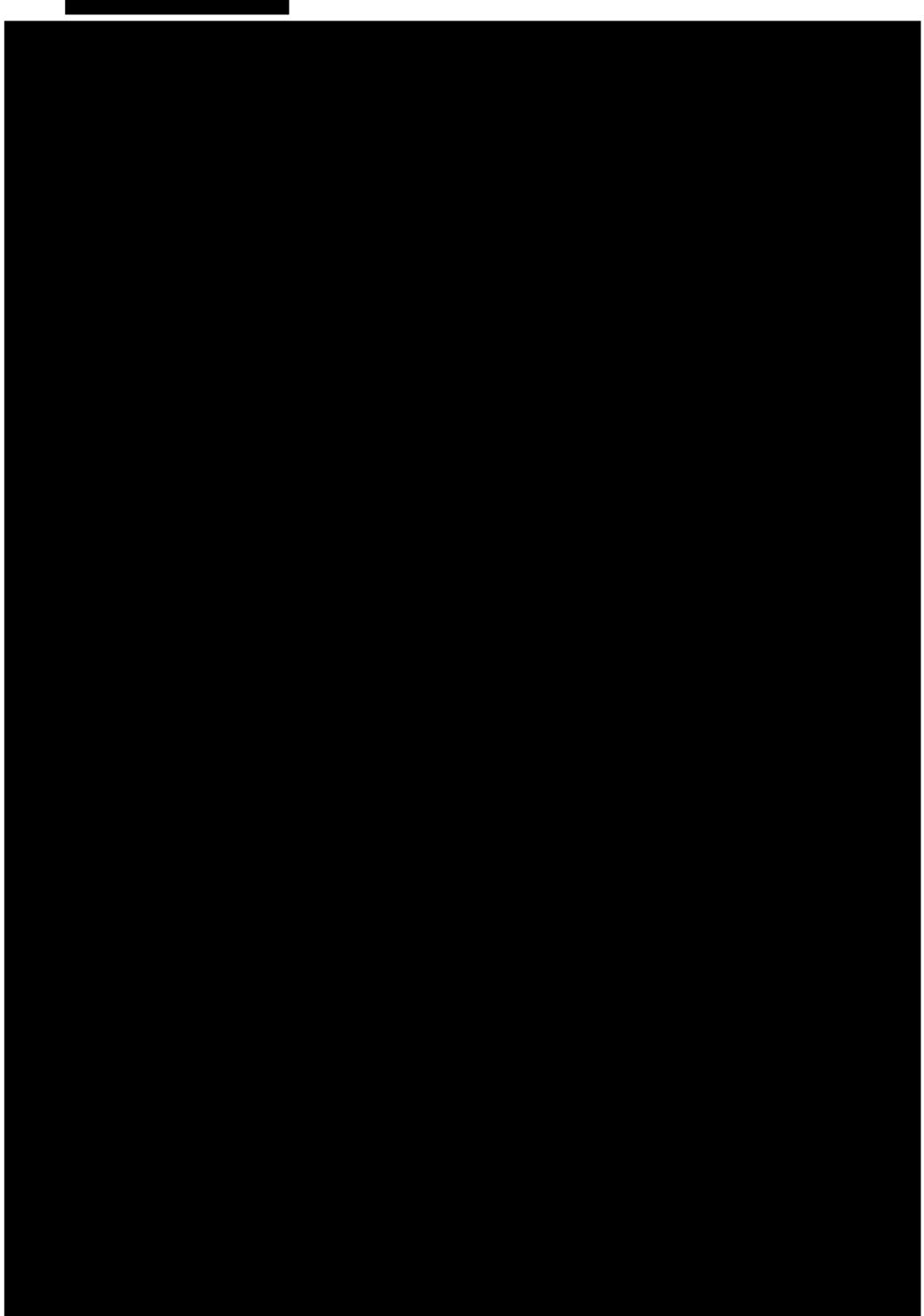
Finally, Yhudai contends that he should be permitted to amend to add a cause of action for wrongful foreclosure. This proposed cause of action, however, is similarly dependent upon the allegation that the 2009 assignment is void because it was made after the ISA Trust's March 2007 closing date. Because he has not alleged sufficient facts to establish that critical allegation, the proposed new cause of action would also fail as a matter of law.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

Chaney, J., and Lui, J., concurred.

Appellant's petition for review by the Supreme Court was denied October 26, 2016, S237080.



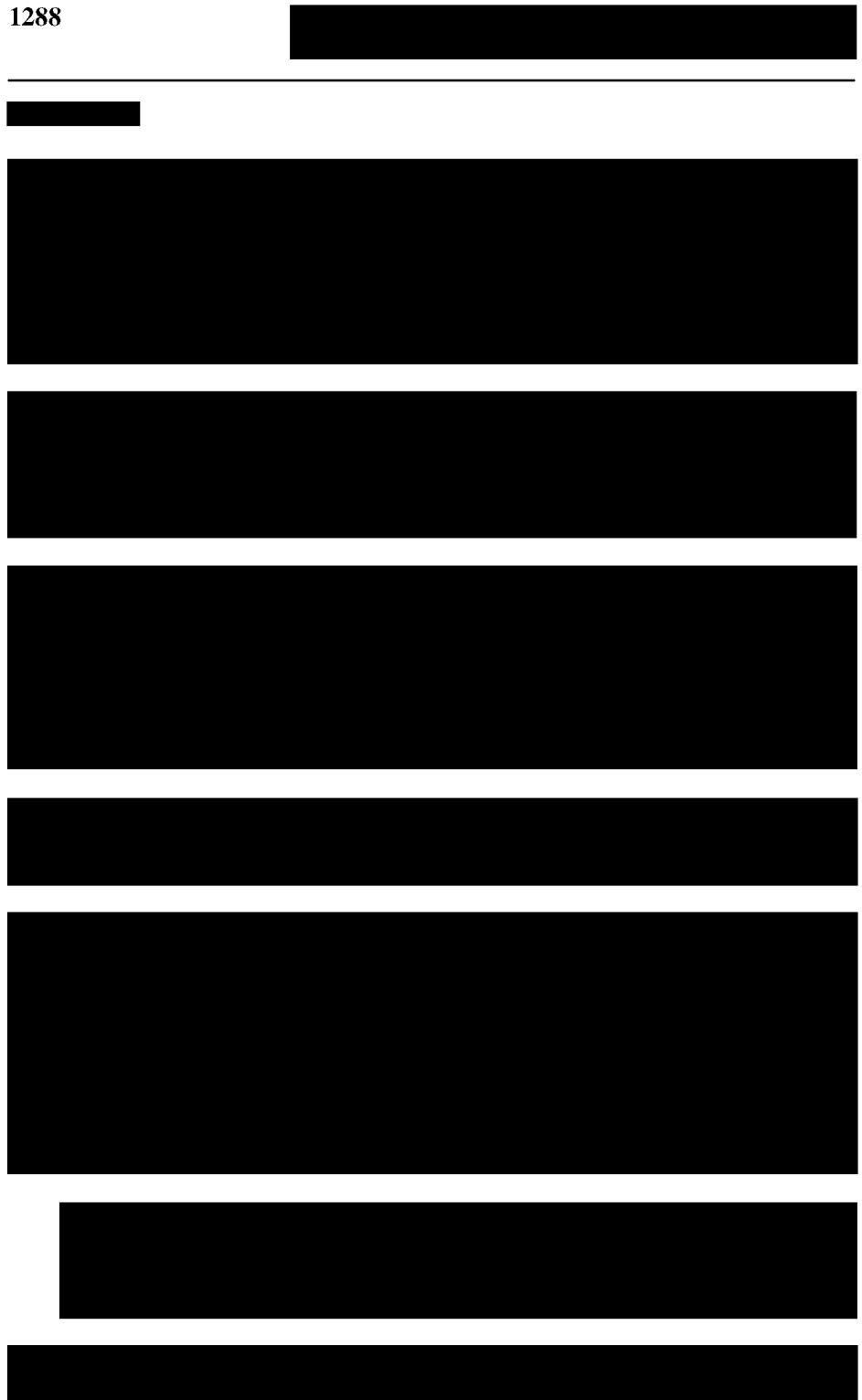
[No. B260643. Second Dist., Div. Six. Aug. 1, 2016.]

JOHN J. SCHMIDT, Plaintiff and Respondent, v.
DEPARTMENT OF THE CALIFORNIA HIGHWAY PATROL, Defendant
and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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COUNSEL

Kamala D. Harris, Attorney General, Chris A. Knudsen, Assistant Attorney General, Kenneth C. Jones and Nancy G. James, Deputy Attorneys General, for Defendant and Appellant.

Law Office of Robin L. Unander, Robin L. Unander; Law Offices of William C. Makler and William C. Makler for Plaintiff and Respondent.

OPINION

GILBERT, P. J.—Penal Code section 849.5 provides that if a person is arrested and released and no accusatory pleading is filed, the arrest shall be deemed a detention *only*.¹ Section 851.6, subdivision (b) provides that the arresting law enforcement agency shall issue the person a certificate describing the action as a detention. Subdivision (d) of section 851.6 provides that the official criminal records shall delete any reference to an arrest and refer to the action as a detention. The Department of the California Highway Patrol (CHP) does not comply with sections 849.5 and 851.6.

John J. Schmidt brought a class action against the CHP for a writ of mandate to compel the CHP to comply. The trial court certified the class and granted Schmidt's writ petition. The court also awarded Schmidt attorney fees pursuant to Code of Civil Procedure section 1021.5, the private attorney general statute. We affirm.

FACTS

On May 1, 2011, Schmidt was arrested by the CHP for driving under the influence. He was booked into the Santa Barbara County jail and released later that day on his own recognizance. Schmidt signed a notice to appear in court.

The CHP sent Schmidt's arrest report to the Santa Barbara County District Attorney's Office. The district attorney reviewed the referral and decided not to file charges "at this time."

The CHP did not provide Schmidt with a certificate describing his arrest as a detention. (§ 851.6, subd. (b).) Nor did the CHP report the arrest as a detention to the Department of Justice.

¹ All statutory references are to the Penal Code unless otherwise stated.

CLASS ACTION

Schmidt brought this action against the CHP on behalf of himself and all persons similarly situated. The action sought a writ of mandate to compel the CHP to comply with sections 849.5 and 851.6, subdivision (b).

Over the CHP's objection, the trial court certified the class as follows: "Any and all individuals who were arrested by the California Highway Patrol in Santa Barbara County and taken into custody and booked between June 1, 2009 and the present, who were released from custody, who did not have an accusatory pleading related to the arrest filed against them in the Santa Barbara County Superior Court, who did not receive a certificate of detention from the California Highway Patrol, and who did not receive a disposition noting the action was a detention only on their criminal records maintained by the California Highway Patrol and the California Department of Justice."

The CHP moved for summary judgment. The trial court denied the motion and the matter proceeded to a court trial.

Schmidt testified that he was arrested for a driving under the influence offense. Schmidt was taken to jail and released the next day. He was not prosecuted; he was not given notice that his arrest would be considered a detention; and his criminal history was not updated.

Santa Barbara Senior Deputy District Attorney Lee Carter testified that he is the filing deputy for his office. He determines whether a case should be filed. He said that neither he nor anyone acting on behalf of his office had filed an "accusatory pleading" against Schmidt.

Susan Segura testified that she has been the records supervisor for the Santa Barbara Police Department for 16 years. She testified to her office's procedure when the police department refers a case to the district attorney and the district attorney's office sends notice to the police department that the case has been rejected.

"[Segura:] We apply our local procedure which is to update our files to indicate that the arrest is now considered a detention. It's no longer considered an arrest. So we do update our files to reflect that information. We also prepare the detention certificate to send to the person that was arrested.

"[Schmidt's counsel:] How do you—describe, please, how you reflect the event as a detention?

“[Segura:] In our local records management system, we have a module for arrest. We update the module for arrest with the status of detention only. We also stamp any paper arrest with the detention stamp.”

Segura testified that this policy is consistent with the industry standard.

The trial court found Segura’s testimony persuasive and stated that Schmidt should have been issued a certificate of detention by the CHP.

The trial court determined that the term “released” in sections 849.5 and 851.6 means released from custody, which may include a notice to appear in court. The term “accusatory pleading” may include a notice to appear, but only when filed with the court. The term “filed” means filed with the court, not the prosecuting agency.

WRIT OF MANDATE

The trial court issued a writ of mandate as follows:

“To Respondent California Highway Patrol (‘CHP’)

“YOU ARE HEREBY COMMANDED TO:

“1. Issue certificates of detention to class members.

“2. Delete any references to the action as an arrest from each class member’s arrest records of the CHP and make written notice of each class member’s case disposition to the Bureau of Criminal Identification and Investigation records of the Department of Justice.

“3. Include a record of release for each class member immediately upon receipt of this Peremptory Writ and have the commands set forth herein completed on or before October 9, 2014, with verification of compliance presented to this Court at a case management conference set for October 29, 2014, at 8:30 a.m.

“4. CHP shall conduct a diligent search in all databases that they have access to for each and every class member, including individuals who fall within the definition of the class but were arrested by CHP after June 1, 2012, to determine their current address and mail them each a certificate of detention.

“5. CHP must comply and apply the aforementioned commands to future eligible arrestees who are arrested by CHP, released from custody, and who do not have an accusatory pleading filed against them in a court of law.”

The trial court awarded Schmidt attorney fees pursuant to Code of Civil Procedure section 1021.5 in the amount of \$296,100.

DISCUSSION

I

The CHP contends the trial court misinterpreted sections 849.5 and 851.6, subdivision (b).

Section 849.5 provides: “In any case in which a person is arrested and released and no accusatory pleading is filed charging him with an offense, any record of arrest of the person shall include a record of release. Thereafter, the arrest shall not be deemed an arrest, but a detention only.”

Section 851.6, subdivision (b) provides: “In any case in which a person is arrested and released and no accusatory pleading is filed charging him with an offense, the person shall be issued a certificate by the law enforcement agency which arrested him describing the action as a detention.”

If the sections apply, section 851.6, subdivision (d) provides: “Any reference to the action as an arrest shall be deleted from the arrest records of the arresting agency and of the Bureau of Criminal Identification and Investigation of the Department of Justice. Thereafter, any such record of the action shall refer to it as a detention.”

The CHP admits that “at first blush,” the terms “released,” “accusatory pleadings” and “filed” “might appear unambiguous.” With the deletion of the words “at first blush” and “might,” we agree. We part company with the CHP when it advances the fanciful argument that the terms are not clear because of changes in criminal procedure over the last 40 years.

The CHP asserts that (1) the word “released” as used in the statutes means released without any obligation to appear in court, (2) the term “accusatory pleading” includes a notice to appear, and (3) the term “filed” includes filed with the district attorney.

Thus, the CHP argues that sections 849.5 and 851.6, subdivision (b) do not apply where, as here, a person is released pursuant to a promise to appear, on his or her own recognizance, or on bail, and an accusatory pleading is filed with the district attorney. This argument assumes that the sections apply when a law enforcement agency determines that a person should be released with no charges filed. The statutes do not give law enforcement the powers of a prosecuting attorney.

■ We give the words of a statute their plain, commonsense meaning. (*California School Employees Assn., Tustin Chapter No. 450 v. Tustin Unified School Dist.* (2007) 148 Cal.App.4th 510, 517 [55 Cal.Rptr.3d 739].) If the language of the statute is clear and unambiguous, there is no need for construction. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 [268 Cal.Rptr. 753, 789 P.2d 934].) Only if the statutory language leaves doubt about its meaning may we consult other sources of the Legislature's intent, such as the history and background of the measure. (*California School Employees Assn.*, at p. 517.)

■ The language of the statutes is clear and unambiguous. Applying the plain, commonsense meaning, a person is "released" when free to leave police custody, whether the person is released on a notice to appear, own recognizance or bail. (See, e.g., § 853.6, subd. (a)(4) ["Nothing in this subdivision shall be construed to affect a defendant's ability to be *released* on bail or on his or her own recognizance" (italics added)]; *id.*, subd. (d) ["Upon the signing of the duplicate notice [to appear], the arresting officer shall immediately *release* the person arrested from custody" (italics added]).)

■ A notice to appear may be an "accusatory pleading" when it is filed with the court. (*Heldt v. Municipal Court* (1985) 163 Cal.App.3d 532, 539 [209 Cal.Rptr. 579].) But the CHP cites no authority holding that a notice to appear may constitute an accusatory pleading without being filed with the court. The ordinary meaning of a pleading is that it is a document filed with the court. (See Code Civ. Proc., § 420 ["The pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the court"].)

■ The CHP's reliance on *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728 [69 Cal.Rptr.3d 365] is misplaced. There the question was whether the statute of limitations regarding plaintiff's civil action was tolled under Government Code section 945.3. That section prevents a person who is charged in an accusatory pleading with a criminal offense from bringing a civil action while the charges are pending. The court determined that a notice to appear constitutes an accusatory pleading within the meaning of section 945.3. (*Schmidlin*, at pp. 749–753.) Whether a notice to appear must be filed with the court to constitute a pleading was not an issue in the case. A case is not authority for matters not considered. (*Contra Costa Water Dist. v. Bar-C Properties* (1992) 5 Cal.App.4th 652, 660 [7 Cal.Rptr.2d 91].)

The CHP argues that designating Schmidt's arrest as a detention conflicts with statutory reporting criteria. Section 11115 requires an arresting agency to file a disposition report with the Department of Justice whenever an arrested person is released without having a complaint or accusation filed with the

court. Where the disposition is “[d]etention only” and the person is issued a certificate pursuant to section 851.6, section 11115, subdivision (b) states, “[T]he report shall state the specific reason for such release, indicating that there was no ground for making a criminal complaint because (1) further investigation exonerated the arrested party, (2) the complainant withdrew the complaint, (3) further investigation appeared necessary before prosecution could be initiated, (4) the ascertainable evidence was insufficient to proceed further, (5) the admissible or adducible evidence was insufficient to proceed further, or (6) other appropriate explanation for release.”

The CHP claims that none of the reasons listed in section 11115 applies to Schmidt. But no charges were filed against Schmidt because Deputy District Attorney Carter found that low blood alcohol and an absence of a bad driving pattern would make securing a conviction difficult. Thus, the reason Carter gave for declining to file a complaint fits precisely into section 11115, subdivision (b), reason (4): “[T]he ascertainable evidence was insufficient to proceed further.”

The CHP argues that a different prosecutor could have determined that the evidence was sufficient to proceed. Perhaps. So what? That argument is as persuasive as speculating that a different law enforcement agency could have come to the same erroneous interpretation of the statutes. But the Santa Barbara Police Department does comply with the statutes. What another prosecutor or law enforcement might do or not do is beside the point, not to mention speculative and irrelevant. The prosecutor here determined that the evidence was insufficient to proceed.

The CHP argues that Carter could have believed Schmidt was guilty, but that Carter simply concluded that a conviction was not reasonably foreseeable. But if Carter in his professional opinion believes the evidence is insufficient to prove Schmidt guilty, Carter’s personal belief is not a pertinent inquiry and, of course, irrelevant.

■ What is relevant is that Schmidt was released and no accusatory pleading was filed against him. Schmidt is entitled to have his arrest deemed a detention (§ 849.5); entitled to a certificate from the CHP describing the action as a detention (§ 851.6, subd. (b)); and entitled to have his arrest deleted from the records of the CHP and the Department of Justice and have any such record refer to it as a detention (§ 851.6, subd. (d)).

II

The CHP contends the trial court erred in certifying the class.

■ A class action is proper whenever “the question [in the case] is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . .” (Code Civ. Proc., § 382.) The party seeking class certification must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 [139 Cal.Rptr.3d 315, 273 P.3d 513].) The community of interest requirement involves three factors: (1) predominant common questions of law or fact, (2) class representatives with claims or defenses typical of the class, and (3) class representatives who can adequately represent the class. (*Ibid.*)

The trial court’s decision in certifying the class is accorded great deference on appeal, and we may reverse only for an abuse of discretion. (*Brinker Restaurant Corp. v. Superior Court, supra*, 53 Cal.4th at p. 1022.) Generally we may reverse the certification order if it (1) is unsupported by substantial evidence, (2) rests on improper criteria, or (3) rests on erroneous legal assumption. (*Ibid.*)

The CHP argues the class is not ascertainable. It claims the terms “arrested” and “released” are ambiguous.

■ The CHP claims it is not always clear whether a person has been arrested or merely detained. (Citing *People v. Celis* (2004) 33 Cal.4th 667, 674 [16 Cal.Rptr.3d 85, 93 P.3d 1027].) But the class is composed of people who were both arrested and booked. Section 7, subdivision 21 states, “To ‘book’ signifies the recordation of an arrest in official police records, and the taking by the police of fingerprints and photographs of the person arrested, or any of these acts following an arrest.” When the police perform any of the acts specified in section 7, subdivision 21, the person has been arrested and booked. There is no ambiguity. We have determined the term “released” is clear. The term “custody” is clear in this context: When a person is taken to the police station and booked, he is in custody.

The CHP argues there is insufficient evidence of numerous persons in the class. Schmidt’s written interrogatory to the CHP asked, “Since June 1, 2009, in how many cases were ACCUSATORY PLEADINGS not filed by the Santa Barbara County District Attorney’s Office based upon ARRESTS made by peace officers of YOUR office?” The CHP answered, “187.” The CHP argues it was not asked to identify the number of persons who were arrested, taken into custody, booked and released. It may be true that not all those who were arrested and against whom no accusatory pleading was filed were taken into custody, booked and released. But all that is required to support the trial

court's order is some substantial evidence. (*Brinker Restaurant Corp. v. Superior Court*, *supra*, 53 Cal.4th at p. 1022.) It is reasonable to conclude that the vast majority of those arrested and against whom no accusatory pleading was filed were also taken into custody, booked and released. The trial court's order is supported by substantial evidence.

The CHP argues the evidence is insufficient to support a finding that a community of interest exists. The CHP repeats its argument that its answer to Schmidt's interrogatory did not specify those who were taken into custody, booked and released. The argument is not persuasive.

■ The CHP argues that Schmidt's claims are not typical of the class. But Schmidt was arrested, taken into custody, booked and released; no accusatory pleading was filed and he did not receive a certificate of detention. That is typical of the class. Typicality refers to the nature of the claim of the class representative, not the specific facts from which the claim arose. (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502 [57 Cal.Rptr.3d 903].)

III

The CHP contends the writ of mandate is problematic.

The CHP argues that implementing the writ of mandate will have unequal and undesirable results. The CHP points to Deputy District Attorney Carter's testimony that sometimes he will forgo prosecution of an offense in favor of proceeding with the matter as a parole or probation violation. The CHP claims that a career criminal may have a history that does not reflect his true history. But the petition to revoke parole or probation qualifies as an accusatory pleading. Such an arrest would not be deemed a detention only.

The CHP argues duplicate dispositions can occur for a single arrest. Thus if a person is arrested and released after a few hours without charges filed, the person arrested is entitled to a certificate of detention. But if the district attorney later decides that the person should be sent to misdemeanor diversion, and the person successfully completes the division program, the person will be entitled to have the arrest treated as if it never happened. (§ 1001.9.)

■ But obviously sections 849.5 and 851.6 do not contemplate that a person is entitled to a certificate of detention immediately upon his release from a few hours in custody. (§ 853.6, subd. (e)(3).) The sections must be read in light of section 853.6, subdivision (e)(3), giving the district attorney 25 days to file an accusatory pleading. During that period the district attorney

must decide whether to file, decline to file, or place the defendant on diversion. There is no substantial probability of duplicate dispositions for the same arrest.

In any event, the writ of mandate simply requires the CHP to comply with the applicable code sections. The language of those sections is clear and unambiguous. We do not ignore that language because the CHP thinks in some situations it might lead to results that are unequal or undesirable. The statutes in issue here, like every other statute, may not work perfectly under every circumstance. The CHP should take note that the Santa Barbara Police Department complies with the code sections without difficulty.

■ The CHP complains that the writ requires it to “conduct a diligent search in all databases that they have access to for each and every class member.” The CHP claims, without citation to authority, that the court has no jurisdiction to dictate how it must perform its duty. But the court has the inherent authority to ensure that its orders are properly carried out. (11) It is true that the mandamus cannot compel the exercise of discretion in a particular manner. (See *Sierra Club v. Department of Parks & Recreation* (2012) 202 Cal.App.4th 735, 740 [136 Cal.Rptr.3d 220].) The statutes at issue here, however, confer no discretion on the CHP.

The CHP claims that searching all databases would be unduly burdensome. But the CHP cites no evidence to support this claim.

The writ requires, at paragraph 5, that the “CHP must comply and apply the aforementioned commands to future eligible arrestees who are arrested by CHP, released from custody, and who do not have an accusatory pleading filed against them in a court of law.” The CHP argues the command is not consistent with the class as certified. But there is no essential difference. From the filing of the complaint and throughout the proceedings, Schmidt has asked for only one thing—that the CHP be required to comply with sections 849.5 and 851.6, subdivisions (b) and (d). That is all paragraph 5 of the writ requires.

IV

The CHP contends the trial court abused its discretion in awarding Schmidt attorney fees.

Code of Civil Procedure section 1021.5 provides in part: “Upon motion, a court may award attorneys’ fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit,

whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

■ The CHP argues that contrary to the trial court's finding, there was no significant benefit conferred on the general public. The CHP overlooks that it was misinterpreting statutes designed to benefit members of the public. Society as a whole benefits when law enforcement agencies properly interpret and implement the law.

The CHP expresses concern about the integrity of criminal records. But the integrity of criminal records encompasses implementing sections 849.5 and 851.6, subdivisions (b) and (d). The integrity of the public records cannot be protected unless the CHP implements the proper interpretation of those sections.

The trial court was within its discretion in awarding attorney fees.

DISPOSITION

The judgment is affirmed. Costs are awarded to respondent.

Yegan, J., and Perren, J., concurred.

[No. B269087. Second Dist., Div. Three. Aug. 2, 2016.]

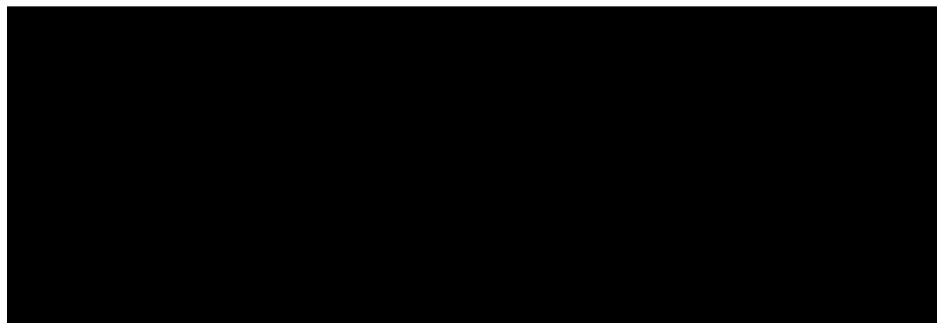
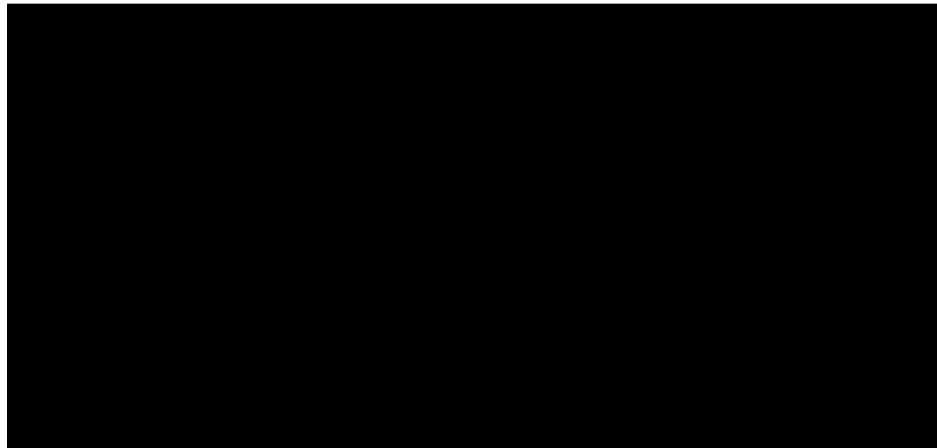
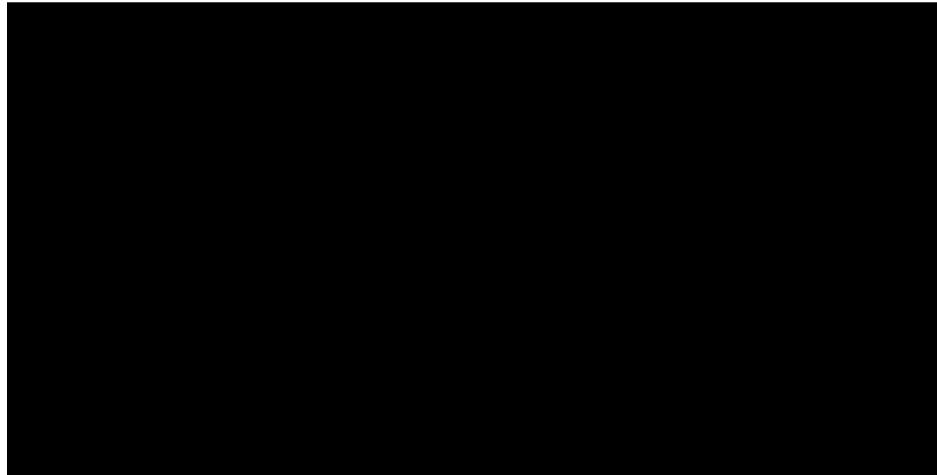
JOHN DOE 2, Petitioner, v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
AVONGARD PRODUCTS U.S.A. LTD., Real Party in Interest.

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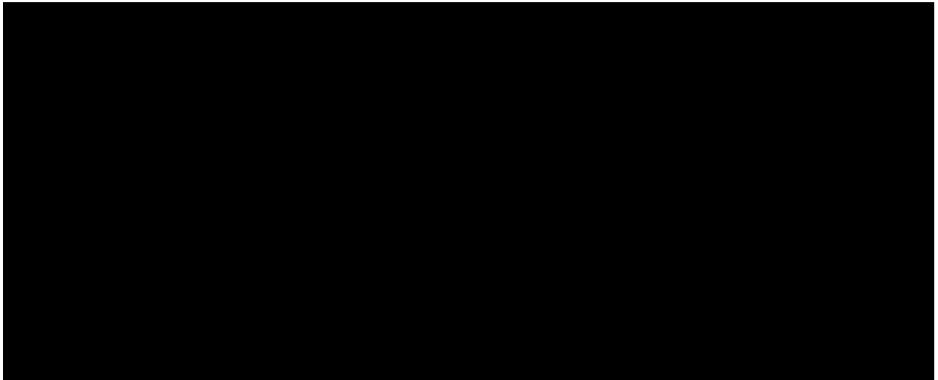
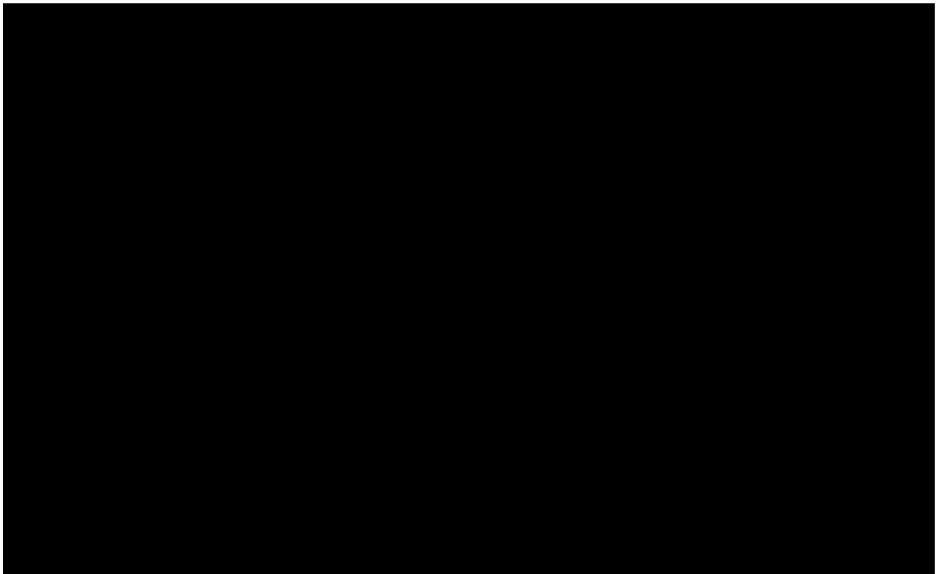
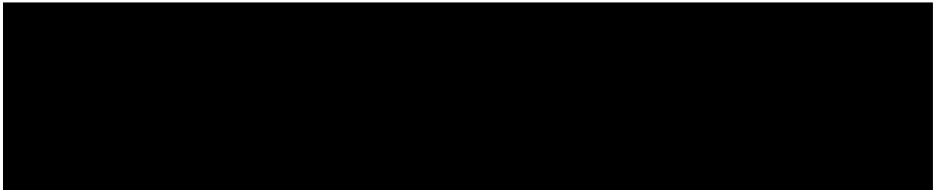
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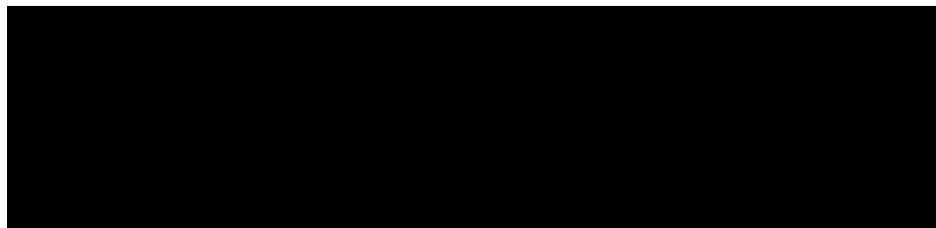
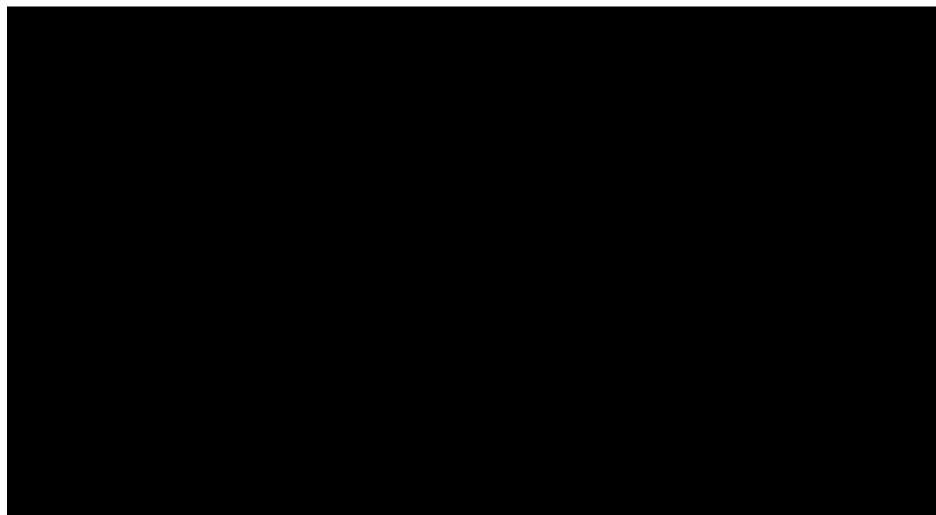
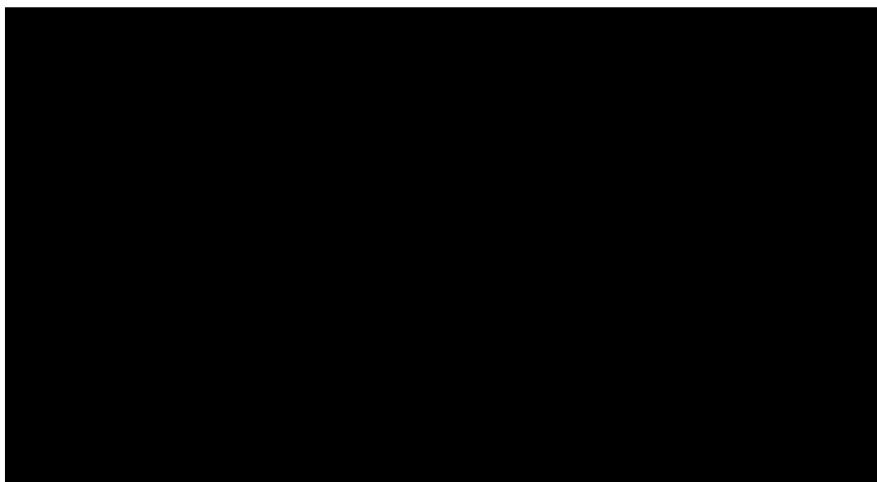
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1302





COUNSEL

Gerard Fox Law and Morgan E. Pietz for Petitioner.

No appearance for Respondent.

Greenberg Glusker Fields Claman & Machtiner, Bonnie E. Eskenazi,
Jonathan B. Sokol and Elizabeth Sbardellati for Real Party in Interest.

OPINION

HOGUE, J.*—Avongard Products U.S.A. Ltd., doing business as Hydraulx (Hydraulx), a preeminent film industry visual special effects (vfx) provider, sued petitioner John Doe 2 (Doe 2) for libel, alleging Doe 2's anonymous e-mails to a film producer and a film industry executive harmed its reputation. After Doe 2 filed a special motion to strike under California's anti-SLAPP statute, Code of Civil Procedure section 425.16, the trial court granted Hydraulx's request to conduct special discovery that would reveal Doe 2's identity.¹ Doe 2 filed a petition for writ of mandate seeking reversal of the discovery order.

We grant the petition. Under *Krinsky v. Doe* 6 (2008) 159 Cal.App.4th 1154 [72 Cal.Rptr.3d 231] (*Krinsky*), First Amendment protection for anonymous speech requires a libel plaintiff seeking to discover an anonymous libel defendant's identity to make a prima facie showing of all elements of defamation. *Paterno v. Superior Court* (2008) 163 Cal.App.4th 1342 [78 Cal.Rptr.3d 244] (*Paterno*) similarly holds that a libel plaintiff cannot establish good cause for special discovery under section 425.16, subdivision (g) without a prima facie showing the allegedly libelous statements are false and unprivileged.

Hydraulx failed to make a prima facie showing that Doe 2's e-mails are provably false and defamatory statements of fact or that the e-mails caused Hydraulx to suffer actual damage. We therefore issue a writ of mandate ordering the trial court to vacate its discovery order and issue a new order denying Hydraulx's special discovery motion.

FACTUAL BACKGROUND

Hydraulx is a leading visual effects designer that provided visual effects services for successful feature films such as *The Avengers* and *Terminator 3*; advertising for large corporations such as Coca-Cola, Inc., and Ford Motor Company; and music videos for famous pop and rock music stars including Jennifer Lopez, Britney Spears, Usher, Aerosmith and U2, among others.

In 2010, Hydraulx was embroiled in a highly publicized dispute with Sony Pictures (Sony), arising out of Hydraulx's alleged conflict of interest in producing the motion picture *Skyline*, while simultaneously providing vfx services for Sony's film, *Battle: Los Angeles*. Both *Skyline* and *Battle: Los*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

¹ Further statutory references are to the Code of Civil Procedure unless otherwise stated.

Angeles involved a similar theme—an alien invasion of Los Angeles—and Hydraulx's scheduled release of Skyline in November 2010—just a few months before Sony released Battle: Los Angeles in March 2011—led to accusations by Sony that Hydraulx had used Sony's equipment and resources to produce the movie in violation of the companies' vfx agreement. After Sony sued Hydraulx in arbitration, news articles reported Sony's contention that "Hydraulx concealed the competitive nature of their project [Skyline]." Sony dropped the arbitration shortly after releasing Battle: Los Angeles in March 2011, reportedly "satisfied its special effects were not used" in Skyline.

Doe 2 is an anonymous individual who sent two substantially identical e-mails to business associates of Hydraulx in August 2015. The e-mails were sent from Google Inc.'s web-based e-mail service, Gmail, and identified the sender as "Greg Baktor" with the e-mail address "vfx.recruits@gmail.com." Doe 2 sent one e-mail to Lori Furie, an executive at Sony involved in Sony's movie project Goosebumps, and the other to Neil Moritz, a producer who worked on Goosebumps and Sony's earlier production, Battle: Los Angeles.² The e-mail to Moritz read:

"I hoped I might whistle-blow on Vitality Visual Effects and Hydraulx. I was surprised to see 'Goosebumps' on Vitality's [sic] IMDB^[3] as Vitality is co-owned by Greg and Colin Strause of Hydraulx and I thought neither you nor Sony had^[4] a good relationship with the Brothers after Skyline/Battle L.A.

"Vitality and Hydraulx share owners (Greg & Colin), their Exec Guy Botham works for both companies—Vitality and Hydraulx even share L.A. and Vancouver offices, hardware, and infrastructure.

"If Vitality misinformed you or Sony as to its ownership or profit participants in any way, please take my email into consideration. I am a concerned vfx professional whom [sic], myself, has been burned by Greg and Colin and I do not like people perpetuating what I consider bad business practices.

"Thank you for your time in reading. I hope this email helps.

² "Goosebumps" refers to a motion picture produced by Sony based on the series of children's novels written by author R.L. Stine. As noted, Moritz worked with Sony executive, Furie, on Goosebumps and an earlier film project, Battle: Los Angeles.

³ "IMDB" refers to the Internet Movie Database, a well-known entertainment industry website identifying the talent, crew, and entertainment companies working on motion picture projects.

⁴ The e-mail to Furie stated, "I thought Sony *did not have* a good relationship . . ." (Italics added.) Otherwise the e-mails are identical.

“Regards,

“A concerned VFX recruit.”

Moritz forwarded the e-mail to a Hydraulx client, visual effects producer Greg Baxter, who worked with Furie and Moritz on the *Goosebumps* film. Baxter responded: “Not sure this is true. [¶] As I understand it, Guy [Botham] bought the hardware and software from (now defunct) Hydraulx. [¶] Strause Brothers, I was told, have zero involvement in Vitality, other than selling Guy their equipment and pipeline. [¶] I’ll confirm with Guy.”

Baxter forwarded the e-mail to Guy Botham, Vitality’s CEO, and Greg Strause, who co-owns Hydraulx with his brother, Colin Strause.

PROCEDURAL HISTORY

1. *Hydraulx’s Complaint for Defamation*

When Doe 2 sent the e-mails at issue in this writ petition, Hydraulx was already engaged in a lawsuit for defamation against several other anonymous individuals, fictitiously named in its March 2015 complaint as Does 1 through 10. The complaint alleged that Doe 1, “with the material assistance of Does 2 through 10,” used a pseudonym and a private e-mail account “to send a November 7, 2014 e-mail to the motion picture studio with which Hydraulx is presently engaged” describing Hydraulx as “‘on the verge of financial collapse.’” The e-mail asserted Hydraulx was “‘running on life support with a skeleton crew,’” while it “‘missed payroll’” and had its “‘resources consumed by many personal expenditures and various independent film projects.’”

Several months after Hydraulx filed suit, Doe 2 sent his August 2015 e-mails to Furie and Moritz. Based on those e-mails, Hydraulx amended its complaint to add allegations against Doe 2.

Doe 2 filed a special motion to strike the complaint under the anti-SLAPP statute, section 425.16.⁵ Hydraulx responded by filing a special discovery motion under section 425.16, subdivision (g) seeking to discover Doe 2’s identity by taking his deposition and enforcing a subpoena directed to Google Inc., the operator of Doe 2’s Gmail account.⁶

⁵ Doe 2 learned of the lawsuit after receiving notice from Google Inc. that Hydraulx had subpoenaed records related to the Gmail account used to transmit the August 2015 e-mails.

⁶ The anti-SLAPP statute stays all discovery pending determination of the special motion to strike but allows the court to “order that specified discovery be conducted” upon “noticed motion and for good cause shown.” (§ 425.16, subd. (g).)

2. *Hydraulx's Special Discovery Motion*

Relying on the *Paterno* court's holding that a prima facie showing of libel is sufficient to entitle a plaintiff to special discovery under the anti-SLAPP statute (see *Paterno, supra*, 163 Cal.App.4th at p. 1349), Hydraulx sought to demonstrate Doe 2's statements were provably false by submitting declarations from Greg Strause and Guy Botham attesting to the independent ownership of Hydraulx and Vitality. Addressing Doe 2's statement, "Vitality is co-owned by Greg and Colin Strause of Hydraulx," Greg Strause declared, "Hydraulx does not now own and has never owned or controlled Vitality, a visual effects company owned and controlled by Guy Botham" and "neither I nor my brother . . . owns or has ever owned any interest in Vitality." Botham identified himself as the "sole shareholder, owner and operator" of two entities using the name Vitality Visual Effects: Vitality Visual Effects, Inc., a California Corporation, and Vitality Visual Effects Ltd., a British Columbia corporation, referring to them collectively as Vitality. Botham further declared, "[n]either Greg Strause, Colin Strause nor Hydraulx own, or have ever owned, any interest in Vitality."

Hydraulx also sought to establish the statements were defamatory in nature by emphasizing the word "whistle-blow" in the e-mails, which Greg Strause declared had the effect of "insinuating that Hydraulx has done something dishonest and/or is hiding something, which it has not." He also averred, "Hydraulx does not perpetuate bad business practices, but rather follows the industry standard," and "Hydraulx does not believe it has unfairly treated or 'burned' anyone in the visual effects community."

Hydraulx argued it needed to discover Doe 2's identity to oppose Doe 2's anti-SLAPP motion with evidence Doe 2 made false statements with actual malice and thereby demonstrate a probability of success on the merits of its defamation claim.⁷ In that regard, Hydraulx maintained Doe 2's chosen pseudonym—"concerned vfx professional"—suggested the writer was likely a "partner (or former partner), vendor, employee (or former employee), consultant or competitor" of Hydraulx whose relationship to the company would demonstrate the e-mail had been "motivated by evil intent." Hydraulx also argued Doe 2's identity was critical to a potential motion to compel arbitration, citing Greg Strause's declaration that "Hydraulx has agreements to arbitrate with nearly all of its partners, vendors, employees, consultants and clients."

⁷ When a defendant on an anti-SLAPP motion makes a threshold showing that a challenged cause of action is one arising from protected activity, the burden shifts to the plaintiff to demonstrate, with evidence, a probability of prevailing on the claim. If the defendant fails to meet this evidentiary burden, a claim arising from protected activity will be stricken. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88–89 [124 Cal.Rptr.2d 530, 52 P.3d 703]; § 425.16, subd. (b)(1).)

3. Doe 2's Opposition to the Special Discovery Motion

Doe 2 argued, in opposition, that Hydraulx could not discover his identity without making a *prima facie* showing on every element of its libel claim *except* those elements, such as actual malice, that required evidence inaccessible to Hydraulx. Doe 2 argued that each statement in the e-mails was nonactionable as a matter of law either because it was not “of and concerning” Hydraulx or it was substantially true. Doe 2 also argued that his statements about “bad business practices” and being “burned” were expressions of constitutionally protected opinion. To provide context for his argument that the e-mails were not defamatory, Doe 2 submitted news articles and Internet postings about the Strause brothers’ high profile careers, the Skyline/Battle: Los Angeles controversy and Hydraulx’s alleged failure to compensate vfx professionals in compliance with wage and hour laws.

To demonstrate the truth of his statement concerning Hydraulx’s and Vitality’s joint ownership, Doe 2 submitted online profiles for five professionals who identified themselves as working for Hydraulx and Vitality and an IMDB resume for Guy Botham listing his companies as Hydraulx and Vitality Visual Effects. Doe 2 also submitted records from the Nevada Secretary of State’s website identifying David and Linda Strause as the managing members of a third entity with Vitality Visual Effects in its name, Vitality Visual Effects LLC, and records from the Illinois Secretary of State’s website identifying Hydraulx as an Illinois corporation with the same principal officers, David and Linda Strause. Doe 2 identified David and Linda Strause as Greg and Colin Strause’s parents, and argued that the records from these state agencies demonstrated the substantial truth of his allegation that Hydraulx and Vitality were co-owned by the Strause family.

Finally, to blunt the charge that Hydraulx needed to know his identity to establish malice, Doe 2 offered the concession that Hydraulx “should be excused from having to make a preliminary *prima facie* showing as to those elements of the claim for defamation where the relevant facts would identify Doe 2 and are out of [Hydraulx]’s control.” Thus, Doe 2 continued, “[Hydraulx] will not have to produce evidence as to actual malice on the part of Doe 2.” Doe 2 maintained this approach was consistent with the procedure established in *Krinsky* for balancing the plaintiff’s right to seek redress for statements it claims amount to defamation and the speaker’s First Amendment right to speak anonymously. (See *Krinsky*, *supra*, 159 Cal.App.4th at p. 1172.)

4. The Hearing on the Special Discovery Motion

After hearing extensive argument from both sides, the trial court granted Hydraulx’s motion for special discovery. The court reasoned that the word

“whistle-blow” “impl[ed] civil or criminal wrongdoing,” which could support a finding of defamation. Further, the court found all statements in Doe 2’s e-mails “[were] capable of being proven true [or] false.” Weighing the due process concerns attendant to making plaintiffs “prove a fact that they don’t have access to,” the court concluded Hydraulx had made a sufficient *prima facie* showing of libel to obtain special discovery that would reveal Doe 2’s identity.

5. *Doe 2’s Petition for Writ of Mandate*

Doe 2 filed a petition for writ of mandate and request for immediate stay of the discovery order with this court. On December 29, 2015, we issued a temporary stay order pending determination of the petition. On February 20, 2016, we issued an order to show cause inviting additional briefing and setting the matter for hearing.

STANDARD OF REVIEW

We review the trial court’s ruling on a discovery motion for abuse of discretion. However, because the relevant facts are undisputed, we review the trial court’s exercise of discretion as a question of law. (*Krinsky, supra*, 159 Cal.App.4th at p. 1161.) Because Doe 2 invokes the protection of the First Amendment, we also conduct an independent review. (*Krinsky*, at p. 1161.) When called upon to draw “‘the line between speech unconditionally guaranteed and speech [that] may legitimately be regulated,’ ” we “‘examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.’ ” (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 285 [11 L.Ed.2d 686, 84 S.Ct. 710], quoting *Pennekamp v. Florida* (1946) 328 U.S. 331, 335 [90 L.Ed. 1295, 66 S.Ct. 1029].)

DISCUSSION

1. *Hydraulx Must Make a Prima Facie Showing Under Krinsky and Paterno*

■ Like *Krinsky*, this case presents a conflict between a plaintiff’s right to employ the judicial process to discover the identity of an allegedly libelous speaker and the speaker’s First Amendment right to remain anonymous. As explained in *Krinsky*, “[j]udicial recognition of the constitutional right to publish anonymously is a long-standing tradition. . . . ‘Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices . . . either anonymously or not at all.’ [Citation.] ‘The

decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.' " (*Krinsky, supra*, 159 Cal.App.4th at p. 1163.)

Notwithstanding the constitutional right to anonymity, the *Krinsky* court acknowledged that a libel plaintiff has a legitimate competing interest in discovering an anonymous speaker's identity in order to effectively prosecute the libel claim. (*Krinsky, supra*, 159 Cal.App.4th at p. 1165.) After surveying standards adopted by other states addressing these competing rights and interests, the *Krinsky* court articulated a rule of general application.

■ Balancing the long-standing First Amendment right to publish anonymously with a libel plaintiff's right to prosecute her case, the *Krinsky* court determined that a libel plaintiff seeking to compel disclosure of an anonymous speaker's identity must (1) give notice to the anonymous speaker and (2) "make a prima facie showing of the elements of libel," limited to "only those material facts that are accessible to [the plaintiff]." (*Krinsky, supra*, 159 Cal.App.4th at pp. 1171–1172.) Recognizing that certain elements of a libel claim, such as actual malice, may be difficult to establish without knowing the defendant's identity, the court limited the requisite prima facie showing to evidence accessible to a libel plaintiff. (*Id.* at pp. 1171–1172 & fn. 12.) With this accommodation, *Krinsky* concluded the burden "should not be insurmountable [where] plaintiff knows the statement that was made and [can] produc[e] evidence of its falsity and the effect it had on her." (*Id.* at p. 1172.)

■ In *Paterno*, the court explained that the prima facie showing required under *Krinsky* is consistent with the prima facie showing required of a libel plaintiff seeking special discovery under section 425.16, subdivision (g), to oppose an anti-SLAPP motion subject to the constitutional malice standard. Citing the "self-executing protections of the First Amendment" and *Krinsky*'s requirement that the "discovery proponent . . . make a prima facie showing the . . . statement was libelous," *Paterno* held that "plaintiffs who bring defamation actions subject to the constitutional malice standard cannot show good cause [under section 425.16, subdivision (g)] for discovery on the question of actual malice without making a prima facie showing that the defendant's published statements contain provably false factual assertions." (*Paterno, supra*, 163 Cal.App.4th at p. 1349.) Thus, consistent with *Krinsky*, the *Paterno* court held a libel plaintiff may not obtain special discovery under the anti-SLAPP statute (see fn. 7, *ante*) without first making a prima facie showing of the elements of libel for which the material facts are available to

the plaintiff. (*Paterno*, at pp. 1349–1351; see also *The Garment Workers Center v. Superior Court* (2004) 117 Cal.App.4th 1156, 1162 [12 Cal.Rptr.3d 506] [“Even if it looks as if the defendant’s actual malice may be an issue in the case, if it appears from the SLAPP motion there are significant issues as to falsity or publication—issues which the plaintiff should be able to establish without discovery—the court should consider resolving those issues before permitting what may otherwise turn out to be unnecessary, expensive and burdensome discovery proceedings”].)

2. *A Prima Facie Showing of Libel Requires Proof of a Provably False Assertion of Fact That Is Susceptible of a Defamatory Meaning*

■ Libel is a form of defamation effected in writing. (*Paterno, supra*, 163 Cal.App.4th at p. 1349; Civ. Code, § 44.) “The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage.” (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1369 [117 Cal.Rptr.3d 747].) The defamatory statement must specifically refer to, or be “‘of and concerning,’ ” the plaintiff. (*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1042 [232 Cal.Rptr. 542, 728 P.2d 1177].)

■ It is the province of the court to determine whether a statement is actionable as a statement of fact susceptible of a defamatory meaning, versus a nonactionable statement of opinion privileged under the First Amendment. “[I]t is a question of law for the court whether a challenged statement is reasonably susceptible of an interpretation which implies a provably false assertion of actual fact. If that question is answered in the affirmative, the jury may be called upon to determine whether such an interpretation was in fact conveyed.” (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608 [284 Cal.Rptr. 244] (*Kahn*); see *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 601 [131 Cal.Rptr. 641, 552 P.2d 425] (*Gregory*).)

A court construing an allegedly defamatory statement must consider the statement in the context in which it was made. “In determining whether statements are of a defamatory nature, and therefore actionable, ‘“a court is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language of the complaint for libelous publication according to its natural and popular construction.”’ That is to say, the publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader.’” (*Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 688 [29 Cal.Rptr.2d 547].)

■ “In determining the meaning of a communication, words, whether written or spoken, are to be construed together with their context. Words which standing alone may reasonably be understood as defamatory may be so explained or qualified by their context as to make such an interpretation unreasonable. So too, words which alone are innocent may in their context clearly be capable of a defamatory meaning and may be so understood. The context of a defamatory imputation includes all parts of the communication that are ordinarily heard or read with it. . . . [T]he entire contents of a personal letter are considered as the context of any part of it because a recipient of the letter ordinarily reads the entire communication at one time.” (Rest.2d Torts, § 563, com. d, pp. 163–164.)

■ “Under the First Amendment there is no such thing as a false idea.” (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339 [41 L.Ed.2d 789, 94 S.Ct. 2997].) Hence, statements of opinion can never subject the speaker to liability for making a false and defamatory statement. As the United States Supreme Court explained in *Gertz*, “However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” (*Id.* at pp. 339–340.)

Consistent with *Gertz*, California courts have repeatedly held statements of opinion are protected by the First Amendment. Thus, to be actionable, an allegedly defamatory statement must make an assertion of fact that is provably false. “The question is whether the statement is provably false in a court of law.” (*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1006 [283 Cal.Rptr. 644].) As our Supreme Court noted in *Gregory*, the critical distinction between “whether the allegedly defamatory statement constitutes fact or opinion is . . . frequently a difficult one, and what constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole.” (*Gregory, supra*, 17 Cal.3d at p. 601.) The test, in California, to determine whether an allegedly defamatory statement is fact or opinion is a “‘totality of the circumstances’” test. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 261 [228 Cal.Rptr. 206, 721 P.2d 87] (*Baker*).)

■ In *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1 [111 L.Ed.2d 1, 110 S.Ct. 2695] (*Milkovich*), the United States Supreme Court considered whether statements in a newspaper editorial about an altercation at a wrestling match were actionable statements of fact defaming the wrestling coach or protected expressions of opinion. It concluded the statement—“‘‘Anyone who attended the meet . . . knows in his heart that [coach] Milkovich . . . lied at the hearing after [giving] his solemn oath to tell the truth’’”—was actionable because it implied a provably false statement of fact—that Milkovich lied under oath. (*Id.* at pp. 5, 21.) In so holding, the *Milkovich* court reasoned

that “expressions of ‘opinion’ may often imply an assertion of objective fact.” (*Id.* at p. 18.) For example, the statement, “‘In my opinion John Jones is a liar . . .’ . . . implies a knowledge of facts which lead to the conclusion that Jones told an untruth.” (*Ibid.*)

On the other hand, when a communication identifies nondefamatory facts underlying an opinion, or the recipient is otherwise aware of those facts, a negative statement of opinion is not defamatory. As explained in the Restatement Second of Torts, a “pure type of expression of opinion” occurs “when both parties to the communication know the facts or assume their existence and the comment is clearly based on those assumed facts and does not imply the existence of other facts in order to justify the comment. The assumption of the facts may come about because someone else has stated them or because they were assumed by both parties as a result of their notoriety or otherwise.” (Rest.2d Torts, § 566, com. b, p. 171.) Actionable statements of opinion are “the mixed type, [where] an opinion in form or context, is apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendant [but] gives rise to the inference that there are undisclosed facts that justify the forming of the opinion.”⁸ (Rest.2d Torts, p. 171.)

■ A court distinguishing between statements of fact and protected statements of opinion must consider the effect of cautionary language in an allegedly defamatory communication. “Where the language . . . is ‘cautiously phrased in terms of apparentness,’ the statement is less likely to be reasonably understood as a statement of fact rather than opinion.” (*Baker, supra*, 42 Cal.3d at pp. 260–261, fn. omitted.) Thus, in *Gregory*, the court focused on the word, “apparently” to determine that the statement—“‘Apparently there were some internal politics within [the union] which certain individuals were using to seek personal gain and political prestige rather than to serve the best interests of the members they were supposed to represent’”—was opinion rather than fact. (*Gregory, supra*, 17 Cal.3d at p. 599, italics added.) Likewise, in *Baker*, the court observed the phrase “[m]y impression is . . .”

⁸ The Restatement Second of Torts, section 566, comment c provides several examples of actionable and nonactionable statements of opinion: “3. A writes to B about his neighbor C: ‘I think he must be an alcoholic.’ A jury might find that this was not just an expression of opinion but that it implied that A knew undisclosed facts that would justify this opinion. [¶] 4. A writes to B about his neighbor C: ‘He moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair with a portable radio listening to a news broadcast, and with a drink in his hand. I think he must be an alcoholic.’ The statement indicates the facts on which the expression of opinion was based and does not imply others. These facts are not defamatory and A is not liable for defamation. [¶] 5. A says to B about C, a city official: ‘He and his wife took a trip on city business a month ago and he added her expenses in as a part of his own.’ B responds: ‘If he did that he is really a thief.’ B’s expression of opinion does not assert by implication any defamatory facts, and he is not liable to C for defamation.” (Rest.2d Torts, § 566, com. c, illus. 3–5, p. 174.)

would signal to a reasonable person that “a statement of opinion rather than of fact was to follow.” (*Baker*, at pp. 261–262; see also, *Carr v. Warden* (1984) 159 Cal.App.3d 1166, 1168–1170 [206 Cal.Rptr. 162] [statement premised by “I think . . .” was not a defamatory statement of fact].)

With these principles in mind, we turn to whether the evidence presented by Hydraulx established a *prima facie* case as to those elements of libel for which Hydraulx had access to relevant material facts.

3. *Doe 2’s Statements Did Not Assert or Imply Provably False Statements of Fact That, in Context, Are Susceptible of a Defamatory Meaning*

Hydraulx contends, and the trial court concluded, Doe 2’s use of the word “whistle-blow” and statements that he was “burned by Greg and Colin” and “does not like people perpetuating what [he] consider[s] bad business practices” are provably false and defamatory. We disagree. In the context in which they were made, Doe 2’s statements are not reasonably susceptible of an interpretation implying defamatory statements of fact beyond the facts disclosed in the e-mails or known to the recipients.

The trial court expressed a concern that “in the language of the law,” “whistleblower” implied Hydraulx engaged in criminal or wrongful conduct: “People don’t whistle-blow fun, nice things that are meaningless. People whistle-blow wrongdoing. . . . And the word whistle-blow . . . causes me to read it in a different light.” While we agree that, in the context of litigation, the term “whistle-blow” can imply an allegation of criminal or wrongful conduct, we must consider the word in the context of Doe 2’s e-mails and measure its use “not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of [the] reader.” (*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 547 [343 P.2d 36].)

The specific wording of the e-mails, and the order in which the information is communicated, are instructive. Doe 2 opened his e-mails with cautionary language, saying, “I *hoped I might* whistle-blow on Vitality Visual Effects and Hydraulx.” (Italics added.) The words “hoped” and “might” before “whistle-blow” signal that Doe 2 is using the term hyperbolically to introduce a communication of specific information that the recipients may not know. In

context, the term explains why he is writing and introduces the information about Vitality and Hydraulx's supposed shared ownership, which, in and of itself, is not defamatory.⁹

In the next statements, Doe 2 goes on to explain the impetus for the communication, describing that he "was surprised to see 'Goosebumps' on Vitality's [sic] IMDB as Vitality is co-owned by Greg and Colin Strause of Hydraulx . . ." Doe 2 continues in the same vein, explaining why he was surprised ("I thought neither you nor Sony had a good relationship with the Brothers after Skyline/Battle L.A") referring to Sony's highly publicized accusation that Hydraulx failed to disclose its conflict of interest in working on Skyline while under contract to Sony for Battle: Los Angeles.

After identifying the basis for his assumption about continuing bad relations between Sony and Hydraulx, Doe 2 started a new paragraph to recite his nondefamatory allegations of common ownership (see fn. 9, *ante*): "Vitality and Hydraulx share owners (Greg & Colin), their Exec Guy Botham works for both companies—Vitality and Hydraulx even share L.A. and Vancouver offices, hardware, and infrastructure." Referring to that disclosure, Doe 2's next paragraph was about Vitality (not Hydraulx) and expressly refrained from accusing Vitality of any failure to disclose: "*If* Vitality misinformed you or Sony as to its ownership or profit participants in any way, please take my email into consideration." (Italics added.) This paragraph communicates no false or defamatory facts "'of and concerning' Hydraulx."

To close the e-mails, Doe 2 communicated additional information about himself, again explaining his motivation for contacting the recipients. Writing in the first person, Doe 2 described himself as "a concerned vfx professional whom, myself, has been burned by Greg and Colin and I do not like people perpetuating what I consider bad business practices." Doe 2 then thanked the recipients for their "time in reading" and expressed his "hope this email helps" before signing off as a "concerned VFX recruit."

■ There is no dispute that the recipients knew about the prior conflict between Sony and Hydraulx. Because they read the e-mails in the context of known facts about that conflict, the conflict is important to the determination whether the e-mails are reasonably susceptible of a defamatory meaning. "In determining the meaning of a communication, account is to be taken of all

⁹ Although Greg Strause's and Botham's declarations were sufficient to make a *prima facie* showing of falsehood with respect to the statements associating Hydraulx with Vitality, the allegation of common ownership is not defamatory on its face and Hydraulx has not offered any extrinsic facts supporting a defamatory innuendo. To the contrary, because Hydraulx's complaint and declarations portray both companies in a positive light, there is no indication that the inaccurate attribution of common ownership was defamatory.

the circumstances under which it is made so far as they were known to the recipient. Words which if isolated from the circumstances under which they were uttered might appear defamatory, may in fact not have been so understood by the person to whom they were published." (Rest.2d Torts, § 563, com. e, p. 164.)

The gist of the various news articles describing the 2011 dispute between Sony (the company that retained Vitality for visual special effects services on its Goosebumps project) was that Sony perceived that Hydraulx had a conflict of interest working on Skyline while under contract for Battle: Los Angeles and was surprised and angry about it. That context explained the impetus for Doe 2's uninvited e-mails about the potential for a new conflict of interest and Doe 2's expressed distaste for such business practices.

Hydraulx argues that Doe 2's offer to "whistle-blow" and references to "bad business practices" and being "burned" imply a defamatory accusation Hydraulx engaged in dishonesty or wrongful conduct beyond the conflicts of interest addressed in the e-mails.¹⁰ We find that in context, the term "whistle-blow" was used hyperbolically to introduce the disclosed and nondefamatory allegation of common ownership and that Doe 2's reference to "bad business practices" reasonably referred to the known or disclosed facts: Hydraulx's Skyline conflict of interest and Vitality's potential conflict if it failed to disclose common ownership. In context, the only reasonable interpretation of "bad business practices" is in reference to facts known to the recipients of the e-mails (Hydraulx's prior conflict of interest) and facts disclosed in the e-mails (the false allegation of common ownership and Vitality's potential conflict of interest involving Goosebumps.)

Hydraulx's libel allegations are not based on Doe 2's statements about conflicts of interest. (Cf. *Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305] [concluding statements about conflicts of interest inevitably involve "an application of an ethical standard to facts, reflecting the exercise of judgment" that "[do] not imply an objective fact that can be proved to be true or false"].) Instead, Hydraulx argues that

¹⁰ Hydraulx argues in the alternative that Doe 2's statements are not entitled to the degree of First Amendment protection afforded opinions because the statements constitute commercial speech. Hydraulx infers that as a "vfx professional" Doe 2 is necessarily a competitor. Although that inference is belied by Doe 2's further admission he is a VFX recruit, Hydraulx's commercial speech argument has no merit. As noted in *Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557 [65 L.Ed.2d 341, 100 S.Ct. 2343], the diminished protection for commercial speech applies to "'speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation.'" (*Id.* at p. 589.) Doe 2's e-mails do not propose a commercial transaction. They are not an advertisement for services. Based on the content of the communications, there is no reason to vitiate Doe 2's right to speak freely and to remain anonymous.

the terms “whistle-blow,” “bad business practices” and being “burned” communicated or implied that Hydraulx engaged in some other undisclosed conduct involving dishonesty. As noted above, we do not find the e-mails reasonably susceptible of such an interpretation.

Even if they were, the onus was on Hydraulx to introduce evidence that the recipients of the e-mails interpreted them as accusations of wrongful conduct beyond the conflicts of interest. (See *Kahn, supra*, 232 Cal.App.3d at p. 1608 [if court finds statements are susceptible of a defamatory meaning, “the jury may be called upon to determine whether such an interpretation was in fact conveyed” to the recipients].) Hydraulx offered no evidence that Moritz, Furie, Baxter, or Botham interpreted the e-mails as implying an accusation that Hydraulx engaged in any misconduct, aside from the actual and potential conflicts of interest. (See *Krinsky, supra*, 159 Cal.App.4th at pp. 1171–1172; *Paterno, supra*, 163 Cal.App.4th at pp. 1349–1351.) Although Botham, in his declaration, averred that the allegation of common ownership was false, he did not say that he understood the e-mails as conveying any defamatory information or implying any undisclosed facts about Hydraulx.

Neil Moritz’s comments when he forwarded an e-mail “FYI” to Greg Baxter suggests that he did not view the e-mail as defamatory. Baxter’s response—“Not sure this is true. [¶] . . . Guy [Botham] bought the hardware and software from (now defunct) Hydraulx. [¶] Strause Brothers, I was told, have zero involvement in Vitality, other than selling Guy their equipment and pipeline”—also offers no indication that Baxter read the e-mail as communicating anything other than the nondefamatory allegation of common ownership. The record is therefore devoid of any evidence the recipients of the e-mails interpreted them as an accusation Hydraulx engaged in any deceit or wrongdoing aside from the conflict of interest with Sony identified in Doe 2’s e-mails.¹¹

Outside the context of the conflicts of interest, the words “whistle-blow” “bad business practices” and “burned” are too vague and amorphous to constitute an accusation of specific wrongdoing. In *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97 [64 Cal.Rptr.3d 467], the court rejected the plaintiff’s argument that a similarly vague implication he engaged in

¹¹ Along the same lines, Hydraulx also failed to offer evidence that the statements caused harm. Though Hydraulx argued in its motion that the reference to “bad business practices” was a libel per se for which damages may be presumed, the United States Supreme Court has held that a presumption of damages is inconsistent with the First Amendment when a public figure libel plaintiff alleges defamation based on statements concerning a matter of public interest. (*New York Times Co. v. Sullivan, supra*, 376 U.S. at pp. 283–284.) Hydraulx premised its motion for special discovery on its need to discover Doe 2’s actual malice. Although, as a libel plaintiff subject to proof of actual malice, Hydraulx also had to prove actual damages, it did not plead or offer proof that Doe 2’s e-mails caused it to suffer any harm.

immoral conduct was actionable as an opinion based on an undisclosed statement of false and defamatory facts. The court held a statement “impliedly assert[ing] [the plaintiff] had engaged in some unspecified immoral behavior . . . [was] incapable of being interpreted as implying a *provable* *false* assertion of fact.” (*Id.* at p. 116.) The court explained, “Behavior that might qualify as immoral to one person, although being perfectly acceptable to another person, demonstrates that an amorphous assertion of immoral behavior is within the range of statements of opinion that are not actionable.” (*Id.* at p. 117.) “Because [defendant’s] statement contain[ed] no hint of what conduct she believed [the plaintiff] had engaged in that would be immoral, her statement neither contained nor implied a provably false assertion of fact, but at most implied an opinion.” (*Ibid.*)

The same is true in this case because behavior one person regards as a “bad business practice” may be acceptable to another person and conduct causing one person to feel “burned” may not affect another person at all. Someone might regard something as trivial as failure to return telephone calls as “bad business practices.” Another person might use “bad business practices” to describe fraudulent or unlawful conduct. Similarly, a person might feel “burned” by any range of behavior, from a social snub to a fraudulent transaction. Without some reference to the type of undisclosed misconduct, e.g., “‘In my opinion, John Jones is a liar,’ ” these comments are too vague and uncertain to be actionable as conveying a defamatory accusation. (*Milkovich, supra*, 497 U.S. at pp. 19–20; see, e.g., *Nygård, Inc. v. Usui-Kerttula* (2008) 159 Cal.App.4th 1027, 1047 [72 Cal.Rptr.3d 210] [employee’s statements about “‘horrible working experiences’ ” with prominent business man, being pestered “‘round-the-clock’ ” and “‘[slaving] without a break’ ” are protected opinion about employer]; *Moyer v. Amador Valley J. Union High School Dist.* (1990) 225 Cal.App.3d 720, 722 [275 Cal.Rptr. 494] [statement that plaintiff was the “‘worst’ ” teacher, “‘babble[d]’ ” and was terrorized by students when a smoke bomb went off in his class were nonactionable opinions].)

This interpretation is supported by Doe 2’s extensive use of cautionary language, emphasizing his communication of opinions rather than facts. The e-mails open with, “I hoped I might whistle-blow,” vitiating any implication that he intended to make an accusation of dishonesty or wrongdoing. His statement, “I thought neither you nor Sony had a good relationship” underscores that his understanding about the relationship was not certain or based on any firsthand knowledge. Doe 2 was careful not to accuse Vitality of dishonesty. His statement, “If Vitality misinformed you . . .” declines to make an accusation of dishonesty; the verb “misinform” rather than “lie” or “defraud” leaves open the possibility of a negligent rather than intentional miscommunication. Doe 2 makes no statement suggesting Hydraulx had been

dishonest in connection with *Goosebumps*, or had a new conflict of interest or duty to disclose its supposed relationship with Vitality.

■ Doe 2 is even more cautionary in his statement about “bad business practices,” inviting the reader to reject his allegation based on his admitted bias against the Strause brothers—i.e., “I . . . myself [have] been burned.” His reference to himself twice in the statement, “*I do not like* people perpetuating *what I consider bad* business practices,” underscores his intention to communicate a personal opinion rather imply an objective and defamatory accusation of fact. (Cf. *Gregory, supra*, 17 Cal.3d at p. 599; *Baker, supra*, 42 Cal.3d at p. 262. “Opinions that present only an individual’s personal conclusions and do not imply a provably false assertion of fact are nonactionable.” (*Paterno, supra*, 163 Cal.App.4th at p. 1356.)

Nothing in the e-mails suggests Doe 2 had any inside information about Hydraulx or professional expertise about industry business practices. As the Supreme Court explained in *Milkovich*, “[s]imply couching . . . statements in terms of opinion does not dispel [false and defamatory] implications” where the speaker implies “a knowledge of facts which lead to the [defamatory] conclusion.” (*Milkovich, supra*, 497 U.S. at pp. 19, 18; cf. *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 488 [80 L.Ed.2d 502, 104 S.Ct. 1949] [sound engineer’s opinion plaintiff’s speakers generated sound that tended to “‘wander about the room’” implied knowledge of underlying defamatory facts]; *Gill v. Hughes* (1991) 227 Cal.App.3d 1299, 1309 [278 Cal.Rptr. 306] [hospital board’s statement plaintiff surgeon was “‘incompetent’” and “‘needs more training’” actionable as implying undisclosed facts].)

There is no similar suggestion of superior knowledge or expertise in this case. By identifying himself as a “vfx professional” and signing off as a “VFX Recruit,” Doe 2 let the recipients of his e-mails know that he is a skilled worker who is new to the profession rather than an executive in a position of power or another person with inside knowledge. Doe 2’s self-identification as a “recruit” also belied any suggestion he was an attorney or person with any particular knowledge about, or authority on, industry business practices. (Cf. *Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 389 [10 Cal.Rptr.3d 429] [nonattorney’s charge that plaintiff “stole” and “plagiarized” copyright material were statements of protected opinion based on disclosed facts].)

■ We therefore conclude that Doe 2’s e-mails are not actionable as libel because the expressed opinions are not reasonably susceptible of an interpretation implying any undisclosed false and defamatory fact “of and concerning” Hydraulx. Therefore, Hydraulx failed to make a prima facie showing of libel.

4. *The Possibility of an Arbitration Agreement Is Not an Adequate Basis for Compelling Discovery of Doe 2's Identity*

Hydraulx argues in the alternative that it is entitled to discovery of Doe 2's identity as a means of potentially enforcing an arbitration agreement that it contends it may have with Doe 2. The contention is entirely speculative and lacks a basis in substantial evidence. Though Greg Strause's declaration states, "Hydraulx has agreements to arbitrate with nearly all of its partners, vendors, employees, consultants and clients," Hydraulx provided no evidence of the contents of the supposed agreements, and made no showing that the agreements would apply to the circumstances of this case. Without evidence of the specific provisions, it is impossible to determine whether any Hydraulx arbitration agreement, even if signed by Doe 2, would be binding in this case.

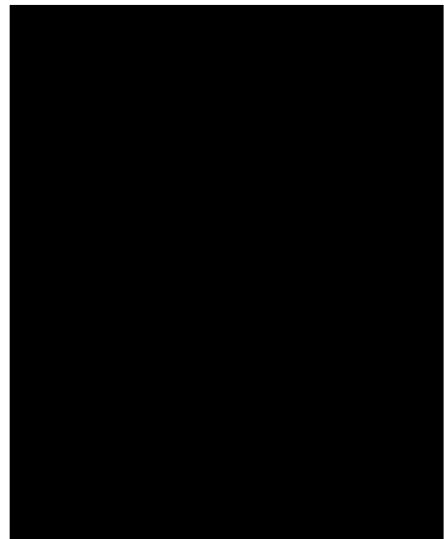
■ *Krinsky*'s requirement that a libel plaintiff make a prima facie showing before invading a speaker's constitutional right to remain anonymous makes no exception for discovery pertaining to forum selection issues. Evidence that Hydraulx might have an arbitration agreement with Doe 2 that may or may not be enforceable is not evidence of a due process or contractual right sufficient to outweigh Doe 2's right to free expression and to protection under the First Amendment. Mindful that Hydraulx initiated this action and that Doe 2 has invoked the protection of the anti-SLAPP statute in an effort to avoid the expense of defending that lawsuit, we decline to make any exception to *Krinsky*'s requirement, which was specifically calibrated to balance the libel plaintiff's right to due process in prosecuting his claim with the defendant's First Amendment right to speak anonymously.

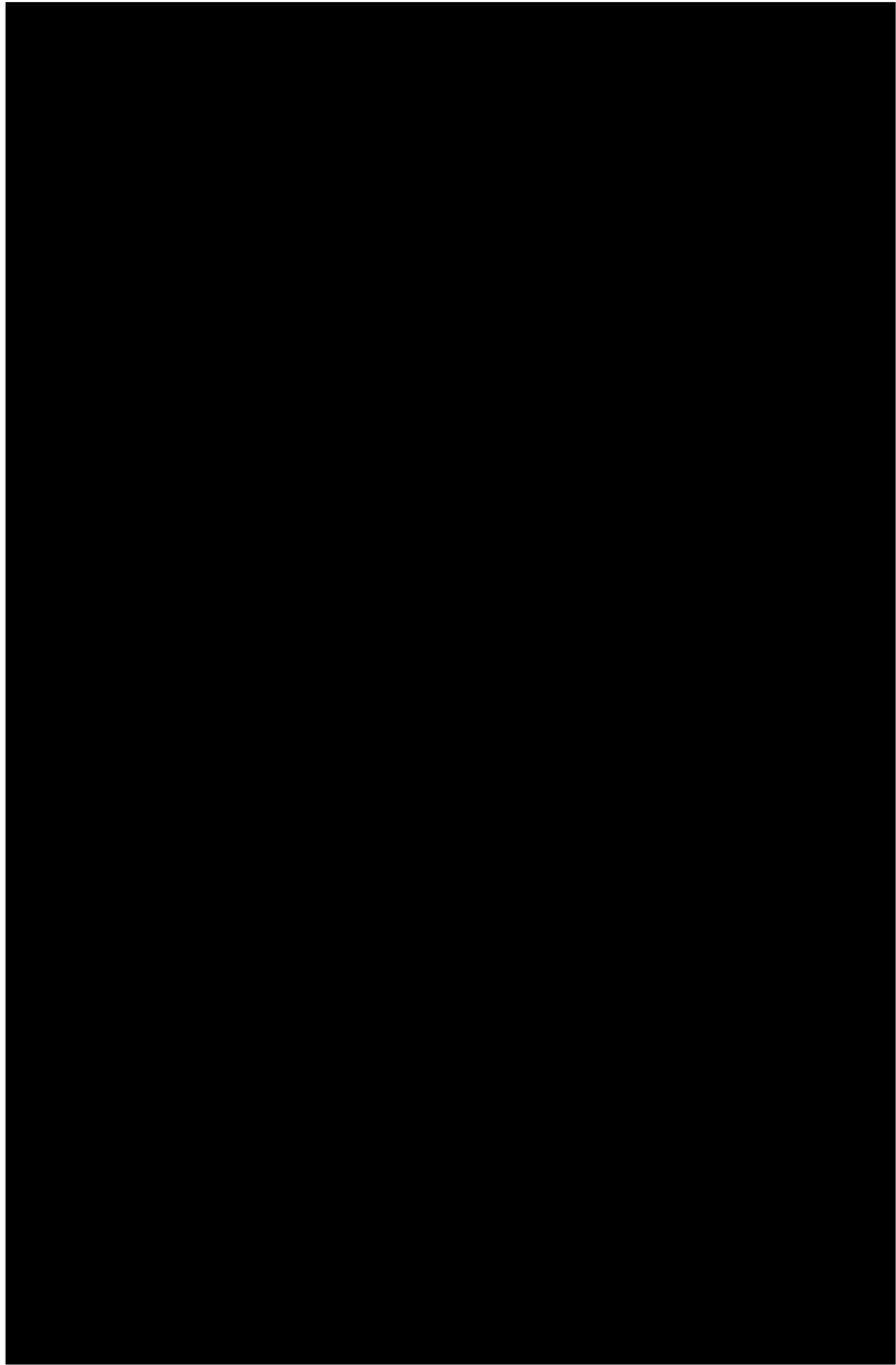
DISPOSITION

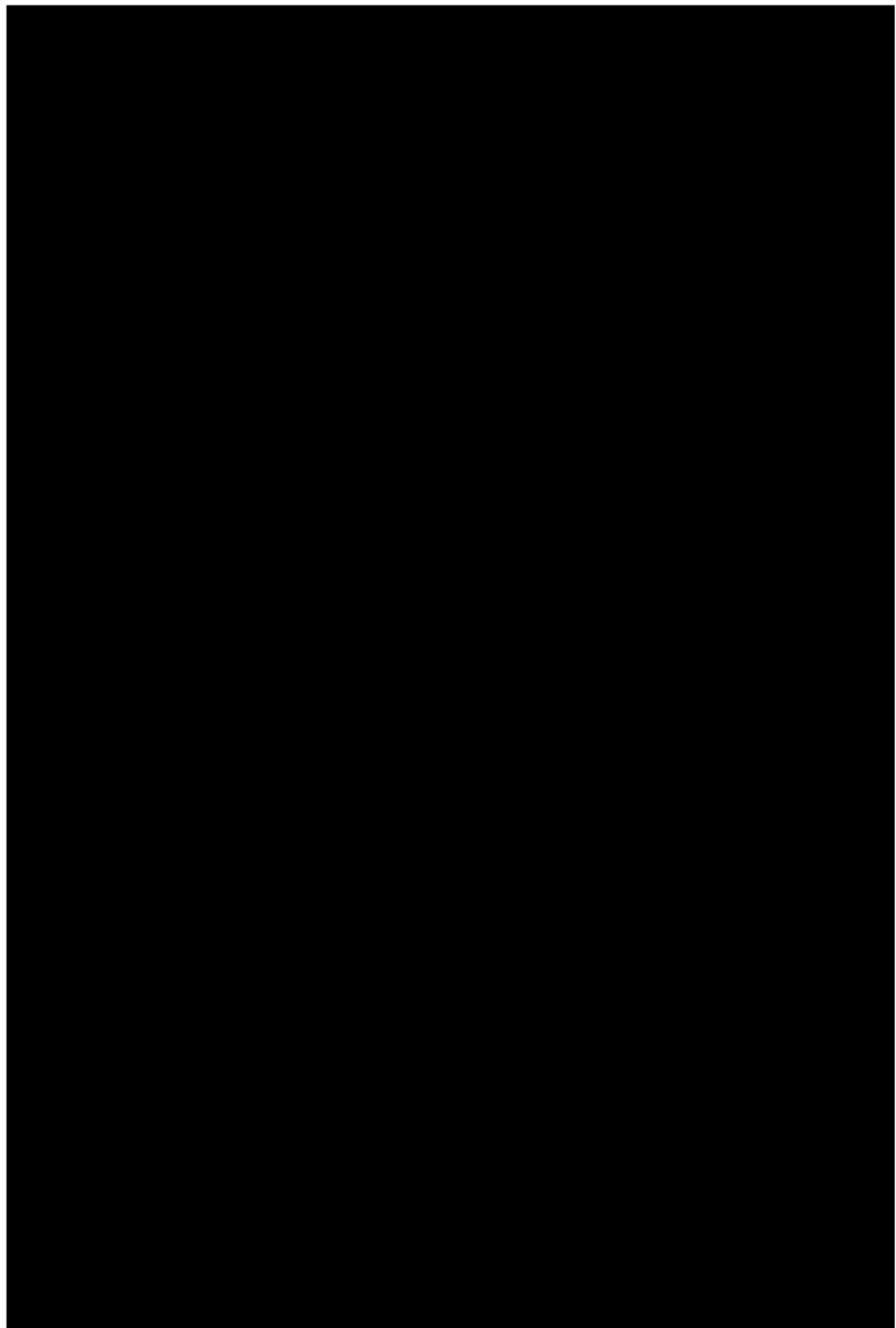
The petition is granted. Let a writ of mandate issue directing the trial court to vacate its order granting Hydraulx's motion for special discovery under section 425.16, subdivision (g) and enter a new order consistent with this opinion. The stay of proceedings in the trial court is lifted. John Doe 2 is awarded his costs in this writ proceeding.

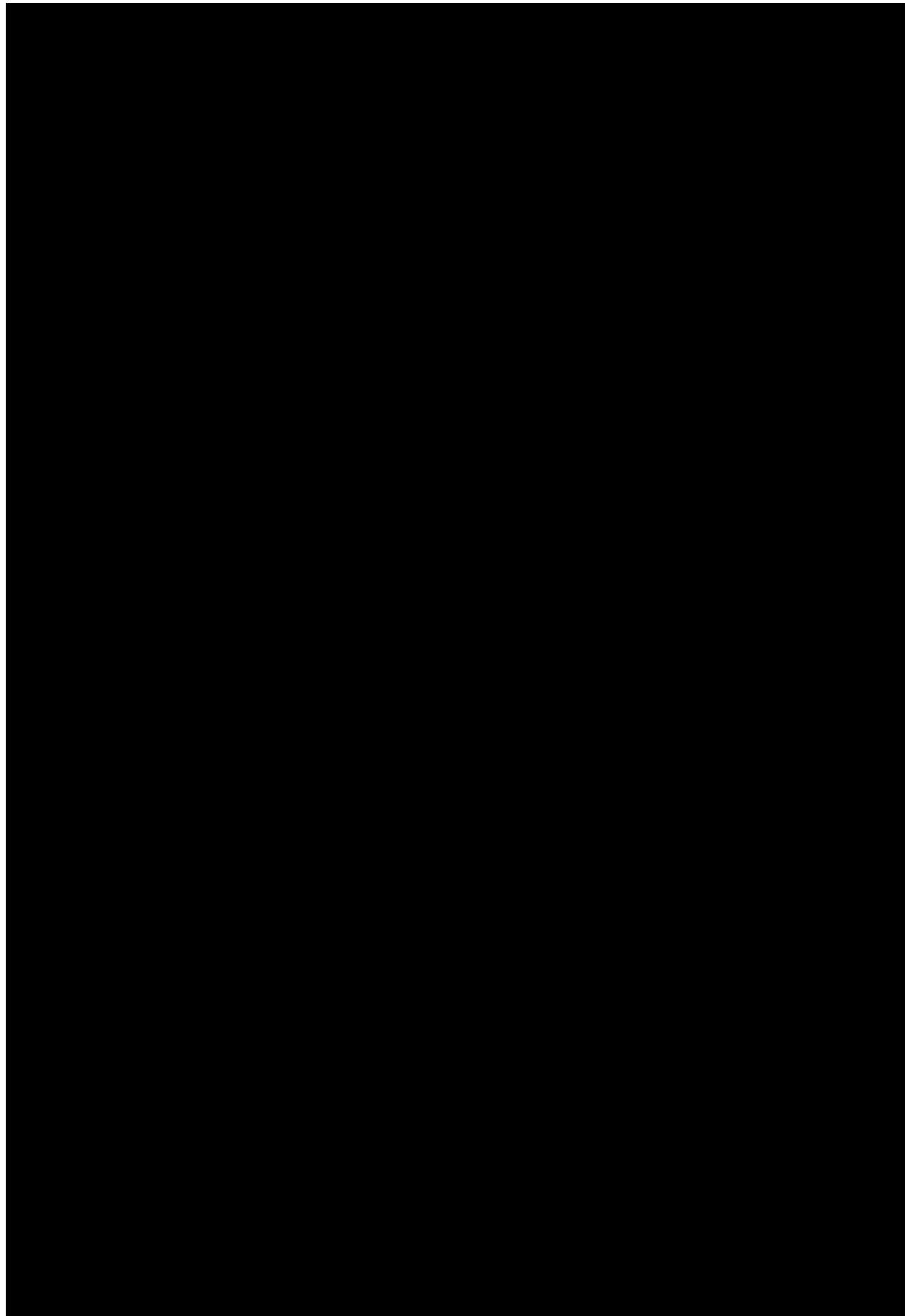
Edmon, P. J., and Aldrich, J., concurred.

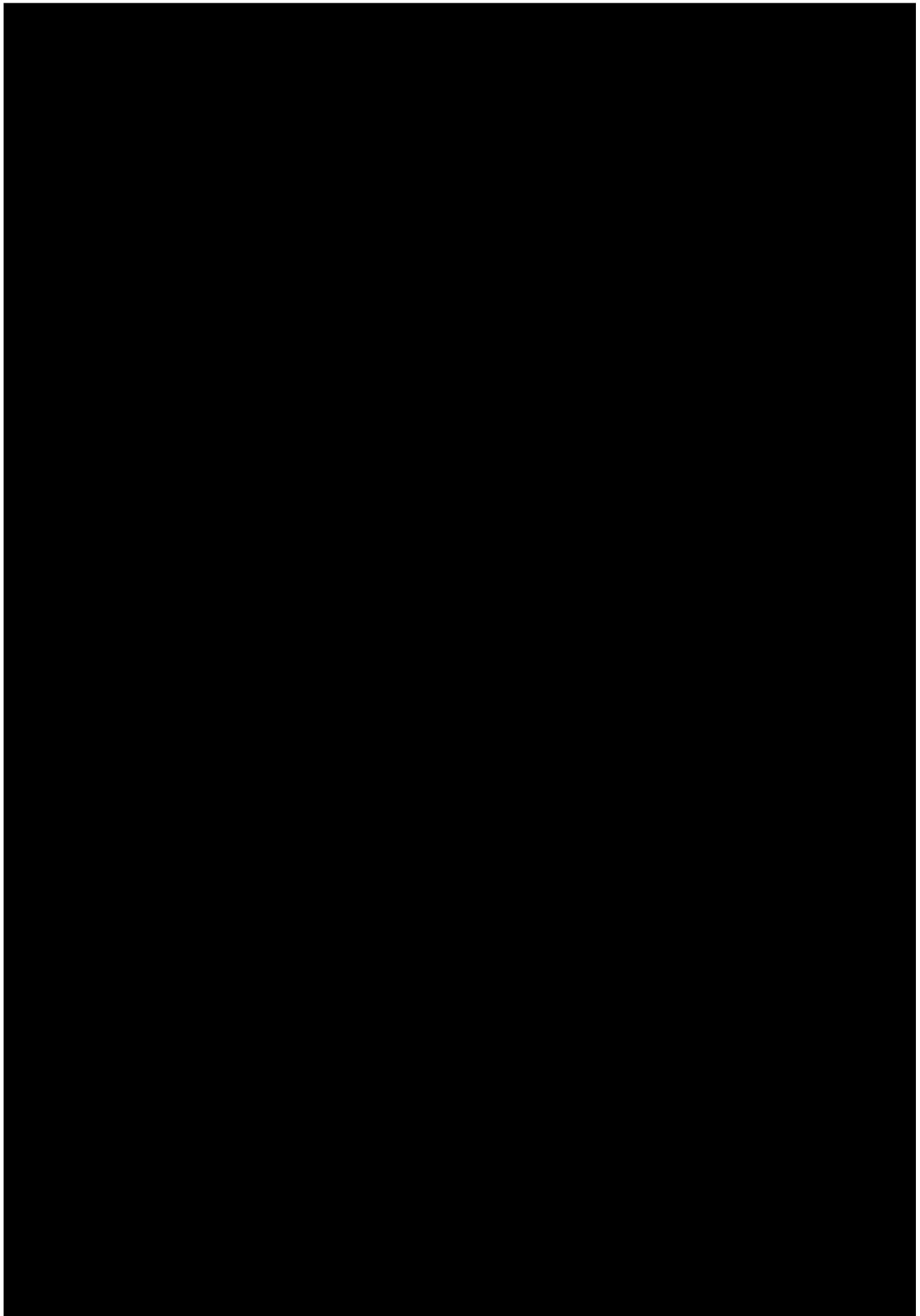
The petition of real party in interest for review by the Supreme Court was denied November 16, 2016, S237127.

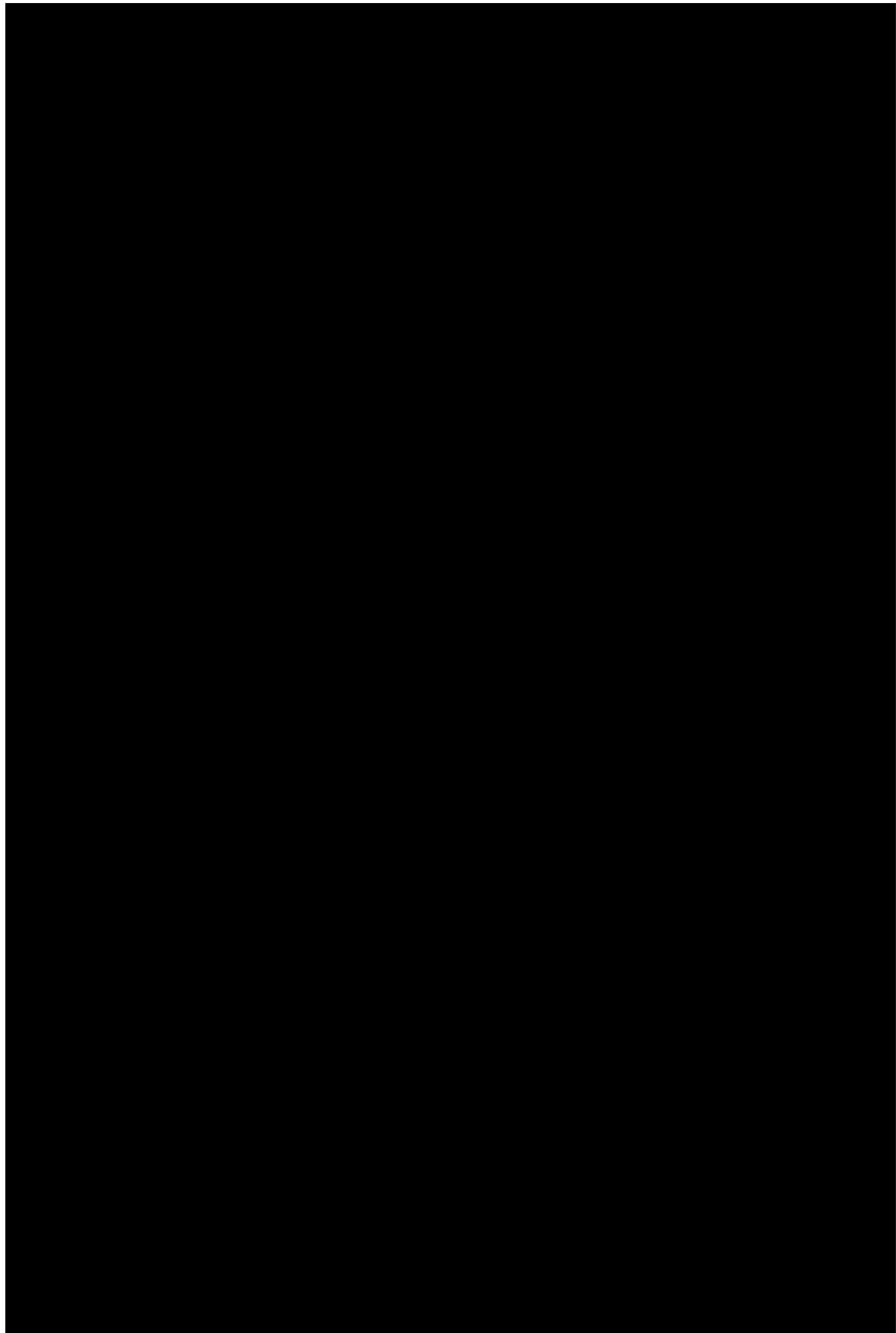


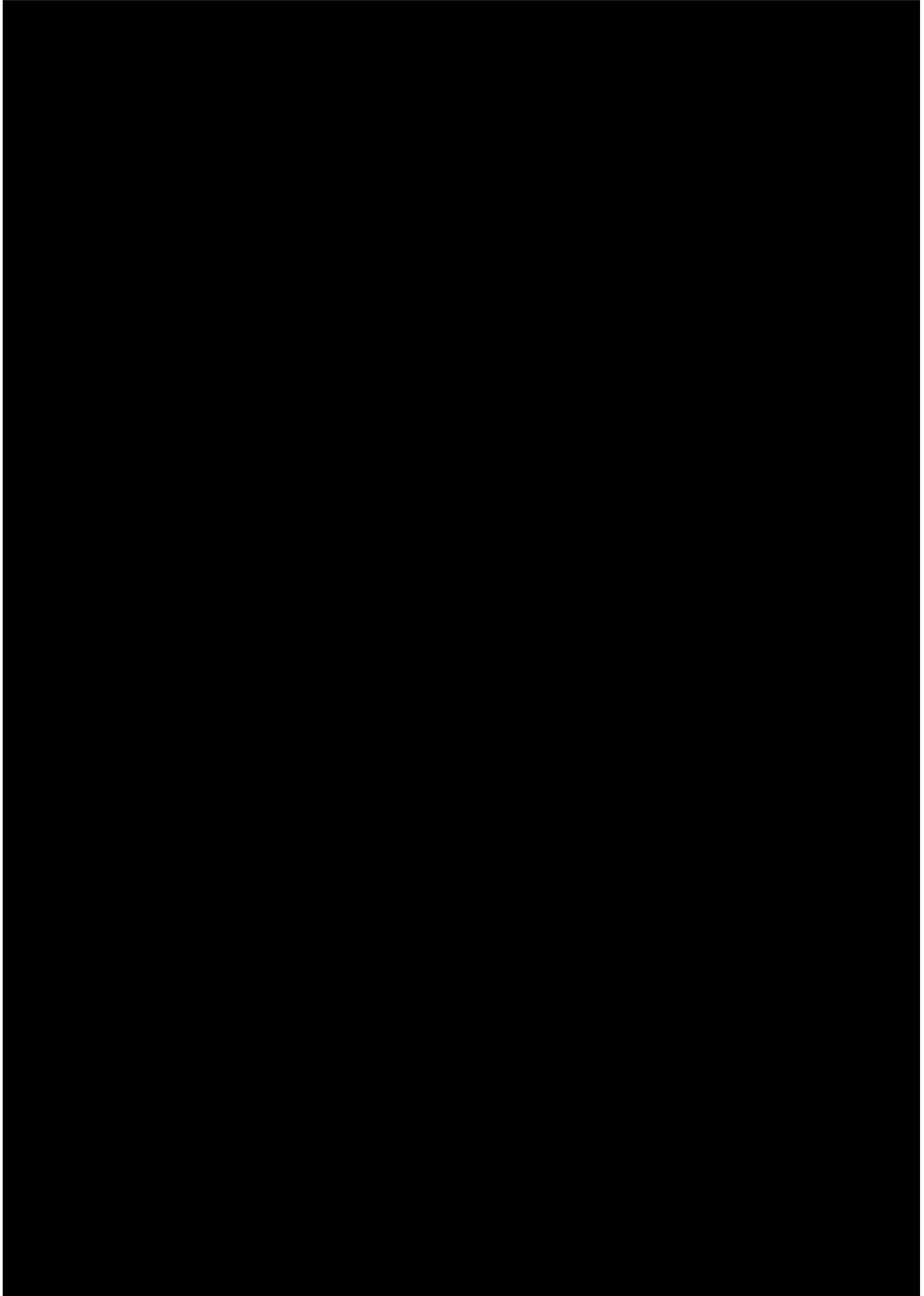


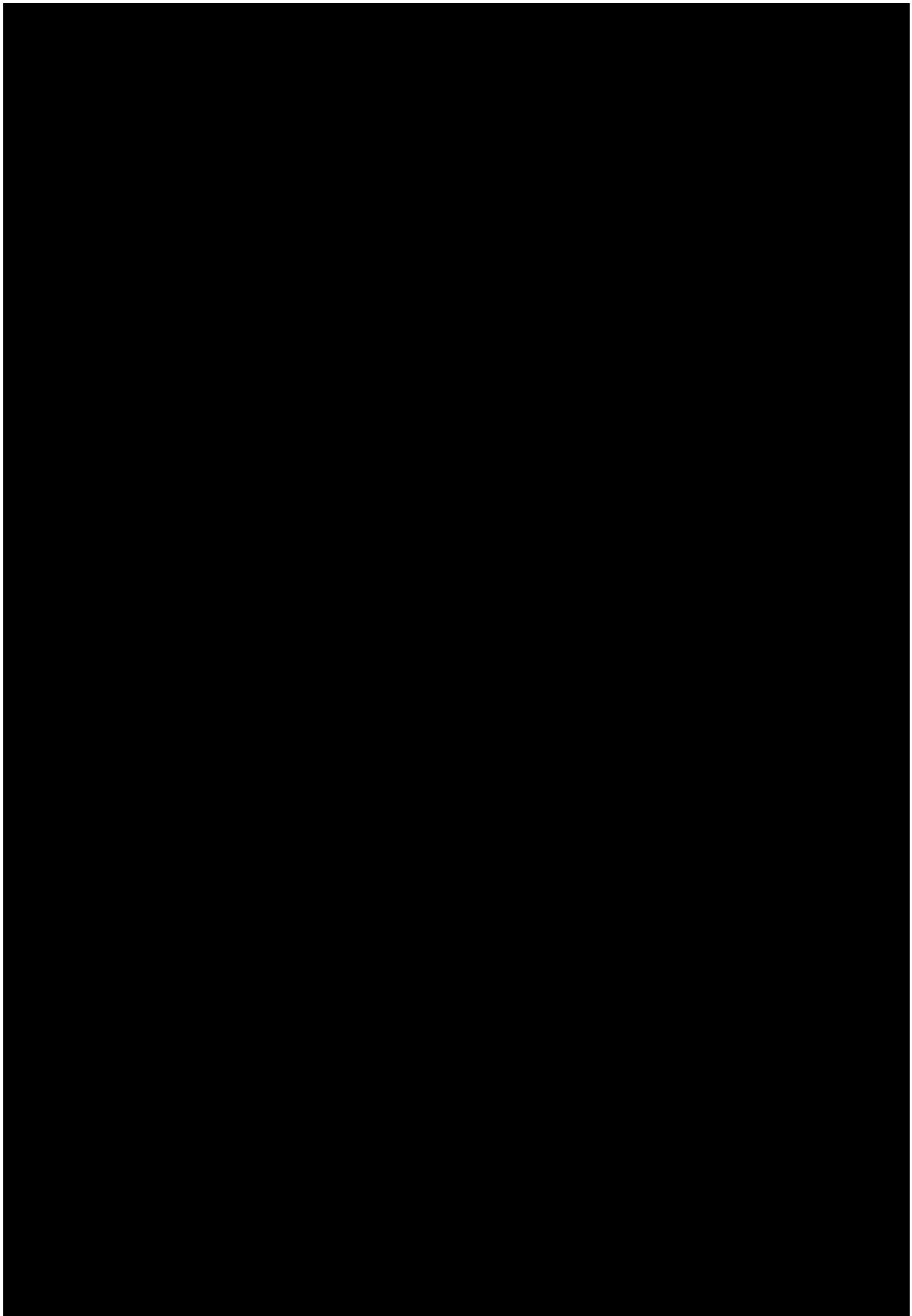


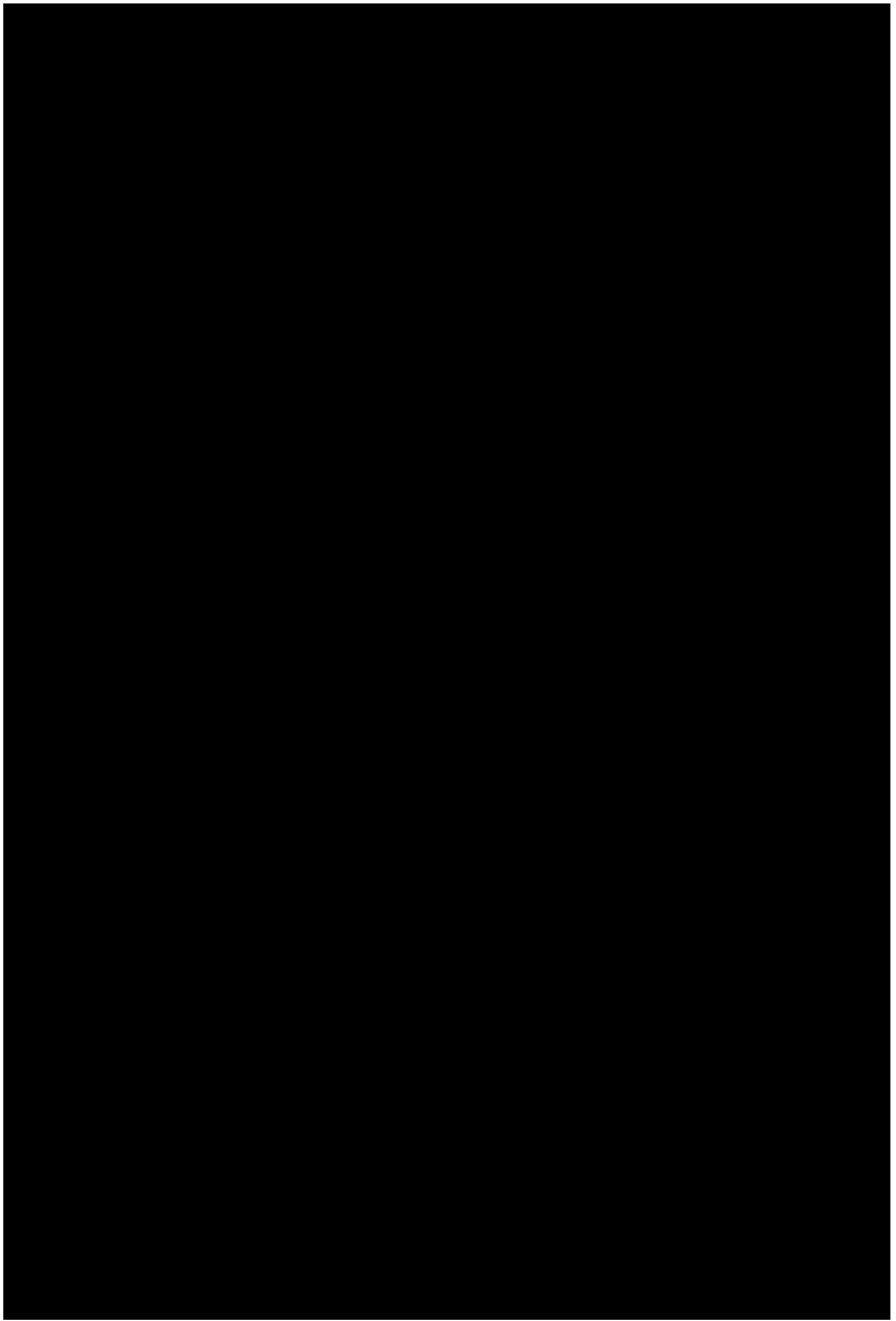












Appellate Division, Superior Court, Los Angeles County

[No. BV031101. June 14, 2016.]

INTELLIGENT INVESTMENTS CORPORATION, Plaintiff and
Respondent, v.
MIGUEL GONZALES, Defendant and Appellant.

[REDACTED]

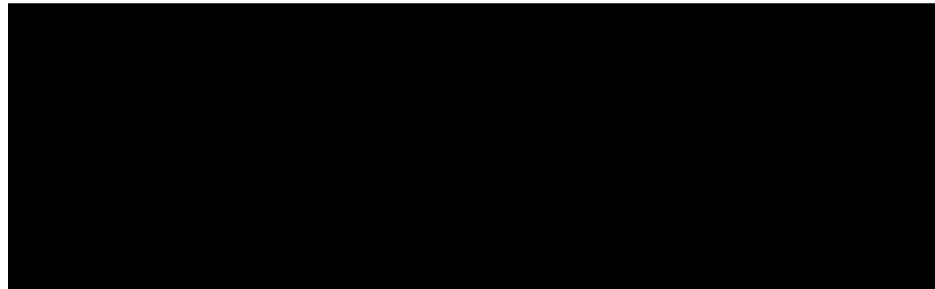
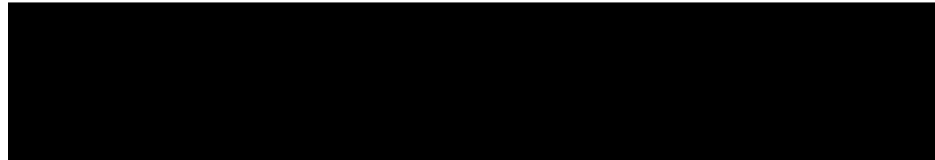
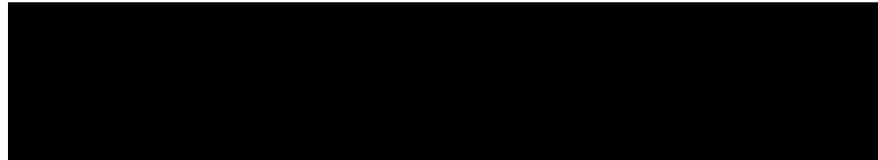
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[REDACTED]

[REDACTED]



COUNSEL

Daniel J. Bramzon, Ross T. Kutash and Claudia Medina of BASTA, Inc., for Defendant and Appellant.

Law Offices of Dennis P. Block & Associates and Dennis P. Block for Plaintiff and Respondent.

OPINION

KUMAR, Acting P. J.—Defendant and appellant Miguel Gonzales appeals the court’s denial of his motion for attorney fees after the voluntary dismissal by plaintiff and respondent Intelligent Investments Corporation of its unlawful detainer action. Defendant contends he was entitled to attorney fees pursuant to the fee shifting provision under Los Angeles Municipal Code (sometimes Municipal Code) section 162.09.A.5, which applies to unlawful detainer actions involving property in the City of Los Angeles’s rent escrow account program

(REAP), and therefore Civil Code section 1717, subdivision (b)(2),¹ did not bar recovery of fees. We agree and reverse the order.

BACKGROUND

On June 2, 2014, plaintiff filed an unlawful detainer action against defendant based on service of a three-day notice to perform covenants or quit. Attached to the complaint was a rental contract for the subject premises executed by defendant and landlord Gumersindo Bautista. Defendant answered the following week, generally denying each allegation in the complaint and asserting several affirmative defenses, including breach of the warranty of habitability, violation of the Los Angeles Rent Stabilization Ordinance, and retaliation. Two weeks later, plaintiff voluntarily dismissed the action.

On July 25, 2014, defendant filed a motion for attorney fees. Defendant argued the property was in REAP² when plaintiff commenced the unlawful detainer action and that, pursuant to Municipal Code section 162.09.A.5, he was entitled to attorney fees as the prevailing party. In support of his motion, defendant submitted a declaration stating he normally paid his rent to REAP; documentation showing plaintiff had notice the property was in REAP as of December 19, 2013; and receipts dated May 6, 2014, and June 2, 2014, reflecting payments defendant made to the REAP account.

On September 2, 2014, the court denied defendant's motion on the ground he had no basis for recovering attorney fees.

DISCUSSION

"A request for an award of attorney fees is largely entrusted to the discretion of the trial court, whose ruling 'will not be overturned in the absence of a manifest abuse of discretion, a prejudicial error of law, or necessary findings not supported by substantial evidence. [Citations.]' [Citation.] The trial court exercises a particularly 'wide discretion' in determining who, if anyone, is the prevailing party for purposes of section 1717[, subdivision](a). [Citations.] To overturn that determination on appeal, the objecting party must demonstrate 'a clear abuse of discretion.' [Citation.] However, the 'determination of the legal basis for an award of attorney fees' is a 'question of law' which the reviewing court will examine *de novo*.

¹ All further statutory references are to the Civil Code unless otherwise specified.

² REAP (L.A. Mun. Code, §§ 162.00–162.12) was created to provide a method to enforce the Housing Code and to encourage compliance from landlords with regard to maintenance and repair of buildings. (L.A. Mun. Code, § 162.01.)

[Citation.]” (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 894 [76 Cal.Rptr.3d 325].)

Entitlement of Prevailing Party to Recover Attorney Fees

■ With respect to attorney fees incurred to litigate a contract claim, the recovery of such fees are governed by section 1717. Section 1717, subdivision (a) provides in part: “In any action on a contract, where the contract specifically provides that attorney’s fees . . . incurred to enforce that contract, shall be awarded . . . , then the party who is determined to be the party prevailing on the contract, . . . shall be entitled to reasonable attorney’s fees” However, section 1717, subdivision (b)(2) “sets forth an exception to the general entitlement to *contractual* attorney fees.” (*CDF Firefighters v. Maldonado* (2011) 200 Cal.App.4th 158, 164 [132 Cal.Rptr.3d 544], italics added.) Under this exception, “[w]here an action has been voluntarily dismissed . . . , there shall be no prevailing party for purposes of this section.” (§ 1717, subd. (b)(2).) According to plaintiff, section 1717, subdivision (b)(2), precluded the recovery of attorney fees in this case.

■ But, defendant did not seek *contract-based* attorney fees. Rather, he sought attorney fees under Municipal Code section 162.09, which applies specifically to unlawful detainer actions involving properties in REAP. Section 162.09.A.5 provides: “In any action by a landlord to recover possession of a rental unit, the tenant may raise as a defense any grounds set forth in this section. If the tenant is the prevailing party, he or she shall be entitled to recover reasonable attorneys’ fees and expenses.” Thus, section 1717, subdivision (b)(2), does not apply in this case. “[S]ection 1717[, subdivision](b)(2) has no application where, as here, attorney fees were not sought under a contract, but pursuant to [a fee-shifting] statute.” (*Parrott v. Mooring Townhomes Assn., Inc.* (2003) 112 Cal.App.4th 873, 878 [6 Cal.Rptr.3d 116].) Put another way, “recoverable litigation costs do include attorney fees when the party entitled to costs has an independent statutory basis upon which to claim recovery of attorney fees. [Citation.]” (*Damian v. Tamondong* (1998) 65 Cal.App.4th 1115, 1129 [77 Cal.Rptr.2d 262], citing *Santisas v. Goodin* (1998) 17 Cal.4th 599, 606–607 [71 Cal.Rptr.2d 830, 951 P.2d 399].) Such is the case here.

Plaintiff argues defendant waived any claim this case involved REAP by not alleging that fact or asserting it as a defense in his answer, and that he was therefore estopped from asserting it as a basis for fees after the case was dismissed. However, plaintiff does not connect the burden to plead a particular statutory defense in an answer to a defendant’s right to ultimately recover

attorney fees. Rather, the cases cited by plaintiff in support of its argument³ concern the timing of two separate, but identical, assertions of an affirmative defense and stand for the general proposition that a defendant is precluded from asserting, after trial or on appeal, an affirmative defense that was not made at trial. It seems quite different to draw the conclusion that a defendant is estopped from seeking attorney fees under a specified statutory scheme unless the defendant pled, in its answer, that the status of the property at issue renders a prevailing defendant eligible for attorney fees pursuant to that same statutory scheme. Indeed, plaintiff cites no authority that goes this far, and to do so would seem to expand the answer to something more than a formal written pleading by a defendant setting forth the grounds of his or her defense.⁴

Moreover, defendant did assert as an affirmative defense in his answer that plaintiff “served defendant with the notice to quit or filed the complaint to retaliate against defendant.” Retaliation is a “ground” set forth in Municipal Code section 162.09. Section 162.09.A.4 provides as relevant: “If the dominant intent of a landlord in seeking to recover possession of a rental unit is retaliation for the tenant’s . . . exercise of rights or duties under this article, and if the tenant is not in default as to the payment of rent, then the landlord may not recover possession of a rental unit in any action or proceeding or cause the tenant to quit voluntarily. Until the unit is removed from REAP and for one year thereafter, the landlord shall have the burden of proving that any action to recover possession, other than one based on nonpayment of rent, is not brought for the purposes of retaliation.” Evidence submitted in support of defendant’s motion for attorney fees—including a declaration from defendant stating he normally paid his rent to REAP, documentation showing plaintiff had notice the property was in REAP as of December 19, 2013, and receipts for May 2014 and June 2014 reflecting payments defendant made to the REAP account before and at the time the complaint was filed—demonstrated plaintiff was aware the property was in REAP and that, per Municipal Code section 162.09.A.4, defendant “[wa]s not in default as to the payment of rent.”⁵

³ See *Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111, 1123 [86 Cal.Rptr.3d 145]; *California Academy of Sciences v. County of Fresno* (1987) 192 Cal.App.3d 1436, 1442 [238 Cal.Rptr. 154].

⁴ Black’s Law Dictionary defines “answer” as “A defendant’s first pleading that addresses the merits of the case, . . . [and] usu[ally] sets forth the defendant’s defenses and counter-claims.” (Black’s Law Dict. (7th ed. 1999) p. 90, col. 2.) “Affirmative relief may not be claimed in the answer” (Code Civ. Proc., § 431.30, subd. (c)) and unlawful detainer cases are unique in that, due to the summary nature of the proceedings, counterclaims are not considered (*Green v. Superior Court* (1974) 10 Cal.3d 616, 632 [111 Cal.Rptr. 704, 517 P.2d 1168]; accord, *Drybread v. Chipain Chiropractic Corp.* (2007) 151 Cal.App.4th 1063, 1072 [60 Cal.Rptr.3d 580]).

⁵ We also note, without additional discussion, it is not entirely clear that a tenant is required to assert a REAP-related defense to an unlawful detainer action in order to recover attorney

Assuming defendant was the prevailing party, he was entitled to an award of his reasonable attorney fees under Municipal Code section 162.09.A.5.

The Prevailing Party

The trial court did not indicate whether it found either party to be the prevailing party. Rather, the minute order denying defendant's motion for attorney fees stated simply the motion was denied and did not indicate the basis for the ruling. Further, although Municipal Code section 162.09.A.5 states unequivocally, a tenant who prevails in "any action by a landlord to recover possession of a rental unit . . . shall be entitled to recover reasonable attorney's fees," it does not define "prevailing party."

In *Salehi v. Surfside III Condominium Owners Assn.* (2011) 200 Cal.App.4th 1146 [132 Cal.Rptr.3d 886] (*Salehi*), where the statute under which attorney fees were sought also did not define "prevailing party," the court noted "'[t]he words "shall be [entitled to recover]" reflect a legislative intent that [the prevailing party] receive attorney fees as a matter of right (and that the trial court is therefore *obligated* to award attorney fees) whenever the statutory conditions have been satisfied.' [Citation.]' (*Id.* at p. 1152.) This in turn required the trial court to analyze "'which party . . . prevailed on a practical level.' [Citation.]'" (*Id.* at p. 1153, quoting *Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1574 [26 Cal.Rptr.2d 758]; see also *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 150 [50 Cal.Rptr.3d 273] ["the court should adopt a pragmatic approach, determining prevailing party status based on which party succeeded on a practical level" in achieving its overall litigation objectives]; *Galan v. Wolfriver Holding Corp.* (2000) 80 Cal.App.4th 1124, 1129 [96 Cal.Rptr.2d 112] (*Galan*).)

■ In the present case, as noted, the record does not indicate whether the court engaged in any such analysis. But, unlike cases in which this analysis may require extensive or additional factfinding,⁶ the determination of which

fees as the prevailing party. Although Municipal Code section 169.02.A.5 both (1) permits tenants to assert their rights under REAP as a defense to an unlawful detainer action, and (2) grants tenants who prevail in the action the right to recover "reasonable attorneys' fees and expenses," it does not by its terms limit the recovery of attorney fees to only those tenants who prevail on a defense set forth in this section. Rather, it appears to permit the recovery of attorney fees by any tenant of a property in REAP who prevails on any ground.

We reject plaintiff's suggestion that the court impliedly found no violation of Municipal Code section 162.09 to support a claim for attorney fees. No such finding was necessary to the court's disposition of defendant's motion.

⁶ For example, whether there was "willful and malicious misappropriation" for recovery of fees under section 3426.4 (see *Khavarian Enterprises, Inc. v. Commline, Inc.* (2013) 216 Cal.App.4th 310, 328–329 [156 Cal.Rptr.3d 657]); or whether a landlord demanded rent under

party prevailed in an unlawful detainer action is generally straightforward. “[T]he primary purpose of an unlawful detainer action is to obtain the possession of real property in the cases specified by statute. [Citations.] . . . [Citation.] [Citation.] The judgment, if any, for damages and the rent found due . . . is a mere incident to the main object—the recovery of possession. [Citation.]” [Citation.] The plaintiff was not the prevailing party insofar as the primary purpose of the action which she instituted The defendant, on the other hand, . . . prevailed by defeating the plaintiff’s claim to possession” (*Strickland v. Becks* (1979) 95 Cal.App.3d Supp. 18, 21 [157 Cal.Rptr. 656]; see also *Beverly Hills Properties v. Marcolino* (1990) 221 Cal.App.3d Supp. 7, 10 [270 Cal.Rptr. 605] [citing *Strickland v. Becks* for the proposition that “right to possession in unlawful detainer action is main object of suit and determines who is prevailing party” for the purpose of awarding attorney fees under § 1717].)

Even in cases involving the pretrial dismissal of an action, the defendant may be found to be the prevailing party for the purpose of awarding attorney fees. For example, the dismissal of a case involving a construction contract dispute “achieved one hundred percent of the ‘precise factual/legal condition’ [the defendant] ‘sought’ The most [the defendant]—or any other civil defendant—ordinarily can hope to achieve is to have the plaintiff’s claim thrown out completely. This is exactly what happened here. In ‘pragmatic’ terms, it does not make any difference whether this total victory comes only after a jury reaches a verdict as to each and every substantive issue or whether, as here, it comes through a judge’s decision the plaintiff waited too long to serve its complaint on the defendant. In any practical sense of the word, the defendant ‘prevailed.’” (*Winick Corp. v. Safeco Ins. Co.* (1986) 187 Cal.App.3d 1502, 1508 [232 Cal.Rptr. 479].) Similarly, despite the plaintiff’s claim in *Salehi* that she dismissed the case for procedural reasons, the Court of Appeal held the trial court abused its discretion in not finding the defendant was the prevailing party for purposes of attorney fees: “To say [the plaintiff] was, somehow, the prevailing party on a ‘practical level’ or that she realized her ‘litigation objectives’ is to do violence to these legal phrases of art.” (*Salehi, supra*, 200 Cal.App.4th at p. 1155.)⁷

■ On the record before us, any finding by the court that defendant was not the prevailing party was a clear abuse of discretion. (See *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC, supra*, 162 Cal.App.4th at p. 894.) As a result of plaintiff’s dismissal of its action seeking “to recover possession of

the conditions specified in section 1942.4, subdivision (a), for the purpose of recovering attorney fees under that section (see *Galan, supra*, 80 Cal.App.4th at p. 1129.)

⁷ Exceptions to this apparent trend include where factual findings are required to support an award of attorney fees (discussed *ante*), and where an action is dismissed pursuant to a settlement agreement which does not provide for the recovery of attorney fees (see, e.g., *Galan, supra*, 80 Cal.App.4th at pp. 1129–1130.)

a rental unit,” defendant “achieved one hundred percent” of his own litigation objectives. He is therefore entitled to an award of attorney fees.

DISPOSITION

The order is reversed, and the matter is remanded for a determination of reasonable attorney fees. Costs on appeal are awarded to appellant.

Ricciardulli, J., and Johnson (B.), J., concurred.

